

Limitations on the Authority of the Constitutional Court as a Positive Legislator

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Abstract

The authority of the Constitutional Court in Indonesia's constitutional system has shifted from merely being a negative legislator to a tendency toward becoming a positive legislator. This phenomenon is reflected in various decisions that not only invalidate norms that contradict the Constitution but also establish new legal norms. This study aims to examine the urgency of limiting the Constitutional Court's authority in acting as a positive legislator and to formulate a limitation model that prevents the Court from exceeding legislative boundaries. This research uses a normative legal method with statutory, case, and conceptual approaches and is analyzed prescriptively and critically based on primary and secondary legal materials. The findings show that the Constitutional Court's expansive role as a positive legislator has the potential to lead to judicial supremacy and juristocracy, which are inconsistent with the principle of separation of powers. Therefore, limiting the Constitutional Court's authority is necessary to maintain the constitutional balance among branches of state power. This study proposes the use of Mahfud MD's "Ten Limiting Guidelines" as a normative framework, complemented by two original models: the Constitutionally Bounded Interpretation Protocol, which emphasizes that judicial interpretation must remain confined to the text, structure, and principles of the Constitution; and the Institutional Dialogue Model, which encourages legislative involvement in the follow-up to Constitutional Court decisions. These models aim to ensure that the Constitutional Court remains within its constitutional role as guardian of the Constitution, without encroaching upon the legislative domain.

1. Introduction

Basically, everything in this world will change and evolve with the times. This aligns with Heraclitus' philosophy of perpetual change (*panta rhei*). According to this view, all entities evolve in response to the dynamic forces of nature.¹ This change was also inevitable and experienced by the Constitutional Court of Indonesia. Along with the development of Constitutional law dynamics in Indonesia, demands on the Constitutional Court of also grew, namely to become one of the bodies that plays a role in the formation of new laws through decisions that are positive legislators. This shift reflects a legal paradigm transition from strict textualism to an emphasis on the values and societal needs underlying substantive justice. The Constitutional Court of positive legislator rulings have direct implications for society and are equivalent to laws because they are final and binding, as well as a tangible symbol of the role

¹ John Burnet, *Early Greek Philosophy* (London: A. & C. Black, 1908), https://books.google.co.id/books/about/Early_Greek_Philosophy.html?id=zxConstitutionalLD6Ztp4C&redir_esc=y.

as guardian of the Constitution.² Thus, legal issues related to the role of the Constitutional Court in interpreting the Constitution and forming new laws through positive legislator decisions have become an integral part of efforts to realize substantive justice and maintain legal certainty in Indonesia. Legal certainty itself does not only mean that a certain legal regulation exists or has been established, but, according to Cannaris, it must also contain elements of predictability regarding the development of existing law, stability in its application, and the concrete applicability of a legal rule.³ However, the shift of the Constitutional Court authority towards positive legislator does not come without consequences. Considering that, in the doctrine of separation of powers, the function of lawmaking is the authority of the legislator, while the judiciary only has the authority to review and assess, not to draft new norms. Therefore, the expansion of the Constitutional Court authority without accompanying proportional oversight and corrective mechanisms creates what is known as Constitutional disequilibrium, i.e., a structural imbalance in the distribution of state power that leads to judicial dominance.

Pan Mohammad Faiz argues that this phenomenon places the Constitutional Court in the position of a temporary legislator, namely when changes to norms resulting from Constitutional review are temporary until the legislator follows up on the decision. In this context, over time, the practice of conditional rulings, which should be temporary, has not been implemented optimally and has created new problems, particularly regarding the legitimacy of a legal product that remains in effect despite being declared unconstitutional in a Constitutional Court ruling.⁴ On the other hand, Moh. Mahfud MD stated that when Constitutional Court issues its ruling, it is not allowed to exceed its authority and Constitutional judges must have clear limits in handing down rulings. According to him, Constitutional Court should not formulate new norms. This is because such authority is the prerogative of the legislative body, so Constitutional Court should only act as a negative legislator.⁵ On the contrary, Maruarar Siahaan believes that through its judicial review authority, Constitutional Court not only acts declaratively as a negative legislator, but also has a constitutive nature which, in practice, includes acting as a positive legislator.⁶ In fact, a Constitutional Court ording to him, such a decision by Constitutional Court cannot be separated from its role as a policy maker in a Constitutional context. From this perspective, he positions the Constitutional Court as an institution that can legally fill legal gaps by establishing new norms through Constitutional interpretation mechanisms, as long as this is done within the framework of maintaining Constitutional supremacy and the principle of

² Amir Junaidi and Muhammad Aziz Zaelani, "Embodying The Meaning Of The Guardian Of The Constitution In The Role Of The Constitutional Court Of Reducing Constitutions Indicated By Policy Corruption," *International Journal of Educational Research & Social Sciences* 2, no. 3 (2021): 592–99, 10.51601/ijersc.v2i3.88.

