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Is the Legislator in the Constitutional Court? Examining the Tension Between Judiciary and Democracy in Indonesia

Labib Muttaqin [a], Andy Omara [a], Sudjito Atmoredjo [a], M Fikri AR [b]

[a] Faculty of Law, Universitas Gadjah Mada, Yogyakarta, Indonesia
[b] Department of Communication Sciences, Sakarya University, Türkiye

Corresponding email: *labibmuttaqin@mail.ugm.ac.id*

Abstract

In cases of judicial review, the extension of the Constitutional Court's authority from negative to positive legislators contests the potential conflicts with democratic institutions, particularly parliament and the government. This study aims to analyze four key aspects: the legitimacy of the Constitutional Court in making Positive Legislature decisions, the conflicts that emerge between democratic institutions and the Constitutional Court due to the issuance of positive legislature decisions, Constitutional Courts as positive legislators in a comparative study, and the efforts undertaken to resolve conflicts. The research utilized a doctrinal legal research method, relying on secondary data gathered across literature pieces and analyzed qualitatively. The findings reveal that the Constitutional Court's decision to take on a positive legislator role has sparked conflicts between the courts and democratic institutions in Indonesia. This conflict was exemplified when parliament and the government withstand Constitutional Court Decision No. 91/PPUU-XVIII/2020, which declared certain provisions of Law No. 11 of 2020 on Job Creation somehow

conditionally unconstitutional. Viewed from a global perspective, the Constitutional Court's role as a positive legislator also challenges democracy issues in many countries. To mitigate such conflicts, it is crucial to establish a mutual understanding among the Constitutional Court, parliament, and the government regarding the guidelines that the Constitutional Court should follow while making positive legislature decisions and the implementation by parliament and the President.

KEYWORDS *Constitutional Court, Judicial Review, Positive Legislator, Democracy*

Introduction

The establishment of the Constitutional Court of the Republic of Indonesia in 2003 has engendered a specific discourse and brought forth a novel dimension in the domain of law and the Constitution of Indonesia.[1] Through the exercise of one of its authorities, namely judicial review (evaluating laws in conformity with the 1945 Constitution of Indonesia), the Constitutional Court assumes the responsibility of supervising national legal politics to avert any provisions of the law that violate the constitutional framework.[2] In essence, all enacted laws must be consistent with, appropriate to, and not contradictory to the Constitution. The Constitution's recognition as the supreme legal basis forms the bedrock for designating the Constitutional Court as the preserver of the Constitution and, concurrently, its ultimate interpreter.[3]

Initially, the Constitutional Court used to have only three decision models in judicial review applications: (i) Dismissing the application if the applicant failed to substantiate and persuade the judge of their argument asserting that the law subject to review conflicted with the Constitution; (ii) Declaring the application inadmissible, if the court deemed the application to suffer from a

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1 Hendrianto, "From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003-2008," *Bulletin of Indonesian Economic Studies* 47, no. 2 (2011): 279 – 280, https://doi.org/10.1080/00074918.2011.585955.

2 Theunis Roux, "Indonesia's Judicial Review Regime in Comparative Perspective," *Constitutional Review* 4, no. 2 (2018): 188 – 221, https://doi.org/10.31078/consrev422.

3 Fritz Edwadr Siregar, "Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)," *Constitutional Review* 1, no. 1 (2015): 1–27, https://doi.org/10.31078/consrev111.

formal defect or non-compliance with the formal conditions for submission; and (iii) Granting the application if the applicant successfully proved and convinced the judge that the law under review was in fact contrary to the Constitution.[4]

In cases where the court's decision grants the application, it takes the role of a negative legislator, rendering laws enacted by legislative institutions null and void.[5] As per Hans Kelsen, the negative legislator represents the judicial system's authority to supersede and invalidate laws that blatantly contravene the Constitution. In, "General Theory of Law and State," Hans Kelsen posited unequivocally that the judicial system is solely authorized to revoke a law or declare it unenforceable.[6]

As a negative legislator, the Constitutional Court is often distinguished as a counter-majoritarian institution.[7] This label ensues from the fact that members of Parliament (the House of Representatives of the Republic of Indonesia) and the Government (the President of the Republic of Indonesia) are elected by a majority of the electorate during general elections. The decisions of the Constitutional Court, which establish certain boundaries, may clash with the directives of parliament and the legislature within a democratic framework.[8] On one hand, the government and parliament possess the authority to enact legislation, while on the other hand, the Constitutional Court holds the power to invalidate laws established by both of these institutions.[9] The pronouncements of the Indonesian Constitutional Court are final and binding, being deemed conclusive and obligatory. Once a decision is rendered, it immediately attains legal validity, negating the need for any further legal

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4 Muhammad Siddiq Armia et al., "Post Amendment of Judicial Review in Indonesia: Has Judicial Power Distributed Fairly?," *Journal of Indonesian Legal Studies* 7, no. 2 (2022): 525 – 556, https://doi.org/10.15294/jils.v7i2.56335.

5 Paul Yowell, "The Negative Legislator: On Kelsen's Idea of a Constitutional Court," in *Courts, Politics and Constitutional Law* (Routledge, 2019), 125–51, https://doi.org/10.4324/9780429297069-8.

6 Hans Kelsen, *General Theory of Law and State*, *General Theory of Law and State* (New York: Russsel & Russel, 2017), https://doi.org/10.4324/9780203790960.

7 Luís Roberto Barroso, "Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies†," *American Journal of Comparative Law* 67, no. 1 (2019): 109–43, https://doi.org/10.1093/ajcl/avz009.

8 Anna Gamper, "Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters," *Cambridge International Law Journal* 4, no. 2 (2015): 423–40, https://doi.org/10.4337/cilj.2015.02.12.

9 Andy Omara, "The Indonesian Constitutional Court and the Democratic Institutions in Judicial Review," *Constitutional Review* 3, no. 2 (2018): 189, https://doi.org/10.31078/consrev323.

recourse. In essence, no body – legislative or executive – is empowered to contest the rulings of the Constitutional Court. Rather, all are compelled to abide by its judgments without exception.[10]

The designation of the Indonesian Constitutional Court as a counter-majoritarian institution gains further fortification as the court embarks on an expansion of its jurisdiction, transcending its role as a negative legislator and assuming the mantle of a positive legislator.[11] Functioning as a positive legislator in the context of rendering decisions in judicial review cases, not only does the Constitutional Court nullify already-existing regulations but also goes above and beyond its purview by instituting or amending them.[12] The amplification of the Constitutional Court's role as a positive legislator is exemplified through the Court's formulation of two distinct decision paradigms it has developed, which it has dubbed as conditional constitutionality and conditional unconstitutionality.[13] In its essence, these twin modes of adjudication lay forth the prerequisites that must be satisfied for a legal provision to retain its constitutionality. Stated differently, the Constitutional Court has erected fresh benchmarks – that is, requirement – that the government and parliament must satisfice to guarantee that the laws they enact are consistent with the parameters of the Constitution.[14]

TABLE 1. Various Indonesian Constitutional Court Decisions

Type of Decision	Description	Character of Decision
Application Dismissed	The ruling asserts that the petitioner has not succeeded in substantiating the alleged contravention of the	Justified Legislator (*The law is declared constitutional*)

[10] Sholahuddin Al-Fatih and Asrul Ibrahim, "Does the Constitutional Court on Local Election Responsive Decisions?," *Journal of Human Rights, Culture and Legal System* 3, no. 3 (2023): 569–96, https://doi.org/https://doi.org/10.53955/jhcls.v3i3.74.

[11] Simon Butt, *The Indonesian Constitutional Court: Implying Rights from the 'Rule of Law,' The Invisible Constitution in Comparative Perspective*, 2018, https://doi.org/10.1017/9781108277914.010.

[12] Luthfi Widagdo Eddyono, "Independence of the Indonesian Constitutional Court in Norms and Practices," *Constitutional Review* 3, no. 1 (2017): 71 – 97, https://doi.org/10.31078/consrev314.

[13] Mirza Karim, "A Controversial Decision of the Constitutional Court on the Indonesian Oil and Gas Law," *Journal of World Energy Law and Business* 6, no. 3 (2013): 260 – 263, https://doi.org/10.1093/jwelb/jwt006.

[14] Heribertus Jaka Triyana, "The Role of the Indonesian Constitutional Court for An Effective Economic, Social and Cultural Rights Adjudication," *Constitutional Review* 1, no. 1 (2015): 72 – 102, https://doi.org/10.31078/consrev114.

Type of Decision	Description	Character of Decision
	Constitution by the challenged law	
Application Not Accepted	The ruling underscores that the submitted application has not adhered to the established procedural framework	
Application Granted	The ruling affirms that the petitioner has convincingly demonstrated the incompatibility of the contested law with the Constitution. Consequently, the Constitutional Court pronounces the law as unconstitutional, rendering it devoid of legal validity	Negative Legislator (*The law is declared void and unconstitutional*)
Law declared conditionally constitutional	The ruling specifies that the subject matter of the judicial review attains constitutional status solely when it conforms to the criteria stipulated in the Constitutional Court's decision	Positive Legislator (*The law must be revised under certain conditions to remain constitutional*)
Law declared conditionally unconstitutional	The ruling delineates that the content of the judicial review is adjudged unconstitutional if specific conditions mandated by the Constitutional Court remain unfulfilled	

According to Article 56 of Law Number 24 of 2003 on the Constitutional Court, the Constitutional Court may render judgment in a variety of formats. These include decisions declaring that the application cannot be accepted, decisions declaring that it is approved, and decisions declaring that the application is rejected. Nevertheless, the Constitutional Court has examined of legislative products in great detail to ensure that the norms or laws under review adhere to constitutional requirements. Decisions made by the Constitutional Court offer interpretations that serve as instructions, guidelines, and even establish new norms.[15] These decisions can be classified as conditionally constitutional or conditionally unconstitutional. When the interpretation set by

[15] Askari Razak et al., "Balancing Civil and Political Rights: Constitutional Court Powers in Indonesia and Austria," *Journal of Indonesian Legal Studies* 8, no. 2 (2023): 1311 – 1360, https://doi.org/10.15294/jils.v8i2.70717.

the Constitutional Court is adhered to, a norm or law is considered constitutional. However, if the interpretation set by the Constitutional Court is defied, a legal norm or law is deemed unconstitutional and needs to be proclaimed to be against the Constitution and lacks legal standing.

