

# Judicial Review as a Constitutional Safeguard: Limiting Majority Power in Indonesia's Constitutional Democracy

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## Abstract

Constitutional review (judicial review) constitutes an authority of the Constitutional Court that functions to ensure that enacted legislation does not contradict the constitution. This authority is grounded in the principle of constitutional legality, which represents an essential element of the rule of law and constitutional democracy. Within the framework of constitutional democracy, the exercise of majority power is constrained by legal and institutional mechanisms in order to ensure respect for the rights of individuals and minority groups. This article aims to examine Judicial Review as an instrument within the framework of Constitutional Democracy. This study is a normative legal research employing statutory and conceptual approaches. The findings of this study indicate that judicial review functions as an important instrument of constitutional democracy by upholding constitutional supremacy and limiting the exercise of majority power. Therefore, judicial review has a significant role in maintaining constitutional democracy and preventing the abuse of power.

**Keywords** *Judicial Review, Constitutional Democracy, Constitutional Law.*

## A. Introduction

Constitutional democracy has developed as a form of governance that emphasizes the constitution as the supreme legal norm in state administration.<sup>1</sup> In this context, democracy is not merely understood as the execution of the majority's will, but as a system that ensures all exercises of state power remain within the framework of the constitution.<sup>2</sup> The constitution functions as a tool to control power, prevent abuses of authority, and simultaneously safeguard the fundamental rights of citizens.<sup>3</sup> Therefore, constitutional democracy requires effective legal and institutional mechanisms to maintain a balance between the sovereignty of the people and the supremacy of the constitution.<sup>4</sup>

According to Arief Budiman, when related to the concept of Trias Politica in Montesquieu's thought, the role of the Government in constitutionalism is limited to the executive function, namely implementing laws that have been enacted by the parliament on behalf of the people.<sup>5</sup> Thus, the Government in such a democracy has a role confined to executive duties. Active public participation, whether in electing leaders, providing input, supervising power, or criticizing the government, reflects political awareness in exercising their rights as citizens.<sup>6</sup> In accordance with universally applicable legal principles, for regulations below the Constitution to be valid and enforceable, they

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<sup>1</sup> Jimly Asshiddiqie, *Konstitusionalisme dan Demokrasi* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2005).

<sup>2</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959).

<sup>3</sup> Saldi Isra, "Demokrasi Konstitusional dan Negara Hukum," *Jurnal Konstitusi* 7, no. 3 (2010): 1–25

<sup>4</sup> Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1967).

<sup>5</sup> Arief Budiman, *Teori Negara: Negara, Kekuasaan, dan Ideologi* (Jakarta: Gramedia Pustaka Utama, 1996).

Saldi Isra, *Pengujian Undang-Undang dalam Sistem Ketatanegaraan Indonesia* (Jakarta: RajaGrafindo Persada, 2010).

<sup>6</sup> Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*, rev. ed. (Jakarta: Gramedia Pustaka Utama, 2008).

must not conflict with higher-level laws.<sup>7</sup> If any regulation contradicts a higher-level law, it must undergo judicial review.<sup>8</sup>

Judicial review emerges as a legal mechanism with a crucial role. This instrument functions to assess whether a particular statutory regulation violates the rights of citizens explicitly guaranteed by the constitution. When a violation is identified, the legal consequence is that the norms within the statute are declared non-binding and inconsistent with the constitution, or deemed unconstitutional.<sup>9</sup> Moreover, the constitution holds a vital function as the guardian of the continuity of the democratic system.<sup>10</sup> This role requires the constitution to provide strong guarantees for the implementation of the principle of separation of state powers.<sup>11</sup> Such guarantees are realized through an effective system of checks and balances among the three pillars of state power: the judiciary, the legislature, and the executive.<sup>12</sup> Within this framework, the constitution serves as the primary benchmark for evaluating the balance and separation of powers, thereby establishing a healthy and democratic system of governance.<sup>13</sup>

In constitutional law literature, a number of studies have examined the function of the Constitutional Court in ensuring the protection of citizens' constitutional rights through the mechanism of judicial review of statutes.<sup>14</sup> These studies generally position judicial review as an essential means of upholding constitutional supremacy and preventing the enforcement of legal norms that contradict the Constitution.<sup>15</sup> In addition, several scholars have highlighted the role of judicial review in maintaining the balance of state powers, particularly in the context of

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<sup>7</sup> Jimly Asshiddiqie, "Pengujian Peraturan Perundang-Undangan," *Jurnal Konstitusi* 4, no. 1 (2007): 1–24.

<sup>8</sup> Saldi Isra, *Pengujian Undang-Undang dalam Sistem Ketatanegaraan Indonesia* (Jakarta: RajaGrafindo Persada, 2010).

<sup>9</sup> Saldi Isra, "Implikasi Putusan Mahkamah Konstitusi terhadap Pembentukan Undang-Undang," *Jurnal Legislasi Indonesia* 6, no. 3 (2009): 357–372.

<sup>10</sup> Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi* (Jakarta: Sinar Grafika, 2006).

<sup>11</sup> Montesquieu, *The Spirit of the Laws*, 155–170.

<sup>12</sup> Saldi Isra, "Checks and Balances dalam Sistem Ketatanegaraan Indonesia," *Jurnal Konstitusi* 8, no. 4 (2011): 597–620.

<sup>13</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).

<sup>14</sup> Jimly Asshiddiqie, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Konstitusi Press, 2006).

<sup>15</sup> Saldi Isra, "Peran Mahkamah Konstitusi dalam Negara Demokrasi," *Jurnal Konstitusi* 5, no. 2 (2008): 45–68.

relations among the legislative, executive, and judicial branches. In the development of contemporary democracy, judicial review is viewed not merely as a juridical mechanism, but also as an instrument of constitutional democracy that functions to limit majority power and protect citizens' constitutional rights.<sup>16</sup>

Although numerous studies have examined the role of judicial review and the Constitutional Court in upholding constitutional supremacy and protecting citizens' rights, existing research has largely positioned judicial review within a purely institutional and juridical framework.<sup>17</sup> Such an approach has not sufficiently explored judicial review as an instrument of constitutional democracy with a strategic function in limiting the exercise of majority power and maintaining a balance between the principle of popular sovereignty and the supremacy of the constitution.<sup>18</sup> Therefore, there remains a need for further analysis of judicial review from a broader perspective of constitutional democracy.

