

# Comparative Study on Judicial Review Mechanisms between Indonesia and South Africa: Implications for Strengthening Constitutionalism

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## Abstract

Judicial review is a key mechanism for maintaining constitutional supremacy and strengthening constitutionalism in modern democracies. Both Indonesia and South Africa, emerging from authoritarian regimes, adopted judicial review as part of their constitutional transition, but with different institutional choices and procedures. This study aims to compare the mechanisms of judicial review in Indonesia and South Africa and analyze their implications for constitutionalism. Using normative legal research with statutory, conceptual, case, comparative, and historical approaches, this study examines constitutional provisions, judicial practices, and relevant scholarly works. The findings show that Indonesia applies a dualistic model: the Constitutional Court reviews statutes, while the Supreme Court reviews regulations below statutes, creating fragmentation and weakening enforcement. In contrast, South Africa adopts a centralized model, with its Constitutional Court as the sole guardian of the Constitution, supported by entrenched rights, strong guarantees of independence, and a unique certification mechanism for constitutional amendments. These institutional differences affect the degree of legal certainty, public legitimacy, and the ability of courts to safeguard constitutionalism. The study concludes that while Indonesia has made significant progress, lessons from South Africa highlight the importance of consolidating judicial review authority, strengthening compliance with judicial decisions, and enhancing participatory legitimacy in constitutional change.

**KEYWORDS:** *Judicial Review; Constitutionalism; Indonesia; South Africa; Comparative Law*

## Introduction

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (henceforth referred to as the 1945 NRI Constitution) affirms that Indonesia is a state of law (*rechtsstaat*).<sup>1</sup> This provision requires that all legal matters in the unitary state of Indonesia be based on law. Law must provide clarity regarding what citizens should and should not do, the direction of government, the relationship among citizens, and the relationship between citizens and the government. To realize the ideal of a state of law, Indonesia has established a legal order through legislation that serves as a guide in the life of the nation and the state. All Indonesians are bound by these provisions, in line with the doctrine of *presumptio iures de iure* (law fictie theory), which assumes that everyone is deemed to know the law.

The concept of judicial review cannot be separated from a monumental event in United States judicial history namely the *Marbury v. Madison* decision of 1803.<sup>2</sup> Although the U.S. Constitution does not expressly grant courts the authority to review legislation, the Supreme Court in this case affirmed its power to declare a law unconstitutional.<sup>3</sup> Chief Justice John Marshall articulated the principle that “a legislative act contrary to the Constitution is not law.” This precedent not only shaped the trajectory of the American constitutional system but also inspired the adoption of judicial review as a mechanism for safeguarding constitutional supremacy in many other countries.

Judicial review has since become a central mechanism by which modern constitutions are enforced and constitutionalism maintained. Its design covering institutional locus, procedural accessibility, and remedial tools significantly affects the ability of courts to uphold constitutional supremacy and protect fundamental rights. Both Indonesia and South Africa present instructive comparative cases. Each has emerged from periods of authoritarianism, adopted robust constitutional institutions, and placed judicial review at the heart of their democratic transitions.

However, important differences remain. Indonesia employs a dualistic model, with the Constitutional Court reviewing statutes and the Supreme Court reviewing regulations beneath statutes, a structure that has generated debates over consistency, transparency, and effectiveness. South Africa, by contrast, centralizes constitutional review in its Constitutional Court, supported by flexible remedial powers that allow courts to suspend or limit the effect of invalidity orders. While both systems aim to protect constitutionalism, their divergent institutional choices and procedural rules produce distinct patterns of enforcement.

Existing scholarship has extensively examined judicial review in Indonesia and South Africa separately. Studies in Indonesia focus on issues of dualism, case overload,

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<sup>1</sup> The 1945 Constitution of the Republic of Indonesia.

<sup>2</sup> Cássio Luís Casagrande and Dalton Robert Tibúrcio, “Marbury V. Madison: A Political Decision to Keep the Court Out of Political,” *A&C - Revista de Direito Administrativo & Constitucional* 19, no. 76 (2019): 199, <https://doi.org/10.21056/aec.v19i76.1008>.

<sup>3</sup> Anthony D. Bartl and Jordan T. Cash, eds., *Constitutionalism and Liberty: Essays in Honor of David K. Nichols*, 1st ed (Lexington Books, 2025), <https://doi.org/10.5040/9781978749122>.

and the need for simplification. Research in South Africa highlights the role of the Constitutional Court and its remedial innovations. Yet, comparative analyses directly juxtaposing these two transitional democracies remain limited.

