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Balancing Civil and Political Rights: Constitutional Court Powers in Indonesia and Austria

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ABSTRACT

This study focuses on analyzing the role and challenges faced by the Constitutional Court in upholding political and civil rights in Indonesia and Austria. This research explores various conceptual and comparative aspects of law through normative research methods and delves deeper into how these institutions operate in practice. Analysis shows that the Constitutional Courts in both countries serve as the primary guardians of justice and human rights. However, it must also operate in a complex environment, dealing with social, political, and international challenges. The study found that changes in laws and



regulations have significant potential to strengthen the authority and effectiveness of the Constitutional Court. This is reflected in the constitutional evolution in both countries, where legal and regulatory reforms have played an important role in shaping and defining the authority of the Constitutional Court. This study confirms the importance of increasing the capacity and legal knowledge of members of the Constitutional Court, as well as the need for greater understanding and appreciation from the public of this institution's vital role and function. This research contributes to understanding how constitutional institutions can adapt and evolve to meet challenges in enforcing political and civil rights.

Keywords: Constitutional Court, Political Rights, Civil Rights, Indonesia, Austria

INTRODUCTION

An unusual form of court, the Constitutional Court (sometimes known as a "*constitutional court*" or "*constitutional council*") has the exclusive authority to assess constitutionality. Alec Stone Sweet describes it as "*an independent state body established by the Constitution whose sole purpose is to preserve the constitutional law's normative superiority in the legal order*".¹ As such, it is responsible for determining the constitutionality of laws, typically presidential acts and decisions, and providing relief if the laws are found to be unconstitutional. It is

¹ Andrew Harding, "Constitution Brief The Fundamentals of Constitutional Courts," *International Institute for Democracy and Electoral Assistance (International IDEA)*, no. April (2017).

the only institution with the authority to conduct a constitutional review, and it does so solely. The majority of the roughly 85 countries with constitutional testing systems have such organizations. The constitutional court is often referred to as a "centralized" constitutional review system due to the fact that it has exclusive jurisdiction over constitutional disputes.²

It is also called the 'European' system because it was invented by Austrian legal scholar Hans Kelsen³ and found in European countries such as Austria, Germany, Italy and Spain, and countries influenced by them, such as Colombia, Russia, the Republic of Korea, Turkey and Taiwan.⁴ This centralized system contrasts with a system in which constitutional testing is conducted by courts with general jurisdiction over all civil, criminal, and public legal matters rather than just constitutional matters. In such a system, any court can engage in constitutional review.⁵ Usually, in this system, the power to decide constitutional questions with finality lies with the highest court (apex), the supreme court, which indicates its superiority over other courts. Since last, this decentralized and prominent system was developed in the United States, sometimes called the 'spread' or

² Ahmad Wijaya and Nasran Nasran, "Comparison Of Judicial Review: A Critical Approach To The Model In Several Countries," *JURNAL LEGALITAS* 14, no. 2 (2021), <https://doi.org/10.33756/jelta.v14i2.11809>.

³ It is Hans Kelsen's theory of law and politics that gives us the tools to productively understand the material interactions and the formal constitution of democratic states. Lars Vinx, "Hans Kelsen and the Material Constitution of Democracy," *Jurisprudence* 12, no. 4 (2021): 466-490. <https://doi.org/10.1080/20403313.2021.1921493>.

⁴ Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy*, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy*, (Oxford: Ofrod University Press, 2009). <https://doi.org/10.1093/acprof:oso/9780199227952.001.0001>.

⁵ Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, *Oxford Constitutional Theory* (Oxford: OUP, 2017).

'American' system. Examples can also be seen in Argentina, Australia, Canada, India, Japan, and the Philippines.⁶

Continental European constitutional courts were founded on a similar principle, albeit with a slightly different implementation: the creation of independent constitutional courts with powers beyond those of the regular court system. The fact that this court exists and performs its functions demonstrates, however, that a constitutional judiciary is essential to any functioning democracy.

According to the words of Hans Kelsen, a brilliant legal theorist and native of Prague: "A constitution that will not establish a constitutional court with the power to overturn an unconstitutional act is a light that does not shine." Hans Kelsen said, "Any minority of class, religious or national whose interests are in any way protected by the Constitution has an eminent interest in the constitutionality of the laws."⁷

As explained earlier, the concept of a constitutional court in Austria is based on Hans Kelsen's thinking that centers on separating constitutional courts from the general court system. In line with this principle, the Constitutional Court of Austria (*Verfassungsgerichtshof*) is an independent judicial body specializing in constitutional issues. Thus, this court can overturn any act or regulation contrary to the Constitution.⁸

Under the Austrian Constitution (B-VG) of 1920, which underwent various amendments over time, the *Verfassungsgerichtshof* was given broad powers to handle various constitutional cases. Article 137 B-VG says that this court is authorized to assess the

⁶ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (London: Oxford University Press, 2000).

⁷ Sara Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918-1929)," *Co-Herencia* 9, no. 16 (2012): 273-295. <https://doi.org/10.17230/co-herencia.9.16.10>.

⁸ Sweet, *Governing with Judges: Constitutional Politics in Europe*.

conformity of laws and other regulations with the Constitution.⁹ In addition, Article 139 B-VG authorizes courts to invalidate unconstitutional regulations or laws if challenged in legal proceedings.¹⁰

In line with Kelsen's approach that prioritizes legal certainty and minority protection, the *Verfassungsgerichtshof* has an important role in ensuring that all government regulations and actions follow the basic principles outlined in the constitution. This includes protecting human rights and democratic principles, such as the right to participate in political processes and the right to fair protection of laws.¹¹ Ultimately, the role and function of the *Verfassungsgerichtshof* in the Austrian legal system reflect Kelsen's thoughts on the importance of constitutional courts in a democracy. This court not only protects the constitutional rights of citizens but also serves as the main guardian of the supremacy of the Constitution.¹²

In particular, reform groups in Indonesia during the time of transition from the New Order to the Reformation Order insisted on the establishment of a Constitutional Court. The Constitutional Court of Indonesia was established primarily for the purpose of judicial review. The primary power of the Constitutional Court in every country is the power of judicial review. There is no mention of a constitutional court in the pre-amendment 1945 Constitution, the RIS Constitution, or the 1950 Constitution.¹³ Article 24 paragraph (2) and

⁹ Article 137, Republic of Austria, *The Federal Constitutional Law of 1920*, (1920).

¹⁰ Article 139, *Id.*

¹¹ Donald P. Kommers and Russell A. Miller, "The Constitutional Jurisprudence of the Federal Republic of Germany", *Thesis* (Durham: Duke University Press, 2013). <https://doi.org/10.1215/9780822395386>.

¹² Luuk van Middelaar, *Alarums and Excursions Improvising Politics on the European Stage* (Columbia University Press, 2020).

¹³ Muhammad Yamin, during the Second Session of the BPUPK on July 11, 1945, once proposed that the Indonesian state establish a Supreme Court or High

Article 24C of the Third Amendment to the 1945 Constitution, enacted by ST MPR in 2001, are the only places in the Constitution where the existence of the Constitutional Court is explicitly stated.

Article 24 of the 1945 Constitution states,

- (1) *Judicial power is an independent power to administer justice in order to uphold law and justice.*
- (2) *Judicial power is exercised by the Supreme Court and subordinate judicial bodies within the general court, religious courts, military courts, administrative courts, and Constitutional Court.*
- (3) *Other bodies whose functions relate to judicial power are provided for in law.*

Article 24C of the 1945 Constitution states,

- (1) *The Constitutional Court has the authority to adjudicate at the first and last instance whose decisions are final to test laws against the Basic Law, decide disputes over the authority of state institutions whose authority is granted by the Basic Law, decide the dissolution of political parties, and decide disputes about election results.*
- (2) *The Constitutional Court shall render a ruling on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the Constitution.*
- (3) *The Constitutional Court has nine members of constitutional judges appointed by the President, three each by the Supreme Court, three by the House of Representatives, and three by the President.*

Court whose task, apart from carrying out judicial functions, was to also review laws against customary law, sharia law, and the Constitution. However, this idea was not sufficiently welcomed; it was even rejected by Soepomo, so it did not appear in the final formulation of the 1945 Constitution. See Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan UUD 1945: Buku VI Kekuasaan Kehakiman* 16–19 (2010).

