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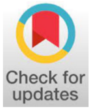
# Kelsen vs Schmitt on Guardians of the Constitution Debates and the Impact on the Indonesian Legal System



# *Perdebatan Kelsen versus Schmitt mengenai Penjaga Konstitusi dan Implikasinya terhadap Sistem Hukum Indonesia*

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## Abstract

This article examines the constitutional debate between Hans Kelsen and Carl Schmitt during the Weimar Republic concerning the proper institution to serve as the guardian of the Constitution, as well as its relevance to Indonesia. Employing historical and statutory approaches, the study demonstrates that Kelsen assigned this function to the Constitutional Court, whereas Schmitt maintained that the President was better positioned to preserve the constitutional order in times of political crisis. In the short term, Schmitt's position appeared more compatible with the political conditions of Weimar. In the long term, however, the collapse of Nazism and the postwar development of constitutional adjudication strengthened Kelsen's model, culminating in the German Federal Constitutional Court as the guardian of the Basic Law. In Indonesia, the Constitutional Court was institutionally designed to perform this function, yet repeated ethical and legal violations by constitutional justices have undermined its legitimacy, independence, and public credibility..

## Abstrak

*Artikel ini mengkaji perdebatan konstitusional antara Hans Kelsen dan Carl Schmitt pada masa Republik Weimar mengenai lembaga yang paling tepat menjadi penjaga konstitusi serta relevansinya bagi Indonesia. Dengan menggunakan pendekatan historis dan perundang-undangan, penelitian ini menunjukkan bahwa Kelsen menempatkan Mahkamah Konstitusi sebagai penjaga konstitusi, sedangkan Schmitt berpendapat bahwa Presiden lebih tepat menjalankan fungsi tersebut dalam situasi krisis politik. Dalam jangka pendek, pandangan Schmitt tampak lebih sesuai dengan kondisi politik Weimar. Namun, dalam jangka panjang, runtuhnya rezim Nazisme dan berkembangnya peradilan konstitusi pasca-Perang Dunia II justru mengukuhkan model Kelsen, yang berpuncak pada Mahkamah Konstitusi Federal Jerman sebagai penjaga Undang-Undang Dasar. Di Indonesia, Mahkamah Konstitusi secara kelembagaan dirancang untuk menjalankan fungsi tersebut, tetapi berbagai pelanggaran etik dan hukum oleh hakim konstitusi telah melemahkan legitimasi, independensi, dan kredibilitasnya di hadapan publik.*

## A. INTRODUCTION

*Hüter der Verfassung* (the guardians of the constitution) is a legal term that originated in the German judicial tradition. In German literature, the guardian can be interpreted as *Hüter* or *Vormund* (a term used to designate the legal guardian of minors). However, in this debate, legal terms that correspond to the function of the guardian of the constitution have emerged, namely *Hüter* (the guardian) and *Verfassung* (the constitution). *Hüter der Verfassung* means the institution with the function of guardian of the constitution.[1] The debate arose in Germany during the reign of the Weimar Republic (9 November 1918 - 23 March 1933). There was a discourse on which institution had the function of protecting the constitution from various threats, in which several institutions could be a proper fit for safeguarding the constitution, such as the *Reichspräsident* (President of the Reich), *Staatsgerichtshof für das Deutsche Reich* (State Court for the German Reich), and *Verfassungsgerichtshof* (Constitutional Court).

The beginnings of this debate were rooted in the work of Sieyès and Hamilton, which surfaced in constitutional discussions during the tumultuous years of the Weimar Republic. Legal terms came to the forefront in a heated debate between Hans Kelsen and Carl Schmitt on the potential guardian of the Weimar Constitution: the President or the Constitutional Court. This discussion presented contrasting ideas from both scientific and theoretical perspectives, as built by the experts. Kelsen built his argument from the perspective of constitutional law, while Schmitt assessed it from the perspective of political science. Kelsen builds his argument with the norm of law based on *Stufenbau* theory (legal pyramid), and Schmitt's work is a means to ascertain the "political sphere".[2]

The debate had a positive impact on the constitutional development of the Presidency and the Constitutional Court, which serves as the guardian of the constitution in various countries worldwide. At the beginning of the debate, Schmitt received much praise for maintaining the argument that the President was the right institution to guard the constitution, considering that, at that time, the ordinary judiciary did not gain the community's trust. Kelsen was also applauded for defending his argument to make the constitutional court the guardian of the constitution. After World War II ended, Kelsen's Constitutional Court institution became the leading constitutional choice in building the tradition of protecting constitutional rights and democracy through constitutional courts.

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[1] Tanto Lailam and Nita Andrianti, "Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia," *Bestuur* 11, no. 1 (2023): 79, https://doi.org/10.20961/bestuur.v11i1.70052.

[2] Stanley L. Paulson, "Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the 'Guardian' Controversy of 1931," in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2017), 510.

The debate between Kelsen and Schmitt originated in legal history and in debates over the roles of the President and the Constitutional Court. The debate is compelling and warrants further discussion, particularly in countries with both institutions, such as Indonesia. In German history, the guardian of the constitution was attached to the institution of the German Federal Constitutional Court/ *Bundesverfassungsgericht* (hereinafter the BVerfG) due to the collapse of public confidence in the *Reichspräsident* (President of the Reich), the *Staatsgerichtshof*, and all state institution, had failed to protect the Weimar constitutional order and allowed Adolf Hitler and the Nazi Party to rise to absolute power. In the political context, Indonesia faced similar conditions and political background in establishing the Mahkamah Konstitusi Republik Indonesia (hereinafter MKRI) during the transition from the New Order's authoritarian power to President Soeharto's fall after 32 years in power.

The study of Schmitt and Kelsen's debate also impacts the various dynamics of state administration in Europe and Asia, including Southeast Asia. Previous researchers have published some related books, dissertations, and articles. The most widely known articles were "The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law," written by Lars Vinx,[3] "The Schmitelsen Court: The Question of Legitimacy" by Bassok,[4] and "Behind the theoretical debate between Hans Kelsen and Carl Schmitt: The nineteenth-century Constitutionalism and German Public Law" by Julia Scholz-Karl.[5] The three publications discuss the Kelsen and Schmitt debate, its implications for the German and European constitutional systems, and its impact on the evolving values of constitutionalism and the strengthening of the constitutional court institution.

In the context of constitutional law studies in Southeast Asia, Rawin Leelapatana's dissertation on "The Kelsen-Schmitt Debate and the Use of Emergency Powers in Political Crises in Thailand" is an excellent example of an article that is fascinating to analyze.[6] The dissertation argues that the dispute between Kelsen and Schmitt remains relevant and can serve as an analytical framework for studying the political and legal dynamics in Thailand. In addition, Rawin Leelapatana and Abdurrachman Satrio Pratomo[7] also wrote an article entitled "The Relationship Between a Kelsenian Constitutional Court and an Entrenched

[3] Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015), 10.

[4] Or Bassok, "The Schmitelsen Court: The Question of Legitimacy," *German Law Journal* 21, no. 2 (2020): 131–62, https://doi.org/10.1017/glj.2020.2.

[5] Julia Scholz-Karl, "Behind the Theoretical Debate between Hans Kelsen and Carl Schmitt: The Nineteenth Century Constitutionalism and German Public Law," *UNIO - EU Law Journal* 7, no. 2 (2021): 16, https://doi.org/10.21814/unio.7.2.3101

[6] Rawin Leelapatana, "The Kelsen-Schmitt Debate and the Use of Emergency Powers in Political Crises in Thailand" (PhD diss., University of Bristol, 2018).

[7] Rawin Leelapatana and Abdurrachman Satrio Pratomo, "The Relationship between a Kelsenian Constitutional Court and an Entrenched National Ideology: Lessons from Thailand and Indonesia," *ICL Journal* 14, no. 4 (2020): 497–521, https://doi.org/10.1515/icl-2020-0013.

