

# Judicial Constitutional Capture and the Transformation of Democratic Backsliding in Indonesia

Exsyel Hendy Basuki <sup>a</sup> , Windya Nopryanti <sup>a</sup> , Hezron Sabar Rotua Tinambunan <sup>a</sup> , Mohammed Ali Ahmed Saeed <sup>b</sup> 

<sup>a</sup> Faculty of Law, Universitas Negeri Surabaya, Surabaya, Indonesia

<sup>b</sup> State University of Science and Technology, Yamen

✉ Corresponding email: [24111764001@mhs.unesa.ac.id](mailto:24111764001@mhs.unesa.ac.id)

## Abstract

This article examines whether the Indonesian Constitutional Court's Decision No. 90/PUU-XXI/2023 should be understood as ordinary constitutional adjudication or as a distinct form of democratic backsliding. Using qualitative-normative legal research, critical doctrinal analysis, precedent tracking, and functional comparative comparison, it analyzes the Court's treatment of standing, open legal policy, conditional constitutionality, plurality reasoning, judicial ethics, and electoral timing. The article argues that Decision No. 90 represents judicial constitutional capture: an endogenous pathology in which a constitutional court becomes an autonomous agent of constitutional manipulation rather than merely a victim of executive capture or a passive validator of political power. The finding rests on the convergence of weak proxy-like standing, abrupt departure from same-cycle precedents, a fractured majority whose broad remedy lacked clear majority reasoning, judicial positive

legislation, an objective familial conflict of interest, and subsequent Ethics Council findings. The article contributes a litmus test distinguishing aggressive judicial activism from capture and proposes reforms concerning preventive recusal, heightened standing in election-rule cases, supermajority requirements for departing from recent precedent, plurality-ratio rules, targeted cooling-off safeguards, and stronger ethics sanctions. It concludes that constitutional courts require internal integrity mechanisms as much as external independence protections.

**KEYWORDS** *Judicial Constitutional Capture, Democratic Backsliding, Open Legal Policy, Constitutional Court of Indonesia, Judicial Ethics*

## Introduction

Democratic backsliding is no longer experienced primarily as an abrupt overthrow of a constitutional order. In many contemporary democracies, erosion occurs through legal instruments, ordinary institutional procedures, and decisions that preserve the outward grammar of legality while draining constitutional guarantees of their constraining force. Comparative constitutional scholarship has therefore moved beyond the classic coup paradigm and has examined executive aggrandizement, partisan capture of courts, abusive amendment, and constitutional hardball. Yet the literature still tends to assign courts a limited repertoire of roles: courts are imagined as guardians that resist democratic erosion, as victims that are packed or intimidated by political branches, or as passive legitimators of executive projects. That triptych is important but incomplete. It does not adequately describe a court that acts from within its own institutional authority to generate the very constitutional distortion that it is supposed to prevent.<sup>1</sup>

The Indonesian Constitutional Court's Decision No. 90/PUU-XXI/2023 reveals precisely this under-theorized phenomenon. The case concerned Article 169 letter q of Law No. 7 of 2017 on General Elections, which required presidential and vice-presidential candidates to be at least forty years old. The Court granted the petition in part and produced an alternative eligibility rule: a candidate may also qualify if he or she has held, or is holding, an office elected through a general election, including a regional head office.

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<sup>1</sup> Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018), 1-16; Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018), 1-10.

The rule did not merely interpret the existing statute in the abstract. In the electoral calendar of 2023, it immediately enabled Gibran Rakabuming Raka, the mayor of Surakarta and son of the incumbent President Joko Widodo, to become eligible as a vice-presidential candidate despite being under forty.<sup>2</sup>

The institutional irregularity was heightened by the participation of Chief Justice Anwar Usman, who presided over the case and joined the majority. His relationship to the principal beneficiary was not remote: he is the brother-in-law of President Joko Widodo and the uncle by marriage of Gibran Rakabuming Raka. The Constitutional Court Ethics Council later held that Anwar Usman had violated principles of impartiality, integrity, competence and equality, independence, propriety, and decency, and removed him from the position of Chief Justice. That ethics decision did not annul Decision No. 90, because Indonesian constitutional judgments are final and binding once pronounced. It did, however, supply a rare official institutional record that the adjudicative process was compromised by a conflict of interest of constitutional significance.<sup>3</sup>

This article argues that Decision No. 90 should not be reduced to a merely controversial decision, a misguided exercise of judicial activism, or an isolated ethical breach. It is better understood as a paradigmatic instance of judicial constitutional capture. By this term, the article refers to a condition in which a constitutional court, or a decisive judicial coalition within it, deploys formal interpretive authority to produce constitutional consequences that serve personal, familial, partisan, or institutional interests linked to the adjudicators themselves, while maintaining the outward vocabulary of constitutional adjudication. Judicial constitutional capture is therefore different from ordinary judicial error. It is also different from executive court-packing, because the decisive manipulation occurs within the court's own reasoning, procedures, and remedial choices rather than through external appointment control.

The novelty of the argument lies in its account of endogenous pathology. In Hungary, Poland, and Turkey, the dominant comparative story is one of exogenous capture: political branches alter appointments, retire judges, discipline courts, manipulate jurisdiction, or use constitutional amendments

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<sup>2</sup> Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 90/PUU-XXI/2023 (16 October 2023).

<sup>3</sup> Majelis Kehormatan Mahkamah Konstitusi, Putusan Nomor 2/MKMK/L/11/2023 (7 November 2023); Mahkamah Konstitusi Republik Indonesia, "MKMK Berhentikan Anwar Usman dari Jabatan Ketua Mahkamah Konstitusi," 7 November 2023, <https://www.mkri.id/berita/-19751>.

to neutralize judicial independence. In Indonesia's Decision No. 90, the bench was not packed for the specific case, and the decisive move did not appear as an explicit command from the executive. Instead, the court's own internal decision-making created an electoral norm that benefited an identifiable dynastic interest. This does not imply that every judge who joined the result shared the same subjective motive. The relevant claim is institutional and doctrinal: the structure of the decision cannot be explained by ordinary interpretive disagreement once standing, precedent, plurality reasoning, recusal, timing, and remedial proportionality are considered together.<sup>4</sup>

The article also responds to a methodological difficulty often present in research on democratic backsliding. A single decision rarely announces itself as anti-democratic. The analyst must therefore avoid two errors. The first is formalism: treating any decision within jurisdiction as legitimate because it has the legal form of a judgment. The second is political reductionism: treating any decision with political consequences as illegitimate because observers dislike its outcome. This article avoids both errors by reconstructing the decision through legal doctrine, institutional design, and comparative theory. The question is not whether the Court had jurisdiction to review election legislation; it plainly did. The question is whether the Court exercised that jurisdiction with the integrity, impartiality, and principled consistency that constitutional adjudication requires.<sup>5</sup>

The article is also positioned within a wider literature on democratic decay and fragile constitutionalism. Daly conceptualizes democratic decay as a gradual degradation of institutions, norms, and accountability mechanisms rather than a single decisive collapse. Issacharoff's account of fragile democracies likewise emphasizes that constitutional courts often operate at the boundary between democratic protection and political contestation. Hirschl's work on juristocracy reminds us that the expansion of judicial power is not automatically progressive; it may relocate political conflict to courts without guaranteeing that courts will resolve that conflict in a democratically

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<sup>4</sup> David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47 (2013): 189-260; Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021), 1-24; Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85, no. 2 (2018): 545-583.

<sup>5</sup> Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, art. 24C; Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi, as amended by Undang-Undang Nomor 7 Tahun 2020.

legitimate way. These strands together justify a careful analysis of when judicial power protects democracy and when it becomes a channel through which democratic competition is distorted.<sup>6</sup>

Indonesian scholarship provides an equally important foundation. Studies of the Court after Reformasi have emphasized its role in translating constitutional supremacy into enforceable legal doctrine, while more recent work on Decision No. 90 has highlighted inconsistency, ethical concerns, and public distrust. This manuscript builds on that literature but shifts the emphasis from institutional disappointment to analytic classification. It asks not only whether the Court acted wrongly, but what type of constitutional pathology is revealed when wrongness is produced through a formally valid judgment of a court that remains institutionally independent in the external sense.<sup>7</sup>

Several existing studies have examined Decision No. 90 as an instance of inconsistency, ethical misconduct, or judicial lawmaking. Those studies are valuable, particularly in documenting the immediate doctrinal and political controversy. However, many remain descriptive and do not fully explain why the Indonesian episode differs from common forms of abusive judicial review.