- (4) *The Chairman and Deputy Chief Justice of the Constitutional Court are elected from and by constitutional judges.*
- (5) *Constitutional judges must have integrity and personality that is beyond reproach, be fair, be statesmen who master the constitution and constitution and do not concurrently serve as state officials.*
- (6) *The appointment and dismissal of constitutional judges, procedural law and other provisions of the Constitutional Court are regulated by law.*

The Constitutional Court of Indonesia is an organization whose name, powers, and duties were written into Indonesia's founding document in 1945. In 2001, the concept of a constitutional court evolved, and on August 13, 2003, with the passage of Law Number 24 of 2003, the institution of the Constitutional Court was officially established. According to Friedman, these shifts in the law take place across three levels: the structure, the substance, and the culture of the legal system.¹⁴ The state institutional structure that originally did not recognize the existence of state institutions now has a "member" in the form of a constitutional court called the Constitutional Court.

The essence of the law also evolves over time. This concerns the Constitutional Court's responsibilities and powers, which were

¹⁴ Lawrence M. Friedman put forward his theory about three layers of law in society, namely: i) legal substance; ii) physical-legal structure; and iii) legal culture. Legal substance, according to Friedman, is the content of statutory regulations, whether written (as in the civil law system) or unwritten (as in the common law system), that are trying to be enforced. The physical structure of law, according to Friedman, is more in the form of institutions or institutions that are desired and then formed by legal substances, which, when these institutions or institutions have been formed, can be imagined to be assembled so as to form a structure, network, or "building" where law can work. Legal culture, according to Friedman, is a condition when regulations or legal substances have been internalized and accepted by society, controlling people's way of thinking and directing people's actions. See Lawrence M. Friedman, *The Legal System: A Social Science Perspective*. (New York: Russell Sage Foundation, 1975).

previously undefined in Indonesia's legal framework. The Constitutional Court has been given new powers and responsibilities along with its formal establishment. These include the following: i) deciding whether or not laws violate the 1945 Constitution; ii) resolving authority disputes between state institutions; iii) dissolving political parties; iv) resolving cases disputing election results; and v) ending the DPR's allegation that the President and/or Vice President violated the law and/or is no longer qualified as President and/or Article 24C, paragraph 1, of the Constitution of 1945 confirms the Constitutional Court's judicial review authority. The Constitutional Court is regarded as the highest court in the land and the ultimate arbiter of ideological purity because of its judicial review powers.¹⁵

The Constitutional Court (MK) of Indonesia was established during the reform era in response to the need for stricter adherence to the rule of law and better protection of civil and political rights. The Constitutional Court of Indonesia, like its Austrian counterpart, is the highest court in the land and has the power to perform judicial review of legislation.

The role of the Constitutional Court in upholding political and civil rights in Indonesia has been recognized, but there are still challenges that need to be faced. Although the Constitutional Court has fairly broad authority, its effectiveness in exercising it is still debatable. Some of the challenges faced include limited resources,

¹⁵ Mexsasai Indra, Geofani Milthree Saragih, and Mohamad hidayat Muhtar, "Kekuatan Putusan Mahkamah Konstitusi Dalam Pengujian Undang-Undang Terhadap Undang-Undang Dasar 1945 Di Indonesia," *Jurnal Konstitusi* 20, no. 2 (2023): 279–99.

corruption issues, and political pressures that can affect the independence and integrity of its institutions.¹⁶

Changes in laws and regulations can play an important role in strengthening the authority of the Constitutional Court and addressing these challenges. For example, changes to procedural laws can make the judicial review process more efficient and transparent.¹⁷ In addition, reform of the judicial system can help address corruption issues and strengthen the integrity of its institutions. When comparing the legal systems and authority of the Constitutional Court in Indonesia and Austria, several differences and similarities can be found. Both operate in a constitutional democratic system and have the authority to conduct judicial review. However, there are differences in their historical, political, and legal contexts that may affect the way they exercise their authority.

A deeper understanding of these differences and similarities can explain how the Constitutional Court's authority can be enhanced to better enforce political and civil rights. For example, lessons from Austria's experience in using constitutional courts to protect minority rights may be applicable in the Indonesian context. Likewise, Indonesia's experience adapting to reform challenges may provide insight for Austria and other countries.

At the operational level, MKs in both countries have experienced challenges in law enforcement and the protection of civil and political rights. For example, in Indonesia, complex legal cases

¹⁶ Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (2010): 397-424. <https://doi.org/10.1017/S1598240800003672>.

¹⁷ Mahkamah Konstitusi Republik Indonesia, *Peraturan Mahkamah Konstitusi Nomor 3 Tahun 2020 tentang Rencana Strategis Mahkamah Konstitusi Tahun 2020-2024*, (2020).

and limited resources often hinder case resolution.¹⁸ On the other hand, Austria's constitutional court,¹⁹ despite having a strong legal

¹⁸ For example, in the case of the polemic on the Regional Head Election (Pilkada), directly or indirectly, which erupted in 2014 in Indonesia, The Indonesian Constitutional Court has to deal with various complex challenges, such as balancing the political rights of the people to elect their leaders directly and the need for political stability necessary for national development. In addition, legal cases involving technology and digital privacy, such as those involving the distribution of illegal and slanderous content online, also challenge the Indonesian Constitutional Court. The balance between freedom of expression and the protection of individual rights is the main focus of the decisions of the Constitutional Court. Decisions in cases of this kind require a deep understanding of technology and privacy issues, as well as sufficient resources to carry out the necessary research and consultation. Another challenge faced by the Indonesian Constitutional Court is limited resources. Despite improvements in human resources and infrastructure, there are still challenges in terms of the speed and efficiency of case handling. Limited budget and human resources result in a backlog of cases, which can hinder law enforcement and the protection of constitutional rights. See Mahkamah Konstitusi Republik Indonesia, *Bukan Rezim Pemilu, Kewenangan MK Memutus Sengketa Hasil Pilkadanya Inkonstitusional*, <https://www.mkri.id/index.php?page=web.Berita&id=9905> (last visited Jun 25, 2023); Mahkamah Konstitusi Republik Indonesia, *Kewenangan MK Menyelesaikan Sengketa Pilkada Bersifat Permanen*, <https://www.mkri.id/index.php?page=web.Berita&id=18566&menu=2> (last visited Jun 25, 2023); Mahkamah Konstitusi Republik Indonesia, *Palguna: Pilkada Ciptakan Demokrasi Rakyat di Daerah*, <https://www.mkri.id/index.php?page=web.Berita&id=10794> (last visited Jun 25, 2023).

¹⁹ For example, the prominent case faced by the *Verfassungsgerichtshof* (VfGH), the Constitutional Court of Austria, is the handling of a case regarding the recognition of same-sex marriages. In 2017, VfGH ruled that the ban on same-sex marriage was discriminatory. This ruling requires a careful interpretation of the constitution and has the potential to have significant implications for Austrian society and politics. Another case that poses a challenge to VfGH is one related to data protection and privacy in the digital age. For example, the case involves the interpretation and application of the European Union's General Data Protection Act (GDPR) in Austrian law. The proper interpretation and application of these regulations requires in-depth technical knowledge and understanding of privacy issues, as well as a careful balance between individual

system, also faces challenges such as the variable interpretation of the constitution and the potential effects of court decisions on political stability.²⁰

Given the contextual differences and challenges faced by the two countries, increasing the authority of the Constitutional Court may require different approaches in each country. In Indonesia, for example, increasing the authority of the Constitutional Court may require an emphasis on institutional capacity building and legal reform to ensure transparency and accountability. In Austria, increasing the authority of constitutional courts may require a more focused approach to improving constitutional interpretation and monitoring the effects of court decisions.²¹

It follows that the Constitutional Court's work to protect political and civil liberties in both Indonesia and Austria has been crucial to the health of their respective democracies. However, significant challenges must be overcome to ensure the effectiveness and integrity of this institution. Changes in laws and regulations can

privacy rights and the public interest. Despite its broad powers, challenges also arise from the VfGH's efforts to maintain political stability when making decisions that can have a significant effect on Austria's political and legal structures. For example, in 2016, VfGH overturned the results of the presidential election due to voting procedure violations. This decision, although important to maintaining the integrity of the electoral process, has the potential to trigger political instability. See Clive Baldwin, *The European court's hidden but hopeful message on same-sex marriage*, THE GUARDIAN, Jun. 29, 2010, <https://www.theguardian.com/law/2010/jun/29/europe-rules-same-sex-marriage-austria> (last visited Jun 27, 2023); Marek Szydlo, "Principles underlying independence of national data protection authorities: Commission v. Austria." *Common Market Law Review* 50, no. 6 (2013); Isabela Cocoli, *Austria's Highest Court Overturns Presidential Election Results*, VOA (2016), <https://www.voanews.com/a/austria-cancels-presidential-election-results/3400020.html> (last visited Jun 27, 2023).