National Ideology: Lessons from Thailand and Indonesia." The article explains the influence of Thai-ness ideologies in Thailand and Pancasila in Indonesia, which advocate strong leadership, national harmony, and social hierarchy in the practice of the Constitutional Court.

The current study employed Kelsen and Schmitt's debate approach in the Weimar Republic as a model for analysing the guardians of the constitution in the recent development of the Indonesian constitutional system, particularly the roles of the President and the MKRI. No legal textbook, academic journal, or research has evaluated the debate, and its influence on the Indonesian institution is unavailable. Thus, the novelty of this study lies in its exploration of the Kelsen-Schmitt debates within the Indonesian legal system, specifically focusing on who should serve as the custodian of the constitution in the Indonesian presidential system: the Indonesian President or the MKRI.

Based on the background described above, the main legal issues to be analysed in this research include the history of the debate between Hans Kelsen and Carl Schmitt regarding the guardian of the constitution during the Weimar Republic, and the implications of that debate for the Indonesian legal system today. To address these issues, the research approaches employed in this study are the historical and statutory approaches. The historical approach is used to uncover the original debate regarding the power of the President or the Constitutional Court as the "true guardian of the constitution". The statutory approach examines the position of the guardian of the constitution in the Weimar Republic and in Indonesia. The research materials used consist of secondary data, with data collection methods including a literature review of official documents, journals, and books related to the research focus. Historical and descriptive analysis is used as the analytical tool to dissect this debate authentically, presenting a systematic and comprehensive analysis of this research.

## B. ANALYSIS AND DISCUSSION

### 1. Hans Kelsen and Carl Schmitt

Hans Kelsen (October 11, 1881 - April 19, 1973) and Carl Schmitt (July 11, 1888 - April 7, 1985) were two experts who debated in depth about the guardian of the Constitution during the Weimar Republic in Germany. The constitutional debate was a result of an intellectual laboratory during the 20th-century political modernity.[8] The debate was considered the "most democratic democracy in the world" by a historian, Peter Gay, also known for his famous quote- a Republic that "was born in defeat, lived in turmoil, and died in a disaster.

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[8] Lucas Brang, "Carl Schmitt and the Evolution of Chinese Constitutional Theory: Conceptual Transfer and the Unexpected Paths of Legal Globalisation," *Global Constitutionalism* 9, no. 1 (2020): 117–54, https://doi.org/10.1017/S2045381719000297.

[9] Kelsen used the approach of pure legal theory and legal positivism[10] to understand the institutions authorized to safeguard the Constitution. Meanwhile, Schmitt is a German legal and political expert who uses a political approach and the Weimar Constitution to understand the guardian of the Constitution.

Kelsen's idea of the Constitutional Court did not spontaneously emerge. Instead, it arose from the centralised judicial review's constitutional refinement process, with the primary function being abstract judicial review. [11] Previously, the United States Supreme Court had a decentralized approach to judicial review, established in the judicial world by John Marshal. The US Supreme Court is a court that focuses on concrete cases and conducts judicial review, serving as a specialised court for constitutional matters. The court adopts the *void ab initio doctrine*, which gives rise to the *ex tunc* effect of unconstitutionality. In contrast, the Austrian Constitutional Court implemented the *pro-futuro* or *ex-nunc* effect of unconstitutionality (abstract judicial review). [12]

Indications of the idea's refinement suggest that a previous attempt had been made at the Imperial Court of the Constitutional Monarchy, which served as a precursor to the Constitutional Court in the Austro-Hungarian Empire. The political system in question was a dual or multi-national constitutional monarchy in Central Europe (1867-1919). In 1919, authority was given to the German-Austrian Constitutional Court, which assumed the functions of the Imperial Court and the State Court. The court was empowered to review laws, particularly those enacted by the provincial assemblies, at the request of the state governments.[13] The first proponent of the Constitutional Court was Austrian politician Karl Renner. He addressed the topic in one of his most significant texts, published in 1917, *Das Selbstbestimmungsrecht der Nationen* (The Right of Self-Determination of Nations). The text discussed democratic transformation and identified the importance of the *Verfassungsgericht* (federal constitutional court) as an institution that protects citizens' rights and verifies legislation's constitutionality.[14] Afterwards, Renner was appointed as

[9] Nikolaos Vagdoutis, "Hans Kelsen and Carl Schmitt in Weimar: A Riddle of Political Constitutionalism" (PhD diss., University of Glasgow, 2018).
[10] David Dyzenhaus, "Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought," *Theoretical Inquiries in Law* 16 (2015): 337–66, https://doi.org/10.1515/til-2015-104.
[11] Tanto Lailam and M. Lutfi Chakim, "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences," *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023): 149, https://doi.org/10.22304/pjih.v10n2.a1.
[12] Ioannis A. Tassopoulos, "The Void *Ab Initio* Theory in Comparative Perspective: J Marshall, H Kelsen, and Beyond," *ICL Journal* 17, no. 3 (2023): 213–32, https://doi.org/10.1515/icl-2023-0034.
[13] Verfassungsgerichtshof Österreich (The Constitutional Court of Austria), *The Constitutional Court* (Vienna: Constitutional Court, n.d.), 29–32.
[14] Sara Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918–1929)," *Revista Co-herencia* 9, no. 16 (2012): 273–95, https://doi.org/10.17230/co-herencia.9.16.10.

Chancellor of German-Austria, October 30, 1918 - October 21, 1919; Chancellor of Austria, October 21, 1919 – July 7, 1920.

When Renner became the Chancellor of Austria, he instructed Kelsen to translate his ideas into constitutional law studies,[15] as well as engaging Kelsen to write several aspects of the new republic's constitution and participate in the work of the constituent assembly.[16] The results of Kelsen's study, which presented the idea of a comprehensive Constitutional Court based on theories of constitutional law and democracy, became known as the Constitutional Court model. He also believed the Constitutional Court was the appropriate institution to develop judicial review of legislation and other additional powers. Hence, in October 1920, his idea was realised by establishing the Austrian Constitutional Court (*Verfassungsgerichtshof*) in the 1920s constitution.

Kelsen's unwavering dedication to the development of pure legal theory,[17] also known as the *Stufenbau* theory, and his establishment of the Constitutional Court from drafting the Austrian Constitution until his passing, greatly deserve recognition for raising and upholding the subject in both theoretical and academic realms. After drafting the 1920 Austrian Constitution, he served as a Justice on the Austrian Constitutional Court from 1921 to 1930. However, when the idea of the Constitutional Court and the Austrian Constitution were enacted, the idea of the Constitutional Court as a guardian of the constitution had not yet emerged. In 1930, Kelsen moved to the Universität zu Köln in Cologne, Germany, as a constitutional law professor and dean of the faculty of law (1932) after being retired from the Austrian Constitutional Court for political reasons.[18] However, Kelsen only lasted three years, after which he was forced out of the university by the Nazi. Then, Kelsen travelled intellectually to other locations, such as Geneva (1933) and the United States (1940), where he first went to Harvard and then moved to California, where he passed away on April 19, 1973, in Berkeley, California, United States.

On the other hand, Schmitt is a German jurist and political theorist. His contributions to the debate on these legal and political issues continue to be cited by scholars today. However, his achievements are highly controversial due to his political association with the Nazi Party, anti-legalism, and anti-Semitism. [19] In 1921, Schmitt became a professor at

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[15] Georg Schmitz, "The Constitutional Court of the Republic of Austria 1918–1920," *Ratio Juris* 16, no. 2 (2003): 240–65, https://doi.org/10.1111/1467-9337.00235.

[16] Paolo Carrozza, "Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes," *Estudios de Deusto* 67, no. 1 (2019): 55–82, https://doi.org/10.18543/ed-67(1)-2019pp55-82.

[17] Hans Kelsen, *Pure Theory of Law* (Clark, NJ: The Lawbook Exchange, 2005), 1.

[18] Jacob Giltaij, "Hermann Kantorowicz and Hans Kelsen: From Debating Legal Sociology to Constructing an International Legal Order," *History of European Ideas* 48, no. 1 (2022): 112–28, https://doi.org/10.1080/01916599.2021.1898438.

