

THE SUPREME COURT'S LEGAL ADVICE: LIMITS, PROCEDURES, AND NEED FOR CHANGE

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Abstract

The Supreme Court offers legal advice to state organs and government agencies. Nonetheless, there are no regulations governing the execution of Supreme Court Legal Advice. This paper analyses the limitations and procedures of Supreme Court legal advice. This is a normative legal analysis grounded in conceptual and statutory law. This study utilized legal texts, doctrinal sources, and scientific material. This study employs Miles and Huberman's data analysis methodology. This study demonstrates that Article 37 of the 1985 Supreme Court Law and Article 22 paragraph (1) of the 2009 Judicial Power Law are contradictory. The dispute pertains to the petitioner seeking Supreme Court Legal Advice. The Supreme Court's Legal Advice is only extended to state organs and government agencies. The Supreme Court lacks the authority to offer legal advice to local governments, community organizations, and non-governmental organizations. The Chief Justice of the Supreme Court offers legal advice to state organs, while the Chairman of the Supreme Court Chamber provides legal advice to government agencies. Both legal advice continues to be designated as Supreme Court Legal Advice.

Keywords: Constitutional Law; Legal Advice; Supreme Court.

Introduction

The Indonesian Supreme Court, hereafter referred to as the Supreme Court, followed up on appeals from courts below it¹ or cassation proceedings.² The Supreme Court is also tasked with executing advisory responsibilities. Article 37 of the 1985 Supreme Court Act and Article 22 of the 2009 Judicial Powers Act delineates the obligations pertaining to these activities. The state organs and governmental bodies get legal advice from the Supreme Court. Nonetheless, there exists a lack of a definitive framework for the execution of these duties. Consequently, many parties have filed petitions with the Supreme Court seeking legal advice. An instance of this is the Ganjar-Mahfud National Victory Team, which has sought the advice of the Supreme Court over the permissibility of voting beyond designated polling locations.³

This circumstance indicates that the limitations and procedures governing advisory roles of the Supreme Court are the primary issues. One method to address these issues is to establish limitations and procedures for providing the Supreme Court's Legal Advice. If the Supreme Court's restrictions and processes for providing advice are explicit, then no parties remain unqualified to make an application for such advice. The establishment of a system for advisory opinions by the Supreme Court would ensure legal certainty. The elucidation of the limitations and procedures for delivering legal advice by the Supreme Court also illustrates the limitations and definiteness of authority.

Numerous studies have examined the Supreme Court's practice of providing legal advice. Candra Maulidi Syahputra (2019) conducted research revealing that the Indonesian Constitution grants the Supreme

¹ Standy Wico et al., "Constitutional Complaint in Indonesia Through the Lens of Legal Certainty," *Indonesian Journal of Law and Society* 2, no. 1 (February 12, 2021): 59–78.

² Paloma Krõõt Tupay, "The Estonian Supreme Court," in *Constitutional Review in Central and Eastern Europe* (London: Routledge, 2023), 86–113.

³ Ardito Ramadhan and Dani Prabowo, "TPN Ganjar-Mahfud Minta MA Beri Fatwa, Warga Boleh Memilih Di Luar Tempat Pemilihan," *kompas.com*, 2024, <https://nasional.kompas.com/read/2024/02/13/08254701/tpn-ganjar-mahfud-minta-ma-beri-fatwa-warga-boleh-memilih-di-luar-tempat>.

Court the ability to provide advisory services.⁴ The Supreme Court's advice in law lacks legal authority, and its execution remains ambiguous.⁵ Research by Fauz Noor (2022) demonstrates that the advice issued by the Supreme Court have a legal foundation and serves as a mechanism for maintaining the rule of law and guaranteeing fair power distribution in alignment with the Constitution.⁶

A research gap persists regarding the limitations and procedures of the Supreme Court in providing legal advice. The research gap pertains to the clarity surrounding the limitations and procedures for delivering legal advice by the Supreme Court. It is essential to address the existing conflict between Article 37 of the 1985 Supreme Court Act, Article 22 of the 2009 Judicial Powers Act, and the 2023 Circular of the Supreme Court regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023 as Guidelines for the Court Duties.

This research will assess the advice issued by the Supreme Court based on the preceding context. This study employs a comparative technique to enhance the analysis, utilizing the advisory role of the Indian Supreme Court. Despite India's adherence to a common law legal system and Indonesia's alignment with a civil law system, India's experience serves as a crucial comparative reference due to its established structure for advisory procedures by the Indian Supreme Court. Moreover, India imposes limitations on the state organs that may get advice from the Indian Supreme Court. This research further offers ideas to elucidate the limitations and procedures for providing advice by the Supreme Court.

Analysis of Supreme Court Legal Advice

Judicial power is distinct from other branches of power.⁷ This separation is regarded as a constitutional foundation defined by

⁴ Candra Maulidi Syahputra, "Pertimbangan Bidang Hukum Mahkamah Agung Untuk Memberikan Kepastian Hukum Indonesia," *Jurnal Pamator, Jurnal Ilmiah Universitas Trunojoyo* (October 19, 2019): 93–99.

⁵ Ibid.

⁶ Fauz Noor, "Kedudukan Fatwa Mahkamah Agung Dalam Hukum Tata Negara Indonesia," *Jurnal Hukum Tata Negara* 1 (2022): 41–48.