³ Claus-Wilhelm Canaris, *Systemdenken Und Systembegriff in Der Jurisprudenz: Entwickelt Am Beispiel Des Deutschen Privatrechts*, Schriften Zur Rechtslehre (Berlin: Duncker & Humblot, 1969), <https://books.google.co.id/books?id=83UwAQAIAAJ>.

⁴ Johansyah, "Kedudukan Mahkamah Konstitusi Sebagai Lembaga Negara Berdasarkan Undang-Undang Dasar 1945," 2019, 10.36546/solusi.v17i2.167.

⁵ Moh. Mahfud MD, *Konstitusi Dan Hukum Dalam Kontroversi Isu* (Jakarta: Rajagrafindo Persada, 2012), <https://books.google.co.id/books?id=DO47QwAACA AJ>.

⁶ Maruarar Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi," *Jurnal Hukum Ius Quia Iustum* 16, no. 3 (2009): 357–78, <https://doi.org/10.20885/iustum.vol16.iss3.art3>.

checks and balances.⁷ The pros and cons surrounding the Constitutional Court decision show that a positive legislator decision can be seen as a progressive step in upholding justice or, conversely, as a deviation from the existing Constitutional system. Therefore, even though the Constitutional Court has a vital role as the guardian of the Constitution, it must remain within a framework of oversight that ensures there is no concentration of power in one hand. This is because a situation where laws are created solely through the interpretation of a small group of judges will lead to the distortion of Constitutional democratic principles. Furthermore, Constitutional Court role as an unrestricted quasi-legislator can blur the boundaries between judicial and legislative power, giving rise to the phenomenon of juristocracy.⁸ This is because, without a clear mechanism or model for setting limits, expanding the Constitutional Court authority risks causing judicial authority to exceed its proper proportions.

Considering these dynamics, this study was conducted to examine in greater depth the urgency of limiting the authority of Constitutional Court as a positive legislator. This study also aims to comprehensively examine the appropriate model of limitation to be applied in cases where Constitutional Court exercises its authority as a positive legislator in order to remain in accordance with the Constitution. Thus, this study will examine the limitation of the Constitutional Court authority as a positive legislator. Previous studies discussing the authority of the Constitutional Court as a positive legislator have been conducted by several researchers. First, research by Fika Alfiella in her thesis entitled "The Authority of the Constitutional Court as a Positive Legislator in Reviewing Laws against the 1945 Constitution" examined the Constitutionality of the Constitutional Court authority to establish new norms in reviewing laws. This study focuses on the fact that the Constitutional Court is Constitutionally only granted the authority to invalidate norms, not to establish new ones. The difference is that this study emphasizes the validity and normative impact of the Constitutional Court decisions on the national legal system, particularly highlighting the urgency of limiting such authority. Second, Wendi Pranji Nababan's thesis entitled "The Authority of the Constitutional Court as a Positive Legislator Reviewed from the Theory of Justice (Analysis of Constitutional Court Decision Number 90/PUU-XXI/2023)" examines the role of the Constitutional Court in creating new norms through the approach of the theory of justice. However, this study focuses on the urgency and model of limitations, not on the evaluation of justice in specific Constitutional Court decisions. Third, the scientific article by Al Fadillah Walduda'ini et al. titled "Criticism of the Constitutional Court Role as a Positive Legislator in Testing Laws" critiques the Constitutional Court tendency to act as a positive legislator from the perspective of the rule of law principle and the doctrine of judicial restraint. Meanwhile, this paper seeks to outline the urgency of restrictions and offer a conceptual model for such restrictions. These three studies collectively provide a comprehensive picture of the issues surrounding Constitutional Court authority as a positive legislator. However, to date, there has been no systematic and in-depth analysis that explicitly addresses both the constitutional urgency and the institutional consequences of the Constitutional Court

⁷ Ibid.

