

Constitutional Review



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Editorial Office

Center for Research and Case Analysis and Library Management

The Constitutional Court of the Republic of Indonesia

Jl. Medan Merdeka Barat No. 6 Jakarta, Indonesia 10110

Phone. (+6221) 23529000 Fax. (+6221) 352177

E-mail: consrev@mkri.id

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THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Volume 12, Number 1, May 2026

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Note From the Editors



The Editorial Team is pleased to present the May 2026 edition of *Constitutional Review* (Volume 12, Number 1). As a biannual journal committed to advancing rigorous scholarship on constitutional law, constitutional adjudication, and comparative constitutional thought, this issue brings together eight articles that examine the evolving relationship between constitutional rights, judicial institutions, state accountability, and democratic governance.

This edition reflects a strong comparative and interdisciplinary character. The articles engage constitutional developments in Indonesia, Germany, South Korea, Italy, Nigeria, Canada, Timor-Leste, Spain, and the United States, while maintaining a shared concern with how constitutional guarantees are interpreted, institutionalized, and implemented in practice. Several contributions focus on constitutional complaint mechanisms and judicial independence, while others examine the contested meanings of socio-economic rights, the limits of federal doctrine, and the practical obstacles that prevent constitutional promises from becoming lived realities.

The opening article, “Rights as Floating Signifier: A Laclauian Reading of Education Rights in Indonesia’s Constitutional Court,” by Rofi Wahanisa, Syahwal, and Eko Mukminto, offers a socio-legal reading of the right to education in Indonesia through Ernesto Laclau’s discourse theory. The article argues that constitutional rights, particularly the right to education, should not be understood as fixed legal concepts.

Instead, their meaning is continually shaped by judicial interpretation, political contestation, and social conditions. By examining the Indonesian Constitutional Court's decisions on education, the authors show how the Court has alternated between emancipatory interpretations that expand access and interpretations that accommodate fiscal limits and existing power structures. The article makes an important contribution by framing constitutional interpretation as a site of discursive struggle rather than merely a technical exercise in legal reasoning.

The second article, "Judicial Independence and the Effectiveness of Constitutional Complaint Systems," by Thomas Sheku Marah, examines the relationship between judicial independence and the functioning of constitutional complaint mechanisms. Drawing on comparative experiences from Germany, South Korea, Italy, and Indonesia, the article emphasizes that constitutional complaint systems can only function effectively when courts are institutionally independent, procedurally accessible, and trusted by the public. The author argues that Germany and South Korea demonstrate how structural and financial autonomy can strengthen compliance, timeliness, and public confidence, while Indonesia's current absence of an individual constitutional complaint mechanism reveals the need for reform. The article concludes that judicial independence must be treated not only as a constitutional ideal, but also as a practical condition for meaningful rights protection.

The third contribution, "Constitutional Complaint on Criminal and Civil Court Judgements: The German Judicial Practices of the Bundesverfassungsgericht and Proposal for the Mahkamah Konstitusi Republik Indonesia," by Tanto Lailam, focuses on the German Federal Constitutional Court's practice of reviewing criminal and civil court judgments through constitutional complaints. By discussing landmark cases such as the *Lüth* case, the *Soldiers are Murderers* case, and the *Right to be Forgotten* case, the article illustrates how the Bundesverfassungsgericht protects constitutional rights against violations arising from ordinary court decisions. The article also considers the relevance of this model for Indonesia, especially in light of concerns over miscarriages of justice and weaknesses in ordinary judicial processes. It proposes that Indonesia may consider adopting a comparable mechanism through constitutional amendment in order to strengthen the protection of citizens' constitutional rights.

The fourth article, "Judicial Autonomy in Nigeria: A Myth or A Constitutional Albatross?" by Ugochukwu Ehirim, shifts the discussion to Nigeria and examines the persistent struggle for judicial autonomy within a constitutional democracy.

The article focuses particularly on judicial financial autonomy, arguing that judicial independence cannot be reduced to the welfare of judges or formal guarantees of separation of powers. Rather, it depends on whether the judiciary can access, control, and administer its constitutionally allocated resources without executive domination. Through a doctrinal analysis of Nigerian constitutional provisions and judicial developments, the article shows that judicial autonomy remains attainable, but only if the bench, the bar, and relevant state institutions are willing to enforce constitutional prescriptions in practice. The contribution underscores the broader lesson that constitutional guarantees of judicial independence require enforceable institutional arrangements.

The fifth article, “Internal Trade Barriers in Canadian Federalism: Privy Council Doctrine and Supreme Court Continuity,” by Alex Atanasov, examines the persistence of internal trade barriers in Canada. The article traces how early interpretations of the federal trade and commerce power by the Judicial Committee of the Privy Council shaped a restrictive doctrinal framework that continues to influence Supreme Court of Canada jurisprudence. It argues that Canadian courts have generally treated internal market fragmentation as a consequence of federalism rather than as an independent constitutional problem. By contrasting Canadian doctrine with European Union internal market principles, the article clarifies that decentralization does not necessarily require market fragmentation. The article concludes that meaningful correction of Canada’s internal trade barriers is more likely to arise through political coordination or legislative initiative than through judicial evolution alone.

The sixth contribution, “Constitutional Tort as A Constitutional Complaint: Reconstructing Governmental Unlawful Acts Regulation,” by Bimo Fajar Hantoro and Fathimah Azzahro, proposes an alternative path for strengthening constitutional rights protection in Indonesia. Recognizing the procedural difficulty of expanding the Constitutional Court’s jurisdiction through constitutional amendment, the article suggests reconstructing the State Administrative Courts’ authority over governmental unlawful acts into a *de facto* constitutional complaint mechanism. Drawing inspiration from the United States concept of constitutional tort, the authors argue that Indonesian administrative courts should be expressly authorized to use the 1945 Constitution as a standard of review in cases involving governmental wrongdoing. The article further emphasizes the importance of procedural safeguards, consistency with Constitutional Court interpretations, and meaningful remedies such as injunctions and damages.

The seventh article, “The Efficacy of the Right to Education and Its Impact on the Elimination of Child Labor in Indonesia and Timor-Leste,” by Asmin Fransiska and Inácio Loiola da Costa Oliveira Maia, examines the relationship between constitutional education rights and the persistence of child labor. Through a comparative socio-legal analysis of Indonesia and Timor-Leste, the article argues that constitutional and statutory guarantees of education remain insufficient when poverty, hidden schooling costs, weak infrastructure, rural isolation, and cultural norms continue to push children into labor. The authors show that child labor directly undermines the right to education and the broader development of children as rights-holders. The article concludes that eliminating child labor requires more than legal prohibition; it requires integrated social, economic, and educational policies capable of addressing the structural causes that keep children outside the classroom.

The final contribution, “Hybrid Multi-Level Constitutional Complaint: Reforming Constitutional Rights Protection in Indonesia,” by Hikam Hulwanullah and Torik Abdul Aziz Wibowo, returns to the central theme of constitutional complaint reform in Indonesia. The article identifies legal, institutional, and political reasons behind the absence of a direct constitutional complaint mechanism and compares the experiences of Germany, South Korea, and Spain. It proposes a Hybrid Multi-Level Constitutional Complaint Model that combines review of legal norms with review of concrete state actions, while involving multiple institutional levels before cases reach the Constitutional Court. This model is designed to expand access to constitutional justice while preserving judicial balance, preventing institutional overload, and maintaining coherence between the Constitutional Court and other judicial bodies. The article offers a pragmatic reform proposal for addressing constitutional rights violations within Indonesia’s existing institutional realities.

Taken together, the articles in this issue offer a rich and timely engagement with contemporary constitutional challenges. They show that rights protection depends not only on constitutional text, but also on judicial independence, procedural design, institutional courage, social context, and the availability of effective remedies. Whether discussing education rights in Indonesia, constitutional complaints in Germany and Indonesia, judicial autonomy in Nigeria, internal trade in Canada, or child labor in Indonesia and Timor-Leste, the contributions remind us that constitutional law must continuously respond to the realities of power, inequality, and institutional constraint.

Note From the Editors

The Editorial Team extends its sincere appreciation to all authors, reviewers, editors, and contributors whose work and commitment have made this publication possible. We hope this issue will enrich scholarly discussion and provide useful insights for academics, judges, legal practitioners, policymakers, and all readers concerned with the future of constitutional democracy and rights protection.

Warm regards,
The Editorial Team
Constitutional Review
May 2026

Rights as Floating Signifier: A Laclauian Reading of Education Rights in Indonesia's Constitutional Court

Rofi Wahanisa, Syahwal, and Eko Mukminto

Constitutional Review, Vol. 12 No. 1, May 2026, pp. 001-035

Within legal discourse, as the constitutional rights are formed in abstract form, constitutional courts then occupy a central position in defining the meaning of constitutional rights, including the right to education. The Court has expressed the right to education in fundamentally different ways in a number of rulings. The court views the right to education as a social right that necessitates state accountability. However, the rights to education are characterized as being limited by financial resources. This study, which looks at how the Court has interpreted and reinterpreted the constitutional right to education, is based on this tension. Based on this inquiry, the study employs a socio-legal methodology that integrates Ernesto Laclau's discourse theory with the legal normativity ingrained in legal studies. According to this framework, the divergence of constitutional interpretation demonstrates that the right to education is a floating signifier, meaning that it is contingently re-articulated by the Court through competing logics of what we refer to as emancipation and domination logics rather than having a fixed meaning. These court decisions show the variety of constitutional interpretation; sometimes it takes an exploitative approach that maintains the status quo and validates existing power structures, while other times it takes an emancipatory approach that seeks to improve access and eradicate structural injustices. The study promotes a more politically aware explanation of constitutional interpretation by tracking this tension and emphasizing how the meaning of rights is constantly debated rather than settled.

Keywords: Constitutional rights discourses; Constitutional interpretation; Floating signifiers; Right to education

Judicial Independence and The Effectiveness of Constitutional Complaint Systems

Thomas Sheku Marah

Constitutional Review, Vol. 12 No. 1, May 2026, pp. 036-069

The focus of this study is to break down the link between judicial independence and the effectiveness of the system for receiving and adjudicating constitutional complaints through the lens of Indonesia, supported by case studies from Germany, South Korea, and Italy. The study applies a comparative doctrinal legal method to assess the impact of institutional independence, procedural frameworks, and public accessibility on the ability of the constitutional court to safeguard fundamental rights. The analysis highlights that judicial independence operates as both a normative safeguard and a functional condition that determines how effectively constitutional justice can be ensured. The findings show that jurisdictions with high judicial independence—such as Germany and South Korea—display greater procedural efficiency, higher admissibility rates, stronger compliance with rulings, and greater public trust in judicial institutions. Systems with lower judicial independence, such as Indonesia, face ongoing challenges, including slow procedures, inconsistent enforcement, and restricted access to constitutional remedies. The research demonstrates that a constitutional complaint system functions best when judicial institutions maintain complete independence and operate with transparent systems that remain accountable to the public. The study further indicates that Indonesia needs to enhance its judicial system by establishing permanent positions for judges, implementing open selection methods, and providing independent funding for the Constitutional Court so it can operate a trustworthy constitutional complaint system.

Keywords: Access to justice; Civil society engagement; Constitutional complaint; Fundamental rights; Judicial independence

Constitutional Complaint on Criminal and Civil Court Judgements: The German Judicial Practices of the Bundesverfassungsgericht and Proposal for the Mahkamah Konstitusi Republik Indonesia

Tanto Lailam

Constitutional Review, Vol. 12 No. 1, May 2026, pp. 070-117

This article examines constitutional complaints regarding criminal and civil court decisions in the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) practices. It proposes recommendations for the Indonesian Constitutional Court. In the German legal system, such constitutional complaints fall under the jurisdiction of the BVerfG. Based on data from 2020 to 2024, approximately 85% of BVerfG decisions pertain to ordinary court judgements, encompassing those of both criminal and civil courts. This legal mechanism is a very popular area of jurisdiction at the BVerfG, with around 5,000–6,000 cases resolved each year. Some notable cases include the Lüth case, the Soldiers are Murderers case, the Right to be Forgotten case, and others. The Lüth case cancelled a Hamburg civil court judgement, the Soldiers are Murderers case overturned several criminal courts' decisions, and the Right to be Forgotten case cancelled the German Supreme Court judgement. In its decisions on these cases, the BVerfG stated that the ordinary court rulings were contrary to the German Basic Law and principles of human rights, and that the rulings had violated the constitutional rights of citizens. The judicial practices of the BVerfG serve as a reference for constitutional courts worldwide, and it could potentially be adopted by the Indonesian Constitutional Court (MKRI) in the future through a constitutional amendment process to the 1945 Constitution. It is certainly motivated by the large number of constitutional complaints relating to criminal courts that have been resolved through the abstract judicial review mechanism, as well as concerns about miscarriages of justice and judicial corruption in the ordinary courts. The aim is to strengthen the protection of citizens' constitutional rights against all court decisions that violate these rights. At the same time, the Indonesian Constitutional Court's power serves as a counterbalance to ordinary court decisions based on Pancasila constitutional values, the 1945 Constitution, and Indonesian human rights principles.

Keywords: Civil Court; Constitutional Complaint; Criminal Court; Judgements

Judicial Autonomy in Nigeria: A Myth or A Constitutional Albatross?

Ugochukwu Godspower Ehirim

Constitutional Review, Vol. 12 No. 1, May 2026, pp. 118-154

The recent threat by Judiciary Staff Union of Nigeria (JUSUN) exuding resolve to stage yet another industrial strike-action to demand realistic autonomy of the Nigerian Judiciary has re-enacted the conversation for judicial autonomy in Nigeria. The power architecture in Nigeria has made both the state and federal legislative and judicial branches of governance the recipients of incremental erosion of independence by a flourishing state bureaucracy for purposes of executive expediency. Adopting the doctrinal research methodology of analysis which leverages on primary and secondary sources, this paper contends that judicial autonomy is a fundamental ingredient for effective dispensation of justice which is a fundamental factor in modern democracies. The paper examines the constitutional guarantees for the hallowed notion of separation of political powers across the branches of governance in Nigeria, with focus on the funding and general administration of the judicial organ of governance. The paper contributes to the proper conceptualization of 'judicial autonomy' to implicate the manner of funding which is at the very root of judicial emasculation in Nigeria. It concludes through its findings that judicial autonomy in Nigeria is attainable despite the seeming challenges, with a courageous bar and willing judiciary. Some recommendations are made that would help the realization of judicial autonomy for proper justice administration in Nigeria.

Keywords: Autonomy; Constitution; Judiciary; Nigeria; Separation of Powers

Internal Trade Barriers in Canadian Federalism: Privy Council Doctrine and Supreme Court Continuity

Alex Atanasov

Constitutional Review, Vol. 12 No. 1, May 2026, pp. 115-193

This Canada's internal market remains fragmented despite the consolidation of judicial authority in the Supreme Court of Canada and the availability of constitutional tools capable of supporting national economic coordination. This article examines how early interpretations of the federal trade and commerce power by the Judicial Committee of the Privy Council shaped a doctrinal framework that continues to constrain internal trade regulation. It contributes to Canadian constitutional scholarship by showing that, in the constitutional domain, common-law adjudication does not necessarily evolve toward greater economic efficiency: early doctrinal settlements may persist. Methodologically, the article adopts a doctrinal-institutional approach, analysing leading Privy Council and Supreme Court of Canada decisions on section 91(2) of the Constitution Act, 1867. The analysis focuses on purposively selected cases that structured constitutional interpretation of internal trade rather than offering an exhaustive survey. A limited comparative reference to European Union internal market law is employed illustratively, using the principle of mutual recognition as a benchmark to clarify the conceptual distinction between decentralized governance and effective market integration. The article concludes that internal trade barriers in Canada reflect durable constitutional choices rather than incidental policy failure, and that meaningful correction is more likely to depend on political coordination or legislative initiative than on judicial evolution alone.

Keywords: Canadian constitutional law; Federalism; Institutional inertia; Internal trade; Internal market fragmentation; Judicial doctrine; Trade and commerce power

Constitutional Tort As A Constitutional Complaint: Reconstructing Governmental Unlawful Acts Regulation

Bimo Fajar Hantoro and Fathimah Azzahro

Constitutional Review, Vol. 12 No. 1, May 2026, pp. 194-223

A chorus of academics has echoed constitutional complaint as an expansion of the Constitutional Court's jurisdiction to strengthen the protection of citizens. In this context, the proposal is hampered by the procedural barriers of constitutional amendment. Therefore, this research aims to propose a more viable alternative by reconstructing the existing State Administrative Courts' governmental unlawful acts jurisdiction into a de facto constitutional complaint mechanism. Governmental unlawful acts cause of action is reconstructed by adopting certain aspects of constitutional tort in the United States as a point of comparison and inspiration. This doctrinal research adopts statutory, comparative, and conceptual approaches, using primary and secondary legal materials. The results show that reconstruction of State Administrative Courts' governmental unlawful acts jurisdiction into a de facto constitutional complaint mechanism depends on four specific and crucial reforms to State Administrative Courts Law, the Governmental Administration Law, and the implementing regulations. First, the authority of State Administrative Courts covers factual actions and includes blocking the enforcement of written state administrative decisions. Second, an explicit statutory authorization should be provided for the state administrative court judges to use the 1945 Constitution as a standard of review. Third, there needs to be procedural safeguards to ensure legal certainty and consistency in constitutional interpretation. State Administrative Courts are obligated to give full effect to the Constitutional Court's interpretation whenever available and applicable to the case at hand, and to stay proceedings when a related case is pending at the Constitutional Court relevant to the case at hand. Lastly, Finally, existing damages regulations must be amended to ensure legal certainty and provide just relief. This prevents remedies from becoming symbolic rather than effective in stopping constitutional violations and wrongdoings.

Keywords: Constitutional Tort, Constitutional Complaint, Governmental Unlawful Acts

The Efficacy of the Right to Education and Its Impact on the Elimination of Child Labor in Indonesia and Timor-Leste

Asmin Fransiska and Inácio Loiola da Costa Oliveira Maia

Constitutional Review, Vol. 12 No. 1, May 2026, pp. 224-263

Indonesia and Timor-Leste have actively ratified the international human rights instruments such as CRC, ICESCR as well as ILO Conventions. One of the fundamental human right is the right of education that mandated by the constitutional frameworks of Indonesia and Timor-Leste. Indonesia mandates twelve years of compulsory education, while Timor-Leste requires nine. On the other hand, child labor play important role hindering the right of education. In Timor-Leste, 16% of children are working in the service and agricultural sectors. Although as not as high in Timor-Leste, an estimated 1.76 million of the nation's 58.8 million children are engaged in child labor. These figures starkly contrast with the constitutional protections afforded by Article 28B and 31 of Indonesia's 1945 Constitution and Article 18 of Timor-Leste's Constitution, which explicitly protect children's rights and guarantee state-financed education. This study analyses the legal frameworks of both nations using comparative socio-legal methodology to assess the efficacy and implementation gaps their respective compulsory education programs. The findings indicate that while robust legal and constitutional mandates exist, their enforcement is severely undermined. Key impediments identified include pervasive poverty, the persistence of child labor in hazardous conditions, and deeply embedded sociocultural norms that frame children as economic assets rather than as rights-holders. This study concludes that a significant discrepancy exists between de jure protections and de facto realities, positing that legal mandates for education are insufficient without concurrent, targeted interventions that address the complex socioeconomic drivers of child labor.

Keywords: Child labor; Child rights; Constitution; Human rights; The rights to education

Hybrid Multi-Level Constitutional Complaint: Reforming Constitutional Rights Protection in Indonesia

Hikam Hulwanullah and Torik Abdul Aziz Wibowo

Constitutional Review, Vol. 12 No. 1, May 2026, pp. 264-312

The absence of a direct constitutional complaint mechanism in Indonesia means that individuals still lack a legal means to contest violations of basic rights beyond the scope of judicial review. This study examines three main issues: the factors causing the absence of a constitutional complaint mechanism in Indonesia, a comparison of the objects and mechanisms of constitutional complaints in Germany, South Korea, and Spain, and the implementation of the Hybrid Multi-Level Constitutional Complaint in Indonesia. This study proposes an alternative model that aims to resolve constitutional rights disputes before this mechanism is officially regulated in the 1945 Constitution of the Republic of Indonesia.

Keywords: Constitutional Complaint; Constitutional Rights; Hybrid Multi-level Model; Indonesian Constitutional Court; Judicial Reform

RIGHTS AS FLOATING SIGNIFIER: A LACLAUIAN READING OF EDUCATION RIGHTS IN INDONESIA'S CONSTITUTIONAL COURT

Rofi Wahanisa*

Faculty of Law Universitas Negeri Semarang
rofiwahanisa@mail.unnes.ac.id

Syahwal**

Faculty of Law Universitas Negeri Semarang
syahwal@mail.unnes.ac.id

Eko Mukminto***

Faculty of Law Universitas Negeri Semarang
ekomukminto@mail.unnes.ac.id

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Abstract

Within legal discourse, as the constitutional rights are formed in abstract form, constitutional courts then occupy a central position in defining the meaning of constitutional rights, including the right to education. The Court has expressed the right to education in fundamentally different ways in a number of rulings. The court views the right to education as a social right that necessitates state accountability. However, the rights to education are characterized as being limited by financial resources. This study, which looks at how the Court has interpreted and reinterpreted the constitutional right to education, is based on this tension. Based on this inquiry, the study employs a socio-legal methodology that integrates Ernesto Laclau's discourse theory with the legal normativity ingrained in legal studies. According to this framework, the divergence of constitutional interpretation demonstrates that the right to education is a floating signifier,

* Professor of Law at the Faculty of Law, Universitas Negeri Semarang (UNNES).

** Lecturer of Public Law at the Faculty of Law, Universitas Negeri Semarang (UNNES).

*** Lecturer of Jurisprudence at the Faculty of Law, Universitas Negeri Semarang (UNNES).



meaning that it is contingently re-articulated by the Court through competing logics of what we refer to as emancipation and domination logics rather than having a fixed meaning. These court decisions show the variety of constitutional interpretation; sometimes it takes an exploitative approach that maintains the status quo and validates existing power structures, while other times it takes an emancipatory approach that seeks to improve access and eradicate structural injustices. The study promotes a more politically aware explanation of constitutional interpretation by tracking this tension and emphasizing how the meaning of rights is constantly debated rather than settled.

Keywords: Constitutional rights discourses; Constitutional interpretation; Floating signifiers; Right to education

I. INTRODUCTION

1.1. Background

In legal studies, the Constitution has been recognized as the cornerstone of the legal system, providing the framework for numerous laws and rules.¹ Ackerman claims that the constitution establishes the basic “rules of the game” for the law-making process.² Furthermore, in the Indonesian context particularly, the constitution has become “*the most important law in the life of a nation and a state*,” according to Sukarno.³ But contemporary constitutional discourse does more than merely view the constitution as a normative validator. As Weinrib argues, modern constitutional law also encompasses a system of enforceable rights.⁴ Yet, just as the realization of rights in general necessitates struggle, the rights enshrined in the constitution similarly require ongoing efforts to be actualized.⁵ One such right is the right to education, which is explicitly recognized in the 1945 Constitution of Indonesia.

¹ Hans Kelsen, *Pure Theory of Law* (London: University of California Press, 1967), 50–70.

² Bruce Ackerman, *The Future of Liberal Revolution* (London: Yale University Press, 1992), 14.

³ Sekretariat Negara Republik Indonesia [Cabinet Secretariat of the Republic of Indonesia], *Himpunan Risalah Sidang-Sidang dari Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) dan Panitia Persiapan Kemerdekaan Indonesia* [Collection of Minutes of Sessions from the Investigating Committee for Preparatory Work for Independence and the Preparatory Committee for Indonesian Independence] (Jakarta: Sekretariat Negara Republik Indonesia, 1959).

⁴ Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016).

⁵ Herlambang P. Wiratraman, “Constitutional Struggles and the Court in Indonesia’s Turn to Authoritarian Politics,” *Federal Law Review* 50, no. 3 (June 2022): 314–330.

The struggle for the right to education became particularly visible through student movements that emerged in mid-2024.⁶ These movements were a response to the escalating costs of education, culminating in the popular slogan “*Orang miskin dilarang kuliah*” (“Poor people are prohibited from attending university”), which served as a critique of the growing unaffordability of higher education.⁷ In reaction to this, the Secretary of the Directorate General of Higher Education, Research, and Technology asserted that higher education constitutes merely “tertiary education.”⁸ This statement suggests that, according to the government acting on behalf of the state, the constitutional right to education does not necessarily extend to higher education. As a result, this interpretation legitimizes the increasing cost of higher education in Indonesia, under the rationale that the state’s obligation to fulfill the right to education is limited to primary or basic education.

Based on the aforementioned facts, there is a glaring difference in how the right to education is regarded, which has an impact on how the government and students view their obligations. Interestingly, the 1945 Constitution’s Article 31(1), which unequivocally declares that “*every citizen has the right to education*,” serves as the foundation for both sides’ arguments. Therefore, despite this frequent constitutional reference, the right to education can be viewed as a right that lacks a single, definite meaning. Instead, it serves as a platform for interpretive disagreement where different perspectives on its applicability and breadth are put forward. The ongoing discussion over how to define and implement the

⁶ See, for example, “Turunkan Biaya Kuliah di Perguruan Tinggi Negeri [Lower Tuition Fees at State Universities],” *Kompas*, accessed May 19, 2024. See also “Jangan sampai Kenaikan UKT Bebani Mahasiswa Sampai Tidak Mampu Kuliah Lagi [Do Not Let the Increase in Single Tuition Fees Burden Students to the Point That They Can No Longer Afford to Study],” Dewan Perwakilan Rakyat Republik Indonesia [House of Representatives of the Republic of Indonesia], accessed May 16, 2024.

⁷ For example, undergraduate students paid a maximum of Rp12,500,000 (approximately \$714) in 2020, whereas in 2024 they were required to pay up to Rp100,000,000 (approximately \$5,714). See “Students Petition for Judicial Review of the Regulation of the Minister of Education, Culture, Research, and Technology of the Republic of Indonesia No. 2 of 2024 on Standar Satuan Biaya Operasional Pendidikan Tinggi pada Perguruan Tinggi Negeri di Lingkungan Kementerian Pendidikan, Kebudayaan, Riset, dan Teknologi [Standards for Operational Costs for Higher Education at State Universities within the Ministry of Education, Culture, Research, and Technology], against Law No. 12 of 2012 on Higher Education” (2024), 22–24.

⁸ “Kemendikbudristek Dorong Perguruan Tinggi Tetapkan Uang Kuliah Tunggal dengan Bijak dan Berkeadilan [The Ministry of Education, Culture, Research, and Technology Encourages Universities to Set Single Tuition Fees Wisely and Fairly],” Kementerian Pendidikan dan Kebudayaan [Ministry of Education and Culture], accessed May 22, 2024.

right to education has a significant impact on this study, which uses the right to education as a specific example to investigate constitutional conflict.

These factors necessitate setting our investigation within the framework of past scholarly research. The Constitutional Court's interpretation of the constitution has been thoroughly examined in earlier studies. For instance, Hapsoro and Ismail use a prescriptive viewpoint to evaluate the Court's interpretive practices in connection to the fulfillment of a living constitution in Indonesia,⁹ whereas Ahmad et al. examine constitutional interpretation via the prism of the Constitutional Dialogue approach.¹⁰ Despite these advancements, there is still a dearth of critical socio-legal examination of constitutional interpretation in the literature. By emphasizing constitutional interpretation as a profoundly embedded political and social process of meaning-making, this work bridges this gap.

1.2. Research Questions

Reflecting ongoing contestations over the right to education, this study is guided by two main questions. First, how does the Constitutional Court interpret the right to education? To address this, the study undertakes a close doctrinal and discursive reading of selected Constitutional Court decisions on education, paying particular attention to the Court's reasoning, interpretive approaches, and justificatory narratives. It examines how constitutional provisions are framed in relation to issues such as state obligations, affordability, and public participation. Second, how might a Laclauian perspective be used to critically analyze these interpretations? According to this viewpoint, constitutional rights are variable and politically produced rather than fixed. It enables the analysis to follow the emergence of judicial interpretations in hegemonic battles, when conflicting articulations temporarily stabilize the meaning of rights.

⁹ Fakhri Lutfianto Hapsoro and Ismail Ismail, "Interpretasi Konstitusi dalam Pengujian Konstitusionalitas untuk Mewujudkan the Living Constitution [Constitutional Interpretation in Constitutional Review to Realize the Living Constitution]," *Jurnal Hukum & Pembangunan* 50, no. 4 (December 2020): 995–1005.

¹⁰ Ahmad Ahmad, Fence M. Wantu, and Dian Ekawaty Ismail, "Convergence of Constitutional Interpretation to the Test of Laws through a Constitutional Dialogue Approach," *Jurnal Konstitusi* 20, no. 3 (September 2023): 514–35.

1.3. Method

This study takes a socio-legal approach to investigate how Indonesian constitutional rights are interpreted, building on these research concerns. This approach places constitutional interpretation amid larger social and political forces rather than approaching it as a strictly technical or doctrinal activity. In this way, interpretation is viewed as a process of creating meaning that is influenced by changing societal circumstances, power dynamics, and institutional settings. According to this standpoint, constitutional interpretation can be viewed as a site of discursive contestation, where various actors, such as lawmakers, courts, and civil society organizations, work to advance and stabilize specific interpretations of constitutional rights. This interpretation is based on Ernesto Laclau's discourse theory, which emphasizes that meanings are contingent, provisional, and subject to rearticulation rather than being completely fixed.

This analysis demonstrates that constitutional rights do not function as completely established guarantees by tracking how the right to education has been construed across Constitutional Court rulings. Rather, they are contested and dynamic forms. Their meanings are always open to revision, renegotiation, and alteration in response to changing legal arguments, political arrangements, and societal influences, even though they may momentarily solidify.

II. RESULT & DISCUSSIONS

2.1. Laclau's Discourse Theory on Constitutional Interpretation

It is generally understood that constitutional norms, even though they are fundamental, but that kind of norms often need to be interpreted.¹¹ In practice, constitutional texts do not carry fixed meanings by themselves, they acquire meaning through judicial interpretation carried out by constitutional court.¹² This places judges at the center of constitutional law, as their role in interpreting the constitution is widely recognized by legal scholars. The need for

¹¹ Gonçalo de Almeida Ribeiro, "What Is Constitutional Interpretation?," *International Journal of Constitutional Law* 20, no. 3 (July 2022): 1130–61.

¹² Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases* (Oxford: Oxford University Press, 2002), 13.

interpretation becomes even more apparent given that constitutional provisions are typically written in abstract and open-ended language, allowing for multiple possible readings. As a result, scholars have developed a range of approaches to interpreting constitutional norms.

In Indonesian legal scholarship, the process of interpretation of the constitutional norms, also the legal norms in a general way, has led the discourses on legal interpretation.¹³ Drawing on Mertokusumo, these methods include grammatical, systematic, historical, and teleological approaches.¹⁴ Grammatical interpretation focuses on the ordinary meaning of words. Systematic interpretation connects a provision with other legal rules and the broader legal framework. Historical interpretation takes into account the context in which a law was created, whereas teleological interpretation emphasizes the purpose of the legislation and gives legislative intent precedence over a purely literal reading.¹⁵

Constitutional interpretation in practice frequently reveals deeper theoretical disputes, despite Mertokusumo's theory suggesting that different interpretative approaches might complement one another.¹⁶ This is especially shown in the debate between originalism and non-originalism.¹⁷ Originalism seeks to anchor constitutional meaning in the original intent or understanding of the constitutional drafters at the time the constitution was made. By contrast, non-originalist approaches reject the idea of a fixed historical meaning.¹⁸ As argued by Dworkin, the constitution can [and should] be understood as a living document, whose broad principles must be interpreted in light of contemporary context. From this non-originalist perspective, constitutional meaning has evolved over time, allowing courts to respond to changing societal realities rather than being bound strictly by the drafters' original intentions.¹⁹

¹³ Satjipto Rahardjo, *Ilmu Hukum* [Jurisprudence] (Bandung: Citra Aditya Bakti, 2006), 95.

¹⁴ Sudikno Mertokusumo, *Penemuan Hukum: Sebuah Pengantar* [Rechtsvinding: An Introduction] (Yogyakarta: Universitas Atma Jaya Yogyakarta, 2010), 57–63.

¹⁵ Mertokusumo, *Penemuan Hukum: Sebuah Pengantar* [Rechtsvinding: An Introduction], 57–63.

¹⁶ Michael Stokes Paulsen, "How to Interpret the Constitution (And How Not To)," *The Yale Law Journal* 115, no. 8 (June 2006): 2037–66.

¹⁷ Paulsen, "How to Interpret the Constitution," 2042.

¹⁸ Paulsen, "How to Interpret the Constitution," 2048.

¹⁹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 133–37.

However, that kind of methodological interpretation of legal norms, in many instances, is presented as if it operates within an apolitical framework. Yet this assumption is difficult to sustain. A constitution is, by its very nature, a political agreement—one that functions both as an emancipatory instrument for marginalized groups and as a mechanism to restrain majority dominance.²⁰ When constitutional interpretation is treated as apolitical, there is a risk that both the constitution and the practice of judicial review end up reflecting what Hirschl identifies as the entrenchment of rights and the exercise of judicial review often serve elite interests, helping to preserve existing power structures rather than emerging from progressive political struggles or genuinely altruistic elite initiatives.²¹

Although it is urgent to define constitutional interpretation in a more political manner, these methods are often criticized. According to Whittington, these criticisms typically fall into one of three categories. Political interpretation is viewed as tyrannical because it raises questions about unbridled judicial power and the possibility of abuse, irrational because it is thought to rely on subjective or value-laden reasoning, and anarchic because it seems to threaten legal stability and predictability.²² But these criticisms have not yet taken on concrete shapes. For example, the Indonesian Constitutional Court has taken a more nuanced approach in a number of its interpretations, as shown in the Court's consideration in the Constitutional Court Decision No. 35/PUU-XXI/2023:

“The management of natural resources must not solely prioritize the principle of efficiency to maximize output, let alone serve the interests of a small group of capital owners. Instead, it must aim to enhance the people’s welfare equitably. Therefore, the management of coastal areas and small islands, which are highly vulnerable, must be conducted with utmost caution to ensure

²⁰ In one of his studies, Jeremy Waldron writes that a constitution is a framework for resolving disagreements within society. He challenges the notion that law can be apolitical; rather, law is always intertwined with political struggle, interpretation, and power dynamics. See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 2012).

²¹ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (London: Harvard University Press, 2004).

²² Keith E. Whittington, “Extrajudicial Constitutional Interpretation: Three Objections and Responses,” *North Carolina Law Review* 80, no. 3 (April 2002): 773–851.

that activities in these areas do not result in severe damage or fall under the doctrine of abnormally dangerous activity [...]"²³

Political methods to constitutional interpretation have the potential to be emancipatory, but they also present significant methodological difficulties. Political interpretation does not depend on a single, generally recognized technique, in contrast to doctrinal or black-letter methods. This frequently prompts questions regarding subjectivity, arbitrariness, and the general validity of judicial reasoning.²⁴ Political interpretation can be readily written off as little more than ideological preference rather than a method of systematic constitutional analysis in the absence of a precise framework.²⁵ This leads to a central question: how can political interpretation be done in a way that is both normatively and analytically legitimate?

To answer that question, one way we propose to approach this problem is by engaging with the discourse theory of Ernesto Laclau (1935–2014). Laclau, an Argentine postmodern philosopher, is widely regarded as a key figure in post-Marxist thought. He challenged the ontological presumptions of orthodox Marxism, which he considered to be unduly restrictive and inflexible. Laclau took a more structuralist stance, rejecting economic determinism and essentialist conceptions of society. He argued that social identities are not fixed or given, but contingent and constantly reshaped through political and social processes.²⁶ In this view, society itself is best understood as a discursive space that is continuously formed and re-formed through practices of articulation.

In the context of constitutional interpretation, Laclau's discourse theory provides an analytical framework through which the constitution can be understood not as a document with a fixed or inherent meaning, but as a contingent social construct whose meaning is produced through discursive

²³ Constitutional Court of the Republic of Indonesia, Decision No. 35/PUU-XXI/2023 regarding the judicial review of Law No. 27 of 2007 on Coastal and Small Island Area Management in conjunction with Law No. 1 of 2014 on Amendments to Law No. 27 of 2007 on Coastal and Small Island Area Management.

²⁴ Whittington, "Extrajudicial Constitutional Interpretation," 778.

²⁵ Hirschl, *Towards Juristocracy*, 107.

²⁶ Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso Books, 2001), 67.

articulation. Although we must acknowledge that Laclau does not build his theories on the constitution directly, his point on social meaning emerges from articulatory practices within discursive spaces shaped by political and social actors, holding a significant contribution that can be inserted in the constitutional studies.²⁷ Based on Laclau's conceptual framework, we can underline that the constitutional interpretation can be understood as a political process in which competing actors struggle to temporarily fix meaning and establish hegemony by embedding particular values and interests into constitutional norms.

Consequently, under this framework, constitutional rights should be seen as rights that emerge from a discursive process that allows for reinterpretation based on evolving social and political needs.²⁸ This explains the problem that was already mentioned about the right to education interpretation. The case was possible, because constitutional rights itself does not contain a fixed meaning. The process of constitutional interpretation involves a network of signifiers that can be imagined as a spider's web, where signifiers interconnect to provide meaning to the social. For instance, the right to education becomes 'the social,'²⁹ with concepts such as free higher education, tertiary education, and various other factors serving as signifiers that compete to contribute to its meaning. Therefore, constitutional interpretation is not merely a juridical task but a political project that continuously links legal norms to various external signifiers.

By situating constitutional norms within a discursive space through articulation, constitutional interpretation necessarily involves the interaction of signifiers that form the meaning of constitutional norms in a specific context. This process is driven by two distinct ways of articulation, which Laclau termed 'the logic of difference' and 'the logic of equivalence'.³⁰ By definition, the logic of

²⁷ Laclau and Mouffe, *Hegemony and Socialist Strategy*, 67.

²⁸ Laclau and Mouffe, *Hegemony and Socialist Strategy*, 135–39.

²⁹ In Laclau's discourse theory, the social does not refer to a pre-given or objective social reality, but to a field of meaning constituted through discursive articulation. Social objects, identities, and practices do not possess inherent or essential meanings; rather, their meaning emerges relationally through a network of signifiers within a discursive formation. What appears as "the social" is therefore always contingent, incomplete, and open to rearticulation, as no signifier can fully fix meaning once and for all. See Laclau and Mouffe, *Hegemony and Socialist Strategy*, 135–39.

³⁰ Ernesto Laclau, *On Populist Reason* (London: Verso, 2005), 77–78.

difference is the act of creating meaning while preserving differences between signifiers. In order to recognize diversity and multiplicity in constitutional standards, this logic permits each signifier to maintain its unique meaning inside a discourse. This is especially important when diverse social ideals collide with these norms. For instance, the logic of difference makes it easier to identify different interpretations resulting from different beliefs, customs, and regional settings when it comes to religious freedom.

At the same time, constitutional interpretation also relies on the logic of equivalence, which links different signifiers into a chain by emphasizing their shared opposition to an external limit. By using this reasoning, different types of inequality—such discrimination on the basis of gender, race, or religion—can be described as similar manifestations of injustice and brought together under overarching fundamental concepts like equality before the law. Therefore, constitutional rules can serve as universal guarantees that transcend specific disparities thanks to the logic of equivalency.

But as Laclau highlights, there is an inherent instability in the way these two logics interact throughout discursive moments. The formation of equivalential chains inevitably excludes certain meanings and positions, which reflect the operation of the logic of differences, producing antagonism that marks the limits of a given interpretation.³¹ Such antagonism emerges in constitutional interpretation when a dominant articulation marginalizes alternative values or interests while elevating a specific reading of a rule. The dominant interpretation may therefore be contested by groups whose experiences or claims are not included in the dominant chain of equivalency, turning constitutional meaning from a matter of settled consensus into a site of continuous contestation.³²

³¹ The interpretation of constitutional rights might, to some extent, result in a Schmittian view, in which constitutional interpretation turns into a practice that establishes “otherness,” making a distinct division between “us” and “them.” According to this theory, rights serve as instruments to establish social and political borders that separate the dominant group from marginalized or excluded groups, rather than merely as legal entitlements. See Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 2007).

³² Ernesto Laclau, “Identity and Hegemony: The Role of Universality in the Constitution of Political Logics,” in *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, ed. Judith Butler, Ernesto Laclau, and Slavoj Žižek (London: Verso, 2000), 54–55.

The inherent antagonism presents an opportunity to analyze the systemic and epistemological injustices that are deeply ingrained in the constitutional framework, even as it may exacerbate polarization. Consequently, by taking into account broader socio-political conditions, Laclau's theory enables judges to engage in judicial activism that goes beyond simple textual interpretation.³³ For instance, when addressing a right to education case, a judge might create a "chain of equivalency" connecting ideas such as gender equality, free education, and high-quality education. However, this strategy must continue to be receptive to a "logic of difference," honoring various regional requirements and cultural circumstances. After that clarification, we can see that Laclau's theory provides a way to comprehend legal standards by considering the social, political, and economic settings in which they are found. This method presents judges as political agents who can address a variety of injustices and correct structural disparities that arise when legal standards deviate from the fundamental emancipatory principles of the constitution.

2.2. The Making of Education Right in Indonesia

In order to track the historical development of the right to education in Indonesia, this part will now apply Laclau's discourse theory as conceptually defined. This historical account is meant to serve as an analytical tool to show how contentious and contingent constitutional interpretation is, rather than as a solely descriptive account of constitutional evolution. The evolution of the right to education is analyzed to demonstrate how its meaning has been continuously re-articulated in response to changing socio-political settings, in keeping with Laclau's emphasis on articulation and discursive struggle.

Indonesian constitutional history illustrates that constitutional norms do not emerge with fixed meanings. Since the proclamation of independence by Sukarno and Hatta, the Indonesian Constitution has undergone several transformations shaped by changing political priorities and ideological commitments. As Wheare suggests, constitutional design and adaptation often reflect dominant beliefs or

³³ Sonja C. Grover, *Judicial Activism and the Democratic Rule of Law* (London: Springer, 2022).

negotiated compromises among competing interests within society.³⁴ Accordingly, tracing the historical articulation of the right to education allows this study to identify how different discursive formations have shaped its constitutional meaning over time.

Article 31(1) of the 1945 Constitution recognizes that every citizen has the right to education. However, the provision itself offers little guidance regarding the scope and content of this right. This textual openness has enabled ongoing contestation over its meaning, with different actors grounding their claims in the same constitutional provision. The ambiguity of Article 31(1) thus makes historical inquiry relevant, as it reveals how early constitutional framings influenced later interpretive struggles.

During the drafting of the 1945 Constitution, educational issues received limited attention, largely due to the revolutionary context in which the constitution was formulated. The urgent task of establishing the basic structure of an independent state resulted in what has often been described as a “*revolutionary grondwet*.”³⁵ Moreover, as articulated by Soekarno, the constitution was grounded in a rejection of individualism and capitalism, leaving little room for extensive debate on fundamental rights, including education. This early articulation positioned education primarily as a state duty rather than as an individual entitlement.³⁶

Nevertheless, the objective of “*educating the life of the nation*,” articulated by Soekarno during the Great Meeting of 10 July 1945 and later enshrined in the preamble of the Constitution, introduced a foundational discursive link between education and nation-building.³⁷ The initial articulation of education positioned it as a vital, collective undertaking necessary for the state's continued existence.

³⁴ K. C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1975), 67.

³⁵ Denny Indrayana, “Indonesia: In Search for a Democratic Constitution (1945–2008),” in *Constitutionalism in Southeast Asia*, ed. Clauspeter Hill and Jörg Menzel (Singapore [Singapore]: Konrad-Adenauer-Stiftung, 2008); see also Soekarno's speech at the Panitia Persiapan Kemerdekaan [Preparatory Committee for Independence] meeting on August 19, 1945, where he stated, “...ini adalah sekadar Undang-undang Dasar sementara, Undang-undang Dasar kilat, bahwa boleh dikatakan pula, inilah revolusi grondwet” [...this is merely a temporary constitution, a flash constitution, so to speak; this is a revolutionary constitution], in Sekretariat Negara Republik Indonesia [Cabinet Secretariat of the Republic of Indonesia], *Himpunan Risalah Sidang-Sidang*, 344.

³⁶ Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualisasi Pancasila* [Plenary State: Historicity, Rationality, and Actualization of Pancasila] (Jakarta: Penerbit PT Gramedia Pustaka Utama, 2017), 583.

³⁷ John Dewey, *Democracy and Education* (New York: Free Press, 1997), 233.

This perspective was subsequently formalised in the Outlines of Education and Teaching, adopted in August 1945. These foundational documents highlighted the significance of affordability and accessibility, demonstrating an early emphasis on the concrete obstacles to educational prospects.³⁸

The constitutional changes between 1949 and 1959 did not significantly alter the basic definition of the right to education. Education was mainly described as a tool for promoting national unity and consciousness, even though the 1949 Federal Constitution (*Konstitusi Republik Indonesia Serikat*) and the 1950 Provisional Constitution (*Undang-Undang Dasar Sementara 1950*) reorganized and expanded constitutional articles. It was not yet defined as an all-encompassing individual right.³⁹ The original viewpoint's tenacity demonstrates how well-established discursive constructions can withstand formal constitutional changes.

An important forum for a more direct contestation of the definition of the right to education was the Constitutional Assembly. The Constitutional Assembly (*Konstituante*) debates. Education was increasingly described as a claimable right throughout these conversations, transcending a broad state obligation. Corresponding state obligations were immediately implied by this new articulation, especially with regard to providing sufficient facilities and guaranteeing access to higher education.⁴⁰ These discussions essentially represent a change in discourse by establishing education as a right based on social justice and equality ideals.

This change was further highlighted by the constitutional amendments (1999-2002) put into place following the Reformasi era. Debates over terminology, educational costs, and state budgeting culminated in the explicit constitutional mandate requiring the state to allocate at least 20 percent of national and

³⁸ Mahkamah Konstitusi Republik Indonesia [Constitutional Court of the Republic of Indonesia], *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan—Buku IX: Pendidikan dan Kebudayaan* [Comprehensive Text of the 1945 Constitution of the Republic of Indonesia's Amendments: Background, Process, and Results of Discussion, Book IX: Education and Culture] (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 21.

³⁹ Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018), 5–7; see also P. J. Drooglever, "The Genesis of the Indonesian Constitution of 1949," *Bijdragen Tot de Taal-, Land- En Volkenkunde* [Contributions to Linguistics, Geography, and Ethnology] 153, no. 1 (January

⁴⁰ Konstituante Republik Indonesia [Constitutional Assembly of the Republic of Indonesia], *Risalah Perundingan—Sidang Ke 1, Rapat Ke 1 Sampai Ke 19* [Minutes of Negotiations—1st Session, 1st to 19th Meetings] (Jakarta: Konstituante Republik Indonesia, 1956), 25.

regional budgets to education.⁴¹ The incorporation of the right to education into the human rights chapter of the Constitution further re-articulated education as a justiciable constitutional right.⁴²

The historical evolution of the right to education is crucial because it demonstrates that this right has never held a fixed or singular meaning within Indonesian constitutional law. Instead, its substance has been continually formed through a series of articulations, negotiations, and conflicts across various historical periods. By tracking these changes, this research positions current constitutional interpretation within a larger context of discursive contestation. This, in turn, provides the necessary foundation for examining how the Constitutional Court presently interprets and solidifies the meaning of the right to education.

2.3. Interpreting the Right to Education: The Role of Constitutional Court

This study analyzes the Constitutional Court's decisions on the right to education as a constitutional struggle, considering the broader context of Indonesia's history of constitution-making and constitutional amendments. In this context, constitutional struggle refers to the process through which the meaning of constitutional rights is contested, negotiated, and temporarily stabilized through institutional and discursive confrontation, particularly in judicial review proceedings. Because the right to education is explicitly recognized in the constitution, it has become a focal point of legal and political contestation when legislative policies are perceived to undermine or restrict its realization.⁴³

As the right to education is explicitly mentioned in the constitution, various social actors—including civil society groups, students, and advocacy organizations—have sought to articulate their understanding of the right to

⁴¹ Sekretariat Jenderal MPR-RI [General Secretariat of the People's Consultative Assembly of the Republic of Indonesia], *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999–2002), Tahun Sidang 2000 Buku Satu* [Minutes of Amendments to the Constitution of the Republic of Indonesia 1945 (1999–2002), Session Year 2000, Book One] (Jakarta: Sekretariat Jenderal MPR-RI, 2008), 112–13 and 535–36.

⁴² Sekretariat Jenderal MPR-RI [General Secretariat of the People's Consultative Assembly of the Republic of Indonesia], *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999–2002), Tahun Sidang 2000 Buku Satu* [Minutes of Amendments to the Constitution of the Republic of Indonesia 1945 (1999–2002), Session Year 2000, Book One], 100.

⁴³ Neha Tripathi and Anubhav Kumar, "The Constitutional Struggle for Religious Freedom: A Comparative Study of India and Indonesia," *Constitutional Review* 8, no. 1 (May 2022): 1–36; Herlambang P. Wiratraman, "Constitutional Struggles," 321.

education by challenging statutory laws before the Constitutional Court. These challenges reflect competing attempts to fix the meaning of constitutional norms within the constitutional order. As previously noted, the Constitutional Court functions as the authoritative interpreter of the constitution, and its decisions represent a moment in which particular interpretations of constitutional rights are institutionalized. From this point, the Court's rulings are not merely applications of pre-existing norms, but outcomes of a process of meaning-making in which competing interpretations are assessed and selectively incorporated.⁴⁴

This judicial role is particularly significant because constitutional texts do not speak for themselves, nor do constitutional norms automatically actualize in social practice. Instead, their meaning must be articulated through interpretive acts that connect abstract constitutional provisions to concrete legal and social contexts.⁴⁵ Article 24C of the Indonesian Constitution empowers the Constitutional Court to conduct judicial review of legislation, thereby positioning the Court as a key site of constitutional struggle where the meaning of rights—including the right to education—is contested and provisionally settled. Consequently, the Court's decisions offer critical insights into how constitutional rights are defined, limited, and transformed through judicial interpretation.

2.3.1. Constitutional Court Decision No. 11-14-21-126 and 136/PUU-VII/2009

In Constitutional Court Decision Nos. 11-14-21-126 and 136/PUU-VII/2009, the Court was confronted with competing articulations of the constitutional right to education, particularly concerning the tension between state responsibility and the involvement of non-state actors in education provision. The Court upheld Article 53(1) of Law No. 20 of 2003 on the National Education System, which states, "*Organizers and/or formal education units established by the government or the community in the form of educational legal entities.*" The Court argued that this article does not absolve the state of its obligation to provide education. It

⁴⁴ Lee Epstein, Olga Shvetsova, and Jack Knight, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," *Law & Society Review* 35, no. 1 (2001): 117–63.

⁴⁵ Fritz Edward Siregar, "Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)," *Constitutional Review* 1, no. 1 (March 2015): 1–27; Simon Butt, "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?," *Asian Journal of Comparative Law* 14, no. 1 (March 2019): 147–74.

emphasized that the article does not limit access to education, increase education costs, or change the educational paradigm in a way that hinders citizens' right to education, nor does it make education a private good.⁴⁶

The Court also defended Article 12(2)(b) of Law No. 20 of 2003, which allows citizens to participate in education costs. The term “participate” was interpreted by the Court as not diminishing the state's responsibility to cover the costs of education. Instead, it signifies the state's willingness to accept community contributions to education costs, especially when the state cannot fulfill the entire financial burden.⁴⁷ The Court observed that the clause, “*except for students who are exempt from these obligations in accordance with applicable laws and regulations*,” embodies the principle of balance. This ensures equal opportunities for all students by requiring those who can afford to contribute to do so, while exempting those who cannot.⁴⁸

The Court's decision established an equivalence between the right to education and the principles of accessibility, affordability, and state responsibility, while also integrating community involvement as a supportive factor.⁴⁹ The Court prevented a polarization between liberalization and constitutional rights—and thus countered the petitioners' effort to create an antagonism between “public education” and “market-oriented education”—by treating the creation of educational legal entities and cost-sharing arrangements as elements that complement, rather than contradict, state duties.

In order to protect current distinctions within the right to education, the Court simultaneously applied the concept of difference. By emphasizing exemptions for economically disadvantaged pupils, the Court prevented the

⁴⁶ Constitutional Court of the Republic of Indonesia, Decision No. 11-14-21-126 and 136/PUU-VII/2009 regarding the review of Law No. 20 of 2003 on the National Education System and Law No. 9 of 2009 on Educational Legal Entities, 399.

⁴⁷ Constitutional Court of the Republic of Indonesia, Decision No. 11-14-21-126 and 136/PUU-VII/2009 regarding the review of Law No. 20 of 2003 on the National Education System and Law No. 9 of 2009 on Educational Legal Entities, 379.

⁴⁸ Constitutional Court of the Republic of Indonesia, Decision No. 11-14-21-126 and 136/PUU-VII/2009 regarding the review of Law No. 20 of 2003 on the National Education System and Law No. 9 of 2009 on Educational Legal Entities, 139.

⁴⁹ Constitutional Court of the Republic of Indonesia, Decision No. 11-14-21-126 and 136/PUU-VII/2009 regarding the review of Law No. 20 of 2003 on the National Education System and Law No. 9 of 2009 on Educational Legal Entities, 378.

constitutional subjects from being treated equally, making a distinction between those who can and cannot make financial contributions.⁵⁰ The Court was able to balance the necessity to take social and economic variety into account while implementing the right to education with the universality of that right because of this differentiation.

Although the Court's reasoning confirms that legal-entity status and educational autonomy are not intrinsically illegal, it nevertheless highlights a serious internal conflict. The Court acknowledged that financial autonomy presents a risk of encouraging colleges to put income generation ahead of educational accessibility and quality. The possibility for market-based reasoning to conflict with the constitutional requirement of equal educational access is a latent animosity in the Court's view that is highlighted by this compromise.

A temporary definition of the right to education based on shared responsibility was established by the Court's ruling. The state can use society resources without renouncing its constitutional duties, even though it is still the primary duty-bearer. By combining conflicting signifiers—state responsibility, community involvement, affordability, and quality—into a cohesive constitutional narrative, this interpretation temporarily stabilizes the meaning of education while not resolving the constitutional dispute over it. Consequently, this exemplifies constitutional interpretation as a space for discursive struggle where the meaning of rights is negotiated, temporarily fixed, and constantly subject to future challenge.

2.3.2. Constitutional Court Decision No. 111/PUU-X/2012

A major constitutional dispute over the interpretation of the right to education was raised by Constitutional Court Decision No. 111/PUU-X/2012, particularly with regard to the boundary between governmental duty and individual financial burden in higher education. The Court was presented with opposing viewpoints: one saw student loans as a workable way to increase access, while the other

⁵⁰ Constitutional Court of the Republic of Indonesia, Decision No. 11-14-21-126 and 136/PUU-VII/2009 regarding the review of Law No. 20 of 2003 on the National Education System and Law No. 9 of 2009 on Educational Legal Entities, 391–97.

described them as the state's failure to uphold its constitutional duty under Article 31 of the 1945 Constitution.⁵¹

In that decision, the Court created a temporary and conditional framework for the right to education rather than completely rejecting the student loan program.⁵² The Court reaffirmed that interest-free student loans cannot take precedence over the state's fundamental obligation to fund higher education, even though they were temporarily approved as a transitional measure. Discursively, the Court established a connection between social justice, equality, and state accountability and the right to education. As a result, student loans were seen as an additional signal that was inevitably subordinate to these fundamental constitutional obligations.

There is an inherent inconsistency in the Court's reasoning that mentioned above. The Court condemned the normality of burdening people with costs, particularly where such measures threaten to exclude economically disadvantaged populations, while acknowledging the reality of budgetary constraints and policy pragmatism. Importantly, the Court sought to keep the loan system from taking over as the predominant, comprehensive definition of the right to education by requiring subsidies to increase with growing national capacity.

Therefore, the constitutional right to education was temporarily defined as an entitlement subject to progressive realization and the principle of non-retrogression in Decision No. 111/PUU-X/2012. This decision set the limits of permissible state policy even if it did not settle the constitutional dispute over education finance. In particular, the Court reiterated that financial constraints cannot always be used as an excuse to postpone the fulfillment of fundamental rights. As a result, this ruling serves as an example of how judicial interpretation serves as a battlefield for constitutional conflict, where conflicting policy justifications are discussed and ranked according to constitutional norms.

⁵¹ Constitutional Court of the Republic of Indonesia, Decision No. 111/PUU-X/2012 regarding the judicial review of Law No. 12 of 2012 on Higher Education against the 1945 Constitution of the Republic of Indonesia, 122.

⁵² Constitutional Court of the Republic of Indonesia, Decision No. 111/PUU-X/2012 regarding the judicial review of Law No. 12 of 2012 on Higher Education against the 1945 Constitution of the Republic of Indonesia, 126.

2.3.3. Constitutional Court Decision No. 103/PUU-X/2012

In Constitutional Court Decision No. 103/PUU-X/2012, a pivotal issue raised was the establishment of *Perguruan Tinggi Negeri Berbadan Hukum* (PTN-BH), or Public Universities with Legal Entity Status. The petitioners contended that the PTN-BH model potentially enables the state to retreat from its constitutional obligation to provide affordable and equitable education. As autonomous legal entities, PTN-BH institutions are granted broad authority over administrative and financial management, which could open space for the commercialization of higher education and the reduction of direct state funding.⁵³ In this case, the Court re-articulated the meaning of the right to education by positioning university autonomy within a hierarchical constitutional framework in which state responsibility remains primary.⁵⁴

Discursively, the Court rejected the petitioners' attempt to draw a boundary between the constitutional right to education and PTN-BH. The integration of PTN-BH is viewed as an analogous chain connecting autonomy, regulation, and public responsibility rather than an indication of a governmental retreat. According to this interpretation, institutional autonomy is a managerial framework that is constantly subject to state supervision. As a result, the state is constituted as both a guarantor and a regulator, fulfilling its constitutional duty while allowing for the presence of many institutional forms.

At the same time, the Court limited the permissible amount of cost-sharing by applying a differentiation reasoning. The Court upheld limited public support while prohibiting a general application of shifting expenses to students by making a distinction between basic and higher education. By removing unduly onerous financial requirements from the constitutional interpretation of the right to education, this distinction helps to preserve the meaning of accessibility.

Based on this reasoning, the Court tentatively established the right to education as a public utility based on this logic. Although institutional autonomy

⁵³ Constitutional Court of the Republic of Indonesia, Decision No. 103/PUU-X/2012 regarding the review of Law No. 12 of 2012 on Higher Education, 31.

⁵⁴ Constitutional Court of the Republic of Indonesia, Decision No. 103/PUU-X/2012 regarding the review of Law No. 12 of 2012 on Higher Education, 216.

is acknowledged, market logic cannot take precedence over this right. The decision does not eliminate the potential for commercialization; rather, it controls this risk by subjecting institutional autonomy to constitutional goals and regulatory supervision. As a result, Decision No. 103/PUU-X/2012 serves as an example of constitutional interpretation as a contentious arena where conflicting opinions—treating education as an economic endeavor vs a public service—are discussed and ranked in accordance with constitutional norms.

2.4. The Court Decision and the Floating Signifiers in the-Making

The Constitutional Court's decisions demonstrate that there is no clear, consistent definition of the right to education. The Court's decisions alternate between upholding the state's primary responsibility for this right and characterizing it as a shared duty in which citizens are also required to participate. This variation highlights how constitutional rights are contested and changeable, making them difficult to interpret definitively. Tushnet points out that various political and social groups define rights according to their differing ideological commitments, demonstrating that the definitions of rights are not neutral nor widely accepted.⁵⁵

Political disputes and opposing ideologies constantly affect the meaning of constitutional rights, which are neither fixed nor apolitical. Divergent views of rights demonstrate this. Social justice movements, for instance, usually emphasize economic and social rights including housing, healthcare, and education. Market-oriented perspectives, on the other hand, place more emphasis on property rights and freedom from governmental intervention. These variations show how rights are continuously debated within different ideological contexts.

The inherent multiplicity of a single concept, where it holds several, even contradictory, meanings, is a well-established subject in social theory. This notion is consistent with Derrida's concept of "supplementarity," which holds that meaning is dependent on things outside of the text itself rather than being entirely complete or self-sufficient.⁵⁶ As a result, constitutional rights are only

⁵⁵ Mark Tushnet, *The New Constitutional Order* (New Jersey: Princeton University Press, 2003).

⁵⁶ Jacques Derrida, *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1997), 27–73 and 144–49.

meaningful in particular social and political settings. Because of this contextual dependence, many interpretations can coexist at the same time, preventing any one interpretation from ever being definitively closed.

The notion that the social realm is created through discursive formations based on power relations is supported by Foucault's discourse analysis.⁵⁷ As a result, meaning—including that of rights—is produced through ongoing placement and repositioning within discourses that are often precarious and contested. Therefore, the prevailing power structures rather than innate legal reasoning determine the recognized, official interpretation.⁵⁸ When it comes to the right to education, this means that its definition is fluid and varies depending on how it is expressed in institutional, political, and legal contexts.

The essential intellectual framework for understanding the intrinsic instability of constitutional meaning is provided by Laclau's discourse theory. According to this idea, social and political meanings are never set in stone; rather, any stability is always tentative, context-dependent, and changeable.⁵⁹ Therefore, it is important to see constitutional rights—like the right to education—as arenas where competing forces compete to use hegemonic contestation to enforce a fixed interpretation. This situation, which Laclau refers to as a “surplus of meaning,” is crucial for political language because it keeps any one interpretation from becoming totally dominant.⁶⁰ The fundamental fabric of “the social” would become inarticulable without this essential surplus.

After that exploration, it is preferable to think of constitutional rights as “floating signifiers”—words with an abundance of meaning that can be interpreted in a variety of ways. Their importance is dynamically determined by their connections to more expansive areas of discourse rather than being set by the constitutional text.⁶¹ As a result, there is no intrinsic or ultimate meaning

⁵⁷ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings—1972–1977* (New York: Pantheon, 1980), 93.

⁵⁸ Foucault, *Power/Knowledge*, 98.

⁵⁹ Laclau and Mouffe, *Hegemony and Socialist Strategy*, 106.

⁶⁰ Ernesto Laclau, *Emancipation(s)* (London: Verso, 1996), 39.

⁶¹ Ernesto Laclau, “The Impossibility of Society,” *Canadian Journal of Political and Social Theory* 15, no. 1 (May 1983): 22; Ernesto Laclau, “Metaphor and Social Antagonism,” in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (London: MacMillan Education Ltd, 1988), 254.

to rights like the right to education. Rather, their definition is continuously disputed by institutional activities, political pressure, and court decisions. All constitutional rights, which are enmeshed in an ongoing discursive debate, are subject to this flexibility. As a result, constitutional rights should be viewed as discursive creations whose meanings are always changing due to ongoing constitutional struggles rather than as unchanging, permanent promises.

2.5. Floating Signifiers in Constitutional Interpretation: A Double-Edged Sword

To understand floating signifiers' broader importance, especially in the context of Indonesian constitutional court debate, it is first required to comprehend their theoretical underpinnings. According to Laclau, floating signifiers are inherently ambiguous or meaningless, which eventually leads to conflicting forces trying to define and contest them.⁶² Through articulatory activities, where meanings are created using the logic of difference and equivalency, this competition is communicated. These processes are intricately linked to political and ideological conflicts; they are neither impartial nor independent. These articulatory methods are used by many actors to influence how constitutional ideas are interpreted and used in accordance with their own goals and worldviews.

At the center of this process lies what Laclau calls the 'nodal point'—a privileged signifier that temporarily anchors meaning within a discursive formation.⁶³ The nodal point enables the construction of a chain of equivalence among otherwise distinct elements, providing a degree of coherence to the discourse.⁶⁴ Following Jessop (and building on Laclau's insights), we can understand the nodal point as the locus of hegemony: it exercises a discursive power capable of limiting the endless play of meaning by privileging certain

⁶² Ernesto Laclau, *Emancipation(s)*, 53.

⁶³ Ernesto Laclau and Chantal Mouffe, preface to the second edition of *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 2001), xi. For examples, see Georg Glasze, "The Discursive Constitution of a World-Spanning Region and the Role of Empty Signifiers: The Case of Francophonie," *Geopolitics* 12, no. 4 (August 2007): 656–79; Claus Offe, "Governance: An 'Empty Signifier'?", *Constellations* 16, no. 4 (November 2009): 550–62. For Lacan's conceptual framework, see Jacques Lacan, *Écrits: A Selection* (New York: Routledge, 2001), 117; see also Yannis Stavrakakis, *The Lacanian Left: Psychoanalysis, Theory, Politics* (Edinburg [Edinburgh]: Edinburgh University Press, 2007), 67.

⁶⁴ Damian O'Doherty, "Missing Connexions: The Politics of Airport Expansion in the United Kingdom," *Organization* 22, no. 3 (September 2015): 418–31.

interpretations over others.⁶⁵ Through its hegemonic function, the nodal point suppresses competing meanings and stabilizes a particular interpretation within the field of discourse.⁶⁶

The importance of this framework is found in how it affects constitutional interpretation. By using “nodal points,” judicial interpretation transforms constitutional adjudication into a process that generates and institutionalizes hegemonic meanings rather than a neutral application of legal reason. Therefore, constitutional interpretation has two possible outcomes: either it is exploitative, supporting prevailing ideologies and denying constitutional legitimacy to dissenting claims, or it is emancipatory, expanding protection and inclusion through the rearticulation of rights.

The Court's choice of “nodal points”—such as “state responsibility,” “affordability,” or “public interest”—is very important. This decision essentially establishes which claims are dismissed as excessive or illogical and which are acknowledged as valid constitutional rights. Raising these ideas can either give marginalized people constitutional chances or, on the other hand, use the well-known rhetoric of constitutional balance to defend laws that perpetuate inequality. Therefore, the fundamental question is not whether the Court's interpretation of the Constitution is political, but rather how its decisions define the boundaries of constitutional legitimacy.

2.5.1. Emancipatory Interpretation of Rights

One implication of understanding constitutional rights as floating signifiers is that their interpretation remains open to emancipatory rearticulation, particularly in contexts marked by structural inequality. In this sense, an emancipatory interpretation does not claim that rights inherently liberate marginalized groups, but rather that their meaning can be redefined through contestation within

⁶⁵ Bob Jessop, “Critical Discourse Analysis in Laclau and Mouffe's Post-Marxism,” *Simbiótica: Revista Eletrônica* [Simbiótica: Electronic Journal] 6, no. 2 (2019): 8–30.

⁶⁶ In fact, Laclau himself admitted that the articulatory project was a discursive struggle in which signifiers contested to hegemonize other signifiers, with the result that particular meanings came to stand for the discourse as a whole. See Ernesto Laclau, *Politics and Ideology in Marxist Theory: Capitalism-Fascism-Populism* (London: NLB, 1977).

specific institutional settings.⁶⁷ Rights are thus not treated as fixed or universal truths, but as contingent outcomes of articulatory practices that reflect particular social, historical, and political conditions.

This viewpoint, which focuses on the right to education, shows how constitutional interpretation can either increase or decrease access depending on the precise interpretations the Court sets and articulates. Emancipation-focused interpretations of educational rights change the foundation for seeing claims to education as legally legitimate, but they do not automatically resolve issues of inequality or exclusion.⁶⁸ For example, identifying education as a social right associated with equality and governmental responsibility allows for debates about access, affordability, and nondiscrimination, but it does not ensure that these claims will be completely realized in practice.

This view reimagines rights as potent tools of social change, going beyond the conventional liberal understanding of rights as merely individual guarantees or protections against governmental authority.⁶⁹ According to this approach, rights are active claims rather than passive legal protections. As powerful tools to demand political, economic, and cultural change, these claims enable people and communities to exercise their agency and contest unjust power dynamics. As a result, communities actively shape, use, and assert their rights in their continuous fight for justice rather than just having the state award them.

The emancipatory interpretation of rights aims to contest and dismantle systemic forms of domination—be they political, economic, or cultural. Emancipation, in this context, signifies liberation from these entrenched structures.⁷⁰ Interpreting constitutional rights through this lens is made possible

⁶⁷ Ingolfur Blühdorn, Felix Butzlaff, and Margaret Haderer, "Emancipatory Politics at its Limits? An Introduction," *European Journal of Social Theory* 25, no. 1 (September 2022): 3–25.

⁶⁸ Allan Hutchinson, "The Politics of Constitutional Law: A Critical Approach," in *The Oxford Handbook of the Canadian Constitution*, ed. Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers (Oxford: Oxford University Press, 2017), 989–1006.

⁶⁹ Marco Perolini, "Limited Tools for Emancipation?," *Sociology* 58, no. 2 (July 2024): 386–402, Saori Murakami, "Emancipation Through Human Rights Practice: New Epistemology From Rural West Bengal," in *Human Rights Strategies: Benefits and Drawbacks*, ed. Ingrid Westendorp (London: Edward Elgar, 2024), 197–218; Bertus de Villiers, "Breathing Life into the Constitution: the Transformative Role of Courts to Give a Unique Identity to a Constitution," *Constitutional Review* 9, no. 1 (May 2023): 109–141.

⁷⁰ Mark Tushnet, "Constitution as Recommendation," *Philosophy & Social Criticism* 50, no. 7 (June 2024): 1023–1033.

in part by the role of constitutional courts.⁷¹ The concept of judicial activism, for example, can be understood as a form of counter-hegemonic practice. Through their interpretive authority, courts have the power to reshape the meaning and scope of rights. From this perspective, constitutional courts function not as agents of emancipation per se, but as institutional arenas in which competing articulations of rights are selectively incorporated. Different interpretations of the right to education can be temporarily favored by judicial interpretation, which simultaneously leads to the marginalization of other possible understandings.

However, this study focuses on how the Constitutional Court's interpretation of the right to education determines the boundaries of constitutional legitimacy rather than emancipatory interpretation as a normative goal attained by judicial activism. In particular, it examines which demands are accepted as constitutional claims, which are not, and how the limits of governmental authority are established. This approach accurately demonstrates how constitutional interpretation impacts the arena of battle over access to education in Indonesia by focusing on the discursive creation of educational rights, without exaggerating the real influence of the court.

2.5.2. Exploitative Interpretation of Rights

An exploitative interpretation of constitutional rights is one that corrupts the original intent of these rights to benefit powerful, dominant groups, frequently harming vulnerable or marginalized communities.⁷² This method twists the language of rights to solidify existing hierarchies and justify actions that sustain injustice and oppression. For example, when considering economic rights, exploitation often happens when they are narrowly defined as purely individual duties, instead of collective responsibilities that the state must ensure. Such a perspective serves to perpetuate wealth disparity and undercuts efforts to confront

⁷¹ Mark Tushnet, "Forms of Judicial Review as Expressions of Constitutional Patriotism," *Law and Philosophy* 22, no. 3/4 (July 2003): 353–79.

⁷² Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021), 56–80; Michal Kovalčík, "The Instrumental Abuse of Constitutional Courts: How Populists Can Use Constitutional Courts Against the Opposition," *The International Journal of Human Rights* 26, no. 7 (August 2022): 1160–80; Kevin Y. L. Tan, "Interpreting the Constitution: The Use and Abuse of History," *International Journal of Constitutional Law* 20, no. 5 (December 2022): 1958–81.

systemic oppression and economic injustice. In this light, economic rights lose their power as tools for liberation and are instead transformed into instruments for validating structural inequality.

The selective implementation of constitutional rights, which frequently ignores the intricate historical, social, and cultural realities that determine communities' ability to use them, is an example of an exploitative pattern.⁷³ Interpretations that prioritize rights that support economic interests—such as the right to property or freedom of enterprise—at the expense of social and economic rights, like housing, health care, or education, are blatantly biased. This tendency neglects underprivileged populations in favor of politically and economically dominant elite groups. One obvious example is the privatization of public resources, where the transfer of public assets to private companies is sometimes justified by citing the right to property, hence restricting the general public's access to necessary services.

Discourse theory by Laclau and Mouffe holds that interpretations of rights that favor dominant social groups serve as tactics for upholding hegemony. These exploitative readings effectively repress or marginalize counter-hegemonic calls for justice and equality by purposefully reinforcing a certain "chain of equivalency" that suits the interests of those in positions of power. As a result, rights are conditional tools that can be used to maintain current power arrangements rather than being intrinsically liberated or progressive. As a result, the debate over rights is a contentious arena where different societal forces compete to define the extent and meaning of constitutional provisions. These narratives are usually successfully shaped by people in positions of authority, guaranteeing that the rights framework upholds their authority and advances their own agendas.

Rights are frequently severed from the real, lived experiences of communities, especially the most disadvantaged, by exploitative interpretations. People's material needs and realities are separated from their rights, making them formal

⁷³ Siri Gloppen and Rachel Sieder, "Courts and the Marginalized: Comparative Perspectives," *International Journal of Constitutional Law* 5, no. 2 (April 2007): 183–86.

and abstract. The right to health, for instance, is a fundamental guarantee that often contrasts with the social reality in which unfair policies, such as the commercialization of healthcare, undermine access to care. Due to this discrepancy between the constitution's promise and social reality, rights are reduced to meaningless platitudes and lose their true significance. As a result, the law becomes a tool that legitimizes policies that exacerbate inequality rather than a means of resolving social problems.⁷⁴

It has not been noted that the Indonesian Constitutional Court has officially adopted an exploitative interpretation of constitutional rights. However, there is still room for these interpretations, especially when it comes to indirect or latent judicial reasoning. Essentially, the Indonesian Constitution's normative foundation is based on meeting fundamental human needs and preserving human dignity; it does not support exploitative interpretations. This fundamental idea upholds the Constitution's function as a legal guarantee for the equality and well-being of all people, thereby avoiding the manipulation of rights for the advantage of strong actors. Sukarno, powerfully summarized this ethos with the rhetorical question: "What is the use of a groundwet if it cannot fill the stomachs of those on the verge of starvation?" [*apa guna grondwet itu kalau ia tak dapat mengisi perut orang yang hendak mati kelaparan*].⁷⁵

Constitutional rights, including the right to education, are susceptible to being appropriated by influential parties due to their interpretation as "floating signifiers." This vulnerability is demonstrated by current discussions in which dominant parties employ discursive hegemony to impose their agendas—which frequently coincide with neoliberal or capitalist frameworks—into the definition of the right to education. As a result, these prevailing narratives provide the impression that there is widespread support for constitutional rights, even if they actively uphold exploitative systems.

⁷⁴ Evan Rosevear and Ran Hirschl, "Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities," in *The Legal Protection of Human Rights: Sceptical Essays*, ed. Tom Campbell, K. D. Ewing, and Adam Tomkins (Oxford: Oxford University Press, 2011), 207–28; Rosalind Dixon and Julie Suk, "Liberal Constitutionalism and Economic Inequality," *The University of Chicago Law Review* 85, no. 2 (2018): 369–402.

⁷⁵ Sekretariat Negara Republik Indonesia [Cabinet Secretariat of the Republic of Indonesia], *Himpunan Risalah Sidang-Sidang*, 230–31.

III. CONCLUSION

As demonstrated by the Constitutional Court's interpretations in several decisions, the meaning of the right to education in Indonesian constitutional law is not exclusively determined by the text of the constitution. According to Laclau's discourse theory, this right serves as a floating signifier, with the Court's judicial articulations serving to temporarily stabilize its meaning despite conflicting interpretations in constitutional adjudication. According to this viewpoint, the differences seen in the Court's rulings do not indicate doctrinal failure or inconsistency. Rather, they represent the contingency that is inherent in the meaning of the constitution. Instead of ending contestation, these judicial articulations temporarily define the meaning of the right in certain sociopolitical settings.

This study contends that the Constitutional Court's main responsibility is to define the limits of constitutional intelligibility by considering constitutional interpretation as a site of discursive conflict. This entails figuring out which claims, and under what circumstances, are constitutional rights. Rather than being a normative assessment of the Court's intentions, the analytical distinction between "emancipatory" and "exploitative" readings is a tool to analyze how various judicial articulations either broaden or narrow the scope of potential constitutional claims. Therefore, Indonesian constitutional rights, especially the right to education, are best understood through the prism of Laclau's discourse theory as dynamic results of an ongoing constitutional struggle shaped by judicial articulation within larger political and social dynamics rather than as permanent, static guarantees.

DECLARATION

During the preparation of this manuscript, Grammarly was used exclusively to review and improve the languages in this manuscript. All AI-assisted output was reviewed and revised by the authors. The authors remain fully responsible for the originality, accuracy, and scientific integrity of the manuscript.

BIBLIOGRAPHY

- Ackerman, Bruce. *The Future of Liberal Revolution*. London: Yale University Press, 1992.
- Ahmad, Ahmad, Fence M. Wantu, and Dian Ekawaty Ismail. "Convergence of Constitutional Interpretation to the Test of Laws Through a Constitutional Dialogue Approach." *Jurnal Konstitusi* 20, no. 3 (September 2023): 514–35.
- Blühdorn, Ingolfur, Felix Butzlaff, and Margaret Haderer. "Emancipatory Politics at Its Limits? An Introduction." *European Journal of Social Theory* 25, no. 1 (September 2022): 3–25.
- Butt, Simon. "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?" *Asian Journal of Comparative Law* 14, no. 1 (March 2019): 147–74.
- Butt, Simon, and Tim Lindsey. *Indonesian Law*. Oxford: Oxford University Press, 2018.
- de Villiers, Bertus. "Breathing Life into the Constitution: The Transformative Role of Courts to Give a Unique Identity to a Constitution." *Constitutional Review* 9, no. 1 (May 2023): 109–41.
- Constitutional Court of the Republic of Indonesia. Decision No. 103/PUU-X/2012 regarding the Review of Law No. 12 of 2012 on Higher Education. 2012.
- Constitutional Court of the Republic of Indonesia. Decision No. 11-14-21-126 and 136/PUU-VII/2009 regarding the Judicial Review of Law No. 20 of 2003 on the National Education System and Law No. 9 of 2009 on Educational Legal Entities. 2009.
- Constitutional Court of the Republic of Indonesia. Decision No. 111/PUU-X/2012 regarding the Judicial Review of Law No. 12 of 2012 on Higher Education against the 1945 Constitution of the Republic of Indonesia. 2012.
- Constitutional Court of the Republic of Indonesia. Decision No. 35/PUU-XXI/2023 regarding the Judicial Review of Law No. 27 of 2007 on Coastal and Small Island Area Management in conjunction with Law No. 1 of 2014

on Amendments to Law No. 27 of 2007 on Coastal and Small Island Area Management. 2023.

Constitutional Court of the Republic of Indonesia. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan—Buku IX: Pendidikan dan Kebudayaan* [Comprehensive Text of the Amendments to the 1945 Constitution of the Republic of Indonesia: Background, Process, and Results of Discussion—Book IX: Education and Culture]. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010.

Dewan Perwakilan Rakyat Republik Indonesia [House of Representatives of the Republic of Indonesia]. “Jangan sampai Kenaikan UKT Bebani Mahasiswa Sampai Tidak Mampu Kuliah Lagi [Do Not Let the Increase in Single Tuition Fees Burden Students to the Point That They Can No Longer Afford to Study].” Accessed May 16, 2024. <https://www.dpr.go.id/berita/detail/id/49518/t/Jangan%20sampai%20Kenaikan%20UKT%20Bebani%20Mahasiswa%20Sampai%20Tidak%20Mampu%20Kuliah%20Lagi>

Dewey, John. *Democracy and Education*. New York: Free Press, 1997.

Derrida, Jacques. *Of Grammatology*. Baltimore: Johns Hopkins University Press, 1997.

Dixon, Rosalind, and David Landau. *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*. Oxford: Oxford University Press, 2021.

Dixon, Rosalind, and Julie Suk. “Liberal Constitutionalism and Economic Inequality.” *The University of Chicago Law Review* 85, no. 2 (2018): 369–402.

Drooglever, P. J. “The Genesis of the Indonesian Constitution of 1949.” *Bijdragen Tot de Taal-, Land- En Volkenkunde* [Contributions to Linguistics, Geography, and Ethnology] 153, no. 1 (January 1997): 65–84.

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.

