

Constitutional Review



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THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Volume 11, Number 2, December 2025

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Note From the Editors



The Editorial Team is pleased to present the December 2025 edition of *Constitutional Review* (Volume 11, Number 2). As a biannual journal published in May and December, *Constitutional Review* remains committed to advancing rigorous scholarship on constitutional law, constitutional adjudication, and the evolving role of constitutional courts in protecting rights and sustaining constitutional democracy. This issue brings together eight articles that engage core constitutional questions across a range of jurisdictions, Hungary, Indonesia, Australia, Madagascar, India, and South Africa, while also offering comparative insights on judicial independence, constitutional complaint mechanisms, indigenous rights, and the regulation of modern rights-sensitive sectors.

The first article, “Fundamental Rights Protection through Constitutional Complaints, with Special Respect of Its Effectiveness” by Ágnes Czine, examines the Hungarian constitutional complaint as a modern legal remedy whose effectiveness has been recognized by the European Court of Human Rights. The article identifies key determinants of effectiveness, such as filtering criteria, legal consequences, and the practice of the Hungarian Constitutional Court, highlighting how doctrinal interpretation and procedural strictness can narrow or broaden access to meaningful constitutional relief.

In “Cultural Expertise and the Social Justice Defense of Indigenous Peoples Rights in the Indonesian Constitutional Court,” Herlambang P. Wiratraman explores how customary justice and cultural expertise operate as components of human-rights-based legal defense in Indonesia, particularly amid natural-resource pressures affecting

indigenous livelihoods. By engaging Indonesia’s landmark Constitutional Court Decision No. 35/PUU-X/2012 and subsequent developments, the article argues that cultural expertise can shape recognition before courts, yet often remains insufficient to secure social justice due to capacity gaps, political-economy dynamics, and vested interests.

The third contribution, “Free, Prior, and Informed Consent in Indigenous Rights: the Juukan Gorge Debacle” by Bertus de Villiers, draws lessons from the Juukan Gorge case as a contemporary illustration of how regulatory approval pathways may become complex and misaligned with indigenous customary processes. The article clarifies that FPIC, while embodying a strong aspiration for consultation and consensus, does not necessarily mandate consensus, and it underscores the practical risks faced by both indigenous communities and developers when approvals are contested in contexts of competing public and private interests.

In “The Dimension of Judicial Activism of Incorporating Constitutional Complaint: An Overview on Judicial Independence,” Murti Ayu Hapsari evaluates the debate on whether Indonesia’s Constitutional Court should incorporate a constitutional complaint mechanism. While acknowledging the substantive-justice rationale, the article advances a cautionary thesis: expanding jurisdiction through judicial interpretation risks overreach, potentially affecting legitimacy, separation of powers, and judicial independence; accordingly, any expansion should proceed through formal democratic processes, including constitutional amendment or legislative revision.

The fifth article, “Judicial Independence Under Political Pressure: the High Constitutional Court and Electoral Justice in Madagascar (2009–2023)” by Ramalina Ranaivo Mikea Manitra and Adya Paramita Prabandari, investigates the relationship between constitutional justice and political power in Madagascar through the High Constitutional Court’s handling of major electoral disputes involving Andry Rajoelina. Based on close doctrinal analysis of pivotal decisions, the authors identify interpretive patterns that raise concerns about judicial independence, including a recurring posture that may diminish equal access to constitutional complaint and contribute to perceptions of constitutional immunity for certain political actors.

In “Who Decides What We Can Watch? Balancing Streaming Services Liberalization and Constitutional Rights in Indonesia,” Surya Oktaviandra, Saldi Isra, and Frenadin Adegustara examine regulatory tensions created by the rise of cross-border streaming services. Combining normative analysis (international trade law, Indonesian constitutional law, and related legal frameworks) with survey-based insights, the article argues that Indonesia’s regulatory architecture and constitutional jurisprudence can enable restrictive measures on access, even as public attitudes strongly favor freedom

to access information, thereby requiring carefully calibrated regulation to manage triangular tensions between international commitments, state regulatory powers, and constitutional rights.

The seventh article, “Unravelling the Anti-Defection Law in India: A Critical Examination of its Constitutionality” by Taniya Malik, provides a critical constitutional assessment of India’s Anti-Defection Law (introduced in 1985) and its operation in practice. By tracing the law’s objectives and legal framework while analyzing recurring episodes of misuse and the evolving judicial view, particularly regarding the Speaker’s role, the article argues that democratic deterioration linked to defections and inducements warrants serious consideration of alternatives, including stronger democratic conventions and party cohesion.

The final contribution, “Protecting Marginalised Groups through Constitutional Complaint: Access to the South African Constitutional Court” by Katherine Mary Savage, considers South Africa’s apex-court jurisprudence in relation to land and property rights affecting poor and marginalized communities. The article discusses pathways to access the Court and highlights features of socio-economic rights litigation through select cases that illustrate how constitutional adjudication can advance meaningful protection for vulnerable groups in contexts of inequality and housing insecurity.

Taken together, the articles in this issue offer a coherent and timely engagement with contemporary constitutional challenges: how constitutional complaint mechanisms are designed and constrained; how courts navigate judicial independence under political pressure; how constitutional rights intersect with economic development, indigenous protections, and modern regulatory dilemmas; and how constitutional adjudication can serve as an avenue for both accountability and social justice.

The Editorial Team extends its sincere appreciation to all authors, reviewers, and contributors whose work and commitment have made this publication possible. We hope this issue will stimulate further scholarly exchange among academics, judges, practitioners, and policymakers, and we look forward to continued engagement with our readers.

Warm regards,
The Editorial Team
Constitutional Review
December 2025

Fundamental Rights Protection through Constitutional Complaints, with Special Respect of Its Effectiveness

Ágnes Czine

Constitutional Review, Vol. 11 No. 2, December 2025, pp. 269-298

The Hungarian constitutional complaint is a modern, functional, and effective legal remedy, the effectiveness of which has been recognized by the European Court of Human Rights. At the same time, the ECtHR emphasized that it is up to the applicant to decide which type of constitutional complaint to file. Based on this idea, I have identified the key points that need to be known in order to assess the success of the constitutional complaint procedure. The effectiveness of a constitutional complaint is fundamentally influenced by the filtering criteria and legal consequences determined by the legislator, as well as by the practice developed by the Hungarian Constitutional Court. More specifically, this means that there are some key points, such as the interpretation of the content of the fundamental rights protected, the determination of issues of fundamental constitutional significance and the strictness of certain formal requirements, all of which could influence the effectiveness of the complaint. In this analysis, I would like to raise a few points that show, based on Hungarian experience, how all these circumstances can narrow or broaden the effectiveness of constitutional complaint procedures.

Keywords: Constitutional complaint; Constitutional law; Effective remedy; Fundamental rights; Judicial review

Cultural Expertise and the Social Justice Defense of Indigenous Peoples Rights in the Indonesian Constitutional Court

Herlambang P. Wiratraman

Constitutional Review, Vol. 11 No. 2, December 2025, pp. 299-339

This article is about rights to legal defense by using customary justice as part of human rights. Given the context of excessive exploitation over natural resources in Indonesia, indigenous people's livelihood has been constantly deprived. Even, there have been laws and its policies influencing their cultural knowledge, traditions, and its social lives (Bedner and Arizona 2019). In a landmark ruling, Indonesia's Constitutional Court through the verdict Number 35/PUU-X/2012 has invalidated the Indonesian government's claim to millions of hectares of forest land, potentially giving indigenous and local communities the right to manage their customary forests. However, although the court ruling does not automatically change the situation at ground, the cultural expertise has played important role to shape ideas in recognizing progressively their expertise before the court system. This article dissects the role of cultural expertise has been translated into the court rules and influence to the practice, understanding debates and practices of cultural expertise, and assessing constitutional court decisions which contradict to 2013's landmark decision and understanding the meaning for social justice. Using an interdisciplinary study of law, this article found that locals are rarely deemed as expert at court while the cultural expertise has been used to underpin their claims mostly over natural resources conflict cases. Really unfortunate that their expertise does not automatically protect rights and social justice due to lack of capacity, political economy driven policies, and various vested interests.

Keywords: Constitutional court; Cultural expertise; Human rights; Indigenous peoples; Social justice

Free, Prior, and Informed Consent in Indigenous Rights: The Juukan Gorge Debacle

Bertus de Villiers

Constitutional Review, Vol. 11 No. 2, December 2025, pp. 340-362

The Juukan Gorge case study is perhaps the most relevant contemporary example of how what seems right as far as accessing indigenous lands can easily turn out to be wrong. It highlights the complexity of regulatory processes and how formal processes interact, or fail to interact, with indigenous customary processes. This article reflects on the way in which approvals processes affecting the customary lands of Indigenous People may become convoluted and complex due to multiple levels of authorities being responsible to consider proposals. When indigenous, public, and private interests intersect the ideal of a consent outcome is not always possible. The reality is that public interest in economic development is often in direct conflict with protection of an indigenous site. As is show in the article, FPIC reflects the assumption, demand and aspiration of Indigenous People to be consulted about what happens on their traditional lands. FPIC as it appears in UNDRIP is often presented, erroneously, as giving to Indigenous People the final control over what happens on their ancestral lands. Whilst FPIC strives towards reaching consensus, FPIC does not mandate consensus. This article uses the Juukan Gorge debacle to draw lessons and insights from the complexity and uncertainty of regulatory approval processes on the lands of Indigenous People. The risks to Indigenous People and developers are palatable with Indigenous People fearing their rights may be encroached, whilst developers being concerned that the approvals they receive from the state may be challenged by Indigenous People.

Keywords: Free, Prior, and Informed Consent; Juukan Gorge; UNDRIP; Indigenous Rights

The Dimension of Judicial Activism of Incorporating Constitutional Complaint: An Overview on Judicial Independence

Murti Ayu Hapsarindi

Constitutional Review, Vol. 11 No. 2, December 2025, pp. 363-392

This paper analyzes the debate surrounding the potential for Indonesia's Constitutional Court to incorporate a constitutional complaint mechanism. While acknowledging the strong arguments for its inclusion, which are deep-rooted in the need for substantive justice and the protection of fundamental rights, this paper advocates for a cautious approach. The core argument is that the Court should refrain from expanding its jurisdiction through judicial interpretation alone. Such an act could be viewed as judicial overreach, potentially undermining the Court's legitimacy, disrupting the separation of powers, and weakening the principles of judicial accountability and judicial independence. Drawing on the historical context of human rights in Indonesia and the foundational design of the Constitutional Court, this analysis suggests that a legitimate expansion of authority should be achieved through formal, democratic processes, such as a constitutional amendment or a revision of the Constitutional Court Law. By advocating for judicial restraint, the paper emphasizes that the Court's strength and independence lies not in expanding its own power, but in strictly adhering to its constitutional mandate as a check on other branches of government. The paper concludes that not exercising restraint by incorporating a constitutional complaint mechanism through the Court's interpretative authority can lead to long-term negative effects on the Court's judicial independence, both in theory and practice.

Keywords: Constitutional complaint; Judicial accountability; Judicial independence; Judicial restraint

Judicial Independence Under Political Pressure: The High Constitutional Court and Electoral Justice in Madagascar (2009–2023)

Ramalina Ranaivo Mikea Manitra, Adya Paramita Prabandari

Constitutional Review, Vol. 11 No. 2, December 2025, pp. 393-421

This paper investigates the relationship between constitutional justice and political power in Madagascar, focusing on the High Constitutional Court (HCC) and its handling of electoral disputes involving Andry Rajoelina from 2009 to 2023. Against the broader principles of constitutional law (i.e., separation of powers, equality before the law, and the integrity of democratic choice) the study explores whether the HCC's repeated validation of Rajoelina's candidacies and election results reflects sound constitutional reasoning or risks fostering a de facto constitutional immunity. Using a doctrinal legal method, complemented with comparative approach, centred on close analysis of eight pivotal HCC decisions, the paper examines the normative framework governing Madagascar's constitutional justice and how it has been applied, with particular attention to judicial independence and the accessibility of constitutional complaint. The findings indicate a pattern: first, the HCC has demonstrated notable interpretative flexibility, particularly regarding nationality and eligibility requirements, often resolving ambiguities in favour of Rajoelina; second, the Court's consistent dismissal of substantial electoral challenges raises concerns about judicial independence and potential structural partiality; third, this judicial posture may erode equal access to constitutional complaint, subtly privileging certain political actors. The paper concludes by urging Malagasy institutions to reinforce the integrity of constitutional justice, ensure rigorous scrutiny of electoral disputes, and uphold the principle that no one stands above constitutional accountability, thereby preserving public trust in democracy and the rule of law.

Keywords: Constitutional complaint; High Constitutional Court (hcc); Judicial independence; Madagascar; Presidential election

Who Decides What We Can Watch? Balancing Streaming Services Liberalization and Constitutional Rights in Indonesia

Surya Oktaviandra, Saldi Isra, and Frenadin Adegustara

Constitutional Review, Vol. 11 No. 2, December 2025, pp. 422-459

Rapidly growing streaming services have become central to the cross-border circulation of information, cultural, and economic value, which presents complex regulatory challenges for states. This study aims to examine the potential tensions and regulatory interaction between a state's right to regulate, its commitment to trade liberalization, and citizens' constitutional rights to access information on the streaming service sector in the context of Indonesia. It offers normative analysis on international trade law, Indonesian constitutional law, and other related disciplines, along with empirical analysis through public surveys to assess public perceptions on protectionist policies. This paper argues that triangular tensions between international laws, states, and citizens occur when a state restricts foreign services. In Indonesia, these tensions are not merely theoretical but are institutionalized through regulations and constitutional court jurisprudence that empower the government to take immediate and repressive measures, including service access restrictions when deemed necessary. In the meantime, empirical research shows that the majority of respondents (83%) demand a high level of freedom to access information, although there is a variety of perceptions and levels of support when government restricts access to foreign streaming services. This means that formulating regulations in this sector requires a careful and comprehensive approach, as the state is obligated to allow streaming services through liberalization and guarantee citizens' rights to access them in line with its policy objectives and measures.

Keywords: Constitutional rights; Streaming services; Trade liberalization

Unravelling the Anti-Defection Law in India: A Critical Examination of its Constitutionality

Taniya Malik

Constitutional Review, Vol. 11 No. 2, December 2025, pp. 460-491

Since its introduction in 1985 to prevent political defections and maintain political stability, India's Anti-Defection Law has been widely misused, leading to a heated constitutional debate. The anti-defection law's constitutional ramifications are critically examined in this paper, focusing on how it has been misused within the Indian political landscape. It examines the background and purpose of the law, highlighting its fundamental objective of ensuring political stability. It also discusses the legal framework within which the law operates. Subsequently, it explores instances of abuse and misuse, such as politically driven defections, intimidation and threats, and horse-trading and inducements, exposing the deterioration of democratic principles in the country's political landscape by examining important defection episodes of the recent past in the states of Karnataka (2019), Goa (2019), Telangana (2019), Madhya Pradesh (2020) Maharashtra (2022). The article also considers judicial perspectives, particularly in the context of the role of the Speaker, to provide insight into the evolving legal landscape surrounding the law. Given the multi-faceted issues compromising the effectiveness of the anti-defection law, the paper's conclusion emphasizes the necessity of looking for alternatives to the anti-defection law, such as building robust democratic conventions and practices and party cohesion, to defend the political conscience of Indian democracy.

Keywords: Anti-defection law; Constitutional validity; Political instability; The constitution (fifty-second amendment) act of 1985; Tenth schedule

Protecting Marginalised Groups through Constitutional Complaint: Access to the South African Constitutional Court

Katherine Mary Savage

Constitutional Review, Vol. 11 No. 2, December 2025, pp. 492-517

This paper examines South Africa's jurisprudence of South Africa's apex court in the context of the land and property rights of poor and marginalized communities. It speaks to the different ways to access the court, with regard had to the key features of socio-economic rights litigation, examining select Constitutional Court cases on advancing the land and property rights of marginalized communities.

Keywords: Constitutional complaint; Eviction and housing; Meaningful engagement; Socio-economic rights; South African Constitutional Court

FUNDAMENTAL RIGHTS PROTECTION THROUGH CONSTITUTIONAL COMPLAINTS, WITH SPECIAL RESPECT OF ITS EFFECTIVENESS

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Abstract

The Hungarian constitutional complaint is a modern, functional, and effective legal remedy, the effectiveness of which has been recognized by the European Court of Human Rights. At the same time, the ECtHR emphasized that it is up to the applicant to decide which type of constitutional complaint to file. Based on this idea, I have identified the key points that need to be known in order to assess the success of the constitutional complaint procedure. The effectiveness of a constitutional complaint is fundamentally influenced by the filtering criteria and legal consequences determined by the legislator, as well as by the practice developed by the Hungarian Constitutional Court. More specifically, this means that there are some key points, such as the interpretation of the content of the fundamental rights protected, the determination of issues of fundamental constitutional significance and the strictness of certain formal requirements, all of which could influence the effectiveness of the complaint. In this analysis, I would like to raise a few points that show, based on Hungarian experience, how all these circumstances can narrow or broaden the effectiveness of constitutional complaint procedures.

Keywords: Constitutional complaint; Constitutional law; Effective remedy; Fundamental rights; Judicial review

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I. INTRODUCTION

1.1. Raising the Issue

Constitutional complaint proceedings are the most common type of constitutional proceedings before the Hungarian Constitutional Court, allowing individuals and organizations that have suffered harm because of a law or a court decision that violates the Fundamental Law.

However, concerns about the effectiveness of constitutional complaints as a legal remedy have existed since the 1990s in Hungary. First, in 1993, the European Court of Human Rights (ECtHR) questioned whether the Hungarian constitutional complaint constituted an effective domestic remedy and whether applicants should therefore first exhaust this remedy before submitting a request to the ECtHR.¹ After 2012, with the introduction of new types of constitutional complaint, Hungarian legal literature questioned whether the use of these complaints really leads to any results for applicants seeking justice at all.²

The effectiveness of constitutional complaints is fundamentally influenced by several factors, such as the filtering criteria and legal consequences determined by the legislator, as well as by the practice developed by the body conducting the proceedings, in this case the Hungarian Constitutional Court. More specifically, this means that there are some key points, such as the interpretation of the content of the fundamental rights protected, the determination of issues of fundamental constitutional significance and the strictness of certain formal requirements, all of which influence the effectiveness of the complaint. Another important factor is the extent to which the applicant seeking justice is aware of the suitability of a constitutional complaint as a legal remedy. There are cases where it is clear that the procedure will not lead to a result, yet the procedure is initiated nonetheless.

¹ *Vén v. Hungary*, no. 21495/93, Commission decision, 30 June 1993.

² Erzsébet Kadlót, "Violation of Rights Guaranteed by the Fundamental Law and Fundamental Rights," *Acta Juridica et Politica*, no. 2 (2015): 48–67.

In this brief analysis, I would like to raise a few points that show, based on Hungarian experience, how all these circumstances can limit or expand the effectiveness of constitutional complaint proceedings.

My starting hypothesis is that constitutional complaints are fundamentally a modern and effective legal remedy, but the complainants must learn how to use them effectively as a remedy. The ECtHR's position on this issue essentially requires this, as I will explain in more detail below.

In writing this analysis, I sought to substantiate my assertions and explain my position by drawing on the decisions of the Hungarian Constitutional Court, my own experience, and legal literature. Of course, the scope of this study does not allow me to explore the Hungarian Constitutional Court's practice regarding constitutional complaints in full depth, as this has already been done thoroughly and excellently by the legal literature. My goal is to summarize in a clear and concise manner the most important lessons I have learned about constitutional complaints during my decade-long tenure as a constitutional judge.

First, I consider it necessary to outline the legal background and some concepts in order to clarify the functioning of Hungarian constitutional complaints for the reader and to make the context more understandable for those who may not be familiar with this legal measure of the Hungarian legal system.

1.2. The Concept of Effectiveness

First, I would like to outline what I mean by the effectiveness of constitutional complaints as a legal remedy.

According to Article XXVIII (7) of the Hungarian Fundamental Law, "everyone has the right to seek legal remedy against any court, administrative or other public authority decision that infringes upon their rights or legitimate interests." The fundamental requirement for legal remedies is that they must be effective. Nevertheless, what does effectiveness mean in this case?

According to the Constitutional Court, the effectiveness of the protection required by the Fundamental Law means, in substance, that the protection must be effective and capable of remedying the harm caused by the decision. The

effectiveness of legal remedies can be influenced by a number of factors, from this aspect e.g. the scope of review, the time limit for filing an appeal.

In the view of the Constitutional Court, the effectiveness of a legal remedy means that the appeal procedure must be conducted within the framework defined by the rules of procedure and that the contents of the appeal must be examined on their merits in accordance with the provisions of the law. The adjudicating body is not obliged to ensure the success of the request in all circumstances, but it is obliged to proceed and decide. Furthermore, the exercise of legal remedies does not require the actual infringement of a right; it is sufficient if, in the opinion of the person concerned, the contested decision infringes their right or legitimate interest. The right to legal remedy as a fundamental right must therefore be realized even if no other (fundamental) right infringement was established in the case.³

An essential, inherent element of the right to legal remedy is the possibility of legal remedy, i.e. the concept and substance of legal remedy includes the possibility of redressing the infringement of rights.⁴ This means that the body providing the remedy must have the possibility to annul or amend the reviewed decision, or instruct the lower-level body to conduct a new procedure.

The constitutional complaint that existed in the Hungarian legal system until the end of 2011 could not be considered an effective remedy according to the European Commission of Human Rights.⁵ In the case of *Vén v. Hungary*, the Commission took the view that, under the rules in force at the time, the Constitutional Court could not annul or modify the specific measures taken by public officials against the applicant, thus precluding the possibility of effective redress for the grievance. This type of complaint was “abstract” at the time and could only be directed against the legislation applied.⁶ The ECtHR reached the similar conclusion in the case of *Csikós v. Hungary*⁷ and in *K.M.C. v. Hungary*.⁸

³ *Decision 3458/2023 (XI. 7.) AB, Reasoning [36]; Decision 3064/2014 (III. 26.) AB, Reasoning [16]–[17].*

⁴ *Decision 3064/2014 (III. 26.) AB, Reasoning [15].*

⁵ At that time, the ECtHR was not yet a unified court, and the Commission acted as the court of first instance.

⁶ *Vén v. Hungary*, no. 21495/93, Commission decision, 30 June 1993.

⁷ *Csikós v. Hungary*, no. 37251/04, §§ 17–19, 5 December 2006.

⁸ *K.M.C. v. Hungary*, no. 19554/11, § 28, 10 July 2012.

However, the Hungarian legal environment changed significantly in 2012 with the adoption of the Fundamental Law and the new Act on the Constitutional Court (hereinafter: ACC).⁹ The ECHR's ambivalent position on the effectiveness of constitutional complaints under the Fundamental Law remained unchanged.¹⁰ One of the three types of constitutional complaints that came into force at that time can only be directed against the applicable legislation, another only against the court decision, and the third against both the court decision and the applicable legislation, so it must be considered which one is suitable for remedying the applicant's legal injury.

However, the ECHR's position later subsequently changed. In two decisions taken in 2018 and 2019 the ECtHR declared that - under the respective conditions and circumstances - all three kinds of constitutional complaints may offer an effective remedy to the applicants at domestic level.¹¹

I have presented the ECtHR's position on constitutional complaints not only as a historical curiosity, but because it contains a very important central idea that needs to be considered further. Many people form their opinion on the effectiveness of constitutional complaints based on statistics showing how many of the total number of constitutional complaints have led to a favourable outcome for the applicant, but the real question is what this type of constitutional complaint is suitable for reparation the legal harm.

I would like to stop here for a moment. As we can see, the ECtHR also assessed effectiveness based on whether the decision of the Constitutional Court reopens the possibility of legal remedy before the ordinary courts or whether it is directly suitable for remedying the grievance. To this end, a few words need to be said about what measures the Constitutional Court can take in relation

⁹ évi CLI. törvény az Alkotmánybíróságról [Act CLI of 2011 on the Constitutional Court] (Hungary) (hereafter ACC).

¹⁰ *Network of Pharmacies Association v. Hungary*, no. 66925/12, decision, 14 May 2013; *Hungarian Christian Mennonite Church and Others v. Hungary*, nos. 70945/11 et al., § 50, ECHR 2014; *Király and Dömötör v. Hungary*, no. 10851/13, § 49, 17 January 2017.

¹¹ Peter Paczolay, "The ECtHR on Constitutional Complaint an Effective Remedy in the Hungarian Legal Order," in *Hungarian Yearbook of International Law and European Law*, eds. M. Szabó, L. Gyenyey, and P. L. Láncoš (The Hague: Eleven International Publishing, 2020), 157; *Szalontay v. Hungary*, no. 71327/13, decision, 4 April 2019; *Mendrei v. Hungary*, no. 54927/15, decision, 19 June 2018.

to the constitutional complaint with regard to the contested court decision and the legislation.

In constitutional complaint proceedings, the Constitutional Court may find that a court decision is unconstitutional and annul it. The annulment generally affects the entire court decision, but it is also possible to annul only part of the decision. In a multi-defendant case, the Constitutional Court finds that the fundamental rights of the person concerned have been violated and then declares the decision under review to be partially annulled in relation to a specific defendant.¹²

The other most important legal consequence is the determination that the legislation is unconstitutional, which may also result in the annulment of the entire legislation, part of it, a specific provision, or even a single term. The annulment may take effect *ex nunc*, which occurs on the day following the publication of the constitutional court's decision, or *ex tunc*, which takes effect retroactively to the date of the original entry into force of the annulled law, as if it had never entered into force. Annulment with *pro futuro* effect is linked to a specific future date, which the Constitutional Court applies in cases where the absence of a legal provision would cause confusion in the application of the law or lead to a legal vacuum. In such cases, the Constitutional Court gives the legislator a reasonable deadline to correct the error through legislation.

There are also cases where annulment is not sufficient because new legal provisions need to be enacted to correct the legal gap. In such cases, the Constitutional Court finds that the regulation is unconstitutional due to the lack of legislation and sets a deadline for the legislator to remedy this situation. If legislation is not necessary, because the situation that is contrary to the Fundamental Law can be remedied by interpreting the legislation correctly, then it establishes a constitutional requirement.¹³

¹² Lilla Berkes, Mária Szívós, János Wiedemann, and Kinga Zakariás, "Bírói döntés alaptörvény-ellenességének megállapítása, megsemmisítés, eljárási jogkövetkezmények" ["Declaration of Unconstitutionality of a Judicial Decision, Annulment, Procedural Legal Consequences"], in *Az Alkotmánybírósági törvény kommentárja [Commentary on the Constitutional Court Act]*, ed. Kinga Zakariás (Budapest: Pázmány Press, 2022), 482.

¹³ Botond Bitskey and Bernát Török, eds., *Az alkotmányjogi panasz kézikönyve [Handbook on Constitutional Complaints]* (Budapest: HVG-ORAC, 2015), 217–34.

All this had to be mentioned in order to understand the following table, which shows the substantive legal consequences that the Constitutional Court was able to impose last year based on the large number of complaints submitted to it.

Table 1: Cases initiated after January 1, 2012 and completed by September 15, 2025¹⁴

<i>Legal consequence</i>	ACC 26. § (1)	ACC Section 26 (2)	ACC Section 27
<i>Annulment of court decision</i>	17	–	176
<i>Annulment of legislation</i>	9	14	4
<i>Declaration of prohibition of application</i>	7	2	6
<i>Establishment of legislative omission</i>	8	5	17
<i>Establishment of constitutional requirements</i>	8	8	20
<i>Total complaints during the specified period</i>	861	2665	4453

It can be seen that the most common legal consequence applied by the Constitutional Court is the annulment of a court decision. Over the past nearly fourteen years, the application of other legal consequences has been very rare in constitutional complaints.

Based on statistics, sceptics are quick to conclude that there is only a few percent chance that a constitutional complaint will result in a legal consequence being established on the grounds of unconstitutionality, which could lead to the case being retried or reviewed.

Those who view the institution of constitutional complaints with scepticism ask how the success rate of a legal remedy can be so low. Are we even talking about a real legal remedy? It is undisputed in international legal literature that the constitutional complaint is a specific legal instruments for the protection

¹⁴ Constitutional Court of Hungary, "Decision Search System," data extracted 15 September 2025.

of human rights. The constitutional complaint can be used only if all other remedies for the protection of rights are previously exhausted. This situation also determines its effectiveness. Although the effectiveness has been also limited in other countries, the need for an additional instrument for the protection of rights and freedoms is never excluded.¹⁵

The central element of my investigation is that, according to the ECtHR, the applicant must consider whether it is worthwhile to pursue this remedy and whether there is a minimum chance of success. However, in order to answer this question in the affirmative, it is necessary to be familiar with the key points of this legal institution and the relevant part of the Constitutional Court's practice so that the applicant can at least substantiate their complaint.

I would like to share a few thoughts on this idea with the reader.

II. THE MODEL OF CONSTITUTIONAL COMPLAINTS IN HUNGARY

2.1. Protection of Fundamental Rights

Constitutional complaints exist in many countries around the world and provide legal remedies for constitutional violations caused by laws and court decisions.¹⁶

Constitutional provisions define fundamental rights in Hungary. Hungary's first written constitution is stipulated by the Act XX of 1949, which came into force on August 20, 1949. This Constitution was announced in the communist system and after the collapse of the state structure during World War II. However, following the 1949 Constitution, several significant constitutional changes took place in Hungary because of historical events. The most significant amendment to the Constitution took place in 1972, but the changes did not affect the basic institutions of the state. However, an important change was that while the

¹⁵ Jelena Trajkovska-Hristovska, "Procedure for Protection of Human Rights by Constitutional Courts Constitutional Complaint," *Iustinianus Primus Law Review* 5, no. 1 (2014): 10–11.

¹⁶ Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review* 2, no. 1 (2016): 103–28.

1949 Constitution can be considered a translation of the Soviet constitution, the modification of 1972 was already Hungarian legislation. Formally, the 1949 Constitution was amended, and the original paragraphs were rearranged and renumbered. The next significant modification enacted in 1989, after the change of regime. After the abolition of state socialism, the constitution was reformed in its fundamental institutions. The 1989 amendments placed the political system within a democratic framework, and fundamental principles such as the protection of human rights were incorporated into the new legal structure.

Hungary joined the European Union on May 1, 2004, the process of creating a new constitution that was in line with both national identity and European norms was completed on January 1, 2011, when the current legislation was promulgated. This law replaced the 1949 Constitution and laid down the legal framework of the modern Hungarian state, including fundamental rights, the rules of state organization, and the separation of powers. In this Fundamental Law, fundamental rights are listed in the chapter entitled Freedom and Responsibility.

In a democratic state governed by the rule of law, such as Hungary, a differentiated institutional system operates to protect fundamental rights. The protection of fundamental rights is therefore primarily a state task, in which all state bodies must participate, but there are also institutions that specialize in the protection of fundamental rights. At the beginning of its operation, the Constitutional Court emphasized that the democratic functioning of the state organization implies that the state, through the activities of its organs, fulfils its constitutional obligation to respect and protect fundamental rights. In addition to protecting fundamental rights, the state has a duty to establish and maintain the functioning of its various organs in such a way that they guarantee fundamental rights, regardless of subjective claims. The unconditional enforcement of constitutional provisions is a fundamental condition for the realization of the rule of law. The courts and the Constitutional Court play a significant role in the protection of fundamental rights. Their involvement is indispensable in

fulfilling the requirements of the rule of law. Their relationship with each other fundamentally determines the effectiveness and success of their involvement.¹⁷

According to the Constitutional Court, the state has an obligation to protect institutions by defining in law the substantive and procedural rules based on and within the framework of which the fundamental rights declared in the Fundamental Law can be enforced. This element (i.e., the legal definition of the details of the enforcement of claims) makes the fundamental right in question a genuine subjective right.

In Hungary, the Fundamental Law classifies the courts, including the Constitutional Court, the Commissioner for Fundamental Rights, and the National Authority for Data Protection and Freedom of Information, as institutions responsible for protecting fundamental rights. The most important requirement for state institutions protecting fundamental rights is to ensure their independence, as these institutions monitor the activities of the executive power that affect fundamental rights. In this system of institutions protecting fundamental rights, constitutional rules ensure the independence of the Constitutional Court, the courts, and the ombudsman at the highest level. Compared to these constitutional institutions, the fundamental rights protection authorities embedded in the state administration system have only limited independence.¹⁸ A number of non-governmental organizations that are well known internationally (e.g., Amnesty International, Helsinki Committee) are also involved in the protection of fundamental rights.

2.2. The Hungarian Constitutional Court

The most important institution for the protection of fundamental rights is the Constitutional Court. The Constitutional Court was established based on the so-called European model.

¹⁷ Ágnes Czine, "The Relationship between the Constitutional Court and Ordinary Courts, with Special Reference to Criminal Courts," in *Commentary on the Constitutional Court Act*, ed. K. Zakariás (Budapest: Pázmány Press, 2022), 64.

¹⁸ Bernadette Somody and Beatrix Vissy, "Az alapjogok védelme [The Protection of Fundamental Rights]," in *Internetes Jogtudományi Enciklopédia [Internet Encyclopedia of Law]*, eds. András Jakab, Miklós Könczöl, Attila Menyhárd, and Gábor Sulyok, 2019.

According to legal tradition, constitutional adjudication dates back to the 1803 case of *Marbury v. Madison*,¹⁹ in which the Supreme Court of the United States declared that any law contrary to the Constitution is void and that the courts have the power to determine this. This marked the emergence of the Anglo-Saxon decentralized system of constitutional adjudication, in which ordinary courts decided on constitutional issues.

In contrast, the history of European constitutional adjudication dates back only a hundred years. European constitutional courts were established based on the so-called centralized model of Austrian-born constitutional lawyer Hans Kelsen. Constitutional adjudication was entrusted to an independent, autonomous body with a monopoly on deciding constitutional disputes.

After World War I, following the breakup of the Austro-Hungarian Monarchy, the first truly functioning constitutional court, the Austrian Constitutional Court, was established in 1920 to protect the constitutionality of independent Austria, which became the model for the continental European model of constitutional adjudication. I would like to note that until 1975, the Austrian Constitutional Court did not have the authority to hear cases brought by private individuals.

The Hungarian Constitutional Court was established in 1990 on a centralized model, but its detailed rules were based on the German Federal Constitutional Court, where the institution of constitutional complaints was introduced at the time of its establishment in 1951.²⁰ Thus, some form of constitutional complaint has existed in the Hungarian Constitutional Court from the outset. First, the Court consisted of 11 members, but since the legislative change in 2011, the number of constitutional judges has increased to 15.²¹ The members were initially elected for a term of nine years and were eligible for re-election. Since the 2011 reform, their term of office has been 12 years, but it is not renewable.

¹⁹ W. T. Eijsbouts, "Wir Sind Das Volk: Notes about the Notion of 'The People' as Occasioned by the Lissabon-Urteil," *European Constitutional Law Review* 6, no. 2 (2010): 199.

²⁰ Eszter Bodnár, "I. Constitutional Complaints-Institutional History and International Overview," in *Az alkotmányjogi panasz kézikönyve [Handbook of Constitutional Complaints]*, eds. B. Bitskey and B. Török (Budapest: HVG-ORAC, 2015), 20–21.

²¹ "The Constitutional Court-History," *Website of the Constitutional Court* (Hungary).

The primary competence of the Hungarian Constitutional Court is to protect constitutional norms, which also includes reviewing the constitutionality of legislation. The body pays particular attention to certain fundamental rights, such as freedom of speech, freedom of expression, protection of privacy, freedom of assembly, and freedom of religion.

On January 1, 2012, a new constitution came into force under the name Fundamental Law, Article 24 of which contains the basic rules governing the Constitutional Court. The legal framework for its operation is set out in the new Act on the Constitutional Court (ACC),²² while the detailed rules on its operation, procedure and organizational structure are laid down in its Rules of Procedure.

2.3. Proceedings of the Hungarian Constitutional Court Aimed at Protecting Fundamental Rights

The most important competences of the Constitutional Court, as enshrined in the Fundamental Law, include preliminary and subsequent judicial review, judicial initiative, and constitutional complaints. Of course, it has several other competences,²³ but the constitutional complaints account for more than 93% of its caseload. It should be noted that the German Federal Constitutional Court, which served as a model for the Hungarian Constitutional Court, dealt with constitutional complaints in similar proportions. In the more than seven decades since its establishment in 1951, 95% of the cases it has adjudicated have been constitutional complaints.²⁴

Constitutional court proceedings initiated for the review of legal norms can be divided into two groups: preliminary and subsequent norm control.

²² évi CLII. törvény az Alkotmánybíróságról [Act CLII of 2011 on the Constitutional Court] (Hungary).

²³ Such powers include: reviewing the National Assembly's decision to hold a referendum (Section 33 of the ACC), issuing an opinion on the dissolution of a representative body operating in violation of the Fundamental Law (Section 34 of the ACC), Opinion on the operation of a religious community with legal personality in violation of the Fundamental Law (Section 34/A), Removal of the President of the Republic from office (Section 35), Conflict of powers between state bodies and state and local government bodies (Section 36), examination of municipal regulations, public law regulatory instruments and decisions on legal uniformity (Section 37), interpretation of the Fundamental Law (Section 38), decision on preliminary interpretative opinions of the European Union (Section 38/A)

²⁴ Bundesverfassungsgericht (Federal Constitutional Court of Germany), "Annual Statistics."

Before the promulgation of a law, only the National Assembly and the President of the Republic are entitled to initiate such proceedings, but subsequent norm control can be divided according to who is entitled to initiate the proceedings. Thus, judicial review may be initiated by a judge, ex post abstract norm control by a specific person (ombudsman) or organization (a quarter of the members of the National Assembly). The two types of constitutional complaints may be initiated by private individuals and legal entities. Ex post facto judicial review can also be divided according to whether the persons specified request that the legislation be found to be in conflict with an international treaty or only with the Fundamental Law.

Let us look at some important detailed rules concerning norm control procedures:

2.3.1. Preliminary Norm Control

Preliminary examination of compliance with the Fundamental Law, preliminary norm control means constitutional review prior to the promulgation of the norm. The National Assembly and the President of the Republic are entitled to initiate preliminary norm control proceedings.²⁵ Accordingly, preliminary norm control must be initiated before the final vote on the law, and the National Assembly may only vote on the law after the decision of the Constitutional Court.²⁶

2.3.2. Ex Post Abstract Norm Control

With the entry into force of the Fundamental Law (January 1, 2012), a paradigm shift took place and the previous general abstract norm control, which could be initiated by anyone, was curtailed. The possibility of anyone submitting a motion was abolished, and the Constitutional Court now only reviews the conformity of legislation with the Fundamental Law at the initiative of a specific group of proposers, namely the Government, one quarter of the members of the National

²⁵ The basis for the jurisdiction under Section 23 of the ACC is Article 24(2)(a) of the Fundamental Law, to which Section 23(1) also refers.

²⁶ László Klicsu, "Preliminary Norm Control Procedure," in *Commentary on the Constitutional Court Act*, ed. K. Zakariás (Budapest: Pázmány Press, 2022), 225–26.

Assembly, the President of the Supreme Court, the Prosecutor General, or the Commissioner for Fundamental Rights.²⁷

2.3.3. Judicial Initiative for Individual Norm Control Proceedings²⁸

When constitutional issues arise, ordinary courts must apply the principles and criteria developed by the Constitutional Court, known as tests (e.g., criticism of public figures, restriction of rights). The purpose of the judicial initiative is to prevent judges from applying legislation that is contrary to the Fundamental Law in cases before them. Although judges in ordinary courts must therefore also take constitutional considerations into account, but they cannot review the constitutionality of legislation themselves, as in Anglo-Saxon systems. Instead, if they have concerns in this regard, they must refer the matter to the Constitutional Court.

2.3.4. Review of Legislation that Conflicts with International Treaties

In this case, the standard of review by the Constitutional Court is not the Fundamental Law, but an international treaty. Neither the Fundamental Law nor the ACC expressly stipulates that the Constitutional Court may only review legislation for conflicts with international treaties whose binding force has been recognized by Hungary. However, a constitutional problem may only arise if a piece of Hungarian legislation conflicts with a provision of an international treaty that is binding on Hungary or has become part of the Hungarian legal system. Article Q(2) of the Fundamental Law does not prescribe the obligation to ensure consistency between international law and Hungarian law in general, but only in order to fulfil Hungary's international legal obligations. The procedure may be conducted not only at the request of an eligible person, but also *ex officio*.²⁹

The procedure may be initiated by one quarter of the members of the National Assembly, the Government, and the President of the Supreme Court, the Prosecutor General, and the Commissioner for Fundamental Rights. The

²⁷ Article 24(2)(e) of the Fundamental Law, Section 24(1) of the ACC.

²⁸ Fundamental Law, Article 24(2)(b), ACC Section 25(1).

²⁹ Petra Lea Láncoš, "Examination of Conflicts with International Treaties," in *Commentary on the Constitutional Court Act*, ed. K. Zakariás (Budapest: Pázmány Press, 2022), 387–388.

judge shall, in addition to suspending the court proceedings, initiate proceedings before the Constitutional Court if, in the course of adjudicating a specific case before him or her, he or she finds that a law must be applied that conflicts with an international treaty.³⁰

In addition to these norm control procedures, there is also a constitutional complaint procedure, which was established partly for norm control and partly for the constitutional review of court decisions. As I have already mentioned, there are three types of this procedure. This will be discussed further below.

III. CONSTITUTIONAL COMPLAINT PROCEDURES

3.1. Types of constitutional complaints in Hungary

According to the rules in force, there are three types of constitutional complaints under Act CLI of 2011 on the Constitutional Court (ACC):

3.1.1. Old-type Constitutional Complaint³¹ [ACC Section 26(1)].

Aimed at establishing the unconstitutionality of the legislation applied in court proceedings and at annulling the unconstitutional legislative provision and the court decision if the application of the legislation resulted in the violation of the petitioner's rights guaranteed by the Fundamental Law in the court proceedings.

This option is to file a constitutional complaint for judicial review, which already existed before January 1, 2012, but was directed only against the law, not against the court decision. Before 2012, the Constitutional Court only examined and annulled the legislation in this type of constitutional complaint, but in the new type, it can also annul the related court judgment.

3.1.2. Direct complaint [ACC Section 26(2)]

This aimed exclusively at establishing the unconstitutionality of a legal provision and its annulment if, as a result of the application or enforcement of the legal provision, the petitioner's right guaranteed by the Fundamental Law

³⁰ ACC § 32(2) (Hungary).

³¹ Complaint pursuant to Section 26(1) of the ACC: maintained and incorporated into the Fundamental Law the constitutional complaint regulated in the old ACC and aimed at reviewing the legislation applied in individual cases (see above). Act XXXII of 1989 on the Constitutional Court, Section 48(1) (old ACC).

has been directly infringed. In this case, no court or administrative proceedings are necessary, only that the legislation directly infringes the applicant's rights guaranteed by the Fundamental Law and there is no possibility of legal remedy. Section 26(2) of the ACC reinterpreted the possibility of an exceptional constitutional complaint directed directly against a legal provision. In both cases, the subject of the constitutional review may be the legal provision itself, i.e., both constitutional complaints are subject to normative review.

The difference between the complaints set out in Section 26(1) and (2) of the ACC is that while in the case of (1) the infringement of rights results from the application of the law in court proceedings, in the case of (2) it occurs directly from the law, without a court decision.

In the case of a complaint directed solely against the legislation [paragraph (2)], the fundamental question is therefore whether the person concerned is affected. While in constitutional complaints related to judicial proceedings, the involvement of the litigant or the defendant is clear, as it is based on civil or criminal proceedings, in the case of grievances without judicial proceedings, a more rigorous examination of involvement is necessary. In such cases, the grievance must be *personal, direct, and current*. The Constitutional Court may only conduct a substantive examination if the petitioner can credibly demonstrate that the contested legal provision has been directly enforced against him or her without a court decision and that, as a result, he or she has suffered a legal injury for which there is no legal remedy available or which has already been exhausted. The required personal, direct, and current involvement must exist at the time the petition is filed.³²

Even in the early days of the Constitutional Court, up until 2012, Hungarian constitutional complaints differed from *actio popularis*. A constitutional complaint could be lodged by anyone whose rights had been infringed because of the application of an unconstitutional law and who had exhausted all other legal remedies or had no other legal remedies available to them.³³ After 2012,

³² *Decision 3110/2013 (VI. 4.) AB, reasoning [27]; Order 3120/2015 (VII. 2.) AB, reasoning [55].*

³³ Act XXXII of 1989 on the Constitutional Court, Section 48(1) (old ACC).

constitutional complaints under Section 26(2) of the ACC required stricter proof of involvement (personal, direct, current).³⁴

3.1.3. Genuine Constitutional Complaint [ACC 27. §]

A “real” complaint seeks to annul a decision on the merits of a court case or a decision otherwise concluding court proceedings if the decision violates the petitioner’s rights guaranteed by the Fundamental Law. This type of constitutional complaint accounts for most of the cases brought before the Constitutional Court.

However, the practice of the Constitutional Court has limited the role of this type of constitutional complaint. The Court cannot become a court of ordinary fourth instance, because laws are primarily interpreted by these courts, and the Constitutional Court refrains from taking a position on the validity of issues pertaining to legal dogma and has no jurisdiction to review the direction of judicial decisions, the judicial assessment of evidence, or the entirety of court proceedings.³⁵

According to one of the Constitutional Court’s early decisions, “a constitutional complaint is a means of protecting the fundamental rights enshrined in the Constitution, the purpose of which is to create constitutional guarantees against state power in order to protect the rights of individuals, or communities, and to ensure their autonomy of action.”³⁶

A common feature of the types of constitutional complaints currently in force in Hungary is that they are objective means of protecting fundamental rights. This means that they go beyond the specific, individual cases of the complainants, as they shape, enrich, and concretize the content of fundamental rights. In this way, they further develop the practice of the Constitutional Court and the interpretation of the Fundamental Law. In addition to their objective function, they also provide subjective legal protection, as they remedy the violation of the applicant’s fundamental rights. It should be noted that the legal institution of

³⁴ *Decision 33/2012 (VII. 17.) AB, reasoning [61]–[62], [66]; Order 3367/2012 (XII. 15.) AB, reasoning [13], [15].*

³⁵ *Decision 3268/2012 (X. 4.) AB, reasoning [28]; Decision 3325/2012 (XI. 12.) AB, reasoning [13]–[15]; Decision 3003/2012 (VI. 21.) AB, reasoning [4]; Decision 3231/2012 (IX. 28.) AB, reasoning [4].*

³⁶ *Decision 65/1992 (XII. 17.) AB, ABH 1992, 289, 291.*

constitutional complaints differs in this respect from the constitutional court proceedings described above, which primarily serve to uphold the integrity of the legal order, with the protection of individual fundamental rights and the redress of grievances being only one possible legal consequence in their case.³⁷

The type of complaint that best achieves subjective legal protection is that which is directed against a judicial decision, since in a specific judicial proceeding, it can break the final decision and compel the ordinary court to conduct a new proceeding. In contrast, complaints against norms bring the interests of a community before constitutional review and operate at a higher level of abstraction, making them often more difficult to justify than a specific case. It is no coincidence that the abstract constitutional complaint in force in the earlier period of the Constitutional Court left a sense of deficiency among the legal remedies of the legal system, which is why the type of complaint directly challenging a court decision was also introduced.

The essence of the constitutional complaint procedure can therefore be understood as an individual (subjective) legal remedy and the possibility of constitutional redress associated with it. This does not mean that the petitioner, any citizen or legal entity, can claim that a law is unconstitutional by referring to any provision of the Fundamental Law, because he or it must prove the involvement in the case in question. In this respect, constitutional complaints differ from the *ex post facto* review of norms that was previously available to anyone. They also differ from previous constitutional complaints in that the possibility of overturning a court decision can also remedy the individual legal injury suffered in the case in question. The Constitutional Court noted as early as 1991 that the complaint may involve a subjective constitutional remedy (the so-called *Jánosi case*³⁸), but it took more than two decades for this to be implemented.

³⁷ Eszter Bodnár, "I. Constitutional Complaints – Institutional History and International Overview," in *Az alkotmányjogi panasz kézikönyve [Handbook of Constitutional Complaints]*, eds. B. Bitskey and B. Török (Budapest: HVG-ORAC, 2015), 24.

³⁸ Decision 57/1991 (XI. 8.) AB.

The Constitutional Court has repeatedly stated in its decisions that a constitutional complaint can only be based on a violation of a right guaranteed by the Fundamental Law, therefore, pursuant to Section 52 (1b) (b) of the ACC, the essence of the violation of a right guaranteed by the Fundamental Law must be indicated in the motion.³⁹ Consequently, not all articles of the Fundamental Law can be invoked as a legal basis in a constitutional complaint, only the rights listed in the section entitled Freedom and Responsibility. Not all of these, however, as there are declarative provisions that express the objectives of the state but do not define the rights of the individual.

Constitutional complaints may therefore be lodged in defence of fundamental rights, but the Constitutional Court has also included certain legal principles in this category. The prohibition of retroactive legislation and the reasonable period of time granted to legal entities to prepare before the legislation enters into force, which is one of the principles of legal certainty and, ultimately, the rule of law. In this way, it has broadened the list of fundamental rights taken from the classic human rights catalogue on which complaints can be based.

The person or organization submitting the constitutional complaint must take the above into account. They must be aware of the content of the fundamental right, as well as the relevant practice of the Constitutional Court, and must also submit a justification for the violation thereof. Without a constitutional justification, the complaint cannot be assessed on its merits.

Based on statistical research based on decisions made between 2012 and 2022, it can be established that the total number of fundamental rights successfully invoked during the 11-year period was 1,441. The most frequently invoked (and adjudicated) rights guaranteed by the Fundamental Law are: the right to a fair trial [Article XXVIII(1)], equality before the law [Article XV(1) and (2)], the rule of law [Article B(1)], the right to property [Article XIII], the right to legal remedy [Article XXVIII(7)], freedom of expression and freedom of the press [Article IX(1) and (2)].⁴⁰

³⁹ *Decision 3325/2012 (XI. 12.) AB, Reasoning [13]*.

⁴⁰ Kinga Zakariás and Ágnes Németh, "The Constitutional Court's Practice of Protecting Fundamental Rights since the Entry into Force of the Fundamental Law – in Numbers," *Constitutional Court Review*, no. 2 (2023): 38.

In my former article written at the beginning of the period mentioned above, I examined the fundamental rights that the applicants invoked as legal grounds in criminal cases. As mentioned, Article B) of the Fundamental Law sets out the requirements of the rule of law, which cannot be invoked in a constitutional complaint, except in two respects: the time needed to prepare for the implementation of the law and retroactive legislation. Interestingly, however, this was the wild card for a long time, until it became common knowledge that it could only be invoked in a limited number of cases. At that point, the situation changed, and applicants began to refer to another, fairly comprehensive article consisting of several sub-rights, Article XXVIII(1), which defines the requirements of a fair trial.⁴¹

The research data cited shows that the two legal bases have switched places, but they are still among the top three, and another general reference basis applicable to legislation has wedged itself between them: the requirement of equality before the law, the general requirement of equality before the law.

The practice of applicants, which indiscriminately refers to all rights and articles that are even remotely related to the grievance in the layman's view, has been transformed into the invocation of general articles that contain several partial rights, in the hope that they may arouse the interest of the Constitutional Court. However, as we have seen, this alone is not enough.

Let us look at the statistics. The statistical data clearly show the extent of the caseload of constitutional complaints within the listed powers of the Constitutional Court. Based on the most recent full year, 2024, the number of completed cases was distributed as follows:

One decision was made on preliminary norm control and one decision was made on the interpretation of the Fundamental Law. During the subsequent review of the norm, 525 decisions were made. Of these, 6 norm controls were initiated by specific persons and bodies, and 28 were initiated by judges.

⁴¹ Ágnes Czine, "The Role of Constitutional Complaints in Criminal Cases," *FORUM*, no. 2 (2015): 11–12.

The two types of constitutional complaints under Section 26 of the ACC (including norm control) resulted in a total of 55 decisions, while the number of decisions on constitutional complaints against judicial judgments (Section 27 of the ACC) was 435.

Thus, 93% of all decisions made by the Constitutional Court last year were constitutional complaints, and 82% of these were directed exclusively against judicial decisions concluding proceedings. With a relatively small margin of error, we can say that this ratio has generally remained the same over the past ten years.

The examination of specific court proceedings related to constitutional complaints therefore accounts for the overwhelming majority of all decisions of the Constitutional Court, so we are talking about a very important procedure and legal institution that influences constitutional practice.

3.2. Key Points of the Hungarian Constitutional Complaint

I must therefore highlight a few factors which, due to the structure of the legal institution, result in the complaint becoming eligible for substantive review or not at certain points of consideration.

3.2.1. Admissibility Screening Procedure

As a result of the admissibility procedure, many constitutional complaints are rejected because they do not meet the basic formal requirements.

In this respect the most important factor could be that there is no requirement to have a lawyer, so any layperson who is unfamiliar with the requirements and practices of the Constitutional Court can send a few handwritten lines stating how they feel the state authorities have treated them unfairly. However, in most cases, these descriptions do not outline a constitutional violation, but only criticize judicial or administrative and other proceedings and the decisions made in them because they did not rule in favour of the applicant. Another important influencing factor may be that the constitutional complaint procedure is free of charge, so it does not matter how many proceedings the applicant initiates and

when, and therefore the applicant does not consider which type of constitutional complaint is appropriate as a legal remedy for resolving the matter.

After receipt of the application, the Secretary General checks the formal requirements during the preparatory phase, and the applicant is asked to provide any missing information, if necessary. Meeting the application to the formal requirements, the case designated to the reporting constitutional judge undergoes a so-called admissibility procedure. On that case, if the petition still does not meet the formal requirements, does not raise a question of fundamental constitutional significance, or does not raise doubts as to the unconstitutionality of the contested court decision, the judge submits a rejection proposal.

I would like to note that in the event of a rejection, the Constitutional Court does not specialize its reasoning by case type in its admissibility practice and does not take a position on the unconstitutionality of the contested court decision or on the related issue of fundamental constitutional significance. The situation is different if the application is not rejected but is decided on its merits. When examining the merits of the application, the reasoning for the two circumstances mentioned above is generally separated, because it must be established on what basis the further examination will be based.

In the course of rejecting applications, the Constitutional Court has developed the practice of attaching a formalized but more specific type of justification. For example, it rejects the application because

- the specific problem is not a constitutional or legal issue at all,
- it is a question of legality, not constitutionality that can be interpreted by ordinary courts,
- the motion is aimed at reviewing the facts of the case, i.e., at obtaining a new ordinary remedy,
- the motion requests a re-evaluation or reconsideration of the evidence,
- the motion does not raise any new constitutional issues,
- the motion would not materially affect the petitioner's situation.

Or the Constitutional Court outlines the other reasons why the motion is unfounded.⁴²

The consideration required for the acceptance of a constitutional complaint falls within the jurisdiction of the Constitutional Court, thus giving it considerable leeway in deciding whether to examine the complaint on its merits. The Constitutional Court has developed a practice, in many cases a test, or a set of criteria, for the protection of individual rights, so if the applicant submits their petition with knowledge and explanation of this, they have a much better chance of obtaining effective legal remedy. During the substantive examination, decisions can be made at two levels: by the five-member councils (there are currently three such councils) or by the full session comprising all members.

If we want to make the proportions and extent of this process tangible, let us turn to the statistics again and take the 2024 figures as a basis.

The Hungarian Constitutional Court concluded 904 cases in 2024. Of these, 377 cases were rejected by single judges due to formal deficiencies, despite the fact that the vast majority of them were supplemented with instructions. In a further 405 cases, the panels, mostly five-member councils, found the applications unsuitable for substantive examination due to deficiencies and therefore rejected the complaints.

For formal reasons, therefore, the overwhelming majority of applications do not meet the filtering criteria. Of course, there are criteria among these that require consideration and cannot be applied mechanically. These include, for example, the identification of the fundamental right that has been violated, the constitutional justification for the violation, and an explanation of how the applicant is affected. A proper explanation of these in the application requires more serious background knowledge, but the basis for the violation of the Fundamental Law and the issue of constitutional significance can be filtered out from the proper justification of the complaint.

⁴² Botond Bitskey, "Special Rules for Individual Constitutional Complaint Procedures," in *Az alkotmányjogi panasz kézikönyve [Handbook of Constitutional Complaints]*, eds. B. Bitskey and B. Török (Budapest: HVG-ORAC, 2015), 145.

Returning to the statistics, it should be noted that in 2024 there were 16 cases in which part of the application was considered suitable for substantive examination, and the complaint was therefore accepted. In 64 cases, the decision rejected the application because of the substantive examination.

Finally, in 58 of the 904 cases, or 6% of the cases, the Constitutional Court found a violation of the Fundamental Law or a question of fundamental constitutional significance that warranted examination.⁴³

At the end of the admissibility screening procedure, in order for a decision on the merits to be made, there must be “doubt as to the constitutionality” or an issue of constitutional significance must be identified for the Constitutional Court to conduct a substantive constitutional review of the case.

Constitutional complaints that meet the formal requirements must pass through another filter. This provision is contained in Section 29 of the ACC. The condition for the admissibility of all three types of constitutional complaints is that they raise a question of unconstitutionality or a question of fundamental constitutional significance that materially affects the judicial decision. These two conditions are alternative in nature, so the existence of one of them alone justifies the Constitutional Court’s substantive proceedings. The examination of the existence of the conditions falls within the discretion of the Constitutional Court.⁴⁴ Let us look at the two questions individually from a practical point of view.

3.2.2. Unconstitutionality and the Special Nature of the Remedy

A constitutional complaint is not a regular judicial remedy in which a higher court may, in certain cases, re-examine the entire case from a legal perspective. In complaints filed under Sections 26(1) and 27 of the ACC, the subject of the examination may be “the decision on the merits of the case or any other decision concluding the court proceedings.” The Constitutional Court conducts a constitutional review, which is therefore much narrower and partly different

⁴³ “Caseload and Statistical Data of the Constitutional Court,” Constitutional Court of Hungary.

⁴⁴ *Decision 3/2013 (II. 14.) AB, Reasoning [30]; Decision 34/2013 (XI. 22.) AB, Reasoning [18].*

in scope than that of an ordinary court, but its starting point is always the final court decision on the merits or concluding the proceedings.

The practice of the Constitutional Court has crystallized the types of court decisions that may be the subject of proceedings. From a substantive legal point of view, a decision may be substantive or non-substantive depending on whether it decides on the fundamental issue raised in the case, i.e. whether it decides on the legality and legal consequences of the claim, charge, application or other motion. Judgments are always substantive, but certain orders may also be considered substantive if they meet the above condition. However, most orders are not substantive because they either do not decide the fundamental issue or only decide on incidental procedural details.

If we classify decisions from a procedural law perspective, they can be final or interim, depending on whether their adoption concludes the proceedings before the given court or whether the proceedings continue. Some decisions, such as those rejecting a statement of claim or a petition and terminating the proceedings (), are also final, while others related to the conduct of the proceedings are not. All procedural orders and decisions on ancillary issues are excluded from decisions that can be challenged by a constitutional complaint. From a substantive legal point of view, judgments and final orders can also be challenged by a constitutional complaint.⁴⁵

According to the Constitutional Court, acting within its competences as regulated in Section 27 of the ACC Consequently, when examining the constitutionality of a judicial decision, the Constitutional Court refrains from taking a position on questions of specialized law or questions of interpretation of the law that fall within the jurisdiction of the courts.⁴⁶

The success rate of the vast majority of constitutional complaints is poor in part because they do not attempt to substantiate a constitutional violation,

⁴⁵ Botond Bitskey, "Special Rules for Individual Constitutional Complaint Procedures," in *Az alkotmányjogi panasz kézikönyve [Handbook of Constitutional Complaints]*, eds. B. Bitskey and B. Török (Budapest: HVG-ORAC, 2015), 196–99; Zs. András Varga, "Constitutional Complaint Against a Judicial Decision," in *Commentary on the Constitutional Court Act*, ed. K. Zakariás (Budapest: Pázmány Press, 2022), 327.

