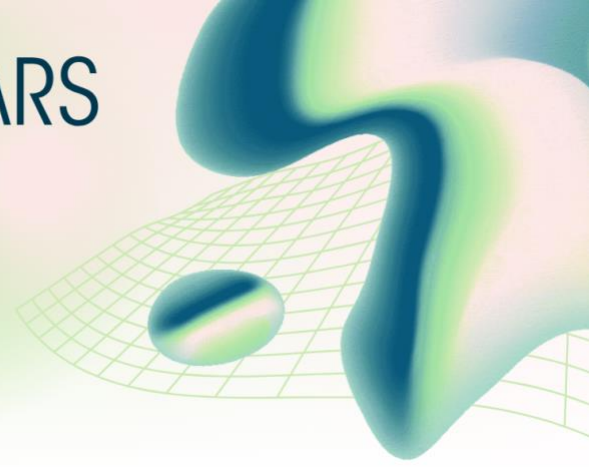


REFLECTIONS ON 25 YEARS OF INDONESIA'S HUMAN RIGHTS COURT LAW

Examining Judicial Reasoning and the Constitutional Court's Evolution



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After 25 Years of Indonesia's Human Rights Court Law: Comparative Judicial Reasoning and the Retreat of the Constitutional Court

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Abstract

Twenty-five years after the enactment of Law No. 26 of 2000 on the Human Rights Court (hereinafter the *Human Rights Court Law*), the persistent impasse in addressing gross human rights violations in Indonesia cannot be explained solely as a failure of political will. This article argues that the impasse is also a product of constitutional adjudication—specifically, the Constitutional Court's (*Mahkamah Konstitusi*, MK) limited capacity to deploy relevant sources of international human rights law as argumentative authority in judicial review of the Human Rights Court Law. By analysing five landmark Constitutional Court decisions reviewing the Human Rights Court Law and/or the Law on the Truth and Reconciliation Commission, the article demonstrates that the MK has not made a meaningful contribution to the advancement of the Human Rights Court regime. This failure stems from the Court's inability to provide judicial correction capable of breaking the structural deadlock embedded in both the normative design of the regime and its implementation practices. Methodologically, the article adopts a socio-legal approach, combining doctrinal analysis of Constitutional Court judgments with a contextual examination of institutional dynamics, power relations, and enforcement practices surrounding gross human rights violations in Indonesia. Drawing on the framework of comparative judicial reasoning, the article maps the trajectory of the MK's constitutional reasoning: from an earlier phase marked by relative openness to international human rights norms and practices as instruments of substantive correction, to a later phase characterized by a retreat toward judicial restraint and reliance on the open legal policy doctrine, which effectively delegates structural reform to the legislature. The article contends that this shift does not represent a mere stylistic variation in judicial reasoning, but rather a normative–institutional choice with direct consequences for the normalization of deadlock and the reproduction of impunity through constitutional language. Nevertheless, the article also argues that—both theoretically and constitutionally—the possibility remains for the MK to reopen itself to the use of international legal sources. On this basis, the article offers a justification for strengthening the MK's role as the last corrective institutional actor in reforming the Human Rights Court Law, particularly where the legislative route has ceased to be conducive to advancing justice for victims of gross human rights violations.

Keywords: Human Rights Court; Judicial Reasoning; Constitutional Adjudication; Constitutional Court; Comparative Constitutional Law.

INTRODUCTION

Twenty-five years after the enactment of Indonesia's Human Rights Court Law, the country continues to grapple with one of the issues most fundamental to the legitimacy of a constitutional state governed by the rule of law: the resolution of gross human rights violations.¹ What was initially envisioned as a robust project of transitional justice architecture has repeatedly encountered deadlock,² not merely due to deficiencies in legal instruments, but also as a result of the persistence of former power holders and deeply entrenched structural problems embedded in power relations, institutional design, and political will.³ In such a landscape, accounts of failure cannot be reduced to a diagnosis of *realpolitik* alone⁴; they require a more nuanced mapping of how law operates—or fails to operate—how it is subjected to constitutional scrutiny, and which judicial actors participate in shaping its meaning and delimiting its boundaries.⁵

Normatively, the legislature has established a range of legal instruments intended to close the gap of impunity.⁶ In addition to the Human Rights Court Law, Law No. 27 of 2004 on the Truth and Reconciliation Commission (hereinafter the *Truth and Reconciliation Commission Law*) was enacted as a non-judicial mechanism designed to complement criminal accountability.⁷ The mere existence of such instruments, however, does not guarantee successful implementation. On the one hand, the post-reform agenda for addressing gross human rights violations has failed to unfold in accordance with the aspirations of the Human Rights Court Law,⁸ notwithstanding the fact that the statute has been subjected to repeated constitutional review before the Constitutional Court.⁹ On the other hand, the stagnation of implementation and the recurrence of constitutional challenges indicate that the problem of resolving gross human rights violations is not only political in character, but is also inherent in the law's normative design and the modes of its constitutional interpretation.

This article focuses on the second problem, namely the contribution of the Constitutional Court (Mahkamah Konstitusi, MK) to the Human Rights Court Law through its jurisprudence. To date,

¹ Ken M.P. Setiawan, "Struggling for Justice in Post-Authoritarian States: Human Rights Protest in Indonesia," *International Journal of Human Rights* 26, no. 3 (2022): 541–65, <https://doi.org/10.1080/13642987.2021.1947805>.

² Suparman Marzuki and Mahrus Ali, "The Settlement of Past Human Rights Violations in Indonesia," *Cogent Social Sciences* 9, no. 1 (2023), <https://doi.org/10.1080/23311886.2023.2240643>.

³ Herlambang P. Wiratraman, "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>.

⁴ Saldi Isra, Ferdi Ferdi, and Hilaire Tegnan, "Rule of Law and Human Rights Challenges in South East Asia: A Case Study of Legal Pluralism in Indonesia," *Hasanuddin Law Review* 3, no. 2 (2025): 117–40.

⁵ Febriansyah Ramadhan and Ilham Dwi Rafiqi, "Menggali Asas-Asas Pengadilan Hak Asasi Manusia Dalam Pengujian Undang-Undang Pengadilan Hak Asasi Manusia," *Journal of Judicial Review* 24, no. 1 (2022): 35–58.

⁶ Nicola Edwards, "Challenging Impunity in Indonesia and the Philippines through the Universal Periodic Review Mechanism," *Australian Journal of Human Rights* 26, no. 2 (2020): 274–91.

⁷ S H Tenriawaru, *Komisi Kebenaran Dan Rekonsiliasi Dalam Upaya Penegakan Atas Pelanggaran HAM Yang Berat Pada UU No 27 Tahun 2004* (Penerbit Adab, 2022).

⁸ Chris Biantoro, "Prospect and Problem of the Transitional Justice in Indonesia after 32 Years Political Injustice under the Soeharto Regime" (Asian Human Rights Commission, 2020), <http://www.humanrights.asia/news/ahrc-news/AHRC-PAP-001-2020/>.

⁹ Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics."

at least five MK decisions have reviewed the Human Rights Court Law and/or the Truth and Reconciliation Commission Law: Decision No. 65/PUU-II/2004; No. 006/PUU-IV/2006; No. 20/PUU-IV/2006; No. 18/PUU-V/2007; and No. 75/PUU-XIII/2015. This body of case law should not be regarded merely as a set of marginal or unpopular precedents. Rather, it constitutes a critical site for the reconstitution of constitutional meaning—one that determines the extent to which the state may (and must) engage with international human rights law, how demands for accountability are to be balanced against the principle of legality, and whether the MK is willing to assume an assertive posture as an institutional actor supporting justice when political systems and governing regimes continue to defer it.¹⁰

Judicial review of the Human Rights Court Law before the Constitutional Court falls squarely within the category of *hard cases*, a feature that renders it a study of particular significance. Drawing on Tamanaha's formulation, hard cases are not merely disputes involving technical difficulties of legal argumentation; rather, they are cases that expose underlying paradigm conflicts—epistemic clashes over what law is and how law ought to operate when confronted with questions of humanity.¹¹ In the context of the Constitutional Court's decisions on the Human Rights Court regime, such differences are evident in both the styles of judicial reasoning and the sources invoked. The first four decisions display a relatively open mode of reasoning, including recourse to principles, doctrines, and developments in international conventions and practice. By contrast, the most recent decision (No. 75/PUU-XIII/2015) reflects a more closed approach—one that privileges positive law and institutional caution—even as the Court simultaneously acknowledges the existence of structural problems in addressing gross human rights violations.¹² This shift from openness to self-restraint must therefore be read as a non-neutral form of judicial contribution, with the capacity either to advance or to undermine the Human Rights Court regime.¹³

At this juncture, debates over comparative constitutional interpretation and the status of transnational legal sources become critical.¹⁴ In modern constitutional adjudication, references to foreign law and practice—particularly in human rights cases—are not understood as substitutes for domestic norms, but rather as tools of reasoning through which courts test assumptions, weigh consequences, and examine analogous constitutional problems across jurisdictions. For this reason, an absolute rejection grounded in the four walls doctrine—confined to text, structure, history, and internal values—has proven theoretically fragile,

¹⁰ Robertus Robet, Meila Riskia Fitri, and Marista Christina Shally Kabelen, "The State and Human Rights under Joko Widodo's Indonesia," *Cogent Social Sciences* 9, no. 2 (2023).