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<sup>6</sup> Tom Gerald Daly, "Democratic Decay: Conceptualising an Emerging Research Field," *Hague Journal on the Rule of Law* 11 (2019): 9-36; Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015), 1-17; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), 1-16.

<sup>7</sup> Rahayu Prasetyaningsih, "Judicial Review in Indonesia: A Post-Reformasi Constitutional Mechanism," *Indonesian Law Review* 2, no. 2 (2012): 143-170; Selvi Christina Situmeang, Ardilafiza Ardilafiza, and Ari Wiryadinata, "Inconsistency of the Constitutional Court Regarding the Minimum Age Requirement for Presidential and Vice-Presidential Candidates," *Jurnal Konstitusi* 21, no. 4 (2024); Yance Arizona et al., *Skandal Mahkamah Keluarga: Eksaminasi Publik Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 Mengenai Batas Usia Calon Presiden dan Wakil Presiden* (Yogyakarta: PANDEKHA Fakultas Hukum Universitas Gadjah Mada, 2023). See also Amiludin Amiludin, Bahtiar Amrullah, Tajudeen Sanni, Zaharuddin Sani Ahmad Sabri, and Bayangsari Wedhatami. "Oligarchy vs. Sovereignty: Constitutional Amendments and the Democratic Regression of Indonesia's Post-Reform Era". *Indonesian Constitutional Studies* 1, no. 1 (2025): 101-132; Joshua Lee, Zhang Mei, and Kunal Mehta. "Digital Authoritarianism and the Erosion of Civil Liberties: A Comparative Legal Study of Surveillance Laws in China, India, and the United States". *Journal of Transformative Legal and Social Studies* 1, no. 1 (2025): 97-120; Fahmi Hidayat Alvaro, and Faizal Junaid. "The Evolution of Indonesian Democracy: Challenges and Prospects in the Post-Reformasi Era". *Indonesian Political Transformation* 1, no. 1 (2025): 1-40.

A court may abuse judicial review by validating executive action. Here, the Court did more: it generated a new electoral eligibility rule. A court may act creatively for rights-protective purposes. Here, creativity coincided with an individualized electoral beneficiary, an accelerated calendar, and a known conflict of interest. A court may fragment in its reasoning. Here, the operative ruling appears broader than any rationale that clearly commanded five votes. The article therefore treats plurality reasoning, temporal inconsistency, and standing as central mechanisms rather than secondary defects.<sup>8</sup>

The research makes four contributions. First, it refines the concept of judicial constitutional capture and distinguishes it from abusive constitutionalism, abusive judicial review, ordinary activism, and court-packing. Second, it reconstructs the open legal policy doctrine and explains how Decision No. 90 redefined that doctrine in a manner that enabled arbitrary intervention. Third, it provides a functional comparison with Hungary, Poland, Turkey, and India, showing that Indonesia's endogenous and familial mechanism is more difficult to detect than many external capture models because it appears as adjudicative reasoning rather than institutional takeover. Fourth, it proposes institutional reforms: mandatory preventive recusal, heightened standing scrutiny for election-rule cases, a supermajority procedure for departures from recent precedent, transparent plurality rules, cooling-off safeguards, and more effective ethics sanctions.

The structure of the article follows that argument. The Method section explains the qualitative-normative, critical-doctrinal, comparative-historical, and theory-building design. The first substantive section reconstructs the Constitutional Court's independence and open legal policy doctrine before Decision No. 90. The second section develops the theoretical framework and provides a litmus test for identifying judicial constitutional capture. The third section analyzes Decision No. 90 in detail: the standing problem, the fractured majority, the positive-legislator remedy, the conflict of interest, and the unforgiving electoral calendar. The fourth section compares Indonesia with other jurisdictions under democratic stress. The fifth section sets out an institutional reform agenda. The Conclusion returns to the article's central claim: when a constitutional court manipulates electoral rules from within the language of legality, constitutional democracy confronts a pathology that cannot be cured by ordinary judicial ethics alone.

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<sup>8</sup> Elva Imeldatur Rohmah, "Dinamika Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 Tentang Persyaratan Usia Calon Presiden dan Wakil Presiden," *PROGRESIF: Jurnal Hukum* 18, no. 1 (2024).

This article employs a qualitative-normative legal research design combining critical doctrinal analysis, comparative constitutional law, and bounded theory-building. The normative materials consist of the 1945 Constitution, the Constitutional Court Law, the Judicial Power Law, the Election Law, Constitutional Court regulations on procedural and ethical matters, Decision No. 90/PUU-XXI/2023, prior related decisions on presidential age requirements, especially Decisions Nos. 29, 51, and 55/PUU-XXI/2023, and the Constitutional Court Ethics Council's decision concerning Anwar Usman. The doctrinal analysis evaluates Decision No. 90 against standards of consistency, coherence, impartiality, remedial propriety, and temporal regularity. To make the analysis reproducible, the relevant decisions are coded according to six variables: legal standing, justiciability under the open legal policy doctrine, treatment of precedent, remedial form, conflict-of-interest handling, and proximity to electoral deadlines. Later proceedings concerning efforts to revisit or formalize objections to Decision No. 90 are used only in a limited way: not to retroactively validate or invalidate the judgment, but to show how the Court treated the legal consequences of a decision already tainted by official ethical findings.

The comparative and theory-building components are functional rather than exhaustive. Hungary and Poland are used to illustrate exogenous court capture through appointments, institutional reorganization, and political control over constitutional adjudication; Turkey illustrates more direct executive domination after emergency politics and constitutional restructuring; and India illustrates a softer pattern of judicial subordination through appointment dynamics, institutional incentives, and selective deference. Indonesia is then examined as a distinct model in which the decisive manipulation was endogenous, case-specific, and linked to familial conflict within the adjudicating institution. The article does not claim to determine the subjective intent of every justice, nor does it assess whether the 2024 election outcome should be legally disturbed. Its narrower claim is that Decision No. 90 reveals a mechanism insufficiently captured by existing categories of ordinary judicial activism, abusive judicial review, or exogenous court capture: namely, endogenous judicial constitutional capture, marked by self-interested judicial participation, abrupt doctrinal deviation, fragmented ratio, individualized electoral consequence, formal legality, and compromised impartiality.

## Constitutional Baseline: MK Independence, Open Legal Policy, and Democratic Remedies

The Indonesian Constitutional Court emerged from the post-1998 Reformasi settlement as one of the most ambitious institutional innovations in Southeast Asian constitutionalism. Its establishment reflected a historical judgment: constitutional supremacy would remain fragile unless there existed a specialized institution capable of reviewing legislation, resolving disputes among state institutions, adjudicating electoral disputes, deciding party dissolution cases, and handling opinions on presidential impeachment. This design gave the Court a double identity. It was a court of law, bound by reasoned adjudication, and a guardian of democratic transition, entrusted with preventing the legislature and executive from undoing the constitutional commitments of the Reformasi period.<sup>9</sup>

Between 2003 and roughly 2020, the Court developed a public reputation as an institution willing to intervene against statutory arrangements that impaired constitutional rights or distorted democratic participation. That reputation was never unqualified. The Court faced criticism over inconsistency, internal ethics, and the political consequences of its electoral jurisdiction. Yet the baseline matters because it explains why Decision No. 90 created such institutional shock. A court that had been designed to restrain political actors appeared, in that decision, to become the institutional site through which an electoral eligibility rule was reconstructed in favor of a visible dynastic interest.<sup>10</sup>

The so-called golden era of the Court should not be romanticized. Constitutional courts in young democracies often oscillate between assertiveness and restraint, and they must build authority without the deep historical legitimacy enjoyed by older supreme courts. Nevertheless, several early Indonesian decisions show the Court acting in a rights-protective and democracy-facilitating manner. In Decision No. 011-017/PUU-I/2003, the Court strengthened political rights by invalidating restrictions that broadly excluded persons associated with the former Communist Party from candidacy. In Decision No. 102/PUU-VII/2009, it permitted certain voters

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<sup>9</sup> Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition* (Jakarta: Kompas Book Publishing, 2008), 219-252; Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara* (Jakarta: Konstitusi Press, 2005), 1-31.

