

The Constitutionality of the Constitutional Court's Role as a Negative Legislator: The Limits of the Constitutional Court's Authority in Judicial Review of Statutes Against the 1945 Constitution

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ABSTRACT

The constitutional role of the Constitutional Court of Indonesia as a negative legislator has generated continuing scholarly debate, particularly regarding whether judicial decisions containing conditional interpretations amount to an exercise of positive legislative authority. However, no clear analytical framework has been consistently applied to distinguish constitutionally permissible constitutional interpretation from judicial law-making. This study examines the Constitutional Court's constitutional position as a negative legislator. It analyzes four landmark Constitutional Court Decisions No. 46/PUU-VIII/2010, No. 14/PUU-XI/2013, No. 91/PUU-XVIII/2020, and No. 90/PUU-XXI/2023 to determine the constitutional limits of judicial review under Article 24C of the 1945 Constitution of the Republic of Indonesia. Employing normative legal research with statutory, conceptual, and case approaches, the study analyzes primary, secondary, and tertiary legal materials using descriptive-analytical methods. The decisions are evaluated based on three analytical criteria: whether the Court merely invalidates unconstitutional statutory provisions, whether it formulates new legal norms or regulatory standards, and whether its reasoning substitutes for legislative policy choices. The findings demonstrate that the Constitutional Court constitutionally remains a negative legislator. Nevertheless, the degree of judicial intervention varies across the examined cases. While several decisions contain constitutional interpretations that guide future application of statutory provisions, not every conditional interpretation constitutes an exercise of positive legislative power. Rather, a decision should be regarded as reflecting positive-legislator characteristics only when the Court effectively creates new normative rules or replaces legislative policy choices. This study contributes an analytical framework for distinguishing legitimate constitutional interpretation from judicial law-making and argues that the Court's authority should continue to be exercised within the principles of judicial restraint, respect for open legal policy, and the constitutional limits established by Article 24C of the 1945 Constitution.

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1. INTRODUCTION

The Constitution constitutes the fundamental foundation of the administration of the state, serving as the supreme law while simultaneously functioning as an instrument for limiting governmental power. In a constitutional democratic state, the Constitution not only provides legitimacy for state institutions but also serves as a mechanism to ensure that every action of public authorities remains within the boundaries of constitutional principles. Such limitations on governmental authority are essential to prevent abuses of power and to safeguard the fundamental rights of citizens [1].

One of the consequences of constitutionalism is the necessity for an institution entrusted with preserving the supremacy of the Constitution. In the context of modern constitutional systems, a constitutional court plays a crucial role in ensuring that legislation enacted by political institutions remains consistent with the norms and values embodied in the Constitution. Through the mechanism of judicial review, constitutional courts perform a strategic function in maintaining the balance between legislative and executive powers while simultaneously protecting the constitutional rights of citizens [1], [2].

Following the amendments to the 1945 Constitution of the Republic of Indonesia, the Constitutional Court (Mahkamah Konstitusi) was established as one of the judicial institutions entrusted with an essential role in upholding the rule of law. The Constitutional Court is constitutionally authorized to review statutes against the 1945 Constitution as part of the constitutional system of checks and balances among state institutions. Its establishment reinforced constitutional supremacy by ensuring that the legislature is no longer the sole institution responsible for determining the validity of statutory norms [3].

The establishment of the Constitutional Court reflects the evolution of modern constitutional law that developed rapidly during the twentieth century as a consequence of the strengthening of constitutional democracy. In contemporary democratic systems, the protection of political rights and human rights is no longer regarded merely as a normative commitment but must be realized through institutional mechanisms capable of ensuring their effective implementation. Accordingly, the Constitution functions not only as the highest source of law but also as an instrument guaranteeing the constitutional rights of every citizen. To ensure the realization of these guarantees, a constitutional court with the authority to safeguard constitutional implementation is indispensable. The establishment of the Constitutional Court therefore became an integral component of Indonesia's constitutional reform agenda aimed at building a democratic state governed by the supremacy of the Constitution [4], [5].

From the perspective of constitutional law, the Constitutional Court occupies a highly strategic position because it functions both as the guardian of the Constitution and the interpreter of the Constitution. These dual functions represent the defining characteristics of constitutional adjudication in maintaining a constitutional system of government. As argued by Jimly Asshiddiqie, the Constitutional Court bears the primary responsibility of ensuring that state institutions and other legal subjects consistently implement all provisions of the 1945 Constitution. In its capacity as the guardian of the Constitution, the Court is responsible

for ensuring that every exercise of governmental authority remains within constitutional boundaries so that constitutional values may be realized in a responsible manner [6], [7].

In addition to supervising the implementation of the Constitution, the Constitutional Court is also vested with the authority to provide authoritative interpretations of the 1945 Constitution. This function is particularly significant because the Constitution, as a fundamental legal document, cannot always anticipate every constitutional development arising within the life of the nation. Through its decisions, the Court provides constitutional meaning to legal norms requiring interpretation while simultaneously addressing constitutional ambiguities or legal gaps without formally amending the Constitution itself. Consequently, the Constitutional Court is recognized as the highest authority in providing official constitutional interpretation [8].