- Epstein, Lee, Olga Shvetsova, and Jack Knight. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law & Society Review* 35, no. 1 (2001): 117–63.
- Foucault, Michel. *Power/Knowledge: Selected Interviews and Other Writings—1972–1977*. New York: Pantheon, 1980.
- Glasze, Georg. "The Discursive Constitution of a World-Spanning Region and the Role of Empty Signifiers: The Case of Francophonie." *Geopolitics* 12, no. 4 (August 2007): 656–79.
- Gloppen, Siri, and Rachel Sieder. "Courts and the Marginalized: Comparative Perspectives." *International Journal of Constitutional Law* 5, no. 2 (April 2007): 183–86.
- Grover, Sonja C. *Judicial Activism and the Democratic Rule of Law*. London: Springer, 2022.
- Hapsoro, Fakhris Lutfianto, and Ismail Ismail. "Interpretasi Konstitusi dalam Pengujian Konstitusionalitas untuk Mewujudkan the Living Constitution [Constitutional Interpretation in Constitutional Review to Realize the Living Constitution]." *Jurnal Hukum & Pembangunan* 50, no. 4 (December 2020): 995–1005.
- Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. London: Harvard University Press, 2004.
- Hutchinson, Allan. "The Politics of Constitutional Law: A Critical Approach." In *The Oxford Handbook of the Canadian Constitution*, edited by Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers, 989–1006. Oxford: Oxford University Press, 2017.
- Indrayana, Denny. "Indonesia: In Search for a Democratic Constitution (1945–2008)." In *Constitutionalism in Southeast Asia*, edited by Clauspeter Hill and Jörg Menzel. Singapore: Konrad-Adenauer-Stiftung, 2008.
- Jessop, Bob. "Critical Discourse Analysis in Laclau and Mouffe's Post-Marxism." *Simbiótica: Revista Eletrônica* [Simbiótica: Electronic Journal] 6, no. 2 (2019): 8–30.

- Kelsen, Hans. *Pure Theory of Law*. London: University of California Press, 1967.
- Kementerian Pendidikan dan Kebudayaan [Ministry of Education and Culture]. “Kemendikbudristek Dorong Perguruan Tinggi Tetapkan Uang Kuliah Tunggal dengan Bijak dan Berkeadilan [The Ministry of Education, Culture, Research, and Technology Encourages Universities to Set Single Tuition Fees Wisely and Fairly].” Accessed May 22, 2024. <https://www.kemdikbud.go.id/main/blog/2024/05/kemendikbudristek-dorong-perguruan-tinggi-tetapkan-uang-kuliah-tunggal-dengan-bijak-dan-berkeadilan>.
- Kompas. “Turunkan Biaya Kuliah di Perguruan Tinggi Negeri [Lower Tuition Fees at State Universities].” Accessed May 19, 2024. https://www.kompas.id/baca/humaniora/2024/05/19/turunkan-biaya-kuliah-di-perguruan-tinggi-negeri?open_from=Tagar_Page.
- Konstituante Republik Indonesia [Constitutional Assembly of the Republic of Indonesia]. *Risalah Perundingan—Sidang Ke 1, Rapat Ke 1 Sampai Ke 19* [Minutes of Deliberations—1st Session, 1st to 19th Meetings]. Jakarta: Konstituante Republik Indonesia, 1956.
- Kovalčík, Michal. “The Instrumental Abuse of Constitutional Courts: How Populists Can Use Constitutional Courts Against the Opposition.” *The International Journal of Human Rights* 26, no. 7 (August 2022): 1160–80.
- Lacan, Jacques. *Écrits: A Selection*. New York: Routledge, 2001.
- Laclau, Ernesto. *Emancipation(s)*. London: Verso, 1996.
- Laclau, Ernesto. “Identity and Hegemony: The Role of Universality in the Constitution of Political Logics.” In *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, edited by Judith Butler, Ernesto Laclau, and Slavoj Žižek. London: Verso, 2000.
- Laclau, Ernesto. “Metaphor and Social Antagonism.” In *Marxism and the Interpretation of Culture*, edited by Cary Nelson and Lawrence Grossberg. London: MacMillan Education Ltd, 1988.
- Laclau, Ernesto. *On Populist Reason*. London: Verso, 2005.

- Laclau, Ernesto. *Politics and Ideology in Marxist Theory: Capitalism-Fascism-Populism*. London: NLB, 1977.
- Laclau, Ernesto. "The Impossibility of Society." *Canadian Journal of Political and Social Theory* 15, no. 1 (May 1983): 22.
- Laclau, Ernesto, and Chantal Mouffe. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*. London: Verso Books, 2001.
- Latif, Yudi. *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualisasi Pancasila* [Plenary State: Historicity, Rationality, and Actualization of Pancasila]. Jakarta: Penerbit PT Gramedia Pustaka Utama, 2017.
- Mertokusumo, Sudikno. *Penemuan Hukum: Sebuah Pengantar* [Rechtsvinding: An Introduction]. Yogyakarta: Universitas Atma Jaya Yogyakarta, 2010.
- Motala, Ziyad, and Cyril Ramaphosa. *Constitutional Law: Analysis and Cases*. Oxford: Oxford University Press, 2002.
- Murakami, Saori. "Emancipation Through Human Rights Practice: New Epistemology From Rural West Bengal." In *Human Rights Strategies: Benefits and Drawbacks*, edited by Ingrid Westendorp, 197–218. London: Edward Elgar, 2024.
- O'Doherty, Damian. "Missing Connexions: The Politics of Airport Expansion in the United Kingdom." *Organization* 22, no. 3 (September 2015): 418–31.
- Offe, Claus. "Governance: An 'Empty Signifier'?" *Constellations* 16, no. 4 (November 2009): 550–62.
- Paulsen, Michael Stokes. "How to Interpret the Constitution (And How Not To)." *The Yale Law Journal* 115, no. 8 (June 2006): 2037–66.
- Perolini, Marco. "Limited Tools for Emancipation?" *Sociology* 58, no. 2 (July 2024): 386–402.
- Rahardjo, Satjipto. *Ilmu Hukum* [Jurisprudence]. Bandung: Citra Aditya Bakti, 2006.
- Ribeiro, Gonçalo de Almeida. "What Is Constitutional Interpretation?" *International Journal of Constitutional Law* 20, no. 3 (July 2022): 1130–61.

- Rosevear, Evan, and Ran Hirschl. "Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities." In *The Legal Protection of Human Rights: Sceptical Essays*, edited by Tom Campbell, K. D. Ewing, and Adam Tomkins, 207–28. Oxford: Oxford University Press, 2011.
- Schmitt, Carl. *The Concept of the Political*. Chicago: University of Chicago Press, 2007.
- Sekretariat Jenderal MPR-RI [General Secretariat of the People's Consultative Assembly of the Republic of Indonesia]. *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999–2002), Tahun Sidang 2000 Buku Satu* [Minutes of Amendments to the 1945 Constitution of the Republic of Indonesia (1999–2002), Session Year 2000, Book One]. Jakarta: Sekretariat Jenderal MPR-RI, 2008.
- Sekretariat Negara Republik Indonesia [Cabinet Secretariat of the Republic of Indonesia]. *Himpunan Risalah Sidang-Sidang dari Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) dan Panitia Persiapan Kemerdekaan Indonesia* [Collection of Minutes of Sessions from the Investigating Committee for Preparatory Work for Independence and the Preparatory Committee for Indonesian Independence]. Jakarta: Sekretariat Negara Republik Indonesia, 1959.
- Siregar, Fritz Edward. "Indonesia Constitutional Court Constitutional Interpretation Methodology (2003–2008)." *Constitutional Review* 1, no. 1 (March 2015): 1–27.
- Stavrakakis, Yannis. *The Lacanian Left: Psychoanalysis, Theory, Politics*. Edinburgh: Edinburgh University Press, 2007.
- "Students Petition for Judicial Review of the Regulation of the Minister of Education, Culture, Research, and Technology of the Republic of Indonesia No. 2 of 2024 on *Standar Satuan Biaya Operasional Pendidikan Tinggi pada Perguruan Tinggi Negeri di Lingkungan Kementerian Pendidikan, Kebudayaan,*

- Riset, dan Teknologi* [Standards for Operational Costs for Higher Education at State Universities within the Ministry of Education, Culture, Research, and Technology], against Law No. 12 of 2012 on Higher Education." Unpublished petition, 2024.
- Tan, Kevin Y. L. "Interpreting the Constitution: The Use and Abuse of History." *International Journal of Constitutional Law* 20, no. 5 (December 2022): 1958–81.
- Tripathi, Neha, and Anubhav Kumar. "The Constitutional Struggle for Religious Freedom: A Comparative Study of India and Indonesia." *Constitutional Review* 8, no. 1 (May 2022): 1–36.
- Tushnet, Mark. "Constitution as Recommendation." *Philosophy & Social Criticism* 50, no. 7 (June 2024): 1023–33.
- Tushnet, Mark. "Forms of Judicial Review as Expressions of Constitutional Patriotism." *Law and Philosophy* 22, no. 3/4 (July 2003): 353–79.
- Tushnet, Mark. *The New Constitutional Order*. New Jersey: Princeton University Press, 2003.
- Waldron, Jeremy. *Law and Disagreement*. Oxford: Oxford University Press, 2012.
- Weinrib, Jacob. *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law*. Cambridge: Cambridge University Press, 2016.
- Wheare, K. C. *Modern Constitutions*. London: Oxford University Press, 1975.
- Whittington, Keith E. "Extrajudicial Constitutional Interpretation: Three Objections and Responses." *North Carolina Law Review* 80, no. 3 (April 2002): 773–851. <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=3980&context=nclr>.
- Wiratraman, Herlambang P. "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics." *Federal Law Review* 50, no. 3 (June 2022): 314–30.

JUDICIAL INDEPENDENCE AND THE EFFECTIVENESS OF CONSTITUTIONAL COMPLAINT SYSTEMS

Thomas Sheku Marah*

Nusa Putra University
thomas.sheku_hk23@nusaputra.ac.id

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Abstract

The focus of this study is to break down the link between judicial independence and the effectiveness of the system for receiving and adjudicating constitutional complaints through the lens of Indonesia, supported by case studies from Germany, South Korea, and Italy. The study applies a comparative doctrinal legal method to assess the impact of institutional independence, procedural frameworks, and public accessibility on the ability of the constitutional court to safeguard fundamental rights. The analysis highlights that judicial independence operates as both a normative safeguard and a functional condition that determines how effectively constitutional justice can be ensured. The findings show that jurisdictions with high judicial independence—such as Germany and South Korea—display greater procedural efficiency, higher admissibility rates, stronger compliance with rulings, and greater public trust in judicial institutions. Systems with lower judicial independence, such as Indonesia, face ongoing challenges, including slow procedures, inconsistent enforcement, and restricted access to constitutional remedies. The research demonstrates that a constitutional complaint system functions best when judicial institutions maintain complete independence

* Thomas Sheku Marah is a researcher at Nusa Putra University, Indonesia. His research primarily focuses on international law, human rights, global governance, humanitarian law, youth participation, and African governance and legal reform.



and operate with transparent systems that remain accountable to the public. The study further indicates that Indonesia needs to enhance its judicial system by establishing permanent positions for judges, implementing open selection methods, and providing independent funding for the Constitutional Court so it can operate a trustworthy constitutional complaint system.

Keywords: Access to justice; Civil society engagement; Constitutional complaint; Fundamental rights; Judicial independence

I. INTRODUCTION

1.1. Background

In modern constitutional democracies, the constitutional complaint system has become an integral part of these democracies. It gives citizens an opportunity to challenge laws, administrative acts, or policies that breach fundamental rights.¹ Unlike traditional judicial review, constitutional complaints are filed without an institutional or governmental ‘trigger.’ Individuals or groups are able to file complaints directly to constitutional courts.² This system is increasingly viewed as fundamental to the protection of rights. It has increasingly been viewed as an important guarantee against arbitrary state action.³

In democracies where constitutional complaint systems are fully developed, such as Germany, South Korea, or Italy, the systems have been instrumental in consolidating the rule of law, improving judicial accountability, and broadening access to justice.⁴ The Federal Constitutional Court of Germany has the most accessible and protective system. It permits the filing of complaints by any individual alleging that their constitutional rights have been breached.⁵ South Korea has systems of constitutional complaints embedded within the structure of the constitutional court. It has a special emphasis on the prompt protection

¹ Viviana di Capua, “The Protection of Fundamental Rights by the Constitutional Court in the Republic of Latvia: Perspectives, Opportunities and Limits of an Introduction of the Model in Italy,” *Journal of the University of Latvia. Law* 16 (October 2023): 195–211.

² Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed. (Durham: Duke University Press, 2012), 45.

³ Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1945), 120.

⁴ 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 (August 2023): 75.

⁵ Kommers and Miller, *Constitutional Jurisprudence*, 2012.

of weak justice and the vulnerable.⁶ Italy has the most sophisticated system of constitutional complaints. It balances rights and procedural safeguards with institutional judicial discretion. On the other hand, the effectiveness of constitutional complaint systems hinges on judicial independence.⁷

An independent judiciary matters because it allows constitutional complaints to be processed free from undue political interference and administrative pressures.⁸ Independence means structural, functional, and administrative autonomy, coupled with financial self-sufficiency, and grants the judge the liberty to decide the case judiciously based on the law.⁹ If constitutional complaints are processed under the shadow of political interference, they will lose their value and serve the purpose of diminishing trust not only in the judiciary but in the entire social contract.¹⁰

In the legal literature, the philosophy of judicial independence and constitutional complaint mechanisms has been explored. Having control over judicial systems, it is argued, is not an act of a constitutional democracy, but a mechanism that puts the democracy ruling under the protective umbrella of human rights provisions, constituting a severe blow to its essence.¹¹ “Juristocracy. In a troubling world, a ‘juristocracy’ is emerging, where constitutional courts sit as the ultimate defenders of basic rights,” notes, stressing the need for lack of political control as structural independence keeps the wheels of stifled democracy turning.¹² No country that has only recently emerged out of the shell of years

⁶ M. Lutfi Chakim, “A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions,” *Constitutional Review* 5, no. 1 (2019): 96.

⁷ Carlo Azeglio Ciampi, “Intervento del Presidente della Repubblica Carlo Azeglio Ciampi in occasione della consegna delle medaglie d’oro ai benemeriti della cultura e dell’arte [Speech of the President of the Italian Republic Carlo Azeglio Ciampi on the Delivery of the Gold Medals for Culture and Arts Merit], May 5, 2003.

⁸ I Dewa Gede Palguna, “Constitutional Complaint and the Protection of Citizens’ Constitutional Rights,” *Constitutional Review* 3, no. 1 (2017): 1.

⁹ Samia Abdellaoui, “Between Reality and Aspiration: A Critical Review of the Principle of Judicial Independence Considering the Algerian Constitutional Amendment of 2020,” *Manchester Journal of Transnational Islamic Law and Practice* 20, no. 3 (2024): 155–64.

¹⁰ Ágnes Czine, “Fundamental Rights Protection through Constitutional Complaints, with Special Respect to Its Effectiveness,” *Constitutional Review* 11, no. 2 (2025): 269–98.

¹¹ Czine, “Fundamental Rights Protection.”

¹² Ni Luh Dewi Sundariwati, “Judicial Activism: Diantara Melindungi Supremasi Konstitusional atau Transisi Menuju Juristocracy” [Judicial Activism: Between Protecting Constitutional Supremacy or Transitioning toward Juristocracy], *Jurnal Konstitusi* 21, no. 3 (2024): 432–47.

of autocratic rule can treat constitutional complaint mechanisms as secondary because it placed political independence on the judiciary.¹³

1.2. Problem Statement

The realization of constitutional courts has not led to equal effectiveness of constitutional complaint systems in regions where civil liberties are exercised.¹⁴ In places characterized by the absence of political interference and adequate judicial infrastructure, corruption persists in civil society and the legal system in conjunction.¹⁵ In Indonesia, the Constitutional Court focuses on the constitutional review of laws and other disputes among state organs.¹⁶ Nevertheless, the country has no viable system for the direct constitutional complaint of individuals, especially in cases of abuse by the administration.¹⁷ These cases reinforce the importance of understanding and reforming the relationship between judicial independence and constitutional complaint systems for improved access to justice and recognized rights frameworks.¹⁸

Moreover, the role of civil society in systemic constitutional complaint actions remains on the periphery, especially in the early stages of democracy.¹⁹ Government legal defenders, public campaigns, and reform advocacy all fall within the purview of civil society. When this input is absent, constitutional complaint systems remain complicated and cumbersome for the average person.²⁰

¹³ Melina Carla de Souza Britto and Claudia Maria Barbosa, "Disfuncionalidades do Modelo Institucional Liberal: Juristocracia e Backlash" [Dysfunctionalities of the Liberal Institutional Model: Juristocracy and Backlash], *Cuestiones Constitucionales* (April 2023): 131–50.

¹⁴ Maulana Amrullah, "Identifying Key Determinants of Civil Society Robustness in Southeast Asia," *JAS (Journal of ASEAN Studies)* 12, no. 1 (2024): 107–31.

¹⁵ Jorge Ernesto Roa Roa and Juan José Aristizábal López, "How Courts Defend Democracy: Challenging Authoritarianism and Advancing Social Transformation," *Revista de Direito Econômico e Socioambiental* 16, no. 3 (2025): 544.

¹⁶ Constitutional Court of the Republic of Indonesia, Decision No. 006/PUU-IV/2006 on the Judicial Review of Law No. 27 of 2004 on the Truth and Reconciliation Commission against the 1945 Constitution, December 7, 2006.

¹⁷ Satjipto Rahardjo, *Law and Justice in Indonesia: Constitutional Perspectives* (Jakarta: Rajawali Press, 2018), 101.

¹⁸ Rudy Rudy et al., "Implementation of Civil Rights against Vulnerable Groups in the Legal and Constitutional System in Indonesia," *Hasanuddin Law Review* 8, no. 3 (2023): 299.

¹⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Civil Society Space and the United Nations Human Rights System," accessed September 20, 2025.

²⁰ UN Peacemaker, "Global Lessons Learned: Judicial Independence and the Rule of Law," accessed September 20, 2025.

1.3. Research Objectives

The paper investigates how judicial independence shapes the effectiveness of constitutional complaint systems. It then evaluates the constitutional complaint structures in Germany, South Korea, and Italy as a basis for proposing reforms for Indonesia. The study also seeks to identify the factors that prevent constitutional complaint mechanisms from functioning optimally, while examining the role of non-governmental organizations in expanding access to justice. Finally, the research develops practical recommendations for establishing or improving constitutional complaint procedures in Indonesia through procedural and institutional reforms.²¹

1.4. Significance of the Study

The research carries significant value for multiple reasons. The research makes a valuable contribution to constitutional law studies through its examination of theoretical models and real-world constitutional complaint system implementations. The research demonstrates how judicial independence shapes human rights protection alongside dispute resolution and the maintenance of democratic governance.²² Through its analysis of different constitutional complaint models, the study generates evidence-based recommendations which benefit policymakers, legal practitioners, and civil society actors who work to strengthen constitutional complaint systems across Indonesia and similar jurisdictions. The research establishes the need for institutional and structural reforms to guarantee that constitutional courts operate independently while protecting fundamental rights.²³

²¹ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 90–95.

²² Office of the United Nations High Commissioner for Human Rights (OHCHR), "Complaints Procedures under Human Rights Treaties," accessed September 20, 2025.

²³ Mishella Romo Rivas and Raul Sanchez-Urribarri, "Studying Judicial Decision-Making beyond Western Democracies: Lessons from Latin America," in *Research Handbook on Judicial Politics* (Cheltenham, UK: Edward Elgar Publishing, 2024), 61–84.

II. METHODOLOGY

Within this study, a comparative doctrinal legal research methodology is employed. This methodology is quite common in scholarship related to the effectiveness of judicial mechanisms in comparative constitutional law.²⁴ It seeks to study the correlation between judicial independence and the functioning of constitutional complaint systems in a bifocal manner of access to justice and fundamental rights protection.²⁵ This methodology involves the integration of legal texts, decisions of constitutional courts, legal statutes, secondary research, and in-depth comparative analyses of frameworks and systems of varying judicial configurations. This integration makes it possible to ascertain specific patterns, challenges, and best practices in emerging democracies, like Indonesia.²⁶

Indonesia is included in this study not as a fully operational constitutional-complaint jurisdiction but as a reform-oriented and prescriptive case. Its current legal system allows researchers to study judicial independence principles for creating individual complaint mechanisms.²⁷ The research identifies necessary institutional and normative changes to fix current procedural and structural gaps through a comparison between Indonesia's review system and established systems in Germany, South Korea, and Italy.²⁸ The design maintains a balanced perspective for evidence-based, future-oriented analysis without presenting any biased or exaggerated conclusions.²⁹

German, South Korean, Italian, and Indonesian legal documents provide the research's focal secondary legal frameworks, including constitutions, constitutional statutes, and case law.³⁰ Followers typically concentrate on how the procedures

²⁴ Mila Versteeg, Tom Ginsburg, and David Landau, *Comparative Constitutional Law and Politics* (New York: Oxford University Press, 2025).

²⁵ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 112.

²⁶ Versteeg, Ginsburg, and Landau, *Comparative Constitutional Law and Politics*.

²⁷ Adies Kadir et al., "Judicial Power and Judges' Status in Indonesia's Constitutional Framework," *Jurnal Hukum [Journal of Law]* 41, no. 1 (2025): 195.

²⁸ Leonardo Parona, "Italy," in *Administrative Rulemaking and Planning in European Laws* (Oxford: Oxford University Press, 2025), 50–54.

²⁹ Simon Butt, "Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts," *Constitutional Review* 9, no. 2 (2023): 247.

³⁰ Iwan Satriawan et al., "An Evaluation of the Selection Mechanism of Constitutional Judges in Indonesia and South Korea," *PADJADJARAN Jurnal Ilmu Hukum [PADJADJARAN Journal of Law]* 10, no. 1 (2023): 122–147.

and the rules of the constitution are mapped onto different territories, how much independence the different jurisdictions can exercise, and how the different courts deal with violations of fundamental rights.³¹ For example, in Germany, the Federal Constitutional Court offers a commanding system of individual constitutional complaints where citizens can contest the actions of the state that violate their basic rights.³² Similarly, there is the Constitutional Complaint of South Korea, which approaches the constitutional complaint procedures system in a constitutional manner that fosters both speed and fairness in accessing the court for the entire population, including vulnerable people.³³ Italy is a more interesting case. It offers a balance between the formal procedural rules and judicial lawmaking to retain coherence and safeguard fundamental rights.³⁴ On the other hand, Indonesia has a constitutional court that carries out constitutional reviews; however, the court does not have a functioning system that allows individuals to directly make constitutional complaints. This is a clear example of not only the absence of justice but also rights denial.³⁵

This study incorporates unique pre-existing data alongside primary resources, including legal textbooks, journal articles, and case studies from global institutions such as the UN, UN OHCHR, and the Venice Commission.³⁶ These materials furnish vital conceptual knowledge on the independence and judicial review of a constitution, the judicial system, and the associated research on constitutional complaint mechanisms in multiple jurisdictions.³⁷ It is also important to document the activities of civil society organizations that attempt to enhance the use of constitutional complaints to advocate for changes and provide litigation support

³¹ Novendri Nggilu et al., "Judicial Review of Constitutional Amendments: Comparison between India, Germany, Colombia, and the Relevancy with Indonesia," *Lex Scientia Law Review* 8, no. 1 (2024): 261–298.

³² Chakim, "A Comparative Perspective on Constitutional Complaint," 96.

³³ Fabian Duessel, "Direct Individual Access to Constitutional Justice in South Korea and Taiwan," in *Comparative Constitutional History* (Leiden: Brill, 2020), 245–276.

³⁴ Ciampi, "Intervento del Presidente della Repubblica Carlo Azeglio Ciampi" [Speech of the President of the Italian Republic Carlo Azeglio Ciampi].

³⁵ Tanto Lailam, Putri Anggia, and Irwansyah Irwansyah, "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court," *Jurnal Konstitusi* 19, no. 3 (2022): 693–719.

³⁶ Venice Commission, *Different Models for Protection of Constitutionality, Legality and Human Rights* (Strasbourg: Council of Europe, 2019), 22.

³⁷ Rahardjo, *Law and Justice in Indonesia*, 110.

to individuals, especially in jurisdictions where systemic and structural barriers exist to personal legal access to the courts.³⁸

This study is built around a systematic legal comparative approach focusing on multiple key facets. To begin with, it studies the judiciary's independence from structural, functional, financial, and administrative aspects, which serve to guarantee impartial adjudicators for constitutional complaints.³⁹ Next, the analysis studies the effectiveness of procedures, along with the decision-making of the complaints and the dismissing of complaints that may be done arbitrarily.⁴⁰ Third, the analysis examines the constitutional rights of the vulnerable and marginalized and the legal, financial, and administrative barriers that may exist to deny the exercise of constitutional rights.⁴¹ Fourth, the study looks at the role of civil society, in particular, the extent to which private entities participate in sponsoring, filing, and successful prosecution of constitutional complaints.⁴² Finally, the analysis examines the system of constitutional complaints and the fundamental rights guaranteed by the constitution, and the extent to which these rights are actually protected and whether the system enhances compliance with constitutional mandates.⁴³

Methods elaborate on the qualitative content analysis of judicial opinions and doctrinal writings – literature which is focused on answering questions regarding the caste and framework of the judiciary. The study analyzes legal reasoning, judicial interpretation, and also procedural documents to identify trends and gaps within the functioning systems of constitutional complaints.⁴⁴

³⁸ OHCHR. "Civil Society Space and the United Nations Human Rights System."

³⁹ Ágnes Váradi, "Access to Constitutional Complaint Procedures: A Real Chance?" *Hungarian Journal of Legal Studies* 61, no. 4 (2022): 372–385.

⁴⁰ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 130.

⁴¹ 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): 347–364.

⁴² Simi Mehta, "Looking Beyond Constitutional Institutions During an Emergency: Exploring the Role of the Civil Society in Protecting Rights," in *Human Rights During the COVID-19 Pandemic* (Singapore: Springer Nature Singapore, 2024), 73–85.

⁴³ Gabriela Dobrovičová and Lukáš Tomaš, "The Authority of a Senate of the Constitutional Court of the Slovak Republic to Initiate Legal Compliance Proceedings Upon a Petition Filed by a Natural or Legal Person," *AUC IURIDICA* 71, no. 4 (2025): 237–255.

⁴⁴ Mirza Satria Buana, "Weak-Form Review and Judicial Independence: A Comparative Perspective," *Constitutional Review* 10, no. 2 (2024): 341–360.

Comparing Germany, South Korea, and Italy within the context of the current legal system in Indonesia yields specific evidence-based policy options to strengthen Indonesia's constitutional complaint system.⁴⁵ This approach provides insights into the interplay between judicial independence and the effectiveness of constitutional complaints, as it offers both analytical and pragmatic perspectives on the problems and possibilities of reform.⁴⁶

2.1. Indicators of Effectiveness

The research evaluates constitutional-complaint systems through four measurable indicators, which stem from comparative jurisprudence and international judicial assessment systems.⁴⁷ These four indicators include (1) decision timeliness, which measures the average time between filing and judgment; (2) compliance rate, which shows how well authorities follow or implement constitutional court decisions; (3) admissibility success rate, which measures the percentage of accepted complaints against rejected ones to show procedural fairness; and (4) accessibility and transparency, which assess how easily marginalized individuals can submit and track complaints. The evaluation indicators align with the World Justice Project Rule of Law Index (2023) and Venice Commission reports on constitutional justice.⁴⁸ Data and cases from Germany, Italy, and South Korea are evaluated through these dimensions to demonstrate how judicial independence affects system performance.⁴⁹

Thus, the methodology aims to be as thorough and interdisciplinary as possible, combining doctrinal and pragmatic assessments of judicial independence, procedural effectiveness, and the accessibility of the system to users.⁵⁰ By using a blend of primary and secondary resources, the study aims to understand the

⁴⁵ M. Lutfi Chakim, "A Comparative Perspective on Constitutional Complaint," 96.

⁴⁶ Lailam and Andrianti, "Legal Policy of Constitutional Complaints in Judicial Review," 75.

⁴⁷ Venice Commission, *Report on Constitutional Justice and the Rule of Law 2023* (Strasbourg: Council of Europe, 2023).

⁴⁸ World Justice Project, *Rule of Law Index 2023* (Washington, DC: World Justice Project, 2023).

⁴⁹ Elena Gentili, "A Comparative Overview of European Systems of Individual Constitutional Complaint," *Italian Journal of Public Law* 4, no. 1 (2012): 27–46.

⁵⁰ László Örkényi, "A New Method for an Objective Measurement of the Judicial Workload—the Application of a Prediction Model Based on an Algorithm Formed by Multiple Linear Regression in Court Administration," *International Journal for Court Administration* 13, no. 1 (2022).

constitutional complaint system in a more holistic way, within varying judicial systems and assessing the level of efficiency the system offers along with the independence and capability of the judiciary.⁵¹

III. COMPARATIVE MODELS OF CONSTITUTIONAL COMPLAINT

The constitutional complaint mechanism is recognized as an effective means of protecting rights and allows individuals to contest administrative and legal artifacts or actions of the state that might encroach on constitutional guarantees.⁵² Unlike Germany, Italy, and South Korea, Indonesia does not yet recognize an individual constitutional-complaint mechanism. Its inclusion in this study is therefore prescriptive, aimed at evaluating how principles of judicial independence can inform the design of a future system within its constitutional framework.⁵³ Germany has perhaps the most refined example of this through its Federal Constitutional Court, which allows any individual claiming a violation of ‘basic’ rights to file a constitutional complaint.⁵⁴ Procedural and substantive constitutional rights protection systems are both alive and well in Germany. Complaints are scrupulously considered, and to the extent that there is effective and efficient compliance, citizens are able to fully exercise their constitutional rights.⁵⁵ This has improved public faith in the courts and the rule of law that touch on individual rights because of the lack of bias in the legal decisions made.⁵⁶

Like Germany, South Korea also has a strong model with constitutional complaints incorporated into its Constitutional Court system.⁵⁷ The South Korean model focuses on timely and equitable access to fundamental rights complaint submission, including for disadvantaged groups. The model has gained South

⁵¹ Osayd Awawda, “Assessment of De Jure Judicial Independence of Constitutional Courts According to International Guidelines,” *Constitutional Review* 10, no. 1 (2024): 202.

⁵² Murti Ayu Hapsari, “The Dimension of Judicial Activism of Incorporating Constitutional Complaint: An Overview on Judicial Independence,” *Constitutional Review* 11, no. 2 (2025): 363–392.

⁵³ Holish and Maharani, “Strengthening Constitutional Complaint Authority,” 347–364.

⁵⁴ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 115.

⁵⁵ Lailam and Andrianti, “Legal Policy of Constitutional Complaints in Judicial Review,” 75.

⁵⁶ Rosa M. Navarrete and Pablo Castillo-Ortiz, “Constitutional Courts and Citizens’ Perceptions of Judicial Systems in Europe,” *Comparative European Politics* 18, no. 2 (2020): 128–150.

⁵⁷ Duessel, “Direct Individual Access,” 245–276.

Korea a positive public perception regarding the judiciary's independence and fundamental rights protection.⁵⁸ Comparative analysis shows South Korea's model has improved the protection of fundamental rights,⁵⁹ and public appreciation toward the judiciary has increased, with the perception of an independent and fair South Korean judiciary improving.⁶⁰

Italy has a different model, merging procedural formalism with a degree of judicial discretion. The Italian Constitutional Court focuses on reviewing legislation's constitutionality and has developed individual complaint mechanisms regarding administrative acts that violate rights.⁶¹ This demonstrates the role of judicial independence and procedural leniency that allows courts to adapt to changes in society and law while preserving institutional reputation.⁶² Italy's case serves to exemplify courts on the balance between procedural discipline and the attainment of real democratic justice.⁶³ Unlike the above-mentioned countries, Indonesia has not developed a functioning constitutional complaint mechanism.⁶⁴

Although the Constitutional Court of Indonesia has broad powers in law review and the resolution of disputes between the organs of the state, it has not formulated any lawful processes allowing for the submission of individual complaints regarding administrative and other governmental actions.⁶⁵ There is, however, a compelling argument to be made in favor of establishing a system of constitutional complaint in order to better defend basic rights, enhance the accountability of the judiciary, and encourage public support for the Constitutional Court.⁶⁶ There are positive aspects, such as individual direct access, procedural protections for certain at-risk populations, and judicial administrative complaint

⁵⁸ Duessel, "Direct Individual Access."

⁵⁹ Marie Seong-Hak Kim, "Travails of Judges: Courts and Constitutional Authoritarianism in South Korea," *American Journal of Comparative Law* 63, no. 3 (2015): 601–654.

⁶⁰ Suparto et al., "Enhancing External Oversight of Constitutional Judges: A Study on the Role of the Judicial Commission in Indonesia and South Korea," *Lex Scientia Law Review* 8, no. 1 (2024).

⁶¹ Ciampi, "Intervento del Presidente della Repubblica Carlo Azeglio Ciampi [Speech of the President of the Italian Republic Carlo Azeglio Ciampi]."

⁶² Ciampi, "Intervento del Presidente della Repubblica Carlo Azeglio Ciampi [Speech of the President of the Italian Republic Carlo Azeglio Ciampi]."

⁶³ Parona, "Italy."

⁶⁴ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 150.

⁶⁵ Constitutional Court of the Republic of Indonesia, Decision No. 006/PUU-IV/2006 (Jakarta: Constitutional Court of the Republic of Indonesia, 2006).

⁶⁶ Rahardjo, *Law and Justice in Indonesia*, 110.

adjudication safeguards that Indonesia can borrow from best practice comparative examinations of Germany, South Korea, and Italy.⁶⁷

The effectiveness of all constitutional complaint systems relies fundamentally on the independence of the judiciary. Courts that are structurally, functionally, financially, and administratively autonomous are far better able to adjudicate complaints without partiality, defend against politicization, and uphold the rule of law.⁶⁸ Jurisdictions that are better at upholding the independence of the judiciary tend to offer stronger enforcement of constitutional guarantees and public assurance in constitutional adjudication.⁶⁹ This, however, is not the case for jurisdictions that are weak in judicial independence; such jurisdictions tend to be mired in irrational delays, capricious dismissals, and ineffectual resolutions, thereby undermining access to justice and democratic legitimacy.⁷⁰

In regions where NGOs go beyond assisting litigants to advocating for policy shifts and creating awareness, the chances of success for, and the meaningful protection of rights resulting from, constitutional complaints are much higher.⁷¹ In Indonesia, the long-term involvement of civil society in legal reform and human rights advocacy makes its participation in any future constitutional complaint system likely to improve its access and effectiveness.⁷²

The juxtaposition of the four countries, i.e., Germany, South Korea, Italy, and Indonesia, reveals that the effectiveness of any constitutional complaint system hinges on the presence of robust judicial independence, well-crafted procedural safeguards, and the involvement of civic advocacy. Indonesia, similarly, stands to benefit from these lessons in attempting to implement a constitutional complaint system that safeguards fundamental rights, enhances access to justice, and fosters public confidence in the judiciary.⁷³

⁶⁷ Lailam and Andrianti, "Legal Policy of Constitutional Complaints in Judicial Review," 75.

⁶⁸ Garrett N. vande Kamp, "The Conditioning Role of Judicial Independence in the Exercise of Judicial Review," *Journal of Law and Courts* 9, no. 2 (2021): 261–282.

⁶⁹ Awawda, "Assessment of De Jure Judicial Independence of Constitutional Courts," 202.

⁷⁰ Michael J. Nelson, "Judicial Independence," in *International Encyclopedia of the Social & Behavioral Sciences* (Amsterdam: Elsevier, 2015), 891–896.

⁷¹ OHCHR, "Civil Society Space and the United Nations Human Rights System."

⁷² United Nations General Assembly, A/HRC/49/80, accessed September 20, 2025.

⁷³ Venice Commission, *Different Models for Protection of Constitutionality, Legality and Human Rights*, 22.

IV. JUDICIAL INDEPENDENCE AND ITS ROLE IN CONSTITUTIONAL COMPLAINT EFFECTIVENESS

Independence of the judiciary is a key element of a constitutional democracy and a necessary condition for the functioning of a constitutional complaint system.⁷⁴ It is crucial for the judiciary's independence to decide cases on the basis of law and justice without considering any external factors of a political or administrative nature, or any private interests.⁷⁵ If judges do not enjoy independence, the constitutional complaint system will be a mere façade and not a genuine, substantial remedy for the protection of the rights of individuals whose fundamental rights have been infringed upon.⁷⁶

4.1. Judicial Independence as a Determinant of Effectiveness

Constitutional independence serves as a protective mechanism, ensuring the effectiveness of any constitutional complaint mechanism.⁷⁷ Political pressure is a reality that any adjudicator faces. Only a politically insulated system of complaints can meaningfully protect rights. For courts to achieve procedural efficiency, consistency of reasoning, and compliance with their rulings, they need structural, functional, and financial autonomy.⁷⁸ Courts need to be in complete control of their adjudicatory and operational discretion, meaning constitutional courts need a sign of complete confidence placed in them. Independence fosters confidence in judicial impartiality and effective complaint systems, reinforcing trust from the other side of the scale.⁷⁹ Compromised court independence contributes to public erosion of confidence in the rule of law.⁸⁰ The interdependence of constitutional courts and the independence of the judicial system is a defining relationship in any legal order.⁸¹ Independence from politics and dominance over

⁷⁴ Chakim, "A Comparative Perspective on Constitutional Complaint," 96.

⁷⁵ Richard Albert and Stefan Bächtold, "Judicial Independence in Comparative Constitutional Courts: Global Lessons for Emerging Democracies," *International Journal of Constitutional Law* 21, no. 4 (2023): 895–920.

⁷⁶ Awawda, "Assessment of De Jure Judicial Independence of Constitutional Courts," 202.

⁷⁷ Czine, "Fundamental Rights Protection through Constitutional Complaints," 275.

⁷⁸ Buana, "Weak-Form Review and Judicial Independence: A Comparative Perspective," 341–360.

⁷⁹ Duessel, "Direct Individual Access to Constitutional Justice in South Korea and Taiwan," 245–276.

⁸⁰ Albert and Bächtold, "Judicial Independence in Comparative Constitutional Courts."

⁸¹ Baroness Hale Richmond, "The Independence of the Judiciary and Some of Its Enemies," *University of Toronto Law Journal* 73, no. Supplement 2 (2023): 140–151.

court systems foster complete autonomy. Accountability in functional complaint systems bolsters court confidence and legal public order.⁸²

Aspects of judicial independence include structural autonomy, functional autonomy, financial self-sufficiency, and administrative independence.⁸³ Structural independence refers to the physical location of courts and judges in such a way as to confer political protection, often accomplished through constitutional, inviolable tenure of judges, and guarantees.⁸⁴ Functional independence allows judges to make unrestricted and unbiased decisions without external counsel or direction from the government and other authorities.⁸⁵ The financial independence of courts is the appropriate level of self-sufficiency so that government discretionary funding is not the primary source of revenue, while administrative self-governance means the ability to manage internal order, people, and cases without external interference.⁸⁶

As the research shows, independence of the judiciary is a necessary condition for the effectiveness of a constitutional complaint system.⁸⁷ In Germany, for instance, the Federal Constitutional Court has been able to preserve its impartiality and credibility in the adjudication of individual complaints, which enables the courts to protect and guarantee constitutional rights effectively and in a sustained fashion.⁸⁸ Similarly, the Constitutional Court of South Korea has been able to deal with complaints in a responsive manner because there is public confidence in the judiciary, which is an outcome of the Court's institutional autonomy.⁸⁹ On the other hand, in jurisdictions that suffer from a lack of judicial independence,

⁸² Kim Lane Scheppele, "A Case for the Judicial Enforcement of Principles," in *Sustaining the Rule of Law* (Cheltenham, UK: Edward Elgar Publishing, 2025), 36–56.

⁸³ Lukáš Tomaš, "Správne Súdnictvo v Systéme Deľby Moci" [Administrative Judiciary in the System of Separation of Powers], *Právny Obzor* [Legal Horizon] 105, no. 6 (2022).

⁸⁴ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*.

⁸⁵ Rafael Bustos Gisbert, "Política, Independencia y Autogobierno Judicial: Cuatro Miradas," *Revista de Estudios Políticos*, no. 198 (December 2022): 93–120, <https://doi.org/10.18042/cepc/rep.198.04>.

⁸⁶ Jeremiah Osasume Okaisabor, "The Quest of Fiscal Autonomy for Judicial Independence: The Case of the Nigerian Judiciary and Its Challenges," *African Identities* 23, no. 3 (2025): 756–780.

⁸⁷ Chakim, "A Comparative Perspective on Constitutional Complaint," 96.

⁸⁸ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*.

⁸⁹ Lailam and Andrianti, "Legal Policy of Constitutional Complaints in Judicial Review," 75.

there is usually a more severe problem with the enforcement of constitutional rights, which in turn adds to the denial of access to justice and the rule of law.⁹⁰

Constitutional complaint effectiveness and judicial independence are demonstrated through the case of Italy.⁹¹ More than centuries of decent and neglect, the Italian Constitutional Court has been able to develop mechanisms to address individual complaints based on the autonomy of the Court, especially in cases where steps taken administratively may infringe or sweep away the constitutional guarantees.⁹² The more autonomous a judiciary is from politics, the more vigorous and effective the constitutional complaints resolution system will be.⁹³ In the case of the Italian judges, the discretion that is granted to the judges enables the courts to streamline and tailor steps to be taken in individual cases; to the degree procedural justice and rigidity dominate the system, the protection of rights also has to be speedy.⁹⁴

In Indonesia, the ceremonial and legal demarcation of judicial independence has no commensurate, proportional, or equal action in real life.⁹⁵ Concerns about political influences, lack of resources, and inefficient procedures are some of the many issues that the Constitutional Court faces despite holding extensive powers of constitutional review and state organ dispute resolution.⁹⁶ These issues raise questions about the practical steps that can be taken to guarantee the independence of judges in constitutional complaints. There must be an attitude of judicial propriety toward the allocation of resources for administrative and institutional purposes. This will, in turn, support the structural changes necessary to improve the constitutional complaint system in the country.⁹⁷

⁹⁰ Holish and Maharani, "Strengthening Constitutional Complaint Authority," 347–364.

⁹¹ Gentili, "A Comparative Overview of European Systems of Individual Constitutional Complaint."

⁹² Ciampi, "Intervento del Presidente della Repubblica Carlo Azeglio Ciampi [Speech of the President of the Italian Republic Carlo Azeglio Ciampi].

⁹³ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 150.

⁹⁴ Holish and Maharani, "Strengthening Constitutional Complaint Authority," 347–364.

⁹⁵ Czine, "Fundamental Rights Protection," 275.

⁹⁶ Rahardjo, *Law and Justice in Indonesia*, 115.

⁹⁷ United Nations Development Programme (UNDP), *Rule of Law and Access to Justice: Global Review 2023* (New York: UNDP, 2023).

The constitutional complaint system is supported by other pillars like civil society, public education, and system honesty.⁹⁸ These factors all aid in access to the judicial system and guarantee that the decisions made are implemented.⁹⁹ These factors work to improve the relationship between society and the judiciary, wherein the public seeks active participation. A well-organized system is improved by active civil participation. The lack of constitutional independence violates the set procedures and relates to the weak protection of rights. These interconnections between judicial independence and constitutional complaints are essential and crucial to understand.¹⁰⁰

To summarize, the independence of the judiciary is crucial for the constitutional complaint system to function.¹⁰¹ In areas like Germany, South Korea, Italy, and possibly Indonesia, the primary defenses afforded to constitutional rights through hinge on access and the relative freedom of the judiciary to act.¹⁰² Constitutional complaint mechanisms that are both tangible and effective are the responsibility of the judiciary, civil society, and procedural safeguards, which should be provided in every case.¹⁰³

4.2. Bridging Theoretical Framework and Comparative Analysis

The above discussion provides judicial independence as the theoretical baseline for evaluating the effectiveness of constitutional-complaint systems.¹⁰⁴ Having outlined its normative and structural dimensions, the subsequent analysis applies this framework to selected jurisdictions to determine how degrees of independence shape practical outcomes.¹⁰⁵ The comparative section that follows examines Germany, South Korea, Italy, and Indonesia to evaluate whether structural, functional, and financial autonomy correlate with measurable indicators of effectiveness such as procedural timeliness, compliance, and accessibility. By

⁹⁸ Venice Commission, *Participation of Civil Society in Constitutional Review* (Strasbourg: Council of Europe, 2020).

⁹⁹ OHCHR, "Civil Society Space and the United Nations Human Rights System."

¹⁰⁰ United Nations General Assembly, A/HRC/49/80.

¹⁰¹ Buana, "Weak-Form Review and Judicial Independence."

¹⁰² Chakim, "A Comparative Perspective on Constitutional Complaint," 96.

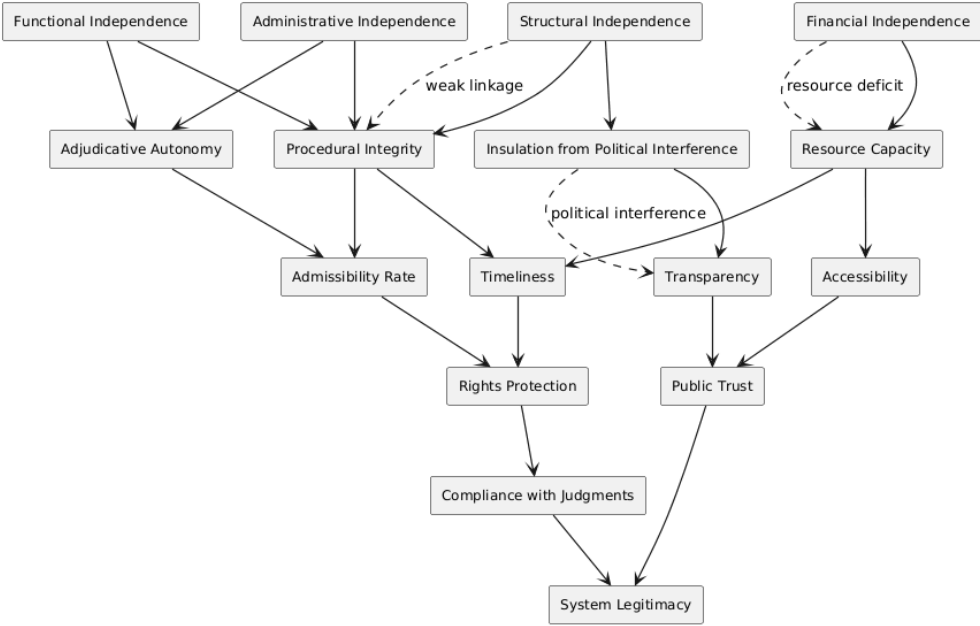
¹⁰³ Venice Commission, *Different Models for Protection of Constitutionality, Legality and Human Rights*, 35.

¹⁰⁴ Chakim, "A Comparative Perspective on Constitutional Complaint," 96.

¹⁰⁵ Albert and Bächtold, "Judicial Independence in Comparative Constitutional Courts," 895–920.

translating theory into empirical observation, this approach demonstrates that judicial independence is not an abstract ideal but a working determinant of constitutional justice.¹⁰⁶ The transition from conceptual discussion to comparative evidence ensures analytical continuity and highlights how institutional design directly influences the performance of complaint mechanisms across diverse legal traditions.¹⁰⁷ The impact of judicial independence on constitutional complaint process is summarized in Figure 1 below.

Figure 1. Causal Model of Judicial Independence and Constitutional Complaint Effectiveness



Source: Author's own illustration, 2025

This diagram illustrates how judicial independence influences each stage of the constitutional complaint process, from filing to final decision. It highlights the potential outcomes when independence is strong versus when political influence interfere.

¹⁰⁶ Venice Commission, *Report on Constitutional Justice and the Rule of Law* 2023.

¹⁰⁷ World Justice Project, *Rule of Law Index* 2023.

V. CHALLENGES AND BARRIERS TO EFFECTIVE CONSTITUTIONAL COMPLAINT SYSTEMS

The potential effectiveness of constitutional complaint mechanisms particularly highlights other downfalls that lie within the systems. These issues seem to be partly structural and partly procedural within their political, social, and legal systems. Outlining the appropriations of the issues is vital for any proposed internal reforms that ensure the constitutional complaint systems function and achieve the desired outcomes.¹⁰⁸

The most significant of these issues is the lack of autonomous and impartial courts in the region. Though there is a lack of any privatized systems outlined in the constitution or any other legal documents that influence constitutional law, the practical exercise of judicial autonomy is heavily clouded by politics, policy, and the absence of peripheral shield systems.¹⁰⁹ Within the political environment, influence, whether open or covert, is the harshest tool within the judicial systems for arm-twisting that determines if enforcement of constitutional rights is exercised or ignored. Within the different legal zones jointly, there is overwhelming discord that suggests a lack of autonomy within the judicial systems.¹¹⁰

A significant constitutional complaint barrier defaults in procedural complexity. Although these restrictions are supposed to sustain procedural discipline, they also can pose serious challenges to the general populace, especially to those who are not legally educated and those who face difficulties in obtaining legal help.¹¹¹ For instance, in Indonesia, the absence of a functioning system of constitutional complaint with elaborated procedural norms to guide individual

¹⁰⁸ Chakim, "A Comparative Perspective on Constitutional Complaint," 96.

¹⁰⁹ Bustos Gisbert, "*Política, Independencia y Autogobierno Judicial* [Politics, Independence, and Judicial Self-Government], 93–120.

¹¹⁰ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 153.

¹¹¹ Ramalina Ranaivo Mikea Manitra and Adya Paramita Prabandari, "Judicial Independence Under Political Pressure: The High Constitutional Court and Electoral Justice in Madagascar (2009–2023)," *Constitutional Review* 11, no. 2 (2025): 393–421.

complaints has hampered ease of access and public confidence in the judicial system.¹¹²

Despite the availability of constitutional complaint systems, the lack of resources can also pose a challenge. The courts need to be adequately funded, staffed, and equipped in the organization and administration of constitutional complaints. Under-resourced courts, which are understaffed and lacking in information technology, suffer chronic backlogs of unresolved cases and poor standards of decision-making. This, in turn, results in discouragement of the populace from making use of constitutional complaints and promotes the loss of confidence in the system as a whole.¹¹³ Germany and South Korea are examples of jurisdictions where the public complaint resolution system is adequately resourced, resulting in the timely resolution of complaints and enhanced public confidence in constitutional adjudication.¹¹⁴

A more general problem is the absence of public information and legal education. Even in jurisdictions that have more than adequate complaint systems, citizens lack information concerning their rights and the legal processes available to contest government action.

This also holds, to some extent, for the lack of attention to concerns of rural women, other marginalized women, and low-income women and teenagers.¹¹⁵ A well-designed constitutional grievance process does not simply involve legal and institutional arrangements. It also requires proactive initiatives to educate and empower the population, raise awareness of their rights, and facilitate access to counsel.¹¹⁶

The role of civil society is both a mitigating factor and a potential hindrance. While there are active civil society organizations that assist directly with case litigation, provide legal representation, and advocate for structural changes, there

¹¹² Rahardjo, *Law and Justice in Indonesia*, 123.

¹¹³ Palguna, "Constitutional Complaint and the Protection of Citizens' Constitutional Rights," 1.

¹¹⁴ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 157.

¹¹⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Access to Justice for Vulnerable Populations," accessed September 20, 2025.

¹¹⁶ United Nations General Assembly, A/HRC/49/80.

are also forms of reduced engagement, which are called political restrictions for NGOs.¹¹⁷ In such political contexts, where civil society is weak or politically restricted, the role of constitutional complaint systems is to provide civil participation and social justice to the marginalized and vulnerable. The Philippines is a case in point which illustrates that increasing civil society participation is central to ensuring that any future constitutional complaint systems are accessible and functional.¹¹⁸

Finally, there are also sociopolitical and cultural obstacles. In some cultures, where people are expected to respect and obey social grades of dominance or political authority, it may be difficult to claim constitutional rights and complain against actions of the state.¹¹⁹ Norms of social control and civility, as well as informal systems of social and political control, often make it difficult to complain and ensure that a court's decision is enforced. Comparative studies note that constitutional complaint systems are most effective when they are in a positive relation to the environment of the country that maintains the rule of law, democracy, and civil accountability.¹²⁰

A responsive approach is necessary to address these problems.¹²¹ They cross the borders of availability of legal aid and assistance, professional engagement of the judiciary, elimination of unnecessary and over-complex legal processes, promoting civic legal education, active nurturing of civil society, and particular care strategies to improve the constitutional complaint systems. Comparative studies from Germany, South Korea, and Italy restate that structural design is only a part of the plan; the real test is the working mechanisms of judicial independence, procedural simplification, and civic activism that demand the particular constitutional complaint systems be responsive to fundamental rights and access to justice.¹²²

¹¹⁷ Venice Commission, *Participation of Civil Society in Constitutional Review*, 17.

¹¹⁸ Rahardjo, *Law and Justice in Indonesia*, 125.

¹¹⁹ Manitra and Prabandari, "Judicial Independence Under Political Pressure," 393–421.

¹²⁰ Chakim, "A Comparative Perspective on Constitutional Complaint," 96.

¹²¹ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 160.

¹²² Duessel, "Direct Individual Access," 245–276.

Finally, the challenges to responsive constitutional complaint systems are many and dense: institutional, procedural, resource, societal, and cultural challenges. These challenges, which are necessary to address, ensure that constitutional complaint mechanisms serve the purposes of protecting the people, nurturing accountability in the judiciary, and building the confidence of the people in the law.¹²³

VI. PROSPECTS AND RECOMMENDATIONS FOR INDONESIA

Even though Indonesia's constitutional structure is designed to defend and promote fundamental rights and freedoms, the workings of constitutional complaints are a crucial blind spot in the complete enforcement of such freedoms. The absence of such constitutional complaints does not only defeat the purpose of democracy and the rule of law, but also leaves a deficiency in individual rights and liberties, weakens legal accountability, erodes the rule of law, and diminishes public confidence in the courts. Moreover, through the experiences of Germany, South Korea, and Italy, Indonesia would be able to put in place a system that is accessible, procedurally efficient, and able to guarantee the independence of the judiciary.¹²⁴

Indonesia's most important opportunity is direct access to constitutional complaint mechanisms. The capacity of citizens to directly challenge administrative acts or other state actions without going through intermediary steps is empowering. This also enhances the capacity of the state to give effective responses to violations of fundamental rights. Access to legal support lessens doubts about the judiciary, increases implementation of the law, and complements overall confidence in the system.¹²⁵ The approach of the Federal Constitutional Court of Germany is an example in a case where the court is fully accessible to citizens while still retaining judicial control without sacrificing the rigor of the court to the complainers.¹²⁶ South Korea is another similar example where the

¹²³ Holish and Aulia Maharani, "Strengthening Constitutional Complaint Authority," 347–364.

¹²⁴ Rahardjo, *Law and Justice in Indonesia*, 130.

¹²⁵ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 165.

¹²⁶ Kommers and Miller, 168.

judicial system provides targeted self-help to aid powerless litigants to maximize the mechanism for the defense of their fundamental freedoms. Fostering self-confidence and personal integrity among court members is vital.¹²⁷

The Constitutional Court of Indonesia is an example of the separation of powers where the judiciary is practically autonomous. In practice, however, the dominance of politics, the lack of freedom to act, and the scarcity of means and resources tend to compromise the impartiality of the court.¹²⁸ Ensuring functional, structural, as well as administrative independence is vital to allow judges to work unencumbered when deciding on constitutional complaints brought before the court. Focused almost exclusively on political matters, the diminishing of the constitution and constitutional complaints is most symptomatic in cross-national studies. In such cases, the system provides unilateral independence to the judges, and the court record strengthens popular belief in the judiciary, demonstrated in measures of responsiveness to constitutional claims, protection of constitutional rights, and, most fundamentally, the defense of public trust and confidence.¹²⁹

Procedural safeguards together with simplification form essential development areas. The procedures for constitutional complaints need precise definition with reasonable filing requirements and clear timelines alongside mechanisms that make participation possible for citizens who lack legal expertise. The simplification of procedures must preserve legal rigor while making the system accessible and equitable and efficient.¹³⁰ Through observation of the Italian approach procedural flexibility along with judicial discretion enables courts to achieve both legal standards and practical outcomes in constitutional complaint cases.¹³¹

The enhancement of Indonesia's future constitutional complaint system depends on public understanding alongside legal education efforts. People need proper knowledge about their legal entitlements as well as the complaint

¹²⁷ Duessel, "Direct Individual Access," 245–276.

¹²⁸ Awawda, "Assessment of De Jure Judicial Independence of Constitutional Courts," 202.

¹²⁹ Holish and Maharani, "Strengthening Constitutional Complaint Authority," 347–364.

¹³⁰ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 170.

¹³¹ Ciampi, "Intervento del Presidente della Repubblica Carlo Azeglio Ciampi" [Speech of the President of the Italian Republic Carlo Azeglio Ciampi], May 5, 2003.

submission process and available judicial relief options. The combination of specialized outreach programs with educational efforts and civil society partnerships will enable citizens to take part in constitutional complaint processes while promoting widespread engagement.¹³² Civil society participation strengthens complaint mechanism access while establishing credibility and legitimacy for this process.¹³³

Indonesia stands to gain through the implementation of technological innovations together with administrative reforms which will back up constitutional complaint procedures. The implementation of digital platforms for complaint submission along with case tracking and judicial decision access will boost efficiency levels while making the system more transparent and accessible. The combination of innovative technology with sufficient staffing along with financial backing and institutional capacity development will lead to a modern complaint system that addresses citizen requirements.¹³⁴

In Conclusion, the outlook for establishing a constitutional complaint system in Indonesia appears promising. The establishment of a constitutional complaint system in Indonesia requires strategic reforms which include direct individual access as well as judicial independence strengthening and procedural simplification along with public education campaigns and civil society involvement and technology implementation to create an effective rights protection mechanism that builds judicial trust. Constitutional adjudication becomes an operational mechanism for defending rights and enhancing legal governance when these steps are implemented.¹³⁵ Figure 2 below illustrates the step-by-step process through which an individual can file a constitutional complaint in Indonesia, highlighting the decision points and potential outcomes of the procedure.”

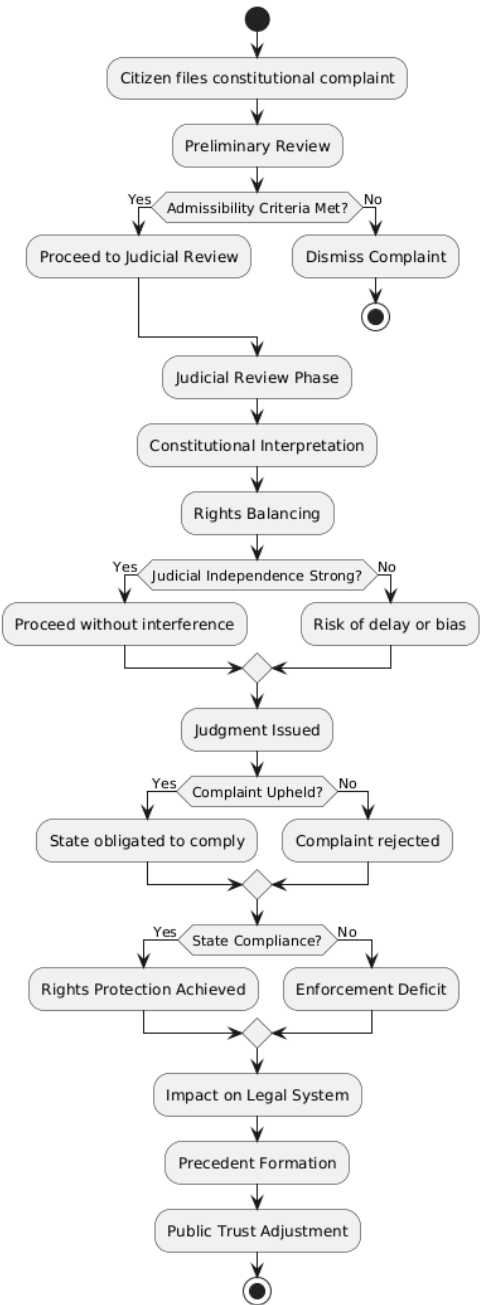
¹³² OHCHR, “Civil Society Space and the United Nations Human Rights System.”

¹³³ Venice Commission, *Participation of Civil Society in Constitutional Review*, 20

¹³⁴ United Nations General Assembly, A/HRC/49/80.

¹³⁵ Rahardjo, *Law and Justice in Indonesia*, 135.

Figure 2. Institutional Decision Tree of Constitutional Complaint Adjudication (Proposed Indonesian Model)



Source: Author's own illustration, 2025

This flowchart summarizes the constitutional complaint procedure, from filing by the citizen to the final decision by the Constitutional Court. It emphasizes procedural steps, decision points, and possible outcomes, facilitating understanding of the rights enforcement mechanism.

VII. Comparative Implications of Judicial Independence for Complaint Effectiveness

The level of judicial independence directly influences the functioning of constitutional complaint mechanisms.¹³⁶ Germany and South Korea have constitutional courts with structural and financial independence, which results in shorter decision-making periods, higher complaint admissibility rates, and stronger enforcement of their decisions.¹³⁷ These courts can ensure compliance, maintain constitutional consistency, and uphold public confidence as constitutional justice is effectively served.¹³⁸ On the other hand, Italy's fluctuating judicial independence due to political bargaining and Indonesia's informal constitutional complaint procedure lead to limited effectiveness in addressing rights violations.¹³⁹ This demonstrates the practical, rather than theoretical, significance of judicial independence.¹⁴⁰ Evidence shows that independence primarily strengthens the enforcement of judicial autonomy, as active complaint systems promote judicial accountability, transparency, and public legitimacy.

For Indonesia, adopting institutional reforms that guarantee tenure security, transparent appointments, and budgetary independence of the Constitutional Court is crucial to ensure that any future constitutional complaint mechanism functions as a genuine protector of fundamental rights rather than a symbolic institution.¹⁴¹ The comparative dimensions of independence and effectiveness across the selected jurisdictions are summarized in Table 1 below.¹⁴²

¹³⁶ Albert and Bächtold, "Judicial Independence in Comparative Constitutional Courts," 895–920.

¹³⁷ Bustos Gisbert, "Política, Independencia y Autogobierno Judicial" [Politics, Independence, and Judicial Self-Government], 93–120.

¹³⁸ World Justice Project, *Rule of Law Index 2023*.

¹³⁹ Gentili, "A Comparative Overview of European Systems of Individual Constitutional Complaint," 27–46.

¹⁴⁰ Venice Commission, *Report on Constitutional Justice and the Rule of Law 2023*.

¹⁴¹ Czine, "Fundamental Rights Protection through Constitutional Complaints," 275.

¹⁴² Czine, "Fundamental Rights Protection through Constitutional Complaints," 275.

Table 1. Relationship between Judicial Independence and Effectiveness of Constitutional Complaint Systems

Country	Judicial Independence Features	Effectiveness Indicators	Overall Assessment
Germany	Strong structural and financial autonomy; judges appointed by qualified parliamentary majority.	High timeliness, strong compliance, broad accessibility.	Highly effective and trusted system.
South Korea	Institutional autonomy; transparent appointment through balanced branches; independent case management.	Moderate-to-high compliance and procedural fairness.	Effective with strong public confidence.
Italy	Independence partly constrained by political appointments; fragmented administrative control.	Moderate timeliness and compliance; uneven accessibility.	Functionally effective but politically sensitive.
Indonesia	No individual complaint mechanism; partial judicial autonomy; limited enforcement capacity.	Low accessibility and procedural coverage.	Developing framework — requires reform to ensure effectiveness.

Source: Author’s comparative analysis based on constitutional frameworks, Venice Commission (2023), and World Justice Project Rule of Law Index (2023).

VIII. CONCLUSION

Constitutional complaint systems represent an advanced legal mechanism that safeguard or protect fundamental rights and strengthen the rule of law across democratic nations. They help or provide citizens with direct access to

constitutional justice and ensure institutional accountability by allowing judicial scrutiny of state actions. The comparative analysis of Germany, South Korea, and Italy demonstrates or shows that the effectiveness of these systems is inseparable from the level of judicial independence, procedural accessibility, and also civic engagement supporting them.

Judicial independence emerges as the cornerstone or central element of an effective constitutional complaint mechanism. Courts that operate independently from political interference and have financial self-sufficiency, structural autonomy, and operate under transparent administrative systems achieve higher procedural efficiency, consistent reasoning, and strengthened public trust. The systems which operate under restricted independence and face procedural delays and political interference fail to deliver rights violation remedies. This damages public trust in constitutional governance.

The selection of Indonesia as a reform-oriented case study reveals multiple benefits and challenges at the same time. While it lacks a fully operational constitutional complaint framework, Indonesia can draw or learn valuable lessons from comparative jurisdictions. Institutional reforms ensuring tenure security, transparent judicial appointments, adequate funding, and technological innovation can help to strengthen judicial independence and accessibility. Civil society participation should be further institutionalized to improve awareness, inclusivity, and accountability.

The implementation of a constitutional complaint mechanism in Indonesia would become a concrete demonstration of justice and equity principles together with human rights protection. Through this mechanism citizens would gain direct access to defend their rights and hold public officials accountable and actively protect constitutional governance. Through its structural design alignment with judicial independence and societal engagement Indonesia can develop an effective and resilient constitutional complaint system which would establish itself as a regional democratic standard.

BIBLIOGRAPHY

- Abdellaoui, Samia. "Between Reality and Aspiration: A Critical Review of the Principle of Judicial Independence Considering the Algerian Constitutional Amendment of 2020." *Manchester Journal of Transnational Islamic Law and Practice* 20, no. 3 (2024): 155–64.
- Albert, Richard, and Stefan Bächtold. "Judicial Independence in Comparative Constitutional Courts: Global Lessons for Emerging Democracies." *International Journal of Constitutional Law* 21, no. 4 (2023): 895–920.
- Amrullah, Maulana. "Identifying Key Determinants of Civil Society Robustness in Southeast Asia." *JAS (Journal of ASEAN Studies)* 12, no. 1 (2024): 107–31.
- Awawda, Osayd. "Assessment of De Jure Judicial Independence of Constitutional Courts According to International Guidelines." *Constitutional Review* 10, no. 1 (2024). <https://doi.org/10.31078/consrev1017>.
- Britto, Melina Carla de Souza, and Claudia Maria Barbosa. "Disfuncionalidades do Modelo Institucional Liberal: Juristocracia e Backlash [Dysfunctionalities of the Liberal Institutional Model: Juristocracy and Backlash]." *Cuestiones Constitucionales [Constitutional Questions]* (April 2023): 131–50.
- Buana, Mirza Satria. "Weak-Form Review and Judicial Independence: A Comparative Perspective." *Constitutional Review* 10, no. 2 (2024): 341–60.
- Butt, Simon. "Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts." *Constitutional Review* 9, no. 2 (2023). <https://doi.org/10.31078/consrev922>.
- Chakim, M. Lutfi. "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions." *Constitutional Review* 5, no. 1 (2019).

- Ciampi, Carlo Azeglio. “*Intervento del Presidente della Repubblica Carlo Azeglio Ciampi in occasione della consegna delle medaglie d’oro ai benemeriti della cultura e dell’arte* [Speech of the President of the Italian Republic Carlo Azeglio Ciampi on the Delivery of the Gold Medals for Culture and Arts Merit].” May 5, 2003.
- Constitutional Court of the Republic of Indonesia. *Decision No. 006/PUU-IV/2006*. Jakarta: Constitutional Court of the Republic of Indonesia, 2006.
- Czine, Ágnes. “Fundamental Rights Protection through Constitutional Complaints, with Special Respect to Its Effectiveness.” *Constitutional Review* 11, no. 2 (2025): 269–98.
- Di Capua, Viviana. “The Protection of Fundamental Rights by the Constitutional Court in the Republic of Latvia: Perspectives, Opportunities and Limits of an Introduction of the Model in Italy.” *Journal of the University of Latvia. Law* 16 (October 2023): 195–211.
- Dobrovičová, Gabriela, and Lukáš Tomaš. “The Authority of a Senate of the Constitutional Court of the Slovak Republic to Initiate Legal Compliance Proceedings Upon a Petition Filed by a Natural or Legal Person.” *AUC IURIDICA* 71, no. 4 (2025): 237–55. <https://doi.org/10.14712/23366478.2025.681>.
- Duessel, Fabian. “Direct Individual Access to Constitutional Justice in South Korea and Taiwan.” In *Comparative Constitutional History*, 245–276. Leiden: Brill, 2020. https://doi.org/10.1163/9789004435315_011.
- Gentili, Elena. “A Comparative Overview of European Systems of Individual Constitutional Complaint.” *Italian Journal of Public Law* 4, no. 1 (2012): 27–46.
- Hapsari, Murti Ayu. “The Dimension of Judicial Activism of Incorporating Constitutional Complaint: An Overview on Judicial Independence.” *Constitutional Review* 11, no. 2 (2025): 363–92. <https://doi.org/10.31078/consrev1124>.

- 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): 347-64. <https://doi.org/10.15294/jllr.v4i3.68129>.
- Kadir, Adies, Gunarto Gunarto, Suwarno Suwarno, and Md. Adnan Kabir. "Judicial Power and Judges' Status in Indonesia's Constitutional Framework." *Jurnal Hukum [Journal of Law]* 41, no. 1 (2025). <https://doi.org/10.26532/jh.v41i1.45197>.
- Kelsen, Hans. *General Theory of Law and State*. Cambridge: Harvard University Press, 1945.
- Kim, Marie Seong-Hak. "Travails of Judges: Courts and Constitutional Authoritarianism in South Korea." *American Journal of Comparative Law* 63, no. 3 (2015): 601-654. <https://doi.org/10.5131/AJCL.2015.0018>.
- Kommers, Donald P., and Russell A. Miller. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 3rd ed. Durham: Duke University Press, 2012.
- 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 (August 2023).
- Lailam, Tanto, Putri Anggia, and Irwansyah Irwansyah. "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court." *Jurnal Konstitusi* 19, no. 3 (2022): 693-719. <https://doi.org/10.31078/jk1939>.
- Manitra, Ramalina Ranaivo Mikea, and Adya Paramita Prabandari. "Judicial Independence Under Political Pressure: The High Constitutional Court and Electoral Justice in Madagascar (2009-2023)." *Constitutional Review* 11, no. 2 (2025): 393-421. <https://doi.org/10.31078/consrev1125>.
- Mehta, Simi. "Looking Beyond Constitutional Institutions During an Emergency: Exploring the Role of the Civil Society in Protecting Rights." In *Human Rights During the COVID-19 Pandemic*, 73-85. Singapore: Springer Nature Singapore, 2024. https://doi.org/10.1007/978-981-97-1480-3_5.

- Nelson, Michael J. "Judicial Independence." In *International Encyclopedia of the Social & Behavioral Sciences*, 891–896. Amsterdam: Elsevier, 2015. <https://doi.org/10.1016/B978-0-08-097086-8.93155-6>.
- Navarrete, Rosa M., and Pablo Castillo-Ortiz. "Constitutional Courts and Citizens' Perceptions of Judicial Systems in Europe." *Comparative European Politics* 18, no. 2 (2020): 128–50. <https://doi.org/10.1057/s41295-019-00154-9>.
- Nggilu, Novendri, Mohamad Rivaldi Moha, Muhammad Ridho Sinaga, and Adelia Rachmaniar. "Judicial Review of Constitutional Amendments: Comparison between India, Germany, Colombia, and the Relevancy with Indonesia." *Lex Scientia Law Review* 8, no. 1 (2024): 261–298. <https://doi.org/10.15294/lslr.v8i1.1901>.
- Office of the United Nations High Commissioner for Human Rights (OHCHR). "Access to Justice for Vulnerable Populations." Accessed September 20, 2025. <https://www.ohchr.org/en/publications/access-to-justice-vulnerable-populations>.
- Office of the United Nations High Commissioner for Human Rights (OHCHR). "Civil Society Space and the United Nations Human Rights System." Accessed September 20, 2025. https://www.ohchr.org/sites/default/files/CS_space_UNHRSysystem_Guide_o.pdf.
- Office of the United Nations High Commissioner for Human Rights (OHCHR). "Complaints Procedures under Human Rights Treaties." Accessed September 20, 2025. <https://www.ohchr.org/en/treaty-bodies/human-rights-bodies-complaints-procedures/complaints-procedures-under-human-rights-treaties>.
- Okaisabor, Jeremiah Osasume. "The Quest of Fiscal Autonomy for Judicial Independence: The Case of the Nigerian Judiciary and Its Challenges." *African Identities* 23, no. 3 (2025): 756–80. <https://doi.org/10.1080/14725843.2024.2349613>.

- Örkényi, László. "A New Method for an Objective Measurement of the Judicial Workload—the Application of a Prediction Model Based on an Algorithm Formed by Multiple Linear Regression in Court Administration." *International Journal for Court Administration* 13, no. 1 (2022). <https://doi.org/10.36745/ijca.407>.
- Palguna, I Dewa Gede. "Constitutional Complaint and the Protection of Citizens' Constitutional Rights." *Constitutional Review* 3, no. 1 (2017).
- Parona, Leonardo. "Italy." In *Administrative Rulemaking and Planning in European Laws*, 50–54. Oxford: Oxford University Press, 2025. <https://doi.org/10.1093/oso/9780198867616.003.0008>.
- Rahardjo, Satjipto. *Law and Justice in Indonesia: Constitutional Perspectives*. Jakarta: Rajawali Press, 2018.
- Richmond, Baroness Hale. "The Independence of the Judiciary and Some of Its Enemies." *University of Toronto Law Journal* 73, no. Supplement 2 (2023): 140–151. <https://doi.org/10.3138/utlj-2023-0063>.
- Roa Roa, Jorge Ernesto, and Juan José Aristizábal López. "How Courts Defend Democracy: Challenging Authoritarianism and Advancing Social Transformation." *Revista de Direito Econômico e Socioambiental* 16, no. 3 (2025).
- Romo Rivas, Mishella, and Raul Sanchez-Urribarri. "Studying Judicial Decision-Making beyond Western Democracies: Lessons from Latin America." In *Research Handbook on Judicial Politics*, 61–84. Cheltenham, UK: Edward Elgar Publishing, 2024. <https://doi.org/10.4337/9781035309320.00013>.
- Rudy, Rudy, et al. "Implementation of Civil Rights against Vulnerable Groups in the Legal and Constitutional System in Indonesia." *Hasanuddin Law Review* 8, no. 3 (2023).

- Satriawan, Iwan, Seokmin Lee, Septi Nur Wijayanti, and Beni Hidayat. "An Evaluation of the Selection Mechanism of Constitutional Judges in Indonesia and South Korea." *PADJADJARAN Jurnal Ilmu Hukum* 10, no. 1 (2023): 122–147. <https://doi.org/10.22304/pjih.v10n1.a7>.
- Scheppele, Kim Lane. "A Case for the Judicial Enforcement of Principles." In *Sustaining the Rule of Law*, 36–56. Cheltenham, UK: Edward Elgar Publishing, 2025. <https://doi.org/10.4337/9781035345472.00006>.
- Sundariwati, Ni Luh Dewi. "Judicial Activism: Diantara Melindungi Supremasi Konstitusional Atau Transisi Menuju Juristocracy [Judicial Activism: Between Protecting Constitutional Supremacy and Transitioning toward Juristocracy]." *Jurnal Konstitusi* [Constitutional Journal] 21, no. 3 (2024): 432–47.
- Suparto, Hyeonsoo Kim, David Hardiogo, and Rani Fadhila Syafrinaldi. "Enhancing External Oversight of Constitutional Judges: A Study on the Role of the Judicial Commission in Indonesia and South Korea." *Lex Scientia Law Review* 8, no. 1 (2024). <https://doi.org/10.15294/lslr.v8i1.14140>.
- Tomaš, Lukáš. "Správne Súdnictvo v Systéme Delby Moci [Administrative Judiciary in the System of Separation of Powers]." *Právny Obzor* 105, no. 6 (2022). <https://doi.org/10.31577/pravnyobzor.2022.6.02>.
- UN Peacemaker. "Global Lessons Learned: Judicial Independence and the Rule of Law." Accessed September 20, 2025. <https://peacemaker.un.org/sites/default/files/document/files/2022/07/ifeslessonslearnedconstitutionalcourtsjudicialindependenceruleoflaw2004.pdf>.
- United Nations Development Programme (UNDP). *Rule of Law and Access to Justice: Global Review 2023*. New York: UNDP, 2023.
- United Nations General Assembly. *A/HRC/49/80*. Accessed September 20, 2025. <https://docs.un.org/en/A/HRC/49/80>.

- Vande Kamp, Garrett N. "The Conditioning Role of Judicial Independence in the Exercise of Judicial Review." *Journal of Law and Courts* 9, no. 2 (2021): 261–82. <https://doi.org/10.1086/713407>.
- Váradi, Ágnes. "Access to Constitutional Complaint Procedures: A Real Chance?" *Hungarian Journal of Legal Studies* 61, no. 4 (2022): 372–85. <https://doi.org/10.1556/2052.2021.00307>.
- Venice Commission. *Different Models for Protection of Constitutionality, Legality and Human Rights*. Strasbourg: Council of Europe, 2019.
- Venice Commission. *Participation of Civil Society in Constitutional Review*. Strasbourg: Council of Europe, 2020.
- Venice Commission. *Report on Constitutional Justice and the Rule of Law 2023*. Strasbourg: Council of Europe, 2023.
- Versteeg, Mila, Tom Ginsburg, and David Landau. *Comparative Constitutional Law and Politics*. New York: Oxford University Press, 2025. <https://doi.org/10.1093/os0/9780197760482.001.0001>.
- World Justice Project. *Rule of Law Index 2023*. Washington, DC: World Justice Project, 2023.

CONSTITUTIONAL COMPLAINT ON CRIMINAL AND CIVIL COURT JUDGEMENTS: THE GERMAN JUDICIAL PRACTICES OF THE BUNDESVERFASSUNGSGERICHT AND PROPOSAL FOR THE MAHKAMAH KONSTITUSI REPUBLIK INDONESIA

Tanto Lailam*

Universitas Muhammadiyah Yogyakarta, Indonesia/
Universität zu Köln, Germany
Email: tanto_lailam@umy.ac.id

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Abstract

This article examines constitutional complaints regarding criminal and civil court decisions in the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) practices. It proposes recommendations for the Indonesian Constitutional Court. In the German legal system, such constitutional complaints fall under the jurisdiction of the BVerfG. Based on data from 2020 to 2024, approximately 85% of BVerfG decisions pertain to ordinary court judgements, encompassing those of both criminal and civil courts. This legal mechanism is a very popular area of jurisdiction at the BVerfG, with around 5,000–6,000 cases resolved each year. Some notable cases include the Lüth case, the Soldiers are Murderers case, the Right to be Forgotten case, and others. The Lüth case cancelled a Hamburg civil court judgement, the Soldiers are Murderers case overturned several criminal courts' decisions, and the Right

* Tanto Lailam is a lecturer of constitutional law at the University of Muhammadiyah Yogyakarta. He is currently a PhD student at the Universität zu Köln, Germany. His scholarly interests primarily encompass comparative constitutional law, judicial review, and elections.



to be Forgotten case cancelled the German Supreme Court judgement. In its decisions on these cases, the BVerfG stated that the ordinary court rulings were contrary to the German Basic Law and principles of human rights, and that the rulings had violated the constitutional rights of citizens. The judicial practices of the BVerfG serve as a reference for constitutional courts worldwide, and it could potentially be adopted by the Indonesian Constitutional Court (MKRI) in the future through a constitutional amendment process to the 1945 Constitution. It is certainly motivated by the large number of constitutional complaints relating to criminal courts that have been resolved through the abstract judicial review mechanism, as well as concerns about miscarriages of justice and judicial corruption in the ordinary courts. The aim is to strengthen the protection of citizens' constitutional rights against all court decisions that violate these rights. At the same time, the Indonesian Constitutional Court's power serves as a counterbalance to ordinary court decisions based on Pancasila constitutional values, the 1945 Constitution, and Indonesian human rights principles.

Keywords: Civil Court; Constitutional Complaint; Criminal Court; Judgements

I. INTRODUCTION

The German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter BVerfG) is an independent and impartial judicial institution from other constitutional organs. The locations of the BVerfG in Karlsruhe and separated and far from Berlin (the capital city of the Federal Republic of Germany). The BVerfG was established as a fundamental pillar of Germany, serving as the supreme guardian of the German Basic Law¹ and the creation of a reliable German constitutional culture.² On 6 May 1969, the BVerfG moved to its official residence in the Schlossbezirk, adjacent to the Karlsruhe Palace. The BVerfG is the constitutional court in the federal level, there are 16 constitutional courts at the country level.³

¹ Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001* (Oxford: Oxford University Press, 2015), 1.

² David Miles, *Democracy, the Courts, and the Liberal State: A Comparative Analysis of American and German Constitutionalism* (New York: Routledge, 2021), 214.