The conditional decision was first presented in the Constitutional Court Decision Number 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005, which pertained to the examination of Law Number 7 of 2004 on Water Resources.[16] The MK's ruling emphasized how crucial it is to adhere to legal considerations outlined by the Government in the implementation of the Natural Resources Law, ensuring its constitutionality. This decision also sparked a heated debate, as the Court acknowledged the potential for reinterpretation of the law in question if it diverged from its original objective, leaving open option of a constitutional review. The aforementioned decision has provoked significant discourse within the legal community due to its possible ramifications.[17] It allows for the prospect of revisiting previously examined provisions within a statute that has already been ruled upon by the Constitutional Court.

Functioning as a positive legislator, the Constitutional Court not only seize the role of a counter-majoritarian institution but also juxtaposes itself within the legislative process as a distinct third chamber, beneath both parliament and the government.[18] As articulated by Stephen Gardbaum, this circumstance has placed the court in a stance of judicial supremacy, particularly when considering the lens of the theory of separation of powers delineating the executive, legislative, and judicial branches. The establishment of such inter-institutional dynamics frequently incites friction, notably when both the parliamentary (legislative) and governmental (executive) entities exhibit hesitance in complying with, or even openly contesting, the rulings of the Constitutional Court.[19]

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[16] Syukri Asy'ari, Meyrinda Rahmawaty Hilipito, and Mohammad Mahrus Ali, "Model Dan Implementasi Putusan Mahkamah Konstitusi Dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003-2012)," *Jurnal Konstitusi* 10, no. 4 (2016): 675, https://doi.org/10.31078/jk1046.

[17] Ahmad Redi, "Dinamika Konsepsi Penguasaan Negara Atas Sumber Daya Alam," *Jurnal Konstitusi* 12, no. 2 (2016): 401, https://doi.org/10.31078/jk12210.

[18] Vicki C. Jackson, "Constitutional Comparisons: Convergence, Resistance, Engagement," *Harvard Law Review* 119, no. 1 (2005): 109–28, http://www.jstor.org/stable/4093561.

[19] Stephen Gardbaum, "American Society of Comparative Law The New Commonwealth Model of Constitutionalism," *The American Journal of Comparative Law* 49, no. 4 (2015): 707–60, https://doi.org/10.2139/ssrn.302401.

The divergence in compliance exhibited by parliament and the government in response to the Constitutional Court's rulings is not devoid of rationale. Alexander Bickel, a law professor at Yale Law School, developed the concept of "counter-majoritarian difficulty."[20] This term serves to elucidate the notion that the resistance of the legislative and executive branches to the Constitutional Court's Judicial Review Authority is comprehensible. This perspective occurs due to the fact that both parliament and the government (the president), as democratic institutions elected by the populace, encounter a hindrance in embracing the idea that laws formulated by their democratic mandate could be overturned or amended by judges who do not derive their authority through popular election.[21]

In an exploration of the counter-majoritarian difficulty within the Indonesian context, this paper endeavors to dissect the Constitutional Court's role as a positive legislator, with a specific focus on Constitutional Court Decision No. 91/PUU-XVIII/2020. This particular ruling declared Law No. 11 of 2020 on Job Creation conditionally unconstitutional, prompting a notable backlash from the government and parliament. These entities collaborated in an effort to reinstate the Job Creation law, which had been found to contravene the directives of the Constitutional Court.[22]

Guided by the aforementioned context, the primary objective of this paper is to address the pivotal challenges resulting from the conflicts between the Constitutional Court, parliament, and the government in the realm of rule establishment. The core inquiries that necessitate resolution in this study encompass the following: What is the legitimization and rationale underlying the Constitutional Court's power to render decisions as positive legislators? How does the outcome of a positive legislature decision engender discord between the legislative and executive branches? Furthermore, how can such conflicts amongst these institutions be effectively mitigated and resolved?

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[20] Joseph Landau, "New Majoritarian Constitutionalism," *Iowa Law Review* 103, no. 3 (2018): 1033 – 1092, https://www.scopus.com/inward/record.uri?eid=2-s2.0-85046150462&partnerID=40&md5=3c1b921781605fd2e61a4c52055fb2ee.

[21] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, *The Yale Law Journal*, vol. 75 (Yale University Press, 1986), https://doi.org/10.2307/794870.

[22] Lelisari et al., "Implications of The Constitutional Court Decision Number 91/PUU-XVIII/2020 Toward Job Creation Law in The Mineral and Coal Mining Sector," *Jurnal IUS Kajian Hukum Dan Keadilan* 10, no. 3 (2022): 555 – 570, https://doi.org/10.29303/ius.v10i3.1132.

Constitutional Court: From Negative Legislators to Positive Legislators

The Constitutional Court of the Republic of Indonesia was established as a result of the third amendment to the 1945 Constitution on November 9, 2001, as part of constitutional reforms following the late 1990s political crisis to strengthen the legal system and democracy in Indonesia. In order to execute the constitutional mandate, on August 13, 2003, the government and the parliament enacted Law Number 24 of 2003, specifically regulating the institutional framework of the Constitutional Court. It is this date, August 13, 2003, that was later agreed upon by the constitutional judges to be the birthday of the Constitutional Court of the Republic of Indonesia. Indonesia is the 78th country to establish a constitutional court and also the first country in the world to establish such an institution in the 21st century.[23]

Article 24C of the 1945 Constitution gives the Constitutional Court vital authority to defend Indonesian democracy. This article authorizes the Court to guarantee that government and parliament laws do not violate legal subjects' constitutional rights under the 1945 Constitution. The Court also resolves general election issues to preserve democracy, fairness, and transparency. To avert constitutional disruptions, the Court can resolve conflicts of jurisdiction between state institutions and dissolve political parties with unconstitutional ideas, policies, and activities. Furthermore, the Court must also rule on parliament's opinions on president and vice president constitutional infractions. Decision Number 138/PUU-VII/2009 gave the Constitutional Court the power to assess Government Regulation in Lieu of Law. This represents how the Court protects the constitution and upholds democratic legislation.[24] Decision Number 85/PUU-XX/2022 expanded the Court's power to permanently decide regional election disputes (regents, mayors, and governors), strengthening its position as a democracy defender.[25] With these various

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[23] Simon Butt, "Establishment of the Constitutional Court," in *The Constitutional Court and Democracy in Indonesia* (Brill Nijhoff, 2015), 9–33, https://doi.org/10.1163/9789004250598_003.

[24] Angky Ayah Natalian Oktavianus, "Kewenangan Mahkamah Konstitusi Dalam Menguji Peraturan Pemerintah Pengganti Undang-Undang Ditinjau Dari Perspektif Negara Konstitusional," *Jurnal Paris Langkis* 2, no. 2 (2022): 41–50, https://doi.org/10.37304/paris.v2i2.3669.

[25] Baharuddin Riqiey, "Kewenangan Mahkamah Konstitusi Dalam Memutus Perselisihan Hasil Sengketa Pilkada Pasca Putusan Mahkamah Konstitusi Nomor 85/PUU-

authorities, the Court plays a vital role in maintaining the integrity of the legal system and democracy in Indonesia, guaranteeing the protection of citizens' constitutional rights and the appropriate upholding of democratic principles.

In democratic nations, constitutionalism stands as an inviolable tenet. Gordon Scott elucidates that constitutionalism is a guiding principle underscoring the necessity for circumscribing governmental authority, thereby averting arbitrary or authoritarian exercise of state power.[26] In terms of the Constitutional Court's oversight over legislative outputs, the crafting of laws within Indonesia is attributed to two separate entities: the parliament and the president (government). Despite these figures being elected by the populace, there exists no assured guarantee that the laws they formulate will always be in the best interest of the public. Since its establishment in 2003 until 2025, the Constitutional Court has accepted 1,979 applications for judicial review from the citizenry. Out of these, 1940 applications have been duly resolved. More details can be observed in the table provided below:[27]

TABLE 2. Recapitulation of Judicial Review Cases 2003 – 2025

Year	Previous year's cases	Registered case this year	Court Decisions					Decision Recap
			Granted	Reject	Not Accepted	Retract	Dismissed	
2003	0	24	0	0	3	1	0	4
2004	20	27	11	10	10	4	0	35
2005	12	25	10	14	4	0	0	28
2006	9	27	8	8	11	2	0	29
2007	7	30	4	11	7	4	0	26
2008	11	36	10	12	7	6	0	35
2009	12	78	15	17	12	7	0	51
2010	39	81	19	21	15	5	1	61
2011	59	86	21	30	34	9	0	94
2012	51	118	30	32	28	5	2	97
2013	72	109	22	52	23	12	1	110
2014	71	140	29	42	37	17	6	131
2015	80	140	25	51	62	15	4	157
2016	63	111	19	34	31	9	3	96
2017	78	102	22	48	45	12	4	131
2018	49	102	15	45	46	7	1	114
2019	37	85	4	49	29	8	2	92

XX/2022," *Japhtn-Han* 2, no. 1 (2023): 109–24, https://doi.org/10.55292/japhtnhan.v2i1.59.

[26] Madhav Khosla and Mark Tushnet, "Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry," *American Journal of Comparative Law* 70, no. 1 (2022): 95 – 138, https://doi.org/10.1093/ajcl/avac009.