⁴⁶ *Decision 3003/2012 (VI. 21.) AB, Reasoning [4]*

but rather raise again legal violations that have already been challenged in the ordinary court system. Applicants often fail to understand that the violation that can be remedied by a constitutional complaint is not just any violation of the law, but the result of a clearly definable, arbitrary judicial decision or legislation that does not take sufficient account of the protection of fundamental rights.

The remedial nature of constitutional complaints is often misunderstood by lawyers, but also by the majority of applicants who proceed without legal representation. The Constitutional Court is not part of the ordinary court system, which decides legal disputes on the basis of sectoral and special legislation and provides two or three levels of legal remedy. When the new type of constitutional complaint was introduced, the Constitutional Court emphasized that it is not a fourth level of decision-making.

This means that although constitutional complaints are considered a legal remedy, as they can remedy subjective legal grievances, their scope is limited because they are not ordinary court remedies. Pursuant to Article 24(1) of the Fundamental Law, the Constitutional Court is the supreme body for the protection of the Fundamental Law. Accordingly, pursuant to Article 24(2)(d) of the Fundamental Law, the Constitutional Court may review judicial decisions from the perspective of constitutionality, and its jurisdiction is limited to examining and eliminating any unconstitutionality that materially affects the judicial decision. Therefore, it has no jurisdiction to review the direction of judicial decisions, the judicial assessment and evaluation of evidence, or the entire court proceedings.⁴⁷ In other words, the Constitutional Court cannot make a legal decision in place of the ordinary courts, so it basically has the power of cassation, on the basis of which the ordinary court must issue a new judgment in accordance with the principles of the Fundamental Law.

Consequently, constitutional complaints are a subsidiary form of legal remedy, similar to applications to the European Court of Human Rights (ECHR). This

⁴⁷ *Decision 3231/2012 (IX. 28.) AB, Reasoning [4]; Decision 3017/2013. (I. 28.) AB, Reasoning [3].*

means that if there is a regular court remedy, it must be exhausted before a constitutional complaint can be successfully lodged in order to ensure that the legal review is carried out in full.

3.2.3. Issues of Fundamental Constitutional Significance

The other condition, the concept of a question of constitutional significance, determines the scope and depth of the Constitutional Court's review of the contested legislation or judicial decision in constitutional complaint proceedings.

When reviewing compliance with the Fundamental Law, the Constitutional Court must examine whether the right enshrined in the Fundamental Law has been violated. The substantive legal concept of the right enshrined in the Fundamental Law is sufficient to delimit the scope of the Constitutional Court's review in the case of constitutional complaints against legislation. The Constitutional Court must examine whether there is a likelihood of a violation of fundamental rights in the case in question.

As can be seen from the above, the subjective rights enforced in court proceedings and fundamental rights often overlap. Courts are obliged to interpret the text of legislation in accordance with its purpose and the Fundamental Law when applying the law. In this sense, a violation of the law by a court may also constitute a violation of fundamental rights. However, the law requires the Constitutional Court to identify and examine not just any constitutional issue, but issues of "fundamental" constitutional significance. The ACC sets out the Constitutional Court's jurisdiction to examine issues of fundamental constitutional significance in constitutional complaint proceedings.⁴⁸ This activity requires consideration and, naturally, involves elements of uncertainty for the applicant.

Of course, many other issues could have been discussed in more detail, but this is all that could be included in the current analysis of Hungarian constitutional complaints.

⁴⁸ Kinga Zakariás, in *Commentary on the Constitutional Court Act*, ed. K. Zakariás (Budapest: Pázmány Press, 2022), 351–52.

IV. CONCLUSIONS

The Hungarian constitutional complaint is a modern, functional, and effective legal remedy, the effectiveness of which has been recognized by the European Court of Human Rights. At the same time, the ECtHR emphasized that it is up to the applicant to consider which type of constitutional complaint to file. It is advisable to consult a lawyer first. With this in mind, I have outlined the key points that need to be known in order to assess the success of the constitutional complaint procedure.

It is therefore highly advisable for the applicant to consider whether a constitutional complaint is suitable for resolving or remedying the legal injury in question. Today, the Constitutional Court has a well-established practice in relation to constitutional complaints, which provides assistance in this regard. The case law of the Constitutional Court makes it possible to determine with a high degree of certainty which of the three types of constitutional complaints currently in existence is likely to be successful in a given case. However, the majority of complainants do not currently consider this issue with sufficient thoroughness, which is why a large number of complaints are rejected on the merits. The Constitutional Court is not the fourth level of the ordinary court system, but a body that conducts examinations based on constitutional criteria and can provide special legal remedies in these proceedings to applicants who have suffered harm because of the administration of justice or legislation.

BIBLIOGRAPHY

Berkes, Lilla, Mária Szívós, János Wiedemann, and Kinga Zakariás. “Bírói döntés alaptörvény-ellenességének megállapítása, megsemmisítés, eljárási jogkövetkezmények [Declaration of Unconstitutionality of a Judicial Decision, Annulment, Procedural Legal Consequences].” In *Az Alkotmánybírósági törvény kommentárja* [Commentary on the Constitutional Court Act], edited by K. Zakariás. Pázmány Press, 2022.

- Bitskey, Botond. “Az egyes alkotmányjogi panasz eljárások különös szabályai [Special Rules for Individual Constitutional Complaint Procedures].” In *Az alkotmányjogi panasz kézikönyve* [Handbook of Constitutional Complaints], edited by B. Bitskey and B. Török. hvgorac, 2015.
- Bodnár, Eszter. “Az alkotmányjogi panasz-intézménytörténet és nemzetközi kitekintés” [Constitutional Complaints—Institutional History and International Overview]. In *Az alkotmányjogi panasz kézikönyve* [Handbook of Constitutional Complaints], edited by B. Bitskey and B. Török. hvgorac, 2015.
- Czine, Ágnes. “Az Alkotmánybíróság és a rendes bíróságok kapcsolata, különös tekintettel a büntető bíróságokra [The Relationship between the Constitutional Court and Ordinary Courts, with Special Reference to Criminal Courts].” In *Az Alkotmánybíróságról szóló törvény kommentárja* [Commentary on the Constitutional Court Act], edited by K. Zakariás. Pázmány Press, 2022.
- Czine, Ágnes. “Az alkotmányjogi panaszok szerepe büntető ügyekben [The Role of Constitutional Complaints in Criminal Cases].” *Forum* no. 2 (2015).
- Eijsbouts, W. T. “Wir sind das Volk: Notes about the Notion of ‘the People’ as Occasioned by the *Lissabon-Urteil*.” *European Constitutional Law Review* 6, no. 2 (2010).
- Faiz, Pan Mohamad. “A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court.” *Constitutional Review* 2, no. 1 (2016): 103–128.
- Kadlót, Erzsébet. “Alaptörvényben biztosított jog, illetve alapjog védelme [Protection of Rights Guaranteed by the Fundamental Law and Fundamental Rights].” *Acta Juridica et Politica* no. 2 (2015): 48–67.
- Klicsu, László. “Az Alaptörvénnyel való összhang előzetes vizsgálata [Preliminary Norm Control Procedure].” In *Az Alkotmánybíróságról szóló törvény kommentárja* [Commentary on the Constitutional Court Act], edited by K. Zakariás. Pázmány Press, 2022.

- Láncos, Petra Lea. “A nemzetközi szerződésbe ütközés vizsgálata [Examination of Conflicts with International Treaties].” In *Az Alkotmánybíróságról szóló törvény kommentárja* [Commentary on the Constitutional Court Act], edited by K. Zakariás. Pázmány Press, 2022.
- Paczolay, Peter. “The ECtHR on Constitutional Complaint an Effective Remedy in the Hungarian Legal Order.” In *Hungarian Yearbook of International Law and European Law*, edited by M. Szabó, L. Gyeney, and P. L. Láncos. Eleven, 2020. <https://doi.org/10.5553/HYIEL/266627012020008001010>.
- Somody, Bernadette, and Beatrix Vissy. “Az alapjogok védelme [The Protection of Fundamental Rights].” Internet Encyclopedia of Law. 2019. <http://ijoten.hu/szocikk/az-alapjogok-vedelme>.
- Trajkovska-Hristovska, Jelena. “Procedure for Protection of Human Rights by Constitutional Courts-Constitutional Complaint.” *Iustinianus Primus Law Review* 5, no. 1 (2014).
- Varga, Zs. András. “Constitutional Complaint Against a Judicial Decision.” In *Az Alkotmánybíróságról szóló törvény kommentárja* [Commentary on the Constitutional Court Act], edited by K. Zakariás. Pázmány Press, 2022.
- Zakariás, Kinga, and Ágnes Németh. “Az Alkotmánybíróság alapjogvédő gyakorlata az Alaptörvény hatályba lépése óta-a számok tükrében [The Constitutional Court’s Practice of Protecting Fundamental Rights since the Entry into Force of the Fundamental Law—In Numbers].” *Constitutional Court Review* no. 2 (2023): 38.

CULTURAL EXPERTISE AND THE SOCIAL JUSTICE DEFENSE OF INDIGENOUS PEOPLES RIGHTS IN THE INDONESIAN CONSTITUTIONAL COURT

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Abstract

This article is about rights to legal defense by using customary justice as part of human rights. Given the context of excessive exploitation over natural resources in Indonesia, indigenous people's livelihood has been constantly deprived. Even, there have been laws and its policies influencing their cultural knowledge, traditions, and its social lives (Bedner and Arizona 2019). In a landmark ruling, Indonesia's Constitutional Court through the verdict Number 35/PUU-X/2012 has invalidated the Indonesian government's claim to millions of hectares of forest land, potentially giving indigenous and local communities the right to manage their customary forests. However, although the court ruling does not automatically change the situation at ground, the cultural expertise has played important role to shape ideas in recognizing progressively their expertise before the court system. This article dissects the role of cultural expertise has been translated into the court rules and influence to the practice, understanding debates and practices of cultural expertise, and assessing constitutional court decisions which contradict to 2013's landmark decision and understanding the meaning for social justice. Using an interdisciplinary study of law, this article found that locals are rarely deemed as expert at court while the cultural expertise has been used to underpin their claims mostly over natural resources conflict

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cases. Really unfortunate that their expertise does not automatically protect rights and social justice due to lack of capacity, political economy driven policies, and various vested interests.

Keywords: Constitutional court; Cultural expertise; Human rights; Indigenous peoples; Social justice

I. INTRODUCTION: CULTURAL EXPERTISE, CONCEPTS AND ITS GAPS

The implementation of human rights has been influenced by the socio-political context. When it comes to protecting human rights, legal systems often discriminate against and even exclude citizen's rights, including the rights of indigenous peoples. Indonesia's social and cultural landscape are marked by the vital role of traditions and indigenous people's laws. These diverse and plural legal system are adopted by Indonesia's constitution since the first enactment.¹ These are called as *adat* or *adat* law in maintaining the legal order of most people. *Adat* includes cultural wisdoms and its dispute resolution through informal justice system.² In the demand of 'certainty' and 'centralised' model of governance, the Indonesian government responded to this socio-cultural reality by implementing a policy of unification of the national justice system but not prohibiting the existence of customary courts. Many studies argued the importance of customary justice as the main choice for most Indonesians, especially those who live in rural areas.³ This is called as '*adat* court'.⁴ However,

¹ Herlambang P. Wiratraman and Dian A. H. Shah, "Indonesia's Constitutional Responses to Plurality," in *Pluralist Constitutions in Southeast Asia*, ed. Jaclyn Neo and Bui Ngoc Son (Oxford: Hart Publishing, 2019), 115–142.

² J. F. Holleman, *Van Vollenhoven on Indonesian Adat Law (Selections from Het Adatrecht van Nederlandsch-Indië [The Adat Law of the Netherlands Indies])*, Vols. I-II (Leiden: KITLV, 1981).

³ Rikardo Simarmata, *Pengakuan Hukum terhadap Masyarakat Adat di Indonesia [Legal Recognition of Indigenous Peoples in Indonesia]* (Bangkok: UNDP Regional Initiative on Indigenous Peoples' Rights and Development (RIPP), 2006). See Rikardo Simarmata, "Filosofi dan Prinsip Peradilan Adat [Philosophy and Principles of Adat Justice]" (paper presented at the Workshop on Strengthening Adat Court Capacity through the Making of Adat Court Guidance in Central Kalimantan, SAJI Project UNDP and Bappenas/Ministry of National Development Planning, 2013). Yance Arizona, "Kedudukan Peradilan Adat dalam Sistem Hukum Nasional [The Position of Adat Courts in the National Legal System]" (paper presented at the meeting on Strengthening of Adat Court in Central Kalimantan for Access to Justice Empowerment, June 11, 2013). Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome: IDLO, 2011).

⁴ Abdurrahman, "Peradilan Adat dan Lembaga Adat dalam Sistem Peradilan Indonesia [Adat Courts and Adat Institutions in the Indonesian Judicial System]" (conference paper presented at the Workshop on Adat Court, 2nd Congress of Aliansi Masyarakat Adat Nusantara (AMAN), Mataram, September 20, 2002); Hilman Hadikusuma, *Peradilan Adat di Indonesia [Adat Courts in Indonesia]* (Jakarta: Miswar, 1989).

it has also caused some tensions, since government policies influenced their cultural knowledge and traditions.⁵

Since the customary court has no formal ‘legal binding’, then the challenges to resolve tensions have been brought to the formal state judiciaries.⁶ Many *adat* law cases have been brought to the state justice system, one of the most influential cases is related to the role of the Constitutional Court. Since legal cases have been brought to the justice, their presence is fundamental to promote human rights and justice system beyond the state formal legal system. Hence, their presence has been conceptually coined as cultural expertise. This study refers to the works of Holden,⁷ who argued about ‘cultural expertise’.

The origin of ‘cultural expertise’ as a concept actually has been formulated in 2009, when it responds to the need to acknowledge and scrutinise the contribution of socio-anthro-legal scientists, experts in laws and cultures, to the resolution of disputes and the ascertainment of rights. Cultural expertise as an umbrella concept proposes a strengthened ethical framework that enhances the ethical references of socio-anthro-legal scientists appointed as experts in court, as well as acknowledging the variety of tools and methods that fall within the broad domain of cultural expertise. Cultural expertise also refers to the special knowledge that enables socio-legal scholars, mediators, the so-called ‘cultural brokers’, to locate and describe relevant facts in light of the particular background of the claimants, litigants or the accused person(s), and in some cases of the victim(s). Therefore, the meaning of cultural expertise is closely related to the cultural defense, and so one can say cultural expertise constitutes the nuts and bolts of cultural defense because it provides the defense for the arguments that are likely to influence the legal outcome of a case.

The ‘cultural expertise’ is equal and supposed to be fairly and equally considered since the growing concerns on the right to access and participate in

⁵ Adriaan Bedner and Stijn van Huis, “The Return of the Native in Indonesian Law: Indigenous Communities in Indonesian Legislation,” *Bijdragen tot de Taal-, Land- en Volkenkunde* 164, no. 2–3 (2008): 165–193. Adriaan Bedner and Yance Arizona, “Adat in Indonesian Land Law: A Promise for the Future or a Dead End?” *The Asia Pacific Journal of Anthropology* 20, no. 5 (2019): 416–434.

⁶ M. B. Hooker, *Adat Law in Modern Indonesia* (Kuala Lumpur: Oxford University Press, 1978).

⁷ Livia Holden (ed), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (London: Routledge, 2011).

science. Science is not merely about scientist, but also applying to those who create knowledge system, included knowledge production.⁸

Cultural expertise and its relation to litigation address the role of local community as well as social scientists as a source of 'expert evidence'. Their experiences and observations of particular cases involved litigants, witnesses, and advocates. Therefore, it is necessary to see how is cultural expertise adopted or successfully considered in the court rulings? How is cultural expertise as source of knowledge understood and or misunderstood in characterizing the patterns, conflicts and narratives that play important role in legal plural settings. Although the inquiry on indigenous people's rights has been often argued to protect their rights, as constitutional rights as studies by Yusa⁹ and Jamin et al.¹⁰

The method of this article applies an interdisciplinary study of law, this study sees the legal gap and combines between exploring rule of law studies and its contextual social-politics, especially dealing with the role of what Holden has coined, as 'cultural expertise'.¹¹ There are three key research questions, First, to what extent the role of cultural expertise has been translated into the court rules and influence to the practice; Second, how the constitutional court verdict in relation to cultural expertise has been debated, translated and implemented by regulations, bureaucracies, lower courts and other law enforcement. The third, how has been the coherence in relation to other constitutional court decisions which contradict to such landmark decision and what would be the meaning for social justice.

The implementation of law often impact fundamental human rights issues. First, this study reviews of Constitutional Court decisions by reflecting on the

⁸ As part of 'rights to access and participate in science', the cultural expertise has been discussed intensively during The United Nation (UN) Expert Meeting on rights to access and participate in science, carried out by the UN Special Rapporteur on Cultural Rights, Palais de Nations, Geneva, 1 November 2023. See United Nations, Expert Meeting on "Rights to Access and Participate in Science," convened by the UN Special Rapporteur in the Field of Cultural Rights, Palais des Nations, Geneva, November 1, 2023.

⁹ I Gede Yusa, "Identification and Analysis of the Rights of Indigenous Peoples in the Study of Constitutional Law," *Constitutional Review* 2, no. 1 (May 2016): 1–28.

¹⁰ Mohamad Jamin, Sapto Hermawan, and Mulyanto, "A Discourse of the Indigenous Peoples' Rights and Their Contributions to Indonesian Development: Lessons Learned from New Zealand," *Padjadjaran Journal of Law* 10, no. 3 (2023).

¹¹ Livia Holden, "Cultural Expertise and Law: An Historical Overview," *Law and History Review* 38, no. 1 (2020): 29-46.

presence of local community leaders and how the facts and arguments presented can influence the court rulings. Second, this applies interpretation analyses, reflecting on the extent to which judges' interpretations in their decisions are followed or obeyed by government policies or in a just law enforcement for meaningful social justice.

II. ANALYSIS

2.1. Defining 'Cultural', Contesting Framework

It showed that the use of anthropological knowledge in court and various kinds of social and cultural perspectives has been widely adopted by the judges. The progressive development in protecting rights of the indigenous peoples has been inseparable from the role of what Holden has written on cultural expertise in translating and convincing judges in the Constitutional Court.¹² In a landmark ruling, Indonesia's the Constitutional Court's Verdict No. 35/PUU-X/2012 has invalidated the Indonesian government's claim to millions of hectares of forest land, potentially giving indigenous and local communities the right to manage their customary forests.¹³ The litigation was prompted by a request for review by National Indigenous Peoples Alliance (AMAN), which represents indigenous people across the sprawling archipelago. AMAN estimates that the ruling affects 30 percent of Indonesia's forest estate or 40 million hectares (154,000 square miles).¹⁴

However, this achievement should be seen in its implementation at ground, as well as the coherence legal argument at court, including the latest ruling on State Capital City (*Ibukota Nusantara*, or IKN), Constitutional Court verdict Number 54/PUU-XX/2022. This case is a quite controversial since the judges

¹² Livia Holden, ed., *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (New York: Routledge, 2011); Livia Holden, *Cultural Expertise: An Emergent Concept and Evolving Practices* (Basel: MDPI, 2019); Livia Holden, ed., *Cultural Expertise, Law and Rights: A Comprehensive Guide* (New York: Routledge, 2023).

¹³ Constitutional Court of the Republic of Indonesia, "Decision No. 35/PUU-X/2012," English version, accessed March 4, 2024.

¹⁴ Aliansi Masyarakat Adat Nusantara (AMAN), *Transisi Kekuasaan dan Masa Depan Masyarakat Adat. Catatan Akhir Tahun 2024 [Power Transition and the Future of Indigenous Peoples: 2024 Year-End Report]* (Jakarta: Aliansi Masyarakat Adat Nusantara, 2024).

refused to proceed the case due to formal requirements, which is related to overdue. This case has been widely affecting people at ground, especially the government could remove at least 21 local or indigenous communities in East Kalimantan. This case remains unresolved. There have been many illegalities involved in law and policy making, as well as showed forced eviction to those communities. Nevertheless, there have been several indigenous community leaders, even intellectuals who deeply concerned about the role of cultural expertise, involved in defending rights of the people through various legal or formal forum at court and bureaucracies.

One of the wings of the organization who organized the protection of indigenous peoples' rights is AMAN, or the Alliance of Indigenous Peoples of the Archipelago. Throughout 2022, AMAN had continued to build and strengthen the consolidation of civil society movements to ensure the solidarity of social movements from various spectrums of social movements in Indonesia, including during the pandemic. Several follow-ups of the social movement solidarities have proven to strengthen the relationship between the indigenous people's movement and other social movements. During the pandemic, the indigenous peoples' movement has also proven that a sense of shared destiny between indigenous peoples, peasant or small farmers, fisherfolks and workers can make us survive through the crisis.

At the end of 2022, there was a momentum for more effective consolidation of social movements, this can be seen from the increasing role and participation of civil society organizations in contributing to support the series of organizing the Sixth Congress of Indigenous Peoples of the Archipelago (KMAN VI) which took place in Papua. A total of 35 networks of civil society organizations also provide input on indigenous peoples' agendas in Indonesia. AMAN undertakes litigation efforts, either filing lawsuits against the state, defending indigenous peoples who are criminalized or targeted for human rights violations. Efforts and strategies to recognize the rights of indigenous peoples are continuously carried out. One of the most influential for the protection of indigenous peoples' rights

was the granting of a judicial review request to the Constitutional Court in 2012, due to land title at forestry areas.

However, ten years after such constitutional court decision, there has been a trend to curb democracy and affecting to indigenous communities. These related to policy even seem to have gone backwards with the issuance of the various 'oligarch friendly' law makings, such as Omnibus Law on The Job Creation Law, officially Law Number 11 of 2020 on Job Creation, Law Number 3 of 2020 on Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining, Law Number 3 of 2022 on National Capital, and Law Number 1 of 2023 on Criminal Code.

Meanwhile, until the end of the plenary session of the Representative People Assembly in 2022, the draft law on Indigenous Peoples Law again failed to become law. Until 2022, the government has managed to designate parts of 105 customary areas as customary forests with a total area of 148,488 hectares. Instead of accelerating the recovery of indigenous peoples' rights to indigenous forests as mandated in the Constitutional Court's Verdict No. 35/PUU-X/2012, as many as 2,400 hectares of customary lands were confiscated through social forestry programs. The enactment of Omnibus Law on Job Creation (The Law Number 6 of 2003)¹⁵ has been followed by a National Strategic Project (PSN), which has been detrimental affecting territories of indigenous peoples.

On the other side, law making process for the draft of indigenous people's law has been limited political participation process, and even many political parties rejected the bill draft. The Golkar Party, for example, continues to reject the discussion on the grounds that: the indigenous people's law is not an urgent issue, while the existence of indigenous peoples has been regulated in various laws and regulations. In addition, this is argued that the indigenous people's draft will disrupt 'the stability of the national economy, especially for investment purposes'.¹⁶ In 2022, AMAN and its civil society coalition have

¹⁵ Law No. 6 of 2023 on Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation.

¹⁶ Budiarti Putri, "Golkar Tolak RUU Masyarakat Adat dan RUU Perlindungan PRT di Prolegnas [Golkar Rejects the Indigenous Peoples Bill and the Domestic Workers Protection Bill in the National Legislation Program]," *Tempo*, January 15, 2021.

repeatedly sent official letters of request to the Leaders of Political Parties and Heads of Political Party Fractions in the house of representative, or DPR RI, for hearings. However, there are only the Democratic National (Nasdem) Party and the National Awakening Party (PKB) willing to accept this hearing.

Such political position reflects the failure to recognize and to adopt the protection of indigenous people's law, and this also reflects the state based economic paradigm which is more dominant and far from human rights-based paradigm. Although under the Indonesian Constitution, art 18B section (2)¹⁷and/or article 28I section (3) says recognition customary law communities (hereinafter referred to as *masyarakat hukum adat*) and traditional communities, along with their traditional rights, but these do not automatically correspond to strengthen rules to protect them. Conceptually, under such constitutional definition of 'customary law community' and 'traditional community', these can be further referred by looking at two words, namely between 'community law' and/or 'customary law'.

This terminology turns out to be little indigenous peoples themselves because in fact they are not only 'legal communities,' but also cultural communities, political communities, and social communities that are part of indigenous peoples at large. Thus, the essence of the term 'customary law community' and 'traditional community' is part of what we call indigenous peoples. Indigenous peoples, indeed reflects diversity. Through the motto *Bhinneka Tunggal Ika*, Indonesia's communities have a diversity of cultures, religions, languages and laws that govern their lives in their respective customary territories.¹⁸ In addition to the state law, Indonesia also has laws that live in society - laws that exist, recognized and applied, but not all of them are written down.¹⁹

¹⁷ Article 18B(2) of the Second Amendment to the 1945 Constitution of the Republic of Indonesia (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 [Constitution of the Republic of Indonesia]): "The State shall recognize and respect entities of the adat law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws."

¹⁸ Jan Michiel Otto, "Unity in Diversity: The Topicality of Professor C. Van Vollenhoven" (Dies lecture delivered at the 442nd *dies natalis* of Leiden University, Pieterskerk, Leiden, the Netherlands, February 8, 2017).

¹⁹ Jimly Asshiddiqie et al., *Pergulatan Tafsir Negara Integralistik: Biografi Intelektual, Pemikiran Hukum Adat dan Konstitusionalisme [Struggles over the Interpretation of the Integralistic State: Intellectual Biography, Adat Law Thought, and Constitutionalism]* (Jakarta: Pustokum-Yakins-Thafa Foundation, 2015).

Customary law is legally adopted. There is a legal process that is taken when indigenous peoples make a mistake, the sanction can be resolved amicably or through litigation in accordance with their own rules in each customary territory. The legal litigation route will take the judicial process. Uniquely, Indonesia does not only have a state justice system, but also has a customary justice system that adapts to the way of life of many indigenous peoples in their respective customary territories. Of course, this needs to fulfill the principles of legal certainty, the principle of justice, and the principle of benefit, which are not standardized by the state legal system. The state judiciary has four pillars of law enforcement which elaborate the roles of each other. They are judges, prosecutors, police and advocates. The court is established under centralized system of the Supreme Court, which of course asserts complexities for protecting local communities.²⁰

The four pillars will work according to their respective roles. What about customary justice? According to art. 51 paragraph (1) of Law Number 21 of 2001 concerning Special Autonomy for Papua, customary justice is a peace court within indigenous peoples who has the authority to examine and adjudicate customary civil disputes and criminal cases among indigenous peoples. Through this article, the customary court has its own system for enforcing the law in accordance with its own environment or customary territory. Papua, which already has its own customary court, takes the path of the state court to fight for what should be their right.²¹

The judges argued that there were no rules governing sanctions for revoking permits directly. The verdict only considers the formal-administrative aspects without looking at the facts and the significance of the threat of social and environmental impacts that occur. It did not stop there, the Regent of Sorong

²⁰ Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca, NY: Cornell Southeast Asia Program, 2005).

²¹ The Jayapura State Administrative Court Verdict Number 32/G/2021/PTUN.JPR (PT Papua Lestari Abadi) and Jayapura Administrative Court Verdict Number 32/G/2021/PTUN.JPR (PT Sorong Agro Sawitindo). The Jayapura Administrative Court stated that they reject all lawsuits from oil palm plantation companies, namely PT Inti Kebun Lestari, PT Sorong Agro Sawitindo, and PT Papua Lestari Abadi who challenged the Sorong Regent's Decree for revoking location permits, environmental permits, and plantation business permits. Then, it was sad when the palm oil company filed an appeal at The Higher Administrative Court of Makassar with the results of an appeal decision that overturned the PTUN Jayapura decision.

- representing the Indigenous People - made an appeal to the Supreme Court (MA). However, once again the Panel of Judges upheld the judge's decision at the appeal level of administrative court in Makassar by using legalistic logic in examining the case. In the end, the victory did not side with the indigenous peoples. In the discussion facilitated by the *Pusaka Bentala Rakyat* Foundation, the Makassar Administrative Court panel of judges' decision and the Supreme Court's Panel of judges' decision should look at and consider broader aspects, not only the formal-administrative aspects.

There is an environment that will be affected and there are Indigenous Peoples as legal subjects who will directly feel the impact of the environmental damage that has occurred. Decisions that are impartial to the interests of the people, especially Indigenous Peoples, are nothing new. The oligarchs and companies work hand in hand to seize the rights of Indigenous Peoples under various pretexts. We often see officials proudly wearing traditional clothing for political purposes, but fail to ensure the recognition and protection of Indigenous Peoples' rights within the framework of the legal umbrella that Indigenous Peoples truly desire.

There are several legal consequences of the Constitutional Court's Verdict No. 35/PUU-X/2012 regarding Reviewing the Forestry Law, the perspective of forest areas, indigenous peoples as rights holders, forest utilization permits and the use of forest areas remain valid until customary forests are returned to indigenous peoples and community forests.²²

The existence of this conflict reflects that the arrangements contained in the Forestry Law do not take into account the existence and rights of indigenous peoples, especially deals with the Constitutional Court's verdict No. 35/PUU-X/2012. As we have known such decision has brought significant changes to the status of customary forests. Customary forest which was originally included as a state forest, is now defined as a forest that exists within the indigenous

²² Yance Arizona, Siti Rakhma Mary Herwati, and Erasmus Cahyadi, *Kembalikan Hutan Adat kepada Masyarakat Hukum Adat: Anotasi Putusan Mahkamah Konstitusi Perkara No. 35/PUU-X/2012 mengenai Pengujian Undang-Undang Kehutanan [Return Customary Forests to Indigenous Law Communities: An Annotation of Constitutional Court Decision No. 35/PUU-X/2012 on the Judicial Review of the Forestry Law]* (Jakarta: Perkumpulan HuMa Indonesia, Epistema Institute, and Aliansi Masyarakat Adat Nusantara, 2014).

community area. The change in the status of customary forest as private forest and interpreted as a forest that is within the scope of the indigenous community has strengthened the status of existing forest as well as strengthened the rights of indigenous peoples over their customary forest. The Constitutional Court's verdict has had a major influence shifting the status of customary forests to private forests and not state forests, changing the status of customary forests should have good implications for indigenous community in the management system and utilization of their customary forests. The Constitutional Court's verdict is a correct

The issuance of the Constitutional Court's verdict No. 35/PUU-X/2012 should have had positive implications for indigenous community's rights to their customary forests. Strengthening the rights of indigenous community over customary forests must also be clarified so that problems do not occur in the future, by making regulations that protect them. Saafroedin Bahar as an expert on the petitioner, argued that the legal issues are not merely about the problem of the relationship between customary forest and state forest, but also indirectly the discussion in the application of the law which affect to the existence of indigenous community and its constitutional rights protection. One of the provisions in the Constitutional Court Verdict states that in order to recognize the rights of indigenous community units over their customary forests, regional regulations that regulate indigenous peoples are needed. The drafting of regional regulations as a continuation of the Constitutional Court's verdict No. 35/PUU-X/2012 was also carried out as an effort to fill the legal vacuum because the law draft on Recognition and Protection of the Rights of Indigenous Peoples had not yet been ratified, even constantly rejected by politicians at the parliament. Therefore, in order to protect the rights of the people, law and social movement approaches are more relevant to see the political strategies and its dynamics, including to promote and defend the idea of culture expertise under Indonesia's legal tradition.

2.2. Cultural Expertise and Strategic Litigation

This part will continue arguing how cultural expertise in using strategic litigation, especially to bring the message for challenging predatory system through constitutional law politics. There are several strategic litigations in relation to indigenous peoples, and this article will focus on how the cultural expertise can be meaningfully considered to see the substantive legal arguments based on indigenous people's statements. One of significant debates was in 2013's court ruling related to the Forestry Law.

On May 16, 2013, the Constitutional Court decided on the application for judicial review submitted by the Alliance Indigenous Peoples of the Archipelago (AMAN) regarding reviewing a number of provisions in Law Number 41 of 1999 concerning Forestry. The provisions requested are: Article 1 number 6, Article 4 paragraph (3), Article 5 paragraph (1), paragraph (2), paragraph (3), paragraph (4), Article 67 paragraph (1), paragraph (2), paragraph (3).

Applicant and subject of application This application was submitted by AMAN et al, in March 2012. The applicants consist of: (1) Indigenous Peoples Alliance Archipelago (AMAN); (2) Kanagarian Customary Law Community Unity Kuntu, Kampar Regency, Riau Province; and (3) Kasepuhan Cisitu Traditional Law Community Unity, Lebak Regency, Banten Province. The application essentially concerns two constitutional issues, namely regarding the existence of customary forests and conditional recognition of the existence of indigenous peoples.

The applicants argued that with the enactment of the Forestry Law which places customary forests as part of state forests and their existence provisions regarding 'conditional recognition' of existence customary law communities have caused 'constitutional harm' to the applicant. The postulated constitutional loss refers to the loss of access to the rights of customary law communities. Loss of customary rights to forests, loss of access to the use and manage of their own customary forest areas. Even, those who are in holding 'certificate of land' or 'concessions', often targeting indigenous peoples for criminalization due to entering forest 'illegally'.

Hence, based on its verdict, No. 35/PUU-X/2012, the Constitutional Court confirmed that ‘customary forests’ are forests located in indigenous territories, and should no longer be considered as ‘state forests’. Indigenous peoples throughout Indonesia welcomed the Constitutional Court’s decision by simultaneously placing signposts throughout indigenous territories, which now read, “Customary forests are no longer State forests. Indigenous peoples are implementing the Constitutional Court’s Verdict No. 35/PUU-X/2012”. Since the Forestry Law is contradictory to the 1945 Constitution principles, indigenous peoples have also started rehabilitating their territories by own initiatives which have been damaged by the activities of companies and many extractives industries. The State involved to this situation due to provide permits for mining, concessions, and large-scale deforestation.

In this case, the lawsuit was filed by AMAN et al as strategic litigation. The experts presented reflect those from the campus, have academic degrees, and are widely recognized for their commitments doing advocacy in public spheres. In this case, Saafroedin Bahar, Noer Fauzi Rachman, Hariadi Kartodihardjo, I Nyoman Nurjaya, and another former Constitutional Court judge, namely Maruarar Siahaan, were present.

However, those who are not seen as ‘experts’, in the sense of having local knowledge and maintaining it within their community, are the indigenous people themselves. Expert and expertise, in this legal context, must be redefined. This legal definition is unconnected to the need for protecting rights of the victims, or it has no strong or even critical engagement to the public interests. The development such expertise in narrative, for the most part has been predicated on the assumption that certain peoples and societies are less developed than others, and that those who are more developed, i.e. more modern, have the expertise/knowledge to help the less developed (or developing) achieve modernity.²³ Hence, this article argues the need of decolonizing expert or expertise, turn to more adjusting the context of Indonesia’s legal tradition.

²³ s Jane L. Parpart, “Deconstructing the Development ‘Expert’: Gender, Development and the ‘Vulnerable Groups,’” in *Feminism/Postmodernism/Development* (London: Routledge, 1995).

The discourse has been influenced by the gap between the “developed” North and a “developing” South, and the assumption that development should follow a simple linear progression towards Western definitions of modernity, provided the rationale for the development business which has continued to expand since its inception in the 1940s. Then, it has become increasingly professionalized. Universities have departments of development studies, and aspiring development experts can take courses in development policy, planning and practice. Some even receive diplomas attesting to their expert status.²⁴ Hence, it refers to their special knowledge of the modern schools. How about *Sedhulur Sikep* communities in Kendeng, since they have no formal schools, even they do not want to join with such modern schools, although they have own learning process which make constantly preserving local wisdom and its knowledge education.

While on the other side, the local community, or indigenous people and their leaders could contribute in providing not merely facts, but also local knowledge, local wisdom, and even discussing the basis of local philosophy, and all forms of science before the court, which are often not considered equally by the judiciary, and perhaps by the parties as ‘true or real experts’ in the particular context, cases and its legal struggle. This article deconstructs scientific mindsets, rather than preserving dominant values of modern schools.

The involvement of locals or indigenous people in strategic litigation, also known as impact litigation, has significant contribution in convincing the court judges. This strategic litigation involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society. Those who engage in strategic litigations aim to use the law to leave a lasting mark beyond merely winning the specific case at hand.

In Indonesia’s legal history, the role of strategic litigation has been developed by Indonesian Legal Aid Foundation (YLBHI) and many legal aid bureaus at provincial levels throughout Indonesia. For YLBHI, strategic litigation is a

²⁴ Parpart, “Deconstructing the Development.”

key strategy for implementing Structural Legal Assistance (*Bantuan Hukum Struktural/BHS*). BHS is a legal assistant that is oriented towards social changes in legal substance, legal culture, or practices carried out by government officials, especially by law enforcers. It argues there is no poverty in society as such, but it is more impoverishment intended situation due to structural injustices. It is more system causing the problems structurally, instead of individual or sectoral issues. In the context of defending indigenous peoples' rights, strategic litigation plays a very crucial role. The core issues are not only providing space for voicing or expressing their rights, but also empowering their capacity at legal-political spheres.

Specifically, there have been ideas, strategies and topics for increasing and or developing strategic litigation in defending indigenous people. Across the globe, indigenous people and their leaders are increasingly turning to litigation as a means to seek remedies for violations of their fundamental human rights.

Why strategic litigation has been increasingly applied to promote and protect indigenous peoples? Based on preliminary findings in referring studies on indigenous peoples, at least there are several factors. First, lack of political will, since there is often a lack of political will to address the specific challenges faced by indigenous peoples. Unsurprisingly, there have been many attacks, criminalization, and also lawsuits against them. Second, there is no serious protection and lack of recognition. As we have known that customary land, customary forest, or access to natural resources, often lack adequate protection and recognition at the national level. Even, lack of recognition on indigenous people as a legal and respected subject. Third, there have been many excessive exploitations and grabbing, either land or ocean/coastal grabbing. Many of indigenous people inhabit territories with the last remaining non-exploited natural resources, making them vulnerable to land and ocean/coastal grabbing, from time to time massively. Therefore, a lot of evidence from historical records, that indigenous peoples have historically suffered forced displacement, land

loss, marginalization, discrimination, and violence. In that regard, no choices for them, they need to find alternative strategy to protect and fulfill their rights, and hence litigation becomes a last resort for seeking justice and remedies.

One example was related to the *Sedhulur Sikep* or Samin indigenous community's lawsuit at administrative court against Governor of Central Java, Ganjar Pranowo, in 2014. The administrative lawsuit on behalf of a Rembang inhabitant (Joko Prianto) and Indonesian Environmental Forum (Walhi), against Governor of Central Java and Semen Indonesia Inc. In the first instance and appeal level, their lawsuit was lost. Nevertheless, when they made a cassation to the Supreme Court, finally the Supreme Court granted their appeal. The court asked the Governor to repeal the license for Semen Indonesia Inc. This was considered the people success, especially as lesson learned for local community who do not have access to fight through legal means, but it can overturn lower decisions. However, although winning at the highest level, Supreme Court, the Central Java Governor, Ganjar Pranowo, did not follow the court ruling. Ironically, he enacted new decree to provide new permit for Semen Indonesia Inc. to exploit Kendeng karst mountain.

Indeed, this example reflects complicated arena to use legal mechanism, especially dealing with the judiciary. The role of strategic litigation is used to promote or campaign local knowledge, wisdom and history, and connecting these local expertise as legal empowerment strategies. Court has been used to express human rights issues at ground, and engage their experiences by applying international human rights law, such as using international norms, including the United Nations Declaration on the Rights of Indigenous Peoples. Hence, the process of litigation itself can contribute not merely to provide expertise and experiences as facts before the judges, but also to indigenous peoples' legal empowerment and the broader fight for social justice. And, at this point,

they are fully aware, despite challenges and the fact that not all court decisions lead to effective implementation, strategic litigation remains a powerful tool for defending indigenous rights. Strategic litigation is not only about winning individual cases but it is addressed to create broader societal change and empowering marginalized communities. In addition, this is also a formal forum or constitutionally accepted as an arena to reflect critically in defending rights of the indigenous people.

2.3. The Cultural Voices at the Court: Legal Narrative and Its Scientific Evidences

There have been numbers of people required to provide testimonies and expertise statements before the Constitutional Court. Their testimonies, including expert statements, are needed to be part of supporting the legal claims, providing empirical evidences as well as arguing the existence of local practices. Their legal presence, and arguments have been conceptually coined as cultural expertise.

They build scientific evidence to promote and protect indigenous people's rights, and try to resolve legal disputes, conflicts and any restrictions or discriminations against them. As explained previously, this concept offers new or alternative framework and methods to enhance ethical perspectives for claiming rights.

This part will overview as well as examine all parties involved in bringing the message of social justice in building knowledge production system in order to convince the constitutional court judges to consider their presence, testimonies, evidences and expertise. In order to do such overview, this article offers a table which could be used to compare and identify their narratives. This table, of course, is unavoidable more reflected from own selected statements in providing examples.

Table 1:

Cultural Expertise and Its Key Legal Narratives at Constitutional Court: Brief

No.	Actors on Cultural Expertise	Background/ Position	Statements/ Arguments	Key Legal Narratives
1.	Abdon Nababan	Secretary General of AMAN, the Alliance Indigenous Peoples of the Archipelago, Applicant 1.	Formal petition, (1) Deleting 'state' in Article 1 paragraph (6), Article 5 paragraph (1) of the Forestry Law: "Forest customary law is a state forest that is within the territory of a customary law community."	The urgency of recognizing customary forests and removing recognition conditional existence of indigenous people
2.	H Bustamir	Leader of Indigenous Community of Kenegerian Kuntu, Riau, Applicant 2.	(2) Remove conditional recognition as contained in Article 4 paragraph (3), Article 5 paragraph (3, 4), Article 67 paragraph (1, 2, 3) of the Forestry Law, such as the phrase "as long as in fact it still exists and its existence is recognized, and does not conflict with national interests", "determined through Regional Regulations", and/ or "determined through Government Regulations".	
3.	Moch Okri or H. Okri	Leader of Indigenous Community of Kasepuhan Cisit, Lebak Banten, Applicant 3.		

No.	Actors on Cultural Expertise	Background/ Position	Statements/ Arguments	Key Legal Narratives
4.	Saafroendin Bahar	Expert 1 (researcher)	The construction of the State's authority to control over the land (Hak Menguasai Negara, HMN), violates the original rights of indigenous communities, and theoretically three constitutional violations occurred, namely: 1) against the original the intent of the State's founding fathers; 2) against government duties as stated in the fourth paragraph of the Preamble to the 1945 Indonesian Constitution; and 3) contradicts to Article 33 paragraph (3) of the 1945 Indonesian Constitution.	State's authorities (HMN) against the Constitution

No.	Actors on Cultural Expertise	Background/ Position	Statements/ Arguments	Key Legal Narratives
5.	Noer Fauzi Rachman	Expert 2 (researcher)	There is a need to rectify the 'stateization' of customary lands and restore routes to citizenship for customary law communities. Political forest designation causes victims. Therefore, it is necessary to review the concept of political forest and replace it with an ecological approach, where forests are defined as a function that links nutrients, non-nutrient elements, living elements of flora and fauna, and humans.	'Stateization' suffered citizen, and the shift from political forest to ecological approach.
6.	Hariadi Kartodihardjo	Expert 3 (university professor)	Certainty of the rights of indigenous peoples in management Customary forests are not only social capital for realization sustainable management of customary forests, but can also reduce conflict and reduce open access to all forests in Indonesia.	Conflict management over forest

No.	Actors on Cultural Expertise	Background/ Position	Statements/ Arguments	Key Legal Narratives
7.	I Nyoman Nurjaya	Expert 4 (university professor)	Indigenous law communities are obliged to obtain proper essential recognition, genuine constitutional and legal recognition. Natural resources contain two important principles. First, precautionary principle, namely the forest as an ecological system and living systems, and second, free, prior, and informed consent (FPIC).	State's recognition and two principles: precautionary principles and FPIC.
8.	Maruarar Siahaan	Expert 5 (Former Constitutional Court judge)	The need for reinterpretation of the protection function, respecting, promoting, enforcing and fulfilling it is the responsibility of the state, as stipulated in Article 28I paragraph (4) of the 1945 Constitution. According to the Expert, this reinterpretation is related to: 1) the existence of traditional government institutions; 2) its existence is recognized based on law (political	Reinterpretation of state obligation

No.	Actors on Cultural Expertise	Background/ Position	Statements/ Arguments	Key Legal Narratives
			<p>law and international juridical recognition, ILO Convention Number 169 of 1989), as a very urgent matter.</p>	
9.	Lirik Colen Dingit	Community leader, the Bentian Indigenous Community, Kutai Barat Regency, East Kalimantan Province	Having suffered losses due to forestry conflicts between companies and communities since the Soeharto regime, the Presidential Decree of 1989 (permit for Industrial Plantation Forest), PT Hutan Mahligai, had evicted them approximately 72 heads of families, from the forest.	Forced eviction due to state's policy over forest
10.	Yoseph Danur	Community leader, Biting Village, Ulu Wae Village, Poco Ranaka District, East Manggarai Regency	Manggarai philosophy (gendang one, lingko pe'ang) is the basis of existence indigenous peoples and control of customary territories. That is, there is no society without garden or land, and vice versa. Since Dutch colonialism, until now, there has been confiscation and eviction of land rights. In fact, destroying residents' plantations, criminalization, etc.	Forced eviction due to state's policy over forest, and violence

No.	Actors on Cultural Expertise	Background/ Position	Statements/ Arguments	Key Legal Narratives
			<p>March 10, 2004, shooting that killed 6 (six) members of the Colol indigenous community.</p>	
<p>11.</p>	<p>Jilung</p>	<p>Community leader, the Talang Mamak community, Jambi</p>	<p>Communities have local wisdom in managing forests, land and other natural resources. However, the Talang Mamak Community began to be disturbed and destroyed by the presence of HPH/ Forest Concession Rights, transmigration settlements, clearing the forest is owned by companies and the rest is controlled by migrants. Government legislation Village Number 5 of 1979, resulting in structural changes centralized village government and eliminating traditional leadership.</p>	<p>Forced eviction due to state's policy over forest, centralized authority to eliminate local leaders.</p>

No.	Actors on Cultural Expertise	Background/ Position	Statements/ Arguments	Key Legal Narratives
12.	Jamaludin	Community leader, the Iban Dayak, Semunying Jaya, Bengkayang Regency	Indigenous communities are facing companies and Perhutani (state), their leaders are being criminalized, their customary land is being evicted by palm oil companies (PT. Ledo Lestari) with government permission. In fact, the conflict resulted in the eviction of customary forests, cemeteries and cultural sites, water crises, local food crises, eliminating sources of traditional medicine.	Forced eviction due to state's policy over forest
13.	Kaharudin	Punan community, Gunung Jolok, Sekatak District, Bulungan Regency, East Kalimantan	Customary forest management traditions were removed, and forests confiscated. Residents who refused were imprisoned. In fact, residents never know or encounter what and how companies can enter their customary land or forest.	Forced eviction due to state's policy over forest

No.	Actors on Cultural Expertise	Background/ Position	Statements/ Arguments	Key Legal Narratives
14	Jailani	Pagaruyung, Jambi	Ancestors for generations lived on Bukit Duabelas, surrounded by many villages. Suddenly Bukit Duabelas was designated as a National Park area. Residents never obtain an explanation regarding the status of the national park designation. No consent.	Forced eviction due to state's policy over forest

Besides those applicants, experts and community leaders, the role of lawyers is also essential to bring the message of 'cultural expertise', since they have been also intensively compiling and arguing through various formal steps at the court mechanism. They call themselves as the Advocates Team of Masyarakat Adat Nusantara, consist of numbers of young lawyers, include Sulistiono, Iki Dulagin, Susilaningtyas, Andi Muttaqien, Abdul Haris, Judianto Simanjuntak, and Erasmus Cahyadi. They represent from various civil society groups, non-governmental organizations activists.

Meanwhile during court session, the Ministry of Forestry presented two legal experts whose statements are heard under oath hearings on June 5 2012 and June 14 2012. They are both from law schools, Nurhasan Ismail (university professor from UGM/Universitas Gadjah Mada) and Satya Arinanto (university professor from UI/Universitas Indonesia). The government rejected the applicant's arguments and stated that the articles being tested for their constitutionality were articles that did not conflict with constitution. Nurhasan Ismail, argued that the applicant's understand the articles of the Forestry Law is inaccurate. The

substance of law was reviewed only partially and textually, resulting in inaccurate conclusions. Another expert, Satya Arinanto, explained similar arguments. From Constitutional Law perspective, articles and verses of the Forestry Law being reviewed is actually in accordance with spirit of changes to the articles and verses of the 1945 Constitution, especially in accordance to the Regional Government, that regulate customary law communities.

The absence of these expert arguments is, humanity perspectives. Their legal arguments are very normative, reflecting 'selected legal formalism', not enriched by the development of international human rights law doctrines. In addition, what is worse is the absence of serious consideration that a *quo* case, especially the Forestry Law, has had a negative impact on citizens, especially indigenous peoples, either in the form of forced eviction, deprivation of the right to life and livelihood, resulting in a food crisis, water crisis, ecological damage, and loss of social and natural relations, including traditional medicine that has been passed down from generation to generation as local knowledge and social wisdom at the village level. The arguments of the two professors actually show that the process of scientification of empirical evidence has been neglected, although the social realities are still occurring in the society. On the contrary, the opinions of these two experts affect dehumanization and the perpetuation of social injustices, especially for those communities at ground.

What can be learnt from these legal narratives, especially from applicants, experts, and community leader statements? At least three key significant legal narratives. First, constitutionally, they would like to challenge fundamental issue on sovereignty, especially deals with the relation between state and its citizen. The narrative on 'indigenous sovereignty' does not have fixed definitions. Different scholars have attributed different meaning to the concept of 'indigenous sovereignty'. Siegfried Wiessner, refers to the idea of 'authentic indigenous sovereignty', by which he means the power to create a 'safe space' for indigenous peoples; enabling them to live a life with the difference; ensuring their right of free, prior, informed consent; the right to have self-governance; the right to

enter into treaties and other agreement; and casting a legal duty on the State to respect, protect and promote indigenous languages and culture.²⁵ Barker has coined about 'indigenous sovereignty', which is closely to these narrative debates at the constitutional court. He stated that 'indigenous sovereignty' has varied meanings, ranging from formulation of rights to reverse continuing experiences of colonialism as well as to carry local efforts at the redemption of ancestral lands, resources, self-governance and preservation of cultural knowledge and practices.²⁶ This narrative is similarly coined by Shrinkhal. He stated that sovereignty exhibits temporal relativism in terms of its meaning and scope. What it used to symbolize and what it presently stands for depends upon the political subjects who have unfold its ambit and continue to do so in defining relationships with one another; setting their political agendas; and their plans for attaining and sustaining autonomy and social justice.²⁷ He argued that indigenous sovereignty is linked with identity and right to self-determination. Self-determination should be understood as power of 'peoples' to control their own destiny. Therefore, for indigenous peoples, right to self-determination is instrumental in the protection of their human rights and struggle for self-governance.²⁸

Second, when I Nyoman Nurjaya and Maruaraar Siahaan argued about the recognition, on the basis of international law, this is also important basis for arguing the rise of global or international recognition over indigenous people's rights, including the use of legal politics at domestic level.²⁹ Indigenous communities, clearly has been recognized as 'peoples' in international law. The legal narrative of indigenous population turning into indigenous peoples is reflection of their struggle from being object to subject of international law.³⁰

²⁵ S. Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples," *Vanderbilt Journal of Transnational Law* 41 (2008): 1141–1176.

²⁶ J. Barker, "For Whom Sovereignty Matters," in *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, ed. J. Barker (Lincoln: University of Nebraska Press, 2005), 1–31.

²⁷ R. Shrinkhal, "'Indigenous Sovereignty' and the Right to Self-Determination in International Law: A Critical Appraisal," *AlterNative: An International Journal of Indigenous Peoples* 17, no. 1 (2021): 71–82.

²⁸ Shrinkhal, "Indigenous Sovereignty."

²⁹ James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (New York: Oxford University Press, 2004). Ian Brownlie, "The Rights of Peoples in Modern International Law," *Bulletin of the Australian Society of Legal Philosophy* 9, no. 2 (1985): 104–119.

³⁰ Russell L. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law," *Harvard Human Rights Journal* 7 (1994): 33–86.

Even, they asserted themselves as ‘peoples’ under the United Nations Charter, and the narrative of ‘indigenous peoples’ have had been grappling for the emphatic recognition of their unmitigated right to self-determination.³¹

Third, deconstruction narrative on colonial legacies of State’s authority to control over the land (*Hak Menguasai Negara*). Dutch colonial state came to local communities by enacting laws which is of course based on racism and ignorance. Therefore, if the constitutional court has no significant argument to protect indigenous sovereignty, it means failed to challenge the colonial nature of the modern State. The court has been asked to end the State’s policies to perpetuate its dominance over indigenous communities. Interestingly, the vehement debates before the court have reflected attempts to decolonize the conceptual and methodological outlook adopted to examine and investigate indigenous histories, culture and their interests in present day world as a part of ‘intellectual colonialism’. This article argued that, what have been articulated by indigenous people leaders before the court, underpinned by scholars as experts, all are reflecting ‘intellectual sovereignty’ against state sovereignty. Amanda Cobb argues similarly by saying, “...the term is intended to empower Native Scholars to make us [indigenous scholars] consider the possibility that we spend too much time ‘writing back’ to colonizer rather than ‘writing forward’, charting our own course and not looking from outside approval”.³² Hence, ‘intellectual sovereignty’ presupposes those indigenous peoples world existed even prior to the conception of modern nation-state system.

2.4. Cultural Expertise, Law and Social Movement

Is cultural expertise only articulated in the context of court trials, then to be called an expert? Or, the meaning of cultural expertise is limited to formal political mechanisms in determining policies, or the formation of laws and regulations, so that this expertise becomes relevant in finding a place for its recognition? These questions are addressed to begin a critic against Holden’s

³¹ Russell L. Barsh, “Indigenous Peoples: An Emerging Object of International Law,” *American Journal of International Law* 80 (1996): 369–385.

³² Amanda J. Cobb, “Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations,” *American Studies* 46, no. 3-4 (2005): 128.

perspective which seems to suggest formal space as more institutional politics. Meanwhile, in the Indonesian historical context, and perhaps also in a context where problems with the rule of law and democracy are disrupted, the role of strategic roles outside official state institutions actually shows a significant role in influencing the strategy of articulating cultural expertise to involve itself in strategic public interests.

In the case of the karst mining rejection movement in the North Kendeng Mountains (Central Java), the Network Kendeng Mountains Care Community (JMPPK) which involves farmers and the indigenous community (*Sedulur Sikep* Community), academics and environmental activists, mobilized campaigning strategy support via multiple platforms of social medias such as Facebook, Twitter (X) and YouTube. Their movement presenting figures of farmers as victims of excessive mining exploitation. They have carried out ‘political safaris’, especially the role of women indigenous community who visited numerous universities in Jakarta, Semarang, Yogyakarta and Surabaya. The main idea on this strategy is related to building stronger alliances, connecting expertise and its strategic networks.

Although many actors involved in mining resistance networks are very diverse, however they were really opposing the arbitrariness of regional government collaboration and mining entrepreneurs who unilaterally determine mining plans and removing local communities. Interestingly they have been also challenging intellectually to learn scientific evidences from university experts, and even making collaborations with academics and various environmental organizations to broaden insight into mountain conditions, agriculture, and social economic impacts to the society.

For example, on June 16-19 2008, Center for Disaster Management Studies (PSMB) UPN Veteran Yogyakarta, they carried out capacity strengthening activities for local communities in order provide a complete understanding of karst conditions and their function in agriculture.³³ Hence, JMPPK members are

³³ Citra Dewi, “Analisis Gerakan Sosial di Kecamatan Sukolilo, Kabupaten Pati, Jawa Tengah [Analysis of Social Movements in Sukolilo District, Pati Regency, Central Java]” (undergraduate thesis, Departemen Sains Komunikasi dan Pengembangan Masyarakat, Fakultas Ekologi Manusia, Institut Pertanian Bogor, Bogor, 2015).

increasingly aware of the importance to protect the karst mountain area for the agriculture sustainability, water management, and other ecological preservations which are clearly threatened with damage by cement industry and its karst mining exploitations.

Besides that, in collaboration with academics, non-governmental organizations, journalist associations, university students, the local communities had initiated numbers of academic activities, such as seminars, public lecture, and public discussions on various campuses, such as at IPB (Institute of Bogor Agriculture), UI (Universitas Indonesia), UGM (Universitas Gadjah Mada), UNAIR (Universitas Airlangga), by presenting farmer representatives as guest lecturers or speakers. This is part of KBR (Lecturing together with the people, or *Kuliah Bersama Rakyat*), starts in 2017. Education and exchange intellectual ideas are part of social movement in convincing public narratives at very contested situations.³⁴

Another strategy is also built by openly protesting campuses, especially dealing with those academics who manipulated narratives. Once, at least 70 members of JMPPK, especially women indigenous community held a demonstration at the UGM Chancellor Office, on March 20, 2015. The protest was addressed to two UGM professors who became expert witnesses at Semarang Administrative Court and supporting Semen Indonesia Inc. The protest was supported by university students and civil society groups.³⁵ Indigenous people's protest at campus to challenges intellectual dishonesty was a really powerful message for university, that they could not do manipulation against local communities, since they have scientific local knowledge and its wisdom. UGM authority has accommodated the protest, by declaring administrative sanctions to these two university professors, due to manipulation in providing 'expert testimonies' before the administrative

³⁴ Syiqqil Arofat, "Kontestasi Kuasa: Diskursus Sengketa Pembangunan Pabrik PT Semen Indonesia (Persero) Tbk di Rembang [Contestation of Power: The Discourse of Disputes over the Construction of PT Semen Indonesia (Persero) Tbk's Factory in Rembang]" (master's thesis, Program Pascasarjana Sosiologi, Universitas Indonesia, Depok, 2016).

³⁵ Syamsul Anwar Khoemaeni, "Ratusan Petani & Mahasiswa Geruduk Rektorat UGM [Hundreds of Farmers and Students Storm the UGM Rectorate]," *Okezone*, March 20, 2015. Hamim Thohari, "Protes Pabrik Semen, Warga Gunung Kendeng Geruduk UGM [Protesting the Cement Plant, Residents of Mount Kendeng Storm UGM]," *Tribun Jogja*, March 20, 2015.

court, April 15, 2015 (Rowiyan 2015).³⁶

Social movement in Samin's strategy has taught into at least three models of struggle, which are first, as explained previously, they build stronger alliances, connecting expertise and its strategic networks; second, education in convincing public narratives; and third, protesting campuses and challenging its scientific claims.

Such social movements also apply when struggling for the cancellation of 'state forest' under Forestry Law's claims and efforts to remove 'conditional recognition' for indigenous peoples when conducting judicial reviews at the Constitutional Court. In fact, when a victory occurs in the Constitutional Court's Verdict No. 35/PUU-X/2012 (16 May 2013), it does not automatically change the repressive situation that occurs in the field. A year later after Constitutional Court verdict given, four members of the Semende Banding Agung indigenous community, Midi, Rahmad, Suraji and Heri were stunned to hear the decision of the Panel of Judges at the Bintuhan District Court, on Thursday, 24 April 2014. They were sentenced to a maximum of three years and a fine of IDR 1.5 billion. The judge convicted them as forest illegal loggers. Even though they have lived for generations, settled, earned a living by gardening on their traditional land, they were accused of illegally entering a national park. What's worse, their location was unilaterally designated by the government as 'a national park', without their consent.³⁷

Conflicts occurred everywhere. Criminalization of communities demanding forest rights, easily arrested by the police when doing daily activities in forest areas. While community land has been deprived by mining and palm oil investors, and hence the conflicts become ongoing occurrences in North Maluku. Masri Anwar, AMAN North Maluku's Advocacy Bureau, also the field coordinator of the mass strike, said that the solidarity social movement was an accumulation

³⁶ Hazairin Rowiyan, "UGM Beri Sanksi Eko Haryono dan Heru Hendrayana [UGM Sanctions Eko Haryono and Heru Hendrayana]," *Literasi*, April 15, 2015.