³ The Constitutional Courts of the German Länder include Bayerischer Verfassungsgerichtshof [Bavarian Constitutional Court] (Munich, established 1947); Staatsgerichtshof des Landes Hessen [State Court of the State of Hesse] (Wiesbaden, established 1948); Staatsgerichtshof der Freien Hansestadt Bremen [State Court of the Free Hanseatic City of Bremen] (Bremen, established 1949); Verfassungsgerichtshof Rheinland-Pfalz [Constitutional Court of Rhineland-Palatinate] (Koblenz, established 1949); Verfassungsgerichtshof für das Land Nordrhein-Westfalen [Constitutional Court for the State of North Rhine-Westphalia] (Münster, established 1952); Hamburgisches

The BVerfG has made a substantial contribution to the formation and shaping of post-war Germany, gaining widespread popularity and adding to its reputation on both the European and international stages. Notably, it has established itself as a positive counter-model to the Supreme Court of the United States.⁴ It has become a pivotal political institution, wielding considerable influence and often regarded as the ‘most powerful constitutional court in the world’ and the ‘most original and interesting institution’ in the German system.⁵ The success of the BVerfG is symbolized by Karlsruhe’s triumph as a representation of German constitutional continuity within the ‘Karlsruhe Republic’.⁶

The establishment of the BVerfG was preceded by a debate in the Parliamentary Council on the institutional model of the Court. The initial proposal was the Supreme Court (*Staatsgerichtshof*), modelled on the Weimar Republic’s judiciary (similar to the United States’ Supreme Court). The *Staatsgerichtshof* functioned as a constitutional court and was the highest federal court. However, concerns were raised by judges, who favoured the traditional model of the separation of ordinary judicial jurisdiction and the review of political decisions (the constitutionality of political decisions).⁷ The second proposal established a constitutional court as envisaged by Hans Kelsen, an independent constitutional

Verfassungsgericht [Hamburg Constitutional Court] (Hamburg, established 1953); Verfassungsgerichtshof Baden-Württemberg [Constitutional Court of Baden-Württemberg] (Baden-Württemberg, established 1955); Landesverfassungsgericht Mecklenburg-Vorpommern [State Constitutional Court of Mecklenburg-Western Pomerania] (Greifswald, established 1957); Verfassungsgerichtshof des Saarlandes [Constitutional Court of Saarland] (Saarbrücken, established 1959); Verfassungsgerichtshof des Landes Berlin [Constitutional Court of the State of Berlin] (Berlin, established 1992); Verfassungsgericht des Landes Brandenburg [Constitutional Court of the State of Brandenburg] (Potsdam, established 1993); Verfassungsgerichtshof des Freistaates Sachsen [Constitutional Court of the Free State of Saxony] (Leipzig, established 1993); Verfassungsgericht des Landes Sachsen-Anhalt [Constitutional Court of the State of Saxony-Anhalt] (Saxony-Anhalt, established 1993); Niedersächsischer Staatsgerichtshof [Lower Saxony State Court] (Bückeburg, established 1995); Thüringer Verfassungsgerichtshof [Thuringian Constitutional Court] (Thuringia, established 1995); and Schleswig-Holsteinisches Landesverfassungsgericht [Schleswig-Holstein State Constitutional Court] (Schleswig-Holstein, established 2008).

⁴ Michaela Hailbronner, “Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism,” *International Journal of Constitutional Law* 12 (2014): 626.

⁵ Jürgen Bröhmer, Clauspeter Hill, and Marc Spitzkat, eds., *70 Years German Basic Law: The German Constitution and Its Court: Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights* (Germany and Malaysia: Konrad-Adenauer-Stiftung and The Malaysian Current Law Journal Sdn Bhd, 2019), 103.

⁶ Donald P. Kommers and Russell A. Miller, “Das Bundesverfassungsgericht [The Federal Constitutional Court]: Procedure, Practice and Policy of the German Federal Constitutional Court,” *Journal of Comparative Law* 3, no. 2 (2009): 210.

⁷ Christian Bumke and Andreas Voßkuhle, *German Constitutional Law: Introduction, Cases, and Principles* (Oxford: Oxford University Press, 2019), 10.

court separate from other German Supreme Court. This proposal was not comprehensive, nor did the framers plan for the new constitutional court to be a court that protected the rights of the strong majority, as they were not particularly concerned with constitutional review in general.⁸ Indeed, even delegates at the *Herrenchiemsee* Convention⁹ said that the new (constitutional court) constituted, at best, a matter of secondary importance. However, the conclusion of the debate resulted in the establishment of a separate Constitutional Court, the *Bundesverfassungsgericht* (BVerfG), which was endowed with exclusive jurisdiction over all constitutional disputes, including the power to review the constitutionality of the law.¹⁰

After the amendment of the German Basic Law in 2025, the powers of the BVerfG are regulated by Article 94 of the German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*). The BVerfG has the following powers: judicial review (abstract review and concrete/ specific review), constitutional complaint, disputes between constitutional organs, election disputes, dissolution of political parties, and impeachment of the federal president and judges. The establishment of the BVerfG was the result of policies from Bonn (the capital of Germany at the time), values from Karlsruhe (where the BVerfG is located today), and input from the German people.

In 2025, the BVerfG will have reached its 76-year milestone. By that time, it will have established itself as a reliable guardian of the German Constitution, a proponent of democratic principles, and a defender of human rights. Beyond its domestic role, the BVerfG has assumed a significant international responsibility, contributing to the development of European integration and the establishment of an international constitutional legal framework. In praxis,

⁸ Hailbronner, "Rethinking the Rise of the German Constitutional Court," 626.

⁹ The Constitutional Convention at Herrenchiemsee (German: *Verfassungskonvent auf Herrenchiemsee* [Constitutional Convention at Herrenchiemsee]) was a meeting of constitutional experts nominated by the minister-presidents of the western states of Germany, held in August 1948 at the former Herrenchiemsee Abbey in Bavaria. It formed part of the process of drafting and adopting the 1949 Basic Law (*Grundgesetz* [Basic Law]). The draft prepared by the Herrenchiemsee Convention served as the starting point for the deliberations of the *Parlamentarischer Rat* [Parliamentary Council] in Bonn during 1948–1949.

¹⁰ Kommers and Miller, "Das Bundesverfassungsgericht [The Federal Constitutional Court]," 210.

the review of a multiplicity of executive acts and court decisions in individual cases is particularly essential. It's truly extraordinary power,¹¹ the “guardian of the constitution” (*Hüter der Verfassung*),¹² and protection of fundamental rights.¹³ It is the most powerful independent constitutional court of the world with a particularly large set of competencies and political impact.¹⁴ This role is greatly influenced by the exercise of authority in abstract-concrete judicial review and constitutional complaints.

In the German legal system, the BVerfG has the power to review decisions of both criminal and civil courts, thereby protecting citizens' constitutional rights. Such judicial decisions can be declared contrary to the Basic Law and have no binding legal force. The sanction can even include compensation for the losses suffered by the applicant during the dispute process. In the case of the BVerfG, the applicant who felt aggrieved by the court decision that had become legally binding filed a lawsuit because the court decision had violated the constitutional rights guaranteed by the Constitution. Legal consequences in the BVerfG decision relate to the cancellation of criminal and civil court decisions. If the decision is based on a law that has been cancelled or is not in accordance with the German Basic Law, the process can be reopened even after the decision is final.

The role and contribution of the BVerfG to the protection of citizens' constitutional rights in Germany and Europe, as demonstrated in the constitutional complaint, has established the court as a model for constitutional

¹¹ Tanto Lailam and Nita Andrianti, “Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia,” *Journal Bestuur* 11, no. 1 (2023): 75–94.

¹² Muhammad Siddiq Armia, “Constitutional Practice of ASEAN Countries: Questioning Judicial Review, Religions and Minority Issues,” *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* [Petita: Journal of Legal and Sharia Studies] 7, no. 1 (2022): 42.

¹³ Tanto Lailam and M. Lutfi Chakim, “A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences,” *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 10, no. 2 (2023): 151.

¹⁴ Iwan Satriawan et al., “Judicial Appointment of German *Bundesverfassungsgericht* [Federal Constitutional Court]: Lesson for Indonesia,” in *Proceedings of the International Conference on Sustainable Innovation on Humanities, Education, and Social Sciences (ICOSI-HESS 2022)* (Atlantis Press, 2022), 142.

courts in various countries around the world. It has made a real scientific contribution to the development of legal systems in the world. Voßkuhle stated:¹⁵

“Over the past decades, the interest in the jurisprudence of the BVerfG has increased considerably among academics and political actors from all over the world. This holds true not only for countries characterized by Continental-European law, but also for countries with an Anglo-American legal tradition. Independently here of, in the course of reforms towards the rule of law in many developing countries and countries in transition - at least in those where English is a working language - a demand for translations of decisions of the BVerfG has arisen”.

Johannes Masing has stated the following: „The BVerfG is one of the most influential constitutional courts in the world - from a domestic perspective, perhaps currently the most powerful of all such courts. Having broad authority over all governmental entities of the states, it reaches reasoned decisions in detail with far-reaching political implications“.¹⁶

Meanwhile, the Indonesian Constitutional Court (Mahkamah Konstitusi Republik Indonesia, hereinafter MKRI) has played a particularly important role in ensuring these higher levels of judicial independence. During its 20-year existence, the Court has heard numerous constitutional challenges to national statutes that touch on issues widely accepted as critical to establishing and maintaining judicial independence.¹⁷ It has limited power to the mechanism of abstract judicial review,¹⁸ without the constitutional complaints and concrete judicial review powers. It has resulted in constitutional complaint cases being ‘forced’ to use the abstract judicial review route, such as the Lese Majeste, Utomo, Wijaya and Lubis cases, among others. The MKRI rejects most constitutional complaint cases on the legal grounds that it does not have the power, but

¹⁵ Andreas Voßkuhle, “Foreword by the President of the German Constitutional Court,” in Jürgen Bröhmer, Clauspeter Hill, and Marc Spitzkatz, eds., *70 Years German Basic Law: The German Constitution and Its Court: Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights* (Germany and Malaysia: Konrad-Adenauer-Stiftung e.V. and The Malaysian Current Law Journal Sdn Bhd, 2019), 9.

¹⁶ Johannes Masing, “The Federal Constitutional Court,” in Matthias Herdegen, Johannes Masing, Ralf Poscher, and Klaus Ferdinand Gärditz, eds., *Constitutional Law in Germany* (Germany: C.H. Beck, 2025), 737.

¹⁷ Simon Butt, “Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts,” *Constitutional Review* 9, no. 2 (December 2023): 246–75.

¹⁸ Zainal Arifin Mochtar, “Guarding Democracy: Judicial Activism in the Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes,” *Constitutional Review* 11, no. 1 (May 2025): 37–62.

there is case that have been granted by the MKRI, such as the Utomo case. Furthermore, the absence of constitutional complaint power means that the MKRI is not able to provide maximum protection of the constitutional rights of citizens.¹⁹ In the context of criminal and civil court decisions, the absence of a constitutional complaint mechanism in the MKRI has resulted in weak legal protection against court decisions that violate the constitution and human rights principles in terms of substance and procedure of the law, especially since there are miscarriages of justice and judicial mafia are still common in criminal and civil court practices. These arguments form the research background for a proposal for a constitutional complaint regarding criminal and civil court judgments for the MKRI, with reference to the judicial practices of the BVerfG.

II. JUDICIAL REVIEW AND CONSTITUTIONAL COMPLAINT POWERS

Judicial review is an integral component of constitutionalism, without which the constitution cannot be utilised effectively. Judicial review of the constitutionality of laws is also regarded as a mechanism to regulate the abuse of legislative power by the majority in legislation making, thereby addressing the gaps of the rule of law, democracy, and identity in transnational governance.²⁰ It is defined as the power of judicial bodies to set aside ordinary legislative or administrative laws if Justices conclude that the conflict with the Constitution has emerged as an almost universal feature of Western-style democracy.²¹ Judicial review is an examination of the constitutionality of the laws, which is carried out using constitutional measurement tools. Furthermore, every state institution has a constitutional obligation to protect and fulfil the fundamental rights of citizens. The abuse of power theory posits that government power is prone to corruption and violations of fundamental rights. Consequently, the

¹⁹ Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review* 2, no. 1 (May 2016): 103–28.

²⁰ Doreen Lustig and J. H. H. Weiler, "Judicial Review in the Contemporary World: Retrospective and Prospective," *International Journal of Constitutional Law* 16, no. 2 (2018): 315.

²¹ Georg Vanberg, *The Politics of Constitutional Review in Germany* (New York: Cambridge University Press, 2005), 1.

Constitution must ensure the availability of a judicial review mechanism for aggrieved parties to protect and fulfil these fundamental rights. Judicial review has the capacity to expand or restrict the exercise of state power, thereby protecting or diminishing human rights. Judicial review establishes the standard for determining the importance of specific rights and the circumstances in which the state may limit those rights.²²

Dieter Grimm has asserted that the judicial review functions as a counterweight to the tendency of all political forces to detach themselves from their competitors as far as possible. It is important to note that competition is the most significant driver of democracy and the most effective means of government control.²³ Even at the European Union level, the need for judicial review is evident in maintaining institutional balance in disputes between political institutions. Additionally, it serves to maintain a balance between the European Union and its Member States in disputes about the existence and exercise of the European Union competencies, which are not subject to significant dispute. The necessity to protect individual rights is indisputable.²⁴

The BVerfG is vested with several powers, including the powers to undertake judicial review, resolve disputes between constitutional organs, adjudicate electoral disputes, dissolve political parties, and impeach the federal president and judges. In terms of judicial review competence, the three most frequently employed mechanisms are abstract judicial review (*Abstrakte Normenkontrolle*), concrete judicial review (*Konkrete Normenkontrolle*), and constitutional complaint (*Verfassungsbeschwerde*).²⁵

First, abstract judicial review power. Abstract review is a process by which a court assesses the text of a law or its potential future implications in the absence of a concrete case. It is a significant power exercised by the courts

²² Wendy K. Mariner, "Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States," *German Law Journal* 22 (2021): 1039.

²³ Dieter Grimm, "Constitutional Adjudication and Democracy," *Israel Law Review* 33, no. 2 (1999): 194.

²⁴ Alexander H. Türk, *Judicial Review in EU Law* (United Kingdom and United States: Elgar European Law, 2009), 1.

²⁵ Tanto Lailam, "Perbandingan Desain Pengujian Konstitusional Pada Mahkamah Konstitusi Federal Jerman dan Indonesia" [Comparison of Constitutional Review Designs in the German Federal Constitutional Court and the Indonesian Constitutional Court], *Arena Hukum: Jurnal Ilmu Hukum* [Arena of Law: Journal of Legal Studies] 16, no. 2 (August 2023): 74–101.

within the political system, closely related to the legislative drafting process. It has been argued that abstract review even influences the formation and change of law. From a political perspective, abstract review empowers unelected bodies such as the Courts to determine the constitutionality of laws enacted by elected political bodies, thereby ensuring the safeguarding of fundamental rights. Abstract review is part of the continental European tradition of constitutional courts, having the power to review laws passed by the legislature in the absence of an actual case in ordinary courts. It is a procedure whereby state authorities ask the court to rule on the constitutionality of a piece of legislation.²⁶ It is closely linked to the legislative process and even influences the creation and amendment of laws. Martin Shapiro and Alec Stone Sweet noted that abstract judicial review is the jargon of European constitutional law for reviewing the constitutionality of laws.²⁷

Second, concrete judicial review power. The concrete review is a review requested by a judges from ordinary courts when they have doubts concerning the constitutionality of a law that is to be applied in a particular case. It is also termed “the constitutionality of law upon the request of the court”. The request for a constitutional question from the general court to the Constitutional Courts generally also uses the terminology of submitting a judicial referral of referral cases from a court.²⁸ According to Kommers and Miller, concrete review is a judicial review mechanism employed by ordinary courts. If an ordinary court determines that the relevant federal or state law on which a case arises contravenes the 1949 Basic Law, it is obligated to refer the constitutional question to the BVerfG prior to proceeding with the resolution of the case. Judicial referrals are made irrespective of the issue of constitutionality raised by either party. The obligation to make such a referral arises when an ordinary

²⁶ David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton, NJ: Princeton University Press, 2010), 41.

²⁷ Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 347–48.

²⁸ Josua Satria Collins and Pan Mohamad Faiz, “Penambahan Kewenangan *Constitutional Question* di Mahkamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara” [Adding the Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens’ Constitutional Rights], *Jurnal Konstitusi* [Constitutional Journal] 15, no. 4 (December 2018): 691.

court is convinced that the law on which the case is based is contrary to the Constitution.²⁹

The BVerfG power of concrete judicial review is divided into three cases: implementation of federal law by judges in ordinary courts; implementation of international law in Germany; the 1949 Basic Law interpretation by Lander Constitutional Courts. Object sengketa concrete review: Implementation of Federal Law in the Ordinary Court based on the Article 100 (1) of the Basic Law; (2) Implementation of International Law in Germany based on the Article 100 (2) of the Basic Law; (3) The 1949 Basic Law interpretation by State Constitutional Courts based on Article 100(3) of the Basic Law. The basis for this referral process is found in Article 100 of the 1949 Basic Law on concrete judicial review, Article 13 on court powers, and the procedural law on Articles 80 – 89 of the BVerfG Law. Judges of the Ordinary Court have the power to submit a constitutional question directly to the BVerfG.

Third, constitutional complaint power. The constitutional complaint constitutes a legal remedy designed to protect fundamental rights against regulations or ordinary court decisions that violate the constitution and human rights principles. According to Justice of the BVerfG, Dieter Grimm (1987–1999), individuals could request for a review of onerous laws using a constitutional complaint.³⁰ Similarly, Kommers emphasizes that constitutional complaints are available to individuals and entities vested with specific fundamental rights.³¹ It is a formal legal challenge lodged by individual citizens (including legal entities) against an alleged violation of their basic rights by state powers,³² encompassing administrative actions and judicial decisions.³³ The most prevalent causes of such violations are often the incorrect interpretation or implementation of the relevant articles of law.³⁴ Constitutional complaints represent an exceptional

²⁹ Kommers and Miller, "Das Bundesverfassungsgericht," 202.

³⁰ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016), 262.

³¹ Kommers and Miller, "Das Bundesverfassungsgericht," 202.

³² Vanberg, *Politics of Constitutional Review in Germany*, 87.

³³ Albert H. Y. Chen and Andrew Harding, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge: Cambridge University Press, 2018), 8.

³⁴ Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (London: Yale University Press, 2009), 7.

and specific legal instrument, which can only be invoked if other national legal orders or state power fail to provide adequate solutions to protect citizens' fundamental rights. Constitutional complaints should therefore be invoked only after the exhaustion of all other legal mechanisms.

The BVerfG has become an important institution for the protection of the Basic Law and the realisation of the rule of law and modern democracy. It also fulfils one of the basic requirements of the rights protected under the principles of the new constitutionalism in Europe.³⁵ The constitutional complaint marked a significant development in the constitutional review process, which now "reflects a long tradition in Germany"; however this seems exaggerated.³⁶ The constitutional complaint was adopted in the BVerfG Law 1951 (*Gesetz über das Bundesverfassungsgerichts 16 März 1951*) and has since become the most common form of application.³⁷

- a. Article 14 (1) of the BVerfG Law 1951 states: The First Senate of the BVerfG shall have jurisdiction in the cases referred to in Article 13 No. 1 to 3, 6, 11, 14 and in constitutional complaints (Articles 90 to 96), and the Second Senate shall have jurisdiction in the cases referred to in Article 13 No. 4, 5, 7 to 9, 12.³⁸
- b. Article 34 (4) of the BVerfG Law 1951 states: If a constitutional complaint or a general complaint is rejected as inadmissible or unfounded under Article 41(2) of the Basic Law (Section 13 No. 3),³⁹ the court of appeal shall impose

³⁵ Denis Preshova, *On the Rise While Falling: The New Roles of Constitutional Courts in the Era of European Integration* (PhD diss., University of Cologne, 2020), 25.

³⁶ Martin Borowski, "The Beginnings of Germany's Federal Constitutional Court," *Ratio Juris* 16, no. 2 (June 2003): 155.

³⁷ Anja Seibert-Fort, "Judicial Independence and Democratic Accountability: The German Function and Legitimacy of the German Federal Court," in Ernest Hirschs Balin, Gerhard van der Schyff, and Marteen Stremmer, eds., *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limit in Democratic Society* (Berlin: Asser Press and Springer, 2020), 46.

³⁸ Original text: "Der Erste Senat des Bundesverfassungsgerichts ist zuständig in den Fällen des § 13 Nr. 1 bis 3, 6, 11, 14 sowie für Verfassungsbeschwerden (§ 90 bis 96), der Zweite Senat in den Fällen des § 13 Nr. 4, 5, 7 bis 9, 12" [The First Senate of the Federal Constitutional Court has jurisdiction in the cases listed in section 13 nos. 1 to 3, 6, 11, and 14, as well as for constitutional complaints (sections 90 to 96); the Second Senate has jurisdiction in the cases listed in section 13 nos. 4, 5, 7 to 9, and 12].

³⁹ *Gesetz über das Bundesverfassungsgericht* [Federal Constitutional Court Act], March 16, 1951, art. 13(3): "on complaints against decisions of the Bundestag regarding the validity of an election or the gain or loss of a seat in the Bundestag (art. 41(2) of the Basic Law)."

a fee of twenty Deutsche Marks to Deutsche Marks on the complainant if the filing of the complaint constitutes an abuse (Article 34 (4)).⁴⁰

In addition to the aforementioned provisions, Articles 90 (1), 91, 92, 93 (1), 94 (1) and 95 (1) of the BVerfG Law 1951 pertain to law enforcement and the procedure for the submission of a constitutional complaint. The constitutional complaint power was based on the BVerfG Law 1951 for a period of 18 years, from 1951 to 1969, after which it underwent a change through an amendment to the Basic Law in 1969, specifically Article 93 (1) number 4a of the Basic Law (May 23, 1949).⁴¹

- a. Article 93 (1) No. 4a of the Basic Law: on constitutional complaints, which may be filed by any person alleging that one of his or her fundamental rights under Article 20(4)⁴², Article 33⁴³, Article 38⁴⁴, Article 101⁴⁵, Article 103⁴⁶ or Article 104⁴⁷ has been infringed by public authority (individual complaint)
- b. Article 93 (1) No.4b of the Basic Law: on constitutional complaints filed by municipalities or associations of municipalities alleging that their right to

⁴⁰ "Wird eine Verfassungsbeschwerde oder eine Beschwerde gemäß Artikel 41 Abs. 2 des Grundgesetzes (§ 13 Nr. 3) als unzulässig oder unbegründet zurückgewiesen, so kann das Bundesverfassungsgericht dem Beschwerdeführer eine Gebühr von zwanzig Deutsche Mark bis zu eintausend Deutsche Mark auferlegen, wenn die Einlegung der Beschwerde einen Mißbrauch darstellt" [If a constitutional complaint or a complaint pursuant to article 41(2) of the Basic Law (section 13 no. 3) is rejected as inadmissible or unfounded, the Federal Constitutional Court may impose a fee of twenty to one thousand Deutsche Mark on the complainant if the filing of the complaint constitutes an abuse of process].

⁴¹ Hailbronner, "Rethinking the Rise of the German Constitutional Court," 630.

⁴² *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 20(4): "All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available."

⁴³ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 33 (equality of political rights and duties; equality of eligibility, qualifications, and professional achievements for public office; and public service according to law).

⁴⁴ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 38 (elections to the German Bundestag, electoral mechanism, and minimum age requirements).

⁴⁵ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 101 (prohibition of extraordinary courts).

⁴⁶ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 103: "(1) In the courts, every person shall be entitled to a hearing in accordance with law; (2) an act may be punished only if a law defined it as a criminal offense before the act was committed; (3) no person may be punished for the same act more than once under the general criminal laws."

⁴⁷ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], Deprivation of liberty (Article 104a), Financial assistance for investments (Article 104b), Financial assistance for investments in municipal education infrastructure (Article 104c), and financial assistance for investments in social housing (Article 104d).

self-government under Article 28 has been violated by law; in the case of infringement by Land law, however, only if the law cannot be challenged in the Land's constitutional court (complaints by municipalities or associations of municipalities).

After the 1969 amendment of the Basic Law, the BVerfG Law of 1951 was revised on 11 August 1993, and the final amendment was introduced in Article 2 of the Law on 8 October 2017. The following are several important points of the constitutional complaint: The First is the powers. The constitutional complaint is regulated in Article 13 (8a)/ Article 13 (8a) of this Law: The BVerfG shall decide on constitutional complaints (Article 93 (1) No. 4a and 4b of the Basic Law). In implementing the complaint, the BVerfG established the distribution of power by the First and Second Senates. The First Senate shall have jurisdiction over constitutional complaints, with the exception of matters related to Article 91 and associated electoral legislation. Conversely, the Second Senate shall not transfer constitutional complaints to the First Senate (Article 14, paragraphs (1,2)).

During the constitutional amendment of the German Basic Law in 2025, there were substantive changes to Articles 93 and 94 of the German Basic Law. Article 93 focuses on institutions and Justices. Meanwhile, Article 94 regulated the court's power. Article 94 No 4 (a,b,c,) of the German Basic Law specifically regulates the constitutional power of the BVerfG, namely:

- a. Article 94 No.4a: on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority (individual complaint)
- b. Article 94 No.4b: on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land (municipalities complaints)

- c. Article 94 No.4c: on constitutional complaints filed by associations concerning their non-recognition as political parties for an election to the *Bundestag* (election complaint).

This article focuses solely on the individual constitutional complaint (Article 94, No. 41). The BVerfG's practices demonstrate that individual constitutional complaints possess the capacity to evaluate the constitutionality of laws and ordinary courts decisions from the perspective of individual complaints. Primarily, a complaint is lodged against a judgment (*Urteilsbeschwerde*), in which the BVerfG undertakes a review to determine whether the fundamental rights enshrined in the Constitution have been violated by the application of law in ordinary court decisions. There is no advantage for rebellious courts not to follow the jurisprudence of the BVerfG, as this might lead a Chamber to quash a decision for its arbitrariness quickly. It is noteworthy that this is something that hardly any Justice is willing to have on their track record.⁴⁸ It is evident that these remedies accounted for more than 90% of the BVerfG caseload.⁴⁹ In her capacity as President of the BVerfG from 1994- 2002, Jutta Limbach articulated the criteria for the adjudication of a constitutional complaint, which are as follows: (a) the complaint must possess fundamental constitutional importance; (b). The alleged violation of fundamental rights must be of an exceptionally high severity; and (c). The complainant must be susceptible to significant harm if the complaint is not adjudicated.

Articles 90–95 of the BVerfG Law of 11 August 1993 (Federal Law Gazette I, p. 1473) regulate the procedure for cases referred. Several points regarding the constitutional complaint procedure on criminal and civil court judgements are as follows: (a) Applications must be submitted in the German language; (b) Applicants who are citizens of Germany or other countries, both individuals, groups, and countries; (c) The BVerfG stipulates that there is no obligation to use a lawyers when applying, but applicants may be represented by a lawyers or

⁴⁸ Armin von Bogdandy and Davide Paris, "Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court," *MPIL Research Paper Series* no. 01 (2019): 5.

⁴⁹ Jibong Lim, "Comparative Study of the Constitutional Adjudication System of the U.S., Germany and Korea," *Tulsa Journal of Comparative and International Law* 6, no. 2 (1999): 151.

professor of law from a university in Germany or the university in a European Union member state; (d) There is no fee for applying; (e) Constitutional complaint case are decided without oral hearings (meeting for the applicant and public) and the process of resolving legal disputes takes only one month; (f) Case decisions of the Chamber (three Justices) shall be adopted by unanimous vote and admission by the Senate of the BVerfG Justice is granted if at least three Justices agree; (g) BVerfG decision in the form of an order, not a judgment, and cannot be appealed (final and binding decision); (h) The federal or state government may be required to bear the procedural costs if the applicant is successful/their decision is accepted (succesfull), and (i) The BVerfG's decision may order the general court to revise its criminal/ civil decision in accordance with the BVerfG's decision.

III. CONSTITUTIONAL COMPLAINT ON CIVIL AND CRIMINAL COURT JUDGEMENTS

3.1. Constitutional Complaint on Ordinary Court Judgements

The BVerfG has historically been regarded as a highly reliable and impartial judicial institution, offering a beacon of hope for those seeking justice. Evidence for this can be found in the significant number of constitutional complaint cases that are decided on an annual basis. The BVerfG has become the most popular and effective citizens' court for the protection of constitutional rights. One of the key factors that has enabled the BVerfG to maintain a strong position in the German political system is the high level of trust that citizens place in the court. This level of trust is significantly higher than the level of trust in other central political institutions,⁵⁰ including the legislature.⁵¹

In the context of BVerfG practice, types of decisions regarding constitutional complaints can be categorised into several distinct types. The following categories

⁵⁰ Oliver W. Lembcke, "The German Federal Constitutional Court: A Court Unbound?" in Kálmán Pócza, ed., *Constitutional Review in Western Europe: Judicial-Legislative Relations in Comparative Perspective* (New York: Routledge, 2024), 144.

⁵¹ Franz C. Mayer, "Judicial Power and European Integration: The Case of Germany," in Christine Landfried, ed., *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge: Cambridge University Press, 2019), 186.

comprise the identified subjects of review: (i) Court decisions, (ii) Laws and ordinances (directly); (iii) Omissions on the part of the legislator; (iv) Other sovereign acts of European authorities; (v) Other sovereign acts of the highest federal authorities; (vi) Other sovereign acts of land authorities; (vii) Other sovereign acts of municipal authorities; (viii) Other general objects of legal challenges. In this context, the review of criminal and civil court decisions is one of the mechanisms in constitutional complaints. The statistics of cases is as follows:

Table 1.
Types of Constitutional Complaint Proceedings 2020 -2024⁵²

No.	Type of Cases	2020	2021	2022	2023	2024
1.	Court decisions	4.462	4.016	3.862	3.804	3.830
2.	Laws and Ordinances (Directly)	237	581	350	121	110
3.	Other General object of Legal Challenges	323	317	349	214	264
4.	Other Sovereign Acts of Land authorities	121	96	78	99	89
5.	Other Sovereign Acts of the Highest Federal Authorities	37	24	9	41	28
6.	Other Sovereign Acts of Municipal Authorities	9	11	12	9	15
7.	Omissions on the part of the legislator	1	8	6	6	99
8.	Other Sovereign Acts of European Authorities	4	6	4	2	1
Total		5.194	5.059	4.607	4.296	4.436

The majority of constitutional complaints in the BVerfG from 2020 to 2024 were resolved through court decisions. These included judgements from civil and criminal courts (*Bundesgerichtshof*), administrative courts (*Bundesverwaltungsgericht*), social courts (*Bundessozialgericht*), labour courts (*Bundesarbeitsgericht*), finance or tax courts (*Bundesfinanzhof*), patent courts (*Bundespatentgericht*), constitutional courts of the 16 states, as well as

⁵² Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court of Germany], *2020 Annual Report*, 49; *2021 Annual Report*, 42; *2022 Annual Report*, 54; *2023 Annual Report*, 54; *2024 Annual Report*, 54.

disciplinary courts, professional disciplinary courts in matters of lawyers and notaries. However, this study focuses on criminal and civil court decisions at the *Bundesgerichtshof*.

Table 2.
Statistic of Judicial Review on Criminal and
Civil Court Judgements 2020-2024⁵³

No.	Type of Cases	2020			2021			2022			2023			2024		
		*	**	***	*	**	***	*	**	***	*	**	***	*	**	***
1.	Civil Courts	1.702	1.713	27	1.645	1.599	17	1.482	1.488	20	1.455	1.641	13	1.431	1.145	13
2.	Criminal Courts	1.215	1.267	35	1.141	1.206	29	1.207	1.207	17	1.149	1.289	20	1.032	1.198	14
3.	Adiministrative Courts	810	778	20	613	750	11	488	488	10	464	495	10	496	491	5
4.	Social Courts	426	566	6	344	346	1	306	306	3	436	443	4	496	544	1
5.	Labour Courts	127	222	3	95	140	0	90	90	0	98	105	0	184	131	0
6.	Finance Courts	131	97	0	112	156	1	148	148	0	161	179	5	149	151	0
7.	State Constitutional Courts	34	28	0	42	39	0	115	115	0	27	106	0	35	41	0
8.	Disciplinary Courts, Professional Disciplinary Tribunals	15	20	1	20	24	0	23	23	1	13	12	0	7	7	0
9.	Patent Courts	2	1	0	4	0	0	3	3	0	1	1	0	0	4	0
Total		4.462	4.692	92	4.106	4.260	59	3.865	3.849	51	3.804	4.271	52	3.830	3.712	33

Note: * New Proceedings ** Decisions *** Successful Applications

The number of successful applications for constitutional complaints that result in judicial decisions is notably low. In 2020, there were 92 successful applications out of 4,692 (1.96%), in 2021, 59 out of 4,260 (1.38%), and in 2022, 51 out of 3,849 (1.32%). In the year 2023, there were 52 successful applications out of a total of 4,271 (1.21%). This decision warrants further examination, given that approximately 99% of decisions handed down by the BVerfG reject constitutional complaints. In particular, data are available on constitutional complaints against the decisions of the five highest federal courts, namely the Federal Court of Justice (*Bundesgerichtshof*), the Federal Labour Court (*Bundesarbeitsgericht*), the Federal Social Court (*Bundessozialgericht*), the Federal Finance Court (*Bundesfinanzhof*) and the Federal Administrative Court (*Bundesverwaltungsgericht*).

⁵³ Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court of Germany].

The following section presents the proceedings and success rates of constitutional complaints against decisions of the five federal courts in the years 2020-2024:

Table 3.
Statistic of Constitutional Complaint on
Supreme Court decisions 2020-2024⁵⁴

No.	The Supreme Federal Courts	2020			2021			2022			2023			2024		
		*	**	***	*	**	***	*	**	***	*	**	***	*	**	***
1.	Federal Court of Justice	491	444	2	359	394	1	313	326	1	329	356	1	309	259	0
2.	Federal Administrative Court	80	71	0	58	68	1	55	81	1	51	59	3	64	55	0
3.	Federal Finance Court	113	77	0	62	93	1	88	62	0	109	116	3	110	105	0
4.	Federal Labour Courts	110	247	0	55	99	0	59	66	0	62	69	0	125	71	0
5.	Federal Social Courts	203	269	0	144	143	0	117	155	1	124	151	2	106	123	0

Note: * New Proceedings ** Decisions *** Successful Applications

As the table above indicates, the mean number of constitutional complaints on Federal Court decisions granted by the BVerfG is 1-3 per year, representing a minor proportion of the hundreds of cases filed by applicants. This suggests that the average number of decisions rendered by the BVerfG in favour of granting constitutional complaints is relatively low. Despite the low statistic of cases granted by the BVerfG, the guarantee that the Federal Court's judgements are fair and do not conflict with human rights is evidence of a modern, credible and reliable court.

3.2. Constitutional Complaint on Civil and Criminal Court Judgements

This subsection will analyse judicial review of civil and criminal court decisions, including landmark cases such as the Lüth case, the Soldiers are Murderers case, and the Right to be Forgotten case, as well as several cases on constitutional complaints in 2024 and 2025.

⁵⁴ Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court of Germany].

1. Lüth case

The Lüth case is a constitutional complaint on civil court judgement decided by the First Senate of the BVerfG on 15 January 1958 (No.1 BvR 400/51). The case was brought by Erich Lüth against a decision of the Hamburg Civil Court (*Landgericht Hamburg*) of 22 November 1951 - Az. 15.O.87/51. Lüth as Senator of the Free and Hanseatic City of Hamburg and Head of the State Press Office, and in his capacity as President of the Hamburg Press Club, gave a speech to film distributors and directors at the opening of the ‘German Film Week’ on 20 September 1950. In his speech, he proposed a boycott of films that were deemed to lack morality and character, and which were believed to be damaging to the international reputation of the German film industry. This included Veit Harlan’s film production “Unsterbliche Geliebte”.⁵⁵

Lüth’s statement was challenged by Veit Harlan and the film companies Domnick-Film-Produktion and Herzog-Film in the Hamburg Civil Court. The Hamburg Regional Court decided that Lüth had committed a civil offence by causing financial loss to Harlan and his film companies. Lüth was accused by the production and distribution company Unsterbliche Geliebte of damaging their legitimate business on the basis of the German Civil Code or *Bürgerliches Gesetzbuch* (BGB). After losing the case, Lüth challenged the Hamburg Regional Court’s decision by filing a constitutional complaint with the BVerfG. The following are the main disputes and Judicial Review decisions filed in the Lüth case:

Table. 4
Lüth case

Petition	Decision
Decision of Hamburg Supreme Court (<i>Landgericht Hamburg</i>) dated 22 November 1951 - Az. 15.O.87/51 which found Lüth guilty of violating Articles 823 and 826 of the German Civil Code (<i>Bundesgesetzblatt/ BGB</i>).	1. The judgment of the Hamburg Civil Court of 22 November 1951 - Ref. 15. O. 87/51 - violates the complainant fundamental right under Article 5 (1) ⁵⁶ paragraph 1 of the Basic Law and is therefore annulled 2. The case was referred back to the Hamburg Regional Court.

⁵⁵ Lüth case, 1.

⁵⁶ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 5(1): “Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and

The Lüth decisions is very interesting and contribute to the legal systems of each country, especially in the area of freedom of opinion and expression. The BVerfG found that the decision of the Hamburg Civil Court was contrary to the Basic Law. In the Lüth case, Lüth was sentenced to pay civil damages for boycotting Harlan's film products. This was based on Article 823 of the BGB and he was found guilty under Article 826 of the BGB of defaming Harlan.⁵⁷ Articles 823 and 826 of BGB:

Article 823 of the German Civil Code (Liability in damages):

- (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or other right of another person is liable to make compensation to the other party for the damage arising from this.
- (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Article 826 of the BGB:

"A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage".

Lüth filed a constitutional complaint with the BVerfG claiming that the Hamburg court's decision applying Articles 823 and 826 of the BGB had violated Article 5(1) of the Basic Law of the Federal Republic of Germany (West Germany), i.e. his right to freedom of expression as guaranteed by the Basic Law.⁵⁸ In its judgment, the BVerfG stated:⁵⁹

"... that the Regional Court, in its assessment of the complainant's conduct, failed to recognise the particular importance that the fundamental right to freedom of expression also has when it comes into conflict with the private interests of others". The judgment of the Regional Court is based

to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

⁵⁷ Hugh Riedley, *Law in West German Democracy: Seventy Years of History as Seen Through German Courts* (Netherlands: Brill, 2019), 67–78.

⁵⁸ Donald P. Kommers, "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany," *Southern California Law Review* 53 (1980): 687.

⁵⁹ *Lüth case*, 75.

on this failure to apply fundamental rights standards and thus violates the complainant's fundamental right under Article 5 (1) sentence 1 of the Basic Law. It must therefore be set aside.⁶⁰

The final result of Lüth's constitutional complaint case, the BVerfG has granted Lüth's request and stated that the Hamburg Court's decision is contrary to Article 5 (1) of the Basic Law which clearly regulates freedom of expression.⁶¹ In this context, the legal arguments used by the justices of the BVerfG were the articles in particular Article 5 (1) sentence 1 of the Basic Law "Every person shall have the right freely to express and disseminate his opinions in speech" and the principle of unstructured balance as supporting arguments. From the perspective of the protection of constitutional rights, the BVerfG decision demonstrates a notable strong decision, exhibiting a marked preference for the protection of constitutional rights. The BVerfG places a high priority on safeguarding constitutional rights, proffering solutions to prevailing issues and offering protection to concrete cases in ordinary court, including final court decisions.

In its judgement, the BVerfG recognised that Hamburg Civil Court judgements can infringe on the right to freedom of expression if not applied correctly. In this context, the BVerfG justices were able to provide cogent legal arguments regarding the relationship between public and private law, where there are limits to freedom of speech and expression that should not be violated by civil courts. The BVerfG, in addition to declaring the Hamburg Civil Court decision null and void, also ordered the court to decide the case in accordance with the BVerfG's decision, i.e. cancelling the damages sanction against Lüth.

⁶⁰ "... daß das Landgericht bei seiner Beurteilung des Verhaltens des Beschwerdeführers die besondere Bedeutung verkannt hat, die dem Grundrecht auf freie Meinungsäußerung auch dort zukommt, wo es mit privaten Interessen anderer in Konflikt tritt. Das Urteil des Landgerichts beruht auf diesem Verfehlen grundrechtlicher Maßstäbe und verletzt so das Grundrecht des Beschwerdeführers aus Art. 5 Abs. 1 Satz 1 GG. Es ist deshalb aufzuheben" [... that the Regional Court, in assessing the complainant's conduct, failed to recognize the special significance of the fundamental right to freedom of expression, even where it comes into conflict with the private interests of others. The judgment of the Regional Court rests on this failure to apply constitutional standards and thus violates the complainant's fundamental right under article 5(1), first sentence, of the Basic Law. It must therefore be set aside].

⁶¹ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 5(1): "Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

The BVerfG's Justices consider the Lüth decision to be an important milestone in the 1950s with respect to its impact on the meaning and shaping of its constitutional jurisdiction in the protection of citizens' constitutional rights (particularly in the case of freedom of speech and expression).⁶² The Lüth decision has also contributed to the refinement of mechanisms and the articulation of standards and methods for the protection of fundamental rights. The Lüth decision is widely regarded as a foundational moment for at least two transformative post-war developments in constitutional thinking that continue to influence legal systems around the world.⁶³ Indeed, Lüth is widely considered by many to be the birth point of the now globally dominant conception of constitutional rights, which holds that constitutional rights are not only concerned with limiting state power,⁶⁴ but also the protection of individual rights against civil cases.

2. The Soldier are Murderer case

The Soldier are Murderer case is judicial review on criminal court judgement by the the First Senate of the BVerfG in its verdict of 10 October 1995, with decision numbers no. 1 BvR 1476/91, no. 1 BvR 1980/91, no. 1 BvR 102/92, no. 1 BvR 221/92. It is the extreme hate speech cases. The Soldiers are Murderers case is an insult to soldiers who are trained to kill. Soldiers in this context is a general term and does not refer to specific individuals.. This case was brought by 4 convicted persons who had been convicted by the criminal court for hate speech/insult in the sense of the Criminal Code of the Federal Armed Forces and individual soldiers by statements such as "Soldiers are murderers" or "Soldiers are potential murderers".⁶⁵

⁶² Ruth Weber, "Law-Making Activity of the German Federal Constitutional Court: A Case-Law Study," in Monika Florczak-Wątor, ed., *Judicial Law-Making in European Constitutional Courts* (London: Routledge, 2020), 33–34.

⁶³ Jacco Bomhoff, "Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing," *German Law Journal* 9, no. 2 (February 2008): 121–24.

⁶⁴ Kai Möller, "Lüth and the 'Objective System of Values': From 'Limited Government' Towards an Autonomy-Based Conception of Constitutional Rights," in Sujit Choudhry, Michaela Hailbronner, Mattias Kumm, et al., eds., *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights* (Oxford: Oxford University Press, 2024), 255–68.

⁶⁵ Complainant 1, represented by Attorney Thomas Scherzberg, requested annulment of the decision of the Bayerisches Oberstes Landesgericht [Bavarian Highest Regional Court], the decision of the Landgericht Ansbach [Regional Court of Ansbach], and the decision of the Amtsgericht Ansbach [Local Court of Ansbach]. Complainant

Table.5
Soldiers are murderers case

Petition	Decision
Court decisions in several States, Regions/ Municipalities that imposed criminal penalties on the applicants for committing the offence of contempt of Soldier, comprising 4 cases Applicant 1, Applicant 2, Applicant 3, and Applicant 4.	The BVerfG ruled that the Criminal Justice Decision in the Soldier-murderer case had violated Article 5(1) ⁶⁶ of the Basic Law. Several States had to reimburse the costs incurred by the Applicant.

The decision of the BVerfG partially annulled the decision of the criminal court, as it was considered to be contrary to the applicants' fundamental rights under Article 5(1) sentence 1 of the Constitution. In the judgement, the justices of the BVerfG stated that:⁶⁷

The BVerfG agrees with the Federal Court (*Bundesgerichtshof* - BGH) that the insulting criticism (*Schmähkritik*) concerns a collective that amounts to an attack on the personal honour of its members. The BVerfG also agrees that the (active) soldiers of the *Bundeswehr* (German Federal Armed Forces) constitute a sufficiently defined group. However, the condemnation must refer to *Bundeswehr* soldiers specifically, not to all soldiers in the world. In this case, the condemnation is general and directed at all soldiers in the world, not the *Bundeswehr* or individual German soldiers.

In the Soldier are murderer case, it has been clearly proven that the insult was a very strong one to the army profession, and that it clearly caused an uproar in the community at that time. However, due to the ambiguity surrounding

2, represented by Konrad Kittl, requested annulment of *den Beschluß des Bayerischen Obersten Landesgerichts* [the order of the Bavarian Highest Regional Court], *das Urteil des Landgerichts Augsburg* [the judgment of the Augsburg Regional Court], and *das Urteil des Amtsgerichts Landsberg* [the judgment of the Landsberg Local Court]. Complainant 3, represented by Attorneys Wilhelm Steitz and Gert Thomas, requested annulment of *den Beschluß des Oberlandesgerichts Koblenz* [the order of the Koblenz Higher Regional Court], *das Urteil des Landgerichts Mainz* [the judgment of the Mainz Regional Court], and *das Urteil des Amtsgerichts Mainz* [the judgment of the Mainz Local Court]. Complainant 4, represented by Attorney Frank Niepe, requested annulment of *den Beschluß des Bayerischen Obersten Landesgerichts* [the order of the Bavarian Highest Regional Court], *das Urteil des Landgerichts München* [the judgment of the Munich Regional Court], *das Urteil des Amtsgerichts München* [the judgment of the Munich Local Court], and *den Strafbefehl des Amtsgerichts München* [the penal order of the Munich Local Court].

⁶⁶ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 5(1): "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

⁶⁷ *Soldiers are Murderers case*, 38-42

the specific “individual” or “group of soldiers” to whom the insult was directed, the act was not classified as a “criminal offence”. Instead, it was regarded as a form of freedom of expression aimed at criticising the army in general. In the case of Soldier-Murderer, the criminal court that had found the applicant guilty and sentenced him to criminal punishment was required to correct its decision. This was due to the fact that the BVerfG’s decision had the legal consequence of requiring the criminal court to retry the case. The BVerfG’s decision was not only to annul the criminal court’s decision, but also to order the criminal court to correct its decision in accordance with the BVerfG’s decision. This decision is applicable retroactively, encompassing legal events that transpired prior to the BVerfG’s ruling.

The BVerfG ruled that the restriction of constitutional rights in the criminal court judgement was contrary to the German Basic Law. The judgement established the standard of freedom of expression guaranteed under the German Basic Law in this case, namely:

- a. Article 5(1) of the Basic Law stipulates the evaluation of the significance of freedom of expression, juxtaposed against the interests of the restricted law.
- b. The act of severe criticism directed towards the army constitutes a freedom of expression that is guaranteed by the Constitution, provided that it does not entail the insulting of a particular, explicitly named individual or group, such as the German Army.
- c. Insults directed towards individual soldiers and insults directed towards the German army are subject to legal sanction. However, insults directed towards soldiers in a general context (soldiers around the world) are not subject to legal sanction, as the insulting statements pertain to the army as a whole, not individual soldiers or the German army specifically.

3. The Right to be Forgotten case

The Right to Be Forgotten is a dispute between a private citizen and a broadcasting corporation regarding the applicant’s request to delist links to online information. In this case, the BVerfG also articulated an autonomous,

domestic standard of the right to be forgotten.⁶⁸ It is highly significant in that the decision effectively removes the imagined normative hierarchy between national law and European Union law.⁶⁹ This decision is an order of the First Senate of the BVerfG, November 6, 2019. Constitutional complaint regarding a private law judgment of the Federal Court of Justice (*Bundesgerichtshof*), which had rejected the complainant's action seeking injunctive relief against the availability, in an online archive, of press articles from more than 30 years ago.

The Judgment of the *Bundesgerichtshof* of November 13, 2012 – VI ZR 330/11. In 1982, the complainant was found guilty of murder and sentenced to life imprisonment for killing two people by shooting them in 1981. In 1982 - 1983, the magazine *Der Spiegel* published three articles about the case in its print edition, which mentioned the complainant's name. In 1999, Spiegel Online GmbH – the defendant in the ordinary court proceedings – uploaded the articles to the magazine's online archive, where they could be accessed free of charge and without restriction. When the complainant's name was entered into one of the major internet search engines, the articles in question appeared among the top search results.

In 2009, the complainant discovered that the articles were available online and sent a cease-and-desist letter to *Der Spiegel* magazine; however, the request was ignored. He then filed a lawsuit to prohibit the defendant from disseminating any information about the crime containing the plaintiff's surname in the *Bundesgerichtshof*, but the lawsuit was rejected. In its legal considerations, the German Supreme Court ruled that the public interest in obtaining information and the defendant's freedom of expression outweighed the plaintiff's interest in protecting his personality. The court ruled that the public had a legitimate interest in obtaining information about important events in contemporary history (including murder trials) that could not be separated from the plaintiff's name and identity by accessing the original, unaltered news reports.

⁶⁸ Federico Fabbrini and Edoardo Celeste, "The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders," *German Law Journal* 21 (2020): 55–65.

⁶⁹ Matthias Goldmann, "As Darkness Deepens: The Right to Be Forgotten in the Context of Authoritarian Constitutionalism," *German Law Journal* 21 (2020): 45–54.

After failing in the *Bundesgerichtshof*, the petitioner filed a constitutional complaint with the BVerfG to challenge the Supreme Court's ruling. In this case, the BVerfG ruled that: (1) the Judgment of the Federal Court of Justice of 13 November 2012 – VI ZR 330/11 – violates the complainant's fundamental right under Article 2(1)⁷⁰ in conjunction with Article 1(1)⁷¹ of the German Basic Law (*Grundgesetz*); (2) the Judgment is reversed. The matter is remanded to the Federal Court of Justice; (3) the Federal Republic of Germany must reimburse the complainant for necessary expenses.

In addition to the three cases mentioned above, several constitutional complaints were filed against court decisions in 2024 and 2025. In 2024, a constitutional complaint was filed regarding the requirements for reasons in criminal prosecution based on victim requests (Decision No. 2 BvR 350/21). This case was decided by the First Chamber of the Second Senate of the BVerfG on September 19, 2024. In this case, the complainant was a victim of sexual abuse, with the perpetrator being a doctor who forced the victim to perform sexual acts. The Regional High Court heard the criminal report, but its decision rejected the report due to the lack of clarity in the facts and evidence submitted by the applicant. Because the application was rejected, the applicant then filed a constitutional complaint against the court's decision with the BVerfG. In this ruling, the BVerfG granted part of the petition because the Regional High Court interpreted the requirements for grounds in the petition to compel criminal prosecution too broadly, inadequately, and with irrelevant arguments, thereby violating the petitioner's constitutional rights.

Several important cases were decided in 2025. These included the constitutional complaint No. 2 BvR 373/25 concerning judicial perversion of justice and No. 2 BvR 1277/23 and 2 BvR 85/24 regarding the validity of arbitration clauses in investment agreements. The three cases were constitutional complaints

⁷⁰ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 2(1): "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

⁷¹ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 1(1): "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

against the decision of the German Federal Court of Justice (*Bundesgerichtshof*). In the first case, a judge in a family court was convicted of judicial perversion and sentenced to two years' imprisonment for an offence involving the abuse of judicial power, as specified in Article 339 of the German Criminal Code⁷². The suspension of the sentence was granted on probation. The judicial perversion of justice occurred because the judge decided on his authority, designed the application, contacted the prospective applicant and expert witnesses via his personal email account, and filed the application in the court in which he worked. The case concerns to the judge's desire to prohibit two schools from requiring children to wear masks, maintain physical distancing and undergo Covid-19 testing, and to require these schools to continue with face-to-face learning. The BVerfG rejected the petition on the legal grounds that interpreting ordinary criminal law and applying it to individual cases is the prerogative of ordinary courts and cannot generally be reviewed by the BVerfG. The BVerfG can only do so exceptionally if the applicant claims a violation of the principle of equality in its manifestation as a prohibition of arbitrariness.

Secondly, the validity of arbitration clauses in investment agreement cases. In the BVerfG decision No. 2 BvR 1277/23, the constitutional complaint was filed by investors from European Union (EU) member states against the Federal Republic of Germany based on the Energy Charter Treaty. The Bundesgerichtshof rejected the petitioners' request on the grounds of referring to the Court of Justice of the European Union (CJEU)'s ruling in the *Achmea* case. The CJEU ruling established that Articles 267⁷³ and 344⁷⁴ of the Treaty on

⁷² *Strafgesetzbuch* (StGB) [German Criminal Code], sec. 339: "Judges, other public officials or arbitrators who, in the course of conducting or deciding a legal matter, bend the law for the benefit or to the detriment of a party incur a penalty of imprisonment for a term of between one year and five years."

⁷³ Treaty on the Functioning of the European Union, art. 267: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

⁷⁴ Treaty on the Functioning of the European Union, art. 244: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

the Functioning of the European Union (TFEU) prohibit the incorporation of arbitration clauses within international agreements between EU member states. Furthermore, in its decision No. 2 BvR 85/24, a constitutional complaint was filed by the Republic of India, which considered that the Bundesgerichtshof had failed to rule on the arbitration clause in the bilateral investment agreement signed between Germany and India in accordance with European Union law. In its ruling, the *Bundesgerichtshof* stated that the Achmea case law cannot be applied to bilateral investment agreements between European Union member states and third countries (India). The two constitutional complaints were both unsuccessful due to the applicants' inability to provide sufficient evidence to substantiate the alleged violations of their rights.

IV. PROPOSAL FOR THE MKRI: OPPORTUNITIES AND CHALLENGES?

From a constitutional systems perspective, Germany and Indonesia share similarities in terms of state ideology. The Basic Law thus established a State Philosophy or even State Ideology unalterable by future amendments of the constitution, very similar to the function Pancasila fulfils in the Indonesian 1945 Constitution. The State philosophy of the Basic Law is evidently based on the tradition of constitutionalism predicated on the realisation of freedom as the fundamental legitimation of state authority.⁷⁵ Additionally, the principle of social justice is central to the political cultures of Germany and Indonesia. The state is considered the only institution capable of achieving this goal.⁷⁶ This includes the Constitutional Court, which acts as the guardian of social justice.

Furthermore, the President of the MKRI (2013-2015), Hamdan Zoelva proposed that the BVerfG be designated as a suitable comparative legal reference for

⁷⁵ Christoph Enders, "Social and Economic Rights in the German Basic Law? An Analysis with Respect to Jurisprudence of the Federal Constitutional Court," *Constitutional Review* 6, no. 2 (December 2020): 190–203.

⁷⁶ Herbert Küpper, "The Indonesian Constitution Read with German Eyes," *Constitutional Review* 7, no. 1 (May 2021): 53–91.

MKRI. A detailed elaboration accompanied this proposal on several key reasons in support of this recommendation:⁷⁷

“...The constitutional review model of both the BVerfG and MKRI is identical and is based on the European model of constitutional review. In terms of legal tradition, Indonesia and Germany are part of the same legal tradition, namely the civil law tradition. The BVerfG is one of a number of constitutional courts around the globe that has been explicitly granted the power to hear constitutional complaints.⁷⁸

This perspective is endorsed by Justice of the MKRI I Dewa Gede Palguna (2003-2008, 2015-2020⁷⁹ and Deputy of the Constitutional Court Saldi Isra (2017 - present).⁸⁰ They posit that the BVerfG functions as a point of reference for comparative studies on the drafting of constitutional complaints in the MKRI for the following reasons, Firstly, a constitutional complaint constitutes a component of a constitutional review, a process which Indonesia and Germany adopt similarly. *Secondly*, regarding the respective legal traditions, it is evident that both Indonesia and Germany are situated within the same legal tradition, namely civil law tradition. Thirdly, Germany is one of the countries that was referenced during discussions about the establishment of a MKRI at the meetings of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly.⁸¹

⁷⁷ Hamdan Zoelva, “Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara” [Constitutional Complaint and Constitutional Question and the Protection of Citizens' Constitutional Rights], *Jurnal Media Hukum* [Journal of Legal Media] 19, no. 1 (2012): 152–65.

⁷⁸ Indonesian version: *Model constitutional review pada MK Jerman dan MKRI sama, yaitu merujuk pada model constitutional review Eropa dan secara tradisi hukum (legal tradition) Indonesia dan Jerman juga berada dalam tradisi hukum yang sama, yaitu tradisi civil law. Pengadilan Konstitusi Jerman adalah salah satu dari pengadilan konstitusi di dunia yang secara tegas memiliki wewenang constitutional complaint yang diatur dalam konstitusi dan Undang-undang MK Jerman* [The model of constitutional review in the German Constitutional Court and the Indonesian Constitutional Court is the same, namely, it refers to the European model of constitutional review, and by legal tradition Indonesia and Germany also belong to the same legal tradition, namely the civil law tradition. The German Constitutional Court is one of the constitutional courts in the world that expressly has the authority of constitutional complaint as regulated in the constitution and the German Constitutional Court Act].

⁷⁹ I Dewa Gede Palguna, “Constitutional Complaint and the Protection of Citizens' Constitutional Rights,” *Constitutional Review* 3, no. 1 (May 2017): 4–5.

⁸⁰ I Dewa Gede Palguna, Saldi Isra, and Pan Mohammad Faiz, *The Constitutional Court and Human Rights Protection in Indonesia* (Jakarta: Rajawali Pers, 2022), 186–88.

⁸¹ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara* [Constitutional Complaint: Legal Remedies for Violations of Citizens' Constitutional Rights] (Jakarta: Bumi Aksara, 2013), 1–740.

In the context of the Indonesian legal system, the Lüth case, the Soldier are murderers case, the Right to be forgotten case, and several cases that occurred in 2024 and 2025 in BVerfG are of particular interest and inspiration for a legal order that prioritises the protection of constitutional rights. In the Lüth case, the primary issue raised is a Hamburg Civil Court judgment that has been legally enforceable, yet is regarded as violating freedom of expression in the Basic Law. The Soldier-Murderer case is a criminal court judgment that contradicts the freedom of expression guaranteed in Article 5 (1) of the German Basic Law. Hence, the Right to be Forgotten case is a German Supreme Court decision that contradicts Article 2(1) in conjunction with Article 1(1) of the German Basic Law. These cases are of particular significance as they concern civil and criminal law cases, which are typically disputes between individuals, and are adjudicated by the BVerfG due to their impact on freedom of expression. In the German legal system, if a judge in a criminal or civil court decides a case that conflicts with the human rights guarantees in the constitution, the decision must be overturned by the BVerfG. In contrast, the Indonesian legal system operates within a distinct framework, where constitutional law and civil/criminal law are considered separate entities. As a result, decisions issued by civil and criminal judges cannot be reviewed by the MKRI.

A review of the data cases of the BVerfG reveals a common thread: criminal and civil court decisions that have permanent legal force and no further legal recourse can be the subject of constitutional complaints in the BVerfG. In MKRI practice, there are several cases related to constitutional complaints on criminal cases, namely the *Lèse-majesté* case, Utomo, Wijaya – Lubis cases:

1. *Lèse-majesté* case

The MKRI's decision on the *lèse-majesté* case demonstrates the implementation of criminal justice through the utilisation of the abstract mechanism of judicial review. The aforementioned cases were initiated by two Indonesian citizens, namely Eggi Sudjana and Pandapotan Lubis. Stefanus Hendrianto's commentary on the *lèse-majesté* judgement underscores the

significant ramifications it has for the Indonesian legal system, asserting that:⁸² “...Lèse majesté articles are irrelevant in a democratic state like Indonesia because they could negate the principle of equality before the law, and moreover, it could harm the freedom of expression, freedom of information, and the principle of legal uncertainty”. The lèse-majesté decision has been categorised as a “weak decision”. However, it still poses challenges in terms of protecting constitutional rights. MKRI’s decision merely pertained to the cancellation of articles in the Indonesian Penal Code, and it was unable to extend the protection of constitutional rights to criminal cases currently under adjudication in the Criminal Court of Jakarta Pusat. When viewed in the context of the theory of constitutional rights protection in the practice of concrete judicial review, this decision is weak. It lacks binding force for the criminal court, thereby not guaranteeing fair legal certainty for the applicants.

Furthermore, in accordance with the provisions enshrined in MKRI Law No.24/2003, the defamation article in question has been annulled and is no longer subject to any legally binding constraints, given that it was pronounced during a session that was open to the general public. It is therefore erroneous for the judge at the Criminal Court of Jakarta Pusat to have utilised the revoked article in his case. Instead, the Judges at the Criminal Court considered that “MKRI’s decision cannot apply to previous criminal cases and applies to future cases of defamation of the President”.⁸³ In this case, the Criminal Court of Jakarta Pusat proceeded with the criminal trial and sentenced the petitioners to three months’ imprisonment. In the cassation process, the Indonesian Supreme Court upheld this decision No. 153 PK/PID/2010, which stated that:⁸⁴

“The act committed/charged against the accused occurred on 3 January 2006, while the MKRI decision was handed down on 6 December 2006. Consequently, the case *quo* does not apply retroactively and cannot be considered based on the MKRI decision.”⁸⁵

⁸² Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 83.

⁸³ Pengadilan Negeri Jakarta Pusat [Central Jakarta District Court], Decision No. 1411/PID.B/2006/PN.JKT.PST, 20.

⁸⁴ Mahkamah Agung Republik Indonesia [Supreme Court of the Republic of Indonesia], Decision No. 153 PK/PID/2010, 18.

⁸⁵ Indonesian version: *Perbuatan yang dilakukan/didakwakan kepada Terdakwa terjadi pada tanggal 3 Januari 2006 sedangkan Putusan Mahkamah Konstitusi dijatuhkan pada tanggal 6 Desember 2006 sehingga terhadap perkara a*

In this case, the decisions of the MKRI and the Indonesian Supreme Court demonstrate a lack of harmony in the judiciary's understanding of the constitution, with conflicting decisions actually undermining the structure of the rule of law based on Pancasila. This is undoubtedly due to the absence of a constitutional complaint mechanism, as there would never be a conflict between an abstract judicial review decision and a court decision in a specific criminal case. Abstract judicial review decisions have implications for legislation and its impact on the legal system, whereas concrete judicial review has an impact on ongoing criminal proceedings. The constitutional complaint mechanism can be invoked after all other mechanisms have been exhausted. In this case, ideally, a constitutional complaint mechanism could be used to re-examine Indonesian Supreme Court decision No. 153 PK/PID/2010, with the main point being that the Indonesian Supreme Court's decision contradicts the MKRI decision.

2. Utomo case

The Utomo case involves hate speech, which was an action taken by the applicant in the form of a demonstration against the government, particularly the Reconstruction and Rehabilitation Agency (Badan Rekonstruksi dan Rehabilitasi/ BRR), which handled rehabilitation issues after the 2004 tsunami in Aceh and Nias. MKRI's decision on the Hate Sowing case was a case characterised as a constitutional complaint that used an abstract judicial review mechanism. The case was filed by R. Panji Utomo, an Indonesian citizen and a doctor, as well as the Director of FORAK (*Forum Komunikasi Antar Barak*), a communication forum for refugees following the earthquake and tsunami that struck Aceh and Nias. Utomo organised a peaceful demonstration to highlight what he perceived as the misappropriation of funds by the BRR for victims of the earthquake and tsunami.

Consequently, Utomo was apprehended and convicted of perpetrating an act of criminal defiance against the public interest, specifically characterised

quo tidak berlaku surut dan tidak dapat dipertimbangkan berdasarkan putusan MKRI tersebut [The act committed/ alleged against the defendant occurred on January 3, 2006, whereas the Constitutional Court's decision was rendered on December 6, 2006; therefore, in the *a quo* case, it does not apply retroactively and cannot be considered on the basis of that Constitutional Court decision].

by the expression of sentiments of hostility, hatred or contempt towards the Government of Indonesia. He was tried and sentenced to three months of imprisonment based on the decision of the Criminal Court of Banda Aceh No. 232/Pid.B/2006/PN/BNB dated 18 December 2006 because he was found guilty of committing the crime as set out in Articles 154 and 155 of the Indonesian Penal Code. The applicant did not appeal to the Criminal High Court of Aceh (*Pengadilan Tinggi Aceh*) and the Indonesian Supreme Court, and the decision is legally binding.

The case involved a critique of the government's performance in overseeing post-tsunami rehabilitation, without naming any individual specifically. The applicant was convicted on charges of violating public order. Although MKRI cancelled the hate-sowing provision, it did not order the criminal court of Banda Aceh to change its decision in accordance with the decision. In the context of protecting human rights in relation to criminal cases, MKRI was only able to annul the norm; its decision, however, did not correct the decision of the Criminal Court of Banda Aceh, which had incorrectly applied the article.

The limitation argument employed by MKRI is particularly pertinent when considering the applicant's experience, the act of criticism in demonstrations carried out by the applicant and other communities, and the alleged "disturbance of public interest" as asserted by the Public Prosecutor. The demonstrations in question were organised to demand transparency and accountability from the institution responsible for the rehabilitation of the earthquake and tsunami. The demonstrations were intended to ensure that "displaced communities get their rights". However, it should be noted that this limitation decision cannot be applied retroactively by "cancelling a previous district court decision", as is the case with the legal implications of the constitutional complaint mechanism in the BVerfG. Despite the declaration of nullity of Articles 154 and 155 of the Indonesian Penal Code by the MKRI, the applicant in this case was still subjected to a 3-month prison sentence.

The Utomo case is a constitutional complaint because it essentially challenges the decision of the Criminal Court of Banda Aceh to impose a prison sentence for an act that falls under the category of freedom of expression (criticising the government's performance). However, because the MKRI does not have a constitutional complaint mechanism, the case was filed using the abstract judicial review mechanism, which essentially challenges the legal norm/article in the Indonesian Penal Code that formed the basis of the criminal court decision. From the perspective of international judicial review practices in various countries, including Germany, filing a constitutional complaint through the abstract judicial review mechanism is inappropriate because the subject matter of the dispute and the basis for assessment are different. Ideally, in this case, the Constitutional Court could assess whether the procedure and substance of the Banda Aceh criminal court's ruling were in contravention of the constitution and human rights principles.

3. Wijaya and Lubis case

Risang Bima Wijaya is a journalist who was convicted of criminal defamation due to his reporting in the mass media. The Sleman District Court, in its decision No. 39/Pid B/2004/PN.Slmn ruled that Wijaya had been proven legally and convincingly to have committed defamation against Soemadi Martono Wonohito as referred to in Article 310 paragraph (2) in conjunction with Article 64 paragraph (1) of the Criminal Code and sentenced the applicant to 9 months' imprisonment. On 27 December 2004, the convicted person filed an appeal with the Yogyakarta High Court, and the Yogyakarta High Court decided to uphold the Sleman District Court's decision No. 39/Pid B/2004/PN.Slmn and reduce the prison sentence to 6 months. On 14 May 2005, Wijaya filed a cassation appeal with the Indonesian Supreme Court again. On 13 January 2006, the court issued a decision that essentially upheld the court of first instance's decision, sentencing the Petitioner to 6 months' imprisonment.

Furthermore, Bersihar Lubis, as a columnist/journalist, was reported for committing the criminal offence of defamation or libel against the National Public Prosecutor as stipulated in Article 310 paragraph (1), Article 316, and Article 207 of the Criminal Code. Lubis's case was heard at the Depok District Court, which in its ruling No. 744/Pid.B/2007/PN.DPK found Lubis legally and convincingly guilty of a criminal offence and sentenced him to one month in prison with a three-month probation period.

Wijaya and Lubis rejected the judgments of both Sleman and Depok criminal courts and submitted constitutional complaints to the MKRI through the abstract judicial review mechanism. The constitutionality of the dispute was examined in relation to Articles 310(1), 310(2), 311(1), 316, and 207 of the Indonesian Penal Code in conjunction with the 1945 Constitution. However, in its decision No. 14/PUU-VI/2008, the MKRI decided that Wijaya and Lubis' petition was rejected. In this case, if the MKRI has the power to hear constitutional complaints against criminal court decisions, then the petitioners would no longer have questioned the constitutionality of article in the Indonesian Penal Code through the abstract judicial review, but the main issue that the petitioners would have questioned would have been the criminal court of Sleman and Depok decisions, which the petitioners considered to be inappropriate or contrary to the guarantee of freedom of expression. Additionally, the primary objective of the petition was for the MKRI to evaluate the application of human rights principles in criminal court proceedings. If the substance and process of the trials in the Depok and Sleman criminal court decisions violate the 1945 Constitution and human rights principles, the MKRI will overturn those decisions and order the two courts to reconsider the criminal acts based on the MKRI's decision.

Furthermore, the Indonesian Judicial Commission (*Komisi Yudisial Republik Indonesia*)⁸⁶ research indicates that there are numerous complaints from individuals seeking justice (plaintiffs) and the wider community regarding the quality of ordinary judges' decisions. These include concerns about the

⁸⁶ The 1945 Constitution of the Republic of Indonesia, art. 24B(1) (*Komisi Yudisial* [Judicial Commission] is autonomous and has the authority to propose the appointment of Supreme Court justices and to safeguard and uphold the honor, dignity, and conduct of judges).

perceived unfairness of decisions and allegations of human rights violations.⁸⁷ For example, criminal and civil court decisions categorised as miscarriages of justice. A miscarriage of justice is a wrong or erroneous decision by a court of law that results in the conviction of a person even though there is insufficient evidence, or the conviction of a person who has not committed any crime. Miscarriage of justice is caused by weaknesses in the application of the law, a lack of capacity and integrity among law enforcement officials, limited valid evidence, and the existence of corruption, collusion, nepotism, and judicial mafia. Several cases of miscarriage of justice in Indonesia include the cases of Sengkon and Karta, two farmers who were convicted of robbery and murder in 1974, the case of the wrongful conviction in the murder of Asrori in Jombang, and others.

Moreover, numerous criminal and civil cases indicate judicial corruption. Simon Butt and Tim Lindsey, both Indonesian constitutional law experts from the University of Melbourne Australia have observed that the Indonesian joke, even when told by *hakim* (judges), employs the word “*hakim*” as an abbreviation for “*hubungi aku kalau ingin menang*,” which translates to “contact me if you want a winner.”⁸⁸ Deputy Minister of Law and Human Rights of the Republic of Indonesia 2011-2014 Denny Indrayana posited that the fundamental problem in court decisions is the judicial corruption (*mafia peradilan*), which he identified as a significant threat to the judiciary.⁸⁹ A comparable argument is put forth by Artidjo Alkostar (Supreme Court Justice 2000-2018), who posits that: “... this judicial corruption destroys the legal system and democratisation, forms of violation of universal human rights, the dignity of the judiciary (contempt of court) and creates a situation of public distrust towards the law”.⁹⁰ Chairman of the Indonesian Judicial Commission 2010-2013 Eman Suparman argues that:

⁸⁷ Sulistyowati Irianto et al., *Problematika Hakim Dalam Ranah Hukum, Pengadilan, dan Masyarakat di Indonesia: Studi Sosio-Legal* [Problems of Judges in the Sphere of Law, Courts, and Society in Indonesia: A Socio-Legal Study] (Jakarta: Sekretariat Jenderal Komisi Yudisial Republik Indonesia, 2017), 198.

⁸⁸ Simon Butt and Tim Lindsey, “Judicial Mafia, the Courts and State Illegality in Indonesia,” in Edward Aspinall and Gerry van Klinken, eds., *The State and Illegality in Indonesia* (Netherlands: Brill Publishers, 2010), 189.

⁸⁹ Denny Indrayana, *Negeri Para Mafioso: Hukum di Sarang Koruptor* [A Land of Mafiosi: Law in the Nest of Corruptors] (Jakarta: Kompas Media Nusantara, 2008), 10.

⁹⁰ Artidjo Alkostar, “Masalah Mafia Peradilan dan Penanggulangannya [The Problem of Judicial Mafia and Its Countermeasures],” *Jurnal Hukum* 9, no. 21 (September 2002): 1.

“...in fact, the judicial corruption creates manipulated legal cases, both civil and criminal, starting from the process of investigation, prosecution, correctional institutions, to decisions. In the end, it is a game of power that determines the law, both money and political power”.⁹¹ Judicial corruption involves judges, prosecutors, lawyers and suspects influencing verdicts, for example, acquitting defendants who have clearly committed murder, among other things.

The proposal for the constitutional complaint on criminal and civil court judgements has implications for the structure of the Indonesian rule of law system, as well as for reforming the national legal system to achieve better human rights protection. First, the mechanism of constitutional complaint against criminal and civil court judgements strengthens the concept of the Pancasila rule of law. In a State based on the rule of law, there must be a guarantee of legal dispute resolution if an ordinary court decision harms the public, whether it involves a violation of the principles of a fair trial by criminal and civil court judges or a violation of the applicant’s constitutional rights. From the rule of law perspective, every person should have the right to a fair trial and fair criminal and civil court decisions, and the State must fulfil this right, especially as evidence of its commitment to implementing the law based on the Constitution and human rights principles. In the context of criminal and civil law perspectives in Indonesia, the process for filing objections to court decisions is through the mechanisms of appeal, cassation, and case review (*peninjauan kembali kasus*). However, in the context of constitutional law and human rights, the constitutional court or an equivalent court can examine whether the criminal and civil court decisions are contrary to the constitution or human rights principles.

Second, strengthening the human rights and constitutional rights of citizens. Ideally, a court decision should not conflict with the constitution and human rights principles, so in the context of human rights, it is necessary to guarantee the protection of these constitutional rights, and there must be an institution

⁹¹ Eman Suparman, “Menolak Mafia Peradilan: Menjaga Integritas Hakim—Menyelaraskan Perbuatan dan Nuraninya” [Rejecting the Judicial Mafia: Safeguarding Judicial Integrity—Aligning Conduct and Conscience], *Jurnal Hukum & Pembangunan* [Journal of Law and Development] 47, no. 1 (2017): 63.

that can overturn ordinary court decisions if they are proven to conflict with the constitution and human rights principles. In addition, this mechanism also strengthens the democratic order and civil society, as it enhances the guarantee of freedom of expression in Indonesia. In the context of checks and balances between the Indonesian Constitutional and the Supreme Courts, this system is ideal in that three Justices are elected by the Supreme Court, and Justices assess whether ordinary and Supreme Court decisions violate the constitution or human rights principles. This is in line with the checks and balances model between the MKRI and the legislators (the President and the House of Representatives), whereby the MKRI reviews the laws enacted by them. In addition, this mechanism aims to strengthen the principles of accountability and prudence in the judiciary and among judges when deciding criminal and civil cases, while promoting a fair criminal and civil justice system, especially in cases involving nuanced criminalisation.

Specifically, court decisions can be submitted as objects of constitutional complaints to constitutional courts in various countries around the world for several reasons: (1) Constitutional courts provide protection against judicial processes and decisions that violate constitutional rights; (2) there is a possibility that court decisions violate constitutional rights guaranteed by the Constitution; (3) violations of human rights principles in court proceedings cause constitutional rights violations of the petitioners; (4) Ordinary court judges in the process of law enforcement may be prone to errors that result in decisions that are contrary to the Constitution and cause violations of constitutional rights; (5) Ordinary court judges in the process of law enforcement may be prone to errors in interpreting certain provisions of the law, resulting in violations of constitutional rights guaranteed in the Constitution.

In the context of legal policy, there are considerable challenges in adopting constitutional complaints in the Indonesian legal system:

First, MKRI Decision No. 28/PUU-XVII/2019 rejected the addition of constitutional complaints to the authority of the MKRI. The public's desire for

the MKRI to have the power to initiate constitutional complaints was addressed by submitting a review of Judicial Powers Law No. 48/2009. In this case, the applicant requested that the MKRI interpret constitutional complaints as part of its judicial review power. The MKRI Justices dismissed the petition because, while constitutional complaints form part of the constitutionality of laws as a theoretical matter, in this particular context, they fall outside the scope of the MKRI's powers. The MKRI's power cannot be expanded through the use of constitutional interpretation. This ruling closes the possibility of adding authority through the method of constitutional interpretation.

Secondly, in Indonesian legal theory and practice, there is no constitutional complaint model for reviewing criminal and civil court decisions on the legal grounds that they violate the constitution and human rights. Currently, there are legal remedies against court decisions through the mechanism of 'criminal and civil case reviews (*peninjauan kembali kasus pidana dan perdata*) by the Supreme Court. However, this constitutional complaint regarding civil and criminal judgments differs from the concept of judicial review by the Supreme Court in criminal and civil cases. It is a form of extraordinary legal remedy designed to correct decisions that are considered unfair or erroneous. The main purpose of a review is to correct errors in final decisions, whether due to significant new evidence, judicial error, or significant changes in relevant law.

Meanwhile, constitutional complaints regarding ordinary court judgements focus on assessing whether the ordinary court's decision is contrary to the constitution and human rights principles, both in terms of the substance of the case and violations of human rights principles during the trial procedure. Substantively, for example, criminalisation that contradicts citizens' freedom of expression for criticising the government. Procedurally, for example, violations of the principles of balance between the parties in court proceedings may violate the constitutional rights of one of the parties, for example, the application of the principle of *audi el alteram partem* (hearing both sides parties of the case proportionally). Furthermore, there is a difference in the institutions that conduct

the assessment. The Supreme Court assesses the substance of criminal/civil acts based on the provisions of the law. At the same time, constitutional complaints focus on whether the court's decision is in accordance with or contrary to the constitution and human rights principles, both in terms of substance and the trial process. Additionally, there has been no academic discussion among legal experts on this issue, particularly regarding the interpretation of general court decisions that violate human rights. Furthermore, likely, the Supreme Court, lower court judges, and legal experts will reject this proposal.

Legal policy in adding constitutional complaint powers over criminal and civil court judgements to the MKRI is not an easy task. It requires a strong commitment from all components of the main state institutions, the President, the Constitutional Court, the Supreme Court, the House of Representatives, the People's Consultative Assembly, and other state institutions. The constitutional interpretation approach is relatively challenging to apply when granting such power, as demonstrated by the arguments of several Justices in the aforementioned MKRI decisions. Furthermore, legal policies related to the addition of power through the revision of the MKRI Law No.24/2003 are very possible to be carried out by the President and the DPR as legislators if we refer to the pattern of adding power in the BVerfG and German legal system practices, because the constitutional complaint model at the BVerfG was first regulated in the BVerfG Law and was not regulated in the German Basic Law. Additionally, a significant policy development is the addition of power through the Fifth Amendment of the 1945 Constitution, which modifies Article 24C of this constitution.⁹² This amendment redesigns the paragraph that clearly regulates the provisions of abstract judicial review, concrete judicial review, and constitutional complaints.

⁹² Tanto Lailam, Putri Anggia, and Irwansyah, "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court," *Jurnal Konstitusi* 19, no. 3 (September 2022): 693–719.

V. CONCLUSION

In the German legal system, the BVerfG's power to hear constitutional complaints regarding criminal and civil judgments falls under the jurisdiction of constitutional complaints. This power is a highly popular legal mechanism that significantly contributes to the protection of citizens' constitutional rights. Based on data from 2020 to 2024, approximately 85% of all decisions involved constitutional complaints on ordinary court decisions, including those from criminal and civil courts. Some well-known cases include the Luth case, the Soldiers are murderers, the Right to be Forgotten, and others. The Luth case was a BVerfG ruling that overturned a Hamburg civil court ruling and has become a landmark ruling in the field of freedom of expression in Germany and Europe. The "Soldiers are Murderers" case was a BVerfG ruling that cancelled a decision made by several criminal courts because it violated the constitutional rights of citizens. Meanwhile, the Right to be Forgotten case was a BVerfG ruling that overturned a German Supreme Court judgment. The BVerfG's primary consideration in several of these rulings was that the criminal and civil court rulings had violated the constitutional rights of citizens as clearly stipulated in the Constitution, particularly in relation to the guarantee of freedom of expression in Article 2(1), Article 5(1) of the German Basic Law.

In the future, this may be adopted as the power of the MKRI through a constitutional amendment process. It is certainly driven by the large number of constitutional complaints related to criminal courts that have been resolved through the abstract judicial review mechanism, as well as concerns about injustice and judicial corruption in the general courts. The Lese Majeste, Utomo, Wijaya, and Lubis cases are constitutional complaints that were resolved through the mechanism of abstract judicial review. This resolution mechanism is a weakness in the protection of constitutional rights, because the main issue is the applicant's rejection of the "criminal court decision," but what is being reviewed is the constitutionality of the articles in the Indonesian Penal Code. The purpose of this proposal is to enhance the protection of citizens' constitutional

rights against all court decisions that infringe upon these rights. At the same time, it serves as a counterbalance to court decisions based on the values of Pancasila, the 1945 Constitution, and human rights principles.