<sup>10</sup> Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015), 1-38.

not listed in the permanent voter register to exercise voting rights by using identity documents. In Decision No. 100/PUU-XIII/2015, it avoided the paralysis of local elections with single candidates by crafting a voting mechanism that preserved electoral choice rather than postponing democracy indefinitely.<sup>11</sup>

Those examples are important for two reasons. First, they show that conditional constitutional remedies are not inherently illegitimate. A constitutional court may sometimes need to supply a transitional reading of a statute to prevent immediate rights deprivation or democratic vacuum. Second, they clarify why Decision No. 90 is different. In the earlier rights-protective cases, the Court's creativity operated to expand general participation, prevent disenfranchisement, or avoid institutional deadlock. The beneficiaries were diffuse and constitutional principle was generalizable. In Decision No. 90, the remedy produced an immediate and identifiable electoral benefit under an accelerated calendar. The technique may resemble earlier creative adjudication, but its institutional context and democratic consequence are fundamentally different.

The open legal policy doctrine became one of the Court's principal tools for determining when to defer to the legislature. In broad terms, the doctrine recognizes that the Constitution often sets ends and principles while leaving policy calibration to democratically accountable lawmakers. Age thresholds, administrative qualifications, electoral design details, and institutional procedures may fall within this zone unless they are manifestly irrational, discriminatory, or destructive of constitutional rights. Open legal policy is not a license for legislative arbitrariness, but it is a doctrine of judicial role morality: a court should not replace legislative judgment merely because it considers another policy wiser.<sup>12</sup>

Decision No. 90 did not simply ignore open legal policy. It redefined the doctrine at precisely the point where the doctrine should have imposed restraint. In Decisions Nos. 51 and 55, the Court treated the age requirement for presidential and vice-presidential candidates as legislative policy. In Decision No. 90, the Court transformed the same statutory provision into a judicially remediable constitutional problem because the legislature had not

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<sup>11</sup> Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 011-017/PUU-I/2003 (24 February 2004); Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 102/PUU-VII/2009 (6 July 2009); Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 100/PUU-XIII/2015 (29 September 2015).

<sup>12</sup> Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 51/PUU-XXI/2023, 172-181; Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 55/PUU-XXI/2023.

created an elected-office exception. The shift was not accompanied by a full explanation of why the category had changed. That absence is central to the article's claim. Capture often appears not through an explicit declaration that doctrine is abandoned, but through a sudden reclassification that allows a court to reach a predetermined or institutionally convenient outcome.

Open legal policy also has a temporal dimension. A constitutional court may be more justified in intervening when a policy defect has persisted over time and when correction can be applied prospectively without destabilizing an ongoing election. It is less justified when intervention occurs immediately before candidate registration, where a new rule can alter the strategic options of political parties and candidates in the same election cycle. The Indonesian age-threshold cases therefore cannot be evaluated without the electoral calendar. Timing was not a neutral background fact. It was part of the legal mechanism through which judicial power translated into electoral opportunity.<sup>13</sup>

The Court's early authority depended on a delicate balance between assertiveness and restraint. It had to show that constitutional rights were enforceable after decades in which constitutional text had often been subordinated to political power. At the same time, it had to avoid becoming a substitute legislature. The open legal policy doctrine developed in this tension. It allowed the Court to say that certain choices were constitutionally permissible without endorsing them as wise. This was not judicial abdication; it was an attempt to separate constitutional necessity from policy preference.<sup>14</sup>

That distinction became increasingly important as election-law litigation expanded. Electoral statutes inevitably involve thresholds, calendars, nominations, ballot formats, and administrative details. A court may have to intervene when those rules exclude voters, entrench discrimination, or destroy meaningful competition. But a court should be cautious when the dispute concerns the optimal calibration of candidacy qualifications. Age thresholds can be debated politically. They may be too high, too low, or historically outdated. Yet a constitutional court must identify a constitutional defect, not merely a better policy, before replacing the legislature's line with its own.

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<sup>13</sup> Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum, art. 169(q); Komisi Pemilihan Umum Republik Indonesia, Peraturan KPU Nomor 19 Tahun 2023 tentang Pencalonan Peserta Pemilihan Umum Presiden dan Wakil Presiden.

<sup>14</sup> Saldi Isra, *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlementer dalam Sistem Presidensial Indonesia* (Jakarta: Rajawali Pers, 2010), 45-82; Mahfud MD, *Politik Hukum di Indonesia* (Jakarta: Rajawali Pers, 2012), 1-20.

The history of the Court therefore provides the baseline against which Decision No. 90 is measured. The issue is not whether the Court had previously been activist. It had. The issue is whether prior activism was justified by reasons generalizable to constitutional democracy. The voting-rights cases expanded access to the ballot. The single-candidate case prevented electoral paralysis. By contrast, the age-threshold decision converted experience as an elected official into a new eligibility pathway for a national executive election at a moment when one identifiable person stood to benefit immediately. The difference is not cosmetic; it is the difference between a structural rights remedy and a personalized electoral remedy.

The baseline also explains why institutional trust was so severely affected. Public confidence in a constitutional court is not produced by the formal finality of judgments alone. It is produced by the expectation that similar cases will be treated similarly, that conflicts will be avoided before they contaminate deliberation, and that the court will explain departures from its own doctrine with candor. Decision No. 90 weakened each of those expectations. It therefore did not merely decide an election-law issue; it altered the perceived identity of the Court from constitutional guardian to potential participant in elite political strategy.

## **Theoretical Framework: From Abusive Constitutionalism to Endogenous Judicial Capture**

The literature on abusive constitutionalism and autocratic legalism has greatly improved the diagnosis of democratic erosion. It shows how constitutional forms can be used to undermine constitutional substance. Amendments, referenda, statutory reforms, and judicial decisions may all preserve legality while enabling incumbent entrenchment. Yet most leading accounts remain centered on political branches. Courts appear as targets of capture, validators of executive action, or institutions whose independence must be preserved. The Indonesian case requires a more precise category because the court did not merely approve a political branch's anti-democratic measure; it produced the decisive constitutional rule itself.<sup>15</sup>

Judicial constitutional capture can therefore be defined as the self-interested deployment of constitutional adjudicative authority by a constitutional court, or by a decisive judicial coalition within it, to generate constitutional outcomes that serve identifiable personal, familial, partisan, or

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<sup>15</sup> David Landau and Rosalind Dixon, "Abusive Judicial Review: Courts against Democracy," *UC Davis Law Review* 53 (2020): 1313-1387.

institutional interests linked to the adjudicators, while preserving the external form of judicial reasoning. This concept builds upon, but departs from, the literature on abusive constitutionalism, autocratic legalism, and constitutional retrogression, which generally conceptualizes constitutional erosion as executive-driven rather than judicially endogenous.<sup>16</sup> The definition contains five elements: formal jurisdiction, doctrinal deviation, compromised impartiality, significant constitutional consequence, and an appearance of legality. The element of appearance is essential because constitutional capture becomes most difficult to detect where the decision outwardly resembles ordinary constitutional review to audiences examining only the formal judgment.<sup>17</sup>

This definition also identifies the red line between aggressive judicial activism and capture. Activism concerns the intensity of judicial intervention, whereas capture concerns the integrity of reasons and the impartiality of the decision-making process.<sup>18</sup> A court may engage in expansive or creative constitutional interpretation in the name of equality, participation, or constitutional structure without necessarily becoming captured. Capture begins when doctrinal innovation is linked to self-interest, when precedent shifts without principled explanation, when procedure is arranged to secure time-sensitive institutional advantage, and when the resulting reasoning cannot be reconciled with the court's own recent jurisprudential commitments.<sup>19</sup>

The Table 1 sets out a litmus test for future researchers. It is not a mechanical checklist in which any one factor is sufficient. It is a diagnostic framework. The stronger the convergence of factors, the more plausible the conclusion that a decision reflects judicial constitutional capture rather than mere error, disagreement, or activism. The framework is designed to be transferable beyond Indonesia while remaining sensitive to local doctrine. It

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<sup>16</sup> David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47 (2013): 189–260; Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85, no. 2 (2018): 545–83; Aziz Z. Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (2018): 78–169.