³⁷ Sapariah Satari et al., "Setahun Putusan MK 35, Pengakuan Hutan Adat Masih di Awang-awang [A Year after Constitutional Court Decision 35, Recognition of Customary Forests Is Still Up in the Air]," *Mongabay Indonesia*, May 16, 2014.

of various problems in indigenous communities. In the North Maluku, there are 345 mining business permits for mining exploration and exploitation, and two National Park Area blocks, namely Aketajawe and Lolobata. According to Masri, North Maluku has 48 traditional communities that are members of the Indigenous Peoples Alliance of the Archipelago (AMAN North Maluku). Their conditions are relatively the same, vulnerable to the threat of eviction and criminalization. They also have difficulty accessing the forests where they depend for their livelihood. In Ternate, hundreds of residents from a number of representatives of traditional communities and activists who are members of the North Maluku Traditional Forest Support Coalition also demonstrated at a number of points in Ternate, demanding the dissolution of the Ministry of Forestry and urging the government to immediately implement Constitutional Court Verdict No. 35/PUU-X/2012.³⁸

After a decade of the Constitutional Court's verdict regarding customary forests, AMAN assesses that the implementation of its decision is still far from expectations. The rights and protection of indigenous peoples have been indeed widely discussed by central and regional governments, but in the field, they are still not recognized. In fact, violence and criminalization against indigenous peoples still continues to occur in various parts of the archipelago. The chairman of the Penunggu Gawah Tunak Indigenous Community, Mahdan, stated how useless the such constitutional court decision was. He and his community always held a traditional ritual in the Gawah Tunak traditional forest. He explained that the Gawah Tunak traditional forest used to be a customary forest, but today, it has become the Gunung Tunak Nature Tourism Park.³⁹

The main message from this part of the discussion shows that, even though good and progressive decisions regarding the recognition of customary forests occurred in the Constitutional Court decision, the facts do not necessarily have

³⁸ Wahyu Chandra and Taufik Wijaya, "Pemerintah Dinilai Tak Serius Urus Pengakuan Hutan Adat [Government Seen as Not Serious about Managing Recognition of Customary Forests]," *Mongabay Indonesia*, March 20, 2014.

³⁹ Mohamad Hajazi and Sepriandi, "Satu Dekade Putusan MK 35: Implementasi di Lapangan Masih Jauh [A Decade of Constitutional Court Decision 35: Implementation on the Ground Still Far Off]," *AMAN*, May 16, 2023.

an impact on the situation at ground. The situation has not changed. Apart from that, even though the idea of recognizing the rights of indigenous peoples over customary forests has been revolutionary in restructuring the relationship between the authorities and their citizens, it has not changed the character of the law which often oppresses and excludes indigenous peoples and their rights. Indeed, this cannot be simplified as something that failed, but rather a strategic effort related to the political, legal and democratic context, the extent to which reading the battle between intellectual ideas regarding culture, tradition, local wisdom, is articulated more systematically, not least consolidating it in the public sphere and its social movement.

During the colonial period, Cornelis van Vollenhoven bravely wrote a pamphlet to prevent the legal unification policy, due to impact on the rights of indigenous people. While currently, legal mobilization carried out actively using the courts and pushing for regulatory changes at the level national and regional to give place to the rights of indigenous peoples. 'Adat' in this regard, is a narrative and strategies of resistance to the denial of rights carried out by the government and the private sector in agrarian conflict situations.⁴⁰ This is called a social resistance to defense pluralities at ground.⁴¹

Learning from Indonesian legal tradition context, the efforts of social movement mean, to organize cultural expertise is a challenge in itself, not only hoping for its ability to fill narrative in the public space, but also pressing for it as part of a force for political and legal change that is more effectively organized and meaningful in society. As is the slogan of their movement on the field, they can no longer beg with their hands up, hoping for grace, but instead seize it and make it happen.

⁴⁰ Yance Arizona, "Adat Sebagai Strategi Perjuangan dan Mobilisasi Hukum [Adat as a Strategy of Struggle and Legal Mobilisation]," *The Indonesian Journal of Socio-Legal Studies* 2, no. 2 (2023).

⁴¹ Herlambang P. Wiratraman and Steny B., "Pluralisme Hukum dalam Konteks Gerakan Sosial [Legal Pluralism in the Context of Social Movements]," in *Pluralisme Hukum: Sebuah Pendekatan Interdisiplin [Legal Pluralism: An Interdisciplinary Approach]*, 2nd ed., ed. Rikardo Simarmata (Jakarta: HuMa, 2013).

III. CONCLUSION

Back to the research questions, this article concludes into three points. First, in relation to the Constitutional Court Verdict No. 35/PUU-X/2012, ideas from many views, especially applicants, experts, and statements from community leaders have had a huge impact in producing new knowledge that accommodate the legal political interests of recognizing the rights of indigenous peoples, including rights to customary forests. The ideas of sovereignty, the use of international law, and breaking the colonial legacies, became important legal narratives in the arguments pushing for this decision. Even so, the impact is limited in the field, even up to a decade later of such decision, indigenous people rights had been easily taken away or dispossessed, indigenous people are often evicted forcibly from their own places where they garden or use forest access. Not a few are easily imprisoned, subjected to violence and even killed due to attacks by authorities, companies and the state. The case of forced eviction due to National Strategic Projects, as part of implementation the Law of Job Creation, has been occurring in many sectors, not merely industries, but also deal with infrastructure projects. Capital accumulation through massive investment has been prioritized instead of protecting indigenous peoples' rights and social welfare, as mandated under art 33 (3) of the constitution.

Second, the Constitutional Court's decision which revolutionized and restructured the relationship between authorities and citizens by utilizing cultural expertise arguments, unfortunately did not become an important part of the other and lower court's legal cases. This is proven by the continuation of number legal cases attacking indigenous peoples through court decisions and brought them into the jail. Hence, it goes to the question about judicial independence and its accountability,⁴² which rarely considered as part of consistency and even the

⁴² Simon Butt, "Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts," *Constitutional Review* 9, no. 2 (2023); Rifqi Assegaf, "The Supreme Court Reformasi, Independence and the Failure to Ensure Legal Certainty," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, ed. Melissa Crouch (Cambridge: Cambridge University Press, 2019), 31–58.

way to strengthen constitutional rights protection.⁴³ However, this phenomena becomes common or 'business as usual' due to authoritarian context of judiciary.⁴⁴ Meanwhile, state political policies do not have much influence on government bureaucracy, so they do not have much impact on efforts to advance legal protection in law enforcement.

The third, therefore, one criticism of Holden's main argument is rather the absence of the debate on the role of cultural expertise, which is not merely a matter of equality in discussions of 'expert' deconstruction, which is often in fact considered unequal and difficult to change as a result of an embedded legal system that attaches itself to certain positions in litigation. Therefore, indigenous peoples cannot be deemed as an 'expert'. This article shows the opposite how the community is making scientific efforts to the point of openly protesting against experts. Experts in the context of cultural expertise, of course, do not limit those who go to school or university, but rather are in line with the development of the UN doctrine, as part of 'rights to access and participate in science' (2023) which places cultural expertise as part of the recognition of scholarship and knowledge that can be adopted from communities' insights for their lives and livelihoods in a sustainable manner. This latest debate emphasizes how important the position of cultural expertise is for progressive efforts to realize meaningful social justice.

BIBLIOGRAPHY

Abdurrahman. "Peradilan Adat dan Lembaga Adat dalam Sistem Peradilan Indonesia [Customary Courts and Customary Institutions in the Indonesian Judicial System]." Paper presented at the Workshop on Adat Court, 2nd Congress of AMAN, Mataram, September 20, 2002.

Aliansi Masyarakat Adat Nusantara (AMAN). *Transisi Kekuasaan dan Masa Depan Masyarakat Adat: Catatan Akhir Tahun 2024 Aliansi Masyarakat*

⁴³ Herlambang P. Wiratraman and Eileen Hanrahan, "Exclusionary Nationalism as Institutionalised Racism: Inconsistencies within the Indonesian Justice System," *Australian Journal of Asian Law* 24, no. 2 (2023): Article 6, 81-99.

⁴⁴ Melissa Crouch, "The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia," *Constitutional Review* 7, no. 1 (2021).

Adat Nusantara [Power Transition and the Future of Indigenous Peoples: AMAN 2024 Year-End Notes]. 2024. <https://aman.or.id/filemanager/files/CATAHU%202024%20%20final.pdf>.

Anaya, S. James. *Indigenous Peoples in International Law*. Oxford; New York: Oxford University Press, 2004.

Arizona, Yance. "Kedudukan Peradilan Adat dalam Sistem Hukum Nasional [The Position of Customary Courts in the National Legal System]." Paper for the meeting "Strengthening of Adat Court in Central Kalimantan for Access to Justice Empowerment," June 11, 2013.

Arizona, Yance, Siti Rakhma Mary Herwati, and Erasmus Cahyadi. *Kembalikan Hutan Adat kepada Masyarakat Hukum Adat: Anotasi Putusan Mahkamah Konstitusi Perkara No. 35/PUU-X/2012 mengenai Pengujian Undang-Undang Kehutanan* [Return Customary Forests to Indigenous Peoples: Annotations on Constitutional Court Decision No. 35/PUU-X/2012 on Review of the Forestry Law]. Jakarta: Perkumpulan HuMa Indonesia; Epistema Institute; Aliansi Masyarakat Adat Nusantara, 2014.

Arizona, Yance. "Adat Sebagai Strategi Perjuangan dan Mobilisasi Hukum [Customary Law as a Strategy of Struggle and Legal Mobilization]." *The Indonesian Journal of Socio-Legal Studies* 2, no. 2 (2023).

Arofat, Syiqqil. "Kontestasi Kuasa: Diskursus Sengketa Pembangunan Pabrik PT Semen Indonesia (Persero) Tbk di Rembang [Contest of Power: The Discourse of the PT Semen Indonesia (Persero) Tbk Factory Development Dispute in Rembang]." Master's thesis, Universitas Indonesia, Depok, 2016.

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

Asshiddiqie, Jimly, et al. *Pergulatan Tafsir Negara Integralistik: Biografi Intelektual, Pemikiran Hukum Adat dan Konstitusionalisme* [The Struggle over the

- Interpretation of the Integralistic State: Intellectual Biography, Customary Law Thought, and Constitutionalism]. Jakarta: Pustokum, Yakins, Thafa Foundation, 2015.
- Barker, Joanne. "For Whom Sovereignty Matters." In *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, edited by Joanne Barker, 1-31. Lincoln: University of Nebraska Press, 2005.
- Barsh, Russel Lawrence. "Indigenous Peoples in the 1990s: From Object to Subject of International Law." *Harvard Human Rights Journal* 7 (1994): 33-86.
- Barsh, Russel Lawrence. "Indigenous Peoples: An Emerging Object of International Law." *American Journal of International Law* 80 (1996): 369-385.
- Bedner, Adriaan, and Yance Arizona. "Adat in Indonesian Land Law: A Promise for the Future or a Dead End?" *The Asia Pacific Journal of Anthropology* 20, no. 5 (2019): 416-434. <https://doi.org/10.1080/14442213.2019.1670246>.
- Bedner, Adriaan, and Stijn van Huis. "The Return of the Native in Indonesian Law: Indigenous Communities in Indonesian Legislation." *Bijdragen tot de Taal-, Land- en Volkenkunde* 164, no. 2/3 (2008): 165-193.
- Brownlie, Ian. "The Rights of Peoples in Modern International Law." *Bulletin of the Australian Society of Legal Philosophy* 9, no. 2 (1985): 104-119.
- Butt, Simon. "Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts." *Constitutional Review* 9, no. 2 (2023).
- Chandra, Wahyu, and Taufik Wijaya. "Pemerintah Dinilai Tak Serius Urus Pengakuan Hutan Adat [Government Deemed Not Serious in Handling Recognition of Customary Forests]." *Mongabay*, March 20, 2014. <https://www.mongabay.co.id/2014/03/20/pemerintah-dinilai-tak-serius-urus-pengakuan-hutan-adat/>. Accessed February 13, 2024.
- Cobb, Amanda J. "Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations." *American Studies* 46, no. 3/4 (2005): 128.

- Constitutional Court of the Republic of Indonesia. Decision No. 35/PUU-X/2012. The Constitutional Court of the Republic of Indonesia, 2012. https://en.mkri.id/download/decision/pdf_Decision_35PUU-X2012.pdf. Accessed March 4, 2023.
- Constitutional Court of the Republic of Indonesia. Decision No. 54/PUU-XX/2022. The Constitutional Court of the Republic of Indonesia, 2022.
- Crouch, Melissa. "The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia." *Constitutional Review* 7, no. 1 (2021).
- Dewi, Citra. "Analisis Gerakan Sosial di Kecamatan Sukolilo, Kabupaten Pati, Jawa Tengah [Analysis of Social Movements in Sukolilo District, Pati Regency, Central Java]." Undergraduate thesis, Institut Pertanian Bogor (IPB), Bogor, 2015.
- Hadikusuma, Hilman. *Peradilan Adat di Indonesia* [Customary Courts in Indonesia]. Jakarta: Miswar, 1989.
- Hajazi, Mohamad, and Sepriandi. "Satu Dekade Putusan MK 35: Implementasi di Lapangan Masih Jauh [A Decade after Constitutional Court Decision 35: Implementation in the Field Still Far Away]." AMAN, May 16, 2023. <https://www.aman.or.id/news/read/satu-dekade-putusan-mk-35-implementasi-di-lapangan-masih-jauh>. Accessed February 13, 2024.
- Harper, Erica. *Customary Justice: From Program Design to Impact Evaluation*. Rome: IDLO, 2011.
- Holden, Livia, ed. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. London: Routledge, 2011.
- Holden, Livia. *Cultural Expertise: An Emergent Concept and Evolving Practices*. Basel: MDPI, 2019.
- Holden, Livia. "Cultural Expertise and Law: An Historical Overview." *Law and History Review* 38, no. 1 (2020): 29-46.
- Holden, Livia, ed. *Cultural Expertise, Law and Rights: A Comprehensive Guide*. London: Routledge, 2023.

- Holleman, J. F. *Van Vollenhoven on Indonesian Adat Law (Selections from Het Adatrecht van Nederlandsch-Indië) (Volume I, 1918; Volume II, 1931)*. The Hague: Martinus Nijhoff, 1981.
- Hooker, M. B. *Adat Law in Modern Indonesia*. Kuala Lumpur: Oxford University Press, 1978. https://www.cambridge.org/core/journals/journal-of-asian-studies/article/abs/adat-law-in-modern-indonesia-by-m-b-hooker-kuala-lumpur-oxford-university-press-1978-viii-181-pp-bibliography-index-2800/8A1FF90F36F12EC5ECD21D6511E5620E?utm_source=chatgpt.com.
- Jamin, Mohamad, Sapto Hermawan, and Mulyanto. "A Discourse of the Indigenous Peoples' Rights and Their Contributions to the Indonesian Development: Lessons Learned from New Zealand." *Padjadjaran Journal of Law* 10, no. 3 (2023).
- Jayapura Administrative Court. *Decision No. 32/G/2021/PTUN.JPR* (PT Papua Lestari Abadi).
- Jayapura Administrative Court. *Decision No. 32/G/2021/PTUN.JPR* (PT Sorong Agro Sawitindo).
- Khoemaeni, Syamsul Anwar. "Ratusan Petani & Mahasiswa Geruduk Rektorat UGM [Hundreds of Farmers & Students Storm the UGM Rectorate]." *Okezone*, March 20, 2015. <http://news.okezone.com/read/2015/03/20/340/1121789/ratusan-petani-mahasiswa-geruduk-rektorat-ugm>. Accessed March 4, 2024.
- Law No. 1 of 2023 on the Criminal Code (KUHP).
- Law No. 3 of 2020 on Amendments to Law No. 4 of 2009 concerning Mineral and Coal Mining.
- Law No. 3 of 2022 on the National Capital (IKN).
- Law No. 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation into Law.
- Otto, Jan Michiel. "Unity in Diversity: The Topicality of Professor C. van Vollenhoven." Dies lecture, 442nd *dies natalis*, de Pieterskerk, Leiden, February 8, 2017.

- Parpart, Jane L. "Deconstructing the Development 'Expert': Gender, Development and the 'Vulnerable Groups.'" In *Feminism/Postmodernism/Development*. London: Routledge, 1995.
- Pompe, Sebastiaan. *The Indonesian Supreme Court: A Study of Institutional Collapse*. Ithaca, NY: Cornell Southeast Asia Program, 2005.
- Putri, Budiarti. "Golkar Tolak RUU Masyarakat Adat dan RUU Perlindungan PRT di Prolegnas [Golkar Rejects the Indigenous Peoples Bill and Domestic Workers Protection Bill in the National Legislation Program]." *Tempo*, January 15, 2021. <https://nasional.tempo.co/read/1423363/golkar-tolak-ruu-masyarakat-adat-dan-ruu-perlindungan-prt-di-prolegnas>. Accessed March 17, 2024.
- Rowiyah, Hazairin. "UGM Beri Sanksi Eko Haryono dan Heru Hendrayana [UGM Sanctions Eko Haryono and Heru Hendrayana]." *Literasi*, April 15, 2015. <http://literasi.co/2015/04/ugm-beri-sanksi-eko-haryono-dan-heru-hendrayana/>. Accessed March 4, 2024.
- Saturi, Sapariah, et al. "Setahun Putusan MK 35, Pengakuan Hutan Adat Masih di Awang-awang [A Year after Decision MK 35, Recognition of Customary Forests Still Up in the Air]." *Mongabay*, May 16, 2014. <https://www.mongabay.co.id/2014/05/16/setahun-putusan-mk-35-pengakuan-hutan-adat-masih-di-awang-awang/>. Accessed February 2, 2024.
- Shrinkhal, R. "'Indigenous Sovereignty' and Right to Self-Determination in International Law: A Critical Appraisal." *AlterNative: An International Journal of Indigenous Peoples* 17, no. 1 (2021): 71-82.
- Simarmata, Rikardo. *Pengakuan Hukum terhadap Masyarakat Adat di Indonesia* [Legal Recognition of Indigenous Peoples in Indonesia]. Bangkok: UNDP Regional Initiative on Indigenous Peoples' Rights and Development (RIPP), 2006.
- Simarmata, Rikardo. "Filosofi dan Prinsip Peradilan Adat [The Philosophy and Principles of Customary Courts]." Paper presented at the Workshop on

Strengthening Adat Court Capacity through the Making of Adat Court Guidance in Central Kalimantan, SAJI Project UNDP and Bappenas/Ministry of PPN, 2013.

- Thohari, Hamim. "Protes Pabrik Semen, Warga Gunung Kendeng Geruduk UGM [Protesting the Cement Plant, Gunung Kendeng Residents Storm UGM]." *Tribun Jogja*, March 20, 2015. <https://jogja.tribunnews.com/2015/03/20/protes-pabrik-semen-warga-gunung-kendeng-geruduk-ugm>. Accessed March 4, 2024.
- United Nations. Expert Meeting on the Right to Access and Participate in Science, carried out by the UN Special Rapporteur on Cultural Rights, Palais des Nations, Geneva, November 1, 2023.
- Wiessner, Siegfried. "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples." *Vanderbilt Journal of Transnational Law* 41 (2008): 1141-1176.
- Wiratraman, Herlambang P., and Steny B. "Pluralisme Hukum dalam Konteks Gerakan Sosial [Legal Pluralism in the Context of Social Movements]." In *Pluralisme Hukum: Sebuah Pendekatan Interdisiplin* [Legal Pluralism: An Interdisciplinary Approach], 2nd ed., edited by Rikardo Simarmata. Jakarta: HuMa, 2013.
- Wiratraman, Herlambang P., and Dian A. H. Shah. "Indonesia's Constitutional Responses to Plurality." In *Pluralist Constitutions in Southeast Asia*, edited by Jaclyn Neo and Bui Ngoc Son, 115-142. Oxford: Hart Publishing, 2019.
- Wiratraman, Herlambang P., and Eileen Hanrahan. "Exclusionary Nationalism as Institutionalised Racism: Inconsistencies within the Indonesian Justice System." *Australian Journal of Asian Law* 24, no. 2 (November 22, 2023): 81-99.
- Yusa, I Gede. "Identification and Analysis of the Rights of Indigenous Peoples in the Study of Constitutional Law." *Constitutional Review* 2, no. 1 (2016).

FREE, PRIOR, AND INFORMED CONSENT IN INDIGENOUS RIGHTS: THE JUUKAN GORGE DEBACLE

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Abstract

The Juukan Gorge case study is perhaps the most relevant contemporary example of how what seems right as far as accessing indigenous lands can easily turn out to be wrong. It highlights the complexity of regulatory processes and how formal processes interact, or fail to interact, with indigenous customary processes. This article reflects on the way in which approvals processes affecting the customary lands of Indigenous People may become convoluted and complex due to multiple levels of authorities being responsible to consider proposals. When indigenous, public, and private interests intersect the ideal of a consent outcome is not always possible. The reality is that public interest in economic development is often in direct conflict with protection of an indigenous site. As is show in the article, FPIC reflects the assumption, demand and aspiration of Indigenous People to be consulted about what happens on their traditional lands. FPIC as it appears in UNDRIP is often presented, erroneously, as giving to Indigenous People the final control over what happens on their ancestral lands. Whilst FPIC strives towards reaching consensus, FPIC does not mandate consensus. This article uses the Juukan Gorge debacle to draw lessons and insights from the complexity and uncertainty of regulatory approval processes on the lands of Indigenous People. The risks to Indigenous People and developers are palatable with Indigenous People fearing their rights may be encroached, whilst developers being concerned that the approvals they receive from the state may be challenged by Indigenous People.

Keywords: Free, Prior, and Informed Consent; Juukan Gorge; UNDRIP; Indigenous Rights

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I. INTRODUCTION

The mention of ‘Juukan Gorge’ raises an image of the complexities and nuances of free, prior and informed consent (FPIC).¹ FPIC reflects the assumption, demand and aspiration of Indigenous People to be consulted about what happens on their traditional lands.² Juukan Gorge is an example of how things can go wrong even if the state had granted approval for a project to proceed. The destruction and damage on 24 May 2020 of 2 Aboriginal sites, 1 with a dated history of around 46 000 years, highlights how much remains to be done to secure and protect indigenous sites and dreaming story lines of national and international importance. Juukan Gorge in general and the rock shelters in particular, are more than a site. They represent evidence of the dynamic living of the oldest uninterrupted culture in the world. It links human occupation in that area to the ice age.³ The word ‘irreplaceable’ does not get close to explain its loss. And yet, mining company Rio Tinto lawfully destroyed 1 site and damaged another site regardless of expert reports that described their unique status, and despite the strenuous objections of the traditional owners of the land. It is unfathomable that so much was known about the Gorge - scientifically, anthropologically, culturally, and managerially - and so many people had a concern about the preservation of the sites, and yet the blasting took place like a Greek tragedy with a foreseeable yet uncontrollable outcome.⁴

¹ The Juukan Gorge is located in the Pilbara region of the state of Western Australia. The Gorge is about 400m long and 70m wide and includes several rock shelters and a rock pool. These sites are regarded as sacred by the traditional Aboriginal custodians. For example, the sighting in 2020 of a python in the snake pool is proof to them of the ongoing spirituality and sacredness of the Gorge in general and the pool specifically.

² Article 19 of the Universal Declaration on the Rights of Indigenous People (UNDRIP) provides as follows: ‘States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’ The declaration is not legally binding, but it reflects a widely held international consensus about how the traditional lands of Indigenous People should be respected. See Bertus De Villiers, “Right to Be Consulted, but the Frustration of Being Ignored: The Ongoing Efforts in International Law to Give Practical Meaning to Free, Prior, and Informed Consent,” in *Indigenous Rights in the Modern Era: Regaining What Has Been Lost* (Leiden: Brill, 2023), 125.

³ M. Slack et al., “Aboriginal Settlement during the LGM at Brockman, Pilbara Region, Western Australia,” *Archaeology in Oceania* 44 (2009): 32–39; M. Slack et al., “The Early Occupation of the Eastern Pilbara Revisited: New Radiometric Chronologies and Archaeological Results from Newman Rockshelter and Newman Orebody XXIX,” *Quaternary Science Reviews* 236 (2020).

⁴ The parliamentary report explains in some detail the efforts made to prevent the blasts; the risks to remove explosives that had already been loaded; and ultimately the inevitability of the blasts on 24 May 2020. See Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 303-4.

If the destruction of Juukan Gorge had happened a century ago one would have shaken your head in disbelief. But for it to have happened in 2020 leaves one speechless. Furious. Distraught. Especially because the damage was caused by a mining giant that prides itself on its constructive and positive working relationship with Indigenous People, its high internal standards for indigenous consultation, its support for native title and reconciliation, and its respect for indigenous culture. Particularly poignant is that the company acted with lawful authority of the state of Western Australia and hence no prosecution arose from the wiping out of an irreplaceable link to pre-ancient history.

The events leading to the Juukan Gorge destruction reflects a culmination of all the facets of FPIC, for example: the meaning of FPIC; the ongoing nature of FPIC in the case of major projects; the legal status of UNDRIP; corporate culture to consult with Indigenous People; industry self-regulation; social licence to operate; country-based legislative and administrative standards; interaction between public and indigenous interests; intra-indigenous cooperation and sharing of information; who speaks for country; the regulatory authority of the state, and, perhaps most importantly, what happens in the legal vacuum between consultation and consent. From that gap may arise actions that are ‘lawful but awful’.⁵

In this article I reflect on the events at Juukan Gorge considering the different facets of FPIC and I draw conclusions that may assist with the implementation of FPIC on a wider scale. I highlight the complexity of contemporary regulatory processes where the state may grant approval for a measure, whilst an indigenous community may object. The reports produced by the Australian parliamentary committee that investigated the events, provides a detailed factual overview of what had happened before and after the destruction.⁶ I will discuss the destruction of Juukan Gorge under the following sub-headings: essential facts; statutory framework; and elements of FPIC as those are relevant to the Juukan

⁵ N. Passas, ‘Lawful but Awful: “Legal Corporate Crimes”’, *Journal of Behavioural and Experimental Economics* 34 (2005): 771–86.

⁶ Parliament of Australia, ‘Juukan Gorge Inquiry to Question Rio Tinto,’ *About the House News* (Canberra, 2020); Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021).

events. I conclude with insights that can be gained in the wider application of FPIC.

The Juukan Gorge case study is perhaps the most relevant contemporary example of how what seems right in statutory approvals can easily turn out to be wrong in community disapproval. It also highlights the complexity of regulatory processes and how formal processes interact, or fail to interact, with indigenous processes. When indigenous, public, and private interests intersect the ideal of a consent outcome is not always possible. The reality is that public interest in economic development is often in conflict with protection of an indigenous site.⁷ Which interest prevails if there is an irreconcilable conflict? Importantly, who carries the burden of a final decision? And how legally secure is a final approval. There is no simple answer – if government has the final approval, it means important indigenous sites can lawfully be destroyed, whilst if an indigenous community has a veto, it means that important socio-economic developments may grind to a halt, or unreasonable conditions may be imposed on a developer.

FPIC as it appears in UNDRIP is often presented, erroneously, as giving to Indigenous People the final control over what happens on their ancestral lands. Whilst FPIC strives towards reaching consensus, FPIC does not mandate consensus. Neither does FPIC grant a legal veto to Indigenous People. The Indigenous People can refuse to consent to a development, but that does not equate to a legal veto.⁸ The final decision remains that of the regulating authority, which may consider the refusal by the indigenous community but without being bound by it.⁹ Agreement by consent remains the ideal, but what if agreement is not reached? Being a final decision-maker is not simple. The legal position

⁷ See as an example the Forrest case in Western Australia which a decision had to be made about retaining the physical integrity of a river in which the local Aboriginal people believe a mythological snake resides, or allowing concrete weirs to be built for purposes irrigation for purposes of economic development. The case highlighted how agreement cannot always be reached; how the interest of one party may be irreconcilable with the interest of the other party; and how reverting to the public interest is not always helpful since the public interest supports economic development as well as protection of Aboriginal heritage. See *Forrest and Forrest Pty Ltd v Minister of Aboriginal Affairs* [2024] WASCA 96 (Supreme Court of Western Australia, Court of Appeal, 2024).

⁸ Australian Human Rights Commission, *Study on Free, Prior and Informed Consent: Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia* (Sydney: Australian Human Rights Commission, 2018).

⁹ A. Tomaselli, "The Right to Political Participation of Indigenous Peoples: A Holistic Approach," *International Journal on Minority and Group Rights* 24 (2017): 390-427.

explained by the Law Society of Western Australia in respect to Juukan Gorge is likely to be similar in other jurisdictions, namely:

There is no legislative regime at a State or Commonwealth level which is effective to *guarantee* the protection of culturally and historically significant sites such as caves at Juukan Gorge. (emphasis added)¹⁰

FPIC is not a justiciable legal right in international law or customary international law;¹¹ the ‘consent’ in FPIC does not constitute a legal veto to be exercised by Indigenous People (unless a domestic statute grants a right of veto as in the case of Baleni in South Africa ¹²);¹³ the withholding of consent does not imply a proposal is legally rejected; courts consider the *process* rather than the outcome of consultation; the obligations of FPIC may be met even if a development goes ahead; the final regulatory and approval authority of the state is not disturbed by FPIC; industry continues in its attempts through self-regulation to improve its interaction with Indigenous People; and FPIC has given new meaning and application to good faith consultation.¹⁴ Juukan shows however how easily good intentions can be derailed, how weak domestic legal arrangements about consultation can be exploited; how scientific knowledge may be buried in bureaucracy and poor management; and how poor communications and the human element present an ongoing risk of poor outcomes.

¹⁰ Law Society of Western Australia, “Submission to the Inquiry into the Destruction of 46,000 Year Old Caves- Juukan Gorge, Western Australia,” July 20, 2020, 28.

¹¹ The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) expresses the opinion in response to the Juukan Gorge event that ‘Indigenous People should have the right to give or withhold consent to any project on their land. This is the principle of free, prior, and informed consent.’ See Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Inquiry into the Destruction of the 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (Canberra: AIATSIS, July 31, 2020), 3; A. Nagar, “The Juukan Gorge Incident: Key Lessons on Free, Prior and Informed Consent,” *Business and Human Rights Journal* 6 (2021): 378. Nagar also refers to ILO 169 and says that the ‘consent requirement’ is ‘enshrined’ therein, but without mentioning that ILO 169 is only binding on treaty partners (Australia is not a signatory) and the scope of FPIC in ILO 160 does not apply to general land access disputes. This reflects the common misunderstanding of the meaning and effect of FPIC. Advocates often present FPIC as a justiciable and enforceable right, leaving Indigenous People disillusioned when they realise it is a relational right rather than a justiciable veto.

¹² *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) (High Court of South Africa, Gauteng Division, Pretoria, 2019).

¹³ *Baleni v Minister of Mineral Resources* 2019.

¹⁴ *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, assented to June 21, 2021 (Canada).

II. ESSENTIAL FACTS OF JUUKAN GEORGE DESTRUCTION

On 24 May 2020 mining company Rio Tinto caused 2 Aboriginal rock shelters (sites) in the Juukan Gorge to be damaged or destroyed as part of an expansion of the Brockman iron ore mine in the state of Western Australia.¹⁵ The destruction was a permitted act under the Aboriginal Heritage Act of the state of Western Australia.¹⁶ Ministerial approval had been given some 6 years earlier for the sites to be destroyed.¹⁷ It had been known since 2003 that the sites had ‘moderate to high degree of archaeological significance.’¹⁸ In a 2014 expert report the one site was described as of the highest archaeological significance in Australia.

The sites contained evidence of Aboriginal occupation and use of at least 46 000 years.¹⁹ The local Aboriginal people, traditional owners of the land, and custodians of the sites, the Puutu Kunti Kurrama and Pinikura peoples (PKKP people), held the sites in high regard for its cultural, ethnographic, and archaeological importance. The PKKP people knew the sites, adhered to their connection to ancestors who utilised the sites, and saw the sites as part of their ongoing living culture. Extensive scientific knowledge existed prior to the destruction of the cultural, ethnographical, archaeological, and historic value of the sites. In a 2014 report by archaeologist Dr Michael Slack submitted to Rio Tinto he observed that one of the sites contained artefacts ‘of the highest archaeological significance in Australia.’²⁰ This information about the high value

¹⁵ For a chronology of events leading up to the destruction refer to the summary of the parliamentary report. See Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 293-303.

¹⁶ *Aboriginal Heritage Act 1972 (WA)*, s. 18(3).

¹⁷ The approval given to Rio Tinto was to destroy or damage 12 rockshelters and 20 artefact scatters after salvage excavations had been done. It was during those subsequent salvage excavations that additional evidence about the significance of the two sites had been collated. The sites were not only important in respect of the salvageable artefacts, but also to the spiritual and physical connection between the PKKP people and their ancestors. Note that the discussion in this article and citation to the Aboriginal Heritage Act reflect the provisions of the Act as it was in 2020. Since then, there have been ongoing efforts to amend the Act. Those are not the subject of this article.

¹⁸ Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 293.

¹⁹ Slack et al., “The Early Occupation of the Eastern Pilbara Revisited.

²⁰ G. Borschmann, “Report Reveals Rio Tinto Knew the Significance of 46,000-Year-Old Rock Caves Six Years before It Blasted Them,” *ABC News*, June 5, 2020.

of the sites was given to Rio Tinto *after* it had been given ministerial approval to destroy the sites, but some 6 years *prior* to the destruction of the sites. In a 2018 report by Scarp Archaeology it was reiterated that one of the sites had the ‘highest archaeological significance in Australia’.²¹

The authority by which Rio Tinto destroyed the sites was issued by the Minister of Aboriginal Affairs on 31 December 2013 pursuant to section 18 of the Aboriginal Heritage Act. None of the research results of excavation of the sites that had been conducted *after* 2013, neither the opposition of the PKKP peoples to any damage being caused to the sites, were submitted to the Minister. There was, however, no legal obligation under the Aboriginal Heritage Act on Rio Tinto or any researcher to make the new information known to the Minister of Aboriginal Affairs. In any case, even if the Minister had been given the new information, the Minister had no legal power to rescind an approval after it had been granted. This meant that the approval for destruction of the sites given in 2013 retained its validity regardless of any findings of important Aboriginal sites or artefacts made after the issuing of the approval. This explains why, regardless of the public outcry, the actions taken by Rio Tinto were technically lawful. But right (at law) soon turned out to be very wrong (in public perception and stakeholder expectations).

Following the ministerial approval issued in 2013, experts retained by Rio Tinto undertook, in cooperation with the PKKP people, further excavation of the sites. They catalogued and preserved around 7000 artefacts. A detailed report of the ethnographic findings and importance of the sites was provided to Rio Tinto. Rio Tinto conceded to the Parliamentary Committee that the additional information obtained after the 2013-approval provided an adequate basis for Rio Tinto to voluntarily re-assess the importance of the sites. (Final Report Juukan 2021, para. 2.62) However, an internal reassessment by Rio Tinto never occurred. The reason for the failure was, according to Rio Tinto, attributable to poor

²¹ Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 297.

internal communication in the company. But the events also reflect the ‘power imbalance’ between mining companies and Indigenous People.²²

Prior to the destruction of the sites, Rio Tinto had extensive involvement with the PKKP people, including knowledge about the importance of the sites, agreements with the PKKP people about exploration and mining in their traditional areas, and other cooperation, heritage protection, and commercial arrangements. Had it not been for the destruction of these sites and the public outcry that followed, the engagement between Rio Tinto and the PKKP people may have been presented by Rio Tinto as standard setting in the mining industry of Australia and beyond.²³ The relationship with the PKKP people had been in existence for at least 18 years prior to the destruction.

In the leadup to the blasting of the sites, communication between Rio Tinto and the PKKP people declined in quality. Rio Tinto, on reflection, accepted that it had suffered poor internal and external communication and that lines of communication within the company became ‘blurred’ and this in turn impacted on communication with the PKKP people. Essential staff skills had been lost for a variety of reasons. These staff movements contributed to the poor communication within the company as well as the PKKP people. For example, in the days prior to the blast, Rio Tinto failed to inform the PKKP people of the planned blast or the extent thereof. By the time the PKKP peoples became aware of the intended blasts it was too late to interrupt it, and to the extent that they communicated to Rio Tinto that the sites must not be destroyed, they believed Rio was taking appropriate steps to prevent the blasts or to mitigate the impacts. (Final Report Juukan 2021, para. 2.80-2.81) Investigation into the days prior to the blasts found, however, that it would be too risky for the explosives to be removed. Rio Tinto admitted as follows:

²² A. Kaur et al., ‘Being Left behind: Disclosure Strategies to Manage the Juukan Gorge Cave Blast’, *Accounting, Auditing and Accountability Journal*, 2024, para. 6.1.

²³ The investigation into the Juukan Gorge destruction brought attention to the agreement-process between Rio Tinto and the PKKP people. For example, in one example a contract of around 740 pages had to be approved by the PKKP people, but it was said that plain English summaries were only handed out shortly before the meeting at which approval had to be given. See D. Kemp et al., “Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change,” *Journal of Energy and Natural Resources Law* 41 (2023): 397; Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021).

In allowing the destruction of the Juukan Gorge rock shelters to occur, we fell far short of our values as a company and breached the trust placed in us by the Traditional Owners of the lands on which we operate.²⁴

A pertinent question that arose in the aftermath of the destruction is whether the PKKP people had since 2013 known about the intended blasts and if so, whether they had adequate opportunity to prevent it from happening. The Parliamentary Report heard detailed evidence about this issue.²⁵ With the benefit of hindsight and the actions being taken by Rio Tinto since the destruction, it is not controversial to conclude that the PKKP people did not know about all the options available to Rio Tinto prevent or mitigate damage to the sites;²⁶ that the PKKP people were not aware of the intended destruction of the sites; and that there was inadequate opportunity for the blasting to be stopped. It is also not controversial to say that the possible destruction of the sites had been on the agenda since approval had been given by the Minister of Aboriginal Affairs in December 2013, but legally the PKKP people had no right to appeal the approval granted by the minister. However, the actual destruction of the sites, in light of additional evidence that had been gained since the approval as well as the ongoing discussions between Rio Tinto and the PKKP peoples, came as a surprise to the PKKP peoples and scientists who had been exploring the sites.

Another pertinent question to be directed at Rio Tinto is whether it could have taken alternative steps to either prevent or to mitigate the damage to the sites? Although Rio Tinto had ministerial approval that authorised its actions, could their self-regulation and internal checks and balances have caused them to reconsider the scope of blasting? Again, with the benefit of hindsight and the actions undertaken by Rio Tinto, the answer to the question is affirmative. More could and should have been done to prevent the destruction or damage

²⁴ Rio Tinto, "Juukan Gorge," *Rio Tinto* (2025).

²⁵ Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), paras. 2.6–2.25.

²⁶ In October 2012, Rio Tinto had produced an internal memorandum in which possible design options for the mine were considered. Of the 4 options identified, 3 avoided or limited impacts to the sites. These options were not disclosed to the PKKP people and the only option to them was presented as *fait accompli*. See Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 294.

of the sites or to mitigate the impact of the blasts. The Parliamentary Report found that as far back as 2013 when the approval had been granted, Rio Tinto 'failed to properly adhere' to the letter and spirit of agreements with the PKKP; failed in the application of their own internal standards; and failed to disclose to the PKKP people alternative design options for the expansion of the mine to mitigate or prevent damage to the sites.²⁷ Added to these contributory causes, Rio Tinto admitted that its management and communication systems had broken down. Furthermore, the 2013-notice in which Rio Tinto explicitly said that the sites will be impacted by the blasts, was not sent directly to the PKKP people, but to another Aboriginal corporation who, in turn, did not pass the notice on to the PKKP people. (Final Report Juukan 2021, para. 2.50, 2.105) Additionally, the initial approval granted by the minister in 2013 was based on incomplete and deficient information. For example, the information provided in support of the destruction failed to explain the ethnographic importance of the sites. In fact, an explicit recommendation by an expert that the sites be preserved, was omitted from the application to the Minister. Added thereto, Rio Tinto did not disclose to the PKKP people that there were alternative options available than the destruction of the sites. Notably, the Aboriginal Heritage Act did not make it an offence to present incomplete information to the Minister or to the Aboriginal people.

Although substantial additional ethnographic evidence had been obtained after the issuing of the 2013-notice of the importance of the sites, the new information was not submitted to the Minister of Aboriginal Affairs. It is noted, however, that the Aboriginal Heritage Act did not require later obtained research findings to be submitted to the Minister, but in the absence of a statutory requirement the question arises whether Rio Tinto should, pursuant to its corporate commitment, ethnics, and self-regulation, have volunteered the information to the Minister, or at least caused an internal reconsideration of the expansion of the mine. Although the report explaining the importance of

²⁷ Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), para. 2.40.

the sites was handed to Rio Tinto, the content of the report was not effectively communicated within Rio Tinto. The inadequacy of self-regulation was obvious.

In the next part we briefly reflect on the statutory arrangements that existed at the time approval was given for the sites to be destroyed.

III. STATUTORY FRAMEWORK GIVING RISE TO THE JUUKAN GORGE DESTRUCTION

The Aboriginal Heritage Act of the state of Western Australia was drafted at a time when there was, essentially, little or no legal, moral, or ethical obligation of any substance to consult with Indigenous People about their traditional lands, sites, or interests. The conventional wisdom at the time was that Australia regarded as terra nullius at time of settlement in 1788 and that no traditional native title rights and interests had survived settlement.²⁸ In the 1970s advocates for indigenous rights were barely heard internationally or in Australia. ILO 169 and UNDRIP had been on the far horizon. Importantly, the ‘living’ aspects of indigenous law, culture, and customs as those related to ongoing connection to land were not appreciated, with the emphasis falling on conservation of indigenous artifacts and stories recorded within museums.²⁹ The interaction between Indigenous People and their country, the ongoing breathing of their storylines, and their continued caring for country as a society with their unique laws and customs, had not yet been appreciated.³⁰ The Aboriginal Heritage Act predated the determination of native title in Australia by around two decades.³¹

The Aboriginal Heritage Act was in 2020 arguably one of the most outdated acts on the statute books in Australia. Ironically, although industry practices and self-regulation by private enterprise in their interaction with Indigenous

²⁸ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Supreme Court of the Northern Territory, April 27, 1971)

²⁹ The emphasis on the display of artifacts in museums often ignored or underappreciated the ongoing spiritual and cultural connection of those artifacts with land and the traditional owners of the land. The destruction of Juukan Gorge therefore not only impacted on the artefacts that may not have been recovered, but also on the spiritual and physical connection to the land and the duty of the PKKP people to be proper custodians and protectors of the land. Kaur et al., ‘Being Left behind: Disclosure Strategies to Manage the Juukan Gorge Cave Blast’. The PKKP people explained that the destruction affected the spirits, a psychological historic anchor, and special ceremonial places that linked them to their ancestors and provided a basis for their living culture.

³⁰ *Yorta Yorta v Victoria* [2002] HCA 58; (2002) 214 CLR 422 (High Court of Australia, 2002).

³¹ *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (High Court of Australia, 1992).

People had in 2020 been far advanced compared to the 1970's, Rio Tinto relied on the outdated legislation rather than on contemporary standards and practices to proceed with the destruction of the sites. One would have expected Rio Tinto to have engaged in an internal review about the appropriateness of the authorisation to destroy that had been granted some 7 years earlier, rather than to rely on legislation that was clearly outdated in comparison to contemporary international and industry standards. The OECD, World Bank, United Nations, and various international organisations had by 2020 made remarkable strides towards industry self-awareness and self-regulation in respect of their interaction with Indigenous People.³² The agreements Rio Tinto had with the PKKP peoples were also advanced and set the standard to the industry in Australia. Added thereto, cultural training awareness of staff had become an industry standard and approaching Aboriginal culture as a living system of law had long been recognised. It is therefore even the more inconceivable that in 2020 Rio Tinto could have engaged in the actions it did in respect of Juukan Gorge.

Focusing on the relevant provisions of the Aboriginal Heritage Act: The two principal operative provisions of the Aboriginal Heritage Act of relevance to this article are sections 17 and 18. Section 17 determines that it is an offence to damage or destroy an Aboriginal site, unless authorisation is received from the minister pursuant to section 18. Section 18 provides that the relevant minister shall consider the recommendations of the advisory Aboriginal Cultural Materials Committee (ACMC) (s 28) as well as the general interests of the community before consenting or declining to approve an Aboriginal site being destroyed or damaged.³³

³² L. Achouk-Spivak and R. Garden, "OECD National Contact Point Specific Instances: When 'Soft Law' Bites?," *Journal of International Dispute Resolution* 13 (2022): 608-42.

³³ In the Juukan Gorge case the ACMC did not properly scrutinise the section 18 application and did not identify any shortcomings or inconsistencies in the application. Importantly, the ACMC does not have powers to conduct its own investigations or to hear evidence. It is therefore open to the ACMC to recommend the destruction of a site without having detailed information about the site. In the case of the Juukan Gorge application the recommendations made by researchers Slack and Builth for the sites to be regarded as of high ethnographic importance, were not included in the application before the ACMC. In fact, the application was so deficient that under the heading dealing with the ethnographic significance of the sites, Rio Tinto replied with "N/A" (not applicable).

There are 5 notable aspects of the legislation for purposes of this article:

firstly, there is no national or state register of all Aboriginal sites in Australia or Western Australia,³⁴ which means a person may damage an Aboriginal site and then be prosecuted without knowing of the existence of the site. There is also no legal obligation on Indigenous People to make known their sites of importance;

secondly, the person applying for approval to destroy or damage an Aboriginal site may appeal the decision of the relevant minister not to grant approval, but the Aboriginal people who may oppose an approval that had been granted, did not have a right of appeal; (s 18(5))

thirdly, there was no obligation on any person or entity to bring to the attention of the Minister of Aboriginal Affairs any new information that had been obtained after approval for the destruction of site had been given;

fourthly, once the Minister had made the decision, there was no power for the Minister to revisit the decision. This meant that even if Rio Tinto or the researchers had made known to the Minister the importance of the sites, the Minister had no power to rescind or vary the approval given. The only entity that could reconsider, was Rio Tinto; and

fifthly, Rio Tinto could or rather should, in light of the evidence that had become available, self-initiated and adjusted the location of the mine, blasting holes, or adopted other steps to prevent or mitigate damage to the sites. But Rio Tinto had regardless of its endorsement of the UNDRIP principles, 'effectively neutralised these commitments in their front-line practices.'³⁵ Rio Tinto hence suffered the consequences of corporate reputational damage when legal compliance is fulfilled 'but in the absence of corporate ethics and community responsibilities.'³⁶

³⁴ The reasons why Aboriginal sites are not recorded are varied, but one important consideration is that some sites are secret or sacred and hence cannot be disclosed to uninitiated persons. Juukan Government Response, 'Australian Government Response to the Joint Standing Committee on Northern Australia's A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge', Australian Government, 2022, 9. Furthermore, the Minister may also deregister Aboriginal sites, and such a decision cannot be appealed by the affected Aboriginal community. Traditional Owners - Niyaparli People and Minister of Health, Indigenous Affairs [2009] WASAT 71 (2009).

³⁵ Kemp et al., "Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change," 382.

³⁶ V. Oliveri et al., "The Juukan Gorge Destruction: A Case Study in Stakeholder-Driven and Shared Values Approach to Cultural Heritage Protection," *Journal of Cultural Heritage Management and Development* (2022).

IV. FPIC ITS APPLICATION AND SHORTCOMINGS IN JUUKAN GORGE

The Juukan Gorge incident highlights several aspects of FPIC of which the following are most pertinent:

4.1. Limitations of International Law

Although Australia subscribes to UNDRIP and to several other international instruments that seek to protect and promote the rights of Indigenous People, those international norms must, as in the case of Canada, be converted into domestic legislation to be of any legal and practical effect.³⁷ The gap between what is promised by international instruments and the protections on offer within domestic legislation, is often confusing and frustrating to Indigenous People. Added thereto, the assertion by advocates that the provisions of UNDRIP are enforceable legal norms in domestic law adds to expectations associated with FPIC that cannot legally be met in domestic law.³⁸ Although international legal and ethical developments are important, domestic regulatory arrangements are often slow to follow and, in some instances such as evidenced by Juukan Gorge, may be greatly inadequate for contemporary protections of indigenous rights. Centrally to this point is the proposition by advocates that FPIC implies a right of veto to indigenous communities with resultant loss of regulatory power by states, whilst states resist such a proposition and insist that final regulatory power about developments remains with the state.

4.2. Domestic Legislative Framework

The shortcomings in the domestic legislation of Western Australia are mainly to blame for the Juukan events. Some of the most noticeable lacunas in the legislation were: no requirement for applications to damage or destroy sites to disclose detailed and up to date information about the site and its scientific, cultural and historical importance; no requirement for new information about

³⁷ *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, assented to June 21, 2021 (Canada).

³⁸ UN Economic and Social Council (ECOSOC), *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, E/C.19/2005/3 (New York: United Nations, 2005).

a site to be submitted to the Minister; no ability of Aboriginal people to appeal an approval for a site to be damaged or destroyed; no ability of the Minister to rescind or amend a previously issued approval; lack of ongoing responsibility on the developer to share information and to continue consulting with Indigenous People; and lack of oversight by the regulating authority to ensure that provisions of the Act are adhered to. This also highlights, however, that industry self-regulation has its limits; that the absence of sanctions when Aboriginal sites are damaged may give rise to slackness within companies; and regardless of commitments by Rio Tinto to protect and promote Aboriginal culture, the absence of clearly established and enforceable legal responsibilities exposed the weaknesses of the legislative regime and self-regulating protocols.

4.3. Meaning of “Free” in FPIC

The meaning of ‘free’ is to be ascertained in the context of its use, but in the case of Juukan the lack of a freely made decision was obvious, for example: some of the legal material given to the PKKP people for their approval was so voluminous and extensive with little time to consider, that one cannot say that reasonably they had adequate opportunity to apply their mind and to consent to the provisions. Furthermore, the failure of Rio Tinto to disclose to the PKKP people the 4 options for location of the mine, whilst only presenting 1 option as if it that was the final and only option, clearly falls short of enabling them to freely make an informed decision. Finally, the absence of an appeal mechanism whereby the PKKP people could challenge the approval granted by the Minister and the failure to share with the PKKP people the blasting schedule, were inconsistent with the most basic elements of procedural fairness and natural justice. One cannot reasonably construe consideration of a proposal as ‘free’ if the information provided is not detailed and complete and the legislative regime protects the rights of the proponent of a development but not the rights of the indigenous custodians of the sites.³⁹

³⁹ *Minister of Mineral Resources and Energy and Others v. Sustaining the Wild Coast NPC and Others* (Case Nos. 58/2023, 71/2023, 351/2023) [2024] ZASCA 84 (Supreme Court of Appeal of South Africa, June 3, 2024).

4.4. Meaning of ‘Prior’ in FPIC

The meaning of ‘prior’ is to be ascertained in the context of its use, but the most obvious plain English meaning is that Indigenous People should be consulted *before* any development occurs or before an approval for development is granted. Added thereto, the scope and scale of a project may require ongoing FPIC, for example as a mine expands.⁴⁰ In the Juukan Gorge case this standard was failed in several respects, but most importantly: the application for the destruction of the sites was not submitted to the PKKP people for comment; the legal arrangements entered into with Rio Tinto precluded the PKKP people from pursuing legal options outside the terms of the contract; the PKKP people could not appeal the ministerial approval to destroy the sites; the new ethnographic information collated by the researchers after approval for destruction had been granted could not be relied upon by the PKKP people to seek mitigation of damage or a redesign; and the approval by the Minister had enduring effect regardless of new research findings about the importance of the sites. The ongoing nature of FPIC was therefore denied and the blasts occurred without the adequate prior involvement or approval of the PKKP people.

4.5. Meaning of ‘Informed’ in FPIC

The meaning of ‘informed’ is to be ascertained in the context of its use, but plain English implies that all relevant information pertaining to the proposal under consideration must be made available to the indigenous community to enable it to make an informed decision, for them to take advice, and to propose mitigatory measures. This obligation does not necessarily imply commercial in confidence information, but it includes the nature and extent of access sought to traditional land; the timing and duration when access is sought; the duration of the project; the expected impacts of the project on land, environment and communities; mitigatory steps available to limit the impact; and arrangements for ongoing consultation as the project unfolds.⁴¹ The Juukan Gorge project

⁴⁰ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069 (Supreme Court of Canada, 2017).

⁴¹ *Kebaowek First Nation v Canadian Nuclear Laboratories* 2025 FC 319 (Federal Court of Canada, 2025).

failed in several material aspects in this obligation: Rio Tinto did not disclose to the PKKP people the 4 options available for the location or footprint of the mine as it expanded; Rio Tinto did not inform the PKKP people of the section 18 application and to the extent that it shared information the inadequacy of the application was not made known to the PKKP people; the possible options for mitigation of blasting were not disclosed to the PKKP people; the legal arrangements between Rio Tinto and the PKKP people restricted their right to seek alternative relief; and there was generally an absence of effort to secure the informed consent of the PKKP people for the damage to be caused to sites.

4.6. Meaning of ‘Consent’ in FPIC

The meaning of ‘consent’ does not imply a legal veto, but it does require a sincere and good faith effort to secure the approval of an indigenous community. Although the community has the right to withhold approval, it does not constitute a veto. The final decision making remains with the regulatory authority. In Canada this has been put as follows:

While the FPIC standard is *not a veto*, it requires significant robust processes tailored to consider the impacted Indigenous Nations laws, knowledge, and practices and employs processes that are directed toward finding mutual agreement. In this case, the record demonstrates that the Commission and the CNSC were not prepared to modify or alter their processes to respond to Kebaowek’s requests for accommodation. This was not reasonable and failed to consider the important added *contextual factors* of the UNDRIP, which must now be considered when assessing the adequacy of Crown consultation. (emphasis added) *Kebaowek First Nation v Canadian Nuclear Laboratories* 2025 FC 319 (2025), ¶ 183.

The process adopted by Rio Tinto to seeking consent was highly deficient and hence it is reasonable to conclude that Rio had failed in its obligations. The following are some of the major shortcomings that negated a good faith effort to achieve consent: lack of information provided to the PKKP people; legal arrangements that constricted the ability of the PKKP people to seek alternative legal remedies; failure to disclose essential information to the PKKP people; lack of time for the PKKP people to consider complex legal documents; lack of

consistent communication between Rio Tinto and the PKKP people; submitting an incomplete application to the Minister of Aboriginal Affairs for approval to destroy sites; failure to undertake internal self-assessment based on additional material that had been proved by experts; and failure to inform the PKKP people when and where blasts were to occur.

4.7. Disclosure of New and Additional Material

The Juukan Gorge event highlights the importance that FPIC may, depending on the nature and scale of a project, be of an ongoing nature. As the project unfolds new information about indigenous sites may become available; or new impacts that had not been anticipated may affect an indigenous community or the environment; or the scope and scale of the project may change. Some allowance should exist for approvals to be amended, for example, mitigatory steps may be required in respect of areas that had previously been regarded as suitable for operations. The Juukan Gorge experience where a ministerial approval was unconditional and impossible to rescind or amend is obviously untenable. The Juukan Gorge experience highlights the importance that staff within the company that seeks access to land should be specially trained to deal and liaise on an ongoing basis with Indigenous People; the staff should have their voice clearly heard in the company; the staff should have access to all relevant materials; and staff should be held to account for compliance with legislative, policy and self-regulatory standards. Juukan Gorge could have been prevented and the footprint of the mine could have been adjusted if Rio Tinto had done an internal review based on the post 2013-evidence it had received. Although self-regulation cannot be the sole avenue for FPIC, Juukan Gorge shows the importance of self-reflection and internal review to meet the requirements of social licence to operate.

4.8. Carrot and Stick

FPIC contains a carrot and stick element. On the one hand the benefits of good relationships with Indigenous People should give credit to a company in terms of social profile, investor support, and general social licence to operate.

On the other hand, poor relationships ought to attract a penalty and sanction. The deficiencies of the Aboriginal Heritage Act were glaring, for example: no obligation to submit detailed and complete information as part of the application; no obligation to communicate the application with the traditional custodians of the land; no penalty for failure to provide full disclosure; and no penalty to provide new research findings to the decision-maker. Additionally, Rio Tinto failed to comply with acceptable industry-practices. The statutory balance was clearly in favour of Rio Tinto. Rio furthermore failed to apply industry standards in self-regulation, and as a result, irreplaceable heritage was destroyed.

4.9. Who Makes the Final Decision?

A final decision must sometimes be made if no agreement is reached. Legally, FPIC as it arises under UNDRIP does not empower indigenous communities to become the final decision-maker.⁴² The effort to reach consent cannot be equated with an obligation to reach consent. The right to withhold consent under UNDRIP cannot be construed as a right of veto. Government agencies are unlikely to divest themselves of decision-making in favour of indigenous groupings. This explains why UNDRIP is widely supported since it is not legally enforceable. The question is not who is responsible to make a final decision, since it is clear that the state retains its responsibilities. The question is what checks and balances apply to the exercise of the state's powers. Juukan Gorge highlights the limitations under the Aboriginal Heritage Act: the section 18 notice could not be legally challenged; the decision of the minister to grant approval to damage could not be legally reviewed; new information about the importance of the sites could not give rise to the decision of the minister being revisited; and the approval issued by the minister had ongoing duration. The answer to these shortcomings is not for decision-making to shift to the indigenous community, since a community may also act unreasonably and improperly. The answer is to ensure that due process is available to all parties before effect is given to a decision by the state.

⁴² *Kebaowek First Nation v Canadian Nuclear Laboratories*.

V. CONCLUSION

This article has highlighted, by reference to the Juukan Gorge events in Australia, how complex the regulatory system has become in respect to FPIC when measures impact on indigenous traditional areas. Although Juukan Gorge is located in Australia, the issues arising from the inadequate consultation and regulatory process are relevant to other parts of the world. On the one hand FPIC often leaves Indigenous People disillusioned because it does not grant them a veto, whilst on the other hand proponents of a development may be frustrated if the approval granted to them by the state is legally challenged by Indigenous People.

It has been illustrated that states generally retain their regulatory authority regardless of their commitment to FPIC, but the implication is that approvals may be granted against the express wishes and interests of Indigenous People. The withholding of consent is not construed as a veto. It is simply one of the facts the state must consider when making a final decision. This leaves both sides at risk: On the one hand, Indigenous People may participate in FPIC and face a situation where regardless of their opposition to a measure, approval is given to it. On the other hand, a developer is at risk since they may suffer reputational damage by proceeding with a development regardless of opposition by the indigenous community. They may also face litigation from Indigenous People regardless of the approval that had been given by the state for a measure to proceed.

The article also highlighted the shortcomings of FPIC since its normative value is restricted by the absence of it being a legal norm in international law. FPIC as it appears in UNDRIP is not legally binding, FPIC is not a treaty-right, but that does not render FPIC without normative value. FPIC has contributed to greater awareness of the interests of Indigenous People in customary land. State regulation and private sector self-regulation view FPIC as part of the social licence to conduct business as a responsible citizen. Juukan Gorge illustrates however the risks FPIC holds to both Indigenous People and developer, and how complex it can be to find win-win solutions.

BIBLIOGRAPHY

- Achtouk-Spivak, Leila, and Rachael Garden. "OECD National Contact Point Specific Instances: When 'Soft Law' Bites?" *Journal of International Dispute Resolution* 13 (2022): 608–42.
- AIATSIS. "Inquiry into the Destruction of the 46,000-Year-Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia." Canberra: AIATSIS, July 31, 2020.
- Australian Government. "Australian Government Response to the Joint Standing Committee on Northern Australia's *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge*." Canberra: Australian Government, 2022.
- Australian Human Rights Commission. *Study on Free, Prior and Informed Consent: Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia*. 2018.
- Baleni v Minister of Mineral Resources*, 2019 (2) SA 453 (GP) (2019).
- Borschmann, Gregg. "Report Reveals Rio Tinto Knew the Significance of 46,000-Year-Old Rock Caves Six Years before It Blasted Them." *ABC News*, June 5, 2020. <https://www.abc.net.au/news/2020-06-05/rio-tinto-knew-6-years-ago-about-46000yo-rock-caves-it-blasted/12319334>.
- Canada. *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (assented to June 21, 2021).
- Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 (2017). <https://www.canlii.org/en/ca/scc/doc/2017/2017scc40/2017scc40.html>.
- De Villiers, Bertus. "Right to Be Consulted, but the Frustration of Being Ignored: The Ongoing Efforts in International Law to Give Practical Meaning to Free, Prior, and Informed Consent." In *Indigenous Rights in the Modern Era: Regaining What Has Been Lost*. Leiden: Brill, 2023.

