

Research Horizon

ISSN: 2808-0696 (p), 2807-9531 (e)

Research Horizon

Volume: 05

Issue: 05

Year: 2025

Page: 2119–2126

Citation:

Thio, R., Azizah, S. N., Wagiman, & Yustanti, D. E. (2025). Lex injusta non-est lex: Article 74 Trademark Law versus constitutional economic democracy in Indonesia's SME protection. *Research Horizon*, 5(5), 2119–2126.

Article History:

Received: September 6, 2025

Revised: September 29, 2025

Accepted: October 6, 2025

Online since: October 30, 2025

Lex Injusta Non-Est Lex: Article 74 Trademark Law versus Constitutional Economic Democracy in Indonesia's SME Protection

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Abstract

This research examines the structural contradiction between Article 74's three-year trademark non-use cancellation provision in Law Number 20/2016 and the People-Based Economy principle of Article 33, 1945 Constitution. This capitalistic norm facilitated predatory litigation against vulnerable MSMEs, constituting philosophical lex injusta. Using normative juridical methodology with case and comparative law approaches, this study justifies arguments from the successful Constitutional Court petition. Constitutional Court Decision Number 144/PUU-XXI/2023 provides the judicial solution by extending non-use period to five years, resolving unconstitutionality. The study distinguishes Article 74's objective non-use standard from Article 76's subjective bad-faith element, establishing the former now prescribes constitutionally equitable timeframe. The five-year period aligns with SME business cycles for research, development, and market penetration, providing protection from premature cancellation threats. This judicial reform represents substantive constitutional justice, granting MSMEs legal certainty for intellectual asset development. The victory harmonizes Indonesia's trademark law with People-Based Economy commitments. Primary recommendations include developing accessible evidentiary guidelines for trademark use documentation, particularly digital-based systems, and creating affordable platforms for SMEs to systematically document commercial activities, ensuring effective intellectual property defense within this equitable legal landscape.

Keywords

Constitutional Review, Economic Democracy, Indonesian Constitutional Law, SME Protection, Trademark Non-Use.

1. Introduction

The modern Intellectual Property (IP) system, rooted in Western legal philosophy, often exists in a dialectical tension with the legal ethos of the Indonesian nation (Swasono, 2010). Pancasila, as the grundnorm, mandates economic governance based on the principles of collectivity and social justice, as manifested in Article 33 of the 1945 Constitution (Manullang, 2015; Zon et al., 2016). This concept of a People-Based Economy demands that every legal instrument, including the Trademark Law, serve to empower domestic economic actors. However, the adoption of global IP norms without adequate contextualization gives rise to structural contradictions that threaten the existence of Micro, Small, and Medium Enterprises (MSMEs) as the backbone of the national economy (Manullang, 2020).

This contradiction is crystallized in Article 74 of the TM Law, a norm that, in its original form, permitted the cancellation of a registered trademark if not used for three consecutive years. On its face, this provision appears neutral, designed to prevent trademark hoarding. However, its rigid application disregards the sociological realities and economic capacity of MSMEs. MSMEs, with their limited capital and fluctuating market access, require a longer timeframe to achieve intensive commercial exploitation (Sedyastuti, 2018). Consequently, this article systemically created a vulnerability, transforming the trademark into a latent liability that was susceptible to legal challenge at any moment (Christiawan & Widyaningrum, 2024).

This structural vulnerability is not hypothetical but a grim reality manifested in the practice of predatory litigation. Recent empirical research confirms that Indonesian business actors perceive intellectual property protection as crucial yet inadequate, with enforcement mechanisms often failing to provide sufficient deterrent effects against infringement (Fawaid et al., 2024). Large corporations, often foreign entities, strategically exploit this provision to eliminate the trademarks of domestic MSMEs. This practice is exemplified by Case Number 28/Pdt.Sus-IPR/Trademark/2023/PN Niaga Jkt.Pst (Central Jakarta Commercial Court), wherein the petitioner in the constitutional review successfully defended their “HDCVI & LOGO” trademark from a cancellation lawsuit. The suit itself was predicated on a dubious market survey report. The COVID-19 pandemic further laid bare this injustice, as numerous MSMEs forced to temporarily cease operations became prime targets under the threat of this article (Asshiddiqie, 2010; Soeprapto, 2020).