<sup>17</sup> Mark Tushnet, "Constitutional Hardball," *John Marshall Law Review* 37, no. 2 (2004): 523–53.

<sup>18</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 225–75.

<sup>19</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018).

asks about institutional role, motivation, reasoning, process, timing, and consequence.

Constitutional hardball helps explain why the decision was so difficult to challenge through ordinary legality arguments. Hardball consists of conduct that may be formally permissible yet violates the implicit norms that make constitutional government workable. Decision No. 90 was not a military decree, and it was not an explicit suspension of democracy. It was a judgment with legal citations and a formal vote. The hardball dimension lies in the use of adjudicative form to achieve a political effect under conditions where the ordinary safeguards of impartiality and consistency failed.<sup>20</sup>

A theory of capture must also avoid overconstitutionalizing policy disagreement. Courts frequently make controversial decisions that favor one political side. That fact alone cannot establish capture. Barak and Ely provide two complementary warnings. Barak emphasizes judicial role morality and proportionality; Ely emphasizes representation-reinforcing review. A court that intervenes to protect democratic representation may act legitimately even if its decision is politically consequential. The problem arises when intervention does not reinforce representation but instead changes the rules of competition in a manner that benefits a linked actor without a generalizable representation-reinforcing rationale.<sup>21</sup>

The proposed concept therefore has a narrow ambition. It does not classify every flawed election decision as capture. It identifies a subset of decisions in which doctrinal irregularity, compromised impartiality, institutional self-interest, and democratic consequence converge. The narrowness is a virtue. If the concept is too broad, it becomes a rhetorical weapon against any disliked judgment. If it is too narrow, it misses the distinctive danger of courts that manipulate constitutional meaning from within. The litmus test is designed to keep the concept analytically disciplined.

**TABLE 1.** Litmus Test for Judicial Constitutional Capture

| Indicator              | Ordinary Activism                                   | Judicial Constitutional Capture                                 |
|------------------------|-----------------------------------------------------|-----------------------------------------------------------------|
| Institutional position | Court acts assertively within constitutional review | Court uses review to create an outcome serving linked interests |

<sup>20</sup> Mark Tushnet, "Constitutional Hardball," *John Marshall Law Review* 37, no. 2 (2004): 523-553; Ozan O. Varol, "Stealth Authoritarianism," *Iowa Law Review* 100, no. 4 (2015): 1673-1742.

<sup>21</sup> Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006), 137-166; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 73-104.

| Indicator          | Ordinary Activism                                       | Judicial Constitutional Capture                                                          |
|--------------------|---------------------------------------------------------|------------------------------------------------------------------------------------------|
| Doctrinal relation | Openly extends or revises doctrine with reasons         | Abruptly departs from recent doctrine without principled explanation                     |
| Impartiality       | No objective self-interest or conflict                  | Conflict, familial benefit, partisan proximity, or institutional self-dealing is present |
| Remedy             | General remedy, usually rights-protective or structural | Case-sensitive remedy with immediate electoral or institutional advantage                |
| Timing             | Not strategically tied to a decisive political deadline | Issued under an unforgiving calendar that magnifies strategic effect                     |
| Detectability      | Visible as a controversial legal interpretation         | Masked by formal legality, fragmented reasoning, or procedural regularity                |

*Source: Authors, 2026 (compiled from doctrinal and comparative analysis).*

This litmus test refines the boundary between abusive judicial review and judicial constitutional capture. Abusive judicial review occurs when courts use review to weaken democratic competition, often by validating executive measures, suppressing opposition, or giving constitutional cover to anti-democratic projects. Judicial constitutional capture begins where the court is not only an enabling validator but a direct generator of the rule or outcome that distorts democracy. In the Indonesian case, the Court created the elected-office exception. It did not merely defer to a statute enacted by the legislature or uphold an executive regulation. The operative democratic distortion emerged from the Court's own remedial language.<sup>22</sup>

Dworkin's concept of law as integrity is especially useful because it shifts the inquiry from formal legality to principled coherence. A Dworkinian judge is not a free moral philosopher, nor a mechanical servant of past text. The ideal judge, symbolized by Hercules, interprets law as a coherent narrative of institutional principle. Applied to open legal policy, a Hercules-like constitutional judge would ask whether the Court's prior cases, the separation of powers, equal political participation, and election stability can be made to fit and justify a new rule. If the answer is yes, the judge must explain the general principle. If the answer is no, the judge must defer to the legislature or

<sup>22</sup> Dixon and Landau, *Abusive Constitutional Borrowing*, 153-190; Landau and Dixon, "Abusive Judicial Review," 1348-1366.

invite legislative correction. In either scenario, a judge with a close familial link to the beneficiary would recuse.<sup>23</sup>

Decision No. 90 fails that Dworkinian test. A judge deciding with integrity could have followed at least three principled paths. The Court could have dismissed the petition because candidacy age thresholds were open legal policy, consistent with Decisions Nos. 51 and 55. It could have held that age thresholds raise constitutional equality questions but applied any new rule prospectively after the 2024 election to avoid strategic manipulation. Or it could have required the legislature to consider alternative qualifications without writing a candidate-specific exception into the statute. What the Court did instead was to create an immediate exception that aligned with an identifiable electoral interest while leaving the doctrinal foundation unstable.

The motivation of the decisive judicial coalition should be analyzed with care. The concept of endogenous capture does not require proof that each judge acted from identical personal loyalty. Judicial coalitions are often formed through overlapping motives: deference to institutional leadership, fear of isolation, ideological sympathy, career calculation, preference for institutional relevance, or genuine but weakly reasoned legal disagreement. In Decision No. 90, the personal and familial conflict of the presiding Chief Justice is the clearest objective fact. The broader institutional pathology lies in the failure of the Court's rules to prevent that conflict from structuring the deliberative environment in which the coalition formed.

This is why judicial constitutional capture is a structural concept. It does not depend solely on moral condemnation of a single judge. A court is captured in the relevant sense when its internal safeguards are insufficient to prevent self-interest from shaping constitutional outcomes. The relevant safeguards include recusal rules, agenda control, case scheduling, standing doctrine, precedent discipline, clarity in plurality reasoning, and effective ethics enforcement. Decision No. 90 exposed weaknesses in each of these safeguards. The article therefore treats reform not as a matter of punishing one actor after the fact, but as the redesign of a decision-making architecture.

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<sup>23</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 225-275.

## Doctrinal Reconstruction of Decision No. 90/PUU-XXI/2023

### A. Standing, Indirect Litigation, and the Proxy-Plaintiff Problem

The doctrinal reconstruction begins with the litigation sequence. In the same election year, the Court considered multiple challenges to Article 169 letter q of the Election Law. Decisions Nos. 29, 51, and 55 rejected efforts to alter the forty-year age threshold, while Decision No. 90 granted an alternative exception. The factual proximity of these decisions matters. A court can change its mind over time when constitutional meaning evolves, when new facts arise, or when prior doctrine becomes unsustainable. But a court that changes position within the same electoral cycle, on substantially the same statutory provision, must carry an especially heavy burden of justification. Decision No. 90 did not carry that burden.<sup>24</sup>

The standing issue is the first doctrinal gateway. The petitioner in Decision No. 90 was a student who claimed a constitutional interest in supporting or admiring a younger public official. Liberal access to constitutional review can be a democratic virtue, especially where citizens challenge statutes that affect public rights. But liberalized standing becomes dangerous when it enables indirect litigation: political actors or beneficiaries may obtain constitutional outcomes through proxy plaintiffs whose injury is diffuse, ideological, or symbolic rather than direct. The problem is not that citizens should be barred from public-interest litigation. The problem is that election-rule litigation close to candidate registration can transform diffuse standing into a route for strategic constitutional engineering.

