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Konstruksi Hukum Kerugian Keuangan Negara dan Penerapan Business Judgment Rule dalam Undang-Undang Nomor 16 Tahun 2025

Legal Construction of State Financial Loss and the Implementation of the Business Judgment Rule in Act Number 16 of 2025

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ABSTRACT

State-Owned Enterprises (SOEs) hold a strategic position in the national economic as both economic actor and instruments of the state in promoting public welfare. However, this position gives rise to juridical complexities, particularly concerning directors' liability for corporate losses that are often classified as state financial losses. This issue has become more prominent following the enactment of Law Number 16 of 2025 on SOEs, which not only strengthens corporate governance but also clarifies the boundary between business risk and unlawful conduct. This research aims to analyze the relationship between mens rea, state financial losses, and corruption offenses within the newly established legal framework governing SOEs, as well as to examine the application of the BJR in limiting the criminalization of business decisions. The research employs a normative juridical method with statutory, case, comparative, and conceptual approaches. The findings indicate that not all losses incurred by SOEs can be classified as state financial losses in the criminal law sense. Criminal liability requires the cumulative fulfillment of state loss, unlawful conduct, and mens rea. In this context, the BJR serves as a legal protection mechanism for directors who act in good faith, with due care, and without conflict of interest, while maintaining a balance between legal certainty, accountability, and managerial discretion.

Keywords: State-Owned Enterprises; state financial losses; Business Judgment Rule

ABSTRAK

Badan Usaha Milik Negara (BUMN) memiliki posisi strategis dalam perekonomian nasional sebagai pelaksana fungsi ekonomi sekaligus instrumen negara untuk mewujudkan kesejahteraan masyarakat. Namun, posisi tersebut menimbulkan kompleksitas yuridis, khususnya terkait pertanggungjawaban direksi terhadap kerugian perusahaan yang kerap dikualifikasikan sebagai kerugian keuangan negara. Persoalan ini menguat pasca disahkannya UU Nomor 16 Tahun 2025 tentang BUMN, yang tidak hanya memperkuat tata kelola korporasi, tetapi juga menegaskan batas antara risiko bisnis dan perbuatan melawan hukum. Penelitian ini bertujuan untuk menganalisis antara unsur *mens rea*, kerugian keuangan negara, dan tindak pidana korupsi dalam konstruksi hukum BUMN yang baru, serta menelaah penerapan prinsip BJR dalam membatasi kriminalisasi keputusan bisnis. Metode yang digunakan adalah yuridis normatif dan pendekatan perundang-undangan, kasus, perbandingan hukum, serta konseptual. Hasil penelitian menunjukkan bahwa tidak setiap kerugian BUMN dapat dikualifikasikan sebagai kerugian keuangan negara dalam arti pidana. Pidanaan mensyaratkan terpenuhinya unsur kerugian negara, perbuatan melawan hukum, dan *mens rea* secara kumulatif. Dalam konteks ini, BJR berfungsi sebagai mekanisme perlindungan hukum bagi direksi atas keputusan bisnis yang diambil dengan itikad baik, kehati-hatian, dan tanpa benturan kepentingan, sekaligus menjaga keseimbangan antara kepastian hukum, akuntabilitas, dan kebebasan manajerial.

Kata Kunci: Badan Usaha Milik Negara; kerugian keuangan negara; Business Judgment Rule.

I. INTRODUCTION

Badan Usaha Milik Negara (BUMN) memiliki kedudukan strategis dalam sistem perekonomian nasional sebagaimana diamanatkan dalam Pasal 33 ayat (2) dan (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, tidak hanya sebagai pelaku kegiatan ekonomi, tetapi juga sebagai instrumen negara dalam mewujudkan kesejahteraan masyarakat melalui penguasaan cabang produksi yang penting bagi negara. Kedudukan ini menempatkan BUMN dalam posisi yang unik karena memikul tanggung jawab ganda (*dual role*), yakni berorientasi pada keuntungan dan efisiensi ekonomi, sekaligus tetap terikat pada kepentingan publik dan akuntabilitas pengelolaan keuangan negara. Pengaturan tersebut termuat dalam Undang-Undang Nomor 19 Tahun 2003 tentang BUMN yang telah mengalami perubahan melalui Undang-Undang Nomor 1 Tahun 2025 dan diperbarui melalui Undang-Undang Nomor 16 Tahun 2025 tentang BUMN (selanjutnya disebut UU BUMN Baru).¹

Kedudukan yang strategis sekaligus kompleks ini menimbulkan konsekuensi yuridis, khususnya terkait batas pertanggungjawaban hukum dalam pengelolaan keuangan dan pengambilan kebijakan korporasi. Sebagai entitas yang mengelola kekayaan negara yang dipisahkan, BUMN berada dalam posisi rentan terhadap potensi penyalahgunaan wewenang dan tindak pidana korupsi, terutama akibat ambiguitas status keuangannya. Di satu sisi, keuangan BUMN dipandang sebagai bagian dari keuangan negara, namun di sisi lain berfungsi sebagai modal korporasi yang dikelola berdasarkan prinsip bisnis yang sehat. Berdasarkan UU BUMN dan UU Nomor 40 Tahun 2007 tentang Perseroan Terbatas, modal negara melalui Penyertaan Modal Negara (PMN) telah bertransformasi menjadi kekayaan BUMN yang dipisahkan dari APBN dan dikelola berdasarkan prinsip *good corporate governance*.²

Meskipun demikian, perdebatan hukum terus berlangsung mengenai apakah kerugian yang dialami BUMN dapat dikategorikan sebagai kerugian keuangan negara atau tidak. Hal ini menimbulkan implikasi serius terhadap pertanggungjawaban pidana

¹ Kuswandi, Yudi Junadi, and Aulia Putri, "Penerapan Prinsip Business Judgement Rule Dalam Putusan Lepas Terkait Tindak Pidana Korupsi Direktur Korporasi" *Jurnal Hukum Mimbar Justitia*. Vol 8, 2022, p. 509. <https://doi.org/10.35194/jhmj.v8i2.3083>

² A Prakoso, D R Pinasang, and H Bawole, "Kepastian Hukum Atas Tindakan Bisnis Direksi BUMN Persero Beritikad Baik Yang Menimbulkan Kerugian Keuangan Negara" *Innovative: Journal Of Social Science Research*, vol. 3, no. 4, 2023, pp. 738–750. <https://j-innovative.org/index.php/Innovative/article/view/2871>.

maupun administratif bagi pengelola BUMN. Putusan Mahkamah Konstitusi Nomor 77/PUU-IX/2011 menegaskan bahwa meskipun kekayaan BUMN telah dipisahkan dari APBN, kekayaan tersebut tetap merupakan bagian dari keuangan negara yang tunduk pada pemeriksaan Badan Pemeriksa Keuangan (BPK). Dengan demikian, kerugian yang terjadi dalam BUMN tetap dapat berimplikasi terhadap pertanggungjawaban atas kerugian keuangan negara, sehingga memperkuat posisi BUMN sebagai entitas bisnis yang berada di antara rezim hukum publik dan privat.³

Dalam konteks korporasi, direksi sebagai organ utama memegang dua fungsi penting, yakni fungsi perwakilan (*representative function*) dan fungsi manajemen (*management function*), serta berperan sebagai personifikasi dari perseroan itu sendiri. Namun, kedudukan hukum direksi BUMN menimbulkan persoalan, khususnya terkait statusnya sebagai penyelenggara negara. Pasal 9G UU BUMN Baru menyatakan bahwa direksi, komisaris, dan dewan pengawas BUMN bukan merupakan penyelenggara negara. Ketentuan ini menimbulkan kontroversi karena bertentangan dengan Putusan MK Nomor 25/PUU-XIV/2016, yang menegaskan sebaliknya. Kondisi ini menunjukkan bahwa meskipun BUMN berbentuk badan hukum privat, pengelolanya tetap tidak terlepas dari dimensi tanggung jawab publik.⁴

Permasalahan tersebut menimbulkan implikasi yuridis yang signifikan terhadap kedudukan dan pertanggungjawaban pidana direksi BUMN. Dalam praktik, kerugian yang timbul dari kegiatan usaha BUMN sering ditafsirkan sebagai kerugian keuangan negara, sehingga membuka potensi pemidanaan terhadap direksi. Ketidakjelasan ini diperparah oleh tumpang tindih status hukum direksi serta belum adanya batas yang tegas antara kerugian akibat risiko bisnis yang wajar dengan kerugian akibat penyalahgunaan kewenangan. Akibatnya, direksi berada dalam posisi dilematis antara tuntutan untuk mengambil keputusan strategis berbasis *good corporate governance* dan

³ Maria Noviarta Sidabutar, "Penerapan Prinsip Business Judgement Rule Oleh BUMN Terkait Keuangan Negara (Studi Kasus putusan nomor 18 / PID.SUS-TPK / 2018 / PT DKI dan 9 / PID.SUS-TPK / 2019 / PT DKI)" *Al Qalam: Jurnal Ilmiah Keagamaan dan Kemasyarakatan*. Vol 17, no. 5 2023, pp. 3472–3490. <http://dx.doi.org/10.35931/aq.v17i5.2650>

⁴ Ibid.

risiko pertanggungjawaban pidana atas kerugian yang timbul, meskipun keputusan tersebut telah diambil dengan itikad baik dan kehati-hatian.⁵

Kondisi dilematis tersebut pada dasarnya menunjukkan adanya persoalan mendasar terkait belum jelasnya batas antara kerugian keuangan negara yang bersumber dari risiko bisnis (*business risk*) dengan kerugian yang memenuhi unsur tindak pidana korupsi. Ketidakjelasan batas ini tidak hanya menimbulkan ketidakpastian hukum, tetapi juga berpotensi mendorong terjadinya *overcriminalization* terhadap kebijakan bisnis yang seharusnya berada dalam ranah hukum korporasi.

Kondisi dilematis yang dihadapi oleh direksi BUMN tersebut semakin nyata apabila dikaitkan dengan data empiris terkait tingginya eksposur BUMN terhadap kasus tindak pidana korupsi. Berdasarkan Laporan Hasil Pemantauan Tren Korupsi Tahun 2024 oleh *Indonesia Corruption Watch* (ICW), sektor BUMN termasuk dalam lima besar lembaga dengan kasus korupsi terbanyak, yakni sebanyak 22 kasus dengan 51 orang tersangka, serta kerugian negara mencapai Rp4,31 triliun.⁶ Hal ini menunjukkan bahwa BUMN tidak hanya berperan strategis dalam pembangunan ekonomi, tetapi juga menjadi salah satu locus utama dalam praktik penyimpangan keuangan negara, sekaligus mencerminkan persoalan dalam tata kelola dan pengawasan.

Table 1. Pemetaan Kasus Berdasarkan Lembaga Sepanjang Tahun 2024.

| No | Lembaga yang Terlibat | Kasus | Tersangka | Kerugian Negara |
|----|-----------------------|-------|-----------|---------------------|
| 1 | Pemerintah Kabupaten | 116 | 217 | 560.901.042.290 |
| 2 | Pemerintah Desa | 77 | 116 | 131.390.112.466 |
| 3 | Perusahaan Swasta | 36 | 249 | 271.490.728.006.233 |
| 4 | BUMN | 22 | 51 | 4.318.673.735.599 |
| 5 | BUMD | 21 | 48 | 345.538.931.950 |

Source: Indonesia Corruption Watch (ICW)

Selain BUMN, persoalan serupa juga terjadi pada Badan Usaha Milik Daerah (BUMD) serta anak perusahaan BUMN yang dalam praktiknya mengelola kekayaan

⁵ Firwanda Sandi Pradipta and Ermania Widjajanti, "Pembaharuan Hukum Pidana Korupsi Dalam Pengelolaan BUMN Pasca Revisi UU No 1 Tahun 2025" *Locus Journal of Academic Literature Review*, Vol. 4, no. 2, 2025, pp. 80–90. <https://doi.org/10.56128/ljoalr.v4i2.431>

⁶ "Laporan Hasil Pemantauan Tren Korupsi Tahun 2024," 2025, online, Internet, 11 Nov. 2025. , Available: [https://www.antikorupsi.org/sites/default/files/dokumen/Laporan Hasil Pemantauan Tren Korupsi Tahun 2024.pdf](https://www.antikorupsi.org/sites/default/files/dokumen/Laporan%20Hasil%20Pemantauan%20Tren%20Korupsi%20Tahun%202024.pdf). [accessed 11 November 2025].

yang bersumber dari penyertaan modal negara atau daerah. Meskipun kekayaan tersebut secara hukum telah dipisahkan menjadi kekayaan korporasi, dalam praktik penegakan hukum seringkali masih dipandang sebagai bagian dari keuangan negara. Hal ini menimbulkan persoalan mendasar mengenai apakah kerugian yang terjadi pada BUMD atau anak perusahaan BUMN dapat secara otomatis dikualifikasikan sebagai kerugian keuangan negara, serta bagaimana batas pertanggungjawaban pidana direksi dalam konteks tersebut.

Melihat berbagai persoalan tersebut, pembaruan hukum melalui UU Nomor 1 Tahun 2025 tentang BUMN menjadi langkah progresif dalam menyeimbangkan antara hukum korporasi dan hukum pidana korupsi dalam pengelolaan BUMN. Reformasi ini menegaskan pentingnya keseimbangan antara akuntabilitas publik dan kebebasan manajerial. Salah satu aspek penting dari pembaruan tersebut adalah pengakuan terhadap prinsip *Business Judgment Rule* (selanjutnya disebut BJR), yaitu suatu doktrin dalam hukum korporasi yang memberikan perlindungan kepada direksi atas keputusan bisnis yang diambil dalam rangka pengelolaan perusahaan, sepanjang keputusan tersebut dilakukan dengan itikad baik (*good faith*), penuh kehati-hatian (*duty of care*), tanpa benturan kepentingan (*duty of loyalty*), serta didasarkan pada informasi yang memadai dan pertimbangan yang rasional. Prinsip ini menegaskan bahwa direksi tidak dapat dimintai pertanggungjawaban hukum semata-mata karena keputusan bisnisnya menimbulkan kerugian, selama keputusan tersebut merupakan bagian dari risiko bisnis yang wajar. Dengan demikian, pengaturan dalam UU BUMN Baru tidak lagi menempatkan setiap risiko bisnis sebagai potensi kesalahan pidana secara otomatis, melainkan menilai secara proporsional antara tindakan profesional yang dilindungi oleh BJR dengan perbuatan yang benar-benar memenuhi unsur melawan hukum, termasuk dalam kaitannya dengan pembuktian *mens rea* dan kerugian keuangan negara.⁷

Penerapan prinsip BJR dalam sistem hukum BUMN Indonesia memiliki implikasi penting bagi perkembangan hukum pidana ekonomi dan hukum korporasi nasional. Doktrin ini mempertegas asas *geen straf zonder schuld* atau “tiada pidana tanpa

⁷ N Syaharani, “Implementasi Doktrin Business Judgment Rule Pada Perkara Tindak Pidana Korupsi Bagi Direksi Korporasi Badan Usaha Milik Negara (Studi Kasus Pt. Pertamina Dengan Pt. Asuransi Jiwasraya)” *Jurnal Darma Agung* vol. 3, no 4, 2024, pp. 28–38, Available: <http://jurnal.darmaagung.ac.id/index.php/jurnaluda/article/view/4609%0Ahttps://jurnal.darmaagung.ac.id/index.php/jurnaluda/article/download/4609/3946/>.

kesalahan,” yang menegaskan bahwa kerugian keuangan negara tidak dapat dijadikan dasar pemidanaan tanpa pembuktian adanya unsur *mens rea* dari pelaku. Dengan demikian, aparat penegak hukum dituntut untuk membedakan antara kegagalan bisnis (*business failure*) dan niat jahat, sehingga penilaian terhadap tindakan direksi seharusnya berfokus pada proses pengambilan keputusan, bukan semata pada akibat yang ditimbulkan.⁸

Penelitian ini menggunakan metode yuridis normatif yang berfokus pada kajian terhadap norma-norma hukum positif yang mengatur kedudukan, tanggung jawab, dan pertanggungjawaban direksi BUMN dalam kaitannya dengan prinsip BJR. Terdapat empat pendekatan yang digunakan dalam penelitian ini, yaitu: pertama, pendekatan perundang-undangan (*statute approach*) untuk menelaah ketentuan dalam UU Nomor 1 Tahun 2025 tentang BUMN, UU Nomor 40 Tahun 2007 tentang Perseroan Terbatas, serta UU Nomor 31 Tahun 1999 jo. UU Nomor 20 Tahun 2001 tentang Pemberantasan Tindak Pidana Korupsi; kedua, pendekatan konseptual (*conceptual approach*) untuk memahami hubungan antara *mens rea*, batas kerugian keuangan negara, dan prinsip BJR dalam perspektif hukum korporasi dan hukum pidana ekonomi; ketiga, pendekatan kasus (*case approach*) yang terbatas pada analisis putusan Mahkamah Konstitusi guna memperoleh pemahaman mengenai penafsiran keuangan negara dan pembuktian *mens rea*; dan keempat, pendekatan perbandingan hukum (*comparative approach*) untuk membandingkan pengaturan dan penerapan prinsip BJR serta pertanggungjawaban pidana korporasi di beberapa negara, sehingga memberikan perspektif yang lebih komprehensif dalam perkembangan hukum di Indonesia.

Bahan hukum yang digunakan terdiri atas bahan hukum primer, sekunder, dan tersier yang diperoleh melalui studi kepustakaan. Analisis data dilakukan secara deskriptif-kualitatif dengan menafsirkan asas, doktrin, dan norma hukum guna merumuskan batasan kerugian keuangan negara serta konstruksi pertanggungjawaban pidana dalam tindak pidana korupsi yang melibatkan BUMN dan/atau BUMD, khususnya dalam kaitannya dengan unsur *mens rea* dan penerapan prinsip BJR.⁹

⁸ Ibid.

⁹ Indriyani Kusumawati and Yeti Sumiyati, “Penerapan Prinsip Business Judgement Rule terhadap Direksi atas Perbuatan Melawan Hukum Karyawan Karena Menetapkan Diskon Pembelian Emas Antam Secara Sepihak” *Dialogia Iuridica: Jurnal Hukum Bisnis dan Investasi*. Vol.13, no.1, 2021, pp. 97–112. <https://doi.org/10.28932/di.v13i1.3880>

Berdasarkan kerangka tersebut, permasalahan utama penelitian ini terletak pada hubungan antara *mens rea*, batas kerugian keuangan negara, dan tindak pidana korupsi dalam konteks BUMN dan BUMD. Penelitian ini menekankan pentingnya penegasan batas antara risiko bisnis dan perbuatan pidana, serta menempatkan prinsip BJR sebagai instrumen perlindungan bagi direksi yang bertindak dengan itikad baik dan kehati-hatian. Penelitian ini menawarkan kebaruan dengan mengintegrasikan ketiga aspek tersebut secara sistematis, sehingga memberikan kejelasan dalam membedakan kegagalan bisnis dari perbuatan koruptif dalam pengelolaan BUMN dan BUMD.

II. DISCUSSION

1. Pengaturan dan Keterkaitan Unsur Niat Jahat (*Mens Rea*), Kerugian Keuangan Negara, dan Tindak Pidana Korupsi Dalam Konstruksi Undang-Undang Badan Usaha Milik Negara yang Baru

Perubahan keempat terhadap Undang-Undang Nomor 19 Tahun 2003 tentang Badan Usaha Milik Negara melalui Undang-Undang Nomor 16 Tahun 2025 menandai pergeseran paradigma penting dalam sistem hukum korporasi negara di Indonesia. Pembaruan ini merefleksikan perubahan dalam melihat hubungan antara fungsi bisnis dan fungsi publik pada BUMN, khususnya dalam menentukan batas pertanggungjawaban hukum atas pengelolaan keuangan negara. Pembaruan ini tidak hanya menata ulang tata kelola BUMN, tetapi juga menegaskan batas antara kesalahan administratif, kesalahan manajerial, dan tindak pidana korupsi.

Permasalahan normatif muncul dari karakter kekayaan BUMN yang berasal dari penyertaan modal negara, namun dikualifikasikan sebagai kekayaan negara yang dipisahkan. Konsekuensinya, pengelolaan kekayaan tersebut tidak sepenuhnya tunduk pada rezim keuangan negara sebagaimana diatur dalam UU No. 17 Tahun 2003 tentang Keuangan Negara, melainkan juga tunduk pada prinsip-prinsip korporasi yang mengandung risiko bisnis. Di sisi lain, dalam perspektif UU Tindak Pidana Korupsi, khususnya Pasal 2 dan Pasal 3, tetap terbuka ruang pemidanaan terhadap setiap perbuatan yang “secara melawan hukum” memperkaya diri sendiri atau orang lain dan menimbulkan kerugian keuangan negara. Kondisi ini menimbulkan ketegangan

normatif dalam menentukan kapan suatu kerugian BUMN dapat dikualifikasikan sebagai kerugian negara dalam arti pidana.¹⁰

Dalam kerangka tersebut, hukum pidana memberikan parameter dasar melalui asas *geen straf zonder schuld*, yang menegaskan bahwa pemidanaan hanya dapat dilakukan apabila terdapat perbuatan melawan hukum (*actus reus*) yang disertai sikap batin pelaku (*mens rea*). Suatu tindakan menjadi tindak pidana apabila memenuhi kedua unsur tersebut secara kumulatif. Unsur *mens rea* berfungsi sebagai parameter untuk menilai apakah suatu tindakan mencerminkan kesengajaan atau penyalahgunaan kewenangan. Oleh karena itu, dalam konteks tindak pidana korupsi, pembuktian unsur niat jahat menjadi krusial untuk membedakan antara kesalahan administratif dan perbuatan yang benar-benar melanggar hukum pidana.¹¹

Sementara dalam konteks korporasi, *mens rea* tidak hanya dilihat dari niat individu, melainkan sebagai kehendak kolektif yang terwujud dalam kebijakan, keputusan, dan tindakan para pengurus korporasi yang merepresentasikan kehendak perusahaan. Oleh karena itu, dalam praktik pengelolaan BUMN, pengenaan tanggung jawab pidana harus mempertimbangkan kompleksitas hubungan antara kepentingan bisnis dan tanggung jawab publik. Tidak semua keputusan yang berujung pada kerugian BUMN dapat dikualifikasikan sebagai tindak pidana, mengingat keputusan bisnis secara inheren mengandung risiko tanpa adanya unsur kesengajaan.¹²

Tabel 2. Keterkaitan Unsur *Mens Rea* dan Tindak Pidana Korupsi pada BUMN

| Unsur yang Dinilai | Indikator Pembuktian | Konsekuensi Hukum |
|---------------------------------------|---|--|
| Niat jahat (<i>mens rea</i>) | Bukti adanya keuntungan pribadi, kolusi, penyembunyian informasi, atau penyalahgunaan wewenang. | Dapat dikualifikasikan sebagai tindak pidana korupsi (Pasal 2–3 UU Tipikor). |
| Kelalaian berat (<i>culpa lata</i>) | Keputusan diambil tanpa analisis risiko, tanpa pertimbangan rasional, atau mengabaikan prosedur tergantung tingkat kesalahan. | Dapat dimintai pertanggung-jawaban pidana atau perdata. |

¹⁰ M.Hum. Dr. Suhartati, S.H., LL.M. Dr. Elfina Lebrine Sahetapy, S.H., and M.H. Hwian Christianto, S.H., *Anatomi Kejahatan Korporasi PT REVKA PETRA MEDIA*. Surabaya: PT REVKA PETRA MEDIA, 2018.

¹¹ Olivia Anggie Johar, Edi Setiadi, and Dini Dewi Heniarti, “Reforming Environmental Criminal Law: A Comparative Study of the United States, the Netherlands, India, and Indonesia”, *Kosmik Hukum*. vol.25, no. 2, 2025, pp. 363–379. [10.30595/kosmikhukum.v25i2.26167](https://doi.org/10.30595/kosmikhukum.v25i2.26167).

¹² Andi Bau Mallarangeng et al., “Pembuktian Unsur Niat Dikaitkan dengan Unsur Mens Rea dalam Tindak Pidana Korupsi,” *LEGAL: Journal of Law*. vol 2, no. 2, 2023, pp. 11–24, <https://jurnal.lamaddukelleng.ac.id/index.php/legal/article/view/69>

pengawasan.

Itikad baik dan Keputusan diambil berdasarkan Tidak dapat dimintai kehati-hatian informasi memadai, melalui pertanggungjawaban pidana; mekanisme rapat, tanpa konflik dilindungi oleh BJR (Pasal 9F kepentingan. UU BUMN Baru).

Tabel tersebut menunjukkan bahwa unsur *mens rea* menjadi pembeda utama antara kesalahan administratif dan tindak pidana korupsi. Sementara itu, kelalaian berat (*culpa lata*) dapat menimbulkan pertanggungjawaban apabila menyebabkan kerugian keuangan negara, dengan tingkat kesalahan dan motif sebagai faktor penentu. Sebaliknya, apabila tindakan direksi dilakukan dengan itikad baik dan kehati-hatian, keputusan tersebut dilindungi oleh prinsip BJR sebagaimana diatur dalam Pasal 9F UU BUMN Baru¹³.

Dalam kerangka normatif, UU BUMN Baru memperkenalkan ketentuan penting melalui Pasal 9F yang mengatur tanggung jawab direksi dalam menjalankan tugasnya. Pasal ini secara substansial mengadopsi prinsip BJR sebagaimana diatur dalam Pasal 97 ayat (5) UU PT, yang menegaskan bahwa direksi tidak dapat dimintai pertanggungjawaban atas kerugian perusahaan sepanjang keputusan diambil dengan itikad baik, kehati-hatian, dan untuk kepentingan perusahaan. Dengan demikian, Pasal 9F berfungsi sebagai bentuk perlindungan hukum bagi direksi agar tidak dikriminalisasi atas keputusan bisnis yang diambil secara profesional dan berdasarkan informasi yang memadai. Norma ini menjadi penting karena memberikan kepastian hukum dan mencegah kriminalisasi terhadap keputusan bisnis.¹⁴

Lebih lanjut, pengaturan dalam Pasal 9F menegaskan bahwa penilaian terhadap kesalahan dalam pengambilan keputusan bisnis tidak dapat semata-mata didasarkan pada akibat berupa kerugian finansial, tetapi harus memperhatikan proses dan itikad dalam pengambilan keputusan tersebut. Dengan kata lain, *mens rea* menjadi elemen penting untuk membedakan antara kesalahan administratif dan perbuatan melawan hukum yang memenuhi unsur pidana. Pengaturan ini mencerminkan penerapan asas *lex specialis derogat legi generali*, di mana penilaian terhadap tindakan direksi harus

¹³ Siswanto and Rudi Margono, *Esensi Niat Jahat (Mens Rea) Dalam Perkara Korupsi yang Mengakibatkan Kerugian Keuangan Negara*. Jawa Barat: Ikhlas Sukses Abadi, 2024.

¹⁴ Erlita Lily Cahya Aulia Putri Perdana and Gialdah Tapiansari Batubara, "Implikasi Disparitas Putusan Hakim dalam Penerapan Prinsip Business Judgement Rule terhadap Implementasi Tujuan Hukum" *Unes Law Review*. Vol. 7, no. 3, 2025, pp. 998–1013. <https://doi.org/10.31933/unesrev.v7i4.2421>

terlebih dahulu menggunakan kerangka hukum korporasi sebelum dikualifikasikan sebagai tindak pidana. Pendekatan ini juga sejalan dengan pandangan Mahkamah Konstitusi dalam Putusan Nomor 25/PUU-XIV/2016 yang menegaskan bahwa perbedaan antara kesalahan administratif dan tindak pidana harus dinilai berdasarkan adanya unsur *mens rea*, bukan semata akibat hukum yang ditimbulkan.

Dalam perspektif komparatif, pengaturan mengenai perlindungan direksi dan batas pertanggungjawaban atas kerugian perusahaan telah berkembang secara matang dalam sistem hukum *common law*. Di Amerika Serikat, BJR dikenal sebagai doktrin yudisial yang kuat dan berfungsi sebagai “payung hukum” bagi direksi. Pengadilan pada prinsipnya menerapkan pendekatan non-intervensi terhadap keputusan bisnis, sehingga tidak akan mempertanyakan kebijakan direksi sepanjang dilakukan dalam batas kewenangan (*intra vires*), dengan itikad baik, dan berdasarkan informasi yang memadai. Intervensi baru dimungkinkan apabila terdapat bukti *fraud*, tindakan *ultra vires*, atau kelalaian berat (*gross negligence*). Dalam kerangka ini, kerugian perusahaan dipandang sebagai bagian dari risiko bisnis (*corporate loss*) yang tidak serta-merta menimbulkan tanggung jawab hukum.

Sementara itu, di Australia, prinsip BJR telah diadopsi secara eksplisit dalam *Corporations Act 1999*, yang memberikan perlindungan hukum yang lebih terstruktur kepada direksi. Pengaturan ini menegaskan bahwa direksi tidak dapat dimintai pertanggungjawaban atas keputusan bisnis sepanjang memenuhi standar *fiduciary duty*, itikad baik, serta didasarkan pada pertimbangan rasional dan informasi yang memadai. Dengan demikian, sistem hukum Australia memberikan batas yang jelas antara kegagalan bisnis dan pelanggaran hukum. Dengan demikian, baik di Amerika Serikat maupun Australia, kerugian korporasi tidak secara otomatis dikualifikasikan sebagai pelanggaran hukum, melainkan harus dikaitkan dengan adanya unsur kesalahan. Pendekatan ini sejalan dengan arah pembaruan dalam UU BUMN Baru dalam membedakan risiko bisnis dan perbuatan melawan hukum.¹⁵

Untuk memperjelas konstruksi hukum mengenai batas kerugian keuangan negara dalam BUMN, diperlukan perbandingan antar rezim hukum sebagai berikut:

¹⁵ Roro Ajeng Muningsar and Rosdiana Saleh, “Perbandingan Sistem Hukum Indonesia dan Australia Tentang Pengaturan Pertimbangan Bisnis (Business Judgement)” *Unes Law Review*. vol. 63, 2024, pp. 9104–9113. <https://dx.doi.org/10.26532/jph.v12i3.48196>.