¹¹ Brian Z. Tamanaha, *Beyond the Formalist–Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010).

¹² Ramadhan and Rafiqi, "Menggali Asas-Asas Pengadilan Hak Asasi Manusia Dalam Pengujian Undang-Undang Pengadilan Hak Asasi Manusia."

¹³ Tanto Lailam and Putri Anggia, "The Indonesian Constitutional Court Approaches the Proportionality Principle to the Cases Involving Competing Rights," *Law Reform* 19, no. 1 (2023): 110–27.

¹⁴ Leszek Leszczynski, "Open Axiology in Judicial Interpretation of Law and Possible Misuse of Discretion," *Studia Iuridica Lublinensia* 29, no. 3 (2020): 39–54.

especially where foreign materials are employed in a genealogical or dialogical manner.¹⁵ Comparative engagement thus carries both expressivist and functionalist value, as Ackerman has emphasized through the notion of concept thickening to identify shared problems and the coping strategies adopted by constitutional courts. From this perspective, the Constitutional Court's decisions concerning the Human Rights Court Law can be read as part of a broader tension between openness to transnational law as argumentative authority and an increasing inclination toward judicial restraint.¹⁶

To date, academic discourse has paid limited attention to the role of the Constitutional Court (*Mahkamah Konstitusi, MK*) in advancing the Human Rights Court Law and its implementation. Prevailing scholarship has tended to focus on victims, memory, and expressions of injustice—most recently exemplified by Drexler's study of the dynamics of the *Aksi Kamisan* movement.¹⁷ In parallel, structural analyses situated outside the Constitutional Court have also gained prominence, such as Lestari's work, which explains state failure as a product of the persistence of New Order power networks and the absence of truth and recognition.¹⁸ While these studies are crucial for explaining why realpolitik continues to gravitate toward impunity, there remains a paucity of research that examines gross human rights violations from the perspective of the Constitutional Court itself—particularly how the Court, through judicial review of the Human Rights Court Law, has shaped or, conversely, constrained the possibilities for accountability. With respect to the role of international legal sources, recent work by Palguna and Wardana demonstrates that the MK's practice reflects a form of "pragmatic monism"¹⁹; however, their analysis does not focus on the Human Rights Court Law. Accordingly, a fuller understanding of the deadlock requires an account that foregrounds the inherent constraints of the Human Rights Court Law and examines how entrenched political actors are able to secure their interests through normative design, procedural arrangements, and interpretive styles mandated or legitimized by Constitutional Court decisions.

Against this backdrop of limited scholarship, this article argues that the Indonesian Constitutional Court (*Mahkamah Konstitusi, MK*) has not made a significant contribution to advancing the Human Rights Court Law due to its constrained and increasingly inconsistent use of relevant international human rights law sources in constitutional adjudication. As a result, the MK has failed to resolve the structural deadlock that has long characterized both the normative framework and the practical implementation of the Human Rights Court regime.

¹⁵ Günter Frankenberg, "Comparative Constitutional Law," in *The Cambridge Companion to Comparative Law*, ed. Mauro Bussani and Ugo Mattei (Cambridge University Press, 2012), 171–90, <https://doi.org/10.1017/CBO9781139017206.011>.

¹⁶ Jack Tsen-Ta Lee, "Interpreting Bills of Rights: The Value of a Comparative Approach," *International Journal of Constitutional Law* 5, no. 1 (2007): 122–52, <https://doi.org/10.1093/icon/mol042>.

¹⁷ Elizabeth F Drexler, "Impunity and Transitional Justice in Indonesia: Aksi Kamisan's Circular Time," *International Journal of Transitional Justice* 16, no. 3 (2022): 298–313, <https://doi.org/10.1093/ijtj/ijac010>.

¹⁸ Sri Lestari Wahyuningroem, "Breaking the Promise: Transitional Justice between Tactical Concession and Legacies of Authoritarian Regime in Indonesia," *International Journal of Transitional Justice* 16, no. 3 (2022): 406–21, <https://doi.org/10.1093/ijtj/ijac021>.

¹⁹ I Dewa Gede Palguna and Agung Wardana, "Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law," *Asian Journal of International Law* 14, no. 2 (2024): 404–24, <https://doi.org/10.1017/S2044251323000723>.

Although the Court initially demonstrated a marked openness to international legal sources as a means of correcting deficiencies in the Human Rights Court Law, it has subsequently retreated, closing itself off from engagement in structural reform of the regime. Nevertheless, the possibility remains for the MK to reopen itself to modes of judicial reasoning that draw on international legal sources, and this article seeks to provide a theoretical justification for sustaining such a discourse and renewing expectations for reform of the Human Rights Court Law through constitutional adjudication. This prospect cannot be disentangled from Indonesia's contemporary political context, which is marked by the leadership of a former New Order actor, Prabowo Subianto—whom Loxton characterizes as emblematic of authoritarian successor parties—and by the consolidation of executive power alongside the extension of political influence into the legislature.²⁰

To substantiate this argument, the article is structured into three interrelated parts. The **first** part elaborates the theoretical framework of comparative judicial reasoning, demonstrating how modern constitutional courts across jurisdictions have opened themselves to international and comparative legal sources as corrective tools in constitutional review. The **second** part maps and describes five decisions of the Indonesian Constitutional Court reviewing the Human Rights Court Law, highlighting the patterns of judicial reasoning and the shifts in approach that emerge across these judgments. The **third** part offers a critical analysis of the Constitutional Court's position in these cases from the perspective of open judicial reasoning, while advancing a normative reflection on the prospects for future improvement of the Human Rights Court Law through constitutional adjudication.

HEADING OF THE DISCUSSION

I. COMPARATIVE JUDICIAL REASONING AND CONSTITUTIONAL COURT

Over the past two decades, constitutional adjudication across jurisdictions has increasingly moved toward comparative constitutional interpretation and—albeit often in a tentative manner—the recognition of transnational constitutional legal bodies as part of the ecology of public legal argumentation.²¹ This shift has emerged from the convergence of several factors, including the expansion of post-authoritarian democratization and constitutionalization, the internationalization of legal education and the legal profession, and advances in communication technology that have accelerated the diffusion of ideas and facilitated cross-jurisdictional jurisprudential dialogue.²²

²⁰ James Loxton, "Authoritarian Successor Parties," *Journal of Democracy* 26, no. 3 (July 2015): 157–70, <https://doi.org/10.1353/jod.2015.0052>.

²¹ Johan Lindholm, Mattias Derlén, and Daniel Naurin, "A Source-Based Theory of Variation in Judicial Reasoning: Evidence from Sweden," *Journal of Law & Empirical Analysis* 2, no. 1 (June 18, 2025): 121–41, <https://doi.org/10.1177/2755323X251335396>.

²² Ran Hirschl, "Comparative Methodologies," in *The Cambridge Companion to Comparative Constitutional Law*, ed. Roger Masterman and Robert Schütze, Cambridge Companions to Law (Cambridge: Cambridge University Press, 2019), 11–39, <https://doi.org/DOI: 10.1017/9781316716731.002>.