The Court should therefore have applied heightened standing scrutiny. Such scrutiny would not require the petitioner to be a declared candidate; Indonesian constitutional review has not always demanded that level of directness. It would require, however, a credible showing that the alleged constitutional injury is not merely admiration for a named beneficiary and that the remedy requested is not functionally tailored to unlock the candidacy of that beneficiary in the ongoing election. Decision No. 90 did not meaningfully confront that problem. By treating a thin personal preference as

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<sup>24</sup> Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 29/PUU-XXI/2023 (16 October 2023); Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 51/PUU-XXI/2023 (16 October 2023); Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 55/PUU-XXI/2023 (16 October 2023).

sufficient gateway material, the Court opened the door for proxy litigation that can be used by political elites while preserving deniability.

## B. Open Legal Policy, Temporal Inconsistency, and the Electoral Calendar

The second problem is temporal inconsistency. Decisions Nos. 51 and 55 treated the determination of age and experience requirements as a matter for the legislature. Decision No. 90 recast the same field as a constitutional defect demanding judicial repair. No intervening constitutional amendment occurred. No new legislative act changed the legal baseline. No broad social fact suddenly made the age threshold unconstitutional. The distinguishing feature was not doctrinal but electoral: the candidate registration calendar made the timing of the judicial exception decisive. In this sense, the electoral calendar functioned as an instrument of capture. The nearer the deadline, the greater the value of judicial speed and the lower the possibility of legislative or public deliberation.<sup>25</sup>

The Table 2 summarizes the relevant decisions. Its purpose is not merely descriptive. It shows that Decision No. 90 sits outside the line of reasoning established by its companion cases. The central question is not whether constitutional courts may ever depart from their own precedent; they may. The question is whether they may do so without a principled account when the departure immediately affects an ongoing presidential election.

**TABLE 2.** Same-Cycle Precedent Tracking on Presidential Age Requirements

| Decision        | Date         | Petitioner / Request                                           | Outcome         | Doctrinal Significance                                                        |
|-----------------|--------------|----------------------------------------------------------------|-----------------|-------------------------------------------------------------------------------|
| 29/PUU-XXI/2023 | 16 Oct. 2023 | Lower presidential age threshold to 35                         | Rejected        | Age threshold treated as legislative policy and not for judicial substitution |
| 51/PUU-XXI/2023 | 16 Oct. 2023 | Alternative based on experience as state official              | Rejected        | Open legal policy used as basis for restraint                                 |
| 55/PUU-XXI/2023 | 16 Oct. 2023 | Alternative based on regional-head or public-office experience | Rejected        | Court declined to construct an experience exception                           |
| 90/PUU-XXI/2023 | 16 Oct. 2023 | Exception for elected-office experience                        | Granted in part | Court created new alternative eligibility rule                                |

<sup>25</sup> Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 90/PUU-XXI/2023, 111-124 (dissenting opinion of Justice Saldi Isra).

| Decision        | Date         | Petitioner / Request                 | Outcome                    | Doctrinal Significance                     |
|-----------------|--------------|--------------------------------------|----------------------------|--------------------------------------------|
| 91/PUU-XXI/2023 | 16 Oct. 2023 | Related challenge to age requirement | Inadmissible / not granted | Shows the density of same-cycle litigation |

*Source: Authors, 2026, compiled from Constitutional Court decisions Nos. 29, 51, 55, 90, and 91/PUU-XXI/2023.*

The table demonstrates that Decision No. 90/PUU-XXI/2023 cannot be understood in isolation from the Court's same-cycle jurisprudence on presidential and vice-presidential age requirements. Decisions Nos. 29, 51, and 55/PUU-XXI/2023 show a relatively stable position: the Court treated the minimum age requirement as a matter of legislative policy and declined to substitute its own eligibility formula for that chosen by the legislature. In those decisions, the open legal policy doctrine functioned as a principle of judicial restraint. The doctrinal anomaly of Decision No. 90 lies precisely in its departure from this position within the same electoral cycle and on the same statutory provision, without a sufficiently persuasive explanation for why an experience-based exception suddenly became constitutionally required.<sup>26</sup>

This pattern is significant because the inconsistency is not merely chronological but structural. Decision No. 90 did not simply interpret the existing norm; it created a new alternative eligibility rule with immediate electoral consequences.<sup>27</sup> The density of litigation reflected in Decisions Nos. 29, 51, 55, 90, and 91/PUU-XXI/2023 shows that the Court was repeatedly asked to intervene in the same regulatory field at a politically sensitive moment. Against that background, the abrupt shift from restraint to remedial innovation strengthens the argument that the case involved more than ordinary judicial activism. It illustrates how precedent instability, time-sensitive adjudication, and individualized electoral benefit can converge to produce what this article identifies as judicial constitutional capture.<sup>28</sup>

<sup>26</sup> Mahkamah Konstitusi Republik Indonesia, *Putusan Nomor 90/PUU-XXI/2023*.

<sup>27</sup> Mahkamah Konstitusi Republik Indonesia, *Putusan Nomor 90/PUU-XXI/2023*, amar putusan.

<sup>28</sup> David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47 (2013): 189–260; Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85, no. 2 (2018): 545–83; Aziz Z. Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (2018): 78–169.

## C. Plurality Reasoning, Ratio Decidendi, and Positive Legislation

The third and most technical problem concerns plurality reasoning and the legal status of the ratio decidendi. The operative ruling of Decision No. 90 was supported by a five-to-four majority, but the majority was fractured. Public summaries and dissenting analysis indicate that only three justices supported the broad formulation that allowed any office elected through general elections, including regional head offices. Two justices who joined the outcome reasoned more narrowly, favoring a formulation connected to gubernatorial experience. The consequence is serious: the broad rule in the judgment appears wider than the rationale clearly supported by five justices.<sup>29</sup>

Indonesian constitutional law gives final and binding force to the Court's decisions. The operative disposition, or *amar*, is therefore legally effective. But finality of the disposition does not answer the jurisprudential question of ratio. When no single rationale commands a majority, future courts, legislators, and election administrators face uncertainty about which principle is binding. Comparative systems have developed different responses to plurality decisions. Some treat the narrowest ground as controlling; others focus on the formal order; still others require a majority opinion before a proposition becomes authoritative precedent. Indonesia lacks a sufficiently explicit rule for extracting ratio from fragmented constitutional judgments.<sup>30</sup>

That gap became a procedural capture mechanism. A fractured court could produce a binding rule broader than the actual shared reasoning of the majority. The defect is not merely academic. If only three justices accepted the broad elected-office formula, then the constitutional justification for including mayors, regents, and other elected officials was not truly majoritarian. The judgment's legal effect then depends on the authority of the Court as an institution rather than on a coherent judicial rationale. That is the opposite of law as integrity. It allows the appearance of a majority to do more work than the reasoning of a majority can sustain.

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<sup>29</sup> Mahkamah Konstitusi Republik Indonesia, "Presidential Tickets at Least 40 Years Old or Elected Officials," 16 October 2023, [https://en.mkri.id/news/details/2023-10-16/Presidential\\_Tickets\\_at\\_Least\\_40\\_Years\\_Old\\_or\\_Elected\\_Officials](https://en.mkri.id/news/details/2023-10-16/Presidential_Tickets_at_Least_40_Years_Old_or_Elected_Officials).

<sup>30</sup> For a comparative discussion of plurality reasoning and narrowest-ground approaches, see Mark A. Thurmon, "When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions," *Duke Law Journal* 42, no. 3 (1992): 419-468. This comparative heuristic is not cited here as Indonesian positive law but as an analytical tool for ratio extraction.

The fourth problem is the remedy. The Court did not simply invalidate the age requirement. It declared the provision unconstitutional unless read to include a new alternative condition. Conditional constitutionality is an established remedial technique in Indonesian constitutional adjudication. Its legitimacy depends on proportionality, generality, and fit with constitutional principle. In Decision No. 90, the remedy functioned as positive legislation. It supplied a new eligibility rule that the legislature had not enacted, and it did so with immediate effect in a live electoral contest. This remedial method exceeded ordinary negative-legislator review in the Kelsenian sense.<sup>31</sup>

A comparison with earlier democracy-protective remedies is instructive. When the Court protected voters omitted from the voter list by allowing identity-card voting, the remedy expanded participation and addressed an administrative failure that threatened the right to vote. When the Court allowed elections with single candidates to proceed through a yes-or-no mechanism, the remedy prevented institutional paralysis and preserved electoral opportunity. Those cases may still be debated, but their logic was general and participation-enhancing. Decision No. 90 did not solve a systemic disenfranchisement problem. It created an exception for candidacy eligibility in a way that aligned with a specific electoral opportunity.