Tabel 3. Perbandingan Pengaturan Kerugian Keuangan Negara

| Aspek | UU Perbendaharaan Negara | UU Tipikor | UU BUMN Baru | Putusan MK No. 62/PUU-XI/2013 |
|--------------------------|---|--|--|--|
| Definisi Kerugian Negara | Kekurangan uang, surat berharga, atau barang nyata dan pasti jumlahnya akibat perbuatan melawan hukum | Kerugian keuangan negara atau perekonomian negara sebagai akibat perbuatan melawan hukum | Tidak merumuskan secara eksplisit, tetapi menekankan karakter korporasi BUMN | Menegaskan bahwa kekayaan BUMN/BUMD adalah kekayaan negara yang dipisahkan |
| Status Kekayaan BUMN | Bagian dari keuangan negara | Termasuk objek yang dapat menimbulkan kerugian negara | Kekayaan negara yang dipisahkan dan dikelola secara korporasi | Tetap termasuk dalam lingkup keuangan negara dan dapat diperiksa BPK |
| Pendekatan Kerugian | Berbasis kerugian nyata (<i>actual loss</i>) | Berbasis akibat (<i>potential loss</i> + perbuatan melawan hukum) | Mulai membedakan antara risiko bisnis dan kerugian negara | Tidak semua kerugian BUMN = kerugian negara dalam arti pidana |
| Implikasi Hukum | Administratif dan ganti rugi | Pidana (penjara, denda, uang pengganti) | Mengarah pada pembatasan kriminalisasi melalui BJR | Menegaskan perlunya kehati-hatian dalam mengkualifikasikan kerugian negara |

Perbandingan tersebut menunjukkan bahwa batasan kerugian keuangan negara dalam konteks BUMN tidak dapat dipahami secara tunggal, melainkan harus dilihat secara sistemik antar rezim hukum. Meskipun secara normatif kerugian negara diartikan sebagai kerugian nyata akibat perbuatan melawan hukum, Putusan Mahkamah Konstitusi Nomor 62/PUU-XI/2013 menegaskan bahwa kekayaan BUMN/BUMD tetap merupakan bagian dari keuangan negara yang dipisahkan dan berada dalam lingkup pengawasan BPK. Namun demikian, putusan tersebut juga mengandung implikasi bahwa tidak setiap kerugian dalam aktivitas usaha BUMN dapat serta-merta

dikualifikasikan sebagai kerugian keuangan negara dalam arti pidana korupsi. Oleh karena itu, penilaian terhadap kerugian BUMN harus mempertimbangkan karakteristik risiko bisnis serta adanya perbuatan melawan hukum yang disertai *mens rea*, sehingga tidak terjadi kriminalisasi terhadap keputusan bisnis yang sah.¹⁶

Penentuan apakah suatu kerugian di BUMN dapat dikualifikasikan sebagai “kerugian keuangan negara” pada akhirnya tidak dapat dilakukan secara sederhana, melainkan memerlukan analisis yang bersifat tekstual sekaligus fungsional terhadap berbagai rezim hukum yang mengaturnya. Sebagaimana telah diuraikan sebelumnya, meskipun kekayaan BUMN merupakan kekayaan negara yang dipisahkan dan tetap berada dalam lingkup pengawasan negara, tidak setiap kerugian dalam aktivitas usaha dapat serta-merta diposisikan sebagai kerugian negara dalam arti pidana.

Dalam kerangka tersebut, ketentuan dalam UU BUMN Baru menegaskan bahwa pengelolaan kekayaan negara yang dipisahkan menjadi domain korporasi, namun tetap berada dibawah pengawasan publik.¹⁷ Akibatnya, untuk menyatakan bahwa suatu kerugian BUMN merupakan “kerugian keuangan negara” yang relevan dalam tindak pidana korupsi, diperlukan pembuktian yang lebih ketat melalui dua parameter utama, yaitu: (a) adanya kerugian terhadap kekayaan negara yang secara hukum termasuk dalam lingkup keuangan negara; dan (b) adanya perbuatan melawan hukum yang disertai *mens rea*, seperti motif memperkaya diri, kolusi, atau penyalahgunaan kewenangan. Dalam proses pembuktian tersebut, peran hasil pemeriksaan auditor independen dan BPK menjadi krusial, tidak hanya untuk mengidentifikasi adanya kerugian secara faktual, tetapi juga untuk menilai apakah pengelolaan keuangan BUMN telah menyimpang dari prinsip tata kelola perusahaan yang baik. Dengan demikian, penilaian terhadap kerugian negara dalam konteks BUMN tidak hanya berfokus pada akibat, tetapi juga pada proses dan kualitas pengambilan keputusan yang melatarbelakanginya.¹⁸

¹⁶ Sri Bakti Yunari et al., “Telaah Terhadap Pengaturan Corporate Social Responsibility (CSR) Berbasis Mandatory Di Negara Mauritius” *Jurnal Yuridis*. vol. 11, no. 2, 2024. pp. 258–277. <https://doi.org/10.35586/jjur.v11i2.9599>

¹⁷ Wahyudi, Achmad Fitriani, and Wira Franciska, “Pertanggungjawaban Hukum Bagi Direksi Perusahaan BUMN Berdasarkan Doktrin Business Judgement Rule Yang Merugikan Keuangan Negara” *Perfecto: Jurnal Ilmu Hukum*. vol. 1, no. 3, 2023, pp. 137–144. https://jurnal.ideaspublishing.co.id/index.php/jih/article/view/1485#google_vignette

¹⁸ Angga Prayudha and Bisdan Sigalingging, “Mekanisme Pengembalian Kerugian Keuangan Negara Akibat Proyek Gagal” *Hukum Inovatif : Jurnal Ilmu Hukum Sosial dan Humaniora*, vol. 1, no. 4, 2024, pp. 295–308.

Dalam perspektif hukum korporasi modern, tanggung jawab direksi dan komisaris diukur berdasarkan tingkat kehati-hatian dan itikad baik sebagaimana diatur dalam Pasal 97 ayat (2) dan (3) UU PT. Pasal ini menegaskan kewajiban direksi untuk bertindak dengan itikad baik dan penuh tanggung jawab, serta membuka kemungkinan pertanggungjawaban tanggung renteng apabila terjadi kelalaian yang menimbulkan kerugian. Namun, Pasal 97 ayat (5) memberikan pengecualian melalui prinsip BJR yang menyatakan bahwa direksi tidak dapat dimintai pertanggungjawaban apabila dapat membuktikan bahwa keputusan bisnis diambil dengan itikad baik, penuh pertimbangan rasional, dan tanpa benturan kepentingan. Prinsip ini kemudian diadopsi ke dalam Pasal 9F UU BUMN Baru untuk melindungi pengurus BUMN dari risiko kriminalisasi atas kebijakan bisnis yang sah.¹⁹

Namun demikian, perlindungan dalam kerangka hukum korporasi tersebut tidak serta-merta menutup kemungkinan adanya pertanggungjawaban pidana, sehingga perlu dianalisis bagaimana konsep kesalahan dikonstruksikan dalam konteks korporasi, khususnya pada BUMN. Dalam konteks BUMN, *mens rea* tidak hanya bersifat individual, tetapi juga dapat diatribusikan sebagai kehendak kolektif korporasi melalui keputusan organ pengurus.. Dalam teori pertanggungjawaban pidana korporasi, niat jahat dapat diatribusikan kepada korporasi sepanjang tindakan pengurus dilakukan dalam lingkup kewenangan dan untuk kepentingan korporasi itu sendiri. Pendekatan ini sejalan dengan doktrin *identification theory*, di mana kehendak dan pengetahuan individu pada posisi strategis dianggap sebagai kehendak korporasi. Sebagaimana dikemukakan oleh Muladi, korporasi memiliki “kehendak” yang diwujudkan melalui organ pengurusnya, sehingga pertanggungjawaban pidana dapat dibebankan apabila tindakan tersebut merupakan bagian dari kebijakan korporasi. Namun, atribusi ini tidak boleh dilakukan secara mekanis, sebab korporasi sebagai entitas hukum bertindak melalui struktur yang kompleks. Untuk itu, penentuan *mens rea* korporasi harus didasarkan pada pembuktian bahwa tindakan yang dilakukan merupakan hasil dari keputusan manajerial yang sadar dan terencana, bukan semata-mata kesalahan individu bawahan.²⁰

¹⁹ Wahyudi, Fitriani, and Franciska, “Pertanggungjawaban Hukum Bagi Direksi Perusahaan BUMN Berdasarkan Doktrin Business Judgement Rule Yang Merugikan Keuangan Negara.”

²⁰ Muladi, D. R., DR Dwidja Priyatno, and SH MH. *Pertanggungjawaban Pidana Korporasi: edisi ketiga*. Kencana, 2015.

Selain *identification theory*, hukum pidana modern juga mengenal model pertanggungjawaban lain seperti *strict liability*, *vicarious liability*, dan *corporate culture model*. *Strict liability* memungkinkan pemidanaan tanpa pembuktian kesalahan, namun kurang relevan dalam tindak pidana korupsi yang mensyaratkan *mens rea*. *Vicarious liability* membebankan tanggung jawab kepada korporasi atas perbuatan individu dalam lingkup pekerjaannya, meskipun berpotensi memperluas pertanggungjawaban secara berlebihan. Sementara itu, *corporate culture model* menilai tanggung jawab berdasarkan budaya organisasi yang mendorong atau membiarkan terjadinya pelanggaran.²¹

Dalam kerangka tersebut, pertanggungjawaban pidana dalam BUMN dapat dibebankan kepada direksi maupun korporasi, tetapi tidak secara otomatis, melainkan harus didasarkan pada pembuktian peran dan *mens rea* yang jelas, baik sebagai niat individual maupun kehendak kolektif korporasi. Hal ini sejalan dengan pandangan Barda Nawawi Arief yang menegaskan bahwa kesalahan pidana (*schuld*) tidak hanya ditentukan oleh akibat, tetapi terutama oleh sikap batin pelaku terhadap perbuatannya. Dengan demikian, dalam konteks BUMN, pembuktian *mens rea* harus diarahkan pada adanya kesadaran dan niat untuk menyimpang dari prinsip *good corporate governance*, seperti tindakan yang bertentangan dengan prosedur, menutup informasi material, atau adanya motif keuntungan pribadi. Sebaliknya, keputusan yang diambil dengan itikad baik dan kehati-hatian tidak memenuhi unsur kesalahan pidana.²²

Keterkaitan normatif antara *mens rea*, kerugian keuangan negara, dan tindak pidana korupsi di arena BUMN juga dibatasi oleh mekanisme proteksi terhadap *business judgment* dan aturan tata kelola internal. Dengan demikian, konstruksi pertanggungjawaban pidana di lingkungan BUMN bergerak pada garis tipis: apabila penuntut dapat membuktikan adanya hubungan kausal antara niat jahat (atau atribusi niat kolektif korporasi) dan timbulnya kerugian pada kekayaan yang statusnya dapat dinilai sebagai bagian dari keuangan negara, maka unsur objektif (kerugian) dan subjektif (*mens rea*) untuk tindak pidana korupsi terpenuhi. Namun, jika yang terjadi adalah kerugian akibat kebijakan bisnis yang diambil dengan itikad baik, kehati-hatian,

²¹ *Ibid.*

²² M.H Dr. Lukman Hakim, S.H., *Buku Ajar Asas-Asas Hukum Pidana Buku*, (Yogyakarta: Deepublish (CV Budi Utama), 2020).

tanpa benturan kepentingan, dan disertai bukti tata kelola (risalah rapat, analisis kelayakan, laporan audit, dan kontrak manajemen), maka norma pembebasan pertanggungjawaban (*business judgment protection*) dan pengaturan khusus BUMN akan membatasi kemungkinan kriminalisasi terhadap keputusan ekonomi tersebut.²³

2. Penerapan Prinsip *Business Judgement Rule* Terhadap Tindakan Direksi Badan Usaha Milik Negara Agar Tidak Dikualifikasikan Sebagai Perbuatan Tindak Pidana Korupsi

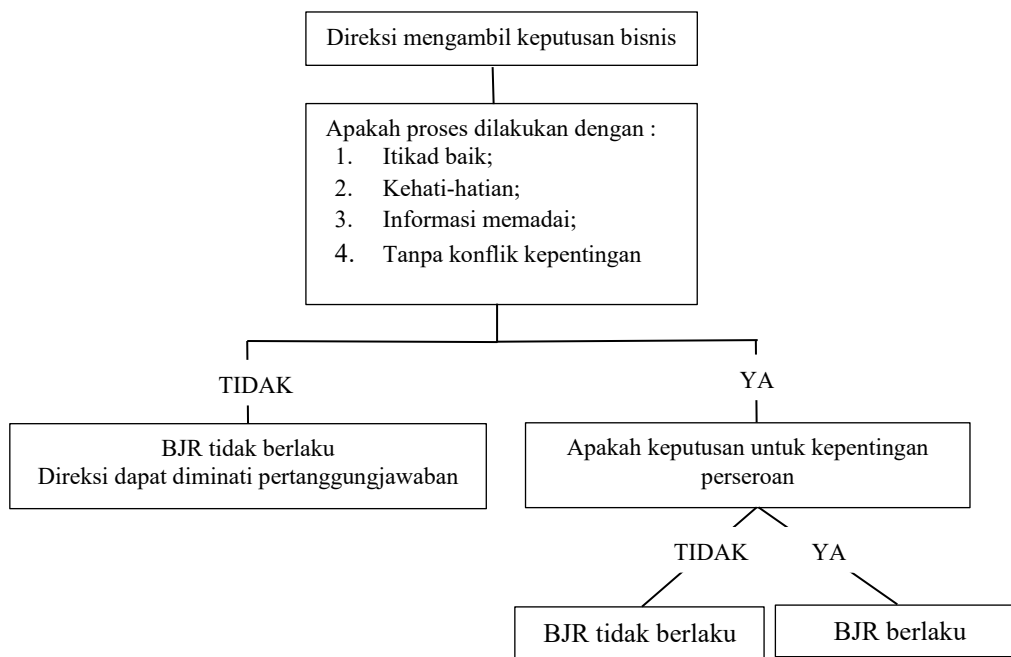
Penerapan prinsip BJR dalam konteks BUMN menjadi krusial mengingat posisi BUMN yang berada pada persimpangan antara rezim privat dan publik. Direksi BUMN tidak hanya dituntut mengambil keputusan bisnis yang efisien, tetapi juga harus mempertanggungjawabkan pengelolaan kekayaan negara yang dipisahkan. Kondisi ini menimbulkan kebutuhan akan standar penilaian yang mampu membedakan antara risiko bisnis yang sah dan perbuatan yang berpotensi dikualifikasikan sebagai tindak pidana korupsi.

Dalam konteks hukum Indonesia, prinsip BJR memperoleh legitimasi normatif ketika ketentuan-ketentuannya diserap secara eksplisit dalam UU PT. Ketentuan dalam Pasal 92 sampai dengan Pasal 97 UU PT mengatur secara komprehensif tugas, kewenangan, dan tanggung jawab direksi sebagai organ perseroan yang memegang fungsi pengurusan. Lebih spesifik, tanggungjawab direksi diatur dalam Pasal 97 ayat (3) UU PT yang menyatakan bahwa direksi bertanggung jawab penuh secara pribadi atas kerugian Perseroan apabila yang bersangkutan bersalah atau lalai menjalankan tugasnya. Meskipun demikian, UU PT memberikan pengecualian dalam Pasal 97 ayat (5), yang memberikan pengecualian terhadap pertanggungjawaban direksi sepanjang keputusan diambil dengan itikad baik, kehati-hatian, tanpa benturan kepentingan, dan untuk kepentingan perseroan. Rumusan ini sejatinya merupakan bentuk kodifikasi utuh atas doktrin BJR, yang mewajibkan pembuktian tiga unsur fundamental yaitu *good faith*,

²³ Aulia Ali Reza, *Pertanggungjawaban Korporasi dalam Rancangan KUHP*, Ed. Supriyadi Widodo Eddyono *Institute for Criminal Justice Reform & Aliansi Nasional Reformasi KUHP*. vols. (Jakarta: Institute for Criminal Justice Reform, 2015), Available: <http://mappifhui.org/wp-content/uploads/2016/12/Pertanggungjawaban-Korporasi-dalam-Rancangan-KUHP.pdf>.

due care, dan *best interest of the company* sebagai kriteria objektif dalam menilai kewajaran proses pengambilan keputusan bisnis oleh direksi.²⁴

Chart 1. *Alur Business Judgment Rule*



Relevansi BJR menjadi semakin menonjol ketika diterapkan dalam pengelolaan BUMN, mengingat karakter BUMN yang berada pada persimpangan antara rezim privat dan publik. Dalam konteks ini, UU BUMN Baru menghadirkan inovasi normatif yang signifikan dengan mengatur secara lebih komprehensif mekanisme perlindungan bagi direksi dalam pengambilan keputusan bisnis. Salah satu penguatan paling penting adalah pengkodifikasian prinsip BJR dalam Pasal 9F, yang pada dasarnya mereplikasi inti Pasal 97 ayat (5) UU PT. Pasal tersebut menegaskan bahwa anggota direksi (serta komisaris/pengawas) tidak dapat dimintai pertanggungjawaban hukum atas kerugian perusahaan sepanjang dapat dibuktikan bahwa:²⁵

- 1) kerugian bukan akibat kesalahan atau kelalaiannya;
- 2) pengurusan dilakukan dengan itikad baik dan kehati-hatian;

²⁴ Ari Wibowo, "Penentuan Kriteria Unsur Pengalihan Wewenang Dalam Perkara Tindak Pidana Korupsi (Studi Putusan Pengadilan)" *Jurnal Yuridis*. vol, 7, no. 1, 2020, pp. 120–148. <https://doi.org/https://doi.org/10.35586/jjur.v7i1.1025>.

²⁵ Wahyudi, Fitriani, and Franciska, "Pertanggungjawaban Hukum Bagi Direksi Perusahaan BUMN Berdasarkan Doktrin Business Judgement Rule Yang Merugikan Keuangan Negara."

- 3) tidak terdapat benturan kepentingan; dan
- 4) telah melakukan tindakan pencegahan untuk mencegah atau menghentikan kerugian.

Dengan demikian, norma ini memberikan landasan eksplisit bahwa tidak setiap kerugian BUMN dapat dikaitkan dengan perbuatan pidana, melainkan harus terlebih dahulu diuji melalui proses pengambilan keputusan yang memenuhi standar BJR.

Dalam kerangka teoritis, pengaturan tersebut dapat dipahami sebagai bentuk perlindungan hukum terhadap direksi dalam menjalankan fungsi pengurusan perusahaan. Mengacu pada pandangan Philipus M. Hadjon, perlindungan hukum merupakan upaya untuk memberikan jaminan terhadap hak subjek hukum agar tidak dirugikan oleh tindakan negara maupun pihak lain. Dalam konteks ini, BJR berfungsi sebagai mekanisme perlindungan preventif, karena sejak awal menetapkan bahwa keputusan bisnis yang diambil dengan itikad baik, kehati-hatian, dan tanpa benturan kepentingan tidak dapat serta-merta dikriminalisasi. Oleh karena itu, BJR tidak hanya berperan sebagai doktrin dalam hukum korporasi, tetapi juga sebagai instrumen yang menjaga keseimbangan antara akuntabilitas dan kebebasan manajerial direksi.

Dalam kaitannya dengan penentuan kerugian tersebut, UU BUMN Baru juga menegaskan pemisahan kekayaan BUMN dari keuangan negara sebagaimana diatur dalam Pasal 4B, yang menempatkan kekayaan BUMN sebagai kekayaan negara yang dipisahkan dan dikelola dalam kerangka korporasi. Ketentuan ini perlu dibaca secara sistematis dengan rezim keuangan negara, khususnya UU Keuangan Negara, yang mendefinisikan keuangan negara sebagai seluruh hak dan kewajiban negara yang dapat dinilai dengan uang, termasuk kekayaan yang berada dalam penguasaan perusahaan negara. Di sisi lain, rezim tindak pidana korupsi tetap mensyaratkan adanya perbuatan melawan hukum atau penyalahgunaan kewenangan yang menimbulkan kerugian keuangan negara. Oleh karena itu, pemisahan kekayaan dalam Pasal 4B UU BUMN Baru tidak serta-merta meniadakan karakter keuangan negara, melainkan berfungsi membatasi penafsiran agar tidak setiap kerugian bisnis dikualifikasikan sebagai kerugian negara dalam arti pidana. Konsekuensinya, suatu kerugian BUMN hanya dapat dikualifikasikan sebagai kerugian keuangan negara apabila terdapat keterkaitan langsung dengan penyalahgunaan dana yang bersumber dari APBN atau adanya hubungan kausal antara perbuatan melawan hukum dengan

timbulnya kerugian tersebut, sehingga memenuhi unsur-unsur dalam Pasal 2 atau Pasal 3 UU Tipikor.²⁶

Perdebatan mengenai cakupan kerugian negara dalam konteks ini juga tercermin dalam pandangan para ahli. Andi Hamzah menekankan pentingnya pembuktian bahwa dana yang disalahgunakan berasal dari APBN atau APBD, bukan sekadar dana operasional BUMN. Sementara itu, Hikmahanto Juwana berpendapat bahwa kerugian BUMN tidak otomatis merupakan kerugian negara, sehingga pemidanaan hanya dapat dibenarkan apabila terdapat bukti adanya niat jahat untuk memperkaya diri atau pihak lain. Pandangan ini menunjukkan bahwa penilaian terhadap kerugian harus dikaitkan dengan unsur kesalahan, bukan semata-mata akibat yang ditimbulkan.²⁷

Meskipun demikian, penerapan BJR tidak bersifat absolut. Prinsip ini tidak dapat dijadikan tameng apabila terdapat bukti bahwa direksi melakukan perbuatan melawan hukum secara nyata, seperti bertindak di luar kewenangan, memiliki motif koruptif, atau mengambil keputusan yang tidak berorientasi pada kepentingan perseroan. Dalam kondisi demikian, kerugian yang timbul dapat dikualifikasikan sebagai kerugian negara sepanjang memenuhi unsur peraturan perundang-undangan. Dengan kata lain, BJR tidak menghapus pertanggungjawaban pidana, melainkan berfungsi untuk membedakan antara risiko bisnis yang sah dan tindakan melawan hukum yang disamakan sebagai keputusan bisnis.²⁸

Persoalan menjadi kompleks ketika dikaitkan dengan kedudukan direksi BUMN yang masih dianggap sebagai penyelenggara negara dalam konteks hukum publik. Status ini menyebabkan direksi berada dalam risiko lebih tinggi untuk dijerat Pasal 3 UU Tipikor mengenai penyalahgunaan kewenangan. Unsur penyalahgunaan kewenangan adalah unsur yang sangat lentur dan dalam praktik kerap didasarkan pada penilaian terhadap hasil, bukan proses, sehingga membuka peluang kriminalisasi kebijakan bisnis yang mengalami kegagalan. Ketika penilaian kerugian negara dilakukan melalui audit investigatif yang bersifat *ex post facto*, auditor cenderung keputusan bisnis masa lalu kerap dinilai menggunakan standar informasi masa kini

²⁶ Dr. Suhartati, S.H., Dr. Elfina Lebrine Sahetapy, S.H., and Hwian Christianto, S.H., *Anatomi Kejahatan Korporasi*.

²⁷ Perdana and Batubara, "Implikasi Disparitas Putusan Hakim dalam Penerapan Prinsip Business Judgement Rule terhadap Implementasi Tujuan Hukum."

²⁸ Reza, *Pertanggungjawaban Korporasi dalam Rancangan KUHP*.

tanpa mempertimbangkan konteks strategis pada saat keputusan tersebut diambil. Kondisi ini berpotensi mengaburkan perbedaan antara *business loss* dan *unlawful loss*.²⁹

Dalam persepektif tindak pidana korupsi, UU Tipikor mengandung beberapa unsur penting yang sering menjadi titik benturan dengan ruang diskresi direksi dalam perusahaan, yaitu unsur penyalahgunaan kewenangan, unsur memperkaya diri atau orang lain, dan unsur kerugian keuangan negara. Dalam praktik penegakan hukum, ketiga unsur ini sering didalilkan berdasarkan hasil akhir keputusan bisnis, bukan prosesnya. Akibatnya, kegagalan bisnis dapat dengan mudah ditafsirkan sebagai perbuatan melawan hukum. Di sinilah peran BJR diperlukan sebagai *framework* penilaian untuk menilai apakah kerugian tersebut merupakan konsekuensi risiko bisnis atau akibat penyalahgunaan kewenangan yang disertai niat jahat.³⁰

Aplikasi BJR pada tindakan direksi BUMN menuntut pemenuhan berbagai kriteria substantif yang menunjukkan bahwa keputusan tersebut merupakan tindakan bisnis yang wajar. Pertama, keputusan harus diambil dengan itikad baik, yang tercermin dari tidak adanya kepentingan pribadi, tidak adanya motif curang, serta tidak ditujukan untuk memberikan keuntungan tersembunyi bagi pihak tertentu. Kedua, keputusan harus didasarkan pada informasi yang memadai, yang diperoleh melalui kajian risiko, analisis kelayakan, atau pendapat profesional yang relevan. Ketiga, keputusan tersebut harus bebas dari konflik kepentingan, baik yang bersifat langsung maupun tidak langsung. Keempat, keseluruhan proses pengambilan keputusan harus ditujukan untuk kepentingan perusahaan dan dilakukan melalui prosedur yang dapat dipertanggungjawabkan. Dalam praktik di BUMN, tindakan yang bersifat strategis seperti pembelian aset bernilai besar, restrukturisasi usaha, investasi berisiko, kerja sama dengan mitra strategis, hingga pengadaan barang dan jasa sering kali menjadi objek penyidikan, terutama ketika tidak didukung oleh dokumentasi yang memadai. Padahal, dokumentasi proses, seperti risalah rapat, analisis kelayakan, dan pendapat profesional, merupakan bagian penting dalam kerangka BJR, karena berfungsi sebagai

²⁹ Firwanda Sandi Pradipta and Ermania Widjajanti, "Pembaharuan Hukum Pidana Korupsi Dalam Pengelolaan BUMN Pasca Revisi UU No 1 Tahun 2025."

³⁰ Abdurrahman Alhakim et al., "Corruption Risks in Smart City Initiatives in Indonesia: Analysis of Legal Framework Adequacy" *Kosmik Hukum*. vol. 25, no. 3, 2025, pp. 631–642. <https://doi.org/10.35586/jjur.v7i1.1025>.

alat bukti bahwa keputusan telah diambil melalui prosedur yang benar dan berdasarkan pertimbangan yang rasional.³¹

Ilustrasi konkret mengenai batas penerapan BJR dapat dilihat dalam kasus yang melibatkan Bank BJB Syariah sebagai anak perusahaan dari Bank BJB. Kasus ini bermula dari pemberian fasilitas pembiayaan sekitar Rp566 miliar, yang dalam pelaksanaannya ditemukan tidak memenuhi prinsip kehati-hatian perbankan. Penyimpangan yang terjadi antara lain berupa pemberian pembiayaan tanpa jaminan yang memadai serta penggunaan dana oleh debitur yang tidak sesuai dengan tujuan pembiayaan. Kondisi tersebut kemudian dinilai oleh aparat penegak hukum sebagai perbuatan yang menimbulkan kerugian keuangan negara dalam jumlah signifikan.

Dalam proses penegakan hukum, perkara ini diperiksa dan diputus di Pengadilan Tindak Pidana Korupsi Bandung, di mana beberapa pejabat internal, termasuk mantan Pelaksana Tugas Direktur Utama, dinyatakan terbukti secara sah dan meyakinkan melakukan tindak pidana korupsi secara bersama-sama. Dari perspektif BJR, putusan ini menunjukkan bahwa tindakan direksi tidak dipandang sebagai bagian dari diskresi bisnis yang sah, melainkan sebagai bentuk penyimpangan yang memenuhi unsur perbuatan melawan hukum. Hal ini terutama didasarkan pada adanya pelanggaran terhadap prosedur internal dan pengabaian prinsip kehati-hatian yang seharusnya menjadi dasar dalam setiap pengambilan keputusan bisnis.³²

Lebih lanjut, kasus ini menegaskan dua hal penting dalam kerangka analisis. Pertama, secara praktis, kerugian pada entitas anak perusahaan BUMD tetap dapat dikualifikasikan sebagai kerugian keuangan negara apabila terdapat penyalahgunaan kewenangan yang berdampak pada berkurangnya nilai kekayaan dalam lingkup penguasaan negara. Kedua, kegagalan penerapan BJR dalam perkara ini menunjukkan bahwa doktrin tersebut tidak dapat dijadikan pembelaan apabila proses pengambilan keputusan telah menyimpang dari standar kehati-hatian, termasuk pelanggaran SOP dan ketiadaan dasar informasi yang memadai. Dengan demikian, perlindungan BJR hanya berlaku sepanjang keputusan bisnis diambil secara profesional dan sesuai dengan

³¹ Sidabutar, "Penerapan Prinsip Business Judgement Rule Oleh BUMN Terkait Keuangan Negara (Studi Kasus putusan nomor 18 / PID . SUS-TPK / 2018 / PT . DKI dan 9 / PID . SUS- TPK / 2019 / PT . DKI)."

³² Tempo, "Dulu Kasus Korupsi Menjerat Bank BJB Syariah, Kini Menimpa Bank BJB," Tempo.co, diakses 10 April 2026, <https://www.tempo.co/ekonomi/dulu-kasus-korupsi-menjerat-bank-bjb-syariah-kini-menimpa-bank-bjb--1218597>.

prinsip tata kelola perusahaan yang baik, bukan untuk melindungi tindakan yang secara nyata merupakan perbuatan melawan hukum.

Dengan ini dapat dikatakan bahwa BJR dapat dipahami sebagai instrumen normatif yang berfungsi memilah antara tindakan bisnis yang sah dan tindakan yang berpotensi koruptif. Prinsip ini tidak memberikan kekebalan hukum, melainkan menyediakan standar objektif bagi penegak hukum dan pengadilan dalam menilai proses pengambilan keputusan direksi. Ketika direksi mampu menunjukkan bahwa keputusan diambil berdasarkan itikad baik, kehati-hatian, serta didukung oleh informasi yang memadai, maka pembuktian unsur *mens rea* dalam tindak pidana korupsi menjadi semakin sulit dilakukan. Sebaliknya, ketiadaan transparansi, dokumentasi, maupun kepatuhan terhadap prinsip tata kelola perusahaan akan melemahkan posisi pembelaan berbasis BJR.³³

Dalam kerangka tersebut, keterkaitan antara BJR dan *mens rea* terletak pada fungsi BJR sebagai parameter untuk menilai ada tidaknya niat jahat dalam pengambilan keputusan. Tindak pidana korupsi sebagai *specific intent crime* mensyaratkan pembuktian bahwa pelaku mengetahui dan menghendaki terjadinya kerugian negara atau memperkaya diri maupun orang lain.³⁴ Oleh karena itu, apabila direksi dapat menunjukkan bahwa tindakannya telah memenuhi standar BJR, maka secara normatif unsur kesengajaan menjadi sulit terpenuhi. Dalam beberapa literatur, BJR bahkan dipandang sebagai “bukti negatif” terhadap keberadaan niat jahat, karena menunjukkan bahwa keputusan tersebut merupakan hasil pertimbangan profesional, bukan tindakan kriminal. Dengan demikian, BJR berpotensi menjadi filter normatif yang penting untuk mencegah kriminalisasi terhadap keputusan bisnis yang diambil secara sah.³⁵

Meski demikian, penerapan BJR dalam konteks BUMN pun tidak terlepas dari berbagai tantangan struktural maupun praktis. Salah satu kendala utama terletak pada mekanisme pembuktian kerugian negara oleh auditor negara yang sering kali belum mencerminkan pendekatan bisnis berbasis risiko, melainkan cenderung berorientasi

³³ Kuswandi, Junadi, and Putri, “Penerapan Prinsip Business Judgement Rule Dalam Putusan Lepas Terkait Tindak Pidana Korupsi Direktur Korporasi.”