The existence of the Constitutional Court reflects the principle of the separation of powers, which is implemented through a system of mutual oversight and checks and balances among state institutions. Within a democratic constitutional system, no branch of government exercises its authority without supervision. Therefore, the Constitutional Court functions as a constitutional instrument to ensure that the exercise of governmental power remains within the limits established by the Constitution [9].

Accordingly, in exercising its power of judicial review, the Constitutional Court is theoretically positioned as a negative legislator. This concept, first introduced by Hans Kelsen, explains that a constitutional court is authorized to invalidate legal norms that conflict with the Constitution rather than create new legal norms, which remains the prerogative of the legislature. Under this conception, the Constitutional Court ideally functions as a guardian of constitutional validity rather than as an institution assuming legislative functions [10], [11].

In the development of Indonesian constitutional practice, several Constitutional Court decisions have attracted significant scholarly attention because they are considered by some constitutional law experts to demonstrate an expansion of the Court's role from that of a negative legislator toward a positive legislator. These decisions have not merely reviewed the constitutionality of statutory provisions but have also introduced new legal constructions or constitutional meanings that influence the formation of legal norms. Such developments have generated considerable debate concerning the constitutional limits of the Court's judicial review authority [12].

One of the most widely discussed decisions is Constitutional Court Decision No. 90/PUU-XXI/2023 concerning the minimum age requirements for presidential and vice-presidential candidates. In this decision, the Court declared that the statutory minimum age requirement remained constitutional while introducing an exception for individuals who currently hold or have previously held an elected public office. This exception had not been provided for in Law No. 7 of 2017 concerning General Elections. Consequently, some scholars argue that the decision did not merely interpret the statutory provision but effectively created a new legal norm, a function constitutionally reserved for the legislature. Conversely, others contend that the ruling constitutes a legitimate exercise of constitutional interpretation aimed at protecting the constitutional rights of citizens [13].

Another significant example is Constitutional Court Decision No. 102/PUU-VII/2009 regarding the use of National Identity Cards (KTP) and Family Cards (KK) as the basis for exercising voting rights in general elections. Through this decision, the Court allowed citizens who had not been registered on the Permanent Voters List to vote by presenting valid population identification documents. This ruling has generally been regarded as a progressive measure to protect citizens' constitutional right to vote. Nevertheless, some legal scholars argue that the Court formulated a new electoral mechanism not previously regulated by legislation, thereby raising questions concerning the constitutional limits of judicial authority in filling legal gaps [14].

A similar debate emerged following Constitutional Court Decision No. 46/PUU-VIII/2010 concerning the legal status of children born outside marriage. In this decision, the Court expanded the civil legal relationship between such children and their biological fathers, provided that biological parentage could be established through scientific and technological evidence as well as other legally recognized forms of proof. The decision has been widely viewed as strengthening the protection of children's rights and promoting a more responsive approach to family law based on principles of justice. However, some scholars maintain that the ruling altered the normative framework previously established under the Marriage Law, thereby raising further questions regarding the constitutional limits of the Court's authority to shape legal norms [15].

Another frequently discussed decision is Constitutional Court Decision No. 55/PUU-XVII/2019 concerning the synchronization of general elections. In its legal reasoning, the Court not only assessed the constitutionality of the challenged statutory provisions but also proposed several alternative models for the implementation of simultaneous elections that the legislature could consider. Although these alternatives were not legally binding as new legal norms, many constitutional scholars regard them as evidence of judicial activism because the Court provided policy guidance that essentially falls within the legislative domain.

These four landmark decisions demonstrate that the Constitutional Court's exercise of judicial review does not always end with the invalidation of unconstitutional norms, as envisioned under Hans Kelsen's theory of the negative legislator. In certain circumstances, the Court has adopted constitutional interpretations that generate new legal constructions in order to preserve constitutional effectiveness and protect the constitutional rights of citizens. Nevertheless, such developments continue to generate debate regarding the distinction between legitimate constitutional interpretation and the creation of legal norms, which constitutionally belongs to the legislature. Consequently, these decisions provide important case studies for examining whether the Constitutional Court continues to function as a negative legislator or has increasingly demonstrated characteristics of a positive legislator within Indonesia's constitutional system [16].

These developments have intensified constitutional law debates concerning the boundary between constitutional interpretation and law-making. On the one hand, the Constitutional Court's actions may be viewed as a necessary response to the need for protecting constitutional rights and preventing legal uncertainty or legal vacuums. On the

other hand, the expansion of the Court's role raises concerns regarding a potential shift from its traditional position as a negative legislator toward that of a positive legislator.