BIBLIOGRAPHY

- Alkostar, Artidjo. "Masalah Mafia Peradilan dan Penanggulangannya [The Problem of Judicial Mafia and Its Countermeasures]." *Jurnal Hukum* 9, no. 21 (September 2002).
- Armia, Muhammad Siddiq. "Constitutional Practice of ASEAN Countries: Questioning Judicial Review, Religions and Minority Issues." *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* 7, no. 1 (2022).
- Bogdandy, Armin von, and Davide Paris. "Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court." *MPIL Research Paper Series* no. 01 (2019).
- Bomhoff, Jacco. "Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing." *German Law Journal* 9, no. 2 (February 2008).
- Borowski, Martin. "The Beginnings of Germany's Federal Constitutional Court." *Ratio Juris* 16, no. 2 (June 2003).
- Bröhmer, Jürgen, Clauspeter Hill, and Marc Spitzkatz, eds. *70 Years German Basic Law: The German Constitution and Its Court: Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights*. Germany and Malaysia: Konrad-Adenauer-Stiftung and The Malaysian Current Law Journal Sdn Bhd, 2019.
- Bumke, Christian, and Andreas Voßkuhle. *German Constitutional Law: Introduction, Cases, and Principles*. Oxford: Oxford University Press, 2019.
- Bundesverfassungsgericht [Federal Constitutional Court of Germany]. *2020 Annual Report*. 2020.

- Bundesverfassungsgericht [Federal Constitutional Court of Germany]. 2021 *Annual Report*. 2021.
- Bundesverfassungsgericht [Federal Constitutional Court of Germany]. 2022 *Annual Report*. 2022.
- Bundesverfassungsgericht [Federal Constitutional Court of Germany]. 2023 *Annual Report*. 2023.
- Bundesverfassungsgericht [Federal Constitutional Court of Germany]. 2024 *Annual Report*. 2024.
- Butt, Simon. "Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts." *Constitutional Review* 9, no. 2 (December 2023): 246–275.
- Butt, Simon, and Tim Lindsey. "Judicial Mafia, the Courts and State Illegality in Indonesia." In *The State and Illegality in Indonesia*, edited by Edward Aspinall and Gerry van Klinken. Netherlands: Brill, 2010.
- Chen, Albert H. Y., and Andrew Harding. *Constitutional Courts in Asia: A Comparative Perspective*. Cambridge: Cambridge University Press, 2018.
- Collings, Justin. *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001*. Oxford: Oxford University Press, 2015.
- Collins, Josua Satria, and Pan Mohamad Faiz. "Penambahan Kewenangan *Constitutional Question* di Mahkamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara [Adding the Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights]." *Jurnal Konstitusi* [Constitutional Journal] 15, no. 4 (December 2018).
- Comella, Víctor Ferreres. *Constitutional Courts and Democratic Values: A European Perspective*. New Haven, CT: Yale University Press, 2009.
- Enders, Christoph. "Social and Economic Rights in the German Basic Law? An Analysis with Respect to Jurisprudence of the Federal Constitutional Court." *Constitutional Review* 6, no. 2 (December 2020): 190–203.

European Union. *Treaty on the Functioning of the European Union*.

Fabbrini, Federico, and Edoardo Celeste. "The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders." *German Law Journal* 21 (2020): 55–65.

Faiz, Pan Mohamad. "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court." *Constitutional Review* 2, no. 1 (May 2016): 103–128.

Germany. *Gesetz über das Bundesverfassungsgericht* [Federal Constitutional Court Act]. March 16, 1951.

Germany. *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany].

Germany. *Strafgesetzbuch (StGB)* [German Criminal Code].

Goldmann, Matthias. "As Darkness Deepens: The Right to Be Forgotten in the Context of Authoritarian Constitutionalism." *German Law Journal* 21 (2020): 45–54.

Grimm, Dieter. "Constitutional Adjudication and Democracy." *Israel Law Review* 33, no. 2 (1999).

Grimm, Dieter. *Constitutionalism: Past, Present, and Future*. Oxford: Oxford University Press, 2016.

Hailbronner, Michaela. "Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism." *International Journal of Constitutional Law* 12 (2014).

Hendrianto, Stefanus. *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*. New York: Routledge, 2018.

Indrayana, Denny. *Negeri Para Mafioso: Hukum di Sarang Koruptor* [A Land of Mafiosi: Law in the Nest of Corruptors]. Jakarta: Kompas Media Nusantara, 2008.

Indonesia. *The 1945 Constitution of the Republic of Indonesia*.

Irianto, Sulistyowati, et al. *Problematika Hakim Dalam Ranah Hukum, Pengadilan, dan Masyarakat di Indonesia: Studi Sosio-Legal* [Problems of Judges in the Sphere of Law, Courts, and Society in Indonesia: A Socio-Legal Study]. Jakarta: Sekretariat Jenderal Komisi Yudisial Republik Indonesia, 2017.

Kommers, Donald P. "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany." *Southern California Law Review* 53 (1980).

Kommers, Donald P., and Russell A. Miller. "Das Bundesverfassungsgericht [The Federal Constitutional Court]: Procedure, Practice and Policy of the German Federal Constitutional Court." *Journal of Comparative Law* 3, no. 2 (2009).

Küpper, Herbert. "The Indonesian Constitution Read with German Eyes." *Constitutional Review* 7, no. 1 (May 2021): 53–91.

Lailam, Tanto. "Perbandingan Desain Pengujian Konstitusional Pada Mahkamah Konstitusi Federal Jerman dan Indonesia [Comparison of Constitutional Review Designs in the German Federal Constitutional Court and the Indonesian Constitutional Court]." *Arena Hukum: Jurnal Ilmu Hukum* 16, no. 2 (August 2023): 74–101.

Lailam, Tanto, and M. Lutfi Chakim. "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences." *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023).

Lailam, Tanto, and Nita Andrianti. "Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia." *Journal Bestuur* 11, no. 1 (2023): 75–94.

Lailam, Tanto, Putri Anggia, and Irwansyah. "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court." *Jurnal Konstitusi* 19, no. 3 (September 2022): 693–719.

- Lembcke, Oliver W. "The German Federal Constitutional Court: A Court Unbound?" In *Constitutional Review in Western Europe: Judicial-Legislative Relations in Comparative Perspective*, edited by Kálmán Pócsa. New York: Routledge, 2024.
- Lim, Jibong. "Comparative Study of the Constitutional Adjudication System of the U.S., Germany and Korea." *Tulsa Journal of Comparative and International Law* 6, no. 2 (1999).
- Lustig, Doreen, and J. H. H. Weiler. "Judicial Review in the Contemporary World: Retrospective and Prospective." *International Journal of Constitutional Law* 16, no. 2 (2018).
- Mahkamah Agung Republik Indonesia [Supreme Court of the Republic of Indonesia]. Decision No. 153 PK/PID/2010.
- Mariner, Wendy K. "Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States." *German Law Journal* 22 (2021).
- Masing, Johannes. "The Federal Constitutional Court." In *Constitutional Law in Germany*, edited by Matthias Herdegen, Johannes Masing, Ralf Poscher, and Klaus Ferdinand Gärditz. Germany: C.H. Beck, 2025.
- Mayer, Franz C. "Judicial Power and European Integration: The Case of Germany." In *Judicial Power: How Constitutional Courts Affect Political Transformations*, edited by Christine Landfried. Cambridge: Cambridge University Press, 2019.
- Miles, David. *Democracy, the Courts, and the Liberal State: A Comparative Analysis of American and German Constitutionalism*. New York: Routledge, 2021.
- Möller, Kai. "Lüth and the 'Objective System of Values': From 'Limited Government' Towards an Autonomy-Based Conception of Constitutional Rights." In *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights*, edited by Sujit Choudhry, Michaela Hailbronner, Matthias Kumm, et al. Oxford: Oxford University Press, 2024.

- Mochtar, Zainal Arifin. "Guarding Democracy: Judicial Activism in the Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes." *Constitutional Review* 11, no. 1 (May 2025): 37–62.
- Palguna, I Dewa Gede. "Constitutional Complaint and the Protection of Citizens' Constitutional Rights." *Constitutional Review* 3, no. 1 (May 2017).
- Palguna, I Dewa Gede. *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara* [Constitutional Complaint: Legal Remedies for Violations of Citizens' Constitutional Rights]. Jakarta: Bumi Aksara, 2013.
- Palguna, I Dewa Gede, Saldi Isra, and Pan Mohammad Faiz. *The Constitutional Court and Human Rights Protection in Indonesia*. Jakarta: Rajawali Pers, 2022.
- Pengadilan Negeri Jakarta Pusat [Central Jakarta District Court]. Decision No. 1411/PID.B/2006/PN.JKT.PST.
- Preshova, Denis. *On the Rise While Falling: The New Roles of Constitutional Courts in the Era of European Integration*. PhD diss., University of Cologne, 2020.
- Robertson, David. *The Judge as Political Theorist: Contemporary Constitutional Review*. Princeton, NJ: Princeton University Press, 2010.
- Riedley, Hugh. *Law in West German Democracy: Seventy Years of History as Seen Through German Courts*. Leiden: Brill, 2019.
- Satriawan, Iwan, Tanto Lailam, Farid Sufian Shuaib, and Devi Seviyana. "Judicial Appointment of German *Bundesverfassungsgericht* [Federal Constitutional Court]: Lesson for Indonesia." In *Proceedings of the International Conference on Sustainable Innovation on Humanities, Education, and Social Sciences (ICOSI-HESS 2022)*. Atlantis Press, 2022.
- Seibert-Fort, Anja. "Judicial Independence and Democratic Accountability: The German Function and Legitimacy of the German Federal Court." In *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limit in Democratic Society*, edited by Ernest Hirsch Balin, Gerhard van der Schyff, and Marteen Stremmer. Berlin: Asser Press and Springer, 2020.

- Shapiro, Martin, and Alec Stone Sweet. *On Law, Politics, and Judicialization*. Oxford: Oxford University Press, 2002.
- Suparman, Eman. “Menolak Mafia Peradilan: Menjaga Integritas Hakim—Menyelaraskan Perbuatan dan Nuraninya [Rejecting the Judicial Mafia: Safeguarding Judicial Integrity-Aligning Conduct and Conscience].” *Jurnal Hukum & Pembangunan* 47, no. 1 (2017).
- Türk, Alexander H. *Judicial Review in EU Law*. United Kingdom and United States: Elgar European Law, 2009.
- Vanberg, Georg. *The Politics of Constitutional Review in Germany*. New York: Cambridge University Press, 2005.
- Voßkuhle, Andreas. “Foreword by the President of the German Constitutional Court.” In *70 Years German Basic Law: The German Constitution and Its Court: Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights*, edited by Jürgen Bröhmer, Clauspeter Hill, and Marc Spitzkatz. Germany and Malaysia: Konrad-Adenauer-Stiftung e.V. and The Malaysian Current Law Journal Sdn Bhd, 2019.
- Weber, Ruth. “Law-Making Activity of the German Federal Constitutional Court: A Case-Law Study.” In *Judicial Law-Making in European Constitutional Courts*, edited by Monika Florczak-Wątor. London: Routledge, 2020.
- Zoelva, Hamdan. “Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara [Constitutional Complaint and Constitutional Question and the Protection of Citizens’ Constitutional Rights].” *Jurnal Media Hukum* 19, no. 1 (2012): 152–165.

JUDICIAL AUTONOMY IN NIGERIA: A MYTH OR A CONSTITUTIONAL ALBATROSS?

Ugochukwu Godspower Ehirim*

Private Law Department, Delta State University, Nigeria
ehirim.ug@delsu.edu.ng

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Abstract

The recent threat by Judiciary Staff Union of Nigeria (JUSUN) exuding resolve to stage yet another industrial strike-action to demand realistic autonomy of the Nigerian Judiciary has re-enacted the conversation for judicial autonomy in Nigeria. The power architecture in Nigeria has made both the state and federal legislative and judicial branches of governance the recipients of incremental erosion of independence by a flourishing state bureaucracy for purposes of executive expediency. Adopting the doctrinal research methodology of analysis which leverages on primary and secondary sources, this paper contends that judicial autonomy is a fundamental ingredient for effective dispensation of justice which is a fundamental factor in modern democracies. The paper examines the constitutional guarantees for the hallowed notion of separation of political powers across the branches of governance in Nigeria, with focus on the funding and general administration of the judicial organ of governance. The paper contributes to the proper conceptualization of 'judicial autonomy' to implicate the manner of funding which is at the very root of judicial emasculation in Nigeria. It concludes through its findings that judicial autonomy in Nigeria is attainable despite the seeming challenges, with a courageous bar and willing judiciary. Some recommendations are made that would help the realization of judicial autonomy for proper justice administration in Nigeria.

Keywords: Autonomy; Constitution; Judiciary; Nigeria; Separation of Powers

* The author holds a Doctor of Laws (Ph.D.) from Delta State University, Oleh Campus, Nigeria. He teaches Constitutional Law, with a particular specialization in the intersection of law and technology. He is also a human rights activist and public interest litigator.



I. INTRODUCTION

The year 2021 passed with bitter memories for litigation lawyers in Nigeria. JUSUN across its strata in the entire Nigerian federation had embarked on industrial strike action, in the first quarter of the year, to exert pressure on the Nigerian government to implement financial autonomy for the judiciary. The Association had argued and protested against the age-long ingenious and pernicious patterns of subjugation and emasculation of the judiciary by successive administrations, notwithstanding constitutional provisions to the contrary.¹ It is of great concern that JUSUN threatened to embark on yet another strike for the same purpose in 2023 despite the harrowing experience such a strike leaves on lawyers and the public at large, in its wake. There have yet been pockets of threats of strike by judiciary workers in select states of the federation in the first quarter of 2025. The nonchalant stance of the government to JUSUN's demands have become rather too familiar. This trend has been identified as cancerous in a civilized society where protection of individual liberties against over-zealous state bureaucracies are essential to maintain order and stability through the legal process. It is contended that the rule of law is of no moment without a guarantee of demarcation of powers, particularly by ensuring judiciary's independence.² Fleck suggests that autonomy of the judicial axis of state governance combines with other factors to define the legal order which affords institutional guarantees that enhances mental and cultural dispositions within the justice delivery matrix.³ Adams does not conceive the independence of judges and court administration in itself as an end but as a necessary prerequisite in contemporary civil society which prioritizes governance by law as against the governance by the whims of men, particularly for the safeguard of constitutional liberties. This is important

¹ Kato Gogo Kingston, Victor Nonso Enebeli, and Felix Chukwuemeka Amadi, "Judicial Financial Autonomy and the Inherent Powers of the Executives in Nigeria: Lessons from Australia, Britain and Canada," *African Journal of Social Sciences (AJSS)* 12, no. 1 (2022): 20.

² Andrew Le Sueur, "Developing Mechanisms for Judicial Accountability in the UK," *Legal Studies* 24, nos. 1–2 (2004): 73.

³ Zoltan Fleck, "Changes of the Political and Legal Systems: Judicial Autonomy," *German Law Journal* 22, no. 1 (2021): 1298.

because without independence, a fully-fledged judiciary is a wishful thinking and does not exist.⁴

The 1999 Constitution of Nigeria (CFRN) provides for judicial independence which resonates with the jurisprudence of clear demarcation of powers.⁵ Section 6, CFRN expresses states' judicial powers in Nigeria which is domiciled with the courts. The funding of the court and entire justice administration requires remarkable non-interference by the agents of other branches of governance, particularly the executive (the government) in order to guarantee constitutionality and confidence of citizens in the democratic society. The pragmatic implementation of the relevant text in Section 121(3), CFRN with regard to funding of the judiciary has generated so much controversy that the revered doctrine of judicial autonomy which situates at the roots of dispassionate adjudication of disputes in Nigeria has become illusory. Executive recklessness and political manipulation of the judiciary has aided maintenance of the unfortunate tradition in Nigeria, having been identified as the major weakness to the proper implementation of judicial independence in Nigeria. However, while the government at the center under the stewardship of President Muhammadu Buhari sought a political solution to the quagmire by the making of Executive Order 10, some leaders of the Nigeria Bar Association took steps to get a proper interpretation of the CFRN on the matter, having faith in the fact that the CFRN has not expressed judicial autonomy with ambiguity.

The complexity of the subject of judicial independence has not lent itself plethora of published works in Nigeria. Most scholars discuss the doctrine more in relation to the doctrine of checks and balances than as a distinct subject deserving scholarly arguments. Oraegbunam discussed judiciary's autonomy as an integral aspect of power sharing within the Nigerian constitutional democratic arrangement.⁶ His work presents judicial independence as necessary

⁴ John Adams, *The Works of John Adams*, vol. 3 (Boston: Little, Brown and Company, 1851), 522. See also *Agbaje v. COP* [1969] 1 MNLR 176, 177 (Nigeria), where John Adams was quoted with approval.

⁵ Ugochukwu Godspower Ehirim et al., "Constitutional Safeguard for Preservation of Democratic Political Culture and the Legitimacy of Political Porting in Nigeria," *Udayana Journal of Law and Culture* 9, no. 1 (2025): 11.

⁶ Ikenga Kenneth Emeka Oraegbunam, "Separation of Powers and Nigerian Constitutional Democracy," *Vanguard*, January 19, 2005.

in a democratic society to ensure justice and order. He failed to state it as a mandatory requirement in a constitutional democracy. This paper addresses the gap, highlighting the fact that judicial independence is not directory but mandatory in the governmental affairs of the Nigerian state. Mrabure and Awhefeada in their article which focus on the judicial-executive relationship conundrum engages the case study of Onnoghen CJN to examine how the display of stark powers by the Nigerian President aligns with the time-tested theory of power sharing among organs of governance in Nigeria. The paper analyzes the relevance of judicial autonomy, describing it as the livewire of boldness, firmness and integrity that underlines dispensation of justice in contemporary society. They conceived judicial autonomy to be the insulation of the judicature from interference by other arms, particularly the executive.⁷ Concentrating on the controversial removal of the head of Nigeria's judiciary (CJN) from office by government fiat, the article frown at politicking with the judiciary at the topmost level. It, however, fell short of integrating the workings of the judiciary into the analysis, particularly in respect of funding which should not requiring the judicial institution to kowtow to its executive counterpart. This short fall is the crux of the extant research. Amuda-Kannike et al examine the beneficial principles of fiscal autonomy for the judiciary, as well as general governance of justice in their article.⁸ The authors dwell on judicial autonomy at the central configuration of governance, to the exclusion of the statutory states comprised in the federation, relying heavily on *Olisa Agbakoba v The Attorney-General of the Federation & 2 Ors* which sought interpretation and enforcement of Sections 81(1) & (2) and 84(1) of the CFRN. Nigeria is a federation and besides the central control of judicial officers through the Nigeria Judicial Council (NJC), every federating state has its independent Service Commission (JSC) fashioned after the NJC. Consequently, the omission of the states which constitutes the

⁷ Kingsley Omote Mrabure and Ufuoma Veronica Awhefeada, "Onnoghen's CJN Conundrum: Exercise of the Executive Powers of the President and the Practice of Separation of Powers in Nigeria," *Commonwealth Law Bulletin* 46, no. 3 (2020): 1.

⁸ Abiodun Amuda-Kannike, Awudumapu Godfrey Obe Agorodi, and Yusuf Amuda-Kannike, "Examining the Mutual Concepts of Judicial Fiscal Autonomy and Administration of Justice," *Redeemers' University of Nigeria Journal of Jurisprudence and International Law* 3, no. 2 (2023): 260.

grassroots for dispensation of justice is a gap that this paper seeks to fill by analyzing the authority of *John Aikpokpo-Martins, Esq & Anor v Governor of Delta State & 5 Ors* which is an attempt at enforcing judicial independence at the state level in line with Sections 120(4), 121(2) & (3) and 124(4) of the CFRN. The issue of judicial independence transcends political boundaries, extending to wherever formal justice is desirable, and deserving of comparative analysis. Consequently, Chan makes an authoritative effort in engaging with comparative analysis regarding the practicality of judiciary's insulation from interference in South Sudan and India.⁹ The author appreciates judicial independence from the optics of ensuring principles of liberal-democracy, particularly checks and balances, to contain executive arbitrariness. Scrutinizing the procedure for judges' appointment, employment security, finance and general court administration, the author identifies loopholes which reduce the concept of judiciary independence to an academic exercise. The author found that the judiciary is helpless when it comes under assault by overbearing executive. The paper falls short of appreciating the fact that it is not at all times that the judiciary is helpless against the intrusion of the executive, particularly where there are willing collaborators in the enterprise of defending judicial autonomy. The jurisprudential complexity of judicial autonomy across the globe may inform particularity in making a case for the phenomenon. Hence, Awawda's work was an evaluation of *de jure* autonomy of the judiciary, particularly Constitutional or Supreme Courts.¹⁰ The author's concentration on Constitutional Court which is but an integral part of the judiciary leaves much field uncovered, particularly in jurisdictions where the constitution has not afforded the state the discretion to pick and choose which categories of court or institutions of the judiciary should be accorded independence. This work makes a case for the entire judiciary as an arm of government, equal in relevance to other arms in a democratic state such as Nigeria thereby filling the gap created by Awawda. This could be seen in the cases of challenges by

⁹ Wol Deng Akech Chan, "Comparative Analysis of Judicial Independence in South Sudan and India," SSRN, June 13, 2018.

¹⁰ Osayd Awawda, "Assessment of De Jure [by law] Judicial Independence of Constitutional Courts According to International Guidelines," *Constitutional Review* 10, no. 1 (May 2024): 202.

persons outside the judiciary such as the Bar leaders.¹¹ The neglect to address the aspect of enforcement of the notion of constitutional provisions of Judicial autonomy for the restoration of judicial integrity as was the case in Nigeria is a gap which this work addresses. On his own part, Okaisabor examines the struggle for financial independence for the judiciary in Nigeria, highlighting its obstacles.¹² The article makes a comparative analysis between Nigeria and some jurisdictions such as the Netherlands in terms of budgetary allocations against the backdrop of the annual budget through the years, highlighting paucity of funds as primary element militating against judicial autonomy as enshrined in the Nigerian constitution. This paper disagrees with Okaisabor, positing that financial autonomy of the judiciary does not dwell with the abundance funds but in the procedure for budgeting and disbursement of the available state funds among the three arms of government. However, the author like Amuda-Kannike et al, builds his arguments majorly on the cases of 2014 without reference to the more recent case of *Aikpokpo – Martins v Governor & 5 Ors* decided in 2023.¹³ *John Aikpokpo – Martins* introduced the matrix of federating states into the debate of judicial autonomy in Nigeria. The omission to discuss the benefits of *John Aikpokpo – Martins*, given the recency of the article creates a huge knowledge gap which this paper addresses.

This paper examines the pragmatic effect of trite constitutional dogmas regarding power separation in a federation, with bias on judicial autonomy and its impact on justice governance in Nigeria.¹⁴ Its novelty lies in the fact that it deepens arguments and the prospect of enforceability of the constitutional doctrine of judicial financial autonomy at the state levels of the Nigerian federation which was hitherto viewed as a matter for discourse at the federal level.¹⁵ It sets out

¹¹ Federal High Court Abuja, *Olisa Agbakoba v. Attorney-General of the Federation & 2 Ors.*, Suit No. FHC/ABJ/CS/63/2013, judgment delivered by Mohammed J., May 26, 2014.

¹² Jeremiah Osasume Okaisabor, "The Quest of Fiscal Autonomy for Judicial Independence: The Case of the Nigerian Judiciary and Its Challenges," *African Identities* 23, no. 3 (2025): 756–80.

¹³ Delta State High Court Asaba, *John Aikpokpo-Martins, Esq. & Anor v. Governor of Delta State & 5 Ors.*, Suit No. A/164/2022, judgment delivered by Hon. Justice Briki-Okolosi, March 7, 2023. See also Federal High Court Abuja, *Judiciary Staff Union of Nigeria (JUSUN) v. National Judicial Council & 74 Ors.*, Suit No. FHC/ABJ/CS/667/13, judgment delivered by Ademola J., January 13, 2014.

¹⁴ Okaisabor, "The Quest of Fiscal Autonomy", 756.

¹⁵ Prior to 2023, arguments on judicial financial autonomy in Nigeria had been advanced largely at the federal level; hence, the governors of the 36 federating states challenged Executive Order No. 10 signed by the President.

to establish that judicial financial autonomy is mandatory and not a matter for political convenience in Nigeria. In this paper, judicial autonomy may be used interchangeably with judicial financial autonomy (JFA).

II. RESEARCH METHODOLOGY

This paper is doctrinal in approach. It is primarily based on library research devoid of empirical analysis. Accordingly, it engages a critical desk analysis of data comprised in primary and secondary source-materials, including current legislations, articles, caselaw, law reports, books, policy statements and sundry documentations relevant to the discourse. Peer – reviewed and gray literature within Nigeria and beyond are evaluated. The complexity of the discourse instructs the engagement of specific case studies of judicial pronouncements which address the subject. The notion of judicial autonomy pervades the entire culture of justice dispensation across the globe, however, the choice of Nigeria as a focus draws from the fact of near complete-erosion of confidence and trust with the country's judiciary flowing from the inability of the arm of government to stand firm against executive rascality which has resulted in JUSUN strikes as the only way to drive the grievances of the judiciary for the attention of the public. Reference to other jurisdictions is for comparative analysis.

The paper has been structured in parts beginning with the introduction which sets the template for the discourse. The second part is the forgoing which presents the methodology engaged throughout the process of the data analysis. This aspect covers the type of legal research, showing the manner by which data was obtained and evaluated. The third part conceptualizes judicial autonomy, dwelling on the history and development of judicial autonomy in Nigeria with a sub-heading detailing financial autonomy in Nigeria. Furthermore, the paper examines the constitutional safeguards for judicial autonomy in Nigeria with a sub-heading on Executive Order 10 issued for the working-implementation of the arrangement. The paper then proceeded to discuss judicial interventions on matters of Judicial Financial Autonomy (JFA) in Nigeria with a sub-heading on experiences from other jurisdictions, particularly South Sudan.

Recommendations and conclusion follow accordingly and respectively. Based on the available literature, comparative analysis as well as the field-experience of the philosophy and workings of the judiciary in Nigeria, the paper makes pragmatic recommendations for better funding to enhance judicial accountability through independence but with cooperation with other arms of government.

III. CONCEPTUALISING JUDICIAL AUTONOMY IN MODERN DEMOCRACIES

The concept of judicial autonomy or independence as an inextricable super structure of administration of justice is not a recent phenomenon. Amuda-Kannike *et al* conceive judicial autonomy as the duty or manner of conferring independence or self-administrative status on the judicature in a state in order to guarantee sustained discharge of the judicial mandates.¹⁶ Consequently, judicial autonomy implicates an arrangement in which a judge handles cases and dispenses justice in a manner insulated from interference, influence or inducement whatsoever by the complementary organs of state governance. Judicial autonomy is a fundamental rubric equitable legal architecture which guarantees accountability and equality at law.¹⁷ The whole idea of judicial autonomy begins with the manner of employing judicial officers, and includes the conditions around optimization of their employment goals.¹⁸ Thus, Dijk and Vos suggest that accountability and judicial independence are twain democratic virtues evaluated with reference to the judicial architecture on the one part and the individual judges, on the other part.¹⁹ Accordingly, the test for autonomy of the judiciary in any given circumstances is both subjective and objective, admitting of assessment through the mechanism of specific indicators.²⁰

¹⁶ Amuda-Kannike et al, "Examining the Mutual Concepts," 266.

¹⁷ Fritz Edward Siregar, "Between the People and the Populists: Safeguarding Judicial Independence in a Changing World," *Constitutional Review* 10, no. 1 (May 2024): 171.

¹⁸ Sultan Mehmood, "Judicial Independence and Development: Evidence from Pakistan," AMSE Working Papers 2041 (Aix-Marseille School of Economics, December 2020).

¹⁹ Frans Van Dijk and Geoffrey Vos, "A Method of Assessment of the Independence and Accountability of the Judiciary," *International Journal for Court Administration* 9, no. 3 (2018): 1–21.

²⁰ The European Network of Councils for the Judiciary (ENCJ) outlines 22 indicators with 64 sub-indicators. See Inglo Keilitz, "Viewing Judicial Independence and Accountability through the 'Lens' of Performance Measurement and Management," *International Journal for Court Administration* 9, no. 3 (2018): 23–36.

Judicial autonomy therefore is hinged on the age-long teachings on check and balances which denote the practice of power sharing among the tripartite arms of government. Kosar et al demonstrate with the Hungarian Constitutional development, in comparison with the Czechia and Austria, that the strength and weakness of the legal system in modern times depends on such factors as the operations and applicability of constitutional power sharing in the state governance.²¹ Oraegbunam conceives the notion of mapping the powers among the arms of governance as a critical index in contemporary democracies.²² Analogous to the economics theory of division of labor as espoused by Adam Smith, the scholar contends that 'separation of powers' is meant to target efficiency, and much more critically, to guard against corruption and abuse.²³ The contemporary state masks human rights abuses with statutory limitations which in the circumstances reasonably invoke the courts' powers for judicial review for the sustenance of constitutionalism. Advancing the realist jurisprudence, Buana suggests that where the executive and legislature are 'drunk', the judiciary should be 'sober' to drive an orderly society. Consequently, in attempting to explain the jurisprudence of power-mapping, Montesquieu espoused the importance of the arrangement to be the guarantee of individual liberty for according to him, liberty may only be assured when the judicial power of the state is separated from those of the legislature and executive.²⁴ Vile, nevertheless, observes that Montesquieu's postulations on separation of powers with respect to English Constitution exuded economy (taking his generation into cognizance) demonstrating more of a picture of a utopian rather an actual state.²⁵ This is so, because the organ of government that is supreme under the English legal system is the Parliament, not the judiciary whether or not it administers justice with interference.

²¹ David Kosar, Jiri Baros, and Pavel Dufek, "The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism," *European Constitutional Law Review* 15, no. 3 (2019): 427.

²² Oraegbunam, "Separation of Powers."

²³ Mirza Satria Buana, "Weak-Form Review and Judicial Independence: A Comparative Perspective," *Constitutional Review* 10, no. 2 (2024): 343.

²⁴ Baron de Montesquieu, *De l'esprit des lois [The Spirit of the Laws]* (n.p., 1748), chap. 11, secs. 3–6.

²⁵ Maurice John Crawley Vile, *Constitutionalism and Separation of Powers* (London: Oxford University Press, 1967), 84–85.

The call for total judicial independence in modern democracies transcends the geographical boundaries of Nigeria or any country whatsoever. In 1998, the Commonwealth of Nations met to discuss the burning issue of judicial independence as one of the root causes of corruption and political uncertainty in majority of member-states.²⁶ The resolution of the meeting on judicial independence produced the following guide to members:²⁷

- a) Judicial appointments should ensure: equal platform for all who are qualified and desirous of judicial office; engagement based on merit with appropriate attention given to the necessity for prioritization of gender equity and elimination of other primordial considerations tending towards discrimination;
- b) Arrangements to guarantee appropriate tenure security and sustained levels of wages must be established;
- c) Adequate funding of the judiciary to enhance its effective operations free from bottlenecks designed as constraint to desirable independence;
- d) Interaction, if any, among arms of government should be conducted in a manner as not to compromise autonomy for the judiciary.²⁸

The Latimer House Principles (LHPs) guarantees financial autonomy of the judiciary. It provides for sufficient and sustainable funding of the judiciary for effective performance in such a manner that such funds are protected from misappropriation and insulated from being a tool of improper judicial interference.²⁹ It has been suggested that the values or LHPs are irreversibly integrated in the standards and beliefs of the Commonwealth 2003, having been evaluated and adopted at a conference of the organization's Heads of Government held in Abuja, Nigeria.³⁰ The LHPs, arguably strengthens extant creed and goals

²⁶ The Commonwealth of Nations is an umbrella body of countries, excluding the United States of America, that were formerly British dominions and that use English as an official language. Nigeria became a member of the Commonwealth upon attaining political independence on October 1, 1960.

²⁷ These guidelines or principles which were declared at Latimer House Commonwealth Secretariat, London is currently known as the Latimer House Principles.

²⁸ Commonwealth of Nations, *The Commonwealth Latimer House Principles Practitioner's Handbook* (London: Commonwealth Secretariat, 2017).

²⁹ Commonwealth of Nations, *The Commonwealth Latimer House*.

³⁰ Okaisabor, "The Quest of Fiscal Autonomy for Judicial Independence."

for which the organization is known as set down in Singapore in 1971.³¹ Similarly, the heads of the judiciary in the Asian-Pacific countries met in 1995 at Beijing, China to evolve a uniform standard for the enhancement and safeguard of judicial independence, and more importantly, judicial financial autonomy.³² Thus, it may be apt to posit that the judiciary around the world face similar challenges in the discharge of its mandates even as courts are universally under legal obligation to make definitive decisions pertaining to the lives, liberties, privileges, obligations and estate of citizens.³³

As elegant and legally expedient as the argument for judicial independence appears, the complex chain of dependencies and inter-dependencies which define the day-to-day interactions between the government and the judicature has made judicial autonomy a conundrum, not only in Nigeria but in several countries of the Commonwealth. Stevens conceive that where the judiciary is practically independent, arbitrary use and abuse of power of judicial officers is inevitable.³⁴ Ojo stresses that absolute mapping of power is neither realistic nor necessary for effective governance.³⁵ In *USA v Bromim*,³⁶ Earl Warren, CJ observed that the demarcation of governmental powers enacted in the American Constitution could certainly not be for the purpose of promoting government efficiency. It was rather intended as a safeguard against tyranny. According to Ojo, the essence of the doctrine is to obviate tyranny by proscribing the arrogation of overwhelming power to any one entity or arm and the moderation of one power by another.³⁷ It is therefore expected that there may be overlapping functions from time to time.³⁸ It is to this end that the constitution of modern democracies entrench

³¹ Okaisabor.

³² This adoption of uniform standard of judicial independence is known as "The Beijing Statement of Principles of Independence of the Judiciary in the LAW ASIA Region".

³³ Keith David Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary," *Alberta Law Review* 38 (2000).

³⁴ Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (Chapel Hill: University of North Carolina Press, 1978), 6.

³⁵ Afe Babalola, "Relevance of Separation of Powers and Its Application in Nigeria" (A Lecture Delivered at the NBA Annual Law Week Held July 5, 2019).

³⁶ *United States v. Brown*, 381 U.S. 437, 443 (1965).

³⁷ John Ikongbeh, "Separation of Powers Under the Constitution of Nigeria 1999: A Critical Review of Its Application since 29 May 1999," *Nigeria Law Journal* 1, no. 1 (2003): 92.

³⁸ Andrew Borokini, "The Doctrine of Separation of Powers and the 1999 Constitution," *Journal of Private and Commercial Law, Faculty of Law, University of Ado-Ekiti* 1, no. 1 (2008): 146–47.

separateness with insistence on interdependence; autonomy with deference to reciprocity.³⁹ It may therefore be germane to de-escalate the constant feud by the government and the judiciary for greater ideals of the society as the executive organ of governance claims the greatest entitlement to democratic validation in every modern state. Hence, perfect co-operation among the organs of government, much more than constitutional prescriptions, is essential for efficient regime of justice.

IV. HISTORY AND DEVELOPMENT OF JUDICIAL AUTONOMY IN NIGERIA

Judiciary in Nigeria consists of the whole machinery or organs of the courts at various levels. The earliest attempt to establish a judicial arm of government in modern Nigeria was made by Britain before 1914 upon the need to establish a proper avenue for entrenchment of the British legal system.⁴⁰ The Anglo-model tribunals were, however, instituted between 1862 through 1874 to include courts with civil and criminal jurisdictions, and the appellate court for West Africa.⁴¹ The judiciary has developed through various constitutional stages to its present status as enacted by CFRN. However, how this development impacts justice delivery has generated discussions, raising the bar against situations where political actors undermine the autonomy of the judiciary by dictating or influencing court judgements.⁴² In Africa, the pressure to erode judicial independence by political leaders is most palpable in electoral cases, particularly in countries with weak institutions like Nigeria and Madagascar.⁴³

³⁹ Uchechukwu Wilson Nwosu, "Separation of Powers and the Constitutional Basis of the Court of Appeal Judgment in *Hon. Justice Nganjiwa v. Federal Republic of Nigeria—A Critique*," *International Journal of Public Administration and Management Research* 5, no. 1 (2019): 28.

⁴⁰ Anthony Obi-Okoye, *Law in Practice in Nigeria: Professional Responsibilities and Lawyering Skills* (Lagos: Snaap Press Nigeria Limited, 2011).

⁴¹ Taslim Olawale Elias, *The Nigerian Legal System* (London: Routledge & Kegan Paul, 1963), 39–45, 52.

⁴² David Kosar and Samuel Spac, "Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?," *Hague Journal on the Rule of Law* 13, no. 2 (2021): 107, 142.

⁴³ Ramalina Ranaivo Mikea Manitra and Adya Paramita Prabandari, "Judicial Independence Under Political Pressure: The High Constitutional Court and Electoral Justice in Madagascar (2009–2023)," *Constitutional Review* 11, no. 2 (2025): 393–421; Izoukumor Afedolor Noah, "Analysing the Application of the *Lex Specialis Derogat Legi Generali* [special law overrides general law] Principle in *Peter Obi v. INEC* (2023): A Focus on Issue Two; Electronic Result Transmission," *African Journal of Law and Justice System* 3, no. 1 (2024): 94.

The principle and doctrine of judicial independence is traceable to Seventeenth Century England and Wales.⁴⁴ In 1607,⁴⁵ King James I adjudicated and delivered judgement on a land matter which was appealed against before Lord Justice Edward Coke who chaired the Common Pleas Court of England.⁴⁶ Lord Coke, in upholding the appeal rightly stated the law when he berated the King's usurpation of the adjudicatory powers of the courts. His Lordship further remarked that, 'No King of England since the conquest has arrogated to himself the powers to adjudicate any cause howsoever'. Any matters which concern the regime of justice within the British realm are exclusively decided by the Courts of Justice.⁴⁷

However, despite Lord Coke's bold statement against executive interference with judicial independence, successive English monarchs⁴⁸ persisted in interfering and manipulating the judicature prior to the Glorious Revolution in 1688⁴⁹ when the judiciary experienced minimal independence.⁵⁰ The Act of Settlement enacted in 1701 during the reign of King Williams III gave security of tenure to the judges thereby insulating judges from the 'hire-and-fire' intimidation by the monarch. Thus, judicial independence in Britain has evolved through case law and conventions⁵¹ leading to the Constitutional Reform Act 2005⁵² which expressly gave 'administrative' autonomy to the judiciary by guaranteeing judicial independence without specific stipulations on fiscal autonomy for the judiciary.

⁴⁴ Thomas Henry Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford: Oxford University Press, 2000), 55–58.

⁴⁵ See the case of *Prohibitions Del Roy* [1607] 7 ER 1342.

⁴⁶ Owen Hood Phillips, *Leading Cases in Constitutional Law* (London: Sweet & Maxwell, 1957), 46–47.

⁴⁷ Owen Hood Phillips, *Leading Cases in Constitutional Law*.

⁴⁸ Lord Woolf, "The Rule of Law and a Change in the Constitution," *Cambridge Law Journal* 63, no. 2 (July 2004): 317, <https://www.jstor.org/stable/4509106>. The interference reached its height during the Stuart dynasty.

⁴⁹ Diana Woodhouse, "United Kingdom: The Constitutional Reform Act 2005—Defending Judicial Independence the English Way," *International Journal of Constitutional Law* 5, no. 1 (2007): 153–65.

⁵⁰ Nicholas Addison Phillips (Lord Phillips), "Judicial Independence and Accountability: A View from the Supreme Court" (paper delivered at the UCL Constitution Unit launch of the research project on the politics of judicial independence, February 8, 2011).

⁵¹ Shimon Shetreet, "Fundamental Values of the Justice System," *The European Business Law Review* 23, no. 1 (2012): 61–75.

⁵² The Constitutional Reform Act 2005 expressly guarantees the independence of the judiciary in Britain, particularly in respect of the recruitment process and tenure of judicial officers. The finances of all arms of government in United Kingdom is centralised and managed by the Chancellor of the Exchequer within the office of His Majesty's Treasury. See Keith Whittington, "Legislative Sanctions and the Strategic Environment of Judicial Review," *The International Journal of Constitutional Law* 1, no. 1 (2003): 446–74.

The independence so guaranteed is subject to parliamentary supremacy in the British system of unwritten constitution and the age-long United Kingdom's governance structure which retains the monarch as member of all the three arms of government.⁵³

Beyond Britain, the conversation on judicial independence in modern democracies has become a global phenomenon which became more fortified through the twentieth century. Awawda identifies four documents setting out guidelines of international relevance with definitive bearing on personal, procedural, and institutional elements of judicial independence.⁵⁴ These include the soft laws prescribing the basics on what constitutes judiciary's independence, in conjunction with the Universal Charter of Judges.⁵⁵ The Montreal convergence of global stakeholders in the justice sector in June 1983 magnified the discourse on judiciary's autonomy. The international summit on independence of justice came up with global declaration regarding autonomy for Justice.⁵⁶ It was no comfort that the instrument of the declaration now known as the Montreal Declaration was silent in matters concerning the fiscal autonomy of the judiciary which is so critical to ideal judicial independence.

Similarly, prior to Montreal Declaration, New Delhi played host to the convention organized by the International Bar Association (IBA) sometimes in October 1982. IBA deliberated on judicial autonomy and evolved the instrument described as New Delhi Standards for Judicial Independence. This instrument subsequently received the endorsement of other critical global stakeholders in 1982.⁵⁷ Discussions have continued at the world stage on the need for proper independence of the judiciary to salvage the deepening 'organizational atrophy'

⁵³ David Clerk, "The Struggle for Judicial Independence," *Macquarie Law Journal* 12, no. 1 (2013): 21.

⁵⁴ Awawda, "Assessment of De Jure [by law] Judicial Independence," 202..

⁵⁵ See United Nations, *Basic Principles on the Independence of the Judiciary*, UN Doc. A/CONF.121/22/Rev.1 (August 26–September 6, 1985), art. 1; see also International Association of Judges, *Universal Charter of the Judge*, approved November 17, 1999, art. 1.

⁵⁶ See *Montreal Declaration: The Universal Declaration on the Independence of Justice*.

⁵⁷ See International Association of Judicial Independence and World Peace, *Standards for Judicial Independence* (Zurich, 2018), <https://www.jiwp.org>. The International Conference on Judicial Independence was held in Jerusalem on January 4–6, 2022.

⁵⁸ in the justice sector and to recalibrate the courts into progressive, evolving and, above all, proactive institutions.⁵⁹ Judicial independence, to say the least, has become a global public policy instrument for attainment of justice.⁶⁰

It suffices to say that barring Britain and its legal system which has been imbibed in Nigeria, the notion of judiciary's autonomy in Nigeria may just be traceable to the Nigeria Constitution (CFRN). ⁶¹ In *Alao v African Continental Bank Limited*,⁶² Karibi-Whyte, JSC emphasizing the boundaries and limitations placed on the court by the CFRN observed that the demonstration of jurisdiction by the Supreme Court is statutory, with its powers also prescribed in the text of the Statute. This pronouncement implicates that where the CFRN has prescribed some powers or privileges such as the court's jurisdiction, extending howsoever to its autonomy in operational and financial matters, the prescription is mandatory and binding on all stakeholders.

4.1. Independence of the Judiciary in Nigeria: Focus on Financial Autonomy

It is an essential principle of constitutional democracy that the judicature assumes the constitutional obligation for dispensation of justice, and for the same reason be accountable for the daily business of the courts.⁶³ A judiciary with the capacity to administer itself through funding and other monetary allocations from a source insulated from executive manipulations develops capacity to enhance court performance and general institutional turn the entire justice system around. Autonomy for the judiciary implicates non-interference by other arms of government in recruitment of judiciary staff, welfare and discipline for judiciary staff and provision of capital infrastructure for the effective justice delivery. In constitutional democracy, it has become a global tradition for the

⁵⁸ Tin Bunjevac, "Court Governance in Context: Beyond Independence," *International Journal of Court Administration* 4, no. 1 (2011): 35.

⁵⁹ Gar Yein Ng, "A Discipline of Judicial Governance?," *Utrecht Law Review* 7, no. 1 (2011): 102.

⁶⁰ Adam Mordecai Dodek, "Judicial Independence as a Public Policy Instrument," *Comparative Research in Law and Political Economy Research Paper* 5, no. 2 (2009): 1–36.

⁶¹ Federal Republic of Nigeria, *Constitution of the Federal Republic of Nigeria 1999* [CFRN], sec. 121(3).

⁶² *Alao v. ACB Limited* [2000] 9 NWLR (Pt. 672) 129; *Ubani v. Director, SSS* [1999] 1 NWLR (Pt. 625) 129, 150–51 on the determination of powers and jurisdiction of the Supreme Court. This case resonates with the prescription of the boundaries of other arms of government by the Constitution.

⁶³ James King, "A Judiciary-Based State Administration—The South Australian Experience," *Journal of Judicial Administration* 3, no. 1 (1993): 136. See also John Logan, "Executive Intervention in Judicial Functions and Judicial Encroachment into Executive Functions—Defining the Boundaries," *Federal Judicial Scholarship* (2017): 23.

legislature to be responsible for appropriation of funds while the government takes responsibility for fiscal administration. However, the combined power of appropriation and fiscal administration can be engaged by the twin organs of government to castrate the judiciary by reducing or refusing appropriation of funds. For example, in 2013, the federal courts in the United States of America (US) had their statutory budget sequestered by a deliberate political decision, resulting in an automatic 5% cut midway into the fiscal year. The development forced the judiciary to downsize its staff strength which adversely affected courts' justice delivery capacity.⁶⁴ The need for judiciary's independence was re-echoed by Lord Denning in his opinion stating that Judges ought to be extricated from all influences from persons who hold power if they must be trusted to determine whether or not authority is being misused or abused.⁶⁵

In Nigeria, recent developments have strengthened renewed agitations for autonomy of the judiciary. These agitations question the sanctity of the country's article of faith as a constitutional democracy. The queries arise from appointment of judges, removal of judges without due process and under bizarre circumstances⁶⁶ as well as the deplorable state of *court* infrastructure, particularly the courts under the administration and control of state governments in Nigeria. The prevailing status of the judiciary in Nigeria reveals a coordinated attempt to drive the organ into irrelevance or make it an appendage of the government of the day. Decrying the foregoing experience, Mogoeng observes the seeming reluctance by contemporary governments to clothe the judiciary with the garb of a proper organ of the State which deserves to exercise independence. The truth is that the judiciary is a valid organ of the State which should be accorded its rightful status in all respects; it should never be treated or seen as an appendage of the Executive arm.⁶⁷

⁶⁴ Justin Apperson, "Comity or Confrontation: Budgeting Independence of the American Judiciary," *Constitutional Review* 10, no. 1 (May 2024): 137.

⁶⁵ Alfred Thompson Denning, *What Next in the Law* (Oxford: Oxford University Press, 1982), 310.

⁶⁶ Mrabure and Awhefeada, "Onnoghen's CJN Conundrum," 19.

⁶⁷ The statement is credited to Hon. Justice Thomas Mogoeng, the Chief Justice of the Constitutional Court of South Africa. See United Nations Office on Drugs and Crime (UNODC), "Independent Judiciary: Key to a Better Performing Judicial System," 2014.

By the dispensation of things, the judiciary appears incontrovertibly as the weakest organ of governance when compared with others within the triangular configuration.⁶⁸ Hence, Hamilton et al decried the configuration by stating the helplessness of the judiciary even to enforce its own judgment which is its sole weapon governance.⁶⁹ It rather relies on the executive for strength and the force required for the efficiency of its judgments.⁷⁰ However, no matter the resolve to operatively subjugate the judicature to other complementary branches of state governance, it is in court and nowhere else that citizens naturally experience the cutting-edge of the law. Where the court is fortified to earn the citizens' respect, such respect inures in favor of the law even if it diminishes in respect of any particular arm of government, and for the overall benefit of the society.⁷¹

In Nigeria, conversations for judicial independence appear rather too ideological for policy makers to grasp. Policy makers often identify judicial independence with judicial officers' welfare, hence the attitude of holding commendation sessions in Nigeria whenever wages are improved for judicial workers or some infrastructure of the judiciary given a face-lift. The crux of the case for autonomy for the judiciary is funding and control of finances budgeted for the judiciary as of right. Consequently, what the judiciary needs to flourish in Nigeria is full financial autonomy as guaranteed under the CFRN. Olumide Akpata captures a picture of the failure in demonstrating full financial autonomy for the judiciary.⁷² He frowns at the spectacle where heads of courts literally beg for the general welfare and overheads costs of the institutions from high-handed executives at the federal or state levels, stating it as an ugly situation highlighting the apparent subservience of the branch of governance to the executive branch from which it should be autonomous. The development presents a somewhat

⁶⁸ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Simon & Schuster, 2004), 78.

⁶⁹ The principle was affirmed by the Supreme Court in the classic case of *Okumagba v. Egbe* [1965] All NLR 62, on the extent to which the judiciary may be independent of other arms of government for societal cohesion.

⁷⁰ Arthur Twining Vanderbilt, *The Challenges of Law Reform* (Princeton, NJ: Princeton University Press, 1955), 4–5.

⁷¹ Uwadineke Chukwemeka Kalu, "Separation of Powers in Nigeria: An Anatomy of Power Convergences and Divergences," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 9, no. 1 (2018): 124.

⁷² The statement is credited to Olumide Akpata, former President of the Nigerian Bar Association. See Alex Enumah, "Body of SANS Lament Executive, Politicians' Interference with Appointment of Judges: NBA Seeks Full Financial Autonomy for Judiciary," *ThisDay*, October 5, 2020.

master-servant relationship which upends the entire idea of autonomy for the judiciary. The unfortunate situation is nonetheless the reality of the interaction between the Judiciary and the government in present-day Nigeria.⁷³ Consequently, the Nigerian judiciary continues to labor under the weight of under-funding or withholding of funds which translates into poor justice delivery. A judiciary that cannot settle its over-heads without external endorsement of the executive leaves much to be desired. Financial autonomy would embolden the judiciary to discharge their duties without fear or favor.

4.2. Constitutional Safeguards for financial autonomy of the Judiciary in Nigeria

It has been stated that judicial independence encompasses a spectrum of issues which insulates the judicature against interference by complementary organs of state governance, safe for the purpose of reciprocity. Financial autonomy for the judiciary is integral to the notion of independence by the judicial organ of the state, and perhaps the livewire of the entire debacle. The independence of the judiciary, particularly as regards financial autonomy, has been grossly misconceived not only by policy makers but by those who should drive the agitation. Ariwoola, CJN, stated that the Nigerian Judiciary operates without any extraneous influence, being extensively independent in the conduct of its affairs, particularly with respect to taking decisions on matters before it. The jurists maintained without mincing words that the Nigerian Supreme Court is completely independent in its judgments. Nevertheless, the jurist expressed the view that, when the judiciary in Nigeria is viewed from the financial optics, it is truly yet to be independent. He further noted that the annual budget of the judiciary in Nigeria which constitutes paltry and regrettable wage package is a major concern deserving urgent attention. Such welfare package of judicial officers could hardly, adequately cater for them upon retirement. It is worrisome that most judicial officers serve the government for record period of 40 to 45

⁷³ Enumah, "Body of SANS Lament Executive."

years before retirement, justifying the desirability befitting retirement benefits after painstaking service to the nation.⁷⁴

The irony of the foregoing text credited to the Honorable Chief Justice of Nigeria is that while he set out to lend a voice to the need for independence of the judiciary on financial matters, the emphasis of his speech was on judicial officers' welfare. It does appear that the welfare of judicial officers has for a long time been confused with financial autonomy for the judicial organ of the state. The truth is that welfare of judges to the taste and standard befitting of their status is only an aspect of the agitation for judicial autonomy. Such construction of judicial independence which perceives judicial autonomy or independent administration of justice as implicating greater involvement of judges or the enhancement of their welfare falls short of sufficiently distinguishing *de facto* from *de jure* judicial autonomy, thereby fails to align with the customary pontifications on judicial independence.⁷⁵ The doctrine of *de facto* judicial independence sacrifices economic performance or welfare of judges on the altar of defence of judicial property rights.⁷⁶ The judiciary is much more than the judges and encapsulates all machineries of justice including infrastructure and staff other than judicial officers.⁷⁷ Financial autonomy does not abide in the paucity of funds made available to the judiciary or the abundance of it for the purpose of bequeathing unto the judicial officers the comfort befitting their status and commensurate with their job demands but in the manner in which funds are accessed, controlled and allocated for the overall improvement of the justice sector from the treasury pool of the nation's commonwealth.⁷⁸ Simply

⁷⁴ Olukayode Ariwoola, the Honourable Chief Justice of Nigeria, "Opening Speech," Made at the Special Session of the Supreme Court of Nigeria to Mark the Commencement of the 2022/2023 Legal Year and Swearing-in of Newly Conferred Senior Advocates of Nigeria Held at the Main Court Room of the Supreme Court on November 28, 2022.

⁷⁵ David Kosar and Samuel Spac, "Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back," *International Journal for Court Administration* 9, no. 3 (2018): 37-46, <https://doi.org/10.18352/ijca.284>

⁷⁶ Frans Van Dijk and Philip Langbroek, "Reaction on the Comments on the ENCJ Study on Methods for Assessment of Judicial Independence and Accountability," *International Journal for Court Administration* 9, no. 3 (2018): 76-78, <https://doi.org/10.18352/ijca.283>

⁷⁷ On who is a judicial officer in Nigeria, see Section 291 of the CFRN (Fifth Alteration Act No. 37, 2023) which reviewed the retirement age of judicial officers in Nigeria.

⁷⁸ Federica Viapiana, "Funding the Judiciary: How Budgeting System Shapes Justice: A Comparative Analysis of Three Case Studies," *International Journal for Court Administration* 10, no. 1 (2019): 23-33.

put, a discourse on fiscal autonomy for the judicature is an interrogation of the constitutionality of the prevailing budgetary practice in Nigeria which is skewed to achieve under-appropriation against the judiciary and the pattern by which the appropriated funds are accessed by the judiciary.⁷⁹

The constitutional basis for the case for fiscal autonomy for the Nigerian judiciary is enacted in Sections 120(1) – (3), 121(1) – (3) and 12 (1) – (4) of the CFRN. The foregoing provisions when given a community reading with Sections 81(3), 84(1), (2), (3), (4) and (7) of the CFRN show a deliberate attempt to guarantee independence of the judiciary with respect to funding.⁸⁰ By the CFRN text in Section 81(1), the President has a duty to direct the preparation and presentation before ‘the federal legislature’ all proposals of incomes and expenditures of the federation regarding the fiscal year, no matter the period within the fiscal year. The CFRN went further to state prescribe the inclusion of the judiciaries’ estimated heads of expenditure in Appropriation Bills presented by the executive. Consequently, any funds validly allocated for spending by the judicature, domiciled with the Federation’s Consolidated Revenue Fund (CRF) is mandated for direct remittance for disbursement to the administrators of the courts through the NJC.

The foregoing provisions stopped short of expressly providing for autonomy of any sort to the judiciary within the ordinary meaning of autonomy.⁸¹ The position is fortified by the constitutional retention of the strangle-hold of the executive in as much as the funds earmarked for the judicature would first be paid to the NJC before it is disbursed through the administrators of courts and without any stipulated sanctions against the legislature, the executive or the NJC for failure or delay in disbursing such funds. The defects in the identified constitutional

⁷⁹ Alexander Rosselli, “Judicial Independence and the Budget: A Taxonomy of Judicial Budgeting Mechanisms,” *Indiana University Maurer School of Law* 5, no. 1 (2020).

⁸⁰ The CFRN, Sections 120(1) – (3) and 121(1) – (3) deal with state judiciary while Sections 81(1) – (2) and 84(1) – (3) of the CFRN deal with the federal judiciary. See section 6 of the CFRN for courts established by the CFRN.

⁸¹ Autonomy is defined as the (the right to self-government; freedom of will. Simply put, financial autonomy of the judiciary implies the capacity to self-government, overall freedom to act or function independently; to own and control its financial with degree of freedom. See Diana Lea, *The Oxford Advanced Learner’s Dictionary*, 10th ed. (Oxford: Oxford University Press, 2020), 85; see also Lucas Swaine, “The Origins of Autonomy,” *History of Political Thought* 37, no. 2 (Summer 2016): 216.

provisions which have been misconstrued as grant of financial autonomy would continue to frustrate financial autonomy indeed until the appropriated clauses are inserted. However, the foregoing provisions of the CFRN have received judicial interpretations.⁸² These judicial decisions have not been complied with by any Governor in Nigeria.⁸³ The persistent agitation to realize the ends of financial autonomy for Nigeria's judicature, and rescue the legislature from the powerful grip of state governors at the state level in the light of the identified constitutional defects in implementation of Section 121(3) propelled President Muhammadu Buhari to sign Executive Order (EO) Number 10.⁸⁴

V. EXECUTIVE ORDER NO. 10 [EO] AND JUDICIAL FINANCIAL AUTONOMY

On 20 May 2022, President Muhammadu Buhari in the exercise of his powers as contained in Section 5, CFRN signed EO 10 for the purpose of enforcing financial autonomy. The EO 10 mandated the federation's Accountant-General to extract and remit to the judiciary and legislature, all such allocations accruing to them directly from the federation account. Section 121(3), CFRN stipulates direct remittances of any amounts to which the judicature is entitled from the CRF of the concerned states to the administrators of the beneficiary courts.

The EO 10 was applauded as a bold step by the government of the day to ease its emasculation of the legislature and the judiciary, particularly from high-handed State Governors. However, the express imputation of the EO 10 whereby

⁸² See *Judiciary Staff Union of Nigeria (JUSUN) v National Judicial Council & 74 Ors* (Unreported Suit No. FHC/ABJ/CS/667/13: On Judicial Financial Autonomy of the Federal Judiciary in Nigeria, Judgement Delivered by Ademola J, of the Federal High Court Abuja on January 13, 2014) and *Olisa Agbakoba v The Attorney-General of the Federation & 2 Ors.* (Unreported Suit No. FHC/ABJ/CS/63/2013 *On the Interpretation of the Constitution on Judicial Independence: Judgement Delivered by Mohammed, J. of the Federal High Court Abuja on May 26, 2014*). See also, *John Aikpokpo – Martins, Esq & Anor v Governor of Delta State & 5 Ors.* (Unreported Suit No: A/164/2022: On the Interpretation of the Constitution on Judicial Financial Autonomy of Courts in Delta State of Nigeria: Judgement delivered by Honourable Justice Briki-Okolosi (Judge) of Delta State High Court, Asaba on March 7, 2023).

⁸³ CFRN, Section 121(3) which provided for monies meant for the state judiciaries to be paid to the state judicial services commission has been amended vide the Fourth Alteration, No. 4, Act No 7 of 2017. The said sub-section provides for such funds meant for the judiciary to be paid directly to the heads of courts concerned.

⁸⁴ The Executive Order No. 10 was signed by President Muhammed Buhari on 20 May 2020 with the intention of evoking the full effects of Section 81 and 121 of the CFRN in response to the agitations for judicial financial autonomy.

States of the Federation are mandated to include allocations of the judiciary and legislature in their Appropriation Laws unsettled some constitutional doctrines and raised germane legal questions. These questions include:

1. Can the executive legislate without being specifically delegated by statute in that regard under the ancient constitutional jurisprudence prescribing separation of powers?
2. Can Presidential EO authorize the President or Governor to do an act that he is not authorized to do by statute? Similarly, can EO take the place of Statute in a constitutional democracy?
3. Can the President direct action of a Governor by fiat in a constitutional federation like Nigeria?
4. Does a Presidential EO have capacity to derogate from or vary Section 162 of the CFRN which already provides for the manner of administering revenue in the distributable pool account of the federation?
5. Where provisions of a statute such as Section 121(3) of the CFRN is unambiguous, can EO direct specific compliance to the said provisions without meddling with law-making or judicial functions?

The validity of the EO 10 must therefore be tested within the confines of its conformity with the CFRN rather than the unilateral desire of the President to deepen the tenets of democratic governance, no matter how well intended. It is argued that EO 10 is *ultra vires* the President for attempting to coerce the State Governors to comply with a non-existent law. The truth is that the invention of the words 'Judicial Financial Autonomy' by the President is alien to the CFRN and therefore void and of no consequence. In the light of the fact that allocation of funds to various arms of government has already been enshrined in the CFRN, it is contended that the president should have leveraged 'judiciary's independence' which exudes statutory familiarity instead of 'judicial financial autonomy (JFA)' which though integral to judiciary's independence, is not recognized with particularity under the extant Nigerian Laws.

Consequently, State Governors in the country challenged the EO 10 in Court.⁸⁵ By a majority decision, the Apex Court nullified EO 10, declaring it unconstitutional and of no effect. The intervention of Nigeria's apex court appears to have made a mockery of the good intentions of the Buhari-led administration to settle the issue of independence of the judiciary once and for all. This has thus returned the agitators for judicial financial autonomy to the drawing table. The practical realities of the legal brick-walls awaiting proponents of JFA reinforced the concept as a constitutional albatross. The agitations would not go away anytime soon as the autonomy of the judiciary remains a constitutional principle without any frameworks for its actualization.

VI. JUDICIAL INTERVENTIONS ON MATTERS OF 'JFA' IN NIGERIA

The question of JFA is at the heart of justice administration in Nigeria and, so important as to elicit legal steps by critical stakeholders in the legal community. On this project, critical stakeholders have not only canvassed the need for JFA at various fora but some took further steps to seek judicial construction of the applicable constitutional provisions on the subject. In *Agbakoba v A-G, Federation & 2 Ors*,⁸⁶ a past Bar leader instituted an action seeking enforcement of Sections 81(1) & (2) and 84(1), (2), (3), (4) & (7) of the CFRN regarding funding of the judiciary in Nigeria. Plaintiff contended that the prevailing arrangement which requires the judiciary organ of the state to route its budget through the budget office, an agency of the executive organ of governance, amounted to rewriting the texts of the CFRN. After reviewing the laws, the Court granted the reliefs sought by the plaintiff on the vexed question of JFA being persuaded that in declaring the vexed practice as unconstitutional, the judiciary would be assisting the government to stick to the stipulations of the CFRN. The presiding judge was unable to find any provisions of the CFRN that subjugates the Judiciary to

⁸⁵ Supreme Court of Nigeria, *Attorney-General of Abia State & 35 Ors. v. Attorney-General of the Federation* [2022] LPELR-57010 (SC), on the legality of Executive Order No. 10 issued by the President of the Federal Republic of Nigeria.

⁸⁶ Federal High Court Abuja, *Olisa Agbakoba v. Attorney-General of the Federation & 2 Ors.*, Suit No. FHC/ABJ/CS/63/2013, judgment delivered by Mohammed J., May 26, 2014.

the Executive under any coloration, without prejudice to Checks and Balances as contained in the CFRN. The court therefore upheld fiscal autonomy for the judiciary as prescribed under the CFRN.

Also, in *JUSUN v NJC & 73 Ors*,⁸⁷ the union sought reliefs from court, mandating defendants to honor the JFA the breach of which has militated against the smooth administration of justice in Nigeria. The union had consistently embarked on industrial actions over unpaid salaries and other entitlements excused by paucity of funds to the judiciary. The Plaintiff ensured that major critical stakeholders and bureaucrats in the justice sector were made parties to the suit. Declaring JFA and in favor of the plaintiff, Ademola, J. construed the law rightly when he stated as follows:

- (a) The neglect, failure and refusal to pay-out funds allocated to the judiciary is in breach of CFRN and should not be allowed to persist.
- (b) The obedience or valid adherence to the provisions of the CFRN regarding JFA is immediate. The government would not be left to persist in violating of the prescriptions of the CFRN in such a manner as to render the judiciary inconsequential.⁸⁸
- (c) The emphasis on the *JUSUN* case is ‘the federating states.’ Consequently, the court nullified and declared as unconstitutional, the failure of the government to directly disburse funds allocated to the state judiciaries in the CRF to the administrators of courts throughout the federating states.⁸⁹

The *JUSUN* decision left the impression that since Nigeria is a constitutional democracy, all State Governors would comply with the order of the courts in their various states. This is, particularly so as there is no pending appeal or application to stay execution of the judgment. However, the executive has continued to honor the judgments of court on JFA in breach thereby forcing further steps to compel compliance with the judgements. Thus, in *John Aikpokpo-Martins, Esq & Anor v*

⁸⁷ Federal High Court Abuja, *Judiciary Staff Union of Nigeria (JUSUN) v. National Judicial Council & 74 Ors.*, Suit No. FHC/ABJ/CS/667/13, judgment delivered by Ademola J., January 13, 2014.

⁸⁸ See Amuda-Kannike *et al*, “Examining the Mutual Concepts,” 268.

⁸⁹ Ameze Guobadia, “The Relationship Between the Judiciary and the Political Branches, Judicial–Executive Relations in Nigeria’s Constitutional Development: Clear Patterns or Confusing Signals?,” in *Separation of Powers in African Constitutionalism*, ed. Charles Manga Fombad (Oxford: Oxford University Press, 2016), 255.

Governor of Delta State & 5 Ors,⁹⁰ two former national officers of the NBA⁹¹ had filed an action challenging the continued breach of the CFRN and the deliberate refusal to abide by the various decisions of court applicable to Delta State on JFA by the Delta State government. Claimants had sought judicial interpretation and appropriate consequences for breach of Sections 120(4), 121(2) & (3) and 124(4) of the CFRN⁹² with particular focus on ‘the mode of implementation of the said Constitutional provisions. Claimants called in aid of their case, the authorities of *Agbakoba v the A-G, Federation & 2 Ors*, and *JUSUN v NJC & 73 Ors*⁹³ to argue that the practice whereby the judiciary kowtow to the executive for the purpose of funding is an aberration and that Delta State, being a party to the suit in the authorities relied upon, is bound to honor the judgments in obedience, not in breach.⁹⁴ The trial court agreed with claimants that the present case was on all fours with *Agbakoba’s* case except that the present case is with respect to judiciary at the state level while *Agbakoba’s* case relates to the Federal Judiciary.⁹⁵ In granting the reliefs sought, Briki-Okolosi, J. stated the law pungently rejecting the argument that the judiciary’s practice of submitting its monetary budget to the executive arm before funds could be released to it upends the doctrine of judicial autonomy. In the same vein, the court vehemently held that the requirement for submission of annual budgetary estimates by the 3rd, 4th and 6th Defendants to the executive organ of government to scrutinize for the purpose of inclusion in the Appropriation Bill is a misconception clothed in illegality. Consequently, the Delta State government was ordered to adhere to the letters of the CFRN, as interpreted in the judgement and quit the practice which mandates the state judiciary to present its yearly budget to the agents of the government for scrutiny and possible inclusion in the state’s Appropriation Bill.⁹⁶

⁹⁰ Delta State High Court Asaba, *John Aikpokpo-Martins, Esq. & Anor v. Governor of Delta State & 5 Ors*.

⁹¹ John Aikpokpo-Martins (1st Claimant) is an activist and former 1st Vice President of the NBA. Olukunle Edu (2nd Claimant) is a human rights crusader and former Publicity Secretary and Welfare Officer of the NBA.

⁹² As amended by the Fourth Alteration, No. 4. Act No. 7 of 2017.

⁹³ See Delta State High Court Asaba, *John Aikpokpo-Martins, Esq. & Anor v. Governor of Delta State & 5 Ors*.

⁹⁴ The Governor of Delta State was the 21st defendant, while the Attorney-General of Delta State was the 22nd defendant on record in the JUSUN case.

⁹⁵ Delta State High Court Asaba, *John Aikpokpo-Martins, Esq. & Anor v. Governor of Delta State & 5 Ors*, Suit No. A/164/2022, judgment delivered by Hon. Justice Briki-Okolosi, March 7, 2023, 15.

⁹⁶ Delta State High Court Asaba, *John Aikpokpo-Martins, Esq. & Anor v. Governor of Delta State & 5 Ors*, Suit No. A/164/2022, judgment delivered by Hon. Justice Briki-Okolosi, March 7, 2023, 20.

The foregoing cases reveal that the agitation for judicial independence, particularly on the fiscal aspect has made appreciable progress in its second stage. The actualization of JFA in Nigeria has been identified in three stages. The first stage is the constitutional amendment. This has been settled in the Fourth Alteration of the CFRN in 2017. The second stage is the interpretation of the constitutional provisions or amendments so made by the courts. The decisions in *Agbakoba*, *JUSUN* and *Aikpokpo-Martins* relate to this stage. *Aikpokpo-Martins's* case is particularly unique in its prayers and approach. The decision shows an effort to expand the frontiers of the argument by not only seeking a declaratory relief but a prohibitory order against the Delta State House of Assembly by making it illegal and unconstitutional for it to receive the budget and expenditure of the Judiciary from the Executive should there be any reasons that the Delta State Judiciary is intimidated to defer to the Executive. The decision also prohibits the Judiciary itself from submitting its annual budget and expenditure through the Executive as was the practice. The decision localizes the struggle for judicial independence, bringing it to the door steps of the critical offenders. With *Aikpokpo-Martins* being the law in Delta State, the legal community watches with keen interest to see how the judiciary would treat its own judgment as it relates to JFA.

The third and final stage involves the execution and enforcement of the product of the second stage. To this end, more energy is required to push through the stage which would guarantee the full, unrestricted financial autonomy to the judiciary in Nigeria.

VII. JUDICIAL AUTONOMY: LESSONS FROM FRANCE, SOUTH SUDAN AND CANADA

Financial independence of courts in France may be analyzed from the optics of financial crisis experienced by the ordinary courts to which the political has not given sufficient attention. The French financing arrangement for the judiciary guarantees autonomy to constitutional and administrative courts, but much more to the *Conseil Constitutionnel* (Constitutional Council). The common financial

pool for the three arms of governance is referred to as the ‘public power’ which is administered as an endowment while the funds are known as *dotation*.⁹⁷ The ‘pool’ otherwise known as the ‘global provision’ grants access to the heads of the arms of governance to the extent of their obligations to run the administration of the relevant arms in a manner that resonates with the jurisprudence of power sharing. Political interference is most minimal or non-existent as no performance indicators attach the annual budgetary allocations. The Constitutional Council does not rely on the Justice Ministry for approval, even on capital projects.

While financial autonomy of the Constitutional Council is modelled to realize true separation of powers, other layers of court cannot be said to be autonomous except with respect to their budget management. This implicates that such lower courts do not participate in budgeting but the moment their annual budget is approved, they are autonomous in managing it, subject to the oversight of the justice ministry.⁹⁸ To this extent, the judicial architecture that most loudly represents classical model of judicial independence in France is that which is applicable to the Constitutional Council which is similar in function and status as Nigeria’s Supreme Court. Other court systems in France may only enjoy budgetary autonomy. Applying this experience to Nigeria for the purpose of guaranteeing independence for the judiciary, a sovereign account/ consolidated fund could be created for the smooth operations of the organs of state governance to be domiciled with the Central Bank of Nigeria. This arrangement, backed by law, would enable the judiciary to draw its running cost as a first charge without having to kowtow to executive preferences. It would be suggested with respect to Nigeria that the funds are drawn from the same source as other arms of government in such a manner as to make any dishonor of drawings from the judiciary to be a suspension of drawings by other arms of government. This arrangement would reduce executive or political interference which would grind the entire bureaucracy to a halt. Where the accounts are

⁹⁷ Caroline Expert-Foulquier, “The Financial Independence of the Judiciary in France,” *International Journal for Court Administration* 11, no. 1 (2020): 1–16.

⁹⁸ Philippe Bas, “Allocution de clôture [Closing Speech],” *Revue française de finances publiques* [French Review of Public Finance] 142 (2018): 164.

separated as the case currently, other arms of government can emasculate the judiciary through funds restrictions and withholding, while the affairs of the state remain unhindered. The French model of judicial financial autonomy is commendable in modern democracy.

South Sudan presents a sharp contrast with the Nigeria's judiciary architecture in terms of autonomy, particularly on financial matters.⁹⁹ The Country's Transition Constitution¹⁰⁰ separates the state powers into the customary three domains of autonomy, particularly the legislature, executive, and judicature organs of state governance. It stipulates Judiciary's autonomy and separation from the operations of the Legislative and Executive domains.¹⁰¹ Under the arrangement, an institution designated the Judicial Service (JS) Council is established with mandate to draw up the annual budget of the judiciary in reference to the constitution, and the JS Act.¹⁰² The judiciary draws its budget directly from the consolidated fund, the management of the funds is basically the remit of the judiciary. The arrangement represents a full, commendable model of judicial independence. The Chief Justice disburses the funds as may be necessarily in the best interest of the judiciary.¹⁰³ Consequently, the judiciary in South Sudan has developed a self-accounting mechanism to ensure prudence and credit when subjected to public audits to which the Judiciary is routinely subjected.¹⁰⁴ It is suggested that Nigeria should borrow a leaf from Sudan. The model identified with South Sudan answers to the best aspirations of the Nigeria's judiciary because it demonstrates clear separation of powers which underpins Nigeria's legal system.

In Canada, the Constitution Act of 1867 enshrines judicial autonomy.¹⁰⁵ Notwithstanding the constitutional guarantees, Canadian Judiciary's budget is largely handled by the Executive and the Legislature. Canada has however,

⁹⁹ Mabel Osato Oniha and Bright Erazé Oniha, "A Critique of the Judiciary Financial Autonomy and Fund Management: Delta State Judiciary in Focus," *DELSU Law Review* 9, no. 1 (2023): 95.

¹⁰⁰ Republic of South Sudan, *Transitional Constitution of the Republic of South Sudan* [TCSS] (2011)

¹⁰¹ Republic of South Sudan, *Transitional Constitution of the Republic of South Sudan (Amendment No. 2)*, secs. 124–25.

¹⁰² Republic of South Sudan, *Judicial Service Council Act* [JSCA] (2008), sec. 6(3).

¹⁰³ JSCA, secs. 75–79.

¹⁰⁴ TCSS, sec. 125(3); JSCA, secs. 77–78.

¹⁰⁵ Canada, *Constitution Act, 1867*, secs. 96–100.

evolved a unique arrangement for judicial autonomy that is not outrightly based on financial self-governance.¹⁰⁶ In *Valente v Queen*,¹⁰⁷ the Canadian Supreme Court construed independent tribunal within the ambit of the Constitution.¹⁰⁸ The court held that judicial independence constituted in tenure security, financial security and institutional autonomy. The principles may be expounded as institutional and decisional independence. Institutional independence implicates exercise of self-governance from within and without external influence or coercion. Whereas decisional independence guarantees the insulation of the judge from liabilities arising from a decision validly rendered. This concept more than any other donates the courage to the judicature to uphold justice, without fear or favor. Suffice it to say that in Canada, judicial autonomy does not mean financial independence from sister organs of governance but security of tenured-employment, salary security and judicial privileges. The Canadian system resonates with the Australian structure which guarantees job security, immunity from liabilities, stable remunerations and sundry benefits to judges without a clear-cut judicial fiscal autonomy.¹⁰⁹ Gleeson suggests that since the judicature, like any other public institution is not immune from influences, particularly from the Executive, greater legitimacy should be enshrined by clearly enthroning judicial (financial) independence.¹¹⁰ The Canadian jurisprudence may well pass for judicial welfarism or ‘qualified’ autonomy which is not devoid of slight external influences as the Parliament fixes judicial officers remuneration following the report of an independent commission, effecting reviews every four years. This is because the proper autonomy resides in the right to administer resources without external influence as in the case of South Sudan. However, courts are allowed to manage their internal budgets, granting them administrative controls over their daily operations.

¹⁰⁶ Kathy Mack and Sharyn Roach Anleu, “Managing Judicial Performance: The Changing Ethical Infrastructure,” *Australian Law Journal* 97 (2023): 664.

¹⁰⁷ *Valente v Queen*, [1985] Can LII 25 (SCC); [1985] 2 SCR 673, on the construction of judicial independence in Canada.

¹⁰⁸ See Canada, *Canadian Charter of Rights and Freedoms*, s. 11(d), 1867.

¹⁰⁹ Tom Frederick Bathurst, “Separation of Powers: Reality or Desirable Fiction?” *New South Wales Judicial Scholarship* (2013): 39

¹¹⁰ Jacqueline Gleeson, “Advancing Judicial Legitimacy: The Stakes and the Means,” *The Judicial Review* 15, no. 1 (2023): 1.

VIII. RECOMMENDATIONS

The Nigerian courts in their hierarchy should be bold and courageous to uphold JFA whenever the case presents itself. There should be an end to appreciating the executive for providing for the judiciary instead of tasking the judiciary to help itself. There should be a synergy between the private bar and the bench to compel the Executive to honor the constitutional provisions guaranteeing JFA. The stakes are too high for the struggle for JFA to be left to the academics, private legal practitioners or JUSUN in isolation of judicial officers.

It is further suggested that Claimants in cases favorable to JFA should be courageous to take steps to enforce such judgments. The courts' courage at such auspicious times should manifest in granting directions for accelerated hearing of such enforcement or contempt proceedings against unscrupulous bureaucrats. The NBA should lobby the National Assembly and other critical stakeholders in the justice delivery enterprise to further amend the CFRN with a view to expressly ironing out the identified 'shields' of the executive against full blown JFA. This may include express sanctions for breaches of such constitutional provisions.

IX. CONCLUSION

The judiciary is no doubt the critical organ of governance which is constitutionally empowered to contain tyrannous and despotic tendencies of the other two organs, particularly the Executive, through decisive judgments. The sacred obligation of the judiciary to identify and strike down executive lawlessness by declaring such actions unconstitutional is inhibited by the judiciary's inability to access funds for its overheads and other expenditure without going cap-in-hand to the execution. The extant practice which derogates from the customary theories of power sharing has engaged informed debates. The judicial decisions on cases challenging executive encroachment into the hallowed domain of the judiciary show that indeed, judicial autonomy in Nigeria is attainable. However, JFA which is integral to full, pragmatic autonomy of the judicature in Nigeria has assumed a constitutional albatross given the unequivocal prescriptions of the CFRN, the practical reality from the response to such provisions by the

Executive arm, and the apparent stance of heads of courts in Nigeria who are more interested in judges' welfare than the pursuit of JFA. It is suggested that since constitutional prescriptions, such as judicial independence, are mandatory and not directory, the Nigerian state should revisit the principles of EO 10 to align it with workable parameters to ensure quality justice delivery within the Nigerian legal system. More importantly, the State governments should, in consultation with the Judicial Service Commissions at the various state levels, evolve frameworks that would guarantee enforceability of financial independence for the various state judiciaries without relying on the federal government's template. That, in itself, is the beauty of a federation.

BIBLIOGRAPHY

- Adams, John. *The Works of John Adams III*. Boston: Little, Brown and Company, 1851.
- Amuda-Kannike, Abiodun, Awudumapu Godfrey Obe Agorodi, and Yusuf Amuda-Kannike. "Examining the Mutual Concepts of Judicial Fiscal Autonomy and Administration of Justice." *Redeemers' University of Nigeria Journal of Jurisprudence and International Law* 3, no. 2 (2023): 260. <https://runlawjournals.com>.
- Apperson, Justin. "Comity or Confrontation: Budgeting Independence of the American Judiciary." *Constitutional Review* 10, no. 1 (May 2024): 137. <https://doi.org/10.31078/consrev1015>.
- Awawda, Osayd. "Assessment of De Jure Judicial Independence of Constitutional Courts According to International Guidelines." *Constitutional Review* 10, no. 1 (May 2024): 202. <https://doi.org/10.31078/consrev1017>.
- Babalola, Afe. "Relevance of Separation of Powers and Its Application in Nigeria." Lecture delivered at the NBA Annual Law Week, July 5, 2019. <https://www.abuad.edu.ng/relevance-of-separation-of-powers-and-its-application-to-nigeria>.

- Bas, Philippe. "Allocution de clôture [Closing Remarks]." *Revue française de finances publiques* [French Review of Public Finances] 142 (2018): 164. <https://doi.org/10.3917/rffp.142.0163>.
- Bathurst, Tom F. "Separation of Powers: Reality or Desirable Fiction?" *New South Wales Judicial Scholarship* (2013): 39. <http://www.austlii.edu.au/au/journals/NSWJSchol/2013/39.html>.
- Bingham, Thomas H. *The Business of Judging: Selected Essays and Speeches*. Oxford University Press, 2000.
- Borokini, Andrew. "The Doctrine of Separation of Powers and the 1999 Constitution." *Journal of Private and Commercial Law, Faculty of Law, University of Ado-Ekiti* 1, no. 1 (2008): 146–47.
- Buana, Mirza S. "Weak-Form Review and Judicial Independence: A Comparative Perspective." *Constitutional Review* 10, no. 2 (2024): 343. <https://doi.org/10.31078/consrev1023>.
- Bunjevac, Tin. "Court Governance in Context: Beyond Independence." *International Journal for Court Administration* 4, no. 1 (2011): 35. <https://iacajournal.org>.
- Chan, Wol Deng A. C. "Comparative Analysis of Judicial Independence in South Sudan and Indian." SSRN, June 13, 2018. <https://ssrn.com/abstract=3195316>.
- Clerk, David. "The Struggle for Judicial Independence." *Macquarie Law Journal* 12, no. 1 (2013): 21. <http://www.austlii.edu.au/journals/MqLawJl/2013/13.html>.
- Commonwealth of Nations. *The Commonwealth Latimer House Principles Practitioner's Handbook*. London: Commonwealth Secretariat, 2017.
- Denning, Alfred T. *What Next in the Law*. Oxford: Oxford University Press, 1982.
- Dijk, Frans V., and Geoffrey Vos. "A Method of Assessment of the Independence and Accountability of the Judiciary." *International Journal for Court Administration* 9, no. 3 (2018): 1–21. <https://doi.org/10.18352/ijca.276>.
- Dijk, Frans V., and Philip Langbroek. "Reaction on the Comments on the ENCJ Study on Methods for Assessment of Judicial Independence and Accountability." *International Journal for Court Administration* 9, no. 3 (2018): 76–78. <https://doi.org/10.18352/ijca.283>.