For this reason, this study seeks to compare the judicial review mechanisms in Indonesia and South Africa, with particular attention to their implications for strengthening constitutionalism. By identifying similarities, differences, and lessons learned, this research contributes to the ongoing discourse on how judicial review can serve as a more effective guardian of constitutional supremacy in transitional and consolidated democracies.

## Method

This research is normative legal research (doctrinal research) that employs statutory, conceptual, case, comparative, and historical approaches by analyzing primary legal materials such as the 1945 NRI Constitution, Law No. 24 of 2003 on the Constitutional Court, Law No. 48 of 2009 on Judicial Power, and Law No. 12 of 2011 on Law-Making, supported by secondary sources including scholarly journals and recent judicial decisions, with descriptive analysis used to explain the institutional and procedural design of judicial review, comparative analysis to identify similarities and differences between Indonesia and South Africa, and prescriptive analysis to formulate recommendations for strengthening constitutionalism in Indonesia based on comparative lessons from South Africa.

## Result & Discussion (title of Result & Discussion should not be used)

There are two major histories of judicial review in the world. First, the history of judicial review in legal practice in the United States through the decision of the United States Supreme Court in the case of *"Marbury vs. Madison"* in 1803. Although the provisions of judicial review are not included in the United States Constitution, the United States Supreme Court made a decision written by John Marshall when he served as Chief Justice of the United States Supreme Court which stated that the court has the authority to overturn laws that are contrary to the constitution.

The second is the existence of the Austrian Constitutional Court, introduced by Austrian legal expert Hans Kelsen, whose idea was then accepted in the Austrian Constitution of 1919. Kelsen's thoughts encouraged the establishment of an institution called the *Verfassungsgerichtshof* or Constitutional Court. Then the first Constitutional Court was established in 1920 in Austria.

Hans Kelsen, who is also recognized as the drafter of the constitution and the founder of the Austrian Constitutional Court, said that Parliament and the Constitutional Court both constitute or function as legislators. The difference is that if Parliament makes and

enacts laws, it is called a positive legislator, while the Constitutional Court annuls the enactment of laws, so it is called a negative legislator. The legal force of the

Constitutional Court's annulment of laws (negative legislation) is the same as the legal force in the enactment of laws (positive legislation) by Parliament; meaning, if a law is annulled by the Constitutional Court, it means that the law becomes invalid, as if replaced by a new law that is negative legislation. Therefore, in contrast to general court decisions, the validity of the annulment of laws as a product of judicial review by the Constitutional Court is the same as the enactment of laws by legislative institutions, namely it does not require an executive institution but is sufficient to be placed in the State Gazette and the State News.

### **Constitutional Authority and Institutional Design of Judicial Review in Indonesia**

The idea of judicial review as a constitutional judicial mechanism to compare, assess, or test the results of the work of political democracy mechanisms has existed since before independence, namely in the BPUPKI sessions when formulating the text of the 1945 UUDNRI.<sup>4</sup> Moh. Yamin proposed that there be a mechanism for testing the validity of the contents of laws against the constitution, custom, and sharia by the highest judicial institution. Yamin said the following:

*"The most honorable Mr. Chairman, etc. for the Supreme Court to exercise judicial power and compare the law so that it is in accordance with customary law, Islamic law (Shariah) and with the Constitution and carry out regulations for canceling the law, the opinion of the Supreme Court, meaning the Supreme Court, is conveyed to the President, who informs the news to the House of Representatives, etc."*

*"The Supreme Court should not only carry out its judicial function, but should also be a body that reviews whether laws made by the House of Representatives violate the Constitution of the Republic or conflict with recognized customary law, or whether they conflict with Islamic sharia. Therefore, within the High Court, civil and criminal bodies should be established, as well as a Customary Court and an Islamic Court..."*

*"High, whose job is not only to exercise justice but also to compare and report his opinion to the President of the Republic regarding all matters that violate basic law, customary law and sharia rules. Regarding other proposals, which are related to the articles, I will report later when we have discussed the articles one by one. I hope, Your Honor, that my discussion can be accepted, etc."*

However, Yamin's idea was refuted by Soepomo, who argued that there had never been a consensus among constitutional experts on judicial review, and that Indonesian legal experts had no experience with the judicial review process. Here is Soepomo's statement at the BPUPKI meeting:

*"...Besides that, Your Excellency, we will frankly say that Indonesian legal experts have absolutely no experience in this matter, and Mr. Yamin must also remember that*

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<sup>4</sup> Ahmad and Novendri Nggilu, *Constitutional Dialogue: Menguatkan Interaksi Menekan Dominasi, (Konvergensi Terhadap Pengujian Norma Di Mahkamah Konstitusi)* (UII Press, 2022).