⁷ James R. Rogers and Joseph Daniel Ura, "A Majoritarian Basis for Judicial Countermajoritarianism," *Journal of Theoretical Politics* 32, no. 3 (July 7, 2020): 435–459.

normative principles.⁸ The Constitution serves as the guarantor for the application of this principle.⁹ The definition of judicial power remains imprecise.¹⁰ Judicial power can be defined as the authority of the state to resolve disputes among its citizens and between the state and its citizens concerning issues of life, liberty, or property. It encompasses the authority to render binding and authoritative decisions.¹¹ A crucial element of judicial authority is the interdependence between the Court and its compliance partners.¹² The judicial power possesses the authority to formulate law.¹³ The judicial power is both granted and constrained by the Constitution.¹⁴

The Supreme Court possesses judicial authority.¹⁵ The foundation of this is the 2009 Judicial Power Act.¹⁶ The Supreme Court possesses nearly complete jurisdiction over the cases it adjudicates.¹⁷ The Supreme

⁸ Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, 2010).

⁹ Laura Cahillane and David Kenny, "Lessons from Ireland's 2020 Judicial Conduct Controversy," *Common Law World Review* 51, no. 1–2 (June 18, 2022): 24–42.

¹⁰ Michael Legg, "The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality," *Federal Law Review* 49, no. 2 (June 15, 2021): 161–184.

¹¹ Jonathan Tjandra, "Justiciability as a Constitutional Limitation on Federal Jurisdiction," *Federal Law Review* 52, no. 2 (June 26, 2024): 182–207.

¹² Daniel Naurin and Øyvind Stiansen, "The Dilemma of Dissent: Split Judicial Decisions and Compliance With Judgments From the International Human Rights Judiciary," *Comparative Political Studies* 53, no. 6 (May 16, 2020): 959–991.

¹³ Joshua Sheppard, "Why Does the Common Law Conform to the Constitution?," *Federal Law Review* 49, no. 4 (December 23, 2021): 569–593.

¹⁴ Brandon Smith, "Reconceptualising 'Justiciability': Crafting a Coherent Framework for Australia's Unique Constitutional Context," *Federal Law Review* 50, no. 3 (September 18, 2022): 371–403.

¹⁵ Solomon A. Adedire, "Nigerian Presidentialism and Legislative Decadence in the Fourth Republic, 2015–2021," 2023, 183–197.

¹⁶ Achmad Kholiq and Iim Halimatusa'diyah, "Does Gender Blindness Improve Gender Equality? Female Judges and the Glass Ceiling Effect in the Islamic Judicial System in Indonesia," *Social & Legal Studies* 32, no. 1 (February 13, 2023): 139–158.

¹⁷ Huchen Liu and Jonathan P. Kastellec, "The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court," *American Politics Research* 51, no. 1 (January 25, 2023): 3–22.

Court possesses the authority to annul the candidacy of candidates in local elections.¹⁸

The Supreme Court performs multiple functions. The initial aspect is the judicial function. The Supreme Court functions as a cassation court.¹⁹ Through cassation decisions, the Supreme Court ensures the consistency of law implementation in Indonesia. The Supreme Court possesses the authority to review permanent court rulings, examine and render judgments in cases concerning disputes over judicial authority, and resolve conflicts arising from the seizure of foreign vessels and their cargo by Indonesian naval forces. The Supreme Court possesses the authority to review regulations that contravene the law.²⁰

The second function is supervisory. The Supreme Court oversees the judicial process within its jurisdiction. The supervision seeks to ensure that the judiciary operates under a framework of straightforward justice, affordability, efficiency, and maintains judges' discretion in examining and resolving cases. The Supreme Court oversees the operations of the Court, the conduct of judges, and the actions of court officials in the execution of their responsibilities. The Supreme Court can issue essential warnings, reprimands, and instructions while maintaining the autonomy of the judge. The Supreme Court possesses the authority to oversee lawyers and notaries within the judiciary.

Third, the regulating function. The Supreme Court may impose additional regulations on essential matters if current legislation fails to address the issue sufficiently. The regulations established by the Supreme Court aim to complement and address the existing legal void. The legal outputs of the regulatory function include Supreme Court Regulations, Supreme Court Circulars, and Decisions issued by the Chief Justice of the Supreme Court. The Supreme Court possesses the authority to establish judicial procedural regulations in accordance with enacted procedural legislation.

¹⁸ Muchamad Ali Safa'at, "Single Candidates: Ensuring a Path to Victory in Local Elections," *Asian Journal of Comparative Politics* 7, no. 4 (December 22, 2022): 1163–1176.

¹⁹ Chris Noonan, "Partial Price-Fixing and Semi-Collusion," *The Antitrust Bulletin* 66, no. 4 (December 30, 2021): 481–509.

²⁰ Simon Butt and Andreas Nathaniel, "Evidence from Criminal Law Experts in Indonesian Criminal Trials: Usurping the Judicial Function?," *The International Journal of Evidence & Proof* 28, no. 2 (April 29, 2024): 129–153.

Fourth are administrative functions. The Supreme Court may regulate the roles, responsibilities, organizational design, and working methods of the Court Clerk. The Supreme Court offers technical and administrative direction to the judicial entities subordinate to it. Administrative advice authority is not applicable to the Indonesian Tax Court. The Ministry of Finance administers advice for the Indonesian Tax Court, whereas the Supreme Court is limited to providing judicial technical advice.²¹ It is based on the 2002 Indonesian Tax Court Act.

Fifth is a category of miscellaneous functions. The Supreme Court is responsible for receiving, examining, adjudicating, and resolving all submitted cases and may also be assigned additional duties and authorities as dictated by law. The 2009 Judicial Power Act and the 1985 Supreme Court Act, along with their amendments, serve as the foundational legal frameworks.