[27] MKRI, "Rekapitulasi Perkara Pengujian Undang-Undang," 2025, https://www.mkri.id/index.php?page=web.Perkara2&menu=4.

Year	Previous year's cases	Registered case this year	Court Decisions					Decision Recap
			Granted	Reject	Not Accepted	Retract	Dismissed	
2020	30	109	3	29	43	14	0	89
2021	50	71	14	44	30	11	0	99
2022	22	121	15	53	37	18	1	124
2023	19	168	13	57	41	25	0	136
2024	51	189	18	77	31	22	8	158
2025	82	0	11	17	12	3	0	43
Total	924	**1979**	338	753	598	216	33	**1940**

The table above illustrates that the number of cases filed increased significantly from the Constitutional Court's founding to January 2025. In 2003, 24 cases were handled. The Constitutional Court heard 189 cases in 2024, an 8-fold increase. This suggests that laws intended to increase the welfare of the people can instead impair their fundamental rights. Thus, the Constitutional Court is essential to preserving citizens' constitutional rights against lawmaking.

The introductory section has expounded upon the Constitutional Court of Indonesia's initial function confined to that of a negative legislator. This entails the approval of applications in judicial review cases wherein a particular article within a law is found to be contradictory to the Constitution, consequently rendering it devoid of legal binding. However, driven by the intricacies of complex cases, the Constitutional Court has begun to shift its status from that of a negative legislator to one of a positive legislator.[28] In its capacity as a positive legislator, the Constitutional Court emerges as a judicatory entity endowed with legislative power. This authority is demonstrated through its aptness to render decisions that substantively alter the reviewed norms and even draft entirely new ones.[29]

The expansion of the Constitutional Court's role as a positive legislator is evidently demonstrated through its formulation of distinct decision models. These models, namely conditional constitutionality and conditional unconstitutionality, represent a significant evolution of their functions.[30]

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[28] Herlambang P Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics," *Federal Law Review* 50, no. 3 (2022): 314 – 330, https://doi.org/10.1177/0067205X221107404.

[29] Erik Láštic and Max Steuer, "The Slovak Constitutional Court: The Third Legislator?," *Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe*, 2018, 184–212, https://doi.org/10.4324/9780429467097-8.

[30] Mirza Satria Buana, "Legal-Political Paradigm of Indonesian Constitutional Court: Defending a Principled Instrumentalist Court," *Constitutional Review* 6, no. 1 (2020): 36 – 66, https://doi.org/10.31078/consrev612.

Provided below are instances of decisions made by the Indonesian Constitutional Court that embody both of these aforementioned models:

a) Conditionally Constitutional: A piece of material up for judicial review attains constitutionality only if it satisfies the conditions stipulated by the Constitutional Court's decision.[31] An illustrative example of this model is provided by Constitutional Court Decision No. 112/PPUU-XX/2022. The case pertained to Article 34 of Law No. 30 of 2002, on the Corruption Eradication Commission. The Constitutional Court determined that the clause specifying the chairman's tenure as four years contradicted conditional constitutionality. In its verdict, the Court imposed an interpretation that the chairman's tenure is five years, with eligibility for re-election restricted to a single term. This instance underscores the Constitutional Court's role as a positive legislator. It proves that the established tenure for the chairman of the Corruption Eradication Commission, originally approved for four years through parliamentary and governmental endorsement, was subsequently redrafted by the Constitutional Court's ruling to a five-year term.[32]
b) Conditionally Unconstitutional: The decision establishes that the substance subject to judicial review is deemed unconstitutional if specific conditions, as delineated by the Constitutional Court, remain unfulfilled.[33] A representative instance of this model is encapsulated in Constitutional Court Decision No. 46/PUU/VIII/2010. The Court's verdict is relevant to Article 43, Section (1) of Law No. 1 of 1974, stipulating that a child born out of wedlock solely maintains a civil affiliation with the mother and the maternal family. The Constitutional Court held that this provision violates conditional constitutionality, under the interpretation that it should be expanded to encompass cases in which a legally mandated civil relationship with the father could be established through scientific, technological, or other evidential means, as sanctioned by the law. Within this context, the

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[31] Muchamad Safa'at and Aan Widiarto, "Conditional Decisions as Instrument Guarding the Supremacy of the Constitution (Analysis of Conditional Decisions of Indonesian Constitutional Court in 2003 – 2017)," *Brawijaya Law Journal* 8, no. 1 (2021): 91–112, https://doi.org/10.21776/ub.blj.2021.008.01.06.

[32] Suparman Marzuki, "Assessing the Conformity of Human Rights Paradigm in Indonesian Legislation and the Rulings of the Constitutional Court," *Academic Journal of Interdisciplinary Studies* 12, no. 4 (2023): 239 – 247, https://doi.org/10.36941/ajis-2023-0110.

[33] Mark Cammack, *Legal Certainty in the Indonesian Constitutional Court: A Critique and Friendly Suggestion*, *Constitutional Democracy in Indonesia*, 2023, https://doi.org/10.1093/oso/9780192870681.003.0014.

Constitutional Court takes on the role of a positive legislator. Meanwhile, the Marriage Law originally prescribed that a child born out of wedlock maintains a civil relationship solely with the mother, the Constitutional Court's decision expands this interpretation, permitting a civil relationship with the father if supported by scientific or medical evidence corroborating a biological connection between the child and the father.[34] This amplification in meaning serves as compelling evidence that, in this specific instance, the Constitutional Court has introduced supplementary norms through its judicial review.

It is clear from the conducted research that out of the 1,940 judicial review decisions rendered by the Constitutional Court, 10% or 205 decisions were positive legislature decisions. Furthermore, out of the total of 205 favorable positive legislator decisions that were analyzed, they were further categorized into two distinct groups. Specifically, 18 decisions were deemed conditionally constitutional, while the remaining 187 decisions were classified as conditionally unconstitutional. The table below displays data of the quantity of positive legislature decisions:

TABLE 3. Positive Legislature Decision of the Indonesian Constitutional Court 2003–2025[35]

Years	Conditionally Constitutional	Conditionally Unconstitutional	Total
2003	0	0	0
2004	0	0	0
2005	1	0	1
2006	2	2	4
2007	1	1	2
2008	4	0	4
2009	4	4	8
2010	4	4	8
2011	0	9	9
2012	1	16	17
2013	0	13	13
2014	0	19	19
2015	0	18	18
2016	0	12	12
2017	0	17	17

[34] Ardian Arista Wardana, "Pengakuan Anak Di Luar Nikah: Tinjauan Yuridis Tentang Status Anak Di Luar Nikah," *Jurnal Jurisprudence* 6, no. 2 (2017): 160, https://doi.org/10.23917/jurisprudence.v6i2.3013.

[35] The data analyzed by the author originates from MKRI, "Rekapitulasi Perkara Pengujian Undang-Undang."

Years	Conditionally Constitutional	Conditionally Unconstitutional	Total
2018	0	9	9
2019	0	4	4
2020	0	3	3
2021	0	9	9
2022	0	10	10
2023	0	11	11
2024	1	17	18
2025	0	9	9
Total	**18**	**187**	**205**

The Constitutional Court's function as a positive legislator has generated diverse discourses within the realm of legal practitioners and academia. Mahfud MD, who served as the Chairman of the Indonesian Constitutional Court from 2008 to 2013, formulated a set of ten prohibitions that the Court must heed. Among these restrictions, one assertion emphasises that the Court is proscribed from issuing predetermined decisions. Such decisions, for instance, must not entail a mere annulment lacking the necessary specification of provisions, procedures, and entities mandated to reconstitute the invalidated legal framework. Mahfud MD's stance is rooted in the knowledge that the domain of regulation fundamentally falls within the purview of the legislative sphere.[36] Hence, the Constitutional Court is exclusively authorised to declare the constitutional or unconstitutional nature of a law or its components, alongside a corresponding statement that the said ruling does not grant any legally enforceable rights.

In her doctoral dissertation titled "Challenges Arising from the Constitutional Court's Decisions with Positive Legislative Implications," Martitah puts forth the argument that the initial intent behind the establishment of the Constitutional Court was centred around the nullification of norms, rather than their creation. Nonetheless, Martitah expounds that a certain "*ratio legis*" underpins the Constitutional Court's evolution into a positive Constitutional legislator. Drawing from her research, she concludes that the Court's decisions now have a proactive legislative role. This newly established position prioritises justice over merely following the law, thereby leading to innovative legal solutions that bridge gaps between the law and

[36] Moh. Mahfud MD, "Rambu Pembatas Dan Perluasan Kewenangan Mahkamah Konstitusi," *Jurnal Hukum Ius Quia Iustum* 16, no. 4 (2009): 441–62, https://doi.org/10.20885/iustum.vol16.iss4.art1.

societal evolution. Consequently, these decisions contribute to breaking through legal impasse, thus facilitating the attainment of substantive justice.[37]

Furthermore, Mahfud MD himself acknowledged that the constraints he proposed may not always hold true and be steadfast. Over time, evolving circumstances and legal proceedings have led to the erosion of certain restrictions, including the capacity for positive legislator decisions aimed at fostering substantive justice.[38] In the same vein, Steamer and Wolfe claim that a comparable shift from a negative legislator to a positive legislator has also similarly undergone a transformation in the United States Supreme Court. This change is explained by the Constitution's ingrained "judge-made law" idea becoming strengthened. This adaptation results from frequent disparities – both vertically and horizontally – between legislative enactments and the ever-evolving societal and legal norms.[39] Consequently, judges find themselves entrusted with a proactive stance in interpreting the constitution, an approach often termed "judicial activism." This unavoidably transgresses the boundaries of standardized interpretation, referred to as "judicial restraint.[40]

The discourse around judicial activity versus judicial restraint is crucial for comprehending the judiciary's function in democratic regimes, particularly Indonesia. Judicial activism denotes an approach wherein judges actively interpret the law and constitution to attain substantive justice and safeguard individual rights, potentially by nullifying or modifying laws perceived as inconsistent with democratic principles and human rights. Judicial activism may be contentious if the Court's actions excessively intrude into democratic institutions (government and Parliament). Radian Salman contends that overly proactive judges may compromise the idea of separation of powers and engender legal confusion. The Constitutional Court's role as a positive legislature is often associated with judicial activism.[41]

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[37] Martitah, *Mahkamah Konstitusi Dari Negative Legislature Ke Positive Lagislature ?* (Jakarta: Konstitusi Press, 2013).