This struggle culminated in the Constitutional Court Decision Number 144/PUU-XXI/2023, a landmark ruling in the legal protection of MSMEs. The Constitutional Court judiciously granted the petition by declaring the phrase “3 (three) years” in Article 74 paragraph (1) of the TM Law unconstitutional and amending it to “5 (five) years”. This victory constitutes a judicial vindication of the arguments presented in the petition. This ruling must be construed as the most viable judicial solution to date a progressive step that mitigates the threat of predatory litigation and provides a more humane breathing space for MSMEs.

An in-depth analysis of the Constitutional Court Decision Number 144/PUU-XXI/2023 reveals it to be a fundamental qualitative recalibration. The extension of the period to five years substantively acknowledges the longer business cycle of MSMEs, from research and development to market penetration. More importantly, this ruling helps to delineate the distinct legal functions of Article 74 and Article 76 of the TM Law. Article 76 targets ‘bad faith’ at the point of registration, whereas Article 74 now governs trademarks that were registered in good faith but subsequently undergo a period of non-use. Article 74 has thus been transformed into a just and proportional norm.

This victory at the Constitutional Court marks the beginning of a new chapter in the effort to strengthen the legal bulwark for MSMEs. Constitutional Court

Decision Number 144/PUU-XXI/2023 has provided a robust juridical foundation; however, its effectiveness hinges on its on-the-ground implementation. The focus now shifts to overseeing its implementation and to empowerment. MSMEs must be equipped with the knowledge and tools to optimally utilize this five-year period, particularly in documenting their trademark use. Therefore, this research aims to dissect the implications of this new legal landscape, formulating concrete strategies to operationalize this constitutional victory into tangible benefits for MSMEs.

This research has three main objectives. First, it conducts a juridical-philosophical analysis of the contradiction between Article 74 of the Trademark Law (three-year version) and Article 33 of the 1945 Constitution, showing how the former disadvantaged MSMEs, using Constitutional Court Decision Number 144/PUU-XXI/2023 as an analytical basis. Second, it evaluates the implications of the Court's ruling, which extended the non-use period to five years, making it more equitable and aligned with MSME business cycles. Third, it formulates strategic policy recommendations to strengthen the implementation of Article 74, including evidentiary guidelines, digital documentation, and legal literacy programs.

2. Methods

This research fundamentally employs a normative juridical methodology, which positions law as a coherent system of norms, principles, and doctrines. As a form of library research, the primary focus is on the analysis of primary legal materials, which include the 1945 Constitution, the Trademark and Geographical Indications Law (TM Law), and, centrally, the Constitutional Court Decision Number 144/PUU-XXI/2023. Secondary legal materials, such as academic literature, legal theory, and relevant jurisprudence also enrich the analysis. This approach was chosen to conduct a doctrinal evaluation of the hierarchical alignment and internal consistency of the trademark cancellation norm post-MK ruling, in order to build a dogmatically sound argument.

Within this normative framework, the research applies several integrated approaches. The statute approach is used to examine the legal text precisely. The case approach is crucial for dissecting the legal reasoning within the Constitutional Court Decision Number 144/PUU-XXI/2023 and the concrete cases that form its background. Furthermore, the comparative approach is utilized to contextualize the five-year norm within the international legal landscape (Van Hoecke, 2016). Finally, the philosophical approach reconnects this normative analysis to the legal ethos of Pancasila and the constitutional mandate of the People-Based Economy, thereby producing a holistic and in-depth analytical synthesis.

In addition to these approaches, this study adopts a conceptual and analytical framework to interpret the normative interaction between statutory provisions and constitutional principles. Legal data were examined through a deductive reasoning process, beginning from general legal doctrines and progressing toward the specific constitutional implications of the five-year non-use period.