³⁴ Ahmad Sofian Sofian et al., “Corporate Liability In Child Rights Violations” *Kosmik Hukum*. vol. 25, no. 1, 2025. p. 191. [10.59581/doktrin.v4i1.5912](https://doi.org/10.59581/doktrin.v4i1.5912)

³⁵ Mallarangeng et al., “Pembuktian Unsur Niat Dikaitkan Dengan Unsur Mens Rea Dalam Tindak Pidana Korupsi Andi.”

pada hasil akhir. Selain itu, status ganda BUMN sebagai entitas privat sekaligus instrumen negara menempatkan direksi dalam posisi yang rentan terhadap penerapan pasal-pasal penyalahgunaan kewenangan. Permasalahan ini diperparah oleh ketidakseragaman penegakan hukum antara KPK, Kejaksaan, dan Kepolisian, yang berimplikasi pada tidak konsistennya standar pembuktian dalam praktik. Di sisi lain, budaya hukum yang masih menitikberatkan pada hasil dibandingkan proses turut meningkatkan risiko kriminalisasi terhadap kebijakan bisnis yang sebenarnya sah. Lebih lanjut, batas antara ranah privat perusahaan dan ranah publik negara juga belum dirumuskan secara tegas, khususnya dalam konteks pemisahan aset, sehingga menimbulkan ketidakpastian dalam menentukan ruang lingkup pertanggungjawaban hukum direksi.

Dalam konteks tersebut, diperlukan upaya harmonisasi regulasi agar prinsip BJR dapat berfungsi secara optimal dalam rezim anti-korupsi. Sinkronisasi antara UU BUMN Baru, UU Perseroan Terbatas, dan UU Tindak Pidana Korupsi menjadi krusial, terutama dalam menafsirkan unsur kerugian negara dan penyalahgunaan kewenangan. Di samping itu, penguatan sistem *compliance*, audit internal, serta penerapan prinsip *good corporate governance* harus ditempatkan sebagai fondasi utama dalam tata kelola BUMN. Dengan demikian, penerapan BJR secara konsisten tidak hanya memberikan perlindungan terhadap direksi dalam menjalankan fungsi bisnis secara profesional, tetapi juga tetap menjaga akuntabilitas dalam pengelolaan keuangan negara dari potensi tindakan koruptif.

III. CONCLUSION

UU BUMN Baru menegaskan bahwa tidak semua kerugian BUMN dapat dianggap sebagai kerugian keuangan negara dalam arti pidana, karena harus dibuktikan adanya perbuatan melawan hukum yang disertai *mens rea*. Dalam konteks ini, prinsip BJR dalam Pasal 9F UU BUMN Baru berfungsi sebagai batas normatif yang melindungi direksi sepanjang bertindak dengan itikad baik, kehati-hatian, dan tanpa benturan kepentingan. BJR juga menjadi alat untuk membedakan antara kesalahan bisnis, kelalaian manajerial, dan tindak pidana korupsi.

Dengan demikian, penilaian terhadap kerugian tidak hanya didasarkan pada

akibat, tetapi juga pada proses pengambilan keputusan. Penerapan BJR memastikan bahwa tidak semua kerugian bisnis dapat dikriminalisasi, kecuali terdapat pelanggaran prinsip kehati-hatian dan unsur niat jahat. Pendekatan ini menjaga keseimbangan antara perlindungan kebebasan manajerial direksi dan akuntabilitas dalam pengelolaan BUMN.

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Constitutional Antinomy: Transition of Term of Office and Quo Vadis of Elections After the Decision of the Constitutional Court

No.135/PUU-XXII/2024

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ABSTRACT

The Constitutional Court's Decision No. 135/PUU-XXII/2024 marks a fundamental reformulation of the design of election synchronization in Indonesia. The separation between the national and regional elections ordered by the Court opens up space for the rearrangement of the electoral system in a more functional direction, but at the same time creates new tensions in terms of term of office and power transition scheme. This article analyzes the constitutional implications of the ruling using a normative juridical research method, which relies on the legislative approach and the Constitutional Court's ruling. The discussion focused on two main aspects: first, the tension between the Constitutional Court's decision and the constitutional provisions related to the term of office; Second, the draft of a legitimate and legitimate transition of power, including the idea of a "limited extension with constitutional basis." This study shows that the implementation of the Constitutional Court's decision must be differentiated based on the normative sources of public office, and that the transitional design must uphold the supremacy of the constitution and the principles of electoral democracy. Without the prudence of legal design, the potential for power engineering will overshadow this post-verdict democratization process.

Keywords: Constitutional Court Decision No.135/PUU-XXII/2024; Transition of Term; National-Regional Elections.

I. INTRODUCTION

The problem that will be covered in the manuscript's introduction should be made apparent. Before the objective, authors should provide a sufficient background and a very brief literature review to record the existing solutions, to highlight the best prior research, to highlight the main limitation of the prior research, to highlight what the authors hope to accomplish (to address the limitation), and to highlight the paper's novelty or scientific merit

The discussion contains a description of the research results or the results of theoretical/conceptual studies for review manuscripts. The results should summarize (scientific) findings rather than providing data in detail. Please highlight differences between your results or findings and the previous publications by other researchers. If there are details according to the problem and using sub-chapters, it can be written in accordance with the writing of the sub-chapters below. It is also noteworthy to say that no body text reference is allowed in the manuscript, please use foot note reference only.

The Constitutional Court Decision No. 135/PUU-XXII/2024 is an important milestone in the systemic correction of the design of the simultaneity of national elections. The "Five-Box Election" model implemented since 2019 has created excessive pressure on organizers, lowered the quality of voter participation, and disrupted the rationality of the presidential system.¹ As a solution, the Court introduced a scheme of two concurrent clusters, namely national elections and regional elections. Constitutionally, the Court relied on this interpretation on the phrase "carried out simultaneously" in Article 22E of the 1945 Constitution, but with a new meaning that emphasizes grouping, not the concentration of implementation time. However, this structural correction is not legally neutral; It carries serious implications for the design of tenure and the direction of the transition of power, which in practice is particularly vulnerable to political manipulation.

One of the fundamental implications of the separation of the synchronization cluster is the need to adjust the term of office of regional heads and especially the DPRD whose term of office is explicitly regulated in Article 22E paragraph (1) of the 1945 Constitution, which is five years. This provision is rigid and does not open up room for flexibility

¹ Saputra, M. R. Sistem politik tanpa partai di Indonesia: Tantangan, peluang, dan dampaknya terhadap demokrasi. *Jurnal Lanskap Politik*, Vol.2, no.2, 2024, Pp. 77-105. <http://doi.org/10.31942/jlp.2024.2.2>

except through constitutional amendments. On the other hand, regional heads have a legal basis for term of office sourced from the law (Law No. 10 of 2016), so they are more flexible technically.² As a consequence of implementing the Constitutional Court's decision in its entirety, the state is faced with the dilemma between adjusting the term of office of legislative members to the implementation of new elections or ignoring the constitution if it shortens or extends their terms. This is where the issue of antinomy begins to be seen, when two equally binding legal norms, namely the constitution and the Constitutional Court's ruling, have the potential to contradict each other in the level of execution.

In constitutional law, the condition in which the implementation of one legal norm leads to a violation of another legal norm is called a problem duality or normative antinomy.³ This dilemma is serious when it involves constitutional norms as the supreme law (constitutional supremacy) and the decisions of the constitutional court that are final and binding. If the state does not implement the Constitutional Court's decision, it will juridically violate the highest court's order in the interpretation of the constitution. However, if the state implements it by shortening or extending the term of office that has been determined by the constitution, it has the potential to commit a constitutional violation. This creates space for constitutional engineering, which is a political strategy using legal interpretation to change or delay the cycle of power without formal amendments, but through transitional justification that is administrative.⁴

Constitutional engineering in the transition of positions is not just a technocratic issue, but a legal political problem that touches the essence of constitutional democracy. Term of office in the presidential system is not only a matter of the period of power, but also part of the checks and balances mechanism. When the term of office can be extended or shortened under the pretext of transition, the logic of *limited government* has the potential to be eroded. Therefore, this Constitutional Court Decision should be read not only as a correction of the electoral system, but as a test of our constitutional commitment

² Sodikin, S. Pemilihan Kepala Daerah dalam Konteks UUD NRI tahun 1945. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, vol. 4, no. 1, 2015, Pp. 43-58. <http://dx.doi.org/10.33331/rechtsvinding.v4i1.47>

³ Endrik Safudin. (2021). *Harmonisasi Hukum dalam Antinomi Hukum: Telaah Kritis atas Penerapannya oleh Mahkamah Agung*. Q Media, Yogyakarta, hlm. 33.

⁴ Al Alawi, M. N. K. Implementasi Teori Law as a Tools of Social Engineering Mahkamah Konstitusi sebagai Instrumen Kontrol Sosial dalam Sistem Hukum Indonesia. *Indonesian Journal of Law and Justice*, vol 2, no. 2, 2014. <https://doi.org/10.47134/ijlj.v2i2.3393>

to maintaining the stability, legitimacy, and supremacy of the constitution in the midst of changes in electoral design.⁵

From a political and legal perspective, the difference in the source of norms between the term of office of regional heads regulated in the Law and the term of office of the DPR/DPRD regulated in the constitution creates structural tension in the implementation of the Constitutional Court's decision. If the government wants to hold two different elections in separate time frames, then some public positions will expire their five-year period, while others will end sooner. Without explicit and constitutional transitional arrangements, these schemes risk delegitimizing power.⁶ Therefore, the transitional design must reflect the principles of electoral justice, power limitations, and legal certainty. No public office may be unconstitutionally extended or shortened under the pretext of technical effectiveness. Transitional legislation that contains a *cut-off* of positions, a limited transition period, or a partial election may be an option, but it must still be based on a constitutional mandate, not an elite compromise.

The Constitutional Court's decision also raises the issue of the legitimacy of separate national and local elections, especially in terms of the governance cycle and the relationship between the executive and the legislature. The separation of election time opens up space for differences in inauguration times that can disrupt the continuity of government.⁷ Within the framework of the presidential system, the legitimacy of the central government is highly dependent on continuity between the president and legislative support. Similarly in the regions, disharmony between regional heads and DPRDs who are elected at different times will increase the potential for friction and disrupt development planning.⁸ This means that term and transition design not only impact individual public officials, but touch the heart of national and regional governance.

⁵ Siboy, A., & Nur, M. Konstitusionalitas Pengangkatan Penjabat Kepala Daerah dalam Putusan MK. *Jurnal Jurisprudence*, vol. 13, no. 2, 2023, pp. 244-263.

<https://doi.org/10.23917/jurisprudence.v13i2.2794>

⁶ Prasetya, S. M., & Soetijono, I. R. Politik Hukum Penundaan Pemilihan Umum Kepala Daerah Serentak 2020. *Jurnal Kajian Konstitusi*, vol. 2, no. 1, 2022, pp. 48-68. <https://doi.org/10.19184/jkk.v1i3.31761>

⁷ Kelibay, I., Boinawu, I., Rosnani, R., & Kalagison, M. D. Dinamika Pemilihan Kepala Daerah Serentak Nasional Dalam Pemilihan Umum Tahun 2024. *Jurnal Noken: Ilmu-Ilmu Sosial*, vol. 7, no. 2, 2022, pp. 167-181. <https://doi.org/10.33506/jn.v7i2.1739>

⁸ Hendro, H., & Susilowati, T. Implementasi Legitimasi Demokrasi Dalam Hukum Pemilihan Umum (Pemilu). *Jaksa: Jurnal Kajian Ilmu Hukum dan Politik*, vol. 2, no. 1, 2024, pp. 85-94. <https://doi.org/10.51903/jaksa.v2i1.1487>

This article aims to critically and systematically analyze the constitutional implications of the Constitutional Court Decision No. 135/PUU-XXII/2024 on the term of office of public office, by highlighting the potential antinomy between constitutional norms and the Court's rulings, as well as the engineering loopholes in the transition of power. Through a normative juridical approach and a limited comparative study, this article identifies the problem of constitutionality in the new term scheme and offers a model of transitional legislation that is constitutionally compliant, politically just, and rational within the framework of electoral democracy.

II. DISCUSSION

1. Antinomy of Norms of the 1945 Constitution and Interpretation of the Constitutional Court

The Constitutional Court Decision No. 135/PUU-XXII/2024 is a judicial intervention that is not only corrective to the design of the five-box election, but also contains constitutional consequences that go beyond the technical realm of elections. In its consideration, the Court adopted a progressive interpretation of Article 22E of the 1945 Constitution of the Republic of Indonesia which mandates that elections be held simultaneously. However, in the construction of the Court, simultaneity does not have to be interpreted as a concentration of time in one day, but as an election cycle consisting of two waves, namely national and regional.⁹ This interpretation does have administrative rationality and pay attention to the burden of the organizers, but ignores its direct connection with constitutional norms regarding the term of office, especially members of the House of Representatives and the House of Representatives. This opens up space for tension between two legal norms that both have a binding nature, namely the written norms of the Constitution and constitutional interpretation by the Court.

This tension stems from the position of term norms in the structure of Indonesian constitutional law. Article 22E paragraph (1) of the 1945 Constitution of the Republic of Indonesia explicitly states that elections for members of the DPR, DPD, and DPRD are

⁹ Hantoro, B. F. Originalisme dan Syarat Keserentakan Pemilu dalam Putusan Mahkamah Konstitusi. *Undang: Jurnal Hukum*, vol. 6, no. 1, 2023, pp. 33-64. <https://doi.org/10.22437/ujh.6.1.33-64>

held every five years. This norm is rigid and contains a constitutional mandate on the principle of periodization of power in the electoral democratic system.¹⁰ Therefore, any attempt to extend or cut the term of office of the legislature must be subject to the mechanism of constitutional amendment, not merely administrative justification or institutional interpretation. This is where the problem lies, Constitutional Court Decision No. 135/PUU-XXII/2024, although it does not explicitly regulate the extension or cut of term of office, demands the consequences of adjusting the election time which is very likely to shift the term of office. In other words, the Court creates a normative effect that is in direct contact with a rigid constitutional design.

In constitutional law doctrine, this situation is known as constitutional antinomy. Constitutional antinomy is a conflict between two legal norms that both originate from the constitution or have constitutional binding force.¹¹ On the one hand, the Constitutional Court's decision is final and binding, and has legal force equivalent to the constitution in terms of interpretation. But on the other hand, the written provisions in the Constitution remain the highest basic law (*grundnorm*) that cannot be overruled. If the implementation of the Constitutional Court's decision has an impact on the extension of the position of the DPR or DPRD, then the state has the potential to violate Article 22E of the Constitution. On the other hand, if it does not implement the Court's decision, the state also violates the principle of compliance with binding judicial decisions. This creates an executive and legislative dilemma, as well as invites debate in the academic community about the limits of constitutional interpretation by the judiciary.

This antinomy implication opens up a large space for what scholars call constitutional engineering. This term is basically neutral, referring to all forms of normative engineering to rearrange the constitutional system according to the demands of the times.¹² But in the practice of political law, engineering often deviates from constitutional ethics, especially when used to perpetuate power, extend term of office, or delay elections. In the context of the Constitutional Court's Decision No. 135/PUU-

¹⁰ Ramdani, A. K., & Hulwanullah, H. Dampak Penafsiran Konstitusi Terhadap Perkembangan Politik Hukum Penyelesaian Perselisihan Hasil Pemilihan. *ADLIYA: Jurnal Hukum dan Kemanusiaan*, vol. 16, no. 2, 2022, pp. 178-197. <https://doi.org/10.15575/adliya.v16i2.20586>

¹¹ Endrik Safudin. (2021). *Harmonisasi Hukum dalam Antinomi Hukum: Telaah Kritis atas Penerapannya oleh Mahkamah Agung*. Q Media, Yogyakarta, hlm. 33.

¹² Al Alawi, M. N. K. Implementasi Teori Law as a Tools of Social Engineering Mahkamah Konstitusi sebagai Instrumen Kontrol Sosial dalam Sistem Hukum Indonesia. *Indonesian Journal of Law and Justice*, vol. 2, no. 2, 2024. <https://doi.org/10.47134/ijlj.v2i2.3393>

XXII/2024, a transition space that is not designed with strict norms has the potential to be infiltrated by political interests to justify extending the terms of office of members of the House of Representatives and the House of Representatives outside the amendment mechanism. This situation demands strict supervision and clarity of the transitional legal design so that constitutional interpretation does not turn into a pragmatic tool of the elite to secure positions of power.

Constitutional Court Decision No. 135/PUU-XXII/2024 does not explicitly stipulate the extension or cut of the term of office of public officials. However, the Court recognizes that the separation of national and regional elections in two waves will have an impact on a non-uniform calendar of positions. In its consideration, the Court leaves it to the lawmakers to prepare an adequate transition design. However, the Court also emphasized that the arrangement must pay attention to the term of office as stipulated in the 1945 Constitution, especially for central and regional legislative institutions. Thus, the Court does not provide a "blank check" for power engineering, but rather demands constitutional rigor in drafting transitional arrangements. Therefore, the space between the decision and the implementation is an important arena that must be filled with democratic, legal, and legitimate policies.

The problem lies in the operational ambiguity of the phrase "adjusted in law" as used by the Court. On the one hand, lawmakers are given the flexibility to design implementation schemes. On the other hand, there is no rigid guidance in the decision regarding how to avoid conflicts with the norm of the five-year term of office in Article 22E paragraph (1) of the 1945 Constitution. The phrase "adjusted" can be interpreted to mean an extension of office, the appointment of an official, or a separate election outside of the ideal cycle.¹³ This guideline vacuum can create a constitutional fabrication that violates the principle of limited government. If the meaning of "adjustment" is carried out opportunistically by the lawmakers, then the transition space can turn into a space for manipulation, not systemic correction.

In the doctrine of constitutional governance, the design of the transition of power is not only technical, but also a substantive constitutional moment that determines the

¹³ Cafaggi, F., & Iamiceli, P. Uncertainty, administrative decision-making and judicial review: The courts' perspectives. *European Journal of Risk Regulation*, vol. 12, no.4, 2021, pp. 792-824. <https://doi.org/10.1017/err.2021.47>

direction of electoral accountability. The Court has indeed provided an outline of the direction of simultaneous reformulation, but the moral and political responsibility remains in the hands of the legislature and the executive. This is where it is important to keep any transition scheme subject to the main constitutional norms, namely the limitation of power through regular elections and fixed terms. If the shift in the election results in a mismatch in the office calendar, then it is necessary to design a transitional arrangement that is limited, temporary, and subject to judicial evaluation. Such a mechanism can avoid the practice of constitutional disregard in the name of implementing court decisions.¹⁴

In practice, the Court also opens up the possibility of gradual synchronization which in progressive interpretation can be interpreted as an opportunity to design a time gap between national and regional elections without having to crash into the constitution. However, this scheme requires clarity from the beginning, whether there will be a cut-off of positions to avoid extensions; whether regional heads and DPRD will be elected at different times; and how to assess the validity of term of office that exceeds 5 years. Without that clarity, all forms of legal engineering actually weaken the credibility of the Court and open up space for delegitimization of decisions. This is a test for the Court's consistency in upholding the principle of non-extension of term of office that it has affirmed in previous decisions.¹⁵

Thus, efforts to execute the Constitutional Court Decision No. 135/PUU-XXII/2024 are at the intersection between compliance with judicial decisions and adherence to written constitutional norms. A transition scheme that is politically legitimate, is not necessarily constitutionally legitimate. Therefore, any form of extension or reduction of term of office must be accompanied by a strong constitutional justification, and supervised through a constitutional review mechanism if necessary. This is where the role of the Court as a constitutional guardian is tested, whether the Court will allow lawmakers to interpret their decisions freely, or whether they will continue to maintain the corridor so that the implementation of decisions does not turn into an

¹⁴ Minan, A., Arinanto, S., & Djohan, D. Local Chief Executive Political Accountability in Indonesia: A Historical-Legal Analysis, *Constitutional Review*, vol. 10, no. 1, 2024 pp. 33–66. <https://doi.org/10.31078/consrev1012>

¹⁵ Windrawan, P. Pergeseran Kekuasaan Tipologi Ketiga; Fenomena Kekuasaan Ke Arah Constitutional Heavy. *Jurnal Konstitusi*, vol. 9, no. 4, 2016 ,pp. 613–642. <https://doi.org/10.31078/jk942>

unconstitutional power engineering.¹⁶

One of the options that can be considered in executing the Constitutional Court Decision 135/PUU-XXII/2024 constitutionally is through adjustments based on limited transitional arrangements, namely a kind of temporary constitutional adjustment with a clear normative mandate, strict time restrictions, and a strong basis of legitimacy.¹⁷ For example, if the term of office of the DPRD that should end in a certain year cannot be consolidated simultaneously with the national elections, then the solution is not to extend it in full, but to impose transitional positions that are limited within the framework of constitutional law and supervision. Such adjustments must be accompanied by explicit norms, both through laws and judicial reinterpretation so as not to become a precedent for the practice of power engineering in the future. In this framework, the principle of checks and balances and public participation in drafting transitional norms are important as a control mechanism for potential power deviations.¹⁸

In the history of Indonesian constitutionalism, we have precedents for transition periods of office and specially regulated elections, such as during the 1998 reform or the consolidation of democracy in the early 2000s. However, lessons from the past show that any transitional arrangement that is not framed in strict constitutional norms always opens up opportunities for power abuses. In fact, in some cases, transitions are used as a pretext to extend the term of office or postpone elections.¹⁹ In the context of the Constitutional Court Decision 135/PUU-XXII/2024, it is important to distinguish between a legitimate transition and a manipulative transition. The legitimate transition is based on the principle of temporary necessity, public openness, and does not violate the substantive norms of the constitution. Meanwhile, the manipulative transition was born from political delays and legal loopholes. If the Court wants to maintain its credibility as a constitutional guardian, then the oversight of the transition design is as important as the initial

¹⁶ Saragih, G. M., Nasution, M., & Sihombing, E. N. Makna Filosofis Putusan Mahkamah Konstitusi Dalam Constitutional Review Dan Urgensi Judicial Activism. *Masalah-Masalah Hukum*, vol. 53, no. 3, 2024. pp. 326-335. <https://doi.org/10.14710/mmh.53.3.2024.326-335>

¹⁷ Nwokora, Z. Constitutional design for dynamic democracies: A framework for analysis. *International Journal of Constitutional Law*, vol. 20, no. 2, 2022, pp. 580-610. <https://doi.org/10.1093/icon/moac030>

¹⁸ Fahira, Y. Sistem Checks and Balances dalam Menjaga Prinsip Demokrasi di Indonesia. *Jurnal Media Akademik (JMA)*, vol. 3, no. 6, 2025. <https://doi.org/10.62281/v3i6.2173>

¹⁹ Hoesein, Z. A. Pemilu Kepala Daerah dalam Transisi Demokrasi. *Jurnal Konstitusi*, vol. 7, no. 6, 2016, pp. 001–024. <https://doi.org/10.31078/jk761>

interpretation it gives.²⁰

Furthermore, the concept of term of office in the 1945 Constitution is not just a limitation of administrative time, but a concrete form of the principle of limited government. A five-year term of office is not just a number, but a symbol of the will of the people which is reflected periodically through elections. Therefore, any form of extension of office, even if it is only temporary, must have formal legitimacy and have a legal basis that does not conflict with constitutional norms.²¹ Without this, the transitional design actually becomes a form of creeping unconstitutionality that undermines public trust in state institutions, including the Court itself. Therefore, the question that must be asked is not only how to implement the Constitutional Court Decision 135/PUU-XXII/2024, but how to keep it within the corridor of constitutional supremacy and healthy procedural democracy.

This is where the Court should be more assertive. The Constitutional Court Decision 135/PUU-XXII/2024 is indeed quite progressive in offering a solution to the chaos of the five-box simultaneous elections. However, this progressivity should not stop at normative assessments, but rather continue with concrete instructions on the design of a constitutional transition. Without more directed guidance, lawmakers have the potential to use this ruling as a justification for unconstitutional power maintenance practices. It is not enough for the court to be a negative legislator or passive interpreter. In the context of major changes like this, the Court is required to play the role of constitutional architect, namely not only to give direction, but also to ensure that the constitutional architecture is not hijacked by the pragmatism of power.²² This means that supervision of implementation is an inseparable part of the integrity of the decision itself.

Taking into account all these variables, the implementation of the Constitutional Court Decision 135/PUU-XXII/2024 must be approached through three main principles:

²⁰ Nugroho, W. Politik Hukum Pasca Putusan Mahkamah Konstitusi atas Pelaksanaan Pemilu dan Pemilukada di Indonesia. *Jurnal Konstitusi*, vol. 13, no.3, 2016, pp. 480-502. <https://doi.org/10.31078/jk1331>

²¹ Ristyawati, A., Utama, YJ, Wardhani, LTAL, & Hanum, WN. MEMIKIRKAN KEMBALI BATAS MASA LEGISLATIF: MENJAGA PEMBARUAN DEMOKRASI DALAM KONSTITUSI NEGARA INDONESIA. *Tinjauan Hukum Diponegoro*, vol. 10, no. 1, 2025, pp. 16-28. <https://doi.org/10.14710/dilrev.10.1.2025.16-28>

²² Sadzali, A. Peranan Mahkamah Konstitusi dalam Mewujudkan Demokrasi Substantif pada Pemilu 2024 melalui Penegakan Hukum Progresif. *As-siyasi: Journal of constitutional law*, vol. 2 no. 2, 2022, pp. 193-218. <https://doi.org/10.24042/as-siyasi.v2i2.14948>

(1) fidelity to the Constitution, full fidelity to constitutional norms, including term of office; (2) transitional discipline, transitional arrangements that are temporary, firm, and proportional; and (3) democratic integrity, which ensures that every implementation design maintains public trust and democratic legitimacy. If these three principles are ignored, then what the Court calls a solution to simultaneous elections will actually give birth to a much larger constitutional problem. This is a constitutional paradox that must be prevented from the start, not by delaying, but by carefully designing. Because in constitutional law, it is not only the norm that is important, but also the way we execute it.

2. Transition Design and Projections of Election Law Politics in the Future

The design of the transition of power after the Constitutional Court Decision No. 135/PUU-XXII/2024 requires an approach that is not only legalistic, but also constitutional in a substantive sense. The Court has corrected the dysfunction of the total synchronization system in the five-box election and given the direction of limited synchronization reform. However, this shift in electoral architecture raises crucial questions related to how to manage tenure and succession of power so as not to hurt the principles of regular elections and the periodization of power. The transitional design must be able to bridge the logic of the separation of national and regional elections while maintaining the continuity of government and avoiding vacancies or extensions of power without constitutional basis. In this context, the formulation of the transition is not merely scheduling, but the process of designing a new norm that keeps the democratic ecosystem healthy and consistent with the mandate of the 1945 Constitution.

The main principle in designing a power transition is to guarantee the absence of power without a mandate. Term of office is a political contract between the people and public officials, and any changes to it must be based on legitimate legal norms and the logic of democratic justice. One concrete alternative is to use a transition scheme based on "limited extension with constitutional basis", which is a limited extension of office with a strict time and scope, and accompanied by institutional accountability. However, this solution can only be applied if it does not contradict the text of the constitution, for example during the term of office of regional heads which are regulated by law, in contrast to the DPR and DPRD which are directly regulated by the Constitution.

Therefore, the transition design needs to distinguish between types of positions based on their normative sources so as not to generalize approaches that can lead to violations of the legal hierarchy.²³

The idea of "limited extension with constitutional basis" is one of the solutions to the transition of power that remains based on constitutionalism. This model is not an extension of ordinary office full of political agendas, but rather a technocratic mechanism designed in a limited and rational manner in response to the need to align national and local election times.²⁴ Under this scheme, the term of office of certain public officials can be temporarily extended with the main conditions: (1) it is strictly limited in duration and scope, (2) it is run through clear legal norms, and (3) it is subject to judicial and public scrutiny. The principle is to prevent a power vacuum without opening up opportunities for creeping extensions or unconstitutional normalization of tenure. This scheme must be once-and-for-all, cannot be repeated or used as a precedent. Therefore, its legality and accountability must be guaranteed through transitional legislation products that are closely monitored by the Court and civil society.²⁵

However, the implementation of the "limited extension" scheme cannot be applied uniformly to all types of positions, because each position has a different legal basis. The term of office of members of the House of Representatives and the House of Representatives is explicitly regulated in the 1945 Constitution, which is five years, so changes in the duration of their term of office cannot be made except through constitutional amendments. Meanwhile, the term of office of regional heads is regulated in the Law (Law No. 10 of 2016), so that adjustments are still possible through the revision of the law without hitting the basic norms.²⁶ This is where it is important to

²³ Mujahidah, M., & Tibaka, L. Presidential Term Limits in the Perspective of the Constitution: Avoiding Authoritarianism in the Era of Democracy: Pembatasan Masa Jabatan Presiden dalam Perspektif Konstitusi : Menghindari Otoritarianisme di Era Demokrasi. *Jurnal Konstitusi*, vol. 21, no. 4, 2024, pp. 680–697. <https://doi.org/10.31078/jk2147>

²⁴ Ibrahim, M. Pembatasan Kekuasaan Amendemen Konstitusi: Teori, Praktik di Beberapa Negara dan Relevansinya di Indonesia. *Jurnal Konstitusi*, vol. 17, no. 3, 2020, pp. 558–581. <https://doi.org/10.31078/jk1735>

²⁵ Camesi T.I and Susanti P. ANALISIS YURIDIS PENGHITUNGAN MASA JABATAN KEPALA DAERAH BERDASARKAN PUTUSAN MAHKAMAH KONSTITUSI DALAM MEWUJUDKAN KEPASTIAN HUKUM. *Jurnal Kritis Studi Hukum*, vol. 10, no. 5, 2025, pp. 129-138. <https://ojs.co.id/1/index.php/jksh/article/view/3025>

²⁶ Al Kautsar, M., & Kurniawan, K. Pembatasan Peroidesasi Masa Jabatan Anggota Legislatif. *Jurnal Ilmiah Mahasiswa Bidang Hukum Kenegaraan*, vol. 3, no. 3, 2019, pp. 361-371. <https://jim.usk.ac.id/kenegaraan/article/view/16154>

distinguish the normative sources of each position in the transition design, generalizing the approach will risk violating the hierarchy of legal norms. If the extension of the DPR's position is carried out through a law without constitutional amendments, then it is not only unconstitutional, but also undermines the legal order that guarantees the supremacy of the 1945 Constitution as the highest norm.