[38] Stefanus Hendrianto, *The Indonesian Constitutional Court and Informal Constitutional Change*, *Constitutional Democracy in Indonesia*, 2023, https://doi.org/10.1093/oso/9780192870681.003.0011.

[39] Robert J. Steamer and Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law.*, *Political Science Quarterly*, vol. 102 (Maryland: Rowman & Littlefield, 1987), https://doi.org/10.2307/2151497.

[40] Louis Blom-Cooper, *The Scope of Judicial Review and the Rule of Law: Between Judicial Restraint and Judicial Activism*, *The Culture of Judicial Independence: Rule of Law and World Peace*, 2014, https://doi.org/10.1163/9789004257818_013.

[41] Radian Salman, "Judicial Activism or Self-Restraint: Some Insight Into the Indonesian Constitutional Court," in *Advances in Social Science, Education and Humanities Research*

Conversely, judicial restraint emphasises that judges should be more cautious and respectful of their authority, giving the legislative and executive institutions of government elected by the people more space. Judicial restraint in Indonesia keeps critical decisions in the hands of elected institutions, maintaining legal and political stability. It can also avert judicial-executive-legislative conflicts and uphold separation of powers. However, according to Ariel L. Bendor, judicial restraint makes the judiciary appear inactive and gives the legislature and administration excessive power, which may not operate in the public interest.[42] Thus, human rights and democracy are neglected. Judicial restraint is primarily associated with the Constitutional Court's role as a negative legislature. The discourse around judicial activism (positive legislature) vs. judicial restraint (negative legislature) illustrates the inherent contradiction in balancing the safeguarding of human rights and democracy with the preservation of the stability and sustainability of the legal and political framework. In Indonesia, these two approaches must be meticulously examined to strike the right balance in the pursuit of democratic values.

Therefore, the Constitutional Court must exercise utmost meticulousness and diligence when issuing positive legislator decisions, bearing in mind its character as a judicial entity rather than a legislative body.[43] The Constitutional Court's positive legislative decisions differ from the legislative actions held by the Parliament. The Court has limitations in its role as the guardian of the constitution. A "positive legislator" decision can only occur within the context of judicial review. The Court does not have the authority to independently enact laws without the context of judicial review. The Parliament, on the other hand, has broader freedom in making legal policies through legislation. However, the Court can review the laws made by the Parliament to ensure their compliance with the constitution.[44]

The It goes without saying that Constitutional Court cannot be regarded as an autonomous legislator. Simply put, the Constitutional Court can play a supportive role for the legislature in fulfilling its functions; however, it cannot

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(ASSEHR), vol. 131 (Atlantis Press, 2017), 228–42, https://doi.org/10.2991/iclgg-17.2018.32.

42 Ariel L. Bendor, "The Relevance of the Judicial Activism vs. Judicial Restraint Discourse," *Tulsa Law Review* 47, no. 2 (2011): 331, https://digitalcommons.law.utulsa.edu/tlr/vol47/iss2/3/.

43 Laurence Claus and Richard Kay, "Constitutional Courts as 'Positive Legislators' in the United States," *American Journal of Comparative Law* 58, no. 1 (2010): 479–504, https://doi.org/10.5131/ajcl.2009.0018.

44 Omara, "The Indonesian Constitutional Court and the Democratic Institutions in Judicial Review."

substitute legislators and pass laws. Moreover, it lacks the political-based discretion to establish legal norms or other measures that exceed the parameters defined within the Constitution itself.[45] Such intervention by the Constitutional Court ought to be reserved for urgent circumstances, wherein a ruling decision becomes necessary to attain substantive justice that cannot be achieved solely through the nullification of a judicial review.[46] This approach safeguards against any perception of the Constitutional Court arbitrarily deviating from established procedural norms. Therefore, it becomes imperative to undertake a comprehensive revision of the Constitutional Court's legal framework. This revision should provide unambiguous and robust regulations, clearly defining under which conditions the Constitutional Court is authorised to issue positive legislature decisions.

Dilemma Of the Constitutional Court as The Positive Legislator in Indonesian Democracy

The doctrine of the separation of powers in the *Trias Politica* model traditionally designates the legislative branch as the primary formulator of laws, the executive branch as the executor of laws, and the judiciary as the enforcers of the law.[47] On the other hand, when it comes to judicial review, these three institutions share a distinctive interplay. The Constitutional Court assumes a role distinct from that of enforcing laws promulgated by the legislative and executive branches; instead, it undertakes their scrutiny and possesses the authority to invalidate them should they contravene the Constitution.[48] In declaring a statute to be unconstitutional, the Constitutional Court repeals a democratic outcome crafted by members of parliament and a president voted

[45] Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge: Cambridge University Press, 2011), https://doi.org/https://doi.org/10.1017/CBO9780511994760.

[46] Pan Mohamad Faiz, "Dimensi Judicial Activism Dalam Putusan Mahkamah Konstitusi Dimensions of Judicial Activism," *Jurnal Konstitusi* 13, no. 2 (2016): 409, https://doi.org/https://doi.org/10.31078/jk1328.

[47] Jeremy Waldron, "Separation of Powers in Thought and Practice?," *Boston College Law Review* 54, no. 3 (2013): 433, https://doi.org/10.12660/rda.v279.2020.82914.

[48] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, 2015, https://doi.org/10.1017/CBO9781139839334.

by the majority of citizens in an election.[49] As a consequence, the Constitutional Court is frequently characterised as a negative legislator and a counter-majoritarian body.

Its character as a counter-majoritarian entity gained further prominence as the court ventured beyond its status as a negative legislator, assuming the function of a positive legislator. In its pronouncements, the Constitutional Court not only invalidated laws but also proceeded to modify prevailing legislation and even instigate new provisions into the laws under scrutiny.[50] In the view of Mietzner, the decisions proclaimed by the Constitutional Court bear the potential to incite conflict, particularly when the legislative body and the government display reluctance to comply with the Court's rulings. This resistance stems from their assertion of possessing the complete mandate from the people to enact laws, thereby deeming the Constitutional Court devoid of the authority to revise or augment legal norms. This contention is originated from the fact that the Constitutional Court lacks the democratic underpinnings characteristic of a legitimate institution.[51] For that reason, the Constitutional Court's power of judicial review engenders the prospect of a dramatic confluence: the Court versus the Democratic Institution.

Alexander Bickel delves into the conflict of Court versus Democratic Institution through the lens of counter-majoritarian difficulty. Coined by Bickel himself, this term challenges the legitimacy of a court's engagement in judicial review within a nation upholding the principles of Democratic majoritarianism. Counter-majoritarian difficulty contends that non-elected judges wield their authority to the preferences of the majority by overturning or amending legal constructs established by duly elected legislators and executives.[52] The matter of legitimacy, stemming from the quandary of counter-majoritarian difficulty, contends the opposition that resistance exhibited by the legislative and executive branches against the pronouncements of judicial review

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[49] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill, 2015), https://doi.org/10.1163/9789004250598.

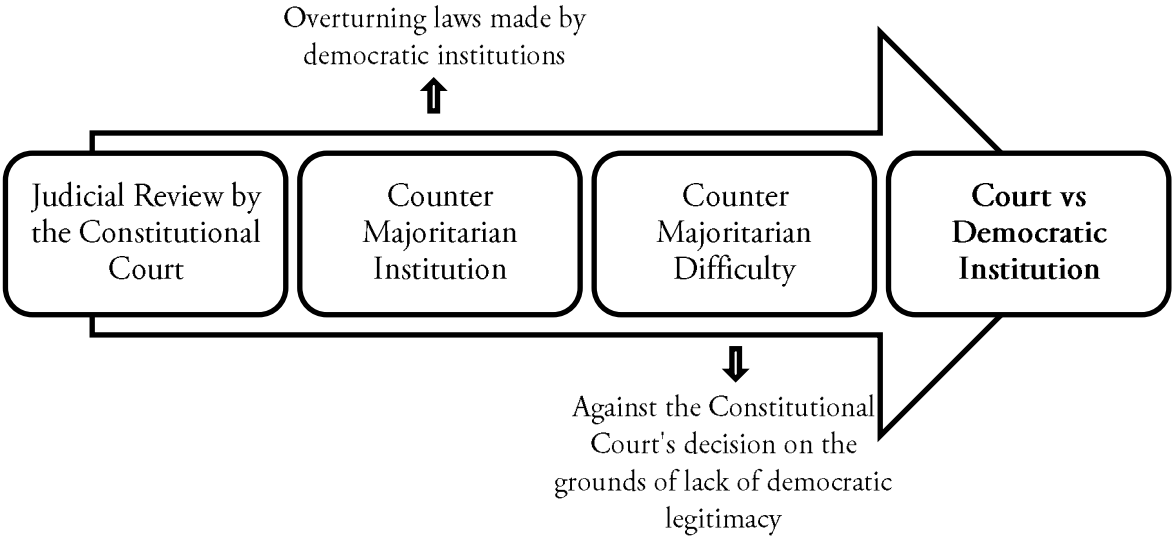
[50] Dimas Firdausy Hunafa, "Menggagas Mekanisme Preventive Review Oleh MK, Upaya Percepatan Pembangunan Nasional Melalui Produk Hukum Berkualitas," *Law and Justice* 4, no. 1 (2019): 23–34, https://doi.org/10.23917/laj.v4i1.8037.