As a consequence, the migration of constitutional ideas and comparative practices has not remained a purely academic agenda; it has also become a practical necessity for judges and policymakers when confronting issues of human rights, institutional design, and the limits of state authority. Within this landscape, modern constitutional scholarship increasingly intersects with other branches of public law, particularly international law—and, in certain contexts, administrative, immigration, and criminal law—inasmuch as norms and practices in these fields are expected to enter into dialogue with constitutional principles.²³ At the same time, mainstream constitutional scholarship continues to treat the constitution and constitutional jurisprudence as an autonomous system, with a primary emphasis on the internal coherence of interpretation. The tension between this approach and openness to transnational sources thus provides an important analytical framework for reading the Constitutional Court’s decisions, particularly in cases concerning human rights and state responsibility.²⁴

From a historical trajectory, openness to cross-border ideas is not, in fact, a novel phenomenon.²⁵ European legal history demonstrates that the formation of international and transnational constitutional law cannot be detached from the contributions of communities of legal experts—judges, notaries, practitioners, and, most notably, academics—who produced, interpreted, and disseminated principles that came to be commonly accepted.²⁶ This historical trace recalls the development of the *jus commune*, namely the reception of Roman law that transcended geographical and political boundaries and was significantly shaped by the scholarly work of jurists during the Middle Ages, as documented by Paolo Grossi.²⁷ Accordingly, the interconnectedness of legal traditions may be understood as part of the historical dynamics through which public legal reasoning is formed: legal traditions do not evolve solely within domestic confines, but are also shaped by recurring currents of intellectual exchange.²⁸ This historical awareness is crucial, as it situates comparison not as a form of “sovereignty surrender,” but rather as one of the enduring modes through which constitutional rationality has long been constructed within the practice of public law.²⁹

Building on this foundation, comparative judicial reasoning presupposes the existence of a form of “constitutional license”—the idea that a constitution ought to permit the use of comparative

²³ Mark Tushnet, “The Possibilities of Comparative Constitutional Law,” *The Yale Law Journal* 108, no. 6 (April 1999): 1225, <https://doi.org/10.2307/797327>.

²⁴ Leonardo Pierdominici, “Constitutional Adjudication and the ‘Dimensions’ of Judicial Activism: Comparative Legal and Institutional Heuristics,” *Transnational Legal Theory* 3, no. 3 (March 7, 2012): 207–42, <https://doi.org/10.5235/20414005.3.3.207>.

²⁵ András Jakab, Arthur Deyevre, and Giulio Itzcovich, “Introduction,” in *Comparative Constitutional Reasoning* (Cambridge University Press, 2017), 1–35, <https://doi.org/10.1017/9781316084281.003>.

²⁶ Joan Pico i Junoy and Juan Antonio Andino López, “Private Communication between Lawyers as Evidence in a Judicial Process: A Comparative Journey,” *The International Journal of Evidence & Proof* 26, no. 1 (January 1, 2022): 61–80, <https://doi.org/10.1177/13657127211055232>.

²⁷ Sergio Bartole, “Comparative Constitutional Law – an Indispensable Tool for the Creation of Transnational Law,” *European Constitutional Law Review* 13, no. 04 (December 4, 2017): 601–10, <https://doi.org/10.1017/S1574019617000293>.

²⁸ Bartole.

²⁹ Shucheng Wang, “The Judicial Document as Informal State Law: Judicial Lawmaking in China’s Courts,” *SSRN Electronic Journal*, 2022, <https://doi.org/10.2139/ssrn.4018235>.

materials so that courts may learn from constitutional experiences elsewhere.³⁰ This license, however, does not operate uniformly; its scope and intensity depend heavily on the theory of interpretation adopted. If interpretation is understood as the application of public reasons to questions of governance within a constitutional framework, then experiences from other jurisdictions become relevant insofar as they provide information that assists the interpreter (the judge) in testing those reasons, both in terms of their coherence and their consequences.³¹ A frequently cited illustration is Justice Breyer's dissenting opinion in *Printz v. United States* (1997). When the majority invalidated the obligation imposed on state officials to conduct background checks under the Brady Act on federalism grounds, Breyer referred to the practices of other federal systems that preserve local control precisely by allowing the national government to utilize local governments in administering national law. For Breyer, these comparative experiences offered "empirical illumination" regarding the consequences of different interpretive solutions to analogous legal problems.

In elaborating on Breyer's approach, Mirza emphasizes the importance of adopting and/or transplanting judicial decisions and legal structures from other jurisdictions as a means of responding to increasingly dynamic domestic problems.³² At this point, it is also essential to distinguish between two dimensions of functionalism in the separation of powers. The first concerns the assessment of the balance between the legislative and executive branches and the potential expansion of power by either branch. The second centers on the judiciary itself, namely the need for institutional caution to ensure that courts do not exceed their proper role. This distinction becomes particularly salient when the language of caution, or judicial restraint, is invoked as an institutional justification that may, in practice, diminish the corrective capacity of comparative engagement.³³

On the other hand, the most classical objection to judicial comparison is often framed through the four walls doctrine, namely the idea that a constitution must be interpreted "within its own four walls." A well-known articulation of this position appears in *Government of the State of Kelantan v. Government of the Federation of Malaya* (1963),³⁴ which emphasized that the Federal Constitution of Malaya should be interpreted primarily through internal reasoning, without recourse to analogies drawn from England, the United States, or Australia. This formulation, however, illustrates why such a version of a general prohibition is problematic, particularly when it rests on the claim that foreign materials are irrelevant simply because they are not grounded in local human rights legislation.³⁵ Many courts—including those in Singapore and Malaysia—have rejected this flawed reasoning and have instead relied on foreign materials to interpret

³⁰ Tushnet, "The Possibilities of Comparative Constitutional Law."

³¹ Tushnet.

³² Mirza Satria Buana, "Menimbang Lembaga Peradilan Khusus Pemilu: Studi Perbandingan Hukum Tata Negara," in *Strategi Pencegahan Politik Uang*, vol. 32 (Batusangkar Padang: Pusat Studi Konstitusi (PUSaKO) Fakultas Hukum Universitas Andalas dan Asosiasi Pengajar Hukum Tata Negara dan Hukum Administrasi Negara (APHTN-HAN) Republik Indonesia, 2019), 1334–51.

³³ Benjamin Bricker, "Consensus Decision Making," *The Justice System Journal* 42, no. 1 (January 19, 2021): 25–49, <https://www.jstor.org/stable/27224763>.

³⁴ Lee, "Interpreting Bills of Rights: The Value of a Comparative Approach."

³⁵ Lee.

domestic rights under certain conditions.³⁶ Two such conditions are especially salient: first, where foreign materials originate from legal systems that are genealogically and historically connected to the domestic system (genealogical interpretation); and second, where such materials assist judges in understanding, articulating, and testing the assumptions underlying their own reasoning (dialogical interpretation).³⁷ Accordingly, the four walls doctrine is better understood not as an isolated command, but as a rule of relevance and caution: foreign principles should not be “applied” where they cannot be validly accommodated by the text, structure, and normative commitments of domestic law.³⁸ The decisive criterion is therefore not origin, but argumentative utility—whether comparative materials genuinely help to elucidate rights, clarify the rationality of judicial decisions, and assess their normative consequences.

Cross-jurisdictional practice demonstrates that the argumentative use of comparative materials can be extensive without displacing domestic authority. The case of *Reyes v. The Queen* (2002) (on appeal from Belize), concerning the constitutionality of the mandatory death penalty, illustrates this point clearly. In holding the provision unconstitutional, the Privy Council referred to decisions and practices from a wide range of jurisdictions, including Australia, Canada, Europe, Guyana, Jamaica, India, the Inter-American Commission, Mauritius, South Africa, the United Kingdom, and the United States.³⁹ The significance of this example lies not merely in the outcome, but in its demonstration that comparative sources were employed as instruments of argumentative testing, even in the presence of divergent prior decisions. In this sense, comparison operates as a mechanism of institutional correction and learning, rather than as a form of supplementary legitimation appended after a conclusion has already been reached.

From a methodological perspective, comparative judicial reasoning operates along two broad and complementary orientations. The first is the expressivist orientation, in which comparative inquiry enables a legal system to see itself anew, compels courts to reassess their intuitive assumptions, and may lead to outcomes that would not have been reached through engagement with domestic materials alone. In this orientation, comparison functions as a “mirror” that destabilizes taken-for-granted assumptions.⁴⁰ The second is the functionalist orientation, whereby comparison provides information about the institutional and policy consequences of different interpretive choices, as illustrated by Breyer’s argument.⁴¹ These two orientations need not be treated as mutually exclusive. In many hard cases, courts may deploy comparison simultaneously as a tool of reflection and as a means of testing consequences. It is at this juncture that Bruce Ackerman’s framework systematically reinforces the comparative method. Ackerman emphasizes that the value of comparison emerges when scholars and courts identify common problems faced by constitutional courts across jurisdictions and then map the

³⁶ Lee.

³⁷ Bricker, “Consensus Decision Making.”

³⁸ Pierdominici, “Constitutional Adjudication and the ‘Dimensions’ of Judicial Activism: Comparative Legal and Institutional Heuristics.”

³⁹ Lee, “Interpreting Bills of Rights: The Value of a Comparative Approach.”