Forrest and Forrest Pty Ltd v Minister of Aboriginal Affairs [2024] WASCA 96 (2024).

Joint Standing Committee on Northern Australia. *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge*. 2021. <https://nativetitle.org.au/sites/default/files/2021-10/AWayForward.pdf>.

Kaur, Amandeep, Sumit Lodhia, and Andrea Lesue. "Being Left Behind: Disclosure Strategies to Manage the Juukan Gorge Cave Blast." *Accounting, Auditing & Accountability Journal* (2024). *Kebaowek First Nation v Canadian Nuclear Laboratories* 2025 FC 319 (2025).

Kemp, Deanna, Karen Kochan, and John Burton. "Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change." *Journal of Energy and Natural Resources Law* 41 (2023): 379–402.

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1 (1992).

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 (Supreme Court of the Northern Territory, April 27, 1971).

Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others (Case No 58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (June 3, 2024).

Nagar, Anirudh. "The Juukan Gorge Incident: Key Lessons on Free, Prior and Informed Consent." *Business and Human Rights Journal* 6 (2021): 377–83.

Oliveri, Valentina, Gregory Porter, Claire Davies, and Peter James. "The Juukan Gorge Destruction: A Case Study in Stakeholder-Driven and Shared Values Approach to Cultural Heritage Protection." *Journal of Cultural Heritage Management and Development* (2022).

Parliament of Australia (House of Representatives). "Juukan Gorge Inquiry to Question Rio Tinto." Canberra, 2020. https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/Media_Releases/Juukan_Gorge_inquiry_to_question_BHP.

- Passas, Nikos. "Lawful but Awful: 'Legal Corporate Crimes.'" *Journal of Behavioural and Experimental Economics* 34 (2005): 771-86.
- Rio Tinto. "Juukan Gorge." 2025. <https://www.riotinto.com/en/news/trending-topics/juukan-gorge>.
- Slack, M., M. Fillios, and R. Fullagar. "Aboriginal Settlement during the LGM at Brockman, Pilbara Region, Western Australia." *Archaeology in Oceania* 44 (2009): 32-39.
- Slack, M., W. Law, and L. Gliganic. "The Early Occupation of the Eastern Pilbara Revisited: New Radiometric Chronologies and Archaeological Results from Newman Rockshelter and Newman Orebody XXIX." *Quaternary Science Reviews* 236 (2020): 106240. <https://doi.org/10.1016/j.quascirev.2020.106240>.
- Tomaselli, Alexandra. "The Right to Political Participation of Indigenous Peoples: A Holistic Approach." *International Journal on Minority and Group Rights* 24 (2017): 390-427.
- Traditional Owners-Niyiyaparli People and Minister of Health, Indigenous Affairs* [2009] WASAT 71 (2009).
- United Nations Economic and Social Council (ECOSOC). *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples* (E/C.19/2005/3). 2005. <https://digitallibrary.un.org/record/544406?v=pdf>.
- Western Australia. *Aboriginal Heritage Act 1972 (WA)*. 1972.
- Yorta Yorta v Victoria* [2002] HCA 58; (2002) 214 CLR 422 (2002).

THE DIMENSION OF JUDICIAL ACTIVISM OF INCORPORATING CONSTITUTIONAL COMPLAINT: AN OVERVIEW ON JUDICIAL INDEPENDENCE

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Abstract

This paper analyzes the debate surrounding the potential for Indonesia's Constitutional Court to incorporate a constitutional complaint mechanism. While acknowledging the strong arguments for its inclusion, which are deep-rooted in the need for substantive justice and the protection of fundamental rights, this paper advocates for a cautious approach. The core argument is that the Court should refrain from expanding its jurisdiction through judicial interpretation alone. Such an act could be viewed as judicial overreach, potentially undermining the Court's legitimacy, disrupting the separation of powers, and weakening the principles of judicial accountability and judicial independence. Drawing on the historical context of human rights in Indonesia and the foundational design of the Constitutional Court, this analysis suggests that a legitimate expansion of authority should be achieved through formal, democratic processes, such as a constitutional amendment or a revision of the Constitutional Court Law. By advocating for judicial restraint, the paper emphasizes that the Court's strength and independence lies not in expanding its own power, but in strictly adhering to its constitutional mandate as a check on other branches of government. The paper concludes that not exercising restraint by incorporating a constitutional complaint mechanism through the Court's interpretative authority can lead to long-term negative effects on the Court's judicial independence, both in theory and practice.

Keywords: Constitutional complaint; Judicial accountability; Judicial independence; Judicial restraint

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I. INTRODUCTION

This writing emphasizes that the Constitutional Court should proceed and exercise caution when considering expanding its authority using constitutional interpretation, particularly regarding constitutional complaints. Arguably, the Court's primary role as a check and balance to the elected branches requires the institution to stay within constitutional limits and avoid broadening its powers in a way that could cause conflicts or weaken democratic legitimacy and the constitution. It's worth noting that the paper doesn't entirely oppose the formal legal expansion of authority, as long as it's done legitimately through the formal process of constitutional amendment or even through the revision of the Constitutional Court Law. As many highly prolific scholars in Indonesia are generally in favor of activist judges, this paper aims to present a counter-argument and offer another perspective, arguably a crucial element in a democratic nation. Furthermore, it tries to present a counter-argument to the dominant view, asserting that using judicial interpretation to expand power is controversial and could undermine judicial independence, the doctrine of separation of powers, and potentially disrupt the existing system of checks and balances.

1.1. Background

Before delving into the argument, it is necessary first to explain the landscape of the literature and previous research that specifically discuss constitutional complaints within Indonesia's constitutional law framework. Some arguments related to the benefits of incorporating a constitutional complaint into the current system can be considered to be of an empirical and philosophical nature. A common argument based on real-world experience or empirical reasoning is that many judicial review cases handled by the Constitutional Court can, in fact, be considered as constitutional complaint cases. Additionally, the philosophical reasoning would be closely tied to the rationale behind the establishment of the Constitutional Court in the first place. Those philosophical rationales include the

need for maximum protection of constitutional rights,¹² addressing the current and potential future injustice, and the manifestation of good governance.³ Further elaboration on this can be found later in this section.

Generally speaking, the current published papers and academic opinions supporting the inclusion of constitutional complaints can be categorized into two main groups. These two groups are: the one that promotes the inclusion in general, and the second advocates for adding it to protect specific constitutional rights or address particular legal needs. For example, a constitutional complaint for a specific legal need easily reflected in the paper titled “The Need for A Constitutional Complaint Mechanism for Tax Matters in Indonesia” by Adrianto Dwi Nugroho et.al argues that a constitutional complaint is one of the viable options and mechanisms to balance the tax enforcer’s and taxpayer’s rights.⁴ The rationale behind this argument is that the authors believed that taxpayers are vulnerable to privacy, property, and equal treatment, especially in tax matters in Indonesia. Another paper, written by Vino Devanta Anjas Krisdanar, which also endorsed the inclusion in a specific legal needs context, explores how a constitutional complaint might enhance the protection of freedom of religion as a constitutional right in Indonesia.⁵

It is safe to conclude that the current published papers on the theme of constitutional complaints in Indonesia generally favor expanding and including constitutional complaints as part of the Constitutional Court’s power. To incorporate the said procedure into the system, some notable proposals consider adding both technical and substantive aspects, in addition to incorporating the said mechanism. The aforementioned technical aspect follows the reconstruction

¹ Dewa Gede Palguna, “Constitutional Complaint and the Protection of Citizens’ Constitutional Rights,” *Constitutional Review* 3, no. 1 (2017): 17

² Pan Mohamad Faiz, “A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court,” *Constitutional Review* 2, no. 1 (2016): 111

³ Tanto Lailam et al., “The Proposal of Constitutional Complaint for the Indonesian Constitutional Court,” *Jurnal Konstitusi* 19, no. 3 (2022): 34.

⁴ Adrianto Dwi Nugroho et al., “The Need for A Constitutional Complaint Mechanism for Tax Matters in Indonesia,” *Constitutional Review* 9, no. 2 (2023): 5

⁵ Vino Devanta Anjas Krisdanar, “Menggagas Constitutional Complaint dalam Memproteksi Hak Konstitusional Masyarakat Mengenai Kehidupan dan Kebebasan Beragama di Indonesia [Initiating a Constitutional Complaint to Protect Citizens’ Constitutional Rights on Freedom of Religion in Indonesia],” *Jurnal Konstitusi* 7, no. 3 (2016): 204–5.

and strengthening of the judicial organization's structure, as well as proposing preliminary examinations to filter out complaints by referring them to panel judges before the actual procedure.⁶ Procedure on preliminary ruling (on a different definition) for constitutional complaints endorsed by Gautama Budi Arundhati on the rationale that the practice and fulfillment of constitutional rights by the Constitutional Court is currently and has been "indirect". Hence, he argues that, in practice, the entire process does not fully adhere to the idea of a substantive rule of law.⁷ Arundhati also points out an argument regarding the substantive aspect of incorporating the constitutional complaint into the system. In this case, the argument he emphasizes centers on the possibility of giving District Courts the power to refer constitutional questions directly to the Constitutional Court. He further argues that this would not only help bridge the gap between limited judicial capacity and the extensive need for individual constitutional protection, but also strengthen the substantive rule of law and ensure the constitution has a direct impact on people's daily lives in the long run.⁸ Such a mechanism is often called the "concrete" form of judicial review, in contrast to the "abstract" form of judicial review currently used by the Court. This highlights the substantive and more concrete approach for the inclusion of the constitutional complaint mechanism.

The need for a more concrete form of judicial review in Indonesia also sparks ideas among scholars to include constitutional questions alongside constitutional complaints toward the legal framework system.⁹ In this case, the urgent need for substantive justice and the extensive fulfillment of constitutional rights are claimed to be the fundamental basis of the mentioned proposal. For example, former Chief Justice of the Constitutional Court, Hamdan Zoelva, proposed

⁶ Amarru Mutfie Holish and Aulia Maharani, "Strengthening Constitutional Complaint Authority: Enhancing Citizens' Constitutional Rights Protection in Indonesia," *Journal of Law and Legal Reform* 4, no. 3 (2023): 357-59.

⁷ Gautama Budi Arundhati, "Kemungkinan Penerapan Preliminary Ruling Procedure sebagai Media Constitutional Complaint di Mahkamah Konstitusi [The Possibility of Implementing a Preliminary Ruling Procedure as a Medium for a Constitutional Complaint in the Constitutional Court]," *Jurnal Konstitusi* 14, no. 4 (2018): 825.

⁸ Arundhati, "Kemungkinan Penerapan Preliminary," 825-826.

⁹ Hamid Chalid and Arief Ainul Yaqin, "Menggagas Pelembagaan Constitutional Question melalui Perluasan Kewenangan Mahkamah Konstitusi dalam Menguji Undang-Undang [Initiating the Institutionalization of Constitutional Questions Through the Expansion of the Constitutional Court's Authority in Reviewing Laws]," *Jurnal Konstitusi* 16, no. 2 (2019): 364-67.

that both constitutional complaints and constitutional questions ought to be incorporated into the Court to address the societal demand stemming from the current inadequate mechanisms for protecting constitutional rights.¹⁰

Historically, although the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR) unanimously approved the establishment of the Constitutional Court during the formal constitution amendment process following the Reform (*Reformasi*), the concept of a constitutional complaint was not thoroughly considered as one of its functions.¹¹ It was revealed that there were two significant obstacles to why the constitutional complaint was not intensively considered. First, there's concern about a potentially unmanageable increase in caseload. Second, another concern is that the additional function would possibly cause overlaps within the functions of existing courts' jurisdiction.¹²

Historically speaking, discussion about constitutional complaints in Indonesia started to gain momentum as retired Constitutional Court justices Soedarsono and Maruarar Siahaan delivered their dissenting opinions in the Constitutional Court's decision No 001/PUU-IV/2006. Former Justice Soedarsono specifically argued that the term "individual constitutional rights" in Article 51 Paragraph (1) should be interpreted broadly. As a result, he gave the Article a broad interpretation to accommodate constitutional complaints as the remedy for citizen rights violations. He arguably broadly interpreted the capacity and the authority of the Constitutional Court by arguing that the court decision (in this context, the Supreme Court's decision) should also be categorized as an object of review. Along the same lines, former justice Maruarar Siahaan emphasizes that incorporation of the constitutional complaint has a "sufficient legal basis" grounded in the 1945 Constitution's fundamental principles.¹³

¹⁰ Hamdan Zoelva, "Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara [Constitutional Complaint and Constitutional Question and Protection of Citizens' Constitutional Rights]," *Jurnal Media Hukum* 19, no. 1 (2012): 153-54.

¹¹ I Dewa Gede Palguna, "Overcoming Constitutional Obstacles in Dealing with Constitutional Complaint Issues: Indonesia's Experience" (paper presented at the International Symposium on Constitutional Complaint, Jakarta, August 2015), 147-48.

¹² Palguna, "Overcoming Constitutional Obstacles," 148.

¹³ *Judicial Review of Constitutional Court Law*, Decision of the Constitutional Court No. 001/PUU-IV/2006 (Constitutional Court of the Republic of Indonesia, 2006).

In accordance with that, the discourse or landscape on constitutional complaint has currently expanded as prominent figures such as former Chief Justice of the Constitutional Court, Mohammad Mahfud MD¹⁴, the former Justice, I Dewa Gede Palguna¹⁵ the Head of the Constitutional Court Research Center, Pan Mohammad Faiz,¹⁶ that have ardently published several papers emphasizing the importance of incorporating constitutional complaints into Indonesia's constitutional practice landscape. They contended that, given these comprehensive arguments, it is sensible to consider constitutional complaints as a standard procedure, since they naturally follow from Indonesia's core principles of good governance: the rule of law and the constitutional democracy.

Palguna strongly advises incorporating a constitutional complaint and argues that it is a necessary mechanism for Indonesia's legal framework to fully embrace constitutionalism, which he asserts has not yet been fully achieved. He also argues that the absence of a constitutional complaint mechanism contradicts the history and the fundamental purpose of establishing the Constitutional Court,¹⁷ and in the long run, undermines the very foundation of the nation's constitutional democracy and the rule of law itself.¹⁸ Another philosophical rationale, as presented by Pan Mohammad Faiz, proposes the adoption of both the constitutional question and the constitutional complaint mechanism. His point of view emphasizes the Constitutional Court's duty as the protector of fundamental rights.¹⁹ Notably, some scholars have also conducted a comparative study of constitutional complaint best practices in this matter across several

¹⁴ Mohammad Mahfud MD, "Rambu Pembatas dan Perluasan Kewenangan Mahkamah Konstitusi [Boundary Signs and Expansion of the Constitutional Court's Authority]," *Jurnal Hukum Ius Quia Iustum* 16, no. 4 (2009): 441–60.

¹⁵ Palguna, "Overcoming Constitutional Obstacles," 147–152; Palguna, "Constitutional Complaint and," 2–20; I Dewa Gede Palguna, "Yang 'Terlepas' dari Kewenangan Mahkamah Konstitusi RI: Pengaduan Konstitusional (Constitutional Complaint) [Those 'Separated' from the Authority of the Constitutional Court of the Republic of Indonesia: Constitutional Complaints]," *Lex Jurnalica* 3, no. 3 (2006): 128–35.

¹⁶ Pan Mohamad Faiz, "Masa Depan Constitutional Complaint [The Future of Constitutional Complaint]," *Majalah Konstitusi*, November 2020; Faiz, "A Prospect and Challenges," 104–21.

¹⁷ Palguna, "Constitutional Complaint and Protection", 17.

¹⁸ Palguna, "Yang 'Terlepas' dari Kewenangan", 133.

¹⁹ Faiz, "A Prospect and Challenges," 105.

countries, including South Korea, Germany, and other European nations, to strengthen their argument further.²⁰

As mentioned above, it is safe to conclude that the majority of the discourse favors incorporating the constitutional complaint into the authority of the constitutional court. It is worth also noting that, for the most part, currently available published papers suggested three methods to incorporate constitutional complaints into the Court's authority: by formally amending the 1945 Constitution, by revising the Law on the Constitutional Court, or by extensively utilizing the Court's interpretative judicial review power to expand its jurisdiction voluntarily. While some papers strongly suggest that amending the 1945 Constitution is the safest and most holistic approach to the issue, the third option—arguably the riskiest—still remains a plausible alternative. As previously noted, this paper argues that the latter, in which is involving the Court expanding its own authority, may not be the most suitable choice and might lead to judicial overreach, potentially breaching the essential core of the separation of powers doctrine.

Looking back at the founding history of the Constitutional Court, it was designed and aimed to help “convert” Indonesia from authoritarianism to constitutional democracy.²¹ Established in a post-conflict setting, the Constitutional Court is becoming an essential part of ongoing nation-building after the Reformasi.²² Historically speaking, before the Reformasi, Indonesia had no judicial institution that had the power to interpret the Constitution, meaning the Constitution was technically not justiciable. Therefore, the Constitution used to be the object of misuse to justify the authoritarian-leaning regime for its arguably undemocratic policies and agendas.²³ Following its formal establishment

²⁰ M. Lutfi Chakim, “A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions,” *Constitutional Review* 5, no. 1 (2019): 130–31; Yunita Nurwulantari and Anna Erliyana, “Menimbang Model Pengujian Keputusan Pejabat Publik oleh Mahkamah Konstitusi Republik Indonesia (Studi Perbandingan Indonesia dan Korea Selatan) [Considering the Model of Testing Public Officials’ Decisions by the Constitutional Court of the Republic of Indonesia (Comparative Study of Indonesia and South Korea)],” *Jurnal Konstitusi* 18, no. 1 (2021): 179–82; Tanto Lailam and Nita Andrianti, “Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia,” *Bestuur* 11, no. 1 (2023): 83–90.

²¹ Simon Butt, *Judicial Dysfunction in Indonesia* (Melbourne: Melbourne University Press, 2023), 238.

²² Robert French AC, “The Australian Experience: Constitutional Courts-The Rule of Law,” in *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia*, ed. Bertus de Villiers et al., vol. 12 (Leiden: Brill, 2024), 284.

²³ Butt, *Judicial Dysfunction in Indonesia*, 239.

as one of the apex judicial authorities in Indonesia, the Constitutional Court bears the responsibility of strengthening democratic institutions, promoting the rule of law, and protecting fundamental rights.²⁴ In fact, after 20 years since its founding, scholars credited the Court's success in preventing "rapid democratic backsliding" and a "reversion into authoritarianism".²⁵ The Constitutional Court managed to establish its own standard for building its reputation and ultimately set new standard for Indonesia's judiciary. As reflected in Simon Butt argument that, due to the strong leadership, the Court has managed to appear more powerful compared to any other Indonesian court.²⁶

The problems arise when the Court itself, which has, on multiple occasions, broadened its authority through various rulings. It is worth noting that the expansion of the Court's authority and power, which in this case potentially exceeds its constitutional authority and encroaches on the powers of the legislative and executive branches, could be considered a significant breach of the separation of powers doctrine. These expansions include the Court's shift from supposedly being a "negative legislature" into a "positive legislature" and its "conditional" decisions. One of the justices did not deny that, in fact, the Court had effectively made law, which is arguably considered unthinkable in the context of a civil law tradition. He further argued that these actions were justified, as otherwise, the complexity of legislation would cause delays in achieving substantive justice.²⁷

Scholars generally respond to this phenomenon in two ways: some support the Court's "progressiveness,"²⁸ while others oppose it and advocate for the Court

²⁴ Saldi Isra and Pan Mohamad Faiz, "The Indonesian Constitutional Court: An Overview," in *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia*, ed. Bertus de Villiers et al., vol. 12 (Leiden: Brill, 2024), 55–56.

²⁵ Adfin Rochmad Baidhowah, "Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding," *Constitutional Review* 7, no. 1 (2021): 128.

²⁶ Butt, *Judicial Dysfunction in Indonesia*, 238.

²⁷ Butt, *Judicial Dysfunction in Indonesia*, 253.

²⁸ Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positif Legislatif) [Progressiveness of Constitutional Judges in Making Decisions (Analysis of the Existence of Constitutional Court Decisions of a Positive Legislature Nature)]," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–25; Dian Agung Wicaksono et al., "Mencari Jejak Konsep Judicial Restraint dalam Praktik Kekuasaan Kehakiman di Indonesia [In Search of Traces of the Concept of Judicial Restraint in the Practice of Judicial Power in Indonesia]," *Jurnal Hukum & Pembangunan* 51, no. 1 (2021): 200–201.

to apply restraint instead.²⁹ Following the flow of the argument, this paper endorses and strongly emphasizes the latter perspective; it is essential for the Court not to exceed its constitutional authority and potentially encroach upon the authority of the democratically elected branches by expanding its judicial review power to include constitutional complaints. Resisting the temptation to extend the power is a part of judicial accountability, which is arguably also an essential component of the judicial independence doctrine.

It is understandable to incorporate constitutional complaints, given the rationale mentioned above and given that the majority of the constitutional scholars in the nation are mostly in favor of it. However, as one of the essential and inseparable components for preventing democratic backsliding or fully achieving the Court's core function as the protector of constitutional rights and democracy, it is also worth noting that the Court does not need to base its decisions on popular opinion on specific issues. Instead, to serve its function of restricting the powers of other branches and upholding the rule of law, the Court must adhere strictly to the Constitution.³⁰

This paper argues that extending the Court's judicial review power could be counterproductive, as it may face potential resistance from other elected branches and decrease their incentives to perform their democratic duties effectively. Before proceeding to the next section, it's essential to cite what the Supreme Court Justice of the United States said in *Trump v Casa, Inc.*; "When a court concludes that the Executive Branch has acted unlawfully, the answer is not for the court to exceed its power, too". As the branch responsible for policing the limits of other branches and holding the final authority on constitutional matters, the judiciary arguably should restrict itself to what the constitution specifies.

1.2. Research Question

The paper primarily argues that the Court should refrain from expanding its judicial review authority to include constitutional complaints through

²⁹ Dian Agung Wicaksono et al., "Mencari Jejak Konsep Judicial Restraint dalam Praktik Kekuasaan Kehakiman di Indonesia [In Search of Traces of the Concept of Judicial Restraint in the Practice of Judicial Power in Indonesia]," *Jurnal Hukum & Pembangunan* 51, no. 1 (2021): 200–201.

³⁰ Isra and Faiz, "The Indonesian Constitutional," 90.

interpretative methods. Such expansion could be perceived as judicial overreach, ultimately threatening the judiciary's accountability and independence. The paper emphasizes the principles of checks and balances and the separation of powers as the conceptual foundation to support this view. Specifically, the focus is on two critical aspects affecting judicial independence: judicial accountability and the potential disruption to the current check and balances system.

II. DISCUSSION

2.1. Constitutional Complaint and Indonesia's Constitutional Court Design in Human Rights Issues

Before focusing on constitutional complaints, it is essential to understand the history, discourse, and constitutional debates surrounding human rights in Indonesia, given the close relationship between the concept of constitutional complaints and human rights. Historically speaking, the incorporation of the human rights clauses in Indonesia's constitutional founding history is a history of compromise. Soepomo, a key figure among the nation's founders, argued that including human rights clauses in the constitution is unnecessary. He believed Indonesia would be founded on a family-state model, where the head of state, metaphorically like a family head, would always care for its citizens, who are viewed as children. In this case, Soepomo envisioned a leadership led by a benevolent and strong leader. Therefore, he saw no relevance in adopting human rights clauses.³¹ Soekarno, one of the signatories of the Declaration of Independence, also endorses the same perspective. As a believer in the family-state model, Soekarno explicitly stated that human rights or citizen rights, in particular, should not be included in the constitution. He further explained that the incorporation of such rights could trigger the emergence of "liberalism and individualism," which he argued is a contrary concept to communitarianism that he envisioned. Additionally, he is also convinced that the incorporation of such clauses simply will not eradicate poverty and hunger.³²

³¹ Todung Mulya Lubis, *Mencari HAM: Hak Asasi Manusia: Dilema Politik Hukum Indonesia Masa Orde Baru 1966–1990* [Searching for Human Rights: The Dilemma of Indonesian Legal Politics during the New Order Era 1966–1990] (Yogyakarta: Circa, 2021), 3–5.

³² Lubis, *Mencari Hak Asasi*, 124.

Another founding father, Mohammad Hatta, challenged this view. It is more than crucial to adopt human rights clauses, Hatta argued, to prevent the rise of authoritarianism. Challenging both Soepomo and Soekarno's view, Hatta stated that, precisely due to the deeply rooted communal values he also attributed to Indonesia, governance should be based on the principles of limited government, which emphasize the protection of fundamental human rights.³³ This debate ended with a compromise to include human rights clauses in the 1945 Constitution, albeit in an 'imperfect' form. To be more precise, the Initial 1945 Constitution did explicitly mention several human rights clauses; however, these clauses remained unenforceable until the executive and legislative branches created specific laws regarding human rights. In this case, human rights clauses were viewed as rights granted by the state, rather than as inherent natural rights, which is arguably a clear misconception.³⁴

Discussions and debates also took place during the drafting of the new constitution within the Constitutional Assembly (*Dewan Konstituante*) in the parliamentary era. Lubis argued that the discussion was heated and fierce.³⁵ However, it is no longer a matter of whether to include the human rights clause, but rather which human rights should be incorporated in the constitution.³⁶ Adnan Buyung Nasution explained that during that period, the human rights discussion was pragmatic, emphasizing greater protection for the vulnerable and considering what to include for a well-structured limited government. It also aimed to achieve a common understanding of the values being discussed. Further explained, the human rights issue was considered just as important as the debate on the nation's ideology.³⁷

This is where human rights issues begin to play a significant role in the history of the newly independent country. This was a pivotal moment for Indonesia,

³³ Lubis, *Mencari Hak Asasi*, 125.

³⁴ Lubis, *Mencari Hak Asasi*, 3-5.

³⁵ Lubis, *Mencari Hak Asasi*, 5.

³⁶ Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956-1959* [Aspirations for Constitutional Government in Indonesia: A Socio-Legal Study of the Constituent Assembly 1956-1959] (Jakarta: Grafiti, 1995), 131.

³⁷ Nasution, *Aspirasi Pemerintahan Konstitusional*, 131.

highlighting the need to foster healthy political discourse and to actively defend human rights, which should never be taken for granted.³⁸ Unfortunately, the Constitutional Assembly's constitution draft, which included its carefully debated human rights clauses, was never enacted due to the Presidential Decree of 1959. This decree explicitly disbanded the Assembly permanently and formally reinstated the Initial 1945 Constitution.

The human rights clause in the 1945 Constitution remained unchanged until the fall of the authoritarian-leaning regime of the New Order (*Orde Baru*). Soeharto, the second President who was in charge of the regime, was arguably not very keen on human rights as a concept. Instead, he was emphasizing the importance of fundamental obligations (*kewajiban asasi*)³⁹ which focuses more on the duty as a citizen rather than the rights they are entitled to. Todung Mulya Lubis argued that the New Order regime justified human rights violations by claiming that the state grants rights; therefore, it also means that the state has the authority to put them aside.⁴⁰

It is now clear that Indonesia has experienced fluctuations in its human rights record, both at the normative and practical levels. As Nasution pointed out, human rights served as a unifying element in the Constitutional Assembly debate because it was a unanimously accepted concept, even though each interest group (the nationalists, religious groups, and the socialists) interpreted it in different terms. These interest groups concur on at least two points: human rights are integral to the aspiration for independence, and they are also a fundamental part of the nation's core values and identity.⁴¹

The 1998 Reform was arguably one of the most significant turning points in the development of Indonesia's human rights regime. The Second Amendment of the 1945 Constitution has significantly expanded human rights provisions to the point of incorporating most of the provisions of the Universal Declaration of Human

³⁸ Nasution, *Aspirasi Pemerintahan Konstitusional*, 132.

³⁹ Lubis, *Mencari Hak Asasi*, 124.

⁴⁰ Lubis, *Mencari Hak Asasi*, 5.

⁴¹ Nasution, *Aspirasi Pemerintahan Konstitusional*, 132-134.

Rights.⁴² Additionally, the Fourth Amendment established the Constitutional Court as a judicial institution to ensure that incorporated constitutional rights are not violated. It is also evident that, since its establishment 20 years ago, Indonesia's Constitutional Court has been recognized as one of the key safeguards of rights in the country.⁴³⁴⁴ The history of Indonesia's Constitutional Court is strongly connected to efforts to promote human rights in the country. It is not an exaggeration to say that the Constitutional Court is one of the key factors in realizing justice based on human rights in Indonesia, precisely, after two consecutive authoritarian-leaning regimes and several cases of human rights violations, and after the long and comprehensive debate to incorporate well-crafted human rights provisions in the Constitution itself. It is safe to conclude that the Constitutional Court is an embodiment of the nation's continuous effort to be a healthy democracy under the rule of law.

Arguably, a healthy democracy under the rule of law and the protection of human rights are two sides of the same coin; one cannot be achieved without the other. Discourse on why constitutional scholar and some Justices of the Constitutional Court advocates incorporating constitutional complaint as a part of judicial review could be identified by the very nature of the mechanism itself. The Encyclopedia of Contemporary Constitutionalism defined constitutional complaint as "an extraordinary legal remedy that protects against the violation of specific constitutional rights and freedoms" or "an individual claim against the state for the protection of his or her fundamental rights in a special proceeding before a constitutional court".⁴⁵ While the constitutional complaint systems differ across countries, they share a common foundation and similarities in the substantive conditions for filing complaints or cases. As cited from the same encyclopedia, the standard requirements for bringing complaints are: to have a personal interest in bringing the complaint; to have a legal interest in bringing a complaint; to prove

⁴² Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Hart Publishing, 2012), 22.

⁴³ Janedjri M. Gaffar, "Peran Putusan Mahkamah Konstitusi dalam Perlindungan Hak Asasi Manusia Terkait Penyelenggaraan Pemilu [The Role of Constitutional Court Decisions in Protecting Human Rights Related to Election Implementation]," *Jurnal Konstitusi* 10, no. 1 (May 20, 2016): 12–14.

⁴⁴ Pan Mohamad Faiz, "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia," *Indonesia Law Review* 6, no. 2 (2016): 162–76.

⁴⁵ J. Cremades and C. Hermida, eds., *Encyclopedia of Contemporary Constitutionalism* (Cham: Springer, 2021), 2.

that the violation of rights and freedoms has already happened, and to exhaust in advance all other legal remedies/exhaustion of the court proceedings.⁴⁶ Clearly, according to the definition and basic requirements, the primary purpose of the constitutional complaint is to serve as a remedy or mechanism for safeguarding fundamental and human rights in a democratic nation.

It is worth noting that the purpose of a constitutional complaint and the reasons for establishing the Constitutional Court likely share the same core goal: offering a remedy for violations of human or fundamental rights. Given the current constitutional limitations faced by the Court, it is a logical step to propose expanding its judicial review authority to include handling constitutional complaint cases. It is safe to assume that if a constitutional complaint were to be implemented in Indonesia, citizens would have a more comprehensive platform to obtain remedies for any rights violations. In fact, given the philosophical, empirical, and urgent needs, it is essential to adopt a constitutional complaints mechanism into the legal system. Again, this paper does not explicitly reject such a proposal, as its main aim is to persuade the constitutional court to proceed cautiously and consider all possible outcomes if it chooses to expand its judicial review power through interpretation. I Dewa Gede Palguna, a former Justice of the Constitutional Court, in one of his published papers, expressed that, and quoted;

“First, the capacity of constitutional judges to develop legal interpretations when exercising the authority given to the Constitutional Court by the constitution should be clarified. Therefore, if in the future the Constitutional Court decides to hear and decide on constitutional complaint cases, it must be explained that this action remains within the scope of the authority granted by the 1945 Constitution.”

Although this is a compelling and layered argument, should the Constitutional Court aims to stay within the authority granted by the 1945 Constitution—upholding principles like separation of powers and constitutionalism—arguably, it should refrain from using its interpretative power to expand its own authority.

⁴⁶ Hermina, eds., *Encyclopedia of Contemporary Constitutionalism*, 3.

2.2. Dimension of Judicial Overreach, Activism, and Expansion of the Constitutional Court of Indonesia

“Courts should be restrained from doing the wrong thing, but they should be active in doing the right thing. Of course, there is little agreement on what counts as the wrong thing or on how courts ought to exercise the power they wield.” This quote from Keith E. Whittington, a constitutional law scholar from Yale University,⁴⁷ might be fitting to open this section. This section explores judicial overreach, judicial activism, and examining how the Constitutional Court has repeatedly expanded its own power and jurisdiction might be leading to those two concept altogether. This paper’s discussion of activist courts does not aim to judge whether activism in general is beneficial or harmful to the Indonesian legal environment. The term “activist court” is used neutrally here, meaning that the paper neither endorses nor opposes the concept of judicial activism in general, therefore following Corey Rayburn Yung that simply define the concept simply as certain type of judicial activity that does not have to be “inherently good or bad”.⁴⁸ However, it is important to note that the paper’s argument is leaning toward suggesting the court to practice restraint in the light of potential expansion to the Court’s power and authority.

On April 1, 2025, a joint hearing was held by the U.S. House of Representatives’ Subcommittees on Courts, Intellectual Property, Artificial Intelligence, and the Internet, along with the Subcommittee on the Constitution and Limited Government. The focus of the hearing was on the perceived judicial overreach by Federal courts, particularly regarding nationwide injunctions issued against the current Administration’s policies. Emphasized in this hearing are the judiciary’s role within the democracy, namely to interpret the law and protect citizens’ rights. The hearing also revealed that the judiciary should serve as a critical check on the authority of the elected branches; this is essential for respecting the constitutional roles of the other branches of government. Courts are never

⁴⁷ Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (Lawrence: University Press of Kansas, 2019), 1.

⁴⁸ Corey Rayburn Yung, “Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts,” *Northwestern University Law Review* 105, no. 1 (2011): 10.

intended to have the ability to decide beyond what the Constitution, in this case Article III of the Constitution of the United States, to decide the constitutional questions unilaterally. This proposition is based on the constitutional design intended by the Framers; judges are unelected and were never given the power to “legislate from the bench.”⁴⁹ Courts are not responsible for creating laws; they are responsible for interpreting them as they apply, in the context of a case or controversy.⁵⁰ Based on this hearing, it is safe to conclude that judicial overreach refers to a situation where courts exceed their authority or interfere excessively in the functions of the legislative or executive branches of government.

Discourse on judicial overreach is often linked to judicial activism. Arguably, this discussion stems from the development of theories and practices related to judicial review and judicial discretion, if not referred to as judicial law-making. Scholars like Nilanjana Jain offer a different perspective by viewing judicial overreach as a “continuation” of judicial activism, which is described as when the judiciary oversteps its limits and assumes the functions of another branch.⁵¹ Jain characterized judicial activism as judges taking an active role in addressing social injustices through public interest litigation, thereby representing the role of the court within the framework of a constitutional democracy. Activism in the judiciary is often justified as a means to take a proactive role in judicial engagement, prioritizing the protection of rights and the pursuit of justice. Wittington defines activism as a court striking down laws inappropriately, thus acting more like a “superlegislature” than a court, and acting willfully rather than judiciously.⁵²

On the other hand, judicial overreach is described as the judiciary’s intervention in legislative processes or executive decisions, which can undermine the doctrine of separation of powers. Jain further explains that while both concepts are distinct, the separating line between the two concepts is a thin one.⁵³ Margaret

⁴⁹ Congress, House Committee on the Judiciary, “Judicial Overreach and Constitutional Limits on the Federal Courts,” hearing, 119th Cong., 1st sess., published April 1, 2025.

⁵⁰ Congress, “Judicial Overreach.”

⁵¹ Nishant Jain, “Judicial Power: From Judicial Review to Judicial Overreach,” *Indian Journal of Public Administration* 56, no. 2 (2017): 331–42.

⁵² Wittington, *Repugnant Laws*, 4.

⁵³ Jain, “Judicial Power,” 340–341.

L. Moses describes the exceeding line as the “judicial boundaries”.⁵⁴ Crossing the boundaries, in this context, could mean disrupting the “harmonious functioning” of the three branches: the judiciary, legislative, and executive.⁵⁵

The concern about judicial overreach arises because what has occurred is often viewed as contrary to the “proper role” or the nature of the judiciary, which is sometimes described as the “least dangerous branch”.⁵⁶ By acting with excessive discretion while at the same time crossing the boundaries, the Court is assumed to have seen the case as a vehicle for changing the law in a way that the majority of the Court felt was desirable. Therefore, it no longer acts as a court; instead, it acts as a politician in a robe.⁵⁷ Meaning that the Court is considered overstepping its judicial role and acting more like a legislative body. The core value of constitutionalism is that no power should be unchecked. When courts exceed their discretion in interpreting the Constitution, they risk turning into the most dangerous branch of government, with little to no checking.⁵⁸ Clearly, perspectives on what constitutes a proper role of the court can vary; however, they are arguably shaped by various legal theories and traditions.⁵⁹ Regardless of the shape or view on this matter, the power of the judiciary is supposed to be and should be designed to be limited.⁶⁰

Proper role of the court, in this case, could also arguably be identified by looking at the constitutional design. Established in 2003 through the Fourth Amendment, the Constitutional Court was founded to address the constitutional crisis that arose from the flawed system of checks and balances prior to the 1998 Reform. Butt described that the Court was built upon several rationales. First and foremost, the Court was necessary to restore the nation from the crisis. Other factors, such as political (including the impeachment of Abdurrahman Wahid, Indonesia’s fourth president), historical, and international influences,

⁵⁴ Margaret L. Moses, “Beyond Judicial Activism: When the Supreme Court Is No Longer a Court,” *University of Pennsylvania Journal of Constitutional Law* 14, no. 1 (2011): 165.

⁵⁵ Jain, “Judicial Power,” 342.

⁵⁶ Alexander Hamilton, “The Federalist Papers No. 78,” accessed September 3 2025.

⁵⁷ Moses, “Beyond Judicial Activism,” 163.

⁵⁸ Moses, “Beyond Judicial Activism,” 165.

⁵⁹ Moses, “Beyond Judicial Activism,” 70.

⁶⁰ Moses, “Beyond Judicial Activism,” 163.

also contributed to its founding.⁶¹ The Constitutional Court was established as the authority responsible for making definitive, initial, and final decisions, with its judgments being conclusive. It reviews national legislation to ensure its compliance with the Constitution⁶² and the Bill of Rights. National legislations or Laws, in this context, are by-products of the House of Representative (*Dewan Perwakilan Rakyat*—DPR), with the joint approval of the President.⁶³ Therefore, it can be concluded that laws in Indonesia are a product of both the elected branch. Hence, it is evident that the authority of judicial review in Indonesia, specifically that belongs to the Constitutional Court, has a direct influence on the by-products of both elected branches, as the Constitution explicitly states that its judgments are final and binding.

Although the Constitution grants the Constitutional Court judicial review authority, Article 24C (6) stipulates that the Court's internal operations—including the appointment and dismissal of justices, procedural law, and other related provisions—are to be regulated by separate national legislation.⁶⁴ This creates a notable gap in the system: the Constitutional Court, which is constitutionally empowered to review laws passed by the executive and legislative branches, technically has the authority to review the very laws that govern its own structure and procedures. This grants the Court the authority to review legislation that affects itself. That “notable gap” has, in fact, been used by the Court to expand its own power and authority in the realm of judicial review.

The Constitutional Court, in its early years, declared the unconstitutionality of limitations imposed upon it by Article 50 of Law No. 24 of 2003 on Constitutional Court Law, which primarily restricts the Court's ability to review national legislation enacted before the formal amendment of the 1945 Constitution. Furthermore, the Court determined that it also has the constitutional authority to conduct judicial review of Government Regulation in Lieu of Law (or Emergency Law) on the basis that it has the same legal hierarchy and substance as a law passed

⁶¹ Simon Butt, “The Constitutional Court and Democracy in Indonesia,” in *Indonesia: Law and Society*, ed. Timothy Lindsey (Sydney: Federation Press, 2012), 47–55

⁶² *The 1945 Constitution of the Republic of Indonesia*, art. 24C(1).

⁶³ *The 1945 Constitution of the Republic of Indonesia*, art. 20(1)-(2).

⁶⁴ *The 1945 Constitution of the Republic of Indonesia*, art. 24C(6).

by the House of Representatives. Simon Butt identifies two categories where the Constitutional Court has expanded its jurisdiction beyond the limits set by the Constitution: first, cases where the Court is asked to assess whether national legislation complies with the constitutional right to legal certainty; second, the conditional constitutional decisions—meaning that an article or law is deemed constitutional if interpreted in the way the Court has interpreted it.⁶⁵ The House of Representatives has actually attempted to restrict the Court's jurisdiction as a reaction to conditional constitutional decisions. They proposed a revision to the Constitutional Court Law (Law No. 8 of 2011) to add Article 57 (2a), which would prohibit the Court from issuing conditionally constitutional decisions. The Court then responded by declaring the article unconstitutional, so it no longer has any binding force.

Through this series of event, it is noticeable that the Court is a powerful actor in interpreting its own authority of judicial review. It is evident by the way the Court expanded its judicial review power, simultaneously based on cases and controversies presented to the Court. Pramudya A. Oktavinanda argues that the 1945 Constitution exhibits “language minimalism,” particularly in its treatment of the judiciary. Although the Constitution grants the Court the authority to conduct judicial review, the Constitution itself never actually defines the term. Similarly, the phrase “enforce law and justice” attached to the judiciary power also lacks any explanation of what that enforcement entails.⁶⁶ This minimalist language makes it nearly impossible to determine the precise meaning and the scope of the Court's authority, leaving the Constitutional Court itself as the sole interpreter of its own powers.

While it may be premature to definitively state that the Constitutional Court has engaged in judicial overreach, and that is not the primary focus of this paper, the evidence indicates the Court has, especially in light of recent developments, become an activist court. Determining judicial overreach arguably requires a more comprehensive and empirical study. A definitive judgment on this

⁶⁵ Butt, “The Constitution Court,” 130.

⁶⁶ Pramudya A. Oktavinanda, “Is the Conditionally Constitutional Doctrine Constitutional?” *Indonesia Law Review* 8, no. 1 (2018): 22–24.

conjecture would need a profound and thorough analysis of the whole body of the Court's decisions, their impact on policy, and the political reactions to them. However, classifying the Constitutional Court as an activist court in this context is relatively straightforward. Examples include declaring legislative restrictions on its jurisdiction unconstitutional and establishing the doctrine of "conditional constitutional decisions," both of which exemplify this approach. This also reflected the recent trend of shifting from a role as a supposedly negative legislature to a positive one. However, because the term 'judicial review' is not clearly defined, the Court can justify its actions by asserting that the subject is justified to fall within its jurisdiction of judicial review. Thus, based on the same reasoning, a similar thought process of interpretation might occur with the adoption of the constitutional complaint; in this case, arguably, the Court is the only entity that can restrict itself to not turn itself into the "most dangerous branch".

2.3. Between the Court's Activism and Judicial Independence

Given the establishment's context and the Constitutional Court's significant role, it is understandable for it to take on an activist stance. This approach helps meet the needs of people whose fundamental rights have been violated and who previously lacked a platform for justice. The Court's presence can be seen as a refreshing development. However, it currently lacks comprehensive and robust tools to handle post-conflict issues effectively. The idea of a fair and functional judiciary differs across countries. Although international factors may have partly influenced the establishment of the Court, the true effectiveness of the judiciary should be rooted in the nation's history, traditions, and core values. While the Constitutional Court has built a strong reputation due to its strong leadership⁶⁷ and the Court itself has not been free from controversy. The ability to exercise some restraint is arguably essential, given how courts sometimes involve themselves and decide cases in ways that undermine the responsibility of policymakers. To name the few, it should be the case for the troubling case that led to the Constitutional Court Decision Number 90/PUU-XXI/2023 on the Provision on

⁶⁷ Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*, 1st ed. (London: Routledge, 2018), 68–97.

Age Requirements for President and Vice President, and it is also most likely should also be the case for the recent Constitutional Court Decision Number 135/PUU-XXII/2024 on Separation between National and Regional Election.

Analysis and criticism of the Constitutional Court often associate its actions with overreach into the legislative and executive branches. Critics argue that the Court undermines democracy by involving itself not only in constitutional issues but also deeply into policy questions and technical matters. The court is also believed to have blurred the lines between the branches of power on multiple occasions.⁶⁸ Of course, claims like “undermining democracy” and “blurring the boundaries between branches” are pretty strong allegations. It is not easy to make such statements without conducting thorough research and providing evidence to support these claims. Furthermore, suppose the argument centers on the Court’s lack of constitutional legitimacy for acting in such a manner. In that case, the Court could also present its own counterargument for the case to support the rationale behind its institution’s legitimacy to do so. It is perhaps not an exaggeration to assume that the Constitutional Court has the potential to be a “super-body” institution given the final and binding nature of the Court’s decision and the absence of any current mechanism to review or “check” those decisions. The Court also has little to no oversight or checking power beyond its own self-supervision mechanism, which focuses on maintaining the Court’s integrity and is arguably unrelated to monitoring or balancing the Court’s authority decisions.⁶⁹ Observing the public’s enthusiasm and still-high expectations for this judicial institution, while it is also clear that the legislature, specifically the House of Representatives, is “conveniently” shifting the accountability for their legislative outputs and processes to the Constitutional Court⁷⁰—it is difficult to see this pattern of activist courts fading away anytime soon. While the Court assumes they should take appropriate action, such as activism, filling legal gaps, or fulfilling “substantive justice”, making this assumption and claim is easy.

⁶⁸ Nathaniel Rayestu, “When the Court Writes the Law: MK’s Judicial Overreach,” *Think Policy Indonesia* (blog), published July 25, 2025.

⁶⁹ *Constitutional Court Regulation Number 1 of 2023 on the Honorary Council of the Constitutional Court.*

⁷⁰ Ratu Durotun Nafisah, “Excessive Reliance on Judicial Review in Indonesia: A Tactic to Avoid Democratic Accountability?” *Indonesian Journal of International & Comparative Law* 10, no. 1 (2023): 97.

However, as cited from Pramudya, proving such claims is a herculean task.⁷¹ The court's decision must be well-reasoned, meaning it should be grounded in a logical legal basis. To 'stand by things decided' is a form of accountability, so the Court should be able to show a clear and rational process leading to its conclusion, and ought to be able to provide the explanation why it will not work the other way around. Regarding this concern, Butt criticized the Court for sometimes exercising its freedom without proper regard for its responsibilities and accountability.⁷² The court's independence, arguably, has come at the cost of what it calls accountability.

Sometimes, the constitution embodied a form of balance between accountability and independence for its judicial power. For example, in the United States Constitution, Article III explicitly states that the judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."⁷³ The Constitution, in brief, guarantees judges' independence by providing them with compensation during their tenure and appointing them for life. However, it also emphasizes that judges are accountable, as they shall hold office "during good behaviour," which implies they can be impeached if they do not act within the good conduct. The 1945 Constitution also allows for judges to be removed from office through procedures regulated by national laws.⁷⁴ Considering the article formulation, the Constitution itself can be assumed to hold judges to a low degree of accountability, at least in the aspect of their removability or impeachment.

A balance between the concepts of judicial accountability and judicial independence is crucial. It is also why it is essential to balance the two, and how these concepts should be played out in the Indonesian legal framework landscape. First, it is essential to follow the premise or the perspective that judicial independence and judicial accountability, rather than opposing forces, are

⁷¹ Oktavinanda, "Is the Conditionally Constitutional Doctrine Constitutional?" 25.

⁷² Butt, *Judicial Dysfunction in Indonesia*, 247–48.

⁷³ *The Constitution of the United States of America*, art. III.

⁷⁴ *The 1945 Constitution of the Republic of Indonesia*, art. 24C(6).

complementary elements, as cited by Stephen B. Burbank. These are inseparable elements crucial to enhancing the performance of courts and the judicial system as a whole.⁷⁵ Judicial independence, in this context, has to be given meaning extensively and not simply by “independence from” and “independence to”, which Viet D. Dinh boldly refers to as “exists just to benefit the judges”. Dinh further explicitly emphasizes that judges aren’t meant to be “platonic guardians” who can act without any checks or balances. Instead, their role is “carefully circumscribed” by the constitutional system.⁷⁶ The equilibrium between independence and accountability should be viewed as an essential component for the judiciary to remain respected as one of the branches of government, effectively capable of upholding the rule of law and responsive to democratic principles.⁷⁷ Furthermore, this equilibrium is a significant factor in minimizing potential political friction and pressure from the elected branches.

In fact, some members of the House of Representatives have expressed their resistance to the recent Constitutional Court Decision Number 135/PUU-XXII/2024 on the separation between national and regional elections.⁷⁸ Should the Court continue its pattern of being activist judges, and as the friction becomes more frequent, it would potentially disrupt the current system of checks and balances. Additionally, it should be noted that Courts need both the legislative and executive to enforce their decision, as the Court possesses “no purse nor swords.”⁷⁹ Courts rely on other branches to function, so it may be best not to cross certain judicial boundaries and practice activism by incorporating the constitutional complaint into the current judicial review power, using its own interpretative authority, considering that the very object of the constitutional complaints is an act of public authorities, including executive and legislative

⁷⁵ Stephen B. Burbank, “Judicial Independence, Judicial Accountability, and Interbranch Relations,” *Georgetown Law Journal* 95, no. 4 (2007): 1-28.

⁷⁶ Viet D. Dinh, “Threats to Judicial Independence, Real and Imagined,” *Georgetown Law Journal* 95, no. 4 (2007): 905-17.

⁷⁷ John A. Ferejohn and Larry D. Kramer, “Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint,” *New York University Law Review* 77, no. 4 (2002): 962-1037.

⁷⁸ Haura Hamidah, “Tanggapan DPR dan Pemerintah atas Putusan MK soal Pemilu [The DPR and the Government’s Response to the Constitutional Court’s Decision on Elections],” *Tempo*, accessed September 1, 2025; Sapto Yunus, “Mengapa DPR Anggap Putusan MK soal Pemilu Salah Konstitusi? [Why the House of Representatives Considers the Constitutional Court’s Election Decision Unconstitutional?],” *Tempo*, accessed September 2, 2025.

⁷⁹ Hamilton, “Federalist No. 78.”

action. Self-expanding authority in this form primarily breaches the separation of powers doctrine and constitutional principles, and could also be seen as an act of aggression toward other branches. Therefore, failing to exercise restraint and incorporating a constitutional complaint mechanism through interpretative authority, both theoretically and practically, can result in long-term negative impacts on the Court's judicial independence.

III. CONCLUSION

The debate over incorporating a constitutional complaint mechanism into Indonesia's legal framework highlights a fundamental tension between judicial activism and judicial restraint. While a strong proposal exists for a constitutional complaint to enhance the protection of fundamental rights and address gaps in justice, in other words, to achieve substantive justice, this paper argues that the Constitutional Court should not expand its jurisdiction through judicial interpretation alone. Such an approach risks being perceived as potential judicial overreach, which could undermine the Court's legitimacy and disrupt the crucial balance of power among the other branches of the government, on top of that the elected branch of government. The 1954 Constitutional design, along with its minimalist language management, allows the Constitutional Court to be the sole powerful actor in defining what judicial review is, arguably without checks. Therefore, restraint is arguably needed for the Court not to cross the boundaries of adding a constitutional complaint by itself. Judicial independence is not the freedom to act without checks, but rather the capacity to exercise power with accountability and restraint. The Court's most vital role is to act as a guardian of the Constitution, not a substitute for the democratically elected legislature. Therefore, any expansion of its powers should be achieved through the formal, legitimate processes of constitutional amendment or legislative revision. By demonstrating self-imposed restraint, the Constitutional Court can maintain its institutional integrity and continue to serve as a cornerstone of Indonesia's constitutional democracy, as well as upholding the rule of law.

BIBLIOGRAPHY

- Arundhati, Gautama Budi. "Kemungkinan Penerapan Preliminary Ruling Procedure Sebagai Media Constitutional Complaint di Mahkamah Konstitusi [The Possibility of Implementing Preliminary Ruling Procedure as a Medium for Constitutional Complaints in the Constitutional Court]." *Jurnal Konstitusi* 14, no. 4 (2017): 820-837, <https://doi.org/10.31078/jk1446>.
- Baidhowah, Adfin Rochmad. "Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding." *Constitutional Review* 7, no. 1 (2021): 124-152, <https://doi.org/10.31078/consrev715>.
- Burbank, Stephen B. "Judicial Independence, Judicial Accountability, and Interbranch Relations." *Georgetown Law Journal* 95, no. 4 (2007), <https://doi.org/10.2139/ssrn.922091>.
- Butt, Simon. *Judicial Dysfunction in Indonesia*. Melbourne: Melbourne University Press, 2023.
- Butt, Simon. "The Constitutional Court and Democracy in Indonesia." In *Indonesia: Law and Society*, edited by Timothy Lindsey, 47-55. Sydney: Federation Press, 2012.
- Butt, Simon, and Tim Lindsey. *The Constitution of Indonesia: A Contextual Analysis*. Oxford: Hart Publishing, 2012.
- Chakim, M. Lutfi. "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions." *Constitutional Review* 5, no. 1 (2019): 96-133, <https://doi.org/10.31078/consrev514>.
- Chalid, Hamid, and Arief Ainul Yaqin. "Menggagas Pelembagaan Constitutional Question Melalui Perluasan Kewenangan Mahkamah Konstitusi Dalam Menguji Undang-Undang [Initiating the Institutionalization of Constitutional Questions by Expanding the Authority of the Constitutional Court in Reviewing Laws]." *Jurnal Konstitusi* 16, no. 2 (2019): 363-390, <https://doi.org/10.31078/jk1628>.

- Congress. "Judicial Overreach and Constitutional Limits on the Federal Courts." House Judiciary Committee, 119th Congress, 1st sess., published April 1, 2025, <https://www.congress.gov/event/119th-congress/house-event/LC74362/text>.
- Cremades, J., and C. Hermida, eds. *Encyclopedia of Contemporary Constitutionalism*. Cham: Springer, 2021.
- Dinh, Viet D. "Threats to Judicial Independence, Real and Imagined." *Georgetown Law Journal* 95, no. 4 (2007): 905-917, <https://www.jstor.org/stable/40544060>.
- Faiz, Pan Mohamad. "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court." *Constitutional Review* 2, no. 1 (2016): 103-128, <https://doi.org/10.31078/consrev215>.
- Faiz, Pan Mohamad. "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia." *Indonesia Law Review* 6, no. 2 (2016): 162-176, <https://doi.org/10.15742/ilrev.v6n2.230>.
- Faiz, Pan Mohamad. "Masa Depan Constitutional Complaint [The Future of Constitutional Complaint]." *Konstitusi* (Jakarta), November 2020.
- Ferejohn, John A., and Larry D. Kramer. "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint." *New York University Law Review* 77, no. 4 (2002): 962-1037.
- French, Robert AC. "The Australian Experience: Constitutional Courts-The Rule of Law." In *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia*, edited by Bertus de Villiers et al., vol. 12, 283-294. Leiden: Brill, 2024.
- Gaffar, M. Janedjri. "Peran Putusan Mahkamah Konstitusi Dalam Perlindungan Hak Asasi Manusia Terkait Penyelenggaraan Pemilu [The Role of Constitutional Court Decisions in Protecting Human Rights Related to Election Implementation]." *Jurnal Konstitusi* 10, no. 1 (2016): 1-32, <https://doi.org/10.31078/jk1011>.
- Hamilton, Alexander. "The Federalist No. 78." Accessed September 3, 2025. <https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493470>.

- Hamidah, Haura. "Tanggapan DPR dan Pemerintah atas Putusan MK Soal Pemilu [The House and the Government's Response to the Constitutional Court's Decision on Elections]." *Tempo*. Accessed September 1, 2025. <https://www.tempo.co/politik/tanggapan-dpr-dan-pemerintah-atas-putusan-mk-soal-pemilu--183168>.
- Hendrianto, S. *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*. 1st ed. London: Routledge, 2018, <https://doi.org/10.4324/9781315100043>.
- Holish, Amarru Mutfie, and Aulia Maharani. "Strengthening Constitutional Complaint Authority: Enhancing Citizens' Constitutional Rights Protection in Indonesia." *Journal of Law and Legal Reform* 4, no. 3 (2023): 347-364, <https://doi.org/10.15294/jllr.v4i3.68129>.
- Isra, Saldi, and Pan Mohamad Faiz. "The Indonesian Constitutional Court: An Overview." In *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia*, edited by Bertus de Villiers et al., vol. 12, 55-94. Leiden: Brill, 2024.
- Jain, Nishant. "Judicial Power: From Judicial Review to Judicial Overreach." *Indian Journal of Public Administration* 56, no. 2 (2017): 331-342, <https://doi.org/10.1177/0019556120100211>.
- Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 001/PUU-IV/2006 (The Constitutional Court of the Republic of Indonesia 2006).
- Krisdanar, Vito Devanta Anjas. "Menggagas Constitutional Complaint Dalam Memproteksi Hak Konstitusional Masyarakat Mengenai Kehidupan dan Kebebasan Beragama di Indonesia [Initiating a Constitutional Complaint to Protect the Constitutional Rights of the Community Regarding Life and Freedom of Religion in Indonesia]." *Jurnal Konstitusi* 7, no. 3 (2016): 185-208, <https://doi.org/10.31078/jk737>.

- Lailam, Tanto, and Nita Andrianti. "Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia." *Bestuur* 11, no. 1 (2023): 75-94, <https://doi.org/10.20961/bestuur.viii.70052>.
- Lailam, Tanto, et al. "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court." *Jurnal Konstitusi* 19, no. 3 (2022): 693-719, <https://doi.org/10.31078/jk1939>.
- Lubis, Todung Mulya. *Mencari HAM: Hak Asasi Manusia: Dilema Politik Hukum Indonesia Masa Orde Baru 1966-1990 [In Search of Human Rights: Legal-political Dilemmas of Indonesia's New Order, 1966-1990]*. Yogyakarta: Circa, 2021.
- Mahfud MD, Mohammad. "Rambu Pembatas dan Perluasan Kewenangan Mahkamah Konstitusi [Limiting Signs and Expansion of the Authority of the Constitutional Court]." *Jurnal Hukum Ius Quia Iustum* 16, no. 4 (2009): 441-462, <https://doi.org/10.20885/iustum.vol16.iss4.art1>.
- Martitah. "Progresivitas Hakim Konstitusi Dalam Membuat Putusan (Analisis Terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature) [Progressiveness of Constitutional Court Judges in Making Decisions (Analysis of the Existence of Constitutional Court Decisions that are Positive Legislature)]." *Masalah-Masalah Hukum* 41, no. 2 (2012): 315-325, <https://doi.org/10.14710/mmh.41.2.2012.315-325>.
- Moses, Margaret L. "Beyond Judicial Activism: When the Supreme Court is No Longer a Court." *University of Pennsylvania Journal of Constitutional Law* 14, no. 1 (2011): 161, <https://scholarship.law.upenn.edu/jcl/vol14/iss1/3/>.
- Nafisah, Ratu Durotun. "Excessive Reliance on Judicial Review in Indonesia: A Tactic to Avoid Democratic Accountability?" *Indonesian Journal of International & Comparative Law* 10, no. 1 (2023): 97, <https://ssrn.com/abstract=4832652>.
- Nasution, Adnan Buyung. *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956-1959 [The Aspiration for Constitutional*

Government in Indonesia: A Socio-legal Study of the Indonesian Konstituante 1956-1959. Jakarta: Grafiti, 1995.