[19] Acar Kutay, "From Weimar to Ankara: Carl Schmitt, Sovereignty and Democracy," *Philosophy and Social Criticism* 45, no. 6 (2019): 728–52, https://doi.org/10.1177/0191453719830150.

the University of Greifswald, where he published his essay, *Die Diktatur* (On Dictatorship). In 1922, he worked as a professor at the University of Bonn. Schmitt moved around to change universities. He became a professor of law at the Handelshochschule in Berlin (1926), the Technical University of Munich (1928), and the Universität zu Köln (1933). His most famous book is *Verfassungslehre* or Constitutional Law (1928), and his paper, "*Der Begriff des Politischen*" (The Concept of Politics), was based on lectures he delivered at the *Deutsche Hochschule für Politik* in Berlin during his tenure as a professor at the University of Berlin (1933-1945). Schmitt died in Plettenberg, Germany, on April 7, 1985.[20]

## 2. Grundnorm vs. Grundentscheidung?

The fundamental debate about the guardian of the constitution is highly related to the theoretical arguments by Kelsen and Schmitt. Their debate is strongly linked to the constitution's position in the state's political system, specifically whether it is referred to as Grundnorm or Grundentscheidung. The idea of Grundnorm, as proposed by Kelsen, refers to the highest norm within a legal system, independent of any political goals. It is not a product of any political institution but rather a primary reason or value. Meanwhile, Schmitt's concept of Grundentscheidung describes the political decision as the beginning of a legal system and as a formulator of the decision that strongly influences the enactment of a regulation. The law of a country begins not with a legal norm but with the will of a legitimate decision-maker.[21] In this context, no institution has regulation or establishment without the highest political decision. Nevertheless, the President is the highest decision-maker in European political life.

In defence of the Grundnorm concept, Kelsen offers a juridical constitution concept from the perspective of legal positivism theory. It is a system of legal norms, free from ideology and separate from politics, and its validity is based on the Grundnorm. He and Adolf Merkl built *Stufenbau* (the pyramid of norms), or a hierarchical structure of regulations. It is the foundation for the subsequent rules; therefore, the rules must not conflict with the Grundnorm. To uphold the Grundnorm, the Constitutional Court was established.[22]

On the contrary, Schmitt's opinion is that the essence of the constitution is not contained in the constitution/ legal norms. There is political power and a decision to create a constitution: the people in a democracy (the President) and the king in a monarchy. The

[20] Jens Meierhenrich and Oliver Simons, eds., *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2017), xix–xxx.

[21] Xiaodong Ding, "Reimagining Law and the Constitution: Carl Schmitt and American Constitutional Scholarship," *ICL Journal* 13, no. 4 (2019): 403–27, https://doi.org/10.1515/icl-2019-0023.

[22] Septi Nur Wijayanti et al., "Progressive Legal Approaches of the Constitutional Justice Reasoning on Judicial Review Cases: Challenges or Opportunities?," *Law Reform* 21, no. 2 (2025): 219–40, https://doi.org/10.14710/lr.v21i2.66334.

grundentscheidung or essential decision is given to the person who is given the mandate by the people or power, which in this case is the President. The President primarily determines the concept of law, as the source of all law for decision-makers is the authority or sovereignty of a final judgment. Therefore, while the legal system is based on a political choice, the legitimacy and validity of a constitution is not explained by the positive hierarchy of norms but instead results from the 'constitution-making capacity' or power or authority that constitutes the constitution/state.[23]

Schmitt addressed the issue in three aspects of the traditional approach to understanding constitutions: (a) by rejecting the traditional opinion that a constitution is fundamental (*Grund*), whether it is *Grundgesetz* of *Grundnorm* (fundamental norms); (b) Questioning whether "legal norm" can be applied to the concept of constitution; (c) he insists on distinguishing constitutions and constitutional law. Schmitt reiterates that constitutions are not laws or norms, but rather political decisions based on the exercise of political power. In contrast to Schmitt, Kelsen observed that judicial review conducted by the constitutional court is indispensable for preserving consistency between inferior norms and superior standards within the legal system (*Stufenbau* theory), which he referred to as the systematic nature of legality. A constitutional court with the authority to invalidate unconstitutional laws is the most effective assurance of adherence to constitutional legitimacy. Judicial review provides the guarantee of legality necessary to maintain the legal system. However, democracy will collapse without the "judicial institutional controls" that guarantee constitutional legality and systematic coherence - consistency between the constitution and legislative acts.

Based on the data above, the author analyzes that the comparison between *Grundnorm* and *Grundentscheidung* presents a contradictory approach, which can be justified theoretically from both political and legal perspectives. *Grundnorm* is a legal norm unrelated to political interests, and the court in law enforcement is also independent and impartial from such influences. At the same time, the *Grundentscheidung* states that all legal systems in a country are determined by the political decisions of the legitimate institution representing the people, namely the democratically elected President. In the German context, the *Grundnorm* is the Weimar Constitution, while the *Grundentscheidung* is the political decision of the Weimar Constitution.

In Indonesia, the juxtaposition between *Grundnorms* and *Grundentscheidung's* contexts is also contentious. Referring to Kelsen's theory in the Indonesian legal system, *Grundnorm* is equivalent to Pancasila. Meanwhile, the 1945 Constitution crystallised the values of Pancasila. In this context, the question arises as to which document should be protected

[23] Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008), 64.

by the Constitutional Court and the President, the Pancasila or the 1945 Constitution. Meanwhile, in the context of *Grundentscheidung*, Pancasila and the 1945 Constitution are products of political decisions formulated by the state's founders. The formulation also underwent a democratic political process, which, according to Schmitt's theory, must be safeguarded by the President. Before the amendment of the 1945 Constitution, Pancasila, the constitution, and popular sovereignty were in the hands of the Indonesian People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR), indicating that prior to the amendment, the MPR had the authority to protect the constitution. Meanwhile, after the amendment of the 1945 Constitution, all state institutions with equal positions are authorised by the Constitution.

### 3. The Guardian of the Constitution: The President or the Constitutional Court?

In the 1920s-1930s, German legal theorists debated which government body should be the 'guardian' of the *Weimarer Verfassung* (Weimar Constitution) or *Verfassung des Deutschen Reiches* [Constitution of the German Reich]. Unquestionably, the debate happened due to the previous government's loss of power. If the constitution were to be established as the supreme law authority of the nation, would it possess the capability to regulate and restrain the authority of the republican government? The argument engaged various constitutional law and political scholars in Germany, Austria, and neighbouring countries.

In 1929, Kelsen published a book entitled "*Wesen und Entwicklung der Staatsgerichtsarbeit*" (Nature and Development of Constitutional Adjudication), a year before he moved to the Universität zu Köln (1930-1933). The book was a paper-based work derived from a speech given at the Association of German Constitutional Law Professors meeting in Vienna (1928). Kelsen, one of the individuals who designed the Austrian Constitutional Court and served as a constitutional Justice, stated that ensuring the constitutionality of laws is crucial for the rule of law in modern democracies. Afterwards, as a professor at *Universität zu Köln*, Kelsen worked on the third constitutional law issue concerning the dangers to the Weimar Republic's legal system, mainly the inquiries about the whereabouts of the constitution's "guardian" (*der Hüter*).