## **D. Conflict of Interest, MKMK Findings, and Ex Post Ethics Limits**

The fifth problem is conflict of interest. The *nemo iudex in causa sua* principle is foundational: no one should judge a cause in which he has a personal interest. Indonesian positive law reflects this principle in the Judicial Power Law, while Constitutional Court regulations address conflict of interest. Yet the Court's architecture at the time left too much to self-assessment. A justice with an obvious familial connection to a foreseeable beneficiary could participate in the case. Once that occurred, later ethics sanctions could not restore the integrity of the decision. Preventive recusal was the missing institutional mechanism.<sup>32</sup>

The Ethics Council's decision is best understood as empirical legal evidence, not merely a postscript. It confirmed that the conduct surrounding

<sup>31</sup> Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1961), 268-289.

<sup>32</sup> Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman, art. 17; Peraturan Mahkamah Konstitusi Nomor 7 Tahun 2020 tentang Pedoman Penanganan Benturan Kepentingan di Mahkamah Konstitusi.

Decision No. 90 violated institutional ethical principles. It also illustrates the limits of *ex post* sanction. Removing Anwar Usman from the position of Chief Justice recognized misconduct, but the judgment remained in force and the underlying electoral effect remained intact. That gap between ethical finding and constitutional remedy is the central institutional failure. A constitutional system cannot rely on *post hoc* reputational correction when the relevant harm is the irreversible alteration of an election-rule environment.<sup>33</sup>

Decision No. 90 also raises the question of legal finality after ethical compromise. Later cases, including challenges that sought to revisit or formalize objections to the judgment, show that the Court treated the decision as legally final. This is understandable within Article 24C's final-and-binding model. But finality should not be confused with institutional vindication. A tainted decision can be legally effective and still reveal serious structural defects. That distinction is crucial. The article does not argue that every ethically compromised judgment automatically loses legal force. It argues that a system that cannot prevent such compromise before judgment must be redesigned.<sup>34</sup>

The Court's later treatment of Decision No. 90 underscores the distinction between legal finality and institutional legitimacy. In subsequent litigation, including cases that questioned the formal validity or future application of the age exception, the Court treated Decision No. 90 as part of the binding legal framework. That approach may be defensible under a final-and-binding model, but it does not cure the procedural and ethical problems that accompanied the original judgment. A constitutional order can preserve finality while still recognizing that finality without preventive integrity creates incentives for strategic litigation.<sup>35,36</sup>

Recent Indonesian commentary has described the dissenting and separate opinions in Decision No. 90 as evidence of deep internal division. The significance of that division is not merely that judges disagreed. Disagreement

<sup>33</sup> Majelis Kehormatan Mahkamah Konstitusi, Putusan Nomor 2/MKMK/L/11/2023, 327-382.

<sup>34</sup> Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 141/PUU-XXI/2023 (29 November 2023); Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 145/PUU-XXI/2023 (16 January 2024).

<sup>35</sup> Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 141/PUU-XXI/2023 (29 November 2023); Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 145/PUU-XXI/2023 (16 January 2024).

<sup>36</sup> Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 90/PUU-XXI/2023, 58-60 (operative ruling).

is ordinary in constitutional courts. The significance is that the division corresponded to uncertainty over the breadth of the rule that would govern a presidential election. Where the difference between a governor-only exception and a broad elected-office exception determines eligibility, the distinction is outcome-determinative rather than stylistic.<sup>37</sup>

The standing, precedent, ratio, remedy, conflict, and timing defects reinforce one another. Each might be explained away in isolation. Liberal standing may be defensible. Courts may change doctrine. Pluralities may occur. Conditional remedies may be legitimate. Recusal may sometimes be debatable. Urgent election cases may require speed. But when all six features converge in one case, and when the result supplies an immediate path for a known beneficiary connected to the presiding Chief Justice, ordinary explanations lose plausibility. The pattern is better described as judicial constitutional capture.

This convergence also explains why the phrase 'bad decision' is analytically inadequate. Many bad decisions are bad because they misread text, misunderstand precedent, or produce undesirable consequences. Decision No. 90 is constitutionally more serious because its defects are mutually corroborating. The procedural gateway was unusually permissive, the doctrinal departure was abrupt, the ratio was fragmented, the remedy was legislative in substance, the conflict was objective, and the timing was electorally decisive. The case therefore supplies a concrete instance in which the form of constitutional review was used to produce democratic distortion.

## **E. Comparative Perspective: Constitutional Courts under Democratic Stress**

Functional comparison clarifies both the distinctiveness and the general relevance of the Indonesian case. Hungary and Poland are the most familiar European examples of constitutional court capture. In Hungary, constitutional amendments, institutional redesign, and appointments changed the Court's composition and reduced its capacity to check the governing party. In Poland, the Constitutional Tribunal crisis involved contested appointments, refusal to publish judgments, procedural obstruction, and political restructuring. In both cases, the main driver was external: the political

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<sup>37</sup> Ghassani Nur Shadrina, Beni Ahmad Saebani, and Taufiq Alamsyah, "Dissenting Opinion Hakim dalam Amar Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," *Jurnal Ilmu Hukum, Humaniora dan Politik* 5, no. 4 (2025): 3274-3286.

branches acted upon the court to transform it into a more compliant institution.<sup>38</sup>

Turkey presents a more coercive model. Following the failed coup attempt and the broader consolidation of presidential power, the judiciary experienced purges, disciplinary pressure, and constitutional restructuring. The Constitutional Court remained formally present, but the broader institutional environment changed the costs and incentives of judicial resistance. Again, the mechanism is largely exogenous. The court's behavior is shaped by executive pressure, emergency politics, and institutional subordination. This differs from a case in which the court itself initiates the decisive legal transformation through its own reasoning.<sup>39</sup>

India offers a subtler comparator. Commentators have described concerns about selective judicial deference, appointment delays, post-retirement incentives, and the uneven pace at which politically sensitive cases are heard. This is not classic court-packing, and it is not identical to Indonesia. It is a model of soft subordination, where diffuse incentives may shape the judiciary without formal takeover. The Indonesian case is more difficult to detect in a different way. It is not hidden in long-term appointment bargaining alone. It is embedded in the doctrinal grammar of a single decision that looks formally legal but contains conflict-of-interest and ratio defects.<sup>40</sup>

The nepotism factor gives Indonesia's case a unique profile. European backsliding examples often involve party-state fusion, ideological dominance, or institutional restructuring. Decision No. 90 involved a visible familial relationship between the presiding Chief Justice and the direct electoral beneficiary. Familial conflict does not automatically prove unconstitutional motive, but it creates a heightened appearance of partiality and a structural risk of self-dealing. In constitutional adjudication, appearance matters because

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<sup>38</sup> Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019), 51-103; Andras L. Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (London: Routledge, 2018), 61-90.

<sup>39</sup> Mustafa Erdogan, "Turkey's Constitutional Court and the Politics of Judicial Review," in *Constitutional Democracy in Crisis?*, ed. Mark A. Graber, Sanford Levinson, and Mark Tushnet (Oxford: Oxford University Press, 2018), 621-636; Ergun Ozbudun, "Turkey's Judiciary and the Drift toward Competitive Authoritarianism," *International Spectator* 50, no. 2 (2015): 42-55.

<sup>40</sup> Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Cambridge, MA: Harvard University Press, 2020), 1-23; Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India," *Law and Ethics of Human Rights* 14, no. 1 (2020): 49-95.

the Court's authority depends on public confidence that legal reasons, not private ties, determine outcomes.