⁸ Ni Luh Dewi Sundariwati, "Judicial Activism: Between Protecting Constitutional Supremacy or Transitioning to Juristocracy Judicial Activism: Diantara Melindungi Supremasi Konstitusional Atau Transisi Menuju," *Journal Homepage: <https://Jurnalkonstitusi. Mkri. Id>* 21, no. 3 (2024), <https://doi.org/10.31078/jk2135>.

expanded role. The absence of a clear doctrinal and normative framework regarding the limits of the Constitutional Court authority risks creating a structural imbalance in the constitutional order and may blur the fundamental separation between the legislative and judicial branches. In this context, this study seeks not only to highlight the critical need to delimit the Constitutional Court lawmaking function, but also to formulate a conceptual model that ensures the exercise of constitutional review remains within the boundaries of democratic legitimacy and constitutional supremacy. By doing so, this research contributes to strengthening the legal architecture of checks and balances and ensuring that judicial power does not evolve into an unaccountable source of norm production.

Thus, this study is significant not only in academic terms but also in practical Constitutional governance. The issue at hand namely, the Constitutional Court authority as a positive legislator represents a fundamental tension between judicial interpretation and legislative supremacy. In a democratic state governed by the rule of law, this tension raises crucial legal questions about the constitutional design of power, the limits of judicial discretion, and the risk of democratic erosion through judicial overreach. Accordingly, the research seeks to investigate a pressing constitutional issue with long-term implications for the coherence and sustainability of Indonesia's Constitutional structure.

The principal aim of this study is to critically assess the urgency of establishing normative and institutional safeguards that restrain the Constitutional Court positive legislating tendencies. In doing so, it explores how such restrictions could be designed to uphold the rule of law, preserve the principle of separation of powers, and reinforce the legitimacy of judicial review. The contribution of this research lies in filling a significant gap in existing legal literature by not only framing the Constitutional Court positive legislator function as a juridical issue but also by proposing a structured model for its limitation that aligns with Indonesia's constitutional framework. This makes the present study both doctrinally relevant and normatively impactful.

2. Methods

This research is normative legal research, which is legal research to find legal rules, legal principles, and legal doctrines to answer legal issues that are faced. This study uses several approaches, namely the statute approach, the case approach, and the conceptual approach. The legal materials used consist of: (1) primary legal materials, namely legislation or court decisions relevant to the legal issue being studied. (2) Secondary legal materials, namely legal materials that support the primary legal materials, such as books, particularly books on law related to the legal issue being raised, as well as articles in various legal magazines and scientific journals. All legal materials are analyzed using the normative analysis method, which consists of three stages: description of the legal issue being studied, systematization of relevant legal materials and legal theories, and prescription of problem-solving based on the normative-conceptual framework constructed.

3. Results and Discussion

3.1. The Constitutional Court Authority in Law Examination

Through the amendments to the 1945 Constitution, the role of the Constitutional Court within Indonesia constitutional framework can be classified into three principal functions. First, as the Guardian of the Constitution and Democracy, the Constitutional Court safeguards and upholds substantive justice within the constitutional order. Second, as the protector of citizens constitutional rights and human rights, the Court bears the responsibility of ensuring that the dignity of the Constitution is consistently respected and implemented by all branches of state authority. Third, as the Final Interpreter of the Constitution, the Court serves as the ultimate arbiter of constitutional meaning, preserving the original intent and fundamental values of the Constitution to ensure their alignment with the sustainability and welfare of the state and the Indonesian people.⁹ One of the Court principal powers is the judicial review of statutes against the 1945 Constitution, as explicitly stated in Article 24C paragraph (1) of the 1945 Constitution, which provides: "The Constitutional Court shall have the authority to adjudicate at the first and final instance the constitutional review of laws, disputes over the authority of state institutions whose powers are derived from this Constitution, the dissolution of political parties, and disputes concerning the results of general elections."¹⁰ This provision forms the textual basis for the Constitutional Court's authority as a negative legislator, a concept theorized by Hans Kelsen, who emphasized that a constitutional court should only annul laws that contradict the constitution, without formulating new norms.¹¹ The negative legislator functions solely to "delete" unconstitutional provisions, not to "create" new norms, thereby upholding the principle of separation of powers.