⁴⁰ Tushnet, “The Possibilities of Comparative Constitutional Law.”

⁴¹ Tushnet.

diverse coping strategies adopted to address those problems.⁴² By achieving clarity regarding both the “problem” and the “strategy,” it becomes possible to assess the comparative value of competing approaches. This approach is not quantitative in nature; rather, it relies on comparative case studies that facilitate concept thickening, through which notions such as “openness” and “restraint” are treated not as rhetorical labels⁴³, but as institutional strategies for addressing shared problems—such as impunity, legality, retroactivity, institutional design, and the limits of judicial roles in human rights cases.⁴⁴

One of the central cautions in comparative law scholarship is skepticism toward the direct borrowing of solutions from one legal system to another. Such caution, however, is not synonymous with a rejection of comparison itself. On the contrary, comparative inquiry is often employed to create critical distance from one’s own legal system, enabling interpreters to identify assumptions that remain obscured precisely because of their familiarity with the domestic context.⁴⁵ Within this framework, genealogical interpretation assumes particular significance. References to legal systems with close historical and intellectual ties are understood as forms of genealogical dialogue, rather than as acts of normative importation. A frequently cited illustration is Justice Guido Calabresi’s approach (1995), in which he referred to the constitutional experiences of Germany and Italy in discussing sentencing disparities for cocaine offenses.⁴⁶ For Calabresi, the relevance of these references lay in the fact that those systems could be regarded as “constitutional offspring” of the American tradition, such that comparison functioned as an argumentative testing device, rather than as a source of binding authority.⁴⁷ Comparison, moreover, does not inevitably lead to homogenization or to wholesale internationalization of constitutional law.

Within this broader framework, the most decisive theoretical contribution for this article is Vicki C. Jackson’s thesis on the legitimacy of comparative engagement in constitutional adjudication.⁴⁸ Jackson rejects the oversimplified dichotomy that treats references to foreign or international law as a substitution for the sovereignty of the national constitution. Instead, she argues that comparative engagement serves to enrich constitutional reasoning by testing assumptions, illuminating consequences, and situating national commitments within a broader constitutional conversation. Jackson acknowledges the existence of political critiques that label such practices as a form of “judicial disloyalty”, but she maintains that these critiques do not negate the methodological value of comparison so long as transnational sources are treated as

⁴² Bruce Ackerman, “The Rise of World Constitutionalism,” *Virginia Law Review* 83, no. 4 (1997): 771, <https://doi.org/10.2307/1073748>.

⁴³ Pierdominici, “Constitutional Adjudication and the ‘Dimensions’ of Judicial Activism: Comparative Legal and Institutional Heuristics.”

⁴⁴ Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law,” *The American Journal of Comparative Law* 53, no. 1 (January 19, 2005): 125–55, <http://www.jstor.org/stable/30038689>.

⁴⁵ Rosalind Dixon and Elisabeth Perham, “Theorising Constitutions Comparatively,” *Verfassung in Recht Und Übersee* 58, no. 1 (2025): 70–96, <https://doi.org/10.5771/0506-7286-2025-1-70>.

⁴⁶ Tushnet, “The Possibilities of Comparative Constitutional Law.”

⁴⁷ Tushnet.

⁴⁸ Vicki C. Jackson, “Constitutions as ‘Living Trees’? Comparative Constitutional Law and Interpretive Metaphors,” *Fordham Law Review* 75, no. 2 (2006): 921–60.

argumentative or persuasive authority in the form of non-binding norms. Accordingly, the central question is not whether such sources may be used, but rather for what purposes and how they are employed responsibly. Jackson further emphasizes that modern constitutional interpretation is inherently multi-sourced and eclectic.⁴⁹

Many established constitutional courts—including Indonesia’s—are not bound to a single interpretive metric. Instead, they combine constitutional text, original understanding, structure and purpose, historical context and constitutional values, as well as precedent. In this context, Jackson considers the living tree metaphor to be more appropriate than the more loosely framed notion of a “living constitution,” because the living tree metaphor emphasizes that the growth and expansion of constitutional meaning occur “within natural limits.”⁵⁰ This metaphor underscores that constitutional interpretation is constrained by the past, yet not entirely frozen by it. As such, openness to international human rights norms may be understood as a form of responsible constitutional evolution, rather than as a transgression of the constitution itself.

Another important contribution from Jackson lies in her critique of absolute rejection of foreign materials, whether in the form of an isolationist understanding of the four walls doctrine or through frozen concepts reasoning. Jackson observes that the rigidity of anti-comparative positions often reflects broader political–epistemic struggles over constitutional identity and judicial authority, rather than mere disagreements over interpretive method. Comparative experience demonstrates that independent constitutional courts tend to employ a plurality of interpretive approaches and argumentative sources, rather than closing themselves off entirely. Consistent with this view, Jackson rejects the claim that democratic legitimacy requires strict formalism or absolute judicial restraint. Shifts in interpretation and the use of multi-sourced methodologies are recurrent features of constitutional practice; accordingly, a turn toward narrow restraint is better understood as a normative–institutional choice with concrete consequences, rather than as a constitutional inevitability.⁵¹

This framework acquires particular relevance in the Indonesian context, where the 1945 Constitution does not explicitly adopt either monism or dualism, thereby requiring the relationship between international law and domestic law to be constructed through constitutional adjudication.⁵² Palguna and Wardana demonstrate that the Constitutional Court’s practice tends to be eclectic and may be described as a form of pragmatic monism: international treaties are regarded as part of domestic law following ratification, yet their substantive effect is recognized only insofar as they are consistent with the Constitution.⁵³ This pragmatic approach opens up corrective space—especially where international human rights norms are deployed to scrutinize domestic legal designs that sustain impunity—but it also

⁴⁹ Jackson.

⁵⁰ Jackson.

⁵¹ Jackson.

⁵² Palguna and Wardana, “Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law.”

⁵³ Palguna and Wardana.

carries risks of fragmentation and instrumentalism.⁵⁴ Accordingly, comparison in the context of the Constitutional Court must be understood as a judicial strategy that determines whether the Court expands or, conversely, narrows the space for resolving gross human rights violations, an issue that will be examined further through a close reading of the Court's decisions in the following section.

II. CONSTITUTIONAL REVIEW OF THE HUMAN RIGHTS COURT LAW BEFORE THE CONSTITUTIONAL COURT

Since the enactment of Law No. 26 of 2000 on the Human Rights Court, the Constitutional Court (*Mahkamah Konstitusi*, MK) has emerged as the primary constitutional forum for determining the direction, limits, and potential effectiveness of the human rights adjudication regime in Indonesia.⁵⁵ Over a period spanning more than a decade, the Human Rights Court Law— together with Law No. 27 of 2004 on the Truth and Reconciliation Commission (the *Truth and Reconciliation Commission Law*)—has been subjected to repeated constitutional review through the mechanism of judicial review.⁵⁶ At least five decisions are of particular significance: Decision No. 65/PUU-II/2004; Decision No. 006/PUU-IV/2006; Decision No. 20/PUU-IV/2006; Decision No. 18/PUU-V/2007; and Decision No. 75/PUU-XIII/2015.⁵⁷ Taken together, these decisions form an undulating jurisprudential pattern: at one stage exhibiting strong openness to international human rights law, and at a subsequent stage revealing an increasingly pronounced tendency toward judicial self-restraint.

The first decision that laid the foundational groundwork is Decision No. 65/PUU-II/2004. The petition was filed by Abilio José Osório Soares, the former Governor of East Timor, who at the time was undergoing trial before the Ad Hoc Human Rights Court in Central Jakarta for gross human rights violations committed in East Timor in 1999.⁵⁸ The object of constitutional review was Article 43(1) of the Human Rights Court Law, which authorizes the establishment of Ad Hoc Human Rights Courts to adjudicate gross human rights violations that occurred prior to the enactment of the statute. The petitioner argued that this provision violated the constitutional right not to be prosecuted under retroactive law, as guaranteed by Article 28I(1) of the 1945 Constitution.

⁵⁴ Palguna and Wardana.

⁵⁵ Mohammad Ibrahim, “The Judicialisation of Discrimination in the Indonesian Constitutional Court,” *International Journal of Discrimination and the Law* 22, no. 2 (2022): 125–51, <https://doi.org/10.1177/13582291221094923>.

⁵⁶ Reyhan Rezki Nata and Jadmiko Anam Husodo, “MEMBENTUK KEMBALI KOMISI KEBENARAN DAN REKONSILIASI DI INDONESIA,” *Res Publica: Jurnal Hukum Kebijakan Publik* 7, no. 1 (November 15, 2023): 74, <https://doi.org/10.20961/respublica.v7i1.47646>.