The sixth function is advisory. In fulfilling its advisory role, the Supreme Court offers legal advice to the high state organs as outlined in Article 37 of the 1985 Supreme Court Act.

*"The Supreme Court may consider, at its discretion, the input of other High State Organs in legal matters."*²²

Article 37 of the 1985 Supreme Court Act includes the phrase "the high state organs". The Supreme Court later expanded the concept of high state organs. Article 22, paragraph (1) of the 2009 Judicial Powers Act stipulates that the Supreme Court is authorized to offer legal advice to state organs and government agencies. This rule signifies an extension of the restrictions on petitioners seeking legal advice from the Supreme Court. This clause was subsequently detailed in the 2023 Supreme Court Circular, which delineates the execution of the outcomes from the 2023 Plenary Meeting of the Supreme Court Chamber, functioning as a directive for the responsibilities of the courts. The Supreme Court is permitted to provide information for consideration and legal advice exclusively to state organs and government agencies.²³ The regulations encompass two components: guidelines pertaining to the object and the eligible applicant party.

²¹ Republic of Indonesia, "Tax Court Act," Pub. L. No. 14 (2002).

²² Republic of Indonesia, "1985 Supreme Court Act," Pub. L. No. 14 (1985), <https://jdih.mahkamahagung.go.id/download-file-satker/uu-nomor-14-tahun-1985>.

²³ Indonesian Supreme Court, "2023 Supreme Court Circular on the Implementation of the Formulation of the Results of the Plenary Meeting of the

The Supreme Court, as outlined in the Article 22 paragraph (1) of the 2009 Judicial Powers Act and 2023 Supreme Court Circular regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber, can provide information on legal considerations and advice to guide the execution of court duties. It contrasts with the stipulations outlined in Article 37 of the 1985 Supreme Court Act, which pertains to legal advice.

Article 35 of the 1985 Supreme Court Act mandates the Supreme Court to provide advice to the President in their capacity as head of state during decision-making processes. Article 14, paragraph (1) of the 1945 Indonesian Constitution grants the Supreme Court the authority to consider the President in matters of rehabilitation, alongside the principle of compassion. Currently, there are no laws or regulations governing the authority to provide legal considerations related to rehabilitation.

Applicants for legal advice, as outlined in the Article 22 paragraph (1) of the 2009 Judicial Powers Act and 2023 Supreme Court Circular regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023, include state organs and government agencies. This contrasts with the stipulations outlined in Article 37 of the 1985 Supreme Court Act, which defines the high state organs.

Article 22 paragraph (1) of the 2009 Judicial Powers Act and 2023 Supreme Court Circular on the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber establishes that two categories of entities may petition for the Supreme Court's Advice: state organs and government agencies. The terminology has evolved from "high state organs," as defined in Article 37 of the 1985 Supreme Court Act, indicating a broadened interpretation.

State organs differ from high-state organs. High-state organs constitute a subset of state organs, whereas state organs do not inherently qualify as high-state organs. The importance of state organs

Supreme Court Chamber in 2023 as a Guideline for the Implementation of Courts' Duties" (2023), <https://jdih.mahkamahagung.go.id/legal-product/sema-nomor-3-tahun-2023/detail>.

is contingent upon the internal structure of the state.²⁴ State organs function as instruments that wield authority to achieve the objectives of the state.²⁵ Since the 1998 reform, numerous state organs have emerged in Indonesia.²⁶ State organs are categorized according to their formation rules into those established by the 1945 Indonesian Constitution and those created by laws and regulations.²⁷

The state organs established by the 1945 Indonesian Constitution qualify as high state organs.²⁸ High state organs encompass the following: the People's Consultative Assembly, the House of People's Representatives, the Regional Representative Council, the President and Vice President, the Supreme Court, the Constitutional Court, and the Financial Audit Board.²⁹ The Minister, the Indonesian National Army, the Indonesian National Police, the Judicial Commission, the General Election Commission, and the Central Bank are classified as second-tier state organs or state organs with constitutional importance.³⁰ Additionally, a state auxiliary organ exists, constituted by various laws and regulations.³¹ State organs in this category include the Corruption Eradication Commission, the National Human Rights Commission, the Witness and Victim Protection Agency, the Financial Transaction Reporting and Analysis Center, the Business Competition Supervisory Commission, the Ombudsman, the Indonesia Broadcasting Commission, the Maritime Security Agency, the National Law Commission, the Chamber of Commerce and Industry, the Indonesia

²⁴ Elif Durmuş, "A Typology of Local Governments' Engagement with Human Rights: Legal Pluralist Contributions to International Law and Human Rights," *Netherlands Quarterly of Human Rights* 38, no. 1 (March 2, 2020): 30–54.

²⁵ Jimly Asshiddiqie, *Perkembangan Dan Konsolidasi Lembaga Negara Pasca Reformasi*, 3rd ed. (Jakarta: Sinar Grafika, 2017).

²⁶ Kyunghoon Kim, "Analysing Indonesia's Infrastructure Deficits from a Developmentalist Perspective," *Competition & Change* 27, no. 1 (January 13, 2023): 115–142.

²⁷ Kelik Iswandi and Nanik Prasetyoningsih, "Kedudukan State Auxiliary Organ Dalam Sistem Ketatanegaraan Di Indonesia," *Jurnal Penegakan Hukum dan Keadilan* 1, no. 2 (2020).

²⁸ Asshiddiqie, *Perkembangan Dan Konsolidasi Lembaga Negara Pasca Reformasi*.

²⁹ Ibid.

³⁰ Ibid.

³¹ Iswandi and Prasetyoningsih, "Kedudukan State Auxiliary Organ Dalam Sistem Ketatanegaraan Di Indonesia."