In addition, the transition of power must be designed gradually with the principle of harmony of the democratic cycle, both at the national and regional levels. In practice, synchronization does not have to be done simultaneously in one major election, but can be done progressively based on the existing office calendar. This model has been applied in the 2015–2020 simultaneous regional election scheme which adjusts the wave of regional elections gradually.²⁷ The gradual transition scheme will also prevent the accumulation of administrative burdens, avoid power vacancies, and better respect the term of service of officials who are in office legally. With this approach, the transition does not become a tool of political opportunism, but rather a systemic process to harmonize a more measurable, stable, and accountable national electoral architecture.

It is also important to emphasize that the transition design must maintain voter rationality and electoral integrity. One of the main problems in the previous five-box simultaneous elections was the decline in the quality of the people's choice due to voter fatigue, technical complexity, and lack of substantive involvement in the campaign.²⁸ With the separation of national and regional elections, the quality of voter participation has the potential to increase as their focus will be more proportionately divided. However, this can only happen if the transition design does not create new confusion due to changes in the timing, mechanism, or legitimacy of candidates in non-uniform tenure. This means that voters must obtain legal certainty and political certainty in determining their voting rights, and this can only be achieved through an orderly, informed, and honest transition in legal engineering.

²⁷ Rahayu, N. P., & Kartika, A. W. Pengaturan masa jabatan kepala daerah dalam hukum positif Indonesia. *Jurnal Kertha Semaya*, vol. 11, no. 6, 2023, pp. 1333-1348. <https://doi.org/10.70404/ketik.v2i05.158>

²⁸ Hanida, R. P., Meldianto, R. P., & Hasnita, S. S. Simultaneous National and Local Elections 2024: Triggering Voter Fatigue, Coattail Effect, and Political Polarization in Indonesia. *KnE Social Sciences*, vol. 10, no. 4, 2025, pp. 21-36. <https://doi.org/10.18502/kss.v10i4.18024>

The transitional design must also strengthen the institutionalization of political parties, which are the main actors in each electoral stage. In the previous condition, the burden of the party in managing election logistics, cadre distribution, and campaign strategies in the five-box simultaneous elections was very heavy and counterproductive to strengthening institutions. With the model of national and regional simultaneous elections as offered by the Court, parties can focus more on the formation of a platform and quality candidacy, especially if the timing of national and local elections does not overlap.²⁹ However, this positive effect can only appear if the transition scheme does not interfere with the legitimacy of cadre recruitment, does not cause conflicts between internal groups, and provides certainty to the term of office that is the basis of the party's organizational structure. Therefore, the clarity of the transition norms will help determine the direction of the consolidation of political parties as the foundation of democracy.

In addition to strengthening political institutions, the design of the transition of power must also be projected to encourage the strengthening of the presidential system which is Indonesia's constitutional choice. One of the root problems in the five-box simultaneous elections is the weak synergy between the presidential system and its electoral design. Elections that pile up legislative and executive agendas at the same time actually nourish transactional practices and political fragmentation, which are counterproductive to the presidential system that requires stability and government cohesion.³⁰ By separating national and regional elections, as emphasized in Constitutional Court Decision 135/PUU-XXII/2024, it is hoped that strengthening the presidential support base in parliament can be more rational and proportionate. However, without an adequate transitional design, these efforts can fail due to the lack of consistency between electoral logic and the structure of state institutions. This means that the reform of the electoral system must go hand in hand with the reconstruction of the power calendar that ensures the sustainability of the principle of presidentialism.

Another projection of the power transition design is to anticipate conflicts of legitimacy in the term of office as a result of synchronization. If national and regional

²⁹ Kartabrata, F. R. *Penguatan Peran Partai Politik dalam Pemilihan Umum Legislatif Pasca Putusan Mahkamah Konstitusi No. 114/PUU-XX/2022*. *Litigasi: Jurnal Hukum dan Politik*, vol. 24, no. 2, 2023, pp. 229-260. <https://doi.org/10.23969/litigasi.v24i2.9860>

³⁰ Solihah, R. *Peluang dan tantangan pemilu serentak 2019 dalam perspektif politik*. *JIIP: Jurnal Ilmiah Ilmu Pemerintahan*, vol 3, no 1, 2018, pp. 73-88. <https://doi.org/10.14710/jiip.v3i1.3234>

elections are separated and the term of office is not concurrent, there will be consequences for the legitimacy of officials who serve longer or shorter than they should.³¹ This needs to be anticipated from the beginning with explicit transitional norms based on public consent. For example, whether regional heads who end before the regional simultaneous elections will be filled by acting or temporarily extended, or whether DPRD members will remain in office while waiting for local legislative elections. All of these scenarios demand a strong legal basis and legitimacy design. Because without public legitimacy, the transition will only give birth to local political instability, weaken trust in elections, and give rise to lawsuits against the power base of public officials in the transitional period.

From a political and legal aspect, this transitional design is an important momentum to revise the electoral regulatory architecture as a whole. Law No. 7 of 2017, which is the foundation of the current national election system, has experienced structural pressure due to the development of constitutional interpretation. The Constitutional Court has opened up space for a total reorientation of the simultaneity system, so that lawmakers cannot only do administrative patchwork. A new formulation is needed that regulates not only the schedule, but also the term of office, the procedures for recruiting candidates, the consistency of the power calendar, and the supervisory system during the transition period. This reform is not only technical, but also a reflection of the nation's political law on the future of electoral democracy. Therefore, transitional arrangements should be part of a serious national legislation agenda, not discussed in emergency situations or simply the accommodation of the short-term interests of the elite.³²

But in the current political context, it is not easy to devise an ideal power transition design. Political fragmentation in the House of Representatives, tug-of-war between the central and regional governments, and the tendency of the executive to maintain short-term stability, have the potential to sacrifice the quality of the transitional legal design. In such a situation, civil society, academics, and the Court itself must appear as the guardian of public reasoning so that the transition is not only procedurally legitimate, but also

³¹ Prayudi, P. Agenda Pemilu Serentak: Pemisahan Pemilu Nasional dan Pemilu Lokal. *Jurnal Politica Dinamika Masalah Politik Dalam Negeri dan Hubungan Internasional*, vol. 12, no. 1, 2021, pp. 67-84. <https://doi.org/10.22212/jp.v12i1.1768>

³² Fuadi, A. B. Politik Hukum Pengaturan Keserentakan Pemilu. *Jurnal Konstitusi*, vol.18, no. 3, 2022, pp. 702–723. <https://doi.org/10.31078/jk18310>

legitimately substantive. The Court, as the constitutional guardian, has the responsibility not only to state the interpretation, but also to ensure that the interpretation is not manipulated by the lawmakers. This escort is important because history has shown that poor transition engineering always paves the way for an unconstitutional expansion of power, either tacitly or through pseudo-normalization.³³

The design of the transition of power after the Constitutional Court Decision 135/PUU-XXII/2024 is not just a technical agenda, but a constitutional test that will determine the direction of Indonesia's democratic consolidation in the future. As a recommendation, what needs to be done immediately is the preparation of transitional rules which are explicitly contained in the revision of the Election Law and the Regional Government Law. This rule must stipulate three main things: first, the mechanism of transitional positions that are non-permanent and do not open the space for politicization of power; second, the establishment of a maximum limit of six months of transition period to avoid too long a power vacuum; third, the implementation of automatic judicial evaluation by the Constitutional Court on the design of the transition of power of regional heads as an effort to maintain the principle of checks and balances in the constitutional system. This recommendation aims to ensure that the democratic process continues to run within the constitutional corridor and avoids potential abuse of power during the vacancy period.

III. CONCLUSION

The Constitutional Court Decision No. 135/PUU-XXII/2024 has opened a new chapter in Indonesia's election architecture, by canceling the total simultaneous system and leading to a "two breaths of elections" model between national and regional elections. However, this shift did not come without constitutional consequences, especially regarding the term of office and the design of the transition of power. In the progressive but open interpretation space of the Court, there is an urgent need to formulate a transition scheme that is not only legally valid, but also constitutionally legitimate. The extension or cut of the term of office cannot be done uniformly, but must be differentiated based on

³³ Gunawan, A. ., & Heryanti, F. Analisa Yuridis Potensi Revisi UU No. 7 Tahun 2017 Tentang Pemilu. *Jurnal Pendidikan Dan Konseling (JPDK)*, vol. 4, no. 5, 2022, pp. 382–391. <https://doi.org/10.31004/jpdk.v4i5.6611>

the normative source of the position. The idea of "limited extension with constitutional basis" is one of the rational compromise options. In the future, the implementation of the Constitutional Court's decision must be strictly monitored so that it does not become a justification for power engineering, but a momentum to improve a constitutional, stable, and democratic electoral system.

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Legal Imbalances in UN Peacekeeping Operations: Peacekeeper Status, Accountability, and the Protection of Indonesian Peacekeepers under International Humanitarian Law

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ABSTRACT

United Nations peacekeeping operations face legal ambiguities due to the expansion of robust mandates that blur the status of peacekeepers as non-combatants, creating gaps in protection and accountability in conflict areas such as the Democratic Republic of Congo (DRC). This study aims to analyze the legal regime governing the status and protection of Indonesian peacekeepers, examine the internalization of International Humanitarian Law (IHL) norms in national policy and training, and formulate recommendations for reform. This research employs a normative juridical method using statute, conceptual, and case approaches, with data collected through a systematic review of secondary legal materials, including international conventions, United Nations documents, and recent academic literature. The Democratic Republic of Congo (DRC) is selected as a representative case of complex United Nations peacekeeping mandates. The findings show that the liminal status of peacekeepers creates accountability gaps, particularly during Direct Participation in Hostilities (DPH) and Protection of Civilians (PoC) mandates. Furthermore, the internalization of International Humanitarian Law (IHL) within Indonesia's Vision 4,000 Peacekeepers Roadmap remains fragmented, especially in aligning legal frameworks, training, and Rules of Engagement (ROE). This study recommends developing contextualized ROE, integrating DPH standards into training, and strengthening coordination between Indonesia and the United Nations. It highlights the need for clearer legal frameworks and stronger accountability mechanisms while providing insights for troop-contributing countries in enhancing the protection and responsibility of peacekeepers.

Keywords: Accountability; International Humanitarian Law; UN Peacekeeping; Indonesian Peacekeepers; Legal Imbalances.

I. INTRODUCTION

Peace operations are institutions such as missions, field offices, or special envoys assigned bilaterally or multilaterally to a country or region. These assignments are usually carried out with the explicit consent of the host state and frequently stem from peace agreements or conflict resolution arrangements. Peace operations have a mandate to implement appropriate measures to mitigate crises, terminate violent hostilities, and establish lasting peace. Peacekeeping missions may be deployed before, during, or after the active phase of a conflict to support stability and security.¹

Peace operations are based on the United Nations (UN) Charter, which provides to settle disputes peacefully (Chapter VI, Article 33) and vests The Security Council is vested with the authority to authorize the use of force against threats and breaches of peace (Chapter VII, Article 42).² This Charter is reinforced by the ethical foundation of the Universal Declaration of Human Rights and regional commitments in the ASEAN Charter to peace and peaceful dispute resolution. At the national level, the 1945 Constitution based on the legal framework established by Law No. 2/2002 concerning the National Police and Law No. 34/2004 concerning the Indonesia National Armed Forces (TNI) form the legal basis governing Indonesia's engagement in UN peacekeeping activities,³ tasking the Indonesia National Armed Forces (TNI) and Indonesian National Police (Polri) with assisting in the responsibility for ensuring international peace and security in accordance with Indonesia's foreign policy. Within this framework, the main issue arises regarding the juridical status and legal protection of Indonesian peacekeepers in armed conflict areas. Various studies show that the legal regime for peace operations, which is based on Status of Forces Agreement (SOFA), UN immunity, and the criminal jurisdiction of the sending country, creates a "liminal" position for peacekeepers and

¹ ZIF. "What Is a Peace Operation?" *WHAT IS A PEACE OPERATION?* | ZIF Berlin, ZIF Center for International Operations, www.zif-berlin.org/en/what-peace-operation. Accessed 6 Dec. 2026.

² "International Law, Codification, Legal Affairs, Legal, Committee, Terrorism, Charter, Criminal Accountability, Administration of Justice, Jurisdictional Immunities, Cloning, Safety of United Nations and Associated Personnel, Ad Hoc, Diplomatic Conferences, Reports of International Arbitral Awards, Summaries of International Court of Justice Judgments and Advisory Opinions, Legislative Series, Juridical Yearbook, Repertory of Practice of United Nations Organs, Books." *United Nations*, United Nations, 1945.

³ Indonesia, Law Number 34 of 2004 on the Indonesian National Armed Forces, State Gazette No. 127 of 2004, <https://peraturan.bpk.go.id/Details/40774/uu-no-34-tahun-2004>. Accessed 6 Dec. 2025.

opens up an "accountability gap" when serious violations occur, including sexual violence and abuse of power.⁴

The unclear division of jurisdiction between the host country, the UN, and the sending country, coupled with the weak internalization of International Humanitarian Law (IHL) and human rights norms in policy and training, creates a protection gap for both civilians and peacekeeping personnel themselves.⁵ UN peacekeepers occupy a liminal legal status because they are not explicitly regulated in the UN Charter, but are instead surrounded by a special regime that provides strong protection and creates gaps in criminal accountability.⁶ In practice, civil protection mandates now often allow the application of force in defense of civilians. In the field, the implementation of this mandate is not always clear due to differences in understanding between countries, different military cultures, and the reluctance of troops to use force.⁷ Research shows that the deployment of a substantial number of peacekeepers may reduce violence against civilians by non-state armed groups, but is far less effective when the perpetrators of violence are local government officials.

For the Garuda Contingent, several studies emphasize the importance of professionalism, discipline, leadership, and the ability to adapt to local cultures. These factors have been shown to improve performance, discipline, and good relations with the community, which ultimately strengthens Indonesia's reputation as a dependable contributor to peace operations.⁸ Indonesia used the 2015–2019 Roadmap for the Vision of 4,000 Peacekeepers policy to increase the contribution of its troops, strengthen its

⁴ Van Leeuwen, Jayden. "Addressing the gap: Accountability Mechanisms for peacekeepers accused of sexual exploitation and abuse." *Victoria University of Wellington Law Review*, vol. 50, no. 1, 2019, pp. 135–157, <https://doi.org/10.26686/vuwlr.v50i1.5556>.

⁵ Rašević, Zivorad. "The decline of military observers in contemporary UN missions – one experience from MONUSCO." *International Peacekeeping*, vol. 32, no. 4, 2025, pp. 729–750, <https://doi.org/10.1080/13533312.2025.2461160>.

⁶ Müller, Tanja R. "Protection of civilians mandates and 'collateral damage' of UN peacekeeping missions: Histories of refugees from Darfur." *International Peacekeeping*, vol. 27, no. 5, 2020, pp. 760–784, <https://doi.org/10.1080/13533312.2020.1803745>.

⁷ Podder, Sukanya, and Kaushik Roy. "Use of force to protect civilians in United Nations peacekeeping: Military culture, organisational learning and troop reticence." *Civil Wars*, vol. 26, no. 1, 2022, pp. 74–97, <https://doi.org/10.1080/13698249.2022.2119506>.

⁸ Nasution, Muhammad Faizal, et al. "Pendekatan Strategis Dan operasional Kontingen Garuda XXXIX-D monusco Dalam Menjaga perdamaian dunia." *Journal of Education, Humaniora and Social Sciences (JEHSS)*, vol. 7, no. 2, 2024, pp. 742–758, <https://doi.org/10.34007/jehss.v7i2.2353>.

diplomatic position at the UN, and assert Indonesia's identity as a peace-loving country that actively carries out its constitutional mandate to participate in maintaining world peace.

Based on these conditions, there appears to be a discrepancy between the expansion of the peacekeeping mandate and the clarity regarding the implementation of IHL to peacekeepers and armed parties in the field, particularly in the Democratic Republic of the Congo (DRC). Therefore, this research endeavors to critically analyze the legal regime governing the status and protection of Indonesian peacekeepers in UN operations, examine the extent to which IHL norms are internalized in policies, training, and Rules of Engagement (ROE), and formulate recommendations for training reforms and accountability mechanisms that are more contextual to the dynamics of the conflict in the DRC. The global discourse on peace operations also shows that the expansion of mandates and the complexity of missions have actually widened the accountability deficit, as existing mechanisms are not commensurate with the risks of human rights violations and failures to protect civilians.

This research is conducted using a normative juridical methodology with a focus on examining internal aspects of positive law within the scope of legal concepts, legal principles, and legal rules. The analysis combines three normative approaches, namely the case approach, which examines concrete examples of UN peace operations such as UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), UN Interim Force in Lebanon (UNIFIL), and UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and uses official UN reports, Non-Governmental Organization (NGO) reports, and findings from secondary data related to violations or inconsistencies in the application of IHL; a conceptual approach that discusses concepts of legal inequality within the theoretical framework of international legal constructivism, liberal peace theory, and transitional justice theory; and a statute approach that analyzes international legal instruments encompassing the Geneva Conventions, the UN Charter, and mandates of UN operations.

The majority of the data used is secondary data sourced from primary legal materials comprising laws, regulations, court decisions, and agreements, in addition to secondary legal materials, including books, academic journals, scholarly articles, and

policy documents relevant to the research focus. Data was collected from various literature sources through academic databases, namely Google Scholar, JSTOR, IEEE Xplore, PubMed, and ScienceDirect, in addition to the International Committee of the Red Cross (ICRC) website and other prominent journals, by employing relevant search keywords such as "legal inequality," "UN peacekeeping operations," "International Humanitarian Law," "Indonesian Peacekeepers," and "Civilian Protection." The collected data was then filtered based on inclusion criteria such as relevance, source quality, and timeliness of information. This study aims to develop a thorough understanding of legal disparities in peacekeeping operations and strategic efforts to improve the enforcement of IHL so as to reduce such inequalities.

This study hypothesizes that the expansion of robust mandates in UN peacekeeping operations has blurred the legal status of Indonesian peacekeepers, thereby creating structural accountability gaps and weakening the effective protection regime under IHL. It is further hypothesized that the internalization of IHL norms within Indonesia's national legal framework and pre-deployment training remains insufficiently integrated with operational realities in robust missions, contributing to persistent legal imbalances in both protection and responsibility mechanisms

II. DISCUSSION

This study understands "legal imbalances" as gaps or inconsistencies in how responsibility and protection are distributed in UN peacekeeping operations, especially between the United Nations, troop-contributing countries, and host states. These gaps mainly arise from overlapping legal authority, the immunity of the UN as an institution, and the increasingly complex nature of robust peacekeeping mandates. These imbalances are further examined through selected case studies, particularly in the DRC and Lebanon.

1. Legal Status of Indonesian Peacekeepers in Peace Operations

1.1 General Legal Status of Peacekeepers in International Law

In general, UN peacekeeping personnel occupy a "liminal" (in-between) position in international law. Peacekeeping forces are not expressly provided for under the UN Charter, but are protected and regulated through a combination of the 1949 Geneva

Conventions, the 1994 Convention on the Safety of UN and Associated Personnel, the Rome Statute of the International Criminal Court (ICC), and the SOFA concluded between the UN and the host State.⁹ Within the framework of IHL, peacekeepers are essentially considered non-combatants, and are therefore protected persons who may not be targeted during hostilities as long as they refrain from direct involvement in hostilities.

The 1999 Guidelines regarding the observance of IHL by UN forces emphasize that when UN forces are involved in hostilities, they are legally required to observe the provisions of IHL, both in terms of protecting civilians and the means and methods used in the conduct of hostilities.¹⁰ Consequently, the legal status of peacekeepers, which from the outset has contained tensions between civil-humanitarian functions and potential military involvement in conflict, shows that the mission's mandate is enhanced to incorporate peace enforcement measures, the line between non-combatant and combatant roles becomes increasingly blurred, thereby increasing the risk to UN personnel and complicating their protection regime. In this case, the concept of 'liminal status' attached to peacekeepers is not merely a theoretical label, but describes a vulnerable position that is influenced by the design of the mandate, command structure, and the way sending countries interpret their IHL obligations. For Indonesia itself, understanding this tension is important as a basis for formulating ROE and training schemes that can anticipate shifts in status from protected civilians to functional combatants in certain situations. For Indonesia itself, understanding these tensions is important as a basis for formulating ROE and training schemes that can anticipate shifts in status from protected civilians to functional combatants in certain situations.

1.2 Direct Participation in Hostilities (DPH) by UN Peacekeepers

According to IHL, direct participation in hostilities (DPH) marks the point at which civilians lose protection from attack "during and to the extent that" they engage in direct hostilities, such as attacks, military targeting, or operational support that is causally

⁹ Cryer, Robert, and Perova, Natalia, "Peacekeepers: Internationalist protectors or national perpetrators, protected either way?" *Journal of Conflict and Security Law*, vol. 25, no. 3, 2020, pp. 501–536, <https://doi.org/10.1093/jcsl/kraa020>.

¹⁰ Mayaut, Felix, et al. "Perlindungan Hukum internasional Bagi Pasukan Penjaga Perdamaian Perserikatan Bangsa-Bangsa." *TATOHI: Jurnal Ilmu Hukum*, vol. 2, no. 10, 2022, pp. 1004–1017, <https://doi.org/10.47268/tatohi.v2i10.1440>.

linked to military damage. The ICRC criteria (damage threshold, direct causal link, and belligerent nexus) for determining when a person transitions from protected civilian status to a legitimate target, and how the "revolving door" of protection must be narrowed temporally to be operational in the field.¹¹ In the context of UN operations, peacekeepers are in principle treated as non-combatants, but when they carry out actions that meet the DPH criteria, such as offensive raids against armed groups in stabilization missions, they functionally approach combatants and can therefore be attacked during that period of direct participation.

The development of robust mandates and stabilization has meant that peacekeepers are no longer limited to monitoring ceasefires, but also conduct intensive armed patrols, law enforcement actions, and even limited offensive operations against armed groups, as seen in MINUSMA in Mali and other major missions in Africa.¹² Research conducted by W. G. Nomikos shows that the presence of strong UN forces significantly reduces the escalation and persistence of internal armed conflicts, but at the same time places peacekeepers closer to the front lines of violence and increases their exposure to targeted attacks and criminal violence that exploits the "peacekeeping economy."¹³ Within the framework of IHL, when UN military units carry out operations directly aimed at neutralizing the combat capacity of armed parties, such actions potentially meet the criteria of IHL, triggering a change in the protection regime whereby they remain obliged to comply as required by the principles of distinction, proportionality, and precaution, but also become legitimate military targets during the operation.

Strengthening the role of peacekeepers as enforcers of local security in suppressing communal violence, organized crime, and ceasefire violations creates a "gray zone" between law enforcement and direct participation in riots.¹⁴ Recent literature on the

¹¹ Silvestri, Alessandro. "The 'revolving door' of direct participation in hostilities." *Journal of International Humanitarian Legal Studies*, vol. 11, no. 2, 2020, pp. 410–446, <https://doi.org/10.1163/18781527-bja10022>.

¹² Duursma, Allard, and Hannah Smidt. "Peacekeepers without helmets: How violence shapes local peacebuilding by civilian peacekeepers." *Comparative Political Studies*, vol. 57, no. 5, 2023, pp. 778–817, <https://doi.org/10.1177/00104140231178740>.

¹³ Nomikos, William G. "Peacekeeping and the enforcement of intergroup cooperation: Evidence from Mali." *The Journal of Politics*, vol. 84, no. 1, 2022, pp. 194–208, <https://doi.org/10.1086/715246>.

¹⁴ Smidt, Hannah M. "United Nations peacekeeping locally: Enabling conflict resolution, reducing communal violence." *Journal of Conflict Resolution*, vol. 64, no. 2–3, 2019, pp. 344–372, <https://doi.org/10.1177/0022002719859631>.

expansion of the DPH concept to non-traditional domains (e.g., cyber operations by civilian actors) emphasizes that the DPH threshold must be applied cautiously, taking into account the causal chain, the physical/non-physical nature of the action, and the duration of involvement, so as not to excessively expand civilian targetability.¹⁵ In relation to UN peacekeeping, this also points to the need for clear ROE that distinguish between the use of typical law enforcement force (law-enforcement paradigm) and actions that rise to the threshold of IHL in armed conflict, while providing operational guidance to commanders in the field on when peacekeeping units risk losing their civilian protection and how to minimize adverse legal and protection consequences for both peacekeepers and civilians.¹⁶

In the context of MONUSCO in the DRC, the increasingly militarized and offensive mandate means that UN forces frequently engage in direct combat with armed groups. As a result, ROE must carefully balance civilian protection, combat effectiveness, and the maintenance of perceived neutrality.¹⁷ A contextualized ROE in the DRC, particularly within MONUSCO operations, refers to operational guidelines tailored to local conflict dynamics, threat environments, and civilian protection needs.¹⁸ In this context, a contextual ROE can be understood through three key operational elements.

First, it establishes clear thresholds for the use of graduated force, particularly in distinguishing between law enforcement actions and situations that meet the criteria of DPH. This is essential to prevent unnecessary escalation of violence while ensuring compliance with IHL.¹⁹ Second, contextual ROE introduce geographically specific restrictions, such as no-fire or restricted-fire zones around Internally Displaced Persons

¹⁵ Byczyński, Michał. “The legal status of ‘civilian hackers’ under international humanitarian law.” *Acta Universitatis Lodzianae. Folia Iuridica*, vol. 106, 2024, pp. 97–109, <https://doi.org/10.18778/0208-6069.106.06>.

¹⁶ Golub, K. “Legal framework of regional organizations’ participation in peacekeeping.” *International Trends / Mezhdunarodnye Protsessy*, vol. 20, no. 1, 2022, pp. 109–121, <https://doi.org/10.17994/it.2022.20.1.68.2>.

¹⁷ Dorn, A. Walter. “Peacekeepers in combat: Protecting civilians in the D.R. Congo.” *Journal of International Peacekeeping*, vol. 26, no. 1, 2023, pp. 31–54, <https://doi.org/10.1163/18754112-26010003>.

¹⁸ Mutiga, Murithi. *Democratic Republic of Congo | International Crisis Group*, 2025, www.crisisgroup.org/africa/great-lakes/democratic-republic-congo. Accessed 31 Mar. 2026.

¹⁹ ICRC. “Interpretive guidance on the notion of direct participation in hostilities under International Humanitarian Law.” *International Review of the Red Cross*, vol. 90, no. 872, Dec. 2008, pp. 991–1047, <https://doi.org/10.1017/s1816383109000319>. See also International Committee of the Red Cross, “Advancing Peacekeeping and the Humanitarian Imperative in a Fragmented World,” 2025.

(IDP) camps, medical facilities, and densely populated civilian areas that are highly vulnerable to collateral damage. These measures strengthen the practical implementation of the Protection of Civilians (PoC) mandate.²⁰ Finally, contextual ROE emphasize intelligence-driven decision-making, where authorization to use force is closely linked to verified threat assessments and real-time operational data. This approach reduces arbitrary or excessive use of force and enhances accountability.

Compared to standard UN ROE, which tend to prioritize uniformity across missions, contextual ROE in the DRC are more adaptive, precise, and operationally grounded. They explicitly integrate DPH thresholds and PoC obligations into field-level decision-making, thereby reducing ambiguity regarding when peacekeepers may lose civilian protection status and become legitimate targets under IHL.²¹ However, detailed operational ROE documents are generally classified and not publicly accessible. Therefore, mission-specific rules applied by individual contingents cannot be fully examined.

These operational requirements have direct implications for pre-deployment training, particularly in preparing peacekeepers to apply context-specific ROE in complex field environments. The integration of DPH, civilian protection, and standards of conduct into the pre-deployment training curriculum for TNI and Polri contingents is essential. This aligns with the broader trend in UN peacekeeping of strengthening PoC capacity and soft skills such as communication, negotiation, and cultural awareness to enhance operational readiness in complex missions.²² The implications of DPH emphasize the importance of formulating clear ROE for TNI and Polri contingents in UN peacekeeping missions, including through the integration of DPH issues into Indonesia's pre-assignment training curriculum.

²⁰ Gregory, Julie. "Protection of Civilians at 25 Years • Stimson Center." *Stimson Center*, 2025, www.stimson.org/project/peace-ops-reform/protection-of-civilians-at-25-years/. Accessed 31 Mar. 2026.

²¹ United Nations. "Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)." United Nations Security Council, 2023, <https://undocs.org/S/2023/691>. Accessed 1 Apr. 2026.

²² Dorn, A. Walter, and Peter F. Dawson. "Simulating peace operations: New digital possibilities for training and public education." *Simulation & Gaming*, vol. 52, no. 2, 2020, pp. 226–242, <https://doi.org/10.1177/1046878120968605>.

1.3 Special Status: When the Mandate is "Robust"

The development of "robust" and even "super-robust" mandates means that peacekeepers are no longer merely passive observers, but may conduct offensive operations against armed groups, as seen in missions in the Democratic Republic of the Congo (MONUSCO), Mali, the Central African Republic, and South Sudan.²³ In missions with offensive mandates such as these, peacekeepers tend to be treated as parties involved in armed conflict (referred to as functional combatants), meaning they are fully subject to the norms of IHL regarding combatant status and lawful targets, rather than simply protected civilians. Debates over the performance and accountability of peacekeepers have become increasingly prominent, particularly in peacekeeping missions authorized to carry out PoC mandates, as failures to protect and violations by peacekeepers themselves highlight the gap between normative promises and practices in the field.²⁴

1.4 Legal Imbalances in Practice

a. Indonesian Peacekeepers in MONUSCO (DRC): Procedural Ambiguity in ROE and DPH

Indonesian peacekeepers deployed under the UN Organization Stabilization MONUSCO operate in active conflict environments, where they are required to conduct patrols and provide protection to civilians. In carrying out these functions, they are authorized to use force under mission-specific ROE, which regulate when and how such force may be employed. These rules are established by the UN in accordance with the mission mandate and operational conditions, and their implementation is overseen by contingent commanders within the UN chain of command. In practice, however, the application of ROE presents significant challenges. Indonesian peacekeepers are often placed in situations where the use of force is necessary, particularly in the context of

²³ Longobardo, Marco. "«super-robust» peacekeeping mandates in non-international armed conflicts under International Law." *Spanish Yearbook of International Law*, vol. 24, 2020, pp. 42–72, <https://doi.org/10.17103/sybil.24.3>.