⁵⁷ Mahkamah Konstitusi Republik Indonesia, “Putusan Mahkamah Konstitusi,” Mahkamah Konstitusi, n.d., <https://www.mkri.id/perkara/persidangan/putusan>.

⁵⁸ Bayu Dwi Anggono, Rian Adhivira Prabowo, and Yussele Nando Mardika, “Constitutional Court and The Past Conflicts in Post- Authoritarian Indonesia,” *Constitutional Review* 9, no. 1 (May 31, 2023): 077, <https://doi.org/10.31078/consrev913>.

In its operative ruling, the Constitutional Court dismissed the petition in its entirety. What is determinative in this decision, however, lies in the construction of the Court's legal reasoning. The Court held that the principle of non-retroactivity is not an absolute norm, particularly in the context of gross human rights violations that are classified as extraordinary crimes and constitute violations of jus cogens norms. To support this position, the Court made extensive use of sources of international law, most notably by referring to Article 29(2) of the Universal Declaration of Human Rights (UDHR), which permits limitations on rights insofar as they are aimed at securing due recognition of the rights of others and at meeting the just requirements of morality and public order in a democratic society.⁵⁹

In addition, the Court also referred to Articles 15(1) and (2) and Article 4 of the International Covenant on Civil and Political Rights (ICCPR)—notwithstanding the fact that Indonesia had not yet ratified the Covenant at the time—to affirm that the trial and punishment of acts which, at the time of their commission, constituted crimes under the general principles of law recognized by the community of nations are permissible.⁶⁰ Similar references were made to Article 7 of the European Convention on Human Rights, the establishment and practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as to the principle of *aut punere aut dedere*, which the Court associated with the writings of Hugo Grotius and Cherif Bassiouni.⁶¹ By relying on these sources, the Court positioned international law as the primary argumentative authority for justifying the constitutionality of the retroactive application of provisions of the Human Rights Court Law.

The next decision of decisive importance is Decision No. 006/PUU-IV/2006, which reviewed the constitutionality of the Truth and Reconciliation Commission Law. The petition was filed by a number of civil society organizations—including ELSAM, KontraS, and Imparsial—as well as individual victims, with the principal object of review being Article 27 of the Truth and Reconciliation Commission Law. This provision required that compensation and rehabilitation for victims could be granted only if an application for amnesty for the perpetrators had first been approved by the President. The petitioners argued that this requirement generated legal uncertainty and, in effect, indefinitely postponed the fulfillment of victims' rights without any clear temporal limit. In its decision, the Constitutional Court granted the petition and declared Article 27 of the Truth and Reconciliation Commission Law unconstitutional. Moreover, the Court held that because Article 27 constituted the "operational core" of the Truth and

⁵⁹ Anggono, Prabowo, and Mardika.

⁶⁰ Simon BUTT, BISARIYADI, and Fritz SIREGAR, "International Law in the Indonesian Constitutional Court: A Typology of Use," *Asian Journal of International Law*, October 3, 2025, 1–22, <https://doi.org/10.1017/S204425132510074X>.

⁶¹ Yilin Wang, "The Origins and Operation of the General Principles of Law as Gap Fillers," *Journal of International Dispute Settlement* 13, no. 4 (November 30, 2022): 560–82, <https://doi.org/10.1093/jnlids/idac018>.

Reconciliation Commission Law,⁶² and was structurally interconnected with its other provisions, the annulment of Article 27 rendered the Law as a whole inoperative.⁶³

The Court's reasoning was explicitly oriented toward victims' rights and state obligations. The Constitutional Court made express reference to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, as adopted by the United Nations General Assembly—particularly the principle that states are obliged to ensure effective access to justice, adequate and timely reparations, and relevant information for victims, without conditioning such entitlements on the prior disclosure, prosecution, or pardon of perpetrators. The Court also cited the Rome Statute of the International Criminal Court and various General Comments of the UN Human Rights Committee to underscore that the granting of amnesty must not obstruct the fulfillment of victims' rights.⁶⁴ In this decision, international human rights law was once again positioned as a universal standard serving as the benchmark for assessing the constitutionality of domestic legislation.

The subsequent review was Decision No. 18/PUU-V/2007, which once again targeted the Human Rights Court Law, specifically the *Explanatory Note to Article 43(2)* concerning the role of the House of Representatives (Dewan Perwakilan Rakyat, DPR) in proposing the establishment of Ad Hoc Human Rights Courts. The petition was submitted by Eurico Guterres, a convicted perpetrator of gross human rights violations in the East Timor cases.⁶⁵ The petitioner argued that the involvement of the DPR, as a political institution, in the process of establishing an ad hoc court violated the principles of legal certainty, judicial independence, and equality before the law.⁶⁶ The Constitutional Court partially granted the petition by declaring the term "allegation" (dugaan) in the Explanatory Note to Article 43(2) unconstitutional and without binding legal force. However, the Court nevertheless preserved the role of the DPR within a more stringent and cautious framework. In its reasoning, the Court emphasized that the establishment of Ad Hoc Human Rights Courts does require the involvement of political institutions as representatives of the people, but that such involvement must be grounded in the results of investigations and prosecutions conducted by the National Commission on Human Rights (Komnas HAM) and the Office of the Attorney General, rather than on political allegations alone. References to international law in this decision were relatively limited and contextual, most notably through citation of United Nations Security Council Resolution No.

⁶² Febriansyah Ramadhan and Ilham Dwi Rafiqi, "Study of Constitutional Court Decisions Cancelling All Norms in the Law," *Legality: Jurnal Ilmiah Hukum* 29, no. 2 (July 28, 2021): 286–308, <https://doi.org/10.22219/ljih.v29i2.15434>.

⁶³ Dian Bakti Setiawan and Politik Hukum, "Jurnal Sakato Ekasakti Law Review Politik Hukum Penyelesaian Non Yudisial Terhadap Pelanggaran Hak Asasi Manusia (HAM) Berat Masa Lalu" 4, no. 3 (2025): 323–33.

⁶⁴ Siti Maizul Habibah et al., *Hukum Internasional: Pilar Keadilan Dan HAM Universal*, ed. Amran Hapsan (Gowa: CV. RUANG TENTOR, 2025).

⁶⁵ Steven Farram, "Pahlawan, Pengkhianat, Atau Penjahat (Hero, Traitor, or Villain): A Personal Journey Through Indonesian History," *Politics and Governance* 12 (March 8, 2024), <https://doi.org/10.17645/pag.7804>.

⁶⁶ Hukum Online, "Komnas HAM, Kejaksaan, Dan DPR Perlu Kembali Duduk Bersama," 2007, <https://www.hukumonline.com/berita/a/komnas-ham-kejaksaan-dan-dpr-perlu-kembali-duduk-bersama-ho17774/>.

1264 (1999) concerning the human rights situation in East Timor.⁶⁷ Beyond this, the Court relied predominantly on its own internal jurisprudence—particularly Decision No. 65/PUU-II/2004 and Decision Nos. 012-016-019/PUU-IV/2006—to reaffirm the constitutionality of special human rights courts.

The final decision concluding this line of jurisprudence is Decision No. 75/PUU-XIII/2015. In this case, the Constitutional Court reviewed Article 20(3) of the Human Rights Court Law, which regulates the mechanism for returning the results of an investigation by the investigator to the preliminary investigator for completion within a period of thirty days. The case arose from practical experiences in the enforcement of gross human rights violations that revealed persistent stagnation at the pre-adjudication stage, particularly in the institutional relationship between the National Commission on Human Rights (Komnas HAM) as the preliminary investigator and the Office of the Attorney General as the investigator.⁶⁸ Since the enactment of the Human Rights Court Law, a number of investigation reports prepared by Komnas HAM concerning incidents of gross human rights violations have been submitted to the Office of the Attorney General. In practice, however, these case files have frequently been returned with various formal and substantive notes, without ever progressing to an effective stage of prosecution.⁶⁹ This pattern of repeated returns has persisted over an extended period, thereby producing a situation of prolonged legal uncertainty.⁷⁰ The constitutional petition in this case was filed by Paian Siahaan and Yati Ruyati, who identified themselves as family members of victims of gross human rights violations. Acting as citizens, they claimed to have suffered constitutional harm as a result of the failure of the law enforcement mechanism to operate as promised under the Human Rights Court Law.