- Dodek, Adam M. "Judicial Independence as a Public Policy Instrument." *Comparative Research in Law and Political Economy Research Paper* 5, no. 2 (2009): 1–36. <https://digitalcommons.osgoode.yorku.ca>.
- Ehirim, Ugochukwu Godspower, Ogechi Bernice Ohwomeregwa, Nwanneka Flora Ehirim, and Adeyinka Koiki-Owoyele. "Constitutional Safeguard for Preservation of Democratic Political Culture and the Legitimacy of Political Porting in Nigeria." *Udayana Journal of Law and Culture* 9, no. 1 (2025): 11. <https://doi.org/10.24843/UJLC.2025.v09.i01.p01>.
- Elias, Taslim O. *The Nigerian Legal System*. London: Routledge & Kegan Paul, 1963.
- Enumah, Alex. "Body of SANS Lament Executive, Politicians Interference with Appointment of Judges: NBA Seeks Full Financial Autonomy for Judiciary." *Thisday Newspaper*, October 5, 2020. <https://www.thisdaylive.com>.
- Ewing, Keith D. "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independence Judiciary." *Alberta Law Review* 38 (2000): 708. <https://doi.org/10.29173/alr1430>.
- Expert-Foulquier, Caroline. "The Financial Independence of the Judiciary in France." *International Journal for Court Administration* 11, no. 1 (2020): 1–16. <https://doi.org/10.36745/ijca.300>.
- Fleck, Zoltan. "Changes of the Political and Legal Systems: Judicial Autonomy." *German Law Journal* 22, no. 1 (2021): 1298. <https://doi.org/10.1017/glj.2021.64>.
- Gleeson, Jacqueline. "Advancing Judicial Legitimacy: The Stakes and the Means." *The Judicial Review* 15, no. 1 (2023): 1. <https://www.judcom.nsw.gov.au>.
- Guobadia, Ameze. "The Relationship Between the Judiciary and the Political Branches, Judicial–Executive Relations in Nigeria’s Constitutional Development: Clear Patterns or Confusing Signals?" In *Separation of Powers in African Constitutionalism*, edited by Charles Manga Fombad. Oxford: Constitution of the World [OCW], 2016.
- Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*. New York: Simon & Schuster, 2004.

- Ikongbeh, John. "Separation of Powers Under the Constitution of Nigeria 1999: A Critical Review of Its Application since 29 May 1999." *Nigeria Law Journal* 1, no. 1 (2003): 92.
- International Association of Judicial Independence and World Peace. *Standards for Judicial Independence*. Zurich, 2018. <https://www.jiwp.org>.
- Kalu, Uwadineke C. "Separation of Powers in Nigeria: An Anatomy of Power Convergences and Divergences." *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 9, no. 1 (2018): 124.
- Keilitz, Inglo. "Viewing Judicial Independence and Accountability through the "Lens" of Performance Measurement and Management." *International Journal for Court Administration* 9, no. 3 (2018): 23–36. <https://doi.org/10.18352/ijca.280>.
- King, James. "A Judiciary-Based State Administration—The South Australian Experience." *Journal of Judicial Administration* 3, no. 1 (1993): 136.
- Kingston, Kato G., Victor N. Enebeli, and Felix Chukwuemeka Amadi. "Judicial Financial Autonomy and the Inherent Powers of the Executives in Nigeria: Lessons from Australia, Britain and Canada." *African Journal of Social Sciences (AJSS)* 12, no. 1 (2022): 20.
- Kosar, David, Jiri Baros, and Pavel Dufek. "The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism." *European Constitutional Law Review* 15, no. 3 (2019): 427. <https://doi.org/10.1017/S1574019619000336>.
- Kosar, David, and Samuel Spac. "Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back." *International Journal for Court Administration* 9, no. 3 (2018): 37–46. <https://doi.org/10.18352/ijca.284>.
- Kosar, David, and Samuel Spac. "Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?" *Hague Journal on the Rule of Law* 13, no. 2 (2021): 107, 142. <https://doi.org/10.1007/s40803-021-00150-w>.

- Lea, Diana, ed. *The Oxford Advanced Learner's Dictionary*. 10th ed. Oxford: Oxford University Press, 2020.
- Logan, John. "Executive Intervention in Judicial Functions and Judicial Encroachment into Executive Functions—Defining the Boundaries." *Federal Judicial Scholarship* (2017): 23. <http://www.austlii.edu.au/au/journals/FedJSchol/2017/index.html>.
- Mack, Kathy, and Sharyn Roach Anleu. "Managing Judicial Performance: The Changing Ethical Infrastructure." *Australian Law Journal* 97 (2023): 664. <https://anzlaw.thomsonreuters.com/Document/l16ef281657c511ee841189749dcabb69/View/FullText.html>.
- Manitra, Ramalina R. M., and Adya Paramita Prabandari. "Judicial Independence Under Political Pressure: The High Constitutional Court and Electoral Justice in Madagascar (2009–2023)." *Constitutional Review* 11, no. 2 (2025): 393–421. <https://doi.org/10.31078/consrev1125>.
- Mehmood, Sultan. "Judicial Independence and Development: Evidence from Pakistan." Aix-Marseille School of Economics [AMSE], 2020. <https://www.amse-aixmarseille>.
- Montesquieu, Baron de. *De l'esprit des lois* [The Spirit of the Laws]. Anonymous Publisher, 1748.
- Mrabure, Kingsley Omote, and Ufuoma Veronica Awhefeada. "Onnoghen's CJN Conundrum: Exercise of the Executive Powers of the President and the Practice of Separation of Powers in Nigeria." *Commonwealth Law Bulletin* 46, no. 3 (2020): 1. <https://doi.org/10.1080/03050718.2020.1756878>.
- Ng, Gar Y. "A Discipline of Judicial Governance?" *Utrecht Law Review* 7, no. 1 (2011): 102. <https://doi.org/10.18352/ulr.149>.
- Noah, Izoukumor A. "Analysing the Application of the *Lex Specialis Derogat Legi Generali* [special law derogates from general law] Principle in *Peter Obi v INEC* (2023): A Focus on Issue Two; Electronic Result Transmission." *African Journal of Law and Justice System* 3, no. 1 (2024): 94. <https://doi.org/10.31920/2753-3123/2024/v.3n1a5>.

- Nwosu, Uchechukwu W. "Separation of Powers and the Constitution Basis of the Court of Appeal Judgment in Hon. Justice Nganjiwa v Federal Republic of Nigeria—A Critique." *International Journal of Public Administration and Management Research* 5, no. 1 (2019): 28.
- Obi-Okoye, Anthony. *Law in Practice in Nigeria: Professional Responsibilities and Lawyering Skills*. Lagos: Snaap Press Nigeria Limited, 2011.
- Okaisabor, Jeremiah O. "The Quest of Fiscal Autonomy for Judicial Independence: The Case of the Nigerian Judiciary and Its Challenges." *African Identities* 23, no. 3 (2025): 756–80. <https://doi.org/10.1080/14725843.2024.2349613>.
- Oniha, Mabel O., and Bright Erazé Oniha. "A Critique of the Judiciary Financial Autonomy and Fund Management: Delta State Judiciary in Focus." *DELSU Law Review* 9, no. 1 (2023): 95.
- Oraegbunam, Ikenga K. E. "Separation of Powers and Nigerian Constitutional Democracy." *Vanguard*, January 19, 2005. <https://www.vanguardngr.com>.
- Philips, Owen H. *Leading Cases in Constitutional Law*. Sweet & Maxwell, 1957.
- Phillips, Nicholas A. "Judicial Independence and Accountability: A View from the Supreme Court." Paper delivered at the UCL Constitution Unit launch of the research project "The Politics of Judicial Independence," February 8, 2011. <https://www.ucl.ac.uk>.
- Rosselli, Alexander. "Judicial Independence and the Budget: A Taxonomy of Judicial Budgeting Mechanisms." *Indiana University Maurer School of Law* 5, no. 1 (2020). <https://www.repository.law.indiana.edu/ijcd/vol5/iss1/2>.
- Shetreet, Shimon. "Fundamental Values of the Justice System." *The European Business Law Review* 23, no. 1 (2012): 61–75. <https://doi.org/10.2139/ssrn.1837486>.
- Siregar, Fritz E. "Between the People and the Populists: Safeguarding Judicial Independence in a Changing World." *Constitutional Review* 10, no. 1 (May 2024): 171. <https://doi.org/10.31078/consrev1016>.
- Stevens, Robert. *Law and Politics: The House of Lords as a Judicial Body, 1800–1976*. University of North Carolina Press, 1978.

- Sueur, Andrew L. "Developing Mechanisms for Judicial Accountability in the UK." *Legal Studies* 24, no. 1-2 (2004): 73. <https://doi.org/10.1111/j.1748-121X.2004.tb00241.x>.
- Swaine, Lucas. "The Origins of Autonomy." *History of Political Thought* 37, no. 2 (Summer 2016): 216. <https://www.jstor.org/stable/26228692>.
- United Nations Office on Drugs and Crime (UNODC). "Independent Judiciary: Key to a Better Performing Judicial System." 2014. <https://www.unodc.org/nigeria/en/independent-judiciary-key-to-a-better-performing-judicial-system.html>.
- Vanderbilt, Arthur T. *The Challenges of Law Reform*. Princeton University Press, 1955.
- Viapiana, Federica. "Funding the Judiciary: How Budgeting System Shapes Justice: A Comparative Analysis of Three Case Studies." *International Journal for Court Administration* 9, no. 3 (2019). <https://www.researchgate.net>.
- Vile, Maurice J. C. *Constitutionalism and Separation of Powers*. London: Oxford University Press, 1967.
- Whittington, Keith. "Legislative Sanctions and the Strategic Environment of Judicial Review." *International Journal of Constitutional Law* 1, no. 1 (2003): 446-74. <https://doi.org/10.1093/icon/1.3.446>.
- Woodhouse, Diana. "The Constitutional Reform Act 2005—Defending Judicial Independence the English Way." *International Journal of Constitutional Law* 5, no. 1 (2007): 153-65. <https://doi.org/10.1093/icon/mo1039>.
- Woolf, Lord. "The Rule of Law and a Change in the Constitution." *Cambridge Law Journal* 63, no. 2 (July 2004).

INTERNAL TRADE BARRIERS IN CANADIAN FEDERALISM: PRIVY COUNCIL DOCTRINE AND SUPREME COURT CONTINUITY

Alex Atanasov*

Applied Science University, Manama, Bahrain
alex.atanasov@asu.edu.bh

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Abstract

This Canada's internal market remains fragmented despite the consolidation of judicial authority in the Supreme Court of Canada and the availability of constitutional tools capable of supporting national economic coordination. This article examines how early interpretations of the federal trade and commerce power by the Judicial Committee of the Privy Council shaped a doctrinal framework that continues to constrain internal trade regulation. It contributes to Canadian constitutional scholarship by showing that, in the constitutional domain, common-law adjudication does not necessarily evolve toward greater economic efficiency: early doctrinal settlements may persist. Methodologically, the article adopts a doctrinal-institutional approach, analysing leading Privy Council and Supreme Court of Canada decisions on section 91(2) of the Constitution Act, 1867. The analysis focuses on purposively selected cases that structured constitutional interpretation of internal trade rather than offering an exhaustive survey. A limited comparative reference to European Union internal market law is employed illustratively, using the principle of mutual recognition as a benchmark to clarify the conceptual distinction between decentralized governance and effective market integration. The article concludes that internal trade barriers

* Alex Atanasov is an Assistant Professor of Law at the College of Law, Applied Science University, Bahrain. His research focuses on judicial systems and constitutional law. He has published extensively on economic regulation and comparative analysis. Email: alex.atanasov@asu.edu.bh. The author used Grammarly Pro and ChatGPT solely for limited language editing and stylistic refinement. All ideas, legal analysis, arguments, and substantive content of this manuscript are entirely the author's original work.



in Canada reflect durable constitutional choices rather than incidental policy failure, and that meaningful correction is more likely to depend on political coordination or legislative initiative than on judicial evolution alone.

Keywords: Canadian constitutional law; Federalism; Institutional inertia; Internal trade; Internal market fragmentation; Judicial doctrine; Trade and commerce power

I. INTRODUCTION

This Internal trade regulation in Canada has been shaped by early constitutional interpretations that became embedded in the structure of federalism and constrained later judicial recalibration. Once absorbed into foundational doctrine, these interpretations allocate regulatory authority in ways that subsequent courts are reluctant to revisit.

Early interpretations of the trade and commerce power emerged in an external trading environment that reduced pressure for internal market integration and later hardened into doctrinal reference points. Constitutional allocations of legislative authority, once judicially articulated, tend to be treated as structural settlements. As a result, doctrine may preserve regulatory fragmentation even where alternative interpretations could support greater coordination.

External market integration may partially offset domestic fragmentation, but reliance on external coordination exposes constitutional systems when economic conditions shift. Recent IMF analysis estimates that policy-related internal barriers within Canada are equivalent to roughly a 9 percent tariff nationally, underscoring persistent internal market fragmentation.¹

This article asks why internal trade barriers persisted after the transition from the Privy Council to the Supreme Court of Canada despite doctrinal tools capable of supporting broader federal economic authority. It argues that early interpretations of section 91(2) of the Constitution Act, 1867 structured later jurisprudence and that stare decisis, the costs of overruling, and amendment rigidity limited recalibration.

¹ Federico J. Díez and Yuanchen Yang, "Canada Can Grow Faster by Unlocking Its Own Market," *IMF Country Focus*, January 27, 2026.

Canadian federalism scholarship has often treated provincial autonomy and economic regulation through distinct doctrinal lenses rather than analyzing internal market integration as a unified institutional problem.² This article shows how Privy Council doctrine linked provincial autonomy to the legal design of the internal market and how the Supreme Court largely absorbed that framework. The contribution is doctrinal: Canadian courts have analyzed trade and commerce disputes as questions of federal–provincial allocation of powers, without articulating internal market integration as an autonomous constitutional concern. This helps explain why fragmentation can persist even when broader federal coordination is institutionally feasible.

II. CONTRIBUTION AND DOCTRINAL CLARIFICATION

This article contributes to Canadian constitutional scholarship by clarifying a persistent doctrinal conflation between federalism analysis and internal market integration. Canadian courts and commentators have traditionally evaluated trade and commerce disputes through the lens of federal–provincial allocation of powers, treating questions of economic coordination as incidental to constitutional structure. This paper argues that this framing has obscured an analytically distinct doctrinal concern: the conditions under which constitutional interpretation facilitates or tolerates fragmentation of the domestic market. The contribution is not to advance a normative economic theory of constitutional interpretation, but to demonstrate that internal market integration has never been articulated as an autonomous doctrinal consideration within Canadian federalism jurisprudence. By separating the doctrinal logic of federal balance from the doctrinal consequences for market coordination, the article brings greater clarity to the limits of existing trade and commerce doctrine and explains why internal trade barriers have persisted even where doctrinal tools for broader federal regulation were available.

² Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations," *McGill Law Journal* 36 (1991): 309–313.

III. METHOD AND SCOPE

This article adopts a doctrinal-institutional approach to Canadian constitutional law, focusing on judicial interpretation of the trade and commerce power and its implications for internal trade. The analysis centres on close reading of leading constitutional decisions rather than on empirical measurement or theory testing. First, the Privy Council jurisprudence is examined. Later, Supreme Court of Canada decisions are selected for their engagement with this inherited framework and their relevance to internal market coordination. Case selection is purposive rather than exhaustive. A limited comparative reference to European Union internal market law is used illustratively, drawing on the principle of mutual recognition to clarify doctrinal distinctions rather than to propose institutional transplantation. The analysis is confined to the Canadian constitutional context and advances institutionally bounded conclusions.

This article proceeds in four stages. First, it reconstructs the doctrinal foundations of Canadian internal trade regulation, beginning with the British North America Act, 1867 and the interpretation of the trade and commerce power by the Judicial Committee of the Privy Council, with particular attention to the interpretive settlement associated with Viscount Haldane. Second, the article clarifies the doctrinal distinction between federalism, centralization, and the internal Canadian market, showing why stronger federal authority does not necessarily translate into effective market integration within the existing constitutional framework. Third, it examines the Supreme Court of Canada's post-Privy Council jurisprudence to assess how inherited constraints on federal market coordination were engaged with, adjusted, or preserved following the institutional transition to a domestic apex court. , Finally, it explains how the interaction of inherited doctrine, judicial continuity, and constitutional structure contributed to the persistence of internal trade fragmentation despite institutional change, situating the Canadian experience within a limited comparative perspective drawn from European Union internal market law.

IV. COMPETING DOCTRINAL ACCOUNTS OF FEDERAL TRADE

The Constitution Act, 1867 has long been interpreted as containing conflicting signals about the degree of centralization or decentralization in the Canadian federation, supporting both a strong central government and substantial provincial autonomy. As Hogg and Wright observe, the constitutional text itself sends “conflicting signals” about centralization and decentralization, reflecting the framers’ attempt to reconcile demands for national unity with the protection of local institutions and identities.³ The authors treat centralization and decentralization chiefly as issues of constitutional structure and judicial interpretation, rather than offering a sustained analysis of the economic consequences of either model.

Sections 91 and 92, therefore, provided a framework that could plausibly sustain either a centralization-oriented reading of federal trade and commerce power or a decentralization-oriented reading grounded in provincial control over property and civil rights. The persistence of internal trade barriers in Canada cannot be explained by constitutional text alone, but by the way these competing possibilities were resolved in early judicial interpretation.

From Confederation until 1949, the Judicial Committee of the Privy Council served as Canada’s final court of appeal and supplied the interpretive framework through which these competing federal visions were reconciled. Although the text allowed for a relatively strong central authority, the Privy Council consistently adopted an interpretation that favoured provincial autonomy and treated federal and provincial governments as coordinate rather than hierarchical actors.⁴ This interpretive choice structured subsequent doctrine and shaped the development of Canadian internal trade law.

4.1. Restrictive Interpretation of Section 91(2)

The historically dominant doctrinal account reads section 91(2) narrowly. Under this approach, federal authority over trade and commerce is largely confined

³ For more see on how the Canadian constitution resulted in weaker federal power see Peter W. Hogg and Wade K. Wright, “Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism,” *UBC Law Review* 38, no. 2 (2005): 329–352.

⁴ Hogg and Wright, “Canadian Federalism, the Privy Council.”

to interprovincial and international trade, while most economic regulation falls within provincial jurisdiction over property and civil rights under section 92(13). Privy Council jurisprudence consolidated this interpretation through decisions that emphasized provincial autonomy in matters touching local commerce, labour, and contractual relations, and that resisted efforts to justify federal regulation on the basis of coordination or efficiency.

In Hogg and Wright's account, this body of case law reflected a consistent constitutional vision: provincial legislatures were treated as coordinate governments whose jurisdiction over economic life was presumptively dominant unless federal legislation could be justified under clearly national heads of power.⁵ The result was a stable doctrinal structure in which federal economic regulation was treated as exceptional rather than primary, and in which national coordination depended on fitting within narrowly defined doctrinal categories.

4.2. Continuity in Supreme Court Jurisprudence

The termination of appeals to the Privy Council in 1949 and the emergence of the Supreme Court of Canada as the final appellate authority did not produce a wholesale reorientation of this framework. Although the Supreme Court adopted a more flexible vocabulary and, in some areas, expanded federal authority,⁶ it largely reasoned within the interpretive structure inherited from Privy Council jurisprudence. Federal powers in areas such as competition law and aspects of the peace, order, and good government power were developed incrementally rather than through a redefinition of the constitutional settlement governing internal trade.

The core distinction between federal authority over "general trade" and provincial authority over economic regulation remained central. As a result, internal trade barriers persisted not because of institutional incapacity but because doctrinal boundaries shaped the range of constitutionally permissible responses. The Supreme Court's jurisprudence thus reflects continuity with

⁵ Hogg and Wright.

⁶ Hogg and Wright.

adjustment: inherited interpretive categories were adapted to new circumstances without displacing their foundational allocation of authority.

4.3. Comparative Clarification

This article's use of a limited comparative reference to European Union internal market law serves a clarifying function. The comparison shows that the dichotomy between centralized and decentralized governance is conceptually false. Decentralization need not entail regulatory fragmentation: EU doctrine subjects barriers to cross-border trade to sustained judicial scrutiny while preserving regulatory autonomy (decentralization) at the member-state level. The contrast underscores that Canada's persistent internal trade barriers reflect specific doctrinal choices made in interpreting section 91(2), rather than an inevitable feature of federalism itself.

4.4. Doctrinal Limitation and Institutional Constraints

The endurance of the restrictive interpretive framework reflects institutional features of Canadian constitutional adjudication that favour continuity. A central constraint is the operation of *stare decisis* in constitutional law. While Canadian courts have recognised the possibility of revisiting precedent,⁷ they have consistently emphasized the importance of stability, predictability, and institutional legitimacy in constitutional interpretation.⁸ The line of cases discussed in this paper shows that the Privy Council and later the Supreme Court of Canada have treated long-standing constitutional decisions as carrying enhanced precedential weight, particularly where they structure the federal

⁷ In *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, the Supreme Court of Canada (SCC) famously departed from its own precedent established in the 1990 *Prostitution Reference*. While the principle of *stare decisis* generally requires courts to follow established rulings, the SCC clarified that this is not a «straitjacket» and laid out specific criteria for when precedents may be revisited. A clear early example is Justice Ronald Martland who authored the unanimous opinion in *R. v. Paquette*, [1977] 2 S.C.R. 189; In his explicit statement—"I am not in agreement with this view, see *Dunbar v. The King*, [1936] 4 D.L.R. 737, and I am of the opinion that it should not be followed."

⁸ See, for example, *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. This is a key authority on the "horizontal" application of precedent. The Court noted that it must not overrule its own decisions lightly because "stability and predictability" are fundamental to the rule of law. It argued that frequent changes based on the shifting ideologies of judges would cause institutional respect for the Court to decline. Also, in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. The Court explicitly stated that the rule of law provides a "shield for individuals from arbitrary state action" and ensures a stable and predictable legal order. It linked the legitimacy of the entire constitutional framework to its ability to remain consistent while reflecting democratic values.

balance. As a result, early interpretations of section 91(2) developed by the Privy Council acquired a form of doctrinal entrenchment that made subsequent departure both institutionally sensitive and jurisprudentially exceptional.

Not much change was produced by the transition from the Privy Council to the Supreme Court. It altered the institutional locus of constitutional authority but did not dismantle the interpretive structure governing federal trade power. Internal trade barriers have therefore persisted because the autonomy-oriented reading of the Constitution selected by the Privy Council became embedded in constitutional doctrine and continued to shape the range of available legal solutions.

V. EVOLUTIONARY CONSTRAINTS IN CONSTITUTIONAL ADJUDICATION: DOCTRINAL PERSISTENCE AND STRUCTURAL CHOICE

This article uses an evolutionary lens to illuminate the persistence of doctrinal patterns in Canadian constitutional law. This section does not propose a unified theoretical framework of legal evolution, but draws selectively on existing accounts to illuminate the persistence of doctrinal patterns in the Canadian constitutional context.

Hayek's account of the common law as a form of spontaneous order provides a useful starting point.⁹ While Hayek emphasizes the adaptive qualities of judge-made law, he also cautions that legal evolution may reach impasses where established rules persist despite changing circumstances.¹⁰ In such cases, judges may be institutionally reluctant to alter settled doctrine, particularly where

⁹ Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944).

¹⁰ Hayek says the following "For a variety of reasons the spontaneous process of growth may lead into an impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. The development of case-law is in some respects a sort of one-way street: when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable. The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad.... judge can develop the law by deciding issues which are genuinely doubtful, he cannot really alter it, or can do so at most only very gradually where a rule has become firmly established; although he may clearly recognize that another rule would be better, or more just, it would evidently be unjust to apply it to transactions which had taken place when a different rule was regarded as valid. Friedrich A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 1982), 84.

precedent is entrenched, and legislative correction is available but politically costly. Thus, the common law, even though it resembles a spontaneous order, may reach an impasse and continue moving in the wrong direction.¹¹ Hayek makes another crucial point is that the law's evolution may not be able to move to an efficient path easily.¹² This insight is especially relevant to constitutional adjudication, where the combination of stare decisis and deference to democratic institutions can constrain judicial willingness to revisit foundational interpretations.

This perspective can be contrasted with a widely accepted view in the literature on common law evolution, according to which inefficient legal structures tend over time to be discarded, while more efficient arrangements persist.¹³ On this account, judicial decision-making in common law systems is said to favour rules that produce superior outcomes, either because inefficient rules are more frequently challenged or because courts gradually select doctrines that better align with prevailing social and economic conditions. From this standpoint, legal persistence is often taken as indirect evidence of functional adequacy rather than institutional constraint. Thus there are two traditions: the optimists and the cautionary account of Hayek.

The Canadian constitutional experience illustrates the caution advanced by Hayek that common law development does not necessarily converge toward optimal or adaptive outcomes. Despite institutional change and evolving regulatory needs, early constitutional interpretations concerning federal trade authority remained remarkably stable. This persistence is not presented here as a test of Hayek's theory, but as an example of the institutional dynamics he described.

Roe's account provides a useful way of describing this form of stability.¹⁴ By emphasizing the role of initial conditions and the cumulative effects of

¹¹ Hayek, *Law, Legislation and Liberty*, 84.

¹² Hayek, *Law, Legislation and Liberty*, 84.

¹³ This view has been propagated by George L. Priest, "The Common Law Process and the Selection of Efficient Rules," *Journal of Legal Studies* 6, no. 1 (1977): 65–82; Paul H. Rubin, "Why Is the Common Law Efficient?," *Journal of Legal Studies* 6, no. 1 (1977): 51–63. Richard A. Posner also advanced this position in early editions of *Economic Analysis of Law*. For a later discussion from a supply-side perspective, see Todd J. Zywicki, "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis," *Northwestern University Law Review* 97, no. 4 (2003): 1551–1633.

¹⁴ Mark J. Roe, "Chaos and Evolution in Law and Economics," *Harvard Law Review* 109, no. 3 (1996): 641–68.

precedent, Roe identifies the mechanisms through which early judicial choices structure subsequent doctrinal development, narrowing the range of feasible alternatives even in the presence of later pressures for change. Roe's analysis of path dependence further refines this perspective by highlighting the significance of initial conditions. Roe argues that legal and institutional arrangements may persist not because they are optimal, but because early choices shape subsequent developments in ways that are difficult to reverse. Applied to constitutional law, this suggests that early judicial interpretations can structure the range of later doctrinal possibilities, channelling legal development along a stable trajectory that follows an institutional inertia even when alternative paths might later appear preferable.

Roe's emphasis on initial conditions provides a useful descriptive lens for understanding the stability of Canadian constitutional doctrine. In his words: "Today's road, dependent on the path taken by the trader decades ago, is not the one that the authorities would lay down if they were choosing their road today."¹⁵ In his account, early institutional choices can shape subsequent legal development by narrowing the range of feasible alternatives, even when later circumstances change. As Roe writes, "Survival does not imply superiority to untried alternatives,"¹⁶

Applied to Canada, this insight helps explain the enduring influence of Privy Council interpretations of sections 91 and 92 of the Constitution Act, 1867. Once these early decisions framed federal economic authority as exceptional and provincial jurisdiction as presumptively dominant, subsequent courts inherited a doctrinal structure that constrained later reinterpretation. The significance of initial conditions in this context lies not in their efficiency or desirability, but in their capacity to stabilize constitutional meaning across judicial eras.

Gennaioli and Shleifer complement this account by emphasizing the role of cognitive and institutional simplification in judicial decision-making. Their work

¹⁵ Roe, "Chaos and Evolution in Law and Economics."

¹⁶ Roe, "Chaos and Evolution in Law and Economics."

shows how courts tend to rely on familiar doctrinal categories and established frameworks when confronting complex regulatory problems.¹⁷ This tendency is associated with continuity and incremental adjustment rather than structural revision, particularly in areas such as federalism where legal categories have long been settled and deeply internalized.

Finally, Luhmann's conception of law as a self-referential system offers a useful perspective on how constitutional doctrine can adapt without fundamental transformation.¹⁸ Legal systems respond to external pressures (economic, political, or social) through established forms of legal reasoning. In practice, this often involves incorporating new considerations within existing lines of precedent.

The constitutional architecture governing internal trade reflected interpretive choices that were well adapted to the institutional environment of their origin but increasingly difficult to reconcile with later demands for national market coordination. As Roe observes in a different context, institutional arrangements may persist because they were suited to an earlier environment, even where alternative configurations would later appear more functional.¹⁹ This dynamic is visible in the Canadian constitutional experience, where early federalism doctrine constrained later efforts to address internal market fragmentation.

Each of these perspectives highlights a different aspect of the Canadian context. Early interpretations of federal trade authority established a doctrinal framework that remained influential across institutional transitions. The perspective adopted here does not claim that such outcomes are inevitable. It is used more modestly to clarify how doctrinal continuity can persist even where courts acknowledge new regulatory needs and adopt more flexible interpretive language.

¹⁷ Nicola Gennaioli and Andrei Shleifer, "The Evolution of Common Law," *Journal of Political Economy* 115, no. 1 (2007): 43–68.

¹⁸ Niklas Luhmann, *Law as a Social System*, trans. Klaus A. Ziegert, ed. Fatima Kastner et al. (Oxford: Oxford University Press, 2004).

¹⁹ Roe, "Chaos and Evolution in Law and Economics."

VI. VISCOUNT HALDANE AND THE DOCTRINAL FOUNDATIONS OF CANADIAN FEDERALISM

During the formative period of Canadian constitutional adjudication, the Judicial Committee of the Privy Council played a decisive role in shaping the distribution of federal and provincial powers. In cases concerning trade, commerce, and economic regulation, Privy Council jurisprudence consistently emphasized provincial autonomy, producing a doctrinal framework in which federal economic authority under section 91(2) of the Constitution Act, 1867, was construed narrowly. This interpretive approach entrenched a decentralized conception of federalism that would structure Canadian constitutional law well beyond the Privy Council era.

The context in which the Privy Council decided cases included the substantial influence of Viscount Haldane on this jurisprudence. Under his leadership, the Privy Council confined the federal trade and commerce power to limited domains. It resisted its extension into areas associated with provincial jurisdiction over property and civil rights. Economic regulation was treated primarily as a local matter, with national coordination regarded as exceptional rather than presumptive.

As Vaughan observes, Privy Council jurisprudence during this period reflected a policy orientation that privileged constitutional structure and institutional authority over considerations of economic coordination. This orientation was expressed through a preference for state-centred constitutional ordering and a reluctance to treat market integration as a relevant interpretive consideration. The result was not merely a set of isolated outcomes, but a doctrinal framework whose early interpretive choices produced enduring structural effects in the distribution of federal and provincial powers.²⁰

²⁰ Frederick Vaughan, *Viscount Haldane: "The Wicked Step-father of the Canadian Constitution"* (Toronto: University of Toronto Press, 2010), 188.

This orientation resulted in a relatively weak federal government, which, in turn, diminished the importance of intra-provincial trade.²¹ As a matter of constitutional doctrine, this approach reflected a strong commitment to preserving provincial legislative spheres and maintaining structural federal balance.

From an internal doctrinal perspective, Haldane's jurisprudence was coherent and reflected a principled application of the classical paradigm of Canadian federalism. The Privy Council conceived its role as that of a constitutional arbiter rather than a policy-making institution, emphasizing exclusivity, judicial restraint, and the preservation of provincial autonomy. On this view, courts were tasked with safeguarding the constitutional distribution of powers as enacted, leaving questions of economic coordination to political processes or constitutional amendment.²² As Ryder notes, the Constitution does not entrench any particular economic theory, and resistance to expansive interpretations of the trade and commerce power reflected a refusal to constitutionalize market integration through judicial doctrine.²³

The doctrinal consequences of this framework, however, were significant. By limiting the scope of federal authority over interprovincial trade and economic regulation, Privy Council jurisprudence constrained the constitutional tools available to address internal market fragmentation. These constraints became particularly visible during periods of economic stress, including the Great Depression, when federal initiatives aimed at economic stabilization encountered constitutional barriers grounded in earlier trade and commerce decisions. The Privy Council's adherence to its established interpretive framework left little room for doctrinal adaptation in response to changing economic conditions.

²¹ For a detailed discussion on the varying perspectives regarding a strong federal government, as well as the debates surrounding the initial design of the Canadian Constitution, see Hogg and Wright, "Canadian Federalism, the Privy Council and the Supreme Court," 329–52.

²² Mark MacGuigan, "The Privy Council and the Supreme Court: A Jurisprudential Analysis," *Alberta Law Review* 4 (1966): 419–441.

²³ Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism," *McGill Law Journal* 36 (1991): 308–356.

Subsequent commentators have been sharply critical of this legacy. His stance has been considered to be against the economy.^{24,25} Vaughan notes the intensity of academic reaction to this legacy, recounting that upon Bora Laskin's appointment to the Supreme Court of Canada in 1970, Frank Scott, Dean of McGill Law School, wrote that the appointment was "the best news since [he learned of] the death of Lord Haldane."²⁶ Such remarks illustrate the strength of feeling in certain academic circles regarding the long-term effects of Privy Council federalism. Other commentators have adopted similarly critical language. Saywell, for example, characterized aspects of the jurisprudence as containing "bizarre dicta" and "constitutional absurdities" that constrained federal authority and shaped Canadian federalism.²⁷ Whether or not these assessments are accepted, their intensity underscores the extent to which early interpretive choices were understood to have lasting structural consequences for the distribution of powers within the Canadian federation.

The transfer of final appellate authority from the Privy Council to the Supreme Court of Canada did not produce a wholesale doctrinal reversal. Although the Supreme Court gradually adopted a more flexible vocabulary of cooperative federalism and permitted some expansion of federal regulatory authority, it largely operated within the interpretive architecture inherited from the Privy Council. As Hogg has observed, the abolition of appeals removed an external institutional constraint but did not erase the doctrinal foundations established during the earlier period.²⁸ Core limitations on the trade and commerce power remained embedded in constitutional law.

Taken together, the Haldane era illustrates how early constitutional interpretations can entrench institutional priorities and shape later adjudication. While the restrictive reading of federal economic power was defensible within the Privy Council's conception of judicial restraint and federal balance, its long-term

²⁴ Vaughan, *Viscount Haldane*, xvi, citing Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press / Osgoode Society for Canadian Legal History, 2005), 365.

²⁵ Charles Hobhouse, *Inside Asquith's Cabinet: From the Diaries of Charles Hobhouse* (London: Murray, 1977), 51–52.

²⁶ Vaughan, *Viscount Haldane*, xv–xvi n. 2, citing Girard, *Bora Laskin*, 365.

²⁷ Vaughan, *Viscount Haldane*, 217.

²⁸ Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Reuters, 2020), § 5.17.

effect was to limit the constitutional capacity for national market coordination, reinforcing continuity rather than correction in Canadian constitutional law..

VII. DOCTRINAL CONSTRAINTS ON FEDERAL ECONOMIC REGULATION IN PRIVY COUNCIL JURISPRUDENCE

The restriction of the trade and commerce power is commonly traced to the period in which Viscount Haldane sat on the Judicial Committee (1911–1928). In trade and commerce cases in *Board of Commerce* 1922, Viscount Haldane dismissed trade and commerce power and said that it is not an independent power and needs to be used only as ancillary to other federal powers. Hogg later described this formulation as an ‘unfortunate sentence’ that did not by itself enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words POGG (Peace. Order .Good .Government). be free to engage in the provinces.²⁹

7.1. *Citizens’ Insurance Co. v . Parsons* 1881³⁰

It can be said that there is a conflict between ss. 91 2 and 92 (13). The first important case that considered the issues is *Citizens’ Insurance Co. v . Parsons* 1881 7 App Cas. The issue was whether the provincial statute, which stipulated that certain conditions were to be included in all fire insurance policies entered into the province. The Privy Council held that the statute was valid law in relation to property and civil rights in the province. It did not come within the federal trade and commerce power because it cannot regulate by legislation the contracts of a particular business or trade such as fire insurance.³¹

7.2. The decisive formulation in Canadian Constitutional Law

The decision in *Citizens’ Insurance Co v Parsons* (1881) established an early structural distinction between the federal power over trade and commerce and provincial jurisdiction over property and civil rights. The Privy Council suggested that federal authority might include “political arrangements in regard to trade...

²⁹ *Board of Commerce*, [1922] 1 A.C. 191; Hogg, *Constitutional Law of Canada*, § 20.7.

³⁰ *Citizens’ Insurance Co. v. Parsons* (1881) 7 App. Cas. 96.

³¹ *Citizens’ Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, 113.

regulation of trade in matters of interprovincial concern... [and possibly] general regulation of trade affecting the whole Dominion.”³² Although framed as a description of federal competence, this formulation became the basis for a narrow reading of federal economic authority. Later Privy Council jurisprudence, particularly in the Haldane era, entrenched this restrictive orientation by locating most regulatory questions within provincial jurisdiction.

From an economic perspective, by confining federal jurisdiction largely to interprovincial or political arrangements, Parsons left uncertain the scope of federal authority to coordinate national markets and reinforced provincial dominance over economic regulation. This contributed to the persistence of internal barriers to trade and to a constitutional structure in which interprovincial coordination is difficult. The resulting fragmentation of Canada’s internal market cannot be attributed solely to Parsons, but the distinction it introduced between general trade regulation and regulation of particular trades provided a doctrinal foundation for later limits on federal economic powers.

A sophisticated defence of this approach is offered by Malcolm Lavoie, who argues that decisions such as Parsons reflect a coherent constitutional commitment to subsidiarity, property-based decentralization, and the preservation of provincial legal diversity, including Quebec’s civilian tradition. On his account, a narrow reading of the trade and commerce power protects local autonomy while still allowing for national coordination where necessary.³³ His work is notable for taking the Constitution’s economic dimension seriously and for emphasizing that integration and decentralization must coexist.

However, this defence rests on a contestable premise: that a broader federal role in facilitating interprovincial trade would necessarily undermine provincial private law.³⁴ Federal coordination of market access does not require the uniformization of provincial legal systems. What is required is a framework

³² *Citizens’ Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, 113.

³³ Malcolm Lavoie, *Trade and Commerce: Canada’s Economic Constitution*, Carleton Library Series 261 (Montreal and Kingston: McGill-Queen’s University Press, 2023), 66.

³⁴ Lavoie, *Trade and Commerce*, 78.

ensuring that goods, services, and economic actors can move across provincial borders without facing discriminatory or duplicative barriers.

The European Union's principle of mutual recognition demonstrates that legal diversity and market integration can coexist. Under this model, goods lawfully produced in one jurisdiction must generally be admitted in others, subject only to limited public-interest exceptions. In a case shortly called *Cassis de Dijon* the principle of mutual recognition preserves local regulatory autonomy while preventing protectionist fragmentation.³⁵ Economic integration is achieved through coordination rather than uniformity.³⁶ In this light, the concern that a broader federal trade and commerce power would erase provincial legal identity appears overstated.

While Lavoie is right to emphasize subsidiarity and decentralization, his defence of the Parsons framework underestimates the extent to which integration and legal diversity can coexist. The economic costs of fragmented internal markets do not necessitate full harmonization of private law, only mechanisms that ensure market access across jurisdictions.

By drawing a sharp distinction between general trade regulation and regulation of particular trades, Parsons contributed to the creation of an initial economically unfavourable condition that led to a path of jurisprudence that limited federal capacity to address collective-action problems in the national economy.

³⁵ European Court of Justice, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [Federal Monopoly Administration for Spirits] (*Cassis de Dijon*), Case 120/78, 1979 E.C.R. 649.

³⁶ As to why such famous ECJ ruling such as the *Cassis de Dijon* has not found any traction in Canada see Ran Hirschl, "Going Global? Canada as Importer and Exporter of Constitutional Thought," in *Canada in the World: Comparative Perspectives on the Canadian Constitution*, ed. Richard Albert and David R. Cameron (Cambridge: Cambridge University Press, 2018), 305–23, esp. 320–23. He describes the inaction of the Canadian Supreme Court towards inefficiencies of Canada's constitutional structure, particularly in its handling of internal trade and federalism, "The Court's openness to engagement with foreign rulings and constitutional concepts in the area of rights and liberties often masks the fact that the comparative turn has not, by and large, penetrated the judicial, academic, or political discourse concerning some of Canada's organic constitutional failings (page 320). He further identifies the areas of law where this openmindedness of Canadian judges does not normally work "federalism, separation of powers, amending procedures) features of the constitution, where national idiosyncrasies and contingencies are more prevalent" (age. 320). Hirschl also states "Canada has become a global powerhouse in comparative constitutionalism, but this influence has not translated into meaningful self-reflection or internal constitutional renewal" (page 323). This aligns with the article's critique of Canada's internal legal frameworks, which remain rigid and resistant to necessary economic adaptations.

7.3. The Insurance Reference (1916)

This case involved the federal government's attempt to regulate the insurance industry across provincial borders through the Insurance Act of 1910. The Privy Council ruled that the federal government did not have the authority to regulate a particular trade, such as insurance, within provinces.

A more precise scope of section 92 that mostly concentrates on trade and commerce powers cases that came to the courts with interprovincial elements to be decided who is going to deal with that power federal or provincial authority. This definition was left to the Haldane period. The Insurance Reference (1916)³⁷ set the pattern. This case involved the federal government's attempt to regulate the insurance industry across provincial borders through the Insurance Act of 1910. The Act purported to establish a licensing regime for insurance companies, other than provincial companies carrying on business wholly within the province of incorporation. The exemption emphasized that the Act aimed to impose federal regulation on an industry that spread across the country without regard for provincial boundaries.

The Privy Council held that country the scope of the industry or particular companies was irrelevant. Viscount Haldane said: "It must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces."³⁸

The main economic issue is that this case created regulatory fragmentation. The ruling limited the federal government's ability to harmonize insurance laws, leading to fragmented regulations that varied across provinces. This created inefficiencies as businesses faced different regulatory environments in each province, increasing compliance costs and administrative burdens. The result was lack of national standards or at least, an easy recognition of provincial regulation across internal Canadian borders.

³⁷ *A.G. Canada v A.G. Alta (Insurance)*, [1916] 1 A.C. 588

³⁸ *A.G. Canada v A.G. Alta (Insurance)*, [1916] 1 A.C. 588.

7.4. Board of Commerce Case (1922)

The trade and commerce power was also rejected as support for the legislation in the Board of Commerce case (1922). This case concerned federal attempts to regulate anti-competitive practices (such as price fixing) and hoarding under the Board of Commerce Act. The legislation included the so-called anti-combines provisions,³⁹ and also provisions regulating hoarding and excessive prices of certain “necessaries of life” (food, clothing, and fuel). The Privy Council ruled that the federal government lacked the constitutional authority to regulate these areas under the “trade and commerce” power.

The case arose after the Canadian government attempted to control inflation and prevent profiteering post-WWI through the Board of Commerce Act and the Combines and Fair Prices Act of 1919. These Acts empowered the Board to investigate and curtail monopolistic practices and price-gouging,⁴⁰ tasks that prompted constitutional questions regarding federal powers.

The Board of Commerce case, as well as reinforcing the lack of federal power over much economic regulation, discouraged the federal Parliament from enacting wage and price controls in peacetime until the Anti-Inflation Act of 1975. The same case forced the substitution of narrower and less effective competition laws, which could be upheld as criminal law^{41,42}

³⁹ Better known under the names of competition or antitrust law

⁴⁰ Price-gouging is economically inefficient, largely due to its distortion of market equilibrium, its impact on resource allocation, and its consequences for consumer welfare and demand elasticity.

Market Distortion: Price-gouging leads to prices that significantly exceed the equilibrium price, where supply and demand naturally balance. In cases of emergency or sudden demand spikes, price-gouging takes advantage of constrained supply by sharply increasing prices. However, this increase does not necessarily correspond to increased value or improved allocation of resources but rather reflects a scarcity premium. This discrepancy reduces the ability of the market to allocate resources efficiently, as it prevents prices from adjusting based on actual production costs or sustainable demand levels. Consumer Welfare and Demand Elasticity: High prices during emergencies reduce consumer welfare by making essential goods unaffordable to many, particularly low-income consumers. The increase in price elasticity under such conditions means that consumers may drastically cut consumption, even when demand is critical. When prices are artificially high, consumers may also engage in hoarding or black-market purchases, which further skews efficient market behavior.

Supply Expansion: Although proponents argue that higher prices incentivize increased supply, price-gouging often occurs in situations where supply cannot be rapidly expanded (e.g., during a natural disaster). This situation can encourage hoarding or inefficiencies in production adjustments. Moreover, the higher prices do not attract new entrants quickly enough to alleviate the scarcity, prolonging inefficiencies and inequitable distribution.

⁴¹ Hogg, *Constitutional Law of Canada*, §§ 20.7–20.8.

⁴² Hogg, *Constitutional Law of Canada*, § 17.22.

In argument, Viscount Haldane suggested that the trade and commerce power had no independent content and could be invoked only as ancillary to other federal powers. In his actual opinion, Viscount Haldane dismissed the trade and commerce power in one uninformative sentence: s. 91(2) “did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above p.o.g.g, be free to engage in the province”⁴³ Haldane’s reasoning was that the trade and commerce power lacked independent content and could only function as ancillary to other federal powers. This restrictive view constrained the federal government’s ability to regulate critical aspects of the economy, further entrenching provincial autonomy.

Moreover, the Board of Commerce decision prompted the federal government to rely on narrower competition laws, permissible under its criminal law jurisdiction, as a substitute for comprehensive economic regulations—a shift that arguably weakened the effectiveness of federal competition policy.⁴⁴ This led to the inability of the federal government to regulate anti-competitive practices, which in turn allowed monopolies to thrive in certain sectors, ultimately resulting in inefficient market outcomes. Another problem is the familiar increased transaction costs. Without federal regulation, the provinces were left with varying standards for what constituted fair market behaviour, resulting in inconsistent legal frameworks that increased transaction costs for businesses operating in multiple provinces.

7.5. *Toronto Electric Commissioners v. Sider* (1925)

Subsequent cases reinforced these patterns. The ancillary theory of the trade and commerce power was repeated in *Toronto Electric Commissioners v. Sider* (1925),⁴⁵ where the power was again rejected, this time as a support for federal labour laws. The case involved federal attempts to regulate labour laws and competition under the Trade and Commerce Clause. The Privy Council

⁴³ *Board of Commerce*, [1922] 1 A.C. 191.

⁴⁴ Hogg, *Constitutional Law of Canada*, § 17.

⁴⁵ *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, 410.

ruled against the federal government's authority to use this power to regulate labour relations.

When addressing pervasive and interconnected economic issues like labour, the JCPC maintained that such matters fell within provincial authority over "property and civil rights." The inability to consider the broader implications of economic interdependence is exemplified by these judicial rulings.

Labour is one of the main factors of production that needs federal mechanisms of protection and freedom in order to be efficient, and for an internal market to function properly. The ruling created uncertainty about labour relations and restricted federal efforts to ensure a standardized and efficient labour market across Canada. Different provincial rules governing labour standards created inefficiencies, particularly for industries that operated nationally. The decision also inhibited market flexibility as businesses had to navigate a patchwork of labour laws that impeded labour, mobility and efficiency. Again, full harmonization of the labour market may not be the way forward. Allowing for different provincial labour standards is possible but under a national mechanism of regulation that provides security and a level of standardization. In the European Union, Article 45 TFEU resolved this issue with a unified but diverse way to regulate an internal labour market.⁴⁶

7.6. The King v. Eastern Terminal Elevator Co. (1925) ⁴⁷

In this case, the Supreme Court held *ultra vires* a provision of the Canada Grain Act that formed part of a broader licensing-and-control scheme for terminal elevators, treating it as an attempt to regulate a local business (elevators and the property interests tied to them) rather than as valid federal regulation of trade and commerce (Duff J., concurring; Anglin C.J.C. dissenting).

The case is valuable here not because it was "Haldane's," but because it shows doctrinal continuity: even in a sector overwhelmingly tied to interprovincial movement and export, the Court applied a jurisdictional logic that made national

⁴⁶ European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, art. 45.

⁴⁷ *The King v. Eastern Terminal Elevator Co.*, [1925] A.C. 396, 410.

coordination difficult whenever effective regulation had to “fasten onto” local infrastructure. Economically, that logic predicts higher transaction costs and foregone scale efficiencies where core nodes of a national market (like elevators) remain subject to fragmented regulatory authority.

Read as a path-dependence marker, *Eastern Terminal Elevator* illustrates how the restrictive framework associated with Privy Council-era federalism could be internalized and reproduced in Canadian doctrine: the constitutional priority given to maintaining jurisdictional boundaries operated as a constraint on integrated market governance, even where the underlying trade functioned as a national (and export) system. The decision to strike down the federal regulation of grain elevators created unnecessary barriers to this integration, leading to inefficiencies in both production and transportation. The situation was amended by the Canada Grain Act, R.S.C. 1985, c. G-10, s. 55.⁴⁸

7.7. Random Mutation, The Path Not Taken, the P.A.T.A. case (1931)⁴⁹

In some instances, later JCPC decisions hinted at alternative interpretations but failed to overturn earlier precedents. For example, in the P.A.T.A. case (1931), Lord Atkin rejected Haldane’s ancillary theory of trade and commerce power but upheld the invalidation of earlier federal attempts to regulate combines. In the P.A.T.A case (1931), the Privy Council through Lord Atkin upheld as a “criminal law” (s. 91(27)) a narrower form of anti-combines law (which has been redrafted following the Board of Commerce case). From an evolutionary economic perspective, this case could be seen as a “random mutation”—a potential turning point that might have reversed some of the inefficiencies stemming from earlier decisions, such as *The King v. Eastern Terminal Elevator Co.* (1925), which limited federal regulatory powers over interprovincial trade. The P.A.T.A. case raised the possibility of granting the federal government more robust authority over economic matters, including trade and commerce, potentially enabling a more unified and efficient regulatory framework.

⁴⁸ *Grain Act*, R.S.C. 1985, c. G-10, s. 55.

⁴⁹ *Proprietary Articles Trade Association v. A.-G. Can.*, [1931] A.C. 310.

7.8. Why the Potential Shift Didn't Fully Materialize

Despite Lord Atkin's suggestion, the Privy Council did not fully embrace this interpretation, and the ruling did not substantially alter the previous judicial decisions that limited the federal government's power. The absence of further legal development in this direction prevented a true shift in Canadian constitutional law, and the economic inefficiencies resulting from fragmented provincial regulation persisted.

Federal attempts to use the trade and commerce power to regulate marketing were also struck down by the Privy Council, and by the Supreme Court of Canada, while still subject to appeals to the Privy Council.

7.9. Natural Products Marketing Reference (1937) ⁵⁰

This case is not a Haldane decision but remains important for understanding the persistence of the restrictive approach to federal economic power. The Supreme Court of Canada, relying on the established Privy Council line of authority, held that the Natural Products Marketing Act and its amendment were ultra vires Parliament because the scheme regulated the marketing of particular commodities in ways that extended to intraprovincial transactions. Although the legislation was framed to address interprovincial and export markets, its practical operation necessarily attached to local production, licensing, and marketing activities within provinces. The Court therefore concluded that the scheme fell within provincial jurisdiction over property and civil rights and could not be justified under the federal trade and commerce power or the residual "peace, order and good government" power. In doing so, the Court explicitly grounded its reasoning in the interpretive framework first articulated in *Citizens Insurance v Parsons* and elaborated in subsequent Privy Council decisions.

The significance of the case lies in its demonstration of doctrinal continuity rather than judicial authorship. Writing for the Court, Duff C.J. treated the established jurisprudence, including *Parsons*, the Board of Commerce line of cases, and *Snider*, as binding and determinative. The judgment emphasized that

⁵⁰ *A.-G. B.C. v. A.-G. Can. (Natural Products Marketing)*, [1937] A.C. 377.

federal jurisdiction over trade and commerce did not extend to the regulation of particular trades or commodities insofar as they operated locally, even where those markets were closely tied to interprovincial or export channels. The Court acknowledged that the statute aimed to coordinate national and export markets but held that a regulatory scheme encompassing intraprovincial transactions could not be sustained without provincial cooperation. In this respect, the decision reflects the entrenchment of a structural distinction between general trade regulation and regulation of particular trades within provinces—a distinction that had become deeply embedded in Canadian constitutional doctrine.

For the purposes of this article, the *Natural Products Marketing Reference* should therefore be read not as a Haldane judgment but as evidence of the path-dependent continuation of the restrictive framework associated with the Haldane-era jurisprudence. Even in the context of Depression-era economic coordination, the Court adhered to the established division-of-powers logic and declined to expand federal authority over integrated national markets. The case thus illustrates how the interpretive approach initiated in earlier Privy Council decisions continued to shape Canadian constitutional law well beyond Haldane's tenure, reinforcing a model in which national economic coordination depended on provincial cooperation rather than robust federal regulatory authority.

7.10. Margarine Reference (1951)⁵¹

The Margarine Reference confirmed the continued limits on federal economic regulation. The Supreme Court held that Parliament could prohibit the importation of margarine under its trade and commerce power, but could not ban its manufacture or sale within the provinces. The Privy Council affirmed this result, emphasizing that the legislation, though framed as criminal law, was in substance economic protection for the dairy industry and not directed at a valid public evil such as health or safety.

Doctrinally, the case reaffirmed two principles: the criminal law power cannot be used to implement ordinary economic policy, and the federal trade

⁵¹ *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, aff'd [1951] A.C. 179.

and commerce power does not extend to regulating particular trades carried on wholly within a province. The decision thus reflects the persistence of the restrictive federalism framework that limited national market regulation and required economic coordination to occur largely through provincial or cooperative mechanisms.

By preventing federal regulation of a nationally integrated market while allowing only fragmented provincial control, the decision entrenched interprovincial barriers and raised transaction costs, reducing overall market efficiency and consumer welfare. Bottom of Form

The doctrinal pattern described above can be summarized by tracing how foundational trade and commerce decisions structured both constitutional interpretation and the conditions of the internal market.

Table 1. Foundational Trade and Commerce Doctrine and Internal Market Consequences (Canada)

Case / Line	Core doctrinal rule	Constraint on federal coordination	Internal- market consequence
Parsons (1881)	Distinction between “general trade” and regulation of particular trades; much commercial regulation treated as provincial (s. 92(13)).	Federal economic regulation treated as exceptional unless clearly national in scope.	Provincial divergence in commercial rules; higher interprovincial compliance and transaction costs.
Insurance Reference (1916)	National scope of an industry insufficient to justify federal licensing/ regulation.	Limits federal harmonization even for nationwide industries.	Sector-by-sector regulatory fragmentation across provinces.

Case / Line	Core doctrinal rule	Constraint on federal coordination	Internal- market consequence
Board of Commerce (1922)	Trade and commerce power narrowly construed; broad federal economic control suspect.	Constrains federal price/competition coordination absent alternative head of power.	Potential for patchwork competition and market- stabilization regimes.
Snider (1925) and labour cases	Labour relations and production conditions largely provincial.	Federal labour-market coordination limited outside emergencies.	Segmented labour regulation and uneven burdens across provinces.
Natural Products Marketing (1937)	Federal schemes invalid where they regulate intraprovincial transactions alongside interprovincial trade.	Nationwide market- ordering schemes constitutionally fragile.	Reliance on cooperative federalism; persistent interprovincial barriers.
Doctrinal pattern	Federalism disputes framed as allocation- of-powers questions; internal market integration not treated as an explicit constitutional principle.	Federal coordination episodic and justificatory rather than structural.	Internal trade fragmentation tolerated as a by-product of provincial autonomy.

This pattern illustrates the article's central claim: internal trade fragmentation reflects durable doctrinal choices rather than episodic policy failure, and later courts largely operate within the interpretive framework established by these early decisions.

VIII. DISTINCTION BETWEEN FEDERALISM, CENTRALIZATION AND THE INTERNAL CANADIAN MARKET

This section provides the lens through which the Supreme Court case law that follows should be read. Its purpose is to explain why courts could think they were “doing federalism right” while actually propagating market fragmentation.

An important issue that warrants attention is the evolving role of federalism in Canada, particularly the way in which questions of economic coordination have been doctrinally subsumed within federalism analysis. Over time, federal authority has strengthened relative to the era of the Privy Council, yet this development should not be conflated with a distinct question concerning the operation of the internal market. In Canadian constitutional jurisprudence, disputes affecting economic efficiency and internal trade have been evaluated primarily through the lens of federal–provincial allocation of powers. The linkage between economic outcomes and federalism doctrine can therefore be understood as doctrinal rather than conceptual: courts have treated market effects as incidental consequences of constitutional structure rather than as an autonomous object of constitutional analysis. The economic sensitivity of the highest courts, accordingly, should be viewed as analytically separate from the constitutional logic governing the division of powers. It is entirely possible, as illustrated by the experience of the European Union, to maintain a weak or decentralized constitutional structure while simultaneously sustaining a strong internal market. This comparison is not invoked as a model for transplantation, but to clarify that market integration and constitutional centralization are analytically distinct.

An alternative perspective on federalism challenges the argument advanced here. On this view, authors like Tierney argue that Canada's federal structure,

despite its challenges, has allowed for diverse policy ideas about the original intent of centralization and the actual result of a degree of decentralization. They assert that Canadian federalism is not a failed centralization project, but a distinctive federal idea rooted in pluralism, accommodation of difference, and political contestation.⁵² This analysis frames Canadian constitutional evolution as: legitimacy-driven, diversity-accommodating, and intentionally resistant to single, efficiency-maximizing logics. They treat decentralization not as an accident, but as a functional response to multinationalism, linguistic, cultural, and regional diversity, and the absence of a single founding “economic settlement.”⁵³

Crucially, such analysis does not deny inefficiencies and does not treat economic integration as a constitutional objective in its own right. This is the key to understanding these views, which can be shown to say that Canadian constitutional law has clear doctrinal commitments: federalism, democracy, diversity, accommodation, but crucially, there is no articulated commitment to internal market integration as an autonomous value.⁵⁴ That supports the idea that internal market fragmentation is not a failure of federalism, but a consequence of what Canadian federalism was never designed to optimize.

This reading contrasts with the article’s claim that early Privy Council doctrine placed Canadian constitutional development on a path that tolerated persistent market fragmentation. Under the alternative view, decentralization is not a doctrinal failure but a constitutional choice that prioritizes regional autonomy, even at the cost of increased economic barriers for the Canadian internal market.

The distinction between centralization and decentralization is not merely theoretical but is closely connected to the management of economic externalities within the federation. Centralization is typically justified where regulatory spillovers generate costs beyond provincial boundaries, while decentralization is

⁵² Stephen Tierney, in Richard Albert and David R. Cameron, eds., *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge: Cambridge University Press, 2018), 51–52.

⁵³ Tierney, in Albert and Cameron, eds., *Canada in the World*, 51–52.

⁵⁴ See for example Howse who argues that the Canadian constitutional structure prioritizes who feels uncomfortable of federal power of trade and commerce is infinitely expandable and argues for the preservation of provincial autonomy and federal balance. See Robert Howse, “NAFTA and the Constitution: Does Labour Conventions Really Matter Any More?,” *Constitutional Forum Constitutionnel* 5, nos. 3–4 (1994): 54.

generally defensible where such spillovers are limited.⁵⁵ Canada's constitutional framework, however, has permitted forms of economic decentralization that generate significant and recurring externalities within the internal market. Examples include truckers being required to change tires at provincial borders due to inconsistent standards, individuals being penalized for purchasing alcohol out of province, or producers facing mandated differences in milk container sizes across provinces, necessitating the duplication of production processes in order to access multiple markets.⁵⁶ These outcomes represent predictable consequences of a constitutional doctrine that tolerates incidental trade barriers as a by-product of provincial regulatory autonomy.

The economic rationale for greater market coordination in this context does not depend on a commitment to constitutional centralization. Rather, it reflects the need to address negative externalities that disrupt the free movement of goods within the federation. Removing such barriers reduces unnecessary costs, promotes efficiency, and facilitates the operation of a national market without altering the formal distribution of legislative authority.⁵⁷ The persistence of these barriers, therefore, illustrates the central claim of this article: internal market fragmentation in Canada is not an inevitable feature of federalism itself, but the result of doctrinal choices that have treated economic integration as subordinate to federal balance rather than as a distinct constitutional concern.

IX. THE SUPREME COURT OF CANADA: DOCTRINAL CONTINUITY AND MANAGED MARKET INTEGRATION

The transfer of final appellate authority from the Judicial Committee of the Privy Council to the Supreme Court of Canada did not produce a fundamental reorientation of federal trade and commerce doctrine. Although the Court adopted more flexible language and permitted limited expansions of federal authority, it largely operated within the doctrinal framework inherited from the

⁵⁵ Jean-Jacques Laffont, "Decentralization with Externalities," *European Economic Review* 7, no. 4 (1976): 359–75.

⁵⁶ See Lavoie, *Trade and Commerce*, 4.

⁵⁷ For a mechanism on how centralization and decentralization require externality analysis, see Laffont, "Decentralization with Externalities."

Privy Council. This resulted in limited adjustment within an unchanged doctrinal framework, allowing federal intervention in specific contexts while preserving structural limits on internal market integration.⁵⁸

From the Court's perspective, tolerating fragmentation avoids judicially constitutionalizing contested economic policy and preserves democratic space for intergovernmental negotiation. Thus, this section does not argue that the Court should have decided otherwise; it explains why doctrinal continuity persisted.

9.1. Early Signs of Flexibility

In the period following the abolition of Privy Council appeals, the Supreme Court showed cautious openness to a broader understanding of federal economic power. In the *Ontario Farm Products Marketing Reference* (1957)⁵⁹, several judges suggested that federal authority could extend to transactions completed within a province where necessary to support interprovincial trade. In *Murphy v. C.P.R.* (1958)⁶⁰, the Court upheld the *Canadian Wheat Board Act*, recognizing Parliament's power to regulate grain destined for interprovincial and export markets through compulsory purchase, pooling, and price equalization.

These cases indicated a willingness to sustain federal schemes aimed at national market stabilization. Doctrinally, however, such authority remained exceptional and instrumental, justified by the interprovincial character of the regulated activity rather than by any general commitment to internal market integration.

9.2. Intrusion into Local Markets and Quota-Based Regulation

The economic implications of this approach became clearer in *R. v. Klassen* (1959)⁶¹, where the Manitoba Court of Appeal upheld the application of the *Canadian Wheat Board Act* to a purely local feed mill. The Court accepted that regulating intraprovincial transactions was constitutionally permissible where incidental to a valid federal scheme governing interprovincial and export trade.

⁵⁸ Hogg, *Constitutional Law of Canada*, §§ 20.5–20.6

⁵⁹ *Ontario Farm Products Marketing Reference*, [1957] S.C.R. 198.

⁶⁰ *Murphy v. C.P.R.*, [1958] S.C.R. 626.

⁶¹ *R. v. Klassen (R.E.)* (2003), 179 Man. R. (2d) 115 (Q.B.).

Doctrinally, this reasoning preserved formal federal–provincial distinctions while enabling extensive federal influence over local markets. Economically, the quota system replaced market allocation with administratively determined production limits, distorting price signals, restricting output, limiting competition, and inflating consumer prices. The doctrine thus authorized extensive administrative control over production and distribution, displacing price-based competition and entry decisions that would otherwise be governed by market forces. The consequence is that higher consumer prices become a structurally protected feature of the regulatory landscape.

9.3. Cooperative Federalism and Agricultural Marketing

The Supreme Court’s one of the most significant post-Privy Council engagement with federal economic regulation occurred in *Reference re Agricultural Products Marketing Act* (1978).⁶² The Court upheld a comprehensive federal–provincial egg marketing scheme involving production quotas, surplus disposal, and levies imposed on all producers, including those serving local markets. As Hogg has noted, the case was highly contextual and difficult to treat as a general precedent.⁶³ This intervention in local markets was especially heavy in that evidence showed that 90 per cent of all eggs produced in Canada were consumed within the province of production: it was cheaper to ship the feed for the birds than the fragile, perishable eggs.⁶⁴

The decision rested less on a reconceptualization of the trade and commerce power than on deference to intergovernmental cooperation. As Pigeon J. observed, the scheme represented a “sincere cooperative effort,” and the Court was reluctant to dismantle a fully integrated regulatory structure endorsed by all governments.⁶⁵

Laskin C.J.’s separate reasons suggested a more restrictive approach to production-based levies, but this line of reasoning did not ultimately reshape the Court’s federalism doctrine. Cooperative supply-management regimes continued

⁶² *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198.

⁶³ Hogg, *Constitutional Law of Canada*, § 20.2(b), 20–7

⁶⁴ Hogg, *Constitutional Law of Canada*, § 20.2(b), 20–7

⁶⁵ *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198, 1296.

to expand without a clear constitutional limit grounded in internal-market integration.⁶⁶

From an economic perspective, the scheme entrenched supply management through quotas that restricted entry, elevated consumer prices, and transformed regulatory protection into transferable producer rents. Although eggs are perishable and often consumed locally, economic geography does not always align with provincial borders: supplying a nearby town across a provincial boundary may be more efficient than complying with quota allocations that segment production by province. By fixing output shares and limiting interprovincial supply responses, the regime suppressed cross-border efficiencies and insulated producers from competition. Constitutionally, the decision illustrates how cooperative federalism can sustain regulatory structures that organize markets along jurisdictional lines but make Canadians buy more expensive eggs.

These marketing cases also exposed a broader category of internal trade barriers: grading, packaging, and marketing requirements that function as non-tariff barriers. Although framed as quality or consumer-protection measures, such rules can impose compliance costs that segment markets and restrict competition. Canadian courts evaluated these measures primarily through the lens of jurisdictional validity rather than through a doctrine focused on market access. A brief comparison with early European internal-market jurisprudence underscores this difference in orientation. By the mid-1970s, the European Court of Justice had articulated in *Dassonville* and later *Cassis de Dijon* that national measures capable of hindering trade required justification within a framework attentive to market integration. Canadian federalism doctrine, by contrast, continued to resolve analogous disputes through allocation-of-powers analysis without treating internal-market access as an independent constitutional concern.

Subsequent jurisprudence confirms this pattern of continuity. In *Air Canada v Ontario (Liquor Control Board)*⁶⁷ and related cases, trade-affecting provincial

⁶⁶ *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 1263. Laskin CJC said: "I would think it rational to limit the scope of subclause (vi) to interprovincial and export trade..."

⁶⁷ *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581.

measures were assessed primarily for jurisdictional validity, not for their impact on market integration. This can be contrasted to the approach of the European Court of Justice, which in a similar alcohol-related case, expanded the EU internal market instead of engaging in a moralistic analysis.⁶⁸ In a relatively recent case, the Supreme Court's modern decision in *R v Comeau* (2018) reinforced this continuation.⁶⁹ The Court declined to interpret section 121 of the *Constitution Act, 1867* as guaranteeing free interprovincial trade, holding instead that provincial laws with incidental trade effects remain valid if their primary purpose is regulatory rather than protectionist. Internal-market liberalization was thus reaffirmed as a matter for political negotiation rather than constitutional adjudication.

Taken together, these decisions illustrate a consistent doctrinal orientation: Canadian constitutional law has treated internal-market fragmentation as a by-product of federalism rather than as a constitutional problem requiring independent scrutiny. Cooperative federalism has enabled extensive regulatory coordination, but without developing a doctrinal framework that evaluates how quotas, standards, and production controls shape market access and competition across provincial boundaries.

X. DOCTRINAL ABSORPTION AND PATH DEPENDENCE IN CANADIAN INTERNAL MARKET JURISPRUDENCE

Together, Supreme Court jurisprudence reflects continuity in the treatment of the restrictive framework inherited from the Privy Council. Federal authority expanded episodically through cooperative schemes, incidental powers, and contextual reasoning, yet the Court did not redefine internal market integration as a constitutional objective. Quotas, regulatory barriers, and restrictions on entry were treated as policy consequences of federalism rather than as doctrinal concerns. The post-Privy Council era therefore, reflects continuity in approach: while institutional authority shifted and doctrinal language softened, the

⁶⁸ *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [Federal Monopoly Administration for Spirits] (Cassis de Dijon), Case 120/78, 1979 E.C.R. 649.

⁶⁹ *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342.

foundational allocation of powers governing internal trade remained largely unchanged.

The persistence of this framework can be explained through mechanisms of doctrinal path dependence. First, *stare decisis* has operated with particular force in division-of-powers jurisprudence. Canadian courts have consistently emphasized stability in constitutional interpretation, treating foundational federalism decisions as authoritative settlements of the federal balance. Although the Supreme Court acknowledges the possibility of revisiting precedent, it has done so cautiously where reconsideration would alter entrenched allocations of legislative authority. Early interpretations of the trade and commerce power, therefore, continued to structure later adjudication even as doctrinal language evolved.

Second, the institutional costs of overruling constitutional precedent have discouraged structural recalibration. Revisiting foundational trade and commerce decisions would entail not merely doctrinal refinement but a reallocation of regulatory authority across the federation. Courts have accordingly preferred incremental adjustment to doctrinal rupture. In the Supreme Court era, this has taken the form of cooperative federalism and contextual expansion rather than a redefinition of federal economic power. Early constraints were absorbed into modern doctrine rather than displaced.

Third, the rigidity of constitutional amendment has reinforced judicial restraint. Canada's demanding amending formulas limit the capacity of political actors to correct allocations of power through formal amendment. This increases reliance on judicial interpretation while simultaneously discouraging changes that would resemble constitutional revision in substance. The combined effect has been to stabilize early doctrinal choices and reduce the likelihood of judicial reorientation.

The transition from the Privy Council to the Supreme Court of Canada therefore did not produce a fundamental recalibration of internal trade doctrine. Instead, Canadian constitutional law evolved through doctrinal absorption, preserving structural limits on federal market coordination established in the early jurisprudence.

XI. CONCLUSION

This analysis highlights several implications for Canadian constitutional law that extend beyond the specific doctrinal questions examined in the preceding sections. Most importantly, it demonstrates that internal market integration has not been articulated as an autonomous constitutional objective within Canada's division-of-powers jurisprudence. Where coordination of trade and economic regulation has occurred, it has done so indirectly through policy instruments and cooperative arrangements rather than through constitutional doctrine itself. The result is persistence of internal trade barriers.

The findings also suggest that expectations of judicial self-correction should remain measured. Interpretive developments under section 91(2) are possible, but they are likely to remain incremental and context-specific rather than transformative. Cooperative federalism and intergovernmental agreements provide mechanisms for coordination, yet their durability depends on sustained political alignment and carries the stability associated with constitutional entrenchment. The economically friendly solution is that mutual recognition frameworks and legislative initiatives offer additional avenues for reducing regulatory fragmentation, though they remain contingent on political will and institutional cooperation.

The contribution of this article is intentionally limited. It clarifies the institutional and doctrinal conditions within which debates over internal trade must occur. Constitutional interpretation has shaped the structure of Canada's economic governance, and the organization of economic activity in turn affects the broader capacity of the federation to act cohesively. In this sense, while the Constitution does not expressly mandate a unified internal market, the strength and independence of a modern state remain closely linked to the stability and coherence of its economic framework. Recognizing that connection helps situate internal trade doctrine within the wider constitutional order without transforming it into an explicit judicial objective.

What emerges from this study is a clearer understanding of the limits of constitutional adjudication as a mechanism for internal market reform. Where foundational allocations of authority have stabilized through precedent and institutional practice, significant change is more likely to depend on legislative action and political coordination than on judicial reinterpretation alone. Appreciating these constraints is essential for any realistic assessment of how Canada's internal market may evolve within its existing constitutional structure.

The present article has been deliberately confined to a doctrinal analysis of the federal trade and commerce power and the institutional continuity that has shaped its interpretation. A fuller explanation of the persistence of internal market fragmentation requires a different analytical lens. Future research will therefore develop a theoretical account of the structural forces that have influenced the evolution of Canadian federalism in this domain. Rather than focusing solely on doctrinal turning points, that work will examine how precedent, institutional incentives, and the political economy of regulatory authority have interacted to stabilize a decentralized model of market governance. By situating division-of-powers jurisprudence within these broader dynamics, the forthcoming study seeks to explain why internal market integration has not emerged as an autonomous constitutional objective and to clarify the conditions under which meaningful coordination might nonetheless occur within Canada's constitutional framework.

BIBLIOGRAPHY

- Air Canada v. Ontario (Liquor Control Board)*. [1997] 2 S.C.R. 581.
- Attorney-General for British Columbia v. Attorney-General for Canada (Natural Products Marketing)*. [1937] A.C. 377 (P.C.).
- Attorney-General for Canada v. Attorney-General for Alberta (Insurance Reference)*. [1916] 1 A.C. 588 (P.C.).
- Canada (Attorney General) v. Bedford*. 2013 SCC 72, [2013] 3 S.C.R. 1101.
- Canada Grain Act*. R.S.C. 1985, c. G-10, s. 55.

Citizens' Insurance Co. of Canada v. Parsons. (1881) 7 App. Cas. 96 (P.C.).

Díez, Federico J., and Yuanchen Yang. "Canada Can Grow Faster by Unlocking Its Own Market." *IMF Country Focus*, January 27, 2026. <https://www.imf.org/en/news/articles/2026/01/27/cf-canada-can-grow-faster-by-unlocking-its-own-market>.

Dunbar v. The King. [1936] 4 D.L.R. 737.

European Union. *Consolidated Version of the Treaty on the Functioning of the European Union*. 2016 O.J. C 202/47.

Gennaioli, Nicola, and Andrei Shleifer. "The Evolution of Common Law." *Journal of Political Economy* 115, no. 1 (2007): 43–68.

Girard, Philip. *Bora Laskin: Bringing Law to Life*. Toronto: University of Toronto Press / Osgoode Society for Canadian Legal History, 2005.

Hayek, F. A. *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*. London: Routledge, 1982.

Hayek, Friedrich A. *The Road to Serfdom*. Chicago: University of Chicago Press, 1944.

Hirschl, Ran. "Going Global? Canada as Importer and Exporter of Constitutional Thought." In *Canada in the World: Comparative Perspectives on the Canadian Constitution*, edited by Richard Albert and David R. Cameron, 305–23. Cambridge: Cambridge University Press, 2017.

Hobhouse, Charles. *Inside Asquith's Cabinet: From the Diaries of Charles Hobhouse*. London: Murray, 1977.

Hogg, Peter W. *Constitutional Law of Canada*. Student ed. Toronto: Thomson Reuters, 2020.

Hogg, Peter W., and Wade K. Wright. "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism." *UBC Law Review* 38, no. 2 (2005): 329–52.

Howse, Robert. "NAFTA and the Constitution: Does Labour Conventions Really Matter Any More?" *Constitutional Forum Constitutionnel* 5 (1994): 54.

- In re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919*. [1922] 1 A.C. 191 (P.C.).
- Laffont, Jean-Jacques. "Decentralization with Externalities." *European Economic Review* 7, no. 4 (1978): 359–75. [https://doi.org/10.1016/0014-2921\(78\)90012-0](https://doi.org/10.1016/0014-2921(78)90012-0).
- Lavoie, Malcolm. *Trade and Commerce: Canada's Economic Constitution*. Carleton Library Series 261. Montreal and Kingston: McGill-Queen's University Press, 2023.
- Luhmann, Niklas. *Law as a Social System*. Translated by Klaus A. Ziegert. Edited by Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert. Oxford: Oxford University Press, 2004.
- MacGuigan, Mark. "The Privy Council and the Supreme Court: A Jurisprudential Analysis." *Alberta Law Review* 4 (1966): 419–41.
- Murphy v. C.P.R.* [1958] S.C.R. 626.
- Ontario (Attorney General) v. Fraser*. 2011 SCC 20, [2011] 2 S.C.R. 3.
- Priest, George L. "The Common Law Process and the Selection of Efficient Rules." *Journal of Legal Studies* 6, no. 1 (1977): 65–82.
- Proprietary Articles Trade Association v. Attorney-General for Canada*. [1931] A.C. 310 (P.C.).
- R. v. Comeau*. 2018 SCC 15, [2018] 1 S.C.R. 342.
- R. v. Klassen (R.E.)*. 2003 MBQB 253, 179 Man. R. (2d) 115.
- R. v. Paquette*. [1977] 2 S.C.R. 189.
- Reference re Agricultural Products Marketing Act*. [1978] 2 S.C.R. 1198.
- Reference re Farm Products Marketing Act (Ontario)*. [1957] S.C.R. 198.
- Reference re Secession of Quebec*. [1998] 2 S.C.R. 217.
- Reference re Validity of Section 5(a) of the Dairy Industry Act*. [1949] S.C.R. 1, aff'd [1951] A.C. 179 (P.C.).

- Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [Federal Monopoly Administration for Spirits] (*Cassis de Dijon* [Blackcurrant Liqueur from Dijon]). Case 120/78. 1979 E.C.R. 649.
- Roe, Mark J. "Chaos and Evolution in Law and Economics." *Harvard Law Review* 109, no. 3 (1996): 641–68.
- Rubin, Paul H. "Why Is the Common Law Efficient?" *Journal of Legal Studies* 6, no. 1 (1977): 51–63.
- Ryder, Bruce. "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations." *McGill Law Journal* 36, no. 2 (1991): 308–381.
- The King v. Eastern Terminal Elevator Co.* [1925] S.C.R. 434.
- Tierney, Stephen. "Misconceiving Federalism: Canada and the Federal Idea." In *Canada in the World: Comparative Perspectives on the Canadian Constitution*, edited by Richard Albert and David R. Cameron, 34–58. Cambridge: Cambridge University Press, 2017.
- Toronto Electric Commissioners v. Snider.* [1925] A.C. 396 (P.C.).
- Vaughan, Frederick. *Viscount Haldane: "The Wicked Step-father of the Canadian Constitution."* Toronto: University of Toronto Press, 2010.
- Zywicki, Todd J. "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis." *Northwestern University Law Review* 97, no. 4 (2003): 1551–1633. <https://ssrn.com/abstract=326740>. <http://dx.doi.org/10.2139/ssrn.326740>.

CONSTITUTIONAL TORT AS A CONSTITUTIONAL COMPLAINT: RECONSTRUCTING GOVERNMENTAL UNLAWFUL ACTS REGULATION

Bimo Fajar Hantoro*

Universitas Jenderal Soedirman
bimo.fajar@unsoed.ac.id

Fathimah Azzahro**

Universitas Jenderal Soedirman
fathimah.azzahro.10@unsoed.ac.id

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Abstract

A chorus of academics has echoed constitutional complaint as an expansion of the Constitutional Court's jurisdiction to strengthen the protection of citizens. In this context, the proposal is hampered by the procedural barriers of constitutional amendment. Therefore, this research aims to propose a more viable alternative by reconstructing the existing State Administrative Courts' governmental unlawful acts jurisdiction into a *de facto* constitutional complaint mechanism. Governmental unlawful acts cause of action is reconstructed by adopting certain aspects of constitutional tort in the United States as a point of comparison and inspiration. This doctrinal research adopts statutory, comparative, and conceptual approaches, using primary and secondary legal materials. The

* Bimo Fajar Hantoro, S.H., LL.M., is a lecturer at Universitas Jenderal Soedirman, specializing in constitutional law, election law, and statutory interpretation. He earned his LL.M. with honors from the University of Illinois Urbana-Champaign in 2023, winning the CALI Excellence for the Future Award in Federal Courts. This paper was presented at the 7th Indonesian Constitutional Court International Symposium (ICCIS) on "Constitutional Complaint". The authors express their utmost gratitude to the experts and reviewers for their feedback and comments. In addition, the authors would like to thank Universitas Jenderal Soedirman for its support in writing this article.

** Fathimah Azzahro, S.H., M.H., is a lecturer at the Faculty of Law, Universitas Jenderal Soedirman, specializing in constitutional law, state institutional law, and gender equality. She earned her Master of Laws (M.H.) from Universitas Jenderal Soedirman in 2024, graduating cum laude. Her research focuses on the institutional frameworks and gender advocacy within the constitutional system.



results show that reconstruction of State Administrative Courts' governmental unlawful acts jurisdiction into a *de facto* constitutional complaint mechanism depends on four specific and crucial reforms to State Administrative Courts Law, the Governmental Administration Law, and the implementing regulations. First, the authority of State Administrative Courts covers factual actions and includes blocking the enforcement of written state administrative decisions. Second, an explicit statutory authorization should be provided for the state administrative court judges to use the 1945 Constitution as a standard of review. Third, there needs to be procedural safeguards to ensure legal certainty and consistency in constitutional interpretation. State Administrative Courts are obligated to give full effect to the Constitutional Court's interpretation whenever available and applicable to the case at hand, and to stay proceedings when a related case is pending at the Constitutional Court relevant to the case at hand. Lastly. Finally, existing damages regulations must be amended to ensure legal certainty and provide just relief. This prevents remedies from becoming symbolic rather than effective in stopping constitutional violations and wrongdoings.