[51] Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (2010): 397–424, https://doi.org/10.1017/S1598240800003672.

[52] Susanna Mancini, "The Crucifix Rage: Supranational Constitutionalism Bumps against the Counter-Majoritarian Difficulty," *European Constitutional Law Review* 6, no. 1 (2010): 6 – 27, https://doi.org/10.1017/S1574019610100029.

is not entirely baseless and remains within the boundaries of comprehension.[53] At this juncture, the concept of judicial supremacy grapples with a quandary concerning its allegiance to democratic ideals. The following depiction illustrates the Court versus Democratic Institution paradigm based on the aforementioned description.

FIGURE 1. Court *vs.* Democratic Institution in Judicial Review[54]



In the Indonesian setting, the challenge of counter-majoritarian difficulty presented in Constitutional Court Decision No. 91/PUU-XVIII/2020 is encountered with non-compliance and even in defiance of both the parliament and the government. This particular Constitutional Court Decision, numbered 91/PUU-XVIII/2020, embodies an instance of positive legislator action. It entails a verdict deeming certain sections of Law No. 11 of 2020 on Job Creation conditionally unconstitutional as per the determination of the Constitutional Court. Several directives and regulations, constituting acts of positive legislation, emanate from the Constitutional Court's decision, encompassing:[55] (i) The pronouncement that the establishment of Law No. 11 of 2020 is conditionally in conflict with the Constitution unless revised within an equivalent of two years from the date of the Constitutional Court's verdict;

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[53] David Wolitz, "Alexander Bickel and the Demise of Legal Process Jurisprudence," *Cornell Journal of Law and Public Policy* 29, no. 1 (2019): 153 – 210, https://www.scopus.com/inward/record.uri?eid=2-s2.0-85095830400&partnerID=40&md5=2712df776545803e42a380473846a766.

[54] This scheme is extracted from Alexander Bickel's thoughts on counter-majoritarian difficulty. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.*

[55] Constitutional Court Decision No. 91/PUU-XVIII/2020 related to "formal review" of Law No. 11 of 2020 on Job Creation

(ii) The directive to the parliament and the government, compelling them to undertake a revision of the framework of Law No. 11 of 2020 within a similar two-year timeframe following the pronouncement of the Constitutional Court's decision. Failing this, Law No. 11 of 2020 would endure a state of permanent unconstitutionality; (iii) The proscription of strategic and far-reaching actions or policies by the government concerning Law No. 11 of 2020; and (iv) The prohibition of the government from issuing new subordinate legislation pertaining to Law No. 11 of 2020.

In the legal analysis of Constitutional Court Decision No. 91/PUU-XVIII/2020, the constitutional judges expound that a foremost focal point, duly deliberated upon by both the parliament and the government during the revision of the Job Creation Law, pertains to the peremptory of embracing a facet of meaningful participation. This, in turn, inspires authentic public engagement and involvement. The elevation of community engagement to a more profound level necessitates the fulfilment of three fundamental prerequisites: the entitlement for their viewpoints to be voiced; the entitlement for their viewpoints to be duly deliberated; the entitlement to elucidations or responses concerning the furnished viewpoints. Public engagement is fundamentally tailored for community cohorts that stand as direct stakeholders or exhibit a vested interest in the affairs of the Job Creation Bill.[56]

Upon hearing the pronouncement, rather than effectuating amendments to Law No. 11 of 2020 on Job Creation corresponding to the Constitutional Court's directive, the government chose to contest the verdict. This was accomplished by the government issuing regulation in lieu of Law, specifically No. 2 of 2022 on Job Creation, whose provisions diverge from the court's stipulation to amend the Job Creation Law through a process of meaningful participation.[57] As elucidated in Article 22, Section (1) of the 1945 Constitution, it is stipulated that the president is empowered to enact legislation in lieu in cases of specific urgency. When deliberating upon such legislation in lieu, the president is not bound to incorporate public input, given the exigency of the situation. Nevertheless, in light of the pretext of the Job Creation Law, the president is advised to refrain from resorting to legislation in lieu, primarily because the Constitutional Court has unambiguously mandated the revision of

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[56] Constitutional Court Decision No. 91/PUU-XVIII/2020 related to "formal review" of Law No. 11 of 2020 on Job Creation

[57] Yati Nurhayati et al., "Investment in Indonesia After Constitutional Court's Decision in the Review of Job Creation Law," *Lentera Hukum* 9, no. 3 (2022): 435 – 458, https://doi.org/10.19184/ejlh.v9i3.32368.

the Job Creation Law through a process of genuine participation.[58] Conversely, amending the Job Creation Law via legislation in lieu would undermine the integral facet of meaningful participation, which prevails as a key concern within the said legislation.[59] Moreover, it is mandatory to note that no state of emergency can be invoked as a justifiable foundation for the president to enact legislation in lieu.[60]

Parliament also displayed its disagreement to the pronouncement of the Constitutional Court by promulgating Law in Lieu No. 2 of 2022, subsequently ratified as Law No. 6 of 2023, addressing the Enactment of Law in Lieu No. 2 of 2022 on Job Creation.[61] Notably, when parliament legislates through a law in lieu, the alteration from a temporary validity period to a permanent one is thereby established.

At this juncture, a discord has arisen amongst the Constitutional Court, the parliament, and the government over how to draft regulations pertaining to Job Creation. On one hand, the pronouncement of the Constitutional Court regarding Job Creation carries irrevocable and obligatory characters, signifying its enduring and timeless validity. Conversely, laws in lieu and other legislative enactments governing Job Creation have also concocted, yet their procedural genesis in conflict with the dictates set forth by the Constitutional Court's decision.[62] This conflict has precipitated a state of legal dualism, wherein two legislative enactments govern the same domain while mutually contradicting one another. The ramifications of this inter-institutional dispute are decidedly adverse. It not only disrupts the established equilibrium but also casts the general populace into a legal limbo, compelling them to grapple with the

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[58] Sudharto P Hadi, Rizkiana S Hamdani, and Ali Roziqin, "A Sustainability Review on the Indonesian Job Creation Law," *Heliyon* 9, no. 2 (2023), https://doi.org/10.1016/j.heliyon.2023.e13431.

[59] Petra Mahy, "Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments," *Asian Journal of Comparative Law* 17, no. 1 (2022): 51 – 75, https://doi.org/10.1017/asjcl.2022.7.

[60] Zainal Arifin Mochtar and Idul Rishan, "Autocratic Legalism: The Making of Indonesian Omnibus Law," *Yustisia* 11, no. 1 (2022): 29 – 41, https://doi.org/10.20961/yustisia.v11i1.59296.

[61] Abdul Kadir Jaelani, Resti Dian Luthviati, and Reza Octavia, "Indonesia's Omnibus Law on Job Creation: Legal Strengthening Digitalization of Micro, Small and Medium Enterprises," *Relacoes Internacionais No Mundo Atual* 3, no. 41 (2023): 209 – 227, https://doi.org/10.21902/Revrima.v3i41.5833.

[62] Tunggul Anshari Setia Negara, Syahriza Alkohir Anggoro, and Imam Koeswahyono, "Indonesian Job Creation Law: Neoliberal Legality, Authoritarianism and Executive Aggrandizement under Joko Widodo," *Law and Development Review* 12, no. 0 (2023): 178–201, https://doi.org/10.1515/ldr-2023-0022.

quandary of whether to adhere to the Constitutional Court's adjudication that deems the Job Creation Law unconstitutional, or alternatively, to support the revived iteration of the Job Creation Law as reinstated by the government and parliament.

Instances of strife between the Constitutional Court, parliament, and government are not finite to this particular case. There have been occasions where legislators have disregarded other Constitutional Court decisions, including Constitutional Court Decision No. 56/PUU-XVII/2019. This ruling is a positive legislator who revised Law No. 10 of 2016 concerning Regional Head Elections (Governor, Regent, Mayor). In its verdict, the Constitutional Court has determined that the existing nomination requirements outlined in Law No. 10 of 2016, pertaining to former convicts seeking candidacy for regional head positions, must be subject to revision. The amended criteria stipulate that a former convict may only be eligible to run for regional head if a minimum period of 5 years has elapsed since their release from prison.[63] To ensure legal certainty, the parliament and government must address the Constitutional Court's decision by undertaking a revision of Law No. 10 of 2016. However, it appears that both the parliament and government have disregarded the Constitutional Court's decision, as evidenced by the absence of the mandated 5-year waiting period for former felons to be eligible for regional head nominations in Law No. 6 of 2020, which acts as an amendment to Law No. 10 of 2016.

The ongoing tension between the Constitutional Court and democratic institutions is evident in the ruling of MK Decision Number 97/PUU-XIV/2016. This decision declares Law No. 24 of 2013 on Population Administration, as unconstitutional due to its failure to acknowledge the religious identity of individuals who adhere to ancestral beliefs on the Indonesian identity card. Through this decision, which is also a positive legislator, The Constitutional Court has taken a major step to ensure equal recognition of identity for both believers and religious adherents. As a result, it is essential for the government to equally acknowledge the existence of both groups on the Indonesian identity card. To ensure the efficacy of the Constitutional Court's ruling and avoid the formation of legal dualism, it is recommended that the parliament and the government undertake a revision of the Population Administration Law according to the decision rendered by the Constitutional Court. Instead of amending the law per the decision of the

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[63] Donal Fariz, "Pembatasan Hak Bagi Mantan Terpidana Korupsi Menjadi Calon Kepala Daerah," *Jurnal Konstitusi* 17, no. 2 (2020): 309, https://doi.org/10.31078/jk1724.

Constitutional Court, the President has appointed the Minister of Home Affairs to issue a Circular to implement the directives outlined in the Constitutional Court's decision.[64] Indeed, this situation poses significant challenges, as the legal status of Circular Letters in Indonesia is relatively weak. The government's decision to publish a Circular Letter from the Minister of Home Affairs subsequent to the ruling of the Constitutional Court suggests a potential disregard for the Court's decision.