²⁰ Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918-1929)."

²¹ Nicola Christine Corkin, "Developments in Abstract Judicial Review in Austria, Italy and Germany," *Thesis*. (Birmingham: Birmingham University, 2011).

strengthen the Constitutional Court's authority and address these challenges. However, each country may require a different approach depending on its historical, political, and legal context.

On the one hand, Austria has successfully used its constitutional courts to protect minority rights and constitutional interpretation. However, it must be wary of the potential effects of court decisions on political stability. On the other hand, despite facing challenges such as limited resources and corruption issues, Indonesia has used its Constitutional Court to reform and enforce the supremacy of the Constitution. Indonesia and Austria have both shown resilience in the face of these challenges, and a comparison of their legal systems and the Constitutional Court's role in each could shed light on how that increased authority is likely to be exercised in the future.

As a way to find out the novelty of this study entitled "*Balancing Civil and Political Rights: Constitutional Court Powers in Indonesia and Austria*" it is necessary to analyze several previous studies as a reference. **First**, research Bantekas and Oette²², although it provides a general map of the role of state structures in the protection of human rights, it tends to be abstract and global in scope. However, this study is more specific, exploring how a particular institution of the Constitutional Court works within the legal and political framework to guarantee such rights. **Second**, Temperman's writings²³ are more oriented towards a single clause of an international treaty and how it gives or does not give "rights" that can be demanded. Meanwhile, the study delves deeper into how such international norms are

²² Ilias Bantekas and Oette Lutz, *International Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2013).

²³ Jeroen Temperman, "The International Covenant on Civil and Political Rights and the "Right to Be Protected against Incitement",*" Journal of Law, Religion and State* 7, no. 1 (2019): 89–103.

interpreted or even challenged by Constitutional Courts in both countries, going beyond normative discussion to practical analysis.

Third, Kairys research²⁴ discusses civil rights as the legal protection of individuals or groups from various forms of oppression, focusing on practices in the Western world. This paper provides a general conceptual framework and approaches these rights in a broad, yet abstract context. The study provides depth and specificity by detailing how Constitutional Courts in two different countries work to uphold and balance civil and political rights. Here, there is a significant expansion of the discussion brought about by Kairys, as the study not only addresses civil rights in abstraction but also considers the effectiveness and weaknesses of institutions that have a key role to play in its application.

Fourth, In the meantime, Isra²⁵ and Faiz²⁶ explicitly focusing on Indonesia, this study broadens the scope by including Austria as a comparative study. This allows for a richer analysis of how legal culture and constitutional traditions influence the interpretation and application of civil and political rights. **Fifth**, Chirembo research²⁷ incorporating elements of good governance could be an interesting link point for this study, but the study is more likely to view governance through the lens of the capabilities and effectiveness of

²⁴ David Kairys, "Civil Rights," in *International Encyclopedia of the Social & Behavioral Sciences*, vol. 3 (Elsevier, 2015), 686–90, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405620.

²⁵ Saldi Isra, "Peran Mahkamah Konstitusi Dalam Penguatan Hak Asasi Manusia Di Indonesia," *Jurnal Konstitusi* 11, no. 3 (2014): 409–27.

²⁶ Pan Mohamad Faiz, "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia," *Indonesia Law Review* 6, no. 2 (2016): 158, <https://doi.org/10.15742/ilrev.v6n2.230>.

²⁷ Doreen Chirembo, "A Critical Analysis of The Relationship Between Civil, Political Rights And Good Governance", *Thesis*. (Zambia: Cavendish University, 2020).

the Constitutional Court itself rather than just as part of larger governance.

If you look at some of the previous research, the principle of this research opens the opportunity to see how similar institutions in two countries that are very different in terms of culture and history operate in the domain of human rights (HAM), especially civil and political rights. In addition, the focus on the powers and effectiveness of the Constitutional Court as a midpoint of the study adds a level of depth to the analysis that has often been overlooked in previous literature. Therefore, this study is important because it fills a gap in the literature by providing an earlier, comparative, and contextual analysis of the role and effectiveness of the Constitutional Court in guaranteeing civil and political rights (Indonesia and Austria). In addition, he also combines various methods and approaches from previous studies to formulate a richer and multidimensional analysis.

Based on that, more study of how different nations deal with these issues is needed to develop best practices and recommendations for using the Constitutional Court to enforce political and civil rights. Because of this, the study will center on two main concerns. The first concerns the Constitutional Court's efforts to protect political and civil liberties in Indonesia and Austria, as well as the obstacles it faces in doing so. Second, how the two countries' respective practices of amending laws and regulations increase the Constitutional Court's power to safeguard civil and political rights.

In this study, we apply normative methods in analyzing the function and authority of the Constitutional Court (MK) in upholding civil and political rights in Indonesia and Austria. This normative research method allows research based on existing legal studies.²⁸ In

²⁸ Chakravanti Rajagopalachari Kothari, *Research Methodology: Methods & Techniques* (New Delhi: New Age International, 2004).

this context, we refer to the laws that govern the Constitutional Court in both countries. This approach gives us an idea of how current rules and regulations support or limit the authority of the Constitutional Court in enforcing these rights. Furthermore, this approach also helps to know the legal challenges that the Constitutional Court may face. We also apply a conceptual approach to explore a deeper understanding of the constitutional principles underlying the role and authority of the Constitutional Court.²⁹ This approach allows us to understand, analyze, and evaluate various legal and constitutional concepts relevant to the research topic.

In addition, we use a comparative legal approach to explore how MKs in Indonesia and Austria operate in similar contexts and how they differ.³⁰ This approach offers a unique perspective on how these two countries have tried to address challenges in upholding civil and political rights. This will help to know what changes in laws and regulations may be needed to strengthen the authority of the Constitutional Court. In the end, we resort to analysis based on authoritarian techniques. Researching legal goals, justice values, the efficacy of the rule of law, legal concepts, and legal norms is the emphasis of the prescriptive method in legal studies.³¹ By taking this tack, you can learn more about the reasons behind laws, as well as how they are supposed to be interpreted and applied. Through this study, we hope to shed light on the Constitutional Court's role and the difficulties it faces in protecting civil and political rights in

²⁹ Dorothy Giles Williams and Earl R. Babbie, "The Practice of Social Research.," *Contemporary Sociology* 5, no. 2 (1976), <https://doi.org/10.2307/2062956>.

³⁰ Esin Örüçü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, 2004, <https://doi.org/10.1163/9789047413578>.

³¹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Preneda Media Group, 2013).

Indonesia and Austria, as well as the ways in which new legislation and regulations can bolster the Court's authority and help it meet these challenges.