Nugroho, Adrianto Dwi, et al. "The Need for A Constitutional Complaint Mechanism for Tax Matters in Indonesia." *Constitutional Review* 9, no. 2 (2023): 358-390, <https://doi.org/10.31078/consrev926>.

Nurwulantari, Yunita, and Anna Erliyana. "Menimbang Model Pengujian Keputusan Pejabat Publik Oleh Mahkamah Konstitusi Republik Indonesia (Studi Perbandingan Indonesia Dan Korea Selatan) [Considering the Model of Testing Public Officials' Decisions by the Constitutional Court of the Republic of Indonesia (Comparative Study of Indonesia and South Korea)]." *Jurnal Konstitusi* 18, no. 1 (2021): 168-194, <https://doi.org/10.31078/jk1818>.

Oktavinanda, Pramudya A. "Is The Conditionally Constitutional Doctrine Constitutional?" *Indonesia Law Review* 8, no. 1 (2018): 17-36, <https://doi.org/10.15742/ilrev.v8n1.381>.

Palguna, I Dewa Gede. "Constitutional Complaint and the Protection of Citizens' Constitutional Rights." *Constitutional Review* 3, no. 1 (2017): 1-23, <https://doi.org/10.31078/consrev311>.

Palguna, I Dewa Gede. "Overcoming Constitutional Obstacles in Dealing with Constitutional Complaint Issues: Indonesia's Experience." Paper presented at the International Symposium on Constitutional Complaint, Jakarta, August 2015.

Palguna, I Dewa Gede. "Yang 'Terlepas' Dari Kewenangan Mahkamah Konstitusi RI: Pengaduan Konstitusional (Constitutional Complaint) [Those 'Separated' from the Authority of the Constitutional Court of the Republic of Indonesia: Constitutional Complaints]." *Lex Jurnalica* 3, no. 3 (2006): 128-136, <https://doi.org/10.47007/lj.v3i3.250>.

Peraturan Mahkamah Konstitusi Nomor 1 Tahun 2023 tentang Majelis Kehormatan Mahkamah Konstitusi [Regulation of the Constitutional Court Number 1 of 2023 on the Honorary Council of the Constitutional Court].

Rayestu, Nathaniel. "When the Court Writes the Law: MK's Judicial Overreach." *Think Policy Indonesia* (blog). <https://www.linkedin.com/pulse/when-court-writes-law-mks-judicial-overreach-thinkpolicyid-r38qc/>.

The 1945 Constitution of the Republic of Indonesia.

The Constitution of the United States of America.

Wicaksono, Dian Agung, et al. "Mencari Jejak Konsep Judicial Restraint Dalam Praktik Kekuasaan Kehakiman Di Indonesia [In Search of Traces of the Concept of Judicial Restraint in the Practice of Judicial Power in Indonesia]." *Jurnal Hukum & Pembangunan* 51, no. 1 (2021): 177-203, <https://doi.org/10.21143/jhp.vol51.no1.3014>.

Whittington, Keith E. *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present*. Lawrence: University Press of Kansas, 2019.

Yung, Rayburn Yung. "Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts." *Northwestern University Law Review* 105, no. 1 (2011): 1-60, <https://scholarlycommons.law.northwestern.edu/nulr/vol105/iss1/1>.

Yunus, Sapto. "Mengapa DPR Anggap Putusan MK Soal Pemilu Salahi Konstitusi? [Why the House of Representatives Considers the Constitutional Court's Election Decision Unconstitutional]." *Tempo*. Accessed September 2, 2025. <https://www.tempo.co/politik/mengapa-dpr-anggap-putusan-mk-soal-pemilu-salahi-konstitusi-2015693>.

Zoelva, Hamdan. "Constitutional Complaint, Constitutional Question and Protection of Citizens' Constitutional Rights." *Jurnal Media Hukum* 19, no. 1 (2012): 152-165, <https://doi.org/10.18196/jmh.v19i1.1984>.

JUDICIAL INDEPENDENCE UNDER POLITICAL PRESSURE: THE HIGH CONSTITUTIONAL COURT AND ELECTORAL JUSTICE IN MADAGASCAR (2009–2023)

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Abstract

This paper investigates the relationship between constitutional justice and political power in Madagascar, focusing on the High Constitutional Court (HCC) and its handling of electoral disputes involving Andry Rajoelina from 2009 to 2023. Against the broader principles of constitutional law (i.e., separation of powers, equality before the law, and the integrity of democratic choice) the study explores whether the HCC's repeated validation of Rajoelina's candidacies and election results reflects sound constitutional reasoning or risks fostering a de facto constitutional immunity. Using a doctrinal legal method, complemented with comparative approach, centred on close analysis of eight pivotal HCC decisions, the paper examines the normative framework governing Madagascar's constitutional justice and how it has been applied, with particular attention to judicial independence and the accessibility of constitutional complaint. The findings indicate a pattern: first, the HCC has demonstrated notable interpretative flexibility, particularly regarding nationality and eligibility requirements, often resolving ambiguities in favour of Rajoelina; second, the Court's consistent dismissal of substantial electoral challenges raises concerns about judicial independence and potential

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structural partiality; third, this judicial posture may erode equal access to constitutional complaint, subtly privileging certain political actors. The paper concludes by urging Malagasy institutions to reinforce the integrity of constitutional justice, ensure rigorous scrutiny of electoral disputes, and uphold the principle that no one stands above constitutional accountability, thereby preserving public trust in democracy and the rule of law.

Keywords: Constitutional complaint; High Constitutional Court (HCC); Judicial independence; Madagascar; Presidential election

I. INTRODUCTION

Constitutional law occupies a singular place in any rule of law, as it constitutes the ultimate guarantor of institutional legitimacy and coherence.¹ Through its foundational principles, such as the separation of powers, the hierarchy of norms, and equality before the law, it safeguards the public interest against abuses of power.² Within this framework, constitutional justice carries a delicate yet essential mission: ensuring that the Constitution remains the supreme norm, not only in texts but also in political and administrative practice. As Carré de Malberg underlined, “*the rule of law is established solely and exclusively in the interest and for the safeguard of citizens: it seeks only to ensure the protection of their rights and their individual status.*”³ This reminder situates constitutional justice as a bulwark for the individual against constituted powers, a role that resonates closely with the very rationale of the constitutional complaint mechanism.⁴ Respect for constitutional law is thus not merely a procedural safeguard but the first condition of an authentic and durable democracy.⁵

¹ Rainer Arnold, “L’État de droit comme fondement du constitutionnalisme européen [The rule of law as the foundation of European constitutionalism],” *Revue française de droit constitutionnel* no. 100 (2014): 769–7.

² Olivier Jouanjan, “Histoire de la science du droit constitutionnel [History of the science of constitutional law], in *Traité international de droit constitutionnel* [International treatise on constitutional law],” ed. Michel Troper and Dominique Chagnollaude (Paris: Dalloz, 2012), 69–111.

³ Louis Favoreu et al., *Droit constitutionnel* [Constitutional law], 21st ed. (Paris: Dalloz, 2019), 32.

⁴ It should be noted that Madagascar’s constitutional system does not formally provide a constitutional complaint mechanism in the strict sense of individual access to constitutional justice. However, this paper employs the term ‘constitutional complaint’ in a functional and contextual sense to describe petitions and electoral disputes submitted before the High Constitutional Court. These cases, although proceduralised under electoral law, engage core constitutional questions such as the protection of democratic legitimacy and the independence of constitutional justice.

⁵ Dominique Rousseau, “Constitutionnalisme et démocratie” [Constitutionalism and democracy], *La Vie des Idées*, September 19, 2008.

This role as guardian of the Constitution confers on constitutional courts a special responsibility. Their task is not confined to abstract review of norms; it extends to protecting democratic values, ensuring the respect of rights and freedoms, and adjudicating electoral disputes that directly affect the credibility of the political system.⁶ In many jurisdictions, constitutional jurisprudence has shaped public life by affirming the primacy of constitutional rules over partisan calculations or temporary political balances.⁷ The constitutional complaint, in this sense, emerges as a central instrument enabling individuals and political actors to challenge violations of their constitutional rights before an independent court.

It is precisely in this perspective that the present study situates itself, offering a critical analysis of the role and functioning of the High Constitutional Court (HCC) of Madagascar. The aim is to determine whether the HCC, in the exercise of its prerogatives in electoral matters and constitutional review, has fully assumed its mission as guarantor of constitutional principles, or whether, on the contrary, some of its decisions reveal a more flexible, or even conciliatory, interpretation of the requirements of the rule of law. Particular attention is devoted to the recent period, namely the 2009, 2018, and 2023 presidential elections, each of which carried decisive stakes for the constitutional order.⁸

The political trajectory of Andry Rajoelina offers a privileged case study for interrogating the strength of Madagascar's institutional safeguards. From the recognition of the transitional regime in 2009, to the validation of his candidacy in

⁶ Guillaume Glénard, "La doctrine constitutionnelle de l'égalité et la parité" [The constitutional doctrine of equality and parity], *Revue du droit public* 2021, no. 2 (March 2021): 489–518.

⁷ Antoine Basset and Eleonora Bottini, "Chronique de droit constitutionnel comparé (janvier 2020 à juin 2020)" [Chronicle of comparative constitutional law (January 2020 to June 2020)], *Titre VII* 5, no. 2 (2020): 180–93; Célestin Keutcha Tchpnga, "Droit constitutionnel et conflits politiques dans les États francophones d'Afrique noire [Constitutional law and political conflicts in francophone states of Black Africa]," *Revue française de droit constitutionnel* 63, no. 3 (2005): 451–91.

⁸ The decision to focus the analysis on the High Constitutional Court (HCC) is justified by its central role within the institutional architecture of Madagascar, particularly in the areas of electoral regulation and constitutional review. As the guardian of constitutional compliance, the HCC exerts a direct influence on the legitimacy of political processes and the legal stability of the State. Its interpretative power, often exercised with wide discretion, grants it a decisive capacity to shape the practical application of constitutional law, especially during critical electoral periods. Examining its decisions therefore provides a deeper understanding of whether this institution functions as a bulwark of the rule of law or, whether intentionally or not, it contributes to an institutional drift that favours certain political actors.

2018 despite various objections, and finally to the dismissal of multiple complaints in 2023, Rajoelina's constitutional itinerary has left a distinctive mark on the jurisprudence of the HCC.⁹ This repeated pattern of favourable rulings raises the question of whether such outcomes reflect the strict application of law or rather the emergence of an implicit form of constitutional immunity. Put differently: does the treatment afforded to Rajoelina by Madagascar's constitutional justice stem from faithful adherence to legal guarantees, or does it suggest a form of institutional leniency liable to undermine the principle of equality of citizens before the law and institutions?

Scholarship has addressed different aspects of Madagascar's constitutional democracy. Rabary-Ranovona highlighted the significance of the blank vote as a genuine political expression, exposing persistent democratic malaise within the electoral system.¹⁰ Giammaria Milani emphasised the structural and normative fragility of Madagascar's successive constitutions, underlining their formalistic drift and opportunistic revisions by political elites.¹¹ More recently, Ramalina R. M. Manitra examined the issue of President Rajoelina's dual nationality, analysing the legal implications of the automatic loss of Malagasy citizenship for presidential eligibility.¹² Yet no study to date has examined in depth the cumulative effect of repeated HCC rulings in favour of the same political actor and the potential construction, *de facto*, of a constitutional immunity that conflicts with the foundational principles of the rule of law. This study distinguishes itself by adopting a systemic and critical approach, shedding light on how the jurisprudence of the HCC might contribute to asymmetrical institutional consolidation and the personalisation of constitutional law in Madagascar.

⁹ For further understanding on the political trajectory of Andry Rajoelina, see McKenna and Amy, "Andry Rajoelina | Biography, Age, Education, Nationality, & Wife," *Encyclopedia Britannica*, November 17, 2023.

¹⁰ Bako Mahaliana Rabary-Ranovona, "Les enjeux du concept de vote blanc pour le régime démocratique malgache – hypothèse sur les élections présidentielles de 2018 [The Stakes of the Concept of the Blank Vote for the Malagasy Democratic Regime: Hypothesis on the 2018 Presidential Elections]," *Revue juridique de l'Océan Indien [Legal Review of the Indian Ocean]* 29 (2020): 549–94.

¹¹ Giammaria Milani, "À quoi sert la Constitution malgache? Les défis pour l'édification d'une Constitution effective et efficace à Madagascar [What Is the Use of the Malagasy Constitution? Challenges for Building an Effective and Efficient Constitution in Madagascar]," *Federalismi.it [Federalism.it]* 3 (2018): 1–25.

¹² Ramalina Ranaivo Mikea Manitra, "Constitutional Fragility and Dual Nationality Disputes: Legal Implications of Madagascar 2023 Presidential Election," *Constitution Journal* 4, no. 1 (June 30, 2025): 93–120.

Accordingly, this research seeks to answer a central question: Is constitutional immunity in Madagascar a mere perception, or a legal reality? To do so, the paper will first examine the normative and doctrinal framework of Malagasy constitutional justice; then analyse key HCC decisions rendered in 2009, 2018, and 2023; before engaging a broader reflection on the possible existence of a *de facto* constitutional immunity, shaped by the Court's own jurisprudence. From a legal standpoint, this study adopts a constitutionalist position that judicial bodies must remain strictly bound by the principle of constitutional supremacy and equality before the law, rejecting any interpretation or practice that implicitly grants immunity to political actors. By linking these perspectives to the thematic of judicial independence and constitutional complaint, the study aims to clarify the true place of constitutional law in the face of contemporary political dynamics in Madagascar.

II. RESEARCH METHOD

This study adopts a doctrinal legal research method, which consists of a systematic and critical analysis of primary and secondary legal sources in order to clarify the normative framework governing constitutional justice in Madagascar. The primary sources examined include the Constitution of Madagascar, the Code of Nationality, relevant organic laws, and, above all, the decisions of the High Constitutional Court (HCC) between 2009 and 2023, with a particular focus on cases involving the eligibility and candidacies of Andry Rajoelina. These sources are interpreted using established tools of legal hermeneutics, aimed at identifying the principles of constitutional law such as equality before the law, separation of powers, and the rule of law, and assessing how they have been applied in practice. Secondary sources, such as comparative constitutional jurisprudence, international human rights instruments including the International Covenant on Civil and Political Rights, and scholarly commentary, are used to contextualise the Malagasy experience within broader theoretical and comparative perspectives. The doctrinal method is particularly appropriate for this research because it allows for

an evaluation of the consistency, coherence, and legitimacy of judicial reasoning, and provides a solid basis to question whether the jurisprudence of the HCC reflects the independence required of a constitutional court or, conversely, risks fostering a form of constitutional immunity through its interpretative practices.

III. DISCUSSION

3.1. Legal Framework of Constitutional Justice in Madagascar

The High Constitutional Court (HCC) of Madagascar constitutes the supreme body for the review of constitutionality and the regulation of institutional disputes. Pursuant to Article 27 of Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, it is vested with a wide range of competences, notably disputes relating to referendum operations, the election of the President of the Republic, and that of members of Parliament. It also exercises a priori constitutional review over legislative and regulatory norms, including:¹³

1. autonomous regulations,
2. treaties,
3. the internal rules of parliamentary assemblies,
4. organic laws.

These powers find their constitutional basis in Article 116 of the 2010 Constitution, which expressly enumerates the jurisdiction of the HCC in matters of constitutional review and electoral disputes, including the proclamation of official election results.¹⁴ Article 200 of Organic Law No. 2018-008 on the general regime of elections and referenda (hereinafter Organic Law No. 2018-008) confirms this competence to adjudicate any contentious complaint relating to a referendum, the presidential election, as well as legislative and senatorial elections.¹⁵

The HCC is also solely competent to hear complaints relating to preparatory acts and to electoral operations themselves, including applications for partial

¹³ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, *Official Journal* No. 2747, November 19, 2001, p. 3077, Article 27.

¹⁴ Constitution of the Republic of Madagascar (Fourth Republic), *Official Journal* No. 3350, January 20, 2011, p. 85, Article 116.

¹⁵ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, *Official Journal* No. 3814, May 16, 2018, p. 2071, Article 200.

or total annulment arising from substantial defects.¹⁶ It is vested with sovereign authority to verify the admissibility and eligibility of candidatures for the presidency of the Republic. Pursuant to Articles 15 and 16 of Organic Law No. 2018-009, it issues a definitive receipt when the legal conditions are fulfilled or, failing that, refuses the registration of the candidature by a duly reasoned decision.¹⁷ It draws up and publishes the official list of candidates no later than five days after the deadline for submission, and in cases of similarity of names or symbols, it rules with sovereign authority.¹⁸

The procedure before the HCC is predominantly written.¹⁹ However, oral submissions may be presented if notified in advance. This modality is reinforced by Article 201 of Organic Law No. 2018-008, which provides that the procedure is essentially written, while permitting lawyers, upon notification, to make oral submissions.²⁰ The constitutional complaint must meet strict conditions of admissibility: full identification of the plaintiff, clear statement of grounds, and supporting documents.²¹ Article 204 of Organic Law No. 2018-008 requires that the complaint be signed, accompanied by a certified copy of the voter card and all supporting grounds and documents, failing which it shall be inadmissible.²²

Where the complaint is declared admissible, a High Councillor-rapporteur is appointed, and the case is entered on the roll.²³ A hearing is then scheduled, and the decision must be rendered within one month. The HCC may order supplementary investigation if the documents produced are insufficient to establish the facts.²⁴ In the event of a finding of a criminal offence linked to an electoral irregularity, the HCC is obliged to refer the matter to the Public Prosecutor, pursuant to Article 207 of Organic Law No. 2018-008.²⁵ This

¹⁶ Organic Law No. 2018-009 on the Election of the President of the Republic, *Official Journal* No. 3814, May 16, 2018, p. 2121, Article 65.

¹⁷ Organic Law No. 2018-009, Articles 15–16.

¹⁸ Organic Law No. 2018-009 on the Election of the President of the Republic, Article 17.

¹⁹ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 29.

²⁰ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 201.

²¹ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Articles 30–31.

²² Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 204.

²³ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 33.

²⁴ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 35.

²⁵ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 207.

investigative role, combined with its judicial authority, strengthens its standing in the objective handling of electoral disputes.

The right to contest the regularity of electoral operations or results is guaranteed to any registered voter as well as to candidates in their constituency.²⁶ Provisional results are transmitted to the HCC within seven days by the Independent National Electoral Commission (CENI).²⁷ Thereafter, the HCC officially proclaims the results within the following nine days.²⁸ This power of proclamation is expressly enshrined in Article 116 of the 2010 Constitution, which confers sovereign authority upon the HCC in electoral matters.²⁹ This arrangement ensures institutional centralisation of electoral disputes and regulation.

Decisions of the HCC are rendered collegially with a quorum of at least six members, under the chairmanship of the President of the Court.³⁰ In the event of a tie, the President's vote is decisive. Decisions are reasoned, published in the Official Gazette, and acquire final and unappealable status.³¹ This rule is consistent with Article 120 of the 2010 Constitution, which imposes the binding authority of these decisions upon all public powers as well as administrative and judicial authorities.³² This irrevocability enshrines the supreme authority of the HCC in constitutional review and electoral disputes.

Finally, the HCC is composed according to the modalities laid down by Article 114 of the 2010 Constitution, which defines the appointment procedure, conditions of office, and the non-renewable term of its members.³³ This provision guarantees institutional stability and the independence of the High Court. Furthermore, in electoral matters, the time limits for appeals and for filing the defence brief are strictly regulated, and the decision of the HCC, delivered no later than seven days after the expiry of the appeal period, constitutes the official proclamation of the final results.³⁴ Article 206 of Organic Law No. 2018-008 further specifies

²⁶ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 202.

²⁷ Organic Law No. 2018-009 on the Election of the President of the Republic, Article 60.

²⁸ Organic Law No. 2018-009 on the Election of the President of the Republic, Article 61.

²⁹ Constitution of the Republic of Madagascar (Fourth Republic), Article 116.

³⁰ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 43.

³¹ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 44.

³² Constitution of the Republic of Madagascar (Fourth Republic), Article 120.

³³ Constitution of the Republic of Madagascar (Fourth Republic), Article 114..

³⁴ Organic Law No. 2018-009 on the Election of the President of the Republic, Articles 66–67.

that the electoral judge rules in accordance with that law and that no ordinary avenue of appeal is open,³⁵ thereby reinforcing the enforceability of decisions rendered.

3.2. Analysis of the Decisions of HCC between 2009 and 2023: Legal Coherence or Institutional Leniency?

3.2.1. 2009 Decisions: Recognition of the Transitional Regime

The analysis of the decisions of the HCC handed down in March 2009 highlights a situation of manifest rupture of the constitutional order, marked by a succession of acts taken outside the established normative framework. Ordinance No. 2009-001, issued by the outgoing President Marc Ravalomanana, conferring full powers on a Military Directorate, did not correspond to any of the cases provided for by the Constitution empowering the President to legislate by ordinance. It was neither adopted in the Council of Ministers nor submitted to prior constitutional review as required by Article 113 of the Constitution. Moreover, the purpose of this ordinance was not legislative in nature but directly undermined the constitutional structure of the State by instituting an authority not provided for by the fundamental text.³⁶

In its decision (No. 03-HCC/D2 and 02-HCC/AV), the HCC acknowledged both the formal and substantive unconstitutionality of this ordinance and recognised that the Military Directorate had no constitutional basis. However, it took note of its existence and justified this recognition by the need to safeguard the principle of continuity of the State, an implicit principle of modern constitutionalism which, in certain exceptional circumstances, allows for the survival of institutions in cases of vacancy of power. It thus referred to a logic of constitutional reality, grounded in crisis circumstances, even though no provision expressly authorised it to validate *de facto* institutions.³⁷

³⁵ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 206.

³⁶ Such practices illustrate a common feature of coup-like interventions, which often suspend constitutional processes and dismantle institutional safeguards, thereby weakening the very foundations of constitutional legitimacy. See Baladas Ghoshal, "Anatomy of Political Atrophy in Thailand," *Strategic Analysis* 39, no. 2 (March 4, 2015): 156–69.

³⁷ This reasoning reflects the broader problem observed in comparative practice, where military or transitional authorities often claim functional legitimacy while eroding democratic legitimacy, as seen in Chile under Pinochet and in several African contexts marked by recurrent coups. See Géraldine Pflieger, "Santiago de Chile Prototype

The appointment of Mr. Andry Rajoelina to head the High Authority of the Transition, endorsed by letter No. 79-HCC/G and later consecrated by an official installation ceremony by the HCC itself, marked a form of officialisation of a power outside the constitutional framework. Yet, the Constitution, in Article 52, provided a clear procedure in cases of vacancy of power: interim rule was to be assumed by the President of the Senate or, failing that, by the collegial Government. The Court disregarded this procedure, invoking the impossibility of applying it under the circumstances, which amounted to recognising the substitution of norms in favour of a transitional order not legally provided for. This form of “institutional accommodation” corresponds to what scholars have identified as the cycle of coups, in which unconstitutional access to power normalises alternative institutional practices and generates risks of further instability.³⁸

The foundation of this stance rested on reconciling the rigidity of the constitutional text with the adaptability required in a context of institutional crisis. However, by admitting *de facto* authorities without explicit legal basis, the HCC departed from its traditional role as guardian of the Constitution to adopt a regulatory, even pragmatic, posture. It relied on general principles of constitutional law such as the preservation of national unity, the continuity of the State and the stability of institutions, but at the cost of interpretative flexibility that weakened the normativity of the Constitution.³⁹

Thus, the legal analysis of the 2009 decisions reveals a tension between formal legality and functional legitimacy. While the HCC’s objective appeared to be the immediate stabilisation of state order, its attitude raises questions regarding the hierarchy of norms and respect for constitutional supremacy. By indirectly

of the Neo-Liberal City: Between a Strong State and Privatised Public Services,” in *Governing Megacities in Emerging Countries*, Institute for Environmental Sciences, Department of Political Science, University of Geneva, Switzerland (Taylor and Francis, 2016), 217–68; Ndzalama Mathebula, “Democratic Deficit and Resurgence of Military Coups: An Assessment of Regional Insecurity in Africa,” *African Renaissance* 22, no. 1 (2025): 375–89.

³⁸ Inesta Brunel Lenzoumbou, “Aid Sanctions and Constitutional Order: The US and France’s Responses to Military Coups in Sub-Saharan Africa and the Rise of Multipolar Competition,” *Third World Quarterly* 46, no. 9 (June 13, 2025): 987–1012.

³⁹ The international experience suggests that even so-called “democratic coups,” which purport to ensure a transition, often entrench the preferences of military or transitional elites in constitutional design, thereby undermining long-term constitutionalism. See See Ozan O. Varol, “The Democratic Coup d’État,” *Harvard International Law Journal* 53, no. 2 (2012): 292–356.

validating the accession to power of Rajoelina through unconstitutional means, the HCC set a precedent whereby institutional practice may prevail over written law, risking the effectiveness and predictability of Malagasy constitutional law.⁴⁰

3.2.2. 2018 Decisions: Validation of a Contested Candidature and Electoral Results

In 2018, the HCC validated, by Decision No. 26-HCC/D₃ of 22 August 2018, the candidature of Andry Rajoelina for the anticipated presidential election of 7 November 2018. It concluded that his file, as well as those of the other 35 selected candidates, complied with the conditions set out in the Constitution, Organic Law No. 2018-009 and implementing decrees. The formal review of the documents submitted was deemed satisfactory, and the Court affirmed that the selected candidates fulfilled the eligibility criteria. In this respect, the HCC's approach a priori respected constitutional requirements of regularity and equality of treatment.

However, a substantive legal flaw emerged when examining Ruling No. 09-HCC/AR of 5 September 2018, which rejected a constitutional complaint challenging the validity of Rajoelina's candidature on the grounds of his involvement in the 2009 regime change.⁴¹ The complainant argued that such action constituted an unconstitutional change of government, which should have disqualified him under the principle of respect for constitutional order. International legal practice underlines that coup leaders should be disqualified from participating in elections, as their candidacy undermines both accountability and the integrity of democratic order.⁴² The HCC, however, declared the constitutional complaint inadmissible due to a procedural defect, without

⁴⁰ As comparative studies emphasise, such precedents not only erode national constitutional legitimacy but also threaten regional stability, as coups often have repercussions beyond national borders and trigger mixed responses from regional organisations. See Franziska Hohlstein, *Regional Organizations and Their Responses to Coups* (Bristol: Bristol University Press, 2022); Nikolay Marinov and Hein Goemans, "Coups and Democracy," *British Journal of Political Science* 44, no. 4 (October 28, 2014): 799–825.

⁴¹ From a comparative constitutional perspective, permitting a political figure who previously engaged in an unconstitutional change of government to stand for election runs contrary to the anti-coup principle, which is rooted in the protection of democratic institutions and the rejection of arbitrary power. See Michael Kreis, "Coups and Punishment in the Constitutional Order," *Wisconsin Law Review* 2025, no. 2 (2025): 459–83.

⁴² Deymah Alweqyan, "Coup in International Law: Between Theory and Reality," *Journal of East Asia and International Law* 17, no. 1 (May 31, 2024): 61–86.

examining the merits, even though the grievance concerned a serious violation of fundamental constitutional principles, namely the prohibition of extra-legal seizures of power.

This purely procedural rejection calls into question the rigour of the judicial scrutiny exercised by the HCC. While the Court is bound to respect procedural rules, its constitutional mission is not limited to a formalistic reading of the law: it is also the guardian of the Constitution and guarantor of institutional order. In comparable jurisdictions, courts have assumed a proactive role in ensuring electoral integrity, for instance, through anti-corruption and integrity enforcement measures, precisely to safeguard public confidence in democratic processes.⁴³ In this case, the argument concerning unconstitutional regime change could have justified substantive review in the name of constitutional public order, particularly in a post-crisis context. The absence of any substantive analysis leaves unresolved uncertainty regarding the interpretation and application of ineligibility principles related to institutional ruptures.

The HCC's stance may thus be perceived as a restrictive application of its contentious jurisdiction, hiding behind a strict procedural reading to avoid deciding on a politically sensitive issue. This choice casts doubt on its impartiality, especially since Rajoelina's involvement in the 2009 crisis was well known and documented. Even if no provision explicitly prescribes ineligibility for unconstitutional regime change, the Court's silence on this point reflects a jurisprudential vacuum and a lack of constitutional activism where it might have been expected. By contrast, the U.S. constitutional tradition, through Section Three of the Fourteenth Amendment, provides an explicit safeguard for constitutional order by disqualifying from public office any individual who, after taking an oath to "support the Constitution of the United States," has "engaged in insurrection or rebellion" or given "aid or comfort to the enemies thereof." This provision reflects a clear constitutional mechanism ensuring that loyalty to the Constitution is a prerequisite for holding public authority.⁴⁴

⁴³ Omer Yair, Raanan Sulitzeanu-Kenan, and Yoav Dotan, "Can Institutions Make Voters Care about Corruption?" *The Journal of Politics* 82, no. 4 (October 1, 2020): 1430–42.

⁴⁴ William Baude and Michael Stokes Paulsen, "The Sweep and Force of Section Three," *University of Pennsylvania Law Review* 172, no. 3 (2024): 605–745.

In sum, the 2018 decisions show that while the HCC respected legal forms in dealing with candidatures, it also avoided addressing substantive grievances that could affect the credibility of the electoral process. This posture reveals a tension between jurisdictional neutrality and strategic abstention.⁴⁵ In a post-crisis institutional environment, such restraint may be interpreted as indirect leniency, exposing the limits of the HCC in fully exercising its role as supreme guarantor of the Constitution when major political interests are at stake.

3.2.3. 2023 Decisions: The Question of Dual Nationality and Electoral Disputes

In 2023, the HCC of Madagascar was at the centre of the politico-legal stage, notably in relation to decisions concerning the candidature of Andry Rajoelina for the presidential election. The process formally began with Ruling No. 04-HCC/AR of 22 August 2023, handed down following a constitutional complaint seeking the invalidation of Rajoelina's candidature, on the grounds of the alleged loss of his Malagasy nationality. The complainant alleged that Rajoelina acquired French nationality by naturalisation in 2014. Under Article 42 of Ordinance No. 60-064 (the Nationality Code), a Malagasy adult who voluntarily acquires a foreign nationality thereby loses Malagasy nationality. Consequently, if the allegation were established, he would fail to satisfy Article 46 of the Constitution, which expressly requires that any candidate for the Presidency be of Malagasy nationality. The HCC, in its decision, dismissed the complaint, ruling that the issue of nationality could not be settled by it but rather fell under ordinary jurisdiction. This position of withdrawal, although legally defensible within a certain reading of jurisdictional competence, raises questions in light of the Court's constitutional review duties, particularly when it concerns safeguarding the integrity of republican principles. Concerns of conflicting loyalty linked to dual citizenship are central here, since constitutional courts are expected to prevent candidates with divided allegiances from occupying the highest political office.⁴⁶

⁴⁵ In doing so, the HCC missed an opportunity to fortify the rule of law against coup-linked actors, a failure that risks normalising unconstitutional paths to power and weakening public trust in electoral legitimacy. See ., Max Steuer, "The 'Will of the People' as Means for Pressuring the Rule of Law?," *Zeitschrift für Vergleichende Politikwissenschaft* 19, no. 2 (January 20, 2025): 247–71; Ben Klein, "A Vote for Clarity: Establishing a Federal Test for Intervention in Election-Related Disputes," *Fordham Law Review* 86, no. 3 (2017): 1361–91.

⁴⁶ Joachim Blatter, "Dual Citizenship and Theories of Democracy," *Citizenship Studies* 15, no. 6–7 (October 2011):

Shortly thereafter, the HCC confirmed its stance in Decision No. 11-HCC/D3 of 9 September 2023, finalising the official list of candidates for the first round of the presidential election scheduled for 9 November 2023. This decision officially included Rajoelina among the thirteen validated candidates. The Court stated that it had recorded admissible candidatures without substantially addressing the previously raised nationality concerns. Institutional stability and adherence to the electoral timetable appear to have prevailed in the HCC's analysis. Yet this absence of an explicit position on such a fundamental issue as the nationality of the incumbent President raises constitutional concerns. Article 46 of the Constitution expressly requires presidential candidates to hold Malagasy nationality, and disregarding this condition, even under the pretext of competence, could be interpreted as sidelining the principle of electoral legality. The omission also risks undermining democratic egalitarianism, since dual citizens may enjoy advantages or exert political influence across more than one jurisdiction, which contradicts the principle of equal political power.⁴⁷

This jurisprudential orientation was confirmed in Ruling No. 06-HCC/AR of 9 September 2023, ruling on several constitutional complaints seeking the invalidation of Rajoelina's candidature. Once again, the Court dismissed the applicants' arguments, finding that the evidence provided was insufficient to establish ineligibility. Significantly, the HCC recalled that it lacked investigative powers regarding nationality, a legal argument that seems to elude the responsibility of verification inherent in its role. By adopting this stance, the Court exposed itself to criticism for delegating a major constitutional issue to other jurisdictions, even though it is the guarantor of electoral regularity and the conformity of candidatures with the Constitution. This judicial restraint overlooks the security risks associated with dual citizenship, particularly in high offices where national interest could conflict with foreign allegiances.⁴⁸

769–98; Patrick Wautelet, "The Next Frontier: Dual Nationality as a Multi-Layered Concept," *Netherlands International Law Review* 65, no. 3 (October 3, 2018): 391–412.

⁴⁷ Robert E. Goodin and Ana Tanasoca, "Double Voting," *Australasian Journal of Philosophy* 92, no. 4 (October 2, 2014): 743–58.

⁴⁸ Daiva Stasiulis and Darryl Ross, "Security, Flexible Sovereignty, and the Perils of Multiple Citizenship," *Citizenship Studies* 10, no. 3 (July 2006): 329–48.

The election proceeded despite political tensions and calls for postponement by several candidates. In this climate of mistrust, the official proclamation of the first-round results by Ruling No. 08-HCC/AR of 1 December 2023 was a decisive moment. The HCC validated Rajoelina's election in the first round with 58.95% of the votes cast, while rejecting challenges to the regularity of the poll. It justified its decision by the lack of sufficient proof of irregularities capable of undermining the sincerity of the vote. Nevertheless, the conditions in which the campaign was conducted, with opposition calls for boycott, a record abstention rate, and widespread distrust of institutions, cast a shadow over the symbolic weight of this proclamation. By failing to take these contextual elements into account, the HCC prioritised a formal reading of the electoral process at the expense of a more substantive assessment of democratic legitimacy. In contexts where public opinion perceives dual nationals as a symbolic threat to cohesion and national identity, judicial inaction may further undermine institutional legitimacy.⁴⁹

Taken together, the 2023 decisions reveal a jurisprudence of restraint by the High Constitutional Court. Its role as guardian of the Constitution seems to have been diluted in favour of a procedural approach, refusing to intervene on substantive issues directly linked to the essence of the constitutional order. By not ruling clearly on the dual nationality of a presidential candidate, a matter central to constitutional provisions, the HCC exposed itself to criticism of institutional complacency, particularly in its treatment of a dominant political figure such as Rajoelina. Comparative experiences, such as the absence of clear legal regulation on dual nationality in Jordan, show how the lack of decisive judicial intervention can generate recurring constitutional disputes and weaken public trust.⁵⁰

Ultimately, the 2023 decisions of the HCC highlight a tension between institutional stability and the constitutional requirement of rigour and impartiality.

⁴⁹ Maarten Vink, Hans Schmeets, and Hester Mennes, "Double Standards? Attitudes towards Immigrant and Emigrant Dual Citizenship in the Netherlands," *Ethnic and Racial Studies* 42, no. 16 (December 10, 2019): 83–101.

⁵⁰ Omar Almahzoumi, Abdulhakim Atroosh, and Mustafa Al-Khasawneh, "The Right of Dual Citizenship to Vote and Run as Candidate for the House of Representatives in Jordanian Law," *Review of International Geographical Education Online* 11, no. 3 (2021): 1176–85.

While it may be understood that the Court sought to avoid an open political crisis, its refusal to adjudicate on substantive issues relating to the conformity of candidatures to constitutional requirements raises concerns about the effectiveness of judicial review in electoral matters. The principle of the rule of law rests on the capacity of constitutional courts to assert themselves as genuine counter-powers, including against the executive. In this respect, the 2023 decisions could represent a risky precedent for the weakening of constitutional review in electoral periods, with profound implications for judicial independence. Failure to resolve the dual nationality issue risks entrenching instability by allowing contested legitimacy to persist, rather than securing the supremacy of constitutional norms.⁵¹

Overall, these decisions illustrate a jurisprudence oscillating between pragmatism and restraint (see Table 1). While the HCC has often prioritised institutional stability and procedural regularity, it has consistently avoided substantive rulings on sensitive constitutional issues such as unconstitutional regime change (2009, 2018) and dual nationality (2023). This pattern reveals an institutional leniency that weakens the Court’s role as guardian of constitutional supremacy, raising doubts about its capacity to act as an effective counter-power in moments of political crisis.

Table 1. HCC Decisions Concerning Andry Rajoelina (2009–2023)

Year	Decision No.	Subject Matter	Key Legal/ Institutional Issue	Court’s Stance
2009	03-HCC/D2 (23 Apr)	Transitional regime	Ordinance creating Military Directorate unconstitutional but recognised de facto authority to ensure continuity of the State	Departure from constitutional text; prioritised stability over legality
	02-HCC/AV (31 Jul)	Interpretation of Art. 53, Constitution of 2010	Advisory opinion on transitional arrangements	Confirmed pragmatic interpretation during crisis

⁵¹ Thomas Faist, ed., *Dual Citizenship in Europe: From Nationhood to Societal Integration* (Abingdon: Routledge, 2016).

Year	Decision No.	Subject Matter	Key Legal/ Institutional Issue	Court's Stance
2018	26-HCC/D3 (22 Aug)	Presidential candidatures	Validation of Rajoelina and 35 others as eligible	Formal compliance with constitutional and statutory requirements
	09-HCC/AR (5 Sep)	Challenge to Rajoelina's candidature	Alleged ineligibility due to 2009 unconstitutional regime change	Rejected on procedural grounds, no substantive review
2023	04-HCC/AR (22 Aug)	Request to invalidate candidature (dual nationality)	Alleged loss of Malagasy nationality (French naturalisation)	Declared not competent, deferred to ordinary jurisdiction
	11-HCC/D3 (9 Sep)	Official list of candidates	Inclusion of Rajoelina despite nationality controversy	Finalised list without addressing nationality issue
	06-HCC/AR (9 Sep)	Complaints on ineligibility (dual nationality)	Multiple challenges to Rajoelina's candidature	Dismissed; held insufficient evidence and lack of investigative powers
	08-HCC/AR (1 Dec)	Proclamation of results	Rajoelina elected with 58.95% first round	Validated results; rejected irregularity claims, prioritised formal legality

Source: Author's analysis

3.3. Reflection on the Potential Existence of a Constitutional Immunity in Madagascar

The concept of “constitutional immunity” refers, in its strict sense, to the protection enjoyed by certain holders of public office against being brought before ordinary or constitutional courts for acts carried out in the exercise of their functions. In Madagascar, the Constitution does not expressly provide for presidential immunity or any jurisdictional privilege for the Head of State. Nevertheless, in the case of Andry Rajoelina, the HCC has, over the span of fourteen years, rendered eight decisions systematically dismissing complaints that sought either to contest his candidacy or to challenge the regularity of the electoral process that resulted in his presidency. This consistent jurisprudence raises doubts as to whether a de facto, if not de jure, immunity exists.⁵²

From the standpoint of constitutional complaint, this practice calls into question the effective availability of remedies to citizens. The constitutional complaint mechanism, as developed in comparative constitutional law (for instance, in Germany or South Korea), is designed to ensure that every individual may challenge violations of constitutional rights, even against the highest authorities. If the HCC consistently shields one candidate from scrutiny, the institution risks undermining the very purpose of judicial review, which is to guarantee equality before the law. Indeed, Article 6 of the Constitution of 2010 and Article 25 of the International Covenant on Civil and Political Rights (ICCPR) enshrine the principle that no one is above the conditions set by the Constitution for eligibility to the presidency.⁵³

⁵² Such repeated rulings risk creating a legitimacy crisis, whereby electoral victories are perceived as judicially manufactured rather than democratically earned, thus eroding public trust in both the judiciary and the democratic process. See Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford: Oxford University Press, 2003); Klein, “A Vote for Clarity: Establishing a Federal Test for Intervention in Election-Related Disputes.”

⁵³ This form of judicial avoidance resembles judicial overreach in reverse: rather than exceeding its power, the Court abdicates it, thereby distorting the separation of powers by silently favouring a dominant political actor. See, *cp.*, Richard L. Pacelle, *The Role of the Supreme Court in American Politics: The Least Dangerous Branch* (University of Missouri-St. Louis, United States: Taylor and Francis, 2018), <https://doi.org/10.4324/9780429495885>; Thomas R. Bell, “The Law : Perverse Politics: Recess Appointments, Noel Canning , and the Limits of Law,” *Presidential Studies Quarterly* 48, no. 2 (June 16, 2018): 373–86, <https://doi.org/10.1111/psq.12460>.

Yet, when faced with complaints challenging Rajoelina's candidacy, especially those concerning the sensitive issue of his nationality (Decision No. 04-HCC/AR of 22 August 2023 and Decision No. 06-HCC/AR of 9 September 2023), the HCC took a restrictive position. It held that the potential loss of Malagasy nationality could only be established by a formal decree of forfeiture. This reasoning, privileging form over substance, echoes the Court's earlier stance in 2018 when it declined to examine arguments of ineligibility linked to the unconstitutional change of power in 2009. The Court, instead of probing the substance of the grievances, confined itself to procedural and formal considerations. Such a pattern invites reflection on whether the HCC is exercising genuine judicial independence or whether it is, in practice, limiting its own capacity for constitutional adjudication.

The implications of this restrictive interpretation are profound. In electoral matters, the HCC is constitutionally empowered to verify the regularity of eligibility conditions under Article 27 of Ordinance No. 2001-003. By refusing to examine substantive evidence, such as allegations of possession of a foreign passport, the Court effectively allowed administrative silence to shield a candidate from legal scrutiny. This sets a dangerous precedent: that mere procedural shortcomings by the administration can protect political figures from constitutional challenge. In the absence of a robust constitutional complaint mechanism, the citizenry is left without recourse, undermining both electoral fairness and the principle of separation of powers. Over time, such judicial complacency risks transforming the Court itself into an institution of political manipulation, sacrificing its constitutional function for short-term stability.⁵⁴

This approach has created a judicial barrier around Rajoelina that resembles immunity in practice. Article 79 of the Malagasy Nationality Code provides that a nationality certificate constitutes proof until rebutted. A genuinely independent constitutional court would have opened an inquiry into the nationality dispute in order to dispel doubts. Instead, the HCC concluded that the lack of a decree

⁵⁴ James A. Gardner, "The Illiberalization of American Election Law: A Study in Democratic Deconsolidation," *Fordham Law Review* 90, no. 2 (2021): 423–65; Roberto Viciano Pastor, "When Judges Declare Constitution as Unconstitutional: Presidential Reelection in Latin-American According to the Last Decisions of the Constitutional Courts," *Anuario Iberoamericano de Justicia Constitucional*, no. 22 (December 11, 2018): 165–98.

on loss of nationality was sufficient to dismiss the challenge. Such reasoning erodes the constitutional guarantee of equal opportunity in elections and weakens confidence in the impartiality of constitutional justice.⁵⁵

From a comparative perspective, constitutional courts in Kenya and Senegal have examined candidacies more thoroughly, addressing allegations of nationality or corruption to safeguard electoral equality. By contrast, the HCC's reluctance to exercise substantive review recalls the doctrine of "constitutional reality" it invoked in 2009 to validate an unconstitutional change of government in the name of national stability. Judicial independence, however, is not measured by the preservation of political equilibrium but by the court's ability to enforce constitutional norms against all actors, including those in power. As scholarship on democratic deconsolidation demonstrates, once courts are perceived as partisan, the very foundations of constitutional democracy are at risk of long-term erosion.⁵⁶

The jurisprudence of 2023 reinforces the impression of institutionalised protection. Decision No. 11-HCC/D3 of 9 September 2023, establishing the definitive list of candidates, included Rajoelina while implicitly dismissing serious objections to his eligibility. Decision No. 08-HCC/AR of 1 December 2023, proclaiming the first-round results, rejected all complaints contesting the regularity of the vote, whether related to nationality or electoral transparency. The repetition of such outcomes, echoing 2009 and 2018 precedents, suggests not judicial neutrality but judicial avoidance, which in practice functions as a disguised immunity. The resulting perception of bias corrodes not only the legitimacy of elections but also the credibility of the judiciary as a neutral constitutional guardian.⁵⁷

Equally concerning is the Court's method of reasoning. Many of its decisions provide only minimal motivation, focusing narrowly on procedural admissibility

⁵⁵ Perceived judicial favouritism has been shown to encourage corruption and clientelism, as political actors seek to secure favourable rulings through patronage rather than through law. See Mohammed Halim Limam, "Detailed Analysis of the Phenomenon of Political Corruption in Algeria: Causes, Repercussions and Reform," *Contemporary Arab Affairs* 5, no. 2 (April 27, 2012): 252–78.

⁵⁶ Gardner, "The Illiberalization of American Election Law: A Study in Democratic Deconsolidation."

⁵⁷ Rebecca L. Brown and Andrew D. Martin, "Rhetoric and Reality: Testing the Harm of Campaign Spending," *New York University Law Review* 90, no. 4 (2015): 1066–94.

while leaving substantive issues unexamined. This lack of reasoned analysis contradicts the principles of transparency and accountability that are essential to constitutional adjudication. A constitutional complaint system without meaningful reasoning risks becoming an empty formality, incapable of delivering genuine constitutional protection.⁵⁸

At the international level, the ICCPR (Articles 2 and 25) obliges states to ensure effective remedies against violations of political rights. By closing the door to substantive examination of electoral disputes, the HCC risks breaching Madagascar's international commitments. Judicial independence requires more than structural safeguards; it requires a willingness by judges to confront politically sensitive issues. A constitutional court that refrains from doing so risks being perceived as an instrument of political validation rather than as a guardian of the Constitution.⁵⁹

Thus, based on the analysis of the eight decisions of HCC, it is difficult to say that there is an explicit recognition of a constitutional immunity in favour of Rajoelina. Rather, it shows a convergence of restrictive judicial practices that have produced the same effect. By retreating behind procedural formalism and adopting a narrow interpretation of its powers, the HCC has created a de facto shield for the political elites, incompatible with the essence of judicial independence and the principle of constitutional complaint.⁶⁰

⁵⁸ As noted in comparative jurisprudence, when courts fail to provide substantive reasoning, they risk being seen as complicit in partisan manipulation of electoral law. See Edward B. Foley, "Voting Rules and Constitutional Law," *George Washington Law Review* 81, no. 6 (2013): 1836–64.

⁵⁹ The danger lies not merely in isolated decisions but in the long-term institutional damage: once the judiciary is identified with political favouritism, it may lose its authority as a constitutional actor altogether. See Stephen Menendian, "Race and Politics: The Problem of Entanglement in Gerrymandering Cases," *Southern California Law Review* 96, no. 2 (2023): 301–54.

⁶⁰ Similar patterns of judicial bias in constitutional adjudication during presidential elections can be observed across Africa. In Benin, Alexander Stroh, "Sustaining and Jeopardising a Credible Arbiter: Judicial Networks in Benin's Consolidating Democracy," *International Political Science Review* 39, no. 5 (November 13, 2018): 600–615, found that the credibility of the Constitutional Court was compromised due to political representation bias linked to executive and legislative appointment practices, undermining its impartiality in electoral disputes. In Angola, David Boio, "Elements of Electoral Manipulation and Fraud Detected in the 2022 Angolan Elections," *Cadernos de Estudos Africanos* 45 (2023): 101–33, demonstrated that the 2022 elections were marred by manipulations, including voter bribery, media control, and biased post-election litigation, revealing how the judiciary and electoral bodies operated as instruments of regime preservation. In Ghana, Christopher Appiah-Thompson, "The Politics of Judicial Review of Elections in Ghana: Implications for Judicial Reforms and Emerging Electoral Jurisprudence," *Africa Review* 13, no. 2 (November 11, 2021): 251–69, highlighted that excessive executive powers over judicial appointments created perceptions of political bias during the review of the 2012 presidential election complaint, weakening public trust in judicial independence. These experiences echo the situation in Madagascar, showing that

This situation calls for serious reflection on the future of constitutional justice in Madagascar. To prevent the mere “impression” of immunity from becoming a juridical reality, the role and methodology of the HCC must be rethought. Only a constitutional justice that embraces transparency, substantive examination of grievances, and strict equality before the law can ensure that the presidency remains under, rather than above, the Constitution it is bound to protect.

IV. CONCLUSION

In conclusion, the analysis of the decisions rendered by the High Constitutional Court (HCC) between 2009 and 2023, when examined against the backdrop of fundamental principles of constitutional law, reveals a profound ambivalence. On the one hand, the HCC has consistently affirmed its function as the regulator of electoral processes and the formal guardian of the Constitution. On the other hand, the remarkable consistency with which its rulings have upheld the positions and candidacies of Andry Rajoelina, sometimes through flexible interpretations of constitutional and statutory requirements, casts doubt on the effective realisation of the principle of equality before the law. Without establishing the existence of an explicitly organised institutional immunity, the recurrence of favourable decisions towards the same political actor exposes a structural fragility: the risk that constitutional justice, under the weight of major political pressures, may shift from strict judicial review to a form of institutional accommodation. This finding highlights the urgent need to strengthen the credibility of constitutional review through more robust guarantees of judicial independence. In particular, the effective operation of a constitutional complaint mechanism, whether direct or indirect, is essential to ensure that citizens and political actors alike have access to meaningful remedies against violations of constitutional rights and electoral irregularities. If such remedies remain formal rather than substantive, the very purpose of constitutional complaint as a safeguard of constitutional democracy is undermined.

judicial restraint or bias in politically sensitive disputes is part of a broader regional trend in which constitutional courts risk legitimising incumbents at the expense of democratic consolidation.

Accordingly, this situation calls on Malagasy institutions, chief among them the HCC but equally the legislature, the executive, and political parties, to reflect on ways of reinforcing the independence of constitutional adjudication and the integrity of electoral justice. More broadly, it requires a collective commitment to consolidating constitutional democracy in Madagascar, so that the Constitution ceases to serve merely as an instrument of legitimisation for those in power and instead becomes the genuine bulwark of equality, transparency, and the protection of political rights for all citizens. As a recommendation for future research, further studies should explore how constitutional justice in Madagascar could be reformed through targeted legal reforms aimed at strengthening judicial independence and preventing similar institutional vulnerabilities. Ultimately, it is the trust of the Malagasy people in their institutions, which constitutes an indispensable condition for the stability and consolidation of the rule of law, that is at stake.

BIBLIOGRAPHY

- Almakhzoumi, Omar, Abdulhakim Atroosh, and Mustafa Al-Khasawneh. "The Right of Dual Citizenship to Vote and Run as Candidate for the House of Representatives in Jordanian Law." *Review of International Geographical Education Online* 11, no. 3 (2021): 1176-85. <https://doi.org/10.33403/rigeo.800560>.
- Alweqyan, Deymah. "Coup in International Law: Between Theory and Reality." *Journal of East Asia and International Law* 17, no. 1 (May 31, 2024): 61-86. <https://doi.org/10.14330/jeail.2024.17.1.04>.
- Appiah-Thompson, Christopher. "The Politics of Judicial Review of Elections in Ghana: Implications for Judicial Reforms and Emerging Electoral Jurisprudence." *Africa Review* 13, no. 2 (November 11, 2021): 251-69. <https://doi.org/10.1080/09744053.2021.1943149>.

- Arnold, Rainer. “L’État de droit comme fondement du constitutionnalisme européen [The Rule of Law as the Foundation of European Constitutionalism].” *Revue française de droit constitutionnel* [French Review of Constitutional Law] 100, no. 4 (2014): 769-76. <https://doi.org/10.3917/rfdc.100.0769>.
- Basset, Antoine, and Eleonora Bottini. “Chronique de droit constitutionnel comparé (janvier 2020 à juin 2020) [Chronicle of Comparative Constitutional Law (January 2020 to June 2020)].” *Titre VII* [Title VII] 5, no. 2 (2020): 180-93. <https://doi.org/10.3917/tvii.005.0180>.
- Baude, William, and Michael Stokes Paulsen. “The Sweep and Force of Section Three.” *University of Pennsylvania Law Review* 172, no. 3 (2024): 605-745. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?params=/context/penn_law_review/article/9843/&path_info=UPLR_172.3_A_Article_1_Baude___Paulsen.pdf.
- Bell, Thomas R. “The Law: Perverse Politics: Recess Appointments, Noel Canning, and the Limits of Law.” *Presidential Studies Quarterly* 48, no. 2 (June 16, 2018): 373-86. <https://doi.org/10.1111/psq.12460>.
- Blatter, Joachim. “Dual Citizenship and Theories of Democracy.” *Citizenship Studies* 15, no. 6-7 (October 2011): 769-98. <https://doi.org/10.1080/13621025.2011.600090>.
- Boio, David. “Elements of Electoral Manipulation and Fraud Detected in the 2022 Angolan Elections.” *Cadernos de Estudos Africanos* 45 (2023): 101-33. <https://doi.org/10.4000/cea.7869>.
- Brown, Rebecca L., and Andrew D. Martin. “Rhetoric and Reality: Testing the Harm of Campaign Spending.” *New York University Law Review* 90, no. 4 (2015): 1066-94. <https://andrewdmartin.washu.edu/app/uploads/2019/01/RHETORIC-AND-REALITY-TESTING-THE-HARM-OF-CAMPAIGN-SPENDING-17bm4gd.pdf>.
- Constitution of the Republic of Madagascar (Fourth Republic). *Official Journal* No. 3350, January 20, 2011.

- Dershowitz, Alan M. *Supreme Injustice: How the High Court Hijacked Election 2000*. Oxford: Oxford University Press, 2003. <https://doi.org/10.1093/0195158075.001.0001>.
- Faist, Thomas, ed. *Dual Citizenship in Europe: From Nationhood to Societal Integration*. Abingdon: Routledge, 2016. <https://doi.org/10.4324/9781315578231>.
- Favoreu, Louis, et al. *Droit constitutionnel [Constitutional Law]*. 21st ed. Paris: Dalloz, 2019.
- Foley, Edward B. “Voting Rules and Constitutional Law.” *George Washington Law Review* 81, no. 6 (2013): 1836–64. https://www.gwlr.org/wp-content/uploads/2015/03/Foley-81_6-Clean.pdf.
- Gardner, James A. “The Illiberalization of American Election Law: A Study in Democratic Deconsolidation.” *Fordham Law Review* 90, no. 2 (2021): 423–65. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5883&context=fldr>.
- Glénard, Guillaume. “La doctrine constitutionnelle de l’égalité et la parité [The Constitutional Doctrine of Equality and Parity].” *Revue du droit public [Review of Public Law]* 2021, no. 2 (March 2021): 489–518. <https://droit.cairn.info/revue-revue-du-droit-public-2021-2-page-489?lang=fr>.
- Ghoshal, Baladas. “Anatomy of Political Atrophy in Thailand.” *Strategic Analysis* 39, no. 2 (March 4, 2015): 156–69. <https://doi.org/10.1080/09700161.2014.1000656>.
- Goemans, Hein, and Nikolay Marinov. “Coups and Democracy.” *British Journal of Political Science* 44, no. 4 (October 28, 2014): 799–825. <https://doi.org/10.1017/S0007123413000264>.
- Goodin, Robert E., and Ana Tanasoca. “Double Voting.” *Australasian Journal of Philosophy* 92, no. 4 (October 2, 2014): 743–58. <https://doi.org/10.1080/00048402.2014.913300>.
- Hohlstein, Franziska. *Regional Organizations and Their Responses to Coups*. Bristol: Bristol University Press, 2022. <https://doi.org/10.51952/9781529224108>.

- Jouanjan, Olivier. “Histoire de la science du droit constitutionnel [History of the Science of Constitutional Law].” In *Traité international de droit constitutionnel* [International Treatise on Constitutional Law], edited by Michel Troper and Dominique Chagnollaud, 69–111. Paris: Dalloz, 2012. http://www.buv.isfad-gn.org/universitaire/1_SJPEG/01_Science%20Juridique/002_Droit%20Constitutionnel/Histoire%20de%20la%20science%20du%20droit%20constitutionnel.pdf.
- Keutcha Tchapnga, Célestin. “Droit constitutionnel et conflits politiques dans les États francophones d’Afrique noire [Constitutional Law and Political Conflicts in the Francophone States of Black Africa].” *Revue française de droit constitutionnel* [French Review of Constitutional Law] 63, no. 3 (2005): 451–91. <https://doi.org/10.3917/rfdc.063.0451>.
- Klein, Ben. “A Vote for Clarity: Establishing a Federal Test for Intervention in Election-Related Disputes.” *Fordham Law Review* 86, no. 3 (2017): 1361–91. https://fordhamlawreview.org/wp-content/uploads/2017/12/Klein_December_v86.pdf.
- Kreis, Anthony Michael. “Coups and Punishment in the Constitutional Order.” *Wisconsin Law Review* 2025, no. 2 (2025): 459–83. <https://doi.org/10.59015/wlr.QIPD5224>.
- Lendzoumbou, Inesta Brunel. “Aid Sanctions and Constitutional Order: The US and France’s Responses to Military Coups in Sub-Saharan Africa and the Rise of Multipolar Competition.” *Third World Quarterly* 46, no. 9 (June 13, 2025): 987–1012. <https://doi.org/10.1080/01436597.2025.2526063>.
- Limam, Mohammed Halim. “Detailed Analysis of the Phenomenon of Political Corruption in Algeria: Causes, Repercussions and Reform.” *Contemporary Arab Affairs* 5, no. 2 (April 27, 2012): 252–78. <https://doi.org/10.1080/17550912.2012.671999>.
- Manitra, Ramalina Ranaivo Mikea. “Constitutional Fragility and Dual Nationality Disputes: Legal Implications of Madagascar 2023 Presidential Election.” *Constitution Journal* 4, no. 1 (June 30, 2025): 93–120. <https://doi.org/10.35719/constitution.v4i1.132>.

- Mathebula, Ndzalama. “Democratic Deficit and Resurgence of Military Coups: An Assessment of Regional Insecurity in Africa.” *African Renaissance* 22, no. 1 (2025): 375–89. <https://doi.org/10.31920/2516-5305/2025/22n1a18>.
- McKenna, Amy, et al. “Andry Rajoelina: Biography, Age, Education, Nationality, & Wife.” *Encyclopedia Britannica*, November 17, 2023. <https://www.britannica.com/biography/Andry-Rajoelina>.
- Menendian, Stephen. “Race and Politics: The Problem of Entanglement in Gerrymandering Cases.” *Southern California Law Review* 96, no. 2 (2023): 301–54. <https://southerncalifornialawreview.com/2023/04/24/race-and-politics-the-problem-of-entanglement-in-gerrymandering-cases/>.
- Milani, Giammaria. “À quoi sert la Constitution malgache? Les défis pour l’édification d’une Constitution effective et efficace à Madagascar [What Is the Use of the Malagasy Constitution? Challenges for Building an Effective and Efficient Constitution in Madagascar].” *Federalismi.it* 3 (2018): 1-25. <https://usiena-air.unisi.it/bitstream/11365/1066354/2/AIR%20Giammaria%20Federalismi.pdf>.
- Organic Law No. 2018-008 on the General Regime of Elections and Referendums. *Official Journal* No. 3814, May 16, 2018.
- Organic Law No. 2018-009 on the Election of the President of the Republic. *Official Journal* No. 3814, May 16, 2018.
- Ordinance No. 2001-003 on the Organic Law Relating to the High Constitutional Court. *Official Journal* No. 2747, November 19, 2001.
- Pacelle, Richard L. *The Role of the Supreme Court in American Politics: The Least Dangerous Branch*. Columbia: University of Missouri Press, 2018. <https://doi.org/10.4324/9780429495885>.
- Pastor, Roberto Viciano. “When Judges Declare Constitution as Unconstitutional: Presidential Reelection in Latin-American According to the Last Decisions of the Constitutional Courts.” *Anuario Iberoamericano de Justicia Constitucional*, no. 22 (December 11, 2018): 165–98. <https://doi.org/10.18042/cepc/aijc.22.06>.