The recent Constitutional Court decision that caused friction with Parliament and the government is Decision No. 60/PUU-XXII/2024. In accordance with the voter population in each region, the Constitutional Court's decision lowered the threshold for regional head elections from 25% to four categories of valid votes: 10%, 8.5%, 7.5%, and 6.5%. One day after the announcement of Decision No. 60/PUU-XXII/2024, Parliament gathered to revise the Regional Head Election Law, a change that contradicted the Constitutional Court's decision. The actions of Parliament provoked demonstrations in multiple locations designated as the "Emergency Warning." Numerous individuals from various societal sectors, including students, activists, and labourers, demonstrated their dissent over the revision of the Regional Head Election Law, which was regarded incompatible with the Constitutional Court's decision. The demonstration successfully applied significant pressure on Parliament to revoke the controversial revision to the Regional Head Election Law and to conform the regional head election processes to the Constitutional Court's decision.[65] Judicial Activism in Decision No. 60/PUU-XXII/2024 illustrates the conflict between the Constitutional Court and Parliament. In this instance, the public perceives the Court's judicial activism as a mechanism to amend the activities of legislative and executive bodies that fail to serve the public interest.

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[64] Muhammad Shuhufi et al., "The Rights to Religious Freedom for Adherents Faith in Indonesia: Comparative Study of the Rights to Religious Freedom in Asia," *International Journal of Criminology and Sociology* 9 (2020): 1273–84, https://doi.org/10.6000/1929-4409.2020.09.146.

[65] Dhieno Yudhistira and Boy Nurdin, "Dynamics of Legal Politics after Constitutional Court Decision Number 60/PUU-XXII/2024 Regarding the Party Wholesale System in the 2024 Regional Head Elections," *Indonesian Journal of Multidisciplinary Science* 4, no. 3 (2024): 129–36, https://doi.org/10.55324/ijoms.v4i3.1039.

Constitutional Courts as Positive Legislators on Democracy: A Global Perspective

The decisions made by the Constitutional Court in cases of judicial review, where they frequently interfere with the authority of legislative institutions, give rise to both theoretical and practical issues. Meanwhile, the Constitutional Court intended to uphold the constitution, but its role as a positive legislator has strayed further from the principle of separation of powers. This has resulted in conflicts with democratic institutions, such as the legislative and executive branches, as demonstrated in Indonesia. This section will provide an overview of the role of the Constitutional Court as a positive legislator and its influence on democratic institutions from a global perspective. It is crucial to examine the role of the Constitutional Court as a legislator in different countries and juxtapose it to the situation in Indonesia.

Allan R. Brewer-Carías addresses the role of Constitutional Courts in his article titled "Constitutional Courts as Positive Legislators: A Comparative Law Study." He contends that these courts cannot be solely characterized as negative legislators, as originally proposed by Hans Kelsen. Carías observed that the Constitutional Court often shifts from a negative legislator to a positive legislator in various countries, as evidenced by his research findings. This conclusion is based on a comprehensive analysis conducted by Brewer-Carías, which examined the functioning of both the Constitutional Court and Supreme Court in 30 different countries. These countries comprise Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Costa Rica, Croatia, Czech Republic, France, Germany, Greece, Hungary, India, Italy, Mexico, Netherlands, Nicaragua, Norway, Peru, Poland, Portugal, Serbia, Slovakia, Sweden, Switzerland, United Kingdom, United States, and Venezuela.[66]

In his report, Allan R. Brewer-Carías noted four primary trends pertaining to this form of behaviour. First, there is the trend of the Constitutional Court's intervention in democratic authority through the enactment of constitutional rules and potential alterations to the Constitution. Second, the trend pertains to the Constitutional Court's involvement in existing legislation by supplementing statutes, introducing new clauses, and determining the longer-term effects of legislation. Third, the trend can be characterized as the Constitutional Court's intervention in cases where there is a lack of legislation, either because of absolute or relative legislative omissions. In conclusion, the

[66] Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study.*

fourth trend that he identified pertains to the Constitutional Court's involvement in judicial review-related legislative concerns.[67]

Comparative studies on the Constitutional Court as a positive legislator are also embraced in the book "Judicial Law-Making in European Constitutional Courts". This book investigates the unique feature of the law-making process of European constitutional courts. The primary dissension is that constitutional courts play a crucial role in shaping legislation and their status within the system of State organs requires re-evaluation. The book traverses the analysis of the law-making activity of four constitutional courts in Western countries: Germany, Italy, Spain, and France; and six constitutional courts in Central–East European countries: Poland, Hungary, the Czech Republic, Slovak Republic, Latvia, and Bulgaria; along with two international courts: the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).[68] The study explores the dynamic relationship between national constitutional courts and international tribunals in terms of their law-making activity. The selected countries feature constitutional courts that have recently come under the control of populist governments and have been made subordinate to political powers.

The examination of the rulings rendered by the European Constitutional Courts, as discussed in this book, clearly amply their substantial and unquestionable impact on the legal framework, encompassing both the Constitution and the statutes. The courts' rulings no longer align with the traditional interpretation of legal authority as described by Hans Kelsen. This is because modern Constitutional Courts transgress simply reviewing the constitutionality of statutes and potentially repealing those deemed unconstitutional. Additionally, they also engage in correcting, enhancing, and evolving the language of statutes through creative interpretation and the careful draft of their rulings and legal consequences.

In addition, they alert parliaments to the necessity of legal changes, thus initiating subsequent processes for its improvement, expansion, and advancement. The law-making activity of Constitutional Courts is reflected in both the provisions of the Constitution and statutory norms. In the first case, the Constitutional Courts prioritize safeguarding the essence and values of the

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[67] Allan R. Brewer-Carías, "Constitutional Courts as Positive Legislators," in *General Reports of the XVIIIth Congress of the International Academy of Comparative Law*, ed. David V. Snyder Karen B. Brown (New York: Springer, 2012), 549 – 569, https://doi.org/10.1007/978-94-007-2354-2.

[68] Monika Florczak-Wator, *Judicial Law-Making in European Constitutional Courts* (New York: Routledge, 2020), https://doi.org/10.4324/9781003022442.

Constitution, rather than solely focusing on its literal interpretation (although this does occur, particularly when the Constitution includes non-amendable provisions as previously stated). The Constitutional Courts curtail the freedom of the Constitution-makers, ensuring that the Constitution can only be altered to a certain extent.[69] This guarantees the permanence of its provisions, which are regarded as the core elements of the Constitution or its constitutional identity.

Constitutional Courts also outline the boundaries of State paticipation in European integration, ensuring it remains within constitutional principles. Constitutional Courts possess a unique potential to creatively develop and supplement the Constitution, particularly in areas that pertain to constitutional principles and individual rights and freedoms. In summary, stringent Constitutions are shaped and upheld in large part by the Constitutional Courts. At a statutory level, the Constitutional Courts demonstrate their expertise by issuing partial and interpretative rulings, as well as confirming the unconstitutionality of legislative omissions. Additionally, Constitutional Courts also establish inter-temporal norms to postpone the implementation of their decision or the nullification of a provision recognized in that decision as unconstitutional. In addition, Constitutional Courts often provide comprehensive signalling guidelines in justifying their rulings, which can mold the content of future statutory regulations enacted by parliament.[70]

Anna Gamper, in her comparative study on Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters, law-making by the constitutional court is understood as the process of abrogating, modifying, and supplementing laws enacted by the legislative body, be of use to a democratic institution. Gamper distinguishes six different types of judicial law-making by constitutional courts from a comparative standpoint. *First,* negative legislation; the primary power of a constitutional court is to assess laws for constitutionality, which often grants them the role of a 'negative legislator', stating whether a law is constitutional or unconstitutional. This role is not a mirror image of a positive legislator, as it requires a prior enactment of positive legislation. Constitutional courts are often rivalled by other negative legislators, such as the law-maker

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[69] Florczak-Wator.

[70] András Jakab, "The Reasoning of Constitutional Courts in Europe," in *The Max Planck Handbooks in European Public Law: Constitutional Adjudication: Common Themes and Challenges: Volume 4*, ed. Christoph Grabenwarter Armin von Bogdandy, Huber Peter (Oxford: Oxford University, 2023), 169 – 222, https://doi.org/10.1093/oso/9780192846693.003.0005.

themselves, who can repeal a law of their own free will.[71] Constitutional Courts, including the Supreme Court with judicial review authority, are accounted negative legislators, as Hans Kelsen believed. This is valid for all of these courts—including Indonesian courts—around the globe. The presence of negative legislators within the Constitutional Court is persistent, unaffected by changes in a country's constitutional or political system. However, it remains entirely feasible for the role to evolve beyond being solely a negative legislator and take on a positive legislative role.

Second, positive legislation as entailed by negative legislation; A constitutional court can act as a positive legislator by settling whether a previous statute that was revoked by a law will be restored or otherwise. This can be a negative legislator if the court prohibits the re-enactment of the previous law, or a confirmative positive legislator if it allows the prior statute to become operative. However, the court cannot create a law with any content, and the legislature may pass another law that terminates, reinstates, or replaces the previous law.[72] One example is Article 140(6) of the Austrian Federal Constitutional Act. This provision states that if the revoking law is repealed by the Constitutional Court, a previous law will be re-established, unless the Constitutional Court decides otherwise.[73]

Third, pre-enactment scrutiny; constitutional courts do not have the authority to function as negative legislators when they thoroughly review draft legislation before to their implementation. However, a court's disapproval of a draft law could contribute positively to its creation, potentially triggering re-drafting and renewed deliberation.[74] The French Constitutional Council is renowned for its expertise in conducting pre-enactment scrutiny. In the legislative process, bills for *lois organiques* undergo automatic review by the Constitutional Council prior to their enactment. These laws deal with the structure and operations of government. They serve to complement the Constitution and assume status in the French hierarchy of norms that comes between the Constitution and ordinary laws. In addition, bills for ordinary laws can be reviewed by the Constitutional Council before they are endorsed into law. However, this review can only take place if it is requested by the President

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[71] Gamper, "Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters."