²⁴ Donais, Timothy, and Eric Tanguay. "Protection of civilians and peacekeeping's accountability deficit." *International Peacekeeping*, vol. 28, no. 4, 2021, pp. 553–578, <https://doi.org/10.1080/13533312.2021.1880900>.

civilian protection and self-defense under robust mandates. At the same time, their actions must remain within the limits of IHL, especially the principle that they should not DPH.²⁵

Under IHL, peacekeepers are generally regarded as civilians because they are not members of the parties to the conflict. As such, Indonesian peacekeepers are entitled to protection from attack, provided that they do not directly participate in hostilities.²⁶ However, the premise that peacekeepers are only considered combatants during the “duration of their engagement” creates uncertainty regarding the threshold at which such protection is lost. This ambiguity becomes particularly evident in operational contexts such as the DRC, where peacekeepers may engage in the use of force under certain conditions while still being expected to maintain neutrality. The challenge lies in balancing the implementation of robust mandates with the risk that such actions may be interpreted as DPH.²⁷ As a result, the distinction between civilian protection and combatant status becomes increasingly blurred. This creates uncertainty as to whether Indonesian peacekeepers remain protected under IHL or may be considered legitimate targets.

This indicates that although ROE and DPH frameworks exist, their application in the field remains ambiguous, creating uncertainty in both protection and operational conduct. While the MONUSCO case highlights procedural ambiguity in the application of ROE and DPH, a different dimension of legal imbalance can be observed in the UNIFIL mission in Lebanon, particularly concerning the issue of accountability.

b. Indonesian Peacekeepers in UNIFIL (Lebanon): Accountability Gaps and Legal Imbalances

Indonesia has been one of the largest troop-contributing countries to UNIFIL, with the Garuda Contingent actively involved in patrol, observation, and civilian protection

²⁵ Williams, Paul D. “How peacekeepers fight: Assessing combat effectiveness in United Nations Peace Operations.” *Security Studies*, vol. 32, no. 1, 2023, pp. 32–65, <https://doi.org/10.1080/09636412.2023.2178965>.

²⁶ ICRC. “Rule 33. Personnel and Objects Involved in a Peacekeeping Mission, .” *IHL*, International Committee of the Red Cross, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule33> . Accessed 3 Apr. 2026.

²⁷ Bourgeois, Hanna, and Patryk I Labuda. “When May UN peacekeepers use lethal force to protect civilians? reconciling threats to civilians, imminence, and the right to life.” *Journal of Conflict and Security Law*, vol. 28, no. 1, 2022, pp. 1–65, <https://doi.org/10.1093/jcsl/krac027>.

tasks in southern Lebanon. In 2024, an incident involving Indonesian peacekeepers under the UNIFIL occurred in the Israel–Hezbollah conflict in southern Lebanon.²⁸ In this incident, two members of the Indonesian Garuda Contingent, Private Eggy Arifiyanto and Private Nofrian Syah Putra, were injured as a result of a Merkava tank firing toward an observation tower at the UNIFIL Headquarters in Naqoura.²⁹ UNIFIL had previously reported repeated attacks targeting its positions and facilities, including fire directed at forward posts and violations of the Blue Line, a demarcation line established by the United Nations in 2000 as a temporary boundary between Lebanon and Israel. The Lebanese government has also reported thousands of ceasefire violations, resulting in casualties and injuries among civilians.³⁰

Under the Rome Statute of the ICC, intentionally directing attacks against personnel involved in peacekeeping missions constitutes a war crime, insofar as that they are entitled to civilian protection. In such situations, responsibility becomes fragmented among multiple actors, including the United Nations, the troop-contributing country, and the host state. While the attacking party, in this case Israeli forces, may bear primary responsibility under international law, the existence of institutional immunity and overlapping jurisdictions often prevents effective accountability. However, in practice, there is no clear mechanism to enforce responsibility against the attacking party, nor a clear allocation of accountability between the United Nations and the troop-contributing country.

The issue of attribution of responsibility has been addressed in cases such as *Netherlands v. Nuhanović* (2019), where the Dutch Supreme Court applied the “effective control” test to determine whether responsibility could be attributed to the United Nations or to the troop-contributing state. The findings demonstrated that, under certain conditions, states may still bear responsibility for the actions of their peacekeeping

²⁸ Kurmala, Azis. “Indonesian UNIFIL Troops Endure Challenge in Israel-Hezbollah Conflict.” *Antara News*, ANTARA, 2024, <https://en.antaranews.com/news/335897/indonesian-unifil-troops-endure-challenge-in-israel-hezbollah-conflict>. Accessed 03 Apr. 2026.

²⁹ Romana, Francisca. and Mada, Kris. “Israeli Tanks Shoot UNIFIL Peacekeeping Positions, Two Indonesian Soldiers Injured.” *Kompas.id*, 2024, <https://www.kompas.id/artikel/en-tank-israel-tembak-posisi-pasukan-penjaga-perdamaian-unifil-dua-tentara-indonesia-terluka>. accessed on April 03 2026.

³⁰ Planasari, Sita. “UN Condemns Israel after Attack on Peacekeeping Post in Lebanon.” *Tempo English*, TEMPO.CO, 2025, <en.tempo.co/read/2007365/un-condemns-israel-after-attack-on-peacekeeping-post-in-lebanon>. Accessed on April 03 2026.

contingents when effective control is established.³¹ However, the application of this test remains highly context-dependent and does not provide a clear or consistent standard in all situations. As a result, similar incidents involving UN peacekeepers, including those in UNIFIL, continue to face uncertainty regarding the allocation of legal responsibility. This persistent accountability gap can also be understood from a theoretical perspective. From a liberal peacebuilding standpoint, the gap reflects a structural limitation, where the institutional design of UN peacekeeping prioritizes state sovereignty and operational flexibility over clear accountability mechanisms. At the same time, from a constructivist perspective, the ambiguity of norms regarding responsibility in peacekeeping operations contributes to inconsistent interpretations and weak enforcement in practice.

This condition clearly reflects a structural legal imbalance in UN peacekeeping operations, where multiple actors hold overlapping responsibilities without effective enforcement. This case demonstrates that despite clear legal norms prohibiting attacks against peacekeepers, the absence of effective enforcement mechanisms results in an accountability gap, highlighting the persistence of legal imbalances in UN peacekeeping operations. For Indonesia, this situation highlights the vulnerability of its peacekeepers and underscores the need for stronger coordination and clearer accountability mechanisms at both the UN and national levels.

1.5 Status of Indonesian Peacekeepers in UN Peacekeeping Operations

Although peacekeepers do not "represent their country," legally they represent the UN and can still be held accountable by their sending country. Formally, the Garuda contingent and others are UN personnel. When carrying out their mission mandate, they act as a "body" of the UN in the field since the UN is recognized as a bearer of rights and obligations under international law with its own legal personality and can file claims for compensation for losses suffered by its personnel. There is a rather complicated division of responsibility among Indonesian soldiers. On the one hand, the UN as an organization has immunity, making it difficult to be sued in international courts, especially for actions that are under the effective control of the UN. However, if a state's is proven to have

³¹ Zgonec-Rožej, Miša. "Netherlands v. Nuhanović Netherlands v. Mustafić-Mujić." *American Journal of International Law* 108.3 (2014) Published online by Cambridge University Press: 20 January 2017: 509–515.

effective authority over its deployed contingent (regulating, commanding, or allowing violations), the conduct of peacekeepers may be attributable to the troop-contributing state so that the state cannot 'hide' behind the immunity of the UN.³²

In UN practice, efforts to close accountability gaps for local actors and security partners have led to the creation of the Human Rights Due Diligence Policy (HRDDP), which combines various forms of accountability to maintain the legitimacy of peace operations. Recent developments also confirm that when effective control over the contingent is exercised by the state, the accountability chain does not stop at UN immunity, but extends to the responsibility of the troop-contributing state. Judicial decisions and practices in recent years have confirmed that the doctrine of effective control serves as a bridge linking state responsibility to the actions of peacekeepers in the field, even when they are formally acting under the UN flag.³³ This reinforces the obligation of sending countries, including Indonesia, to ensure that the national legal framework, ranging from military criminal law and disciplinary procedures to independent investigation mechanisms, is truly capable of prosecuting serious violations such as war crimes and sexual violence committed by mission personnel.

Policies such as the HRDDP at the UN level will only be effective if they are responded to with improved due diligence standards at the national level, including transparency in coordination between Indonesian authorities and the UN Secretariat in cases of alleged violations. Without strengthening at the domestic level, accountability gaps risk multiplying because peacekeepers' actions are at the intersection of organizational immunity and the sluggishness of the sending country. Physical protection is stipulated in the 1949 Geneva Convention and the Convention on the Safety of UN and Associated Personnel (1994), which prohibit attacks on UN personnel, facilities, and equipment. In terms of criminal jurisdiction, the SOFA usually gives primary jurisdiction to the sending state to hold peacekeeping personnel criminally accountable, including war

³² Morris, Tamer. "State responsibility and accountability in UN Peacekeeping: The case of *the mothers of Srebrenica V. the Netherlands*." *International Peacekeeping*, vol. 29, no. 2, 16 Nov. 2021, pp. 204–234, <https://doi.org/10.1080/13533312.2021.1989304>.

³³ White, Nigel. "In search of due diligence obligations in UN Peacekeeping Operations." *Journal of International Peacekeeping*, vol. 23, no. 3–4, 2020, pp. 203–225, <https://doi.org/10.1163/18754112-02303005>.

crimes or sexual violence.³⁴ For serious international crimes, the Rome Statute of the ICC may also apply where the troop-contributing state or the host state has ratified the Statute and the state is unwilling or unable to prosecute.

Recent literature confirms that the "liminal" legal position of peacekeepers creates an accountability gap both when they are victims of attacks and when they are perpetrators of violations, especially in missions with robust civilian protection mandates. Cryer & Perova show that the combined regime of the UN Charter, the Geneva Conventions, the 1994 Convention, the Rome Statute and SOFA can protect peacekeepers while making it difficult to attribute responsibility to the sending state when serious crimes occur. Donais & Tanguay add in their research that the PoC mandate widens the gap between normative commitments and practices in the field because accountability mechanisms are not yet commensurate with the complexity of the tasks and the risk of human rights violations.

1.6 The Impact of Attacks on Indonesian Peacekeepers in Conflict Areas

Attacks on Indonesian peacekeepers in conflict areas have multiple impacts, both at the individual soldier level, the TNI institution, the UN mission in the field, and Indonesia's position as a troop-contributing country. Individually, peacekeepers face high physical and psychological burdens due to exposure to threats of violence, armed attacks, and uncertain security situations. A scoping review of peacekeepers' health shows that mental health issues such as stress, anxiety, and exposure to violence are the main risks during deployment.³⁵ When an attack occurs against a contingent, these risks increase: threats to life, psychological burdens from seeing colleagues injured or killed, and prolonged stress that can have an impact even after they return to Indonesia.³⁶ Consequently, attacks on contingents not only increase the psychological burden on individuals, but also reduce the operational presence of peacekeepers in the field, which

³⁴ Tasker, Heather, et al. "Peacekeeper-perpetrated sexual exploitation and abuse in the Democratic Republic of the Congo: Legal pluralism and legal recession." *Law & Social Inquiry*, vol. 50, no. 3, 2025, pp. 643–666, <https://doi.org/10.1017/lsi.2025.7>.

³⁵ Yuan, Quan, et al. "UN peacekeeper health and risk factors --- a systematic scoping review." *Global Health Research and Policy*, vol. 9, no. 1, 2024, <https://doi.org/10.1186/s41256-024-00351-4>.

³⁶ Harwood-Gross, Anna, et al. "How do you see me? the impact of perceived societal recognition on PTSD symptoms amongst Norwegian peacekeepers." *European Journal of Psychotraumatology*, vol. 15, no. 1, 2024, <https://doi.org/10.1080/20008066.2024.2314442>.

in turn disrupts the mission's ability to create a sense of security and restore local economic activity.

Studies in the context of civil war show that an adequate and active peacekeeper presence can increase the sense of security, which correlates with the recovery of market transactions and household consumption; conversely, attacks on peacekeepers tend to encourage patrol restrictions, reduce public trust, and hamper economic recovery.³⁷ At the mission level, attacks on peacekeepers can undermine the UN mission's ability to create a sense of security, reduce violence, and support local economic recovery. Qualitative studies on peacekeeping in South Sudan show that the presence of sufficient and active military peacekeepers increases observed and perceived security, which in turn encourages economic activity, market transactions, and household consumption, while reducing daily stress for the community.³⁸

If peacekeepers become the target of attacks, missions will usually tighten security procedures, limit patrols, or reduce interaction between soldiers and civilians. This can reduce the community's sense of security, hamper economic recovery, and reduce public trust in the ability of the UN and sending countries such as Indonesia to protect civilians. For Indonesia, every incident of attack against Garuda troops affects foreign policy, diplomacy, and the image of the TNI. Indonesia's involvement in UNIFIL in Lebanon, for example, is proof of its commitment to the constitutional mandate to participate in world peace, as well as a means of strengthening Indonesia's cooperation and diplomatic role in conflict resolution, such as the Israel-Hezbollah dispute.³⁹ Attacks on Indonesian contingents may force the government to reevaluate acceptable risk levels, increase the need for pre-assignment training, health and mental protection, and closer coordination between the UN, host countries, and Indonesia to ensure the safety of troops and the effectiveness of the mission.

³⁷ Di Salvatore, Jessica. "Peacekeepers against criminal violence—unintended effects of peacekeeping operations?" *American Journal of Political Science*, vol. 63, no. 4, 2019, pp. 840–858, <https://doi.org/10.1111/ajps.12451>.

³⁸ Bove, Vincenzo, et al. "Un peacekeeping and households' well-being in civil wars." *American Journal of Political Science*, vol. 66, no. 2, July 2021, pp. 402–417, <https://doi.org/10.1111/ajps.12644>.

³⁹ Nabila, Kania Salsa. "Peran diplomasi Indonesia Dalam Penyelesaian konflik israel-hizbullah di Lebanon." *Jurnal Res Justitia: Jurnal Ilmu Hukum*, vol. 5, no. 1, 2025, pp. 261–271, <https://doi.org/10.46306/rj.v5i1.222>.

1.7 The Impact When Peacekeepers Carry Out Attacks in Conflict Areas

The use of force by peacekeeping forces can reduce direct violence by former combatants against civilians, but it is not always effective against violence committed by other armed actors such as local militias or armed criminals. Poorly managed attacks by peacekeepers risk triggering a shift in patterns of violence, such that violence does not disappear but changes actors or forms (e.g., organized crime or local political violence).⁴⁰ Research on post-war violence finds that the presence of peacekeepers with offensive mandates sometimes only shifts patterns of violence rather than eliminating them: violence can shift from former combatants to local armed actors or organized criminal groups. In situations where the use of force is considered excessive or misdirected, armed groups may retaliate by attacking civilians associated with the UN or mission bases, triggering a new spiral of insecurity and undermining the legitimacy of the mission as perceived by the local population and the host country.⁴¹

In some cases, when peacekeepers use force, armed groups may respond with retaliatory tactics, including attacking civilians perceived to be close to the UN or attacking UN bases themselves, creating a new spiral of insecurity. Therefore, UN mandates now often emphasize the PoC as well as the use of force by peacekeeping forces is justified primarily for this purpose. However, if peacekeeper attacks are perceived as excessive, misdirected, or non-transparent, local public trust can plummet. The public may see the UN (and contingents from certain countries) no longer as "peacekeepers," but as ordinary armed forces, thereby undermining the legitimacy of the mission and local cooperation. When citizens perceive the mission as illegitimate or overly brutal, the host government may demand a reduction or withdrawal of the mission.⁴²

Each time peacekeepers conduct an attack, the risk of retaliation and increased threats to their camps, patrols, and convoys increases rapidly. This adds to exposure to

⁴⁰ Bara, Corinne. "Shifting targets: The effect of peacekeeping on postwar violence." *European Journal of International Relations*, vol. 26, no. 4, 2020, pp. 979–1003, <https://doi.org/10.1177/1354066120902503>.

⁴¹ Ohnishi, Ken. "Compellence by denial against armed groups: Un peacekeeping in Ituri, the Democratic Republic of the Congo." *European Journal of International Security*, vol. 9, no. 4, Nov. 2024, pp. 631–649, <https://doi.org/10.1017/eis.2024.26>.

⁴² Bardalai, AK. "Necessity of use of force: UN Mandate and protection of civilians." *Journal of International Peacekeeping*, vol. 28, no. 1, 2 July 2025, pp. 28–47, <https://doi.org/10.1163/18754112-28010002>.

violent incidents known to correlate with stress, anxiety, and PTSD in peacekeepers. Exposure to intense conflict and the use of force can be sources of additional psychological burden that impact mental health during and after deployment. Effective peacekeepers who reduce violence and increase security usually have a positive impact on household economic recovery and local market activity. However, if operations often take the form of attacks and armed conflict, communities may feel unsafe to work, trade, or travel, thereby reducing the economic benefits of the peacekeepers' presence or even turning them into negative effects.

1.8 Legal Status of Indonesian Peacekeepers in Conflict Areas

Indonesian peacekeepers in armed conflicts generally have protected civilian status, but they can lose that protection if they engage in direct combat. Under IHL, UN peacekeeping forces are classified as civilians because they are present not as combatants but to carry out UN missions. Therefore, threats or attacks against peacekeepers constitute a serious violation of IHL and are also regulated as crimes in the Rome Statute (war crimes against UN personnel). This protection is underpinned by Convention on the Protection of Civilian Persons in Time of War, as well as the 1994 Convention on the Safety of UN and Associated Personnel, which requires host countries to protect UN personnel, facilities, and equipment.⁴³

The status and protection of peacekeepers may change during:

1. They act as classic peacekeepers (impartial, non-offensive)
They are treated and protected as civilians, but may use weapons to defend civilians/protected facilities.⁴⁴
2. If they participate directly in hostilities (robust/offensive)
When peacekeepers are "actively engaged as combatants" in armed conflict situations, they are bound by the applicable ROE. And during periods when peacekeepers are directly involved in combat, the enemy may target them as legitimate military targets,

⁴³ Pedrason, Rodon, et al. "Refusal of UN peacekeeping missions for security missions in conflict countries as a violation of international law." *Russian Law Journal*, vol. 11, no. 2, 2023, <https://doi.org/10.52783/rj.v11i2.884>.

⁴⁴ Wills, Siobhán. "Use of deadly force by peacekeepers operating outside of armed conflict situations: What laws apply?" *Human Rights Quarterly*, vol. 40, no. 3, 2018, pp. 663–702, <https://doi.org/10.1353/hrq.2018.0036>.

similar to combatants, and their "civilian" protection may be temporarily lost for as long as that involvement lasts.⁴⁵ This dilemma is particularly evident in missions with offensive mandates such as the intervention brigades in MONUSCO or MINUSMA, where the line between "peacekeeping" and "peacemaking/peace enforcement" becomes blurred.

2. Rules for the Protection of Indonesian Peacekeepers in Armed Conflict Zones

2.1 Article 9 of the First Geneva Convention (1949)

Geneva Convention I 1949 Article 1 stipulates that the provisions of the convention do not preclude humanitarian activities carried out, among others, by peacekeeping forces to protect the wounded and sick, provided that they have been approved by the parties to the conflict. Peacekeepers who do not directly participate in hostilities are entitled to civilian status. However, attacks against them are prohibited and constitute a grave breach of IHL. The general principles of IHL (distinction, protection of war victims, proportionality restrictions governing the means and methods of warfare) also protect peacekeepers as part of a group that must not be targeted.⁴⁶ If peacekeepers participate directly in hostilities (e.g., missions with a very "robust" mandate), their legal status may be debatable, potentially subjecting them to treatment as combatants for the duration of their involvement, thereby reducing their civilian protection.⁴⁷

2.2 Additional Protocol I 1977

The rule emphasizing peacekeepers as "civilians" is contained in Article 48 in accordance with the principle of distinction, whereby attacks may be directed only against

⁴⁵ Wicaksono, Isa Agung, et al. "Studi Kasus Perang Saudara di Yugoslavia pada tahun 1991 - 1992 Ditinjau Dari Aspek Hukum humaniter Dan Ham serta Manfaatnya Bagi TNI angkatan laut." *SCIENTIFIC JOURNAL OF REFLECTION: Economic, Accounting, Management and Business*, vol. 8, no. 2, 2025, pp. 444–451, <https://doi.org/10.37481/sjr.v8i2.1079>.

⁴⁶ Kaiser, Thierry, and Carlijn Ruers. "The application of International Humanitarian Law to peacekeepers." *Journal of International Peacekeeping*, vol. 24, no. 1–2, 2021, pp. 190–222, <https://doi.org/10.1163/18754112-20210004>.

⁴⁷ Martyniuk, O., et al. "Regarding the legal protection of civilians during armed conflict in the context of the implementation of international humanitarian law." *Uzhhorod National University Herald. Series: Law*, vol. 4, no. 88, 2025, pp. 102–108, <https://doi.org/10.24144/2307-3322.2025.88.4.15>.

military objectives. Article 51 explains attacks against civilians and acts of terror against civilians. Article 57 requires caution in attacks to minimize civilian casualties.⁴⁸

2.3 1944 UN Personnel Safety Convention

Articles 1 and 2 of this Convention clearly define the terms "UN personnel" and "associated personnel." This category includes military, police, and civilian personnel assigned or deployed under the authority and control of the UN in an operation, including those working under agreement with the UN (e.g., contractors or humanitarian personnel associated with the mission). This definition is important because it determines who is entitled to special protection and forms the basis for the application of state obligations to prevent and respond to attacks against them.

Article 4 requires the UN and the host country to immediately draft and ratify either SOFA or a Status of Mission Agreement (SOMA) when a mission is established. Through the SOFA, various privileges and immunities are regulated, including the legal status of military and police components, criminal and civil jurisdiction, and physical protection that must be provided by the host country. Thus, Article 4 serves as a bridge between general convention rules and technical regulations in the field that are tailored to the context of each mission. Furthermore, Articles 7 to 10 (as summarized in various literature) impose clear criminal obligations on States Parties. States are required to establish in national law that attacks against UN personnel and related personnel are serious criminal offenses, establish and enforce jurisdiction to prosecute perpetrators, apply the principle of "prosecute or extradite," and cooperate in investigations, prosecutions, and extraditions. This provision is intended to ensure that there is no "safe haven" for perpetrators of crimes against UN personnel: wherever the perpetrator may be, a state party must be able to prosecute or surrender them to another competent State.

2.4 UN Charter Chapter VII

UN peacekeepers operate based on three principles: consent of the parties, impartiality, and the non-use of force except in self-defense and defense of the mandate. This is stipulated in Chapter VII, Article 42 of the UN Charter confers upon the the

⁴⁸ Riyanto, Sigit. "Keamanan internasional KOLEKTIF Dan Peran organisasi regional." *TANJUNGPURA LAW JOURNAL*, vol. 5, no. 1, 2021, pp. 67–91, <https://doi.org/10.26418/tlj.v5i1.46225>.

Security Council holds the mandate to permit the use of force for the maintenance or restoration of international peace and security.⁴⁹

2.5 Constitutional and Legal Basis in Indonesia

The constitutional basis and Indonesian law place the TNI as the main actor in national defense and at the same time provide a legal basis for Indonesia's involvement in peacekeeping operations. Article 30(2) as provided under the 1945 constitution stipulates that the defense and security of the state are organized through a universal defense and security system, with the TNI and the Indonesian National Police as the primary components.⁵⁰ This provision is clarified in Law No. 3 of 2002 on National Defense, which establishes the TNI as the main component of defense; one of its tasks is to protect the sovereignty and safety of the nation, including through participation in peacekeeping missions at both national and international levels.⁵¹ Analysis of national defense shows that this regulation forms the legal basis for the TNI's involvement in peacekeeping operations under a UN mandate. In line with this legal basis, Indonesia then developed a specific peacekeeping policy through the "Road Map for the Vision of 4,000 Peacekeepers 2015-2019" as stipulated in Minister of Foreign Affairs Regulation No. 1 of 2017 provides the legal framework for increasing the number and strengthening the role of Indonesian peacekeepers, including strengthening the participation of women in these missions.⁵²

In essence, from the perspective of the IHL, peacekeepers are essentially treated as protected civilians, so that attacks against them are classified as serious violations and,

⁴⁹ Bunga, Gerald Aldytia, and Elisabeth Nirmalasari Tukan, "Legal impact of state defense on Indonesian citizen in international humanitarian law perspective." *Yustisia Jurnal Hukum*, vol. 8, no. 2, 2019, pp. 164–185, <https://doi.org/10.20961/yustisia.v8i2.21604>.

⁵⁰ Syafei, Imam, and Marwan. "Authority of the Indonesian National Army in prevention and Eradication." *Journal of Law, Politic and Humanities*, vol. 5, no. 3, 2025, pp. 1520–1529, <https://doi.org/10.38035/jlph.v5i3.1182>.

⁵¹ ICRC. "International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions." *International Review of the Red Cross*, vol. 101, no. 911, 2019, pp. 869–949, <https://doi.org/10.1017/s1816383119000523>.

⁵² Deriglazova, Larisa V., and Olga Yu. Smolenchuk. "Prosecution for violations of International Humanitarian Law: Russia's position." *Russia in Global Affairs*, vol. 19, no. 4, 2021, pp. 198–225, <https://doi.org/10.31278/1810-6374-2021-19-4-198-225>.

under the Rome Statute, are categorized as war crimes against UN personnel.⁵³ The 1994 Convention then requires state parties to criminalize attacks against UN personnel in national law and apply the principle of prosecute or extradite, so that normatively there should be no "safe haven" for perpetrators of crimes against peacekeepers. In the Indonesian context, this regulation is related to the constitutional basis of Article 30 of the 1945 Constitution and the Defense Law, which form the formal basis for the TNI's participation in UN peacekeeping operations.⁵⁴

3. Deployment and Protection of Indonesian Peacekeepers in Conflict Areas

3.1 Implementation of the Deployment of Indonesian Peacekeeping Forces in Conflict Areas

Indonesia's role in UN missions is formally regulated under the Vision 4,000 Peacekeepers Roadmap for 2015–2019, which targets approximately 4,000 Garuda Contingent personnel as an expression of Indonesia's identity as a "peacemaker state" in accordance with the mandate of the 1945 Constitution and the country's free and active foreign policy. This roadmap is supported by under Presidential Regulation No. 86 of 2015 on Peacekeeping Missions, the deployment of the TNI and Polri personnel to UN operations is formally regulated.⁵⁵ The Indonesia Peace and Security Center (IPSC) in Sentul serves as an integrated training center for enhancing the capabilities of military and civilian components (doctors, legal experts, and technicians) preceding their deployment in UN missions. The readiness of these civilian capabilities forms the basis for the development of Indonesian civilian peacekeepers (health workers, educators,

⁵³ Murwanto, Ilham, et al. "Indonesia's commitment to the United Nations peacekeeping operations in Constructivist perspective: case study of roadmap vision 4,000 peacekeepers 2015-2019 policy." *Jurnal Pertahanan: Media Informasi Tlg Kajian & Strategi Pertahanan Yang Mengedepankan Identity, Nasionalism & Integrity*, vol. 6, no. 3, 2020, pp. 342–356, <https://doi.org/10.33172/jp.v6i3.869>.

⁵⁴ Sihite, Ganda Martunas, et al. "Enhancing Indonesia's participation in UN peacekeeping missions through Indonesian civilian peacekeepers." *International Journal Of Humanities Education and Social Sciences (IJHES)*, vol. 3, no. 5, 2024, <https://doi.org/10.55227/ijhess.v3i5.828>.

⁵⁵ Sumertha, Gede, et al. "Indonesian female peacekeepers participation in United Nations Interim Forces in Lebanon (UNIFIL) during 2015–2017." *ATHENS JOURNAL OF MEDITERRANEAN STUDIES*, vol. 7, no. 1, 2020, pp. 29–44, <https://doi.org/10.30958/ajms.7-1-2>.

economic development specialists) who are projected to support post-conflict recovery based on the concept of human security.⁵⁶

At UNIFIL Lebanon, the Indonesian contingent conducts border patrols, ceasefire observations, and confidence-building with local communities through free medical services, social assistance, and cultural diplomacy. The deployment of women from TNI and the Polri in UNIFIL and other UN missions has expanded since 2015–2017, although it is still hampered by recruitment and placement in frontline operational areas.⁵⁷ Indonesian female peacekeepers play a strategic role in building trust among local women and children, facilitating psychosocial recovery, and serving as role models for local women to demand their socio-political rights.

The Garuda contingent at UNEF II (1975-1977) also served as an early example of how Indonesia continued to maintain its peacekeeping assignments even while facing other military operations, in order to maintain its image as a country that supports global stability.⁵⁸ The Indonesian government recognizes the importance of gender mainstreaming through regulations and policies, but evaluations show that the domestic legal framework has not fully incorporated a feminist perspective and still places women in administrative/clerical roles, rather than combat or key decision-making roles.⁵⁹ The idea of Indonesian Civilian Peacekeepers places civilian specialists as peacekeepers to handle the non-military dimensions of conflict (education, health, economy), with a holistic approach to human security.

These institutional arrangements demonstrate that Indonesia has established a structured pre-deployment system through the IPSC. However, gaps remain in ensuring the consistent integration of IHL, ROE, and accountability standards into training

⁵⁶ Safi, Fathomi, and Yandry Kurniawan. "International role perspective of Indonesia's participation in the Second United Nations Emergency Force (UNEF II) 1975–1977." *Jurnal Pertahanan: Media Informasi Tentang Kajian Dan Strategi Pertahanan Yang Mengedepankan Identity, Nasionalism Dan Integrity*, vol. 10, no. 2, 2024, pp. 253–269, <https://doi.org/10.33172/jp.v10i2.19599>.

⁵⁷ Dewi, E, et al. "The unboxing the legal background for women involvement in Indonesia's peacekeeping operation mission: Challenges and opportunities." *Proceedings of the Proceedings of the First Brawijaya International Conference on Social and Political Sciences, BSPACE, 26-28 November, 2019, Malang, East Java, Indonesia*, 2020, <https://doi.org/10.4108/eai.26-11-2019.2295184>.