The comparison also shows why reforms designed only for exogenous capture are insufficient. Court-packing can be addressed through appointment rules, tenure security, transparent nomination processes, and protection against arbitrary removal. Those reforms matter, but they do not prevent a sitting court from using its own authority to generate a captured outcome. Endogenous capture requires additional safeguards: mandatory recusal, internal deliberation rules, clear treatment of plurality decisions, precedent-departure procedures, and ethics bodies capable of preventing conflicted participation before judgment rather than merely sanctioning it afterward.<sup>41</sup>

The following table summarizes the comparison. It emphasizes mechanisms rather than labels. The same jurisdiction may contain multiple mechanisms over time, and no typology should be treated as exhaustive. Nevertheless, the distinction between exogenous, soft, and endogenous capture helps identify which institutional safeguards are necessary.

This comparison also demonstrates the value of looking at detectability. Exogenous capture often leaves institutional traces: altered appointment laws, forced retirements, public attacks on judges, or noncompliance with judgments. Soft subordination may leave patterns of delay or deference. Endogenous capture leaves a different trace: a decision whose internal legal structure is unstable. The relevant evidence is found in the gap between ratio and disposition, the treatment of standing, the management of conflict, and the timing of the remedy. Comparative research should therefore look not only at who appoints judges, but also at how judges reason when an electorally valuable case reaches them.

**TABLE 3.** Functional Typology of Constitutional Court Capture

| Jurisdiction | Dominant Mechanism                                                  | Primary Agent                      | Visibility                    | Why Indonesia Differs                                                                |
|--------------|---------------------------------------------------------------------|------------------------------------|-------------------------------|--------------------------------------------------------------------------------------|
| Hungary      | Court-packing, constitutional amendment, jurisdictional restriction | Executive and legislative majority | High institutional visibility | Indonesian manipulation occurred inside adjudication, not mainly through prior bench |

<sup>41</sup> Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007 (Strasbourg: Council of Europe, 2016), 20-29; Venice Commission, *Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges*, CDL-PI(2020)008 (Strasbourg: Council of Europe, 2020).

| Jurisdiction | Dominant Mechanism                                                                       | Primary Agent                              | Visibility                                  | Why Indonesia Differs                                                               |
|--------------|------------------------------------------------------------------------------------------|--------------------------------------------|---------------------------------------------|-------------------------------------------------------------------------------------|
|              |                                                                                          |                                            |                                             | restructuring                                                                       |
| Poland       | Contested appointments, refusal to publish judgments, procedural obstruction             | Executive and legislative majority         | High institutional conflict                 | Indonesian case did not depend on external refusal to obey the court                |
| Turkey       | Emergency politics, purge, constitutional restructuring                                  | Executive                                  | High coercive visibility                    | Indonesian case lacked direct purge or overt emergency coercion                     |
| India        | Selective deference, appointment delay, institutional incentives                         | Executive pressure and judicial incentives | Moderate to low visibility                  | Indonesia presents more individualized familial conflict and a court-generated rule |
| Indonesia    | Conflict-linked adjudication, fragmented ratio, positive remedy under electoral calendar | Constitutional Court majority              | Low formal illegality; high ethical concern | Endogenous judicial constitutional capture                                          |

*Source: Authors, 2026 (functional comparison).*

The comparative analysis supports a cautious but important claim: endogenous capture may be more difficult for legal systems to recognize than exogenous court-packing because it uses the internal legitimacy of adjudication. When a government expands a court, replaces judges, or refuses to publish judgments, the institutional assault is visible. When a court issues a formally reasoned decision with citations, separate opinions, and a conventional remedial formula, the pathology is harder to name. The danger is normalization. Once the first case-specific electoral exception is treated as ordinary adjudication, future actors learn that judicial pathways can substitute for transparent legislative bargaining.

This is why Decision No. 90 has significance beyond Indonesia. Newer constitutional courts often operate in political systems characterized by strong presidentialism, dense elite networks, and fragile party institutionalization. Those conditions make familial or patronage-based influence especially relevant. A court may remain formally independent from direct executive orders while being socially and institutionally embedded in elite networks that

create self-interested incentives. Judicial constitutional capture names this problem without requiring proof that the court has become a formal agent of the executive.

The Indonesian case also refines the concept of democratic backsliding. Backsliding is not only a change in regime score or the abolition of opposition rights. It can occur through micro-level alterations of competition rules at decisive moments. Candidate eligibility, electoral district design, party registration, campaign finance, media access, and dispute resolution all shape the real openness of democratic competition. A constitutional court that alters one of these variables under compromised impartiality can contribute to backsliding even if elections continue and constitutional text remains unchanged.<sup>42</sup>

## **F. Institutional Reform Agenda: From Punitive Ethics to Preventive Integrity**

The institutional response should be preventive rather than primarily punitive. Punitive ethics sanctions occur after damage has materialized. In election cases, the damage may be irreversible by the time a sanction is imposed. The first reform is therefore mandatory preventive recusal. Recusal should be triggered by objective criteria: direct family relationship with a foreseeable beneficiary, prior representation or advisory role, recent political office connected to the dispute, financial interest, or public conduct creating a reasonable appearance of partiality. The decision should not be left solely to the conflicted justice. A standing recusal committee, composed of non-conflicted justices and external ethics members, should decide contested recusal motions before merits deliberation begins.<sup>43</sup>

Second, the Court needs a procedure for departures from recent precedent in election-rule cases. A supermajority requirement is one option. For example, where the Court seeks to depart from a decision on the same legal issue within the same election cycle or within twelve months, it should require at least seven of nine justices and a written explanation identifying the prior holding, the reason for departure, and whether the new rule applies prospectively. The purpose is not to freeze constitutional law. It is to prevent sudden, thinly reasoned reversals in time-sensitive electoral settings.

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<sup>42</sup> V-Dem Institute, *Democracy Report 2024: Democracy Winning and Losing at the Ballot* (Gothenburg: University of Gothenburg, 2024), 6-22.

<sup>43</sup> Bundesverfassungsgerichtsgesetz (BVerfGG), sec. 19; Federal Constitutional Court of Germany, Rules of Procedure of the Federal Constitutional Court.

The supermajority proposal has risks. It may enable minority tyranny if a minority of three can block necessary constitutional correction. That risk can be mitigated through narrow design. The rule should apply only to recent precedent on the same statutory provision or same electoral rule, not to all constitutional questions. It should preserve existing law unless a substantial majority agrees that immediate correction is constitutionally necessary. It should also include an emergency rights exception, where the Court may protect voting rights or prevent disenfranchisement with a lower threshold if the remedy is general, participation-expanding, and not tailored to an identifiable candidate or party. The Korean Constitutional Court's supermajority model illustrates that heightened voting thresholds can coexist with constitutional review.<sup>44</sup>

Third, the Court should adopt a clear rule for plurality decisions. Where the dispositive result is supported by a majority but the reasoning is fragmented, the Court should identify the controlling rationale before the judgment is finalized. If no rationale commands a majority, the operative rule should be limited to the narrowest proposition accepted by the decisive judges. In Decision No. 90, such a rule would have forced the Court to confront whether the broad elected-office formula truly commanded five votes. This reform would improve legal certainty and reduce the possibility that a broad disposition will be smuggled through a fractured majority.

Fourth, standing doctrine should be recalibrated for election-rule litigation. The Court should not abolish public-interest standing. Instead, it should require enhanced disclosure and injury analysis when a petition seeks to alter candidacy, party eligibility, campaign, or ballot rules within a defined pre-election period. Petitioners should disclose direct links with potential beneficiaries, campaign teams, political parties, or public officials whose eligibility would be affected. Failure to disclose should carry procedural consequences. Such rules would deter indirect litigation while preserving access for genuine constitutional grievances.

Fifth, cooling-off safeguards should be targeted rather than overbroad. Judges who previously held executive or legislative office should not be categorically disabled from judging public-law cases; such a rule would impoverish the bench and may be impractical. But a judge should be recused for a defined period from cases directly involving the appointing institution, a recent former office, or a matter in which a close family member has a

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<sup>44</sup> Constitutional Court of Korea Act, art. 23(2), requiring six or more votes for decisions of unconstitutionality and analogous major constitutional determinations.

foreseeable and individualized interest. For family-related conflicts, the trigger should apply regardless of the judge's prior public office. The central criterion is objective appearance of partiality, not proof of actual bias.