[72] Gamper.

[73] Ronald Faber, "The Austrian Constitutional Court - An Overview," *ICL Journal* 2, no. 1 (2008): 49–53, https://doi.org/10.1515/icl-2008-0105.

[74] Gamper, "Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters."

of the Republic, the Prime Minister, the President of the National Assembly, or the President of the Senate.[75]

Fourth, Legislative proposals; Constitutional courts can design and initiate laws in rare instances, resembling positive legislators. These courts can present bills, propose laws, and propose amendments. They can also draft laws based on their own political beliefs, although these recommendations are only meant to serve as guidance for the positive law-maker. These illustrations show that constitutional courts can be suitable initiators of legislation.[76] The Constitutional Courts of Ecuador, Russia and Paraguay are some examples that could implement legislative proposals. According to Article 134(4) of the Constitution of Ecuador, the Constitutional Court is empowered to submit bills on the subjects that pertain to the Court per its competencies.[77] In a similar vein, Article 104 of the Russian Constitution provides that the power of legislative initiative shall belong to the Constitutional Court on issues within its purview.[78] An even wider empowerment can be derived from Article 203 of the Constitution of Paraguay according to which the Supreme Court of Justice—which also exercises constitutional review—may propose laws 'in the cases and in the conditions specified in this Constitution and in the law'.[79]

Fifth, Substitute and mandated legislation; In some circumstances, such as when the legislature fails to pass legislation, constitutional courts have the authority to enact laws on their own without the support of other legislative bodies. This is particularly critical when objectives or human rights are enshrined in constitutions, requiring ordinary legislation to implement these guarantees. Meanwhile, most constitutional courts are unable to enact legislation on behalf of the omitting lawmaker, some can declare the omission

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[75] Julien Mouchette, "The French Constitutional Council as a Law-Maker: From Dialogue with the Legislator to the Rewriting of the Law," in *Judicial Law-Making in European Constitutional Courts*, ed. Monika Florczak-Wątor (New York: Routledge, 2020), 9–27, https://doi.org/10.4324/9781003022442-1.

[76] Gamper, "Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters."

[77] Michael Freitas Mohallem, "Horizontal Judicial Dialogue on Human Rights: The Practice of Constitutional Courts in South America," in *Judicial Dialogue and Human Rights*, ed. Amrei Müller (Cambridge: Cambridge University Press, 2017), 67 – 113, https://doi.org/10.1017/9781316780237.003.

[78] Alexandra Troitskaya, "The Proportionality Principle in the Jurisprudence of the Russian Constitutional Court," *Review of Central and East European Law* 46, no. 2 (2021): 203 – 233, https://doi.org/10.1163/15730352-bja10049.

[79] Mohallem, "Horizontal Judicial Dialogue on Human Rights: The Practice of Constitutional Courts in South America."

unconstitutional and enact substitute legislation as a provisional measure.[80] However, cases without explicit constitutional authorization require closer examination. Article 436(10) of the Ecuadorian Constitution allows the Constitutional Court to declare state institutions or public authorities unconstitutional if they fail to comply with constitutional mandates within reasonable time limits. After this time limit, the Court will provisionally issue the rule or enforce the legislation if this failure persists. The Constitutional Court may rule the law unconstitutional and enact a replacement.[81]

Sixth, Legislation through interpretation; Judicial law-making through interpretation is an intricate process that involves the interpretation of laws by judges. Although interpretation by judges should not affect legislation, the words of the law and constitutions are left obscure as one might wish It is challenging to distinguish between the creation of laws and interpretation because constitutional courts are free to create their own standards of interpretation. Courts may use linguistic, historical, or contextual interpretations, or consistency interpretation, which makes a law compatible with superior law. However, the legal force of interpretation may not be as binding as a law that has been duly passed. Courts may also be limited to apex or constitutional courts, which may not have the legal weight as other courts. If a legislature disagrees with a court's interpretation, it can change the law, enact an authentic interpretation, or enact a law requesting the court to use a certain interpretive method or, even, prohibiting it.[82] Certain constitutional laws, such as the Constitution of Barbados, s 49(6); Constitution of Slovakia, art 152(4); Constitution of Hungary, art 28; Constitution of Ghana, ch IV art 11(6); Constitution of Lesotho, art 156(1); Constitution of Zambia, s 6(1), require interpretation of ambiguous laws in a manner that corresponds with the constitution. In certain constitutional contexts, especially those related to the interpretation of human rights, numerous constitutions offer extra criteria for consistency. On the other hand, certain constitutions, such as the Constitution of Namibia, Article 146, state that the interpretation of the constitution should heed previous laws, unless the context suggests otherwise.[83]

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[80] Gamper, "Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters."

[81] Mohallem, "Horizontal Judicial Dialogue on Human Rights: The Practice of Constitutional Courts in South America."

[82] Gamper, "Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters."

[83] Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study.*

The various powers of constitutional courts with regard to positive or negative legislation can subvert the division of powers in a constitutional framework. This does not, however, imply that the exercise of legislative powers by the judiciary entails a loss of democracy. The constitutional courts often have less democratic legitimacy than that of non-judicial bodies, such as parliaments or governments. Constitutional courts cannot claim as much democratic legitimacy as parliaments or non-parliamentary bodies, as they are appointed and not elected by the populace. The separation of powers requires democratic concessions, but it does not ultimately legitimize independent courts as positive legislators. This meddling in the domain of the legislature raises the "counter-majoritarian difficulty."[84] However, when a constitutional court initiates laws of its own free will or enacts substitute legislation due to the legislature's fault, there are two shortcomings. First off, the constitutional court cannot dispute the democratic legitimacy of a legislature in terms of organization. Second, the separation of powers does not provide constitutional courts exercising positive legislative powers with "compensational" legitimacy.

The selection and independence of constitutional courts are not the only factors that define their democratic legitimacy. Generally speaking, judges are not typically elected by the people and are not bound to instructions or accountability towards parliament or the electorate. They must leave office after a fixed period and require backing from other bodies that nominate or appoint them. Constitutional courts are also bound to the relevant constitution, which is compatible with constitutional review. The concept of functional democracy is established on constitutional review, which grants constitutional courts to protect the constitution. This function is essentially democratic, as the constitution is the most democratic source of law in liberal democracies.

Constitutional courts receive democratic legitimacy through their function to uphold the constitution, safeguarding the will of the people expressed therein. However, this does not necessarily denote that constitutional courts can initiate laws, set deadlines for omitting legislatures, or even enact substitute legislation. Functional democracy does not legitimize law-making through interpretation, as most constitutions do not provide explicit rules on interpretation. Instead, they assign this role to the legislature, which would be a potential violation of the constitution if constitutional courts violated the legislature's monopoly. The legal limbo between interpretation and law-making is problematic, as there may be extraordinary cases where the legislature's intended purpose endorses judicial law-making. One instance is the consistency

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[84] Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.*

method, where the constitutional court upholds an ordinary law by interpreting it consistently with the constitution. However, non-consistent interpretations may still violate the constitution, aggravating uncertainty.

Finding A Middle Ground Between Strong and Weak-Forms of Judicial Review

Two prominent models of parliamentarism have crystallized on the global stage. The first exemplar is the Westminster parliamentary supremacy, which found its genesis within the United Kingdom of Great Britain and Northern Ireland. Emanating from this is the Westminster Model of parliamentary governance, which upholds the principle that a legislative body, constituted through a democratic process and representing the prevailing majority, wields an overarching authority that remains unbounded, save for cultural presuppositions.[85] The Westminster Model ardently advances the tenets of democratic self-governance, though bearing the potential consequence of conferring unchecked dominion upon parliamentarians and governmental agents, thereby enabling them to promulgate regulations that deviate from democratic and human rights precepts, ultimately jeopardize social cohesion.[86]

The second paradigm encompasses the notion of limited parliamentarism, as exemplified by the United States. Within this framework, the legislative branch finds itself circumscribed by well-defined, judiciously enforceable constitutional provisions. This model proves efficacious in averting the potential for parliamentary overreach, as the judiciary retains the prerogative to invalidate statutes deemed in contravention of the Constitution.[87] Nonetheless, this model holds the latent capacity to furnish an avenue whereby the judiciary might leverage its authority to contest democracy, through rulings that encroach upon the prerogatives of the legislative branch, effectively seizing the role akin to that of a positive legislator.[88]

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[85] Mark Bevir, "The Westminster Model, Governance and Judicial Reform," *Parliamentary Affairs* 61, no. 4 (2008): 559 – 577, https://doi.org/10.1093/pa/gsn025.

[86] Kari Palonen, "Political Theories of Parliamentarism," in *Parliament and Parliamentarism: A Comparative History of a European Concept* (New York: Berghahn Books, 2016), 219–27, https://doi.org/10.2307/j.ctvgs0b7n.18.

[87] Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 114, no. 3 (2000): 634, https://doi.org/10.2307/1342286.

[88] Aleksandar Tsekov, *The Bulgarian Constitutional Court as a Positive Legislator, Rule of Law in Crisis: Constitutionalism in a State of Flux*, 2022, https://doi.org/10.4324/9781003349501-17.