This understanding aligns with the principle of judicial restraint, which originates from James Bradley Thayer, asserting that courts must exercise caution and refrain from substituting judicial preferences over legislative judgments. Thayer emphasized that unless a law is clearly unconstitutional, courts should defer to legislative wisdom.¹² Applying this to Indonesia context, the Constitutional Court must refrain from acting as a positive legislator unless absolutely necessary to uphold constitutional supremacy. In practice, however, several decisions by the Constitutional Court have expanded its role beyond the negative legislator model. One such example is Decision Number 46/PUU-VIII/2010 on the status of children born out of wedlock. In this ruling, the Court not only declared Article 43 paragraph (1) of the Marriage Law unconstitutional but also formulated a new norm that recognized civil relations between such children and their biological fathers, under certain conditions. This kind of regulatory ruling or conditional ruling indicates the Court transition toward a positive legislator.

Such transformative decisions, although often based on constitutional values such as justice and human rights, have sparked debate regarding the legitimacy and boundaries of

⁹ Jimly Asshiddiqie, *Perkembangan Dan Konsolidasi Lembaga Negara Pasca Reformasi (Edisi Kedua)* (Sinar Grafika, 2024)

https://www.google.co.id/books/edition/_/gHQVEQAAQBAJ?hl=en&sa=X&ved=2ahUKEwjnkeP74tKNAXVuzzgGHaKEAN4Qre8FegQIERAE.

¹⁰ Safi, Sejarah Dan Kedudukan Pengaturan Judicial Review Di Indonesia: Kajian Historis Dan Politik Hukum. (Surabaya: Scorpindo Media Pustaka, 2022), <https://books.google.co.id/books?id=rDNcEAAAQBAJ>.

¹¹ Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange, 1999), <https://books.google.co.id/books?id=D1ERgDXEbk> Constitutional Court .

¹² James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Little, Brown, 1893), <https://books.google.co.id/books?id=ed09AAAAIAAJ>.

judicial law-making. Mahfud MD argue that while the Constitutional Court may occasionally need to fill legal gaps, it must adhere to strict limiting guidelines to avoid overstepping its constitutional mandate.¹³ These include avoiding *ultra petita* rulings, basing interpretations on textual constitutional provisions, and respecting the legislative domain of the DPR. To ensure that the Court authority remains within legitimate bounds, it is essential to clarify the distinctions between negative and positive legislators. The former annuls without substitution, while the latter creates or modifies norms. The judicial function must primarily remain reactive and not proactive unless compelled by constitutional necessity and interpreted within the parameters of judicial restraint and constitutional supremacy. Thus, the legitimacy of the Constitutional Court intervention depends on its adherence to its negative legislator mandate, guided by Hans Kelsen theory, constrained by Thayer judicial restraint, and informed by Mahfud MD practical boundaries. Failing to observe these principles risks undermining the doctrine of separation of powers and leading to a form of judicial overreach or juristocracy.

3.2. The Practice of the Constitutional Court Authority in Law Examination from Negative Legislator to Positive Legislator

Hans Kelsen concept of the negative legislator situates a constitutional court as an adjudicatory body whose authority is limited to annulling statutory provisions that contradict the constitution, without engaging in the creation of new legal norms. This authority is declaratory constitutive in nature, meaning the court merely declares whether a norm is consistent or inconsistent with a higher legal norm, leaving the function of drafting and enacting new norms to the legislature.¹⁴ In contrast, a positive legislator assumes a norm creating role, either by adding provisions or formulating new norms that were absent from the legislative text. Within this framework, a conditional ruling is defined as a decision in which a statutory provision is declared constitutional only if interpreted in accordance with conditions set by the Court effectively adding a norm with specific qualifications. In its early jurisprudence, the Constitutional Court of the Republic of Indonesia adapt Kelsen negative legislator model, confining itself to striking down unconstitutional provisions. However, as judicial practice evolved, the Court increasingly adopted a positive legislator posture in situations where the annulment of a provision would result in a *rechtvacuum* (legal vacuum), generate conflicting interpretations, or perpetuate inconsistencies between statutory norms and constitutional principles of justice. This transformation is evident in landmark cases such as Decision No. 46/PUU-VIII/2010 on the legal status of children born out of wedlock, where the Court not only invalidated the restrictive provision but also inserted a new norm granting legal recognition, thereby preventing a *rechtvacuum* and safeguarding constitutional rights. A more recent example is Decision No. 90/PUU-XXI/2023, where the Court introduced an eligibility criterion for presidential and vice-presidential candidates under forty years old,

¹³ Martitah, *Mahkamah Konstitusi, Dari Negative Legislature Ke Positive Legislature?* (Jakarta: Konstitusi Press, 2013),

https://www.google.co.id/books/edition/Mahkamah_Konstitusi_dari_negative_legisl/iJl9ngEACAAJ?hl=en.