This issue is of considerable constitutional significance because judicial power in a democratic state must itself remain subject to constitutional limitations. Although the Constitutional Court possesses broad authority to ensure that legislation remains consistent with the Constitution, such authority must continue to operate within the framework of the separation of powers. Therefore, examining the constitutional role of the Constitutional Court as a negative legislator is essential for analyzing the extent to which the Court may interpret legal norms without exceeding its constitutional authority. Accordingly, this study focuses on three principal issues: the constitutional position of the Constitutional Court as a negative legislator, the challenges associated with that position, and the constitutional limits governing the Constitutional Court's exercise of its role as a negative legislator.

2. METHOD

This study employs a normative legal research method by examining legal norms, legal principles, and doctrines concerning the position of the Constitutional Court as a negative legislator within Indonesia's constitutional system. Normative legal research is selected because the object of this study focuses on legal regulations, the concept of the authority of state institutions, and Constitutional Court decisions that serve as the basis for understanding the relationship between judicial power and legislative authority. The study adopts a statutory approach, a conceptual approach, and a case approach to analyze the Constitutional Court's authority in judicial review and the development of its decisions that potentially expand its role in the formation of legal norms.

These approaches enable the research to examine not only the normative aspects of the Constitutional Court's authority but also its practical implementation within Indonesia's constitutional framework through various judicial review decisions. The analysis is conducted using a descriptive-analytical method based on primary, secondary, and tertiary legal materials to identify the constitutional limits of the Constitutional Court's authority, ensuring that it remains within its function as a negative legislator and does not shift toward the role of a positive legislator. Accordingly, this study is expected to provide sound legal arguments regarding the balance between the Constitutional Court's constitutional interpretative function and the principle of the limitation of governmental powers in a democratic state governed by the rule of law.

3. RESULTS AND DISCUSSION

The Position of the Constitutional Court as a Negative Legislator

The concept of the negative legislator is one of the fundamental principles in constitutional law that explains the limits of the constitutional court's authority in exercising the power of judicial review. Under this concept, the Constitutional Court is entrusted with the authority to review and invalidate statutory provisions that are found to be inconsistent with the Constitution. Consequently, the Constitutional Court does not possess the primary authority to create new legal norms, as the constitutional function of law-making belongs to the legislature in conjunction with the executive branch.

This concept originates from the constitutional theory developed by Hans Kelsen, who emphasized the necessity of establishing a specialized institution responsible for safeguarding the supremacy of the Constitution. According to Kelsen, a constitutional court serves as a mechanism for controlling legislation enacted by the law-making authority. Such an institution is essential because, within a democratic system, decisions adopted through the legislative process by the majority must nevertheless remain subject to constitutional limitations. Judicial review therefore functions as an instrument to ensure that the political will of the legislature does not conflict with higher constitutional norms [17].

Similarly, Jimly Asshiddiqie argues that the Constitutional Court is a state institution established as part of the judicial branch whose principal function is to uphold the Constitution as the supreme law of the state (*the guardian of the Constitution*). The Constitutional Court is authorized to review statutes against the 1945 Constitution of the Republic of Indonesia, resolve disputes concerning the constitutional powers of state institutions, adjudicate the dissolution of political parties, decide disputes over general election results, and render decisions regarding the House of Representatives' opinion on alleged constitutional violations committed by the President and/or Vice President. Through these constitutional powers, the Constitutional Court serves as the guardian of constitutional supremacy, the protector of citizens' constitutional rights, and the defender of the rule of law and constitutional democracy [18].

Within this framework, the Constitutional Court's authority as a negative legislator is corrective rather than substitutive in nature. In other words, the Court is empowered to correct legal norms that are inconsistent with the 1945 Constitution of the Republic of Indonesia without replacing the legislature's role in determining the direction of national legal policy. Decisions invalidating statutory provisions represent a form of constitutional supervision intended to ensure that the legal system continues to operate in accordance with the principles of a constitutional state governed by the rule of law.

The Constitutional Court's position as a negative legislator is closely related to the principles of separation of powers and checks and balances. Within a democratic constitutional system, each state institution possesses distinct functions and constitutionally defined limits of authority. The House of Representatives (DPR) and the President exercise legislative authority as representatives of the democratic process, whereas the Constitutional Court ensures that both the legislative process and the resulting statutes comply with constitutional requirements. Accordingly, the authority to invalidate statutory provisions deemed contrary to the Constitution constitutes the defining characteristic of the Court's role as a negative legislator. Through this authority, the Constitutional Court does not create new legal norms but merely removes or nullifies the legal force of provisions that have been proven unconstitutional. This understanding is consistent with Hans Kelsen's theory, which maintains that a court empowered to invalidate legislation, either wholly or partially, essentially performs the function of a negative legislator [19].

Accordingly, the Constitutional Court's authority to review statutes against the 1945 Constitution forms an integral part of Indonesia's constitutional system following the establishment of the Constitutional Court through the Third Amendment to the 1945 Constitution. This authority fundamentally constitutes a mechanism of constitutional control

over the legislative power. Such constitutional oversight seeks to ensure that legislation remains consistent with constitutional values, protects the constitutional rights of citizens, and preserves the principle of the rule of law (*rechtsstaat*).