Keywords: Constitutional Tort, Constitutional Complaint, Governmental Unlawful Acts

I. INTRODUCTION

1.1. Background

The discourse of constitutional complaint has been widely echoed as a potential effort to protect citizens' constitutional rights in Indonesia. Many scholars state that the current judicial review authority is insufficient in protecting citizens' rights as guaranteed by the 1945 Constitution.¹ Under the current scheme, the Constitutional Court only has the jurisdiction to examine the constitutionality of laws, and the nature of the decision is declarative and constitutive.² Consequently, this bars the possibility of remedies in the form of damages or an injunction for concrete and imminent constitutional violations.

¹ Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review* 2, no. 1 (August 27, 2016): 105; Tanto Lailam, Putri Anggia, and Irwansyah Irwansyah, "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court," *Jurnal Konstitusi* 19, no. 3 (August 30, 2022): 695.

² Andri Setiawan, Antikowati Antikowati, and Bayu Dwi Anggono, "Kekuatan Mengikat Putusan Pengujian Undang-Undang Oleh Mahkamah Konstitusi Terhadap Putusan Pengujian Peraturan Perundang-Undangan Oleh Mahkamah Agung" [The Binding Force of Constitutional Court Decisions on Judicial Review of Laws Against Supreme Court Decisions on Review of Laws and Regulations], *Jurnal Legislasi Indonesia* [Indonesian Journal of Legislation] 18, no. 1 (March 31, 2021): 21.

Considering the current lack of damages or injunctive remedies, the availability of a new cause of action in the form of a constitutional complaint mechanism, *arguendo*, strengthens the protection and promotion of citizens' rights.³ As a concept, I Dewa Gede Palguna defined "constitutional complaint" as a legal remedy in the form of a lawsuit filed by a citizen who claims a constitutional right has been violated by an act or omission committed by a governmental body or official.⁴ For example, the German constitutional complaint offers only injunctive relief.⁵ This limitation on remedies renders any past constitutional violations effectively without redress.

Most Indonesian legal experts advocate for constitutional complaints to be granted jurisdiction.⁶ This is an intuitive conclusion, considering the Court's existing jurisdiction to interpret the 1945 Constitution in judicial review of laws.⁷ However, the proposal faces two distinct constitutional barriers. First, Constitutional Court's jurisdiction in Article 24C paragraph (1) of the 1945 Constitution is exhaustive or closed in nature. The jurisdiction cannot be

³ Gautama Budi Arundhati, "Kemungkinan Penerapan Preliminary Ruling Procedure Sebagai Media Constitutional Complaint Di Mahkamah Konstitusi" [The Possibility of Applying a Preliminary Ruling Procedure as a Means of Constitutional Complaint in the Constitutional Court], *Jurnal Konstitusi* [Journal of Constitutional Law] 14, no. 4 (February 9, 2018): 825–26.

⁴ I Dewa Gede Palguna, "Constitutional Complaint and the Protection of Citizens the Constitutional Rights," *Constitutional Review* 3, no. 1 (August 2, 2017): 2; Ruth Weber, "Law-Making Activity of the German Federal Constitutional Court," in *Judicial Law-Making in European Constitutional Courts*, ed. Monika Florczak-Wątor (London: Routledge, 2020), 31.

⁵ Palguna, "Constitutional Complaint and the Protection of Citizens," 13–14; Karl-Peter Sommermann, "Constitutional State and Public Administration," in *Public Administration in Germany*, ed. Sabine Kuhlmann et al. (Birmingham: Pelgrave Macmillan, 2021), 27–28.

⁶ Arundhati, "Kemungkinan Penerapan Preliminary Ruling Procedure Sebagai Media Constitutional Complaint Di Mahkamah Konstitusi [The Possibility of Applying a Preliminary Ruling Procedure as a Means of Constitutional Complaint in the Constitutional Court]," 834–35; M. Lutfi Chakim, "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions," *Constitutional Review* 5, no. 1 (May 31, 2019): 130–31; Palguna, "Constitutional Complaint and the Protection," 20; Faiz, "A Prospect and Challenges," 120–21; Lailam, Anggia, and Irwansyah, "The Proposal of Constitutional Complaint," 165; Tanto Lailam and M. Lutfi Chakim, "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences," *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023): 161; Galuh Candra Purnamasari, "Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara Melalui Pengaduan Konstitusional (Constitutional Complaint) [Legal Remedies for Violations of Citizens' Constitutional Rights through Constitutional Complaint]," *Veritas et Justitia* 3, no. 2 (December 26, 2017): 267–68; Sri Warjiyati et al., "Complaint Authority for Constitutional Complaint by Indonesia's Constitutional Court," *Jurnal IUS Kajian Hukum dan Keadilan* 10, no. 2 (August 24, 2022): 313; Standy Wico et al., "Constitutional Complaint in Indonesia Through the Lens of Legal Certainty," *Indonesian Journal of Law and Society* 2, no. 1 (February 12, 2021).

⁷ Theunis Roux, "Indonesia's Judicial Review Regime in Comparative Perspective," *Constitutional Review* 4, no. 2 (December 31, 2018): 205–16; Saldi Isra and Pan Mohamad Faiz, "The Indonesian Constitutional Court: An Overview," in *Courts and Diversity*, ed. Bertus De Villiers, Saldi Isra, and Pan Mohamad Faiz (Leiden: Brill | Nijhoff, 2024), 63–69.

expanded by statute and requires a formal constitutional amendment.⁸ **Second**, Article 24C paragraph (3) of the 1945 Constitution limits the Court to only nine justices, reducing the capacity to handle tsunami of new cases a constitutional complaint would create.⁹

The prevailing truism in Indonesia's constitutional paradigm is the supremacy of the Constitutional Court in constitutional interpretation.¹⁰ However, the truism is often misunderstood, blurring the distinction between finality and exclusivity. This has silenced dissonant voices, leaving a void where proposals to attribute constitutional complaint jurisdictions to courts outside the Constitutional Court are non-existent. While the Constitutional Court is indeed the final interpreter of the 1945 Constitution, it is by no means the exclusive one. Other state institutions necessarily engage in constitutional interpretation in exercising their constitutional authority.¹¹ Under this departmentalist view of constitutional interpretation, the President and the People's Representative Council are engaging in constitutional interpretation while exercising their lawmaking authority under Article 20 of the 1945 Constitution.¹² Therefore, a proper understanding balances departmentalism

⁸ Bimo Fajar Hantoro, "Pembatasan Yudisial Dan Perluasan Kewenangan Mahkamah Konstitusi Dalam Memutus Sengketa Hasil Pilkada [Judicial Limitation and Expansion of the Constitutional Court's Authority in Deciding Regional Election Result Disputes]," *Media Iuris* 7, no. 1 (February 29, 2024): 102; Lailam and Chakim, "A Proposal to Adopt Concrete Judicial Review," 161; Simon Butt, Melissa Crouch, and Rosalind Dixon, "Special Issue: The First Decade of Indonesia's Constitutional Court," *Australian Journal of Asian Law* 16, no. 2 (2016).

⁹ Josua Satria Collins and Pan Mohamad Faiz, "Penambahan Kewenangan Constitutional Question Di Mahkamah Konstitusi Sebagai Upaya Untuk Melindungi Hak-Hak Konstitusional Warga Negara [Adding Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights]," *Jurnal Konstitusi* 15, no. 4 (January 15, 2019): 704; Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint," 113–14; Bayu Dwi Anggono, "Pembatasan Pengajuan Perkara Sengketa Hasil Pemilihan Kepala Daerah Di Mahkamah Konstitusi Dan Implikasinya Terhadap Jaminan Keamanan Nasional [Restrictions on Filing Regional Head Election Result Disputes in the Constitutional Court and Their Implications for National Security Guarantees]," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 5, no. 1 (2016): 88–89.

¹⁰ Luthfi Widagdo Eddyono, "Independence of the Indonesian Constitutional Court in Norms and Practices," *Constitutional Review* 3, no. 1 (August 2, 2017): 73; Rahayu Prasetyaningih, "Judicial Activism in Indonesia: Constitutional Culture by the Constitutional Court," *PETITA: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 2 (November 1, 2020): 171.

¹¹ Richard H. Fallon Jr., "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age," *Texas Law Review* 96, no. 3 (2018): 488–92; Robert Post and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," *California Law Review* 92, no. 4 (July 2004): 1031–34; Dawn E. Johnsen, "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?," *Law and Contemporary Problems* 67, no. 3 (2004): 105–47; Neal Devins and Louis Fisher, "Judicial Exclusivity and Political Instability," *Virginia Law Review* 84, no. 1 (February 1998): 98–104; Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110, no. 7 (May 1997): 1359–61.

¹² M. Jeffri Arlinandes Chandra, Bayu Dwi Anggono, and Febrian Febrian, "Rekonsruksi Tahapan Pembentukan Perundang-Undangan: Urgensi Re-Harmonisasi Dan Evaluasi Sebagai Siklus Pembentukan Undang-Undang Yang Berkualitas [Reconstruction of the Stages of Lawmaking: The Urgency of Reharmonization and Evaluation as a Cycle of Quality Lawmaking]," *Jurnal Legislasi Indonesia* 19, no. 4 (December 31, 2022): 556–58

with judicial supremacy. Other institutions make valid interpretations, while Constitutional Court retains the ultimate plenary authority as the final interpreter.

A more feasible alternative to a constitutional amendment exists by reconstructing the existing State Administrative Courts' jurisdiction to review governmental unlawful acts. Even though most academics focus on Constitutional Court, State Administrative Courts have the jurisdiction to adjudicate governmental unlawful acts per Law Number 30 of 2014 on Governmental Administration (hereinafter Governmental Administration Law).¹³ This existing cause of action allows individuals aggrieved by governmental acts to sue for damages or injunctions.¹⁴ Comparatively, the United States employs a similar "constitutional tort" concept, allowing citizens to sue for damages or injunctive relief for constitutional rights violations resulting from an act of governmental bodies and officials.¹⁵ The clear parallels suggest that Indonesian governmental unlawful acts cause of action can be reconstructed into an effective instrument for constitutional protection, warranting a closer analysis.

Previous research on the adoption of complaints has uniformly focused on Constitutional Court. For example, I Dewa Gede Palguna discusses the mechanism as an expansion of the Constitutional Court's jurisdiction.¹⁶ Pan Mohamad Faiz explores the integration of constitutional complaint and question into the Constitutional Court's authority.¹⁷ Even though this foundational research confirms the need for a constitutional complaint mechanism, the proposals exclusively consider the Constitutional Court as the proper venue. This research diverges from the consensus and fills a critical gap by analyzing the adoption of a constitutional

¹³ M. Aunul Hakim and Sheila Kusuma Wardani Amnesti, "Problematika Penanganan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah (Onrechtmatige Overheidsdaad) Pada Peradilan Tata Usaha Negara [Problems in Handling Claims of Unlawful Acts by Government (Onrechtmatige Overheidsdaad) in the State Administrative Court]," *De Jure: Jurnal Hukum dan Syar'iah* [De Jure: Journal of Law and Sharia] 14, no. 1 (June 29, 2022): 127–29.

¹⁴ Bagus Oktafian Abrianto, Xavier Nugraha, and Nathanael Grady, "Perkembangan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah Pasca-Undang-Undang Nomor 30 Tahun 2014 [Development of Lawsuit for Law Violation by the Government Post Statute/Law Number 30 of 2014]," *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 11, no. 1 (June 23, 2020): 55–60; E. Garrett West, "Refining Constitutional Torts," *The Yale Law Journal* 134 (2025): 875–79.

¹⁵ Richard H. Fallon Jr., "Bidding Farewell to Constitutional Torts," *California Law Review* 107 (2019): 946–50; West, "Refining Constitutional Torts," 875–79; Gregory Sisk, "Recovering the Tort Remedy for Federal Official Wrongdoing," *Notre Dame Law Review* 96, no. 5 (2021): 1801.

¹⁶ Palguna, "Constitutional Complaint and the Protection," 1–23.

¹⁷ Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint," 103–28.

complaint mechanism under the jurisdiction of State Administrative Courts. The method is developed by drawing a comparative analysis with the concept of constitutional tort in the United States.

1.2. Research Questions

1. How are governmental unlawful acts cause of action regulated under Indonesian law?
2. How is the concept of constitutional tort implemented in the United States, and what role does it play in remedying constitutional violations?
3. How should the aspects of constitutional tort be adopted as a form of constitutional complaint in Indonesia by reconstructing governmental unlawful acts regulation?

1.3. Method

This doctrinal research employs statutory, comparative, and conceptual approaches method.¹⁸ The statutory approach analyzes relevant laws, regulations, and court decisions governing governmental unlawful acts in Indonesia and constitutional tort in the United States by clarifying the semantic meaning of legal texts, determining their validity, and examining their construction for their application to factual circumstances. The comparative approach analyzes the defining aspects of constitutional tort in the United States for the purposes of offering the framework for reform proposals to the governmental unlawful acts cause of action in Indonesia.¹⁹ The conceptual approach explores relevant concepts to provide contexts and theoretical bases in addressing legal issues of this research.²⁰

This research relies on primary and secondary legal materials. Primary legal materials consist of laws, regulations, and court decisions that govern

¹⁸ Theresia Anita Christiani, "Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object," *Procedia - Social and Behavioral Sciences* 219 (May 2016): 203–4.

¹⁹ Robert Leckey, "Review of Comparative Law," *Social & Legal Studies* 26, no. 1 (February 24, 2017): 14; David Nelken, "Comparative Legal Research and Legal Culture: Facts, Approaches, and Values," *Annual Review of Law and Social Science* 12, no. 1 (October 27, 2016): 49–52; Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), 235–38.

²⁰ Sanne Taekema, "Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice," *Law and Method* 2018, no. 2 (February 2018): 3–5, <https://doi.org/10.5553/REM/000031>; Marzuki, *Penelitian Hukum: Edisi Revisi*, 114.

governmental unlawful acts in Indonesia and constitutional tort in the United States.²¹ Secondary legal materials include journal articles and books relevant to the issue.²² These legal materials are collected through a literature review and are analyzed, synthesized, and systematized to answer the research questions.²³

II. RESULTS AND DISCUSSION

2.1. Governmental Unlawful Acts Regulation in Indonesia

The recent development of governmental unlawful acts after the enactment of Governmental Administration Law has several legal consequences.²⁴

Table 1. The Differences of Governmental Unlawful Acts Lawsuit Before and After the Enactment of the Governmental Administration Law

	Pre-Governmental Administration Law	Post-Governmental Administration Law
Legal Bases	Article 1365 of the Civil Code.	1. Governmental Administration Law; 2. State Administrative Courts Law; and 3. Supreme Court Regulation 2/2019.
Forum	General Courts	State Administrative Courts
Review Bases	1. Violating laws and regulations; 2. Violating the subjective rights of others; 3. Violating decency and/or 4. Violating propriety in society.	1. Violating laws and regulations; and 2. Violating the principles of good governance.

²¹ P. Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford: Oxford University Press, 2019), 114.

²² Bhat, *Idea and Methods of Legal Research*, 114.

²³ Bhat, *Idea and Methods of Legal Research*, 158–61; Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review* 17, no. 1 (October 1, 2012): 116–18.

²⁴ Muhamad Raziv Barokah and Anna Erliyana, "Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara: Gugatan Perbuatan Melawan Hukum Oleh Penguasa (Onrechtmatige Overheidsdaad) [The Shift of Absolute Competence from the General Courts to the State Administrative Courts: Claims for Unlawful Acts by the Authorities (Onrechtmatige Overheidsdaad)]," *Jurnal Hukum & Pembangunan* 51, no. 4 (2021): 829–38; Abrianto, Nugraha, and Grady, "Perkembangan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah Pasca-Undang-Undang Nomor 30 Tahun 2014 [Development of Lawsuit for Law Violation by the Government Post Statute/Law Number 30 of 2014]," 48–60.

	Pre-Governmental Administration Law	Post-Governmental Administration Law
Remedies	1. Monetary award; 2. Damages in equivalent form or restitution to the original state; 3. Statement that the act performed is unlawful; and/or 4. Prohibition to act.	1. Court orders to government officials to do or refrain from doing certain governmental action; and 2. Rehabilitation and/or damages relief.

Source: processed by the Authors, 2025.

First, regarding the objects of dispute and forum, the judicial review jurisdiction in State Administrative Courts was initially limited to only written state administrative decisions.²⁵ Article 87 of the Governmental Administration Law expanded the definition of state administrative decisions to include “[*not only*] written determinations [*but*] also encompass factual actions.”²⁶ The inclusion of factual actions transferred the governmental unlawful acts lawsuit from the jurisdiction of the general courts to the State Administrative Courts.²⁷ This jurisdictional shift was affirmed by the enactment of Supreme Court Regulation Number 2 of 2019 on Guidelines for Settlement of Government Action Disputes and Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (hereinafter Supreme Court Regulation 2/2019).²⁸

Second, regarding the standard of review. As a direct consequence of the jurisdictional shift, the bases for reviewing governmental unlawful acts are subject to the standards in Article 53 paragraph (2) of Law Number 5 of 1986 on State Administrative Courts, as lastly amended by Law Number 51 of 2009 on the Second Amendment to Law Number 5 of 1986 on State Administrative

²⁵ Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 1, para. (3).

²⁶ Republik Indonesia [Republic of Indonesia], Law No. 30 of 2014 on Government Administration, art. 87.

²⁷ Barokah and Erliyana, “Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara: Gugatan Perbuatan Melawan Hukum Oleh Penguasa (Onrechtmatige Overheidsdaad) [The Shift of Absolute Competence from the General Courts to the State Administrative Courts: Claims for Unlawful Acts by the Authorities (Onrechtmatige Overheidsdaad)],” 827.

²⁸ Barokah and Erliyana, “Pergeseran Kompetensi Absolut.”

Courts (hereinafter State Administrative Courts Law).²⁹ This change is significant since the concept replaces the four broad standards from the Civil Code with established administrative law criteria. Specifically, a violation of “laws and regulations” under the framework can take three forms: 1) procedural conflicts; 2) material/substantive conflicts; and 3) the state administrative decision was issued by unauthorized governmental officials.³⁰

Third, regarding remedies. Supreme Court Regulation 2/2019 provides two categories of relief: 1) injunctive orders to take, refrain from, or cease a Governmental Action, and 2) the imposition of rehabilitation and/or damages.³¹ However, these remedies are not clearly defined by the regulation. Article 121 of State Administrative Courts Law provides rehabilitation in state employment disputes, rendering the concept irrelevant for most governmental unlawful acts cases.³² The “damages” remedy is rendered practically useless by the governing regulation. Governmental Regulation Number 43 of 1991 on Damages and Procedures for Implementation in State Administrative Courts (hereinafter Government Regulation 43/1991) caps the maximum payable amount at Rp. 5.000.000 (five million rupiahs).³³ Given the decades of inflation since 1991 regulation was enacted, this cap is not “inadequate,” but functionally obsolete. A citizen’s potential remedy is also reduced to a symbolic and insulting amount.³⁴

A common counter-argument is that Supreme Court Circular Number 2 of 2019 “supposedly” abolished the damages cap for factual actions, limiting it only

²⁹ Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 53, para. (2).

³⁰ Barokah and Erliyana, “Pergeseran Kompetensi Absolut,” 831.

³¹ Supreme Court of the Republic of Indonesia, Supreme Court Regulation No. 2 of 2019 on Guidelines for the Settlement of Government Action Disputes and Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (Onrechtmatige Overheidsdaad [unlawful acts by the government]), art. 5, paras. (2)–(3).

³² Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 121.

³³ Republik Indonesia [Republic of Indonesia], Government Regulation No. 43 of 1991 on Damages and Procedures for Implementation in State Administrative Courts, art. 3; Barokah and Erliyana, “Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara,” 825; Bambang Arwanto, “Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah” [Legal Protection for the People Resulting from Factual Government Actions], *Yuridika* 31, no. 3 (August 24, 2017): 379.

³⁴ Barokah and Erliyana, “Pergeseran Kompetensi Absolut,” 875; Bambang Arwanto, “Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah [Legal Protection for the People Resulting from Factual Government Actions],” *Yuridika* 31, no. 3 (September 2016): 380.

to written state administrative decisions.³⁵ The logic for this flawed argument is from Article 97 paragraphs (9) and (10) of State Administrative Courts Law.³⁶ The damages cap is only applied to written state administrative decisions since Article 97 paragraph (9) uses “annulment” and “issuance” when authorizing “compensation” in paragraph (10). This interpretation is untenable and ignores the text of Article 87 of the Governmental Administration Law, which normatively expands the definition of “state administrative decisions” to include factual actions. The broader statutory definition overrides the older, narrower implications of Article 97. Therefore, the damages cap is applied to the entire unified definition of state administrative decisions.

The text of Government Regulation 43/1991 confirms the conclusion. The regulation never states that it only applies to written state administrative decisions. Article 1 paragraph (1) provides a broad, general definition of damages “*payment ... based on a decision of State Administrative Courts ...*”.³⁷ The wording is not limited to a specific type of case, only to the existence of a State Administrative Courts decision. Considering the general definition, the most plausible and consistent interpretation is that Government Regulation 43/1991 applies to the entire unified jurisdiction. The obsolete cap is in full effect for governmental unlawful acts cases.

2.2. Constitutional Tort in the United States and Its Role in Remediating Constitutional Violations

In the United States, “constitutional tort” is a critical mechanism for protecting citizens’ constitutional rights as guaranteed by the federal Constitution.³⁸ As a doctrine, the concept provides a cause of action to sue government bodies and

³⁵ Supreme Court of the Republic of Indonesia, Supreme Court Circular No. 2 of 2019 on the Implementation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as Guidelines for the Performance of Court Duties, chap. E, no. 3.

³⁶ Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 97, paras. (9)–(10).

³⁷ Republik Indonesia [Republic of Indonesia], Government Regulation No. 43 of 1991 on Damages and Procedures for Implementation in State Administrative Courts, art. 1, para. (1).

³⁸ West, “Refining Constitutional Torts,” 862.

officials for constitutional violations.³⁹ This non-monolithic doctrine refers to two distinct types of lawsuits against government officials:⁴⁰

- 1. Section 1983 Lawsuit: lawsuits filed against state government officials and local government entities under 42 U.S.C. § 1983, originally enacted in the Civil Rights Act of 1871 (Ku Klux Klan Act); and
- 2. *Bivens* Lawsuit: lawsuits filed against federal government officials based on the cause of action established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (hereinafter *Bivens*).

These lawsuits provide two primary forms of relief: (1) monetary damages for past constitutional violations, or (2) injunctive relief to prevent imminent constitutional violations. In brief, both causes of action have the following characteristics:⁴¹

Table 2. Section 1983 and *Bivens* Lawsuits’ Characteristics

	Section 1983 Lawsuit	<i>Bivens</i> Lawsuit
Legal Basis	federal statute (42 U.S.C. § 1983, originally enacted in the Civil Rights Act of 1871)	implied from the 4 th Amendment of the United States Constitution
Defendant	state or local officials and local governmental bodies	federal officials
Plaintiff	citizens and noncitizens	citizens and noncitizens
Remedies	monetary damages and/or injunctive relief	monetary damages and/or injunctive relief
Forum	federal or state court	federal court

Source: processed from deLisle, 2014.

2.2.1. Section 1983 Lawsuit

Section 1983 Lawsuit is based on a cause of action established under 42 U.S.C. § 1983 of the Civil Rights Act of 1871 and enacted following the American

³⁹ Fallon Jr., “Bidding Farewell to Constitutional Torts,” 946–50.
⁴⁰ West, “Refining Constitutional Torts,” 875.
⁴¹ Jacques deLisle, “Damages Remedies for Infringements of Human Rights Under U.S. Law,” *American Journal of Comparative Law* 62, no. 1 (July 1, 2014): 474–83.

Civil War with ratification of the Reconstruction Amendment.⁴² Section 1983 provides that any individual may sue for damages or injunctive relief to remedy the “*deprivation of any rights, privileges, or immunities secured by the Constitution and laws*” of the United States.⁴³ However, in the eight decades after its enactment, Section 1983 has been in a state of dormancy until the rulings in *Monroe v. Pape* (hereinafter *Monroe*) and *Monell v. Department of Social Services* (hereinafter *Monell*) revitalized its potency as a cause of action.⁴⁴

The revival started with *Monroe*, where state government officials could be sued for violating citizens’ federal constitutional rights.⁴⁵ The Supreme Court expanded the scope of Section 1983 to include local government entities in *Monell* when the official policy, custom, practice, or usage caused constitutional violation.⁴⁶ This expansion did not extend to state governments, which were protected by the longstanding doctrine of state’s sovereign immunity.⁴⁷

The revival of Section 1983 is widely viewed as an attempt by the Supreme Court to fill the remedial gap left by *Ex Parte Young*.⁴⁸ *Ex Parte Young*’s prospective remedies are useless when a constitutional violation has occurred in the past.⁴⁹ Justice William O. Douglas, writing for the majority in *Monroe*, affirmed this purpose, stating the statute has three primary purposes: 1) to “*override certain*

⁴² Bailey D. Barnes, “The Constitution’s Waning Enforceability: Constitutional Torts After *Egbert & Vega*,” *Hastings Constitutional Law Quarterly* 50, no. 1 (2023): 74–75.

⁴³ Fallon Jr., “Bidding Farewell to Constitutional Torts,” 946.

⁴⁴ Fallon Jr., “Bidding Farewell to Constitutional Torts,” 946; Noah Smith-Drelich, “The Constitutional Tort System,” *Indiana Law Journal* 96, no. 2 (2021): 575; Katherine Mims Crocker, “Qualified Immunity, Sovereign Immunity, and Systemic Reform,” *Duke Law Journal* 71, no. 8 (2022): 1727–28; Barnes, “The Constitution’s Waning Enforceability: Constitutional Torts After *Egbert & Vega*,” 75.

⁴⁵ Barnes, “The Constitution’s Waning Enforceability,” 76.

⁴⁶ Samuel Rossum, “Constitutional Whodunnits: Maintaining Section 1983 and Bivens Suits Against Unidentified State Actors,” *University of Pennsylvania Journal of Constitutional Law* 25, no. 3 (2023): 620–23; Alexander A. Reinert, Joanna C. Schwartz, and James E. Pfander, “New Federalism and Civil Rights Enforcement,” *Northwestern University Law Review* 116, no. 3 (2021): 754–55; Fallon Jr., “Bidding Farewell to Constitutional Torts,” 995.

⁴⁷ Michael L. Wells, William P. Marshall, and Gene R. Nichol, *Cases and Materials on Federal Courts*, 4th ed. (St. Paul: West Academic Publishing, 2020), 33; Aaron L. Nielson and Christopher J. Walker, “Qualified Immunity and Federalism,” *The Georgetown Law Journal* 109, no. 2 (2020): 253; Fred Smith, “Local Sovereign Immunity,” *Columbia Law Review* 116, no. 2 (2016): 449–54.

⁴⁸ Katherine Mims Crocker, “Constitutional Rights and Remedial Consistency,” *Virginia Law Review* 110, no. 3 (2024): 542–43; Richard H. Fallon Jr., “Constitutional Remedies: In One Era and Out the Other,” *Harvard Law Review* 136, no. 5 (2023): 1350; James E. Pfander and Jacob P. Wentzel, “The Common Law Origins of *Ex Parte Young*,” *Stanford Law Review* 72 (2020): 1283–90; Fallon Jr., “Bidding Farewell to Constitutional Torts,” 947–48.

⁴⁹ Wells, Marshall, and Nichol, *Cases and Materials on Federal Courts*, 23.

kinds of state laws” that amount to “invidious legislation by States against the rights or privileges of citizens of the United States”, 2) to offer a remedy where the state’s remedy is inadequate; and 3) to provide a federal remedy where the state remedy, while adequate in theory, was not available in practice.⁵⁰

Even though Section 1983 permits suits against state officials and local government entities, the effectiveness is constrained by significant limitations. The most formidable barrier is the doctrine of qualified immunity, which shields state officials from liability for damages unless the conduct violated “clearly established” statutory or constitutional law.⁵¹ Another limitation applies to the payment of damages, where state governments may cap the amount of indemnification provided to state officials.⁵² Furthermore, local governments may develop indemnification policies or criteria to deny indemnification in certain cases.⁵³

2.2.2. *Bivens* Lawsuit

Bivens Lawsuit provides a non-statutory cause of action, allowing citizens and noncitizens to sue federal officers for constitutional violations.⁵⁴ Unlike Section 1983 which is statutory, *Bivens* is implied directly from the United States Constitution based on the theory of a self-executing constitution.⁵⁵ The Supreme Court initially expanded the scope of rights protected under *Bivens* to include the 5th Amendment right to due process (*Davis v. Passman*) and the 8th Amendment

⁵⁰ Barnes, “The Constitution’s Waning Enforceability,” 76.

⁵¹ Teresa Ravenell, “Unincorporating Qualified Immunity,” *Loyola University Chicago Law Journal* 53, no. 2 (2022): 379–86; Kelsey Joyce Dayton, “Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine,” *The University of Chicago Law Review* 86, no. 6 (2019): 1614.

⁵² Reinert, Schwartz, and Pfander, “New Federalism and Civil Rights Enforcement,” 764; Nielson and Walker, “Qualified Immunity and Federalism,” 268–82.

⁵³ Reinert, Schwartz, and Pfander, “New Federalism and Civil Rights Enforcement,” 764; Joanna C. Schwartz, “Qualified Immunity and Federalism All the Way Down,” *The Georgetown Law Journal* 109, no. 2 (2020).

⁵⁴ Andrew Kent, “Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers,” *Notre Dame Law Review* 96, no. 5 (2021): 1756.

⁵⁵ Peter Margulies, “Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases,” *Case Western Reserve Law Review* 68, no. 4 (2018): 1154; Helen Gugel, “Remaking the Mold: Pursuing Failure-to-Protect Claims under State Constitutions via Analogous Bivens Actions,” *Columbia Law Review* 110, no. 5 (2010): 1315–18; Susan Bandes, “Reinventing Bivens: The Self-Executing Constitution,” *Southern California Law Review* 68 (1995): 289–91.

prohibition against cruel and unusual punishment (*Carlson v. Green*).⁵⁶ However, this expansion was short-lived. The Supreme Court subsequently focused not on broadening the doctrine, but on severely limiting its application and efficacy.⁵⁷

This judicial retreat exemplifies the reasons *Bivens* serves as a cautionary tale. The Court has created a gauntlet of limitations, such as precluding suits where an “alternative remedy” exists (*Bush v. Lucas* and *Minneci v. Pollard*) based on a vague “special factors counseling hesitation” test used in *Ziglar v. Abbasi* to shield post-9/11 detention policies from review.⁵⁸ Furthermore, *Bivens* plaintiffs must defeat qualified immunity.⁵⁹

Bivens decision is viewed as a judicial anomaly, which is a federal common law remedy after *Erie Railroad Co. v. Tompkins* prohibited the creation of federal general common law.⁶⁰ Critics argue that this was an act of policymaking, creating a cause of action in a manner better suited to Congress or the states.⁶¹ Despite the theoretical tension, *Bivens* was seen as the Court’s commitment to racial justice, economic inequality, and limited government⁶² through the means of deterrence. Chief Justice William Rehnquist affirmed in *Correctional Services Corp v. Malesko* that the doctrine’s main purpose was to deter “[federal] officers from engaging in constitutional wrongdoing.”⁶³

⁵⁶ Aseem Chipalkatti, “A Backdoor Bivens Remedy: State Civil Rights Torts and the Federal Tort Claims Act,” *University of Pennsylvania Journal of Constitutional Law* 23, no. 5 (2021): 13.

⁵⁷ E. Garrett West, “Torts Stories After Bivens,” *Harvard Law Review Forum* 138 (2025): 103–4; Chipalkatti, “A Backdoor Bivens Remedy: State Civil Rights Torts and the Federal Tort Claims Act,” 13.

⁵⁸ Joanna C. Schwartz, Alexander A. Reinert, and James E. Pfander, “Going Rogue: The Supreme Court’s Newfound Hostility to Policy-Based Bivens Claims,” *Notre Dame Law Review* 96, no. 5 (2021): 1857–58; Alexander J. Lindvall, “Gutting Bivens: How the Supreme Court Shielded Federal Officials from Constitutional Litigation,” *Missouri Law Review* 85, no. 4 (2020): 1022; Ben Shattuck, “Bivens or Nothing: Constitutional Torts and Cross-Border Shootings,” *Arizona State Law Journal* 53 (2020): 1385; Stephen I. Vladeck, “The Disingenuous Demise and Death of Bivens,” *Cato Supreme Court Review* (2019): 273–74.

⁵⁹ Lindvall, “Gutting Bivens: How the Supreme Court Shielded Federal Officials Gutting Bivens: How the Supreme Court Shielded Federal Officials from Constitutional Litigation,” 1059–60.

⁶⁰ Ann Woolhandler and Michael G. Collins, “Was Bivens Necessary?” *Notre Dame Law Review* 96, no. 5 (2021): 1893–94.

⁶¹ West, “Torts Stories After Bivens,” 108; Crocker, “Constitutional Rights and Remedial Consistency,” 552–55; Woolhandler and Collins, “Was Bivens Necessary?” 1894.

⁶² Katherine Mims Crocker, “A Scapegoat Theory of Bivens,” *Notre Dame Law Review* 96, no. 5 (2021): 1949.

⁶³ Lindvall, “Gutting Bivens: How the Supreme Court,” 1025.

2.3. Reconstructing the Governmental Unlawful Acts Regulation Based on the Concept of Constitutional Tort as a Form of Constitutional Complaint

This article proposes four main reforms to reconstruct Indonesian governmental unlawful acts cause of action. **First**, the reform must address State Administrative Courts' inability to review a written decision when hearing a governmental unlawful acts case. This flaw is from the definition of "Governmental Action" in Article 1 paragraph (1) of Supreme Court Regulation 2/2019, "*the actions of Government Officials or other state organizers to perform and/or not perform concrete actions in the context of government administration*".⁶⁴ However, theoretically, there are two types of factual actions:⁶⁵

1. Type 1: factual action based on a written state administrative decision, and
2. Type 2: factual action not based on a written state administrative decision.

By limiting the scope of review to the "concrete action," the regulation precludes the court from invalidating the underlying written state administrative decision in a Type 1 case by limiting the scope of review to the "concrete action".⁶⁶ This creates an absurd condition where a court can enjoin the enforcement of an unlawful order but cannot invalidate the order itself.

The first reform of the article does not propose granting State Administrative Courts the power to invalidate the underlying written administrative decision.⁶⁷

⁶⁴ Supreme Court of the Republic of Indonesia, Supreme Court Regulation No. 2 of 2019 on Guidelines for the Settlement of Government Action Disputes and Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (Onrechtmatige Overheidsdaad [unlawful acts by the government]), art. 1, para. (1).

⁶⁵ Raines Wadi et al., "Tindakan Faktual Hasil Putusan Etik DKPP Sebagai Objek Pengujian Pengadilan Tata Usaha Negara [Factual Acts Resulting from DKPP Ethics Decisions as Objects of Review in the State Administrative Court]," *Jurnal Penelitian Hukum De Jure* 23, no. 1 (2023): 81–83; Arwanto, "Perlindungan Hukum Bagi Rakyat," 372–73.

⁶⁶ Agus Budi Susilo, "Reformulasi Perbuatan Melanggar Hukum Oleh Badan Atau Pejabat Pemerintahan Dalam Konteks Kompetensi Absolut Peradilan Tata Usaha Negara [Reformulation of Unlawful Acts by Government Agencies or Officials in the Context of the Absolute Competence of the State Administrative Court]," *Jurnal Hukum dan Peradilan* 2, no. 2 (July 31, 2013): 299–301.

⁶⁷ deLisle, "Damages Remedies for Infringements of Human Rights Under U.S. Law," 474–83.

In this context, the reform must focus on the legal effect of the injunction. To close this loophole, the law should be clarified to ensure that an injunction by State Administrative Courts against a Type 1 factual action automatically renders the related administrative decision unenforceable. Even though the injunction is technically aimed at the “factual action,” the practical legal effect must neutralize the unlawful written state administrative decision.⁶⁸

Second, in terms of judicial review standard, a governmental unlawful acts lawsuit has the same basis for review as judicial review of written state administrative decisions. The basis for review can be inferred from the following normative bases.⁶⁹

Table 3. Basis for Review under State Administrative Courts Law and the Governmental Administrative Law

No.	Law	Provision	Texts
1.	State Administrative Courts Law	Art. 53 par. (2)	The grounds that can be used in the lawsuit, as referred to in paragraph (1) are: a. the state administrative decision being challenged conflicts with the applicable laws and regulations; b. ...

⁶⁸ Alexandra Nickerson and Kellen R. Funk, “When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action,” *California Law Review* 111 (2023): 1771–72.

⁶⁹ Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 53, para. (2); Republik Indonesia [Republic of Indonesia], Law No. 30 of 2014 on Government Administration, art. 7, para. (2b), art. 8, para. (2), and art. 9, paras. (1)–(2).

No.	Law	Provision	Texts
2.	Governmental Administrative Law	Art. 7 par. (2b)	Governmental officials have the duty to]: a. comply with ... the applicable laws and regulations; b. ...
		Art. 8 par. (2)	Agencies and/or Government Officials, in exercising Authority, must base their actions on: a. laws and regulations; and b. ...
		Art. 9 par. (1) and (2)	(1) Every Decision and/or Action must be based on the provisions of laws and regulations ... (2) The laws and regulations referred to in paragraph (1) include: a. laws and regulations that are the basis of Authority; and b. laws and regulations that are the basis for establishing and/or carrying out Decisions and/or Actions.

Source: processed by the Authors, 2025.

Table 3 shows that laws and regulations (*peraturan perundang-undangan*) are important grounds for review in governmental unlawful act lawsuits. The term “laws and regulations” is not defined in the Governmental Administration Law. Article 7 paragraph (1) of Law Number 12 of 2011 on the Establishment of Laws and Regulations specifies the following types of laws and regulations:⁷⁰

- a. The 1945 Constitution;
- b. People’s Consultative Assembly’s Decree;

⁷⁰ Republik Indonesia [Republic of Indonesia], Law No. 12 of 2011 on the Establishment of Laws and Regulations, as lastly amended by Law No. 13 of 2022 on the Second Amendment to Law No. 12 of 2011 on the Establishment of Laws and Regulations, art. 7, para. (1).

- c. Law/Government Regulation in Lieu of Law;
- d. Government Regulation;
- e. Presidential Regulation;
- f. Provincial Regional Regulation; and
- g. Regency/Municipal Regional Regulation.

The general use of the phrase “laws and regulations” in Governmental Administration Law implies that the term may include the 1945 Constitution. Thus, under the current regulatory scheme, the 1945 Constitution could serve as the basis for review in a governmental unlawful acts lawsuit.

An implied power is insufficient to overcome the deep-seated “truism” of Constitutional Court exclusivity; State Administrative Court judges will not use a power that is not explicit. Therefore, the second major reform is to make the power explicit. The law must be amended to provide clear, unambiguous statutory authorization for State Administrative Courts to employ the 1945 Constitution as a standard of review in governmental unlawful acts cases. The United States comparison is instructive here. The implied *Bivens* remedy is textually weak and has been judicially dismantled, while the explicit Section 1983 remains a durable and clear grant of authority for courts to hear constitutional tort claims.⁷¹ Indonesia must follow the Section 1983 model instead of *Bivens*.

Third, clear procedural safeguards must be established to protect the Constitutional Court’s role as the final interpreter of the constitution. This article proposes two guarantees:

1. Binding Interpretation: State Administrative Courts must give full effect to any existing Constitutional Court interpretation relevant to the case, and
2. Stay of Proceedings: State Administrative Courts must stay “constitutional complaint” proceedings when a relevant case is pending at the Constitutional Court.

⁷¹ Michael A. Mazzuchi, “Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism,” *Michigan Law Review* 90, no. 5 (1992): 1092.

The “stay” provision is analogous to Article 55 of the Law Number 24 of 2003 on Constitutional Court, as lastly amended by Law Number 7 of 2020 on the Third Amendment to Law Number 24 of 2003 on Constitutional Court (hereinafter Constitutional Court Law) and Constitutional Court Decision Number 93/PUU-XV/2017. This is essential for ensuring legal certainty and consistency between Constitutional Court and State Administrative Courts’ interpretations.⁷³ The approach includes practical risks since the substantial caseload can cause an overly broad stay to indefinitely suspend legitimate proceedings in State Administrative Courts. Therefore, this stay provision must be balanced with two specific caveats as follows:

1. A stay is only mandatory when the pending Constitutional Court case is factually or legally similar that its outcome would dispositively affect the basis of the “constitutional complaint” case, and
2. A stay is not required for Constitutional Court cases in the preliminary examination stage.

Lastly, regarding damages remedy. Prior to the transfer of jurisdiction to adjudicate governmental unlawful acts to the state administrative court, the amount of payable damages was not limited because it was still subject to the jurisdiction of the general courts.⁷³ The amount of payable damages was not regulated by the Civil Code or the Regulations on Civil Procedure, allowing the courts to tailor the amount of damages remedy proportional to the harm suffered by the plaintiffs.⁷⁴ Therefore, there needs to be an amendment to Government Regulation 43/1991 to provide legal certainty and the guarantee of just relief to plaintiffs. Absent an amendment, the damages cap discourages potential plaintiffs from filing a lawsuit and renders recovery “virtually meaningless”, reducing

⁷² Suparto Suparto, “The Problematic Implementation of Law and Regulations Testing in Indonesia,” *Yuridika* 37, no. 1 (March 1, 2022): 264; Collins and Faiz, “Penambahan Kewenangan Constitutional Question Di Mahkamah Konstitusi Sebagai Upaya Untuk Melindungi Hak-Hak Konstitusional Warga Negara [Adding Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens’ Constitutional Rights],” 691; Adhitya Widya Kartika, “The Existence of Decision Norms of the Constitutional Court as a Source of Legislative and Executive Laws,” *Lentera Hukum* 6, no. 2 (July 29, 2019): 315

⁷³ Republik Indonesia [Republic of Indonesia], Law No. 30 of 2014 on Government Administration, art. 88; Barokah and Erliyana, “Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara,” 825.

⁷⁴ Abrianto, Nugraha, and Grady, “Perkembangan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah Pasca-Undang-Undang Nomor 30 Tahun 2014 (Development of Lawsuit for Law Violation by the Government Post Statute/Law Number 30 of 2014),” 48–59.

the effectiveness of “constitutional complaint” as a deterrent to constitutional violations.⁷⁵

III. CONCLUSION

With no constitutional amendment in sight, the attribution of constitutional complaint authority in the form of a constitutional tort to State Administrative Courts becomes a viable alternative to the expansion of the Constitutional Court’s jurisdiction that certainly would require a constitutional amendment. This is accomplished by reconstructing the existing jurisdiction of State Administrative Courts in adjudicating governmental unlawful acts lawsuits currently governed by laws (*undang-undang*). The reconstruction can be accomplished by borrowing some aspects of constitutional tort as it is known in the United States. Even though the current regulatory scheme provides a textual basis for the adoption of constitutional tort, a clear statutory authorization for state administrative judges to interpret the 1945 Constitution in reviewing governmental unlawful acts is necessary. A statutory grant of authority creates a strong legal basis for the plaintiffs to sue government officials for constitutional wrongdoings. This grant does not undermine the constitutionally assigned authority of the as the final interpreter of the 1945 Constitution, since state administrative judges are required to defer to the Constitutional Court’s interpretation where available and applicable.

Remedies are at the core of the adoption proposal, representing the fundamental pursuit of plaintiffs in a constitutional tort case. Injunctions and damages relief become the “bread and butter” of governmental unlawful acts litigation. These concepts are not available under the current constitutional review authority. Imminent violations of citizens’ constitutional rights remain unchecked, past constitutional wrongs go unremedied, and government officials who engage in misconduct act without deterrence without injunctions, or damages. This goal is to achieve a balanced system that protects citizens’ constitutional rights while allowing government officials to carry out duties effectively.

⁷⁵ John C. Jeffries, “Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts,” *Virginia Law Review* 75, no. 8 (November 1989): 1461–64.

BIBLIOGRAPHY

- Abrianto, Bagus Oktafian, Xavier Nugraha, and Nathanael Grady. "Perkembangan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah Pasca-Undang-Undang Nomor 30 Tahun 2014 [Development of Lawsuit for Law Violation by the Government Post Law Number 30 of 2014]." *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 11, no. 1 (2020). <https://doi.org/10.22212/jnh.v11i1.1574>.
- Alexander, Larry, and Frederick Schauer. "On Extrajudicial Constitutional Interpretation." *Harvard Law Review* 110, no. 7 (1997). <https://doi.org/10.2307/1342175>.
- Anggono, Bayu Dwi. "Pembatasan Pengajuan Perkara Sengketa Hasil Pemilihan Kepala Daerah Di Mahkamah Konstitusi Dan Implikasinya Terhadap Jaminan Keamanan Nasional [Restrictions on Filing Regional Head Election Result Disputes in the Constitutional Court and Their Implications for National Security Guarantees]." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 5, no. 1 (2016). <https://doi.org/10.33331/rechtsvinding.v5i1.6>.
- Arundhati, Gautama Budi. "Kemungkinan Penerapan Preliminary Ruling Procedure Sebagai Media Constitutional Complaint Di Mahkamah Konstitusi [The Possibility of Applying a Preliminary Ruling Procedure as a Means of Constitutional Complaint in the Constitutional Court]." *Jurnal Konstitusi* 14, no. 4 (2018). <https://doi.org/10.31078/jk1446>.
- Arwanto, Bambang. "Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah [Legal Protection for the People Resulting from Factual Government Actions]." *Yuridika* 31, no. 3 (2017). <https://doi.org/10.20473/ydk.v31i3.4857>.
- Bandes, Susan. "Reinventing Bivens: The Self-Executing Constitution." *Southern California Law Review* 68 (1995). <https://via.library.depaul.edu/lawfacpubs/1535/>.

- Barnes, Bailey D. "The Constitution's Waning Enforceability: Constitutional Torts After *Egbert & Vega*." *Hastings Constitutional Law Quarterly* 50, no. 1 (2023). <https://scholarship.law.missouri.edu/facpubs/1292>.
- Barokah, Muhamad Raziv, and Anna Erliyana. "Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara: Gugatan Perbuatan Melawan Hukum Oleh Penguasa (Onrechtmatige Overheidsdaad [unlawful acts by the government]) [The Shift of Absolute Competence from the General Courts to the State Administrative Courts: Claims for Unlawful Acts by the Authorities]." *Jurnal Hukum & Pembangunan* 51, no. 4 (2021). <https://doi.org/10.21143/jhp.vol51.no4.3290>.
- Bhat, P. Ishwara. *Idea and Methods of Legal Research*. Oxford University Press, 2019.
- Butt, Simon, Melissa Crouch, and Rosalind Dixon. "Special Issue: The First Decade of Indonesia's Constitutional Court." *Australian Journal of Asian Law* 16, no. 2 (2016). <https://ssrn.com/abstract=2745100>.
- Chakim, M. Lutfi. "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions." *Constitutional Review* 5, no. 1 (2019). <https://doi.org/10.31078/consrev514>.
- Chandra, M. Jeffri Arlinandes, Bayu Dwi Anggono, and Febrian Febrian. "Rekonsruksi Tahapan Pembentukan Perundang-Undangan: Urgensi Re-Harmonisasi Dan Evaluasi Sebagai Siklus Pembentukan Undang-Undang Yang Berkualitas [Reconstruction of the Stages of Lawmaking: The Urgency of Reharmonization and Evaluation as a Cycle of Quality Lawmaking]." *Jurnal Legislasi Indonesia* 19, no. 4 (2022). <https://doi.org/10.54629/jli.v19i4.980>.
- Chipalkatti, Aseem. "A Backdoor Bivens Remedy: State Civil Rights Torts and the Federal Tort Claims Act." *University of Pennsylvania Journal of Constitutional Law* 23, no. 5 (2021). <https://scholarship.law.upenn.edu/jcl/vol23/iss5/6>.
- Christiani, Theresia Anita. "Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object." *Procedia - Social and Behavioral Sciences* 219 (2016). <https://doi.org/10.1016/j.sbspro.2016.05.006>.

- Collins, Josua Satria, and Pan Mohamad Faiz. "Penambahan Kewenangan Constitutional Question Di Mahkamah Konstitusi Sebagai Upaya Untuk Melindungi Hak-Hak Konstitusional Warga Negara [Adding Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights]." *Jurnal Konstitusi* 15, no. 4 (2019). <https://doi.org/10.31078/jk1541>.
- Crocker, Katherine Mims. "A Scapegoat Theory of Bivens." *Notre Dame Law Review* 96, no. 5 (2021). <https://scholarship.law.nd.edu/ndlr/vol96/iss5/7>.
- Crocker, Katherine Mims. "Constitutional Rights and Remedial Consistency." *Virginia Law Review* 110, no. 3 (2024). <https://virginialawreview.org/articles/constitutional-rights-and-remedial-consistency/>.
- Crocker, Katherine Mims. "Qualified Immunity, Sovereign Immunity, and Systemic Reform." *Duke Law Journal* 71, no. 8 (2022). <https://scholarship.law.wm.edu/facpubs/2070>.
- Dayton, Kelsey Joyce. "Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine." *The University of Chicago Law Review* 86, no. 6 (2019).
- deLisle, Jacques. "Damages Remedies for Infringements of Human Rights Under U.S. Law." *American Journal of Comparative Law* 62, no. 1 (2014). <https://doi.org/10.5131/AJCL.2013.0033>.
- Devins, Neal, and Louis Fisher. "Judicial Exclusivity and Political Instability." *Virginia Law Review* 84, no. 1 (1998). <https://doi.org/10.2307/1073808>.
- Eddyono, Luthfi Widagdo. "Independence of the Indonesian Constitutional Court in Norms and Practices." *Constitutional Review* 3, no. 1 (2017). <https://doi.org/10.31078/consrev314>.
- 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). <https://doi.org/10.31078/consrev215>.

- Fallon, Richard H., Jr. "Bidding Farewell to Constitutional Torts." *California Law Review* 107 (2019). <https://www.californialawreview.org/print/bidding-farewell-to-constitutional-torts>.
- Fallon, Richard H., Jr. "Constitutional Remedies: In One Era and Out the Other." *Harvard Law Review* 136, no. 5 (2023). <https://harvardlawreview.org/print/vol-136/constitutional-remedies-in-one-era-and-out-the-other/>.
- Fallon, Richard H., Jr. "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age." *Texas Law Review* 96, no. 3 (2018). <https://texaslawreview.org/judicial-supremacy-departmentalism-rule-law-populist-age/>.
- Gugel, Helen. "Remaking the Mold: Pursuing Failure-to-Protect Claims under State Constitutions via Analogous Bivens Actions." *Columbia Law Review* 110, no. 5 (2010). <https://www.jstor.org/stable/27806651>.
- Hakim, M. Aunul, and Sheila Kusuma Wardani Amnesti. "Problematika Penanganan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah (Onrechtmatige Overheidsdaad [unlawful acts by the government]) Pada Peradilan Tata Usaha Negara [Problems in Handling Claims of Unlawful Acts by Government in the State Administrative Court]." *De Jure: Jurnal Hukum dan Syar'iah* 14, no. 1 (2022). <https://doi.org/10.18860/j-fsh.v14i1.15833>.
- Hantoro, Bimo Fajar. "Pembatasan Yudisial Dan Perluasan Kewenangan Mahkamah Konstitusi Dalam Memutus Sengketa Hasil Pilkada [Judicial Limitation and Expansion of the Constitutional Court's Authority in Deciding Regional Election Result Disputes]." *Media Iuris [Legal Media]* 7, no. 1 (2024). <https://doi.org/10.20473/mi.v7i1.41871>.
- Hirschl, Ran. *Comparative Matters: The Renaissance of Comparative Constitutional Law*. Oxford: Oxford University Press, 2014.
- Hutchinson, Terry, and Nigel Duncan. "Defining and Describing What We Do: Doctrinal Legal Research." *Deakin Law Review* 17, no. 1 (2012). <https://doi.org/10.21153/dlr2012vol17no1art70>.

- Isra, Saldi, and Pan Mohamad Faiz. "The Indonesian Constitutional Court: An Overview." In *Courts and Diversity*, edited by Bertus De Villiers, Saldi Isra, and Pan Mohamad Faiz. Leiden: Brill | Nijhoff, 2024. https://doi.org/10.1163/9789004691698_004.
- Jeffries, John C. "Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts." *Virginia Law Review* 75, no. 8 (1989). <https://doi.org/10.2307/1073245>.
- Johnsen, Dawn E. "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?" *Law and Contemporary Problems* 67, no. 3 (2004). <https://www.jstor.org/stable/27592054>.
- Kartika, Adhitya Widya. "The Existence of Decision Norms of the Constitutional Court as a Source of Legislative and Executive Laws." *Lentera Hukum* 6, no. 2 (2019). <https://doi.org/10.19184/ejhl.v6i2.10495>.
- Kent, Andrew. "Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers." *Notre Dame Law Review* 96, no. 5 (2021). <https://scholarship.law.nd.edu/ndlr/vol96/iss5/1>.
- Lailam, Tanto, and M. Lutfi Chakim. "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences." *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023). <https://doi.org/10.22304/pjih.v10n2.a1>.
- Lailam, Tanto, Putri Anggia, and Irwansyah Irwansyah. "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court." *Jurnal Konstitusi* 19, no. 3 (2022). <https://doi.org/10.31078/jk1939>.
- Leckey, Robert. "Review of Comparative Law." *Social & Legal Studies* 26, no. 1 (2017). <https://doi.org/10.1177/0964663916670718>.
- Lindvall, Alexander J. "Gutting Bivens: How the Supreme Court Shielded Federal Officials from Constitutional Litigation." *Missouri Law Review* 85, no. 4 (2020). <https://scholarship.law.missouri.edu/mlr/vol85/iss4/7>.

- Margulies, Peter. "Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases." *Case Western Reserve Law Review* 68, no. 4 (2018).
- Marzuki, Peter Mahmud. *Penelitian Hukum: Edisi Revisi* [Legal Research: Revised Edition]. Jakarta: Kencana, 2017.
- Mazzuchi, Michael A. "Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism." *Michigan Law Review* 90, no. 5 (1992). <https://repository.law.umich.edu/mlr/vol90/iss5/6>.
- Nelken, David. "Comparative Legal Research and Legal Culture: Facts, Approaches, and Values." *Annual Review of Law and Social Science* 12, no. 1 (2016). <https://doi.org/10.1146/annurev-lawsocsci-110615-084950>.
- Nickerson, Alexandra, and Kellen R. Funk. "When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action." *California Law Review* 111 (2023). <https://doi.org/10.15779/Z384X54H8W>.
- Nielson, Aaron L., and Christopher J. Walker. "Qualified Immunity and Federalism." *The Georgetown Law Journal* 109, no. 2 (2020). <https://ssrn.com/abstract=3544897>.
- Palguna, I Dewa Gede. "Constitutional Complaint and the Protection of Citizens the Constitutional Rights." *Constitutional Review* 3, no. 1 (2017). <https://doi.org/10.31078/consrev311>.
- Pfander, James E., and Jacob P. Wentzel. "The Common Law Origins of *Ex Parte Young*." *Stanford Law Review* 72 (2020).
- Post, Robert, and Reva Siegel. "Popular Constitutionalism, Departmentalism, and Judicial Supremacy." *California Law Review* 92, no. 4 (2004). <https://doi.org/10.2307/3481316>.
- Prasetianingsih, Rahayu. "Judicial Activism in Indonesia: Constitutional Culture by the Constitutional Court." *PETITA: Jurnal Kajian Ilmu Hukum dan Syariah* 5, no. 2 (2020). <https://doi.org/10.22373/petita.v5i2.106>.

- Purnamasari, Galuh Candra. "Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara Melalui Pengaduan Konstitusional (Constitutional Complaint) [Legal Remedies for Violations of Citizens' Constitutional Rights through Constitutional Complaint]." *Veritas et Justitia* 3, no. 2 (2017). <https://doi.org/10.25123/vej.2668>.
- Ravenell, Teresa. "Unincorporating Qualified Immunity." *Loyola University Chicago Law Journal* 53, no. 2 (2022). <https://lawcommons.luc.edu/lucj/vol53/iss2/5>.
- Reinert, Alexander A., Joanna C. Schwartz, and James E. Pfander. "New Federalism and Civil Rights Enforcement." *Northwestern University Law Review* 116, no. 3 (2021). <https://scholarlycommons.law.northwestern.edu/nulr/vol116/iss3/3>.
- Republik Indonesia [Republic of Indonesia]. Government Regulation No. 43 of 1991 on Damages and Procedures for Implementation in State Administrative Courts.
- Republik Indonesia [Republic of Indonesia]. Law No. 12 of 2011 on the Establishment of Laws and Regulations, as lastly amended by Law No. 13 of 2022 on the Second Amendment to Law No. 12 of 2011 on the Establishment of Laws and Regulations.
- Republik Indonesia [Republic of Indonesia]. Law No. 30 of 2014 on Government Administration.
- Republik Indonesia [Republic of Indonesia]. Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts.
- Rossum, Samuel. "Constitutional Whodunnits: Maintaining Section 1983 and Bivens Suits Against Unidentified State Actors." *University of Pennsylvania Journal of Constitutional Law* 25, no. 3 (2023). <https://doi.org/10.58112/jcl.25-3.3>.
- Roux, Theunis. "Indonesia's Judicial Review Regime in Comparative Perspective." *Constitutional Review* 4, no. 2 (2018). <https://doi.org/10.31078/consrev422>.

- Schwartz, Joanna C. "Qualified Immunity and Federalism All the Way Down." *The Georgetown Law Journal* 109, no. 2 (2020). <https://ssrn.com/abstract=3565362>.
- Schwartz, Joanna C., Alexander A. Reinert, and James E. Pfander. "Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based Bivens Claims." *Notre Dame Law Review* 96, no. 5 (2021). <https://scholarship.law.nd.edu/ndlr/vol96/iss5/3>.
- Setiawan, Andri, Antikowati Antikowati, and Bayu Dwi Anggono. "Kekuatan Mengikat Putusan Pengujian Undang-Undang Oleh Mahkamah Konstitusi Terhadap Putusan Pengujian Peraturan Perundang-Undangan Oleh Mahkamah Agung [The Binding Force of Constitutional Court Decisions on Judicial Review of Laws Against Supreme Court Decisions on Review of Laws and Regulations]." *Jurnal Legislasi Indonesia* 18, no. 1 (2021). <https://doi.org/10.54629/jli.v18i1.796>.
- Shattuck, Ben. "Bivens or Nothing: Constitutional Torts and Cross-Border Shootings." *Arizona State Law Journal* 53 (2020). <https://arizonastatelawjournal.org/2021/02/23/bivens-or-nothing-constitutional-torts-and-cross-border-shootings/>.
- Sisk, Gregory. "Recovering the Tort Remedy for Federal Official Wrongdoing." *Notre Dame Law Review* 96, no. 5 (2021). <https://scholarship.law.nd.edu/ndlr/vol96/iss5/2>.
- Smith, Fred. "Local Sovereign Immunity." *Columbia Law Review* 116, no. 2 (2016). <https://www.jstor.org/stable/43744120>.
- Smith-Drelich, Noah. "The Constitutional Tort System." *Indiana Law Journal* 96, no. 2 (2021). <https://www.repository.law.indiana.edu/ilj/vol96/iss2/6>.
- Sommermann, Karl-Peter. "Constitutional State and Public Administration." In *Public Administration in Germany*, edited by Sabine Kuhlmann et al. Birmingham: Palgrave Macmillan, 2021. https://doi.org/10.1007/978-3-030-53697-8_2.

- Suparto, Suparto. "The Problematics Implementation of Law and Regulations Testing in Indonesia." *Yuridika* 37, no. 1 (2022). <https://doi.org/10.20473/ydk.v37i1.28627>.
- Supreme Court of the Republic of Indonesia. Supreme Court Circular No. 2 of 2019 on the Implementation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as Guidelines for the Performance of Court Duties.
- Supreme Court of the Republic of Indonesia. Supreme Court Regulation No. 2 of 2019 on Guidelines for the Settlement of Government Action Disputes and Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (Onrechtmatige Overheidsdaad [unlawful acts by the government]).
- Susilo, Agus Budi. "Reformulasi Perbuatan Melanggar Hukum Oleh Badan Atau Pejabat Pemerintahan Dalam Konteks Kompetensi Absolut Peradilan Tata Usaha Negara [Reformulation of Unlawful Acts by Government Agencies or Officials in the Context of the Absolute Competence of the State Administrative Court]." *Jurnal Hukum dan Peradilan* 2, no. 2 (2013). <https://doi.org/10.25216/jhp.2.2.2013.291-308>.
- Taekema, Sanne. "Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice." *Law and Method* 2018, no. 2 (2018). <https://doi.org/10.5553/REM/.000031>.
- Vladeck, Stephen I. "The Disingenuous Demise and Death of Bivens." *Cato Supreme Court Review* (2019).
- Wadi, Raines, et al. "Tindakan Faktual Hasil Putusan Etik DKPP Sebagai Objek Pengujian Pengadilan Tata Usaha Negara [Factual Acts Resulting from DKPP Ethics Decisions as Objects of Review in the State Administrative Court]." *Jurnal Penelitian Hukum De Jure* [De Jure Journal of Legal Research] 23, no. 1 (2023). <https://doi.org/10.30641/dejure.2023.V23.071-086>.
- Warjiyati, Sri, et al. "Complaint Authority for Constitutional Complaint by Indonesia's Constitutional Court." *Jurnal IUS Kajian Hukum dan Keadilan* 10, no. 2 (2022). <https://doi.org/10.29303/ius.v10i2.1070>.

- Weber, Ruth. "Law-Making Activity of the German Federal Constitutional Court." In *Judicial Law-Making in European Constitutional Courts*, edited by Monika Florczak-Wątor. London: Routledge, 2020. <https://doi.org/10.4324/9781003022442-2>.
- Wells, Michael L., William P. Marshall, and Gene R. Nichol. *Cases and Materials on Federal Courts*. 4th ed. St. Paul: West Academic Publishing, 2020.
- West, E. Garrett. "Refining Constitutional Torts." *The Yale Law Journal* 134 (2025). <https://www.yalelawjournal.org/feature/refining-constitutional-torts>.
- West, E. Garrett. "Torts Stories After Bivens." *Harvard Law Review Forum* 138 (2025).
- Wico, Standy, et al. "Constitutional Complaint in Indonesia Through the Lens of Legal Certainty." *Indonesian Journal of Law and Society* 2, no. 1 (2021). <https://doi.org/10.19184/ijls.v2i1.21449>.
- Woolhandler, Ann, and Michael G. Collins. "Was Bivens Necessary?" *Notre Dame Law Review* 96, no. 5 (2021). <https://scholarship.law.nd.edu/ndlr/vol96/iss5/5>.

THE EFFICACY OF THE RIGHT TO EDUCATION AND ITS IMPACT ON THE ELIMINATION OF CHILD LABOR IN INDONESIA AND TIMOR-LESTE

Asmin Fransiska*

The Law Faculty of Atma Jaya Catholic University of Indonesia, Jakarta, Indonesia
asmin.fr@atmajaya.ac.id

Inácio Loiola da Costa Oliveira Maia**

The Law Faculty of Atma Jaya Catholic University of Indonesia, Jakarta, Indonesia
Instituto Superior de Filosofia e Teologia (ISFIT), Timor-Leste
inomaia@isfit.edu.tl

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Abstract

Indonesia and Timor-Leste have actively ratified the international human rights instruments such as CRC, ICESCR as well as ILO Conventions. One of the fundamental human right is the right of education that mandated by the constitutional frameworks of Indonesia and Timor-Leste. Indonesia mandates twelve years of compulsory education, while Timor-Leste requires nine. On the other hand, child labor play important role hindering the right of education. In Timor-Leste, 16% of children are working in the service and agricultural sectors. Although as not as high in Timor-Leste, an estimated 1.76 million of the nation's 58.8 million children are engaged in child labor. These figures starkly contrast with the constitutional protections afforded by Article 28B and 31 of Indonesia's 1945 Constitution and Article 18 of Timor-Leste's Constitution, which explicitly protect children's rights and guarantee state-financed education. This study analyses the legal frameworks of both nations using comparative socio-legal methodology to assess the efficacy and implementation gaps their respective compulsory education programs. The findings indicate that while robust legal

* Asmin Fransiska is a legal scholar and academic at the Law Faculty of Atma Jaya Catholic University of Indonesia, Jakarta (Corresponding Author).

** Inácio Loiola da Costa Oliveira Maia is a lecturer in Philosophy of Law at the Instituto Superior de Filosofia e de Teologia (ISFIT), Dom Jaime Garcia Goulart, Dili, Timor-Leste.



and constitutional mandates exist, their enforcement is severely undermined. Key impediments identified include pervasive poverty, the persistence of child labor in hazardous conditions, and deeply embedded sociocultural norms that frame children as economic assets rather than as rights-holders. This study concludes that a significant discrepancy exists between de jure protections and de facto realities, positing that legal mandates for education are insufficient without concurrent, targeted interventions that address the complex socioeconomic drivers of child labor.

Keywords: Child labor; Child rights; Constitution; Human rights; The rights to education

I. INTRODUCTION

Timor-Leste and Indonesia claim to be states governed by the rule of law and human rights obligation under international human rights law.¹ To fulfil this obligation, the State must focus on three key actions: to respect, to protect, and to achieve human rights.² Compliance entails Timor-Leste and Indonesia taking progressive steps to ensure the realization of these rights.³ Furthermore, both constitutions should interpret human rights as having universal principles as legal rights and, therefore, should be obeyed by the states.⁴

Article 1(1) of the Constitution of Timor-Leste states, “The Democratic Republic of Timor-Leste is a democratic, sovereign, independent, and united State, based on the law, the will of the people, and the honor of human dignity.” As a state governed by law, the government has a legal responsibility to protect the rights of every citizen, including the rights of children⁵. Meanwhile, the Indonesian Constitution states that the State of Indonesia shall be a state based on the rule of law;⁶ moreover, it declares that every child shall have the right to live, grow, and develop, and shall have the right to protection from violence and

¹ Jack Donnelly, “Cultural Relativism and Universal Human Rights,” *Human Rights Quarterly* 6, no. 4 (1984): 411.

² Katharine G. Young, “Rights and Obligations,” in *International Human Rights Law*, 4th ed., ed. Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (Oxford: Oxford University Press, 2022), 129–48.

³ Young, “Rights and Obligations.”

⁴ Titon Slamet Kurnia and Ninon Melatyugra, “Universality of Rights as an Interpretive Principle for the Indonesian Constitutional Court,” *Constitutional Review* 10, no. 2 (2024): 474.

⁵ Constitution of the Democratic Republic of Timor-Leste, Article 6(1)(b): “The basic objectives of the State are: To guarantee and promote the basic rights and freedoms of citizens as well as the honour for the principles of a democratic State based on the rule of law.”

⁶ 1945 Constitution of the Republic of Indonesia, Article 1.

discrimination.⁷ Failure to fulfil this responsibility is considered a violation of the essence of the State, because the Constitution governs it as the highest law, and the principles of human rights as customary international law. Consequently, the State has a duty as a human rights obligor, meaning it is the government's responsibility to uphold these rights.

Under international human rights law, the State must protect children's rights. In Indonesia and Timor Leste, these rights are safeguarded under national child protection laws. Timor Leste⁸ and Indonesia⁹ have also ratified the United Nations Convention on the Right of the Child (CRC), with Timor Leste being a new United Nations (UN) member. Timor-Leste gained independence in 2002 and, strives to establish and develop a country that promotes the welfare of its people, as outlined in the Constitution of the Democratic Republic of Timor Leste (KRDTL). As a rule-of-law State, Timor-Leste embraces democratic principles, including respect for human dignity.¹⁰ Indonesia gained independence in acknowledged and guaranteed human rights under the 1945 Indonesian Constitution.¹¹ Though Indonesia and Timor Leste may differs in their respective path to independence and the enactment of its democracy, child labor still harbours as one of the main unresolved issue in its society.

Defining the word "child" may constitute a task on its own. Legal definition varied amongst jurisdictions, influenced not only by how a state define the word from a legislative frameworks but also to an extend on the efforts made by state in integrating international legal norms, many referring to the scope delineated by the CRC.¹² On the other hand, the definition and context of a "child" can be entirely different from an economic and development standpoint. Children are discerned through human capital theory, holding their role as

⁷ 1945 Constitution of the Republic of Indonesia, Article 28B(2).

⁸ Timor-Leste National Parliamentary Resolution No. 16/2003 on Ratification of the Convention on the Rights of the Child.

⁹ Presidential Decree No. 36 of 1990 on Ratification of the Convention on the Rights of the Child (Republic of Indonesia 1990).

¹⁰ Constitution of the Democratic Republic of Timor-Leste, preamble: "Fully aware of the need to build a democratic culture and institutions appropriate for a State of Law, where respect for the Constitution and for democratically elected institutions is an unquestionable foundation."

¹¹ 1945 Constitution of the Republic of Indonesia.

¹² Convention on the Rights of the Child, adopted November 20, 1989, UN General Assembly Resolution 44/25.

“resources”, to support the better future of their nation. Such view stresses and limit the role of children solely as an investment, where dedication towards health and education serve the purposes for future returns (both societal and economically).¹³ This specific view on children has been raised as a concern by the CRC, highlighting that children shall not be confined merely as tools of development but to acknowledge them as an independent subject with rights to be respected.¹⁴ Consequently, this approach asserts that children are entitled to a specific set of inalienable rights and special protections, rather than being primarily defined by future responsibilities or their utility to the state.¹⁵ They require guidance and protection to ensure their physical, mental, and social development. Children can mature into individuals who contribute positively to their country’s growth when adequately supported.¹⁶

Human rights protection is essential for everyone, especially for children living in poverty, as it leads to forcing children into economic activities for many reasons, such as child labor. However, both in Indonesia and Timor-Leste, child labor remains a significant issue that affects the implementation of children’s rights. According to the International Labor Organization (ILO), in Timor-Leste there is approximately 67,688 children aged 5 to 17 years, or 16.1% of this age group, are engaged in economic activities in rural and urban areas.¹⁷ While in Indonesia, the number of child laborers in 2022 is approximately 58.8 million children aged 5 to 17, of which 4.05 million, or 6.9%, are working. Among those working children, 1.76 million (43.3%) are considered child laborers, and unfortunately, 20.7 percent of them are involved in the worst forms of labor. Many of these child laborers come from rural areas, where extreme poverty persists.¹⁸

¹³ G. S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (New York: National Bureau of Economic Research, 1964), 155.

¹⁴ M. Freeman, “The ‘New’ Sociology of Childhood and Children’s Rights,” *The International Journal of Children’s Rights* 15, nos. 3–4 (2007): 413.

¹⁵ UNICEF, *A Human Rights-Based Approach to Programming: Conceptual Framework* (New York: United Nations Children’s Fund, 2007).

¹⁶ UNICEF, *Sustainable Development Starts And Ends With Safe, Healthy And Well-Educated Children*, 2013, 2.

¹⁷ UNICEF, “Orang Tua Jangan Libatkan Anak dalam Aktivitas Kerja [Parents Should Not Involve Children in Work Activities],” *TATOLI Agência Noticiosa de Timor-Leste*, accessed April 21, 2024; ILO, “Analysis of Child Economic Activity and School Attendance Statistics from National Household or Child Labor Surveys,” accessed June 1, 2024.

¹⁸ Ministry of Manpower of the Republic of Indonesia, *Roadmap Towards a Child Labour-Free Indonesia in 2022* (Jakarta: Ministry of Manpower of the Republic of Indonesia, 2022).

There are many findings stating that child labor has an impact on children's physical and mental development. Working children have higher rates of hospitalization than their non-working counterparts.¹⁹ Epidemiological studies reveal that children exposed to toxic agents at a young age have higher mortality and morbidity rates than adults exposed to the same agents.²⁰ Working children using hand tools designed for adults have a higher risk of fatigue and injury than adults.²¹ The World Health Organization (WHO) study noted, «Long hours and days of uninterrupted work have a stultifying effect on the child, narrowing his horizons and often crippling him emotionally.²² ILO states that children in certain occupations are also vulnerable to physical and sexual abuse.²³ Child labor deprives children of their chance to benefit from typical development and often replaces education.²⁴ These socioeconomic realities are not insignificant; rather, they are formidable barriers that systematically deny children their right to develop to their fullest potential within a safe and protective environment.

The research aims to scrutinize firstly, to what extent does a disconnection exist between the codified right to education and the socioeconomic realities that drive children into hazardous work in Indonesia and Timor-Leste. Second, how effective Law No 20/2003 (Indonesia) and Law No. 14/2008 (Timor Leste) in mandating compulsory education as a mean to eliminate child labor. Lastly, does the standard of protection of children have the capacity to intervene impoverished communities as stated in Article 32 of the CRC in Indonesia and Timor Leste.

II. METHOD

This research focus its findings through a comparative socio-legal method, assessing the Indonesia and Timor Leste's current legal policies in efforts to eliminate child labor. A functionalist approach will assist this study by delineating

¹⁹ World Health Organization (WHO), *Children at Work: Special Health Risks* (Geneva: World Health Organization, 1987).

²⁰ World Health Organization (WHO), *Children At Work*.

²¹ Alan D. Woolf, "Health Hazards for Children at Work," *Journal of Toxicology: Clinical Toxicology* 40 (2002): 477.

²² Woolf, "Health Hazards for Children," 478.

²³ International Labour Office (ILO), *Child Labour: Targeting the Intolerable* (Geneva: ILO, 1996), 5.

²⁴ James J. Silk and Meron Makonnen, "Ending Child Labor: A Role for International Human Rights Law," *Saint Louis University Public Law Review* 22 (2003): 359.

constitutional and labor provisions to assess and evaluate programs of basic and primary school as a right mandated through international and domestic norm in its application. Comparative study is essential in analysing the different approaches Indonesia and Timor Leste in compliance to universal commitment in tackling child labor.

Existing disparity between written code (normative provisions) and its implementation will be addressed through a legal gap analysis. Legal gap analysis will assist in dissecting the interrelation of the rights to education enshrined in constitution and the on-going presence of child labor in Indonesia and Timor Leste. Such analysis is needed to settle whether current legal foundation have effectively influence mandatory education as preventive method. The analysis will not only describe but integrate primary legal tools on addressing the implementation and challenges faced. Through the delineation of systematic barriers that range from limits on resources to the execution of positive laws. Therefore, such approach is required to address why the current provisions still fail to provide real action in eliminating child labor.

Comparative study will ensure to analyse the supreme legal instruments in both Indonesia and Timor Leste in light to substantiate an accepted baseline. Indonesia, referring to Article 31 of the constitution which mandates the right to education and the resource allocation for the educational sectors. On the other hand, Timor Leste's Section 50 and Section 59 of its Constitution impede on the practice of child labor by establishing a connection between education and labor protection by obliging the rights to education and the prohibition of child exploitation for economic gain. Both Indonesia's and Timor Leste's Constitution reflects the different approach in respect to the rights to education and its agenda for child protection.

Lastly, the methodology employed will help to address the efforts made by Indonesia and Timor Leste in ratifying international obligations into their respective national laws. It is to our knowledge that both Indonesia and Timor Leste are signatories of the CRC and core ILO Conventions—C138 on Minimum

Age; C182 on Worst Forms of Child Labor. The study evaluates how effective national laws incorporate national standards in determining the legal efficacy of such adoption. It is required to review both Indonesia's Child Protection law (Law No. 23/2002) in conjunction to Manpower Act (Law No. 13/2003). Conversely, it is also required to analyse Timor Leste's Labor Code (Law No. 4/2012). Scrutinizing these instruments identifies normative gaps or statutory contradictions that may inadvertently perpetuate child labor at the expense of educational access.

III. ANALYSIS AND DISCUSSION

3.1. The Failure to Connect the Right to Education and Ending the Child Labor in Timor Leste and Indonesia

Education is both a right and essential for realizing other human rights, thus enhancing all rights and freedoms when it is guaranteed, while jeopardizing them all when it is violated.²⁵ While education isn't solely a children's right, it's particularly crucial for their development and well-being.²⁶ The CRC significantly advanced the articulation of these rights, especially for those under 18, going beyond the provisions of the International Covenant on Social, Economic, and Cultural Rights (CESCR). The CRC's Articles 28²⁷ and 29²⁸ and other provisions establish a complex set of "education rights," as Lundy et al. argue, that are more nuanced than the simple "right to education". The State that 'education rights has been chosen in place of the 'right to education' in an attempt to be true to the complex and multifaceted ways in which these provisions have evolved and been articulated in international human rights law, particularly in the CRC.²⁹

²⁵ K. Tomaševski, *Education Denied: Costs and Remedies* (London: Zed Books, 2003).

²⁶ K. Tomaševski, "Globalizing What: Education as a Human Right or as a Traded Service," *Indiana Journal of Global Legal Studies* 12, no. 1 (2005): 1.

²⁷ Convention on the Rights of the Child, Article 28: "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity . . ."; Article 28(1) (a): "Make primary education compulsory and available free to all."

²⁸ Convention on the Rights of the Child, Article 29: "States Parties agree that the education of the child shall be directed to: (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential; [and] (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations."

²⁹ Laura Lundy, Karen Orr, and Harry Shier, "Children's Education Rights: Global Perspectives," in *Handbook of Children's Rights: Global and Multidisciplinary Perspectives*, ed. Martin D. Ruck et al. (Abingdon: Routledge, 2017).

The CRC defines a child as “any human being under the age of 18 unless the applicable law sets an earlier age of majority.”³⁰ This definition is consistent across international treaties, reflecting a global consensus on the age limit for defining children. In addition to age, these agreements emphasize the importance of recognizing and promoting children’s rights, ensuring they can live, grow, and develop freely. However, there are variations in how a child is defined in Indonesia and Timor-Leste that lead to the limitation of certain child’s rights. Under Indonesian criminal law, a child is deemed responsible for committing a crime at age 12.³¹ In contrast, Timor-Leste currently has no juvenile justice law, but the minimum age of criminal responsibility is 16 years.³² Those aged 16 to 21 are defined as juveniles within the juvenile justice system, which has yet to be established. Meanwhile, in Indonesia, juveniles are subject to the juvenile criminal justice system. In private law, such as the legal age for marriage and entry into the workforce, definitions of a child also vary, reflecting different rules and customs in both countries. The definition of “child” itself becomes problematic when considering how Indonesia, Timor-Leste and society protect children or hold them accountable, especially since the CRC allows each State to define “child” according to its national laws and regulations. This flexibility in definition can lead to inconsistencies in child protection and the assignment of responsibilities. The cultural and national interests regarding the various definitions of the child create the complexity of the rights implementation.³³

The issue of child labor is one of the oldest problems in our society, and it is still a challenge around the globe.³⁴ Indonesia and Timor-Leste have ratified several conventions aimed at addressing child labor, including ILO Convention No. 182, which focuses on the immediate action needed to eliminate the worst

³⁰ Convention on the Rights of the Child, Article 1.

³¹ Judicial Review of the Juvenile Criminal Justice System, Decision of Constitutional Court No. 1/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2010).

³² Penal Code, Article 20, Democratic Republic of Timor-Leste.

³³ Fernando R. Tesón, “International Human Rights and Cultural Relativism,” *Virginia Journal of International Law* 25, no. 4 (1985): 870.

³⁴ Amir Radfar et al., “Challenges and Perspectives of Child Labor,” *Industrial Psychiatry Journal* 27, no. 1 (2018): 17.

forms of child labor. Article 18 of the KRDTL addresses “Child Protection,” a fundamental basis for safeguarding children’s rights. In this context, Philip Alston and John Tobin emphasize the necessity for special protection for children,^{35,36} as highlighted by Patrícia Jerónimo. They describe the KRDTL and the 1945 Indonesian Constitution as a “Special Protection Constitution.” As States Parties to the CRC, the National Parliament of Timor-Leste enacted Law No. 6 of 2023, concerning the Protection of Children and Adolescents in Danger.³⁷ Similarly, Indonesia introduced Law No. 35 of 2024, which outlines the principles, procedures, and responsibilities of various parties involved in child protection programs. However, statutory protections remain insufficient as long as economic access remains discriminatory across different segments of society.³⁸

As a member of the UN’s Organ, such as ILO, it is important to scrutiny whether Indonesia and Timor-Leste implement the State’s obligation under the child rights and labor rights as stated in the ILO Constitution. According to the International Labor Organization (ILO), in Timor-Leste there is approximately 67,688 children aged 5 to 17 years, or 16.1% of this age group, are engaged in economic activities in rural and urban areas. Of these economically active children, 12.5% are classified as child laborers, with a majority (55.5%) involved in hazardous work. While 83.8% of the total child population is in school, working children are less likely to attend. About 43,000 children in this age group have never attended school. Among these, 6,455 are involved in economic activities, 4,901 are classified as child laborers, and 2,888 are engaged in hazardous work.³⁹ While in Indonesia, UNESCO indicates that among children aged 5 to 14 years

³⁵ Philip Alston and Mary Robinson, eds., *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005).