This article offers a novel perspective by positioning judicial review as an instrument of constitutional democracy that functions to limit majority power and maintain a balance between popular sovereignty and constitutional supremacy.<sup>19</sup>

This study aims to analyze the role of judicial review as an instrument within the framework of constitutional democracy, particularly in limiting majority power and ensuring constitutional supremacy.<sup>20</sup>

The purpose of this study is to examine how judicial review functions as a mechanism to maintain the balance between popular sovereignty and constitutional supremacy within Indonesia's constitutional democracy. This research focuses on how the judicial review mechanism operates to protect citizens' constitutional rights and to what extent the limitations of the Constitutional Court's authority affect the optimization of this function.

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<sup>16</sup> Fritz Edward Siregar, "Fungsi Kontra-Mayoritarian Mahkamah Konstitusi dalam Demokrasi Konstitusional," *Jurnal Yudisial* 9, no. 1 (2016): 1–22.

<sup>17</sup> Hidayat and Adiba, "Reformulasi Kewenangan Judicial Review dalam Sistem Ketatanegaraan Indonesia," *Jurnal Konstitusi* 20, no. 2 (2023): 215–240.

<sup>18</sup> Nggilu et al., "Perlindungan Hak Konstitusional dalam Praktik Judicial Review," *Jurnal HAM* 14, no. 1 (2024): 45–67.

<sup>19</sup> Jimly Asshiddiqie, *Constitutional Democracy: Teori dan Praktik di Indonesia* (Jakarta: Sinar Grafika, 2011).

<sup>20</sup> Pan Mohamad Faiz, *Judicial Review sebagai Instrumen Demokrasi Konstitusional* (Jakarta: Rajawali Pers, 2015).

This study offers novelty by demonstrating a gap between the constitutional guarantees of citizens' rights and the available mechanisms for their protection. In addition, it highlights the importance of strengthening judicial review through the development of constitutional complaint mechanisms, constitutional questions, and enhanced judicial oversight within the context of modern democracy.

This article is structured into several sections. The first section discusses the concepts of constitutional democracy and judicial review. The following section examines the role of judicial review in maintaining the balance between constitutional supremacy and popular sovereignty. The final section presents the research findings.

The research employs a normative legal method that focuses on examining legal norms, principles, and doctrines related to judicial review within the framework of constitutional democracy. The approaches used include a statutory approach, by analyzing constitutional provisions and relevant legislation, as well as a conceptual approach, which explores concepts and doctrines concerning constitutional democracy, constitutional supremacy, and the limitation of majority power.

In addition, constitutional theory is analyzed through doctrinal and interpretative approaches by highlighting the relationship between constitutional principles, the hierarchy of norms, and their application in the practice of judicial review.

## B. Judicial Review within the Framework of Constitutional Democracy

### 1. *Judicial Review and Constitutional Supremacy*

Judicial review constitutes a legal mechanism through which judicial institutions examine legislation to assess its conformity with higher legal norms, particularly the 1945 Constitution of the Republic of Indonesia. This mechanism serves to uphold the principle of constitutional supremacy, maintain a system of checks and balances, and ensure the protection of citizens' constitutional rights. Normatively, the authority to conduct judicial review in Indonesia is grounded in Article 24A paragraph (1) of the 1945 Constitution, which grants the Supreme Court the power to review regulations below the level of statutes against statutes, as well as Article 24C paragraph (1) of the 1945

Constitution, which vests the Constitutional Court with the authority to review statutes against the Constitution.<sup>21</sup>

Judicial review, or *controle juridictionale*, is essentially a mechanism of oversight exercised by the judiciary over the actions of the legislative and executive branches. According to Brewer-Carias, judicial review is an inherent function of the courts to ensure that every legal act conforms to higher legal norms. This view aligns with Maurice Duverger's perspective, which emphasizes the necessity of review mechanisms to prevent legislation from deviating from the constitution. Without a supervisory institution, the constitution risks losing its normative force. Therefore, judicial review is understood as a primary instrument for upholding constitutional supremacy while maintaining order within the hierarchy of legal norms.<sup>22</sup>

However, in constitutional practice, the implementation of judicial review is not without challenges. In Indonesia, the division of authority between the Supreme Court and the Constitutional Court in reviewing legislation often creates potential overlaps in jurisdiction and legal uncertainty. Moreover, limited public access to filing judicial review petitions indicates that this mechanism has not yet fully ensured optimal protection of constitutional rights.<sup>23</sup>

From a theoretical perspective, this situation gives rise to debates regarding the ideal limits of judicial review authority. On the one hand, judicial review is seen as an essential instrument for safeguarding constitutional supremacy and protecting human rights. On the other hand, its authority must be constrained to prevent excessive judicial dominance that could disrupt the balance among branches of power within a democratic system.

## 2. *Judicial Review, Democracy, and the Limitation of Majority Power*

In the context of constitutional democracy, upholding democratic ideals cannot be understood merely as the implementation of majority rule, but must be carried out within

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<sup>21</sup> Wilma Silalahi and Yunita Estu Lestari, "Pengujian Perundang-Undangan: Legislative Review, Executive Review, dan Judicial Review," *Jurnal Pustaka Cendekia Hukum dan Ilmu Sosial* 3, no. 2 (June–September 2025): 131–41.

<sup>22</sup> Ni'matul Huda, "Partisipasi Publik dalam Pembentukan Peraturan Perundang-Undangan," *Jurnal IUS QUIA IUSTUM* 16, no. 3 (2009): 355–372.