In exercising this authority, the Constitutional Court generally has three possible outcomes when deciding constitutional review cases. First, it may declare an application inadmissible (*niet ontvankelijk verklaard*) if the formal procedural requirements have not been satisfied. Second, it may reject the application when the challenged statutory provision is found to be consistent with the 1945 Constitution. Third, it may grant the application by declaring that the statutory provision is inconsistent with the Constitution and therefore no longer has binding legal force, either in whole or in part. These forms of judgment demonstrate that the Constitutional Court's authority is directed toward eliminating unconstitutional norms rather than creating new ones.

From the perspective of the theory of separation of powers, the Constitutional Court's role as a negative legislator also functions as a mechanism of checks and balances over the legislative branch. Article 20 of the 1945 Constitution grants the House of Representatives, together with the President, the constitutional authority to enact legislation, while the Constitutional Court is entrusted with the authority to review the constitutionality of such legislative products. This allocation of constitutional powers is intended to prevent the concentration of governmental authority in a single institution and to ensure that legislative power is exercised within constitutional boundaries.

In practice, the characteristics of a negative legislator are reflected when the Constitutional Court invalidates statutory provisions that violate citizens' constitutional rights, the principle of equality before the law, the guarantee of legal certainty and fairness, or the principles of constitutional democracy. Decisions of the Constitutional Court in such cases are declaratory and constitutive (*declaratoir constitutief*), meaning that they simultaneously declare a legal norm unconstitutional and remove its binding legal force from the moment the judgment becomes legally effective. Consequently, the invalidated provision can no longer serve as the legal basis for governmental action or law enforcement [20].

The Constitutional Court's character as a negative legislator is further reflected in the final and binding nature of its decisions, as stipulated in Article 24C paragraph (1) of the 1945 Constitution and reaffirmed in Law No. 24 of 2003 concerning the Constitutional Court, as most recently amended by Law No. 7 of 2020. The term *final* signifies that no further legal remedies are available against Constitutional Court decisions, whereas *binding* means that such decisions apply erga omnes, binding all persons rather than merely the parties to the dispute. Accordingly, once the Constitutional Court invalidates a statutory provision, that provision automatically ceases to have legal effect within Indonesia's national legal system.

Nevertheless, developments in constitutional practice demonstrate that the distinction between the roles of a negative legislator and a positive legislator is not always absolute. In several landmark decisions, the Constitutional Court has not merely invalidated statutory provisions but has also formulated new constitutional standards through conditionally constitutional, conditionally unconstitutional, and constitutional interpretation rulings. These forms of decision-making are intended to prevent legal vacuums and ensure the

effective protection of constitutional rights. From Hans Kelsen's theoretical perspective, however, such practices are frequently viewed as extending the Constitutional Court's role beyond the traditional function of a negative legislator because they substantively influence the formation of legal norms.

From a constitutional standpoint, it is important to distinguish between constitutional interpretation and the creation of new legal norms. Constitutional interpretation constitutes an inherent judicial function exercised in resolving constitutional disputes. By contrast, the formulation of new regulatory norms belongs exclusively to the legislative function exercised jointly by the House of Representatives and the President. Accordingly, to preserve the principle of separation of powers, the Constitutional Court should confine itself to reviewing the constitutionality of statutory provisions and avoid creating legal norms that substantially replace the legislative policy choices of the law-making institutions (*open legal policy*).

The Constitutional Court's position as a negative legislator cannot be separated from its constitutional authority to conduct judicial review of statutes against the 1945 Constitution. In practice, judicial review consists of two forms: formal review and material (substantive) review. One of the Constitutional Court's constitutional powers, as provided in Article 24C paragraph (1) of the 1945 Constitution, is to review statutes for their conformity with the Constitution. Although these two forms of review differ in terms of their object, scope, and purpose, both function as constitutional mechanisms designed to uphold constitutional supremacy and to realize the principle of a state governed by the rule of law (*rechtsstaat*).

Formal review is a constitutional review mechanism that focuses on the legislative process through which a statute is enacted, rather than on the substantive legal norms contained therein. The object of assessment is whether a statute has been enacted in accordance with the procedures, stages, and mechanisms prescribed by the 1945 Constitution of the Republic of Indonesia and the legislation governing the formulation of laws and regulations.

According to Jimly Asshiddiqie, formal review is intended to ensure that a statute acquires constitutional legitimacy through a valid legislative process. The validity of a statute is determined not only by the substance of its provisions but also by compliance with the legislative procedures mandated by the Constitution. From the perspective of the rule of law (*rechtsstaat*), the legislative process constitutes an inseparable component of the principle of constitutional supremacy. Accordingly, any deviation from the prescribed legislative procedures may undermine the constitutional legitimacy of a statutory enactment.