Kelsen and Schmitt engaged in a dispute at this juncture. Kelsen wanted the constitution to be enforced by the courts. However, Schmitt gave scholarly support to the position of the *Deutsche Nationale Volkspartei* and gave the *Reichspräsident* the job of protecting the constitutional framework.[24] The constitutional debates discorded opposing views on

[24] François Rigaux, "Hans Kelsen on International Law," *European Journal of International Law* 9 (1998): 325–34, https://doi.org/10.1093/ejil/9.2.325

the guardians of the Constitution.[25] To substantiate his views and reject Kelsen's ideas, Schmitt wrote a paper entitled "*Das Reichsgericht als Hüter der Verfassung*" (the Imperial Court of Justice as guardian of the constitution) in 1929. The same title was later used for a book published in 1931, "*Hüter der Verfassung.*[26] In Schmitt's paper, the President, as "Guardian of the Constitution," is a"neutral power" to give a solution in the crisis (financial crisis), and the position of head of state is a powerful influence. Schmitt argued that: "*Der Reichspräsident als Hüter der Verfassung"*[27] (President of the Reich as the guardian of the Constitution):

> *No legal formality can hide the fact that such state or constitutional courts are highly political bodies with constitutional legislative powers. Therefore, before the courts are appointed as constitutional guardians for highly political issues and conflicts, and before the judiciary is burdened and threatened by such politicisation, we must first recall the positive content of the Weimar Constitution and its constitutional system. According to the existing content of the Weimar Constitution, there was already a guardian of the Constitution, namely the President of the Reich. The fact that the President of the Reich was the guardian of the constitution also corresponded to the democratic principle on which the Weimar constitution was based (Keine Justizförmigkeit könnte darüber hinwegtäuschen, daß es sich bei einem solchen Staats- oder Verfassungsgerichtshof um eine hochpolitische Instanz mit Verfassungsgesetzgebungsbefugnissen handelte).*[28] *Bevor man also für hochpolitische Fragen und Konflikte einen Gerichtshof als Hüter der Verfassung einsetzt und die Justiz durch solche Politisierungen belastet und gefährdet, sollte man sich zunächst dieses positiven Inhaltes der Weimarer Verfassimg und ihres verfassungsgesetzlichen Systems erinnern. Nach dem vorliegenden Inhalt der Weimarer Verfassung besteht bereits ein Hüter der Verfassung, nämlich der Reichspräsident.*[29] *Daß der Reichspräsident der Hüter der Verfassung ist, entspricht aber auch allein dem demokratischen Prinzip, auf welchem die Weimarer Verfassung beruht.*[30]

Kelsen responded to Schmitt's views; in early 1931, Kelsen refuted Schmitt's opinion by publishing an article entitled "*Wer soll der Hüter der Verfassung sein*?" (Who shall be the guardian of the Constitution?) In his article, Kelsen criticized Schmitt and questioned why not empower the judiciary to function as the guardian of the Weimar Constitution, as in judicial practice in the United States Supreme Court has the authority of judicial review.[31] In the American democratic order, the Supreme Court is the guardian of the constitution

[25] Stanley L. Paulson, "Hans Kelsen on Legal Interpretation, Legal Cognition, and Legal Science," *Jurisprudence* 10, no. 2 (2019): 188–221, https://doi.org/10.1080/20403313.2019.1604887.
[26] Arkadiusz Górnisiewicz, "Dispute over the Guardian of the Constitution: Hans Kelsen, Carl Schmitt and the Weimar Case," *Politeja* 18, no. 3(72) (2021): 193–214, https://doi.org/10.12797/politeja.18.2021.72.10.
[27] Carl Schmitt, *Der Hüter der Verfassung* (Berlin: Duncker & Humblot, 1996), 132.
[28] Schmitt, *Der Hüter der Verfassung*, 155–56.
[29] Schmitt, *Der Hüter der Verfassung*, 158.
[30] Schmitt, *Der Hüter der Verfassung*, 159.
[31] Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (New York: Oxford University Press, 2007), 149–50.

against the threat of legislative and other general judicial interpretations". Schmitt answers that it is historically accurate that several courts are considered guardians of the Constitution, namely the *Staatsgerichtshof* (Supreme Court) and the *Verfassungsgerichtshof* (Constitutional Court). However, their task was primarily to determine whether laws were constitutional, rather than to act as protectors of the Constitution. The guardian of the Constitution should be the holder of the people's mandate, the President. It could ignore formal parts of the Constitution that could lead to "disintegration"; hence, the President is called the "guardian of the Constitution." This perspective reflects a political analysis that positions the President as the ultimate decision-maker regarding the nation's stability.

Meanwhile, Kelsen still disagrees with the idea that the guardian of the Constitution is given to the President. [32] Kelsen stated that the judiciary should conduct a judicial review of the Constitution, specifically in the case of an abstract review, where the possibility of deciding the constitutionality of a legal act exists in the absence of a specific case or controversy. Thus, a mechanism of legal self-defence of the constitutional system, democracy, and freedom of politics is required.[33] The significance of institutions forged through political compromise lies in their responsibility for upholding the fundamental constitutional rights essential in contemporary democracies.

Kelsen acknowledged the prevailing lack of confidence among the public in the regular court's ability to enforce the Constitution. Consequently, he devised the Constitutional Court as a distinct entity, independent of the ordinary judiciary and the Supreme Court. The Constitutional Court is an authoritative organisation empowered to invalidate legislation that conflicts with the Constitution. It is the guardian of minority rights and majoritarian self-government.[34] Kelsen considered consistency in the legal system and its internal cohesion critical to understanding law as a scientific study. Based on his view, the guardian protects a more systematic legal logic and legality. Kelsen stated that constitutional courts should be composed of legal experts, ensuring that the legality of their decisions is based on expertise. Schmitt's view was widely supported by the government of the day, as it was closely tied to the Weimar Constitution. The President of the Reich (*Reichspräsident*) was the guardian of the constitution, including in times of political and financial crisis in Germany. Article 42 of the Weimar Constitution of August 11, 1919, mentioned:

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[32] Lars Vinx, "Hans Kelsen and the Material Constitution of Democracy," *Jurisprudence* 12, no. 4 (2021): 466–90, https://doi.org/10.1080/20403313.2021.1921493.

[33] Antoni Abat Ninet, "Kelsen versus Schmitt and the Role of the Sub-National Entities and Minorities in the Appointment of Constitutional Judges in Continental Systems," *ICL Journal* 14, no. 4 (2020): 523–43, https://doi.org/10.1515/icl-2020-0015.

[34] Yaniv Roznai, "Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review," *ICL Journal* 14, no. 4 (2020): 355–77, https://doi.org/10.1515/icl-2020-0039.

> *"The President of the Reich shall take the following oath before the Reichstag: I swear to devote my energies to the well-being of the German people, to further their interests, to guard them from injury, to maintain the Constitution and the laws of the Reich, to fulfil my duties conscientiously, and to administer justice for all (Der Reichspräsident leistet bei der Übernahme seines Amtes vor dem Reichstag folgenden Eid: Ich schwöre, daß ich meine Kraft dem Wohle des deutschen Volkes widmen seinen Nutzen mehren, Schaden von ihm wenden, die Verfassung und die Gesetze des Reichs wahren, meine Pflichten gewissenhaft erfüllen und Gerechtigkeit gegen jedermann üben werde." Die Beifügung einer religiösen Beteuerung ist zulässig.*

Therefore, the Weimar Constitution gave the *Reichspräsident* (President of the Reich) extensive and even dangerous powers.[35] During the 1920s and early 1930s, the Weimar Republic experienced many emergencies.[36] The President was meant to be a countervailing force that could step in if parliament could not work, especially by protecting the constitution. The President was a democratically elected official who was accountable to the people. The President had the authority to appoint the chancellor, which has a beneficial influence on customary law. In addition, the President has the authority to dissolve the Reichstag, undermining established legal norms and launching popular referendums.

Benjamin A. Schupmann, in a book that Schmitt has three reasons, namely:[37](1) the judiciary is functionally dependent on the legislature; (2) the judiciary does not have an executive, so it cannot guarantee the "totality of the situation" by developing and applying political status; and (3) the judiciary lacks democratic legitimacy. Vinx added that Schmitt opposed any judicial review due to the authorisation of the judiciary to make political decisions beyond its competence. Schmitt argued that the Reichspräsident's duty as guardian of the constitution was that the President had been sworn in as head of state. Therefore, the head of state must act as an honest and impartial mediator between the various complex interests of society, including groups, political parties, and other stakeholders. The President represents a democratic and independent social force, acting as an open decision-maker in the country.