The petitioners were represented by Haris Azhar and a legal team, who emphasized that the deadlock was not merely a technical problem arising from inter-institutional relations, but rather stemmed from the normative design of Article 20(3) of the Human Rights Court Law itself.⁷¹ According to the petitioners, the provision allowed for the repeated return of case files without any clear limitation, failed to provide a mechanism for resolving disagreements between the preliminary investigator and the investigator, and imposed no legal consequences where the thirty-day deadline was not complied with. As a result, the petitioners argued that their constitutional rights to legal certainty and equal treatment before the law, as guaranteed by Article 28D(1) of the 1945 Constitution, as well as their right to special facilitation and differential treatment to achieve justice under Article 28H(2), had been violated.

⁶⁷ Bernardo Almeida, “The Law and Its Limits: Land Grievances, Wicked Problems, and Transitional Justice in Timor-Leste,” *International Journal of Transitional Justice* 15, no. 1 (July 23, 2021): 128–47, <https://doi.org/10.1093/ijtj/ijaa030>.

⁶⁸ Febriansyah Ramadhan, Xavier Nugraha, and Patricia Inge Felany, “Penataan Ulang Kewenangan Penyidikan Dan Penuntutan Dalam Penegakan Hukum Pelanggaran Ham Berat,” *Veritas et Justitia* 6, no. 1 (2020): 172–212, <https://doi.org/10.25123/vej.3514>.

⁶⁹ Ramadhan, Nugraha, and Felany. Hukum Online, *KontraS Desak Presiden Tindak Lanjuti Rekomendasi MK*, 2016, <https://www.hukumonline.com/berita/a/kontras-desak-presiden-tindak-lanjuti-rekomendasi-mk-lt57be83a3739d8/>.

⁷¹ Hukum Online.

In its reasoning, the Constitutional Court acknowledged that the institutional relationship between the National Commission on Human Rights (Komnas HAM) and the Office of the Attorney General in handling cases of gross human rights violations has encountered a range of obstacles. The Court noted the existence of implementation-related problems, including divergent views regarding the completeness of investigation findings, standards of proof, and other formal requirements.⁷² The Court further recognized that Article 20(3) of the Human Rights Court Law fails to regulate in sufficient detail the mechanism for resolving prolonged disagreements between the preliminary investigator and the investigator, does not impose clear legal consequences when the thirty-day deadline is not complied with, and does not provide any legal remedy for parties who suffer harm as a result of such deadlock. Accordingly, the Court explicitly acknowledged the presence of legal deficiencies at the level of implementation that carry the potential to generate legal uncertainty.⁷³

Nevertheless, the Constitutional Court held that these problems did not, in and of themselves, render Article 20(3) of the Human Rights Court Law unconstitutional. According to the Court, the contested provision was fundamentally intended to ensure caution and accuracy in the handling of cases involving gross human rights violations. The absence or insufficiency of regulation concerning follow-up mechanisms in situations of prolonged deadlock was characterized as a matter of open legal policy, falling within the legislative discretion of the lawmaker.⁷⁴ On this basis, the Court asserted that any improvement to the normative design of the law and to inter-institutional working mechanisms constituted the responsibility of the House of Representatives and the President, acting in their capacity as legislators, rather than a domain for judicial intervention through the annulment of norms or the issuance of conditionally constitutional interpretations. Accordingly, the Court rejected the petition in its entirety. At the same time, however, both in the operative ruling and in its reasoning, the Court conveyed a constitutional mandate to the legislature to evaluate and refine the Human Rights Court Law, particularly with respect to the regulation of the working relationship between Komnas HAM as the preliminary investigator and the Attorney General as the investigator in cases of gross human rights violations.

This exhortation may be understood as a form of delegation of constitutional responsibility to the legislature to address the structural deadlock that the Court itself acknowledged as a real and persistent problem in practice,⁷⁵ even though the Court refrained from taking any direct corrective action through a binding ruling on the contested provision. From the perspective of its engagement with international legal sources, Decision No. 75/PUU-XIII/2015 reflects a relatively limited approach. The Court did make reference to the International Covenant on Civil and Political Rights (ICCPR), particularly in relation to the principle of non-discrimination;

⁷² Mahkamah Konstitusi Republik Indonesia, “IKHTISAR PUTUSAN PERKARA NOMOR 75/PUU-XIII/2015” (2015).

⁷³ Mahkamah Konstitusi Indonesia.

⁷⁴ Mahkamah Konstitusi Indonesia.

⁷⁵ Fajar Laksono, “Relasi Antara Mahkamah Konstitusi Dengan Dewan Perwakilan Rakyat Dan Presiden Selaku Pembentuk Undang-Undang (Studi Terhadap Dinamika Pelaksanaan Putusan Mahkamah Konstitusi Melalui Legislasi Tahun 2004-2015)” (Universitas Brawijaya, 2017).

however, this reference was not developed further to construct substantive standards concerning state obligations to ensure effective investigations, the prevention of impunity, or the reparation of victims' rights. In contrast to the Court's earlier decisions concerning the regime of gross human rights violations—most notably the decision annulling the Truth and Reconciliation Commission Law—in this case international human rights law did not function as a substantive evaluative framework, but appeared only in a limited and ancillary capacity to respond to specific arguments raised by the petitioners.

III. THE HUMAN RIGHTS COURT LAW: CONSTITUTIONAL ADJUDICATION AND COMPARATIVE JUDICIAL REASONING

Within Indonesia's current constitutional configuration, the Constitutional Court (*Mahkamah Konstitusi*, MK) occupies a position of critical importance. By design, the Court was established as the guardian of the Constitution and a check on political power,⁷⁶ and in contemporary politics it has emerged as one of the few remaining **structural hopes** for reforming the Human Rights Court Law. The legislative route can no longer be relied upon; there are no discernible indications of any forthcoming revision to the Human Rights Court Law. At the same time, the configuration of power has increasingly shifted toward a stronger presidential dominance, accompanied by characteristics that much of the literature categorizes as **authoritarian successor parties**.⁷⁷ Parliament, rather than functioning as a deliberative arena for victim-centered legal reform, has increasingly moved within the orbit of executive power and has lost political incentives to reopen the agenda of accountability for gross human rights violations.⁷⁸

In such circumstances, constitutional review before the Constitutional Court can no longer be understood as an ordinary legal mechanism. Rather, it functions as the **last forum** realistically capable of delivering **immediate and binding normative correction**. Consequently, the quality of the Court's judicial reasoning—particularly its stance toward the use of international legal sources—becomes a decisive factor in determining whether the **structural deadlock** will be broken or, conversely, legitimized.⁷⁹

The foregoing discussion reveals the existence of two opposing camps in assessing whether constitutional judges may—or may not—directly employ sources of international law. The conservative view rejects such references on the ground that the constitution is an expression

⁷⁶ 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, <https://doi.org/10.22304/pjih.v10n2.a1>.

⁷⁷ Loxton, "Authoritarian Successor Parties."

⁷⁸ A. Dardiri Hasyim and Mufrod Teguh Mulyo, "Fulfilment of Human Rights in The Past of Gross Human Rights Violations (Study of Inpres No. 2 of 2023 In Indonesia)," *Journal of Human Security* 19, no. 2 (2023): 65–69, <https://doi.org/10.12924/johs2023.19010009>.

⁷⁹ Gabriel Pereira, "Judges as Equilibrists: Explaining Judicial Activism in Latin America," *International Journal of Constitutional Law* 20, no. 2 (November 9, 2022): 696–732, <https://doi.org/10.1093/icon/moac044>.

of democratically legitimated national interests, rendering international norms invalid, contextually inappropriate, and susceptible to cherry-picking. By contrast, the open approach regards international law and comparative practice as persuasive authority through which domestic reasoning may be tested, constitutional rationality strengthened, and normative consequences assessed—particularly in complex human rights cases. An open, receptive, and adaptive form of comparative judicial reasoning, which engages with diverse sources of international law and foreign judicial decisions, therefore constitutes a rational choice—and a principled stance—within the Indonesian context. *First*, there is no constitutional provision that can be authoritatively invoked to clarify the state’s position on the relationship between domestic law and international law. Simon Butt emphasizes that this uncertainty has, in fact, benefited the government by enabling it to deflect criticism—both from the international community and from its own citizens—regarding compliance with international obligations, while simultaneously allowing state institutions to select whichever theory best suits their interests in a given case.⁸⁰ From the perspective of the Constitutional Court, Butt further observes that the absence of consistency and coherence in the government’s legal arguments can generate serious difficulties when the Court is required to adjudicate cases with unpredictable outcomes.⁸¹ It is within this normative and institutional vacuum that judicial openness emerges not merely as a methodological preference, but as an institutional necessity for constructing coherent judicial reasoning and for closing the space for state opportunism.