In Indonesia, the Constitutional Court's authority to conduct formal review is derived from Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which is further elaborated in Law Number 24 of 2003 concerning the Constitutional Court, as most recently amended by Law Number 7 of 2020, as well as Article 51A of the Constitutional Court Law, which distinguishes between formal and substantive judicial review. The procedures governing the enactment of legislation are regulated under Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 on the Formation of Laws and Regulations. In constitutional adjudication, the Constitutional Court evaluates

several essential aspects in conducting formal review, including compliance with legislative procedures, the competence of the law-making institutions, the fulfillment of the principle of meaningful public participation, and adherence to the principles of openness, transparency, and accountability throughout the legislative process.

This differs fundamentally from substantive review. Substantive review concerns the content or material provisions of a statute. Its primary purpose is to determine whether the legal norms contained in a statute are inconsistent with the constitutional norms, principles, or values guaranteed by the 1945 Constitution of the Republic of Indonesia.

Theoretically, substantive review is rooted in Hans Kelsen's Stufenbau Theory (Theory of the Hierarchy of Norms), which maintains that legal norms are arranged hierarchically, whereby lower-ranking norms must derive their validity from and must not conflict with higher-ranking norms. Within a constitutional state, the Constitution occupies the highest position in the hierarchy of legal norms; consequently, all legislation must conform to constitutional provisions. Substantive review therefore serves as an essential instrument for the protection of citizens' constitutional rights. Through this mechanism, the Constitutional Court performs its dual role as the guardian of the Constitution and the protector of constitutional rights.

The legal basis for substantive review is found in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia and the Constitutional Court Law. Furthermore, Article 51A of the Constitutional Court Law stipulates that substantive review applies to articles, paragraphs, and/or specific provisions of statutes that are alleged to be inconsistent with the Constitution.

In practice, the Constitutional Court examines whether statutory provisions violate constitutional rights, conflict with the principles of the rule of law, equality before the law, democracy, justice, or human rights guaranteed by the Constitution. If the Constitutional Court declares a statutory provision unconstitutional, that provision loses its binding legal force. Such a consequence represents the enforcement of constitutional supremacy while simultaneously functioning as a mechanism to control the legislature, ensuring that statutory enactments remain within constitutional boundaries.

Accordingly, the Constitutional Court's position as a negative legislator has evolved considerably over time. Several Constitutional Court decisions have not merely invalidated statutory provisions but have also provided constitutional interpretations through decisions declaring provisions conditionally constitutional, conditionally unconstitutional, or through judgments containing specific normative formulations. This judicial practice has generated considerable academic debate regarding the limits of the Court's constitutional authority. On the one hand, such decisions are intended to enhance legal certainty and prevent legal vacuums; on the other hand, they are viewed as approaching the function of a positive legislator, a constitutional authority that properly belongs to the legislative branch.

Therefore, the Constitutional Court's primary function is not to replace the House of Representatives (Dewan Perwakilan Rakyat) and the President in formulating legal policy, but rather to ensure that such policies remain within constitutional limits. The Constitutional Court does not function as a policy maker; instead, it determines whether legislative policy choices are consistent with the fundamental values embodied in the Constitution.

Nevertheless, developments in constitutional review demonstrate that the Court's role is not always straightforward. In several cases, the Court has gone beyond simply invalidating statutory provisions by providing authoritative constitutional interpretations that enable particular legal provisions to remain constitutionally valid. This development illustrates the dynamic relationship between the need to safeguard constitutional values and the necessity of maintaining the proper limits of judicial authority. Consequently, the concept of the negative legislator should be understood in a balanced manner, allowing the Constitutional Court sufficient latitude to perform its constitutional guardianship function without encroaching upon the democratically vested legislative authority to enact laws.

Problems Concerning the Constitutional Court's Position in Various Judicial Review Decisions

The development of judicial review practices conducted by the Constitutional Court demonstrates a dynamic evolution in the exercise of its authority as the *guardian of the constitution*. Normatively, the Constitutional Court is vested with the authority to review statutes against the 1945 Constitution of the Republic of Indonesia, as stipulated in Article 24C paragraph (1) of the 1945 Constitution. This authority fundamentally positions the Constitutional Court as a *negative legislator*, meaning that it is empowered only to declare whether a statutory provision is constitutional or unconstitutional without creating new legal norms. Nevertheless, the development of numerous judicial review decisions indicates a tendency toward an expansion of the Court's functions, giving rise to debates regarding the limits of its constitutional authority.

This issue arises because, in a number of decisions, the Constitutional Court has not merely invalidated statutory provisions but has also formulated new legal norms through constitutional interpretation, *conditionally constitutional* decisions, *conditionally unconstitutional* decisions, and, in several cases, by determining the legal norms that should apply before the legislature amends the challenged statute. Such practices raise questions concerning the consistency of the Constitutional Court in performing its function as a *negative legislator*, considering that the creation of legal norms is, in principle, the constitutional authority of the House of Representatives (DPR) together with the President as the *positive legislator*.