National Sports Committee, the Information Commission, the Press Council, the Election Supervisory Agency, the Indonesia Medical Council, the Presidential Advisory Council, the Financial Services Authority, the Education Council, the Child Protection Commission, the National Commission on Anti-Violence Against Women, the National Resilience Council, the National Resilience Institute, the State Administration Institution, and the Honorary Council of Election Organizers.³²

Based on Article 37 of the 1985 Supreme Court Act, the Supreme Court's Advice may be directed to the People's Consultative Assembly, the House of People's Representatives, the Regional Representative Council, the President and Vice President, and the Financial Audit Board, as defined by the top state organs. The Constitutional Court, serving as a guardian and interpreter of the Constitution, is not classified as one of the high state organs entitled to receive advice from the Supreme Court. Additionally, a clause stipulates that the Supreme Court is prohibited from engaging in matters concerning the authority of state organs supervised by the Constitutional Court.³³ The Supreme Court should similarly be restricted from providing advice to the Constitutional Court. Therefore, the Supreme Court is limited to providing legal advice to high state organs entities that possess executive, legislative, or administrative functions.

Article 22 paragraph (1) of the 2009 Judicial Powers Act and 2023 Supreme Court Circular on the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber serves as a guideline for the duties of courts and also applies to government agencies. Government agencies refer to state organs.³⁴ Nevertheless, the provision employs the term "and", leading the Supreme Court to differentiate between state organs and government agencies.

³² Ibid.

³³ Article 2 of the 2006 Indonesian Constitutional Court Regulation on Procedural Guidelines in Disputes over the Constitutional Authority of State Organs. See Iswandi and Prasetyoningsih, "Penyelesaian Sengketa Kewenangan Lembaga Negara Independen Di Indonesia."

³⁴ Utami Argawati, "Mengungkap Konsep Dan Kriteria Lembaga Negara Dengan 'Constitutional Importance,'" mkri.id, 2023, <https://www.mkri.id/index.php?page=web.Berita&id=19726>.

The Supreme Court has provided advice to state organs on multiple occasions, as illustrated in Table 1.

Table 1. Advice Provided by the Supreme Court

Advice Number	Applicant	Matters
038/KMA/IV/2009	Minister of Finance	Confiscation of assets in corruption cases and deposited into the state
30/Tuaka.Pid/IX/2015	Election Supervisory Bodies	Definition of former convict
77/KMA/HK.01/VII/2018	Minister of State Secretary	Signing of the President's Special Power of Attorney in Handling Civil and State Administrative Lawsuits
		439
		297
		264
		245

Source: Primary data, 2024.³⁵

The Supreme Court provides advice to the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the President and Vice President, the Financial Audit Board, the Minister, and the Election Supervisory Bodies. So it can be interpreted that the state organs interpreted by the Supreme Court are the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the President and Vice President, the Financial Audit Board, Ministers, the Indonesia National Army, the Indonesia National Police, the Judicial Commission, the General Election Commission, the Central Bank, the Corruption Eradication Commission, the National Human Rights Commission, the Witness and Victim Protection Institution, the Financial Transaction Reporting and

³⁵ Indonesian Supreme Court, “Fatwa MA,” Direktori Putusan Mahkamah Agung Republik Indonesia, accessed July 21, 2024, <https://putusan3.mahkamahagung.go.id/peraturan/index/kategori/fatwa-ma.html>.

Analysis Center, the Business Competition Supervisory Commission, the Ombudsman, the Indonesia Broadcasting Commission, the Maritime Security Agencies, the National Law Commission, the Chamber of Commerce and Industry, the Indonesia National Sports Committee, the Information Commission, the Press Council, the Election Supervisory Agency, the Indonesia Medical Council, the Presidential Advisory Council, the Financial Services Authority, the Education Council, the Child Protection Commission, the National Commission on Anti-Violence Against Women, the National Resilience Council, the National Resilience Institute, the State Administration Institution, and the Honorary Council of Election Organizers.

The Supreme Court's provision of legal advice illustrates the disparity in the awarding process for challengers. The handling varies according to the classification of the applicant. Assume the applicant is a high-state organ and possesses constitutional importance. The Chief Justice of the Supreme Court addresses the application in that context. If the applicant is a state auxiliary organ, the Chief Justice of the Supreme Court Chamber manages the case.