Sixth, ethics enforcement should include mandatory consequences for serious conflicts of interest. The Ethics Council's sanction in Decision No. 2/MKMK/L/11/2023 removed Anwar Usman from the chief justiceship but not from the bench. A future framework should distinguish ordinary ethical lapses from adjudicative conflicts that affect constitutional outcomes. Where a justice knowingly participates in a case involving an objectively foreseeable benefit to a close family member, mandatory disqualification from the case is the minimum remedy. If participation continues and the case reaches judgment, stronger sanctions, including dismissal procedures, should be available under clear statutory standards.<sup>45</sup>

Seventh, transparency should be strengthened. Separate opinions should be published in full and in a manner that makes the vote count and controlling rationale clear. Case scheduling in urgent election matters should be accompanied by a short procedural order explaining the reason for expedition. Where petitions are withdrawn and then withdrawal is cancelled, the Court should disclose the procedural basis for continuation and whether the same procedural treatment would be available to ordinary litigants. Transparency does not guarantee integrity, but it increases the cost of procedural manipulation.

The reforms should be implemented through a combination of statutory amendment and internal regulation. Matters affecting judicial removal, mandatory recusal, and ethics sanctions may require legislative action. Matters concerning deliberation procedure, publication of opinions, ratio identification, and scheduling can be handled by Constitutional Court regulations, provided they do not contradict statute. The following table organizes the reform agenda according to risk, proposed rule, and expected effect.

Eighth, the Court should create an internal election-law urgency protocol. The protocol should require the registrar or panel to identify whether a petition, if granted, would affect candidacy, ballot access, party nomination, campaign period, or dispute resolution in an ongoing election. If so, the Court should issue a procedural note explaining why immediate adjudication is necessary, whether the legislature has time to respond, and

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<sup>45</sup> Constitutional Court of Indonesia, Constitutional Court Regulation No. 1 of 2023 concerning the Ethics Council of the Constitutional Court; Majelis Kehormatan Mahkamah Konstitusi, Putusan Nomor 2/MKMK/L/11/2023.

whether any remedy should be prospective. This would not eliminate urgent review, but it would make urgency visible and reviewable by the public.

Ninth, the Court should distinguish between structural remedies and individualized remedies. Structural remedies address a general class of constitutional injury, such as voter exclusion or administrative deadlock. Individualized remedies in election cases alter the position of an identifiable candidate, party, or officeholder. The latter category should trigger heightened justification. A court may still grant an individualized remedy when constitutional rights demand it, but it must explain why the benefit is unavoidable rather than incidental to a broader rule.

Tenth, the appointment process should be paired with continuing integrity obligations. Constitutional judges are selected by different state institutions, and that plural appointment design can protect the Court from domination by one branch. But appointment pluralism is not enough if sitting judges can participate in cases involving their appointers, close family members, or recent political networks without independent screening. Appointment independence must be supplemented by adjudicative independence in each case.

Eleventh, the Court should institutionalize doctrinal memory. A small precedent office or research unit could prepare internal memoranda identifying recent cases on the same issue, the vote distribution, and the controlling reasons. Such a unit would not decide cases, but it would make sudden inconsistency harder to overlook. In civil-law systems, precedent may not bind in the common-law sense, but constitutional courts still owe the public an explanation when they treat the same legal question differently.

**TABLE 4.** Proposed Institutional Design Reforms for the Indonesian Constitutional Court

| Risk                      | Proposed Reform                     | Operational Design                                                                        | Expected Effect                                   |
|---------------------------|-------------------------------------|-------------------------------------------------------------------------------------------|---------------------------------------------------|
| Conflict of interest      | Mandatory preventive recusal        | Objective triggers plus standing recusal committee                                        | Prevents conflicted participation before judgment |
| Abrupt precedent reversal | Supermajority for recent departures | Seven of nine votes for same-issue departures within election cycle, with written reasons | Reduces strategic reversals near elections        |
| Fractured majorities      | Plurality ratio rule                | Control by majority rationale or narrowest shared ground                                  | Prevents broad rules without majority reasoning   |
| Proxy litigation          | Enhanced standing                   | Mandatory disclosure of                                                                   | Limits indirect                                   |

| Risk                                    | Proposed Reform                   | Operational Design                                                           | Expected Effect                       |
|-----------------------------------------|-----------------------------------|------------------------------------------------------------------------------|---------------------------------------|
|                                         | disclosure                        | links to beneficiaries in election-rule cases                                | litigation by political elites        |
| Dynastic or appointing-institution ties | Targeted cooling-off safeguards   | Recusal for cases involving close family or recent appointing institution    | Reduces appearance of self-dealing    |
| Weak ethics deterrence                  | Graduated and mandatory sanctions | Mandatory disqualification; dismissal path for serious adjudicative conflict | Gives ethics findings practical force |

*Source: Authors, 2026 (normative institutional design proposal).*

These reforms are modest when compared with the magnitude of the problem. They do not require weakening the Court, subjecting it to political branches, or reducing constitutional review. On the contrary, they seek to preserve judicial authority by making it more difficult for that authority to be used in self-interested ways. A constitutional court that disciplines its own procedures is more, not less, independent. Independence without internal integrity becomes insulation for self-dealing. Integrity without independence becomes vulnerability to political intimidation. The design challenge is to secure both.

The reform agenda also preserves the legitimate uses of conditional constitutionality. The Court should remain able to prevent rights violations and democratic paralysis. But it should justify any creative remedy through general principles, identify its temporal application, and avoid immediate case-specific benefits in electorally sensitive contexts unless the constitutional injury is direct, severe, and incapable of legislative correction. A remedy that expands the voting rights of a broad class is not equivalent to a remedy that unlocks the candidacy of a specific person in an ongoing presidential election. Treating them as equivalent obscures the difference between constitutional guardianship and constitutional capture.

Finally, reform must address institutional culture. Rules matter, but a culture of reason-giving, recusal, and precedent humility is equally important. Constitutional judges must understand that impartiality is not only subjective confidence in one's own fairness. It is also the public's reasonable confidence that private ties do not structure public judgment. In politically divided societies, the legitimacy of constitutional adjudication depends on the

discipline to avoid even the appearance that the Court is available as a shortcut for elite interests.<sup>46</sup>

## Conclusion

This article has argued that Decision No. 90/PUU-XXI/2023 should be understood as an instance of judicial constitutional capture rather than ordinary judicial error or aggressive judicial activism. Its constitutional pathology lies in the convergence of weak and proxy-like standing, abrupt departure from recent open legal policy reasoning, fractured plurality, judicial creation of a new eligibility rule, objective conflict of interest, accelerated timing before candidate registration, and subsequent ethics findings confirming compromised judicial conduct. These features show that the distortion did not merely occur around the Court but through the Court's own adjudicative machinery. Indonesia's experience therefore differs from external court-packing, overt executive domination, and softer forms of judicial deference found in other jurisdictions. It reveals an endogenous form of democratic backsliding in which a constitutional court becomes not only a legitimating institution but also an active producer of constitutional distortion.

The institutional lesson is equally direct. Formal jurisdiction is not enough to sustain constitutional legitimacy; judicial authority also requires principled consistency, impartial procedure, and remedies that respect the boundary between adjudication and legislation. To prevent repetition, Indonesia should strengthen mandatory preventive recusal, standing scrutiny in election-rule cases, supermajority procedures for rapid departures from recent precedent, rules on plurality reasoning, cooling-off safeguards, ethics sanctions for serious conflicts, and transparent scheduling and opinion-publication practices. These reforms would not eliminate judicial discretion, but they would discipline it so that constitutional interpretation cannot easily become a vehicle for individualized electoral advantage. Decision No. 90 will remain part of Indonesia's constitutional history; the decisive question is whether it becomes a precedent for repetition or a catalyst for institutional correction.

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<sup>46</sup> For a broader account of legal accountability and institutional trust, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 91-113.

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“If we are not careful,  
democracy can become a  
ritual rather than a living  
system.”

**Yuval Noah Harari**

*historian and author known for his writings on  
politics, technology, and the future of democracy.*

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