NAVIGATING CONSTITUTIONAL RESPONSIBILITIES: EXAMINING THE CONSTITUTIONAL COURT'S ROLE & CHALLENGES IN SAFEGUARDING POLITICAL & CIVIL RIGHTS IN INDONESIA & AUSTRIA

I. Concept & Legal Basis of Political & Civil Rights Enforcement Arrangements in Indonesia & Austria

The Constitutional Court (MK) in Indonesia is an independent institution that maintains the rule of law and democracy in the Indonesian legal system. The concept of the Constitutional Court is based on the understanding that a democratic rule of law requires an effective constitutional safeguarding mechanism.³² The Constitutional Court in Indonesia operates under the provisions of Law No. 24 of 2003. The Constitutional Court is the highest court in the land and has the ultimate say in matters like whether or not a law is in accordance with the Constitution of 1945, whether or not a political party should be dissolved, whether or not an election result should be overturned, and whether or not a candidate should be declared the winner. The DPR may also seek the Constitutional Court's advice on whether or not the President and/or Vice President

³² Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Sinar Grafika, 2021).

should be impeached. By upholding the law and the Constitution, the Constitutional Court acts as a crucial check on the power of other branches of government.

An integral part of the rule of law in Indonesia is that the Constitutional Court is the sole body authorized to interpret the Constitution. Therefore, the Constitutional Court is crucial in preventing any one department of government from becoming too powerful. In a free and open society, the Constitutional Court plays an essential function. Timothy Lindsey stated: "The Constitutional Court has established itself as a major player in Indonesian politics and as a leading defender of constitutional and human rights".³³ Therefore, the concept and legal basis of the Constitutional Court focus on upholding the rule of law, maintaining democracy, and protecting human rights. The Constitutional Court, with its authority and role, ensures that Indonesia operates as a truly democratic state of law. Austria's Constitutional Court, or *Verfassungsgerichtshof* (VfGH), is tasked with safeguarding the rule of law and protecting constitutional rights in Austria. It is based on the understanding that a democratic rule of law requires an effective constitutional deterrence mechanism.³⁴

The legal basis of VfGH is set out in the Austrian Constitution (B-VG) and the Law on the Constitutional Court of Austria (VerfGG).² Some of its main tasks include judicial review of laws and regulations, resolution of authority disputes between state institutions, and protecting individual rights and freedoms against violations by the government.³⁵ The Austrian Constitution authorizes the VfGH to

³³ Mark Cammack and Timothy Lindsey, "Indonesia: Law and Society," *Indonesia* 68 (1999), <https://doi.org/10.2307/3351303>.

³⁴ Kommers and Miller, "The Constitutional Jurisprudence of the Federal Republic of Germany"

³⁵ Republic of Austria, *Constitutional Court Act 1953*, (1953).

interpret the Constitution and serves as the final court in constitutional matters.³⁶ Thus, the Constitutional Court plays an important role in maintaining a balance between the branches of government and ensuring that no single institution monopolizes power.

In a democratic society, the role of VfGH is very important. As David P. Currie explains, "The Austrian Constitutional Court plays a decisive role in interpreting the Constitution and ensuring the protection of citizens' rights".³⁷ Therefore, the concept and legal basis of VfGH focus on upholding the rule of law, maintaining democracy, and protecting human rights. VfGH, with its authority and role, ensures that Austria operates as a truly democratic state of law.

Political and civil rights in Indonesia are protected by the Constitution and other laws and regulations. Articles 28B-28J of the 1945 Constitution guarantee a wide range of civil and political liberties, including freedom of expression, due process, and political participation. The safeguarding of political and civil rights was bolstered by Law No. 39 of 1999 on Human Rights. The Human Rights Court and the Commission on Human and People's Rights play significant roles in the enforcement setting. The primary mechanism for receiving complaints and conducting investigations into suspected human rights breaches, including political and civil rights, it was established under Law No. 39 of 1999 and Law No. 26 of 2000.³⁸

³⁶ Kurt Heller, *Outline of Austrian Constitutional Law* (Brill Archive, 1989).

³⁷ David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994).

³⁸ Claudia Fuchs, "Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern", *Jahrbuch Öffentliches Recht* (2011): 91-101. See Konrad Lachmayer, "The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity", in Anneli Albi and Samo Bardutzky eds., *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (London: Springer Nature, 2019). https://doi.org/10.1007/978-94-6265-273-6_27.

On the other hand, in Austria, political and civil rights are also protected by the Federal Constitution and several other laws. B-VG Article 1 affirms that "liberty is a fundamental right". Austrian and European human rights laws also strengthen these protections, ensuring that all citizens have equal rights to participate in political life.

The Austrian Constitutional Court and the European Court of Human Rights have primary responsibility for protecting political and civil liberties in Austria. Individual complaints of violations of their political and civil rights are within VfGH's purview. Individuals or organizations that believe their rights have been violated by a European Convention on Human Rights member state can take their case to the European Court of Human Rights.³⁹

In the analysis, both countries have strong legal tools to protect and enforce political and civil rights. However, effective enforcement of these rights depends on the extent to which legal institutions and law enforcement in these two countries operate independently and free from political interference. The strengths and weaknesses of the enforcement systems in these two countries may be the focus of further research. In this regard, finding out how these institutions work in practice and whether there are specific challenges or obstacles in enforcing political and civil rights is relevant.

³⁹ See Außenministerium der Republik Österreich, *European Policy*, <https://www.bmeia.gv.at/en/european-foreign-policy/european-policy/> (last visited Jun 27, 2023).

II. Challenges Faced by The Constitutional Court in Upholding Political & Civil Rights in Indonesia & Austria

The challenges faced by the Constitutional Court in upholding political and civil rights include regulation and enforcement of the law and the complexity of international and global interactions. Although historical and cultural contexts differ, countries such as Indonesia and Austria face challenges. Some of the challenges in both countries are limited as follows:

1) *Political and Civil Rights Arrangements*

In Indonesia, the 1945 Constitution provides a legal basis for protecting political and civil rights. However, the challenge is how the Constitutional Court can ensure that all regulations and laws made by state institutions do not contradict the 1945 Constitution and common human rights principles.⁴⁰ This is complicated by ethnic and religious pluralism and challenges in balancing individual and societal rights. The constitutional legal system in Austria is based on the Federal Constitution of 1920, which has undergone various amendments.⁴¹ The Federal Constitution and the European Convention on Human Rights must, however, be upheld by the Austrian Constitutional Court. Protecting human rights in the multicultural and multi-national framework of the European Union

⁴⁰ Simon Butt and Timothy Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (London: Bloomsbury Publishing, 2012.)

⁴¹ Parliaments and Constitutional Courts: A Comparative Report through the Lens of Parliamentary Practice, 5 (Austrian Parliamentary Administration ed., 2022).

is a task that requires resolving conflicts between national traditions and international standards.⁴²

In Indonesia, one prominent example is the issue of religious freedom. The country has six officially recognized religions, and Article 28E of the 1945 Constitution guarantees freedom of religion.⁴³ In practice, however, there is often discrimination and abuse against minority groups, such as attacks on Ahmadis and closures of places of worship for religious minorities.⁴⁴ This reflects how challenges to religious and ethnic pluralism can complicate protecting civil and political rights.

In Austria, a frequent problem is opposition to EU rules that contradict national laws and traditions, as in the case of using religious symbols in schools. Austria's Constitutional Court ruled that a ban on displaying religious symbols in public schools violates the Federal Constitution, even though it complies with the European Convention on Human Rights.⁴⁵ This shows how tensions between international standards and national traditions can complicate the enforcement of human rights.

The two countries face challenges in upholding human rights and ensuring that all laws follow the constitution. Indonesia struggles with religious and ethnic pluralism, while Austria faces pressure to blend national traditions with international standards. Both countries must find a way to balance these conflicting needs to ensure that all their citizens get the human rights protections they deserve.

⁴² Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012).

⁴³ Article 28E, Republic of Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, (1945).

⁴⁴ Human Rights Watch, *Indonesia: Events of 2020*, in *WORLD REPORT 2021* (2020), <https://www.hrw.org/world-report/2021/country-chapters/indonesia>.

⁴⁵ Lachmayer, "The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity."