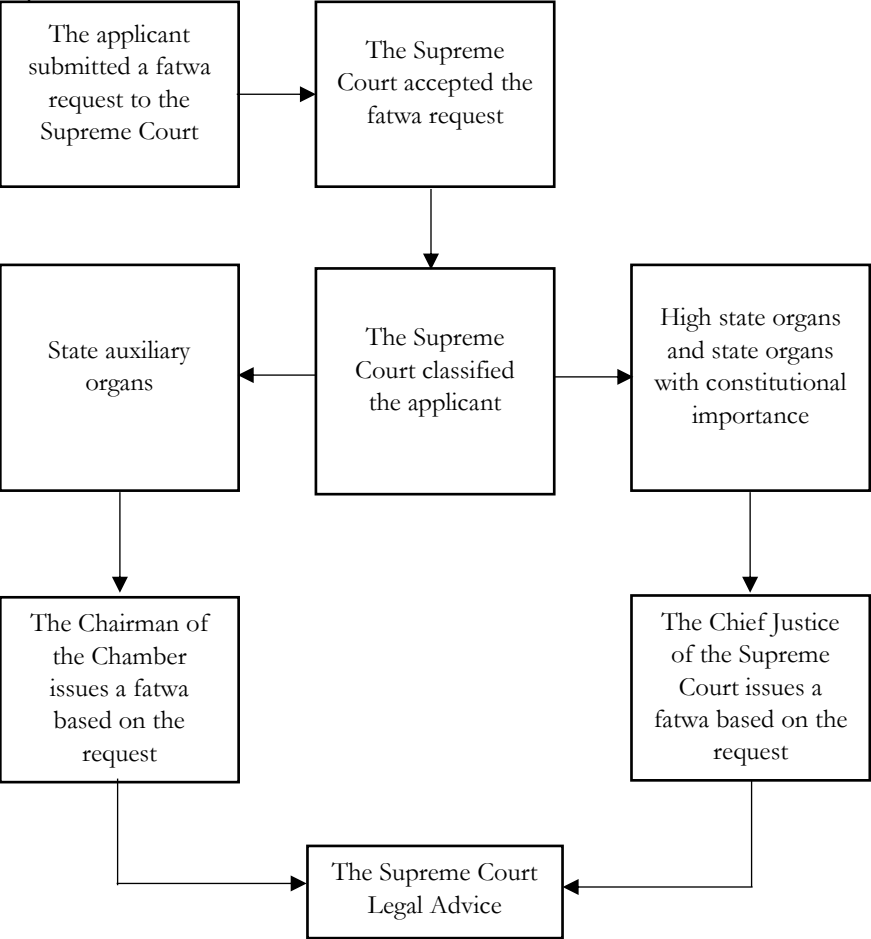
The presence of Article 22 paragraph (1) of the 2009 Judicial Powers Act, and the 2023 Supreme Court Circular on the Implementation of the Formulation of the Results of the Supreme Court Chamber in 2023 as a guideline for court duties indicates that the scope of legal advice provided by the Supreme Court is restricted. The Supreme Court is limited to providing legal advice to state organs and government agencies. The Supreme Court is unable to provide legal consideration to local governments.

Procedure for Providing Legal Advice by the Supreme Court

The procedural framework at the Supreme Court is essential, serving as a key indicator of public adherence to its rulings.³⁶ There remains a lack of clarity regarding the mechanism for granting the Supreme Court's Advice. Nevertheless, observable patterns and procedures emerge from practice. The process by which the Supreme Court grants legal consideration is illustrated in Graph 1.

³⁶ Miles T. Armaly, "Loyalty over Fairness: Acceptance of Unfair Supreme Court Procedures," *Political Research Quarterly* 74, no. 4 (December 17, 2021): 927–940.

Graph 1. The process for providing the Supreme Court's Advisory Opinion



The applicant presents a letter to the Chief Justice of the Supreme Court seeking advice. The Supreme Court subsequently evaluated the application. The initial study pertains to the legal status of the applicant. Applications from entities that are not state organs will be rejected, and conversely, those that are state organs will be accepted. Accepted applications will undergo review. The second study pertains to the category of applicant state organ. If the applicant is a high-state organ or state organ with constitutional importance, the Chief Justice of the Supreme Court provides advice in response to the application. In the

case of an applicant being a state auxiliary organ, the application is accompanied by recommendations provided by the Chairman of the Supreme Court Chamber. The Chairman of the Supreme Court Chamber responsible for follow-up is also the one who receives the application materials. The Chairman of the Supreme Court's Criminal Chamber is authorized to provide advice in response to a request from the Election Supervisory Agency regarding the interpretation of inmates. The advice provided by the Chief Justice of the Supreme Court and the Chairman of the Supreme Court Chamber is collectively referred to as the Supreme Court's Legal Advice.

Legal Advice from the Indian Supreme Court: Insights for Indonesia

The High and District Courts operate under the jurisdiction of the Indian Supreme Court.³⁷ The Indian Supreme Court possesses the jurisdiction to adjudicate appeals concerning lower court rulings.³⁸ The Indian Supreme Court safeguards human rights via its regulations.³⁹ The Indian Supreme Court offers legal scrutiny regarding state organs and performs judicial review functions.⁴⁰ The Indian Supreme Court possesses the authority to interpret the Constitution.⁴¹

The Indian Supreme Court may offer legal advice or considerations to the President of India. According to Article 143 of the 2024 Indian Constitution. The article states:

³⁷ Sakshat Bansal and Shruti Sahni, "Bail, Prisons and COVID-19: An Indian Perspective," *Alternative Law Journal* 46, no. 4 (December 16, 2021): 326–331.

³⁸ Po-Han Lee, "A Pluralist Approach to 'the International' and Human Rights for Sexual and Gender Minorities," *Feminist Review* 128, no. 1 (July 21, 2021): 79–95; Raja Qaiser Ahmed et al., "Chosen Trauma and Saffronization of India," *International Area Studies Review* 25, no. 1 (March 13, 2022): 36–49, <https://doi.org/10.1177/22338659211047167>

³⁹ Md. Milan Hossain and S. M. Shahidullah Mamun, "Marine Pollution in Bangladesh-Framing Legal Responses: A Critical Study," *Environmental Law Review* 23, no. 3 (September 10, 2021): 210–227; Hanspreet Kaur, "Transparency in Governance: A Comparative Study of Right-to-Information Legislation in India, Indonesia and Nigeria," *Asian Journal of Comparative Politics* 7, no. 4 (December 11, 2022): 1282–96, <https://doi.org/10.1177/20578911221109852>.

⁴⁰ Arvind P. Bhanu, Ambika Dilwali, and Adityaraj Patodia, "Imperatives of the Basic Structure Doctrine: A Semi-Centennial Concept," in *Comparative Approaches in Law and Policy* (Singapore: Springer Nature Singapore, 2023), 7–20.