*in Austria, Czechoslovakia and Germany during the Weimar era, it was not the Supreme Court, but a special court, the Constitutional Court, a specific court that solely dealt with the constitution. We must know that we do not have that many personnel, and that we must increase our personnel, experts in this matter. So, for a young country, I think it is not yet time to deal with this problem..."*

Moh. Yamin's idea in the BPUPKI Meeting after independence was then followed up with the enactment of the 1945 Constitution of the Republic of Indonesia for the first period (1945-1949), KRIS 1949 (1949-1950), UUDS 1950 (1950-1959), UUDNRI 1945 for the period 1959-1966 (Old Order) and the period 1966-1998 (New Order). At that time, it was limited to testing of laws and regulations under the law against the law carried out in the Supreme Court. While at the level of testing laws and regulations, it could not be carried out by the Supreme Court.<sup>5</sup>

During the New Order era, the Supreme Court's judicial review authority was contained in Article 31 of Law No. 14/1985 concerning Judicial Power. The Supreme Court subsequently issued Supreme Court Regulation (Perma) No. 1/1993 concerning the Right to Material Review. This Perma allows the District Court to declare a lower-level statutory regulation contradicts a higher-level statutory regulation, thus having no binding legal consequences.

Meanwhile, if we trace the initial traces of the practice of testing norms at the level of laws in Indonesia that have been implemented, the existence of the right to test laws against a basic law, in state practice in Indonesia has been carried out with several models and accompanying authorities, such as the Decree of the Provisional People's Consultative Assembly No. XIX/MPRS/1966 concerning the Review of State Legislative Products outside the Provisional People's Consultative Assembly Products that are not in accordance with the 1945 Constitution. This is meant, according to Padmo Wahyon, that laws are a reflection of the people's sovereignty, and parallel to that, they are worthy of being tested/replaced/changed by those authorized to make them.

Following this, the MPRS issued TAP MPRS No. XX/MPRS/1966 concerning the DPR-GR Memorandum concerning the Sources of the Indonesian Legal Order and the Order of Legislation of the Republic of Indonesia. The timeframe from the birth of these two MPRS products represents an effort to purify the implementation of the 1945 Constitution by assigning the Government together with the House of Representatives (DPR) to conduct a review of legislative products. These concurrent efforts can be interpreted as enforcing the sources of order and the order of legislation that are clearly detailed. The affirmation of the sources of legal order and the order of legislation, according to Soehino, aims to realize legal certainty and harmony as well as unity of interpretation and understanding of the implementation of the 1945 Constitution.

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<sup>5</sup> Novendri M. Nggilu, "Menggagas Sanksi Atas Tindakan Constitution Disobedience Terhadap Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 1 (2019): 43, <https://doi.org/10.31078/jk1613>.

The review and efforts to affirm the sources of legal order and the order of the legislation, are suspected to be due to the chaos of various forms of legislation in implementing the Presidential Decree of July 5, 1959. It should be noted, in the context at that time the types of legislation that existed and were regulated by the 1945 Constitution were only 3, namely Laws, Government Regulations in Lieu of Laws, and Government Regulations. "In practice, several materials that should be regulated by law, but turned out to be accommodated in the form of Presidential Decrees or with Presidential Regulations. In addition, many laws such as Presidential Decrees, Presidential Regulations, Government Regulations, Government Regulations in Lieu of Laws and laws that deviated from the spirit of the 1945 Constitution.