Mark Tushnet categorizes the Westminster Model as an embodiment of parliamentary supremacy, wherein parliament exercises ultimate sovereignty. As such, it is vested with the exclusive prerogative to effectuate amendments or abrogation of extant legislation. Such a model manifests a palpable hostility towards the authority of the court to engage in judicial review. Even in instances where the Constitution permits judicial review, then there is only a weak-form of judicial review. The court's remit is confined to pronouncing the invalidity of laws; however, it lacks the mandate to nullify them. As such, the conclusive determination of the legitimacy of laws remains within the realm of parliament and the executive.[89]

In contradistinction to the Westminster Model, the paradigm of limited parliamentarism accords paramountcy to the judiciary, endowing it with the authority to exert oversight over parliament through the mechanism of judicial review.[90] According to Mark Tushnet, this model is a strong-form of judicial review, wherein the ultimate determination of the legality of a law does not reside within the purview of parliament but is rather adjudicated by the courts. This robust framework further asserts that the court's pronouncement in the realm of judicial review is binding and impervious to revision. Consequently, this formidable embodiment of judicial review disregards the legislative output emanating from both parliament and the government.[91]

The Indonesian Constitutional Court evidently adheres to a strong-form of judicial review. According to Law No. 8 of 2011, the Constitutional Court's decision is conclusive, meaning that it immediately has permanent legal validity upon being announced, and no further litigation can be pursued. The Constitutional Court's ruling in this law possesses inherent legal weight and is enforceable.

Put succinctly, the ultimate adjudication of the legality of laws lies not within the purview of parliament or the government, but squarely rests with the constitutional justices. The strong-form of judicial review has catapulted the Constitutional Court into a stance of judicial supremacy, a posture that has frequently been castigated for potentially encroaching upon democratic institutions. In the words of Alexander Bickel, the concept of judicial supremacy

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[89] Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries," *Wake Forest Law Review* 38 (2003): 813–38, https://doi.org/10.4324/9781315096339-10.

[90] Leslie Friedman Goldstein, "From Democracy to Juristocracy," *Law and Society Review* 38, no. 3 (2004): 611 – 629, https://doi.org/10.1111/j.0023-9216.2004.00059.x.

[91] Mark Tushnet, "Alternative Forms of Judicial Review," *Michigan Law Review* 101, no. 8 (2003): 2781–2802, https://doi.org/10.2307/3595395.

within the setting of judicial review mirrors a scenario akin to positioning the Constitutional Court as a counter-majoritarian entity, one that might threaten the edifice of Democratic majoritarianism.[92] Bickel labels this conundrum as "*counter-majoritarian difficulty.*" The culmination of this dynamic is a confrontation between judicial supremacy and the supremacy of the executive and legislative branches, crystallized through the clash between the parliament and the government on one side, and the Constitutional Court on the other. The Constitutional Court's issuance of Decision No. 97/PUU-XIV/2016, Decision No. 56/PUU-XVII/2019, Decision No. 91/PPUU-XVIII/2020, and Decision No. 60/PUU-XXII/2024 represents a tangible manifestation of this tension.

The pertinent query revolves around the appropriateness of the Indonesian Constitutional Court adopting a robust framework of judicial review, given the potential for prompting conflicts between the parliament and the government. In the author's perspective, under the banner of constitutionalism, Indonesia's judicial review must adhere to a strong framework, despite existing documentation and evaluations necessitating their preservation. Addressing this concern necessitates the segmentation of the discourse into two distinct dimensions: firstly, an investigation into the imperative of embracing a strong model of judicial review for the realm of Indonesian constitutionalism; and secondly, a study of the factors underpinning the adoption of a formidable model of judicial review that is harmonious with the tenets of democratic institutions.

As mentioned in the previous discourse, there exists a significant level of public discontent and a lack of confidence in the legislation enacted by Parliament and the President. This finding is supported by the substantial number of public judicial review requests—currently 1979—that have been made. Should the Indonesian Constitutional Court embrace a weak-form of judicial review, the foundation of constitutionalism would encounter formidable challenges, ultimately culminating in an unchecked state of affairs and a far cry from a meaningful democracy.

Nonetheless, it is imperative to acknowledge that a strong-form of judicial review carries the inherent risk of disputes with democratic institutions;[93]

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[92] Matthew E K Hall, "Judicial Review as a Limit on Government Domination: Reframing, Resolving, and Replacing the (Counter)Majoritarian Difficulty," *Perspectives on Politics* 14, no. 2 (2016): 391 – 409, https://doi.org/10.1017/S1537592716000086.

[93] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited," *International Journal of Constitutional Law* 5, no. 3 (2007): 391 – 418, https://doi.org/10.1093/icon/mom021.

consequently, there exists a need for conscientious deliberation by the Indonesian Constitutional Court, Parliament, and Government to avert potential tensions that might arise. A salient consideration pertains to the absence of Constitutional Court Procedural Law accompanying the existing legislation on the Constitutional Court. Unlike Civil Law and Criminal Law, which are complemented by the enactment of Civil Procedural Law and Criminal Procedural Law, the Constitutional Court misses a procedural framework.[94] The absence of such procedural legislation assumes significance as it delineates the protocol for instituting legal cases before a judicial body, the procedures governing case hearings, and the protocols dictating judicial decision-making.

Given the unavailability of Constitutional Court Procedural Law enacted by the parliament and the government, the Constitutional Court has frequently undertaken the task of formulating regulations regarding judicial review. Regrettably, this has led to clashes among the Constitutional Court, the parliament, and the government.[95] An illustrative instance emerges when the Constitutional Court, of its own volition, transmutes from a negative legislator to a positive legislator, despite the Constitutional Court Law not bestowing upon it the authority to adopt the role of a positive legislator.

In light of this, it is incumbent upon the parliament and the government to expeditiously institute the Constitutional Court Procedural Law, which outlines the protocols governing the court's adjudication of judicial review cases. Amongst the crucial tenets necessitating regulation within the Constitutional Court Procedural Law is the delineation of the Constitutional Court's role as a positive legislator.[96] Building upon the preceding discourse, it has been posited that the issue of a positive legislator has been sparked by disagreement with democratic institutions. It behooves the parliament and the government, as formulators of legislative frameworks, to confer in deliberations with the Constitutional Court in the making of provisions that pertain to the positive legislator role. This entails defining the circumstances under which the Constitutional Court may assume the mantle of a positive legislator, the degree

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[94] Salahuddin Gaffar et al., "The Concept of Procedural Law Regarding the Implementation of Collective Agreements with Legal Certainty in Termination of Employment in Indonesia," *Heliyon* 7, no. 4 (2021), https://doi.org/10.1016/j.heliyon.2021.e06690.

[95] Ahmad Siboy et al., "Judicial Review in Indonesia: A Simplification Model," *Lex Scientia Law Review* 6, no. 2 (2022): 359 – 390, https://doi.org/10.15294/lesrev.v6i2.54848.

[96] Oly Viana Agustine et al., "Constitutional Review of Criminal Norms: Does Indonesia Need Judicial Activism?," *International Journal of Human Rights* 27, no. 4 (2023): 772 – 788, https://doi.org/10.1080/13642987.2023.2185608.

to which this role can intersect with the remit of democratic institutions, and the subsequent protocols for the implementation of decisions made by the positive legislator, which are to be adhered to by the parliament and the president.[97]

With the formalization of the Constitutional Court's procedural framework by the parliament and the government, the equilibrium of the separation of powers paradigm can be restored. The Constitutional Court, acting in the capacity of a judicial body, upholds the established boundaries once the government and parliament develop the fundamental principles. This stands in contrast to the current state of affairs wherein the Constitutional Court defines and enforces the contours of the positive legislator role. Through the active participation of the parliament and the government in shaping the procedural architecture of the Constitutional Court, it is envisaged that the discord between the court and democratic institutions would be assuaged. By adhering to the standards set forth by the very institutions, the government and the parliament would be alleviated of any rationale to contest the pronouncements of the Constitutional Court. Once this systemic harmony is achieved, the dichotomy between Judicial Supremacy and parliamentary government supremacy can be obviated, as each domain is allocated its distinct sphere; the parliament and government formulate the framework, while the Constitutional Court safeguards its execution.

Conclusion

The Constitutional Court must persist in rendering conclusive decisions in judicial review cases, decisions that are both final and binding, and that even embrace the role of a positive legislator. This is crucial to ensure the formulation of laws by Democratic Institutions remains firmly within the confines of the constitution. It is important to note, however, that a strong-form of judicial review may incite conflicts with democratic institutions, thereby potentially detrimentally impacting society. Consequently, there is a demand for dispute resolution. One potential avenue for dispute resolution involves reinstating the core authority of each institution. Within this framework, Parliament and the government must consult with the Constitutional Court in order to formulate

[97] Stephen Gardbaum, "Are Strong Constitutional Courts Always a Good Thing for New Democracies?," *Columbia Journal of Transnational Law* 53, no. 2 (2015): 285 – 320, https://www.scopus.com/inward/record.uri?eid=2-s2.0-84930847917&partnerID=40&md5=0e1786ecae4e58fff18d03be4ec12de3.

a Constitutional Court Procedure Law that regulates the strong-form judicial review mechanism, including the authority of the Constitutional Court to act as a positive legislator. If successfully implemented, this approach is anticipated to cultivate an environment characterized by reciprocal respect and harmonious interaction between the Constitutional Court and democratic institutions.

Future research on judicial review in Indonesia is highly encouraged, as it is a complex topic that offers significant opportunities for exploration, especially regarding the judicial activism of the Constitutional Court. Examining the necessity for the Court to moderate its activism or seek methods to align its powers with democratic principles is essential. Another perspective involves analyzing the impact of activism on public trust and the perception of the judiciary, with comparative studies of other emerging democracies providing valuable insights. Exploring the historical evolution of the Court may identify areas for refinement, while evaluating its influence on human rights and social justice issues could uncover wider implications of judicial activism. Furthermore, examining the relationship between domestic laws and international legal standards may enhance discussions and offer valuable insights for policymakers. Ultimately, to achieve a balance between judicial authority and democratic principles requires the examination of possible legal reforms or constitutional amendments to redefine the Court's powers, as well as the role of civic education and public engagement.

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Generative AI Statement
None

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