⁵⁸ Sriyanto, Sriyanto. "Kapabilitas Pasukan perdamaian Indonesia di republik demokratik Kongo." *Jurnal Diplomasi Pertahanan*, vol. 8, no. 1, 2022, <https://doi.org/10.33172/jdp.v8i1.889>.

⁵⁹ Kilroy, Walt, et al. "Civilian protection in theory and Practice." *Civil Wars*, vol. 26, no. 1, 2024, pp. 1–15, <https://doi.org/10.1080/13698249.2024.2332160>.

modules, reflecting broader challenges identified in UN peacekeeping operations.⁶⁰ This indicates that strengthening pre-deployment mechanisms is essential to addressing accountability gaps, particularly within the framework of Presidential Regulation No. 86 of 2015, which should prioritize the enhancement of training standards rather than the expansion of extraterritorial jurisdiction.

3.2 Protection of Indonesian Peacekeepers Deployed to Conflict Areas

3.2.1. Protection During the Process of Deployment to Conflict Areas

Protection during the deployment of peacekeepers to conflict areas is regulated by the UN Civilian Peacekeepers Readiness Standards (UNCPRS), which assess the readiness of human resources, logistics, leadership, facilities, and regulations to ensure the safety of troops facing multidimensional threats in the DRC and other missions.⁶¹ The Indonesian Civilian Peacekeepers (ICP) framework emphasizes training, capacity building, and human rights protection for civilian peacekeepers before deployment, as well as the UN's international PoC framework, which regulates dialogue, physical protection measures and a secure environment, including pre-deployment training and rules on the use of force.⁶²

3.2.2. Legal Protection while Serving in Conflict Areas

UN peacekeepers (including Indonesia) are protected by SOFA and MoU between the UN, the host country, and the sending country, which grant them certain status, rights, and immunities; the main immunity is to protect them from unilateral legal proceedings by the host country while acting within the scope of their official duties. Studies on FPU (Formed Police Units) emphasize that the effectiveness and protection of units are highly dependent on a clear mandate, human rights-based training, logistical readiness, and the ability to build trust with local communities. Indonesia's policy to increase and maintain

⁶⁰ United Nations. "Training - Peacekeeping Resource Hub - Peacekeeping Resource Hub at Department of Peace Operations (DPO)." *United Nations*, <https://peacekeepingresourcehub.un.org/en/training>. Accessed 31 Mar. 2026.

⁶¹ Yunissa, Ade Arya. "Kesepakatan Antarnegara Terkait pelanggaran Pelecehan Oleh pasukan Perdamaian Perserikatan Bangsa-Bangsa di Wilayah Konflik." *Jurnal Ilmu Sosial Dan Ilmu Politik Malikussaleh (JSPM)*, vol. 3, no. 2, 2022, pp. 250–258, <https://doi.org/10.29103/jspm.v3i2.5718>.

⁶² Nopela, Mastina. et al. "Analysis of the implementation of government expenditure, cost benefit and political economy on the INDONEISA's peacekeeping." *International Journal Of Humanities Education and Social Sciences (IJHES)*, vol. 3, no. 5, 2024, pp. 2494–2507, <https://doi.org/10.55227/ijhess.v3i5.982>.

its contribution to UN peacekeeping forces is essentially shaped by a combination of foreign policy considerations, budget availability and management, as well as institutional capacity and human resources. therefore, the realization of quantitative targets such as the "Vision 4,000 Peacekeepers" Roadmap tends to be dynamic and constantly renegotiated in line with changing political priorities, fiscal constraints, and the operational capabilities of the TNI/Polri and civilian elements involved in peace missions.⁶³

These findings are in line with the conclusion that the legal framework governing peace operations is still fragmented and often reacts after incidents occur, rather than preventively. On the one hand, the UN has developed various policy instruments such as HRDDP and PoC training standards. On the other hand, their implementation at the mission and troop-contributing country levels is often hampered by resource constraints, military cultural differences, and political sensitivities.⁶⁴ In the case of Indonesia, endeavors to strengthen Indonesia's involvement in UN missions through the implementation of the Roadmap Vision 4,000 Peacekeepers and the development of Indonesian Civilian Peacekeepers demonstrate a high level of normative commitment, but questions remain as to the extent to which substantive legal protection and accountability are truly a priority in policy, rather than merely a complement to diplomacy and international image.

Thus, analysis of the development of robust mandates, due diligence standards, and patterns of accountability of the UN and sending countries shows that legal imbalances in peace operations are not only a matter of IHL doctrine, but also institutional design and accountability politics that have not been fully capable of preventing or punishing violations by or against peacekeepers, including Indonesian contingents.

⁶³ Fadillah, Yulia, et al. "The role of Indonesia's female peacekeepers in United Nations peacekeeping operations to promote gender equality." *Jurnal Pertahanan: Media Informasi Ttg Kajian & Strategi Pertahanan Yang Mengedepankan Identity, Nasionalism & Integrity*, vol. 6, no. 2, 2020, pp. 118–128, <https://doi.org/10.33172/jp.v6i2.756>.

⁶⁴ Gilder, Alexander. "Human security and the stabilization mandate of MINUSCA." *International Peacekeeping*, vol. 28, no. 2, 2020, pp. 200–231, <https://doi.org/10.1080/13533312.2020.1733423>.

III. CONCLUSION

The fragmented and reactive legal framework for UN peace operations fails to close the accountability gap for Indonesian peacekeepers. Therefore, preventive reforms must be tailored to address specific legal imbalances. First, the ambiguity in the legal status of peacekeepers requires the strengthening of ROE that integrate DPH and PoC. Second, persistent accountability gaps necessitate enhanced bilateral coordination between Indonesia and the UN to ensure transparent due diligence mechanisms. Third, inconsistencies in the implementation of IHL highlight the need to strengthen pre-deployment systems, particularly through the expansion of training curricula at the IPSC with context-based simulations from the DRC. Strengthening these targeted measures represents the most feasible approach to improving accountability, reducing the risk of IHL violations, and ensuring more effective mandate implementation. Ultimately, these reforms can reinforce Indonesia's position as an active peacemaker and support the refinement of Presidential Regulation No. 86 of 2015 in alignment with international standards.

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Reforming Advance Pricing Agreements in Vietnam: Implications for Tax Governance Efficiency

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ABSTRACT

Advance Pricing Agreements (APAs) have increasingly been adopted as a key instrument to reduce transfer pricing disputes and enhance certainty in cross-border taxation. While APA systems are well established in many OECD jurisdictions, their institutional design and practical implementation in emerging economies such as Vietnam remain underdeveloped and uneven. Despite a growing body of literature on APAs, limited attention has been paid to institutionally grounded analyses of APA reforms in emerging economies, particularly in relation to their implications for tax governance.

This article examines the recent reform of Vietnam's APA framework under Decree No. 122/2025/NĐ-CP and evaluates its implications for tax governance efficiency in the context of the global economy. The study adopts a qualitative doctrinal legal approach, combined with comparative analysis against OECD standards, drawing on both primary legal sources and secondary literature.

The findings suggest that the reform reflects a shift towards a more cooperative and administratively flexible model of tax governance, particularly through the reallocation of decision-making authority and procedural adjustments in bilateral and multilateral APAs. However, its effectiveness remains constrained by challenges relating to administrative capacity, inter-agency coordination, and institutional accountability.

This study contributes to the literature by linking legal reform with governance performance in emerging tax systems and highlights the importance of strengthening institutional capacity and transparency to ensure the effective operation of APA mechanisms.

Keywords: Advance Pricing Agreements, Tax Governance, Vietnam.

I. INTRODUCTION

In recent decades, growing economic integration across borders has reshaped the way international taxation operates. Multinational enterprises (MNEs) now structure their activities through increasingly complex production and distribution networks that span multiple countries, with frequent transactions taking place between related entities. This shift has made it more difficult for tax authorities to determine where profits should be taxed. In particular, applying the arm's length principle in practice has become more challenging as business structures grow more intricate. As a result, managing transfer pricing is no longer a technical issue alone, but has become a key concern for tax administrations and an important topic in broader tax policy discussions¹.

Disputes over transfer pricing have become one of the most common sources of tension between MNEs and tax authorities. Because transactions between related parties are based on internal pricing decisions rather than prices formed in the open market, tax authorities often face difficulties in assessing whether these arrangements reflect fair market conditions. In practice, this assessment depends on economic reasoning and comparisons with similar transactions, which are not always straightforward. It is therefore not surprising that differences in understanding and interpretation arise, both between taxpayers and tax authorities, and among tax authorities in different countries. These differences can lead to lengthy disputes, the risk of the same income being taxed more than once, and higher compliance costs for businesses². In response, both international organisations and national governments have made efforts to develop clearer rules and more workable mechanisms, with the aim of providing greater certainty for taxpayers while maintaining fairness in tax systems.

One way to address these challenges has been the introduction of Advance Pricing Agreements (APAs). In simple terms, an APA is an arrangement between a taxpayer and one or more tax authorities in which they agree in advance on how transfer pricing will be determined for certain transactions between related parties over a specific period of

¹ Eden, Lorraine. *Transfer Pricing and Multinational Enterprises*. Oxford UP, 2019.

² OECD. *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. OECD Publishing, 2022.

time. By setting out these arrangements before the transactions take place, APAs help reduce uncertainty and lower the risk of disputes³.

In current tax practice, APAs are increasingly linked to more cooperative approaches between tax authorities and taxpayers, based on transparency and early engagement. Instead of relying mainly on audits and disputes after the fact, these approaches aim to address potential tax issues at an earlier stage through dialogue and agreement. As noted by the OECD, such arrangements can improve voluntary compliance and make tax administration more efficient when there is clear guidance and mutual trust⁴. From this perspective, APAs are not only technical tools for handling transfer pricing, but also a means of supporting a more cooperative way of managing tax relations.

While many developed economies have operated APA programmes for several decades and accumulated substantial administrative experience, the adoption of such mechanisms in emerging economies has occurred more recently. In these contexts, the implementation of APA regimes often takes place within evolving institutional environments where legal frameworks, administrative capacity, and organisational coordination are still developing. Consequently, the effectiveness of APAs in emerging economies depends not only on the formal regulatory provisions governing their operation but also on the institutional design of tax administrations responsible for implementing them.⁵

Despite a growing body of literature on APAs, most studies focus on dispute resolution and regulatory alignment in developed jurisdictions, with relatively limited attention to institutionally grounded analyses in emerging economies. In particular, there remains a lack of systematic research examining how APA reforms influence tax governance efficiency, including administrative capacity, accountability, and coordination. This gap is especially evident in the Vietnamese context, where empirical and doctrinal analyses remain limited.

Vietnam represents a particularly relevant case for examining these dynamics. Over the past two decades, Vietnam has experienced rapid economic growth and increasing

³ Organisation for Economic Co-operation and Development. *Advance Pricing Arrangements: Best Practices*. OECD Publishing, 2001.

⁴ OECD. *Co-operative Compliance: A Framework – From Enhanced Relationship to Co-operative Compliance*. OECD Publishing, 2013.

⁵ International Monetary Fund. *Tax Administration Diagnostic Assessment Tool (TADAT)*. IMF, 2019.

integration into the global economy through trade liberalisation, foreign direct investment, and participation in international production networks. As multinational enterprises have expanded their operations within the country, issues relating to transfer pricing and profit shifting have attracted greater attention from policymakers and tax authorities. In response, Vietnam has gradually strengthened its transfer pricing regulatory framework in order to align domestic tax rules with international standards and to safeguard the national tax base.

The legal basis for Advance Pricing Agreements in Vietnam was formally established under the Law on Tax Administration 2019 (Law No. 38/2019/QH14), which introduced provisions enabling taxpayers and tax authorities to negotiate advance agreements on transfer pricing methodologies. Subsequent implementing regulations, including Decree No. 126/2020/NĐ-CP, provided further procedural guidance for the application, evaluation, and approval of APAs within the Vietnamese tax administration.⁶ These developments formed part of broader reforms aimed at modernising tax governance and improving the predictability of the tax system for investors.

Despite the establishment of this legal framework, practical implementation of the APA regime has faced several institutional challenges. Administrative processes initially relied on a highly centralised review structure within the General Department of Taxation (GDT), which was responsible for conducting economic analysis and approving APA applications. While centralisation was intended to ensure consistent interpretation of transfer pricing regulations, it also created procedural congestion and extended review timelines, particularly in complex cases involving cross-border transactions. Similar implementation constraints have been identified in other emerging tax administrations where specialised expertise and institutional coordination remain limited.⁷

In response to these operational challenges, the Vietnamese government adopted Decree No. 122/2025/NĐ-CP, which introduces reforms to the institutional structure of the APA regime. The decree redistributes certain responsibilities within the tax administration, allowing specialised units at different administrative levels to participate more actively in the evaluation process while maintaining central oversight. These

⁶ National Assembly of Vietnam. *Law on Tax Administration (Law No. 38/2019/QH14)*. 2019; Government of Vietnam. *Decree No. 126/2020/NĐ-CP Guiding the Law on Tax Administration*. 2020.

⁷ International Monetary Fund. *Tax Administration Diagnostic Assessment Tool (TADAT)*. IMF, 2019.

institutional adjustments are intended to improve administrative efficiency, enhance procedural clarity, and strengthen the role of APAs as preventive instruments within Vietnam's transfer pricing governance framework.

Despite these developments, academic discussion on Vietnam's APA regime is still quite limited. Most existing studies on transfer pricing in emerging economies tend to focus on aligning domestic rules with international standards and on anti-avoidance efforts linked to the BEPS initiative. Less attention has been given to how APA systems are actually organised and how institutional design affects their performance in practice.

Against this background, this article examines how Vietnam's APA framework has developed and how recent reforms may shape its role in tax administration. It focuses on three main questions: how Vietnam's APA rules have evolved in the broader context of international tax reforms; what changes were introduced by Decree No. 122/2025/NĐ-CP, especially in terms of administrative responsibilities; and how these changes may affect the effectiveness of APAs in preventing transfer pricing disputes.

This study adopts a qualitative doctrinal legal approach combined with comparative analysis. The analysis is based on primary legal sources, including the Law on Tax Administration 2019 and Decree No. 122/2025/NĐ-CP, as well as secondary materials such as OECD Transfer Pricing Guidelines and recent academic literature. It further incorporates an institutional perspective to assess how organisational structures and decision-making processes influence the effectiveness of APA implementation.

The discussion demonstrates that while Vietnam's APA reform reflects a shift towards a more cooperative and flexible model of tax administration, its effectiveness remains dependent on key governance factors, including administrative capacity, inter-agency coordination, and accountability mechanisms. In particular, the redistribution of decision-making authority may enhance efficiency but also introduces potential governance risks that require appropriate safeguards.

By addressing these questions, the article contributes to ongoing discussions on the implementation of cooperative compliance mechanisms in developing tax administrations. It argues that the effectiveness of APA programmes depends not only on regulatory alignment with international standards but also on institutional factors such as administrative capacity, procedural design, and organisational coordination within tax authorities. The Vietnamese experience therefore provides useful insights into the broader

challenges faced by emerging economies seeking to strengthen tax certainty while maintaining effective oversight of cross-border transactions.

This study combines legal analysis with observations from practice. By looking at both the written rules and how they are applied, it aims to capture not only the formal structure of the law but also the way it operates in reality.⁸

First, the study examines the legal framework governing APAs in Vietnam through a close reading of relevant laws and regulations. It focuses on how the rules are structured, how they are interpreted, and how they fit together as a system. This approach is commonly used in legal research to clarify the meaning of legal provisions and to assess how a regulatory framework operates within a particular institutional setting.⁹ The study therefore analyses key legal sources including the Law on Tax Administration, implementing regulations on transfer pricing, and the institutional reforms introduced under Decree No. 122/2025/NĐ-CP. Through a statutory and conceptual approach, the research identifies the legal architecture of the APA regime, the procedural stages of APA negotiations, and the distribution of decision-making authority within the tax administration.

Second, the article incorporates empirical observations regarding the operation of the APA mechanism in practice. Empirical legal research examines how legal rules function within institutional contexts and evaluates whether regulatory frameworks operate effectively when implemented. This approach complements doctrinal analysis by focusing on the practical application of legal norms and the behaviour of institutions responsible for enforcing them.¹⁰ The empirical component of this study draws on policy reports, administrative guidance, publicly available information issued by tax authorities, and secondary analyses concerning transfer pricing enforcement. These materials provide insight into the practical challenges encountered by tax authorities and multinational enterprises in the negotiation and implementation of APAs, particularly in emerging tax administrations where institutional capacity and administrative coordination play a critical role in the effectiveness of cooperative compliance mechanisms.

⁸ Perrine Simon et al., *Guidelines on Academic Legal Research Methodology* (Inter-University Cooperation Project Laos–Luxembourg, University of Luxembourg, 2022).

⁹ Simon, Perrine, et al. *Guidelines on Academic Legal Research Methodology*. University of Luxembourg, 2022, pp. 9–13.

¹⁰ Epstein, Lee, and Andrew D. Martin. *An Introduction to Empirical Legal Research*. Oxford UP, 2014, pp. 2–8.

The analysis focuses on three key aspects that influence how the APA system works in practice. First, it looks at how decision-making powers are distributed within the tax administration. Second, it considers whether there is enough specialised expertise to deal with complex transfer pricing issues. Third, it examines how procedures are organised, especially the coordination needed to ensure consistency and transparency during the APA process.

By combining legal analysis with observations from practice, the study takes a broader view of how rules and administrative realities interact. This helps explain how the design of the system affects the way transfer pricing is managed in practice.

II. DISCUSSION

1. Evolution of Vietnam's APA Legal Framework

Vietnam introduced APA mechanism as part of a broader effort to improve transfer pricing control and modernise tax administration in the context of growing cross-border economic activity. The legal basis for this mechanism was first set out in the Law on Tax Administration 2019 (Law No. 38/2019/QH14), which allows taxpayers and tax authorities to reach prior agreement on how transfer pricing should be determined for related-party transactions.¹¹ The details of how this system operates were later clarified in implementing regulations, most notably Decree No. 126/2020/NĐ-CP. This decree sets out the procedures for submitting, reviewing, and approving APA applications.¹² Together, these instruments form the core legal infrastructure through which Vietnam has sought to incorporate preventive transfer pricing mechanisms into its domestic tax administration system.

The introduction of APAs in Vietnam can be seen as part of a wider shift in the way tax systems are managed globally. Over the past few decades, many tax authorities have moved toward preventive approaches that aim to deal with transfer pricing issues before they turn into disputes.

¹¹ National Assembly of Vietnam. *Law on Tax Administration (Law No. 38/2019/QH14)*. 2019.

¹² Government of Vietnam. *Decree No. 126/2020/NĐ-CP Guiding the Law on Tax Administration*. 2020. <https://english.luatvietnam.vn/decree-no-126-2020-nd-cp-dated-october-19-2020-of-the-government-191542-doc1.html>

In this context, and in line with the OECD approach, APAs are often seen as a way to strengthen cooperation between taxpayers and tax authorities. Instead of dealing with issues only after audits or disputes arise, both sides can agree in advance on how transfer pricing will be applied.¹³ By clarifying the pricing approach applicable to controlled transactions in advance, APAs are intended to reduce litigation risks, prevent instances of double taxation, and enhance predictability in international tax planning for multinational enterprises.

Under Vietnamese tax law, an APA is a written agreement between the tax authority and the taxpayer, and in some cases also involving foreign tax authorities, which sets out how transfer pricing will be determined for related-party transactions over a certain period. A key feature is that this agreement is reached before the tax return is filed, allowing taxpayers to have greater certainty about how their future transactions will be treated for tax purposes. This preventive feature distinguishes APAs from traditional transfer pricing enforcement mechanisms, which typically rely on ex post audits and subsequent dispute resolution procedures. By shifting the regulatory focus toward advance negotiation and risk management, the APA mechanism represents a significant evolution in the governance of international taxation.

The adoption of the APA mechanism in Vietnam therefore reflects a broader global trend toward cooperative compliance in tax administration. Instead of relying exclusively on post-transaction audits and litigation, tax authorities increasingly seek to manage transfer pricing risks through instruments that allow taxpayers and regulators to agree in advance on acceptable pricing methodologies. Within this framework, APAs serve not only as technical tools for transfer pricing regulation but also as institutional mechanisms that promote dialogue and cooperation between tax administrations and multinational enterprises.

In Vietnam, the APA regime is primarily designed to apply to enterprises engaged in related-party transactions, particularly multinational enterprises operating across multiple jurisdictions. Through the APA mechanism, the tax authority and the taxpayer

¹³ OECD. *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. OECD Publishing, 2022. <https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>;

De Simone, Lisa, Richard Sansing, and Jacob Seidman. "When Are Enhanced Relationship Tax Compliance Programs Mutually Beneficial?" *The Accounting Review*, 2013.

negotiate and agree in advance on the appropriate transfer pricing method applicable to specific transactions or categories of transactions. This arrangement significantly reduces the likelihood of subsequent tax disputes and provides greater certainty regarding the tax consequences of complex cross-border corporate arrangements.

At the early stage, Vietnam's APA system was designed in a highly centralised way. Most of the key decisions, including the review and approval of applications, were handled at the General Department of Taxation under the Ministry of Finance. This centralised approach aimed to ensure that complex transfer pricing rules were applied consistently and that agreements with potential budget impacts were carefully controlled. In many developing tax systems, such an arrangement is often seen as necessary at the beginning, as it helps build specialised expertise and maintain a more uniform application of the rules.¹⁴

However, this centralised structure also created some practical difficulties. As foreign investment grew and Vietnam became more integrated into global production networks, both the number and complexity of related-party transactions increased. This, in turn, led to a greater need for tools like APAs to prevent disputes.

In practice, the handling of APA applications has often been time-consuming, with multiple stages of internal review and lengthy negotiations. Delays tend to be more noticeable in complex cases, especially where detailed economic analysis is required or where coordination with foreign tax authorities is involved under bilateral tax agreements.¹⁵

These implementation challenges illustrate a broader tension frequently observed in international tax administration: the gap between normative regulatory design and institutional capacity. While Vietnam's legal framework formally establishes procedures for APA negotiation and approval, the effective functioning of the system depends heavily on administrative resources, specialised transfer pricing expertise, and coordination mechanisms within the tax administration. Similar institutional constraints

World Bank. *Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners*. World Bank, 2016. <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/230331483627135642>

¹⁵ Ernst & Young. "OECD Holds Tax Certainty Day, Presenting MAP and APA Statistics and Addressing Dispute Prevention and Resolution Developments." 2025. <https://globaltaxnews.ey.com/news/2025-2219-oecd-holds-tax-certainty-day-presenting-map-and-apa-statistics-and-addressing-dispute-prevention-and-resolution-developments>

have been documented in other developing tax systems, where highly centralised approval procedures may inadvertently create administrative bottlenecks during the early stages of implementing sophisticated international tax instruments.¹⁶

Consequently, the evolution of Vietnam's APA framework can be understood as part of a broader process through which developing tax administrations gradually adapt cooperative compliance mechanisms to domestic institutional conditions while simultaneously aligning their regulatory practices with emerging international standards in tax governance. Rather than representing a static regulatory arrangement, the APA regime in Vietnam continues to evolve in response to changes in the global tax environment, the increasing complexity of multinational business structures, and the institutional learning processes within the domestic tax administration.

2. Institutional Reform under Decree No. 122/2025/NĐ-CP

The adoption of Decree No. 122/2025/NĐ-CP represents a significant institutional adjustment within Vietnam's tax administration. Rather than fundamentally altering the legal basis of the APA regime, the reform primarily restructures the distribution of administrative responsibilities involved in the evaluation and approval process.

Under the earlier framework, local tax departments conducted preliminary fact-finding, yet substantive economic analysis and final decision-making authority remained concentrated at the central level. This structure ensured interpretative uniformity but contributed to congestion in the review process.

The 2025 reform introduces a tiered governance model that redistributes technical functions across different levels of the tax administration. Local tax departments now undertake initial functional and risk assessments, while specialised regional units participate in the evaluation of benchmarking methodologies and economic modelling. The GDT retains supervisory authority and final endorsement powers, particularly for bilateral and multilateral APAs involving treaty partners.

¹⁶ OECD. Tax Administration 2023: Comparative Information on OECD and Other Advanced and Emerging Economies. OECD Publishing, 2023. <https://www.oecd.org/tax/administration/tax-administration-23077727.htm>

Table 1. Administrative Features of Vietnam’s APA Framework: Pre-2025 and Post-2025 Reform

| Dimension | Pre-2025 Framework | Post-2025 Reform |
|------------------------|--|--|
| Approval authority | Highly centralised at General Department of Taxation | Tiered review with central endorsement |
| Economic analysis | Concentrated at central level | Shared with regional technical units |
| Procedural milestones | Formal but weakly segmented | Structured and monitored stages |
| Risk differentiation | Limited formal segmentation | Risk-based case classification |
| MAP coordination | Sequential coordination | Earlier integration with APA process |
| Performance monitoring | Limited transparency | Internal case tracking mechanisms |

Source: Author’s compilation based on Law on Tax Administration No. 38/2019/QH14, Decree No. 126/2020/NĐ-CP, and Decree No. 122/2025/NĐ-CP.

Table 1 summarises the key administrative differences between the earlier centralised framework governing Advance Pricing Agreements (APAs) and the institutional arrangement introduced after the 2025 reform. The comparison highlights the shift from a highly centralised approval structure toward a more functionally differentiated administrative model in which responsibilities for negotiation, technical evaluation, and final approval are more clearly distributed across different levels of the tax administration.

From an institutional perspective, this restructuring reflects a model of functional decentralisation rather than complete administrative autonomy. While central authorities continue to exercise doctrinal oversight and maintain interpretative control over the application of transfer pricing rules, certain operational and technical responsibilities are partially delegated to specialised administrative units. Comparative studies in tax administration suggest that hybrid governance arrangements of this type may enhance

regulatory responsiveness and reduce administrative congestion while still preserving coherence in the interpretation of complex tax rules.¹⁷

A significant institutional development occurred with the adoption of Decree No. 122/2025/NĐ-CP, which introduced a formal decentralisation mechanism in the approval process of bilateral and multilateral APAs. Prior to the issuance of this decree, the approval of APAs involving foreign tax authorities required consultation with, and in certain cases approval by, the Prime Minister. This multi-layered administrative procedure often resulted in prolonged negotiation periods and created additional procedural uncertainty for both taxpayers and tax authorities.

The 2025 reform fundamentally modifies this institutional arrangement by delegating greater authority to the Ministry of Finance. Under Article 8 of the decree, the Minister of Finance is authorised to approve and sign the contents of bilateral or multilateral APAs negotiated with foreign tax authorities, as well as to determine the effective date of such agreements. By reallocating decision-making authority to the ministerial level, the reform seeks to streamline the approval process and shorten the time required to finalise complex international tax agreements.

In addition to reallocating formal approval authority, the decree also clarifies the procedural responsibilities of the tax administration. The tax authority—primarily through specialised units within the General Department of Taxation—is responsible for negotiating the APA with the taxpayer and the relevant foreign competent authorities, conducting the necessary economic and transfer pricing analyses, and preparing the negotiation dossier submitted for ministerial approval. By setting out these roles more clearly, the reform aims to improve coordination between the technical work and the final decision-making process.

From a governance perspective, the reform appears to strike a balance between efficiency and oversight. Reducing layers of approval may help speed up procedures and make it easier to engage with foreign tax authorities in a timely manner. On the other hand, the concentration of final approval authority at the ministerial level raises broader questions concerning administrative capacity, transparency, and accountability in the management of complex transfer pricing arrangements.

¹⁷ Bird, Richard, and Eric Zolt. "Technology and Taxation in Developing Countries." *National Tax Journal*, 2008.

The reform therefore illustrates a broader challenge frequently encountered in contemporary tax governance: reconciling the need for consistent application of transfer pricing principles with the practical necessity of improving administrative efficiency. In this context, the restructuring introduced by Decree 122 can be interpreted as an attempt to modernise Vietnam's APA governance framework by reducing bureaucratic bottlenecks while maintaining sufficient central oversight to safeguard fiscal interests and regulatory coherence.

From a tax governance perspective, the institutional restructuring introduced by Decree No. 122/2025/NĐ-CP has important implications beyond procedural efficiency. First, the partial decentralisation of technical functions may reduce administrative congestion; however, it also introduces potential risks of inconsistent interpretation across different levels of the tax administration. Second, the concentration of final approval authority at the ministerial level raises questions concerning accountability and oversight, particularly in complex bilateral and multilateral APA cases. While centralised endorsement may ensure policy coherence, it may also limit procedural transparency if decision-making criteria are not clearly articulated. These governance trade-offs suggest that the effectiveness of APA reform depends not only on institutional design but also on the adequacy of safeguards ensuring consistency, transparency, and accountability in administrative practice.

3. Comparative APA Governance in OECD and Emerging Economies

The governance of Advance Pricing Agreements (APAs) has developed significantly over the past three decades as tax administrations have sought more cooperative approaches to managing transfer pricing risks.¹⁸ Originally introduced in the early 1990s in jurisdictions such as the United States and Japan, the APA mechanism has gradually become an integral component of international tax governance.¹⁹ The framework has been further consolidated through the work of the Organisation for Economic Co-operation and Development, particularly in the context of the OECD/G20

¹⁸ Eden, Lorraine. "The Arm's Length Standard and the Shifting State of International Tax Governance." *Journal of International Business Policy*, vol. 10, 2019, p. 1.

¹⁹ Markham, Michelle. *The Transfer Pricing of Intangibles*. 2nd ed., Kluwer Law International, 2012.

Base Erosion and Profit Shifting Project, which emphasises transparency, dispute prevention, and cooperative compliance in international taxation.²⁰

Within OECD jurisdictions, APAs are widely regarded as a preventive mechanism designed to reduce transfer pricing disputes before they arise.²¹ Rather than relying solely on ex post audits and litigation, tax authorities and multinational enterprises negotiate in advance the appropriate methodology for determining transfer prices in related-party transactions.²² This approach reflects a broader transformation in tax administration, shifting from adversarial enforcement models toward cooperative regulatory frameworks that prioritise risk management, certainty, and long-term compliance.²³

In many OECD countries, APA programmes tend to share some common features. A key element is the establishment of specialised units within tax administrations. These units handle the technical work, including economic analysis, reviewing transfer pricing documents, and negotiating agreements with taxpayers and foreign tax authorities. For instance, in the United States, the Internal Revenue Service operates a dedicated Advance Pricing and Mutual Agreement Program (APMA) to manage bilateral and multilateral APAs. Likewise, Japan's National Tax Agency has specialised teams responsible for APA negotiations and coordination with foreign counterparts²⁴; OECD countries often place greater emphasis on bilateral and multilateral APAs to reduce the risk of double taxation. These agreements involve coordination between tax authorities in different countries and are usually carried out under tax treaties based on the OECD Model Tax Convention on Income and on Capital.²⁵ Bilateral APAs are particularly important because they ensure that the transfer pricing methodology agreed upon in one jurisdiction will also be accepted by the tax authority of the counterparty jurisdiction. As a result, they provide greater certainty for multinational enterprises engaged in cross-border transactions; OECD APA programmes generally operate within a transparent procedural framework that includes pre-filing consultations, formal application procedures,

²⁰ OECD. OECD/G20 Base Erosion and Profit Shifting Project: Explanatory Statement. OECD Publishing, 2015.