- Pflieger, Géraldine. “Santiago de Chile Prototype of the Neo-Liberal City: Between a Strong State and Privatised Public Services.” In *Governing Megacities in Emerging Countries*, 217–68. Institute for Environmental Sciences, University of Geneva. Taylor and Francis, 2016. <https://doi.org/10.4324/9781315585574-9>.
- Rabary-Ranovona, Bako Mahaliana. “Les enjeux du concept de vote blanc pour le régime démocratique Malgache-hypothèse sur les élections présidentielles de 2018 [The Stakes of the Concept of the Blank Vote for the Malagasy Democratic Regime: Hypothesis on the 2018 Presidential Elections].” *Revue juridique de l’Océan Indien* [Legal Review of the Indian Ocean] 29 (2020): 549–94. <https://hal.univ-reunion.fr/hal-03327617/document>.
- Rousseau, Dominique. “Constitutionnalisme et démocratie [Constitutionalism and Democracy].” *La Vie des idées* [The Life of Ideas], September 19, 2008. <https://lavedesidees.fr/Constitutionnalisme-et-democratie>.
- Stasiulis, Daiva, and Darryl Ross. “Security, Flexible Sovereignty, and the Perils of Multiple Citizenship.” *Citizenship Studies* 10, no. 3 (July 2006): 329–48. <https://doi.org/10.1080/13621020600772107>.
- Steuer, Max. “The ‘Will of the People’ as Means for Pressuring the Rule of Law?” *Zeitschrift für Vergleichende Politikwissenschaft* 19, no. 2 (January 20, 2025): 247–71. <https://doi.org/10.1007/s12286-024-00620-z>.
- Stroh, Alexander. “Sustaining and Jeopardising a Credible Arbitrator: Judicial Networks in Benin’s Consolidating Democracy.” *International Political Science Review* 39, no. 5 (November 13, 2018): 600–615. <https://doi.org/10.1177/0192512118805366>.
- Varol, Ozan O. “The Democratic Coup d’État.” *Harvard International Law Journal* 53, no. 2 (2012): 292–356. <https://www.armyupress.army.mil/Portals/7/Hot-Spots/docs/CR/Varol-Democratic%20Coup.pdf>.
- Vink, Maarten, Hans Schmeets, and Hester Mennes. “Double Standards? Attitudes towards Immigrant and Emigrant Dual Citizenship in the Netherlands.” *Ethnic and Racial Studies* 42, no. 16 (December 10, 2019): 83–101. <https://doi.org/10.1080/01419870.2019.1567929>.

Wautelet, Patrick. “The Next Frontier: Dual Nationality as a Multi-Layered Concept.” *Netherlands International Law Review* 65, no. 3 (October 3, 2018): 391–412. <https://doi.org/10.1007/s40802-018-0125-6>.

Yair, Omer, Raanan Sulitzeanu-Kenan, and Yoav Dotan. “Can Institutions Make Voters Care about Corruption?” *The Journal of Politics* 82, no. 4 (October 1, 2020): 1430–42. <https://doi.org/10.1086/708504>.

WHO DECIDES WHAT WE CAN WATCH? BALANCING STREAMING SERVICES LIBERALIZATION AND CONSTITUTIONAL RIGHTS IN INDONESIA

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Abstract

Rapidly growing streaming services have become central to the cross-border circulation of information, cultural, and economic value, which presents complex regulatory challenges for states. This study aims to examine the potential tensions and regulatory interaction between a state's right to regulate, its commitment to trade liberalization, and citizens' constitutional rights to access information on the streaming service sector in the context of Indonesia. It offers normative analysis on international trade law, Indonesian constitutional law, and other related

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disciplines, along with empirical analysis through public surveys to assess public perceptions on protectionist policies. This paper argues that triangular tensions between international laws, states, and citizens occur when a state restricts foreign services. In Indonesia, these tensions are not merely theoretical but are institutionalized through regulations and constitutional court jurisprudence that empower the government to take immediate and repressive measures, including service access restrictions when deemed necessary. In the meantime, empirical research shows that the majority of respondents (83%) demand a high level of freedom to access information, although there is a variety of perceptions and levels of support when government restricts access to foreign streaming services. This means that formulating regulations in this sector requires a careful and comprehensive approach, as the state is obligated to allow streaming services through liberalization and guarantee citizens' rights to access them in line with its policy objectives and measures.

Keywords: Constitutional rights; Streaming services; Trade liberalization

I. INTRODUCTION

1.1. Background

The Internet has shaped digital services nowadays. This development allows an enhanced form of cross-border supply where the mode is possible to be entirely contactless across countries. Among positive impacts of this trend are noticed through the findings of a more efficient method in the business process, like in the case of blockchain in trading,¹ and the ability to improve the regional integration process like European Single Market.² With rapid, wide, and direct exchange of data transmission through the internet, information from one to others is possible to be transferred simultaneously. For example, ones can stream-watch or listen to audio-visual content - directly through internet services from foreign service providers.³ A dedicated study from the perspective of this type of

¹ Xin Tian et al., "Improving Operational Efficiency through Blockchain: Evidence from a Field Experiment in Cross-Border Trade," *Production Planning & Control* 35, no. 9 (2024).

² Stefan Dedovic and Vincent Homburg, "Cross-Border Digital Public Services in the European Union: A Systematic Literature Review," *International Journal of Electronic Governance* 16, no. 1 (2024).

³ Categorizing streaming services could be a relatively difficult task as many online digital platforms may appear as streaming services. Tiktok, for example, is generally considered a non-streaming service because it is designed and utilized mainly as a user and social media platform. In that sense, to some extent, YouTube may also fall into this category. However, YouTube can be regarded as a streaming service due to the availability of its music and movie content. Meanwhile, other popular digital platforms like Netflix, Amazon Prime, Apple TV, Disney Hotstar, Max (HBO), Viu, We TV, and Spotify are categorized as streaming services since the services, video or audio content, are made available by the providers. When the origin of a provider and its services are not from

services is compelling to be examined due to its specific characteristic and impact on state measures. While foreign streaming services such as Netflix, YouTube, and Spotify operate entirely through cross-border supply and are widely consumed directly by users within a state, they also challenge the government's ability to balance the protection of national interests with its international commitments and citizen freedom rights.

Despite its abundant advantages, new model of digital service disrupts the traditional form of service. In turn, it forces stakeholders, especially the government, to modify regulations to adjust to various effects of digital services, including the concern of data privacy and national security. Various government measures, such as geo-content blocking, censorship, local content requirement, and partial to full blocking access of foreign services, have the potential to violate its international obligations, mainly in the General Agreement on Trade in Services (GATS) framework.⁴ While the applicability of foreign services entry primarily involves states and their respective service providers within the scope of international trade law, little attention has been paid to the impact of this concern from the lens of citizens' constitutional rights. A question should also emerge as to the extent to which the rights and interests of individuals in a country are relevant in accessing foreign services. For example, when a streaming service like Netflix is made unavailable by a government through blocking, censorship, or other limitations, is the citizen's right to obtain information violated?

In most countries around the world, the right to access and obtain information is guaranteed under the constitution, as it is now perceived as an essential human right that is also strongly supported through the regime of international

a state, they are labeled as foreign entities. In the context of Indonesia, Netflix and Co., as previously described, are viewed as foreign streaming services. In comparison, Indonesia has its own domestic streaming services, which include Vision+, Vidio, Maxstream, and Bioskop Online.

⁴ From the perspective of international trade law, questions arise regarding the applicability of the GATS in addressing digital services issues due to a lack of readiness for the current digital age. To address this challenge, initiatives and new regulations have been introduced to mitigate the issue that intersects with the concern of cross-border services, even though the GATS itself remains a universal foundation governing trade in services. For instance, the availability of the General Data Protection Regulation (GDPR) and the Digital Services Act (DSA) in the European Union. In addition to these, many Regional Trade Agreements (RTA) have been proposed to further liberalize service trade, with some of the latest attempts focusing on regulating digital services. This instance includes the ASEAN Framework Agreement on Services (AFAS) that operates for ASEAN countries.

human rights law. In Indonesia, Article 28F of the 1945 Constitution serves as the umbrella for this right.⁵ Promoting this type of right in this particular relationship will generate complex considerations. The state's right to regulate as state sovereignty in this case, therefore, will intersect other regulation dimensions such as the international trade law, international human rights law, and constitutional law within the scope of its national law. The last will also have to be carefully examined under administrative law to assess whether the state is rightfully establishing legitimate measures limiting citizens' constitutional rights while exercising its sovereignty.

Early discussions on this newly recognized freedom in Indonesia during the internet era have been introduced by Hill & Sen. They pointed out that the new democratic era of Indonesia has embraced the internet as a public space for political discourse, especially after years of censorship under the New Order (*Orde Baru*) regime.⁶ Previous significant studies have also attempted to discuss the notion of the right to access and obtain information in Indonesia. For example, Butt examined the application of this right through the lens of Law No. 14 of 2008 concerning the Disclosure of Public Information,⁷ while Satriawan discussed the application of this right in the context of government policies to shut down the internet during critical moments.⁸ The promotion of this right has also been examined and tested through constitutional review of relevant laws and articles. These include Article 27(3) of the ITE Law, interpreted in Constitutional Court Decision No. 50/PUU-VI/2008 regarding the right to transmit data electronically,⁹ and Article 40(2b), reviewed in Constitutional Court Decision No. 81/PUU-XVIII/2020 concerning the government's authority to block internet services.¹⁰ On the other hand, there are some dedicated GATS

⁵ *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* [The 1945 Constitution of the Republic of Indonesia].

⁶ David T. Hill and Krishna Sen, "The Internet in Indonesia's New Democracy," in *Democratization* (London: Frank Cass Publishers, 2000).

⁷ Simon Butt, "Freedom of Information Law and Its Application in Indonesia: A Preliminary Assessment," *Asian Journal of Comparative Law* (Berlin: Walter de Gruyter GmbH, 2014).

⁸ Iwan Satriawan et al., "Internet Shutdown in Indonesia: An Appropriate Response or a Threat to Human Rights?" (2023).

⁹ *Judicial Review of Constitutional Court Law*, No. 50/PUU-VI/2008 (Constitutional Court of the Republic of Indonesia, 2008).

¹⁰ *Judicial Review of Constitutional Court Law*, No. 81/PUU-XVIII/2020 (Constitutional Court of the Republic of Indonesia, 2020).

discussions such as by Leroux in the cases development¹¹ and by Dongchul in the dynamic negotiation issue within streaming services sector.¹² However, no significant studies have been found in discussing the intersection of citizen constitutional rights in relation to the restriction of foreign streaming services. This study intends to fill that gap by exploring the complexity of information right among competing regulations by using Indonesia as a case of study. It is aimed to enrich the debate on how to regulate foreign streaming services by balancing three conceptual regimes: trade liberalization, state regulatory authority, and citizens' constitutional rights.

1.2. Method and Structure

This study employs theoretical and empirical approaches to examine the liberalization of streaming services in Indonesia. By combining legal theory and public perception perspective, this study seeks to provide a more contextual explanation of how international trade commitments and state sovereignty in introducing regulations interact with citizens' constitutional rights to obtain information. The following sections of this paper will be divided into two major parts.

The first part, the theoretical concept, includes a brief discussion on the available international legal frameworks for foreign streaming services access and human rights protection. This part also introduces relevant constitutional and administrative regulatory frameworks especially those related to the right of information in Indonesia. Finally, the emergence of triangular tensions is shown, which is the central issue of this paper. The second part of this paper describes data and its analysis to measure previous theoretical concepts. Questions were then delivered to respondents through a survey to understand their views on how they perceive government regulation of streaming services, which affects their constitutional right to obtain information. A non-probability purposive sampling technique has been used because the survey was distributed through

¹¹ Eric H. Leroux, "Twenty Years of GATS Case Law: Does It Taste like a Good Wine?" in *Research Handbook on Trade in Services* (2016).

¹² Dongchul Kwak and Minjung Kim, "Trade Negotiations in the Digital Era: The Case of OTT Video Streaming Services," *Global Policy* 11 (2020).

academic, professional, and social media networks by utilizing online platform. The respondents who participated were Indonesian internet users who had accessed foreign streaming services.

Respondents' selection was executed voluntarily without a random process, so the sample was selected based solely on ease of access and characteristics relevant to the research topic. This technique can also be considered to lead to snowballing sampling because it is possible that the survey was continued from the initial respondents to their acquaintances who had the appropriate criteria. Respondents' answers are structured using multiple-choice questions and Likert scales. Obtained data was then processed in Microsoft Excel to observe frequency and recurring themes. Relevant and essential data are analyzed in light of the theoretical concepts previously provided. Some important instruments in this analysis include the 1945 Constitution (UUD 1945), the Government Administration Law (UUAP) and Law number 11 of 2008 on Electronic Information and Transaction (ITE law). Analysis from international laws was brought from international trade law on services perspective and relevant ICCPR regulation about citizens' rights. Meanwhile, perspectives from other disciplines, such as behavioral law and other legal approaches, were utilized to enrich discussion.

II. DISCUSSION

2.1. Theoretical Concept

Back in 1995, when the Marrakesh agreement culminate the long-term Uruguay round, the majority of states in the world commit to take the international trade to the better level: promoting trade liberalization while also provide spaces for state protectionism policies. In terms of trade in services, the spirit of this liberalization embodies in GATS framework on Article II regarding Most Favoured Nation, Article XVI regarding market access and Article XVII about national treatment.¹³ Meanwhile, Article XIV and XIV bis GATS provide essential legal

¹³ Despite intense debate during negotiations, the trade in services agreement, GATS, was successfully agreed. For instance, initially, industry representatives of several countries suggested that audio visuals be excluded in the discussion of agreements to protect domestic industries and culture from foreign influences. See WTO Secretariat, *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services* (The Hague: Kluwer Law International, 2000), 141.

standing for a space of state policy. With those provisions, among others, GATS provides a comprehensive regulation on trade in services.¹⁴

Through an economic integration mechanism, which is allowed by Article V GATS, states have also developed more Preferential Trade Agreements (PTAs) to facilitate trade in services such as in the form of Bilateral and Regional Trade Agreements (RTAs). While they facilitate the expansion and completion of the regulations established by GATS, the presence of these PTAs may generate a certain degree of confusion. There might be a *spaghetti bowl* phenomenon where some overlapping or conflicting regulations exist on different PTAs.¹⁵ In addition, confusion can also be attributed to the difference in scheduling approach. GATS employs a so-called positive list approach, while many new RTAs, such as the Regional Comprehensive Economic Partnership (RCEP) and ASEAN Trade in Services Agreement (ATISA), introduce a negative list approach.

Ones may fail to read and identify the correct applicability of certain services in the schedule of commitment in different regulations. The ability to understand this difference is essential as it serves as a crucial aspect to determine how market access treatment in certain services is applied and assessed within the state's policies. Meanwhile, market access for trade in services itself is a problematic issue in this digital age. Its provision has a different regulatory scheme compared to the one that governs trade in goods (General Agreement on Trade and Tariffs/ GATT). Market access norms in the GATT are generally inflexible since they are designed to provide certainty and predictability for tariffs. In contrast, the GATS formulates this norm more flexibly by allowing countries to define which services are permissible for trade through a schedule of commitments agreed upon when entering the GATS agreement.

Another essential point related to this market access obligation is the exemptions, as stipulated in Articles XIV and XIV bis of GATS, which allow countries to deviate from their obligations. Countries have invoked these

¹⁴ Article X GATS which governs Emergency and Safeguard Measure (ESM) was initially designed to offer space for emergency public policy. However, the working party of GATS members was unable to establish the dedicated agreement. As a result, ESM cannot be invoked as a ground for GATS liberalization disobedience.

¹⁵ Jagdish Bhagwati, "US Trade Policy: The Infatuation with FTAs" (1995).

exemption rules to block foreign services for various reasons, such as protecting public morals or national security. Since the birth of GATS, several cases have been brought to the WTO Dispute Settlement Body to resolve disputes among states by citing these exemptions. The problem is that the measurement to define which measures are categorized as protective or only trade restrictions in disguise remains somewhat controversial.

Furthermore, it is also fundamental to fathom that, based on Article 27 of Vienna Convention on the Law of Treaties (VCLT), compliance with domestic laws cannot be invoked as an excuse to violate treaty obligations.¹⁶ Various cases have referred to this norm explicitly, such as in investment law disputes like *Metalclad*¹⁷ and human rights law cases like *Loayza-Tamayo*.¹⁸ Nevertheless, it was not mentioned explicitly in major international trade law cases despite Appellate Body having also applied the content of this norm with the view of domestic policy as a matter of ‘fact’, not only ‘regulation’, as shown in *US-Gambling* case.¹⁹

A scenario for domestic compliance justification is possible if the law itself is a subsequent implementation or compulsory mandate of other international laws. An example of this is shown in *the Philip Morris* case, where the application of national tobacco regulation for public health reasons in Uruguay is perceived as a subsequent implementation of the WHO Framework Convention on Tobacco (FCTC) that allows the state to invoke an excuse of the alleged breach of its investment treaty obligation.²⁰

Another regime of international law, human rights may also be considered as another factor in foreign streaming services competing rules. Its frameworks, in particular the Bill of Rights, certainly have a direct effect on the inclusion of basic constitutional rights in the constitution when states committed to adopt its rules when they ratified the conventions. Meanwhile, its relationship with international

¹⁶ *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331.

¹⁷ *Metalclad Corp. v. Mexico*, ICSID (AF) Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

¹⁸ *Loayza-Tamayo v. Peru*, Inter-American Court of Human Rights, Order of Nov. 17, 1999, para. 9.

¹⁹ *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, WT/DS285/AB/R (Apr. 7, 2005), para. 25.

²⁰ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016), para. 420.

trade law is subject to a broad discussion among legal scholars. For instance, one point out that general exceptions clause contains certain human rights protection to guard public moral, human health and environment.²¹ Meanwhile, another scholar emphasizes the urgency of interpreting WTO rules, including general exceptions, with broader international law contexts like several human rights treaties.²² In addition, a different angle should also be considered. When GATS general rules demand the state to avoid restricting foreign services, that could mean an indirect persuasion to grant access to freedom right to services. This will be further discussed in the following sections.

States' measures toward foreign streaming services are noticeable and subject to assessment in this global era. From the perspective of GATS, considering whether a violation has occurred or an exemption is valid depends on how policies are implemented. Article XIV GATS requires the state to demonstrate measures to be taken unarbitrary, non-discriminatory, and in good faith. These requirements touch upon how the policies are administered in a fair, consistent, transparent, and accountable manner. In the national context, similar criteria shall also apply when government policies possibly affect its citizens' fundamental rights. Article 10 of Indonesia Law Number 30 of 2014 on Government Administration (*Undang-Undang Administrasi Pemerintahan/ UUAP*) stipulates the following principles of good governance, among others: (1) legal certainty or consistency, (2) impartiality or non-discriminatory, (3) unarbitrary, and (4) transparency.²³

Administrative law will also assist us to fathom whether government authority (Article 8) and discretion (Article 22), as granted in the UUAP, can justify its regulatory measures. In addition, constitutional law also provides a crucial corrective tool in the event of government mis-enactment or misapplication of legal norms. For example, article 28 F of Indonesia UUD 1945 constitution has granted the right to information to its citizens. Once a concern of a violation of this right arises because of a law and its implementation, citizens may request an

²¹ Hoe Lim, "Trade and Human Rights: What's at Issue?," *Journal of World Trade* 35, no. 2 (2001).

²² Anna Ventouratou, "Justifying Trade Sanctions: Exceptions and Defences under WTO Law," *Cornell International Law Journal* 57 (2024).

²³ Law No. 30 of 2014 on Government Administration.

examination and review through constitutional court. These two legal regimes, administrative and constitutional law, collectively assist in upholding citizens' constitutional rights.

Restrictions on digital platforms, including streaming services in Indonesia, are primarily regulated in Article 40 of Law No. 11 of 2008 concerning Electronic Information and Transactions (ITE Law).²⁴ It stipulates government role in electronic transaction from the facilitation to the termination of internet service access. However, initial provisions of this article have some shortages, which require some evolution for greater clarity. In its original version, ITE law did not provide a clear legal basis for content restriction. Article 40 (2) merely stated a plain norm where the government is responsible for protecting the public interest against any misuse of electronic activity that disturbs public order. It has no specific procedural, definitive, or substantive criteria for further determining content blocking. It took eight years to clarify further with an amendment through Law No. 19 of 2016, which then introduced Paragraph (2b).²⁵ For the first time, the law explicitly authorized a termination of digital access when it is deemed a violation occurs. Nevertheless, the provision remained vague since there is no definition of a legal violation. This gap grants excessive discretion to the executive authority in determining what constitutes a legal violation. Only recently, with the latest revision through Law No. 1 of 2024, Article 40 has been further refined. Lawmakers established Paragraph (2c) to define prohibited content in pornography, gambling, and other forms of unlawful material.²⁶ In addition, Paragraph (2d) emerged to expand the grounds for restriction by including the threats to human life and health. Both additional clauses incorporate the regulation of Article XIV GATS in providing a general excuse for restriction

²⁴ Law No. 11 of 2008 on Electronic Information and Transactions (ITE Law) [*Undang-Undang Informasi dan Transaksi Elektronik*]. Although this law is initially perceived to regulate a pure electronic information and transactions, it fills the gap of the unavailability of specific streaming services or e-commerce transaction in Indonesia. Lawmakers, through subsequent amendments of this law, clearly intended the applicability of this law to much more specific related technology transactions. A further regulation then addresses specific issue with detailed provisions like Government Regulation No. 80 of 2019 on Trading Through Electronic Systems that serve as the advanced basis for e-commerce and online service trade.

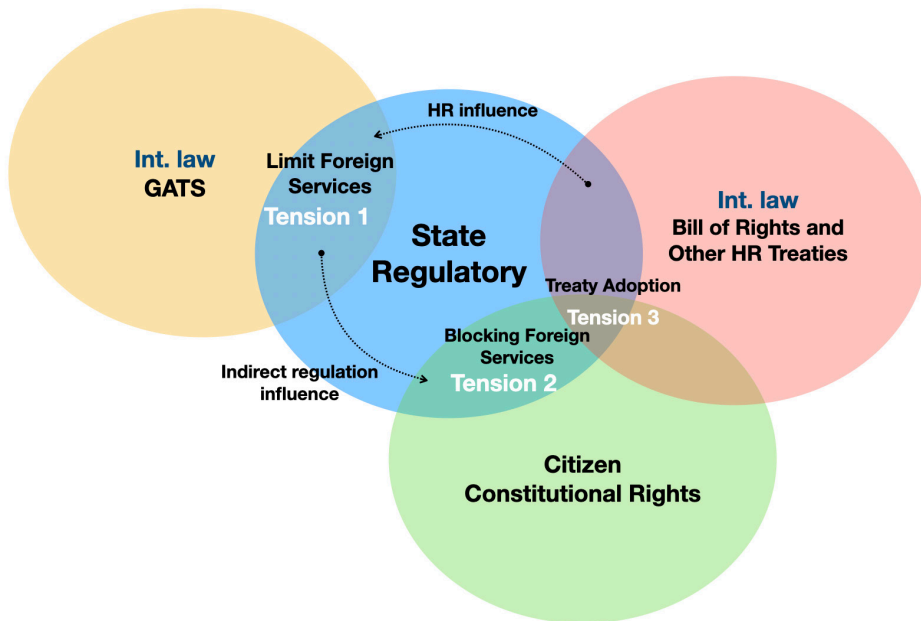
²⁵ Law No. 19 of 2016 on Amendment to Law No. 11 of 2008 on Electronic Information and Transactions (ITE Law).

²⁶ Law No. 1 of 2024 on Second Amendment to Law No. 11 of 2008 on Electronic Information and Transactions (ITE Law).

policies. In doing so, the wording ‘public moral’ has been elucidated with specific criteria of “pornography, gambling, and other forms of unlawful material.” This improvement of the Article 40 provision shows a positive development despite the fact that it took more than fifteen years for lawmakers to articulate clear legal parameters for digital access restrictions.

With international trade law, international human rights law, state sovereignty, and national laws to uphold citizen constitutional rights involved, government policies that limit or block foreign streaming services generate triangular tensions. Tension 1 involves state regulatory authority and its commitment to trade liberalization in the scope of international trade law. Tension 2 applies when citizens’ constitutional rights for freedom and access are disrupted. Meanwhile, the state’s commitment to its human rights obligations with other states inflicts the last tension. Figure 1 below illustrates how these tensions are related.

Figure 1. Triangular tensions when a government takes restrictive measures on foreign streaming services



Source: Author’s elaboration based on the analysis in this study

From the above illustration, tension 1 between GATS and state regulatory measures occurs directly between them as an effect of state's direct commitment and obligation toward other states through GATS. This tension seems to be independent of other factors. However, tension may occur indirectly due to the adoption and influence of the international human rights treaty. As general exceptions listed in Article XIV GATS and growing states' awareness of human rights protection, a government may adopt policies that result in tension 1. Tension 1 may also relate indirectly with the applicability of Tension 2 if we consider that GATS regulations, which are also influenced by human rights treaties besides pure economic goals, encourage member states to minimize trade restrictions that affect people's freedom rights. Meanwhile, Tensions 2 and 3 are interdependent since the constitutional rights of citizens and international human rights, in nature, are complementary. It means that the implementation of human rights provisions as stipulated by the Bill of Rights and other human rights treaties will only be successful if citizens are able and willing to enforce their rights through several channels available to them, *vice versa*.

Although all these tensions are connected somehow, directly or indirectly, their possible remedies differ. Tensions 1 and 2 are reviewed mainly by specific dispute settlement bodies, which are WTO Dispute Settlement and Constitution Court, respectively. Meanwhile, Tension 3 is also subject to "international shaming and pressure" if designated courts like international human rights courts are unavailable or inapplicable.

2.2. Empirical Study Analysis

1. Survey Control and Validity Measure

The sample size of this study is 204 people from population of around 160 million people that utilize internet and are above 18 years in Indonesia provides. Based on standard calculations using a 95% confidence level, the margin of error is around $\pm 6,8\%$. This margin is acceptable in exploratory studies, as this survey focuses on identifying general trends or social problems and not claiming national representation.

Initial respondents of this survey were 210, but 8 of them were excluded from the final record because the survey provided several control questions during the initial stage to ensure that only valid respondents participated. One of the first filters was asking whether respondents had ever accessed popular foreign streaming platforms operating in Indonesia, such as YouTube, Netflix, Spotify, and others. If respondents answered that they had never used any of these services, they were ineligible and could not continue the survey. This is necessary because the main objective of this study is to measure public perceptions of foreign streaming service providers, and such perceptions are only relevant from people who have experienced the services directly.

The survey also includes a general check to observe whether respondents showed basic awareness of political issues in Indonesia. The question was simple: “Who is the current President of Indonesia?” At the time of this survey, the correct answer was “Prabowo Subianto.” If respondents chose a different name, the authors considered the answers from the filling to be unreliable, and the survey system automatically concludes the survey for that particular respondent. The authors realize that not all respondents may follow political developments and be able to identify who their current president is. However, simple question like this assists the authors decide whether respondents are reliable to provide further answers in the context of this study. Such general political awareness may reflect a person’s attention to national issues, including the topic of liberalization in streaming services, which is a major issue in the study that is much more complicated.

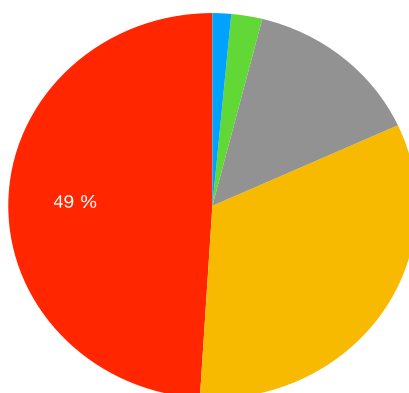
In the subsequent sections of the survey, the authors no longer eliminated potential participants but added some small instructions to test the respondents’ focus. For example, in one section, the survey instructed participants to choose “blue” as the normal color of the sky. If the respondent ignored the instruction or chose something else, their answer was still recorded but constitutes as data with a lower level of confidence. This may indicate that the person was not fully focused or just clicked on the answer randomly. Because it is arduous to have full control on respondents’ behaviors in an online survey, this type of control

method aids the authors to review which responses are more reliable. Thus, this control is designed to improve data quality and ensure that the results utilized in this study truly represent relevant respondents and are reliable to be analyzed. The results of the control show that more than 95% of respondents answers are believed to be focus and not random.

2. Competing Norms in Restriction

A survey was conducted on 204 Indonesian citizens to determine their preferences for the level of freedom in accessing international streaming services. The survey utilized a Likert scale of 1–5, where scale 5 represents optimal access freedom without restrictions with scale 1 is the minimum level of freedom. The results find that 100 respondents (49.75%) chose scale 5, and 67 respondents (33.33%) chose scale 4. This means that more than 83% of respondents prefer a high level of freedom in accessing foreign streaming services. This data illustrates the solid preference of citizens towards the liberalization of the streaming services sector, especially in audiovisual content services. The illustration below shows a general picture of this data.

Figure 2. Respondent`s preference on freedom level of accessing international services



Source: Author's survey data collected in 2025

Note: Measured using a five-point Likert scale and reported in percentages (n = 204)

In terms of education level, respondents with a bachelor's degree (S1) showed the highest support for this freedom. Of the 90 respondents with a S1 degree, 48 people (53.3%) chose scale 5, and 26 people (28.9%) chose scale 4. This finding shows that almost 82% of bachelor's graduates support maximum digital openness. However, a similar trend was also seen in other education groups which depicts that the demand for digital freedom is cross-level educational. It also indicates that digital citizenship in Indonesia has developed into an inclusive phenomenon that goes beyond formal educational backgrounds. Furthermore, analysis of the income variable shows that support for freedom of access is not exclusively owned by high-income groups. In fact, of the 61 respondents who do not yet have a fixed income (students or unemployed), the majority still chose scale 4 and 5 as answer choices. This pattern is also consistent in the middle and high-income groups. Thus, it can be concluded that the desire to freely access foreign digital services is a universal demand by citizens regardless of their economic status. Meanwhile, when we looked at their age differences, there was also no significant difference between the young and adult age groups. Both the digital-native generation and the older age group tend to show support for freedom of access to global digital services. It means that the preference for digital openness is not generational but has become part of the general values of Indonesian society which is increasingly connected globally.

Above finding is in line with the concept of service liberalization as contained in the General Agreement on Trade in Services (GATS) regime which prioritizes the principles of market access and national treatment. Theoretically, GATS allows member countries to gradually open up the digital services sector while still reserve domestic policy space (regulatory space). Therefore, Indonesia may exercise these rights through the invocation of Article XIV and XIV bis on the ground of general and security exceptions to defend their policies to protect public moral, human health, environment and national security. Alternatively, the state is also possible to utilize Article X on emergency safeguard excuse although no specific agreement to determine this application and no GATS cases have been referred to this provision to this date. In the absence of these excuses and

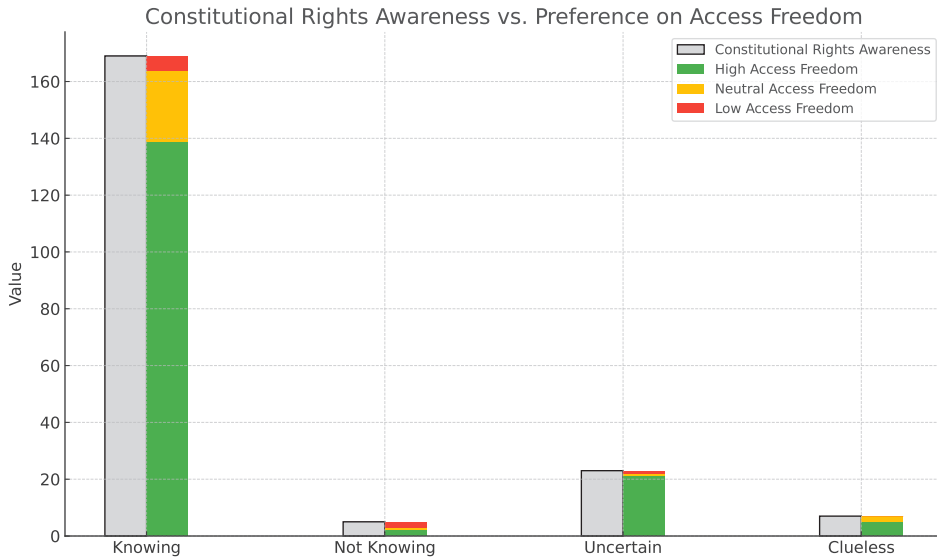
when a discriminatory measure has been taken, a protectionist approach without a legitimate legal reason will violate Indonesia's international commitments specifically the principles of transparency and least trade-restrictive measures in international trade law.

From a constitutional law perspective, the results of this survey also strengthen the argument that Indonesian citizens have expectations regarding the protection of the right to information, freedom of expression, and digital choices, especially since the Reformation Era (1998 onwards). These rights are guaranteed in Article 28F of the 1945 Constitution, which states that everyone has the right to "communicate and obtain information." Therefore, if the state implements a policy of restricting access to foreign digital services without an adequate legal basis and sufficient public participation, this action risks violating citizens' constitutional rights.

Above discussion has significant normative and empirical implications. Normatively, it urges the requisite for regulations on the streaming and digital services sector that are consistent with the principles of the rule of law, due process, and openness of information. Empirically, it shows that there is a demand from society for regulations that are inclusive, accountable, and adaptive to digital realities. In other words, the formulation of national policies requires to adopt a balanced approach between protecting digital sovereignty and guaranteeing citizens' rights in the global digital ecosystem.

We move to the next analysis. It was found that there are 169 out of 204 respondents (84.08%) who admitted that they realized the constitution guarantees freedom of information. Furthermore, 139 people (82.25%) of that number chose scale 4 and 5 in the previous question regarding freedom of access to foreign digital services. Although this data is not showing an absolute correlation between these two indicators, it still may indicate solid evidence that a guarantee in the constitution persuades the majority of respondents in demanding high-level freedom for accessing international services. Figure below shows a complete picture of the correlation.

Figure 3. Level of respondents’ awareness on information freedom rights in constitution and their freedom level preferences for accessing international services



Source: Authors’ analysis of survey data collected in 2025

Note: Measured using a five-point Likert scale where ‘High’ represents scales 4 and 5, ‘Neutral’ is 3, and ‘Low’ shows scales 1 and 2. Data is reported in percentages (n = 204)

This data is extremely relevant in the context of a research question that examines the tension between digital service liberalization policies, state protectionism, and citizens’ constitutional rights. It can provide an early signal that awareness of constitutional law (grey colored bar) contributes to public attitudes that tend to be more supportive of openness to foreign digital services (green colored bar). This awareness is a vital element in assessing the legitimacy of state intervention—namely whether a restriction on digital access can be justified if it is not based on a clear legal mechanism and proportionality.

Article 28F of the 1945 Constitution explicitly states that, “Every person is entitled to ... to seek, to obtain, to own, to store, to process, and to convey information by means of *all kinds of available channels*.” [emphasis added].

This norm shows that freedom of information is not only a formal right, but is also guaranteed with a broad scope, including the right to access cross-border digital services. From an international legal perspective, a similar guarantee is also emphasized in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)²⁷ which has been ratified by Indonesia through Law Number 12 of 2005,²⁸ which states that “Everyone has the right to ... seek, receive and impart information and ideas of all kinds, *regardless of frontiers*, ... or through *any other media of his choice*” [emphasis added]. Thus, this concept emphasizes the importance of constitutional principles and international legal instruments as a normative foundation in determining the limits of state intervention in the foreign digital services sector. Although the state has the authority to protect national interests, protectionist interventions must still be subject to a ‘proportionality test’ and must not violate the constitutional guarantees of citizens.²⁹ In this context, a ‘precautionary approach’ that balances the right to freedom of information and protection against digital risks is essential but must not compromise the principle of fundamental rights.³⁰

Access to guaranteed information as a constitutional right is an important pillar in a modern democratic system. In this case, freedom to obtain information is an integral part of freedom of expression, which involves not only the right to speak, but also the right to receive and access information. On the other hand, the existence of government regulations in this digital age must also be viewed as a fundamental tool to preserve public order. To this point, it is fair to mention that there will be a concern that government policies or discretion can lead to acts of abusive power. However, the constitutional court in its legal consideration on para. 3.16.4 of decision number 50/PUU-VI/2008 resolved this

²⁷ *International Covenant on Civil and Political Rights (ICCPR)*, Dec. 16, 1966, 999 U.N.T.S. 171.

²⁸ Law No. 12 of 2005 on Ratification of International Covenant on Civil and Political Rights (ICCPR).

²⁹ Proportionality test exhausts three steps: legitimacy, suitability, and necessity. It was formally applied at first in Prussian Supreme Administrative Court in 1800s. Since then, it was widely applied in both international and national law cases. See more discussion in Kenneth F Ledford, “Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876–1914,” *Central European History* 37, no. 2 (2004).

³⁰ Precautionary principle, or *Vorsorgeprinzip* in origin word, firstly introduced by German Authority in assessing and formulating their environmental policy. This principle then became one of the main principles of international environmental law and also have been applied in public policy measures. See more in Herman Cousy, “The Precautionary Principle: A Status Quaestionis,” *Geneva Papers on Risk and Insurance* (1996).

concern by emphasizing that the potential for abuse is literally greater by the parties who utilize cyber space than the government itself.³¹ The court grounds its opinion by pointing out that the internet era characteristic - open, nearly limitless, and rapid spread of data dan information- may lead to undesired effects if user activities are not limited. Furthermore, extreme negative impacts are exacerbated when legal, religious, and moral norms are abandoned by cyber users. In another sentence, a high level of human interaction requires a high level of caution due to the absence of filters or barriers that can counteract negative values (self-censorship). Considering this, the government's role is crucial to determine limitations or even censorships.

A constitution court decision number 81/PUU-XVIII/2020, which reviews Article 40 (2b) of ITE Law, has further addressed restrictions on electronic information. The ruling discusses whether such restrictions should ideally be preceded by a lawful written administrative decision, as requested by the petitioner. The majority voice of the court members rejected the petition because requiring an administrative decision before blocking access to information would be impractical.³² The court emphasizes the importance of government response to act swiftly and accurately in preventing unlawful content distribution. Nevertheless, a compelling counterargument has been presented by the court's dissenting opinion. It articulates how Article 40 paragraph (2b) has significant implications for limiting fundamental rights and, thus, should be regulated with greater legal precision.³³

3. Internalizing Constitutional Rights

While the constitution may guarantee rights textually, its implementation and effectiveness depend on the institutional context and the level of public legal awareness.³⁴ Empirical data obtained in this survey show that the constitutional

³¹ *Judicial Review of Constitutional Court Law*, No. 50/PUU-VI/2008 (Constitutional Court of the Republic of Indonesia, 2008), 107.

³² *Judicial Review of Constitutional Court Law*, No. 81/PUU-XVIII/2020 (Constitutional Court of the Republic of Indonesia, 2020), 296–97.

³³ *Judicial Review of Constitutional Court Law*, No. 81/PUU-XVIII/2020 (Constitutional Court of the Republic of Indonesia, 2020), 301–4.

³⁴ Jay N. Krehbiel, "Public Awareness and the Behavior of Unpopular Courts," *British Journal of Political Science* 51, no. 4 (2021): 1601.

guarantee of the right to obtain information has not fully crystallized in public awareness as an uncompromising principle. Of the 167 respondents who strongly believed that they had the right to information (scale 4 and 5), only 139 of them stated that they were aware that this right was guaranteed by the constitution. Interestingly, of the group that was already constitutionally aware, only 60 people later saw that restrictions on foreign services were a form of violation of their rights. The rest were divided between those who did not see any violations (41 people) and those who were doubtful or did not know (38 people). Empirical data obtained in this survey show that the constitutional guarantee of the right to obtain information has not fully crystallized in public awareness as an uncompromising principle. Of the 167 respondents who strongly believed that they had the right to information (scale 4 and 5), only 139 of them stated that they were aware that this right was guaranteed by the constitution. Interestingly, of the group that was already constitutionally aware, only 60 people later saw that restrictions on foreign services were a form of violation of their rights. The rest were divided between those who did not see any violations (41 people) and those who were doubtful or did not know (38 people).

This finding shows that awareness of rights does not necessarily give rise to an attitude of protection of those rights when faced with state intervention. This can be explained through the legal consciousness approach,³⁵ where constitutional rights are not always fully understood or internalized by citizens.³⁶ In another words, the internalization process has not been fully effective, even among people who claim high trust in the constitution. This confirms that constitutionalism does not solely rely on the existence of written norms, but also on how those norms live and are experienced by citizens as well as any other

³⁵ Legal consciousness is believed to have been developed under the US legal system. Although it is difficult to track precisely the origin of this concept, the era of 1940s when Wagner Act cases emerged is considered as the thought of modern legal consciousness as elaborated by Karl E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941," *Minnesota Law Review* 62 (1977): 325.

³⁶ For this understanding, it is useful to fathom the characteristic of legal consciousness as explained by Podgorecki which stated three steps of this concept (1) knowledge of relevant laws, (2) evaluation of mandatory obligations, and (3) preposition of the desired laws. See Adam Podgorecki, "Legal Consciousness as a Research Problem," in *European Yearbook in Law and Sociology 1977* (Berlin: Springer, 1977), 85.

political contexts. In Ran Hirschl's terms, this is the failure of juristocracy in building an empowered popular constitutionalism.³⁷

The right to information, although guaranteed, is considered negotiable when faced with the narrative of state legitimacy, such as the issue of data privacy and national security. Thus, a framing effect by the government can play a role in directing citizen's behaviour e.g by framing foreign content that it may pose a risk for data privacy and security.³⁸ Alternatively, a nudging may also be applicable to intercept citizens' conduct: that is, when the government favors domestic service providers, e.g. by setting them as a default in various electronics, gadgets and websites.³⁹ However, applying this concept may generate tension with international trade law where national treatment clause should be respected. Although nudging is a soft tool and no explicit legal barrier exists, it could still violate state obligations if proven to distort market conditions and be discrimination in nature.

A citizen dilemma becomes more complex when the argument for restricting digital services is linked to national security reasons. Of the 60 respondents who previously stated that restrictions were a violation of constitutional rights, only 22 people still rejected restrictions even for security reasons. The rest, 23 people changed their opinions and 15 people stated they were neutral. This shows the flexibility or even ambiguity of the public in assessing the legitimacy of restrictions, depending on the narrative or framing used by the state. If we observe the overall data, out of 204 respondents, 87 (42.65%) supported restrictions on the grounds of national security, 69 (33.82%) were neutral, and 48 (23.53%) rejected them. This indicates that the narrative of national threats has the power to mobilize public opinion but does not necessarily produce a

³⁷ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2009), 211.

³⁸ Framing has been used many times by government whether conscious or not in controlling its citizen behavior and as legitimacy for their policies. See Jessica Pykett, Michael Saward, and Anja Schaefer, "Framing the Good Citizen," *British Journal of Politics and International Relations* 12, no. 4 (2010): 523–38.

³⁹ Many governments in the world have been utilizing nudging in their public policies intentionally or unintentionally, consciously or unconsciously to control their citizens behavior to what they have desired. See David Halpern and Michael Sanders, "Nudging by Government: Progress, Impact, & Lessons Learned," *Behavioral Science & Policy* 2, no. 2 (2016): 53–65.

stable consensus. Here, the state faces a dilemma: between the obligation to guarantee security and the obligation to protect the constitutional rights of its citizens. Within the framework of the Indonesian constitution, Article 28F of the 1945 Constitution guarantees the right to seek, obtain, store, and convey information. However, a reference to Article 28J must also be counted which provides legal basis for restrictions as long as they are regulated by law and are necessary to respect the human rights of others or to meet the demands of justice, order, and public security. This shows that the right to information is relative, so that the room for interpretation by the state is relatively substantial, especially in the context of public policy based on the reason of public interest.

With the recent amendment of Article 40 (2c) ITE Law to define categories of prohibited content, a path to interpret this public interest is clearer. It provides that public interest is something that should not be contested with the harmful content of pornography, gambling, and other materials. With that provision in hand, the government has a legal basis to restrict foreign streaming services if their contents are perceived to violate legal, moral, or religious norms. The key concept for this restriction is the harm that it could cause to society. For instance, pornographic material may lead to an increased risk of sexual violence. In practice, this excuse has been invoked earlier by the government of Indonesia when it partially blocked Netflix access in the initial stage of its expansion to Indonesia although Article 40 (2c) itself did not exist at that time.⁴⁰ Meanwhile, gambling platforms may stimulate subsequent criminal behaviors, such as theft or fraud. The government of Indonesia consistently blocks this type of service.⁴¹ A utilization of this excuse has also been shown by the US government when restrict the access of online gambling service despite of its unsuccessful result due to unjustified legitimation.⁴²

⁴⁰ Leo Kelion, "Netflix Blocked by Indonesia in Censorship Row," *BBC News*, Jan. 28, 2016.

⁴¹ Laila Affa, "Kominfo Blocks Over 800,000 Online Gambling Content in July–December 2023," *Tempo*, Jan. 2, 2024.

⁴² The panel ruled out that the US Government excuse cannot be justified legitimate because it has been applied discriminatorily as domestic gambling service was not banned compared to foreign one. See US Gambling Case, see *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R (Nov. 10, 2004).

Despite Article 40 (2c) already provided legitimate ground for service restrictions, another issue may also arise due to ambiguous provisions in the wording of “muatan lain” or other materials. As it refers to unclear associated regulations, it may present catch-all provisions with unclear boundaries or objective criteria. Eventually, the government will be in a precarious regulatory position where its policy may be in risk to deviate from legitimate to disguised restriction. To tackle this concern, a perspective from administrative law may offer support.

When restrictions of foreign services are introduced by the government, it will fall into the category of *bestuursmedidas* (administrative policy steps) which must be subject to the general principles of good governance (*Asas-Asas Umum Pemerintahan yang Baik/AUPB*) in Law Number 30 of 2014.⁴³ Some of the fundamental principles are legality and proportionality, which mean that the state may impose restrictions, but there must be a clear legal basis, be non-discriminatory, and be proportional to the goals to be achieved. If restrictions are carried out without a transparent implementation, then the action will lead to administrative overreach and can be viewed as a form of abuse of power. Thus, the policy of restricting foreign streaming services reflects the classic dilemma between the state’s right to regulate and the state’s responsibility to respect the rights of citizens. From the responsive regulation theory perspective, the state is suggested to employ an adaptive and dialogical approach in regulating public policies as the regulated actors’ voices shall be heard.⁴⁴ In another word, the formation of policies must consider responses from the affected community.

In addition, Indonesia’s commitment to the GATS framework also presents an additional normative layer that must be adhered. Articles XVI and XVII of this regulation require member countries to avoid quantitative or discriminatory restrictions on foreign service providers. There are possible exceptions to this, but they are not a *carte blanche*- that is, unlimited discretion without a rigorous justification. Article XIV (a) and (c) of GATS do allow restrictions on

⁴³ Law No. 30 of 2014 on Government Administration.

⁴⁴ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992).

this ground which are to protect public morals, to maintain public order and to secure compliance with laws or regulations. However, these exceptions must meet the chapeau test of Article XIV GATS. In *US – Gambling*, the Appellate Body determined that security or public order reasons must meet the necessity test, which are: (1) The existence of a legitimate purpose, (2) The absence of less restrictive policy alternatives to trade, and (3) The absence of disguised discrimination or violation of the principle of good faith.⁴⁵ Thus, if Indonesia chooses to restrict foreign services on these security grounds, then the restrictions must be formulated to satisfy those tests to defend its motives. Otherwise, any restrictive policies could be questioned and at the risk of a dispute at the WTO Dispute Settlement Body.

Above combination of constitutional norms, administrative principles, and international commitments generates a complex and challenging position to the Indonesian government in. On the one hand, it must protect national interests that it perceives as essential issue. On the other hand, it must maintain the legitimacy of public policy and individual rights within the framework of national and global law. The findings of this survey reflect that public support for restrictions is contextual and not solid. As a result, the state needs to be careful in implementing restrictive policies, especially if they are carried out unilaterally and without public consultation. One of the crucial elements for this effort is to identify suitable actors involved.

4. Rethinking Involved Actors

The survey findings facilitate observing various demographic characteristics of respondents toward their level of support for government policies restricting access to foreign digital services on national security grounds. Respondents aged 40 and over, for example, showed a greater tendency to support such restrictive policies. Of the total 81 respondents in this age group, 40 people (49.38%) chose a scale of 4 and 5 (showing strong support), while 25 people were neutral and only 16 people disagreed (choosing a scale of 1 and 2). This data indicates that

⁴⁵ *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, WT/DS285/AB/R (Apr. 7, 2005), 101.

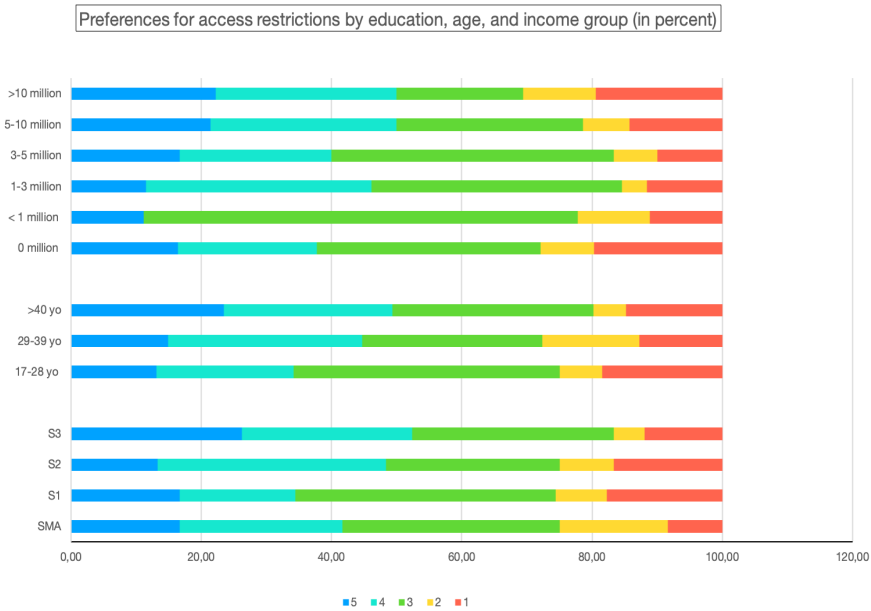
citizens of a more mature age tend to be more receptive to government policies, even when they contain restrictive elements. In contrast, the younger age group (17–29 years old) showed a tendency to be neutral. Of the 76 respondents in this group, 31 people (40.79%) chose a scale of 3, while the rest were spread between supportive and unsupportive choices. The 29–39 age group shows a middle position, with an increasing trend of support for government policies: 21 out of 47 respondents (44.68%) chose a scale of 4 and 5. This trend shows that maturity is directly proportional to the level of support for government policies. The higher the age, the higher the percentage of respondents who are willing to accept the state's protective policies.

A similar trend can also be seen when viewed from the level of education. Respondents with higher levels of education generally showed a greater tendency to support policies restricting access to foreign services. Support for government policies (scales 4 and 5) was shown by 41.7% of respondents with a high school education, 34.4% for the S1 level, 48.3% at the S2 level, and 52.4% for the S3 level, respectively. Although it is seen that higher levels of education are associated with higher support, there are few anomalies in the S1 educated group. The lower support (34.4%) of this group is thought to be closely related to the age composition of the respondents, because the age group of 17–29 years (which in general knowledge is commonly filled by students or early S1 graduates) shows a fairly high neutral tendency (40.79%). Thus, the inconsistency in the level of S1 education can be explained by the influence of the age characteristics of the respondents in the group.

When associated with financial ability factors, support for restrictive policies also shows a fairly clear correlation. Respondents with an income between 5 and 10 million rupiah and those with an income above 10 million rupiah showed a relatively high level of support, namely 50% who chose the 4 and 5 scales, respectively. In this group, neutral and disagree choices occupy a smaller portion. On the other hand, respondents from the group who did not have an income or were not yet employed showed a more dynamic and dispersed pattern. As many as 37.70% of this group supported the policy (scale 4 and 5), while 34.43% were

neutral and 27.87% did not support. This pattern shows that the higher income leads to better support for foreign service restrictions by the state.

Figure 4. Preference for access restrictions



Source: Authors' analysis of survey data collected in 2025

Note: Education is described within High School (SMA), Undergraduate (S₁), Master (S₂), and Doctoral (S₃) degree. Age ranges from 17-28, 29-39 and >40 years old. Income group is represented from 0 to >10 million. Data is reported in percentages (n = 204)

Examining at all the available data, there is a robust tendency that the higher the age, education, and income of the respondents, the higher the level of support for government policies that restrict access to foreign digital services for the sake of national security. However, this trend still leaves important questions about what exactly drives these preferences. Are they supportive because of the increased maturity of thinking with age and life experience, or because of greater concerns about the misuse of personal data? For this purpose, the correlation between these demographic characteristics and the level of concern over personal data will be discussed later.

The State as an entity not only functions as a public service provider, but also as a regulator of risks arising from the process of globalization and liberalization, including in the cross-border digital services sector.⁴⁶ In this context, the state gains legitimacy to act not only from the existing legal apparatus, but also from the support of citizens who perceive such actions as a form of protection for their national interests and individual rights. Therefore, the higher the awareness and knowledge of citizens on global and critical issues such as data security and digital sovereignty, the greater the opportunity for countries to gain support for their regulatory actions.

Theory of responsive regulation emphasizes the importance of state responsibility to public trust. Lofty support from a particular group of citizens should not be interpreted as a form of absolute legitimacy, but rather as a social contract that demands accountability. The state is required to not only use formal power, but also to build an inclusive, participatory, and risk-based regulatory system. Therefore, adaptive and flexible regulatory design is important. In this regard, a smart regulation approach may offer a framework that combines legal instruments with collaborative mechanisms, technological oversight, and the principle of prudence in the face of threats to citizens' digital rights. However, as emphasized by Graham, smart regulation, particularly in the health sector, should not incorporate cost-benefit analysis as the major policy determination.⁴⁷ In the context of streaming services, nonetheless, cost may play a key role despite the government must also consider the analysis of data privacy and national security to be risked. Thus, the direction of regulation of foreign streaming services must be designed with considerations that are not only technocratic or normative but also based on the preferences and protection of citizens. The public trust shown by the mature, highly educated, and high-income age groups provides initial legitimacy, but it is also a reminder that the state must be able to repay that trust with transparent, proportionate governance, and ensure the protection of citizens' constitutional rights in the digital space.

⁴⁶ Risk regulation regime varies depending on perspective. See Christopher Hood et al., "Where Risk Society Meets the Regulatory State: Exploring Variations in Risk Regulation Regimes," *Risk Management* 1, no. 1 (1999): 22.

⁴⁷ Janice Graham, "Smart Regulation: Will the Government's Strategy Work?," *CMAJ* 173 (2005).

5. The Role of Personal Data Concern

Concerns about potential misuse of personal data are evenly distributed across demographic groups, although some groups show significantly higher levels of anxiety than others. Among respondents with a S3 education level, 32 out of 44 people (76.19%) stated that they were extremely worried about the misuse of personal data by choosing a scale of 4 and 5. Similar concerns were also expressed by respondents with an income of more than 10 million rupiah per month, with 28 out of 36 respondents (77.78%) stating that their high level of worries. The age group over 40 years old showed even higher numbers, with 67 out of 81 people (82.72%) expressing high concerns about the security of their personal data. Nonetheless, this trend is not only shared by groups that are more mature in age, education, or finances. In general, out of a total of 204 valid respondents, 160 people (78.43%) expressed high concern over the potential misuse of their personal data. Only 28 people (13.73%) chose a neutral attitude and 16 people (7.84%) said they were not so worried (choosing a scale of 1 and 2). These findings indicate that the issue of digital privacy and personal data protection is a broad and cross-group issue, not limited to the elite or educated.

However, when personal data concerns are confronted with government policies to restrict access to foreign digital services on national security grounds, citizens' responses show a variation. Support for the restrictive policy reached 43.28% of all respondents that is awarded as the highest compared to other answers. Despite that, total responds still reflect a diversity of attitudes. For example, in the special group of people with a bachelor's education, the number who supported the restriction amounted to 36%, smaller than the neutral voter of 40%. Interestingly, in the highest age, education and income groups—which also indicate a high concern for personal data—support for restrictions was more prominent than other options. In the specific age group over 40 years old, the percentage of support for the restrictive policy reached 49.38%, followed by neutrality as the second at only 30.86%. Likewise, for specific group of respondents with S3 or better education, support for this policy reached 52.4% while 50% of people in group with an income above 10 million rupiah expressed

support for the restriction. Thus, it can be seen that although concerns about the misuse of personal data are common across groups, not all groups interpret them in the same way.

Youngest age groups, lowest-income groups, or those who are still in early education tend not to immediately convert these concerns into support for government policies. They are more neutral or even reject restrictions, despite having high concerns. In contrast, the more mature age, educational, and financial groups showed a greater tendency to respond to their concerns by supporting state policies. This phenomenon can be analyzed through the *risk governance* and *perceived vulnerability* approaches,⁴⁸ where citizens who feel they have a higher level of risk—either due to greater exposure, stronger analytical capacity, or higher legal awareness—tend to support regulation as a form of risk mitigation. Within this framework, state actions that restrict access to foreign entities can be seen as a form of protection for the integrity of citizens' data and national digital sovereignty. The state is present as a protective actor, not only as a regulator that protects citizens' rights in the digital space.

Furthermore, *the theory of privacy pragmatism* can also be used to read this dynamic.⁴⁹ Citizens in the age, education, and high-income groups may not only have high levels of anxiety but also have more mature *risk calculations*. They do not reject foreign technology or information outright but recognize that certain restrictions that are selective and based on national interest can be a reasonable instrument to mitigate threats to their personal data. This is a form of compromise between digital freedom and greater risk protection. However, it is important to note that while some groups support restrictive policies, the majority of respondents as a whole still uphold the principle of freedom of access

⁴⁸ Risk and vulnerability tools should also be integrated to avoid oversimplification of risk through immature responses. For instance, by utilizing both quantitative and qualitative tools for risk assessment. See Nicolas Rossignol, Pierre Delvenne, and Catrinel Turcanu, "Rethinking Vulnerability Analysis and Governance with Emphasis on a Participatory Approach," in *Risk Analysis* (Oxford: Blackwell Publishing Inc., 2015), 137.

⁴⁹ In this conception, citizen is to be perceived as an individual that has control over its level of protection by evaluating available options. See Nora A Draper, "From Privacy Pragmatist to Privacy Resigned: Challenging Narratives of Rational Choice in Digital Privacy Debates," in *Policy and Internet* (Wiley-Blackwell Publishing Ltd, 2017), 234.

to information. As many as 83.08% of all respondents stated that they have the right to freedom of access to information, and 84.08% of that figure admitted to knowing that this right is guaranteed by the constitution of the Republic of Indonesia. This shows that support for restrictions is not a form of *denial of rights*, but rather an expression of a form of protection of rights themselves in the context of global risk. Here, a dialectic emerges between the principle of protection and the principle of freedom (liberalization) which requires the state to be careful in designing regulations that are able to answer public concerns while remaining within the framework of constitutionalism. Therefore, the direction of regulatory policies based on the public's real concern about the misuse of personal data must be prepared by considering the *precautionary principle*, the clarity of regulatory *objectives*, and the guarantee of accountability and public participation. The state is not enough to be present only as a dominant actor, but also as a facilitator of trust between citizens and technology. The combination of a protective approach and a rights approach is important to navigate Indonesia's digital regulatory landscape going forward.

6. Formulating Regulation

An important conclusion can be drawn up so far. There are factual and widespread concerns regarding the misuse of personal data despite the majority of citizens still upholding their constitutional right to information freedom. These concerns are most prominent in the mature age, higher education, and high-income groups—but are not exclusive to these groups. More than 78% of all respondents expressed concerns over the security of their personal data. Meanwhile, only 43.28% supported the policy of restricting foreign access, and the rest were spread out in neutral or disagreed. This is where the state needs to be present to regulate with the right portions and direction to better answer fundamental questions.