<sup>23</sup> Mursyidi, "Kekuatan dan Batas Judicial Review dalam Arsitektur Hukum Indonesia," *Syura: Journal of Law* 3, no. 1 (2025): 1–17.

a democratic legal framework. Democracy and the rule of law are two complementary and inseparable principles. Indonesia, as a democratic state governed by law, is obliged to place democratic principles and legal principles in a symbiotic relationship, ensuring that political power generated through democratic processes remains subject to legal constraints. The legislative process formulated through democratic mechanisms is indeed an important instrument in the development of the national legal system; however, the outcomes of this process must continue to be supervised to prevent deviations from constitutional principles.<sup>24</sup>

### 3. *Judicial Review within the Hierarchy of Norms and Constitutional Structure*

In the Indonesian context, this theory provides an analytical framework in which the Constitution of the Republic of Indonesia of 1945 and the foundational values of the state, such as Pancasila, are understood as the primary basis of the national normative structure, followed by statutes, government regulations, regional regulations, and other subordinate regulations.<sup>25</sup>

In this context, there is a direct derivative relationship between basic norms and subordinate norms: statutes must be derived from the constitution, regulations below the level of statutes must be consistent with statutory laws, and the values of Pancasila are reflected in the interpretation of higher-level constitutional norms.<sup>26</sup>

The concept of the contemporary democratic state governed by law has evolved alongside the emergence of judicial

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<sup>24</sup> Fahmi Ramadhan Firdaus and Bayu Dwi Anggono, "Safeguarding Constitutional Democracy: The Role of the Indonesian Constitutional Court through Formal Review," *Jurnal Litigasi* 26, no. 2 (October 2025): 229

<sup>25</sup> Diyaul Hakki, "Judicial Review of the 1945 Constitution of the Republic of Indonesia against Pancasila," *Journal of Law and Regulation Governance* 1, no. 2 (2023): 60–67.

<sup>26</sup> Brilliant Gustama et al., "The Influence of TAP MPR's Position on the Hierarchy System of Indonesian Laws and Regulations," *Indonesia Law Reform Journal* 2, no. 1 (2022): 67–80.

review authority. From a theoretical perspective, this mechanism serves several key objectives: first, to protect citizens from the domination of power or abuses of authority by state institutions. Second, to ensure the effective functioning of the democratic system through a balanced distribution of roles among the executive, legislative, and judicial branches. And third, to guarantee and safeguard all citizens from abuses of power that may threaten their constitutional rights.<sup>27</sup>

The formation of a constitution is essentially driven by a strong political awareness of the importance of fundamentally regulating the organization of the state. As a basic norm, a constitution functions not only as a legal rule but also as a reflection of the political, economic, and social forces that develop at the time of its establishment. This indicates that a constitution is the result of the interaction of various interests existing within society.

According to Bryce, a constitution is deliberately designed as a set of fundamental norms that hold a higher position than other legal norms. Therefore, all legislation must be aligned with and must not contradict the constitution.

Thus, within the framework of the hierarchy of norms theory, the constitution occupies the highest position as the foundation for the formation of lower-level legal norms.

#### 4. *Judicial Review and the Protection of Constitutional Rights*

The mechanism of judicial review serves as a strategic instrument in ensuring the protection of citizens' constitutional rights from potential abuses of authority by policy-makers. Within the Indonesian legal system, the authority of constitutional review provides constitutional judicial institutions with the competence to assess whether legislative regulations are consistent with the principles enshrined in the 1945 Constitution of the Republic of Indonesia. Through this mechanism, legal norms that conflict with the constitution may be declared to have no binding legal force, thereby positioning

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<sup>27</sup> M. Fadly Hasibuan and Iza Rumesten, "Reorientasi Kewenangan Judicial Review di Mahkamah Konstitusi Berdasarkan Prinsip Supremasi Konstitusi," *Ekspose: Jurnal Penelitian Hukum dan Pendidikan* 22, no. 2 (December 2023): 42–55.

judicial review as a means of upholding constitutional supremacy as well as protecting the constitutional rights of citizens.<sup>28</sup>

##### 5. *Development of Judicial Review in Contemporary Constitutional Democracy*

In academic studies, numerous researches have emphasized the importance of expanding the authority of the Constitutional Court through the mechanisms of constitutional complaint and constitutional question. The constitutional complaint is regarded as an instrument that allows citizens to directly file complaints regarding violations of constitutional rights that cannot be addressed through ordinary judicial channels.<sup>29</sup> Meanwhile, the constitutional question enables judges in general courts to submit constitutional inquiries to the Constitutional Court when there is doubt about the constitutionality of a norm applied in a case.<sup>30</sup> Both mechanisms are understood as a logical extension of judicial review aimed at strengthening the protection of citizens' constitutional rights.

Alongside the development of modern democracy, these studies also emphasize that judicial review is no longer solely focused on protecting the rights of the current generation but must also encompass the rights of future generations. For instance, the right to a good and healthy environment has been recognized as a constitutional right with a sustainability dimension. Protecting this right requires a judicial review mechanism capable of scrutinizing and correcting policies and

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<sup>28</sup> Dwi Anggreni, Ahmad Fuadi, Fitriyani, and Muhammad I. Al-Kautsar, "Peran Mahkamah Konstitusi dalam Menjamin Kedaulatan Hukum di Indonesia," *Hutanasyah: Jurnal Hukum Tata Negara* 3, no. 1 (2024): 11–26.

<sup>29</sup> S. B. Plaituka, "Constitutional Complaint dalam Rangka Penegakan Hak Asasi Manusia di Republik Indonesia," *Media Hukum* 23, no. 2 (2016): 196–210.