²¹ Brauner, Yariv, and Pasquale Pistone. "Adopting and Implementing Advance Pricing Agreements." *Intertax*, vol. 45, 2017, p. 609.

²² Michelle Markham, *Advance Pricing Agreements: Past, Present and Future* (Kluwer Law International, 2005).

²³ Valerie Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, 2003).

²⁴ National Tax Agency of Japan, *APA Program Annual Report* (Tokyo, 2022).

²⁵ Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017).

negotiation phases, and monitoring mechanisms. These processes are often supported by extensive transfer pricing guidance, including the widely recognised OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.²⁶ These guidelines provide detailed recommendations on comparability analysis, selection of transfer pricing methods, and documentation requirements.

Despite these common institutional features, the implementation of APA programmes varies significantly across jurisdictions. Prior studies have highlighted the structural channels through which multinational enterprises engage in tax planning and profit shifting, while more recent research emphasises the role of institutional capacity and governance frameworks in addressing these challenges²⁷. This indicates that cross-country differences in APA implementation are not merely technical but fundamentally institutional in nature.²⁸ These trends are reflected in updated international standards, which increasingly emphasise risk-based approaches and coordinated dispute prevention mechanisms in transfer pricing governance.

In practice, some jurisdictions operate highly institutionalised APA programmes supported by substantial administrative capacity, whereas others maintain more limited frameworks due to resource constraints. Such disparities are particularly evident when comparing OECD countries with emerging economies.²⁹ Recent empirical studies confirm that variations in administrative capacity and institutional design significantly influence the effectiveness of tax governance in addressing multinational profit shifting.³⁰ Similarly, prior research demonstrates that transfer pricing practices and regulatory responses differ across developing economies, reflecting uneven institutional capacity and anti-avoidance frameworks.³¹ Existing literature also underscores the central role of

²⁶ OECD. *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. OECD Publishing, 2022.

²⁷ Beer, Sebastian, Ruud de Mooij, and Li Liu. "International Corporate Tax Avoidance: A Review of the Channels." *Journal of Economic Surveys*, 2019.

²⁸ OECD. *Cooperative Tax Compliance: Building Better Tax Control Frameworks*. 2021.

²⁹ OECD. *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. OECD Publishing, 2022.

³⁰ Brauner, Yariv. "What the BEPS?" *Florida Tax Review*, vol. 16, 2014, p. 55.

³¹ Johannesen, Niels, Thomas Tørsløv, and Ludvig Wier. "The Global Minimum Tax and Profit Shifting." *The Economic Journal*, 2023.

transfer pricing as a strategic instrument in multinational tax planning, especially within complex cross-border corporate structures.³²

In many emerging economies, the adoption of APA mechanisms reflects a broader effort to modernise tax administration and align domestic transfer pricing regimes with international standards.³³ However, the institutional environments in which these mechanisms operate differ substantially from those in OECD jurisdictions. Tax administrations in these contexts often face persistent constraints, including limited technical expertise, restricted access to comparable data, and broader administrative capacity challenges.³⁴

One of the primary challenges concerns the availability of specialised transfer pricing expertise within tax administrations. APA negotiations typically require complex economic analyses, including benchmarking studies and functional analyses of multinational enterprise structures. In OECD jurisdictions, tax authorities often employ teams of economists, legal experts, and data analysts to support these processes.³⁵ By contrast, many emerging economies have limited pools of such expertise, which can affect their capacity to negotiate and monitor sophisticated APA arrangements.

A second challenge relates to access to reliable comparable data. Transfer pricing analysis frequently relies on databases containing financial information about comparable companies operating in similar markets. These databases are widely available in developed economies but may be less accessible in developing jurisdictions.³⁶ As a result, tax administrations in emerging economies may encounter difficulties in conducting robust benchmarking analyses, particularly when dealing with highly specialised or intangible-intensive industries.

A third institutional constraint concerns the complexity of international coordination in bilateral and multilateral APAs. Negotiations between tax authorities

³² Sari, D., S. Utama, Fitriany, and N. Rahayu. "Transfer Pricing Practices and Specific Anti-Avoidance Rules in Asian Developing Countries." *International Journal of Emerging Markets*, vol. 16, no. 3, 2021, pp. 492–516. <https://doi.org/10.1108/IJOEM-10-2018-0541>;

Kumar, Satish. "What Do We Know about Transfer Pricing? Insights from Bibliometric Analysis." *Journal of Business Research*, vol. 134, 2021, pp. 275–287. <https://doi.org/10.1016/j.jbusres.2021.05.041>

³³ Cui, Wei. "China's Transfer Pricing Regime and Its Global Implications." *Bulletin for International Taxation*, vol. 72, 2018, p. 10.

³⁴ Picciotto, Sol. *International Business Taxation*. Cambridge UP, 2013.

³⁵ Eden, Lorraine, and Richard Collier. "Transfer Pricing and the Arm's Length Principle." *World Tax Journal*, vol. 9, 2018, p. 345.

³⁶ OECD. *Transfer Pricing Comparability Data and Developing Countries*. OECD Publishing, 2014.

require well-established competent authority procedures and strong institutional relationships with foreign tax administrations. OECD countries have developed extensive experience in these processes through decades of participation in tax treaty networks and mutual agreement procedures.³⁷ Emerging economies, however, may have more limited experience in conducting such negotiations, which can prolong APA procedures and reduce their practical attractiveness for taxpayers.

When viewed in comparative perspective, Vietnam's APA framework reflects partial convergence with OECD practices in terms of procedural structure and cooperative compliance orientation. However, significant divergence remains at the level of institutional capacity and governance safeguards. Unlike many OECD jurisdictions where specialised APA units operate with high levels of technical autonomy and transparency, Vietnam's system continues to rely on a hybrid model combining decentralised technical input with centralised approval authority. This divergence has direct implications for tax governance efficiency, as the benefits of cooperative compliance mechanisms may be constrained by institutional limitations in emerging administrative contexts.

4. Administrative Capacity and Technical Expertise

The effectiveness of Advance Pricing Agreement (APA) programmes depends not only on the existence of a legal framework but also on the technical and institutional capacity of tax administrations responsible for implementing transfer pricing rules. Transfer pricing regulation requires a high level of specialised expertise because the determination of arm's length prices involves complex economic analysis, including functional and risk assessments, benchmarking studies, financial modelling, and the use of international comparability databases.³⁸ These analytical processes are necessary to evaluate whether related-party transactions within multinational enterprise groups reflect market-based pricing conditions.

³⁷ Ring, Diane. "International Tax Relations: Theory and Implications." *Tax Law Review*, vol. 60, 2010, p. 83.

³⁸ OECD. *Tax Administration 2023: Comparative Information on OECD and Other Advanced and Emerging Economies*. OECD Publishing, 2023.
<https://www.oecd.org/tax/administration/tax-administration-23077727.htm>

International policy research consistently emphasises that administrative capacity constitutes a critical determinant of effective transfer pricing governance, particularly in developing and emerging economies. This insight is supported by prior research on international tax behaviour, which highlights both the structural incentives for profit shifting and the growing importance of governance capacity in ensuring effective tax compliance³⁹. The Organisation for Economic Co-operation and Development (OECD) further notes that transfer pricing administration requires multidisciplinary expertise, combining legal analysis, accounting knowledge, and economic modelling.⁴⁰ In the absence of such expertise, tax administrations may encounter significant challenges in evaluating complex corporate structures and intangible asset transactions commonly employed by multinational enterprises. Empirical evidence also indicates that capacity constraints continue to limit the ability of tax authorities in emerging economies to implement sophisticated transfer pricing tools effectively⁴¹. This challenge is particularly evident in emerging economies, where transfer pricing regulations continue to influence corporate decision-making behaviour and compliance strategies.⁴²

In Vietnam, the development of such technical expertise has historically been unevenly distributed across the tax administration system. Prior to the institutional reforms introduced in 2025, specialised transfer pricing analysis was largely concentrated within central units of the tax administration, particularly within the General Department of Taxation (GDT) and specialised departments located in major economic centres such as Hanoi and Ho Chi Minh City. At the provincial level, tax offices often possessed more limited access to specialised personnel and analytical resources required for sophisticated transfer pricing assessments.

The decentralisation of certain APA-related administrative functions therefore raises important questions concerning absorptive capacity at the subnational level.

Beer, Sebastian, Ruud de Mooij, and Li Liu. "International Corporate Tax Avoidance: A Review of the Channels." *Journal of Economic Surveys*, 2019.

OECD. *Cooperative Tax Compliance: Building Better Tax Control Frameworks*. 2021.

⁴⁰ OECD. *Tax Administration 2023: Comparative Information on OECD and Other Advanced and Emerging Economies*. OECD Publishing, 2023.
<https://www.oecd.org/tax/administration/tax-administration-23077727.htm>

⁴¹ Johannesen, Niels, Thomas Tørsløv, and Ludvig Wier. "The Global Minimum Tax and Profit Shifting." *The Economic Journal*, 2023.

⁴² Nguyen, H. N., et al. "Conceptualizing the Effects of Transfer Pricing Law on Transfer Pricing Decision Making of FDI Enterprises in Vietnam." *International Journal of Data and Network Science*, vol. 4, no. 2, 2020, pp. 187–198. <https://doi.org/10.5267/j.ijdns.2020.1.002>

Decentralisation can improve administrative responsiveness and reduce procedural bottlenecks, but it also creates potential risks of interpretative inconsistency if technical expertise is unevenly distributed across local tax authorities. Similar institutional challenges have been observed in other emerging tax administrations where transfer pricing enforcement initially relied on centralised expertise.⁴³

To mitigate these risks, the reform framework introduces several institutional support mechanisms aimed at strengthening administrative capacity. These measures include the development of standardised APA documentation templates, the issuance of technical guidance manuals, and the organisation of centralised training programmes for tax officials responsible for transfer pricing analysis. In addition, supervisory review procedures are expected to remain in place for complex cases, allowing central authorities to provide technical oversight and ensure consistency in the interpretation of transfer pricing rules.

These safeguards are intended to keep a balance between flexibility and consistency within the tax system. However, the long-term success of the reform will depend on continued investment in staff training, access to reliable data, and the ability to retain skilled personnel within the tax administration. If technical capacity is not strengthened, decentralisation may lead to uneven implementation across different regions. This could reduce predictability and weaken the role of APAs in preventing disputes.

From a governance perspective, uneven distribution of technical expertise may generate government-related risks, including inconsistent application of transfer pricing rules and increased reliance on discretionary judgement. Such risks may undermine taxpayer confidence and reduce the predictability that APA mechanisms are intended to provide. Therefore, strengthening technical capacity is not only a matter of administrative efficiency but also a key element of effective tax governance.

5. Transparency and Cooperative Compliance

Beyond considerations of administrative efficiency, Advance Pricing Agreements (APAs) play a broader role within contemporary cooperative compliance frameworks in

⁴³ World Bank. *Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners*. World Bank, 2016. <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/230331483627135642>

international tax governance. Cooperative compliance is premised on the idea that transparent communication, mutual trust, and early engagement between taxpayers and tax authorities can improve tax compliance while reducing the need for adversarial enforcement mechanisms.⁴⁴ Within this framework, APAs function as institutional instruments that facilitate structured dialogue between multinational enterprises and tax administrations concerning the appropriate application of transfer pricing rules. Empirical studies further indicate that participation in cooperative compliance programmes is influenced by factors such as transparency, perceived fairness, and administrative trust.⁴⁵

A central element of cooperative compliance regimes is the predictability of administrative procedures. Clear procedural guidelines, structured negotiation stages, and transparent timelines encourage taxpayers to participate voluntarily in advance agreement programmes. From the perspective of multinational enterprises, APAs provide ex ante certainty regarding transfer pricing methodologies, thereby reducing the risk of unexpected tax adjustments, costly audits, and prolonged dispute resolution processes.⁴⁶ In turn, tax administrations benefit from improved information exchange and a clearer understanding of complex corporate structures before transactions are subject to formal examination.

International experience suggests that transparency in APA procedures contributes significantly to the credibility of transfer pricing governance systems. The Organisation for Economic Co-operation and Development (OECD) emphasises that cooperative compliance initiatives depend on open communication channels, timely administrative responses, and clearly defined procedural expectations for both taxpayers and tax authorities.⁴⁷ These institutional features are particularly important in jurisdictions where transfer pricing enforcement is still evolving and where multinational enterprises seek greater certainty in regulatory interpretation.

⁴⁴ OECD. Co-operative Compliance: A Framework – From Enhanced Relationship to Co-operative Compliance. OECD Publishing, 2013. <https://www.oecd.org/tax/administration/co-operative-compliance.htm>

⁴⁵ Goslinga, Sjoerd, et al. “Cooperative Compliance Programmes: Who Participates and Why.” *Journal of Tax Administration*, vol. 6, no. 2, 2021, pp. 95–121.

⁴⁶ OECD. Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. OECD Publishing, 2022. <https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>

⁴⁷ OECD. Tax Administration 2023: Comparative Information on OECD and Other Advanced and Emerging Economies. OECD Publishing, 2023. <https://www.oecd.org/tax/administration/tax-administration-23077727.htm>

Recent reforms in Vietnam suggest a stronger focus on improving transparency in the APA system. The introduction of clearer procedural steps, better internal tracking of cases, and a more defined division of responsibilities may make the negotiation process more predictable. These changes can help reduce uncertainty for taxpayers while also improving coordination within the tax administration.

However, transparency cannot be ensured simply by introducing formal procedures. In practice, it also depends on how consistently these rules are applied, the availability of clear guidance, and ongoing communication between tax authorities and taxpayers. In this respect, the development of Vietnam's APA framework reflects a broader process of institutional learning in which tax administrations gradually adapt international regulatory instruments to domestic administrative realities.

Ultimately, the effectiveness of cooperative compliance mechanisms such as APAs depends on the interaction between legal design, administrative capacity, and organisational culture within tax authorities. Where these institutional elements develop in a mutually reinforcing manner, APA programmes can contribute not only to dispute prevention but also to the broader transformation of tax governance toward more transparent and cooperative regulatory relationships.

However, transparency in APA procedures must be accompanied by robust accountability mechanisms. Without clear criteria for decision-making and effective review processes, increased procedural flexibility may lead to variations in interpretation and potential governance concerns. In this regard, accountability plays a crucial role in ensuring that cooperative compliance frameworks operate in a manner that is both efficient and institutionally credible.

International policy discussions increasingly emphasise tax certainty as a central objective of modern tax administration, particularly in the context of cross-border investment.⁴⁸

6. Administrative Performance and Institutional Capacity

The effectiveness of an Advance Pricing Agreement regime depends not only on the existence of a formal legal framework but also on the administrative performance and institutional capacity of the tax authority responsible for its implementation. In the field

⁴⁸ OECD. *Tax Certainty Day Report*. 2024.

of international taxation, administrative capability plays a decisive role in determining whether regulatory mechanisms designed to prevent transfer pricing disputes can operate effectively in practice.

APAs are generally defined as arrangements between taxpayers and tax authorities that determine in advance the appropriate transfer pricing methodology to be applied to controlled transactions over a specified period of time.⁴⁹ By providing ex-ante certainty regarding the tax treatment of related-party transactions, APAs are intended to reduce the likelihood of transfer pricing disputes and minimise the risk of double taxation in cross-border economic activities.⁵⁰ However, the successful operation of such preventive mechanisms depends heavily on the capacity of tax administrations to conduct complex economic analysis and manage technically demanding negotiation processes.

International policy research consistently emphasises that administrative capacity is a critical prerequisite for effective transfer pricing governance. The Organisation for Economic Co-operation and Development (OECD) has noted that tax administrations involved in transfer pricing regulation must develop specialised expertise in economic evaluation techniques, comparability analysis, and the interpretation of increasingly sophisticated multinational business structures.⁵¹ Without such expertise, tax authorities may encounter substantial difficulties when assessing the pricing policies adopted by multinational enterprises, potentially weakening both the credibility and the practical effectiveness of APA programmes.

From an institutional perspective, administrative performance in the context of APA implementation can be analysed through several interrelated dimensions.

First, technical expertise relates to whether tax authorities have staff with the necessary skills to handle complex transfer pricing cases. As multinational business structures become more sophisticated, assessing these transactions often requires a mix

⁴⁹ OECD. Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. OECD Publishing, 2022. <https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>

⁵⁰ OECD. Tax Administration 2023: Comparative Information on OECD and Other Advanced and Emerging Economies. OECD Publishing, 2023. <https://www.oecd.org/tax/administration/tax-administration-23077727.htm>

⁵¹ OECD. Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. OECD Publishing, 2022. <https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>

of legal understanding, economic analysis, and accounting knowledge.⁵² The presence of such expertise within tax administrations is therefore essential for ensuring that APA negotiations produce economically sound and legally defensible outcomes.

Second, institutional coordination refers to how well different units within the tax authority work together during the APA process. In cases involving bilateral or multilateral APAs, this also includes coordination with foreign tax authorities under existing tax treaties. Good coordination is important to ensure that transfer pricing rules are applied consistently and that negotiations can be completed in a timely manner.

Third, procedural efficiency reflects the capacity of tax administrations to process APA applications within reasonable timeframes while maintaining transparent decision-making procedures. Recent international statistics suggest that the use of advance pricing agreements continues to expand globally. OECD data presented at the 2025 Tax Certainty Day indicate that 1,169 new APA applications were filed worldwide in 2024 and 826 agreements were concluded, illustrating the growing reliance on APAs as dispute-prevention mechanisms in international taxation.⁵³

For emerging economies such as Vietnam, strengthening administrative capacity is especially important as transfer pricing rules become more closely linked to global tax standards. This means improving expertise, strengthening coordination within the tax system, and investing in training for tax officials. These steps are essential if the APA framework is to work effectively in preventing disputes and providing greater certainty for cross-border transactions. These findings align with broader literature suggesting that the success of cooperative compliance frameworks depends on the interaction between institutional design and governance capacity rather than formal legal provisions alone.⁵⁴

⁵² World Bank. *Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners*. World Bank, 2016. <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/230331483627135642>

⁵³ Ernst & Young. "OECD Holds Tax Certainty Day, Presenting MAP and APA Statistics and Addressing Dispute Prevention and Resolution Developments." 2025. <https://globaltaxnews.ey.com/news/2025-2219-oecd-holds-tax-certainty-day-presenting-map-and-apa-statistics-and-addressing-dispute-prevention-and-resolution-developments>

⁵⁴ OECD. *Cooperative Tax Compliance: Building Better Tax Control Frameworks*. 2021; Beer, Sebastian, Ruud de Mooij, and Li Liu. "International Corporate Tax Avoidance: A Review of the Channels." *Journal of Economic Surveys*, 2019.

Taken together, these findings indicate that while Vietnam's APA reform represents a significant step towards a more cooperative and flexible model of tax administration, its overall impact on tax governance efficiency remains conditional. Improvements in procedural design and institutional restructuring may enhance administrative responsiveness; however, without corresponding advances in technical capacity, coordination, and accountability, the effectiveness of APA mechanisms in preventing disputes and ensuring consistent tax administration may be limited. This suggests that APA reform should be understood not merely as a legal or procedural adjustment, but as part of a broader transformation of tax governance in emerging economies.

III. CONCLUSION

Vietnam's reform of the Advance Pricing Agreement regime underscores a broader shift in tax governance in emerging economies, where effectiveness depends less on formal legal alignment than on the interaction between institutional design and administrative capacity. While the 2025 reform improves procedural efficiency through clearer allocation of responsibilities, its long-term success hinges on specialised expertise, strong inter-agency coordination, and transparent, consistent procedures. Absent these conditions, risks of fragmented implementation may persist. This study contributes by reframing APAs as governance instruments rather than technical tools, highlighting the central role of capacity and procedural integrity. Future progress requires sustained investment in training, clearer procedural rules, stronger monitoring systems, and further comparative research to assess broader applicability.

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Assessing the Role of Social Control in Criminal Policy on Grave Desecration in Bantul and Yogyakarta

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ABSTRACT

This study examines the phenomenon of juvenile delinquency, specifically the act of vandalizing graves, which not only violates the law but also undermines the social, cultural, and religious values within society. A legal approach alone is deemed insufficient to explain and prevent this phenomenon; therefore, a more comprehensive criminological perspective is required. This study aims to analyze the role of Hirschi's Social Control Theory in explaining the causes and prevention efforts regarding juvenile delinquency. This study employs an empirical method using a legal sociology approach, along with data collection techniques through observation and literature review. The results indicate that weak social bonds within family, school, and community environments contribute to increased risks of deviant behavior among adolescents. Specifically, low emotional attachment, weak commitment to values and the future, lack of involvement in positive activities, and a weak belief in social norms and the law are the primary factors driving such behavior. Conversely, strengthening these four elements has been shown to effectively reduce the potential for juvenile delinquency through preventive measures; therefore, various approaches are needed to reinforce these elements so that adolescents can avoid such behavior. This study emphasizes that preventing juvenile delinquency is not sufficient through a legal approach alone but must be balanced with the comprehensive strengthening of social control in the daily lives of adolescents.

Keywords: *Criminal offense; grave desecration; social control; youth.*

I. INTRODUCTION

The criminal offense of grave desecration is a violation of legal, social, and moral norms.¹ In the Indonesian criminal legal system, this act is regulated under Article 269 of the New Criminal Code, which states that anyone who intentionally defiles or damages a grave or memorial to the deceased shall be punished with imprisonment for a maximum of one year and four months or a fine.² This sanction reflects the legal protection of the final resting place, which is symbolic and sacred in society.³

The destruction of 18 Christian graves that occurred in mid-May 2025 in several locations in Bantul Regency and Yogyakarta City caused public concern. Although the police confirmed that the perpetrator's motive was not related to ethnicity, religion, or race and that there were no elements of religious hatred, this incident still caused unrest because it targeted objects that are highly respected socially and spiritually. The suspected perpetrator, ANF, is a 16-year-old teenager still in school and is known to have a family history of mental health issues. He admitted to the act and was captured on CCTV during the incident, even in broad daylight without special tools, indicating boldness and a lack of awareness of the consequences of his actions.⁴

The police handled this case using a diversionary approach because the perpetrator is a minor and the criminal charges are relatively minor. The perpetrator was not detained but instead placed in the care of the Youth Protection and Rehabilitation Center.⁵ Although legal action has been taken, this case raises a fundamental question: what is the role of the social system surrounding the perpetrator that allowed such acts of destruction to occur repeatedly and spread across four different locations?

¹ Tazkiya Rahma Nabila, "Landasan Konsep Pasal 181 KUHP Terhadap Kejahatan Penelantaran Mayat Dan Turut Serta Menyembunyikan Kematian," *Jurnal Global Ilmiah* 1, no. 11, 2024, p. 779, <https://doi.org/10.55324/jgi.v1i11.111>.

² Husna Jauhara, "Kebijakan Hukum Pidana Terhadap Perkosaan Mayat (Necrophilia)" (Universitas Jambi, 2021), p. 51.

³ Marihot Bernard and PL Tobing, "Penerapan Pasal 156A KUHP Sebagai Delik Penodaan Agama," *Journal of Syntax Literate* vol. 8, no. 9, 2023, p. 4958. <https://doi.org/10.36418/syntax-literate.v8i9.13550>.

⁴ "Fakta-Fakta Perusakan Makam Warga Kristen Di Bantul," *Tempo* (Jakarta), May 21, 2025, <https://www.tempo.co/hukum/fakta-fakta-perusakan-makam-warga-kristen-di-bantul--1503748>.

⁵ "Alasan Terduga Pelaku Perusakan Nisan Di Yogya Belum Ditahan Polisi," *Tempo* (Yogyakarta), May 20, 2025, <https://www.tempo.co/hukum/alasan-terduga-pelaku-perusakan-nisan-di-yogya-belum-ditahan-polisi-1493883>.

In addition to being governed by Article 269 of the Criminal Code, which addresses respect for the deceased,⁶ the handling of this case must also be understood within the framework of the Juvenile Criminal Justice System as established by Law No. 11 of 2012. Under this law, the approach is not purely punitive but focuses on restoring relationships between the perpetrator, the victim, and the community.⁷ This is achieved through diversion mechanisms for children, which involve transferring case resolution from the criminal justice process to alternative non-judicial settings with the aim of achieving restorative justice.⁸

Essentially, diversion is a form of special protection provided to children in conflict with the law, as stipulated in the Juvenile Criminal Justice System Act. This protection is not merely intended to shield children from formal judicial proceedings but also encompasses comprehensive support throughout every stage of the legal process, from investigation and prosecution through to trial. This signifies that the provisions in the law also affirm that children have certain rights that must be guaranteed when facing the law, whether during the judicial process, while serving a sentence, or after the legal process has concluded. With these provisions in place, it is clear that the juvenile criminal justice system is not solely focused on law enforcement, but also on the protection, rehabilitation, and future of the child as a member of society.⁹

In this case, the limitations of diversion as a post-offense intervention mechanism highlight the need for a more preventive approach. In this regard, it is necessary to evaluate social control mechanisms, which should serve as the first line of defense in preventing individuals from committing crimes. The theory of social control, as proposed by Travis Hirschi in his work *Causes of Delinquency* (1969),¹⁰ states that an individual's attachment to social institutions such as family, school, and community, as well as their

⁶ Fuadi Isnawan, "Islamic Approach to Violations against the Sanctity of the Deceased: A Case Study on Necrophilia in Islam," *Articles, Fikri : Jurnal Kajian Agama, Sosial Dan Budaya* vol. 9, no. 2, 2024, pp. 367–93. <https://doi.org/10.25217/jf.v9i2.5100>.

⁷ Fauzan Sugama et al., "Efektivitas Penerapan Restorative Justice Dalam Penyelesaian Tindak Pidana Anak Di Indonesia," *Jimmi: Jurnal Ilmiah Mahasiswa Multidisiplin* vol. 1, no. 3, 2024, p. 310. <https://doi.org/10.71153/jimmi.v1i3.148>.

⁸ Anita Zulfiani, "Restorative Justice Dan Penjatuhan Pidana Pada Anak," *Ranah Research: Journal of Multidisciplinary Research and Development* vol. 5, no. 4, 2023, p. 291. <https://doi.org/10.38035/rj.v5i4.778>.

⁹ Ririn Kurniasi, "Penerapan Restorative Justice Terhadap Anak Yang Menjadi Pelaku Tindak Pidana Melalui Diversi," *UNES Law Review* vol. 6, no. 4, 2024, p. 10825. <https://doi.org/10.31933/unesrev.v6i4.2056>.

¹⁰ Travis Hirschi, *Causes of Delinquency* (Berkeley, CA: University of California Press, 1969).

belief in moral and legal values, plays a crucial role in preventing criminal behavior.¹¹ If these social bonds are weak or fail to function effectively, individuals become more vulnerable to deviant behavior.¹²

The ANF case reflects the weakening of these social bonds. He lived with his mother and sister, who also suffered from mental disorders, had a tendency to run away from home, and did not receive intensive supervision from his family or the surrounding community. This shows the weakness of informal social control, which should be able to prevent deviant behavior before it develops into a criminal act.¹³ This is important because it positions crime prevention as part of a more preventive and humanistic non-penal approach.¹⁴ A penal (criminal law) approach is certainly still necessary as a last resort, but it must be balanced with strong social control efforts through the roles of families, schools, community leaders, and other social institutions.¹⁵ In other words, there needs to be a restructuring of crime prevention strategies that do not solely rely on law enforcement agencies but also activate social control within the perpetrators' environment.

Research on criminal acts related to the desecration of graves has essentially been conducted, but there are still limitations in the approaches used. Research by Orry Dwin Seftiandi focuses more on a criminological analysis of the desecration of graves classified as cultural heritage sites. The primary focus is on causal factors, both internal, and external factors, such as socioeconomic and environmental conditions. Although this research has comprehensively identified these causal factors, its approach remains

¹¹ Evgenia Postoeva and Viktor Shestak, "Criminological Theory of Social Control and Features of Its Application in China," paper presented at Law and Modern Economics, St. Petersburg, *Experience and Future. International Scientific and Practical Conference*, 2022, p. 2, <https://dx.doi.org/10.2139/ssrn.4077719>.

¹² Ramona Ciobanu, "The Social Control Of Drug Users Without Criminal Behaviour," *Dialog Teologic* vol. 26, no. 52, 2023. <https://doi.org/10.53438/DAPJ9238>.

¹³ Tim detikjogja, "Terungkapnya Misteri Perusak Nisan Salib Di Bantul Dan Jogja," *Detik.Com* (Yogyakarta), May 24, 2025, <https://www.detik.com/jogja/berita/d-7930090/terungkapnya-misteri-perusak-nisan-salib-di-bantul-dan-jogja>.

¹⁴ Cici Riski Sufi Amalia et al., "New Paradigm in The Treatment of Cyberbullying Crimes Through an Integrated Cyberbullying Prevention: A Non-Penal Policy in Indonesia," *Jurnal Legalitas* vol. 17, no. 1, 2024, p. 42. <https://doi.org/10.33756/jelta.v17i1.24900>.

¹⁵ Wagiman and Didi Jubaidi, "Ultimum Remedium Principles: Realizing Restorative Justice For Children In Conflict With The Law," *Articles, KRTHA BHAYANGKARA* vol. 18, no. 3, 2024, pp. 691. <https://doi.org/10.31599/krtha.v18i3.2984>.

descriptive-empirical and has not specifically examined how social control mechanisms function as preventive measures against such behavior.¹⁶

Meanwhile, the study conducted by Ainul Masruroh and her team focuses more on the normative legal aspects related to desecration of graves, particularly those of religious scholars. This study emphasizes the legal basis employed, such as provisions in the Criminal Code (KUHP) and the Law on Information and Electronic Transactions (ITE Law), as well as the urgency of protecting dignity, even after a person's death. However, this study remains limited to legal regulatory aspects and has not addressed the social dimensions underlying the occurrence of such acts, particularly from the perspective of community-based prevention.¹⁷

On the other hand, Hanafi's research examines the philosophical foundations for criminalizing acts related to corpses. This study asserts that crimes against corpses constitute a violation of religious norms, the values of Pancasila, and social order, which can cause unrest in society. Although it provides a strong philosophical basis regarding the importance of legal protection for corpses, this study has not concretely outlined how preventive efforts can be implemented through social mechanisms at the community level.¹⁸

This study aims to analyze how social control theory can be effectively applied in preventing criminal acts of grave desecration committed by adolescents. By examining concrete cases and linking them to social control theory, this study is expected to contribute to the development of community-based crime prevention strategies and refine the national criminal policy framework to be more responsive to the social dynamics and psychological conditions of perpetrators.