2) *Implementation Enforcement*

Enforcement of law implementation in Indonesia is often challenging for the Constitutional Court. For example, decisions made by the Constitutional Court are often ignored by the executive and legislature.⁴⁶ In addition, people's knowledge and understanding of the law and due process are often low, meaning they cannot always exercise their rights effectively.⁴⁷ Enforcement of the statute by Austria's Constitutional Court is fraught with difficulties of its own. Particularly in the context of the European Union, it is the responsibility of the Court of Justice to guarantee that Austrian legislation is consistent with EU law. Another difficulty is overcoming opposition to the Constitutional Court's ruling from both governmental and private institutions.⁴⁸

In Indonesia, enforcement of law implementation by the Constitutional Court is often faced with challenges from various parties, for example, in the MD3 Law test case involving the Corruption Eradication Commission (KPK) and the DPR. Although the Constitutional Court ruled that some articles in the MD3 Law contravened the 1945 Constitution, the executive and legislature seemed to ignore the decision. They continued the legal process that should have been amended.⁴⁹ This shows how challenges on the part of the executive and legislature can hinder law enforcement.

⁴⁶ Simon Andrew Butt, "Judicial Review in Indonesia: Between Civil Law and Accountability?: A Study of Constitutional Court Decisions 2003-2005", *Dissertation* (Melbourne: University of Melbourne, Department of Law, 2006).

⁴⁷ Sebastiaan Pompe, *The Indonesian Supreme Court: a study of institutional collapse*. No. 39. SEAP Publications, 2005.

⁴⁸ Mauro Bussani, and Ugo Mattei, eds. *The Cambridge Companion to Comparative Law*. (Cambridge: Cambridge University Press, 2012).

⁴⁹ Aida Mardatillah, "Pengujian UU 'Berbau' Politik Mendominasi di MK", *Hukum Online* (2018), <https://hukumonline.com/berita/a/2018--pengujian-uu-berbau-politik-mendominasi-di-mk-lt5c41b829c5048/> (last visited Jun 20, 2023).

In addition, Indonesian people's knowledge and understanding of the law and legal process are often lacking. For example, in the case of customary land dispute resolution in Kalimantan, indigenous peoples often do not understand the law and legal process, making it difficult to exercise their rights effectively.⁵⁰ Meanwhile, in Austria, challenges related to law enforcement often occur in the context of the European Union, for example, in the case of regulation of the use of harmful pesticides. Although the European Union banned its use, Austria still allowed it on the grounds of the protection of local farmers.⁵¹ It shows how tensions between national law and EU law can be a challenge for Austria's Constitutional Court.

In addition, Austria also faces challenges in law enforcement related to the resistance of public and private institutions, for example, cases of rejection by private institutions of the Constitutional Court's decision related to workplace discrimination.⁵²

Overall, the Constitutional Court is in a difficult position in Indonesia and Austria to enforce the law. On the one hand, they have to deal with resistance from the executive and legislative parties. On the other hand, they must also overcome challenges from society and private institutions. This shows how complex the role of the Constitutional Court is in society.

⁵⁰ Suraya Afiff and Celia Lowe, "Claiming indigenous community: Political discourse and natural resource rights in Indonesia", *Alternatives* 32, no. 1 (2007): 73-97.

⁵¹ France 24, "Austria becomes first EU country to ban weedkiller glyphosate", *France 24* (2019), <https://www.france24.com/en/20190702-austria-divided-over-glyphosate-ban-weedkiller-cancer> (last visited Jun 20, 2023).

⁵² Stefan Kieber and Reinhard Klaushofer, "The Austrian Constitutional Court Post Case-Law After the Landmark Decision on Charter of Fundamental Rights of the European Union", *European Public Law* 23, no. 2 (2017).

3) *International Scope*

At the international level, the Constitutional Courts in both countries face challenges in interacting with international norms and laws. In Indonesia, issues such as democratic transition, corruption, and minority rights often attract attention and pressure from the international community. On the other hand, Austria, as part of the European Union, must also abide by broad international laws and norms.⁵³ Indonesia's democratic transition also poses challenges. The international community is watching the tension between the need to maintain stability and the need for legal reform to ensure civil and political liberties. For example, the Constitutional Court must ensure that the electoral process and the establishment of new laws are aligned with international democratic standards while maintaining national stability.⁵⁴

In Austria, challenges of interaction with international norms and law often arise in the context of the country's membership in the European Union. For example, in 2019, Austria faced a case involving an EU order to stop mining lignite, a type of brown coal, to meet greenhouse gas emissions reduction targets. While this contradicts Austria's domestic energy policy, the Constitutional Court must ensure compliance with EU law.⁵⁵ Ultimately, Indonesia and Austria face challenges adapting domestic laws and policies to international standards. While the context and details of the challenge differ, both

⁵³ Leonard FM Besselink, "National and constitutional identity before and after Lisbon", *Utrecht Law Review* 6, no. 3 (2010): 36-49.

⁵⁴ Marcus Mietzner, "Fighting illiberalism with illiberalism: Islamist populism and democratic deconsolidation in Indonesia", *Pacific Affairs* 91, no. 2 (2018): 261-282.

⁵⁵ Part II: Member States, European Commission, *Commission Staff Working Document*, (2015).

need to find a balance between domestic needs and international commitments.

Overall, the challenges faced by the Constitutional Court in both countries demand a deep understanding and knowledge of laws, norms, and social realities, both at national and international levels. In other words, the Constitutional Court must be able to operate in a highly complex sphere, where demands for justice, democracy, and human rights often clash with difficult political and social realities. The Constitutional Courts of Indonesia and Austria are important in maintaining justice and human rights. However, they must also operate in complex social, political, and international contexts. They must understand and address these challenges to ensure they can perform their duties effectively and safeguard justice and human rights in their communities. To that end, it is important for these two countries to continuously improve the capacity and legal knowledge of their Constitutional Courts and ensure that they have sufficient resources to perform their duties. In addition, they must also ensure that the public at large understands and appreciates the role and function of the Constitutional Court and that they get the support they need to do their job well.

ENHANCING CONSTITUTIONAL COURT AUTHORITY: EVOLVING LEGAL FRAMEWORKS FOR CIVIL AND POLITICAL RIGHTS ENFORCEMENT IN TWO NATIONS

There have been numerous changes to preexisting legislation in Indonesia, notably the 1945 Constitution (UUD 1945), over the course of the country's history. From a historical perspective, this dynamic is seen beginning with the fundamental state discussion at the BPUPKI

and PPKI meetings prior to Indonesia's independence. This dynamic was also evident in the amendment process that took place between 1999 and 2002 after independence had been achieved. The concept of pleading the fifth continues to surface. This incident exemplifies how fundamental laws and regulations are to the Indonesian legal system. This case can be strengthened by learning more about the historical context of the establishment of the Constitutional Court in Indonesia. The establishment of Indonesia's Constitutional Court was an attempt to fix the document's many flaws. In 2003, as part of a legal change, specifically the third amendment to the 1945 Constitution, the Constitutional Court was established.

By agreeing to authorize a judicial body to conduct a legal review of the Basic Law, the Consultative Assembly of the results of the 1999 general election ushered in a significant change to Indonesian law that is now seen as a watershed moment in the development of the Indonesian nation-state. The People's Consultative Assembly of the Republic of Indonesia unanimously approved the accord at its 7th plenary meeting on November 9, 2001, marking the third and final modification to the 1945 Constitution. The Supreme Court was originally tasked with assuming this function. A judicial entity, the Constitutional Court, was established to conduct legal tests of the Basic Law, although this did not win over everyone. According to Article 24C, paragraphs (1) and (2) of the 1945 Constitution, the Constitutional Court of Indonesia has the following powers and responsibilities:⁵⁶

- 1) Testing laws against the 1945 Constitution (1945 Constitution);

⁵⁶ The authors prefer to equate the authority and obligations possessed by the Constitutional Court, and this is in line with the opinion of the Deputy Chief Justice of the Constitutional Court, Saldi Isra, who believes that basically between the authority and obligations of the Constitutional Court, there is no difference at all.

- 2) Resolve disputes over the authority of state institutions whose authority is granted (based) on the 1945 Constitution;
- 3) Break the dissolution of political parties;
- 4) Resolve disputes about election results;
- 5) The House of Representatives may request a ruling from the Constitutional Court if they believe the President or Vice President has committed treason against the state, corruption, bribery, or another serious crime or reprehensible act or if they believe the President or Vice President is no longer qualified to serve in those roles as set forth in the 1945 Constitution.