Second, the Court’s caseload itself illustrates why a multi-sourced approach to constitutional reasoning is rational. Quantitatively, as of January 2026 the Constitutional Court had adjudicated 2,293 constitutional review cases, issuing 2,160 decisions, of which 668 petitions were granted and 823 were dismissed.⁸² Many of these cases involve complex legal questions in which domestic law and existing legal doctrine are insufficient to sustain robust legal argumentation. Under the classical maxim *iura novit curia*, the Court is nevertheless required to provide legal reasoning despite such limitations within the domestic legal system; in doing so, the Court has frequently drawn upon provisions and doctrines of international law.⁸³ *Third*, such openness is not an anomaly in the Court’s practice. Zhang observes that since its establishment, the Constitutional Court has regularly cited international law—particularly covenants, conventions, and treaties—as part of the rationalization (*ratio decidendi*) of its decisions, both in cases where petitions were granted⁸⁴ and where they were rejected. According to Zhang’s study, during the Court’s first five years of operation (2003–2008)⁸⁵, 86 per cent of the Court’s decisions in constitutional review cases (out of a total of 78 cases) cited at least one foreign legal

⁸⁰ David Kosar and Katarína Šipulová, “Comparative Court-Packing,” *International Journal of Constitutional Law* 21, no. 1 (May 30, 2023): 80–126, <https://doi.org/10.1093/icon/moad012>.

⁸¹ Simon Butt, “The Position of International Law within the Indonesian Legal System,” *Emory International Law Review* 28, no. 95 (2014): 1.

⁸² Mahkamah Konstitusi Republik Indonesia, “Rekapitulasi Perkara Pengujian Undang - Undang” (2026), <https://www.mkri.id/perkara/rekapitulasi-perkara/puu>.

⁸³ Diane Zhang, “The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003–2008” (University of Melbourne, 2010).

⁸⁴ BUTT, BISARIYADI, and SIREGAR, “International Law in the Indonesian Constitutional Court: A Typology of Use.”

⁸⁵ BUTT, BISARIYADI, and SIREGAR.

source. More specifically, the Court referred to 34 provisions drawn from international conventions or treaties, foreign legislation, and judicial decisions from 26 foreign jurisdictions, as well as decisions of supranational courts or tribunals. Such references also appeared in dissenting opinions and concurring opinions authored by the justices.⁸⁶

Fourth, the findings of Palguna and Wardana regarding the practice of “pragmatic monism” further reinforce the case for judicial openness:⁸⁷ The Constitutional Court’s practice cannot be readily classified within the traditional dichotomy of monism or dualism. Instead, it tends toward pragmatic monism, in which the thesis of legal unity is embraced: international law is directly incorporated to construct persuasive constitutional interpretations and, more importantly, to serve as a source of law for filling gaps within the domestic legal order. This practice demonstrates a complementary relationship between international law and national law.

This framework enables a more precise reading of the entire body of Constitutional Court decisions reviewing the Human Rights Court Law and/or the Truth and Reconciliation Commission Law. Broadly speaking, these five decisions reveal a discernible trajectory of judicial reasoning: an initial phase that was relatively open and oriented toward transnational standards, followed by a subsequent phase that became increasingly defensive, formalistic, and inclined to shift responsibility for normative correction back to the legislature. Simon Butt provides a useful classificatory tool for measuring this shift. Butt distinguishes the Constitutional Court’s engagement with international law into three approaches. The weak-use approach applies where the Court rejects or disregards international legal arguments. The qualified-use approach applies where the Court accords such arguments some weight but without tangible normative effect—closely resembling the principle of consistent interpretation. Finally, the strong-use approach applies where the Court relies heavily on principles of international law and interpretations by international bodies to assist in construing the Constitution, the challenged statute, or both—approaching the logic of direct effect, in which international norms operate as autonomous decision-making rules within the domestic legal order.⁸⁸

Decision No. 65/PUU-II/2004 represents the clearest example of the strong-use phase in the context of the Human Rights Court Law. The Court did not merely invoke international instruments in an illustrative manner; rather, it constructed its *ratio decidendi* by integrating the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR)—despite the fact that it had not yet been ratified at the time—the European Convention on Human Rights (ECHR), the practices of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda

⁸⁶ Zhang, “The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003–2008.”

⁸⁷ Palguna and Wardana, “Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law.”

⁸⁸ Butt, “The Position of International Law within the Indonesian Legal System.”

(ICTR), as well as general principles such as *aut punere aut dedere*. Through this argumentative structure, the Court relaxed the absolutism of the principle of non-retroactivity and situated gross human rights violations as extraordinary crimes connected to jus cogens norms.⁸⁹ What emerges here is a form of judicial courage: the Court employed international law not to “replace” the 1945 Constitution, but to thicken the constitutional meaning of legality, limitations on rights, and permissible exceptions to non-retroactivity in cases of gross human rights violations. Importantly, this decision demonstrates that the Court was, at least at this stage, willing to move beyond formalism by engaging in complex legal reasoning to ensure that anti-impunity objectives remained compatible with constitutional guarantees of rights.⁹⁰

This openness reached its apex in Decision No. 006/PUU-IV/2006, which annulled the Truth and Reconciliation Commission Law. In this decision, the Constitutional Court did not merely appropriate international vocabulary; it positioned victims’ reparation standards as the constitutional axis of review. References to the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation*,⁹¹ the Rome Statute, and various General Comments of UN human rights bodies were employed to underscore that the design of the Truth and Reconciliation Commission Law—conditioning compensation and rehabilitation on the granting of amnesty to perpetrators—constituted an unjustifiable postponement of victims’ rights. The Court went so far as to hold that because Article 27 constituted the “core” of the Truth and Reconciliation Commission Law, its annulment rendered the statute incapable of operation. At this juncture, the Court presented itself as an institution that understood transitional justice not merely as a moral agenda, but as an architecture of rights: victims were not objects of state benevolence, but constitutional subjects whose rights must not be held hostage to political calculation.

If Decision No. 65/PUU-II/2004 expanded the space for accountability through an interpretive relaxation of the principle of legality, Decision No. 006/PUU-IV/2006 broadened the space for victims’ redress by employing international standards as constitutional benchmarks. Taken together, these two decisions demonstrate that the Constitutional Court once exercised its corrective function in a substantive manner, and that it did so precisely through openness to international legal sources. This progressive phase, however, did not continue consistently, and it is at this point that the Court’s retreat becomes apparent. Decision No. 18/PUU-V/2007 reflects a shift toward a qualified-use approach. While the Court did undertake a corrective intervention by invalidating the term “allegation” (*dugaan*) in the Explanatory Note to Article 43(2)—thereby ensuring that the role of the House of Representatives in establishing Ad Hoc Human Rights Courts could no longer rest on political conjecture alone, but had to be grounded

⁸⁹ Jesús Francisco Ramírez Bañuelos, “Are Dictates of Public Conscience a Norm of Jus Cogens in International Humanitarian Law?,” *Ius et Praxis* (07172877) 28, no. 1 (2022).

⁹⁰ Harold Bertot Triana and Elena C. Díaz Galán, “Impunity in Cases of Serious Human Rights Violations: Three Relevant Aspects of Contention in the Jurisprudence of the Inter-American Court of Human Rights,” *The International Journal of Human Rights* 29, no. 4 (April 21, 2025): 691–712, <https://doi.org/10.1080/13642987.2024.2411404>.

⁹¹ Dian Ekawaty Ismail et al., “Collocation of Restorative Justice with Human Rights in Indonesia,” *Legality: Jurnal Ilmiah Hukum* 32, no. 2 (September 20, 2024): 394–417, <https://doi.org/10.22219/ljih.v32i2.35374>.

in the results of investigation and prosecution—the structure of the Court’s reasoning nevertheless changed. International references became limited and contextual, while the Court increasingly relied on its own internal precedents. The language of institutional caution grew more pronounced, and the argumentation shifted from the articulation of transitional justice standards toward the management of procedural balance. This decision is significant not because it was entirely regressive, but because it marked an early warning sign: the Court began to reduce its reliance on international standards as tools of substantive correction and started to frame the problem of gross human rights violations within a narrower logic of procedural design.