This study employs an empirical legal research method, often referred to as socio-legal research. In this approach, law is viewed not merely as a set of written rules, but also as a living, evolving social phenomenon within society.¹⁹ The approach used is the

¹⁶ Orry Dwin Seftiandi, "Tinjauan Kriminologi Terhadap Perusakan Cagar Budaya Makam Keramat Bantilan Di Kabupaten Sambas," *Jurnal Fatwa Hukum* vol.6, no. 4, 2023. <https://jurnal.untan.ac.id/index.php/jfh/article/view/71851>

¹⁷ Ainul Masruroh, Siti Afiyah, and Ari Wibowo, "Tinjauan Yuridis Penistaan Makam Ulama Di Indonesia," *HUMANIS: Jurnal Ilmu-Ilmu Sosial Dan Humaniora* VOL. 15, no. 2, 2023. <https://e-jurnal.unisda.ac.id/index.php/Humanis/article/view/6228>.

¹⁸ Hanafi Hanafi, "Landasan Filosofis Kebijakan Formulasi Kejahatan Terhadap Jenazah Dalam Pasal 180 KUHP," *VOICE JUSTISIA: Jurnal Hukum Dan Keadilan* vol. 3, no. 1 2019, pp.73–95. <https://journal.uim.ac.id/index.php/justisia/article/view/812>

¹⁹ Muhaimin Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 82.

sociology of law. This approach aims to examine law within a social context, so that it does not merely focus on the content of the rules, but also on how those rules function, are applied, and sometimes fail to operate as intended in society. Through this approach, the study seeks to both explain and critique the role of law in regulating social behavior.²⁰

Data collection in this study was conducted through observation.²¹ The researcher directly observed social phenomena related to adolescent behavior and social control within the community. This observation was used to obtain a realistic picture of how social interactions occur and how social values are applied in daily life.

The data used in this study consists of primary and secondary data. Primary data was obtained directly through field observations. Meanwhile, secondary data was obtained from various available sources, such as books, scientific journals, previous research findings, laws and regulations, as well as other documents relevant to the research topic. In the context of legal research, this secondary data also includes primary legal materials, namely laws and regulations. Secondary legal materials come from scientific journals, books, research findings, as well as tertiary legal materials such as legal dictionaries and other supporting references.²²

Furthermore, data analysis is conducted using a qualitative approach. This approach emphasizes a deep understanding of the data obtained, rather than merely focusing on numbers or figures alone. The collected data is then analyzed descriptively to depict the actual conditions in the field. In this process, the researcher identifies relevant and high-quality data to then connect it to the research problem.²³ democracy.

II. DISCUSSION

1. Antinomy of Norms of the 1945 Constitution and Interpretation of the Constitutional Court

The Constitutional Court Decision No. 135/PUU-XXII/2024 is a judicial

²⁰ Suyanto, *Metode Penelitian Hukum Pengantar Penelitian Normatif, Empiris Dan Gabungan* (Gresik: UNIGRES PRESS, 2022), 148.

²¹ Nur Solikin, *Pengantar Metodologi Penelitian Hukum* (Pasuruan: Qiara Media, 2021), 118.

²² Muhammad Syarif et al., *Metode Penelitian Hukum* (Padang: GET Press Indonesia, 2024), 72.

²³ Sigit Supto Nugroho, Anik Tri Haryani, and Farkhani, *Metodologi Riset Hukum* (Surakarta: Oase Pustaka, 2020), 102.

intervention that is not only corrective to the design of the five-box election, but also contains constitutional consequences that go beyond the technical realm of elections. In its consideration, the Court adopted a progressive interpretation of Article 22E of the 1945 Constitution of the Republic of Indonesia which mandates that elections be held simultaneously. However, in the construction of the Court, simultaneity does not have to be interpreted as a concentration of time in one day, but as an election cycle consisting of two waves, namely national and regional.²⁴ This interpretation does have administrative rationality and pay attention to the burden of the organizers, but ignores its direct connection with constitutional norms regarding the term of office, especially members of the House of Representatives and the House of Representatives. This opens up space for tension between two legal norms that both have a binding nature, namely the written norms of the Constitution and constitutional interpretation by the Court.

This tension stems from the position of term norms in the structure of Indonesian constitutional law. Article 22E paragraph (1) of the 1945 Constitution of the Republic of Indonesia explicitly states that elections for members of the DPR, DPD, and DPRD are held every five years. This norm is rigid and contains a constitutional mandate on the principle of periodization of power in the electoral democratic system.²⁵ Therefore, any attempt to extend or cut the term of office of the legislature must be subject to the mechanism of constitutional amendment, not merely administrative justification or institutional interpretation. This is where the problem lies, Constitutional Court Decision No. 135/PUU-XXII/2024, although it does not explicitly regulate the extension or cut of term of office, demands the consequences of adjusting the election time which is very likely to shift the term of office. In other words, the Court creates a normative effect that is in direct contact with a rigid constitutional design.

In constitutional law doctrine, this situation is known as constitutional antinomy. Constitutional antinomy is a conflict between two legal norms that both originate from the constitution or have constitutional binding force.²⁶ On the one hand, the Constitutional

²⁴ Hantoro, B. F. Originalisme dan Syarat Keserentakan Pemilu dalam Putusan Mahkamah Konstitusi. *Undang: Jurnal Hukum*, vol. 6, no. 1, 2023, pp. 33-64. <https://doi.org/10.22437/ujh.6.1.33-64>

²⁵ Ramdani, A. K., & Hulwanullah, H. Dampak Penafsiran Konstitusi Terhadap Perkembangan Politik Hukum Penyelesaian Perselisihan Hasil Pemilihan. *ADLIYA: Jurnal Hukum dan Kemanusiaan*, vol. 16, no. 2, 2022, pp. 178-197. <https://doi.org/10.15575/adliya.v16i2.20586>

²⁶ Endrik Safudin. (2021). *Harmonisasi Hukum dalam Antinomi Hukum: Telaah Kritis atas Penerapannya oleh Mahkamah Agung*. Q Media, Yogyakarta, hlm. 33.

Court's decision is final and binding, and has legal force equivalent to the constitution in terms of interpretation. But on the other hand, the written provisions in the Constitution remain the highest basic law (*grundnorm*) that cannot be overruled. If the implementation of the Constitutional Court's decision has an impact on the extension of the position of the DPR or DPRD, then the state has the potential to violate Article 22E of the Constitution. On the other hand, if it does not implement the Court's decision, the state also violates the principle of compliance with binding judicial decisions. This creates an executive and legislative dilemma, as well as invites debate in the academic community about the limits of constitutional interpretation by the judiciary.

This antinomy implication opens up a large space for what scholars call constitutional engineering. This term is basically neutral, referring to all forms of normative engineering to rearrange the constitutional system according to the demands of the times.²⁷ But in the practice of political law, engineering often deviates from constitutional ethics, especially when used to perpetuate power, extend term of office, or delay elections. In the context of the Constitutional Court's Decision No. 135/PUU-XXII/2024, a transition space that is not designed with strict norms has the potential to be infiltrated by political interests to justify extending the terms of office of members of the House of Representatives and the House of Representatives outside the amendment mechanism. This situation demands strict supervision and clarity of the transitional legal design so that constitutional interpretation does not turn into a pragmatic tool of the elite to secure positions of power.

Constitutional Court Decision No. 135/PUU-XXII/2024 does not explicitly stipulate the extension or cut of the term of office of public officials. However, the Court recognizes that the separation of national and regional elections in two waves will have an impact on a non-uniform calendar of positions. In its consideration, the Court leaves it to the lawmakers to prepare an adequate transition design. However, the Court also emphasized that the arrangement must pay attention to the term of office as stipulated in the 1945 Constitution, especially for central and regional legislative institutions. Thus, the Court does not provide a "blank check" for power engineering, but rather demands constitutional rigor in drafting transitional arrangements. Therefore, the space between

²⁷ Al Alawi, M. N. K. Implementasi Teori Law as a Tools of Social Engineering Mahkamah Konstitusi sebagai Instrumen Kontrol Sosial dalam Sistem Hukum Indonesia. *Indonesian Journal of Law and Justice*, vol. 2, no. 2, 2024. <https://doi.org/10.47134/ijlj.v2i2.3393>

the decision and the implementation is an important arena that must be filled with democratic, legal, and legitimate policies.

The problem lies in the operational ambiguity of the phrase "adjusted in law" as used by the Court. On the one hand, lawmakers are given the flexibility to design implementation schemes. On the other hand, there is no rigid guidance in the decision regarding how to avoid conflicts with the norm of the five-year term of office in Article 22E paragraph (1) of the 1945 Constitution. The phrase "adjusted" can be interpreted to mean an extension of office, the appointment of an official, or a separate election outside of the ideal cycle.²⁸ This guideline vacuum can create a constitutional fabrication that violates the principle of limited government. If the meaning of "adjustment" is carried out opportunistically by the lawmakers, then the transition space can turn into a space for manipulation, not systemic correction.

In the doctrine of constitutional governance, the design of the transition of power is not only technical, but also a substantive constitutional moment that determines the direction of electoral accountability. The Court has indeed provided an outline of the direction of simultaneous reformulation, but the moral and political responsibility remains in the hands of the legislature and the executive. This is where it is important to keep any transition scheme subject to the main constitutional norms, namely the limitation of power through regular elections and fixed terms. If the shift in the election results in a mismatch in the office calendar, then it is necessary to design a transitional arrangement that is limited, temporary, and subject to judicial evaluation. Such a mechanism can avoid the practice of constitutional disregard in the name of implementing court decisions.²⁹

In practice, the Court also opens up the possibility of gradual synchronization which in progressive interpretation can be interpreted as an opportunity to design a time gap between national and regional elections without having to crash into the constitution. However, this scheme requires clarity from the beginning, whether there will be a cut-off of positions to avoid extensions; whether regional heads and DPRD will be elected at

²⁸ Cafaggi, F., & Iamiceli, P. Uncertainty, administrative decision-making and judicial review: The courts' perspectives. *European Journal of Risk Regulation*, vol. 12, no. 4, 2021, pp. 792-824. <https://doi.org/10.1017/err.2021.47>

²⁹ Minan, A., Arinanto, S., & Djohan, D. Local Chief Executive Political Accountability in Indonesia: A Historical-Legal Analysis, *Constitutional Review*, vol. 10, no. 1, 2024, pp. 33-66. <https://doi.org/10.31078/consrev1012>

different times; and how to assess the validity of term of office that exceeds 5 years. Without that clarity, all forms of legal engineering actually weaken the credibility of the Court and open up space for delegitimization of decisions. This is a test for the Court's consistency in upholding the principle of non-extension of term of office that it has affirmed in previous decisions.³⁰

Thus, efforts to execute the Constitutional Court Decision No. 135/PUU-XXII/2024 are at the intersection between compliance with judicial decisions and adherence to written constitutional norms. A transition scheme that is politically legitimate, is not necessarily constitutionally legitimate. Therefore, any form of extension or reduction of term of office must be accompanied by a strong constitutional justification, and supervised through a constitutional review mechanism if necessary. This is where the role of the Court as a constitutional guardian is tested, whether the Court will allow lawmakers to interpret their decisions freely, or whether they will continue to maintain the corridor so that the implementation of decisions does not turn into an unconstitutional power engineering.³¹

One of the options that can be considered in executing the Constitutional Court Decision 135/PUU-XXII/2024 constitutionally is through adjustments based on limited transitional arrangements, namely a kind of temporary constitutional adjustment with a clear normative mandate, strict time restrictions, and a strong basis of legitimacy.³² For example, if the term of office of the DPRD that should end in a certain year cannot be consolidated simultaneously with the national elections, then the solution is not to extend it in full, but to impose transitional positions that are limited within the framework of constitutional law and supervision. Such adjustments must be accompanied by explicit norms, both through laws and judicial reinterpretation so as not to become a precedent for the practice of power engineering in the future. In this framework, the principle of checks and balances and public participation in drafting transitional norms are important

³⁰ Windrawan, P. Pergeseran Kekuasaan Tipologi Ketiga; Fenomena Kekuasaan Ke Arah Constitutional Heavy. *Jurnal Konstitusi*, vol. 9, no. 4, 2016, pp. 613–642. <https://doi.org/10.31078/jk942>

³¹ Saragih, G. M., Nasution, M., & Sihombing, E. N. Makna Filosofis Putusan Mahkamah Konstitusi Dalam Constitutional Review Dan Urgensi Judicial Activism. *Masalah-Masalah Hukum*, vol.53, no. 3, 2024, pp. 326-335. <https://doi.org/10.14710/mmh.53.3.2024.326-335>

³² Nwokora, Z. Constitutional design for dynamic democracies: A framework for analysis. *International Journal of Constitutional Law*, vol. 20, no. 2, 2022, pp. 580-610. <https://doi.org/10.1093/icon/moac030>

as a control mechanism for potential power deviations.³³

In the history of Indonesian constitutionalism, we have precedents for transition periods of office and specially regulated elections, such as during the 1998 reform or the consolidation of democracy in the early 2000s. However, lessons from the past show that any transitional arrangement that is not framed in strict constitutional norms always opens up opportunities for power abuses. In fact, in some cases, transitions are used as a pretext to extend the term of office or postpone elections.³⁴ In the context of the Constitutional Court Decision 135/PUU-XXII/2024, it is important to distinguish between a legitimate transition and a manipulative transition. The legitimate transition is based on the principle of temporary necessity, public openness, and does not violate the substantive norms of the constitution. Meanwhile, the manipulative transition was born from political delays and legal loopholes. If the Court wants to maintain its credibility as a constitutional guardian, then the oversight of the transition design is as important as the initial interpretation it gives.³⁵

Furthermore, the concept of term of office in the 1945 Constitution is not just a limitation of administrative time, but a concrete form of the principle of limited government. A five-year term of office is not just a number, but a symbol of the will of the people which is reflected periodically through elections. Therefore, any form of extension of office, even if it is only temporary, must have formal legitimacy and have a legal basis that does not conflict with constitutional norms.³⁶ Without this, the transitional design actually becomes a form of creeping unconstitutionality that undermines public trust in state institutions, including the Court itself. Therefore, the question that must be asked is not only how to implement the Constitutional Court Decision 135/PUU-XXII/2024, but how to keep it within the corridor of constitutional supremacy and healthy procedural democracy.

³³ Fahira, Y. Sistem Checks and Balances dalam Menjaga Prinsip Demokrasi di Indonesia. *Jurnal Media Akademik (JMA)*, vol. 3, no. 6, 2025. <https://doi.org/10.62281/v3i6.2173>

³⁴ Hoesein, Z. A. Pemilu Kepala Daerah dalam Transisi Demokrasi. *Jurnal Konstitusi*, vol.7, no. 6, 2016, pp. 001–024. <https://doi.org/10.31078/jk761>

³⁵ Nugroho, W. Politik Hukum Pasca Putusan Mahkamah Konstitusi atas Pelaksanaan Pemilu dan Pemilukada di Indonesia. *Jurnal Konstitusi*, vol.13,no. 3, 2016, pp. 480-502. <https://doi.org/10.31078/jk1331>

³⁶ Ristyawati, A., Utama, YJ, Wardhani, LTAL, & Hanum, WN. MEMIKIRKAN KEMBALI BATAS MASA LEGISLATIF: MENJAGA PEMBARUAN DEMOKRASI DALAM KONSTITUSI NEGARA INDONESIA. *Tinjauan Hukum Diponegoro*, vol. 10, no. 1, 2025, pp. 16-28. <https://doi.org/10.14710/dilrev.10.1.2025.16-28>

This is where the Court should be more assertive. The Constitutional Court Decision 135/PUU-XXII/2024 is indeed quite progressive in offering a solution to the chaos of the five-box simultaneous elections. However, this progressivity should not stop at normative assessments, but rather continue with concrete instructions on the design of a constitutional transition. Without more directed guidance, lawmakers have the potential to use this ruling as a justification for unconstitutional power maintenance practices. It is not enough for the court to be a negative legislator or passive interpreter. In the context of major changes like this, the Court is required to play the role of constitutional architect, namely not only to give direction, but also to ensure that the constitutional architecture is not hijacked by the pragmatism of power.³⁷ This means that supervision of implementation is an inseparable part of the integrity of the decision itself.

Taking into account all these variables, the implementation of the Constitutional Court Decision 135/PUU-XXII/2024 must be approached through three main principles: (1) fidelity to the Constitution, full fidelity to constitutional norms, including term of office; (2) transitional discipline, transitional arrangements that are temporary, firm, and proportional; and (3) democratic integrity, which ensures that every implementation design maintains public trust and democratic legitimacy. If these three principles are ignored, then what the Court calls a solution to simultaneous elections will actually give birth to a much larger constitutional problem. This is a constitutional paradox that must be prevented from the start, not by delaying, but by carefully designing. Because in constitutional law, it is not only the norm that is important, but also the way we execute it.

2. Transition Design and Projections of Election Law Politics in the Future

The design of the transition of power after the Constitutional Court Decision No. 135/PUU-XXII/2024 requires an approach that is not only legalistic, but also constitutional in a substantive sense. The Court has corrected the dysfunction of the total synchronization system in the five-box election and given the direction of limited synchronization reform. However, this shift in electoral architecture raises crucial

³⁷ Sadzali, A. Peranan Mahkamah Konstitusi dalam Mewujudkan Demokrasi Substantif pada Pemilu 2024 melalui Penegakan Hukum Progresif. *As-siyasi: Journal of constitutional law*, vol. 2, no. 2, 2022, 2022, pp. 193-218. <https://doi.org/10.24042/as-siyasi.v2i2.14948>

questions related to how to manage tenure and succession of power so as not to hurt the principles of regular elections and the periodization of power. The transitional design must be able to bridge the logic of the separation of national and regional elections while maintaining the continuity of government and avoiding vacancies or extensions of power without constitutional basis. In this context, the formulation of the transition is not merely scheduling, but the process of designing a new norm that keeps the democratic ecosystem healthy and consistent with the mandate of the 1945 Constitution.

The main principle in designing a power transition is to guarantee the absence of power without a mandate. Term of office is a political contract between the people and public officials, and any changes to it must be based on legitimate legal norms and the logic of democratic justice. One concrete alternative is to use a transition scheme based on "limited extension with constitutional basis", which is a limited extension of office with a strict time and scope, and accompanied by institutional accountability. However, this solution can only be applied if it does not contradict the text of the constitution, for example during the term of office of regional heads which are regulated by law, in contrast to the DPR and DPRD which are directly regulated by the Constitution. Therefore, the transition design needs to distinguish between types of positions based on their normative sources so as not to generalize approaches that can lead to violations of the legal hierarchy.³⁸

The idea of "limited extension with constitutional basis" is one of the solutions to the transition of power that remains based on constitutionalism. This model is not an extension of ordinary office full of political agendas, but rather a technocratic mechanism designed in a limited and rational manner in response to the need to align national and local election times.³⁹ Under this scheme, the term of office of certain public officials can be temporarily extended with the main conditions: (1) it is strictly limited in duration and scope, (2) it is run through clear legal norms, and (3) it is subject to judicial and public

³⁸ Mujahidah, M., & Tibaka, L. Presidential Term Limits in the Perspective of the Constitution: Avoiding Authoritarianism in the Era of Democracy: Pembatasan Masa Jabatan Presiden dalam Perspektif Konstitusi : Menghindari Otoritarianisme di Era Demokrasi. *Jurnal Konstitusi*, vol. 21, no. 4, 2024, pp. 680–697. <https://doi.org/10.31078/jk2147>

³⁹ Ibrahim, M. Pembatasan Kekuasaan Amendemen Konstitusi: Teori, Praktik di Beberapa Negara dan Relevansinya di Indonesia. *Jurnal Konstitusi*, vol. 17, no. 3, 2020, pp. 558–581. <https://doi.org/10.31078/jk1735>

scrutiny. The principle is to prevent a power vacuum without opening up opportunities for creeping extensions or unconstitutional normalization of tenure. This scheme must be once-and-for-all, cannot be repeated or used as a precedent. Therefore, its legality and accountability must be guaranteed through transitional legislation products that are closely monitored by the Court and civil society.⁴⁰

However, the implementation of the "limited extension" scheme cannot be applied uniformly to all types of positions, because each position has a different legal basis. The term of office of members of the House of Representatives and the House of Representatives is explicitly regulated in the 1945 Constitution, which is five years, so changes in the duration of their term of office cannot be made except through constitutional amendments. Meanwhile, the term of office of regional heads is regulated in the Law (Law No. 10 of 2016), so that adjustments are still possible through the revision of the law without hitting the basic norms.⁴¹ This is where it is important to distinguish the normative sources of each position in the transition design, generalizing the approach will risk violating the hierarchy of legal norms. If the extension of the DPR's position is carried out through a law without constitutional amendments, then it is not only unconstitutional, but also undermines the legal order that guarantees the supremacy of the 1945 Constitution as the highest norm.

In addition, the transition of power must be designed gradually with the principle of harmony of the democratic cycle, both at the national and regional levels. In practice, synchronization does not have to be done simultaneously in one major election, but can be done progressively based on the existing office calendar. This model has been applied in the 2015–2020 simultaneous regional election scheme which adjusts the wave of regional elections gradually.⁴² The gradual transition scheme will also prevent the accumulation of administrative burdens, avoid power vacancies, and better respect the

⁴⁰ Camesi T.I and Susanti P. (2025). ANALISIS YURIDIS PENGHITUNGAN MASA JABATAN KEPALA DAERAH BERDASARKAN PUTUSAN MAHKAMAH KONSTITUSI DALAM MEWUJUDKAN KEPASTIAN HUKUM. *Jurnal Kritis Studi Hukum*, vol. 10, no. 5, 2025, pp. 129-138. <https://ojs.co.id/1/index.php/jksh/article/view/3025>

⁴¹ Al Kautsar, M., & Kurniawan, K. Pembatasan Periode Masa Jabatan Anggota Legislatif. *Jurnal Ilmiah Mahasiswa Bidang Hukum Kenegaraan*, vol. 3, no. 3, 2019. pp. 361-371. <https://jim.usk.ac.id/kenegaraan/article/view/16154>

⁴² Rahayu, N. P., & Kartika, A. W. Pengaturan masa jabatan kepala daerah dalam hukum positif Indonesia. *Jurnal Kertha Semaya*, vol. 11, no. 6, 2023, pp. 1333-1348.

term of service of officials who are in office legally. With this approach, the transition does not become a tool of political opportunism, but rather a systemic process to harmonize a more measurable, stable, and accountable national electoral architecture.

It is also important to emphasize that the transition design must maintain voter rationality and electoral integrity. One of the main problems in the previous five-box simultaneous elections was the decline in the quality of the people's choice due to voter fatigue, technical complexity, and lack of substantive involvement in the campaign.⁴³ With the separation of national and regional elections, the quality of voter participation has the potential to increase as their focus will be more proportionately divided. However, this can only happen if the transition design does not create new confusion due to changes in the timing, mechanism, or legitimacy of candidates in non-uniform tenure. This means that voters must obtain legal certainty and political certainty in determining their voting rights, and this can only be achieved through an orderly, informed, and honest transition in legal engineering.

The transitional design must also strengthen the institutionalization of political parties, which are the main actors in each electoral stage. In the previous condition, the burden of the party in managing election logistics, cadre distribution, and campaign strategies in the five-box simultaneous elections was very heavy and counterproductive to strengthening institutions. With the model of national and regional simultaneous elections as offered by the Court, parties can focus more on the formation of a platform and quality candidacy, especially if the timing of national and local elections does not overlap.⁴⁴ However, this positive effect can only appear if the transition scheme does not interfere with the legitimacy of cadre recruitment, does not cause conflicts between internal groups, and provides certainty to the term of office that is the basis of the party's organizational structure. Therefore, the clarity of the transition norms will help determine the direction of the consolidation of political parties as the foundation of democracy.

⁴³ Hanida, R. P., Meldianto, R. P., & Hasnita, S. S. Simultaneous National and Local Elections 2024: Triggering Voter Fatigue, Coattail Effect, and Political Polarization in Indonesia. *KnE Social Sciences*, vol. 10, no. 4, 2025, pp. 21-36. <https://doi.org/10.18502/kss.v10i4.18024>

⁴⁴ Kartabrata, F. R. (2023). *Penguatan Peran Partai Politik dalam Pemilihan Umum Legislatif Pasca Putusan Mahkamah Konstitusi No. 114/PUU-XX/2022*. *Litigasi: Jurnal Hukum dan Politik*, vol. 24, no. 2, 2023, pp. 229-260. <https://doi.org/10.23969/litigasi.v24i2.9860>

In addition to strengthening political institutions, the design of the transition of power must also be projected to encourage the strengthening of the presidential system which is Indonesia's constitutional choice. One of the root problems in the five-box simultaneous elections is the weak synergy between the presidential system and its electoral design. Elections that pile up legislative and executive agendas at the same time actually nourish transactional practices and political fragmentation, which are counterproductive to the presidential system that requires stability and government cohesion.⁴⁵ By separating national and regional elections, as emphasized in Constitutional Court Decision 135/PUU-XXII/2024, it is hoped that strengthening the presidential support base in parliament can be more rational and proportionate. However, without an adequate transitional design, these efforts can fail due to the lack of consistency between electoral logic and the structure of state institutions. This means that the reform of the electoral system must go hand in hand with the reconstruction of the power calendar that ensures the sustainability of the principle of presidentialism.

Another projection of the power transition design is to anticipate conflicts of legitimacy in the term of office as a result of synchronization. If national and regional elections are separated and the term of office is not concurrent, there will be consequences for the legitimacy of officials who serve longer or shorter than they should.⁴⁶ This needs to be anticipated from the beginning with explicit transitional norms based on public consent. For example, whether regional heads who end before the regional simultaneous elections will be filled by acting or temporarily extended, or whether DPRD members will remain in office while waiting for local legislative elections. All of these scenarios demand a strong legal basis and legitimacy design. Because without public legitimacy, the transition will only give birth to local political instability, weaken trust in elections, and give rise to lawsuits against the power base of public officials in the transitional period.

From a political and legal aspect, this transitional design is an important momentum to revise the electoral regulatory architecture as a whole. Law No. 7 of 2017, which is the

⁴⁵ Solihah, R. Peluang dan tantangan pemilu serentak 2019 dalam perspektif politik. *JlIP: Jurnal Ilmiah Ilmu Pemerintahan*, vol. 3, no. 1, 2018, pp. 73-88. <https://doi.org/10.14710/jiip.v3i1.3234>

⁴⁶ Prayudi, P. Agenda Pemilu Serentak: Pemisahan Pemilu Nasional dan Pemilu Lokal. *Jurnal Politika Dinamika Masalah Politik Dalam Negeri dan Hubungan Internasional*, vol. 12, no.1, 2021, pp. 67-84. <https://doi.org/10.22212/jp.v12i1.1768>

foundation of the current national election system, has experienced structural pressure due to the development of constitutional interpretation. The Constitutional Court has opened up space for a total reorientation of the simultaneity system, so that lawmakers cannot only do administrative patchwork. A new formulation is needed that regulates not only the schedule, but also the term of office, the procedures for recruiting candidates, the consistency of the power calendar, and the supervisory system during the transition period. This reform is not only technical, but also a reflection of the nation's political law on the future of electoral democracy. Therefore, transitional arrangements should be part of a serious national legislation agenda, not discussed in emergency situations or simply the accommodation of the short-term interests of the elite.⁴⁷

But in the current political context, it is not easy to devise an ideal power transition design. Political fragmentation in the House of Representatives, tug-of-war between the central and regional governments, and the tendency of the executive to maintain short-term stability, have the potential to sacrifice the quality of the transitional legal design. In such a situation, civil society, academics, and the Court itself must appear as the guardian of public reasoning so that the transition is not only procedurally legitimate, but also legitimately substantive. The Court, as the constitutional guardian, has the responsibility not only to state the interpretation, but also to ensure that the interpretation is not manipulated by the lawmakers. This escort is important because history has shown that poor transition engineering always paves the way for an unconstitutional expansion of power, either tacitly or through pseudo-normalization.⁴⁸

The design of the transition of power after the Constitutional Court Decision 135/PUU-XXII/2024 is not just a technical agenda, but a constitutional test that will determine the direction of Indonesia's democratic consolidation in the future. As a recommendation, what needs to be done immediately is the preparation of transitional rules which are explicitly contained in the revision of the Election Law and the Regional Government Law. This rule must stipulate three main things: first, the mechanism of transitional positions that are non-permanent and do not open the space for politicization

⁴⁷ Fuadi, A. B. Politik Hukum Pengaturan Keserentakan Pemilu. *Jurnal Konstitusi*, vol. 18, no. 3, 2022, pp. 702–723. <https://doi.org/10.31078/jk18310>

⁴⁸ Gunawan, A. ., & Heryanti, F. Analisa Yuridis Potensi Revisi UU No. 7 Tahun 2017 Tentang Pemilu. *Jurnal Pendidikan Dan Konseling (JPDK)*, vol. 4, no. 5, 2022, pp. 382–391. <https://doi.org/10.31004/jpdk.v4i5.6611>

of power; second, the establishment of a maximum limit of six months of transition period to avoid too long a power vacuum; third, the implementation of automatic judicial evaluation by the Constitutional Court on the design of the transition of power of regional heads as an effort to maintain the principle of checks and balances in the constitutional system. This recommendation aims to ensure that the democratic process continues to run within the constitutional corridor and avoids potential abuse of power during the vacancy period.

III. CONCLUSION

The Constitutional Court Decision No. 135/PUU-XXII/2024 has opened a new chapter in Indonesia's election architecture, by canceling the total simultaneous system and leading to a "two breaths of elections" model between national and regional elections. However, this shift did not come without constitutional consequences, especially regarding the term of office and the design of the transition of power. In the progressive but open interpretation space of the Court, there is an urgent need to formulate a transition scheme that is not only legally valid, but also constitutionally legitimate. The extension or cut of the term of office cannot be done uniformly, but must be differentiated based on the normative source of the position. The idea of "limited extension with constitutional basis" is one of the rational compromise options. In the future, the implementation of the Constitutional Court's decision must be strictly monitored so that it does not become a justification for power engineering, but a momentum to improve a constitutional, stable, and democratic electoral system.

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