¹⁴ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Jakarta: Sinar Grafika (Jakarta: Sinar Grafika, 2011), https://www.google.co.id/books/edition/Hukum_Acara_Mahkamah_Konstitusi_Republik/-y9sEAAAQBAJ?hl=en&gbpv=0.

allowing them to run if they hold or have held an elected public office. This ruling exemplifies the Court willingness to reconstruct norms and respond to societal demands for justice, legal certainty, and public benefit, an exercise that clearly departs from the traditional negative legislator role. These interventions sometimes employ *ultra petita* (beyond the request) reasoning, where the Court grants relief not explicitly sought by the petitioner, thereby expanding its normative influence. Thus, the important thread to be aware of is that this shift did not occur haphazardly or without foundation, but was driven by urgent objective conditions and the real legal needs of society. This aligns with the theory of progressive law as articulated by Satjipto Rahardjo, who emphasizes that law must be humanistic and contextual, and prioritize substantive justice over mere procedural legality.¹⁵ In many cases, the implementation of positive legislator decisions often faces implementation obstacles due to the absence of coercive instruments or clear enforcement mechanisms, because it is true that the application of judicial activism by the Constitutional Court in Indonesia in the context of judicial review contains progressive values, but it also raises complex constitutional challenges.

While this judicial creativity is often celebrated as a mechanism to ensure substantive justice and bridge legislative inertia, it has also drawn criticism for blurring the separation of powers. Proponents, such as Roger Cotterrell, contend that judges have a responsibility to adapt legal norms to the existing values of justice within society, reflecting a modern, responsive legal paradigm.¹⁶ This can be described as a form of “*quasi-constitutional legislation*,” where judicial rulings possess a legislative like character due to their binding normative effects.¹⁷ In this context, the Court’s role in shaping norms should be understood not merely as judicial activism, but as a constitutionally responsive function aimed at addressing pressing societal needs.¹⁸ Nevertheless, this positive law-making function must remain firmly bounded by the principle of judicial restraint, ensuring that the Court fulfil its constitutional mandate without encroaching upon the legislative domain.

From an institutional perspective, former Chief Justice Hamdan Zoelva emphasizes that while certain positive legislative acts particularly conditional rulings are sometimes unavoidable to avert a *rechtovacuum*, they must be narrowly tailored and exceptional.¹⁹ He warns that an expansive positive legislator role risks encroaching upon the exclusive lawmaking mandate of the legislature and executive. Mahfud MD echoes this caution, insisting that the Constitutional Court is constitutionally limited to determining the constitutionality of norms, without intruding into the political domain of law-making.²⁰ The risks of this practice are evident in inter-institutional conflicts that follow certain conditional

¹⁵ Satjipto Rahardjo, *Penegakan Hukum Suatu Tinjauan Sosiologis* (Yogyakarta: Genta Publishing, 2009), <https://books.google.co.id/books?id=p4OSNwAACAAJ>.

¹⁶ R B M Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press, 1992), <https://books.google.co.id/books?id=Mz3v35mJz5EC>.

¹⁷ Hadyan Iman Prasetya, “The Law of Lawmaking as Quasi Constitutional Legislation: Undang-Undang Pembentukan PeraturanPerundang-Undangan Sebagai Legislasi Kuasi Konstitusional,” *Jurnal Konstitusi* 20, no. 1 (2023): 36–57, <https://doi.org/10.31078/jk2013>.

¹⁸ Adena Fitri Puspita f and Purwono Sungkono Raharjo, “Mahkamah Konstitusi Sebagai Negative Legislator Dan Positive,” *Sovereignty* 1, no. 4 (2022): 687, <https://doi.org/10.13057/souvereignty.v1i4.112>.

¹⁹ Op. Cit., 3.