The tests carried out include testing the material and converting the rules, which can be seen in Article 2 (1) of TAP MPRS No. XIX/MPRS/1966 "Presidential Decrees and Presidential Regulations whose content and objectives are in accordance with the voice of the people's conscience in the context of efforts to secure the revolution are set out in the form of Laws." Then, in Article 3, "Laws and Government Regulations in Lieu of Laws that contain material that is contrary to the 1945 Constitution are reviewed." The review and confirmation of the source of legal order with the existence of the TAP MPRS is a concrete effort to resolve the problem of chaos in the types and forms of Legislation. By using the concept of legislative review, this practice tries to test existing legislation (both Presidential Decrees and laws) against the 1945 Constitution through the people's representative institution or parliament.

After the Amendment to the 1945 Constitution, the existence of Article 24 paragraph (2) and Article 24C of the 1945 Constitution which became part of the Third Amendment to the 1945 Constitution, gave birth to a new institution, namely the Constitutional Court. The Constitutional Court is a state institution that was born after the reformation and was formed after the amendment to the 1945 Constitution of the Republic of Indonesia which was carried out 4 (four) times from 1999 to 2002. The provisions regarding the Constitutional Court in the 1945 Constitution did not receive a portion of discussion during the discussion and ratification period.

The First Amendment to the 1945 Constitution was outlined in the 1999 MPR General Assembly. Discussions during the first amendment focused primarily on provisions concerning the Judicial Power in general and the Supreme Court. It was only during the discussions on the Judicial Power during the second amendment that the issue of the Constitutional Court began to emerge.

The Constitutional Court was established on August 13, 2004, namely when Law Number 24 of 2003 concerning the Constitutional Court was enacted, although in fact functionally the Constitutional Court had existed since August 10, 2002, namely when the Fourth Amendment to the 1945 Constitution of the Republic of Indonesia was ratified. In the Fourth Amendment to the 1945 Constitution, the provisions of Article III of the Transitional Provisions were adopted which stated that "The Constitutional Court shall be established no later than August 17, 2003 and

before its establishment, all its authorities shall be exercised by the Supreme Court of the Republic of Indonesia.

After being established based on Law Number 24 of 2003 concerning the Constitutional Court, the existence of the Constitutional Court in the Indonesian state system provides a breath of fresh air that political processes such as the formation of laws, the dissolution of political parties and the impeachment of the President and/or Vice President run according to the law without political content. Where the Constitutional Court plays a role as a neutralizer for political institutions. "This assertion has been conveyed by Mahfud MD, that "Law is a political product so that the character of the content of each legal product will be greatly determined or colored by the balance of power or the political configuration that gave birth to it.<sup>6</sup> This is based on the fact that every legal product is a product of political decisions so that law can be seen as a crystallization of political thought that interacts with each other among politicians.

Therefore, the provisions concerning the Constitutional Court were initially designed as a state institution that counterbalances the political power of national legislation, which could dominate lawmaking by ignoring constitutional aspects of the birth of national legislation created by the Indonesian House of Representatives (DPR RI) together with the President of the Republic of Indonesia and, on some occasions, may involve the Regional Representative Council (DPD RI). It is stated that the Constitutional Court's decision is final, first, and final. This means that the Constitutional Court's decision cannot be retried.

The Constitutional Court has four powers and one obligation, as stipulated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia. These powers are explicitly stated as follows:

- 1) reviewing laws against the Constitution;
- 2) deciding disputes over the authority of state institutions whose powers are granted by the Constitution;
- 3) deciding on the dissolution of political parties; and (4) deciding disputes regarding general election results.

Furthermore, the obligations of the Constitutional Court are regulated in Article 24C paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states "The Constitutional Court is obliged to issue a decision on the opinion of the People's Representative Council regarding alleged violations by the President and/or Vice President according to the Constitution."

In Indonesia, there is no division in handling judicial review cases. This is because the Indonesian Constitutional Court only recognizes one type of judicial review in the

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<sup>6</sup> Novendri M. Nggilu et al., "Constitutional Crisis: Intensifying Disobedience to the Decisions of the Indonesian Constitutional Court," *Revista Chilena de Derecho* 50, no. 2 (2023): 115–32, <https://doi.org/10.7764/R.502.5>; Bertus De Villiers et al., *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia* (Brill | Nijhoff, 2024), <https://doi.org/10.1163/9789004691698>.

legislation, namely the testing of laws against the 1945 Constitution (Article 10 paragraph (1) letter a of Law No. 24 of 2003 concerning the Constitutional Court and Article 24C paragraph (1) of the 1945 Constitution)). The absence of division here is clarified by Article 28 of Law No. 24 of 2003 concerning the Constitutional Court that 9 MK judges examine, try and decide cases. The number of 9 judges is the total number of judges of the Constitutional Court of the Republic of Indonesia as written in Article 4 of Law No. 24 of 2003 concerning the Constitutional Court.