³⁶ Gordon Betcherman et al., “Child Labor, Education, and Children’s Rights,” in *Human Rights and Development: Towards Mutual Reinforcement*, ed. Philip Alston and Mary Robinson (Oxford: Oxford University Press, 2005).

³⁷ Patrícia Jerónimo, “Os Direitos da Criança em Timor-Leste [Children’s Rights in Timor-Leste],” in *Estudos em Homenagem ao Professor Doutor Heinrich Ewald Hörster [Essays in Honor of Professor Dr. Heinrich Ewald Hörster]* (Coimbra: Almedina, 2012), 14.

³⁸ *Unnikrishnan J.P. v. State of Andhra Pradesh*, Decision of the Supreme Court of India (The Supreme Court of India 1993).

³⁹ UNICEF, “Orang Tua Jangan Libatkan [Parents Should Not Involve]”; ILO, “Analysis of Child Economic Activity.”

who are child laborers, 55.8% work in the agricultural sector, 36.9% in the service sector (which includes domestic work, street work, as well as selling, begging, and scavenging), and 7.3% in the industrial sector. In Indonesia, the number of child laborers in 2022 is approximately 58.8 million children aged 5 to 17, of which 4.05 million, or 6.9%, are working. Among those working children, 1.76 million (43.3%) are considered child laborers, and unfortunately, 20.7 percent of them are involved in the worst forms of labor. Many of these child laborers come from rural areas, where extreme poverty persists.⁴⁰ Based on this data, it is hardly to state that Indonesia and Timor-Leste has fulfil the obligation under the ILO Convention on the elimination of child labor.

The ILO-IPEC differentiates between “working children” and “child labor.” “Working children” participate in age-appropriate, non-hazardous tasks that contribute positively to their development and don’t interfere with their education. These activities, such as household chores or learning traditional skills, are generally considered beneficial.⁴¹ Although these work activities may involve less risks,⁴² they differ from “child labor.” ILO Convention 138 (Article 7) permits light work for 13–15-year-olds, provided it doesn’t endanger their health or development or hinder their education or vocational training. “Child labor,” on the other hand, refers to work that negatively impacts children’s education, safety, health, growth, and development. This includes excessive working hours and exploitative conditions that prevent school attendance. Timor-Leste and Indonesia face challenges with child labor in hazardous occupations, as detailed below.⁴³

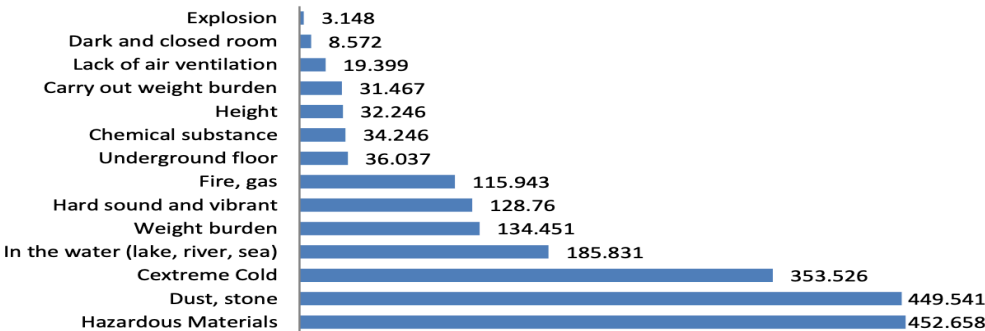
⁴⁰ Ministry of Manpower of the Republic of Indonesia, *Roadmap Towards a Child Labour-Free Indonesia in 2022*.

⁴¹ ILO-IPEC, “International Programme on the Elimination of Child Labour (IPEC): What Is Child Labour?,” International Labour Organization, accessed April 30, 202.

⁴² ILO, *Menanggulangi Pekerja Anak: Panduan untuk Pengawas Ketenagakerjaan [Tackling Child Labour: A Guide for Labour Inspectors]* (Jakarta: ILO, 2002), 7.

⁴³ Ministry of Manpower of the Republic of Indonesia, *Roadmap Towards a Child Labour-Free Indonesia in 2022*.

Figure 1. Number of children aged 5-14 exposed to hazardous materials.⁴⁴



Child labor deprives children of their childhood, limits their potential, and harms their physical and mental health. This dangerous work can be physically, mentally, socially, or morally damaging and often prevents children from attending school or forces them to combine it with excessive work. The data illustrates that numerous children aged 15-17 work around 40 hours each week in Indonesia. Such numbers refers similarly to the working hours of adults. Nonetheless, there seem to be discrepancies in differentiating the understanding of ‘child labor’ and ‘working children’. Respectively, ‘child labor’ refers to the exploitative nature of the work while ‘working children’ may constitute as permissible. The lack of empirical data and legislative reluctance in defining the terms that is not limited to age and location fail in confronting the nature of exploitation of children.

ILO Convention No. 182 defines the worst forms of child labor as slavery, trafficking, forced recruitment for armed conflict, and the use of children in prostitution, pornography, or illegal drug-related activities. Any work jeopardizing a child’s health, safety, or moral development is strictly prohibited.⁴⁵ Article 4(1) mandates that national laws and authorities, in consultation with relevant employer and worker organizations, regulate the types of work specified in Article 3(d) (hazardous work). This regulation must comply with international standards, notably Recommendation No. 190 concerning the Worst Forms of Child Labor

⁴⁴ Ministry of Manpower of the Republic of Indonesia, *Roadmap Towards a Child Labour-Free Indonesia in 2022*.
⁴⁵ ILO, *Pekerja Anak: Manual Informasi bagi Guru, Pendidik, dan Organisasi Pendidikan [Child Labour: An Information Manual for Teachers, Educators, and Educational Organizations]* (Jakarta: ILO, 2009), 39.

(1999). Criteria for identifying hazardous work include: (a) exposure to physical, psychological, or sexual abuse; (b) work in dangerous locations or conditions; (c) use of hazardous machinery or heavy lifting; (d) unhealthy environments involving hazardous materials or extreme conditions; and (e) difficult working conditions, such as long hours or confinement.

Table 1. Children aged 15-17 by age group and working hours⁴⁶

Age Group	0-15	16-30	31-40	>40	Total
Number					
15-17	611	650	255	9094	10510
15	194	129	59	3102	3484
16	203	216	81	3158	3658
17	214	205	115	2834	3368
Percentage					
15-17	5.8	5.2	2.4	86.5	100
15	5.6	3.7	1.7	89.0	100
16	5.5	5.9	2.2	86.3	100
17	6.4	6.1	3.4	84.1	100

Source: Sakerma, 2012

Child labor significantly impacts children's right to education, primarily due to economic factors,⁴⁷ and exacerbated in States unable to ensure equitable access to economic opportunities for all. According to Article 32 of the CRC, child labor involves economic exploitation that disrupts a child's education and overall health. This often results in limited school attendance, making it harder for them to secure decent jobs later, leading to unemployment and job instability.⁴⁸ The ILO states that children who leave school before age 15 face significant challenges in finding good employment. Thus, child labor has severe short-term and long-term consequences for children and overall economic development, hindering future productivity and efforts to reduce poverty.⁴⁹

⁴⁶ Ministry of Manpower of the Republic of Indonesia, *Roadmap Towards a Child Labour-Free Indonesia in 2022*.

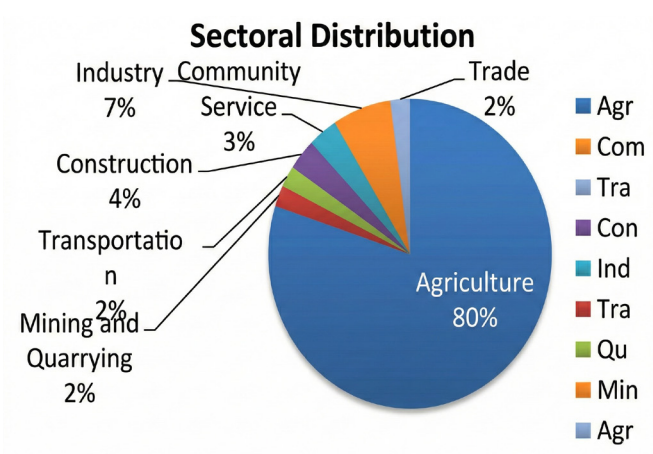
⁴⁷ Government of Timor-Leste, *Timor-Leste First National Child Labor Survey Report and Mini-Labor Force Survey Report 2016* (Dili: Governo de Timor-Leste, 2016).

⁴⁸ Rebeca Ribeiro Silva, "Trabalho Infantil na Ordem Jurídica Internacional [Child Labour in the International Legal Order]" (dissertation, Universidade de Lisboa, 2018), 25.

⁴⁹ ILO, *World Report on Child Labour: Economic Vulnerability, Social Protection and the Fight against Child Labour* (Geneva: ILO, 2013), 16

In Indonesia, there were 24.06 million poor people in Indonesia and, 11.34 percent live in rural (villages) areas.⁵⁰ In those are many children aged 7-17 are engaged in economic activities rather than attending school, particularly in impoverished regions, especially in eastern Indonesia. Papua province has the highest rate of out-of-school child labor, followed by Central Java.⁵¹ Most child laborers work in the agricultural sector. Nationally, 177,374 children work in agriculture, fishing, trade, and services instead of attending school (Figure 2). While most working children (87%) also attend school, their attendance rates are still lower than those of their non-working peers, highlighting the negative impact of child labor on education for all.

Figure 2. Percentage of employment in rural areas for children aged 10-17.⁵²



The CRC is built on four core principles: non-discrimination (Article 2), the best interests of the child (Article 3), the right to life, survival, and development (Article 6), and respect for the child’s voice (Article 12). Despite this core principles oblige State Parties of CRC, the economic exploitation arises

⁵⁰ BPS-Statistics Indonesia, *Indonesia Poverty Profile, September 2024* (Jakarta: BPS, 2025).
⁵¹ The National Team for Accelerated Poverty Reduction (TNP2K), *Annual Report on Very Poor Households (RTSM) in 2012* (2012).
⁵² The National Team for Accelerated Poverty Reduction (TNP2K), *Annual Report on Very Poor Households (RTSM) in 2012*.

when a child's work compromises their rights to education and health, thereby hindering their overall development.⁵³ Article 32 of the CRC explicitly protects children from work that harms their health or development, guaranteeing them a safe working environment and fair wages. Other relevant articles include 28 (right to education), 29 (goals of education), and 31 (right to leisure and cultural activities). Article 28(1) emphasizes the State's commitment to progressively realizing the child's right to education on an equal opportunity basis. Both Indonesia and Timor-Leste demonstrate a systemic failure to uphold the core tenets of the Convention on the Rights of the Child (CRC), specifically regarding the violation of Articles 28 through 31. Indonesian government's educational policies and program interventions fail to address the root causes of barriers to education, such as the hidden costs of uniforms, books, and other school-related expenses. Rather, the government allocates its budget toward infrastructure development and nutritional meals programs, placing a significant burden on the national fiscal budget.⁵⁴ Critics argue that this prioritization fails to uphold the fundamental right to equal access. Furthermore, undermining basic education for marginalized groups leads to constitutional violations by failing to fulfil the essential educational needs of vulnerable communities.⁵⁵ Similarly, Timor-Leste grapples with extreme poverty and infrastructural shortages, despite possessing national legislation that explicitly mandates the realization of these rights.⁵⁶ In Timor-Leste, the state's obligation to protect the right to education is frequently undermined by economic realities; the prohibitive "hidden costs" of schooling and a lack of physical access in rural areas force families to prioritize child labor over educational aim.⁵⁷

The CRC emphasizes that education should aim to develop children's personalities, mental capacities, and physical abilities to their fullest potential (article 29(1)(a)) and recognizes children's right to rest, play, and age-appropriate

⁵³ Komnas HAM, "Komnas HAM Soroti Eksploitasi Ekonomi terhadap Pekerja Anak [Komnas HAM Highlights Economic Exploitation of Child Workers]," accessed April 25, 2024.

⁵⁴ East Asia Forum, "Indonesia's Free Meal Program Cracks under Poor Leadership," November 14, 2025.

⁵⁵ Fulcrum, "Indonesia's Free School Lunches: Not So Free," February 6, 2025.

⁵⁶ U.S. Department of Labor, *2024 Findings on the Worst Forms of Child Labor: Timor-Leste* (Washington, DC: U.S. Department of Labor, 2025).

⁵⁷ United Nations in Timor-Leste, *Timor-Leste Common Country Analysis* (Dili: United Nations in Timor-Leste, 2025).

cultural and artistic activities (article 31(1). Similarly, The ICESCR also obliges the member state to protect children's rights, such as but not limited to the rights to life, health, free basic education, adequate living standards, leisure, recreation, and the right of minority children to enjoy their own culture.⁵⁸ Addition to that, Article 10(3) ICESCR mandates protection from economic and social exploitation, specifically prohibiting hazardous child labor that threatens their health or development, with legal penalties for violations. It also encourages State Member to establish a minimum working age and enforce it with legal action.

Both the CRC and the ICESCR establish a comprehensive legal norms that frames economic exploitation not as an isolated labour issue, but as a fundamental barrier to a child's holistic development. This framework constructs an indivisible and interdependent set of protections, where the prohibition of harmful child labour is a requirement for realizing the rights to education, health, leisure, and a protected childhood. Indonesia and Timor-Leste are in breach of their statutory commitments under the CRC and ICESCR. Despite ratifying these instruments, both nations exhibit significant implementation gaps regarding Article 32 of the CRC (protection from economic exploitation) and Articles 13 and 14 of the ICESCR (right to education), failing to translate these international norms into effective domestic enforcement.

3.2. The Relationship between Primary Education Access and Child Labor in Timor-Leste and Indonesia

3.2.1. Indonesian Challenges in Eliminating Child Labor through Primary Education Access

Child labor and the right to education are concerns across ASEAN.⁵⁹ In 2016, the ASEAN-ILO developed a roadmap to combat the worst forms of child labor, focusing on legal enforcement, education and training, social protection, partnerships, funding, support for vulnerable children, communication, and

⁵⁸ Fúlvia Rosemberg and Carmem Lúcia Sussel Mariano, "A Convenção Internacional sobre os Direitos da Criança: Debates e Tensões [The International Convention on the Rights of the Child: Debates and Tensions]," *Cadernos de Pesquisa [Research Notebooks]* 40, no. 141 (2010): 712.

⁵⁹ ASEAN, *ASEAN Roadmap on the Elimination of the Worst Forms of Child Labour by 2025* (Jakarta: ASEAN Secretariat, 2021).

awareness campaigns.⁶⁰ In Indonesia, the Constitution obliges the government to ensure the basic education program with full financing.⁶¹ The Constitutional Court (MK) has adjudicated various education-related cases and handed down decisions such as No. 58/PUU-VIII/2010 on the judicial review of Law No. 20 of 2003 on the National Education System. The Indonesian Constitutional Court declared the word ‘can’ in Article 55 paragraph (4) of Law No. 20 of 2003 on the National Education System, if linked to Article 31 paragraph (2) of the 1945 Constitution, resulting in the financing for any community-based or implemented basic education by other parties than the government to not be mandatory for the central and/or regional government.⁶² This means the Constitutional Court decided that the word ‘can’ in said article was contrary to the 1945 Constitution if community-based educational institutions said the article included basic education.

Responding to the Decision, Judge Foekh stated that the Constitutional Court could not interfere in implementing the norm through its decision, including on the education budget. Regulation of the Ministry of Home Affairs No. 77 of 2020 on Technical Guidelines for Regional Financial Management under private schools. However, He continued to state that the Constitutional Court’s commitment to implementing these constitutional rights has been expressly conveyed through its decisions.⁶³ Does this policy contravene the Constitutional Court’s decision? The unequivocal answer is that it constitutes absolute non-compliance with the Court’s mandate. The policy effectively circumvents the constitutional obligation by delegating the fiscal burden of “free basic education” primarily to Pemerintah Daerah [Regional Government], however when the central government is absent to conduct adequate oversight or ensure that regional budgets (*APBD*), there are possibility of insufficient fund to cover these costs. This contradicts the Constitutional Court’s ruling (specifically Decision No. 13/PUU-VI/2008 and

⁶⁰ ASEAN, *ASEAN Roadmap on the Elimination of the Worst Forms of Child Labour by 2025*.

⁶¹ 1945 Constitution of the Republic of Indonesia, Article 31(2).

⁶² Judicial Review of Law No. 20 of 2003 on the National Education System, Decision of Constitutional Court No. 58/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2010).

⁶³ Constitutional Court of the Republic of Indonesia, “Court’s Role in Protecting Citizens’ Right to Education,” January 20, 2023.

reaffirmed in Decision No. 3/PUU-XXII/2024), which clearly decide that the state's responsibility to finance basic education is also constitutional mandate for central government that cannot be abdicated solely to regional autonomy, especially when it leads to inequality in implementation. The legal consequence is this policy mismatch leads to a violation of the State's obligations under the CRC. By allowing regional fiscal capacity to dictate a child's access to schooling, the central government fails to guarantee the "available resources" standard required to prevent discrimination, thereby breaching the right to education as a universal entitlement regardless of the jurisdiction.⁶⁴

While basic primary education aims to reduce child labor by engaging children in schooling, the concept of compulsory education presents a paradox. Although education is a recognized right, the *obligation* to receive that education raises questions. This compulsory nature of a right requires careful consideration. Since compulsion implies a duty, it's crucial to determine who holds this duty. Neither children nor their families should be compelled to exercise this right without due process. Laws regarding compulsory education should adapt to the evolving autonomy of maturing individuals. In its progressive flexibility, they must reflect the growing possibilities of choice for right-holders who are adults' *in fieri* [in the making].⁶⁵ In response to ongoing questions about state obligations regarding the right to education, a recent Constitutional Court ruling (MK No. 3/PUU-XXII/2024) reaffirms this fundamental duty. The decision, issued on May 27, 2025, mandates that the state provide inclusive, equitable, and free basic education across all public and private schools. This ruling reinforces Article 31, paragraphs (1) and (2) of the 1945 Indonesian Constitution, solidifying education as a guaranteed, cost-free right for every child. The Constitutional ruling should be provide by clear executing on progressive realization of rights. CESCR imposes an immediate 'obligation of conduct' that precludes passivity. Under Limburg Principle 72 and CESCR interpretations of Article 2(1), States

⁶⁴ Committee on Economic, Social and Cultural Rights (CESCR), *Report on the Third Session*, Economic and Social Council, Official Records, UN Doc. E/1989/22 (1989).

⁶⁵ José-Luis Gaviria, "Education: A Compulsory Right? A Fundamental Tension within a Fundamental Right," *British Journal of Educational Studies* 70, no. 6 (2022): 653–75,

must demonstrate ‘deliberate, concrete and targeted’ efforts toward compliance.⁶⁶ Article 14 reinforces this by requiring States lacking universal primary education to adopt a comprehensive plan of action within two years. The *raison d’être* [reason for being] of this provision is to strip away the defense of ‘resource constraints,’ ensuring that even the poorest nations take immediate, calculable steps toward guaranteeing education as a right.⁶⁷

An analysis of these interventions, informed by Indonesian Manpower Ministry data (Table 2), reveals a focus on combating the most severe forms of exploitation. However, seemingly, Indonesian government fails to develop efficacy of prevention. Child trafficking for sexual purposes emerges as the primary issue until present, driven by entrenched economic and cultural factors. The second most prevalent concern is the use of children as drug mules and limited protection towards them. Despite these targeted efforts, a significant implementation gap persists (Table 2). While a phased approach prioritizing compulsory education has reportedly increased school participation rates over a four-year period, the programs’ overall efficacy is fundamentally undermined by systemic poverty. This socio and legal structural barrier ensures that child labour remains a persistent challenge, questioning the long-term impact of education-based interventions without concurrent, robust economic support for vulnerable families.

Table 2. Child workers who were prevented and withdrawn in 2012-2017⁶⁸

Sector	withdrawn	Prevented	Number
Trafficking for prostitution	177	6,709	6,886
Drug trafficking	517	8,298	8,815
Child domestic worker	2	1,321	1,323
Footwear	1,830	6,399	8,229
Fishery	711	6,283	6,994
Gold mining	421	3,539	3,960
Prevention in disaster areas	-	8,904	8,904
Jumlah	3,658	41,453	45,111

⁶⁶ United Nations, *General Comment No. 3 of the CESCR*, UN Doc. E/1991/23 (1991).

⁶⁷ Philip Alston, “The International Covenant on Economic, Social and Cultural Rights, United Nations,” in *Manual on Human Rights Reporting* (New York: United Nations, 1991), 68.

⁶⁸ Ministry of Manpower of the Republic of Indonesia, *Roadmap Towards a Child Labour-Free Indonesia in 2022*.

While primary education enrolment increased significantly between 2009 and 2013, maintaining compulsory education and school participation became increasingly challenging as children entered their teenage years, caused by the rising and significantly expensive tuition fees.⁶⁹ Moreover, meaningful participation is lacking when one of the critical principles in child rights is the child's best interest are absent in Indonesia's policy relate.⁷⁰ The education attendance becomes a burden for children when there is inequality in education equity, as well as the view from the family regarding education as an investment, instead of a right, and the aims towards the child's development.⁷¹ These deeply ingrained intergenerational cultural norms are difficult to deconstruct, often failing to align with a child-centered perspective, with girls being disproportionately affected. In Indonesia, more girls living in poverty, in particular, often bear a disproportionate burden of household and parental care responsibilities, stemming from both cultural and economic pressures.⁷²

The Indonesian government's strategy to combat child labor is predicated on addressing its primary socioeconomic driver: poverty. The Ministry of Manpower builds several social protection framework by providing income security for vulnerable families. This approach combines several mechanisms:

1. Direct Financial Relief through conditional and unconditional cash transfers.
2. Income Generation via labour-intensive job creation schemes and access to microcredit for family enterprises.
3. Barrier Reduction by providing food assistance and tuition exemptions, which lowers household expenditure burdens.

The underlying logic of this policy is that by alleviating economic precarity, these initiatives will collectively dismantle the conditions that compel families to engage their children in labor, thereby fostering greater access to education. However,

⁶⁹ Raja Bentaouet Kattan and Nicholas Burnett, *User Fees in Primary Education* (Washington, DC: World Bank, 2004).

⁷⁰ Emily Keddell, "Recognising the Embedded Child in Child Protection: Children's Participation, Inequalities and Cultural Capital," *Children and Youth Services Review*.

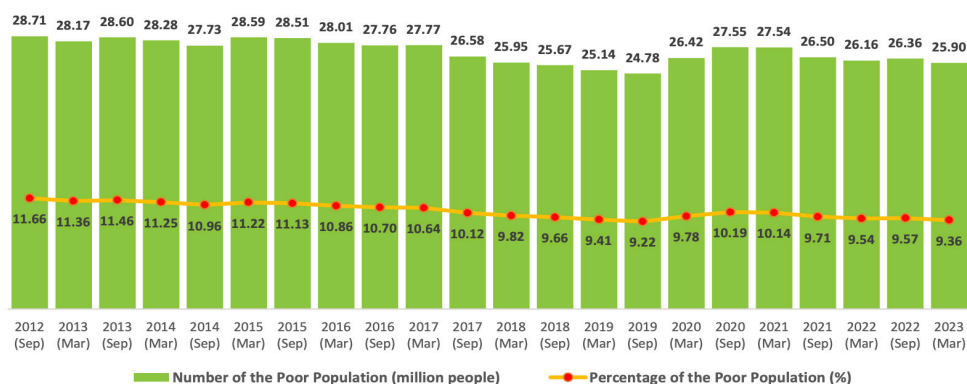
⁷¹ Zikun Zhou, Xiaoyan Lei, and Yan Shen, "Education Burden Reduction, Family Education Investment, and Education Equity," *China Economic Quarterly International* 3, no. 3 (September 2023): 179..

⁷² Badan Pusat Statistik (BPS), *Indonesia Poverty Profile in March 2023*, Official Statistics News No. 47/07/Th XXVI (Jakarta: BPS, 2023).

these programs will face many challenges regarding the increasing number of poor households or poverty in several provinces in Indonesia, especially in the Eastern part of Indonesia, which contributes to child labor and reduces the equal opportunity for every child to access education.

According to the Data Statistics Agency, poverty has decreased both in rural and urban areas. The Data Statistic Agency states that Indonesia's poverty rate declined from September 2012 to March 2023, both in number and percentage, except in September 2013, March 2015, March 2020, September 2020, and September 2022. The increase in fuel prices triggered the rise in September 2013, March 2015, and September 2022 (Figure 3). Meanwhile, the increase from March 2020 until September 2020 was caused by the large-scale social distancing during the COVID-19 pandemic in Indonesia.⁷³

Figure 3. Number of the poor population in Indonesia (2012-2023)⁷⁴



Ultimately, the state's reliance on regional autonomy to finance primary education, coupled with the Ministry of Manpower's isolated approach to poverty reduction, creates a structural barrier to the fulfillment of the right to education. A socio-legal analysis reveals that these programs are functionally disconnected: economic interventions do not target the specific financial burdens of schooling (the 'hidden costs'), resulting in a policy failure where child labor persists as

⁷³ Badan Pusat Statistik (BPS), *National Socio-Economic Survey (SUSENAS)*, September 2012–March 2023.

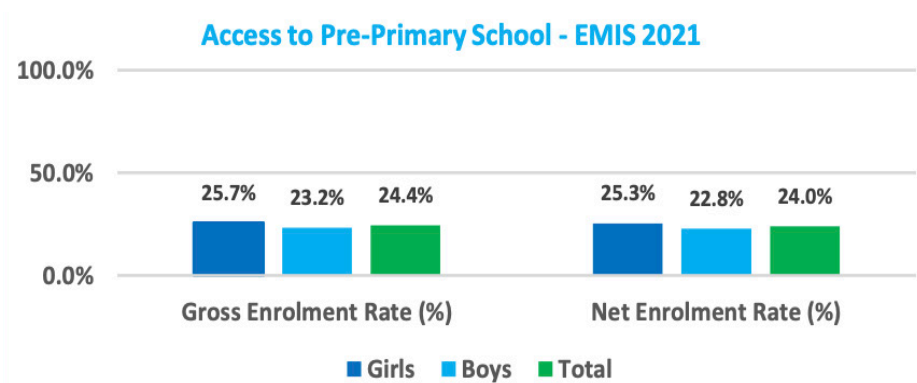
⁷⁴ Badan Pusat Statistik (BPS), *National Socio-Economic Survey (SUSENAS)*, September 2012–March 2023.

a survival strategy. Consequently, the current regulatory framework fails to dismantle the poverty-education trap, leaving the most marginalized children without substantive protection.

3.2.2. Timor Leste Challenges in Eliminating Child Labor through Primary Education Access

Like Indonesia, Timor-Leste recognizes that ending child labor is a legal obligation under the rule of law. International law plays a significant role in shaping national law in Timor-Leste. As an initial step, the country has ratified several international legal instruments to eliminate child labour, particularly in hazardous sectors. By ratifying ILO Convention No. 182, Timor-Leste is committed to taking immediate and effective measures to prohibit and eliminate the worst forms of child labor.⁷⁵ Patricia concludes that the welfare of children in Timor-Leste does not solely depend on introducing new legal frameworks, but rather on the practical implementation of the existing ones.⁷⁶ As a result, the rise in the number of child laborers in Timor-Leste is no longer simply a legal issue or a consequence of a legal vacuum, but the violation of access to education. As shown in the data below, the child attends school below 50 percent, or 24% where the boys are less than the girls.⁷⁷

Figure 4. Access to Pre-primary School⁷⁸



⁷⁵ Jerónimo, “Os Direitos da Criança em Timor-Leste [Children’s Rights in Timor-Leste],” 13.

⁷⁶ Jerónimo, “Os direitos da Criança,” 27.

⁷⁷ UNICEF, *Timor Leste at Glance, 2024* (2024).

⁷⁸ UNICEF, *Timor-Leste at a Glance, 2024*.

The *Países Africanos de Língua Oficial Portuguesa* (PALOP),⁷⁹ in collaboration with IPEC and the ILO, offers recommendations for implementing ILO Conventions No. 138 and No. 182 and national laws in CPLP countries.⁸⁰ Since its establishment, the Timor-Leste government has made significant efforts to produce and ratify numerous national legal instruments and conventions related to child protection. Researchers indicate that Timor-Leste has actively worked to enforce constitutional protections for children and has ratified several international conventions, alongside passing national laws to protect children and improve child poverty reduction. However, there is an issue within the Employment Law regarding the definition of a child that defines a child as anyone under 17 years of age, which does not align with the definition specified in ILO Convention No. 182 concerning the elimination of the worst forms of child labor.

Article 9, paragraph (3) of the KRDTL states that “all rules that conflict with the provisions of international treaties, treaties, and agreements applied in the national legal system of Timor-Leste shall not apply.” This implies that the Constitution grants superior legal status to international conventions incorporated into the national legal framework, rendering any conflicting legal rules invalid. Consequently, this raises the possibility that the provisions in the Labor Law defining a child as someone under the age of 17 may be invalid. Therefore, the government must protect children’s rights by ensuring they are not allowed to work as adults as obliged by Article 32, paragraph (2) of the Convention on the Rights of the Child.

Under the obligation for parents to actively participate in child protection programs, the child protection system defined in Article 4, letter (j) of Law No. 6/2023 outlines the cooperation needed among parents, relevant government institutions, community organizations, regional authorities, legal institutions, security forces, the Ombudsman for Human Rights and Justice, social solidarity institutions, civil society, and religious organizations. This collaboration aims to

⁷⁹ Wikipedia, “Países Africanos de Língua Oficial Portuguesa [African Countries with Portuguese as an Official Language],” accessed May 13, 2024.

⁸⁰ Timor-Leste Customs Authority, “Comunidade dos Países de Língua Portuguesa (CPLP) [Community of Portuguese-Language Countries (CPLP)],” accessed May 13, 2024.

ensure the welfare of children, promote and protect their rights, and prevent actions that may endanger these rights, all while prioritizing children’s best interests. Additionally, Article 4, paragraph 1, letter (a) of Law No. 6/2023 mandates that parents cooperate with child protection services.⁸¹ However, a profound dichotomy exists between the written law (*de jure*) and the law in action (*de facto*). As illustrated in Figure 4, these legal instruments are rendered functionally inert in practice. This implementation failure occurs because the regulatory framework ignores the structural root cause: the chronic poverty pervasive across most regions of Timor-Leste, which overrides the normative power of the law. Timor-Leste faces a challenge similar to that of Indonesia, where poverty contributes to low school attendance among children, often forcing them into economic activities that result in child labor.⁸² As a consequence of child labor, these children encounter significant obstacles that hinder their ability to attend school, leading to an increase in dropout rates as shown in Table 3.⁸³

Table 3. Education Enrolment⁸⁴

Pre-Primary School Gross Enrolment Rate - (GER) (%)	Total	26.7	Pre-Secondary School Net Enrolment Rate-Cycle 3 (NER) (%)	Total	58.8
	Male	25.5		Male	51.1
	Female	28.0		Female	67.3
Pre-Primary School Net Enrolment Rate - (NER) (%)	Total	24.8	Primary School Drop-Out Rate (%)	Total	3.9 (iv)
	Male	23.6		Male	4.3 (iv)
	Female	26.0		Female	3.4 (iv)
Primary School Gross Enrolment Rate-Cycle 1&2 (GER) (%)	Total	105.1	Pre-Secondary Drop-Out Rate (%)	Total	2.7 (iv)
	Male	102.0		Male	3.2 (iv)
	Female	108.5		Female	3.4 (iv)
Primary School Net Enrolment Rate-Cycle 1&2 (NER) (%)	Total	87.2	Gender Parity Index in NER (female to male)	Pre-Primary School	1.1
	Male	83.0		Primary School	1.1
	Female	91.9		Pre-Secondary School	1.34

⁸¹ Law No. 6/2023, Article 4(1)(j) (Democratic Republic of Timor-Leste).

⁸² UNICEF, *Timor Leste at Glance*, 2024.

⁸³ UNICEF, *Timor Leste at Glance*, 2024.

⁸⁴ UNICEF, *Timor Leste at Glance*, 2024.

Pre-secondary School Gross Enrolment Rate-Cycle 3 (GER) (%)	Total	92.7	Youth (age 15-24) Literacy Rate (%)	Total	84.3 (i)
	Male	85.2		Male	84.6 (i)
	Female	101.1		Female	84.0 (i)

Timor-Leste government has developed several programs to combat child labor. One such initiative is the *Bolsa da Mãe* [Mother's Bag], which targets poor and vulnerable households with children. The program aims to reduce poverty, increase participation in compulsory education, and enhance access to basic health services.⁸⁵ Implemented since 2008,⁸⁶ the Mother's Bag Program is regulated under Government Regulation No. 1 of 2024, which pertains to the 2nd Amendment of Regulation No. 18 of 2012 regarding conditional assistance known as "*Bolsa da Mãe*." The question is whether this program possess the requisite impact to disrupt the systemic of child labor exploitation? A critical legal analysis suggests it does not. The program faces from a fundamental flaw: it lacks sustainability and an integrated strategic framework for elimination. Although the program provides temporary aid to impoverished households, it fails to incentivize families who actively contribute to ending child labor. Legally, this approach is insufficient because it frames state assistance as discretionary charity rather than a constitutional obligation. By failing to institutionalize this aid as a human right, the state evades its duty to create a permanent, enforceable mechanism for the protection of children.

Although this regulation is based on several principles outlined in the KRDTL. These include paragraph 1 of Article 18 of the Regulation, which emphasizes the State's responsibility to provide special protection for children, and paragraph 2 of Article 19, which mandates the State to promote young people's education, health, and vocational training, however this policy hard to be implemented. Paragraph 1 of Article 56 also states that all citizens are entitled to legal assistance and social security. This regulation highlights the importance of increasing educational access, particularly for children from subsidized families, and aligns with social

⁸⁵ ILO, *Assessing the Bolsa da Mãe [Mother's Grant] Benefit Structure: A Preliminary Analysis* (2015), 1.

⁸⁶ ILO, "'Bolsa Mãe' Programme em Timor-Leste ['Mother's Grant' Programme in Timor-Leste]," *Social Protection*.

and educational policies.⁸⁷ As noted, one contributing factor to child labor is the vulnerability of economic conditions does not address directly, since using subsidizing framework instead of eliminating the financial burden of family in school and health sectors.

Specifically, Article 8 of this Regulation outlines the essential criteria for receiving the Mother's Bag subsidy. These criteria are as follows: 1. Household economic conditions, prioritizing those in more dire financial situations. 2. The number of caregivers in the household, giving preference to single-parent or equivalent households. 3. The number of children in the family, prioritizing families with more children. 4. The presence of children with physical or mental disabilities. Article 24 specifies that the provision of subsidies must include a written agreement between the responsible party and the subsidy recipient. This agreement should outline the obligations of each party to ensure access to basic education and health services, as well as to improve the socio-economic conditions of families. Additionally, Article 25 details the obligations of aid recipients. They are required to provide food, hygiene, safety, and comfort for all children under their care, as far as they are able. They must also ensure that all school-aged children in their families attend school as mandated and submit the necessary supporting documents. Based on the author's research, there has been no communication from the relevant parties, specifically the government, regarding the impact of the Mother's Bag program on reducing child labor in Timor-Leste.

However, considering the conditions and requirements outlined in the regulation, the Mother's Bag program has the potential to help reduce poverty and child labor in Timor-Leste if these stipulations are effectively implemented and evaluated by both the government and the subsidy recipients. According to a report from the Social Solidarity Institute, approximately 69,571 families are expected to receive assistance from the Mother's Bag program in 2024.⁸⁸

⁸⁷ Government Regulation No. 1 of 2024 concerning the Second Amendment to Regulation No. 18 of 2012 on apoio condicional "Bolsa da Mãe" [conditional "Mother's Grant" support], preamble.

⁸⁸ TATOLI Agência Noticiosa de Timor-Leste, "MSSI Aprova Beneficiários 69.571 ba Programa Bolsa da Mãe Kondisional 2024 [MSSI Approves 69,571 Beneficiaries for the 2024 Conditional Mother's Grant Program]."

However, this number does not reduce the limitation of access to education for children or family who are living poor quality and not in quality attainable standard of living.

The Mother's Bag Program aims to improve the economic situation of households while also actively working to reduce child labor. In addition to this program, the government has established laws and policies that promote compulsory basic education. The State's responsibility to address child labor through educational initiatives is outlined in Article 32 of the CRC. These education programs are essential steps for participating states to ensure that every child has the right to education and is protected from economic exploitation or harmful occupations that can jeopardize their physical, mental, spiritual, moral, or social development. Specifically, this education must be basic, compulsory, and provided free of charge to all children.⁸⁹

The National Parliament of Timor-Leste enacted Law No. 14 of 2008 concerning Basic Education, which aims to ensure universal, compulsory, and free nine-year basic education. This law strengthens equal opportunities for access and success in schools and establishes measures for effective education in line with quality standards. Article 59 of the Constitution mandates the State to provide free basic education, while Article 7 outlines the education system, including preschool, secondary, higher, out-of-school, and vocational training. Government Regulation No. 3 of 2007 further supports this framework, designating these educational components as essential for combating poverty and enhancing the nation's education.⁹⁰

Government Regulation No. 3 of 2007 outlines key principles for educational and cultural policies in Timor-Leste, such as education as a Fundamental Right that aligns with constitutional and international agreements, including the CRC. Secondly, the Law and Policy should focus on children and learning by creating safe learning environments free from violence. Thirdly, Equal access opportunities should be ensured by ensuring equal education access for girls,

⁸⁹ Convention on the Rights of the Child, Article 28.

⁹⁰ Timor-Leste Government Resolution No. 3 of 2007, preamble.

the poor, rural communities, and disadvantaged groups. Fourthly are quality and values through developing a curriculum that supports holistic learning in economic, social, cultural, moral, political, and spiritual areas while promoting national identity. Lastly, participation and consultation should be ensured by engaging key stakeholders, including parents, communities, private educators, and civil society. These principles are essential for establishing an effective, inclusive education system. However, this law becomes useless when the children have limited access to the education and cultural activities.

Law No. 14 of 2008 guarantees the right to education for all citizens and highlights the significance of private and cooperative education as a form of freedom in learning and teaching (Article 3, paragraph 2). Preschool education, or Early Childhood Education (PAUD), is described in Article 7, paragraph 2 as an extension of the educational activities provided by parents or families, encouraging their collaboration. This means preschool education is rooted in the child's home life and continues into school settings. Article 12, paragraph 4 states that attending preschool is optional. It emphasizes the essential role of families in early childhood education while also noting the State's duty to encourage enrolment, especially for five-year-olds. PAUD serves children from three years old until they start primary school. The government is responsible for providing a Preschool/PAUD education network, including kindergartens run by local governments and private entities, as well as cooperatives, parent associations, and various organizations. This collaborative network also involves trade unions and employers' associations to help prevent harmful work for young children. While these legal notions are principled in theory, they remain normatively disconnected from the reality of the informal economy. In practice, children engaged in street situations or informal sectors in Timor-Leste are effectively beyond the reach of statutory protection. The high prevalence of informal child labor in the jurisdiction highlights a critical regulatory void, where the law's protective mechanisms fail to penetrate the very sectors where exploitation is most rampant.

Law No. 14 of 2008 also governs *Ação Social Escolar* [School Social Action] as outlined in Article 40. The purpose of School Social Action is to support students who are severely economically disadvantaged by providing targeted and public measures of positive discrimination in accordance with the law. This initiative includes various services such as reimbursement for meal costs, canteen services, transportation to school, accommodation, textbooks, school supplies, and the provision of scholarships. School Social Action applies to the 9 years of Primary and Secondary Education (Verses 1 and 2). However, the method of reimbursement is ineffective since many poor households are to pay that need in the first place, and they are unable to afford that.

Nine Years of Primary Education, as outlined in Article 11 of Law No. 14/2008, includes the following conditions and principles: (1). Basic education is universal, compulsory, and free, lasting for nine years. (2). Children who turn six by December 31 of the year before the start of the new school year are eligible to enter primary education. (3). Children aged six between January 1 and March 31 may also enter elementary school, if there are available places. (4). Cases not addressed in the previous two points will be reviewed and decided upon by the appropriate regional education office. The obligation to attend primary education concludes at the end of the school year when the student reaches seventeen. Tuition-free primary education covers tuition, fees, and costs associated with registration, attendance, and diplomas. Students are also provided with free books, school supplies, transportation, food, and accommodation if needed.

Law No. 14 of 2002 regulates various forms of education in Timor-Leste, aiming to eradicate illiteracy, ensure access to education for all citizens, and enhance human resources. The types of education addressed include special education, mainly for children with disabilities, Out-of-School education, arts, re-education assigned for students above the basic age of education, and long-distance learning that provides access to learning opportunities. Access to schools has long been recognized as a crucial factor in households' decisions about their children's time use. Several studies indicate that improved access to education

can significantly reduce children's involvement in both economic activities and household chores. Specifically, the availability of primary schools within communities and the distance to these schools play a vital role in decreasing child labor.

A report published by the Ministry of Education of the Democratic Republic of Timor-Leste in 2015 indicated that the level of education related to Education for All (EFA) has been steadily increasing. Since gaining independence in 2002, Timor-Leste has made significant progress toward achieving EFA goals. This progress was evaluated using various educational indicators collected in the Education Management Information System (EMIS) and national censuses conducted in 2004 and 2010.⁹¹ However, education in Timor-Leste still faces challenges, particularly regarding access to education for rural versus urban populations and the overall quality of education.⁹² The government has struggled to implement the various educational programs across all districts effectively, but fail to distribute the equal access both in rural and urban areas.

Additionally, inadequate infrastructure and limited communication and transportation facilities remain significant obstacles. The law emphasizes that guaranteeing the right to education is crucial for addressing citizens' economic, social, and cultural inequalities. This right is vital for personal, professional, and community success.⁹³ By ensuring every citizen has access to education, particularly from childhood, Timor-Leste can foster hopes for economic growth and development.⁹⁴

3.3. The Challenges of Fulfilling the Right to Education and Eliminating Child Labor: A Constitutional Comparison of Indonesia and Timor-Leste

While both nations firmly mandate state protection of educational rights, their constitutional architectures reveal distinct philosophical approaches to the

⁹¹ UNESCO, *Timor-Leste National EFA 2015 Review*.

⁹² World Bank, "Timor-Leste: Começando uma Revolução da Educação [Timor-Leste: Starting an Education Revolution]," accessed July 7, 2024.

⁹³ Law No. 14 of 2008, Article 1(2) (Democratic Republic of Timor-Leste).

⁹⁴ Susete Albino, "(Re)building the Educational System of Timor-Leste: Evolution and Current Challenges," *Cadernos de Estudos Africanos [Journal of African Studies]* 39 (2020): 31–55.

intersection of right to education and eliminate the child labor. Indonesia relies on an affirmative duty framework based on Article 31 of the 1945 Constitution imposes a substantial obligation on the state to fund and provide education, primarily framing it as a mechanism for national education development. However, as a legacy text, the UUD 1945 lacks explicit constitutional prohibitions against child labor, delegating the economic protection of minors to lower-tier statutory laws.⁹⁵ On the other hand, Timor-Leste has an integrated constitutional model. It reflects international human rights law, Section 59 (Right to Education) is deliberately paired with Section 50 (Protection of Minors in the Workplace). This structural pairing constitutionally acknowledges that economic exploitation is a direct threat to educational access, elevating child labor from a mere statutory dispute to a fundamental constitutional rights violation.

Despite both states show commitment to international standards by ratifying of the CRC and core ILO Conventions (C138 and C182), their divergent strategies for domesticating these treaties yield unique enforcement challenges. Indonesia utilizes a bifurcated legal structure, separating the fundamental right to development within the Child Protection Law from the specific minimum age and hazardous work regulations housed in the Manpower Act. This statutory dichotomy inherently generates enforcement friction, necessitating complex inter-ministerial coordination between social welfare bodies and industrial relations inspectorates.⁹⁶ On the other hand, Timor-Leste centralizes these international protections directly within its national Labor Code. While this provides a cohesive and legally framework, the structural vulnerability shifts to state capacity; the efficacy of a robust Labor Code remains severely constrained by the geographic and resource limitations of state labor inspectorates operating in rural districts.⁹⁷

Beyond formal legal structures, the realization of constitutional guarantees in both countries is severely hampered by local socioeconomic realities. Despite legal

⁹⁵ Yana Suryana, Yulia Kurniaty, and Aroma Elmina Martha, "A Model for Protecting the Right to Education for Child Labour," *Jurnal Hukum IUS QUIA IUSTUM* 30, no. 2 (2023):371-95.

⁹⁶ Siti Nurhayati and Elly Asmarawati, "Prevention of Child Labor Exploitation through the Implementation of Fair Labor Laws," *Pena Justisia: Media Komunikasi dan Kajian Hukum [Pena Justisia: Media for Legal Communication and Studies]* 24, no. 1 (2025): 3468–85.

⁹⁷ P. Justino, M. Leone, and P. Salardi, "Short- and Long-Term Impact of Violence on Education: The Case of Timor-Leste," *The World Bank Economic Review* 28, no. 2 (2014).

alignment with international treaties prohibiting the worst forms of child labor, both countries struggle to regulate their vast informal agricultural sectors. In rural and agrarian contexts across Indonesia and Timor-Leste, children's participation in the workforce is often normalized as an essential family obligation or survival mechanism, rather than as legally punishable exploitation.⁹⁸ Consequently, the ultimate effectiveness of both countries' legal frameworks deliver not solely on their doctrinal elegance, but on the practical capacity of their respective Child Protection Laws and Labor Codes to dismantle the underlying economic necessity of child labor. Only by addressing these socioeconomic drivers can the constitutional promises of universal education be fully actualized.⁹⁹

IV. CONCLUSION

The right to education in Indonesia and Timor-Leste is critical instrument for both countries to eliminate child labor as part of the Convention on the Rights of the Child (CRC) ratification. Although the "Right to Education" is embedded within their constitutional frameworks, the findings of this study demonstrate that statutory prohibitions alone are insufficient to protect children from the labor market. Child labor often viewed culturally as a necessary component of the "adult development process" or an economic survival strategy. It directly competes with the state's mandate to ensure the full development of the child. Consequently, the persistence of child labor is not merely a social phenomenon but a failure of the State to discharge its tripartite human rights obligations: to respect, protect, and fulfil.

First, regarding the obligation to protect, the current legal architecture, especially obliged under both Constitution, fails to shield children from the structural coercion of poverty. As evidenced by the high dropout rates among child farmworkers and the gendered prioritization of education, the State has

⁹⁸ E. Rachmawati et al., "Child Labor Rights for Violating Employment Requirements Practices," *LJOBSOR* 10, no. 2 (2022).

⁹⁹ ILO and UNICEF, *Drivers of Child Labour in Timor-Leste* (International Labour Organization and Government of Timor-Leste, 2022).

not adequately mitigated the “opportunity costs” of schooling.¹⁰⁰ Budgeted spending focuses on several unsustain program and rarely being reviewed. The reliance on children to supplement household income creates a de facto barrier to education that the current legal waivers for school fees have failed to overcome. The State’s inability to offset these *indirect costs*—and the subsequent reliance on informal fees—constitutes a breach of the obligation to ensure education is accessible “without discrimination of any kind,” particularly for girls and children without guardians.

Second, regarding the obligation to fulfill, and the fulfillment of rights under national and international human rights law, this study highlights profound gaps in legal accessibility and public engagement. In Timor-Leste, the linguistic exclusivity of legislation in Portuguese without adequate Tetum translation renders it inaccessible to the communities it is intended to regulate. This model of lawmaking results in legislation that reflects state interests rather than community needs, thereby weakening the effectiveness of child labor laws. Furthermore, while social protection programs such as Bolsa da Mãe and the “Free Meal” initiative are positive steps, they lack the integrated strategic approach needed to replace income generated by child labor. Without concomitant investment in educational infrastructure—particularly in additional teachers and classrooms to accommodate higher enrollments—these demand-side interventions risk undermining the quality of education, reinforcing economic incentives for children to work rather than study.

Although Indonesia and Timor-Leste constitutionally guarantee the right to education and have ratified identical international labor standards, their legal architectures are fundamentally different. Indonesia employs a fragmented legal approach that requires complex inter-ministerial coordination, while Timor-Leste centrally integrates these protections but struggles with enforcement capacity in rural areas. Ultimately, despite these structural differences, both countries

¹⁰⁰ T. Hesketh, J. Gamlin, and M. Woodhead, “Policy in Child Labour,” *Archives of Disease in Childhood* 91, no. 9 (2006): 721.

face identical socio-economic obstacles: the normalization of child labor in the vast informal agricultural sector. Therefore, the success of any legal framework depends not on the sophistication of its doctrine, but on the state's practical ability to dismantle the systemic poverty that makes child labor an economic necessity, thereby enabling the full realization of constitutional education rights.

BIBLIOGRAPHY

1945 Constitution of the Republic of Indonesia.

Albino, Susete. "(Re)building the Educational System of Timor-Leste: Evolution and Current Challenges." *Cadernos de Estudos Africanos* 39 (2020): 31–55.

Alston, Philip. "The International Covenant on Economic, Social and Cultural Rights, United Nations." In *Manual on Human Rights Reporting*, 68. New York: United Nations, 1991.

Alston, Philip, and Mary Robinson, eds. *Human Rights and Development: Towards Mutual Reinforcement*. Oxford: Oxford University Press, 2005.

ASEAN. *ASEAN Roadmap on the Elimination of the Worst Forms of Child Labour by 2025*. Jakarta: ASEAN Secretariat, 2021. https://asean.org/wp-content/uploads/ASEAN-Roadmap-on-the-Elimination-of-the-Worst-Forms-of-Child-Labour-by-2025_Final_19Feb2021.pdf.

Badan Pusat Statistik (BPS). *Indonesia Poverty Profile in March 2023*. Official Statistics News No. 47/07/Th XXVI. Jakarta: BPS, 2023. <https://www.bps.go.id/en/pressrelease/2023/07/17/2016/indonesia-poverty-profile-in-march-2023.html>.

Badan Pusat Statistik (BPS). *Indonesia Poverty Profile, September 2024*. Jakarta: BPS, 2025. <https://www.bps.go.id/en/pressrelease/2025/01/15/2401/in-september-2024--the-percentage-of-the-poor-population-decreased-into-8-57-percent-.html>.

Badan Pusat Statistik (BPS). *National Socio-Economic Survey (SUSENAS), September 2012–March 2023*.

- Becker, G. S. *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education*. New York: National Bureau of Economic Research, 1964.
- Bentaouet Kattan, Raja, and Nicholas Burnett. *User Fees in Primary Education*. Washington, DC: World Bank, 2004.
- Betcherman, Gordon, et al. "Child Labor, Education, and Children's Rights." In *Human Rights and Development: Towards Mutual Reinforcement*, edited by Philip Alston and Mary Robinson. Oxford: Oxford University Press, 2005.
- Committee on Economic, Social and Cultural Rights (CESCR). *Report on the Third Session*. Economic and Social Council, Official Records. UN Doc. E/1989/22. 1989.
- Constitution of the Democratic Republic of Timor-Leste.
- Constitutional Court of the Republic of Indonesia. "Court's Role in Protecting Citizens' Right to Education." January 20, 2023. https://en.mkri.id/news/details/2023-01-21/Court's_Role_in_Protecting_Citizens'_Right_to_Education.
- Convention on the Rights of the Child. Adopted November 20, 1989. UN General Assembly Resolution 44/25.
- Donnelly, Jack. "Cultural Relativism and Universal Human Rights." *Human Rights Quarterly* 6, no. 4 (1984): 400-419.
- East Asia Forum. "Indonesia's Free Meal Program Cracks under Poor Leadership." November 14, 2025. <https://eastasiaforum.org/2025/11/14/indonesias-free-meal-program-cracks-under-poor-leadership/>.
- Freeman, M. "The 'New' Sociology of Childhood and Children's Rights." *The International Journal of Children's Rights* 15, nos. 3-4 (2007): 413.
- Fulcrum. "Indonesia's Free School Lunches: Not So Free." February 6, 2025. <https://fulcrum.sg/indonesias-free-school-lunches-not-so-free/>.
- Gaviria, José-Luis. "Education: A Compulsory Right? A Fundamental Tension within a Fundamental Right." *British Journal of Educational Studies* 70, no. 6 (2022): 653-75. <https://doi.org/10.1080/00071005.2021.2024136>.

- Government of Timor-Leste. *Timor-Leste First National Child Labor Survey Report and Mini-Labor Force Survey Report 2016*. Dili: Governo de Timor-Leste, 2016.
- Government Regulation No. 1 of 2024 concerning the Second Amendment to Regulation No. 18 of 2012 on *apoio condicional “Bolsa da Mãe* [conditional “Mother’s Grant” support].
- Hesketh, T., J. Gamlin, and M. Woodhead. “Policy in Child Labour.” *Archives of Disease in Childhood* 91, no. 9 (2006): 721.
- Human Rights Watch. *Failing Our Children: Barriers to the Right to Education*. 2005. https://www.hrw.org/reports/2005/education0905/education0905.htm#_ftn7.
- ILO-IPEC. “International Programme on the Elimination of Child Labour (IPEC): What Is Child Labour?” International Labour Organization. Accessed April 30, 2024. <https://www.ilo.org/international-programme-elimination-child-labour-ipecc/what-child-labour>.
- International Labour Office (ILO). *Child Labour: Targeting the Intolerable*. Geneva: ILO, 1996. <http://www.ilo.org/public/english/comp/child/text/publ/target>.
- International Labour Organization (ILO). “Analysis of Child Economic Activity and School Attendance Statistics from National Household or Child Labor Surveys.” Accessed June 1, 2024. <https://data.unicef.org/country/tls/#>.
- International Labour Organization (ILO). *Assessing the Bolsa da Mãe [Mother’s Grant] Benefit Structure: A Preliminary Analysis*. 2015. <https://socialprotection.org>.
- International Labour Organization (ILO). “‘Bolsa Mãe’ Programme em Timor-Leste [‘Mother’s Grant’ Programme in Timor-Leste].” *Social Protection*. <https://www.social-protection.org/gimi/gess/ShowWiki.action?wiki.wikid=1225>.
- International Labour Organization (ILO). *Menanggulangi Pekerja Anak: Panduan untuk Pengawas Ketenagakerjaan [Tackling Child Labour: A Guide for Labour Inspectors]*. Jakarta: ILO, 2002.

- International Labour Organization (ILO). *Pekerja Anak: Manual Informasi bagi Guru, Pendidik, dan Organisasi Pendidikan [Child Labour: An Information Manual for Teachers, Educators, and Educational Organizations]*. Jakarta: ILO, 2009.
- International Labour Organization (ILO). *World Report on Child Labour: Economic Vulnerability, Social Protection and the Fight against Child Labour*. Geneva: ILO, 2013.
- International Labour Organization (ILO), and UNICEF. *Drivers of Child Labour in Timor-Leste*. International Labour Organization and Government of Timor-Leste, 2022.
- Jerónimo, Patrícia. “Os Direitos da Criança em Timor-Leste [Children’s Rights in Timor-Leste].” In *Estudos em Homenagem ao Professor Doutor Heinrich Ewald Hörster [Essays in Honor of Professor Dr. Heinrich Ewald Hörster]*. Coimbra: Almedina, 2012.
- Judicial Review of Law No. 20 of 2003 on the National Education System, Decision of Constitutional Court No. 58/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2010).
- Judicial Review of the Juvenile Criminal Justice System, Decision of Constitutional Court No. 1/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2010).
- Justino, P., M. Leone, and P. Salardi. “Short- and Long-Term Impact of Violence on Education: The Case of Timor-Leste.” *The World Bank Economic Review* 28, no. 2 (2014).
- Keddell, Emily. “Recognising the Embedded Child in Child Protection: Children’s Participation, Inequalities and Cultural Capital.” *Children and Youth Services Review* 147 (April 2023): 106815. <https://doi.org/10.1016/j.childyouth.2023.106815>.
- Komnas HAM. “Komnas HAM Soroti Eksploitasi Ekonomi terhadap Pekerja Anak [Komnas HAM Highlights Economic Exploitation of Child Workers].” Accessed April 25, 2024. <https://www.komnasham.go.id/index.php>.

- Kurnia, Titon Slamet, and Ninon Melatyugra. "Universality of Rights as an Interpretive Principle for the Indonesian Constitutional Court." *Constitutional Review* 10, no. 2 (2024): 474. <https://doi.org/10.31078/consrev1027>.
- Law No. 6/2023, Article 4(1)(j) (Democratic Republic of Timor-Leste).
- Law No. 14 of 2008, Article 1(2) (Democratic Republic of Timor-Leste).
- Lundy, Laura, Karen Orr, and Harry Shier. "Children's Education Rights: Global Perspectives." In *Handbook of Children's Rights: Global and Multidisciplinary Perspectives*, edited by Martin D. Ruck et al. Abingdon: Routledge, 2017.
- Ministry of Manpower of the Republic of Indonesia. *Roadmap Towards a Child Labour-Free Indonesia in 2022*. Jakarta: Ministry of Manpower of the Republic of Indonesia, 2022.
- National Team for Accelerated Poverty Reduction (TNP2K). *Annual Report on Very Poor Households (RTSM) in 2012*. 2012.
- Nurhayati, Siti, and Elly Asmarawati. "Prevention of Child Labor Exploitation through the Implementation of Fair Labor Laws." *Pena Justisia: Media Komunikasi dan Kajian Hukum [Pena Justisia: Media for Legal Communication and Studies]* 24, no. 1 (2025): 3468–85.
- Penal Code, Article 20, Democratic Republic of Timor-Leste.
- Presidential Decree No. 36 of 1990 on Ratification of the Convention on the Rights of the Child. Republic of Indonesia, 1990.
- Rachmawati, E., et al. "Child Labor Rights for Violating Employment Requirements Practices." *LJOBSOR* 10, no. 2 (2022).
- Radfar, Amir, et al. "Challenges and Perspectives of Child Labor." *Industrial Psychiatry Journal* 27, no. 1 (2018): 17–20.
- Rosemberg, Fúlvvia, and Carmem Lúcia Sussel Mariano. "A Convenção Internacional sobre os Direitos da Criança: Debates e Tensões [The International Convention on the Rights of the Child: Debates and Tensions]." *Cadernos de Pesquisa [Research Notebooks]* 40, no. 141 (2010): 693–728.

- Silk, James J., and Meron Makonnen. "Ending Child Labor: A Role for International Human Rights Law." *Saint Louis University Public Law Review* 22 (2003): 359.
- Silva, Rebeca Ribeiro. "Trabalho Infantil na Ordem Jurídica Internacional [Child Labour in the International Legal Order]." Dissertation, Universidade de Lisboa, 2018.
- Suryana, Yana, Yulia Kurniaty, and Aroma Elmina Martha. "A Model for Protecting the Right to Education for Child Labour." *Jurnal Hukum IUS QUIA IUSTUM [IUS QUIA IUSTUM Law Journal]* 30, no. 2 (2023): 371-95. <https://doi.org/10.20885/iustum.vol30.iss2.art7>.
- TATOLI Agência Noticiosa de Timor-Leste. "MSSI Aprova Beneficiários 69.571 do Programa Bolsa da Mãe Condicional 2024 [MSSI Approves 69,571 Beneficiaries for the 2024 Conditional Mother's Grant Program]."
- Tesón, Fernando R. "International Human Rights and Cultural Relativism." *Virginia Journal of International Law* 25, no. 4 (1985): 870.
- Timor-Leste Customs Authority. "Comunidade dos Países de Língua Portuguesa (CPLP) [Community of Portuguese-Language Countries (CPLP)]." Accessed May 13, 2024.
- Timor-Leste Government Resolution No. 3 of 2007.
- Timor-Leste National Parliamentary Resolution No. 16/2003 on Ratification of the Convention on the Rights of the Child.
- Tomaševski, K. *Education Denied: Costs and Remedies*. London: Zed Books, 2003.
- Tomaševski, K. "Globalizing What: Education as a Human Right or as a Traded Service." *Indiana Journal of Global Legal Studies* 12, no. 1 (2005): 1.
- UNESCO. *Timor-Leste National EFA 2015 Review*. 2015. <https://unesdoc.unesco.org/ark:/48223/pf00000229880>.
- UNICEF. *A Human Rights-Based Approach to Programming: Conceptual Framework*. New York: United Nations Children's Fund, 2007.

UNICEF. “Orang Tua Jangan Libatkan Anak dalam Aktivitas Kerja [Parents Should Not Involve Children in Work Activities].” *TATOLI Agência Noticiosa de Timor-Leste*. Accessed April 21, 2024.

UNICEF. *Sustainable Development Starts and Ends with Safe, Healthy, and Well-Educated Children*. New York: UNICEF, 2013.

UNICEF. *Timor-Leste at a Glance, 2024*. 2024. <https://www.unicef.org/timorleste/media/6991/file/Timor%20Leste%20at%20a%20Glance%20as%20of%2031%20May%202024.pdf>.

United Nations. *General Comment No. 3 of the CESCR*. UN Doc. E/1991/23. 1991.

United Nations in Timor-Leste. *Timor-Leste Common Country Analysis*. Dili: United Nations in Timor-Leste, 2025. <https://timorleste.un.org/en/305721-2025-timor-leste-common-country-analysis>.

United States Department of Labor. *2024 Findings on the Worst Forms of Child Labor: Timor-Leste*. Washington, DC: U.S. Department of Labor, 2025. https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2024/Timor-Leste.pdf.

Unnikrishnan J.P. v. State of Andhra Pradesh, Decision of the Supreme Court of India (The Supreme Court of India 1993).

Wikipedia. “Países Africanos de Língua Oficial Portuguesa [African Countries with Portuguese as an Official Language].” Accessed May 13, 2024.

Woolf, Alan D. “Health Hazards for Children at Work.” *Journal of Toxicology: Clinical Toxicology* 40 (2002): 477.

World Bank. “Timor-Leste: Começando uma Revolução da Educação [Timor-Leste: Starting an Education Revolution].” Accessed July 7, 2024. www.worldbank.org.

World Health Organization. *Children at Work: Special Health Risks*. Geneva: World Health Organization, 1987. http://whqlibdoc.who.int/trs/WHOTRS_756.pdf.

Young, Katharine G. "Rights and Obligations." In *International Human Rights Law*, 4th ed., edited by Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris, 129–48. Oxford: Oxford University Press, 2022.

Zhou, Zikun, Xiaoyan Lei, and Yan Shen. "Education Burden Reduction, Family Education Investment, and Education Equity." *China Economic Quarterly International* 3, no. 3 (September 2023): 179.

HYBRID MULTI-LEVEL CONSTITUTIONAL COMPLAINT: REFORMING CONSTITUTIONAL RIGHTS PROTECTION IN INDONESIA

Hikam Hulwanullah*

Faculty of Law, Universitas Negeri Surabaya
hikamhulwanullah@unesa.ac.id

Torik Abdul Aziz Wibowo**

Faculty of Law, Universitas Brawijaya
torikwibowo@ub.ac.id

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Abstract

The absence of a direct constitutional complaint mechanism in Indonesia means that individuals still lack a legal means to contest violations of basic rights beyond the scope of judicial review. This study examines three main issues: the factors causing the absence of a constitutional complaint mechanism in Indonesia, a comparison of the objects and mechanisms of constitutional complaints in Germany, South Korea, and Spain, and the implementation of the Hybrid Multi-Level Constitutional Complaint in Indonesia. This study proposes an alternative model that aims to resolve constitutional rights disputes before this mechanism is officially regulated in the 1945 Constitution of the Republic of Indonesia.

Keywords: Constitutional Complaint; Constitutional Rights; Hybrid Multi-level Model; Indonesian Constitutional Court; Judicial Reform

* Hikam Hulwanullah is a constitutional law lecturer at Universitas Negeri Surabaya (Unesa) and serves as the Director of the Centre for Constitutional, Legislative, and Democratic Studies at the Faculty of Law, Unesa. He holds a Master of Laws (LL.M.) degree from the University of Melbourne, Australia. His expertise is focused on constitutional rights, legislative law, state governance, and public law.

** Torik is a lecturer in Constitutional Law at the Faculty of Law, Universitas Brawijaya. Holds a Master of Laws from Universitas Islam Indonesia.



I. INTRODUCTION

1.1. Background

The protection of citizens' constitutional rights is a fundamental pillar for the upholding of a democratic rule of law. The Constitution as the supreme law not only contains the blueprint of state organization but also guarantees a set of rights and freedoms inherent to every individual. However, such normative guarantees would be meaningless if not accompanied by effective enforcement mechanisms. One mechanism that is widely recognized in various constitutional democracies¹ is the constitutional complaint. This mechanism provides direct access for citizens to lodge complaints regarding violations of their constitutional rights to the constitutional court.²

On the other hand, the only ideal way to implement the Constitutional Complaint mechanism in the Constitutional Court is through an amendment by adding this authority. The problem is that constitutional amendments are a highly dynamic political mechanism, making it difficult to achieve. Even if the amendment is carried out, debates on the technicalities, mechanisms, and concepts of the constitutional complaint will still remain a long discourse to be implemented without causing other new issues.

In fact, in Indonesia, the discourse on constitutional complaints has been ongoing for quite some time, but this mechanism has not yet been formally adopted into the legal system. The absence of this legal avenue reflects a limitation in the constitutional rights protection system, particularly due to the lack of a direct constitutional complaint mechanism against concrete acts or judicial constitutional complaints (the review of judicial decisions or legal proceedings that violate constitutional rights), Regulatory Constitutional Complaints (*Beleidsregel*) (the review of state instruments outside of regulations, such as presidential instructions, circular letters, and regulations below the law that violate the constitution), and Constitutional Omission (the neglect of constitutional duties,

¹ Hikam Hulwanullah, "Indonesian Constitutional Policies to Overcome Climate Crisis from Ecological Democracy Perspectives," *E3S Web of Conferences* 673 (2025): 02017, 2–4.

² Jackson, "Constitutional Law in an Age of Proportionality," 3094–3196.

such as the failure to create laws that the DPR RI is supposed to pass to protect fundamental rights, which remain unimplemented, as well as decisions by the Constitutional Court that have not been fully implemented). Consequently, individuals frequently encounter obstacles when seeking adequate legal recourse after their constitutional rights, enshrined in the 1945 Constitution, are violated by governmental measures, whether in the form of legislation or specific policy implementations. This situation places individuals in a vulnerable position and, in practice, weakens the supremacy of the Constitution as the primary guardian of human rights.³

The absence of a constitutional complaint mechanism is becoming increasingly problematic in the face of more complex constitutional challenges.⁴ Violations of constitutional rights no longer arise solely from general laws, but also from state instruments beyond regulations and basic legal frameworks, court decisions, and judicial processes that fail to uphold due process of law, as well as from the state's failure to fulfill its constitutional obligations situations that are not adequately addressed within the existing legal framework (Constitutional Omission).⁵ In this context, there is a growing need for a legal breakthrough that can offer more comprehensive and accessible protection of citizens' rights. This paper explores the factors contributing to the absence of a constitutional complaint mechanism in Indonesia, draws lessons from the experiences of Germany, South Korea, and Spain, and proposes an alternative model to address the gap in constitutional complaint authority before it is formally incorporated into the constitution.⁶

In this study, "Hybrid" refers to the integration of two or more different elements, methods, or approaches into a new unified system. In the context of this study, it means not relying solely on a pure constitutional complaint model at the Constitutional Court, but rather combining various approaches

³ Refly Harun, "Memangkas Mahkamah Konstitusi [Trimming the Constitutional Court]," *Harian Media Indonesia*, April 17, 2004, quoted in Gugun El Guyanie, "Urgensi Pengujian Constitutional Complaint oleh Mahkamah Konstitusi Republik Indonesia [The Urgency of Constitutional Complaint Review by the Constitutional Court of the Republic of Indonesia]," *In Right: Jurnal Agama dan Hak Azazi Manusia* 3, no. 1 (2013): 184.

⁴ Hulwanullah, "Konstruksi Constitutional Complaint [Construction of Constitutional Complaint]"

⁵ Seyla Benhabib, "Dialogic Constitutionalism and Judicial Review," *Global Constitutionalism* 9 (2020): 506–14.

⁶ Standy Wico et al., "Constitutional Complaint in Indonesia Through the Lens of Legal Certainty," *Indonesian Journal of Law and Society* 2, no. 1 (2021): 57.

(for example, combining judicial oversight through the Judicial Commission with the expanded authority of the Administrative Court, Human Rights Court, and others). Meanwhile, “Multi-Level” indicates that the process or resolution of constitutional rights violations does not only occur at one level or one institution in the Constitutional Court, but involves multiple levels (for instance, from oversight institutions/ombudsman to the judiciary). This concept represents a filtering method to address constitutional rights protection issues at the Constitutional Court as a curative method, once individuals have exhausted all other avenues for fulfilling their constitutional rights, provided the Constitutional Court has the authority through constitutional amendment. With this design, the model aims to strengthen the protection of citizens’ rights while maintaining judicial balance and helping to manage the Constitutional Court’s caseload before the establishment of a constitutional complaint mechanism at the Constitutional Court. This approach directly addresses the limitations of Indonesia’s existing remedial framework, which does not yet provide a direct constitutional avenue to address violations arising from concrete acts or judicial decisions. As a consequence, individuals are often forced to rely on fragmented mechanisms that are not specifically tailored to address constitutional grievances. In this context, the proposed model offers a more cohesive approach by integrating the review of legal norms with concrete state actions, while incorporating procedural safeguards to preserve institutional balance.

1.2. Research Questions

This paper raises three main questions: First, what factors have caused the absence of a constitutional complaint mechanism in the Indonesian legal system thus far? Second, how can the implementation of constitutional complaints in several countries provide lessons for designing the objects of constitutional complaints and an alternative mechanism beyond the Indonesian Constitutional Court? And how can the concept and normative design of the hybrid multi-level constitutional complaint model be formulated as an alternative system?

1.3. Research Method

This study employs a normative legal research method to address the three research questions in a structured manner.⁷ The statute approach is used to answer the first research question by examining Indonesia's existing legal framework, particularly the 1945 Constitution, the Constitution of Germany, the Constitution of South Korea, the Constitution of Spain, the Constitutional Court Law, the Judicial Power Law, the Administrative Court Law (UU PTUN), the Human Rights Court Law, and other relevant regulations. The objective is to uncover the underlying normative constraints that contribute to the absence of a constitutional complaint mechanism. This approach allows the study to evaluate the effectiveness of existing legal frameworks in safeguarding constitutional rights, while also identifying the significant gaps that persist in the system.⁸

The conceptual framework plays a crucial role in addressing the second research question by offering a theoretical rationale for the establishment of a constitutional complaint mechanism. By drawing upon foundational principles such as the rule of law, constitutional supremacy, and the protection of fundamental rights, this approach provides a solid normative foundation for understanding the necessity of such a mechanism within Indonesia's constitutional framework.⁹

The comparative approach is pivotal in tackling the third research question and in crafting the proposed model. Rather than merely providing a descriptive comparison, this study delves into the experiences of Germany, South Korea, and Spain, identifying key elements of institutional design such as admissibility criteria, filtering mechanisms, and the scope of review that can be tailored to fit Indonesia's context. These insights are then selectively incorporated and adapted into the development of the Hybrid Multi-Level Constitutional Complaint Model. Through this process, comparative analysis becomes a bridge that connects

⁷ Depri Liber Sonata, "Metode Penelitian Hukum Normatif dan Empiris: Karakteristik Khas dari Metode Meneliti Hukum [Normative and Empirical Legal Research Methods: Distinctive Characteristics of Methods for Researching Law]," *FIAT JUSTISIA: Jurnal Ilmu Hukum* 8, no. 1 (2015).

⁸ Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi [Legal Research, Revised Edition]* (Jakarta: Kencana, 2017), 135–36.

⁹ Abdul Hakim Siagian, "Constitutional Complaint as Strengthening Constitutionalism in Indonesia," *Randwick International of Social Science Journal* 1, no. 3 (2020): 486–98.

theoretical arguments with practical institutional design, offering a well- rounded perspective on how to implement such a mechanism effectively.¹⁰

II. RESULTS & DISCUSSION

2.1. Factors Underlying the Absence of a Constitutional Complaint Mechanism in Indonesia's Legal System

The lack of a constitutional complaint mechanism in Indonesia's legal system does not stem from mere chance but arises from a combination of interconnected factors. Recognizing these underlying causes is essential before developing a viable alternative model. Broadly speaking, the barriers to implementing such a mechanism fall into three main groups: legal considerations, institutional challenges, and political dynamics.¹¹ Together, these elements form a systemic obstacle that is hard to overcome without strong political commitment and deep legal reforms. A detailed examination of each factor will help clarify the nature of the challenges involved.¹²

From a legal standpoint, the constitutional framework governing the authority of the Constitutional Court under the 1945 Constitution presents a significant barrier. Article 24C paragraph (1) clearly lists four powers and one duty of the Court in an exhaustive manner, without providing any mandate for the Court to directly hear constitutional complaints submitted by individual citizens. While certain progressive readings have tried to expand the scope of judicial review, the dominant interpretation continues to adhere closely to the text and remains narrow in application. Furthermore, there is no specific organic law that regulates this particular mechanism, which means individuals lack a direct constitutional avenue to contest rights violations resulting from specific actions or court rulings. Institutional considerations also carry considerable weight, especially concerning the preparedness of the Constitutional Court and other judicial institutions.

¹⁰ Marzuki, *Penelitian Hukum Edisi Revisi [Legal Research, Revised Edition]*, 12.

¹¹ 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.

¹² Simon Butt and Tim Lindsey, "Indonesian Laws and Lawmaking," in *Indonesian Law* (Oxford: Oxford University Press, 2018), 34–60.

Worries about a possible flood of cases, or what is often described as judicial overload, frequently surface as grounds for resistance, since such an increase is seen as a threat to the Court's core responsibilities.¹³

From a political perspective, opposition to broadening citizens' access to the Constitutional Court frequently comes from state institutions like the government and the House of Representatives. Introducing a constitutional complaint mechanism might strengthen judicial oversight of government policies and actions, which could be seen as limiting the autonomy of the executive and legislative branches.¹⁴ Short-term political interests are frequently prioritized over the long-term strengthening of constitutional rights protection. The lack of strong and organized pressure from civil society also contributes to why this agenda has not yet become a priority in national legal reform. The combination of these three factors has left the idea of a constitutional complaint largely confined to academic discourse, without advancing into a concrete policy agenda.¹⁵

Understanding these inhibiting factors is essential for designing an effective advocacy strategy. Efforts to introduce a constitutional complaint cannot be limited solely to amending legal texts. A holistic approach is required, one that also addresses institutional capacity-building and the development of political consensus among stakeholders. Without simultaneously overcoming the root problems at the juridical, institutional, and political levels, any proposed model will be difficult to implement and risks becoming a mere paper tiger without enforceability.¹⁶ Accordingly, the analysis in this subsection serves as a foundation for the subsequent discussion on the design of alternative models and their implementation strategies.¹⁷

¹³ Juwai Riyah, "Position and Authority of the Constitutional Court as a State Institution," *JUSTICES: Journal of Law* 3, no. 2 (2024): 76–85.

¹⁴ Aziz Z. Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018).

¹⁵ Wico et al., "Constitutional Complaint in Indonesia," 57.

¹⁶ David S. Law and Mila Versteeg, "Is the Influence of the U.S. Constitution Declining?," in *Modern Constitutions* (Chicago: University of Chicago Press, 2020), 17–63.

¹⁷ Christine Bell, "Introduction: Bargaining on Constitutions—Political Settlements and Constitutional State-Building," *Global Constitutionalism* 6 (2017): 13–32.

2.1.1. Legal Factors

Juridical factors constitute a fundamental obstacle to the implementation of a constitutional complaint in Indonesia. The root of the problem lies in the formulation of the Constitutional Court's authority under the 1945 Constitution.¹⁸ Article 24C paragraph (1) explicitly and exhaustively stipulates that the Constitutional Court has jurisdiction, at the first and final instance with binding decisions, to review laws against the Constitution, to adjudicate disputes over the authority of state institutions whose powers are granted by the Constitution, to decide on the dissolution of political parties, and to resolve disputes concerning the results of general elections. Not a single phrase in this provision grants the Constitutional Court the authority to receive and examine individual complaints from citizens regarding violations of their constitutional rights. The dominant interpretation among legal scholars and constitutional judges tends to be textualist, meaning that the Constitutional Court's powers are confined to what is literally stated. This method hinders the introduction of legal innovations via judicial interpretation.

In addition to constitutional constraints, the lack of a legal foundation at the statutory level also presents a significant barrier. As of now, no specific legislation governs the constitutional complaint mechanism. Law No. 24 of 2003, most recently revised by Law No. 7 of 2020 concerning the Constitutional Court, only details powers that are already outlined in the 1945 Constitution. Without a statutory framework, it becomes impossible to establish technical procedures, procedural rules, admissibility criteria, or the scope of constitutional complaints. Efforts to include such provisions in amendments to the Constitutional Court Law have consistently failed due to the absence of political agreement. This legal gap leads to uncertainty and makes any attempt to submit an individual complaint premature and lacking legal basis.¹⁹

¹⁸ Felicia Felicia, "Kedudukan Mahkamah Konstitusi dalam Sistem Hukum Ketatanegaraan Indonesia [The Position of the Constitutional Court in the Indonesian Constitutional Law System]," *Jurnal Indonesia Sosial Teknologi* [Indonesian Journal of Social Technology] 3, no. 5 (May 2022): 58

¹⁹ Jack M. Balkin, "Translating the Constitution," *Michigan Law Review* 118, no. 6 (2020): 977–1004.

Another juridical problem relates to the nature of the Constitutional Court's decisions in judicial review. At present, the Court may only declare that a statutory provision is inconsistent with the 1945 Constitution and therefore lacks binding legal force. Such rulings are *erga omnes*, meaning they apply universally to all persons. By contrast, a constitutional complaint mechanism may provide individual relief to applicants (*inter partes*), while in some cases also resulting in the invalidation of legal norms with broader effect (*Erga omnes*). In this way, the Constitutional Court can address not only concrete acts or judicial decisions, but also the legal norms that may underlie constitutional violations. The current procedural framework is not designed to accommodate such a dual function, which would necessitate fundamental changes not only to the Court's procedural law but also to the overall judicial system. This complexity renders juridical factors the first line of resistance that must be overcome in order to realize a constitutional complaint mechanism in Indonesia.²⁰

2.1.2. Institutional Factors

Institutional factors concern the preparedness and capability of legal institutions, especially the Constitutional Court and the wider judiciary, to implement a mechanism for constitutional complaints.²¹ One of the most enduring concerns in this area is the risk of case overload, or judicial congestion, that could emerge once individuals are given direct access to the Court. Instead of depending on speculative estimates, a more realistic evaluation can be based on comparative experiences from other legal systems that have long applied similar mechanisms.²² In Germany, the Federal Constitutional Court handles over 5,000 constitutional complaints annually, placing it among the world's busiest constitutional courts in the realm of individual rights litigation. Despite the substantial caseload, the court maintains effective operations by employing a

²⁰ Agsel Awanisa, Yusdianto Yusdianto, and Siti Khoiriah, "The Position of Constitutional Complaint in the Constitutional Court of the Republic of Indonesia," *Pancasila and Law Review* 2, no. 1 (2021): 61–78.

²¹ Steven Greer and Luzius Wildhaber, "Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights," *Human Rights Law Review* 12, no. 4 (2012): 655–87.