²⁰ Op. Cit., 6.

rulings. For example, after Decision No. 14/PUU-XI/2013 on election dispute resolution, the legislature's prolonged inaction in amending the relevant law created legal uncertainty and procedural deadlock between electoral bodies. Likewise, in the aftermath of Decision No. 46/PUU-VIII/2010, delays in legislative follow-up fostered tensions between the judiciary and parliament, revealing the fragility of institutional cooperation. In light of these developments, Pan Mohammad Faiz conceptualizes the Court role as a form of "temporary legislator," whereby the norms it creates are intended to be provisional until the legislature enacts permanent legislation.²¹ Yet, in practice, many such judicially created norms persist for years without legislative endorsement, effectively transforming the Court into a long-term law-maker. This undermines the principle of checks and balances, potentially upsetting the equilibrium between the legislative and judicial branches. Therefore, while the Constitutional Court evolution into a positive legislator has, in many cases, advanced constitutional justice, it also underscores the urgent need for clear juridical parameters and institutional safeguards. Without such boundaries, the Court risks transforming into a quasi-legislative body operating within a constitutional "gray area," complicating the delicate balance of powers envisaged in Indonesia's democratic constitutionalism.

3.3. The Urgency of Limiting the Constitutional Court Authority as a Positive Legislator

The urgency of limiting the Constitutional Court's authority as a positive legislator becomes increasingly critical given the growing frequency and intensity of its norm-formative rulings.²² Under the 1945 Constitution, particularly Articles 24C, the Constitutional Court is granted the power to adjudicate the constitutionality of laws; however, no explicit textual provision authorizes it to create or modify legislative norms. This absence of a formal constitutional boundary leaves a normative and procedural vacuum, which, if unchecked, risks the accumulation of quasi-legislative power within the judiciary. In constitutional theory, such limitations whether explicit, implicit, or supra-constitutional function as safeguards against institutional overreach and are vital to maintaining the balance of powers.²³

Comparative legal practices illustrate this necessity. In India, Articles 13 to 15 of the Constitution, combined with the "basic structure doctrine" established in *Kesavananda Bharati v. State of Kerala*, explicitly prevent the judiciary from altering the core principles of the Constitution, even when filling legislative gaps.²⁴ In Germany, Article 20(3) of the Basic

²¹ Muhammad Alief Farezi Efendi, Muhtadi Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature Oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 626.

https://www.researchgate.net/publication/376460157_Positive_Legislature_Decisions_by_the_Constitutional_Court_Putusan_Positive_Legislature_oleh_Mahkamah_Konstitusi

²² Muhammad Alief Farezi Efendi, Muhtadi and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature Oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 626, <https://doi.org/10.31078/jk2044>.

²³ Munawara Idris and Kusnadi Umar, "Dinamika Mahkamah Konstitusi Dalam Memutus Perkara Judicial Review," *Siyasatuna: Jurnal Ilmiah Mahasiswa Syarah Syar'iyah* 1, no. 2 (2020): 263–77, <https://journal3.uin-alauddin.ac.id/index.php/siyasatuna/article/view/18740/>

²⁴ Aditi Agarwal and Navreet Kaur, "Harmonising Constitutional Ideals: A Modern Reassessment of the Basic Structure Doctrine," *NUJS Law Review* 16, no. 4 (2023): 582–610. <https://nujlawreview.org/2024/02/08/harmonising-constitutional-ideals-a-modern-reassessment-of-the-basic-structure-doctrine/>

Law binds the Federal Constitutional Court (Bundesverfassungsgericht) to the law and the Constitution, prohibiting it from exercising legislative powers; the decision in 2 BvR 2236/04 reaffirmed that any normative additions must be left to the legislature.²⁵ In Colombia, the Constitutional Court's authority is framed by Articles 241–242 of the 1991 Constitution, which empower it to review laws for constitutionality but confine norm creation to exceptional circumstances, as in Decision C-141/10, where the Court invalidated a constitutional amendment to preserve the integrity of the separation of powers.²⁶ These examples underscore the necessity for Indonesia to adopt structured doctrinal and procedural thresholds for the Constitutional Court's positive legislator role. Such thresholds may include: (a) an intervention standard that limits judicial review to conflicts between explicit, firm norms; (b) clear forms for addressing legal gaps, such as conditional rulings defined as rulings that add a norm under specific conditions rather than open-ended normative rulings; and (c) a formal review mechanism involving the DPR and the President to evaluate and codify conditional rulings within a defined timeframe and to prevent a concentration of judicial power and maintain the integrity of democratic governance, any expansion of authority must be accompanied by clear constitutional mandates and procedural safeguards.²⁷