The existence of the Constitutional Court in Indonesia aligns with Indonesia's goal of becoming a nation governed by the rule of law. This institution emerged from the pursuit of constitutional supremacy, which informed the amendments to the 1945 Constitution. The Constitutional Court serves as a state institution that safeguards the constitution. The Constitutional Court's presence aims to create a democratic government, implement checks and balances, and exercise judicial control over state administration.

The establishment of the Constitutional Court of the Republic of Indonesia can be understood from two perspectives: political and legal. From a constitutional political perspective, the Constitutional Court is necessary to balance the legislative power held by the House of Representatives (DPR) and the President. This is necessary to prevent laws from legitimizing the tyranny of the majority of representatives in the DPR and the President, who are directly elected by the majority of the people. On the other hand, changes in the constitutional system that no longer adhere to the supremacy of the People's Consultative Assembly (MPR) place state institutions on an equal footing. This allows, and in practice, disputes between institutions to arise, requiring a legal forum to resolve them. The most appropriate institution is the Constitutional Court.

From a legal perspective, the existence of the Constitutional Court is one of the consequences of the change from the supremacy of the MPR to the supremacy of the constitution, the principle of a unitary state, the principle of democracy, and the principle of a state based on the rule of law. Article 1 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that the State of Indonesia is a unitary state in the form of a republic. A unitary state is not only interpreted as a unity of geographical territory and governance. The principle of a unitary state requires the existence of a national legal system. The unity of the national legal system is determined by the existence of a unified basis for the formation and implementation of law, namely the 1945 Constitution. The substance of national law can be pluralistic, but this diversity has the same source of validity, namely the 1945 Constitution.

Judicial review is divided into two, namely judicial review consisting of material and formal review. The distinction between these types of review, according to Jimly Asshiddiqie, arises from the difference in understanding between *wet in materiële zin* (Law in the material sense) and *wet in formele zin* (Law in the formal sense), which is distinguished by the review of the material content of the law is material review and the review of the formation of the law is formal review. The limits of the proceedings can be seen in the regulations regarding the Procedural Law for Judicial Review, both those

regulated in Law 24/2003, Law 8/2011 and PMK 6/2005, as well as the principles of judicial power in general.

The review resulted in the cancellation of some of the material content or parts of the law in question. What is meant by the material content of the law is the content of certain paragraphs, articles and/or parts of a law, even just one word, one period, one comma or one letter that is considered to be in conflict with the 1945 Constitution of the Republic of Indonesia. Conversely, what is meant by part of the law can also be the whole of a section or the whole of a chapter of the law in question.

The objective of determining the constitutionality of a law is to first go through the procedural legal process, ultimately resulting in a decision to assess whether the content of a paragraph, article, or section of the law contradicts the 1945 Constitution. Several measuring instruments for assessing or testing the constitutionality of a law include not only the written text of the 1945 Constitution, but also several other things, including:

- 1) Written documents closely related to the text of the Constitution, such as minutes, decisions and decrees of the People's Consultative Assembly (MPR), certain laws, procedural regulations, etc.;
- 2) Constitutional values embedded in state practice, considered an inseparable part of the requirements and customs of state administration;
- 3) Values embedded in the cognitive consciousness of the people, as well as the reality of citizens' political and legal behavior, considered ideal customs and requirements in national and state life.

The benchmark in question makes the concept of constitutionality not only limited to the 1945 Constitution of the Republic of Indonesia in textual terms, but in a broad sense where the Constitutional Court in delving into various constitutionality cases of a legal product must delve into the abstract aspect, namely Pancasila as its touchstone.

Continuing on to the measuring tools and evidence, the case that is decided is also influenced by the judge's belief. This can be seen in Article 45 Paragraph (1) of Law 24/2003, which states "The Constitutional Court decides cases based on the 1945 Constitution of the Republic of Indonesia in accordance with the evidence and the judge's belief". The pattern of the relationship between the judge's belief in assessing evidence is divided into several theories, but the most relevant to Article 45 of Law 24/2003 is the negative pattern of proof of the Law (*negatieve wettelijk*). According to Riawan Tjandra, this pattern is a combination of the theory of proof according to the Law with the system of proof according to the judge's belief. In this pattern, the judge decides based on the evidence regulated in the law followed by the judge's belief, so that the combination of evidence and the judge's belief becomes an inseparable part of the decision-making process.