The concept of the Constitutional Court as a *negative legislator* represents the implementation of the principle of *judicial restraint*. The doctrine of judicial restraint was first introduced by James B. Thayer in his work *The Origin and Scope of the American Doctrine of Constitutional Law*. According to this theory, courts must exercise self-restraint and avoid encroaching upon the functions of other state institutions, particularly in formulating public policies beyond their constitutional competence. Consequently, in exercising judicial review, the Constitutional Court is authorized solely to assess whether statutory provisions conform to the Constitution through either formal or substantive constitutional review. Meanwhile, judicial review of regulations below the level of statutes remains within the jurisdiction of the Supreme Court [21], [22].

The Constitutional Court's authority to review statutes against the 1945 Constitution is a direct consequence of its position as one of the institutions exercising judicial power. In

addition, the Court serves as the *guardian of the Constitution*, ensuring that every legislative product enacted by the legislature conforms to the constitutional values embodied in the 1945 Constitution.

Hans Kelsen likewise conceived the constitutional court as an institution whose authority is limited to invalidating legal norms that conflict with the Constitution. According to Kelsen, a constitutional court lacks democratic legitimacy to create new legal norms because legislative authority derives from the political process carried out by representative institutions. Therefore, when the Constitutional Court formulates legal norms that were previously absent from the statute under review, criticisms emerge that the Court has entered the domain of *law-making*, thereby exceeding its constitutional mandate [23].

One of the most debated issues concerns the emergence of *conditionally constitutional* and *conditionally unconstitutional* decisions. In these decisions, the Constitutional Court does not merely declare a statutory provision constitutional or unconstitutional but also establishes specific conditions regarding how the provision must be interpreted to remain consistent with the 1945 Constitution. On one hand, this model of decision is regarded as a necessary form of constitutional interpretation aimed at protecting citizens' constitutional rights and preventing a legal vacuum (*rechtsvacuum*). On the other hand, the conditions formulated by the Constitutional Court frequently possess a regulatory character (*regeling*), thereby creating the impression that the Court has effectively produced new legal norms with general binding force.

In principle, the Constitutional Court's authority in judicial review is intended to ensure that every statutory norm enacted by the legislature conforms to constitutional principles. However, in practice, simply invalidating a statutory provision is not always the most appropriate solution, as it may result in a legal vacuum or uncertainty in the application of the law. Consequently, in several cases, the Constitutional Court has adopted constitutional interpretation to preserve the validity of a statutory provision, provided that it is understood in accordance with constitutional values.

A more complex issue is evident in several decisions that have substantively replaced the legislature's *open legal policy*. In constitutional theory, *open legal policy* refers to the discretionary authority granted to the legislature to determine policy choices based on legal-political considerations, provided that such policies do not conflict with the Constitution. Therefore, intervention by the Constitutional Court in matters of *open legal policy* has the potential to blur the distinction between judicial and legislative functions. If the Court goes too far in determining the substantive content of legal norms that the DPR and the President should enact, the principles of the separation of powers and checks and balances may be undermined.

One of the most controversial decisions in this regard is Constitutional Court Decision No. 90/PUU-XXI/2023 concerning the minimum age requirement for presidential and vice-presidential candidates. In this decision, the Constitutional Court upheld the statutory minimum age requirement while simultaneously introducing an exception for individuals who have held or currently hold elected public office. This exception was not expressly contained in the statutory provision under review, prompting criticism that the Constitutional Court had effectively created a new legal norm that should have fallen within the legislature's

authority. From the perspective of the *negative legislator* doctrine, this decision has been viewed as illustrating the Court's gradual shift toward functioning as a *positive legislator*.

In addition to Decision No. 90/PUU-XXI/2023, similar debates have arisen concerning several other Constitutional Court decisions containing transitional norms or granting the legislature a specific period to amend statutes declared unconstitutional. Such practices are intended to preserve legal certainty and prevent regulatory vacuums that could disrupt governmental administration. Nevertheless, if the Constitutional Court determines in detail the substantive legal norms that should apply during the transitional period, the judicial function may effectively evolve into a legislative function [24].

Conversely, there are arguments supporting this institutional development. According to this perspective, the Constitutional Court should not be understood merely as a *negative legislator* in the classical sense proposed by Hans Kelsen. The complexity of contemporary constitutional issues requires the Court to provide constitutional solutions that extend beyond simply invalidating statutory provisions by ensuring effective protection of citizens' constitutional rights. Accordingly, constitutional interpretation and conditional decisions are considered legitimate judicial instruments, provided that they do not permanently replace the functions of the legislature.

From the perspective of the *negative legislator* doctrine, however, the Constitutional Court's authority should remain focused on supervising legislative products rather than assuming the legislature's law-making function. Therefore, any expansion of the Court's role through conditional decisions must be approached with caution. Such decisions are justifiable only insofar as they are intended to preserve the constitutionality of statutory provisions and do not introduce new legal policy choices that constitutionally belong to the legislature.

Nevertheless, from the perspective of a democratic rule-of-law state, the expansion of authority through constitutional review decisions must remain constrained by the principle of *judicial restraint*, which requires judges to exercise prudence and self-restraint in the use of their constitutional powers. The Constitutional Court must continue to respect the legislative discretion of the law-making institutions and refrain from creating legal norms of a generally regulatory nature. Such limitations are essential to maintaining a balance between the protection of the Constitution and respect for the principle of representative democracy, under which the House of Representatives (DPR), together with the President, possesses the political legitimacy to enact legislation.