This retreat became even more pronounced in Decision No. 75/PUU-XIII/2015, rendering the decision problematic not merely because the petition was dismissed, but because its argumentative structure reveals an almost explicit withdrawal. The Court acknowledged the existence of a structural deadlock between Komnas HAM and the Office of the Attorney General—characterized by repeated returns of case files, divergent standards, the absence of a dispute-resolution mechanism, the lack of legal consequences for failure to comply with the thirty-day deadline, and the unavailability of legal remedies for affected parties. In other words, the Court accepted the diagnosis that the contested norm contributed to prolonged legal uncertainty. Yet, at the very moment when judicial correction should have been activated, the Court instead foreclosed it by invoking the doctrine of open legal policy, thereby shifting the entire responsibility for reform to the legislature.⁹² It is here that the Court’s retreat becomes unmistakable: despite possessing factual knowledge of the norm’s failure and expressly acknowledging its adverse impact on victims, the Court chose not to exercise its authority—at least in the form of conditional constitutional interpretation—to compel the state to break out of the deadlock.

References to the ICCPR did appear, but they were not developed into substantive standards of state obligations to ensure effective investigations and the prevention of impunity. Instead, such references functioned largely as ornamental citations, deployed to respond to specific claims raised by the petitioners rather than as an evaluative framework guiding the Court’s reasoning. In Butt’s terminology, Decision No. 75/PUU-XIII/2015 moves toward the weak-use approach: international law no longer operates as a corrective tool, while institutional caution is transformed into a mechanism for the delegation of responsibility. It is at this point that the Court’s retreat acquires substantive meaning—the Constitutional Court no longer positions itself as the last corrective institution, but rather as an institution that acknowledges the problem while simultaneously normalizing it.

This retreat becomes even more apparent when read alongside the latent institutional potential that the Court in fact possesses—a potential that was previously exercised in its earlier decisions. Had the Court consistently employed international law as argumentative authority within the

⁹² Kt Sukewati Lanang P. Perbawa, “Open Justice Policy in Constitutional Court Decision and Law in Indonesia,” *International Journal of Criminal Justice Sciences* 18, no. 2 (2023): 89–101, <https://doi.org/10.5281/zenodo.4756307>.

framework of pragmatic monism as articulated by Palguna and Wardana, it could have developed standards of positive state obligations to ensure effective investigations as an integral component of the constitutional rights to legal certainty and justice. The Court could have closed the normative gap that permits the indefinite return of case files in a manner that remained compatible with its role as a negative legislator, for example by issuing conditional decisions that limit the permissible return of files or that require the establishment of inter-institutional dispute-resolution mechanisms in situations of deadlock.⁹³ Such measures would not have transformed the Court into a lawmaker, but rather would have reaffirmed its role as a guardian of the effectiveness of citizens' constitutional rights—a function that is inherent in the Court's constitutional design. Decision No. 75/PUU-XIII/2015, however, demonstrates that the Court declined this path, thereby allowing institutional caution to be transformed into the normalization of deadlock.

At this point, the Constitutional Court's retreat cannot be understood merely as a variation in argumentative style, but rather as a normative-institutional choice that has produced material consequences for the project of transitional justice. The Court's earlier decisions (Decision No. 65/PUU-II/2004 and Decision No. 006/PUU-IV/2006) demonstrate that it was once capable of employing international legal sources to thicken constitutional concepts—both to break through narrow legality formalism and to place victims at the center as rights-bearing subjects whose entitlements must not be held hostage to amnesty. By contrast, subsequent decisions, most notably Decision No. 75/PUU-XIII/2015, reveal the opposite trajectory: the Court moved from corrective courage to delegative caution; from the use of international law as a substantive standard to its deployment as a symbolic reference; and from an anti-impunity strategy to a justification of institutional incapacity. This retreat ultimately transforms impunity from a mere product of *realpolitik* into a condition that also acquires normative legitimacy through constitutional adjudication.

Twenty-five years after the enactment of the Human Rights Court Law, the state's failure to resolve cases of gross human rights violations can no longer be adequately explained by the absence of political will alone;⁹⁴ it also reflects the ways in which judicial reasoning shapes and constrains the realization of justice. As long as the Constitutional Court continues to normalize structural deadlock through the language of institutional caution and the doctrine of open legal policy, justice for victims will remain indefinitely deferred, and gross human rights violations will continue to be treated as "matters of the past" that are never truly resolved. Yet precisely because the legislative route is no longer conducive, the Constitutional Court bears a heightened responsibility to return to its own tradition of argumentative openness—an openness that once formed part of the Court's decisional ecology, as demonstrated by Zhang—and to employ international human rights law as persuasive authority to thicken the state's

⁹³ Muhammad Alief Farezi Efendi, Muhtadi Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court," *Jurnal Konstitusi* 20, no. 4 (December 1, 2023): 622–39, <https://doi.org/10.31078/jk2044>.

⁹⁴ Oksidelfa Yanto Yanto, Imam Fitri Rahmadi, and Nani Widya Sari, "Can Judges Ignore Justifying and Forgiveness Reasons for Justice and Human Rights?," *Srinijaya Law Review*, January 31, 2022, 122–42, <https://doi.org/10.28946/slrev.Vol6.Iss1.1054.pp122-142>.

constitutional obligations.⁹⁵ This choice is not merely a methodological preference; it constitutes a minimum condition to prevent the Constitution from degenerating into a document that recognizes victims' rights only on paper, while legal practice continues to sustain impunity. Ultimately, the future of human rights advancement in Indonesia—particularly the resolution of gross human rights violations—turns on a highly concrete question: whether the Constitutional Court is willing to reclaim its role as the last corrective institution capable of closing the gaps of deadlock, or whether it will persist in retreating and thereby entrench injustice in constitutional language.

CONCLUSION

Twenty-five years after the enactment of the Human Rights Court Law, the persistent deadlock in addressing gross human rights violations in Indonesia can no longer be adequately explained solely as a failure of political will or *realpolitik*. It is also a product of a normative design that permits stagnation and—more decisively—of the manner in which the Constitutional Court (*Mahkamah Konstitusi*, MK) has constructed the meaning and limits of the regime's effectiveness through its judicial reasoning. An examination of five key decisions reveals a clear trajectory: an initial phase characterized by argumentative openness, in which international legal sources were employed as persuasive authority to thicken constitutional concepts and to close the gaps of impunity; followed by a later phase—most notably Decision No. 75/PUU-XIII/2015—marking a retreat toward institutional caution that tends to delegate normative correction to the legislature, even as the Court itself acknowledges the existence of structural deadlock and prolonged legal uncertainty for victims.

This article affirms that the corrective tools available to constitutional judges should not be confined to international legal sources alone. Equally important is the use of judicial decisions—both domestic and comparative—that are relevant to resolving analogous structural problems and that support forms of deadlock-breaking reasoning. The invocation of international norms and comparative jurisprudence should be understood as argumentative authority that assists courts in assessing coherence, consequences, and the necessity of institutional correction, subject to a clear precondition: such references must not conflict with the 1945 Constitution and must operate within the bounds of constitutionally accountable reasoning. Accordingly, judicial openness does not function as a substitution for domestic norms, but rather as an interpretive strategy aimed at strengthening the state's constitutional obligations to ensure legal certainty, access to justice, and victims' redress.

This article contributes to debates on Indonesian constitutional adjudication by demonstrating that the shift from judicial openness to judicial restraint is not merely a variation in argumentative style, but a normative–institutional choice capable of transforming impunity from a political product into a condition that acquires constitutional legitimacy. Second, the article proposes a reading of the Constitutional Court's reasoning through the lens of modern

⁹⁵ Zhang, "The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003–2008."

comparative constitutional interpretation, which situates international law and relevant jurisprudence as part of the foundational resources of public legal reasoning. Through this lens, the Court's retreat can be evaluated not as a constitutional inevitability, but as a regression in corrective capacity—precisely at a moment when the legislative route is no longer conducive to reform.

This article opens avenues for further research aimed at deepening the methodological mapping of relevant international legal sources—such as standards on the right to an effective remedy, the obligation to conduct effective investigations, and the principle of the prevention of impunity—while simultaneously identifying the spectrum of judicial decisions that may serve as appropriate references for the Constitutional Court in correcting the deadlock embedded in the Human Rights Court Law. This agenda is important not merely to clarify what may be referenced, but, more critically, to articulate how such references can function as coherent, consistent, and constitutionally compatible corrective standards under the 1945 Constitution. With this framework, the article ultimately situates the advancement of accountability for gross human rights violations within a highly concrete question: whether the Constitutional Court is willing to reactivate its openness in judicial reasoning—drawing on relevant international legal instruments and jurisprudence as legitimate corrective strategies—or whether it will continue to sustain a retreat that normalizes deadlock and prolongs the deferral of justice for victims of gross human rights violations.

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COMPETING INTEREST

The authors declare that they have no competing interests.

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