⁴¹ *Ibid.*

"143. Power of the President to consult the Supreme Court.—(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.
*(2) The President may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the [said proviso] to the Supreme Court for opinion, and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon."*⁴²

This provision indicates that the President of India possesses the authority to consult with the Indian Supreme Court. Consultation occurs when the President of India identifies legal facts that present challenges or may lead to issues affecting the interests of the community. If the President of India deems it necessary, he may seek the Indian Supreme Court's advice regarding the identified legal issues. The 2024 Indian Constitution grants the Attorney General the authority to provide legal advice to the Government of India. Article 76(2) of the 2024 Indian Constitution provides regulation on this matter. The 2024 Indian Constitution is summarized in Table 2.

Table 2. Considerations of the field of law in India

Applicant	Considerer	Regulation
President	Indian Supreme Court	Article 143 of the 2024 Indian Constitution
Indian Government	Attorney General	Article 76(2) of the 2024 Indian Constitution

Source: Author compilation.

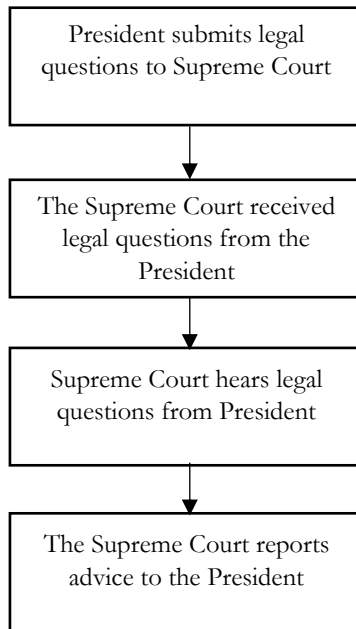
Article 143 of the 2024 Indian Constitution stipulates that the Indian Supreme Court is authorized to offer legal advice solely to the President of India, excluding the Indian Government from such advice.

⁴² Government of India, “The Constitution of India” (2024), <https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2024/07/20240716890312078.pdf>.

The Indian Government is permitted to seek advice exclusively from the Attorney General. The petitioner is limited in providing legal consideration to the Indian Supreme Court.

Article 143 of the 2024 Indian Constitution delineates the process through which the Indian Supreme Court provides legal advice to the President of India. The mechanism is illustrated in Graph 2.

Graph 2. The mechanism for granting legal consideration by the Indian Supreme Court.



Graph 2 illustrates that the Indian Supreme Court employs a specific mechanism for the provision of legal consideration. The Indian Supreme Court is required to conduct a preliminary hearing to address legal inquiries from the President of India. The events that occurred in India differ from those in Indonesia.

What Changes are Necessary for Indonesia?

Article 37 of the 1985 Supreme Court Act stipulates that the Supreme Court provides legal advice to the high-state organs. Article 22 paragraph (1) of the 2009 Judicial Powers Act and the 2023 Supreme Court Circular on the Implementation of the Formulation of the Results

of the Plenary Meeting of the Supreme Court Chamber outlines various provisions, indicating that the Supreme Court offers legal advice to state organs and government agencies. The Supreme Court provides legal advice to the Election Supervisory Agency, the Minister of Finance, and the Minister of State Secretary in practice.

The Necessity for Limitations on Applicants Seeking Advice from the Supreme Court

Concerns exist regarding the limitations of the Supreme Court's legal advice and the procedures for its issuance, as evidenced by the events in Indonesia. Consequently, Indonesia needs to implement adjustments. First, modifications to the application limits are necessary.

The discrepancies in regulations outlined in Article 37 of the 1985 Supreme Court, Article 22 paragraph (1) of the 2009 Judicial Powers Act, and the 2023 Supreme Court Circular regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023 serve as a guideline for the execution of court duties. Consequently, Article 22 paragraph (1) of the 2009 Judicial Powers Act and the 2023 Supreme Court Circular regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023 should be applied. The legal principle of *lex posterior derogat legi priori* is applicable.

The principle of *lex posterior derogat legi priori* elucidates the concept of law as a system of norms. Hans Kelsen posits that norms possess hierarchical levels and abstract properties, with the *grundnorm* representing the apex of this structure.⁴³ The concept is referred to as the pyramidal hierarchy of law.⁴⁴ The notion of *lex posterior derogat legi priori* is employed to mitigate legal confusion arising from conflicts between two rules of equal hierarchical status.

⁴³ Siti Romlah, Salma Zavira, and Khansa Muafa, "Implementation of Progressive Legal Theory in Law Enforcement in Indonesia," *Journal La Sociale* 1, no. 6 (December 4, 2020): 24–30.

⁴⁴ Ambareen Beebeejaun and Rajendra Parsad Gunpath, "A Study of the Influence of Artificial Intelligence and Its Challenges: The Impact on Employees of the Legal Sector of Mauritius," *Global Business Review* (September 18, 2023).

Numerous countries, including Morocco⁴⁵ and those within the European Union, follow a hierarchical structure of laws.⁴⁶ Indonesia recognizes the hierarchy of laws as established by the 2011 Law-making Act.⁴⁷ The legal framework in Indonesia is structured hierarchically, beginning with the 1945 Indonesian Constitution, followed by the Decree of the People's Consultative Assembly, Government Laws/Regulations, Government Regulations, Presidential Regulations, Provincial Regional Regulations, and Regency/City Regional Regulations.⁴⁸ According to this principle, Article 22 paragraph (1) of the 2009 Judicial Powers Act is a regulation at the same level as Article 37 of the 1985 Supreme Court Act. In addition, Article 22 paragraph (1) of the 2009 Judicial Powers Act is also a newer regulation than Article 37 of the 1985 Supreme Court Act. The material regulated in both is the same. Therefore, the principle of *lex posterior derogat legi priori* can be applied to overcome this problem. The provisions contained in Article 22 paragraph (1) of the 2009 Judicial Powers Act have been outlined in the 2023 Supreme Court Circular regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023, which serves as a guideline for the execution of courts' duties.