The data analysis relies on qualitative interpretation, emphasizing coherence and consistency between legal norms and socio-economic objectives. To ensure analytical reliability, a triangulation of legal sources was employed cross-referencing statutory texts, judicial reasoning, and scholarly opinions. This integrative process enabled the research to produce a comprehensive legal framework that evaluates not only textual validity but also its practical impact on Micro, Small, and Medium Enterprises (MSMEs).

Methodologically, the normative juridical design was selected because it enables a doctrinal evaluation rooted in Indonesia's civil law tradition, where legal reasoning is derived from systematic interpretation of written norms. By synthesizing doctrinal and contextual elements, the method supports the formulation of a

constitutional reading that aligns trademark law with Indonesia's socio-economic constitutionalism.

3. Results

3.1. Constitutional and Statutory Framework Analysis

The documentary analysis reveals a hierarchical conflict between statutory provisions and constitutional mandates. Article 74(1) of Law Number 20 of 2016 concerning Trademarks and Geographical Indications originally stipulated that registered trademarks could be cancelled if not used for three consecutive years. This provision operates within a first-to-file registration system where trademark rights are established through registration rather than use. The Constitutional Court Decision Number 144/PUU-XXI/2023 declared the phrase "3 (three) years" in Article 74(1) unconstitutional and modified it to "5 (five) years." The Constitutional Court identified three constitutional provisions directly engaged by Article 74: Article 28D(1) guaranteeing the right to fair legal certainty, Article 28H(4) protecting private property rights from arbitrary deprivation, and Article 33(4) mandating economic democracy principles. The court's ratio decidendi established that the three-year period failed to accommodate the operational realities of micro, small, and medium enterprises, thereby creating structural discrimination within the trademark protection system.

The philosophical and juridical tension underlying this provision can be traced back to the historical roots of the Intellectual Property (IP) system itself. The modern IP framework shaped largely by Western liberal-capitalist philosophy emphasizes individual ownership, rapid commercialization, and market efficiency (Drahos & Braithwaite, 2017). This orientation stands in contrast to Indonesia's constitutional ethos based on Pancasila, which envisions an economic order grounded in collectivity and social justice as articulated in Article 33 of the 1945 Constitution. Consequently, the transplantation of Western IP norms into Indonesia without contextual adaptation has produced a legal system that inadvertently disadvantages MSMEs, who are the backbone of the national economy (Fatakh et al., 2022). MSMEs generally operate with limited capital and slower business cycles, requiring longer periods to reach stable commercialization. Thus, the original three-year cancellation norm constituted a legal framework incompatible with the socio-economic reality of Indonesia's productive class (Tambunan, 2019).

3.2. Case Law Evidence and Litigation Patterns

Analysis of Case Number 28/Pdt.Sus-HKI/Merek/2023/PN Niaga Jkt.Pst reveals specific litigation patterns in trademark cancellation proceedings. Foreign corporations initiated cancellation actions against domestic SME trademarks using commissioned market survey reports as primary evidence. The evidentiary requirements demanded continuous commercial use documentation, with market survey costs ranging from IDR 50 million to IDR 100 million per survey. SMEs faced cancellation proceedings following temporary operational disruptions, including force majeure events such as the COVID-19 pandemic period from 2020 to 2022. The case files demonstrate that plaintiffs in cancellation proceedings were predominantly large corporations with international presence, while defendants consisted primarily of domestic SMEs with limited legal resources. The burden of proof required defendants to produce contemporaneous documentation of continuous commercial use throughout the entire three-year period, without provisions for justified non-use or economic hardship exceptions.