The first question is what the government needs to regulate. First, reckoning with Article XVI GATS concerning market access, Indonesia does not specify any

streaming services, or 'audio-visual' as a general sector for this type of service,⁵⁰ in its GATS schedule of commitment.⁵¹ This, as ground, provides a lofty space to regulate foreign streaming services. There is no obligation to provide access to foreign services as it has to be specified in the schedule since GATS utilizes a positive list approach.⁵² However, the worst-case scenario should also be considered. Although Indonesia does not specifically mention specific streaming services or even audio-visual sector within its schedule, there is a potential dispute when other states interpret and consider streaming services fall into categories of different sectors/subsectors for streaming services commitment. For instance, Indonesia listed subsector 'entertainment services' (CPC 75299) under sector 'telecommunication services' as NONE for market access which means no limitation commitment being made.⁵³ Streaming services might be considered to fall into this category because entertainment services are broad. In addition, even if activities in this sub-sector were not designed for online service as streaming services are, there is still a chance for that claim if the technology neutrality principle is successfully applied in a dispute.⁵⁴ If this potential is considered, there will be a domino effect in treating foreign streaming services in Indonesia as required by GATS obligations. Eventually, as a whole, it will force Indonesia to take a careful approach in every policy that deal with those services.

⁵⁰ Many authors have referred streaming services activities as an audio visual service sector in GATS schedule, such as Kevin Zhu, "Internet-Based Distribution of Digital Videos," *Electronic Markets* 11, no. 4 (2001): 13. Thorsten Hennig-Thurau et al., "The Last Picture Show?," *Journal of Marketing* 71, no. 4 (2007): 79. Kwak and Kim, "Trade negotiations in the digital era: The case of ott video streaming services.", 17. Shin-yi Peng, "GATS and the over-the-top services: A legal outlook," *Journal of World Trade* 50, no. 1 (2016). 28-29.

⁵¹ In Provisional CPC classification, published in 1991, that available when the WTO agreement concluded in 1995, streaming service might also be related with several sub sectors such as television and radio broadcast transmission services (CPC 75241 & 75242); radio and television cable services (CPC 75300); motion picture and video tape distribution services (CPC 96113); radio services (CPC 96131); television services (CPC 96132); and combined program making and broadcasting services (CPC 96133). See United Nations, *Provisional Central Product Classification* (1991).

⁵² In details, it can be described as a hybrid because positive list refers only for the covered service sector and negative list refers to market access and national treatment restriction, see Aaditya Mattoo, Robert M. Stern, and Gianni Zanini, *A Handbook of International Trade in Services* (Oxford: Oxford University Press, 2007), 253.

⁵³ See Indonesia's schedule of specific commitments in GATS, GATS/SC/43, 15 April 1994.

⁵⁴ Technology neutrality principle allows the view that even though a service is not designed as online activity when it was listed, it will fall also into category of online mode since it does not change the nature of service. For example, according to this principle, a service of distributing movies is equal between physical or online delivery mode. This principle has been successfully invoked at US Gambling, see *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R (Nov. 10, 2004). For more discussion on this principle, see also Sherzod Shadikhodjaev, "Technological Neutrality and Regulation of Digital Trade: How Far Can We Go?" *European Journal of International Law* 32, no. 4 (2021).

Furthermore, the findings of this study show that the necessary regulation is not just concerning an arbitrary restriction of foreign access, but a *mechanism for protecting citizens' personal data in the context of cross-border digital interactions and the rights to have information through all channels including from abroad*. Data protection policies cannot only be interpreted as access blocking, but must also cover aspects of data governance, data storage architecture, operational licensing of foreign digital service providers, and transparency standards for data processing. Restrictive policies that intersect citizens constitutional rights must have a clear goal, which is to maintain the security of citizens' data, national security and ensure digital sovereignty. In doing so, the government must not violate the constitutional principle of freedom of information as granted in Article 28 F Indonesia constitution. In addition, when the restriction measures are adopted, the regulatory objective should also be accountable and legitimate to invoke exemption as provided under Article XIV and XIV bis GATS to justify international commitments. With all of these careful considerations, it will not only satisfy the obligation set up by GATS, but also conditions for introducing policies as required by administrative law. In the meantime, the government should also be able to maintain the protection and promotion of its citizen rights as prescribed in the constitution.

The second question is then to understand who should be regulated or the main target of the policy. While government measures apply to all citizens, specific groups may play key roles in accepting or shaping government policies. From the demographic data and public perceptions collected, it is clear that the young age group (17–29 years) and the group with a S1 education are the part of the population that tends to be neutral or do not support restrictions on foreign access, although they also express concerns about personal data. This indicates a gap in *understanding or trust deficit* towards state intervention. Therefore, they need to be given a persuasive approach through public education, digital literacy, and intensive policy socialization. Meanwhile, mature and highly educated age groups who are more supportive of government policies can be

used as *strategic partners in building public legitimacy for regulatory policies that are protective*. The integration of concern involving those actors to the whole regulatory framework may determine the successful application of the answer to the first question above.

Finally, the third question explores the best method or design to formulate regulations. The most relevant and constitutional path is through *participatory and adaptive regulatory* approaches. In this context, the state should not take the position of being the sole holder of digital security but should instead build a regulatory system that is transparent, publicly accessible, open to citizen participation, and subject to the principle of accountability. This governance model is more in line with the spirit of Article 28F of the 1945 Constitution which guarantees the right of citizens to obtain and convey information, but at the same time allows the state to carry out its functions in protecting basic rights, including the right to security and digital privacy. Derivative regulations from the PDP (Personal Data Protection) Law need to be designed not only to bind digital business actors, but also target *international cooperation, and transparent audits of data management*. Furthermore, the state needs to adopt an approach that is not only 'state-centric,' but 'rights-based' and 'risk-informed.' In another words, policy is not based on abstract national security assumptions, but is based on measurable risk data, the genuine necessity for citizen protection, and respect for constitutional rights. In this context, restrictive efforts can be legitimate, as long as they can be legally accountable, are proportionately limited, and are not discriminatory generalizations against foreign business actors. Those nondiscriminatory measures align with the obligations set by GATS in Article II GATS to not discriminate against foreign services of other states and Article XVII GATS to equally offer treatment with its domestic services.

Reckoning with the exposed data trends and analyses, it is clear that the country is faced with the challenge of navigating two issues at once: on the one hand is the demand for the protection of citizens' rights to privacy and security, while on the other hand is the demand not to ignore the right to freedom of

information in the digital age. Therefore, the answer to this challenge cannot be a dichotomy between protection or liberalization. Instead, what Indonesia needs is a form of regulation that unites the two within a progressive and contextual framework of constitutional protection.

III. CONCLUSION

3.1. Closing

This paper has discussed the tensions and dynamics of Indonesian people's perception of foreign digital service restriction policies, especially in the context of national security and personal data protection. Indonesian laws and jurisprudence afford the government a relatively high level of discretion to restrict internet-based services immediately when deemed necessary to protect public morals and order, even without prior administrative procedures. In the meantime, with mutually reinforcing theoretical and empirical approaches, the findings in this article show that age, education, and income levels have an effect on the tendency to support restrictive policies by the state, although in general, the majority of citizens still hold the right to access information guaranteed by the constitution. On the other hand, concerns over the misuse of personal data are proving to be cross-demographic and are widely felt by the public, including those who do not explicitly support restrictions on foreign access. This condition indicates a regulatory challenge that is multidimensional. The state cannot rely on a single justification in the name of national security to justify intervention against citizens' digital access without transparently explaining the limits, objectives, and mechanisms for protecting citizens' rights that come with it. Such policies risk creating a *conflict of norms* between the principle of protection and the principle of constitutional rights, especially when applied in general and without adequate public oversight.

3.2. Recommendation

The main contribution of this article lies in the effort to map and understand the tension between the need for state obligation in international agreement and

protection of citizens' personal data in the digital age and its obligation to remain respectful of the basic principles of freedom of information. By showing differences in perceptions based on age, education, and income groups, this article provides empirical evidence that state regulatory strategies should be differentiation, not generalistic, and designed based on contextual social understanding. In a broader framework, this article emphasizes the importance of a regulatory approach that is not only state-centric, but also upholds the principles of participation, accountability, and respect for the constitution. For this reason, in the future, it is necessary to strengthen digital data governance that is not only reactive to global challenges, but also able to articulate the protection of citizens' digital rights as part of a progressive constitutional mandate.

This study has limitations in terms of the scope of quantitative-descriptive data without in-depth qualitative exploration of the motivations and value preferences of each respondent group. In addition, the survey was conducted in a certain time frame (cross-sectional), so it was not able to capture the dynamics of changes in public perception longitudinally, especially for digital policies that are very dynamic and contextual. The next research can be directed at exploring the *behavioral intentions* of citizens in responding to digital restriction policies through a combined approach between *legal consciousness*, digital literacy, and trust in state institutions. In addition, the development of an evaluation model on the legitimacy of digital regulation, based on participation and procedural fairness, will make a stronger conceptual contribution in enriching the legal discourse of state administration and constitutional rights in the digital era.

Ethics Statement

The study was conducted in accordance with ethical standards applicable to survey-based social science research. Participation was voluntary, informed consent was obtained, and all responses were collected anonymously. Due to the minimal-risk and non-interventional design, no formal ethics committee approval was required.

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BIBLIOGRAPHY

- Ayres, Ian, and John Braithwaite. *Responsive Regulation: Transcending the Deregulation Debate*. Oxford: Oxford University Press, 1992.
- Bhagwati, Jagdish. "US Trade Policy: The Infatuation with FTAs." Working paper, 1995.
- Butt, Simon. "Freedom of Information Law and Its Application in Indonesia: A Preliminary Assessment." *Asian Journal of Comparative Law* 9 (2014): 113-54.
- Cousy, Herman. "The Precautionary Principle: A Status Quaestionis." *The Geneva Papers on Risk and Insurance-Issues and Practice* 21 (1996): 158-69.
- Dedovic, Stefan, and Vincent Homburg. "Cross-Border Digital Public Services in the European Union: A Systematic Literature Review." *International Journal of Electronic Governance* 16, no. 1 (2024): 4-28.
- Draper, Nora A. "From Privacy Pragmatist to Privacy Resigned: Challenging Narratives of Rational Choice in Digital Privacy Debates." *Policy and Internet* 9, no. 2 (2017): 232-51.
- Graham, Janice. "Smart Regulation: Will the Government's Strategy Work?" *CMAJ: Canadian Medical Association Journal* 173 (2005): 1469-70. <https://doi.org/10.1503/cmaj.050424>.

- Halpern, David, and Michael Sanders. "Nudging by Government: Progress, Impact, & Lessons Learned." *Behavioral Science & Policy* 2, no. 2 (2016): 53-65.
- Hennig-Thurau, Thorsten, Victor Henning, Henrik Sattler, Felix Eggers, and Mark B. Houston. "The Last Picture Show? Timing and Order of Movie Distribution Channels." *Journal of Marketing* 71, no. 4 (2007): 63-83.
- Hill, David T., and Krishna Sen. "The Internet in Indonesia's New Democracy." In *Democratization*, 119-36. London: Frank Cass Publishers, 2000.
- Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press, 2009.
- Hood, Christopher, Henry Rothstein, Robert Baldwin, Judith Rees, and Michael Spackman. "Where Risk Society Meets the Regulatory State: Exploring Variations in Risk Regulation Regimes." *Risk Management* 1, no. 1 (1999): 21-34.
- Klare, Karl E. "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941." *Minnesota Law Review* 62 (1977): 265-339.
- Krehbiel, Jay N. "Public Awareness and the Behavior of Unpopular Courts." *British Journal of Political Science* 51, no. 4 (2021): 1601-19.
- Kwak, Dongchul, and Minjung Kim. "Trade Negotiations in the Digital Era: The Case of OTT Video Streaming Services." *Global Policy* 11 (2020): 14-22.
- Ledford, Kenneth F. "Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876-1914." *Central European History* 37, no. 2 (2004): 203-24.
- Leroux, Eric H. "Twenty Years of GATS Case Law: Does It Taste Like a Good Wine?" In *Research Handbook on Trade in Services*, 2016. <https://doi.org/10.4337/9781783478064.00015>.
- Lim, Hoe. "Trade and Human Rights: What's at Issue?" *Journal of World Trade* 35, no. 2 (2001).

- Mattoo, Aaditya, Robert M. Stern, and Gianni Zanini. *A Handbook of International Trade in Services*. Oxford: Oxford University Press, 2007.
- Peng, Shin-yi. "GATS and the Over-the-Top Services: A Legal Outlook." *Journal of World Trade* 50, no. 1 (2016).
- Podgorecki, Adam. "Legal Consciousness as a Research Problem." In *European Yearbook in Law and Sociology 1977*, 85-97. Berlin: Springer, 1977.
- Pykett, Jessica, Michael Saward, and Anja Schaefer. "Framing the Good Citizen." *The British Journal of Politics and International Relations* 12, no. 4 (2010): 523-38.
- Rossignol, Nicolas, Pierre Delvenne, and Catrinel Turcanu. "Rethinking Vulnerability Analysis and Governance with Emphasis on a Participatory Approach." In *Risk Analysis*, 129-41. Oxford: Blackwell Publishing Inc., 2015.
- Satriawan, Iwan, Tareq Muhammad, Aziz Elven, and Tanto Lailam. "Internet Shutdown in Indonesia: An Appropriate Response or a Threat to Human Rights?" Working paper, 2023.
- Secretariat, WTO. *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services*. The Hague: Kluwer Law International, 2000.
- Shadikhodjaev, Sherzod. "Technological Neutrality and Regulation of Digital Trade: How Far Can We Go?" *European Journal of International Law* 32, no. 4 (2021): 1221-47.
- Tian, Xin, Jiayi Zhu, Xuan Zhao, and Junfeng Wu. "Improving Operational Efficiency through Blockchain: Evidence from a Field Experiment in Cross-Border Trade." *Production Planning & Control* 35, no. 9 (2024): 1009-24.
- Ventouratou, Anna. "Justifying Trade Sanctions: Exceptions and Defences under WTO Law." *Cornell International Law Journal* 57 (2024).
- Zhu, Kevin. "Internet-Based Distribution of Digital Videos: The Economic Impacts of Digitization on the Motion Picture Industry." *Electronic Markets* 11, no. 4 (2001): 273-80.

UNRAVELLING THE ANTI- DEFECTION LAW IN INDIA: A CRITICAL EXAMINATION OF ITS CONSTITUTIONALITY

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Abstract

Since its introduction in 1985 to prevent political defections and maintain political stability, India's Anti-Defection Law has been widely misused, leading to a heated constitutional debate. The anti-defection law's constitutional ramifications are critically examined in this paper, focusing on how it has been misused within the Indian political landscape. It examines the background and purpose of the law, highlighting its fundamental objective of ensuring political stability. It also discusses the legal framework within which the law operates. Subsequently, it explores instances of abuse and misuse, such as politically driven defections, intimidation and threats, and horse-trading and inducements, exposing the deterioration of democratic principles in the country's political landscape by examining important defection episodes of the recent past in the states of Karnataka (2019), Goa (2019), Telangana (2019), Madhya Pradesh (2020) Maharashtra (2022). The article also considers judicial perspectives, particularly in the context of the role of the Speaker, to provide insight into the evolving legal landscape surrounding the law. Given the multi-faceted issues compromising the effectiveness of the anti-defection law, the paper's conclusion emphasizes the necessity of looking for alternatives to the anti-defection law, such as building robust democratic conventions and practices and party cohesion, to defend the political conscience of Indian democracy.

Keywords: Anti-defection law; Constitutional validity; Political instability; The constitution (fifty-second amendment) act of 1985; Tenth schedule

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I. INTRODUCTION

Over the past few decades, several democracies have adopted anti-defection laws that penalise legislators for switching parties between elections.¹ Some have even constitutionalised these rules, making political parties, rather than individual representatives, the primary bearers of the voters' mandate.² India is one such case. When legislators abandon the parties on whose platforms they were elected, often in pursuit of office or other gains, they weaken the link between electoral choice and government formation. In India's fragmented, coalition-prone party system, such moves generate short-term instability and deepen public mistrust of political parties and democratic institutions.³

Indian democracy is particularly prone to the scourge of defection due to its diverse population, complex sociopolitical system, and a multitude of regional parties.⁴ The historical narrative of defections in India is as old as the system of elected representation introduced by the British through successive reforms before Independence. For instance, Shri Shyam Lal Nehru, a member of the Central Legislative, switched his allegiance from the Congress Party to the British side.⁵ To give another example, Shri Hafiz Mohammed Ibrahim, a Muslim League candidate who was elected to the Uttar Pradesh Legislative Assembly, switched parties and joined the Congress in 1937.⁶ However, since the late 1960s, the phenomenon of defection began to permeate the entire Indian polity, from the Parliament to the state legislatures. In fact, the infamous slogan, "*Aaya Ram, Gaya Ram*", coined in the 1960s and loosely translated as "I have come, I have gone", emerged as a damning reminder of the prevalent trend of continuous defections by the legislators.⁷ This slogan can be traced to the disconcerting tale

¹ Csaba Nikolenyi, "The Adoption of Anti-Defection Laws in Parliamentary Democracies," *Election Law Journal: Rules, Politics, and Policy* 15, no. 1 (2016): 96-108.

² Nikolenyi, "The Adoption of Anti-Defection Laws," 96.

³ Csaba Nikolenyi, "Government Termination and Anti-Defection Laws in Parliamentary Democracies," *West European Politics* 45, no. 3 (2022): 638-62.

⁴ Chirag Balyan, "An Integrated Approach to Resolve the Crisis of Defection in India," *SSRN Electronic Journal*, ahead of print, 2020.

⁵ G. C. Malhotra, *Anti-Defection Law in India and the Commonwealth* (New Delhi: Metropolitan Book Co., 2005), 4.

⁶ Malhotra, *Anti-Defection Law in India*, 5.

⁷ Paras Diwan, "Aya Ram Gaya Ram: The Politics of Defection," *Journal of the Indian Law Institute* 21, no. 3 (July-September 1979): 291.

of Gaya Lal, an elected Member of the Legislative Assembly representing Hodal in Haryana. In 1967, after being elected as an independent candidate, Gaya Lal joined the Indian National Congress (INC) and thereafter changed parties thrice in a fortnight.⁸ Another noticeable trend in Indian Polity is that the problem of defection has been observed to be much more rampant in state legislatures resulting in government instability. The committee of governors reported in 1971 that in the states, the defections became widespread after the elections of 1967. From March 1967 to August 1970, there were 1240 defections in the states, and shockingly most of these defections took place on promise of reward of office or for a gain of other means “considered not too honourable.”⁹

Ultimately to discourage defections both in the Indian Parliament as well as the state legislatures, the anti-defection law was passed, after several attempts, in the form of the Constitution (Fifty-second Amendment) Act of 1985 which amended Articles 101, 102, 190, and 191 of the Indian constitution and also inserted the Tenth schedule.¹⁰ These provisions provided for the disqualification of members of Parliament and state legislatures on the grounds of defection. The law also vested the power to decide such questions in the Speaker or Chairman of the House. Arguing in favour of the adoption of the Constitution (Fifty-second Amendment) Bill, Rajiv Gandhi (then Prime Minister of India) remarked, “This bill is the first step towards cleaning our public life.”¹¹ However, more than three and a half decades since its adoption, India’s anti-defection law has not only braced constitutional challenges and intense debate but has also not proved to be adequately effective in checking defections in state legislatures. The fall of governments in the last decade in the states of Karnataka (2019),¹² Goa (2019),¹³

⁸ Ritwika Sharma and Mayuri Gupta, “Anatomy of India’s Anti-Defection Law” (New Delhi: Vidhi Centre for Legal Policy, 2023), 4.

⁹ M. P. Jain, *Indian Constitutional Law*, 8th ed. (New Delhi: LexisNexis, 2018), 325.

¹⁰ Madhav Khosla and Milan Vaishnav, “Democracy and Defections,” *International Journal of Constitutional Law* 22, no. 2 (April 1, 2024): 405.

¹¹ Abhishek Dey, “India’s Anti-Defection Law Didn’t Stop Power Politics. It Just Moved from Farmhouse to Resort,” *The Print*, July 17, 2022.

¹² PTI, “Eight Turncoats of 2019 ‘Coup’ Who Helped BJP Form Government in Karnataka, Lose Election,” *The Economic Times*, May 13, 2023.

¹³ Marcus Mergulhao, “Goa’s Tryst with Defections Goes Back over Half a Century,” *The Times of India*, September 15, 2022.

Telangana (2019), Madhya Pradesh (2020),¹⁴ and Maharashtra (2022)¹⁵ bare the shadowy side of the anti-defection law, exposing its fragility and susceptibility to manipulation. Political actors have learned to work around its provisions through mass resignations, engineered mergers and strategic litigation. At the same time, Speakers have often faced allegations of partisanship and delay in deciding disqualification petitions.¹⁶ Additionally, the anti-defection law has also been severely criticized as it curtails the freedom of speech and expression of the legislators by restricting their ability to express dissenting opinions and encourages a party's autocratic functioning.¹⁷

Against this backdrop, the paper asks how far the anti-defection law succeeds in curbing defections while preserving democratic values and remaining consistent with constitutional principles. It adopts a socio-legal methodology, examining the anti-defection law not only as a set of constitutional and statutory provisions, but also as it operates within India's party system, coalition politics, and process of government formation. This is complemented by case law analysis through close reading of key Supreme Court and High Court decisions applying the anti-defection provisions in varied factual situations.

The paper addresses four core issues: the rationale for the anti-defection law in India and its evolution in scope and impact; the constitutional soundness of the Tenth Schedule; the role of the Speaker or Chairman in deciding defection cases and the adequacy of safeguards for neutrality; and the practical functioning of the framework in light of recent political developments, including the falls of governments in Karnataka (2019), Goa (2019), Telangana (2019), Madhya Pradesh (2020) and Maharashtra (2022). This paper is divided into six parts. After setting out the background, Part II examines the rationale, scope and evolution of the law; Part III analyses constitutional challenges and judicial responses; Part IV

¹⁴ Mukesh Rawat, "MP Govt Crisis: Kamal Nath Announces Resignation, Congress Falls and BJP Rejoices," *India Today*, March 20, 2020.

¹⁵ Bilal Kuchay, "How BJP Wrested Back Control of India's Richest State Maharashtra," *Al Jazeera*, January 7, 2022.

¹⁶ Charith Reddy and Shagun Bhargava, "For Laws May Come and Laws May Go, but Defections Go on Forever: A Critical Analysis of the Role of the Speaker in Indian Anti-Defection Laws," *NLIU Law Review X*, no. 1 (2022): 339.

¹⁷ Jishnutosh Majumdar, "India Must Reform Its Anti-Defection Law to Prevent Further Corrosion of Democracy," *JURIST*, July 19, 2022.

evaluates the Speaker's position; Part V uses the recent state episodes to test the law in practice; and the conclusion reassesses its overall effectiveness and the need to consider alternatives.

II. THE RATIONALE, SCOPE, AND EVOLUTION OF THE ANTI-DEFECTION LAW IN INDIA

The introduction of the anti-defection law in India was driven by the imperative to mitigate the destabilizing impact of defections and strengthen the foundations of Indian democracy.¹⁸ This section explains why such a far-reaching constraint on legislators' behaviour was thought necessary, and why its history still matters. It traces the rationale behind the law to the chronic instability of the late 1960s and early 1970s, outlines the original design of the Tenth Schedule, and then follows its evolution through later constitutional amendments and key judicial decisions. Understanding this trajectory is essential for assessing whether the current framework addresses the problem it set out to solve, or whether its scope and operation have created new tensions for democratic representation and constitutional principles.

2.1. Rationale of Introducing the Anti-Defection Law in India

Democratic systems should be made resilient to withstand the disruptive impact of defections. Defections can destabilize legitimately elected governments with relative ease, toppling a government in majority by reducing it to a minority through defection.¹⁹ Through deceitful inducements, a party that otherwise fails to get a majority through elections in the legislative assembly may yet be able to maneuver a majority and thereby form a government by inducing defections from other parties. During the 1960s and 1970s, the country witnessed rampant defections at the state and center levels.²⁰ Therefore, the anti-defection law was introduced with the awareness that if the evils of political defection were not contained, it would undermine the foundations of Indian democracy. At the same

¹⁸ *The Constitution (Fifty-second Amendment) Act, 1985*, Statement of Objects and Reasons, Bill No. 22 of 1985.

¹⁹ Nikolenyi, "Government Termination and Anti-Defection Laws in Parliamentary Democracies," 4.

²⁰ Diwan, "Aya Ram Gaya Ram."

time, recent scholarship suggests that Indian parties cannot be understood only as vehicles of patronage and clientelism; they also embody distinct ideological positions on the role of the state in the economy and on the recognition of social and religious groups.²¹ For many voters, party labels signal not just access to material benefits but also broader commitments regarding redistribution, secularism and minority protection.²² In this setting, defections disrupt not only the numerical balance of legislatures but also the ideological link between voters and their elected representatives.

The anti-defection law, which forms part of the Constitution (Fifty-second Amendment) Act, was ultimately enacted by the Parliament in 1985 after extensive deliberations. Reflecting the urgency and dire need for the anti-defection law for the Indian democracy, the statement of objects and reasons accompanying the Bill specifically stated that,

*“The evil of defection has been a matter of national concern, and if it is not combated, it is likely to undermine the very foundation of our democracy and the principle which sustain it.”*²³

Therefore, the main objective of the anti-defection law was to deter political defections. It stipulated that any elected member who switched their political affiliations after elections could lose their legislative membership as a consequence. As a result, the Constitution (Fifty-second Amendment) Act of 1985 amended Articles 101, 102, 190, and 191 of the Constitution regarding the vacation of seats and disqualification from membership of Parliament and the State Legislatures and also added the Tenth Schedule to the Constitution outlining specific provisions as to disqualification based on defection²⁴ and established the authority of the Speaker/Chairman²⁵ to decide on defection cases.

²¹ Pradeep K. Chhibber and Rahul Verma, *Ideology and Identity: The Changing Party Systems of India* (Oxford: Oxford University Press, 2018).

²² Adnan Naseemullah, “Patronage vs. Ideology in Indian Politics,” *Commonwealth & Comparative Politics* 59, no. 2 (2021): 193-214.

²³ *The Constitution (Fifty-second Amendment) Act, 1985*, Statement of Objects and Reasons, Bill No. 22 of 1985.

²⁴ *The Constitution of India, 1950*, Tenth Schedule, para. 2.

²⁵ *The Constitution of India, 1950*, Tenth Schedule, para. 6.

2.2. Scope and Evolution of the Anti-Defection Law

India has a bi-cameral federal legislature at the Union level (Lok Sabha and Rajya Sabha in Parliament)²⁶ and separate legislatures in each State (Legislative Assembly, and in some States also a Legislative Council),²⁷ which together share law-making powers as divided by the Constitution. The anti-defection law operates in broadly the same way at both the Union and State levels, but the forums and actors differ.²⁸ At the Union level, it applies to members of Parliament (MPs) in the Lok Sabha and the Rajya Sabha, with disqualification petitions decided by the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha, as the case may be.²⁹ At the State level, it applies to members of the State Legislative Assembly (MLAs) and, where they exist, members of the State Legislative Council, with petitions decided by the Speaker of the Assembly or the Chairman of the Council.³⁰ In both settings, the grounds and consequences of defection are identical, since they flow from the same constitutional provisions;³¹ what differs is the institutional and political context in which the law is applied.

Therefore, the anti-defection law applies to elected members of Parliament and State Legislative Assemblies who switch parties or vote contrary to the party line. In this context, it is prudent to refer to Articles 102(2) and 191(2), read with the Tenth Schedule of the Constitution. A conjoint reading of these provisions implies that a member of the Parliament or State legislature can be disqualified from membership of the House upon the occurrence of the following contingencies. First, if the member voluntarily gives up their membership of the political party to which they belong.³² Second, if the member votes, or abstains from voting, contrary to the direction or whip issued by their political party, without obtaining prior permission, and the party fails to condone such action within fifteen days.³³ Third, if an elected member, who was not set up

²⁶ *The Constitution of India, 1950*, Art. 79.

²⁷ *The Constitution of India, 1950*, Art. 168.

²⁸ *The Constitution of India, 1950*, Tenth Schedule, para. 1(a). "House" means either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State.

²⁹ *The Constitution of India, 1950*, Tenth Schedule, para. 6(1).

³⁰ *The Constitution of India, 1950*, Tenth Schedule, para. 1(a).

³¹ *The Constitution of India, 1950*, Arts. 102(2), 191(2), and Tenth Schedule.

³² *The Constitution of India, 1950*, Tenth Schedule, para. 2(1)(a).

³³ *The Constitution of India, 1950*, Tenth Schedule, para. 2(1)(b).

as a candidate by any political party, chooses to join a political party after the election.³⁴ Fourth, if a nominated member joins a political party six months after taking their seat in the House.³⁵

It is important to note that, in its current form, the law covers both individual defections and collective defections by a group of legislators through the mechanism of merger. When the Tenth Schedule was first incorporated into the Indian Constitution, it created two specific exemptions from disqualification for certain forms of collective defection. First, under Paragraph 3 of the Tenth Schedule, a member of Parliament or a State legislature was exempt from disqualification if they left their party due to a split, provided that the faction resulting from the split comprised at least one-third of the party's total membership in the House.³⁶ This exemption for collective defections on the ground of a "split" within the political party was subsequently removed from the Constitution in 2003. Second, under Paragraph 4 of the Tenth Schedule, disqualification would not apply in the event of a merger of political parties. Specifically, if a member's original political party merged with another, and at least two-thirds of the members of the concerned legislative party agreed to such a merger, it would be deemed valid. In that case, the member and similarly placed members could declare that they had either joined the merged political party or chosen to function as a separate group. From the time of such a merger, the new entity—whether the merged party or the separate group—would be considered the member's political party for the purposes of the anti-defection rules.³⁷

These two provisions provided exemption to collective defections on the ground of split or merger aimed at accommodating a genuine shift in political ideologies or facilitating alignment of smaller political parties to help form stable governments. However, soon after its adoption, the provision related to splits (Paragraph 3 of the Tenth Schedule) in political parties became a problem. It began to be misused by unscrupulous politicians to effect vertical splits in political

³⁴ *The Constitution of India, 1950*, Tenth Schedule, para. 2(2).

³⁵ *The Constitution of India, 1950*, Tenth Schedule, para. 2(3).

³⁶ *The Constitution of India, 1950*, Tenth Schedule, para. 3.

³⁷ *The Constitution of India, 1950*, Tenth Schedule, para. 4.

parties and thereby facilitate defections of elected members while avoiding their disqualification under the anti-defection law.³⁸

The case of *Mayawati v Markendeya Chand*³⁹ stands out as a noticeable example that highlights the misuse of the provision related to splits in political parties to facilitate defections. In this case, twenty-two members of the Indian National Congress (INC) and twelve members of the Bahujan Samaj Party (BSP) defected in October 1997 from their parties. They supported the confidence motion of the Bhartiya Janta Party (BJP) government led by then Chief Minister Kalyan Singh to give it a majority in the Uttar Pradesh Legislative Assembly. Shortly after that, all the defectors were made ministers in the BJP government. Mayawati, the leader of BSP, filed a complaint before the Speaker that the twelve members who had defected from the party should be disqualified from the membership of the Legislative Assembly. The Speaker procrastinated the matter related to the disqualification of the defecting Members of Legislative Assembly (MLAs) and ultimately decided that there was a split in the BSP and one-third of the members of the party (numbering twenty-three MLAs) had split and hence the defecting MLAs (twelve in number) were exempt from disqualification. The claim that twenty-three and not twelve MLAs had split from the BSP was disputed and never substantiated. However, the Speaker relying upon certain proceedings conducted before him, came to this conclusion. It is also worth noting that the Speaker belonged to the ruling BJP government. When the Speaker's decision was appealed before the Supreme Court, it was heard by a bench of three judges. All three judges gave separate judgments. Justice K.T. Thomas allowed the appeal and held that the decision of the Speaker was perverse as there was, in fact, no split in the BSP within the meaning of paragraph 3 of the Tenth Schedule, and the defecting members stood disqualified.⁴⁰ Justice M. Srinivasan dismissed the appeal and upheld the decision of the Speaker.⁴¹ Punchhi, CJ refrained from giving a definitive opinion and acknowledged the need for clarification on the

³⁸ Malhotra, *Anti-Defection Law in India and the Commonwealth*, 973.

³⁹ *Mayawati v. Markendeya Chand*, AIR 1998 SC 3340 (Supreme Court of India, 1998).

⁴⁰ *Mayawati v. Markendeya Chand*, AIR 1998 SC 3340 (Supreme Court of India, 1998), para. 68.

⁴¹ *Mayawati v. Markendeya Chand*, AIR 1998 SC 3340 (Supreme Court of India, 1998), para. 72.

procedure to be followed by the Speaker/Chairman in cases of reference to the question of disqualification along with the alleged split in the party relatable to paragraph 3 of the Tenth Schedule.⁴² He, therefore, referred the matter to the constitution bench for decision, given the apparent silence of the *Kihoto Hollohan*⁴³ case on the procedure to be followed by the Speaker/Chairman in such cases. However, the Constitution Bench left the difference of opinion unresolved, and the appeal was disposed of as infructuous in November 2004.

Following the Mayawati case, the chorus grew within the country to strengthen the anti-defection law by preventing the misuse of paragraph 3 of the Tenth Schedule. The Law Commission of India, in its 170th Report in 1999 on the “Reform of Electoral laws,” recommended the omission of paragraph 3 of the 10th schedule.⁴⁴ The same view was endorsed by the National Commission to Review the Working of the Constitution (NCRWC) set up in 2000.⁴⁵ The NCRWC also recommended that a defector should be penalised by debarring him or her from holding any public office as a Minister or any other remunerative political post for at least the remaining term or until next the next elections, whichever is earlier. Both these recommendations were accepted by the Parliament and the provision related to split in political parties, i.e., paragraph 3 of the Tenth Schedule, was deleted from the Tenth Schedule with the passage of the Constitution (Ninety-First Amendment) Act of 2003.⁴⁶ Further, Article 164 was amended with the introduction of Clause 1B for disqualifying defectors from being appointed as Ministers⁴⁷ for the period suggested by the NCRWC. The Constitution (Ninety-First Amendment) Act of 2003 also introduced Article 361B, which disqualified defectors from holding any remunerative political post for the same period.⁴⁸

Subsequently, the Supreme Court in *Rameshwar Prasad v. Union of India*⁴⁹ had observed in the context of this amendment that,

⁴² *Mayawati v. Markendeya Chand*, AIR 1998 SC 3340 (Supreme Court of India, 1998), para. 1.

⁴³ *Kihoto Hollohan v. Zachilhu and Others*, AIR 1993 SC 412 (Supreme Court of India, 1993).

⁴⁴ Jain, *Indian Constitutional Law*, 52.

⁴⁵ Jain, *Indian Constitutional Law*, 52.

⁴⁶ *The Constitution (Ninety-First Amendment) Act of 2003*, Section 5.

⁴⁷ *The Constitution*, Section 3.

⁴⁸ *The Constitution*, Section 4.

⁴⁹ *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1 (Supreme Court of India, 2006).

“By the 91st Amendment, defection was made more difficult by deleting the provision which did not treat mass shifting of loyalty by one-third members as defection and by making defection altogether impermissible and only permitting the merger of the parties in the manner provided in the Tenth Schedule.”⁵⁰

Other important provisions of the Tenth Schedule include paragraph 6, which states that the question of disqualification under the Tenth Schedule is to be determined by the Speaker/Chairman of the concerned House. However, the Speaker/Chairman is not empowered to take notice of an alleged defection on their own motion or *suo motu*, but only upon receiving a petition in writing from a fellow member of the House. Further, paragraph 6 of the Tenth Schedule clarifies that the speaker’s decision is final. Paragraph 7 of the Tenth Schedule, now rendered void given the decision of the Supreme Court in *Kihoto Hollohon* case, ousted the jurisdiction of the courts to decide question/s of disqualification of a member of the House under the Tenth Schedule. Paragraph 8 authorizes the chairman speaker of a house to «make rules for giving effect to the provisions of the Tenth Schedule.» Relying upon this provision, the Speaker of Lok Sabha framed the Members of the Lok Sabha (Disqualification on ground of Defection) Rules, 1985, for giving effect to the provisions of the Tenth Schedule, which came into force with effect on March 18, 1986.⁵¹

This part shows that the anti-defection law emerged as a strong response to real fears of instability and manufactured majorities. The deletion of the split provision and the retention of the merger exception, the central role of the Speaker, and the pattern of partisan misuse revealed in cases such as *Mayawati v. Markandeya Chand* all suggest that design choices within the anti-defection law framework have significant constitutional and democratic implications. Having traced how the anti-defection law came into being and how it has been reshaped over time, the next part turns to a closer examination of its constitutional foundations, the challenges it has attracted, and the judiciary’s efforts to reconcile party discipline with core principles of representative democracy.

⁵⁰ *Rameshwar Prasad v. Union of India*, 87.

⁵¹ Jain, *Indian Constitutional Law*, 116.

III. CONSTITUTIONAL VALIDITY OF THE ANTI-DEFECTION LAW AND THE TENTH SCHEDULE

Wherever they are adopted, anti-defection laws provoke intense debate about their compatibility with the political freedoms of elected legislators, including the plausible freedom to change party affiliation.⁵² In India, the introduction of the anti-defection law through the Constitution (Fifty-second Amendment) Act of 1985 has had significant implications for democratic practices. Although designed to promote political stability and curb opportunistic defections, it has raised complex constitutional questions and adversely affected legislators' freedom of speech, expression and dissent, which are protected as fundamental freedoms under Indian Constitution.⁵³ In the case of *Kihota Hollohon v. Zachilhu and Others*,⁵⁴ a constitutional challenge was mounted against the anti-defection law on multiple grounds. First, it was contended that the Tenth Schedule violates fundamental principles of parliamentary democracy and undermines a basic feature of the Indian Constitution by imposing penalties and disqualifications on elected representatives. Second, the validity of Paragraph 7 of the Tenth Schedule was questioned on the ground that it bars judicial review and, in doing so, alters the scope of Articles 136, 226, and 227 of the Constitution. It was argued that such an alteration would require ratification by at least half of the states, as mandated by the proviso to Article 368(2). Third, the provision in Paragraph 6(1), which confers constitutional finality on the decisions of the Speaker or Chairman, was challenged for potentially ousting the jurisdiction of courts and thereby undermining judicial review. Fourth, concerns were raised regarding whether the Speaker or Chairman, as adjudicating authorities under the Tenth Schedule, meet the standards of an independent and impartial tribunal, or whether their institutional role within the legislature introduces a reasonable apprehension of bias in the adjudication of defection cases.

⁵² Zdzisław Kędzia and Agata Hauser, *The Impact of Political Party Control over the Exercise of the Parliamentary Mandate* (Inter-Parliamentary Union, 2011).

⁵³ *The Constitution of India*, 1950, Art. 19.

⁵⁴ *Kihota Hollohon v. Zachilhu and Others*, AIR 1993 SC 412 (Supreme Court of India, 1993).

The Supreme Court ruled 3:2 in favor of the anti-defection law while upholding its constitutionality. It endorsed the view that its provisions aim to curb unprincipled and unethical political defections. At the same time, the Court held that the speaker's order of disqualification of a member of the House on the grounds of defection is subject to Judicial Review. Justices L.M. Sharma and J.S. Verma made up the minority, while Justices M. N. Venkatachaliah, K. J. Reddy, and S. C. Agrawal made up the majority.

Explaining the rationale underlying the Tenth Schedule, Justice M.N. Venkatachaliah, in his majority opinion, stated that the provisions of the Tenth Schedule recognize the role of political parties in the political process. Therefore, any defection by the elected members in pursuit of power and wealth would be in utter disregard of the electoral mandate. In this context, he observed that,

“These provisions in the Tenth Schedule give recognition to the role of political parties in the political process. A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party. The provisions of Paragraph 2(1) (a) proceed on the premise that political propriety and morality demand that if such a person, after the election, changes his affiliation and leaves and political party which had set him up as a candidate at the election, then he should give up his Membership of the legislature and go back before the electorate.”⁵⁵

The following paragraphs discuss in detail the various grounds of constitutional challenge and the reasoning given by the Supreme Court.

3.1. Issue No. 1: Violation of Fundamental Principles of Parliamentary Democracy

The petitioners had contended that paragraph 2(1)(b) of the Tenth Schedule, which provided for disqualification of a member from the House for voting or abstaining from voting against the direction or *whip* issued by their political party, was violative of the principles underlying Parliamentary democracy (in particular Articles 105 & 194 of the Indian Constitution) and infringed upon the

⁵⁵ *Kihota Hollohon v. Zachilhu and Others*, 425.

freedom of speech, the right to dissent and the freedom of conscience of the legislators. The said provision is, therefore, unconstitutional and destructive of the basic feature of the Indian Constitution.

The majority ruled that paragraph 2(1)(b) of the Tenth Schedule is constitutionally valid. It aims to target unprincipled defections, which cannot be protected under freedom of conscience, the right to dissent, or intellectual freedom. The court specifically stated,

*“The provisions of Paragraph 2 do not violate any rights or freedom under Article 105 and 194 of the Constitution. The provisions are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections.”*⁵⁶

3.2. Issue No. 2: Need for Ratification of the Amendment by State Legislatures under Article 368(2)

Secondly, it was contended that paragraph 7 of the Tenth Schedule, which bars judicial review and excludes the jurisdiction of all Courts, including the Supreme Court and High courts, thus altering the operation and effect of Articles 136, 226, and 227 of the Indian Constitution, necessitates ratification by half of the state legislatures in accordance with Article 368 (2) of the Indian Constitution. As the Constitution (Fifty-Second Amendment) Act of 1985 had not been so ratified, it became constitutionally invalid.

While dealing with this contention, the majority accepted that considering the effect of paragraph 7 of the Tenth Schedule on Articles 136, 226, and 227 of the Indian Constitution, it needed ratification by state legislatures, as provided by Article 368(2). Therefore, paragraph 7 of the Tenth Schedule was declared constitutionally invalid for want of ratification. However, the majority held a consistent view that this omission did not mean that the entire Tenth Schedule had become constitutionally invalid. In their opinion, paragraph 7 of the Tenth Schedule was independent of and stood apart from its main provisions. Therefore, after applying the doctrine of severability, the majority held that as the remaining provisions of Schedule 10 are severable from paragraph 7, they

⁵⁶ *Kihota Hollohon v. Zachilhu and Others*, 412.

can stand independently of para 7 and are complete and workable by excision of paragraph 7.⁵⁷

In contrast, the minority view was that the assent of the President to the Constitution (Fifty-Second Amendment) Act of 1985 was *non est*, null, and void given the absence of ratification by half of the state legislatures as required under Article 368(2).⁵⁸ Therefore, according to them, in the absence of such ratification, it is not merely paragraph 7 of the Tenth Schedule but the entire Constitution (Fifty-Second Amendment) Act of 1985 that is unconstitutional.

3.3. Issue No. 3: Paragraph 6 of the Tenth Schedule and Bar to Judicial Review

As to the contention that paragraph 6(1) of the Tenth Schedule conferring constitutional “finality” to decisions of Chairmen/Speakers bars judicial review and is, therefore, unconstitutional, the majority responded by reiterating that the said provision, to the extent it seeks to impart finality to the decision of the Speakers/Chairmen, is valid. However, that does not mean that the decision of the Speaker/Chairman is immune from judicial review. When exercising their authority and carrying out their duties under the Tenth Schedule, the Speaker/Chairman operates as a tribunal, adjudicating the rights and obligations outlined in the Tenth Schedule. The decisions they make in that capacity are subject to judicial review. In this context, the court observed that,

*“The concept of statutory finality embodied in Paragraph 6 (1) does not detract from or abrogate judicial review under Articles 136, 226, and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned.”*⁵⁹

Further, while setting the limits of judicial review, the majority opined that any stage before the speaker or chairperson makes a decision should not be subject to judicial review, the only exception being the cases wherein (a) the Speaker suspends or takes action during the pendency of disqualification proceedings;

⁵⁷ *Kihota Hollohon v. Zachilhu and Others*, 421.

⁵⁸ *Kihota Hollohon v. Zachilhu and Others*, 457.

⁵⁹ *Kihota Hollohon v. Zachilhu and Others*, 451.

and (b) disqualifications or suspensions which may have grave, immediate and irreversible repercussions.⁶⁰

3.4. Issue No. 4: Role of the Speaker/Chairman as a Non-Biased Adjudicator

Concerns were also raised about the speaker's position and whether the Chairman/Speaker of the House met the requirements of an impartial adjudicatory system or if his authority to render decisions on defection cases creates a plausible possibility of bias. On this issue, the majority rejected the contention that the investiture of adjudicatory functions in the Speaker/Chairman is invalid on the grounds of political bias and lack of impartiality. The majority noted that,

“The Speakers/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far reaching decisions in the Parliamentary democracy. Vestiture of power to adjudicate questions under the Tenth Schedule in them should not be considered exceptionable.”⁶¹

Further, alluding to the high constitutional status conferred upon the Speaker/Chairman as guardians of rights and privileges of the House, Justice Venkatachaliah categorically observed that,

“It would, indeed be unfair to the high traditions of that great office to say that the investiture in it of this jurisdiction would be vitiated for violation of a basic feature of democracy... Accordingly, the contention that the vesting of adjudicatory functions in the Speakers/Chairmen would by itself vitiate the provision on the ground of likelihood of political bias is unsound and is rejected.”⁶²

In contrast, the minority was of the view that the speaker could not be given the role of the sole arbiter in the defection cases as it would be against the basic structure of the Constitution. The Speaker/Chairman cannot be regarded as an independent adjudicating authority because he is constantly dependent on the support of the majority in the house. The further observed that,

“Democracy is a part of the basic structure of the Constitution and free and fair elections with provision for resolution of disputes relating to the same

⁶⁰ *Kihota Hollohon v. Zachilhu and Others*, 421.

⁶¹ *Kihota Hollohon v. Zachilhu and Others*, 453.

⁶² *Kihota Hollohon v. Zachilhu and Others*, 453.

as also for adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system in our Constitution. Accordingly, an independent adjudicatory machinery for resolving disputes relating to the competence of Members of the House is envisaged as an attribute of this basic feature.”⁶³

Upon careful examination, it becomes evident that the Supreme Court dismissed all constitutional challenges except for the ground related to the ouster of judicial review under paragraph 7 of the Tenth Schedule. However, it is submitted that the mere rejection of these constitutional challenges does not fully address the adverse impact of the anti-defection law on the country’s parliamentary democracy.

In this context, it is proper to refer to paragraph 2(1)(a) of the Tenth Schedule, which provides that an elected member can be disqualified from the House if he has “voluntarily given up the membership of the political party” on whose ticket he was elected to the House. Although the said provision listed out specific overt acts that could lead to disqualification, the Supreme Court in *Ravi Naik v. Union of India*⁶⁴ interpreted paragraph 2(1)(a) of the Tenth Schedule broadly by suggesting that voluntary giving up of membership could also be inferred by the conduct or actions of the member. Such interpretation has created several awkward situations when even public criticism of the party leader’s orders and decisions was interpreted as a defection. For instance, in 2017, relying upon the decision of the Supreme Court in *Ravi Naik’s* case, then Rajya Sabha Chairman M. Venkaiah Naidu disqualified former JD(U) President Sharad Yadav and Ali Anwar Ansari from membership of Rajya Sabha under Paragraph 2(1)(a) of the Tenth Schedule.⁶⁵ Interestingly, they were disqualified even though they had not tendered any resignation from JD(U) on the grounds that they had disobeyed party orders by attending an opposition party rally in Patna.

Taken together, *Kihoto Hollohon* and subsequent decisions upheld the core architecture of the Tenth Schedule. At the same time, by treating unprincipled

⁶³ *Kihoto Hollohon v. Zachilhu and Others*, 457.

⁶⁴ *Ravi Naik v. Union of India*, 1994 Supp. (2) SCC 641 (Supreme Court of India, 1994).

⁶⁵ PTI, “Sharad Yadav Disqualified from RS,” *The Hindu*, December 4, 2017.

defection as the primary constitutional evil and reading paragraph 2(1)(a) expansively, the Court has endorsed a model of parliamentary democracy in which party loyalty is prioritised over individual conscience and intra-party dissent. The result is a framework that concentrates adjudicatory power in politically situated Speakers and allows disqualification threats to be used to discipline criticism as much as to deter opportunism. These tensions may not render the law formally unconstitutional, but they raise serious doubts about its compatibility with political freedoms of elected legislators. The next Part therefore turns from abstract validity to institutional design and practice, asking how this combination of strong party control and Speaker-centred adjudication shapes the functioning of India's parliamentary democracy.

IV. EXAMINATION OF THE ROLE OF THE SPEAKER/CHAIRMAN IN DEFECTION CASES

In order to investigate the weaknesses of the anti-defection law, it is essential to critically evaluate the role and significance of the office of the Speaker, as he is the most important functionary under the anti-defection law. The Speaker's position is vital for parliamentary democracy. The role and functions of the Speaker in the Indian Parliament are based on the Westminster model, much like its counterparts in UK, Ireland, Australia, and Canada.⁶⁶ A Speaker (along with the Deputy Speaker) is elected generally in the first meeting of the House after general/state assembly elections for five years.⁶⁷

The Speaker's role in the Indian parliamentary system is multifaceted and pivotal to the effective functioning of the House. The Speaker has three primary responsibilities in the House: (1) facilitating discussions and deliberations; (2) enforcing discipline to maintain decorum within the House; and (3) carrying out quasi-judicial duties such as adjudicating cases of defection under the provision of the Tenth Schedule.⁶⁸ For the performance of these functions,

⁶⁶ Reddy and Bhargava, "For Laws May Come," 337.

⁶⁷ *The Constitution of India*, Arts 93 and 178.

⁶⁸ Harsimran Kalra, "Decisional Analysis and the Role of the Speaker" (The Hindu Centre for Politics and Public Policy, September 17, 2013), 4-10.

Speaker's impartiality and non-partisanship are essential qualities. These values are respected as constitutional conventions even if they are not expressly stated in the Constitution.

While the Speaker can hail from any political party, he is often frequently elected from the ruling party. Because of this setup, there have been times when the Speaker's decisions have favored the ruling party. For instance, the Speaker's decisions have been postponed in cases of disqualification for defection, ostensibly to the ruling party's advantage. The Speaker, chosen by a particular political party, is expected to uphold neutrality in resolving conflicts, which leads to a paradoxical setting. The conflict between constitutional responsibility and party loyalty makes it difficult for Speakers to uphold their impartial position..

As discussed in the previous section, in *Kihota Hollohan's* case, the petitioners had raised concerns about the potential bias of the Speaker considering his political affiliations and extensive powers bestowed upon him by the Constitution. The majority opinion in *Kihoto Hollohan* disregarded these concerns and put its faith in the Speaker's office. However, the minority view referenced Constitutional Assembly debates to argue that the Speaker was purposefully left out of the decision-making process when the President and Governors were given the authority to resolve disqualification matters under Articles 102, 103, and 192. The minority also opined that the Speaker's position being dependent on the majority may result in bias and compromise the integrity of trials.

Further, it is pertinent to note that under Articles 136, 226, and 227, the Speaker's decisions as a tribunal are susceptible to limited judicial scrutiny on the grounds of violations of constitutional mandates, *mala fides*, and non-compliance with principles of Natural Justice. As prescribed in *Kihoto Hollohan*, the courts can only interfere in the defection matters once the Speaker makes a decision, creating loopholes that benefit the ruling parties when the Speaker abstains from deciding the anti-defection petition. In fact, the Tenth Schedule does not prescribe any timeline within which a Speaker must decide on anti-defection matters. To illustrate this deficiency of law, reference may be made to the case of

*Meisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly.*⁶⁹ In this case, after being elected to the House on a BJP ticket, Mukul Roy, a West Bengal State Assembly legislator, left the party and joined the government of Trinamool Congress Party in June 2021. The BJP tried to get him disqualified from the state Assembly under the anti-defection law. However, the Speaker, affiliated with the Trinamool Congress, did not adjudicate the disqualification petition even after six months. In Supreme Court, a bench comprising Justices R. F. Nariman, Aniruddha Bose, and V. Ramasubramanian held that the Speaker has to decide disqualification petition within a “reasonable period”. While clarifying the meaning of the expression, the court held that,

*“What is reasonable will depend on the facts of each case, but absent exceptional circumstances for which there is good reason, a period of three months from the date on which the petition is filed is the outer limit within which disqualification petitions filed before the Speaker must be decided...”*⁷⁰

There have been other instances when disqualification petitions have been left pending for prolonged periods, sometimes even spanning years. For instance, in 2017, YSR Congress, the main Opposition party in Andhra Pradesh, boycotted the state assembly due to the Speaker's delay of over eighteen months in hearing disqualification petitions of twenty MLAs who had defected.⁷¹ Similarly, in the Telangana assembly, twenty-six defections were left unresolved for years, leading to the dissolution of the House in 2018 without any consequences for the defectors.⁷²

The misuse of powers by the Speaker extends beyond prolonged delays in disposing of disqualification petitions. Numerous instances have involved the improper exercise of powers granted to the Speaker under the Tenth Schedule. In the case of *Rajendra Singh Rana v Swami Prasad Maurya*,⁷³ a case related to the disqualification of members on the grounds of defection from the Uttar Pradesh

⁶⁹ *Meisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly*, 2020 SCC OnLine SC 55 (Supreme Court of India, 2020).

⁷⁰ *Meisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly*, 2020 SCC OnLine SC 55 (Supreme Court of India, 2020), para. 28.

⁷¹ PTI, “YSR Congress to Boycott AP House over Defection of MLAs to TDP,” *The Indian Express* (Amaravati), November 8, 2017.

⁷² Umang Poddar, “Explainer: How Speakers Are Undermining the Anti-Defection Law by Simply Sitting on Petitions,” *Scroll.in*, December 14, 2021.

⁷³ *Rajendra Singh Rana v. Swami Prasad Maurya*, (2007) 4 SCC 270 (Supreme Court of India, 2007).

Legislative Assembly, the Supreme Court had to intervene. The facts of the case are such that in 2003, Mulayam Singh Yadav, the leader of the Samajwadi Party (SP), attempted to form the U. P. government with the backing of 13 Bahujan Samaj Party (BSP) MLAs. The BSP leader, Swami Prasad Maurya, petitioned the Speaker to remove these thirteen MLAs from the House on the grounds of defection. The Speaker dismissed the petition and refused to disqualify the defecting MLAs on the grounds that there was a split in the BSP. A five-judge Constitution Bench ruled that the thirteen BSP MLAs were disqualified and had voluntarily given up their membership since they had sent a letter to Governor T.V. Rajeswar asking him to invite the Samajwadi Party to form the government. The Court decided that the disqualification would be deemed to have taken place as soon as the members committed the act of defection. The Constitution Bench further declared the decision of the Speaker, when he refused to disqualify the members on the grounds of defection and acknowledged a split in BSP, as unconstitutional because it was based on no evidence.

Illustrating the precariousness of the post of the Speaker, reference may be made to the facts of *Kashinath G. Jalmi (Dr) v. The Speaker*.⁷⁴ Ravi S. Naik was elected as a member of the Goa Legislative Assembly in November 1989. On January 25, 1991, Ravi S. Naik became the Chief Minister. On the same day, Dr. Kashinath Jalmi, another Member of the Assembly, filed a petition seeking Naik's disqualification on the grounds of defection. On February 16, 1991, the Speaker, Sirsat, disqualified Ravi S. Naik on the grounds of defection. Naik challenged this order by filing a writ petition before the Goa Bench of the Bombay High Court. During the pendency of the writ petition, Simon Peter D'Souza was elected Deputy Speaker on February 27, 1991, and Speaker Sirsat was removed. On the same day, Ravi S. Naik submitted an application to the Deputy Speaker, Simon Peter D'Souza, asking for a review of the earlier disqualification order. On March 8, 1991, D'Souza set aside the earlier disqualification order issued by Speaker Sirsat and restored the membership of Ravi S. Naik to the House. When the matter came before the Supreme Court, the Court quashed the order

⁷⁴ *Kashinath G. Jalmi (Dr) v. The Speaker*, (1993) 2 SCC 703 (Supreme Court of India, 1993).

made by the deputy speaker on the ground that there were no inherent powers of review vested in the office of the Speaker under the Tenth Schedule.

Most recently, in the case of *Subhash Desai v. Principal Secretary Governor of Maharashtra*,⁷⁵ the Supreme Court called out to the Speaker (affiliated to the BJP, part of the ruling coalition) of the Maharashtra Legislative Assembly that its decision to appoint Bharat Gogawale (from the Eknath Shinde group) as chief Whip and Eknath Shinde as Leader of the Shiv Sena party was contrary to law. The said decision triggered events that led to the fall of the Uddhav Thackeray government. In 2019, a coalition comprising the Shiv Sena, Nationalist Congress Party, Indian National Congress, and independent Members formed the government in Maharashtra, led by Chief Minister Uddhav Thackeray of the Shiv Sena. However, in mid-2022, certain events led to the formation of a new government by a coalition of a faction claiming to be the “real” Shiv Sena, BJP, and independent MLAs, with Mr. Eknath Shinde as the Chief Minister. The change in government composition was triggered by the emergence of two factions within the Shiv Sena – each headed by Uddhav Thackeray and Eknath Shinde. The Supreme Court categorically observed that,

*“The political party and not the legislature party appoints the Whip and the Leader of the party in the House. Further, the direction to vote in a particular manner or to abstain from voting is issued by the political party and not the legislature party... The Speaker shall recognize the Whip and the Leader who are duly authorised by the Shiv Sena political party with reference to the provisions of the party constitution, after conducting an enquiry in this regard and in keeping with the principles discussed in this judgement.”*⁷⁶

The above discussion amply demonstrates that although the speaker/chairman is expected to act as a neutral arbiter in disqualification petitions arising from the anti-defection law, in reality, it is seen that the Speaker is rarely able to rise above his political affiliation, his position being dependent upon the support of the majority of the House. Noted constitutional law scholar Prof. M. P. Jain has also remarked that the Speaker of the Legislature is a political creature; therefore,

⁷⁵ *Subhash Desai v. Principal Secretary Governor of Maharashtra*, AIR 2023 SC 2406 (Supreme Court of India, 2023).

⁷⁶ *Subhash Desai v. Principal Secretary Governor of Maharashtra*, AIR 2023 SC 2406 (Supreme Court of India, 2023), para 206(d).

he is generally not impartial.⁷⁷ Most of the time, he takes the view that is in the interest of the party to which he belongs. Thus, under the present state of the anti-defection law, a paradoxical situation arises where a Speaker/Chairman is torn between his constitutional responsibility to be impartial and party loyalty. This inherent conflict makes it challenging for the Speaker to maintain an impartial and non-partisan position. Nevertheless, the anti-defection law fails to provide a solution to address this challenge.

V. INSIGHTS FROM THE RECENT FALL OF STATE GOVERNMENTS: SHORTCOMINGS OF THE ANTI-DEFECTION LAW

The anti-defection law has been a subject of significant controversies since its inception. Although the anti-defection law was enacted to preserve political stability and safeguard democratic values, its execution has been far from ideal. This section examines the recent fall of state governments in Karnataka (2019), Madhya Pradesh (2020), and Maharashtra (2022) to highlight the shortcomings of the anti-defection law. Politicians have effectively found ways to get around the anti-defection law, as can be seen by looking at the defections and counter-defections of the recent past. One thing is sure, the dynamics of coalition governments, a mainstay of the Indian political landscape, where party affiliations remain fluid, provide unique challenges for the strict enforcement of the anti-defection law.