The scope of judicial review is inseparable from the discussion of decisions and their legal consequences. There are three types of judicial decisions in judicial review cases:

- 1) The application is not accepted;
- 2) The application is granted; and
- 3) The application is rejected.

In the case of a judicial decision stating "the application cannot be accepted," restrictions on the content or substance of the judicial decision are regulated in Article 57 paragraph (2A) of Law 8/2011 concerning matters not included in the decision, namely:

- 1) Orders other than those referred to in paragraphs (1) and (2);
- 2) Orders to the legislators; and
- 3) Formulation of norms as substitutes for norms from laws declared to be in conflict with the 1945 Constitution of the Republic of Indonesia

Limitations on the content or content of a decision constitute a limitation on the judge's authority, preventing the judge from acting as a legislator through the existence of substitute norms. Another form of limitation is found in Article 45A of Law 8/2011, which reads:

Constitutional Court decisions may not contain rulings not requested by the applicant or exceed the applicant's petition, except in certain matters related to the subject matter of the petition.

This limitation is intended to prevent the potential for an Ultra Petita Decision. Consequently, in practice, deliberate deviations are often made to bridge the gap between written regulations and regulatory requirements. The same applies to judicial review cases, whose decisions aim to provide constitutional justice. To date, the Indonesian Constitutional Court has made some progressive progress in reviewing laws against the 1945 Constitution of the Republic of Indonesia. However, the Constitutional Court, as the guardian of the Indonesian Constitution, has often fallen short of the public's high hopes and expectations for this constitutional court.

## **Constitutional Design Choices and the Foundations of Judicial Review in South Africa**

The drafters of the South African Constitution took three specific paths when drafting the constitutional text, specifically regarding the judicial power in South Africa.<sup>7</sup> The drafters of the constitution gave birth to a thought that was expressed in the text, namely to increase the independence of the judiciary and thereby simultaneously increase its perceived legitimacy.<sup>8</sup> First, the drafters, through the Constitution, created the Constitutional Court institution at the apex of the judicial system. Second, the drafters, through the Constitution,

<sup>7</sup> Chris Oxtoby, "The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission," *Journal of Asian and African Studies* 56, no. 1 (2021): 34–47, <https://doi.org/10.1177/0021909620946849>.

<sup>8</sup> Paul Craig, "Definition and Conceptualisation of the Rule of Law and the Role of Judicial Independence Therein," *Teoría y Realidad Constitucional*, no. 50 (December 2022): 165–84, <https://doi.org/10.5944/trc.50.2022.36371>.

created a large number of entrenched rights that are supreme and can be justified through the protection of human rights. Third, the drafters, through the Constitution, gave the courts the right of judicial review.

The establishment of the Constitutional Court in South Africa, at the agenda stage, their setting first prepared the paradigm of constitution making which consisted of: (1) an agreement to create an interim constitution as a transitional period from the apartheid regime; (2) granting a mandate to the parliament resulting from the 1994 elections which also became the Constitutional Assembly; (3) the creation of 34 constitutional principles which became the reference for the new constitution. These constitutional principles include universal basic matters such as the protection of human rights and the independence of the judiciary; (4) the establishment of a Constitutional Court which functions to certify the draft constitution prepared by the Constitutional Assembly. The method, the Constitutional Court checks whether the draft constitution of the Constitutional Assembly is in conflict or not with the 34 constitutional principles; and (5) a mechanism for ratifying the constitution while providing alternatives to avoid deadlock.

South Africa's initial step in constitutional reform was to create a more democratic constitution-making procedure. This was a fundamental weakness of Indonesia's constitutional reform, which relied on Article 37 to amend the 1945 Constitution. This was an absurdity, as it hinged the amendment process on an article that should have been amended.