This empirical finding substantiates prior academic observations that the IP legal structure, although facially neutral, systematically marginalizes smaller economic actors. Previous studies (Sardjono, 2012; Margono, 2010; Pane, 2018) emphasized that the evidentiary burden under the first-to-file system disproportionately benefits

capital-rich entities capable of sustaining formal documentation and litigation costs. The case under review thus exemplifies the broader pattern of structural inequality embedded in trademark law, wherein the enforcement of Article 74 effectively became a weapon for market domination rather than a mechanism for fair competition.

3.3. Structural Differentiation of Legal Provisions

The systematic mapping of MIG Law provisions identifies distinct regulatory functions between Article 74 and Article 76. Article 74 addresses post-registration non-use consequences applicable to all registered trademarks regardless of initial registration circumstances. The provision functions as a market-clearing mechanism to prevent trademark hoarding and ensure active commercial utilization. Article 76 specifically targets bad-faith registrations, requiring evidence of malicious intent at the moment of trademark application. The constitutional court's modification affects exclusively the temporal element of Article 74, extending the non-use period from three to five years. This modification preserves the fundamental structure of the provision while adjusting its operational parameters. The evidentiary requirements remain unchanged, maintaining the burden on trademark owners to demonstrate commercial use within the specified period. The relationship between Article 74 and Article 76 remains structurally intact, with each provision addressing distinct aspects of trademark validity. The legal transplant characteristics of the original three-year provision trace to common law trademark systems emphasizing rapid commercial exploitation. The modification to five years aligns Indonesian trademark law with civil law jurisdictions that recognize longer business development cycles. This adjustment represents a calibration of imported legal norms to domestic economic conditions rather than a fundamental restructuring of the trademark cancellation framework.

The Court's adjustment must therefore be interpreted not merely as a technical amendment but as a philosophical correction. By extending the non-use period, the Court upheld the constitutional rights of SMEs to fair legal certainty (Article 28D paragraph 1) and protection from arbitrary deprivation of property (Article 28H paragraph 4). It also reaffirmed Article 33's mandate for an economy that prioritizes collective welfare over pure market efficiency. This transformation reflects a paradigm shift in Indonesia's IP jurisprudence from positivist adherence to global uniformity toward a more socio-legal and contextualized approach, aligning law with the nation's economic realities (Ehrlich, 2017; Rinawati, 2020; Setiawan et al, 2024).

Furthermore, from the standpoint of comparative law, this recalibration situates Indonesia within the broader international framework provided by the TRIPS Agreement, which allows member states flexibility in determining what constitutes a "reasonable" non-use period. By adopting a five-year threshold, Indonesia harmonizes its system with numerous civil law countries while asserting its sovereign right to interpret international obligations in a way that supports domestic economic development (Van Hoecke, 2016). This shows a maturing legal consciousness where international commitments are internalized through the lens of national constitutional values rather than external conformity.

The modification's socio-economic impact is equally significant. Extending the period provides SMEs with vital breathing space to innovate, stabilize operations, and expand market presence without the looming threat of premature cancellation. This "temporal justice" recognizes the asymmetric capacities between SMEs and large corporations (Kustanto, 2022). The decision thus represents not only a doctrinal correction but also a strategic reinforcement of Indonesia's people-based economy model.

Importantly, the Constitutional Court Decision Number 144/PUU-XXI/2023 demonstrates the role of judicial review as a democratic corrective mechanism. When legislative products conflict with constitutional principles, the Court acts as the guardian of constitutional justice, ensuring the supremacy of social welfare-oriented interpretation over rigid textualism. This aligns with Hutchinson and Duncan's (2012) concept of normative coherence, in which law must maintain internal consistency while remaining responsive to social reality. The Court's intervention illustrates the living law principle, harmonizing *lex scripta* with Indonesia's socio-economic moral order.

The primary question is no longer whether Article 74 is fair but how the reformed provision can be effectively implemented to realize substantive justice for SMEs. This marks a transition from critique to construction a shift from identifying systemic ailments to designing sustainable frameworks for equitable IP governance. As such, this research stands as the first comprehensive analysis of the post-reform landscape, establishing the foundation for future scholarship and policy innovation (Brannick & Coghlan, 2007; Qamar & Syah Rezah, 2020; Hariri & Babussalam, 2024).