Accordingly, the Constitutional Court's position in judicial review decisions reflects the increasingly blurred distinction between its traditional role as a *negative legislator* and its growing tendency to function as a *positive legislator*. Normatively, the 1945 Constitution of the Republic of Indonesia grants the Constitutional Court the authority only to review the constitutionality of statutes, rather than to create new legal norms. Therefore, to preserve the principles of constitutional supremacy, separation of powers, and checks and balances, the Constitutional Court should exercise its authority proportionately by prioritizing constitutional protection while refraining from assuming legislative functions that constitutionally belong to the House of Representatives (DPR) and the President. Such an

approach would safeguard the institutional legitimacy of the Constitutional Court while simultaneously strengthening legal certainty within Indonesia's constitutional system.

Constitutional Limits of the Constitutional Court as a Negative Legislator

The position of the Constitutional Court as a negative legislator is not merely derived from constitutional law theory but is also expressly limited by constitutional provisions governing the scope of its authority. Within the Indonesian constitutional system, the Constitutional Court exercises judicial power based directly on Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia. This provision grants the Court the authority to review statutes against the Constitution, adjudicate disputes concerning the constitutional authority of state institutions, decide on the dissolution of political parties, and resolve disputes concerning general election results. Furthermore, under Article 24C paragraph (2) of the 1945 Constitution, the Constitutional Court is also obliged to render decisions on the opinion of the House of Representatives (DPR) regarding alleged legal violations committed by the President and/or Vice President in impeachment proceedings. All of these powers are attributive in nature, meaning that the Constitutional Court may act only within the boundaries explicitly conferred upon it by the Constitution.

The development of constitutional adjudication in practice demonstrates that the distinction between the functions of a negative legislator and a positive legislator is not always clearly defined. In several constitutional review decisions, the Constitutional Court has not merely invalidated or upheld statutory provisions but has also provided constitutional interpretations that significantly influence the substance of the applicable legal norms. This development has generated extensive academic debate as to whether such actions remain within the legitimate scope of constitutional interpretation or have evolved into the creation of legal norms, which constitutionally falls within the authority of the legislature [25].

Accordingly, the distinction between the roles of a negative legislator and a positive legislator constitutes a central issue in this study. Determining this boundary concerns not only the scope of the Constitutional Court's authority but also the principles of the rule of law, constitutional supremacy, and respect for the separation of powers, all of which serve as fundamental pillars of Indonesia's constitutional system.

In the context of judicial review, the Constitutional Court's constitutional limitation lies in its primary function as a reviewer of the constitutionality of statutory norms rather than as a creator of legal norms. The Court is authorized to determine whether a statutory provision is inconsistent with the 1945 Constitution and subsequently declare whether the provision remains valid or loses its binding legal force. This authority reflects the Court's function as a negative legislator, namely, an institution that eliminates unconstitutional legal norms rather than creating new regulatory provisions.

This limitation is consistent with Hans Kelsen's theory of the negative legislator, which clearly distinguishes the legislative function from constitutional review. According to Kelsen, the creation of legal norms belongs exclusively to the legislature as the positive legislator, whereas a constitutional court performs only the supervisory function of reviewing norms that have already been enacted. Consequently, a constitutional court lacks democratic legitimacy to formulate legal policy or establish new legal norms because such

authority constitutes an expression of popular sovereignty exercised through representative institutions.

Mahfud MD, in his book *Constitution and Law in Controversial Issues*, explains that the concept of a negative legislator describes the Constitutional Court's authority to review statutes against the Constitution. In exercising this function, the Court may declare a statutory provision to have no binding legal force if it is found to be inconsistent with the Constitution or uphold its validity if it remains compatible with the constitutional spirit and meaning. Thus, the Court's principal role as a negative legislator is to supervise the constitutionality of legal norms rather than to create new legal rules of general application [26].

Conversely, Mahfud MD explains that the concept of a positive legislator refers to institutions constitutionally authorized to enact legal norms, namely the House of Representatives (DPR) together with the President through the legislative process. This authority constitutes the exercise of the legislative function based on the principle of representative democracy, whereby legal policies of general application are fundamentally produced through political processes and statutory enactment in accordance with constitutional procedures.

Indonesia's constitutional system adopts the principle of the separation of powers as articulated by John Locke and Montesquieu. This principle aims to prevent the abuse of governmental authority, realize the system of checks and balances, and avoid the concentration of power within a single state institution. As a consequence of this constitutional arrangement, Article 20 of the 1945 Constitution assigns legislative authority to the House of Representatives, exercised jointly with the President. In contrast, the Constitutional Court forms part of the judicial branch and is entrusted with ensuring that legislation complies with the Constitution. This functional distribution is intended to maintain equilibrium among the branches of government while preventing the concentration of state power. Accordingly, the Constitutional Court is not constitutionally permitted to assume legislative functions that belong exclusively to the DPR and the President.