Based on Article 22 paragraph (1) of the 2009 Judicial Powers Act *jo.* 2023 Supreme Court Circular regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2023, which serves as a guideline for the execution of courts' duties, the Supreme Court provides advice to the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the President and Vice President, the Financial Audit Board, the Minister, and the Election Supervisory Bodies. So it can be interpreted that the state organs interpreted by the Supreme

⁴⁵ Francesco Tamburini, "The COVID-19 Outbreak in North Africa: A Legal Analysis," *Journal of Asian and African Studies* 56, no. 7 (November 13, 2021): 1738–1754.

⁴⁶ John A.E. Vervaele, "European Criminal Justice in the European and Global Context," *New Journal of European Criminal Law* 10, no. 1 (March 9, 2019): 7–16.

⁴⁷ Ibrahim, "The Judicialisation of Discrimination in the Indonesian Constitutional Court."

⁴⁸ Government of Indonesia, "Law-Making Act," Pub. L. No. 12 (2011), <https://bphn.go.id/data/documents/11uu012.pdf>.

Court are the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the President and Vice President, the Financial Audit Board, Ministers, the Indonesia National Army, the Indonesia National Police, the Judicial Commission, the General Election Commission, the Central Bank, the Corruption Eradication Commission, the National Human Rights Commission, the Witness and Victim Protection Institution, the Financial Transaction Reporting and Analysis Center, the Business Competition Supervisory Commission, the Ombudsman, the Indonesia Broadcasting Commission, the Maritime Security Agencies, the National Law Commission, the Chamber of Commerce and Industry, the Indonesia National Sports Committee, the Information Commission, the Press Council, the Election Supervisory Agency, the Indonesia Medical Council, the Presidential Advisory Council, the Financial Services Authority, the Education Council, the Child Protection Commission, the National Commission on Anti-Violence Against Women, the National Resilience Council, the National Resilience Institute, the State Administration Institution, and the Honorary Council of Election Organizers.

In response to the Supreme Court's solicitation for legal advice from community or non-governmental organizations, such as the initiatives undertaken by the Ganjar-Mahfud National Victory Team, the appropriate course of action is to submit a judicial review. The Supreme Court is authorized to review rules that contravene the law.⁴⁹ Community or non-governmental organizations will get an opinion from the Supreme Court on a stated issue through the judicial review procedure. The Supreme Court will offer legal insights into the matter in its ruling.

The restriction on applicants seeking legal advice from the Supreme Court is crucial for establishing legal clarity. The regulations regarding parties eligible to seek legal advice from the Supreme Court are designed to guarantee the accuracy of the legal advice provided.

⁴⁹ Kadek Agus Sudiarawan et al., "Discourses on Citizen Lawsuit as Administrative Dispute Object: Government Administration Law vs. Administrative Court Law," *Journal of Indonesian Legal Studies* 7, no. 2 (December 21, 2022): 499–486; Ken M. P. Setiawan and Dirk Tomsa, "Defending a Vulnerable yet Resilient Democracy: Civil Society Activism in Jokowi's Indonesia," *Journal of Current Southeast Asian Affairs* 42, no. 3 (December 23, 2023): 350–71, <https://doi.org/10.1177/18681034231209058>

Moreover, the presence of these limitations indicates that there are constraints on authority. The limitation of power restricts the authority possessed by state entities. The restriction of power seeks to avert arbitrariness or the tyranny of authority.⁵⁰ The lack of limitations on those eligible to get legal advice from the Supreme Court reflects a precariousness of authority. The ambiguity of authority transforms democracy into a domain of discord.⁵¹

The Necessity for Transparency Regarding the Supreme Court's Legal Advisory Process

The second modification pertains to the method employed by the Indonesian Supreme Court in providing legal consideration. The Indonesian Supreme Court may benefit from the practices of the Indian Supreme Court in formulating legal considerations or advice, which are systematically compiled through the trial mechanism. In Indonesia, the provision of legal advice occurs via the trial mechanism, resulting in decisions rendered by the panel of examining judges.

The Supreme Court can establish a specific regulation concerning the mechanism for providing legal considerations based on these issues. The Supreme Court can observe and adopt practices from the Indonesian Constitutional Court, which oversees the resolution of disputes concerning the authority of state organs. The authority of the Indonesian Constitutional Court is governed by the 2006 Indonesian Constitutional Court Regulation, which outlines guidelines for proceedings in disputes concerning the constitutional authority of state organs. This regulation delineates the roles of the applicant and respondent, outlines the procedures for application submission, administrative examination and registration, scheduling and summoning of hearings, judges' deliberative meetings, and decision-making regarding disputes over the authority of state institutions. This regulation demonstrates the clarity of procedures for addressing disputes regarding the authority of state organs.

The 2006 Indonesian Constitutional Court Regulation on Guidelines for Proceedings in Disputes Regarding the Constitutional

⁵⁰ Sharon R. Krause, "Citizenship for a New World," *Philosophy & Social Criticism* 44, no. 2 (February 21, 2018): 131–134.