4. Conclusion

This research concludes that Article 74 of the MIG Law (three-year version) fundamentally contradicted the constitutional mandate of Article 33 of the 1945 Constitution. As a manifestation of a capitalistic paradigm, the provision generated structural discrimination and injustice against SMEs, thereby qualifying as *lex injusta*. Constitutional Court Decision Number 144/PUU-XXI/2023 resolved this constitutional defect by extending the non-use period to five years. This recalibration aligns trademark law with socio-economic realities and SME business cycles, while simultaneously reaffirming the principle of the People's Economy. Theoretically, this decision introduces a new paradigm in trademark legal protection in Indonesia, establishing

Article 74 is an equitable and proportional provision. It balances the prevention of trademark hoarding with protection for good faith actors and clarifies the differentiation between Article 74 on non-use and Article 76 on bad faith registrations, allowing both provisions to operate coherently. Practically, this shift reduces opportunistic litigation risks and strengthens legal certainty for SMEs, enabling them to focus on innovation and long-term brand building. Despite these contributions, this study has limitations. Its analysis is primarily normative and jurisprudential, without incorporating empirical data on SME experiences post-ruling. It also focuses narrowly on Article 74, leaving broader aspects of the MIG Law and comparative perspectives unexplored. Future research should therefore examine the effectiveness of the five-year norm in judicial practice, assess the feasibility of digital documentation as legal evidence, and conduct comparative studies with other jurisdictions. Such inquiries will deepen understanding of how trademark law can continue evolving to ensure substantive justice for SMEs.

References

- Asshiddiqie, J. (2010). *Konstitusi Ekonomi*. Jakarta: PT. Kompas Media Nusantara.
- Brannick, T., & Coghlan, D. (2007). In defense of being "native": The case for insider academic research. *Organizational Research Methods*, 10(1), 98-105.
- Christiawan, R., & Widyaningrum, T. (2024). *Penelitian hukum normatif*. Jakarta: PT RajaGrafindo Persada.
- Drahos, P., & Braithwaite, J. (2017). *Information feudalism: Who owns the knowledge economy*. London: Earthscan.
- Ehrlich, E. (2017). *Fundamental principles of the sociology of law*. New Brunswick, NJ: Transaction Publishers.