From a theoretical perspective, Satjipto Rahardjo's progressive legal theory prioritizes substantive justice as the ultimate aim of the law. However, Rahardjo also emphasized that substantive justice cannot justify "all means", meaning the creation of new norms must remain consistent with the principles of proportionality and necessity.²⁸ This implies that the Constitutional Court may only regulate norms where urgently required to avoid substantive injustice, and even then, only as a last resort when legislative inaction threatens constitutional rights. Without such parameters, the Constitutional Court's positive legislative interventions risk undermining the principle of separation of powers, disrupting the checks and balances mechanism, and eroding democratic representation.²⁹ Moreover, prolonged reliance on judicially created norms especially when the legislature fails to respond to conditional rulings could institutionalize juristocracy and tilt the constitutional equilibrium.³⁰ The ultimate goal of these restrictions is not to weaken the Court's role as guardian of the Constitution but to preserve the purity of institutional functions, strengthen constitutional supremacy, and ensure

²⁵ Alicia Hinarejos, "Bundesverfassungsgericht (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law," *Common Market Law Review* 43 (2006): 583–595. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211641

²⁶ Jennifer Boesten, *Constitutional Origin and Norm Creation in Colombia: Discursive Institutionalism and the Empowerment of the Constitutional Court* (London: Taylor & Francis, 2022). https://www.researchgate.net/publication/359957943_Constitutional_Origin_and_Norm_Creation_in_Colombia_Discursive_Institutionalism_and_the_Empowerment_of_the_Constitutional_Court

²⁷ Anajeng Esri Edhi Mahanani, "Impresi Putusan Mahkamah Konstitusi Bersifat Positive Legislature Ditinjau Dari Progresivitas Hukum Dan Teori Pemisahan Kekuasaan," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 54, no. 2 (2020): 421–41, <https://doi.org/10.14421/ajish.v54i2.920>.

²⁸ Satjipto Rahardjo, "Hukum Progresif (Penjelajahan Suatu Gagasan)," *Majalah Hukum Newsletter Nomor 59* (2004), <https://doi.org/10.22437/ujh.1.1.159-185.x>

²⁹ Indra Fatwa, "Putusan Mahkamah Konstitusi Yang Bersifat Mengatur (Positive Legislature) Dalam Upaya Menghadirkan Keadilan Substantif," *Journal Equitable* 5, no. 2 (2020): 95–120, <https://doi.org/10.37859/jeq.v5i2.2480>.

³⁰ Machmud Aziz, "Pengujian Peraturan Perundang-Undangan Dalam Sistem Peraturan Perundang-Undangan Indonesia," *Jurnal Konstitusi* 7, no. 5 (2010): 114, <https://doi.org/10.31078/jk756>.

that democratic governance operates within the framework of proportionality, necessity, and constitutional discipline.

3.4. Model of Limitation of Positive Legislator's Authority

The need to limit the Constitutional Court authority as a positive legislator finds its constitutional foundation in Articles 24C of the 1945 Constitution of the Republic of Indonesia. These provisions grant the Constitutional Court the authority to “decide” on specific constitutional matters such as judicial review of laws, settlement of disputes between state institutions, dissolution of political parties, and resolution of electoral disputes without expressly granting the power to “create” new legal norms. This textual limitation implies that any exercise of norm formation by the Court must be exceptional, justified, and procedurally bounded. As the foundational doctrine, Mahfud MD Ten Guidelines for restraining the Constitutional Court’s authority are:

1. The Constitutional Court must refrain from issuing regulatory rulings.
2. The Constitutional Court must avoid *ultra petita* decisions (granting relief beyond the petitioner’s request).
3. The Constitutional Court must not use one statute as the legal basis to annul another statute.
4. The Constitutional Court must not interfere in matters expressly delegated by the Constitution to the legislature for regulation according to its own political discretion.
5. The Constitutional Court must not base its rulings on theories not explicitly embraced by the Constitution.
6. The Constitutional Court must not violate the principle of *nemo iudex in causa sua* (no one should be judge in their own cause) by adjudicating matters involving its own institutional interest.
7. Constitutional Court justices must not make public statements or express opinions on pending cases, including in seminars or official speeches.
8. Constitutional Court justices must not solicit cases by encouraging any party to file a petition.
9. Constitutional Court justices must not proactively offer themselves as mediators in political disputes between state institutions or political actors.
10. The Constitutional Court must not engage in public commentary on the existence, merits, or deficiencies of the Constitution, or on whether it should be amended or retained; its sole duty is to uphold and safeguard the Constitution as it stands, leaving revision or preservation to the competent political bodies.