<sup>30</sup> J. S. Collins and P. M. Faiz, "Penambahan Kewenangan Constitutional Question di Mahkamah Konstitusi sebagai Upaya untuk Melindungi Hak-hak Konstitusional Warga Negara," *Jurnal Hukum Prioris* 39, no. 4 (2019): 293–310.

legal norms that may threaten environmental sustainability and the well-being of future generations.<sup>31</sup>

Furthermore, research on judicial review indicates that strengthening this mechanism directly contributes to improving the quality of democracy and the enforcement of constitutionalism principles. A robust judicial review promotes transparency, accountability, and legal certainty in state administration.<sup>32</sup> However, such strengthening cannot be implemented partially. Several studies emphasize the necessity of systematically reformulating the authority of judicial review while taking into account the state structure, legal-political dynamics, and the complexity of protecting constitutional rights in the era of contemporary democracy.<sup>33</sup>

As the *guardian of the constitution*, the Constitutional Court holds a crucial role in safeguarding citizens' constitutional rights. However, its current authority remains limited to reviewing laws against the 1945 Constitution through the mechanism of judicial review. In practice, violations of constitutional rights do not arise solely from statutory norms, but may also stem from concrete actions of state officials across the executive, legislative, and judicial branches. In this context, the concept of a constitutional complaint is viewed as a promising alternative to expand the protection of constitutional rights, particularly by providing a channel for citizens to report violations that cannot be resolved through ordinary judicial mechanisms.<sup>34</sup>

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<sup>31</sup> Z. K. Shokhikhah, "Hak Konstitusional Generasi Mendatang atas Lingkungan Hidup Layak: Kajian Hukum Tata Negara terhadap Tanggung Jawab Negara dalam Pembangunan Berkelanjutan," *Jurnal Riset Rumpun Ilmu Sosial, Politik dan Humaniora* 4, no. 3 (2025).

<sup>32</sup> F. Arifin, "The Role of the Constitutional Court in Strengthening Indonesian Democracy: A Perspective on the Sovereignty of Law and the Distribution of Power," *Sign Jurnal Hukum* 5, no. 2 (2023).

<sup>33</sup> R. Hidayat and R. S. Adiba, "Reformulation of Absolute Judicial Review Authority in the Constitutional Court to Uphold the Principle of Constitutional Supremacy," *Jurnal Sosial Humaniora* 4, no. 2 (2023).

<sup>34</sup> Riskiyawan Hasan, "Urgensi Constitutional Complaint dalam Melindungi Hak Konstitusional Warga Negara," *Staatsrecht: Jurnal Hukum Tata Negara*, UIN Sunan Kalijaga Yogyakarta

Nevertheless, the implementation of constitutional complaint within Indonesia's constitutional system faces several challenges. The 1945 Constitution does not explicitly grant such authority to the Constitutional Court, meaning that its application may raise constitutional issues and would require either amendments to the fundamental law or more progressive interpretation. Furthermore, expanding this authority risks significantly increasing the Court's caseload and opening the possibility of judicial activism, where the Constitutional Court may exceed the limits of its judicial function. As noted by I Dewa Gede Palguna, in practice, a number of cases that essentially constitute constitutional complaints are often "redirected" into the judicial review mechanism due to the absence of an adequate legal channel. This condition indicates that although constitutional complaint is considered a viable solution to strengthen the protection of constitutional rights, its implementation requires careful consideration so as not to disrupt the balance within the constitutional system.<sup>35</sup>

### C. Judicial Review As An Instrument of Constitutional Democracy in Indonesia

The study of judicial review and its role in safeguarding constitutional rights in modern democracies demonstrates that this mechanism is both complex and indispensable to democratic governance. Judicial review grants courts the authority to examine the constitutionality of legislation and governmental actions, thereby serving as a key oversight mechanism over legislative and executive powers. Its primary objective is to prevent abuses of state authority and to ensure that all public policies and governmental actions adhere to constitutional principles. Although judicial review is widely recognized as a cornerstone of constitutional democracy, its effectiveness varies across different democratic systems.

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<sup>35</sup> Fitri Maulidyah, "Penegakan Hak Konstitusional Warga Negara melalui Constitutional Complaint Perspektif Hak Asasi Manusia Menurut John Locke" (skripsi, Universitas Islam Negeri Kiai Haji Achmad Siddiq Jember, 2025)

In well-established democracies, such as the United States and several European countries, judicial review has become an integral component of constitutional governance, grounded in the principle of checks and balances. Courts possess the authority to interpret the constitution and invalidate laws that infringe upon constitutional rights. Through this function, judicial review not only upholds the rule of law but also provides a legal avenue for individuals and minority groups to challenge unjust or discriminatory policies. Numerous landmark rulings on civil rights illustrate the judiciary's role as a safeguard against the dominance of transient political majorities.

The effectiveness of judicial review is also shaped by a country's legal and political environment. In states with strong legal traditions and respect for judicial authority, judicial review tends to operate more effectively. Conversely, in systems where the rule of law is weak or judicial decisions are frequently disregarded by political authorities, the impact of judicial review may be significantly diminished. Public acceptance of judicial decisions further influences its effectiveness, particularly when rulings protecting minority rights conflict with majority opinion. This tension between constitutional protection and democratic majoritarianism remains a persistent challenge in debates surrounding judicial review.<sup>36</sup>

Ultimately, judicial review continues to play a central role in preserving constitutional rights and ensuring that state governance remains within constitutional boundaries. It functions as a critical control mechanism over state power, preventing violations of individual freedoms and safeguarding democratic order. Despite facing structural and political challenges, particularly in emerging democracies, judicial review remains a fundamental pillar of constitutional governance, reinforcing the rule of law and the core principles of democracy.

Nevertheless, the effectiveness of judicial review in Indonesia continues to face various structural and conceptual challenges. One of the primary issues lies in the limited scope of authority of the Constitutional Court, which is currently focused on reviewing statutes, while many violations of constitutional rights instead arise from concrete actions of state institutions or decisions of lower courts. This condition results in the inability of existing mechanisms to address all

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<sup>36</sup> Rahmad Satria, "Judicial Review and Its Role in Safeguarding Constitutional Rights in Modern Democracies," *Riwayat: Educational Journal of History and Humanities* Vol. X, no. Y (Tahun): 863

forms of constitutional rights violations.<sup>37</sup> Consequently, a gap emerges between the constitutional guarantees of citizens' rights and actual access to constitutional justice.

Furthermore, legislative dynamics in Indonesia reveal a tendency toward accelerated lawmaking processes that often neglect principles of constitutional prudence. Rapid legislation carries the risk of producing legal norms that are substantively and procedurally problematic, thereby increasing the potential for violations of citizens' constitutional rights.<sup>38</sup> In such circumstances, judicial review functions as the last line of defense for constitutional protection. However, without strengthening its authority and institutional design, this function cannot operate optimally.