⁵¹ Annabel Herzog, "The Attack on Sovereignty: Liberalism and Democracy in Hayek, Foucault, and Lefort," *Political Theory* 49, no. 4 (August 16, 2021): 662–685.

Authority of State Organs explicitly restricts the applicant's ability to contest the authority of state organs. Article 2(1) of the regulation delineates the state organs eligible to act as applicants or respondents in disputes concerning the constitutional authority of state organs. The entities authorized to act as applicants or respondents include the House of Representatives, the Regional Representative Council, the People's Consultative Assembly, the President, the Financial Audit Board, and the Regional Government. The Supreme Court cannot participate as either the applicant or respondent in a dispute concerning judicial technical authority. The 2006 Indonesian Constitutional Court Regulation on Guidelines for Proceedings in Disputes Regarding the Constitutional Authority of State Organs delineates the procedure for addressing disputes concerning the constitutional authority of state organs.

The Supreme Court may draw insights from the practices of the Indonesian Constitutional Court. The Supreme Court may create a regulation concerning guidelines for the provision of legal advice by the Supreme Court. The regulation may encompass aspects related to the applicant's limitations and the framework for providing legal advice to the Supreme Court.

The Supreme Court has the authority to restrict the applicant for legal consideration or advice, as outlined in Article 37 of the 1985 Supreme Court Act. The Supreme Court is empowered to interpret high-state organs and other state organs within that classification through this regulation. The Indonesian Supreme Court may restrict the applicant to the People's Consultative Assembly, the House of Representatives, the House of Regional Representatives, the President and Vice President, and the Financial Audit Board for consideration or advice in legal matters. The Indonesian Constitutional Court is excluded from the high state organs eligible to receive advice from the Indonesian Supreme Court due to its role as the guardian and interpreter of the Constitution.

The Supreme Court possesses the authority to regulate the advisory mechanisms within the legal framework. The provisions delineate the applications and procedures for submission, administrative and registration examinations, scheduling and summoning hearings, examinations, judges' deliberative meetings, and decisions rendered as considerations or legal advice from the Supreme Court. The procedure

for providing consideration or advice in the legal domain by the Supreme Court will enhance legal certainty for the interested parties. Legal certainty constitutes a fundamental objective of the law, and the establishment of regulations serves as a mechanism to enhance this certainty.⁵²

Conclusion

The advice provided by the Supreme Court, as outlined in Article 22 paragraph (1) of the 2009 Judicial Powers Act *jo.* the 2023 Supreme Court Circular regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber, contradicts Article 37 of the 1985 Supreme Court Act. The contradiction is evident in the terms "high state organs" and "state organs and government agencies." The inconsistency of these statutes illustrates the ambiguity surrounding the authority held by the Supreme Court. The ambiguity of authority signifies the paradox of democracy and the infringement of the concept of power restriction. Consequently, clarification is required regarding the limitations and procedures for delivering legal advice to the Supreme Court.

According to the principle of *lex posterior derogate legi priori*, Article 22 paragraph (1) of the 2009 Judicial Powers Act is applicable. Furthermore, the mechanism for providing legal advice by the Supreme Court remains unclear. The Supreme Court can draw insights from the Indian Supreme Court to address this issue. Although India implements a different legal system than Indonesian, India has clear limitations and procedures in providing legal advice to the Supreme Court. The Indian Constitution of 2024 explicitly stipulates that the Indian Supreme Court is authorized solely to assess or provide advice to the President of India regarding legal issues. The Indian Supreme Court regulates the provision of legal consideration or advice.

The Supreme Court should have the authority to restrict the applicant and the process for providing legal consideration or advice, drawing insights from India's approach. The Supreme Court may implement a regulation concerning guidelines for the provision of legal advice by the Supreme Court. The Supreme Court is empowered to interpret state organs and government agencies, and any state organs

⁵² Pistor, "The Value of Law."

and government agencies classified within that category through that regulation. The Supreme Court may restrict the applicants for legal advice to the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the President and Vice President, the Financial Audit Board, the Minister, and the Election Supervisory Bodies. So it can be interpreted that the state organs interpreted by the Supreme Court are the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the President and Vice President, the Financial Audit Board, Ministers, the Indonesia National Army, the Indonesia National Police, the Judicial Commission, the General Election Commission, the Central Bank, the Corruption Eradication Commission, the National Human Rights Commission, the Witness and Victim Protection Institution, the Financial Transaction Reporting and Analysis Center, the Business Competition Supervisory Commission, the Ombudsman, the Indonesia Broadcasting Commission, the Maritime Security Agencies, the National Law Commission, the Chamber of Commerce and Industry, the Indonesia National Sports Committee, the Information Commission, the Press Council, the Election Supervisory Agency, the Indonesia Medical Council, the Presidential Advisory Council, the Financial Services Authority, the Education Council, the Child Protection Commission, the National Commission on Anti-Violence Against Women, the National Resilience Council, the National Resilience Institute, the State Administration Institution, and the Honorary Council of Election Organizers. The Constitutional Court is excluded from the state organs eligible to receive advice from the Supreme Court due to its role as the guardian and interpreter of the Constitution in Indonesia. Consequently, community or non-governmental organizations may initiate a judicial review rather than seek legal advice from the Supreme Court.

The Supreme Court possesses the authority to regulate the processes for providing consideration or advice within the legal domain. The provisions delineate the applications and procedures for petitions, administrative and registration examinations, scheduling and summoning of hearings, examinations, judges' deliberative meetings, and decisions rendered as legal advice. The presence of constraints and protocols for delivering legal counsel by the Supreme Court demonstrates the enforcement of power restrictions and legal certainty.

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