5.1. Fall of Congress-Janata Dal (Secular) Government in Karnataka (2019)

The fall of the Congress-Janata Dal (Secular) coalition government in Karnataka in 2019 highlighted the challenges of enforcing the anti-defection law in coalition politics. In July 2019, seventeen MLAs from the ruling coalition submitted their resignations to the Speaker. The MLAs desired to quit to avoid disqualification from the House on the grounds of defection. In this way, they wanted to avail benefits of office provided by the then-opposition BJP, should it form the government following the dissolution of the JD(s)-Congress alliance.

⁷⁷ Jain, *Indian Constitutional Law*, 53.

The Speaker of the House was called upon to decide on these resignations and disqualification petitions filed against the defectors under the anti-defection law. According to the ruling coalition, the opposition party - BJP, used political pressure and inducements to induce the resignations, which were not voluntary. On the other hand, the defectors insisted that their resignations were genuine and voluntary. The Speaker made a controversial decision to disqualify the seventeen MLAs from contesting in by-elections to seek re-election and resume their membership in the House for the remainder of its tenure.

In the case of *Srimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly*,⁷⁸ the court had to decide whether the Speaker had the power to prevent defecting members from contesting elections during the remaining term of the House and to reject a resignation that had been tendered voluntarily. A three-judge bench of the Supreme Court ruled that the Speaker will be able to disqualify members under Paragraph 2(1) of the Tenth Schedule but will not have the authority to prevent them from contesting election during the current term of the House. Second, the right to resign from the House is unqualified, and the Speaker's power is limited to determining whether the resignation was offered voluntarily and genuinely. The Constitution does not permit the Speaker to consider any extraneous factors while deciding upon the authenticity of the resignation. Further, the Speaker's satisfaction is open to judicial challenge.

Ultimately, the coalition government lost its majority in the Karnataka Legislative Assembly, and the BJP formed a new government in the state with the help of these resignations and defections.⁷⁹

Therefore, the elected legislators can easily circumvent the provisions of the anti-defection law by resigning from their membership of the House and the party, thus bringing down the collective strength of the House and facilitating the opposing party to form the government. After that, they can seek re-election on the tickets of the party which formed the new government and also enjoy other benefits of office.

⁷⁸ *Srimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly* (2020) 2 SCC 595 (Supreme Court of India, 2020).

⁷⁹ Special Correspondent, "Karnataka Assembly: Congress-JD(S) Government Loses Trust Vote," *The Hindu*, July 23, 2019.

5.2. Fall of Congress Government in Madhya Pradesh (2020)

The Congress party was in power in Madhya Pradesh in March 2020, and Kamal Nath served as the state's Chief Minister. The stability of the government was jeopardized when twenty-two Congress MLAs, led by Jyotiraditya Scindia, rebelled against the party leadership. If these MLAs' resignations were accepted, it would have resulted in the government's collapse because it lost the majority in the House.⁸⁰

In the ideal scenario, the anti-defection law should prevent such defections and guarantee the stability of elected administrations. However, in this instance, the MLAs made a strategic move to avoid disqualification. As seen before in Karnataka in 2019, they circumvented the anti-defection law. They prevented the Speaker from acting on their petitions for disqualification by resigning from their legislature and the Congress party membership.

Kamal Nath, the state's Chief Minister, resigned due to the political crisis, which opened the door for the BJP to take over as the state's new government. When their resignations were accepted, the dissident MLAs received immediate support from the BJP, the opposition party. After joining the BJP, they contested in by-elections from various constituencies. Most of them won the subsequent by-elections, returning to the Legislative Assembly on BJP tickets and thus making a mockery of the anti-defection law.⁸¹

5.3. Fall of Shiv-Sena led coalition government in Maharashtra (2022)

The fall of the Shiv Sena-led coalition government in Maharashtra in 2022 provides yet another interesting case study. In Maharashtra, a coalition government was formed, with the Shiv Sena, the NCP, and the INC joining hands in 2019, and Shiv Sena's Uddhav Thackeray becoming the Chief Minister. However, internal conflicts emerged within the Shiv Sena, leading to the formation of a new government by a different faction of the party – led by Eknath Shinde,

⁸⁰ Mukesh Rawat, "MP Govt Crisis: Kamal Nath Announces Resignation, Congress Falls and BJP Rejoices," *India Today*, March 20, 2020.

⁸¹ Rakesh Kumar and Vandana Singh, "Anti Defection Law in India: Emerging Issues and Challenges," *ILI Law Review*, Summer Issue (2021): 252.

along with the BJP and some independent MLAs. Eknath Shinde was named the Chief Minister, and his faction claimed to be the “real” Shiv Sena, causing a political imbroglio in the state.⁸²

In this instance, the defection was not of the individual MLAs but involved a faction of the Shiv Sena leaving the existing coalition and aligning with a rival party. While still belonging to the same political party, these MLAs changed their allegiance inside the party. This maneuver did not include resignations from the legislative membership or party affiliation and technically permitted them to get over the Anti-Defection Law’s restrictions. The questionable role of the speaker in enabling the circumvention of the anti-defection law has already been discussed in detail in the previous section.

It is submitted that such actions severely hamper the anti-defection law’s effective implementation. The law primarily focuses on individual defections, but when factions within a party unite with opposition parties, the distinction between defection and intra-party conflict becomes muddled. A similar situation emerged once again in Maharashtra in July 2023. This time a vertical split was effected in the NCP party, led by Ajit Pawar. Both the factions, led by Sharad Pawar and Ajit Pawar, have laid claim to the NCP. As a political reward, Ajit Pawar was immediately made Deputy Chief Minister of Maharashtra upon effecting the vertical split.⁸³

5.4. Other notable cases of Defection

A significant political change happened in Goa in 2019 when ten out of fifteen Congress MLAs opted to join hands with the governing BJP under the leadership of Chandrakant Kavlekar, the leader of the opposition.⁸⁴ The BJP’s representation in the 40-seat house increased to 27 seats as a result of this merger. The move permitted the members of the Congress Legislative Party to escape any legal action under the anti-defection law because two-thirds of the party had joined the BJP, and the number of MLAs who switched sides was

⁸² *Subhash Desai v. Principal Secretary Governor of Maharashtra*, AIR 2023 SC 2406 (Supreme Court of India, 2023).

⁸³ Shailesh Gaikwad and Faisal Malik, “In Another Maha Twist, Ajit Splits NCP, Becomes Dy CM,” *Hindustan Times*, July 2, 2023.

⁸⁴ PTI, “Congress Decimated in Goa: 10 of 15 MLAs Defect to Ruling BJP,” *The Wire*, July 10, 2019.

sufficient to meet the requirements for a successful merger without attracting disqualification under the Tenth Schedule.

In 2019, there was a substantial defection of Congress legislators to the Telangana Rashtra Samithi (TRS). Twelve of the state's eighteen Congress legislators switched to the TRS, joining the party in power. This defection was carried out per paragraph 4 of the Tenth Schedule, which permits a legislative party to merge with another party provided at least two-thirds of its members do so without attracting disqualification on the grounds of defection.⁸⁵

VI. CONCLUDING REMARKS

This article has examined the anti-defection law's origins, design, constitutional validation and operation in practice in India. It has traced how the Tenth Schedule emerged as a response to genuine fears of instability and manufactured majorities, and analysed its treatment by the Supreme Court in *Kihoto Hollohon* and later cases. By referring to the recent instances of political upheavals in states like Karnataka (2019), Goa (2019), Telangana (2019), Madhya Pradesh (2020), and Maharashtra (2022), an attempt has been made to highlight its shortcomings and limitations in preventing defections.

On the research question, the analysis suggests that the anti-defection law has had only limited success in curbing defections, while generating serious tensions with democratic values and constitutional principles. It has reduced some forms of overt, individual floor crossing, but parties and legislators have quickly adapted through strategies such as mass resignations, engineered mergers and intra-party splits. These workarounds have allowed governments to be toppled and reconstituted without attracting disqualification, weakening the link between electoral mandate and government formation. At the same time, the law has imposed significant costs on representative democracy. By reading paragraph 2(1)(a) broadly and treating party loyalty as the central constitutional value, courts and Speakers have permitted the use of disqualification threats to

⁸⁵ PTI, "12 Congress MLAs Join TRS in Telangana, Speaker Recognises Merger," *The Times of India*, June 6, 2019.

suppress dissent, constrain freedom of speech and erode the space for intra-party debate. Concentrating adjudicatory power in politically affiliated Speakers, without strict timelines or robust safeguards, has further undermined confidence in the neutrality of the process and enabled partisan delay or manipulation.

Keeping aside the criticism of the effectiveness of the anti-defection law in India, the time is ripe to take a fresh perspective on the need for anti-defection in a democracy. According to a research covering forty Commonwealth nations, it was observed that only the relatively newer democracies, including India and South Africa, had adopted anti-defection laws. On the contrary, more advanced democracies, like those in the UK, Canada, and Australia, did not need anti-defection laws due to the development of conventions and practices that prevented such cross-party defections. For instance, Speakers in the United Kingdom renounce all party affiliation after being elected due to longstanding conventions.⁸⁶

Party cohesion is often the distinguishing feature in most advanced democracies.⁸⁷ The foundation of party cohesion lies in the unwavering loyalty of elected members toward their party's policies, programs, and ideologies.⁸⁸ Unfortunately, in the Indian political landscape, this essential concept is notably absent, and unprincipled defections have become the norm. It is crucial to recognize that the anti-defection laws should serve as a temporary measure to enforce party discipline and curb defections.⁸⁹ However, there are more sustainable solutions than relying on these laws. The Indian polity should consider the anti-defection laws as a starting point and work towards cultivating stronger party cohesion within the cadre. This requires fostering a culture of commitment, belief, and loyalty to the party's values among its members. Political parties should focus on promoting internal democracy, encouraging open dialogue,

⁸⁶ Matthew Laban, "More Westminster than Westminster? The Office of Speaker across the Commonwealth," *The Journal of Legislative Studies* 20, no. 2 (2014): 143-55.

⁸⁷ Shaun Bowler et al., eds., *Party Discipline and Parliamentary Government*, Parliaments and Legislatures Series (Ohio State University Press, 1999).

⁸⁸ Kenneth Janda, "Laws Against Party Switching, Defecting, or Floor Crossing in National Parliaments" (The Legal Regulation of Political Parties working paper no. 2, Northwestern University, 2009), 7.

⁸⁹ Reddy and Bhargava, "For Laws May Come," 351.

and providing opportunities for members to participate in decision-making processes actively. Moreover, as the Indian polity progresses towards nurturing party cohesion, the reliance on anti-defection laws can gradually be reduced.

BIBLIOGRAPHY

- Balyan, Chirag. "An Integrated Approach to Resolve the Crisis of Defection in India." *SSRN Electronic Journal*, ahead of print, 2020. <https://doi.org/10.2139/ssrn.3895868>.
- Bowler, Shaun, David M. Farrell, Richard S. Katz, and European Consortium for Political Research, eds. *Party Discipline and Parliamentary Government*. Parliaments and Legislatures Series. Columbus: Ohio State University Press, 1999.
- Chhibber, Pradeep K., and Rahul Verma. *Ideology and Identity: The Changing Party Systems of India*. New York: Oxford University Press, 2018.
- Correspondent, Special. "Karnataka Assembly: Congress-JD(S) Government Loses Trust Vote." *The Hindu*, July 23, 2019. <https://www.thehindu.com/news/national/karnataka/karnataka-assembly-congress-jds-government-loses-trust-vote/article28689149.ece>.
- Dey, Abhishek. "India's Anti-Defection Law Didn't Stop Power Politics. It Just Moved from Farmhouse to Resort." *The Print*, July 17, 2022. <https://theprint.in/past-forward/indias-anti-defection-law-didnt-stop-power-politics-it-just-moved-from-farmhouse-to-resort/1041656/>.
- Diwan, Paras. "Aya Ram Gaya Ram: The Politics of Defection." *Journal of the Indian Law Institute* 21, no. 3 (1979): 291-312. <https://www.jstor.org/stable/43950639>.
- Gaikwad, Shailesh, and Faisal Malik. "In Another Maha Twist, Ajit Splits NCP, Becomes Dy CM." *Hindustan Times*, July 2, 2023. <https://www.hindustantimes.com/india-news/ajit-pawar-s-surprise->

alignment-with-bjp-shakes-up-maharashtra-politics-raises-questions-for-opposition-in-2024-101688321439002.html.

Jain, M. P. *Indian Constitutional Law*. 8th ed. Haryana: LexisNexis India, 2018.

Kalra, Harsimran. *Decisional Analysis and the Role of the Speaker*. No. 1. Chennai: The Hindu Centre for Politics and Public Policy, 2013. <https://www.thehinducentre.com/publications/policy-report/decisional-analysis-and-the-role-of-the-speaker/article64935998.ece>.

Kędzia, Zdzisław, and Agata Hauser. *The Impact of Political Party Control over the Exercise of the Parliamentary Mandate*. Geneva: Inter-Parliamentary Union, 2011. <http://archive.ipu.org/conf-e/129/control-study.pdf>.

Khosla, Madhav, and Milan Vaishnav. "Democracy and Defections." *International Journal of Constitutional Law* 22, no. 2 (2024): 400-430. <https://doi.org/10.1093/icon/moae037>.

Kuchay, Bilal. "How BJP Wrested Back Control of India's Richest State Maharashtra." *Al Jazeera*, January 7, 2022. <https://www.aljazeera.com/news/2022/7/1/how-bjp-wrested-back-control-of-indias-richest-state-maharashtra>.

Kumar, Rakesh, and Vandana Singh. "Anti Defection Law in India: Emerging Issues and Challenges." *ILI Law Review*, Summer Issue (2021): 252.

Laban, Matthew. "More Westminster than Westminster? The Office of Speaker across the Commonwealth." *The Journal of Legislative Studies* 20, no. 2 (2014): 143-55. <https://doi.org/10.1080/13572334.2014.895126>.

Majumdar, Jishnutosh. "India Must Reform Its Anti-Defection Law to Prevent Further Corrosion of Democracy." *JURIST*, July 19, 2022. <https://www.jurist.org/commentary/2022/07/jishnutosh-majumdar-anti-defection-india/>.

Malhotra, G. C. *Anti-Defection Law in India and the Commonwealth*. New Delhi: Metropolitan Book Co. for Lok Sabha Secretariat, 2005.

- Mergulhao, Marcus. "Goa's Tryst with Defections Goes Back over Half a Century." *The Times of India*, September 15, 2022. <https://timesofindia.indiatimes.com/city/goa/goas-tryst-with-defections-goes-back-over-half-a-century/articleshow/94211322.cms>.
- Naseemullah, Adnan. "Patronage vs. Ideology in Indian Politics." *Commonwealth & Comparative Politics* 59, no. 2 (2021): 193-214. <https://doi.org/10.1080/14662043.2021.1910397>.
- Nikolenyi, Csaba. "Government Termination and Anti-Defection Laws in Parliamentary Democracies." *West European Politics* 45, no. 3 (2022): 638-62. <https://doi.org/10.1080/01402382.2021.1880719>.
- Nikolenyi, Csaba. "The Adoption of Anti-Defection Laws in Parliamentary Democracies." *Election Law Journal: Rules, Politics, and Policy* 15, no. 1 (2016): 96-108. <https://doi.org/10.1089/elj.2015.0345>.
- Poddar, Umang. "Explainer: How Speakers Are Undermining the Anti-Defection Law by Simply Sitting on Petitions." *Scroll.in*, December 14, 2021. <https://scroll.in/article/1012515/explainer-how-speakers-are-undermining-the-anti-defection-law-by-simply-sitting-on-petitions>.
- PTI. "12 Congress MLAs Join TRS in Telangana, Speaker Recognises Merger." *The Times of India*, June 6, 2019. <https://timesofindia.indiatimes.com/india/12-congress-mlas-join-trs-in-telangana-speaker-recognises-merger/articleshow/69680344.cms>.
- PTI. "Congress Decimated in Goa: 10 of 15 MLAs Defect to Ruling BJP." *The Wire*, July 10, 2019. <https://thewire.in/politics/congress-decimated-go-defections-ruling-bjp>.
- PTI. "Eight Turncoats of 2019 'Coup' Who Helped BJP Form Government in Karnataka, Lose Election." *The Economic Times*, May 13, 2023. <https://economictimes.indiatimes.com/news/elections/assembly-elections/>

karnataka/eight-turncoats-of-2019-coup-who-helped-bjp-form-government-in-karnataka-lose-election/articleshow/100214524.cms?from=mdr.

PTI. "Sharad Yadav Disqualified from RS." *The Hindu*, December 4, 2017. <https://www.thehindu.com/news/national/sharad-yadav-disqualified-from-rs/article21262499.ece>.

PTI. "YSR Congress to Boycott AP House over Defection of MLAs to TDP." *The Indian Express*, November 8, 2017. <https://indianexpress.com/article/india/ysr-congress-to-boycott-ap-house-over-defection-of-mlas-to-tdp-4928511/>.

Rawat, Mukesh. "MP Govt Crisis: Kamal Nath Announces Resignation, Congress Falls and BJP Rejoices." *India Today*, March 20, 2020. <https://www.indiatoday.in/india/story/madhya-pradesh-govt-crisis-floor-test-kamal-nath-congress-bjp-1657768-2020-03-20>.

Reddy, Charith, and Shagun Bhargava. "For Laws May Come and Laws May Go, but Defections Go on Forever: A Critical Analysis of the Role of the Speaker in Indian Anti-Defection Laws." *NLIU Law Review X*, no. 1 (2022): 339.

Sharma, Ritwika, and Mayuri Gupta. *Anatomy of India's Anti-Defection Law*. New Delhi: Vidhi Centre for Legal Policy, 2023. https://vidhilegalpolicy.in/wp-content/uploads/2023/11/Anatomy-of-Indias-Anti-Defection-Law_Sharma_Gupta_Vidhi-Centre.pdf.

PROTECTING MARGINALISED GROUPS THROUGH CONSTITUTIONAL COMPLAINT: ACCESS TO THE SOUTH AFRICAN CONSTITUTIONAL COURT

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Abstract

This paper examines South Africa's jurisprudence of South Africa's apex court in the context of the land and property rights of poor and marginalized communities. It speaks to the different ways to access the court, with regard had to the key features of socio-economic rights litigation, examining select Constitutional Court cases on advancing the land and property rights of marginalized communities.

Keywords: Constitutional complaint; Eviction and housing; Meaningful engagement; Socio-economic rights; South African Constitutional Court

I. INTRODUCTION

South Africa is a country plagued by a history of gross human rights violations. Despite 30 years having elapsed since the end of apartheid and its system of entrenched racial discrimination, it remains one of the most unequal countries in the world. The country's Constitution of the Republic of South Africa, 1996¹

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¹ Constitution of the Republic of South Africa, 1996.



[hereinafter the Constitution] represents a transition from a past plagued by such violations to a present and future built on human dignity, equality and freedom.² Yet, 30 years after the end of apartheid white people own more than 72% of rural land in the country,³ around five million people live in informal dwellings and about 10% of South Africans continue to live in poverty.

Much of South Africa's past, described as that of "a deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge",⁴ remains evident in the daily lives of most South Africans a quarter of a century later. In spite of the Bill of Rights affirming the values of dignity, equality and freedom⁵ and the enactment of the new Constitution, with its promise to unleash the transformation of society,⁶ significant challenges remain. The capacity of the state to ensure the realisation of fundamental human rights, despite the constitutional commitment to the values of accountability, transparency and responsiveness as those underpinning the operation of the modern state,⁷ remains constrained.

In this context the law and the legal remedies it provides have a critical role to play in the promotion and realisation of fundamental constitutional rights and in holding the state, its functionaries and officials to account in a manner "consistent with principles of justice, equality and fairness".⁸ While courts, subject to constitutional control, may use their wide powers to make orders, including those that can affect policy and legislation,⁹ any remedy must be imposed as

² *S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.), paras. 261–63. See also Constitution of the Republic of South Africa, 1996, § 1(a).

³ Terrence Corrigan, "Land Debate Distorted by Misrepresentation of Ownership Figures," Institute of Race Relations, February 26, 2025.

⁴ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S. Afr.) [hereinafter *Certification*], para. 5.

⁵ Constitution of the Republic of South Africa, 1996, § 7(1).

⁶ Jason Brickhill and Yana van Leeve, "Transformative Constitutionalism-Guiding Light or Empty Slogan?" *Acta Juridica* (2015): 144.

⁷ Brickhill and Van Leeve, 151. See Michael Le Roux and Dennis Davis, *Lawfare* (Johannesburg: Jonathan Ball Publishers, 2020), iv.

⁸ Brickhill and Van Leeve, 152.

⁹ *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.) [hereinafter *Treatment Action Campaign*], para. 113.

a response to the right violated.¹⁰ Since, as Kriegler J cautioned in *Sanderson v Attorney-General, Eastern Cape*,¹¹ flexibility in providing remedies and the broad range of remedial options available when rights are threatened or infringed should “not affect our understanding of the right.”¹²

The country’s emerging jurisprudence on socio-economic rights illustrates how marginalized groups can be protected through its constitution. This paper speaks to some of the seminal cases protecting the socio-economic rights of marginalized groups, particularly in the context of property and land. The reason for limiting this paper’s scope to property and land is perhaps best encapsulated in the case of *Agri South Africa v Minister for Minerals and Energy*,¹³ which held that:

South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.¹⁴

Constitutional litigation has been of critical importance in giving meaning to the progressively realization of access to adequate housing and in setting the parameters for those facing eviction from housing by, for example, ensuring provision of emergency alternative accommodation. In spite of this, courts are hesitant to resolve structural issues relating to land inequality, access to housing and property rights in South Africa when these are considered to stray into the area of government policy. This is so when the need for coherent government policy

¹⁰ A. Price, “State Liability and Accountability,” *Acta Juridica* (2015): 316.

¹¹ *Sanderson v. Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (S. Afr.), para. 27.

¹² *Sanderson v. Attorney-General*.

¹³ *Agri South Africa v. Minister for Minerals and Energy* 2013 (4) SA 1 (CC) (S.Afr.).

¹⁴ *Agri South Africa v. Minister for Minerals and Energy*, para. 1.

on the issue remains fundamental in securing a just and lasting redistributive social and economic outcome in the country.

II. CONSTITUTIONAL FRAMEWORK

South Africa's Bill of Rights, unlike many constitutions drafted in the same period, expressly recognises social and economic rights as justiciable.

2.1. The Bill of Rights

Section 25, the property clause in the South African Bill of Rights, provides protection against arbitrary deprivation of property and for expropriation on just and equitable terms, with section 25(8) expressly requiring the state to take legislative and other measures to achieve land and related reform to redress past discrimination. In this regard, the Constitution seeks to balance the right not to be deprived of property, as opposed to an express property right, against the pressing need for land redistribution.

Section 26 provides for the right of access to adequate housing, with the state obliged to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". This formulation embodies a "reasonableness" and "progressive realisation" standard, which balances enforceability with recognition of resource constraints. The provision bars arbitrary evictions, which can only be effected by court order. The interaction between sections 25 and 26 underpins many of the Constitutional Court's socio-economic rights decisions on the issue of property and land rights.

2.2. National Legislation

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 [hereinafter PIE] provides the procedural requirements for eviction, giving content to the constitutional bar on arbitrary evictions. It requires that all relevant circumstances be considered in an effort to avoid an eviction that would render people homeless without alternative accommodation. It creates safeguards for vulnerable groups and acts as a frontline statutory protection for marginalised

occupiers facing displacement. The Extension of Security of Tenure Act 62 of 1997 [hereinafter ESTA] provides similar protection for rural occupiers. At the same time, municipal by-laws on informal settlements and national land-reform legislation implementing section 25(7) of the Constitution restitution and land redistribution programmes form part of the legislative landscape.

III. ACCESS TO COURTS IN RAISING CONSTITUTIONAL COMPLAINT

Litigants may bring social and economic cases to a competent court through a number of pathways. Section 38 of the Constitution is a broad standing provision which allows several categories of persons to approach a competent court when a right in the Bill of Rights is threatened or infringed. This includes “anyone acting in their own interest; on behalf of another who cannot act in their own name; as a member of, or in the interest of, a group or class of persons; in the public interest; or an association acting in the interests of its members.” This inclusive standing principle facilitates public interest litigation on behalf of vulnerable or marginalised groups.

3.1. Direct Access

Section 167(6) of the Constitution allows litigants to apply for direct access to the Constitutional Court when the interests of justice so require. The Court has interpreted this provision narrowly, granting direct access only in exceptional circumstances, usually where the matter is urgent or where the lower courts cannot offer an adequate remedy. In the *Treatment Action Campaign case*, for instance, the Court accepted direct access given the urgency and national importance of the case, which concerned the government’s restriction on providing the anti-retroviral drug Nevirapine to HIV-positive mothers.

3.2. Appeal from Lower Courts

Most social and economic rights cases reach the Constitutional Court on appeal from the High Court or Supreme Court of Appeal. The High Court is recognised as the primary forum for factual inquiry and evidence-based

adjudication. Once constitutional issues arise, particularly involving legislative validity or alleged violations of fundamental rights, these may be appealed to the Constitutional Court.

3.3. Confirmation Proceedings

Under section 172(2)(a) of the Constitution, any High Court order declaring legislation or executive conduct unconstitutional must be *confirmed by the Constitutional Court*. This ensures that the Court retains ultimate authority in determining constitutional validity. For example, in the housing rights case of *Government of the Republic of South Africa v. Grootboom*¹⁵ [hereinafter *Grootboom*] the Constitutional Court confirmed that the State's housing programme was constitutionally deficient because it excluded those in desperate need of shelter.¹⁶

IV. KEY FEATURES OF SOCIO-ECONOMIC RIGHTS LITIGATION

4.1. Doctrine of Subsidiarity

The first feature of South African constitutional litigation is the recognition by our courts of the doctrine of subsidiarity, which holds that where legislation has been enacted to give effect to a constitutional right, litigants must rely on that legislation before invoking the right directly.¹⁷ This doctrine aims to promote coherence and prevent constitutional arguments from being made unnecessarily when ordinary law provides an adequate framework. It also allows lower courts to consider the issues which arise in the interpretation of legislation before the issues are considered by the Constitutional Court.

4.2. Standard of Review

South African scholars such as Karl Klare have highlighted the importance of viewing social and economic rights as integral to transformative constitutionalism, a process aimed at dismantling apartheid-era structures of poverty and exclusion in accordance with constitutionally entrenched parameters.¹⁸ They contend that

¹⁵ *Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) (S. Afr.)*.

¹⁶ This case is further analysed below.

¹⁷ Hugh Corder, "The Doctrine of Subsidiarity and the Enforcement of Socio-Economic Rights in South Africa," *South African Public Law* 32 (2017): 114.

¹⁸ Karl Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, (1998): 150.

effective enforcement of socio-economic rights requires not only judicial vigilance but also participatory governance, where courts, legislatures, and civil society collaborate to realise constitutional promises.

In its approach to socio-economic rights the Constitutional Court has given content to the reasonableness standard referenced in many of the socio-economic provisions in the Bill of Rights, including the right of access to housing in its assessment of measures taken by the state in compliance with its constitutional obligations. The Court has refused to decide a “minimum core” threshold to be given to such rights on the basis that it considers its role not to be to define universal minimum entitlements but to evaluate whether government measures are reasonable in conception and implementation, given the constitutional commitment to progressive realisation. The Court’s approach to the reasonableness standard has been the subject of continued criticism by scholars who often urge a more activist approach to the problems besetting South African society. For example, while the reasonableness standard has been said to mediate the tension between judicial restraint and the transformative vision of the Constitution, enforcing accountability without intruding into the technical and budgetary domains of government,¹⁹ it has also been cautioned that the approach unduly defers to the State, leaving systemic inequalities intact.²⁰ Liebenberg defends the reasonableness model as a pragmatic and context-sensitive method that respects democratic separation of powers while ensuring accountability.²¹ Bilchitz, by contrast, argues that the Court should adopt a minimum core obligations approach, grounded in international human rights law, to guarantee a baseline of protection for all citizens regardless of resource limitations.²²

The Court’s jurisprudence in relation to the reasonableness standard has not however engaged with the fact that South Africa ratified the International

¹⁹ Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (South Africa, Juta, 2010), 144.

²⁰ David Bilchitz, “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance,” *South African Journal on Human Rights* 26 (2010): 31.

²¹ Liebenberg, *Socio-Economic Rights: Adjudication*, 144.

²² David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007).

Covenant on Economic, Social and Cultural Rights in 2015. This has had the effect that the terms of the Convention, which include a minimum-core approach to socio-economic rights, have been brought into South African law. Thus, while the Constitutional Court's approach to socio-economic rights accords with the express wording of the text of socio-economic provisions, including section 26 of the Constitution, it does not accord with that of the ratified Convention, a tension which has still to play itself out in South African courts. What is clear is that the Constitutional Court in its jurisprudence has approached socio-economic rights on the basis that it cannot usurp the functions of the executive or legislature given that, as was stated in the case of *Mazibuko v. City of Johannesburg*²³ [hereinafter *Mazibuko*] courts are "ill-suited to adjudicate upon issues requiring budgetary and technical expertise." As is recognised by scholars such as Young, judicial findings of unreasonableness should rather prompt the State to revise policies rather than to replace them with judicially imposed alternatives.²⁴

4.3. Remedies

The Constitutional Court's remedial powers under sections 38 and 172(1) (b) are broad, allowing it to "make any order that is just and equitable." Limited content has been given to this remedial mandate, with remedies applied on a case by case basis. While the provision has permitted the Court to craft innovative remedies suited to the structural nature of social and economic rights violations, it would benefit from more jurisprudential content being given to the issue of relief in expanding the reach of these rights. The forms of relief granted include supervisory orders, requiring the administration to implement and report to the court on such implementation; structural interdicts, which require the administration to act in accordance with directions given by the court; and the award of constitutional damages, such as in *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd*²⁵ [hereinafter *Modderklip*] where the state failed to provide alternative accommodation for land occupiers, thereby vindicating the right of access to housing.

²³ *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.).

²⁴ Katharine Young, *Constituting Economic and Social Rights* (United Kingdom, Oxford University Press, 2012), 54.

²⁵ *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (S. Afr.).

In this manner, broad standing provisions, innovative remedial powers, and a context-sensitive reasonableness review, allows the Court to hold the state to account for socio-economic deprivation. However, for litigants the challenge remains that they are still required, in the quest to enforce social and economic rights, to navigate what remain often complex and at times archaic procedural rules, building evidence-based claims, and framing sometimes difficult arguments in terms of reasonableness, dignity, and accountability.

V. SELECTED CONSTITUTIONAL COURT CASES ON PROTECTING THE LAND AND PROPERTY RIGHTS OF MARGINALIZED GROUPS

The Constitutional Court's jurisprudence on property and land in the context of marginalized groups has specifically centered around issues such as eviction, meaningful engagement, just and equitable eviction orders and the state's constitutional obligations to take reasonable measures to ensure access to adequate housing and alternative accommodation for affected persons. On reasonableness, it has also called into question whether South Africa should adopt a minimum core approach and why such approach is not appropriate. The following cases aim to illustrate how South Africa's Constitution protects marginalized groups in the face of property and land rights' infractions.

5.1. *Daniels v. Scribante*

In the case of *Daniels v. Scribante*,²⁶ a farm worker, Ms Daniels, wished to make certain improvements to her dwelling, but was instructed to cease doing so by the farm manager.²⁷ Ms Daniels argued that she was legally entitled to make improvements to her dwelling on the basis that the ESTA enabled her to do so, along with her constitutional right to human dignity.²⁸ The Constitutional Court held that Ms Daniels could make improvements to her home by virtue of the fact that ESTA gives effect to section 25(6) of the Constitution, which

²⁶ *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.).

²⁷ *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), paras. 6–8.

²⁸ *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), paras. 6, 10.

provides that: “A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”²⁹ It further found in favour of Ms Daniels on the basis that ESTA protects farm workers, such as her, as a means to address South Africa’s history of land dispossession.³⁰ In speaking to the importance of giving effect to Ms Daniels right to human dignity, the Constitutional Court held:

For present purposes, the right enjoyed by an occupier in terms of section 6(1) of ESTA is to reside on and use the land in issue. An occupier who lives on property under the most deplorable conditions does “reside” on that property. But is that the right conferred by ESTA? Definitely not. The occupier’s right to reside must be consonant with the fundamental rights contained in section 5, in particular – for present purposes – the right to human dignity. Put differently, the occupation is not simply about a roof over the occupier’s head. Yes, it is about that. But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights.³¹

5.2. Government of the Republic of South Africa v. Grootboom

The case of *Grootboom* is the seminal case for developing the reasonableness test, albeit in the context of the right of access to adequate housing. It is also one of the first cases which dealt with the imperative for meaningful engagement between parties. This case concerned men, women and children who occupied private land as a result of the horrendous conditions they lived in in an informal settlement.³² They were subsequently evicted from such land, only to subsequently occupy a sports field.³³ They sought relief from government in the form of temporary shelter or housing.³⁴ The High Court found that their right of access to adequate housing was not breached under section 26(1) of the Constitution, but section 28(1)(c) of the Constitution was breached, which aims to protect the

²⁹ *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), paras. 61–71.

³⁰ *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), para. 23.

³¹ *Daniels v. Scribante* 2017 (4) SA 341 (CC) (S. Afr.), para. 31.

³² *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), paras. 3–4.

³³ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), paras. 2–4.

³⁴ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 4.

rights of children to shelter.³⁵ When the matter came before the Constitutional Court, it rejected arguments around a minimum core approach³⁶ and held that:

The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.³⁷

Most importantly, the Constitutional Court held that the right of access to adequate housing hinges on the state's ability to achieve it within its available resources.³⁸ It further held that the state must meaningfully engage with individuals and communities affected by housing development, with a view to resolving any conflicts.³⁹

5.3. Port Elizabeth Municipality v. Various Occupiers

In *Port Elizabeth Municipality v. Various Occupiers*⁴⁰ [hereinafter *Port Elizabeth Municipality*], the Port Elizabeth Municipality sought an order pursuant to section 6 of the PIE to evict unlawful occupants from privately owned land.⁴¹ The provision provides that an eviction order may only be granted by a court so long as it is just and equitable, taking into account the circumstances of the occupation of the land; the time of unlawful occupation and so long as there is alternative accommodation. Notwithstanding the unlawful occupation, the Constitutional Court chose not to grant the eviction order on the basis that

³⁵ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 15.

³⁶ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), paras. 18, 32; see also *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.), para. 59, where the Constitutional Court again rejected arguments around a minimum core approach when it held that: "[W]hat the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable."

³⁷ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 37.

³⁸ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 20.

³⁹ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para. 84.

⁴⁰ *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.).

⁴¹ *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), para. 1.

such occupiers were a small community, comprising of children.⁴² Further, that those who would be deemed to lawfully occupy the land were not doing so and there was no alternative accommodation for the unlawful occupiers.⁴³ Hence, the Court found that it was not just and equitable to grant the eviction order. This was also yet another case in which meaningful engagement was emphasized by the Constitutional Court, as most aptly put by Sachs J when he held:

In seeking to resolve the ... contradictions, ... [t]he managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.⁴⁴

Hence, the case also speaks to how meaningful engagement is used to enforce socio-economic rights and remedy disputes, thus serving as a review standard to grant an eviction order.⁴⁵

5.4. Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg

*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*⁴⁶ [Hereinafter *Occupiers of 51 Olivia Road*] is the seminal case dealing with meaningful engagement in the context of eviction proceedings. In this case, the Constitutional Court issued an interim order for the City of Johannesburg and the applicants to engage meaningfully with each other.⁴⁷ It held that where people face homelessness due to an impending eviction, the state must meaningfully engage.⁴⁸ It held that:

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides

⁴² *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), paras. 53–61.

⁴³ *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), paras. 53–61.

⁴⁴ *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), para. 39.

⁴⁵ *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.), para. 61.

⁴⁶ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.).

⁴⁷ *Occupiers of 51 Olivia Road... v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.), paras. 53–54.

⁴⁸ *Occupiers of 51 Olivia Road... v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.), paras. 9–21.

are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.⁴⁹

5.5. City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 Pty (Ltd)

The case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty (Ltd)*⁵⁰ dealt with the issue of evicting unlawful occupiers from private property pursuant to the abovementioned PIE.⁵¹ It called into question the arbitrary deprivation of property, the right of access to adequate housing and the state's obligation to provide temporary emergency housing. Blue Moonlight sought to evict the unlawful occupiers, however doing so would render such occupiers homeless.⁵² The occupiers challenged the City's housing policy as it failed to prescribe availing alternative emergency accommodation.⁵³ The High Court found such policy to be unconstitutional and ordered that the occupiers be provided with alternative temporary accommodation when evicted.⁵⁴ Following the Supreme Court of Appeal decision, which upheld the High Court finding, the Constitutional Court held that unlawful occupiers can only be evicted so long as it is just and equitable.⁵⁵ More importantly, the Constitutional Court held that the state is obliged to provide temporary emergency accommodation.⁵⁶

⁴⁹ *Occupiers of 51 Olivia Road... v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.), para. 15.

⁵⁰ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.).

⁵¹ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 1.

⁵² *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 11.

⁵³ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 15.

⁵⁴ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 76.

⁵⁵ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), paras. 29, 97–104.

⁵⁶ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.), para. 104.

5.6. Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes

The case of *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes*⁵⁷ [hereinafter *Joe Slovo*] dealt with an application to evict thousands of residents from an informal settlement in place of developing housing for poor communities.⁵⁸ While the Constitutional Court found the residents to be unlawful occupiers within the meaning of PIE and that the state acted reasonably in seeking to promote the right of access to adequate housing, it again highlighted the importance of the state providing alternative accommodation to those affected.⁵⁹ It further held that 70% of the houses developed in Joe Slovo go to current and former residents.⁶⁰ More importantly, the case speaks to meaningful engagement and how the absence of such engagement must militate against granting an eviction order.⁶¹

5.7. Charnell Commando and Others v. City of Cape Town

In *Charnell Commando and Others v. City of Cape Town*,⁶² decided by the Constitutional Court at the end of 2024, residents of cottages near the City Centre of Cape Town enjoyed lawful tenancy and inter-generational lease arrangements in terms of which they paid rent.⁶³ Their property was sold to a developer. The Court held that the City's emergency accommodation far away from the inner city can worsen the significant problem of spatial inequality in South Africa and undermine the rights to dignity, access to opportunity and other fundamental rights.⁶⁴ The City was ordered to provide transitional or emergency housing in the inner-city area within six months.⁶⁵

⁵⁷ *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.)

⁵⁸ *Residents of Joe Slovo Community... v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.), para. 2.

⁵⁹ *Residents of Joe Slovo Community... v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.), paras. 5, 7.

⁶⁰ *Residents of Joe Slovo Community... v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.), para. 7.

⁶¹ *Residents of Joe Slovo Community... v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.), paras. 5, 7, 21.

⁶² *Charnell Commando v. City of Cape Town* 2025 (3) SA 1 (CC) (S. Afr.).

⁶³ *Charnell Commando v. City of Cape Town* 2025 (3) SA 1 (CC) (S. Afr.), para. 6.

⁶⁴ *Charnell Commando v. City of Cape Town* 2025 (3) SA 1 (CC) (S. Afr.), paras. 82, 104–5, 108.

⁶⁵ *Charnell Commando v. City of Cape Town* 2025 (3) SA 1 (CC) (S. Afr.), para. 205.

5.8. First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services

Just how far South Africa's Constitution goes in protecting property rights was best illustrated in the case of *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services*.⁶⁶ This case centered around the issue of whether a law permitting the South African Revenue Service to confiscate property owned by one party to settle the tax debt of another was constitutional.⁶⁷ The Constitutional Court found such law to be unconstitutional and set precedent in clarifying the relationship between the deprivation and expropriation of property. It held that when a person alleges that there has been an infringement of their property rights, the alleged infringement must be analyzed as follows: namely, whether what is taken away constitutes property under section 25 of the Constitution; whether there was a deprivation and whether such deprivation is consistent with section 25; if not, whether the deprivation can be justified under section 36 of the Constitution; does the deprivation lead to expropriation under section 25(2) of the Constitution; if so, does the expropriation comply with section 25(2)(a) of the Constitution; is the expropriation justified under section 36 of the Constitution.⁶⁸

VI. DISCUSSION

As societal tensions rise regarding the failure of the state to substantially improve socio-economic living conditions for the majority of South Africans, criticisms have been increasingly raised regarding the purpose and utility of the South African Constitution in its current form. The Constitutional Court in particular is criticised for taking a hands-off approach to the increasing fulfilment of socio-economic rights despite its just and equitable remedial jurisdiction. This increasing societal pressure means that the Court must remain alive to

⁶⁶ *First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (S.Afr.).

⁶⁷ *First National Bank...* 2002 (4) SA 768 (CC) (S. Afr.), para. 1.

⁶⁸ *First National Bank...* 2002 (4) SA 768 (CC) (S. Afr.), para. 46.

the challenges of access to courts, the enforcement of rights and the need to incremental reform and development in the area of remedy.

6.1. Difficulties of Access to Court

As with countries such as Germany or South Korea, South Africa has a stand-alone “constitutional complaint” procedure which allows individuals to petition the Constitutional Court for direct access to the Court. The law on direct access to the Constitutional Court is sourced from the Constitution and the Court’s Rules. Section 167(6)(a) of the Constitution provides that “National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court to bring a matter.”

One of the difficulties with the Court’s approach to direct access, unlike other foreign jurisdictions, is that it is treated as an extraordinary procedure and is only granted by the Constitutional Court in exceptional circumstances. Such exceptional circumstances have been found to exist only if a matter is of such urgency or public importance that the delay necessitated by the use of ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.⁶⁹ In addition, as was held by the Constitutional Court in the socio-economic rights case in *Mazibuko*, it must be in the interests of justice for direct access to be granted;⁷⁰ and there must also be good prospects of success for such direct access to be granted.⁷¹ This is especially so given that consideration must be had to whether there are issues and related evidence which could be better ventilated before the lower courts, following the ordinary judicial process, particularly because this Court could benefit from their insight.⁷²

What is clear from the Constitutional Court’s approach to granting litigants direct access is that the Court does not prefer to hear matters without the benefit of the matter having been considered by a lower court. This is all the more so

⁶⁹ *Bruce v. Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC) (S. Afr.) [hereinafter *Fleecytex*], para. 35; see also *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.), para. 35.

⁷⁰ *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.), paras. 87, 126.

⁷¹ *Transvaal Agricultural Union v. Minister of Land Affairs* 1997 (2) SA 621 (CC) (S. Afr.), para. 46; see also *Fleecytex*, para. 7.

⁷² *Women’s Legal Trust v. President of the Republic of South Africa* 2009 (6) SA 94 (CC) (S. Afr.) [hereinafter *Women’s Legal Trust*], paras. 27–29.

where it gives rise to disputes of fact. In *Women's Legal Trust v. President of the Republic of South Africa*,⁷³ the Court put it this way:

[T]he power to grant litigants direct access outside the Court's exclusive competence is one this Court rarely exercises, and with good reason. It is loath to be a court of first and last instance, thereby depriving all parties to a dispute of a right of appeal. It is also loath to deprive itself of the benefit of other courts' insights. In addition, a multi-stage litigation process has the advantage of isolating and clarifying issues as well as bringing to the fore the evidence that is most pertinent to them . . . The ventilation of the difficult issues the application involves in the High Court, followed possibly by a considered judgment from the Supreme Court of Appeal, will ensure that the views of these organisations, and the evidence that may be germane to their contentions, will be properly considered.⁷⁴

It follows that the majority of constitutional complaints are channelled through ordinary litigation, beginning their life in the High Court and culminating ultimately in a hearing before the Constitutional Court, which has final jurisdiction over constitutional matters as per section 167(3) of the Constitution.

There are many challenges which arise in this regard. The first of these is delay. It may take many years for a constitutional complaint which follows the ordinary litigation process to make their way to the Constitutional Court. This is so for a number of reasons. These include extensive delay in having matters set down given that courts are over-extended, there are insufficient numbers of judges appointed and court rooms available to hear matters and court rolls are swamped.

A further difficulty is that of cost. The costs of litigation are prohibitive, with limited legal support available through the state-funded Legal Aid system or through donor-funded public interest law organisations outside of the government system.

In addition, for complainants to attempt to litigate constitutional complaints in their own name is often extremely difficult given the complexity of court rules and the lack of knowledge of court procedures. Even the requirements of an

⁷³ *Women's Legal Trust...* 2009 (6) SA 94 (CC) (S. Afr.), paras. 27–29.

⁷⁴ *Women's Legal Trust...* 2009 (6) SA 94 (CC) (S. Afr.), paras. 27–29.

application for direct access are generally beyond the scope of knowledge of most litigants complaining of a constitutional infringement of threatened violation. The result is that this often leads to matters not being filed in the correct form, or in not being prosecuted in the manner required by the rules of court.

Furthermore, limited access to legal representation by marginalised communities remains a challenge in the country. For example, while the Legal Aid South Africa Act 39 of 2014, provides that indigent people have a constitutional right to legal representation in criminal matters, this is not so in civil or constitutional matters in which legal aid may be granted in such cases when they are of public importance. Non-governmental organisations are limited in their reach, both due to geographic location and funding constraints. All of these factors have a serious and direct impact on the ability of litigants to prosecute matters before the Constitutional Court and limits the nature and scope of cases brought to the Court. Other obstacles to access remain. These include low education levels and levels of literacy, geographic isolation, particularly in rural areas of the country.

The result is that increasingly there is call for the funding of more public interest cases by non-governmental organisations and Legal Aid South Africa, with compulsions to be enforced that further work is done by pro bono lawyers to realise fundamental constitutional rights.

6.2. Relaxing Court Rules to Enable Access

In the area of housing rights, the Constitutional Court relaxed procedural formalities in the abovementioned case of *Joe Slovo*. Ordinarily, a direct and substantial interest in the outcome of a case must be shown. In this case, the Court accepted that the applicant represented a large community not easily defined in legal terms and accepted that the applicant had collective standing, allowing representatives in the form of public interest lawyers to act on behalf of the residents, even though every resident was not individually cited. In *Grootboom*, discussed above, the Court similarly accepted that constitutional issues are of fundamental importance and that vulnerable, poor and marginalised groups must not be barred from asserting their constitutional rights.

In addition, Rule 10 of the Constitutional Court Rules, permits individuals or organisations with an interest in a case to be admitted as *amicus curiae* (friends of the court), to support constitutional issues raised. This allows civil-society groups to present expert evidence, social context, and comparative perspectives that amplify the voices of marginalised communities. This has had the result that the number of cases challenging socio-economic provisions brought to the Constitutional Court have been limited in number. In doing so, the Court persistently permits both written and oral submissions to be made to it by such organisations and individuals, leading to court processes which are often inclusive and encourage participation and access. All of these innovations collectively represent what scholars such as Liebenberg and Albertyn describe as a “dialogic” model of enforcement — one that combines judicial oversight with participatory democracy, with even the structure and location of the Constitutional Court chamber advancing this approach.⁷⁵

6.3. Making Remedies Meaningful in the South African Context

Appropriate relief under section 38 of the Constitution, which is “required to protect and enforce the Constitution”,⁷⁶ must also be effective.⁷⁷ In *Fose* in which damages for torture at the hands of the police were sought, it was stated:

Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.⁷⁸

⁷⁵ Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Cape Town: Juta, 2010); and Cathi Albertyn, “Transformative Constitutionalism and the Development of South African Constitutional Jurisprudence,” in [edited volume title], ed. [editor(s)] (Cape Town: Juta, 2018).

⁷⁶ *Fose v. Minister of Safety and Security* 1997 (3) SA 786 (CC) (S. Afr.) [hereinafter *Fose*], para. 19.

⁷⁷ *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (S. Afr.), para. 58.

⁷⁸ *Fose* 1997 (3) SA 786 (CC) (S. Afr.), para. 69.

In *Hoffmann v. South African Airways*,⁷⁹ it was recognised that appropriate relief imports elements of justice and fairness and “a consideration of the interests of all those who might be affected by the order.”⁸⁰ This balancing of the interests—

must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, “we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source.”⁸¹

As was stated in *Steenkamp N.O v Provincial Tender Board of the Eastern Cape*:⁸²

In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law.⁸³

In eviction and housing rights cases involving marginalised groups, the Constitutional Court has increasingly sought ways in which to allow the constitutional rights entrenched in the Bill of Rights to become a reality. This has included mandated meaningful engagement between authorities and affected communities in cases such as the abovementioned *Occupiers of 51 Olivia Road*. Without such a process, it has been judicially determined that the eviction contemplated may not proceed. This has enabled marginalised communities to be consulted with regards to the eviction, alternatives to it and the availability of emergency accommodation. The Constitutional Court has often imposed supervisory remedies to retain jurisdiction to monitor compliance with orders benefiting marginalised groups.

⁷⁹ *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC) (S. Afr.).

⁸⁰ *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC) (S. Afr.), paras. 42–43.

⁸¹ *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC) (S. Afr.), para. 45.

⁸² *Steenkamp N.O. v. Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) (S. Afr.), para. 29.

⁸³ *Steenkamp N.O. v. Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) (S. Afr.), para. 29.

In the South African constitutional context, the concept of transformative constitutionalism, first articulated by Karl Klare, frames the Constitution as a long-term project of social transformation through law.⁸⁴ The Constitutional Court has embraced this idea, acknowledging that litigation is not merely about vindicating individual rights but about reshaping society's structures of power and exclusion. In this sense, enabling marginalised communities to access the Court and assert constitutional rights is itself a transformative act insofar as it seeks to disrupt patterns of domination and make the Constitution a living instrument for justice.

VII. CONCLUSION

In South Africa such a shared conception of justice, absent under apartheid, started to emerge with the adoption of, first, the interim and, secondly, the final Constitution. The uniqueness of the South African Constitution is its clear transformative intent⁸⁵ seen from its commitment to oversee the progressive realisation of socio-economic rights,⁸⁶ improve the quality of life of all citizens and free the potential of each person.⁸⁷ It lay the foundation for an open and democratic society, equal protection of the law, adherence to the rule of law and accountable, responsive and open government,⁸⁸ with the Bill of Rights, as the cornerstone of democracy, entrenching fundamental human rights and freedoms and affirming the values of human dignity, equality and freedom.⁸⁹

Yet, in spite of the constitutional entrenchment of fundamental rights and careful structure of government, including a formal separation of powers between the three branches, there is growing discontent in South Africa as to the extent and speed of the transformation required to remove the lasting legacy of

⁸⁴ Karl Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14 (1998): 150.

⁸⁵ David Bilchitz, Daryl Glaser and Andrew Konstant et al, "Assessing the Performance of the South African Constitution", *International Institute for Democracy and Electoral Assistance, Stockholm*, (2016): 9 -12. See also *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 8 (S.Afr.) [hereinafter *Soobramoney*]; *Investigating Directorate Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO*, 2001 (1) SA 545 (CC) at para. 21 (S.Afr.).

⁸⁶ Constitution of the Republic of South Africa, 1996, §§ 26(2), 27(2), 29(1).

⁸⁷ Constitution of the Republic of South Africa, 1996, Preamble.

⁸⁸ Constitution of the Republic of South Africa, 1996, § 1.

⁸⁹ Constitution of the Republic of South Africa, 1996, § 7(1).

apartheid.⁹⁰ This manifests as dissatisfaction with the persistence of seemingly intractable problems related to poor governance, state policy implementation failures, institutional malaise caused in part by a failure to transfer skills and continued high levels of crime and corruption, within the context of increasing fiscal constraints on government. The continued existence of these issues inhibits the ability of the democratic state to deliver.⁹¹ As a result, more than two decades after its transition to democracy, and in stark contrast to its express constitutional commitment to transformation, South Africa remains one of the most unequal countries in the world,⁹² with its distinctly racialised and gendered forms of inequality and poverty⁹³ not having altered fundamentally since 1994.⁹⁴

The uniquely unequal nature of South African society was recognised almost a quarter of a century ago by the Constitutional Court in the above cited case of *Soobramoney*:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.⁹⁵

Within this context of deep-rooted poverty and inequality and the failure on the part of the state to deliver many basic services, real meaning has not been given to many of the fundamental rights contained in the Constitution. This is despite the obligation on the state to ensure the progressive realisation

⁹⁰ Seen in debates to amend section 25 of the Constitution (the property clause).

⁹¹ Jason Brickhill and Yana van Leeve, "Transformative Constitutionalism—Guiding Light or Empty Slogan?," *Acta Juridica* (2015): 151; see also Michael Le Roux and Dennis Davis, *Lawfare* (Johannesburg: Jonathan Ball Publishers, 2020), iv.

⁹² Neva Makgetla, contribution in Gilbert M. Khadiagala et al., [book/report title] (2018), 14, quoting Haroon Borat and Carl van der Westhuizen, "Poverty, Inequality and the Nature of Economic Growth in South Africa," in Judith Misra-Dexter and Jeremy February, eds., *Testing Democracy: Which Way Is South Africa Going?* (Cape Town: IDASA, 2010).

⁹³ Neva Makgetla, in Gilbert M. Khadiagala et al., [book/report title] (2018), 1.

⁹⁴ Neva Makgetla, in Gilbert M. Khadiagala et al., [book/report title] (2018), 15.

⁹⁵ *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.), para. 8.

of socio-economic rights through reasonable legislative and other measures.⁹⁶ Persistently poor socio-economic conditions continue to prevail for the majority of South Africans, estimated to be 64 million people.⁹⁷ Approximately 13,1 % of South African households are informal,⁹⁸ with 3,3 million people living in informal settlements. 36,6% of South Africans continue to use pit latrines,⁹⁹ 20,2% of South Africans continue to have inadequate access to food¹⁰⁰ and 46,3% of people have access to piped water in their dwellings,¹⁰¹ while 44.3% of households by 2018 relied on at least one type of social grant.¹⁰²

More than 77,1% of learners who attended public schools benefitted from school feeding schemes in 2018.¹⁰³ As at June 2020 there remain approximately 3000 schools at which no water is provided, with inadequate provision of water at 7000 schools across the country and up to 4000 schools still using pit latrines.¹⁰⁴ South Africa's healthcare system is similarly compromised. Access to healthcare remains deeply unequal, with the state of public healthcare facilities compromised and service delivery and resource shortages apparent across the system, in which approximately 80% of medical specialists serve 16% of the population in the private sector. As the public health care system has strained, the number of successful medical negligence claims against the state have spiralled,¹⁰⁵ which has placed further strain on the availability of funds and resource allocation in the public health sector.¹⁰⁶

Similarly, the number of complaints of police misconduct have not subsided, with systemic problems persisting in the extent of and adequacy of crime investigation and its prosecution. Of a total of 5829 complaints of police misconduct reported in the 2018/2019 year, 214 related to deaths in custody, 393

⁹⁶ Constitution of the Republic of South Africa, 1996, § 27(2).

⁹⁷ "South Africa Population," Worldometer, October 13, 2025.

⁹⁸ Statistics South Africa, *General Household Survey 2019* (Pretoria: Statistics South Africa, 2020), 32.

⁹⁹ Statistics South Africa, *General Household Survey 2019*, 49.

¹⁰⁰ Statistics South Africa, *General Household Survey 2019*, 67.

¹⁰¹ Statistics South Africa, *General Household Survey 2019*, 42.

¹⁰² Statistics South Africa, *General Household Survey 2019*, 30.

¹⁰³ Statistics South Africa, *General Household Survey 2019*, 17.

¹⁰⁴ Inside Education, "Angie Motshekga Admits 4000 South African Public Schools Still Use Pit Latrines," *Inside Education*, August 3, 2020.

¹⁰⁵ Kollapen et al (2017) at 3.

¹⁰⁶ Department of Health (2015).

deaths as a result of police action, 124 incidents of rape by a police officer (half of this number by off-duty policemen), 13% cases of rape led to those being in custody, 270 cases of torture and 3835 of assault;¹⁰⁷ and damages claims against the police show no signs of abating. By 2018, Human Rights Watch reported, “(c) orruption, poverty, high unemployment, and violent crime significantly restricted South Africans enjoyment of their rights. Cuts to health and education services also compromised quality and access to these rights.”¹⁰⁸

The result is that much of South Africa’s past, described as that of “a deeply divided society characterised by strife, conflict, untold suffering and injustice” which “generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge”,¹⁰⁹ remains evident in the daily lives of most South Africans a quarter of a century after the end of apartheid. In spite of the enactment of the new Constitution, with its Bill of Rights affirming the values of dignity, equality and freedom,¹¹⁰ social and economic rights and the promise to unleash the transformation of the society,¹¹¹ significant challenges remain. The realisation of fundamental human rights, despite their entrenchment in the Bill of Rights and the constitutional commitment to the values of accountability, transparency and responsiveness underpinning the operation of the modern state,¹¹² very often remain constrained.

In this context, the courts continue to be used as a “a core tool” in the development of the constitutional state,¹¹³ with a broad range of societal issues litigated in the courts, including those concerned with the violation of fundamental rights. Subject to constitutional control, courts use their power to apply or, where appropriate, develop the law and impose remedies, including

¹⁰⁷ Independent Police Investigative Directorate, *Annual Report 2018/2019* (Pretoria: IPID, 2019), 38.

¹⁰⁸ Human Rights Watch, [report title] (New York: Human Rights Watch, 2019).

¹⁰⁹ *Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) (S. Afr.)*, para. 5.

¹¹⁰ Constitution of the Republic of South Africa, 1996, § 7(1).

¹¹¹ Brickhill and Van Leeve, “Transformative Constitutionalism,” 144.

¹¹² Brickhill and Van Leeve, 151. See also Michael Le Roux and Dennis Davis, *Lawfare* (Johannesburg: Jonathan Ball Publishers, 2020), IV.

¹¹³ Le Roux and Davis, *Lawfare*, 1.

those against the executive, the government administration at different levels and state functionaries.

BIBLIOGRAPHY

- Albertyn, Cathi. *Transformative Constitutionalism and the Development of South African Constitutional Jurisprudence*. South Africa: Juta, 2018.
- Bilchitz, David, Daryl Glaser, Andrew Konstant, et al. *Assessing the Performance of the South African Constitution*. Stockholm: International Institute for Democracy and Electoral Assistance, 2016.
- Bilchitz, David. "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance." *South African Journal on Human Rights* 26 (2010): 31.
- Bilchitz, David. *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*. United Kingdom: Oxford University Press, 2007.
- Brickhill, Jason, and Yana Van Leeve. "Transformative Constitutionalism-Guiding Light or Empty Slogan?" *Acta Juridica* 15 (2015): 141-171.
- Corder, Hugh. "The Doctrine of Subsidiarity and the Enforcement of Socio-Economic Rights in South Africa." *South African Public Law* 32 (2017): 114.
- Corrigan, Terrence. "Land Debate Distorted by Misrepresentation of Ownership Figures." *Institute of Race Relations*, February 26, 2025. <https://irr.org.za/media/land-debate-distorted-by-misrepresentation-of-ownership-figures-2212-irr>.
- Inside Education. "Angie Motshekga Admits 4000 South African Public Schools Still Use Pit Latrines." *Inside Education*, August 3, 2020. <https://insideeducation.co.za/2020/05/04/anger-over-schools-without-water-mounts-as-education-department-plans-to-re-open/>.
- Klare, Karl. "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights* 14 (1998): 146-188.

- Le Roux, Michael, and Dennis Davis. *Lawfare*. South Africa: Jonathan Ball Publishers, 2020.
- Liebenberg, Sandra. *Socio-Economic Rights: Adjudication under a Transformative Constitution*. South Africa: Juta, 2010.
- Price, Allistair. "State Liability and Accountability." *Acta Juridica* 1 (2015): 316.
- Worldometer. "South Africa Population." *Worldometer*, October 13, 2025. <https://www.worldometers.info/world-population/south-africa-population>.
- Young, Katherine. *Constituting Economic and Social Rights*. United Kingdom: Oxford University Press, 2012.

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INDONESIA'S JUDICIAL REVIEW REGIME IN COMPARATIVE PERSPECTIVE

Theunis Roux*

The University of New South Wales (UNSW), Sydney, Australia
t.roux@unsw.edu.au

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

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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.

- **Introduction:** It presents a clear information concerning the issue that will be discussed in the manuscript. The background of the article is presented in this section. The end of the introduction should be finished by stating the signification and the objective/aim of the article.
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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.

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