Based on the importance of the people's self-belonging to their constitution, South Africa disseminated its draft constitution through radio, television, bulletins, and seminars. As a result, an estimated 82 percent of the population over the age of 18 listened to constitutional radio broadcasts; 37 constitutional programs on television received a warm response from 34 percent of viewers; and 160,000 Constitutional Assembly bulletins were distributed to the public every two weeks. Finally, in April 1996, before the draft constitution was finalized, an independent survey concluded that the constitutional reform campaign had successfully captured the support of 73 percent of South African adults. Last but not least, South Africa benefited from the leadership of a statesman like President Nelson Mandela.<sup>9</sup>

The establishment of the Constitutional Court was intended to enhance the legitimacy of the legal system in various ways. The Constitutional Court was

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<sup>9</sup> Rosalind Dixon and Theunis Roux, "Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa," in *From Parchment to Practice*, 1st ed., ed. Tom Ginsburg and Aziz Z. Huq (Cambridge University Press, 2020), <https://doi.org/10.1017/9781108767859.004>.

established to ensure the adherence of the legislature and the executive to entrenched principles and to resolve all constitutional challenges as the final arbiter of legal disputes. The Constitution provides that the Constitutional Court "makes the final decision on matters relating to the "interpretation, protection and enforcement of the Constitution. As is known, the Constitutional Court of South Africa has decisions that are binding on all legislative, executive and judicial bodies of the country. In addition, the salaries of all judges are protected from reduction, and judges can only be removed by "the President on the grounds of misconduct, incompetence, or lack of adequate competence as determined by a body or agency of the Judicial Service Commission." Thus, the Constitutional Court provides the foundation for the supremacy of the constitution itself.

Furthermore, the Constitutional Court has the distinct advantage of not having "an apartheid legal space or legal practice." The court represents a new structure separate from the old legal system, responsible for "interpreting and applying the apartheid legal framework." The creation of the new court allowed the new majority- led government to control the appointment of the entire Constitutional Court, thus ensuring a larger number of liberal jurists than the current judges. This was crucial for enhancing the black majority's perception of the justice system's legitimacy. Under the previous apartheid regime, the highest court of appeal was the Appellate Division. While one obvious solution would have been to expand the jurisdiction of the existing Appellate Division to include constitutional matters, interviews with Appellate Judges revealed the perception that the creation of the Constitutional Court was a direct result of the perceived illegitimacy of the Appellate Division.

The new majority was unwilling to rest critical decisions with a bench that was comprised largely of white Afrikaners who were perceived as sympathetic to the old regime. South African constitutional reform thinkers continued to criticize and make critical decisions against the Appellate Division, which was largely composed of white Afrikaners who were perceived as sympathetic to the old regime, which was very apartheid in nature. Further evidence of the distrust of the drafters of the constitution towards the Appellate Division, which was renamed the Supreme Court in the new constitution, was the ability of the Constitutional Court to review and overturn Supreme Court decisions.

A variety of fundamental rights are enshrined in the new South African Constitution. These rights represent the first time in South Africa's history that individual rights and freedoms are defined and protected by constitutional law. Furthermore, the Constitution grants the judiciary the power to review legislative acts for constitutional compliance, enhancing the capacity of an

independent judiciary to emerge. The Constitution explicitly addresses judicial independence. Courts are deemed "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor, or prejudice." Furthermore, "No person and no organ of the state may interfere with the functioning of the court..." and "organs of the state" are required to "assist and protect the court to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the court." The concept of judicial review was also important in enhancing the legitimacy of the court in the eyes of the minority white population, which favored special protection of individual rights.

The existence of a judicial review mechanism greatly enhances judicial independence, but such guarantees mean little if judicial decisions are repeatedly ignored or undermined by the regime. The Constitutional Court, with judges who are essentially ideologically sympathetic to the regime, has generally ruled consistently with the ANC's preferences. However, as noted above, in several judgments, the new government has lost; nevertheless, the government has so far supported the court's capacity to rule against it. This enhances the standing and independence of the Constitutional Court.

What is interesting in the constitutional justice system in South Africa is the authority granted by the state through its Constitution, namely the authority to assess the constitutionality of changes to the constitution or the country's basic law, where the South African Constitutional Court has the authority to provide certification of constitutionalism for constitutional amendments. Before providing such certification, a barometer or measure of constitutional change is first established, from there then the indicators of constitutionalism as a barometer of change that will be used by the Constitutional Court to assess and provide certification for the constitutional amendment product carried out by the South African Constitutional Commission, which includes members of the representative institution who are also the formulators of the new constitution that will be produced.<sup>10</sup>