Fundamentally, the Constitutional Court's authority should remain confined to its role as a negative legislator, namely reviewing the constitutionality of statutes and invalidating provisions that conflict with the Constitution. The creation of new legal norms, by contrast, falls within the exclusive domain of the legislature. Consequently, any Constitutional Court decision that formulates new legal norms or fills legislative gaps inevitably becomes the subject of academic debate regarding the extent to which the Court continues to perform constitutional review or has instead approached the role of a positive legislator.

The Constitutional Court's constitutional limitations are also reflected in the nature of its decisions. Under Law No. 24 of 2003 on the Constitutional Court, as most recently amended by Law No. 7 of 2020, the Court's decisions are final and binding. This characteristic gives immediate legal effect to the reviewed statutory provisions but does not authorize the Court to formulate replacement regulations for invalidated norms. Once a statutory provision is declared inconsistent with the Constitution, the responsibility for enacting replacement legislation remains with the legislature through the constitutional legislative process.

Nevertheless, constitutional practice demonstrates that these constitutional boundaries are frequently challenged. In several decisions, the Constitutional Court has issued binding constitutional interpretations through conditionally constitutional, conditionally unconstitutional, and transitional rulings designed to prevent legal vacuums. From the perspective of protecting citizens' constitutional rights, such approaches may be understood as efforts to preserve constitutional effectiveness and ensure legal certainty. However, when these interpretations effectively generate new legal norms of general application, questions arise as to whether the Constitutional Court remains within the constitutional limits of its authority as a negative legislator.

This issue becomes even more significant when the Constitutional Court enters the sphere of open legal policy, namely policy areas constitutionally entrusted to the legislature. In principle, the Court is authorized only to assess whether legislative policies violate the Constitution and not to determine which policy option is preferable. Judicial intervention into substantive legal policy that remains within the legislature's discretionary authority risks shifting the Constitutional Court's function from guardian of the Constitution to creator of legal policy, thereby diminishing the democratic legitimacy of the legislative process [27].

Within the framework of a democratic rule-of-law state, these constitutional boundaries should be preserved through the application of the principle of judicial restraint, which requires constitutional judges to exercise caution when reviewing legislation. This principle requires the Constitutional Court to intervene only where a clear constitutional violation exists, without substituting its own policy judgments for those of the legislature. In this manner, the Constitutional Court can effectively perform its constitutional supervisory function while respecting the legislative authority vested in the people's representatives.

In conclusion, the constitutional limitation of the Constitutional Court as a negative legislator lies in its authority to review and invalidate statutory provisions that conflict with the 1945 Constitution, without creating new legal norms or assuming legislative functions. These limitations are a direct consequence of the principles of constitutional supremacy, separation of powers, and checks and balances, which constitute the foundation of Indonesia's constitutional system. Therefore, the evolving practice of judicial review must remain within the constitutional framework established by the Constitution, enabling the Constitutional Court to fulfill its role as the guardian of the Constitution without exceeding the authority conferred upon it by the 1945 Constitution of the Republic of Indonesia.

4. CONCLUSION

This study concludes that the Constitutional Court of Indonesia remains, as a matter of constitutional design, a negative legislator. Pursuant to Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, the Court is constitutionally authorized to review statutes against the Constitution and to declare statutory provisions unconstitutional when they conflict with constitutional norms. Accordingly, the Court's constitutional status does not include general legislative authority. Nevertheless, the analysis of Constitutional Court Decisions No. 46/PUU-VIII/2010, No. 14/PUU-XI/2013, No. 91/PUU-XVIII/2020, and No. 90/PUU-XXI/2023 demonstrates that certain remedial techniques adopted by the Court, particularly conditional rulings and transitional arrangements, may produce norm-like

effects that influence the future application of statutory provisions. These remedial effects, however, should not automatically be equated with the exercise of positive legislative power.

The study further finds that the constitutional validity of such remedial techniques depends on whether they are firmly grounded in the Constitution and satisfy the principles of necessity, proportionality, temporariness, and respect for legislative discretion, particularly in matters falling within the sphere of open legal policy. Consequently, the distinction between the Court's constitutional status and the legal effects of particular decisions is essential. While the Court remains constitutionally a negative legislator, certain judicial remedies may exceptionally have normative consequences when they are required to ensure constitutional protection and prevent legal uncertainty, provided that they do not permanently replace the legislative function.

Accordingly, several institutional measures should be strengthened to preserve the constitutional balance between judicial review and legislative authority. The Constitutional Court should provide explicit constitutional justification whenever it formulates a conditional norm, clearly distinguish temporary judicial remedies from permanent regulatory changes, and apply more consistent standards when reviewing matters involving open legal policy. At the same time, the legislature and the President should ensure the timely implementation of Constitutional Court decisions through legislative follow-up, thereby maintaining legal certainty, respecting the separation of powers, and reinforcing the system of checks and balances within Indonesia's constitutional framework.

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