The Supreme Court's ability to review legislation for compliance with the Constitution of 1945 and to resolve election disputes is directly related to the protection of civil and political rights. Civil and political rights enforcement efforts have been numerous throughout history, particularly in Europe. Slavery and other 19th-century abuses of citizens' political and civil liberties inspired the birth of the movement. At the time, civil and political liberties were severely limited, with some arguing that only the aristocracy enjoyed these protections at all.⁵⁷ The movement to guarantee and recognize universal civil and political rights in reality only occurred after the second world war, which was stated in the Declaration of Human Rights on December 10, 1948, through resolution 217 A (III) by the United Nations.⁵⁸ After the issuance of the resolution, countries and even individuals in the world get guarantees for their human rights, including, in this case, civil and political rights. This situation can be seen from establishing the International Court of Human Rights

⁵⁷ David Bernstein, "The Supreme Court and" Civil Rights," 1886-1908", *The Yale Law Journal* 100, no. 3 (1990): 725-744

⁵⁸ Michael H. Posner and Peter J. Spiro, "Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993", *DePaul Law Review* 42, no. 4 (1992): 1209.

established by the United Nations to guarantee this.⁵⁹ A few years before the UN passed the resolution, Indonesia had guaranteed human rights in the 1945 Constitution. However, along with the course of Indonesian statehood from the Old Order and New Order to the Reformation Order, several dynamics required amending the 1945 Constitution. Constitutional and human rights, including civil and political rights, were finally realized with the establishment of the Constitutional Court.

During the ORBA administration itself, human rights violations were among the highest they had ever been in Indonesia. This is because the ORBA government regime, at the time, exploited the state-founding 1945 Constitution as a means to consolidate its dictatorial rule. Mahfud MD argues that there were at least some weaknesses at that time that made his young man enter an authoritarian government system, namely as follows:⁶⁰

- 1) The development of an executive-heavy system that makes the president the determinant of the entire national political agenda;
- 2) Contains important articles that are multi-interpretation and the interpretation that must be considered correct is the government's interpretation unilaterally;
- 3) Attributing too much authority to the legislature to regulate important matters by law without clear restrictions, even though the president is the holder of legislative power with the DPR, which, at that time, was only given the function of approving it;
- 4) The original 1945 Constitution trusted the spirit of the people more than the strong system.

⁵⁹ Rosana Garcandia, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement*. (Brill Nijhoff, 2020).

⁶⁰ Moh. Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu* (Jakarta: Rajawali Press, 2009)

Due to the despotic period of ORBA, a strong idea arose to immediately carry out reforms. The emergence of an atmosphere of reform in all fields of life in society, nation, and state can certainly give rise to several ideas or ideas that the joints of constitutional life also need to undergo reassessment following the new paradigm that has been adopted. The power of the president, at the heart of the heavy executive⁶¹, is the most reviewed part. In addition, the position of state institutions is also a concern that cannot be ruled out. In essence, strengthening the division of power of state institutions was also the main focus of the amendment to the 1945 Constitution. Thus, the main result of the amendment to the 1945 Constitution has given birth to a new constitutional law that has now been realized and has gone quite far, such as the development of judicial power into the Supreme Court and the Constitutional Court plus an auxiliary institution, namely the Judicial Commission.

The constitution is the result of the nation and states through the figures who are its representatives. As mentioned by Mahfud MD, the content of the 1945 Constitution is not wrong and follows the spirit of the nation and state.⁶² In Indonesia, the Constitutional Court plays a crucial role as the guardian and implementer of the ideological ideals and state basis set forth in the country's founding document from 1945. This highlights the significance of the Constitutional Court in Indonesia's legal structure, which is tasked with checking legislation for conformity to the 1945 Constitution and the Pancasila doctrine. In his book, King Faisal Sulaiman affirms the Constitutional Court's role as the defender of ideas. The Constitutional Court, he wrote, plays a

⁶¹ Executive heavy is a term that confirms that executive power is stronger than other state institutions, especially in terms of the meaning of the 1945 Constitution, which is centred on executive interpretation; in other words, the President determines all national political agendas.

⁶² Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu*

crucial role in reviving, internalizing, and enforcing the values of Pancasila.⁶³

The Constitutional Court of Indonesia is crucial in protecting the civil and political liberties of its people. Pan Mohamad Faiz, a member of the country's second generation of founding fathers, has said that the Constitutional Court was established to safeguard citizens' civil and political liberties.⁶⁴ Several countries throughout the world eventually established a Constitutional Court for the same purpose that Indonesia did: to ensure the rule of law during the country's transition from an authoritarian to a democratic government.⁶⁵ This opinion is in line with what Jimly Asshiddiqie said: the idea of establishing a Constitutional Court in a country is generally motivated by constitutional experience where it has experienced a constitutional crisis and has just come out of an authoritarian system of government.⁶⁶ The possibility of civil and political rights violations often occurs through regulations and policies formed by the positive legislature (Government/President and/or DPR) because they are not sensitive to human rights.⁶⁷ Indonesia, as a country that wants to change towards a good democracy, clearly needs the existence of the Constitutional Court.

The Constitutional Court has often shown its importance in protecting the civil and political rights of Indonesians by checking

⁶³ King Faisal Sulaiman, *Teori dan Hukum Konstitusi* (Jakarta: Nusamedia, 2019).

⁶⁴ Pan Mohamad Faiz, "The protection of civil and political rights by the constitutional court of Indonesia", *Indonesia Law Review* 6.2 (2016): 159-179.

⁶⁵ Anna Rotman, "Benin's constitutional court: An institutional model for guaranteeing human rights", *Harvard Human Rights Journal* 17 (2004)

⁶⁶ H. Acmad Surkati, "Kedudukan Dan Wewenang Mahkamah Konstitusi Ditinjau dari Konsep Demokrasi Konstitusional Studi Perbandingan di Tiga Negara (Indonesia, Jerman, dan Thailand)", *Jurnal Equality* 11, no. 1 (2006): 42-46

⁶⁷ Saldi Isra, "Peran Mahkamah Konstitusi dalam penguatan hak asasi manusia di Indonesia", *Jurnal Konstitusi* 11, no. 3 (2014): 409-427.

laws against the Constitution. The word "religion" in Article 61 paragraph (1) and Article 64 paragraph (1) of Law Number 23 of 2006 concerning Population Administration as amended by Law Number 24 of 2014 concerning Amendments to Law Number 23 of 2006 concerning Population Administration is contrary to the 1945 NRI Constitution and has no conditionally binding legal force as long as it does not include "belief" (Decision Number 97/PUU-XIV/2016).⁶⁸ The government's initial response to the Constitutional Court ruling was the issuance, on December 5, 2017, of Minister of Home Affairs Regulation Number 118 of 2017. Then, on December 11, 2017, it was officially released. The Constitutional Court decided in Decision No. 35/PUU-X/2012 that state-centric customary forests had become community-centric. This judgement by the Constitutional Court serves to safeguard the customary forest rights of indigenous peoples.⁶⁹ Apart from these two rulings, several Constitutional Court rulings guarantee and ensure the civil rights of Indonesian citizens.

The Constitutional Court also plays a significant role in protecting political rights, as seen by a number of landmark rulings. One can be found in ruling 56/PUU-XVII/2019 from the Constitutional Court. The Constitutional Court reasoned that the norm unfairly increased inmates' punishment in its decision. After five years of indifference upon release, the requirement that you have never been convicted based on a court decision that has achieved permanent legal force (*inkracht*) can expire. A person convicted of a crime carrying a

⁶⁸ Sukirno Sukirno and Nur Adhim, "Implementasi Putusan Mahkamah Konstitusi No. 97/PUU-XIV/2016 pada Masyarakat Adat Karuhun Urang di Cigugur", *Jurnal Penelitian Hukum De Jure* 20, no. 1 (2020): 11-24.