The effectiveness of judicial review is also influenced by the relationship between the Constitutional Court and other state institutions. Within Indonesia's constitutional system, the Constitutional Court maintains a complex relationship with the legislative and executive branches. Tensions frequently arise when Constitutional Court decisions are perceived as obstructing particular political agendas. This situation places the Court under political pressure that may affect its independence and the consistency of its rulings.<sup>39</sup> Therefore, strengthening judicial review must also be understood as an effort to reinforce the institutional independence of the Constitutional Court in safeguarding constitutional supremacy.

In academic discourse, numerous studies have highlighted the importance of expanding the Constitutional Court's authority through the mechanisms of constitutional complaint and constitutional question. The constitutional complaint is viewed as an instrument that enables citizens to directly submit complaints regarding violations of constitutional rights that cannot be resolved through ordinary judicial procedures.<sup>40</sup> Meanwhile, the constitutional question allows judges in general courts to refer constitutional issues to the Constitutional Court when doubts arise concerning the constitutionality of a norm applied in

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<sup>37</sup> S. Warjiyati, K. M. Ibrahim, and S. Salam, "Complaint Authority for Constitutional Complaint by Indonesia's Constitutional Court," *Jurnal IUS Kajian Hukum dan Keadilan* 10, no. 2 (2022).

<sup>38</sup> M. Farhan and U. Rosidin, "Supremasi Konstitusi di Tengah Legislasi Cepat: Urgensi Penguatan Wewenang Mahkamah Konstitusi," *Itiqadiah* 2, no. 2 (2025).

<sup>39</sup> D. Edyson and A. B. Hasibuan, "The Role of the Constitutional Court in Maintaining Democracy and Strengthening the Rule of Law: Critical Evaluation," *Jurnal Pendidikan Amarta* 3, no. 1 (2024).

<sup>40</sup> A. F. Sakinah and S. N. Wijayanti, "Urgensi Kewenangan Constitutional Complaint dalam Penguatan Hak-Hak Konstitusional," *Media of Law and Sharia* 6, no. 1 (2024).

a particular case.<sup>41</sup> Both mechanisms are regarded as logical extensions of judicial review aimed at strengthening the protection of citizens' constitutional rights.

However, when examined more deeply through a comparative approach, the effectiveness of judicial review in Indonesia shows notable differences compared to its practice in well-established constitutional democracies such as the United States. In the United States, judicial review has developed within a strong legal culture, supported by high institutional legitimacy and consistent enforcement of court decisions, thereby reinforcing the judiciary's role as the guardian of the constitution. In contrast, in Indonesia, the effectiveness of judicial review continues to face various structural and institutional constraints, including the limited scope of the Constitutional Court's

authority and challenges in the implementation of its decisions. Moreover, while in established democracies judicial review tends to operate within a relatively stable system of checks and balances, in Indonesia this mechanism is often influenced by legal and political dynamics that may affect judicial independence. This indicates that the effectiveness of judicial review is shaped not only by constitutional design, but also by the surrounding social, legal, and political conditions.

Furthermore, unlike the practice in the United States, where judicial review can extend to various forms of governmental action through an integrated judicial system, in Indonesia the mechanism remains largely confined to the review of statutory norms. As a result, violations of constitutional rights arising from concrete actions of state institutions cannot always be adequately addressed through the existing mechanisms. This limitation reflects a gap between constitutional guarantees and their practical implementation. Therefore, further institutional development is necessary, including through the consideration of constitutional complaint and constitutional question mechanisms. Nevertheless, any expansion of authority must be carried out with caution to avoid creating new issues, such as disrupting the balance of power among state institutions and the risk of an expanded judicial role that exceeds its proper limits.

### ***1. Structural and Institutional Challenges of Judicial Review***

In Indonesia, the mechanism of judicial review is fundamentally grounded in the legal hierarchy, which stipulates that the substance of

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<sup>41</sup> J. S. Collins and P. M. Faiz, "Penambahan Kewenangan Constitutional Question di Mahkamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara," *Jurnal Hukum Prioris* 39, no. 4 (2019): 293–310.

lower-level legislation must not conflict with higher-level norms.<sup>42</sup> When such a conflict occurs, the appropriate mechanism is judicial review, whereby a statute found to be inconsistent with the 1945 Constitution of the Republic of Indonesia may be annulled by the Constitutional Court.<sup>43</sup> Accordingly, the authority of judicial review positions the Constitutional Court as a state institution responsible for ensuring that no legal provisions deviate from constitutional principles.<sup>44</sup> However, in Indonesia, the Constitutional Court is vested with only one form of constitutional review, namely the review of enacted statutes (judicial review), without accommodating the review of legislative bills (judicial preview) against the Constitution.<sup>45</sup>

The successful practice of judicial preview in Austria and France ultimately serves as a point of reflection in efforts to reconstruct the authority of the Constitutional Court in Indonesia.<sup>46</sup> Accordingly, there is a need to expand and strengthen the role of the Constitutional Court in its capacity as a negative legislator. The incorporation of judicial preview within the scope of the Court's authority is viewed as a strategic measure to reinforce the concept of a democratic state governed by law. This step also aims to institutionalize the principle of constitutional supremacy as a mandate of the reform era. Furthermore, the involvement of the Constitutional Court as part of the overall legislative process constitutes an affirmation of the checks and balances system within the framework of the separation of powers principle.

The existing practice of judicial review continues to exhibit various weaknesses, both conceptually and in its practical implementation. Judicial review has proven insufficient in accommodating the complexity of constitutional issues embedded

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<sup>42</sup> Ni'matul Huda, *Hukum Tata Negara Indonesia* (Jakarta: RajaGrafindo Persada, 2018), 145–147.

<sup>43</sup> Jimly Asshiddiqie, "Mahkamah Konstitusi sebagai Pengawal Demokrasi (The Guardian of Democracy)," *Jurnal Konstitusi* 1, no. 1 (November 2004): 5–7.

<sup>44</sup> Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Sinar Grafika, 2010), 123–125.