To transform Mahfud MD limiting guidelines into a functional and enforceable framework, it is necessary to complement them with methodological and institutional mechanisms. First, the Constitutionally Bounded Interpretation Protocol establishes a methodological safeguard. It requires the Constitutional Court to explicitly define the interpretative boundaries in any decision with potential norm-forming implications. This protocol distinguishes corrective constitutional interpretation, aimed at aligning existing laws with the Constitution, from substitutive norm creation, which constitutes legislative action. Such a distinction is essential in a rule of law system, ensuring that substantive justice does

not justify the abandonment of legal certainty or procedural propriety. As Satjipto Rahardjo emphasises, substantive justice cannot justify “all means”; accordingly, the Court may only “regulate” norms when such action conforms to the principles of proportionality and necessity, and when no other constitutional pathway exists. Second, the Strengthened Institutional Dialogue Model addresses the absence of structured coordination between the Constitutional Court and the legislature following conditional decisions. In many cases, legislative inaction after such decisions compels the Court to fill the *rechtvacuum* through its own norm formation, thereby expanding its positive legislator role. This model mandates:

- (a) A threshold for intervention: the Court exercises norm-forming authority only when there is a direct constitutional conflict and no available legislative remedy within the required time frame;
- (b) A follow-up mechanism: the legislature must respond to Court rulings within a defined period;
- (c) Sanctions and incentives: sanctions may include public constitutional compliance hearings; incentives may include scheduled coordination meetings between the Constitutional Court and legislative committees;
- (d) Fallback authority: if legislative inaction persists, the Constitutional Court may issue temporary norms subject to a sunset clause of two years, after which the legislature must enact permanent provisions.

Third, to ensure the sustainability of these models, an evaluation framework must be established through measurable Key Performance Indicators (KPIs), such as:

1. Legislative compliance rate with conditional rulings;
2. Average legislative response time;
3. Frequency of *ultra petita* decisions;
4. Number of temporary norms issued and resolved within the sunset clause period;
5. Qualitative improvements in inter-institutional cooperation.

By integrating Mahfud MD doctrinal guidelines with these methodological and institutional safeguards, the writer proposed model to not only limits judicial overreach but also creates a balanced mechanism for cooperation between the Constitutional Court and the legislature. This ensures that the Court’s corrective function operates within constitutional limits, promoting legal certainty while still safeguarding substantive justice, thus preserving the principle of separation of powers and reinforcing checks and balances within the Indonesian constitutional system.

4. Conclusions

The urgency of limiting the authority of the Constitutional Court as a positive legislator intensifies in line with the evolution of its jurisprudence, which has expanded beyond annulling unconstitutional norms to the active creation of new legal provisions. This shift reflects a doctrinal paradox between the corrective mandate of a negative legislator and the normative creativity of a positive legislator, raising concerns over the blurring of functional boundaries between the judiciary and the legislature. Such a development – not as a normative failure, but as an unintended institutional drift risks distorting the principle of separation of powers and weakening the checks and balances envisaged by the 1945 Constitution. The

tendency toward judicial supremacy and juristocracy emerges when the Constitutional Court assumes a law-making role without explicit constitutional or legislative authorization, thereby undermining the representative legitimacy vested in elected lawmakers. The challenge is not merely procedural but structural: how to ensure that the Court's progressive contributions to substantive justice remain consistent with the principles of legal certainty, proportionality, and institutional accountability.

Addressing this tension requires the operationalization of clear normative, ethical, and institutional safeguards. The Ten Boundary Signs model offers substantive limitations on judicial action; the Constitutionally Bounded Interpretation Protocol ensures interpretive discipline; and the Institutional Dialogue Model establishes cooperative mechanisms with the legislature, reducing incentives for unilateral judicial law-making. Together, these frameworks provide a coherent strategy to reconcile the Constitutional Court's role as a guardian of the Constitution with the preservation of democratic law-making authority. Ultimately, maintaining the Court within its constitutionally intended corrective function is essential to safeguarding Indonesia's democratic constitutional order. This entails embracing judicial restraint not as a constraint on justice, but as a disciplined commitment to the constitutional equilibrium where the judiciary remains an impartial and accountable arbiter, rather than an unchecked superbody shaping the nation's legal landscape

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6. Reference

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