- Fatakh, A., Wasman, W., & Khulaili Harsya, R. M. (2022). Mengembalikan eksistensi hukum bisnis dan ekonomi kerakyatan untuk memajukan ekonomi syariah di Indonesia di tengah era neo-globalisasi dan sosialisme demokratis (sosdem). *Inklusif (jurnal pengkajian penelitian ekonomi dan hukum islam)*, 7(1), 180-192.
- Fawaid, B., Manan, A. F., & Indriyanto, I. (2024). Analysis of business actors' perceptions of intellectual property legal protection in digital business. *Research Horizon*, 4(5), 77-86.
- Hariri, A., & Babussalam, B. (2024). Legal pluralism: concept, theoretical dialectics, and its existence in Indonesia. *Walisono Law Review (Walrev)*, 6(2), 45-51.
- Harvelian, A. (2016). Mahkamah Konstitusi dan Penguatan Konstitusi Ekonomi Indonesia. *Jurnal Konstitusi*, 13(3), 65-76.
- Hutchinson, T., & Duncan, N. (2012). Defining and describing what we do: doctrinal legal research. *Deakin Law Review*, 17(1).
- Kustanto, A. (2022). Usaha Mikro Kecil Menengah (UMKM) sebagai: pilar ekonomi kerakyatan dalam dimensi politik hukum integratif. *QISTIE*, 15(1), 353-368.
- Mahmuctarom, M., Irawan, D. H., & Pratama, I. B. A. (2024). Criminal regulation against counterfeiting of goods and trademarks in the industrial sector. *Research Horizon*, 4(5), 87-102.
- Marzuki, M. P. (2017). *Penelitian Hukum: Edisi Revisi*. Jakarta: PT.Kencana.
- Manullang, E. F. M. (2020). Mempertanyakan Pancasila sebagai grundnorm: suatu refleksi kritis dalam perspektif fondasionalisme. *Jurnal Hukum & Pembangunan*, 50(2), 78-91.
- Manullang, F. M. (2015). The purpose of law, Pancasila and legality according to Ernst Utrecht: a critical reflection. *Indonesia Law Review*, 5(2), 187-193.
- Margono, S. (2010). *Aspek Hukum Komersialisasi Aset Intelektual*. Bandung: Nuansa Aulia.
- Marseda, A. T., Rosidah, E., & Lany, A. (2025). Blockchain-Based data bank for music royalty protection in Indonesia. *Research Horizon*, 5(3), 921-932.
- Pane, H. (2018). Perlindungan hukum terhadap merek terdaftar dari perbuatan pihak lain yang beritikad tidak baik dengan melakukan pemboncengan reputasi (Passing Off) (Studi Kasus Putusan Mahkamah Agung No. 450/Pdt. Sus-Hki/2016). Medan: Universitas Sumatera Utara (Bacherol Dissertation).
- Qamar, N., & Rezah, F. S. (2020). *Metode Penelitian Hukum: Doktrinal dan non-Doktrinal*. Makassar: CV. Social Politic Genius (SIGn).
- Rinawati, A. (2020). Pancasila dan eksistensi ekonomi kerakyatan dalam menghadapi kapitalisme global. *Jurnal Terapung: Ilmu - Ilmu Sosial*, 2(2), 46-58.
- Sardjono, A. (2012). Culture and intellectual property development in Indonesia. *Indonesian J. Int'l L.*, 10(23), 134-149.
- Sedyastuti, K. (2018). Analisis pemberdayaan UMKM dan peningkatan daya saing dalam kancah pasar global. *INOBI: Jurnal Inovasi Bisnis dan Manajemen Indonesia*, 2(1), 35-49.
- Setiawan, I., Muzaffar Wahyu, A., Rahman, A., & Sutrisno, A. (2024). Juridical study of customary law in the Indonesian national legal system. *Asian Journal of Social and Humanities*, 2(8), 1824-1831.
- Sinaga, N. A. (2020). Pentingnya perlindungan hukum kekayaan intelektual bagi pembangunan ekonomi Indonesia. *Jurnal Hukum Sasana*, 6(2), 35-46.
- Soeprapto, M. F. (2020). *Ilmu Perundang-Undangan 2: Proses dan Teknik Penyusunan Edisi Revisi*. Yogyakarta: PT Kanisius.
- Swasono, S. E. (2010). *Kembali ke Pasal 33 UUD 1945: Menolak Neoliberalisme*. Jakarta: Yayasan Hatta.
- Tambunan, T. (2019). Recent evidence of the development of micro, small and medium enterprises in Indonesia. *Journal of Global Entrepreneurship Research*, 9(1), 576-582.
- Twining, W. (2006). Diffusion and globalization discourse. *Harvard International Law Journal*, 47(2), 507-511.
- Van Hoecke, M. (2013). Methodology of comparative legal research. *Pravovedenie* 2(1), 114-121.
- Zon, F., Iskandar, M., & Zuhdi, S. (2016). Tinjauan sejarah hukum pasal 33 UUD 1945 sebagai ideologi ekonomi. *Jurnal Negara Hukum, Volume* 7(1), 45-61.

Acknowledgment

We gratefully acknowledge the contributions of individuals who supported the completion of this article.

Funding Information

This research did not receive any funding.

Conflict of Interest Statement

The authors declare that there is no conflict of interest.

Ethical Approval and Originality Statement

Ethical approval was obtained for this study. The manuscript represents original work and has not been previously published, nor is it under consideration by another journal.

Data Disclosure Statement

The data that support the findings of this study are available from the corresponding author upon reasonable request.



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