<sup>45</sup> M. Fadly Hasibuan and Iza Rumesten, "Reorientasi Kewenangan Judicial Review di Mahkamah Konstitusi Berdasarkan Prinsip Supremasi Konstitusi," *EKSPOSE: Jurnal Penelitian Hukum dan Pendidikan* 22, no. 2 (Desember 2023): 46–48.

<sup>46</sup> Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* (Jakarta: Konstitusi Press, 2006), 186.

within legal norms. Moreover, by adhering to the principle of judicial restraint, the Constitutional Court faces limitations in ensuring optimal access to constitutional justice for citizens' constitutional rights.<sup>47</sup> Consequently, granting the Constitutional Court the authority to review legislative bills against the Constitution (judicial preview) is regarded as an alternative solution and a strategic approach to addressing the inherent shortcomings of the current judicial review mechanism.

## **2. *Judicial Review and the Protection of Constitutional Rights***

Judicial review at the Constitutional Court is divided into two types: formal review and substantive review. Formal review focuses on the procedures involved in the enactment of legislation, whereas substantive review examines the content or substance of the law itself. Formal review aims to ensure that legislation is enacted in accordance with the prescribed procedures, while substantive review assesses whether the substance of the law is consistent with the principles enshrined in the 1945 Constitution.<sup>48</sup>

However, despite the Constitutional Court's strong authority, the implementation of its decisions continues to face significant challenges. Several studies indicate that certain state institutions have not fully complied with Constitutional Court rulings, including the Supreme Court, which may result in legal.<sup>49</sup> Therefore, strengthening law enforcement mechanisms is essential to ensure that Constitutional Court decisions are effectively implemented. Judicial review is not merely a legal procedure but also an integral part of efforts to uphold democracy and justice in Indonesia. The Constitutional Court plays a crucial role in maintaining a balance between legislative authority and the protection of individual rights, ensuring that the resulting regulations are not only legally valid but also just and aligned with humanitarian values.<sup>50</sup>

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<sup>47</sup> Rebecca E. Zietlow, "The Judicial Restraint of the Warren Court (and Why It Matters)," dalam Wicaksana Dramanda, "Menggagas Penerapan Judicial Restraint di Mahkamah Konstitusi," Jurnal Konstitusi 11, no. 4 (Desember 2014): 618.

<sup>48</sup> Wicaksono and R. M. Nugroho, "Tinjauan Yuridis Pembentukan Peraturan Perundang-Undangan sebagai Tindak Lanjut atas Putusan Pengujian Undang-Undang oleh Mahkamah Konstitusi," Ahmad Dahlan Legal Perspective 1, no. 1 (2021): 67–89

<sup>49</sup> A. R. Nata and M. R. R. Baskoro, "Analisis Dampak Putusan Hakim Mahkamah Konstitusi terhadap Putusan MK Nomor 90/PUU-XXI/2023," Sanskara Hukum dan HAM 2, no. 2 (2023): 105–117

<sup>50</sup> T. S. Kurnia, "Mahkamah Konstitusi dan Hak untuk Bebas dari Perlakuan Diskriminasi," Jurnal Konstitusi 12, no. 1 (2016): 21

The authority of judicial review also reflects the relationship among state institutions. In addition to reviewing legislation, the Constitutional Court plays a supervisory role over policies adopted by the legislative and executive branches, thereby ensuring the effective functioning of the system of checks and balances within government.<sup>51</sup> In practice, the Constitutional Court frequently handles complex and controversial cases that require thorough legal analysis. Therefore, its decisions must consistently be grounded in the law and principles of justice in order to maintain public trust.<sup>52</sup>

One of the principal impacts of judicial review is the realization of harmony between the prevailing legal system and the values embodied in the 1945 Constitution. When the Constitutional Court decides to invalidate a particular legal norm, the decision not only removes the norm from the legal system but also serves as a lesson for legislators to exercise greater caution in drafting laws in the future. This mechanism thus contributes to reducing the risk of legal conflicts or inconsistencies in the future.<sup>53</sup>

In the context of national and state life, judicial review also strengthens the principle of constitutionalism in Indonesia. Through this mechanism, every policy and action undertaken by the government and state institutions can be monitored and evaluated to ensure compliance with the Constitution. This process creates space for the public to demand governmental accountability and ensures that state power is not.<sup>54</sup> In this regard, the Constitutional Court plays a crucial role as the guardian of citizens' constitutional rights by providing protection for individuals against arbitrary actions by the state.<sup>55</sup>

### ***3. Judicial Review as a Mechanism to Limit Majority Power***

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<sup>51</sup> N. S. Darmadi, "Kedudukan dan Wewenang Mahkamah Konstitusi dalam Sistem Hukum Ketatanegaraan Indonesia," *Jurnal Hukum* 28, no. 2 (2020): 1088

<sup>52</sup> B. Bisariyadi, "Distinguishing Constitutional and Statutory Interpretation in Judicial Review Cases: A Blurred Boundary Line," *Jurnal Dinamika Hukum* 18, no. 2 (2018): 235

<sup>53</sup> M. M. B. Kushadianto and M. D. Putra, "Implikasi Hierarki Hukum dalam Pembentukan Undang-Undang: Pengaruhnya terhadap Penafsiran dan Penegakan Hukum," *Syntax Idea* 6, no. 3 (2024): 1476–1484.

<sup>54</sup> E. T. Yandy et al., "The Principle of Checks and Balances in Islamic State Administration Studies," *Jurnal Mediasas: Media Ilmu Syari'ah dan Ahwal al-Syakhsyiah* 7, no. 1 (2024): 165–183.

<sup>55</sup> E. M. Tambunan et al., "Analisis Eksistensi Etika Hakim Mahkamah Konstitusi dalam Mewujudkan Peradilan Berintegritas dan Akuntabel (Putusan MK No. 90/PUU-XXI/2023)," *IBLAM Law Review* 4, no. 2 (2024): 50–61.