⁶⁹ Faiq Tobroni, "Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012)", *Jurnal Konstitusi* 10, no. 3 (2013): 461-482.

sentence of 5 (five) or more years in prison loses the right to vote in regional elections if they are detained for a year or more.⁷⁰

Several further political rights-related decisions have been made by the Constitutional Court. In Indonesia, the body with the power to rule on challenges to election results is also the body with the power to protect the political rights of its citizens. When it comes to the election of the President and Vice President, contesting the official tally has become something of a habit in Indonesia's general election process. This is due to the fact that, ever since the Constitutional Court was established, the results of every election have been contested. The Constitutional Court also plays a crucial role in protecting and preserving citizens' political rights within the context of the dispute over the Regional Head Election (Pilkada). After passing back and forth several times between the Supreme Court and the discourse to form a judicial election body, the authority to handle final regional election disputes is now permanently owned by the Constitutional Court, especially as of the Supreme Constitutional Court Decision Number 85/PUU-XX/2022.⁷¹ Thus, the Constitutional Court in Indonesia has a very important role in granting and recognizing citizens' civil and political rights.

In truth, the Indonesian Constitutional Court has issues with its authority, as seen in its interpretation of the Basic Law's legality, for example. According to paragraph one of Article 24C of the 1945 Constitution, the ruling of the Constitutional Court is binding on all levels of government. Despite this, the Constitutional Court's judgements have not always been implemented. Decision 91/PUU-

⁷⁰ Agusniwan Etra, "Peran Mahkamah Konstitusi dalam Perlindungan Hak Pilih dalam Negara Hukum Demokratis", *Jurnal Konstitusi* 19, no. 2 (2022): 479-502.

⁷¹ Geofani Milthree Saragih, "Kewenangan Penyelesaian Sengketa Pemilihan Kepala Daerah Pasca Putusan Mahkamah Konstitusi Nomor 85/PUU-XX/2022", *Jurnal Hukum Caraka Justitia* 2, no. 2 (2023): 129-140.

XVIII/2020, which held that Law 11 of 2020 for Job Creation was conditionally illegal, was one of the judgements of the Constitutional Court that was not followed, especially by state institutions that also drew great public attention. However, the government's actions in response to the Constitutional Court's verdict were unlawful. The administration is accused of splitting the law over the occurrence. Many Constitutional Court verdicts have yet to be addressed by lower courts or other branches of government.

The Constitutional Court of Austria is widely regarded as a model for other similar institutions around the world. It was in Austria that the first Constitutional Court was ever established. Trusting Hans Kelsen to draft Austria's constitution in 1920 was the first step.⁷² The Austrian Constitutional Court was formally introduced on January 25, 1919.⁷³ Because of the great influence of Hans Kelsen over the formation of the Constitutional Court in Austria, he was given the title of the "father" of the 1920 Austrian Constitution.⁷⁴ The background to the birth of the Austrian

⁷² There is a view that Karl Renner, also a friend of Hans Kelsen, had an important role in forming the Austrian Constitutional Court. This is because, in 1918, Karl Renner, in his book entitled *Das Selbstbestimmungsrecht der Nationen*, said it was important to establish a Constitutional Court as part of transforming the imperial form into a democratic one. The Constitutional Court would have an important role in protecting the rights of the people and examining the constitutionality of laws and decisions made by the states, and maintaining a balance between states with a centre. Apart from the debate whether Hans Kelsen or Karl Renner had an important role in shaping the Constitutional Court in Austria, Hans Kelsen, with his thoughts, did have such a great influence in the legal world that until now, it is still widely used by legal scholars. See Stephan G. Hinghofer-Szalkay, "The Austrian Constitutional Court: Kelsen's Creation and Federalism's Contribution?", *Fédéralisme Régionalisme* 17 (2017). <https://doi.org/10.25518/1374-3864.1671>

⁷³ Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918-1929)," *Co-Herencia* 9, no. 16 (2012): 273-295. <https://doi.org/10.17230/co-herencia.9.16.10>.

⁷⁴ Ronald Faber, "The Austrian Constitutional Court—An Overview", *ICL Journal* 2, no. 1 (2008): 49-53.

Constitutional Court can be seen from Hans Kelsen's belief that the constitution should be treated as a set of legal norms superior to ordinary laws and positioned as the highest norm. Then Hans Kelsen also argued that ordinary judicial bodies had been viewed badly and considered inappropriate if given the authority to enforce the constitution.⁷⁵

The powers of the Austrian Constitutional Court are largely affirmed in the Austrian constitution (B-VG), and some other powers are stipulated in the Constitutional Court Act (VfGG). It can be said that the authority possessed by the Austrian Constitutional Court is very broad. The powers of the Austrian Constitutional Court are as follows:⁷⁶

- 1) Complaints/Objections to administrative tribunal decisions;
- 2) Testing the Constitutionality of the Act;
- 3) Verifying the validity (lawfulness) of laws and regulations issued by administrative officials;
- 4) Assess the validity of an international treaty;
- 5) Decide the validity of certain elections, namely:
 - a. Federal Presidential Election;
 - b. National Council Elections;
 - c. Election of the Federal Council;
 - d. State parliamentary elections;
 - e. Municipal (Vienna) parliamentary council elections;
 - f. European Parliament elections;
 - g. Election of local governing bodies;
 - h. Election of the mayor, head of district government;

⁷⁵ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2010)

⁷⁶ Dewa Gede Palguna, *Mahkamah Konstitusi: Dasar Pemikiran, Kewenangan, dan Perbandingan dengan Negara Lain* (Jakarta: KonPress, 2018).

- i. The election of a body provided for by law from a chamber representing sectoral interests that perform functions like a parliament in the chamber concerned.
- 6) Opposition or objection to the results of popular initiatives, plebiscites, referendums, and European citizen initiatives;
- 7) Resolve the issue of loss of office;
- 8) Complaints/objections against territorial authorities on the grounds of certain ownership claims;
- 9) Resolve jurisdictional conflicts related to:
 - a. Between the court and the administrative authority;
 - b. Between the court and the administrative tribunal or administrative court, as well as between the Constitutional Court and other courts;
 - c. Between federal and state administrative authorities or between administrative authorities from different states.
- 10) Decide the statement has jurisdiction;
- 11) Resolving disputes relating to parliamentary inquiry committees;
- 12) Impeachment of state officeholders;

According to its mandate, the Austrian Constitutional Court plays a significant part in safeguarding the central and state residents' civil and political rights. Since its inception in 1920 (after being previously disbanded), however, the Austrian Constitutional Court has undergone numerous reforms.⁷⁷ Like the Constitutional Court in Indonesia, the Austrian Constitutional Court also aims to uphold the spirit of constitutional justice. Constitutional justice can be achieved

⁷⁷ Monica Claes, "Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure", *German Law Journal* 16, no. 6 (2015): 1331-1342.

if all laws and regulations are in harmony, flow, and rhythm with the fundamental rules contained in the constitution.⁷⁸

However, several problems are faced by the Austrian Constitutional Court in exercising its authority, so it can be said to be not optimal. Christoph Bezemek believes that Austria's Constitutional Court is essentially privileged but not exalted or exclusive, partly in constitutional matters.⁷⁹ In contrast, the Constitution of Austria establishes two additional High Courts beyond the Constitutional Court: the Administrative Court, which reviews the actions of administrative authorities but lacks the authority to investigate potential violations of constitutional law, and the Supreme Court, which acts as the final court in civil and criminal matters (and thus in terms decided by what is called ordinary court). In such a circumstance, the Constitutional Court of Austria lacks jurisdiction to review rulings made by the District Court Administration or the Supreme Court.⁸⁰ All ordinary court decisions can only be reviewed within the relevant judiciary regarding alleged violations of fundamental rights.⁸¹

The Constitutional Courts of both Indonesia and Austria play crucial roles in safeguarding the civil and political liberties of their respective populations. As was previously said, the establishment of a Constitutional Court in a country usually follows a time of transition from an authoritarian to a more representative form of government.

⁷⁸ Zainal Arifin Mochtar, *Kekuasaan Kehakiman: Mahkamah Konstitusi dan Diskursus Judicial Activism vs Judicial Restraint* (Jakarta: Rajawali Press, 2021).

⁷⁹ Christoph Bezemek, "A Kelsenian Model of Constitutional Adjudication - The Austrian Constitutional Court", *Zeitschrift für öffentliches Recht* 67 (2012): 115-128.