Meanwhile in Indonesia the mechanism of constitutional change by granting certification is completely unknown in constitutional changes in Indonesia, so that all the material of the changes is completely handed over to the state institution in the legislative sphere, namely the People's Consultative Assembly of the Republic of Indonesia to change and determine the results of the changes as a new constitution. The new constitution that was made did not

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<sup>10</sup> Alison Tilley and Zikhona Ndlebe, "Judicial Appointments in South Africa," *British Journal of American Legal Studies* 10, no. 3 (2021).

involve other state institutions at all, especially the judicial power institution, namely the Constitutional Court to be involved in assessing the aspects of fulfilling constitutionalism against the new constitutional product as practiced in South Africa to provide certification of the constitution before it was stipulated as the country's Basic Law. Therefore, the practice of constitutional change in South Africa by involving state institutions in the Judicial sphere (the Constitutional Court of South Africa) to provide constitutional legitimacy, is considered by constitutional or constitutional law experts as the best and most successful constitutional change mechanism ever carried out in the world.

### **Comparative Analysis Indonesia and South Africa**

Both Indonesia and South Africa emerged from authoritarian pasts and placed judicial review at the center of their democratic transitions, yet they designed distinct institutional frameworks and procedures that shape how constitutional supremacy is maintained.

In Indonesia, the development of judicial review evolved gradually. The idea appeared as early as the BPUPKI debates, but only materialized after the 1999–2002 constitutional amendments, which established the Constitutional Court (MK). The MK reviews laws against the 1945 Constitution, but the authority to review regulations below statutes remains with the Supreme Court, creating a dualistic system. Judicial review in Indonesia is divided into material and formal review, with decisions that are final and binding, though limited by doctrines such as the prohibition of *ultra petita*. While the MK has introduced progressive jurisprudence, challenges remain: inconsistent rulings, political pressures, and weak legislative compliance. This makes the MK a critical but sometimes fragile guardian of constitutionalism.

By contrast, South Africa deliberately designed its constitutional system to strengthen judicial independence and legitimacy after apartheid. The 1996 Constitution established the Constitutional Court as the apex judicial body with the exclusive authority to interpret and enforce the Constitution. It holds broader powers than Indonesia's MK, including the unprecedented role of certifying constitutional amendments against 34 entrenched constitutional principles. The drafting process itself was highly participatory, enhancing public ownership of the Constitution. South Africa's judiciary is shielded through strong guarantees of independence, entrenched fundamental rights, and binding authority of the Constitutional Court over all branches of government. Unlike Indonesia's dualism, South Africa employs a centralized and unified model, ensuring consistency and legal certainty.

These differences have significant implications for constitutionalism. Indonesia's dualistic model often creates fragmentation and uncertainty, as conflicting interpretations may arise between the MK and the Supreme Court. Weak compliance mechanisms further reduce the Court's effectiveness in enforcing constitutional supremacy. Meanwhile, South Africa's unified model consolidates constitutional review under one apex body, strengthening the enforceability of rights and providing greater coherence. Its certification mechanism for constitutional amendments also demonstrates a deeper institutional commitment to constitutionalism, ensuring that even the process of constitutional change remains subject to judicial scrutiny—something absent in Indonesia.

Thus, while both systems aim to prevent the abuse of political power, Indonesia's model emphasizes gradual development within existing structures, whereas South Africa's model reflects a transformative constitutionalism that redefined the legal order in its entirety. For Indonesia, lessons from South Africa highlight the need to address institutional fragmentation, strengthen compliance with judicial rulings, and enhance participatory legitimacy in constitutional change, thereby reinforcing constitutionalism in practice.

## Conclusion

This study demonstrates that the mechanisms of judicial review in Indonesia and South Africa reflect distinct paths toward strengthening constitutionalism. Indonesia's dualistic system, although providing checks on legislation, creates fragmentation and limits effectiveness due to weak compliance and overlapping authority. Conversely, South Africa's centralized Constitutional Court ensures coherence, legal certainty, and legitimacy through its authority to enforce rights and certify constitutional amendments. The comparative analysis suggests that Indonesia could reinforce its constitutional system by consolidating review authority, ensuring stronger enforcement of judicial rulings, and incorporating broader public participation in constitutional reform. By learning from South Africa's transformative model, Indonesia may enhance the role of judicial review as an effective guardian of constitutional supremacy and deepen the practice of constitutionalism in its democratic governance.

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