The study of judicial review and its role in safeguarding constitutional rights within modern democratic systems demonstrates that this mechanism is complex yet essential for maintaining the integrity of democratic governance. Judicial review grants courts the authority to examine the constitutionality of legislation and executive actions, thereby functioning as an important oversight mechanism over legislative and governmental powers.<sup>56</sup> Its primary objective is to protect individual rights from potential governmental overreach while ensuring that all state actions remain consistent with constitutional principles.<sup>57</sup> This analysis also indicates that although judicial review is widely recognized as a crucial element in sustaining constitutional democracy, its effectiveness and implementation may vary significantly across different democratic systems.<sup>58</sup>

However, the analysis also indicates that judicial review, even within well-established democratic systems, continues to face various challenges. One of the most significant criticisms is the allegation of judicial activism, which occurs when courts are perceived to exceed their constitutional authority by issuing decisions that resemble policy-making rather than merely interpreting the law. Critics argue that in certain circumstances judicial review may disrupt the principle of separation of powers because it allows judges, who are not democratically elected, to invalidate laws enacted by legislatures chosen by the people.<sup>59</sup> This debate often arises when courts issue rulings on controversial social or political issues. In such situations, opponents contend that judicial review has the potential to weaken the will of the people as expressed through legislative institutions. Nevertheless, supporters of judicial review argue that this mechanism remains essential because it plays an important role in protecting constitutional rights that might otherwise be neglected or even violated by the majority.

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<sup>56</sup> Bisariyadi, "Judicial Review by the Constitutional Court: Judicial Activism vs Judicial Restraint," *Jurnal Konstitusi* 18, no. 2 (2021).

<sup>57</sup> M. Iqbal Yandy et al., "Judicial Review and Its Role in Safeguarding Constitutional Rights in Modern Democracies," *Riwayat: Educational Journal of History and Humanities* 7, no. 2 (2024).

<sup>58</sup> Ahmad Fauzi et al., "A Comparative Study of Judicial Review Mechanisms in Indonesia and Other ASEAN Countries," *Court Review: Jurnal Penelitian Hukum* 1, no. 1 (2023).

<sup>59</sup> Fajlurrahman Jurdi, "Finality of Indonesian Constitutional Court Decision in Regard to Judicial Review," *Jurnal Mimbar Hukum* 28, no. 3 (2016).

Judicial review plays a crucial role in safeguarding constitutional rights in modern democracies by ensuring that governmental actions remain within constitutional boundaries.<sup>60</sup> This mechanism provides essential oversight over legislative and executive powers, thereby preventing abuses of authority that may threaten individual freedoms and the democratic order. However, its effectiveness is strongly influenced by the political and legal context in which it operates. In well-established democracies, judicial review functions as a powerful instrument for the protection of rights, although it is sometimes criticized for potentially encroaching upon the legislative domain.<sup>61</sup> Meanwhile, in emerging democracies, judicial review remains an important mechanism, yet it frequently encounters challenges related to judicial independence and political interference. Despite these challenges, judicial review continues to serve as a fundamental pillar of constitutional governance, strengthening the rule of law and protecting the core values of democracy, including safeguarding individuals from arbitrary actions of the state.<sup>62</sup>

The role of judicial review in safeguarding constitutional rights becomes increasingly significant in the context of evolving social norms within society. As society develops, interpretations of what constitutes constitutional rights also change accordingly. Through the mechanism of judicial review, courts possess the authority to interpret the constitution in ways that reflect contemporary values, ensuring that constitutional protections remain relevant to societal developments. The dynamic nature of constitutional interpretation enables courts to adapt the protection of constitutional rights to emerging challenges.

Overall, the capacity of judicial review to uphold and protect constitutional rights constitutes one of the fundamental pillars of modern democratic governance. Although this mechanism is not free from criticism, its importance in maintaining the supremacy of law and safeguarding individual freedoms cannot be denied. The primary challenge for courts lies in maintaining a balance between their role as

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<sup>60</sup> M. Ali Safa'at, "Strength of Constitutional Court Decisions in Judicial Review of the 1945 Constitution in Indonesia," *Jurnal Konstitusi* 17, no. 3 (2020).

<sup>61</sup> Rahmad Hidayat, "Judicial Activism of the Constitutional Court in Rulings on the Review of Laws," *International Journal of Humanities, Education, Social Sciences* 2, no. 1 (2023).

<sup>62</sup> Arif Hidayat and Mahfud MD, "Undelivered Constitutional Justice? Study on How the Decisions of the Constitutional Court Are Executed," *Jurnal Civics* 20, no. 1 (2023).

guardians of constitutional rights and their obligation to respect legislative processes and democratic principles.

#### **4. *The Urgency of Strengthening Judicial Review Mechanisms***

The Constitutional Court is expected to safeguard and uphold constitutional and democratic values. Accordingly, its functions and roles are often conceptualized as the guardian of the constitution, the final interpreter of the constitution, the guardian of democracy, the protector of citizens' constitutional rights, and the protector of human rights.<sup>63</sup> In performing these roles, the Constitutional Court plays a strategic function in ensuring that legislative products and governmental actions remain consistent with constitutional principles and democratic values embedded in the Indonesian constitutional system.

In the process of law-making, public participation plays a crucial role. Public involvement is not only necessary to ensure a good law-making process, but also functions as an early detection mechanism for identifying potential provisions within draft legislation that may adversely affect the public.<sup>64</sup> Therefore, neglecting public participation may not only result in violations of citizens' rights but may also limit public involvement in governance as guaranteed under Article 28D paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Furthermore, from a broader interpretative perspective, restrictions on public participation may also constitute a violation of the human right to express opinions as stipulated in Article 28E paragraph (3) of the 1945 Constitution.<sup>65</sup>

Although in practice there are no directly binding legal consequences when public participation is not implemented during the deliberation of draft legislation, public aspirations should still be accommodated within the legislative process. This is important to ensure that the law-making process, as an organized and systematic activity, produces policies that genuinely reflect the broader interests of society. Within the framework of democracy, public policies should ideally be formulated by institutions that are open and accountable.

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<sup>63</sup> Salman Luthan, "Mahkamah Konstitusi sebagai Pengawal Demokrasi dan Konstitusi Khususnya dalam Menjalankan Constitutional Review," *Administrative Law & Governance Journal* 2, no. 2 (2019).