²² Tanto Lailam and M. Lutfi Chakim, "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 10, no. 2 (2023): 148–71.

structured filtering system, which allows it to screen and dismiss a significant number of cases at an early stage.²³ A similar pattern can also be seen in South Korea. Since its establishment in 1988, the Constitutional Court of Korea has handled a total of 55,476 cases up to the end of 2025, of which 54,159 cases approximately 97 percent, are constitutional complaints. This overwhelming dominance of individual petitions underscores the central role of constitutional complaint as a primary avenue for rights protection. However, the Court manages this caseload through a rigorous screening process: more than 35,000 cases have been dismissed at the panel stage, meaning that only a limited number proceed to full adjudication. In Spain, the *recurso de amparo* demonstrates how open individual access can create significant institutional pressures.²⁴ In 2023, the Spanish Constitutional Court handled more than 8,000 applications, which led it to tighten admissibility standards to preserve procedural efficiency and judicial effectiveness. These experiences across different jurisdictions show that granting direct individual access to a constitutional court typically results in a substantial rise in caseload. In Indonesia, where the Constitutional Court has only nine justices and functions under existing institutional limitations, such a surge would pose serious challenges to its ability to process cases efficiently. An overwhelming number of cases could delay rulings and weaken the quality of judicial reasoning. Over time, this might erode the core purpose of constitutional complaints, ensuring effective protection of constitutional rights. Additionally, the relationship between the Constitutional Court and the Supreme Court requires careful thought.²⁵

Introducing a constitutional complaint mechanism, especially one that covers judicial decisions, can create tension between two top courts. The Supreme Court might see the Constitutional Court's review of its rulings as a threat to its independence and to the principle that court decisions should be final. To avoid conflict, the system needs clear rules that define each court's role and encourage

²³ Bundesverfassungsgericht [Federal Constitutional Court], *Annual Report* (Karlsruhe: Bundesverfassungsgericht, n.d.).

²⁴ Constitutional Court of Korea, "Case Load Statistics," accessed May 25, 2026.

²⁵ Tribunal Constitucional de España [Constitutional Court of Spain], *Memoria Anual 2023* [Annual Report 2023] (Madrid: Tribunal Constitucional, 2023).

cooperation instead of rivalry.²⁶ Without clear procedural protocols and a shared institutional understanding, carrying out constitutional complaints may create tensions that, if not handled properly, could weaken the overall coherence and effectiveness of the judiciary. This situation therefore requires structured dialogue among institutions and a step-by-step improvement of the judicial framework, so that the protection of constitutional rights can be enhanced without disrupting the balance between institutions.

The quality of human resources in the Constitutional Court is also a key factor. Resolving constitutional complaints demands specialized knowledge from judges, court registrars, and legal researchers. These individuals need more than just a solid grasp of constitutional law, they must also understand related areas like administrative, criminal, and civil law, since violations of constitutional rights can occur in various legal contexts.

Building institutional capacity through staff training, comparative learning, and hiring experts is essential for the mechanism to function properly. At the same time, the IT infrastructure must be ready to handle a large number of cases. Without sufficient preparation, introducing a constitutional complaint system could seriously affect the Court's efficiency and daily operations.²⁷

2.1.3. Political Factors

Political considerations frequently play the decisive role in shaping legal reform initiatives, including the implementation of a constitutional complaint system. Resistance or lack of commitment from the executive and legislative authorities often poses a significant barrier to progress.²⁸ Filing a constitutional complaint naturally reinforces the role of judicial review and broadens the court's oversight over government actions and legislative outcomes.²⁹ This implies that

²⁶ Satya Arinanto, "Constitutional Court in Indonesia," *Jurnal Hukum & Pembangunan* [Law and Development Journal] 26, no. 5 (2017): 387.

²⁷ Maartje de Visser, "Promoting Constitutional Literacy: What Role for Courts?," *German Law Journal* 23, no. 7 (2022): 1121–38.

²⁸ Gerhard Dannemann, "Constitutional Complaints: The European Perspective," *International and Comparative Law Quarterly* 43, no. 1 (1994): 142–53.

²⁹ 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): 75–94; Mark Tushnet, "The Possibility of Illiberal Constitutionalism?," *Florida Law Review* 69, no. 6 (2017): 1367–84.

citizens could directly challenge any government policy, implementing regulation, or administrative action if they believe it violates constitutional rights. For some officials in the government and parliament, stronger judicial oversight might be seen as limiting their political discretion and room to maneuver, which could lead to resistance against such reforms.³⁰

Party politics also play a crucial role in shaping the prospects for constitutional reform. Proposals to amend the 1945 Constitution or revise important laws, such as the Constitutional Court Law, require wide-ranging support across political parties in the legislature. In a highly divided political environment, achieving consensus on such foundational matters becomes extremely challenging. Political parties usually pursue different goals, and protecting citizens' constitutional rights often fails to rank high on their agendas because it lacks immediate political appeal or urgency. As a result, this issue tends to be overshadowed by other legislative priorities that more directly serve the interests of those in power, like changes to electoral rules or party regulations. Unless major parties demonstrate strong commitment or form a stable coalition around the issue, discussions about constitutional complaints will likely remain limited to academic circles.³¹

Another political factor lies in the level of public or civil society awareness and the pressure they exert. In numerous countries, the implementation of robust rights-protection mechanisms frequently stems from social movements or widespread public demands. In Indonesia, while awareness of constitutional rights has been steadily increasing, efforts to push for a constitutional complaint mechanism have not yet evolved into a coordinated and enduring mass movement. Although civil society organizations, academics, and legal professionals have emphasized the importance of this issue, their advocacy has not gained sufficient momentum to substantially shape the national political agenda. In the absence of substantial bottom-up political pressure, political elites tend to maintain the status quo, which they perceive as safer for their interests. Therefore, building

³⁰ Adam S. Chilton and Mila Versteeg, "Do Constitutional Rights Make a Difference?," *American Journal of Political Science* 60, no. 3 (2016): 575–89.

³¹ Wolfgang C. Müller, "Political Parties in Parliamentary Democracies: Making Delegation and Accountability Work," *European Journal of Political Research* 37, no. 3 (2000): 309–33.

public awareness and mobilizing broad support is one of the keys to overcoming this political barrier.³²

2.2 Protection of Constitutional Rights in Comparative Perspective

A comparative constitutional approach is essential in identifying institutional designs capable of balancing individual access to constitutional justice with judicial sustainability. Rather than adopting any single foreign model wholesale, comparative analysis enables the extraction of institutional elements that may be selectively adapted to Indonesia's constitutional structure. In this regard, Germany, South Korea, and Spain present three distinct yet complementary models of constitutional complaint, each offering important insights for institutional design.

Germany's *Verfassungsbeschwerde* is widely seen as the classic model for individual constitutional complaints. Under Article 93(1)(4a)³³ of the Basic Law and the Federal Constitutional Court Act (*BVerfGG*),³⁴ individuals can directly bring cases before the Federal Constitutional Court to challenge actions by public authorities that violate constitutional rights. Although access is broad, the system imposes strict requirements for admissibility. Applicants must first exhaust all other available legal remedies and show that their complaint involves a matter of fundamental constitutional importance.³⁵ Additionally, the chamber system (*Kammer*), consisting of three judges, acts as an initial screening mechanism with the authority to reject complaints that are clearly inadmissible or lack merit.³⁶ Only cases that meet substantial constitutional requirements move forward to the Senate. This structured filtering approach shows how broad protection of rights can coexist with institutional efficiency by managing judicial workload effectively, rather than trying to eliminate it completely. In reality, thousands of constitutional complaints are still filed each year, as seen in the experience of

³² Wico et al., "Constitutional Complaint in Indonesia," 57.

³³ Basic Law for the Federal Republic of Germany (*Grundgesetz* [Basic Law]), art. 93(1)(4a).

³⁴ Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* [Federal Constitutional Court Act]—*BVerfGG*), §§ 13(8a), 90–95.

³⁵ Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed. (Durham: Duke University Press, 2012), 36–42.

³⁶ Christian Boulanger, "The Federal Constitutional Court: Guardian of the Constitution," in *The German Federal Constitutional Court*, ed. Matthias Jestaedt (Oxford: Oxford University Press, 2016), 121–25.

Germany's Federal Constitutional Court. However, through a strict admissibility review process, the Court ensures that only matters of real constitutional importance proceed to full judicial consideration. This way, the system maintains meaningful constitutional oversight while preserving the institution's ability to function properly.

South Korea adopted its constitutional complaint mechanism within the broader context of democratic transition following authoritarian rule. Established in 1988, the Korean Constitutional Court introduced a system³⁷ that allows individuals to challenge governmental actions and, under certain circumstances, judicial decisions that infringe constitutional rights.³⁸ The mechanism has played a significant role in consolidating constitutional governance and strengthening the protection of civil liberties. For example, in 2015 the Korean Constitutional Court declared the criminalization of adultery unconstitutional, affirming the protection of individual autonomy and privacy.³⁹ Similarly, in 2018 the Court recognized the right to conscientious objection to compulsory military service, reinforcing freedom of conscience under the Constitution.⁴⁰ These landmark rulings show that constitutional complaints in South Korea serve not only as a procedural mechanism but also as a normative tool that strengthens democratic accountability and fosters constitutional culture within a society transitioning from authoritarian rule.

Spain offers another significant reference point through its *recurso de amparo*, especially for civil law systems. This legal mechanism is established under Articles 53(2) and 161(1)(b) of the Spanish Constitution.⁴¹ and further detailed in the Organic Law of the Constitutional Court (LOTC),⁴² the *amparo* procedure allows individuals to request protection of their fundamental rights when these are threatened or violated by acts of public authorities, including court rulings. Similar to Germany, Spain has established strict criteria for

³⁷ Constitution of the Republic of Korea (1987), arts. 111–13.

³⁸ Constitutional Court Act of Korea, arts. 68–75.

³⁹ Korean Constitutional Court, Case No. 2009 Hun-Ba17, Decision of February 26, 2015 (Adultery Case).

⁴⁰ Korean Constitutional Court, Case No. 2011Hun-Ba379, Decision of June 28, 2018 (Conscientious Objection Case).

⁴¹ *Constitución Española de 1978* [Spanish Constitution of 1978], arts. 53(2), 161(1)(b).

⁴² *Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional* [Organic Law 2/1979 of October 3 on the Constitutional Court] (LOTC), as amended.

admissibility, particularly the requirement of “special constitutional relevance” (especial trascendencia constitucional) as a prerequisite for constitutional review.⁴³ This admissibility filter acts as a tool to manage caseload while ensuring access to constitutional justice. The Spanish case shows that a constitutional complaint system can be successfully incorporated into a civil law court structure without upsetting the institutional equilibrium, as long as procedural safeguards and filtering criteria are clearly defined.⁴⁴

The experiences of Germany, South Korea, and Spain collectively point to three key design features necessary for a workable constitutional complaint system. In Germany, the model shows how a structured filtering mechanism helps control the court’s workload by applying strict admissibility criteria, allowing only cases with genuine constitutional relevance to move forward to full review. South Korea’s approach, on the other hand, underscores the normative role of constitutional complaints, where the court interprets constitutional rights and shapes legal standards through its rulings, thus supporting democratic development and enhancing rights protection during periods of legal transition. Meanwhile, Spain’s system emphasizes the need for institutional compatibility, demonstrating how a constitutional complaint process can function effectively within a civil law framework without sacrificing procedural efficiency. Together, these lessons offer a solid basis for crafting a hybrid, multi-tiered constitutional complaint system in Indonesia, one that broadens access to constitutional justice while maintaining judicial capacity and upholding the balance of the legal system.

2.2.1. Model Constitutional Complaint in Germany

The German constitutional complaint system, known as *Verfassungsbeschwerde*, is one of the oldest and most influential models worldwide. Established under Article 93(1) No. 4a of the German Basic Law, it allows any person to bring a claim before the Federal Constitutional Court if they believe a public authority,

⁴³ Spanish Constitutional Court, STC 155/2009, June 25, 2009.

⁴⁴ Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (New Haven: Yale University Press, 2009), 96–120.

such as legislation, executive action, or a court ruling, has infringed upon their fundamental rights. The Court does not re-try the case or act as an appellate body. Instead, it only examines whether the contested measure violates constitutional law, especially regarding fundamental rights. This narrow focus ensures the mechanism serves primarily to safeguard constitutional principles rather than function as an extra level of ordinary judicial review.⁴⁵ This model is notably broad in scope and has become the dominant instrument in the practice of the German Constitutional Court, accounting for more than 90 percent of the cases it handles. The success of the German model lies in its ability to provide broad access for individuals while at the same time maintaining the effectiveness of the judiciary's performance. One of the key features of the German model is the strict prerequisites for filing a constitutional complaint. The primary requirement is the principle of subsidiarity, which requires applicants to exhaust all available legal remedies in the ordinary courts before turning to the Federal Constitutional Court. This principle reflects the role of ordinary courts as the primary protectors of fundamental rights, while the Constitutional Court exercises a subsidiary and corrective function limited to constitutional review.⁴⁶

Furthermore, the complaint must clearly show a specific breach of a fundamental right that is protected under the Constitution.⁴⁷ The Court will not accept cases that only challenge the improper application of general law.⁴⁸ Disputes in Germany often involve challenges to statutory laws, executive measures, and court rulings that violate fundamental rights, particularly those protected under the Basic Law. These cases must meet specific criteria, which act as a crucial first filter in determining admissibility.⁴⁹

To handle the enormous number of cases it receives, the German Federal Constitutional Court uses a systematic and highly selective filtering process.⁵⁰

⁴⁵ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 34–42.

⁴⁶ Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara [Models of Constitutional Review in Various Countries]* (Jakarta: Konstitusi Press, 2005), 22.

⁴⁷ Federal Constitutional Court Act (BVerfGG), § 90(2); Christian Boulanger, "The Federal Constitutional Court: Guardian of the Constitution," in *The German Federal Constitutional Court*, ed. Matthias Jestaedt (Oxford: Oxford University Press, 2018), 121–35.

⁴⁸ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 36–42.

⁴⁹ Awanisa, Yusdianto, and Khoiriah, "Position of Constitutional Complaint," 61–78.

⁵⁰ Boulanger, "Federal Constitutional Court," 121–35.

Each constitutional complaint is first reviewed by a Chamber (Kammer) consisting of three judges. The Chamber has the authority to reject complaints that are clearly inadmissible or lack sufficient constitutional significance. In such cases, it may issue a summary rejection without providing detailed reasoning, and these decisions are final and cannot be appealed.⁵¹ A complaint will move forward to adjudication by the Senate, which consists of eight judges, only if it involves a matter of fundamental constitutional importance or if dismissing it would cause serious harm to the applicant. This multi-stage filtering system enables the Court to handle a consistently large caseload, often reaching several thousand complaints each year, while ensuring that only issues of real constitutional significance are given full judicial review.⁵²

The implications of the German model are profound for the legal culture and constitutional awareness of society.⁵³ The availability of the *Verfassungsbeschwerde* has rendered the constitution a living and relevant document in the daily lives of German citizens. This mechanism not only provides remedies for individuals whose rights have been violated but also ensures the protection of individual rights against actions by the legislature, executive, or judiciary that fail to uphold constitutional standards. This mechanism also plays a role in shaping constitutional law doctrines through the Court's rulings. Regular courts have become more aware and careful when applying the law, avoiding actions that might violate basic rights, since their decisions can be overturned by the Constitutional Court. The German example shows how a constitutional complaint can serve at once as a tool for protecting individuals, fostering dialogue among courts, and promoting constitutional awareness across the country.⁵⁴

2.2.2. The Constitutional Complaint Model in South Korea

The Constitutional Court of South Korea was established in 1988 during the country's shift toward democracy. It holds authority over constitutional

⁵¹ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 58–60.

⁵² Niels Petersen, "The German Constitutional Court and Legislative Capture," *International Journal of Constitutional Law* 12, no. 3 (2014): 650–69.

⁵³ Kommers and Miller, *Constitutional Jurisprudence of the Federal Republic of Germany*, 58–65.

⁵⁴ Alfredo Narváez Medécigo, "The German System of Constitutional Review: Prototype of a Concentrated Model?" in *Rule of Law and Fundamental Rights* (Cham: Springer, 2016), 155–211.

complaints, a key function that underpins its role in safeguarding human rights.⁵⁵ Regulated under Article 68 of the Constitutional Court Act of Korea (Act No. 4017, promulgated on August 5, 1988, and most recently amended by Act No. 17900 in 2021), the South Korean model allows for two types of constitutional complaints.⁵⁶ The first type, outlined in Article 68(1), is similar to the German model in that individuals who believe their fundamental rights have been infringed by an act or omission of a public authority may file a complaint after they have exhausted all other legal avenues. However, unlike the German *Verfassungsbeschwerde*, the South Korean system takes a more restrictive stance when it comes to judicial decisions. Generally, court rulings are not included within the scope of constitutional complaints, and only under very narrow conditions can such decisions be reviewed at the constitutional level. This reflects a system designed to prioritize the finality of judicial outcomes and to uphold the authority of regular courts.⁵⁷

The second type of constitutional complaint, as outlined in Article 68(2), serves as a unique procedural tool within South Korea's constitutional framework. Under this mechanism, regular courts have the option to submit a constitutional question to the Constitutional Court when a law appears pertinent to resolving a given case. If, however, the ordinary court declines to make such a referral, the involved parties retain the right to lodge a constitutional complaint contesting that decision.⁵⁸ In this context, the objection is not aimed at the law itself but at the court's refusal to refer the constitutional issue for review. Nevertheless, through this procedural route, the Constitutional Court can still assess the law's constitutionality, albeit in an indirect manner.⁵⁹

⁵⁵ Constitution of the Republic of Korea (1987), arts. 111–13.

⁵⁶ Rofi Rasyidah and Mohammad Jamin, "Constitutional Complaint Through Constitutional Court as Protection of Constitutional Rights of Citizens (Comparative Study of the Constitutional Courts of Germany and South Korea)," *International Journal of Business, Economics and Law* 25, no. 1 (December 2021): 58–61.

⁵⁷ Jeongran Yun, "Constitutional Review Complaint as an Evolution of the Kelsenian Model," *ICL Journal* 14, no. 4 (2020): 423–46.

⁵⁸ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 239–45.

⁵⁹ Hyo-jun Im, "The Characteristic and Scope of the 'Enforcement Action' at Issue in the 'Directiveness' Requirement of Constitutional Complaint: Focused on the Organization Clause for Committee Composition," *World Constitutional Law Review* 30, no. 1 (2024): 89–117.

This model demonstrates a refined institutional framework that integrates aspects of concrete judicial review, which emerges from specific cases brought by individuals, with a restricted form of normative control.⁶⁰ It maintains the central role of regular courts in triggering constitutional review, while also guaranteeing that individuals can still seek constitutional redress when their requests for referral are rejected.⁶¹ In South Korea, constitutional complaints generally concern conflicts involving laws, court rulings, or state actions that are seen as violating basic rights. The key areas include constitutional violations by laws, such as those affecting the right to privacy, freedom of speech, or discrimination issues.⁶² Notably, cases involving the right to refuse compulsory military service on grounds of conscience, or the decriminalization of adultery show how constitutional complaints can have a direct impact on societal reform. Such cases exemplify how constitutional complaints have played a pivotal role in shaping human rights protection in South Korea.⁶³ The hybrid model, which allows citizens to contest constitutional breaches stemming from government actions, has become a crucial mechanism for advancing constitutional justice.⁶⁴ This system proves its practical value in situations where regular courts decline to submit constitutional questions but still permit individuals to continue their legal claims directly. As a result, laws can be examined within the broader legal framework, enabling citizens to contest actions or decisions that violate constitutional principles, even when lower courts are hesitant to take up such issues at first.⁶⁵

The Constitutional Court has the authority to examine complaints of this nature, playing a crucial role in ensuring that legislation remains consistent with the principles of fundamental rights. This power enables citizens to

⁶⁰ Chaihark Hahm and Sung Ho Kim, "The Korean Constitutional Court in a Changing Society," in *Asian Constitutional Courts in Context* (Cambridge: Cambridge University Press, 2015).

⁶¹ Korean Constitutional Court, 89Hun-Ka113, Decision of April 2, 1990 (National Security Act Case).

⁶² Kyunghye Yi, "The Fragility of Liberal Democracy: A Schmittian Response to the Constitutional Crisis in South Korea (1948–79)," *Journal of Asian Studies* 81, no. 2 (2022): 305–21.

⁶³ Ginsburg, *Judicial Review in New Democracies*, 249–60.

⁶⁴ Janpatar Simamora, "Comparison of Constitutional Court Authority Between Indonesia and South Korea," *Jurnal Dinamika Hukum [Journal of Legal Dynamics]* 15, no. 3 (September 2015): 331–38.

⁶⁵ Awanisa, Yusdianto, and Khoiriah, "Position of Constitutional Complaint," 61–78.

contest government actions, court decisions, or administrative measures that violate constitutional protections.⁶⁶ Considering that South Korea's system has successfully integrated citizen participation into constitutional adjudication, its model could offer valuable insights for Indonesia as it develops its own constitutional complaint mechanism.⁶⁷

2.2.3. The Constitutional Complaint Model in Spain

Spain serves as a significant civil law model for designing institutional frameworks for constitutional complaint mechanisms through its *recurso de amparo*. This mechanism was introduced under the 1978 Spanish Constitution, with its procedural basis primarily outlined in Articles 53(2) and 161(1)(b). The implementation and details of the *amparo* process are further specified in the Organic Law of the Constitutional Court (*Ley Orgánica del Tribunal Constitucional*, LOTC).⁶⁸ The mechanism enables individuals to request protection of their fundamental rights in cases where actions or failures to act by public authorities, including court rulings, infringe upon rights guaranteed under Articles 14 to 29 and Article 30(2) of the Constitution.⁶⁹

The *recurso de amparo* is designed as an extraordinary remedy. Applicants must first exhaust all available ordinary judicial remedies before filing a complaint before the Constitutional Court.⁷⁰ This requirement reflects the principle of subsidiarity, positioning the Constitutional Court not as a fourth instance of appeal, but as the ultimate guardian of constitutional rights. Only after lower courts have had the opportunity to address the alleged violation may the Constitutional Court intervene.

⁶⁶ Arthur Dyevre, "Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations," *American Journal of Comparative Law* 61, no. 4 (Fall 2013): 729–55.

⁶⁷ Tauchid Komara Yuda, Pinurba Parama Pratiyudha, and Kafa Abdallah Kafa, "Managing Social Policy in the Emerging Welfare Regime of Governance: What Indonesia Can Learn from South Korea's Experience," *International Social Work* 66, no. 2 (2023): 357–72.

⁶⁸ *Constitución Española de 1978* [Spanish Constitution of 1978], arts. 53(2), 161(1)(b); *Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional* [Organic Law 2/1979 of October 3 on the Constitutional Court] (LOTC), as amended.

⁶⁹ *Constitución Española de 1978* [Spanish Constitution of 1978], arts. 14–29, 30(2).

⁷⁰ *Ley Orgánica 2/1979* (LOTC) [Organic Law 2/1979 on the Constitutional Court], arts. 43–44.

The objects of constitutional complaints in Spain include a wide array of issues, including challenges against judicial decisions, violations of fundamental rights such as equality and freedom, and the imposition of laws or government actions that are deemed unconstitutional. For instance, the Spanish Constitutional Court has seen complaints relating to violations of the right to equality (e.g., gender discrimination), infringements on the right to a fair trial, and breaches of the right to personal freedom and integrity. Complaints can also address laws or regulations that undermine these rights, as well as executive actions or public policies that conflict with constitutional guarantees.

Over time, Spain has implemented important admissibility filters to control the number of cases and maintain judicial efficiency. A key reform came with Organic Law 6/2007, which established that a complaint must show “special constitutional relevance” as a requirement for being admitted.⁷¹ This reform enhanced the Court’s ability to manage its caseload at its own discretion, ensuring that only cases with significant constitutional implications move forward to full judicial review. The Spanish model shows that wide access to constitutional remedies for individuals can coexist with the long-term viability of the institution, provided there are strict procedural controls in place. While the *amparo* mechanism significantly enhances the protection of fundamental rights, its admissibility criteria primarily serve to manage the Court’s caseload rather than to fully prevent judicial overload.⁷²

For Indonesia, the Spanish experience offers two important lessons. First, the *amparo* model shows that a constitutional complaint mechanism can be integrated within a civil law judicial hierarchy. At the same time, however, this integration is not without its challenges. In practice, the *amparo* procedure has at times taken on a quasi-appellate character and, in certain instances, has generated institutional tension with ordinary courts, particularly in relation

⁷¹ *Ley Orgánica 6/2007, de 24 de mayo* [Organic Law 6/2007 of May 24], amending the Organic Law of the Constitutional Court; see also Spanish Constitutional Court, STC 155/2009, June 25, 2009.

⁷² Ferreres Comella, *Constitutional Courts and Democratic Values*, 96–120; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 140–65.

to the finality of judicial decisions.⁷³ Second, the introduction of the “special constitutional relevance” requirement provides a practical way to manage caseload while maintaining access to constitutional justice. Rather than fully preventing judicial overload, this filtering mechanism allows the Constitutional Court to focus on cases that raise broader constitutional questions. The Spanish example shows that a constitutional complaint mechanism can work within a civil law framework, as long as it is carefully structured to maintain a balance between public access, the judiciary’s workload, and the consistency of legal institutions.

Table 1. Types of Cases Accepted by Constitutional Courts
Based on Annual Reports

Country	Types of Cases Accepted by Constitutional
Germany	Court decisions: The German Constitutional Court hears complaints about judicial rulings that impact fundamental rights
	Executive actions: This includes emergency ordinances and government regulations deemed inconsistent with constitutional principles, particularly those that infringe on personal rights or freedoms.
	Privacy and civil liberties: Numerous cases center on issues of privacy, freedom of expression, and policies related to anti-discrimination.
South Korea	Court Decisions: The South Korean Constitutional Court accepts complaints regarding court decisions that do not comply with constitutional justice principles, such as those related to civil rights or procedural justice.

⁷³ Michal Kovalčík, “Constitutional Referrals by Ordinary Courts: A Platform for Judicial Dialogue and Another Toolkit for Judicial Resistance?,” *European Constitutional Law Review* 20, no. 1 (2024): 52–81.

Country	Types of Cases Accepted by Constitutional
	Executive Actions: Complaints about executive decisions that infringe on constitutional rights, such as policies restricting freedom of speech or discrimination.
	Omissions by the State: Complaints about actions that ignore constitutional protection, such as the failure of the legislature to carry out certain constitutional obligations.
Spain	Court Decisions: The Spanish Constitutional Court handles complaints against court decisions that involve human rights issues, often focusing on procedural justice or privacy rights.
	Regulatory Actions: Complaints related to government regulations or policies that are considered unconstitutional or violating fundamental rights.
	Omissions by the State: Cases involving failure of the state to fulfill constitutional obligations, such as failing to enact the necessary laws to protect basic rights.

Table 2. Comparison of Constitutional Complaint Types in Germany, South Korea, and Spain

Country	Judicial Constitutional Complaint	Regulatory Constitutional Complaint (<i>Beleidsregel</i>)	Constitutional Omission
Germany	Can challenge statutes, executive actions, court decisions that infringe upon	Government Regulations in Lieu of Law (Perppu), actions of state	Deals with the state’s failure to act in situations requiring legislative

Country	Judicial Constitutional Complaint	Regulatory Constitutional Complaint (<i>Beleidsregel</i>)	Constitutional Omission
	fundamental rights. (Based on Decision No. 138/PUU-VII/2009)	bodies. Typically handled under the principle of subsidiarity.	or administrative action that directly impacts constitutional rights.
South Korea	Includes court decisions in limited circumstances. Excludes most judicial decisions from the scope of constitutional complaints, unless they involve fairness or procedural justice.	Regulations outside of laws (executive actions or government orders) can be contested, particularly when they violate fundamental rights.	Failing to provide constitutional protection or actions that are explicitly required by law but are not executed can be contested within the constitutional review process.
Spain	Can challenge court decisions in cases involving constitutional issues, particularly relating to fairness or public rights.	Complaints against laws affecting constitutional rights directly or indirectly. Complaints	Deals with the failure of authorities to create laws or implement policies that protect fundamental

Country	Judicial Constitutional Complaint	Regulatory Constitutional Complaint (<i>Beleidsregel</i>)	Constitutional Omission
		can be filed if government actions contradict constitutional guarantees.	constitutional rights. These cases often involve ongoing social justice or civil rights issues.

2.3. Normative Concept and Design of the Hybrid Multi-Level Constitutional Complaint as an Alternative Model

Based on the analysis of the absence of a constitutional complaint mechanism in Indonesia and the lessons learned from practices in other countries, it is essential to formulate an alternative model that is innovative, realistic, and appropriate to Indonesia’s constitutional context. The model proposed here is called the “Hybrid Multi-Level Constitutional Complaint Model.” This name captures two core features that form the foundation of its design. The term “hybrid” indicates the combination of two review targets: constitutional scrutiny of legal norms, like laws and regulations, and constitutional examination of specific actions, such as court rulings or administrative decisions, that directly violate the constitutional rights of individuals. By integrating both abstract legal provisions and concrete state actions, this approach provides broader protection for constitutional rights. It allows the system to respond not only to general legal rules but also to real-life government conduct that impacts citizens directly. This is particularly relevant in the Indonesian context, where the current legal framework lacks a constitutional complaint mechanism, leaving rights

violations stemming from specific judicial or administrative acts without proper legal recourse.⁷⁴

The idea of a “multi-level” mechanism describes a procedural structure that involves more than one layer of judicial bodies. Instead of allowing direct access to the Constitutional Court, this approach gives an initial screening role to courts under the Supreme Court’s authority, making them the first point of review for constitutional complaints. This system is based on the principle of subsidiarity and the need to exhaust legal remedies, meaning regular courts act as the primary guardians of constitutional rights before a case reaches the Constitutional Court. It’s important to note that this filtering role does not mean the Supreme Court is subordinate to the Constitutional Court, since both operate within their own separate constitutional mandates. Rather, the relationship is complementary: the Supreme Court handles the legality and application of laws in the regular court system, while the Constitutional Court remains the final authority on interpreting the Constitution.⁷⁵ By organizing access in this way, the model aims to handle the Constitutional Court’s workload more effectively while enhancing the role of regular courts in upholding constitutional principles. At the same time, it enables the Constitutional Court to focus on cases that involve significant constitutional issues and carry wider systemic consequences. The design supports greater access to justice for citizens without disrupting the balance of judicial authority. This method directly addresses a weakness in Indonesia’s current system, where constitutional breaches caused by executive measures or court rulings are not properly handled.

The formulation of this model is grounded in the philosophy that the protection of constitutional rights is the responsibility of the entire judiciary, rather than being the exclusive domain of the Constitutional Court.⁷⁶ In line with this philosophy, this model proposes that other state

⁷⁴ Siagian, “Constitutional Complaint,” 486–98.

⁷⁵ Wico et al., “Constitutional Complaint in Indonesia,” 57.

⁷⁶ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), 148–55.

institutions, such as the Administrative Court (PTUN), Human Rights Court, and Ombudsman, could serve as transitional instruments to resolve constitutional rights disputes before this mechanism is officially regulated within the 1945 Constitution of the Republic of Indonesia. Courts at all levels should serve as the frontline defenders of citizens' rights. The constitutional complaint mechanism thus functions as a final safety net when the ordinary judicial system fails to provide such protection. The normative design of this model must be formulated in detail, encompassing the subjects entitled to file a complaint, the objects that may be challenged, procedural rules, filing requirements, as well as the types and binding force of the decisions that may be rendered.⁷⁷

Overall, the hybrid multi-level model seeks to strike a balance. On one hand, it aims to provide the broadest possible access for citizens to obtain constitutional justice. On the other hand, it aims to preserve the overall health and efficiency of the judicial system by avoiding an excessive burden on any single institution. This approach combines the idealism of safeguarding rights with a pragmatic understanding of institutional realities. Putting it into practice will certainly demand significant reforms at both constitutional and legislative levels, along with sustained political will from all involved parties.

Table 3. State Institutions Capable of Addressing Constitutional Complaints in Indonesia

No	Institutions	Scope of Authority
1	Constitutional Court of the Republic of Indonesia (Mahkamah Konstitusi RI)	Authority is limited to reviewing the conformity of laws with the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945)

⁷⁷ Siagian, "Constitutional Complaint," 486–98.

No	Institutions	Scope of Authority
2	National Commission on Human Rights (Komnas HAM)	Only handles recommendations for the protection of human rights and does not have the authority to issue binding decisions
3	Ombudsman	Has authority limited to maladministration in public services
4	Human Rights Court	Authority is limited to handling cases of gross human rights violations
5	Administrative Court (PTUN)	Authority is limited to adjudicating disputes concerning administrative decisions and actions (state administrative acts) issued by public officials

2.3.1. Formulation of the Hybrid Multi-Level Model Concept

The hybrid concept in the proposed model does not aim to create entirely new subjects for constitutional review. In practice, the Constitutional Court has already held the authority to examine statutes and, under specific circumstances, Government Regulations in Lieu of Law (Perppu), especially following Decision No. 138/PUU-VII/2009. Instead of broadening the range of norms eligible for review, the innovation of the hybrid model lies in redefining how such review is initiated and situated within real-life contexts. The model links the scrutiny of legal norms more directly to actual cases faced by individuals, recognizing that constitutional breaches often stem not just from the existence of a rule but from how it is applied in practice. Additionally, constitutional complaints may target judicial decisions perceived to conflict with constitutional rights,

particularly when issues of fairness or procedural justice are involved. In this way, the hybrid approach combines the review of legal norms with the assessment of specific state actions, including court rulings and administrative measures. This structure ensures that constitutional safeguards function not only at the level of abstract legal principles but also during the implementation phase, where rights violations commonly occur.⁷⁸

Later on, the multi-level approach sets up a step-by-step system organized in layers. At the first stage, constitutional complaints are not filed straight with the Constitutional Court. Complaints challenging judicial decisions must first be brought before courts within the Supreme Court's jurisdiction through available legal remedies, including *Peninjauan Kembali* (PK), accompanied by supplementary arguments concerning alleged violations of constitutional rights. It is important to note, however, that under the current legal framework, PK is classified as an extraordinary legal remedy with strictly limited grounds.⁷⁹ Therefore, positioning it as a mechanism for constitutional rights review would require explicit legal reform, particularly through amendments to the Law on the Supreme Court and relevant procedural laws, in order to incorporate constitutional claims as an admissible ground. Within this reformed framework, the Supreme Court functions as a preliminary judicial filter, limited to assessing whether a case raises a credible constitutional issue, rather than conducting a full constitutional adjudication. The petitioner may bring the case to the Constitutional Court only when the complaint has not been properly resolved or when a review request is rejected. This mechanism is known as the indirect access model. Its main purpose is to strengthen the authority of courts under the Supreme Court's supervision while controlling the number of cases handled by the Constitutional Court. In doing so, it supports greater efficiency and consistency in constitutional adjudication, all without interfering with the clear division of roles among judicial institutions.⁸⁰

⁷⁸ M. Barros, "Constitutional Design and the Brazilian Judicial Review: Remarks about Strong and Weak-Form Review in the Brazilian Federal Supreme Court," *Opinião Jurídica* 15, no. 20 (2017): 180–206.

⁷⁹ Saldi Isra, "Model Akses Tidak Langsung dalam Pengujian Konstitusional [Indirect Access Model in Constitutional Review]," *Jurnal Konstitusi* 17, no. 2 (2020): 215–30.

⁸⁰ M. Lutfi Chakim, "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions," *Constitutional Review* 5, no. 1 (2019): 96–133.

When it comes to complaints about administrative actions by the state, a specific procedural pathway can be outlined. Individuals must first go through all available administrative channels, such as filing appeals and pursuing cases in the State Administrative Court up to the cassation stage at the Supreme Court. Only after these lower legal routes have been fully used and have not resolved the issue can someone bring the matter to the Constitutional Court. This step-by-step process follows the principle that all legal remedies must be exhausted first. The structure supports the propriety among judicial bodies and encourages each institution to pay closer attention to constitutional aspects within their cases, helping create a kind of ongoing conversation about constitutional values across the judiciary.⁸¹

Combining hybrid and multi-level approaches results in a system that is both thorough and well organized. It allows individuals to bring forward various types of constitutional rights violations, whether they involve abstract legal norms or specific, real-life situations. At the same time, the layered structure ensures that the Constitutional Court only handles cases with truly essential constitutional implications, those where the regular court system has clearly failed to offer adequate safeguards. This approach manages to find a middle ground between the ambitious goal of protecting all rights and the practical need to handle judicial workloads efficiently, making it a solution that is more feasible both institutionally and politically.⁸²

2.3.2. Normative Design of the Constitutional Rights Protection System

The hybrid multi-level model requires a normative foundation grounded in a clear legal framework, preferably through an amendment to the 1945 Constitution. This should be followed by corresponding updates to related laws. At the constitutional level, Article 24C of the 1945 Constitution needs to be expanded to include a clause that explicitly authorizes the Constitutional Court to review and rule on constitutional complaints.⁸³ The wording of this clause could be general in nature, for example :

⁸¹ Wico et al., "Constitutional Complaint in Indonesia," 57.

⁸² Benhabib, "Dialogic Constitutionalism," 506–14.

⁸³ Benhabib, "Dialogic Constitutionalism," 506–14.

“The Constitutional Court has the authority to review and rule on complaints filed by any individual concerning violations of constitutional rights as guaranteed by the Constitution, which arise from actions taken by public authorities. The procedural aspects of this process will be further detailed and regulated by law.”

Such an addition would give the entire mechanism strong constitutional legitimacy.

At the statutory level, particularly in the amendments to the Constitutional Court Law and the Supreme Court Law, the normative framework requires more detailed elaboration. First, with regard to the legal standing of petitioners, it must be clearly established that any individual, whether a citizen or a private legal entity, whose constitutional rights are directly and actually infringed has the right to file a complaint. Second, concerning the scope of admissible complaints, it is essential to precisely define what qualifies as “actions of public authorities,” including final and binding court rulings, administrative decisions, regulatory policies, and instances of omission. These provisions must also expressly exclude the review of Constitutional Court decisions themselves to uphold the finality of its judgments.⁸⁴

Furthermore, the legislation must provide detailed regulations regarding the requirements and procedures for filing a complaint. This includes filing deadlines (e.g., within 90 days after the exhaustion of the last available legal remedy), the format of the petition, evidentiary requirements, and, most importantly, criteria for case acceptance. These criteria can adopt best practices from other countries, such as the necessity to have exhausted all available legal remedies, ensuring that the complaint is not trivial, and that it involves a fundamental constitutional issue. Additionally, a dedicated unit or screening panel within the Constitutional Court’s registry should be established to conduct a preliminary examination of the completeness and admissibility of petitions before they are submitted to the judges.⁸⁵

⁸⁴ Dovilė Pūraitė-Andrikiienė, “Advantages and Disadvantages of the Lithuanian Individual Constitutional Complaint Model,” *Teisė* 114 (2020): 49–70.

⁸⁵ Ria Casmi Arsa and F. Susanto, “Constitutional Complaint, Human Rights, and Protection of Right to Freedom of Religion and Belief in Indonesia,” *World Constitutional Law Review* 26, no. 3 (2020): 325–50.

Finally, the normative design must regulate the types of decisions that the Constitutional Court may issue. These decisions should be sufficiently flexible. The Constitutional Court may declare a particular action or court decision unconstitutional and annul it or order a public authority to act or refrain from acting in order to remedy a constitutional violation. However, remedies in the form of compensation or damages do not generally fall within the jurisdiction of the Constitutional Court and remain within the competence of ordinary or administrative courts. Decisions may be *inter partes* (binding only on the parties involved) or, in cases involving fundamental constitutional principles, may also have *erga omnes* effect. The binding force and enforcement mechanisms of these decisions must be explicitly regulated to ensure that Constitutional Court rulings are not merely symbolic but can be effectively implemented.

2.3.3. Inclusive and Accessible Mechanism

One of the primary objectives of the constitutional complaint mechanism is to provide access to justice for all segments of society. Therefore, the design of the mechanism must ensure that it is both inclusive and accessible. Inclusivity implies that no discriminatory barriers should exist in accessing the mechanism. Every individual, regardless of social, economic, or educational background, must have an equal opportunity to file a complaint. This can be achieved by simplifying administrative procedures and avoiding high filing fees. Moreover, the provision of state-funded legal aid for economically disadvantaged petitioners should be considered, ensuring that they can be represented by competent legal counsel.⁸⁶ Within the framework of the Hybrid Multi-Level Constitutional Complaint Model, access to justice includes a multi-tiered filtering mechanism. Initially, complaints undergo review by courts under the Supreme Court's jurisdiction, such as through the *Peninjauan Kembali* (PK) process, which ensures that regular courts serve as the first layer of scrutiny. This step ensures that only cases involving substantial constitutional matters advance to the Constitutional Court, thereby supporting efficient management of its workload.

⁸⁶ Fabian Duessel, "Direct Individual Access to Constitutional Justice in South Korea and Taiwan," in *Comparative Constitutional History* (Leiden: Brill, 2020), 245–76.

Accessibility also encompasses how easily individuals can obtain information and submit petitions. The Constitutional Court should actively engage in public outreach and education about this new mechanism. Details regarding filing procedures, required forms, and documentation criteria must be readily available and simple to access, both in person at the Court's facilities and online via an intuitive website. Implementing information technology solutions, such as an electronic filing system, would greatly improve accessibility, especially for citizens living outside the capital. This method removes geographic obstacles and lowers the expenses faced by people pursuing justice.⁸⁷

To promote inclusivity, the language used across all stages of the process, from application forms to final rulings, should be straightforward, simple, and accessible to the general public. Legal terms that might confuse applicants should be kept to a minimum or avoided altogether. Staff and court clerks at the Constitutional Court need proper training so they can clearly explain procedures and provide helpful guidance to citizens. In addition, there should be formal opportunities for civil society organizations to take part as *amicus curiae* in cases that affect large segments of society. Their input can give judges access to broader viewpoints and help reinforce the credibility of the judicial process.⁸⁸

A mechanism can only be genuinely inclusive and accessible when the public trusts the institution overseeing it. For this reason, the Constitutional Court must consistently maintain its integrity, independence, and transparency. Every stage of the review process, from case registration through hearings to the announcement of rulings, needs to be carried out openly and made available to the public. When trust is built in this way, people will feel assured and willing to use the constitutional complaint mechanism as a tool to protect their most basic constitutional rights.⁸⁹

⁸⁷ Awanisa, Yusdianto, and Khoiriah, "Position of Constitutional Complaint," 61–78.

⁸⁸ Tegar Raffi Putra Jumentoro et al., "Constitutional Question dan Constitutional Complaint: Pembahasan Mahkamah Konstitusi dan Terjaminnya Hak Konstitusional Warga Negara [Constitutional Question and Constitutional Complaint: Reform of the Constitutional Court and Guarantee of Citizens' Constitutional Rights]," *AL-MIKRAJ Jurnal Studi Islam dan Humaniora* 4, no. 2 (2024).

⁸⁹ Aylin Aydin-Cakir and Amanda Driscoll, "On Motives and Means: How Approach and Justification for Court-Curbing Impact Public Trust," *Democratization* 32, no. 4 (2025): 938–62.

Indonesia urgently needs to adopt a hybrid multi-level constitutional complaint model. This necessity stems not just from the theoretical requirement to complete the legal framework, but also from the real-world situation where many citizens hit legal dead ends when their constitutional rights are violated. Currently, if someone's rights are undermined by a flawed court ruling or arbitrary government action, their options to seek constitutional redress are extremely restricted.⁹⁰ Existing mechanisms, such as filing lawsuits at the State Administrative Court or requesting statutory review by the Constitutional Court, do not adequately address all types of rights violations. Introducing a constitutional complaint mechanism would close this gap and act as an essential protection for democratic principles.⁹¹

The implementation of this model, while not without obstacles, remains entirely feasible. Legally, the current discussions surrounding the fifth amendment to the 1945 Constitution present a timely opportunity to introduce this expanded authority for the Constitutional Court. There is already considerable backing from legal scholars and practitioners, which can provide a solid intellectual foundation to influence policy decisions. However, putting this model into practice will require more than just changes to the Constitutional Court's jurisdiction. It will also demand coordinated action from other state institutions, including the Supreme Court and administrative courts (PTUN), which would play a key role in screening complaints during the early stages before they reach the Constitutional Court. This layered approach would help manage the volume of cases more efficiently and establish a more unified system for delivering constitutional justice.⁹² From an institutional standpoint, the Constitutional Court and the Supreme Court have shown significant development in recent decades. Through strategic planning, efforts to strengthen institutional capacity, and the integration of technological

⁹⁰ Isra, "Model Akses Tidak Langsung [Indirect Access Model]," 215–30.

⁹¹ 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): 347–64.

⁹² Simon Butt and Tim Lindsey, *Indonesian Constitutional Law: A Research Guide* (Oxford: Oxford University Press, 2018), 45–67.

tools, challenges related to excessive judicial workload can be effectively managed. The proposed multi-tiered model is tailored specifically to tackle this problem.⁹³

The biggest opportunity, and at the same time the toughest hurdle, comes from politics. Making this model work depends heavily on the President and the House of Representatives (DPR) showing real political commitment. It's essential to make political leaders understand that improving citizens' rights protection isn't a risk, it's an investment in lasting stability.⁹⁴ Advocacy efforts by civil society organizations, media outlets, and pro-democracy groups can build public pressure that pushes politicians to focus on this issue and support the larger aim of safeguarding constitutional rights. When properly carried out, the constitutional complaint mechanism will not only transform Indonesia's human rights protection system but also strengthen the nation's reputation internationally as a modern, democratic state grounded in the rule of law.⁹⁵

The urgency and future prospects of adopting this model ultimately hinge on the collective decision of the Indonesian people. Will the nation persist with the current system, which fails to fully protect citizens' rights, or will it have the courage to take bold steps toward establishing a legal framework that truly upholds the Constitution as the highest law and recognizes citizens as sovereign individuals whose rights must be respected and safeguarded by the state? The path ahead may be long and fraught with challenges, but the ultimate aim, achieving constitutional justice for everyone, is unquestionably worth the effort.⁹⁶

2.3.4. The Urgency of Reforming Rights Protection

The main reason for urgently reforming the constitutional rights protection system through a constitutional complaint mechanism is to achieve genuine constitutional supremacy. Currently, constitutional supremacy is mostly seen in terms of the legal hierarchy, where laws must not conflict with the 1945

⁹³ Larysa Nalyvaiko and Olha Chepik-Tregubenko, "Institute of Constitutional Complaint: Foreign Practice, Domestic Experience and Prospects," *Naukovyi Visnyk Dnipropetrovskoho Derzhavnoho Universytetu Vnutrishnikh Sprav* 2, no. 2 (2020): 7–15.

⁹⁴ Ginsburg, *Judicial Review in New Democracies*, 24–30.

⁹⁵ Faiz, "Prospect and Challenges," 103–28.

⁹⁶ Pan Mohamad Faiz, "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia," *Indonesia Law Review* 6, no. 2 (2016): 158–79.

Constitution. Yet real constitutional supremacy means every action by the state, without exception, must align with constitutional provisions, especially those safeguarding human rights. Without a system that lets individuals challenge specific state actions that infringe on their constitutional rights, constitutional supremacy stays incomplete. A constitutional complaint acts as a vital link between the general rights outlined in the constitution and their actual enforcement in people's everyday lives.

Another pressing concern arises from the necessity to strengthen the accountability of state institutions. When every official decision, bureaucratic action, and court ruling can be challenged on constitutional grounds, state bodies are encouraged to act more carefully, professionally, and in alignment with constitutional principles. The constitutional complaint serves as a strong external oversight tool, directly exercised by citizens as the ultimate authority. This helps curb the misuse of power and arbitrary conduct, while fostering transparent and responsible governance. Over time, it contributes to building greater public confidence in state institutions.⁹⁷

From the victims' point of view, the need for this reform is clear and urgent. Research, both based on real-world evidence and legal theory, shows that many people and community groups whose constitutional rights are violated often cannot get proper justice through the current court systems, especially when those violations are part of everyday laws or how institutions normally operate. Issues like unfair forced evictions, the prosecution of human rights activists, discrimination against minorities, and harm to the right to live in a healthy environment often go unresolved or receive only weak responses under the present system.⁹⁸ The criminalization of human rights defenders has been widely acknowledged as a systemic issue that erodes the safeguarding of fundamental rights and undermines the rule of law. In this context, the constitutional complaint mechanism serves as an essential corrective measure, offering victims a direct and effective legal

⁹⁷ Heru Setiawan, "Mempertimbangkan Constitutional Complaint sebagai Kewenangan Mahkamah Konstitusi [Considering Constitutional Complaint as an Authority of the Constitutional Court]," *Lex Jurnalica* 14, no. 1 (April 2017): 146952.

⁹⁸ Aikaterini Christina Koula, "Strengthening the Rule of Law: The Necessity of Protecting Human Rights Defenders from Criminalisation," *Human Rights Law Review* 26, no. 1 (2026): 39.

pathway to contest such abuses and secure appropriate relief. Ultimately, this reform goes beyond mere legal engineering, it embodies a deeper commitment to human dignity, justice, and the constitutional obligation to uphold basic rights.⁹⁹

Finally, this urgency also carries global significance. In a time when human rights and democratic standards serve as key benchmarks in international relations, the lack of an effective rights protection mechanism risks weakening Indonesia's reputation and position on the global stage. Numerous modern democracies have implemented systems similar to constitutional complaints, treating them as the gold standard for safeguarding rights. By introducing such a mechanism, Indonesia would not only meet its constitutional duties to its citizens but also show its commitment to being part of the international community that values and upholds human rights. Implementing a hybrid multi-level constitutional complaint model in Indonesia is highly urgent. This urgency stems not just from the theoretical need to complete the legal framework but also from the real-world challenges many citizens face when their constitutional rights are violated. Currently, if someone's rights are harmed by a flawed court ruling or an arbitrary government policy, options for pursuing constitutional justice remain severely limited. Existing avenues, such as filing cases with the State Administrative Court or requesting judicial review at the Constitutional Court, do not adequately address all types of rights violations. Introducing a constitutional complaint mechanism would close this gap and act as a vital pillar in protecting democracy.

2.3.5. Model Prospects for Implementing the Model

The prospects for implementing this model, despite existing challenges, are far from impossible. From a legal perspective, the ongoing debate surrounding the fifth amendment to the 1945 Constitution presents a timely opportunity to introduce this new authority for the Constitutional Court. Academics and legal professionals have already shown strong support for the idea, which

⁹⁹ Edy Suasono, Priyo Saptomo, and Tri Dian Aprilsesa, "Constitutional Complaints as Extraordinary Legal Remedies Against Violations of Citizens' Constitutional Rights," *Pranata Hukum [Legal Institution]* 18, no. 2 (July 2023).

can serve as a solid intellectual foundation to influence policymakers.¹⁰⁰ Successful implementation of this model demands more than just reforming the Constitutional Court's jurisdiction; it also calls for coordinated action from other state institutions, including the Supreme Court and administrative courts (PTUN). These bodies would play a key role in the early stages by screening complaints before they reach the Constitutional Court. Such a multi-tiered system would help manage the volume of cases more efficiently and establish a unified structure for delivering constitutional justice across Indonesia.¹⁰¹

From an institutional standpoint, both the Constitutional Court and the Supreme Court have shown significant development in recent decades.¹⁰² With proper planning, efforts to strengthen institutional capacity, and the adoption of technological tools, challenges related to an overwhelming judicial workload can be effectively addressed.¹⁰³ The proposed multi-level model is specifically designed to address this issue, ensuring that only significant constitutional issues are escalated to the Constitutional Court.¹⁰⁴ However, the greatest prospect and, simultaneously, the most significant challenge lies in the political domain. Implementing this model requires strong political will from both the President and the House of Representatives (DPR).¹⁰⁵ Raising awareness among political elites that strengthening the protection of citizens' rights is not a threat but an investment in long-term stability is crucial.¹⁰⁶ Advocacy efforts by civil society organizations, the media, and pro-democracy groups can create public pressure that pushes politicians to make this issue a priority.¹⁰⁷ If successfully implemented, the constitutional complaint mechanism will not only transform Indonesia's

¹⁰⁰ Simon Butt and Tim Lindsey, "Economic Reform and the Constitutional Court," *Bulletin of Indonesian Economic Studies* 48, no. 2 (2012): 239–61.

¹⁰¹ Sixto González-Villora et al., "Hybridizing Pedagogical Models: A Systematic Review," *European Physical Education Review* 25, no. 4 (2019): 1056–74.

¹⁰² Mahkamah Konstitusi Republik Indonesia [Constitutional Court of the Republic of Indonesia], *Putusan No. 006/PUU-III/2005* [Decision No. 006/PUU-III/2005].

¹⁰³ Mahkamah Konstitusi Republik Indonesia [Constitutional Court of the Republic of Indonesia], *Putusan No. 138/PUU-VII/2009* [Decision No. 138/PUU-VII/2009].

¹⁰⁴ Tim Lindsey, "The Indonesian Constitutional Court: Democratization and Judicialization," in *Constitutional Courts in Asia*, ed. Albert H. Y. Chen (Cambridge: Cambridge University Press, 2018), 233–56.

¹⁰⁵ Awanisa, Yudianto, and Khoiriah, "Position of Constitutional Complaint," 61–78.

¹⁰⁶ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), 34–45.

¹⁰⁷ Harold Crouch, *Political Reform in Indonesia after Soeharto* (Singapore: ISEAS, 2010), 112–30.

human rights protection system but also strengthen the country's position in the international community as a modern, democratic state grounded in the rule of law.¹⁰⁸ The urgency and potential of implementing this model ultimately hinge on the collective decision of the Indonesian people. Will the nation persist with the current system, where rights protection remains incomplete, or will it have the courage to take a decisive step toward establishing a legal framework that truly positions the Constitution as the highest law and acknowledges citizens as sovereign individuals whose rights must be respected and safeguarded by the state? The path ahead may be long and fraught with challenges, but the ultimate objective, achieving constitutional justice for everyone, is unquestionably worth the effort.¹⁰⁹

III. CONCLUSION

3.1. Closing

The lack of a constitutional complaint mechanism in Indonesia highlights a structural gap in safeguarding constitutional rights, especially when violations stem from specific actions taken by the state. Although experiences from other countries underscore its value, introducing such a mechanism in Indonesia encounters significant legal and institutional hurdles. These include the Constitutional Court's narrow powers as defined in Article 24C, possible conflicts with the Supreme Court's authority, and the danger of overwhelming the judiciary with excessive cases. To address this, a Hybrid Multi-Level Constitutional Complaint Model offers a practical path forward, but it must be implemented through careful legal reform. This process should begin with amending the constitution to establish a solid legal foundation, followed by laws that detail how the mechanism will function, covering procedures, eligibility requirements, and the roles of various institutions, particularly the Supreme Court's role in screening cases. At the same

¹⁰⁸ Ginsburg, *Judicial Review in New Democracies*, 24–30.

¹⁰⁹ Herlambang P. Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics," *Federal Law Review* 50, no. 3 (2022): 314–30.

time, institutions need to be strengthened to handle the new system efficiently without disrupting the overall coherence of the judiciary. Rather than seeing this change as just an expansion of legal norms, it should be approached as a well-planned and realistic institutional framework designed to improve the protection of constitutional rights within Indonesia's current legal structure.

3.2. Recommendation

Indonesia should prioritize the adoption of a Hybrid Multi-Level Constitutional Complaint Model as part of its constitutional reform agenda. To make this happen, the country needs to take several concrete steps. First, it must amend the constitution to expand the Constitutional Court's authority, so it can handle constitutional complaints. Second, supporting laws should be drafted to include clear procedures, admissibility criteria, and enforcement mechanisms. Third, both the Constitutional Court and the Supreme Court require stronger institutional capacity through adequate resources, staff training, and modern technology. Fourth, a strict multi-level filtering mechanism should be implemented to avoid overwhelming the courts while still guaranteeing access to justice. Fifth, there must be strong political will, with cooperation and agreement among the executive, legislative, and judicial branches. Lastly, civil society should play an active role by promoting public awareness and participation, creating grassroots pressure for meaningful reform.

DECLARATION

During the preparation of this manuscript, ChatGPT, DeepL, and Grammarly were used solely to support translation and language refinement. The manuscript's substantive content was originally developed by the authors. The authors retain full responsibility for the manuscript's originality, accuracy, and scientific integrity.

BIBLIOGRAPHY

- Arinanto, Satya. "Constitutional Court in Indonesia." *Jurnal Hukum & Pembangunan* 26, no. 5 (2017): 387. <https://doi.org/10.21143/jhp.vol26.no5.1071>.
- Arsa, Ria Casmi, and F. Susanto. "Constitutional Complaint, Human Rights, and Protection of Right to Freedom of Religion and Belief in Indonesia." *World Constitutional Law Review* 26, no. 3 (2020): 325–50. <https://doi.org/10.24324/kiac.l.2020.26.3.325>.
- Asshiddiqie, Jimly. *Model-model Pengujian Konstitusional di Berbagai Negara [Models of Constitutional Review in Various Countries]*. Jakarta: Konstitusi Press, 2005.
- Awanisa, Agsel, Yusdianto Yusdianto, and Siti Khoiriah. "The Position of Constitutional Complaint in the Constitutional Court of the Republic of Indonesia." *Pancasila and Law Review* 2, no. 1 (2021): 61–78. <https://doi.org/10.25041/plr.v2i1.2308>.
- Aydin-Cakir, Aylin, and Amanda Driscoll. "On Motives and Means: How Approach and Justification for Court-Curbing Impact Public Trust." *Democratization* 32, no. 4 (2025): 938–62. <https://doi.org/10.1080/13510347.2024.2428271>.
- Balkin, Jack M. "Translating the Constitution." *Michigan Law Review* 118, no. 6 (2020): 977–1004. <https://doi.org/10.36644/MLR.118.6.TRANSLATING>.
- Barros, M. "Constitutional Design and the Brazilian Judicial Review: Remarks about Strong and Weak-Form Review in the Brazilian Federal Supreme Court." *Opinião Jurídica* 15, no. 20 (2017): 180–206. <https://doi.org/10.12662/2447-66410j.v15i20.p180-206.2017>.
- Basic Law for the Federal Republic of Germany (*Grundgesetz*), art. 93(1)(4a).
- Bell, Christine. "Introduction: Bargaining on Constitutions—Political Settlements and Constitutional State-Building." *Global Constitutionalism* 6 (2017): 13–32. <https://doi.org/10.1017/S2045381716000216>.

- Benhabib, Seyla. "Dialogic Constitutionalism and Judicial Review." *Global Constitutionalism* 9 (2020): 506–14. <https://doi.org/10.1017/S204538172000012X>.
- Boulanger, Christian. "The Federal Constitutional Court: Guardian of the Constitution." In *The German Federal Constitutional Court*, edited by Matthias Jestaedt, 121–25. Oxford: Oxford University Press, 2016.
- Boulanger, Christian. "The Federal Constitutional Court: Guardian of the Constitution." In *The German Federal Constitutional Court*, edited by Matthias Jestaedt, 121–35. Oxford: Oxford University Press, 2018.
- Bundesverfassungsgericht [Federal Constitutional Court]. *Annual Report*. Karlsruhe: Bundesverfassungsgericht, n.d.
- Butt, Simon, and Tim Lindsey. "Economic Reform and the Constitutional Court." *Bulletin of Indonesian Economic Studies* 48, no. 2 (2012): 239–61.
- Butt, Simon, and Tim Lindsey. *Indonesian Constitutional Law: A Research Guide*. Oxford: Oxford University Press, 2018.
- Butt, Simon, and Tim Lindsey. "Indonesian Laws and Lawmaking." In *Indonesian Law*, 34–60. Oxford: Oxford University Press, 2018. <https://doi.org/10.1093/oso/9780199677740.003.0002>.
- 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>.
- Chilton, Adam S., and Mila Versteeg. "Do Constitutional Rights Make a Difference?" *American Journal of Political Science* 60, no. 3 (2016): 575–89. <https://doi.org/10.1111/ajps.12239>.
- Constitución Española de 1978* [Spanish Constitution of 1978], arts. 14–29, 30(2), 53(2), 161(1)(b).
- Constitution of the Republic of Korea (1987), arts. 111–13.
- Constitutional Court Act of Korea, arts. 68–75.

Constitutional Court of Korea. "Case Load Statistics." Accessed May 25, 2026.

Crouch, Harold. *Political Reform in Indonesia after Soeharto*. Singapore: ISEAS, 2010.

Dannemann, Gerhard. "Constitutional Complaints: The European Perspective." *International and Comparative Law Quarterly* 43, no. 1 (1994): 142–53. <https://doi.org/10.1093/iclqaj/43.1.142>.

de Visser, Maartje. "Promoting Constitutional Literacy: What Role for Courts?" *German Law Journal* 23, no. 7 (2022): 1121–38. <https://doi.org/10.1017/glj.2022.73>.

Duessel, Fabian. "Direct Individual Access to Constitutional Justice in South Korea and Taiwan." In *Comparative Constitutional History*, 245–76. Leiden: Brill, 2020. https://doi.org/10.1163/9789004435315_011.

Dyevre, Arthur. "Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations." *American Journal of Comparative Law* 61, no. 4 (Fall 2013): 729–55. <https://doi.org/10.2139/ssrn.2163735>.

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): 103–28. <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): 158–79. <https://doi.org/10.15742/ilrev.v6n2.230>.

Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*), §§ 13(8a), 90–95.

Felicia, Felicia. "Kedudukan Mahkamah Konstitusi dalam Sistem Hukum Ketatanegaraan Indonesia [The Position of the Constitutional Court in the Indonesian Constitutional Law System]." *Jurnal Indonesia Sosial Teknologi* 3, no. 5 (May 2022): 584. <https://doi.org/10.36418/jist.v3i5.422>.

- Ferreres Comella, Víctor. *Constitutional Courts and Democratic Values: A European Perspective*. New Haven: Yale University Press, 2009.
- Ginsburg, Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press, 2003.
- González-Víllora, Sixto, Carlos Evangelio, Jacob Sierra-Díaz, and Javier Fernández-Río. "Hybridizing Pedagogical Models: A Systematic Review." *European Physical Education Review* 25, no. 4 (2019): 1056–74. <https://doi.org/10.1177/1356336X18797363>.
- Greer, Steven, and Luzius Wildhaber. "Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights." *Human Rights Law Review* 12, no. 4 (2012): 655–87. <https://doi.org/10.1093/hrlr/ngs034>.
- Guyanie, Gugun El. "Urgensi Pengujian Constitutional Complaint oleh Mahkamah Konstitusi Republik Indonesia [The Urgency of Constitutional Complaint Review by the Constitutional Court of the Republic of Indonesia]." *In Right: Jurnal Agama dan Hak Azazi Manusia* 3, no. 1 (2013): 184.
- Hahm, Chaihark, and Sung Ho Kim. "The Korean Constitutional Court in a Changing Society." In *Asian Constitutional Courts in Context*. Cambridge: Cambridge University Press, 2015.
- Harun, Refly. "Memangkas Mahkamah Konstitusi [Trimming the Constitutional Court]." *Harian Media Indonesia*, April 17, 2004.
- Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press, 2004.
- 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): 347–64. <https://doi.org/10.15294/jllr.v4i3.68129>.
- Hulwanullah, Hikam. "Indonesian Constitutional Policies to Overcome Climate Crisis from Ecological Democracy Perspectives." *E3S Web of Conferences* 673 (2025): 02017. <https://doi.org/10.1051/e3sconf/202567302017>.

- Hulwanullah, Hikam. "Konstruksi Constitutional Complaint untuk Mewujudkan Negara Hukum Demokratis [Construction of Constitutional Complaint to Realize a Democratic Rule-of-Law State]." Master's thesis, Universitas Brawijaya, 2023.
- Huntington, Samuel P. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press, 1991.
- Huq, Aziz Z., and Tom Ginsburg. *How to Save a Constitutional Democracy*. Chicago: University of Chicago Press, 2018. <https://doi.org/10.7208/chicago/9780226564418.001.0001>.
- Im, Hyo-jun. "The Characteristic and Scope of the 'Enforcement Action' at Issue in the 'Directiveness' Requirement of Constitutional Complaint: Focused on the Organization Clause for Committee Composition." *World Constitutional Law Review* 30, no. 1 (2024): 89–117. <https://doi.org/10.24324/kiac1.2024.30.1.089>.
- Isra, Saldi. "Model Akses Tidak Langsung dalam Pengujian Konstitusional [Indirect Access Model in Constitutional Review]." *Jurnal Konstitusi* 17, no. 2 (2020): 215–30.
- Jackson, Vicki C. "Constitutional Law in an Age of Proportionality." *Yale Law Journal* 124, no. 8 (2015): 3094–3196.
- Jumantoro, Tegar Raffi Putra, Syedna Ahmad Albanna, Antikowati Antikowati, and Igam Arya Wada. "Constitutional Question dan Constitutional Complaint: Pembaharuan Mahkamah Konstitusi dan Terjaminnya Hak Konstitusional Warga Negara [Constitutional Question and Constitutional Complaint: Reform of the Constitutional Court and Guarantee of Citizens' Constitutional Rights]." *AL-MIKRAJ Jurnal Studi Islam dan Humaniora* 4, no. 2 (2024). <https://doi.org/10.37680/almikraj.v4i02.5030>.
- Kommers, Donald P., and Russell A. Miller. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 3rd ed. Durham: Duke University Press, 2012.
- Korean Constitutional Court. 89Hun-Ka113, Decision of April 2, 1990 (National Security Act Case).

- Korean Constitutional Court. Case No. 2009 Hun-Ba17, Decision of February 26, 2015 (Adultery Case).
- Korean Constitutional Court. Case No. 2011 Hun-Ba379, Decision of June 28, 2018 (Conscientious Objection Case).
- Koula, Aikaterini Christina. "Strengthening the Rule of Law: The Necessity of Protecting Human Rights Defenders from Criminalisation." *Human Rights Law Review* 26, no. 1 (2026): ngafo39. <https://doi.org/10.1093/hrlr/ngafo39>.
- Kovalčík, Michal. "Constitutional Referrals by Ordinary Courts: A Platform for Judicial Dialogue and Another Toolkit for Judicial Resistance?" *European Constitutional Law Review* 20, no. 1 (2024): 52–81. <https://doi.org/10.1017/S1574019624000087>.
- 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, and M. Lutfi Chakim. "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences." *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023): 148–71. <https://doi.org/10.22304/pjih.v10n2.a1>.
- Law, David S., and Mila Versteeg. "Is the Influence of the U.S. Constitution Declining?" In *Modern Constitutions*, 17–63. Chicago: University of Chicago Press, 2020. <https://doi.org/10.2307/j.ctv16t6mq1.4>.
- Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional* [Organic Law 2/1979 of October 3 on the Constitutional Court] (LOTIC), as amended, arts. 43–44.
- Ley Orgánica 6/2007, de 24 de mayo* [Organic Law 6/2007 of May 24], amending the Organic Law of the Constitutional Court.
- Lindsey, Tim. "The Indonesian Constitutional Court: Democratization and Judicialization." In *Constitutional Courts in Asia*, edited by Albert H. Y. Chen, 233–56. Cambridge: Cambridge University Press, 2018.

- Mahkamah Konstitusi Republik Indonesia [Constitutional Court of the Republic of Indonesia]. *Putusan No. 006/PUU-III/2005* [Decision No. 006/PUU-III/2005].
- Mahkamah Konstitusi Republik Indonesia [Constitutional Court of the Republic of Indonesia]. *Putusan No. 138/PUU-VII/2009* [Decision No. 138/PUU-VII/2009].
- Marzuki, Peter Mahmud. *Penelitian Hukum Edisi Revisi* [Legal Research, Revised Edition]. Jakarta: Kencana, 2017.
- Müller, Wolfgang C. “Political Parties in Parliamentary Democracies: Making Delegation and Accountability Work.” *European Journal of Political Research* 37, no. 3 (2000): 309–33. <https://doi.org/10.1111/1475-6765.00515>.
- Nalyvaiko, Larysa, and Olha Chepik-Tregubenko. “Institute of Constitutional Complaint: Foreign Practice, Domestic Experience and Prospects.” *Naukovy Visnyk Dnipropetrovskoho Derzhavnoho Universytetu Vnutrishnikh Sprav* 2, no. 2 (2020): 7–15. <https://doi.org/10.31733/2078-3566-2020-2-7-15>.
- Narváez Medécigo, Alfredo. “The German System of Constitutional Review: Prototype of a Concentrated Model?” In *Rule of Law and Fundamental Rights*, 155–211. Cham: Springer, 2016. https://doi.org/10.1007/978-3-319-24562-1_4.
- Petersen, Niels. “The German Constitutional Court and Legislative Capture.” *International Journal of Constitutional Law* 12, no. 3 (2014): 650–69. <https://doi.org/10.1093/icon/mou040>.
- Pūraitė-Andrikienė, Dovilė. “Advantages and Disadvantages of the Lithuanian Individual Constitutional Complaint Model.” *Teisė* 114 (2020): 49–70. <https://doi.org/10.15388/teise.2020.114.3>.
- Rasyidah, Rofi, and Mohammad Jamin. “Constitutional Complaint Through Constitutional Court as Protection of Constitutional Rights of Citizens (Comparative Study of the Constitutional Courts of Germany and South Korea).” *International Journal of Business, Economics and Law* 25, no. 1 (December 2021): 58–61.

- Riyah, Juwai. "Position and Authority of the Constitutional Court as a State Institution." *JUSTICES: Journal of Law* 3, no. 2 (2024): 76–85. <https://doi.org/10.58355/justices.v3i2.52>.
- Setiawan, Heru. "Mempertimbangkan Constitutional Complaint sebagai Kewenangan Mahkamah Konstitusi [Considering Constitutional Complaint as an Authority of the Constitutional Court]." *Lex Jurnalica* 14, no. 1 (April 2017): 146952.
- Siagian, Abdul Hakim. "Constitutional Complaint as Strengthening Constitutionalism in Indonesia." *Randwick International of Social Science Journal* 1, no. 3 (2020): 486–98. <https://doi.org/10.47175/rissj.vii3.102>.
- Simamora, Janpatar. "Comparison of Constitutional Court Authority Between Indonesia and South Korea." *Jurnal Dinamika Hukum* 15, no. 3 (September 2015): 331–38. <https://doi.org/10.20884/1.jdh.2015.15.3.446>.
- Sonata, Depri Liber. "Metode Penelitian Hukum Normatif dan Empiris: Karakteristik Khas dari Metode Meneliti Hukum [Normative and Empirical Legal Research Methods: Distinctive Characteristics of Methods for Researching Law]." *FIAT JUSTISIA: Jurnal Ilmu Hukum* 8, no. 1 (2015). <https://doi.org/10.25041/fiatjustisia.v8n01.283>.
- Spanish Constitutional Court. STC 155/2009, June 25, 2009.
- Stone Sweet, Alec. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000.
- Suasono, Edy, Priyo Saptomo, and Tri Dian Aprilsesa. "Constitutional Complaints as Extraordinary Legal Remedies Against Violations of Citizens' Constitutional Rights." *Pranata Hukum* 18, no. 2 (July 2023). <https://doi.org/10.36448/pranatahukum.v18i2.322>.
- Tribunal Constitucional de España [Constitutional Court of Spain]. *Memoria Anual 2023 [Annual Report 2023]*. Madrid: Tribunal Constitucional, 2023.
- Tushnet, Mark. "The Possibility of Illiberal Constitutionalism?" *Florida Law Review* 69, no. 6 (2017): 1367–84.

- Webber, Jeremy. "A Democracy-Friendly Theory of the Rule of Law." *Hague Journal on the Rule of Law* 16 (2024): 339–74. <https://doi.org/10.1007/s40803-024-00240-5>.
- Wico, Standy, Michael L. Michael, Patricia Louise Sunarto, and A. Anastasia. "Constitutional Complaint in Indonesia Through the Lens of Legal Certainty." *Indonesian Journal of Law and Society* 2, no. 1 (2021): 57. <https://doi.org/10.19184/ijls.v2i1.21449>.
- Wiratraman, Herlambang P. "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics." *Federal Law Review* 50, no. 3 (2022): 314–30. <https://doi.org/10.1177/0067205X221107404>.
- Yi, Kyunghee. "The Fragility of Liberal Democracy: A Schmittian Response to the Constitutional Crisis in South Korea (1948–79)." *Journal of Asian Studies* 81, no. 2 (2022): 305–21. <https://doi.org/10.1017/S002191182100231X>.
- Yuda, Tauchid Komara, Pinurba Parama Pratiyudha, and Kafa Abdallah Kafa. "Managing Social Policy in the Emerging Welfare Regime of Governance: What Indonesia Can Learn from South Korea's Experience." *International Social Work* 66, no. 2 (2023): 357–72. <https://doi.org/10.1177/00208728211011634>.
- Yun, Jeongran. "Constitutional Review Complaint as an Evolution of the Kelsenian Model." *ICL Journal* 14, no. 4 (2020): 423–46. <https://doi.org/10.1515/icl-2020-0024>.

Biography

Rofi Wahanisa is a Professor of Agrarian Law Politics at the Faculty of Law, Universitas Negeri Semarang. She completed her undergraduate, master's, and doctoral studies at the Faculty of Law, Diponegoro University, Semarang. Her academic interests broadly encompass agrarian law, particularly issues related to agrarian reform agendas. She has been actively involved in numerous national and international research projects. In addition to publishing articles in academic journals and conference proceedings.

Syahwal is a lecturer at the Faculty of Law, Universitas Negeri Semarang, whose academic and professional activities focus on the study and advocacy of human rights. He completed his degree at Universitas Hasanuddin dan Universitas Gadjah Mada. Currently affiliated with the Lingkar Studi Hukum dan Masyarakat (LSHM).

Eko Mukminto is a lecturer of jurisprudence at the Faculty of Law, Universitas Negeri Semarang. He completed his undergraduate at the Faculty of Law Universitas Islam Sultan Agung Semarang and his master at the Faculty of Law Universitas Diponegoro.

Thomas Sheku Marah is a multidisciplinary scholar whose work bridges law, political science, computer science, and education through interdisciplinary research on contemporary governance challenges. His research focuses on constitutional law, international law, humanitarian law, global governance, artificial intelligence governance, comparative constitutionalism, education policy, higher education reform, and public policy, with particular emphasis on the intersection of emerging technologies, democratic institutions, the rule of law, and educational transformation. His scholarship seeks to advance innovative approaches to constitutional governance, judicial reform, AI-enabled governance, sustainable institutional development, and inclusive education, particularly within the Global South. Beyond his academic research, Marah is the founder of the Salone Future Leaders Foundation, a nonprofit initiative dedicated to promoting education, youth empowerment, and leadership development in Sierra Leone. His broader academic and professional interests center on advancing justice, constitutional democracy, equitable governance, sustainable development, and educational innovation through rigorous interdisciplinary scholarship and evidence-informed policy research.

Tanto Lailam is a Comparative Constitutional Law Lecturer at the Faculty of Law, Universitas Muhammadiyah Yogyakarta. He earned a Bachelor of Laws degree from Universitas Muhammadiyah Yogyakarta, a Master of Laws (LL.M.) from Universitas Gadjah Mada, and a PhD in Comparative Constitutional Law from the University of Cologne, Germany. His research focuses on German-Indonesian comparative law, constitutional

review, human rights, elections, and democracy. He is also active as a constitutional law expert witness in court proceedings and in the legislative drafting of laws and local regulations. He is also active in the Department of Politics and Public Policy at the Central Board of Muhammadiyah. He serves as Executive Director of the Indonesian Centre for Rule of Law and Social Justice. Email: tanto_lailam@umy.ac.id

Ugochukwu Godspower Ehirim is a legal practitioner and Principal Partner at U. G. Ehirim & Co., a law firm based in Warri, Delta State, Nigeria. He is also a Chartered Arbitrator and Notary Public for Nigeria. He is an accomplished constitutional lawyer and public commentator with particular expertise in constitutional governance, legal practice, and technology law. He teaches Constitutional Law, Law of Torts, and Energy Law at the LL.B. level, as well as Maritime Law at the Postgraduate School of Delta State University, Abraka, Oleh Campus, Nigeria. He holds an LL.B. (Hons.) from the University of Ibadan, an LL.M. from Obafemi Awolowo University, Ile-Ife, and a Ph.D. in Law from Delta State University, Nigeria.

Alex Atanasov is an Assistant Professor of Law at Applied Science University, Bahrain, where he also serves as Programme Coordinator for the LLB and LLM programmes delivered in collaboration with London South Bank University. He holds a PhD in Law from Toulouse 1 Capitole University, an LLM in International Trade and Commercial Law from Durham University, an LLM in European and Comparative Law from Toulouse 1 Capitole University, and a common law qualification from Nottingham Law School. He is also a Fellow of Advance HE. His research focuses on constitutional governance, law and economics, comparative judicial institutions, technology regulation, and AI governance. He is the author of *La machine judiciaire: Analyse économique et comparative du fonctionnement du système judiciaire*, and his work has appeared in journals and edited volumes, including *Social Sciences & Humanities Open*, *Constitutional Review*, Springer's *Lecture Notes in Networks and Systems*, and IEEE conference proceedings. His recent scholarship examines institutional coordination, economic regulation, constitutional law, and the governance challenges posed by emerging technologies.

Bimo Fajar Hantoro (S.H., LL.M.) is a lecturer at the Faculty of Law, Universitas Jenderal Soedirman. His teaching and research focus on constitutional law, election law, and statutory interpretation. He earned his Bachelor of Laws (S.H.), *summa cum laude*, from Universitas Gadjah Mada in 2020. In 2023, he completed his Master of Laws (LL.M.) with honors at the University of Illinois Urbana-Champaign, where he received the CALI Excellence for the Future Award in Federal Courts and Environmental Law and Policy I.

Fathimah Azzahro (S.H., M.H.) is a lecturer at the Faculty of Law, Universitas Jenderal Soedirman. Her teaching and research focus on constitutional law, state institutional law, and gender equality. She earned her Bachelor of Laws (S.H.), *cum laude*, from Universitas Jenderal Soedirman in 2022, where she was also recognized as the best graduate. In 2024, she completed her Master of Laws (M.H.) at the same university, graduating *cum laude*. She is actively involved in academic research regarding constitutional law and the promotion of gender equality in Indonesia.

Asmin Fransiska earned her Bachelor of Laws (S.H.) from Unika Parahyangan in Bandung in 1998, followed by a Master of Laws (LL.M. with Honors) in International Human Rights Law from Northwestern University Pritzker School of Law in Chicago, U.S.A., in 2004 as a Fulbright Scholar. In 2016, she received her Doctor of Law (Dr. iur.) *magna cum laude* from Justus Liebig University Giessen in Germany. She currently serves as the Dean of the Faculty of Law at Atma Jaya Catholic University of Indonesia and is the founder and director of the Indonesian Center for Drugs Research (ICDR). As a legal scholar and human rights advocate, she specializes in the protection of children and women in international law, health and human rights law, and drug law and policy, with a particular focus on human rights and people who use drugs.

Inacio Loiola da C. O. Maia is a lecturer in the Philosophy of Law at the Instituto Superior de Filosofia e de Teologia (ISFIT), Dom Jaime Garcia Goulart in Dili, Timor-Leste. He teaches Citizenship and the Constitution. He graduated from the same institute in 2019 and earned his Master of Laws from the Faculty of Law at Atma Jaya Catholic University of Indonesia in 2024. He also serves as a member of the Legal Office of ISFIT and specializes in Business Relations Law.

Hikam Hulwanullah is a constitutional law scholar and lecturer at Universitas Negeri Surabaya. He currently serves as the Executive Director of the Centre for Constitutional, Legislative, and Democratic Studies at the Faculty of Law, Universitas Negeri Surabaya. He holds a Master of Law degree from the University of Melbourne, Australia, and Universitas Brawijaya, Indonesia. He is currently pursuing a PhD in Constitutional Law with a scholarship from the Indonesian government. Hikam actively conducts research and publishes opinion pieces in national and international media outlets, as well as in Scopus-indexed academic journals. His expertise covers constitutional rights, legislative law, state governance, and public law. Passionate about legal research and education, Hikam is dedicated to advancing constitutional studies and fostering future legal professionals.

Torik Abdul Aziz Wibowo is a lecturer at the Faculty of Law, Universitas Brawijaya, with research interests focusing on legislative studies and legal politics. His academic work primarily examines the development of laws and regulations, legislative reform, and the dynamics of legal policy in Indonesia. He is also a researcher at the Brawijaya Law Research Center: Law and Society, as well as a member of the Indonesian Human Rights Teachers Association.

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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

* Professor of Law at The University of New South Wales (UNSW) Sydney, former, Secretary-General of the International Association of Constitutional Law (IACL), and the Founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC).

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Example of Table

TABLE 2. Real-world magnitudes of the relationship between tort reform and death rates

Tort reform	Annual death rates (%)	Number of deaths in 2000	Deaths across all years
Cap on noneconomic damages	-3.54	-333	-5,242
Higher evidence standard for punitive damages	-2.57	-982	-11,798
Product liability reform	-3.83	-1,267	-16,841
Prejudgment interest reform	-4.88	-647	-9,060
Collateral source reform			
Offset awards	+4.71	+938	+14,160
Admit evidence	+2.43	+294	+4,468
Net effect		-1,998	-24,314

Note: Values presented are average changes. These computations are based on the coefficients from the primary regression (table 3) and the average annual populations and average annual death rates in the states that had each reform. The sums of the individual reforms differ by one from the net effects owing to rounding.

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