## 4. The Guardian of the Constitution: from the President to the BVerfG

The conclusion of the discussion between Kelsen and Schmitt had significant repercussions, both in the short and long term. Schmitt emerges as the victor of the discussion in the immediate term, thereby enhancing the President's ability to maintain government

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35 Leila Brännström, "Carl Schmitt's Definition of Sovereignty as Authorized Leadership," in *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology*, ed. Matilda Arvidsson, Leila Brännström, and Panu Minkkinen (Abingdon: Routledge, 2016), 28, https://doi.org/10.4324/9781315742243.

36 Christopher Adair-Toteff, *Carl Schmitt on Law and Liberalism* (Cham: Palgrave Macmillan, 2020), vii.

37 Benjamin A. Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford: Oxford University Press, 2017), 167.

stability and manage an unstable administration. As the head of state, the President can safeguard the Weimar Constitution, address emergency issues, and serve as the highest leader to make state decisions. In the *Grundentscheidung* theory, the highest authority that decides state issues is the guardian of the constitution. Nevertheless, in an unstable government, the President must intervene to avoid constitutional violations. However, from the perspective of modern constitutionalism, the existence of the Constitutional Court imposes a legal obligation on all state institutions to comply with its decisions. It is this compliance by state institutions that serves as the solution to prevent governmental and political instability. Through its functions of resolving jurisdictional disputes among state institutions and conducting judicial review, the Constitutional Court aims to prevent such conditions from arising.

Kelsen emerged victorious in the conflict with time. Following the Weimar Republic's decline into chaos and instability, the President of the Reich, appointed by plebiscite, administered the country through emergency decrees. In 1932, the President of the Weimar Republic, Paul von Hindenburg, still had a political role to play as the guardian of the constitution and protector of the democratic constitutional order. However, he completely failed to halt the economic and political crisis. This situation had destroyed confidence in the strong presidential office in Germany. In the crisis, he appointed Adolf Hitler as Reich Chancellor on January 30, 1933, and the Nazi Party took absolute power between 1933 and 1945. In exercising power, the party controlled the country and transformed the government into a totalitarian dictatorship. Hindenburg died on August 2, 1934, and Hitler became dictator by merging the powers of the chancellery and presidency.

The triumph of Kelsen's ideas was further enhanced after the end of the Second World War and the emergence of new democratic transition countries, which established a system of government by adopting constitutional review through the establishment of a constitutional court. The Kelsenian court model has spread globally and rapidly - as John Ferejohn put it, "like wildfire" - after World War II and the collapse of authoritarian regimes.[38] Ran Hirschl called the phenomenon in which courts worldwide hold increasingly broad powers - 'juristocracy.[39] Hence, after the collapse of communism in Europe, almost all Central and Eastern European countries established Constitutional Courts as institutions with judicial review powers and other additional powers. Italy established the *Corte Costituzionale della Repubblica Italiana* in 1947, although it was implemented in 1956. In Germany, after the fall of Adolf Hitler and the Nazi government, the end of World War II,

[38] Jeong In Yun, "Constitutional Review Complaint as an Evolution of the Kelsenian Model," *ICL Journal* 14, no. 4 (2020): 423–46, https://doi.org/10.1515/icl-2020-0024.

[39] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

and the establishment of constitutional courts in several states of West Germany, such as the Bayerischer Verfassungsgerichtshof München in 1947 and the Staatsgerichtshof des Landes Hessen in 1948. These conditions led to the establishment of the Bundesverfassungsgericht at the federal level (1949). Similarly, France underwent a shift in its government system in 1958 with the creation of the *Conseil Constitutionnel*, which is responsible for examining laws. Following the transition to democracy, Portugal established the *Tribunal Constitucional de Portugal* (Portuguese Constitutional Court) in 1982, and Spain established the *Tribunal Constitucional* in 1978.

In the Federal State of Germany, the drafters of the Basic Law established a strong BVerfG to oversee the boundaries of the Constitution and uphold fundamental rights, with liberalism and individualism as the ideological basis. The BVerfG institutionally refers to the Austrian model of legal review, but in terms of authority, it also adopts the American model of constitutional complaints. The German Constitution (*Grundgesetz für die Bundesrepublik Deutschland*) gave the BVerfG comprehensive and complete powers to protect the constitutional rights of citizens by judicial review,[40] including the authority to abstract judicial review (*abstrakte normenkontrolle*), concrete/specific judicial review or constitutional questions (*konkrete normenkontrolle*), and constitutional complaints (*verfassungsbeschwerde*).[41] Additionally, there are sub-national constitutional courts at the level of 16 states.[42] The BVerfG was established under the 1949 Basic Law.

The 1950s were a notable period marked by significant achievements. The BVerfG was established on policies from Bonn (Germany's capital at the time), values from Karlsruhe (where the Constitutional Court is located today), and what emerged from the people. Both Jürgen Habermas and Schmitt expressed concerns, albeit in distinct manners, over the relinquishment of sovereignty to the Court. Schmitt worries about the Court based

[40] Tanto Lailam, Putri Anggia, and Nita Andrianti, "Proportionality Analysis in Competing Rights Cases: A Model from the German Federal Constitutional Court," *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* 8, no. 2 (2023): 236, https://doi.org/10.22373/petita.v8i2.220.

[41] Tanto Lailam, "Perbandingan Desain Pengujian Konstitusional Pada Mahkamah Konstitusi Federal Jerman dan Indonesia," *Arena Hukum: Jurnal Ilmu Hukum* 16, no. 2 (2023): 274–301, https://doi.org/10.21776/ub.arenahukum.2023.01602.4.

[42] Bayerischer Verfassungsgerichtshof (1947), Staatsgerichtshof des Landes Hessen (1948), Staatsgerichtshof der Freien Hansestadt Bremen (1949), Verfassungsgerichtshof Rheinland-Pfalz (1949), Verfassungsgerichtshof für das Land Nordrhein-Westfalen (1952), Hamburgisches Verfassungsgericht (1953), Verfassungsgerichtshof Baden-Württemberg (1955), Landesverfassungsgericht Mecklenburg-Vorpommern (1957), Verfassungsgerichtshof des Saarlandes (1959), Verfassungsgerichtshof des Landes Berlin (1992), Verfassungsgericht des Landes Brandenburg (1993), Verfassungsgerichtshof des Freistaates Sachsen (1993), Verfassungsgericht des Landes Sachsen-Anhalt (1993), Niedersächsischer Staatsgerichtshof (1995), Thüringer Verfassungsgerichtshof (1995), and Schleswig-Holsteinisches Landesverfassungsgericht (2008). See Tanto Lailam, "Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional," *Jurnal HAM* 13, no. 1 (2022): 65, https://doi.org/10.30641/ham.2022.13.65-80.

on authoritarian principles. In contrast, Habermas's concern was based on democratic principles.[43] Schmitt questioned whether the Court's presence might lead to fragmentation of the state's decision-making capacity. Conversely, Habermas expressed concern that the Court would deprive the people of the chance to deliberate.

In 1951, the Court declared itself *Hüter der Verfassung* (the guardian of the 1949 Basic Law). With the commitment of the BVerfG, the term "guardian of the constitution" became attached to the function of the Constitutional Court and has remained in place to the present day. The Court is almost universally recognised as the guardian of the constitution and guarantor of the rule of law.[44] Hailbronner and Martini believe the system is a model for many constitutions and constitutional courts worldwide and an internationally recognised global principle.[45] Andreas Voßkuhle (President of BVerfG 2010-2020) proposed that the BVerfG mediate the 1949 Basic Law and the European legal system.[46]

From the Indonesian legal historical perspective, BVerfG is referred to as the Ad Hoc Committee of the People's Consultative Assembly (*Panitia Adhoc Badan Pekerja Majelis Permusyawaratan Rakyat*) in 2001, which proposed the idea of establishing a model for the Constitutional Court during the amendment process of the 1945 Constitution. The BVerfG discussed the constitutional regulation of the BVerfG in the 1949 Constitution, as well as authorities, justice selection mechanisms, and other related matters. The German Basic Law confers the authority of judicial review upon a Constitutional Court, which is empowered to safeguard against any infringement of the Basic Law and determine its constitutionality.[47]

Even today, the BVerfG remains a reference point in academic debates on expanding the constitutional complaint authority of the Constitutional Court of Indonesia. Based on the opinion of the President of the MKRI (2013-2015), Hamdan Zoelva, posited that the BVerfG is an appropriate comparative legal reference for MKRI for several reasons:

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[43] Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951–2001* (Oxford: Oxford University Press, 2015), 61.