⁸⁰ The function of the Supreme Court in Austria, as the last court in civil and criminal matters, has the same function as the Supreme Court of Indonesia.

⁸¹ The review of ordinary court decisions that can only be reviewed within the relevant judicial institutions (relating to alleged violations of fundamental rights) is the same as in Indonesia.

Therefore, it is obvious that safeguarding citizens' basic rights, which in this context include civil and political rights, is crucial.

The success of the transition period will, in large part, depend on the decisions made by the Constitutional Court, which was given a central role in the process. From what has been said, however, it is clear that both the Indonesian and Austrian Constitutional Courts face challenges when attempting to enforce their rulings. The obstacle in question is still limited, or there is the authority that should be owned but cannot be exercised because it has not been regulated, or there is authority possessed by the Constitutional Court but is still not running optimally.

Neither the Indonesian nor the Austrian Constitutional Courts have absolute authority, and their decisions cannot be overturned by any lower court. However, there are relatively few sources that explicitly state how long the rulings of the Indonesian Constitutional Court or the Austrian Constitutional Court will remain in effect. When the Constitutional Court of Indonesia makes a ruling, it immediately goes into force. However, the Constitutional Court's ruling does not become official until it is published in the official State Gazette of Austria.

Since humans are the focus of laws, they, too, must change over time. Because of the inflexibility of the law, it was necessary to make adjustments to the new circumstances. The Constitutional Court's power will be increased as part of these reforms. As was previously said, both the constitutions and the general and special legislation regulate the powers of the Constitutional Court of Indonesia and the Constitutional Court of Austria. Both the Indonesian and Austrian Constitutional Courts face challenges when trying to enforce their rulings because of a lack of clear legislation on the subject. As previously explained, the Constitutional Court, as a sort of judicial

power institution, was first founded in Austria in the nineteenth century.⁸²

The Constitutional Court is in a precarious position, yet changes to the statutes and regulations governing its authority are necessary. Increasing the Constitutional Court's jurisdiction is one possible legislative solution. The authority over constitutional issues has been a long-sought addition in Indonesia. This power is related to the Constitutional Court's ability to review legislation for compliance with the Constitution of 1945. The Constitutional Question process is utilized when a judge in a lower court has concerns about the legality of a statute and wants to have it reviewed by the Constitutional Court.⁸³

Connected to issues of political and civil liberties. In addition, the issues dealt with by the court are open to the public (Court of Justice). The Austrian Constitutional Court, unlike its Indonesian counterpart, has long held the power to answer constitutional questions. The development of constitutional courts such as Indonesia's and Austria's, which are charged with upholding the rule of law based on the constitution and fostering democratic government, may be traced back to this encouragement and enthusiasm. Similar values are upheld by the Constitutional Courts of Indonesia and Austria. When looking at the past, we can see that both Indonesia and Austria have been ruled by authoritarian regimes. Both Indonesia and Austria were motivated by a desire to move toward democracy when they

⁸² Although the Constitutional Court has been established in Czechoslovakia for several months, it has not been as effective as the Austrian Constitutional Court.

⁸³ Jazim Hamidi and Mustafa Lutfi, "Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya)", *Jurnal Konstitusi* 7, no. 1 (2010): 29-48. See also Emy Hajar Abra, and Rofi Wahanisa. "The Constitutional Court Ultra Petita As a Protection Form of Economic Rights in Pancasila Justice". *Journal of Indonesian Legal Studies* 5, no. 1 (2020): 187-224. <https://doi.org/10.15294/jils.v5i1.35965>.

established their respective Constitutional Courts. The formation of rules and regulations also includes the creation of the Constitutional Court, as seen in Indonesia and Austria.

The authority of the Constitutional Court in both Indonesia and Austria grew as the two countries' legal systems evolved. As an example, Constitutional Court Decision No. 138/PUU-VII/2009 and Constitutional Court Decision No. 85/PUU-XX/2022 both expand the authority of the Indonesian Constitutional Court. In its judgment 138/PUU-VII/2009, the Constitutional Court interpreted the Constitution of 1945 to suggest that Government Regulations, rather than Law (Perpu), can also be examined. After passing back and forth several times between the Supreme Court and the discourse to form a judicial election body, the Constitutional Court finally claims ownership of the authority to handle final election disputes in Decision Number 85/PUU-XX/2022. Article 10(1)(d) states that the Constitutional Court's ruling is one of the materials that the positive legislator, through law, must govern.⁸⁴

As a result, the protection of civil and political rights of Indonesian citizens is intimately connected to the role that changes in laws and regulations play in the Indonesian Constitutional Court's ability to carry out its primary task as protector and concretization of the constitution. The rules and regulations that define Austria's power have evolved alongside the country. The Austrian Constitutional Court came into existence due to the country's needing a permanent solution to a number of constitutional issues. Human rights were codified in the Constitution of 1848, however, it has been criticized for being inadequate. As of recently, Austria is likewise a constitutional monarchy. After the Constitution of 1848 was repealed, the Reich Constitution was drafted the next year. The Constitution of 1849

⁸⁴ Certain Constitutional Court decisions can apply alone after being decided without being previously promulgated.

prioritized equality principles within a framework of state federalism.⁸⁵

This constitution created a more democratic one, manifested through representative democracy. This constitution also carries out an administrative test system by the State Administrative Court. Only then, in 1920, was finally formed a new constitution in which Hans Kelsen became the main figure. The constitution was later considered the most qualified of the previous constitution because it adhered to the principles of representative democracy, the guarantee of human rights, and the separation of powers. This fact confirms that the Indonesian Constitutional Court and the Austrian Constitutional Court can be strengthened in their authority and position to cover civil and political rights; indeed, that is the philosophical reason for establishing the Constitutional Court institution.

The Constitutional Court's ability to resolve problems in the enforcement of civil and political rights can be bolstered in a number of ways through legislative and regulatory changes. Expanding authority, delineating roles and responsibilities, and enhancing monitoring and reporting requirements are all examples of the sorts of reforms we see in action in Indonesia and Austria. The Constitutional Court protects the rights of the people and upholds the law. For this purpose, the Constitutional Court needs adequate power to review the constitutionality of laws and other governmental actions. There have been numerous proposals to give the Constitutional Court more power so that it can fulfill this function, most notably in Indonesia and Austria. For instance, the Constitutional Court can play a role in addressing challenges that emerge in the practice of law by being granted the authority to answer constitutional questions.

⁸⁵ Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara* (Jakarta: KonPress, 2005).

The Constitutional Court's mandate and responsibilities can be made more clear by legislative reforms as well. Because of shifts in society and politics, or because of the emergence of new problems, the Constitutional Court's function has evolved over time. The Constitutional Court in Indonesia, for instance, has been given a more prominent role in clarifying the electoral process and resolving conflicts thanks to its judgements.

Last but not least, modifications to existing rules and regulations might enhance the Constitutional Court's monitoring and accountability. The Constitutional Court has a public duty to behave responsibly and issue decisions in an open and accountable manner. Laws and regulations need to be updated to better assure this by, for example, making it easier to review and appeal decisions or giving more power to impartial watchdog groups.

The Constitutional Court's power and influence can be bolstered in large part through legislative and regulatory measures. The Constitutional Court's work as protectors of the Constitution and citizens' fundamental rights, as well as the challenges of protecting civil and political rights, would be aided by this procedure. It is important to note that the ideals of democracy, justice, and the rule of law should all be taken into account throughout this process.

CONCLUSION

The Constitutional Courts of both Indonesia and Austria are vital institutions for the preservation of civil and political rights, demonstrating resilience against challenges such as limited funding, corruption, and political interference. However, these courts could enhance their efficacy through legislative reforms. In Indonesia, this could involve broadening the Court's mandate to protect a wider

array of civil liberties, while in Austria, procedural efficiencies could be introduced. Ultimately, despite existing obstacles, both courts have played a significant role in safeguarding constitutional integrity and individual freedoms, but they require continual legislative and procedural refinements to better fulfill their roles.

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*You can't separate peace
from freedom because no
one can be at peace unless
he has his freedom.*

Malcolm X

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