<sup>64</sup> Enny Nurbaningsih, "Judicial Preview sebagai Mekanisme Verifikasi Konstitusionalitas Rancangan Undang-Undang," *Jurnal Konstitusi* 13, no. 3 (2016).

<sup>65</sup> Ni'matul Huda, "Partisipasi Publik dalam Pembentukan Peraturan Perundang-Undangan," *Jurnal Konstitusi* 9, no. 1 (2012).

Through transparent and responsible processes, legislative outcomes are expected to achieve enforceability, adequacy, and implementability in the resulting legislation.

Philosophically, the authority and legitimacy of the Constitutional Court's decisions are grounded in two fundamental principles: the principle of popular sovereignty and the principle of constitutional supremacy.<sup>66</sup> The principle of popular sovereignty emphasizes that the ultimate source of state power resides in the people, thereby requiring the Constitutional Court to consider public aspirations when exercising its powers and functions. Meanwhile, the principle of constitutional supremacy affirms that the constitution constitutes the highest law of the state, meaning that all governmental policies and actions must conform to constitutional values and principles. In addition, the Constitutional Court must also consider the values of Pancasila as the ideological foundation of the state, as well as the spirit of the 1945 Constitution, which should be interpreted dynamically and progressively in accordance with the evolving social and political conditions of society.<sup>67</sup>

Within the development of Indonesia's constitutional system, there has also emerged a discourse concerning the urgency of implementing a judicial preview mechanism by the Constitutional Court to assess the constitutionality of draft legislation prior to its enactment. The mechanism of judicial preview is viewed as a potential extension of the Court's authority aimed at preventing the enactment of laws that may conflict with the constitution. This concept aligns with the institutional role of the Constitutional Court of the Republic of Indonesia, which functions not only as the interpreter of the constitution but also as the guardian of the constitution in strengthening the process of sustainable democratization.

Furthermore, strengthening the mechanism of constitutional review is also crucial for improving the quality of legislative formation in Indonesia. The existing mechanism of judicial review, which is conducted after a law has come into force, tends to be reactive in nature, as the review can only be initiated once the legal norm has produced legal consequences within society. Therefore, reinforcing the mechanism of constitutional review at the stage of drafting legislation is considered a preventive measure to ensure that every legislative

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<sup>66</sup> Fajlurrahman Jurdi, "Finality of Indonesian Constitutional Court Decision in Regard to Judicial Review," *Mimbar Hukum* 28, no. 3 (2016).

<sup>67</sup> Bisariyadi, "Judicial Review by the Constitutional Court: Judicial Activism vs Judicial Restraint," *Jurnal Konstitusi* 18, no. 2 (2021).

product is consistent with constitutional principles and does not conflict with the constitutional rights of citizens.<sup>68</sup>

From the perspective of a democratic rule-of-law state, the existence of a strong constitutional review mechanism also constitutes an essential component of the system of checks and balances among state institutions. Through this authority, the Constitutional Court functions not only as a body that reviews the constitutionality of laws but also as an institution that ensures the legislative process remains within the constitutional framework while respecting democratic values and the protection of human rights.<sup>69</sup>

## D. Conclusion

Conceptually, judicial review is a fundamental mechanism in a constitutional democracy, serving to uphold the supremacy of the constitution while also restraining the exercise of state power so that it remains within legal boundaries. In the Indonesian context, the authority of judicial review exercised by the Constitutional Court functions not only as a tool for reviewing legal norms, but also as an instrument for maintaining checks and balances among state institutions and protecting citizens' constitutional rights. Thus, judicial review should be understood not merely as a formal legal procedure, but as a normative instrument that ensures democratic practices are carried out in accordance with constitutional principles.

Within the framework of constitutional democracy, judicial review also plays a strategic role in limiting majority dominance. The will of the majority in a democratic system cannot be exercised absolutely without constitutional constraints. Through this mechanism, the judiciary is empowered to review and invalidate legal norms that conflict with the constitution or that potentially violate the rights of individuals or minority groups. Therefore, judicial review serves as a bridge between the principle of popular sovereignty and the protection of human rights.

However, the implementation of judicial review in Indonesia still encounters various structural and institutional challenges, such as the

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<sup>68</sup> Enny Nurbaningsih, "Judicial Preview sebagai Mekanisme Verifikasi Konstitusionalitas Rancangan Undang-Undang," *Jurnal Konstitusi* 13, no. 3 (2016)

<sup>69</sup> Salman Luthan, "Mahkamah Konstitusi sebagai Pengawal Demokrasi dan Konstitusi Khususnya dalam Menjalankan Constitutional Review," *Administrative Law & Governance Journal* 2, no. 2 (2019)

limited scope of review authority and the dynamics of law-making that are not yet fully aligned with constitutional principles. This condition indicates an urgent need to strengthen the judicial review mechanism in a more comprehensive manner. The development of instruments such as constitutional complaint, constitutional question, and judicial preview becomes important as an effort to expand access to constitutional rights protection while also improving the quality of the legislative process.

In terms of its contribution to constitutional theory, this study highlights that judicial review in modern democratic development is no longer static, but has evolved from merely acting as a negative legislator into a more progressive mechanism for the protection of constitutional rights. Furthermore, it enriches the perspective that constitutional protection should not only focus on the present generation, but must also take into account sustainability for future generations. Accordingly, judicial review is positioned not only as an instrument for maintaining consistency within the hierarchy of legal norms, but also as an adaptive tool in addressing the complexities of modern democratic challenges.

Ultimately, strengthening judicial review constitutes a strategic step in consolidating constitutional democracy in Indonesia. By reinforcing the role of the Constitutional Court as the guardian of the constitution, this mechanism is expected to ensure the continued supremacy of the constitution, prevent the abuse of power, and guarantee that governance is carried out in accordance with the principles of justice, human rights protection, and the rule of law.

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### **Acknowledgment**

None.

### **Funding Information**

None.

### **Conflicting Interest Statement**

None.

### **Publishing Ethical and Originality Statement**

None.

### **Generative AI Statement**

None.