[44] Tanto Lailam, Putri Anggia, and M. Luthfi Chakim, "The Proportionality Test Models of Competing Rights Cases in the Civil and Common Law Systems: Lesson to Learn for Indonesia," *Hasanuddin Law Review* 10, no. 2 (2024): 206–25, https://doi.org/10.20956/halrev.v10i2.4844.

[45] Michaela Hailbronner and Stefan Martini, "The German Federal Constitutional Court," in *Comparative Constitutional Reasoning*, ed. András Jakab, Arthur Dyevre, and Giulio Itzcovich (Cambridge: Cambridge University Press, 2017), 367.

[46] Andreas Voßkuhle, "Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*," *European Constitutional Law Review* 6, no. 2 (2010): 175, https://doi.org/10.1017/S1574019610200020.

[47] Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan 1999–2002 (Buku VI Kekuasaan Kehakiman)* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 380, 444–45.

> *"...The constitutional review model of both the BVerfG and MKRI is identical and is based on the European model of constitutional review. In terms of legal tradition, Indonesia and Germany share a common legal heritage, rooted in the civil law tradition. The BVerfG is one of several constitutional courts around the globe that has been explicitly granted the power to hear constitutional complaints".*[48]

This perspective is endorsed by Justice of the MKRI I Dewa Gede Palguna (2003-2008, 2015-2020)[49] and Deputy of the Constitutional Court Saldi Isra (2017 - present).[50] They posit that the BVerfG serves as a point of reference for comparative studies on the drafting of constitutional complaints at MKRI for the following reasons. Firstly, a constitutional complaint constitutes a component of a constitutional review, a process which Indonesia and Germany adopt similarly. Secondly, regarding the respective legal traditions, Indonesia and Germany are situated within the same legal tradition, namely the civil law tradition. Thirdly, Germany is one of the countries that was referenced during discussions about the establishment of a constitutional court at the meetings of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly. [51]

## 5. Who is the Real Guardian of the Constitution in the Indonesian Legal System?

The ongoing relevance of Schmitt and Kelsen's constitutional argument on whether the President or the Constitutional Court serves as the guardian of the constitution makes it a valuable contextual study for analysing constitutional matters. According to the author of the current study, both proposals have different perspectives, as the President and the Constitutional Court have distinct authorities and functions. Although both parties protect the constitution from different directions, the President is the guardian of the constitution from the threat of state instability. At the same time, the Constitutional Court defends the constitution against oppressive legislative challenges made by legislators.

Referring to Schmitt's theory, the Indonesian President acts as the guardian of the Constitution. In the Indonesian presidential system, the President holds both the head of state and head of government positions and is entrusted with authority by the majority of the Indonesian population. The President bears the responsibility for guiding the state and its government. Additionally, the President undertakes a formidable burden, as they possess the authority to defend the Constitution from external threats. In a stable government and a democratic state of law, the 1945 Constitution also gave the President the power to

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[48] Hamdan Zoelva, "Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara," *Jurnal Media Hukum* 19, no. 1 (2012): 152–64.

[49] I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara* (Jakarta: Bumi Aksara, 2013), 1.

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

[51] Lailam and Andrianti, "Legal Policy of Constitutional Complaints in Judicial Review," 75–94.

propose bills, a power that differs significantly from the German system of government. The President's power in legislative making serves as a safeguard of the Constitution against the political pragmatism of the ruling party and the power of parliament. On the other hand,

If Kelsen's theory is applied, the MKRI serves as the guardian of the constitution against the threat posed by the political pragmatism of the President and the House of Representatives in the legislative process of law. Ideally, the rulings of the MKRI as the guardian of the 1945 Constitution should be respected by all parties, including the President, the House of Representatives, the Supreme Court, and other state institutions. The court has a judicial review role, safeguarding the 1945 Constitution against legislation that conflicts with it and with human rights guarantees. Furthermore, the Constitution emerged from reforms that mandated the establishment of a democratic legal system following the downfall of President Suharto's regime, which had held power for nearly 32 years. However, in Kelsen's theory, the establishment of the Constitutional Court is separate from the Supreme Court due to public distrust of the judiciary's role, which is often entangled in political interests. The court is staffed by legal professionals who have the qualities of statesmanship. The essence and disposition of statesmanship demonstrate the expert's devotion to the state and nation and should be devoid of personal and collective interests when resolving judicial review conflicts.

Kelsen demonstrated this consistency and commitment until his death; like a pure legal theory free of political factors, he also became a human being who never prioritised practical political interests. Kelsen's independence and impartiality as a constitutional judge and professor led him to leave his country and universities on several occasions due to political interests. When referring to Kelsen's ideal in the Indonesian context, it is inversely proportional; the Indonesian Constitutional Justices often fall into the problem of violations of law (criminal) and ethics. Fourteen (14) of the thirty-one (31) Justices have violated constitutional ethics, ranging from mild to severe. Justices who commit criminal offences and serious and minor ethical violations are highly disconcerting, mainly due to their frequent failure to become fair statesmen (*negarawan yang adil*), trusted by the public to uphold the constitution and social justice based on Pancasila.

Several minor ethical violations were observed in the cases of Arsyad Sanusi (2011), Chairman of the Court Arief Hidayat (2016, 2018, 2023, 2025), and Guntur Hamzah, who committed violations twice in 2023 and 2025. Furthermore, the wave of ethical violations by justices peaked in 2023 and 2025. In 2023, all the justices were found guilty of violating the principles of decency and modesty. This breach of ethics was associated with the information leak from the Justice's deliberation meeting on the judicial review of a case

regarding the age requirements for candidates for President and Vice President, who must be under 40 years old. In 2025, 9 (nine) Justices were also found to have committed minor breaches of the code of ethics, specifically the principles of competence and accuracy (*prinsip kecakapan dan kesaksamaan*). In the MK Honorary Council decision No. 01/ MKMK/L/11/2025, it was decided that the nine Justices were collectively found to have committed errors, particularly when drafting, formulating, and compiling the text of the decision prior to its reading by the Justices in the court meeting for the public, which had the force of law, final and binding. Furthermore, the Akil Mochtar case (2013), the Patrialis Akbar case (2017), and the Anwar Usman case (2023) are cases of criminal or serious ethical violations. Three of the six chairmen of the MKRI were found to violate ethics,[52] and two committed severe or criminal violations. They were dismissed as chairpersons of the Constitutional Court, and one chairperson violated constitutional ethics several times and was given oral and written reprimands.[53]

The multiple cases at different levels have destroyed the court's legitimacy and have led to grave legal, ethical, and moral transgressions.[54] These cases have resulted in significant disruptions and political turmoil within society, leading to a decline in public trust and the judiciary's credibility. Additional adverse consequences include the delegitimisation of the court's decisions that have been legally binding and have been executed, especially in local election disputes and judicial review. These cases can be categorised under the terms' constitutional degradation,[55] the rule of law backsliding,[56] and oral and ethical justice erosion.[57] It indicates that the constitutional system has collapsed and that the Pancasila-based rule of law has crumbled. When their "independence, impartiality, and integrity of justice collapsed, the negative effects afterward included the rule of law, and Indonesia's constitutional system also collapsed. Hence, this has led to the collapse of the

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[52] Iwan Satriawan et al., "An Evaluation of the Selection Mechanism of Constitutional Judges in Indonesia and South Korea," *Padjadjaran Jurnal Ilmu Hukum* 10, no. 1 (2023): 122–47, https://doi.org/10.22304/pjih.v10n1.a7.

[53] Iwan Satriawan and Tanto Lailam, "Implikasi Mekanisme Seleksi Terhadap Independensi dan Integritas Hakim Konstitusi di Indonesia," *Jurnal IUS Kajian Hukum dan Keadilan* 9, no. 1 (2021): 112–38, https://doi.org/10.29303/ius.v9i1.871.

[54] Siti Marwiyah, "Construction of Ratio Decidendi Constitutional Judges to Maintain the Authority of the Indonesian Constitution," in *Proceedings of the International Conference on Environmental and Energy Policy (ICEEP 2021)*, vol. 583 of *Advances in Social Science, Education and Humanities Research* (Atlantis Press, 2021), 264–68, https://doi.org/10.2991/assehr.k.211014.057.

[55] Lidia Bonifati, "Constitutional Design and the Seeds of Degradation in Divided Societies: The Case of Bosnia-Herzegovina," *European Constitutional Law Review* 19, no. 2 (2023): 223–48, https://doi.org/10.1017/S1574019623000123.

[56] Joan Solanes Mullor, "Spain, Judicial Independence, and Judges' Freedom of Expression: Missing an Opportunity to Leverage the European Constitutional Shift?," *European Constitutional Law Review* 19, no. 2 (2023): 271–93, https://doi.org/10.1017/S1574019623000081.

[57] Tanto Lailam, "Membangun Constitutional Morality Hakim Konstitusi di Indonesia," *Jurnal Penelitian Hukum De Jure* 20, no. 4 (2020): 511–30, https://doi.org/10.30641/dejure.2020.V20.511-530.

ideals of Indonesian constitutional reform and public trust in a modern constitutional judiciary, undermining Hans Kelsen's theory in the Indonesian context of "the collapse of the guardian of the constitution". Furthermore, this situation has been exacerbated by the House of Representatives (*Dewan Perwakilan Rakyat/DPR*)'s abrupt dismissal of the justice and the replacement of the elected candidate for the position, who had been approved during a plenary session of the DPR, with a new candidate (a politician). This dismissal of justice and selection process constitutes a form of political compromise that undermines the independence, impartiality, and integrity of Justices in carrying out their duty to guard the constitution.[58]

Does the public still believe that the MKRI is the guardian of the Indonesian Constitution?. Moreover, in light of the dispute between Kelsen and Schmitt during the Weimar Republic, does the current situation in Indonesia better support Schmitt's view that the President is the more appropriate holder of the title of guardian of the Constitution?. This question will be answered by the future dynamics of Indonesia's constitutional system. Hopefully, in the future, the MKRI will hold the title of guardian of the Constitution if its justices are statesmen who love Indonesia, like Hans Kelsen, who maintained his integrity until the end of his life.

## C. CONCLUSION

*Hüter der Verfassung* (the guardians of the Constitution) emerged from scholarly discussions during the Weimar Republic era in Germany. The most prominent academic debates about which institution serves as the guardian are between constitutional law expert Hans Kelsen and political scientist Carl Schmitt. Kelsen offers a constitutional law approach by entrusting the constitutional court, a judicial institution filled with legal experts, as the guardian of the Constitution. Meanwhile, Schmitt suggested that the President is the most suitable guardian of the Constitution. From an academic perspective, the debate was not about winning and losing but about building arguments to protect the Constitution. Shortly after the start of the debate, the Weimar Republic government favoured Schmitt's view as it represented the political conditions at the time. Subsequently, following the passage of time, the downfall of Adolf Hitler and the Nazi government, along with the conclusion of World War II, led to the establishment of the BVerfG, which was later declared the *Hüter der Verfassung* (the guardian of the 1949 Basic Law). In the Indonesian context, this debate is particularly interesting because the MKRI was established as a solution to the authoritarian New Order regime, and, in theory, serves as the guardian of the Constitution. But in reality,

[58] Septi Nur Wijayanti et al., "Constitutional Judges: What Powers Does the House of Representatives Have?," *Jurnal Media Hukum* 32, no. 1 (2025): 96–113, https://doi.org/10.18196/jmh.v32i1.23842.

the MKRI has not always acted as the guardian of the Constitution, especially given that its justices frequently violate the law and ethical standards. This study concludes that the MKRI has weakened; the court is no longer fit to be considered a guardian of the Constitution. However, hope remains, and hopefully in the future there will be Justices who uphold the spirit of true Indonesian statesmanship, earning the title of "guardians of Pancasila and the 1945 Constitution.

## REFERENCES

Abat Ninet, Antoni. "Kelsen versus Schmitt and the Role of the Sub-National Entities and Minorities in the Appointment of Constitutional Judges in Continental Systems." *ICL Journal* 14, no. 4 (2020): 523–43. https://doi.org/10.1515/icl-2020-0015.

Adair-Toteff, Christopher. *Carl Schmitt on Law and Liberalism*. Cham: Palgrave Macmillan, 2020.

Bassok, Or. "The Schmitelsen Court: The Question of Legitimacy." *German Law Journal* 21, no. 2 (2020): 131–62. https://doi.org/10.1017/glj.2020.2.

Bonifati, Lidia. "Constitutional Design and the Seeds of Degradation in Divided Societies: The Case of Bosnia-Herzegovina." *European Constitutional Law Review* 19, no. 2 (2023): 223–48. https://doi.org/10.1017/S1574019623000123.

Brang, Lucas. "Carl Schmitt and the Evolution of Chinese Constitutional Theory: Conceptual Transfer and the Unexpected Paths of Legal Globalisation." *Global Constitutionalism* 9, no. 1 (2020): 117–54. https://doi.org/10.1017/S2045381719000297.

Brännström, Leila. "Carl Schmitt's Definition of Sovereignty as Authorized Leadership." In *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology*, edited by Matilda Arvidsson, Leila Brännström, and Panu Minkkinen, 19–33. Abingdon: Routledge, 2016. https://doi.org/10.4324/9781315742243.

Carrozza, Paolo. "Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes." *Estudios de Deusto* 67, no. 1 (2019): 55–82. https://doi.org/10.18543/ed-67(1)-2019pp55-82.

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

Ding, Xiaodong. "Reimagining Law and the Constitution: Carl Schmitt and American Constitutional Scholarship." *ICL Journal* 13, no. 4 (2019): 403–27. https://doi.org/10.1515/icl-2019-0023.

Dyzenhaus, David. "Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought." *Theoretical Inquiries in Law* 16 (2015): 337–66. https://doi.org/10.1515/til-2015-104.

Giltaij, Jacob. "Hermann Kantorowicz and Hans Kelsen: From Debating Legal Sociology to Constructing an International Legal Order." *History of European Ideas* 48, no. 1 (2022): 112–28. https://doi.org/10.1080/01916599.2021.1898438.

Górnisiewicz, Arkadiusz. "Dispute over the Guardian of the Constitution: Hans Kelsen, Carl Schmitt and the Weimar Case." *Politeja* 18, no. 3(72) (2021): 193–214. https://doi.org/10.12797/politeja.18.2021.72.10.

Hailbronner, Michaela, and Stefan Martini. "The German Federal Constitutional Court." In *Comparative Constitutional Reasoning*, edited by András Jakab, Arthur Dyevre, and Giulio Itzcovich, 356–93. Cambridge: Cambridge University Press, 2017.

Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press, 2004.

Kelsen, Hans. *Pure Theory of Law*. Clark, NJ: The Lawbook Exchange, 2005.

Kutay, Acar. "From Weimar to Ankara: Carl Schmitt, Sovereignty and Democracy." *Philosophy and Social Criticism* 45, no. 6 (2019): 728–52. https://doi.org/10.1177/0191453719830150.

Lagi, Sara. "Hans Kelsen and the Austrian Constitutional Court (1918–1929)." *Revista Co-herencia* 9, no. 16 (2012): 273–95. https://doi.org/10.17230/co-herencia.9.16.10.

Lailam, Tanto. "Membangun Constitutional Morality Hakim Konstitusi di Indonesia." *Jurnal Penelitian Hukum De Jure* 20, no. 4 (2020): 511–30. https://doi.org/10.30641/dejure.2020.V20.511-530.

Lailam, Tanto. "Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional." *Jurnal HAM* 13, no. 1 (2022): 65–80. https://doi.org/10.30641/ham.2022.13.65-80.

Lailam, Tanto. "Perbandingan Desain Pengujian Konstitusional Pada Mahkamah Konstitusi Federal Jerman dan Indonesia." *Arena Hukum: Jurnal Ilmu Hukum* 16, no. 2 (2023): 274–301. https://doi.org/10.21776/ub.arenahukum.2023.01602.4.

Lailam, Tanto, Putri Anggia, and Nita Andrianti. "Proportionality Analysis in Competing Rights Cases: A Model from the German Federal Constitutional Court." *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* 8, no. 2 (2023). https://doi.org/10.22373/petita.v8i2.220.

Lailam, Tanto, Putri Anggia, and M. Luthfi Chakim. "The Proportionality Test Models of Competing Rights Cases in the Civil and Common Law Systems: Lesson to Learn for Indonesia." *Hasanuddin Law Review* 10, no. 2 (2024): 206–25. https://doi.org/10.20956/halrev.v10i2.4844.

Lailam, Tanto, and Nita Andrianti. "Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia." *Bestuur* 11, no. 1 (2023): 75–94. https://doi.org/10.20961/bestuur.v11i1.70052.

Lailam, Tanto, and M. Lutfi Chakim. "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences." *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023): 148–71. https://doi.org/10.22304/pjih.v10n2.a1.

Leelapatana, Rawin. "The Kelsen-Schmitt Debate and the Use of Emergency Powers in Political Crises in Thailand." PhD diss., University of Bristol, 2018.

Leelapatana, Rawin, and Abdurrachman Satrio Pratomo. "The Relationship between a Kelsenian Constitutional Court and an Entrenched National Ideology: Lessons from Thailand and Indonesia." *ICL Journal* 14, no. 4 (2020): 497–521. https://doi.org/10.1515/icl-2020-0013.

Marwiyah, Siti. "Construction of Ratio Decidendi Constitutional Judges to Maintain the Authority of the Indonesian Constitution." In *Proceedings of the International Conference on Environmental and Energy Policy (ICEEP 2021)*. Vol. 583 of *Advances in Social Science, Education and Humanities Research*, 264–68. Atlantis Press, 2021. https://doi.org/10.2991/assehr.k.211014.057.

Meierhenrich, Jens, and Oliver Simons, eds. *The Oxford Handbook of Carl Schmitt*. Oxford: Oxford University Press, 2017.

Palguna, I Dewa Gede. *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*. Jakarta: Bumi Aksara, 2013.

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

Paulson, Stanley L. "Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the 'Guardian' Controversy of 1931." In *The Oxford Handbook of Carl Schmitt*, edited by Jens Meierhenrich and Oliver Simons, 510–546. Oxford: Oxford University Press, 2017.

Paulson, Stanley L. "Hans Kelsen on Legal Interpretation, Legal Cognition, and Legal Science." *Jurisprudence* 10, no. 2 (2019): 188–221. https://doi.org/10.1080/20403313.2019.1604887.

Republik Indonesia. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan 1999–2002 (Buku VI Kekuasaan Kehakiman)*. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010.

Rigaux, François. "Hans Kelsen on International Law." *European Journal of International Law* 9 (1998): 325–34. https://doi.org/10.1093/ejil/9.2.325.

Roznai, Yaniv. "Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review." *ICL Journal* 14, no. 4 (2020): 355–77. https://doi.org/10.1515/icl-2020-0039.

Schmitz, Georg. "The Constitutional Court of the Republic of Austria 1918–1920." *Ratio Juris* 16, no. 2 (2003): 240–65. https://doi.org/10.1111/1467-9337.00235.

Schmitt, Carl. *Constitutional Theory*. Durham: Duke University Press, 2008.

Schmitt, Carl. *Der Hüter der Verfassung*. Berlin: Duncker & Humblot, 1996.

Scholz-Karl, Julia. "Behind the Theoretical Debate between Hans Kelsen and Carl Schmitt: The Nineteenth Century Constitutionalism and German Public Law." *UNIO - EU Law Journal* 7, no. 2 (2021): 16–36. https://doi.org/10.21814/unio.7.2.3101.

Schupmann, Benjamin A. *Carl Schmitt's State and Constitutional Theory: A Critical Analysis*. Oxford: Oxford University Press, 2017.

Satriawan, Iwan, Seokmin Lee, Septi Nur Wijayanti, and Beni Hidayat. "An Evaluation of the Selection Mechanism of Constitutional Judges in Indonesia and South Korea." *Padjadjaran Jurnal Ilmu Hukum* 10, no. 1 (2023): 122–47. https://doi.org/10.22304/pjih.v10n1.a7.

Satriawan, Iwan, and Tanto Lailam. "Implikasi Mekanisme Seleksi Terhadap Independensi dan Integritas Hakim Konstitusi di Indonesia." *Jurnal IUS Kajian Hukum dan Keadilan* 9, no. 1 (2021): 112–38. https://doi.org/10.29303/ius.v9i1.871.

Solanes Mullor, Joan. "Spain, Judicial Independence, and Judges' Freedom of Expression: Missing an Opportunity to Leverage the European Constitutional Shift?" *European Constitutional Law Review* 19, no. 2 (2023): 271–93. https://doi.org/10.1017/S1574019623000081.

Tassopoulos, Ioannis A. "The Void *Ab Initio* Theory in Comparative Perspective: J Marshall, H Kelsen, and Beyond." *ICL Journal* 17, no. 3 (2023): 213–32. https://doi.org/10.1515/icl-2023-0034.

Vagdoutis, Nikolaos. "Hans Kelsen and Carl Schmitt in Weimar: A Riddle of Political Constitutionalism." PhD diss., University of Glasgow, 2018.

Verfassungsgerichtshof Österreich (The Constitutional Court of Austria). *The Constitutional Court*. Vienna: Constitutional Court, n.d.

Vinx, Lars. *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*. Cambridge: Cambridge University Press, 2015.

Vinx, Lars. *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy*. New York: Oxford University Press, 2007.

Vinx, Lars. "Hans Kelsen and the Material Constitution of Democracy." *Jurisprudence* 12, no. 4 (2021): 466–90. https://doi.org/10.1080/20403313.2021.1921493.

Voßkuhle, Andreas. "Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*." *European Constitutional Law Review* 6, no. 2 (2010): 175–98. https://doi.org/10.1017/S1574019610200020.

Wijayanti, Septi Nur, Lita Tyesta, Tanto Lailam, and Kelik Iswandi. "Progressive Legal Approaches of the Constitutional Justice Reasoning on Judicial Review Cases: Challenges or Opportunities?" *Law Reform* 21, no. 2 (2025): 219–40. https://doi.org/10.14710/lr.v21i2.66334.

Wijayanti, Septi Nur, Retno Saraswati, Lita Tyesta Addy Listya Wardhani, Kelik Iswandi, and Tanu Surana. "Constitutional Judges: What Powers Does the House of Representatives Have?" *Jurnal Media Hukum* 32, no. 1 (2025): 96–113. https://doi.org/10.18196/jmh.v32i1.23842.

Yun, Jeong In. "Constitutional Review Complaint as an Evolution of the Kelsenian Model." *ICL Journal* 14, no. 4 (2020): 423–46. https://doi.org/10.1515/icl-2020-0024.

Zoelva, Hamdan. "Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara." *Jurnal Media Hukum* 19, no. 1 (2012): 152–64.