

JUDICIAL OVERREACH AND THE RISE OF THE POSITIVE LEGISLATOR: A CONSTITUTIONAL ANALYSIS OF INDONESIA'S CONSTITUTIONAL COURT

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Abstract

The shifting role of the Constitutional Court from a negative to a positive legislator is not merely an expansion of authority; it also exhibits symptoms of judicial overreach that may threaten the principle of separation of powers. The Indonesian Constitutional Court was originally designed to function as a negative legislator, with the authority to review the constitutionality of laws without creating new legal norms. However, in practice, several Constitutional Court decisions have shifted toward a positive legislator role, wherein the Court engages in norm formulation as a form of judicial activism. This article aims to analyze the limits of such authority by examining three landmark decisions: Decision Numbers 102/PUU-VII/2009, 90/PUU-XXI/2023, and 62/PUU-XXII/2024. The analysis shows that the role of a positive legislator can be justified in urgent situations, particularly when a legal vacuum threatens to violate constitutional rights. Nevertheless, the Constitutional Court's interventions must be limited, proportional, and free from conflicts of interest. This research proposes six substantive criteria as normative boundaries to ensure that the Court's judicial activism remains within the constitutional framework and reinforces the system of checks and balances. These findings aim to strengthen the institutional design of constitutional justice in Indonesia.

Key words: constitutional court; judicial activism; positive legislator.

1. Introduction

The Constitutional Court holds a vital role in the Indonesian constitutional system as the guardian of constitutional supremacy. As an institution entrusted with the authority

to conduct judicial reviews, the Court ensures that laws enacted by the legislature do not conflict with the Constitution. This function positions the Constitutional Court as a negative legislator, meaning its authority is limited to annulling unconstitutional legal norms without replacing them with new ones. This model is aligned with Hans Kelsen's theory, which asserts that constitutional courts must restrict themselves to eliminating norms that contradict the Constitution rather than creating new ones (AL-Dulaimi, 2018, p.1-4). However, in practice, the Constitutional Court's role has undergone a significant shift. It has not only annulled legal norms but also introduced new ones with legislative implications. This development raises concerns about the extent to which judicial activism can occur without undermining the principle of separation of powers (Agustine et al., 2023, p. 183). Brewer-Carías (2011, p. 5) identified four key trends in the Court's evolution from a negative to a positive legislator: (1) intervention in constitutional amendments, (2) intervention in existing laws, (3) intervention to fill legal gaps, and (4) shaping norms through judicial review. These shifts have sparked debate over the Constitutional Court's proper limits within the framework of the separation of powers (Brewer-Carías, 2011, p. 5).

The legal basis for the Constitutional Court's authority to conduct judicial review in Indonesia is outlined in Article 24C of the 1945 Constitution and Article 10 of Law No. 24 of 2003 on the Constitutional Court. As part of the system of checks and balances, the Court functions to ensure that legislation passed by the legislature remains consistent with constitutional principles (Qamar, 2012, p. 1-15; Nugraha et al., 2020, p. 1-15). However, in several of its rulings, the Court has acted as a positive legislator by introducing new legal norms to address legal uncertainty (Adena Fitri Puspita Sari, 2022, p. 187). This phenomenon has sparked debate among scholars and legal practitioners. On one hand, the Constitutional Court's positive legislative role is viewed as necessary in certain circumstances to uphold substantive justice and prevent legal vacuums (Marlina, 2018, p.171). On the other hand, actions that exceed the Court's role as a negative legislator can disrupt the balance of power between the executive, legislative, and judicial branches. Therefore, a deeper analysis is required to understand the legitimacy boundaries of the Court's positive legislative function and to identify effective mechanisms for preventing the abuse of judicial authority.

Several previous studies have explored the Constitutional Court's judicial review role and the implications of its judicial activism. For instance, (Efendi et al., 2023, p. 622-639) found that out of 198 decisions rendered by the Court, 107 exhibited characteristics of a positive legislator, highlighting the prevalence of this practice. Similarly, (Andiraharja, 2021, p. 70) emphasized how the Court's function in judicial review has evolved toward norm creation, sparking debate over its compatibility with the separation of powers principle. by (Puspita Sari, 2022, p. 687) argued that although the Constitutional Court lacks explicit authority to establish new norms, in certain urgent contexts it may adopt legal breakthroughs to fill normative gaps and promote substantive justice. Interestingly, this trend is not unique to Indonesia. (Smekal et al., 2023, p. 92) observed that the Czech Constitutional Court also engages in selective judicial activism to protect democratic integrity and prevent excessive political influence. Similarly, the Turkish Constitutional Court, which was originally focused on preserving state ideology, has transformed into a defender of human rights while still adhering to the principle of separation of powers (Hazama, 2023, p. 570).

Although numerous studies have addressed the Constitutional Court's evolving role, there remains a significant academic gap concerning the legitimacy criteria and control mechanisms necessary to limit the Court's function as a positive legislator. Therefore, this study focuses on two aspects that have not been comprehensively explored: how judicial activism by the Constitutional Court influences the balance of power among state institutions, and why clear boundaries are essential to ensure that the Court's positive legislative actions do not undermine Indonesia's constitutional

framework. By developing criteria and control mechanisms to ensure the legitimacy of the Court's actions within its constitutional mandate, this study contributes to the formulation of clearer juridical boundaries. These boundaries will allow the Constitutional Court to effectively perform its constitutional function without violating the separation of powers or diminishing the role of judicial review as a tool of constitutional oversight.

2. Materials and Methods

This research uses normative or doctrinal legal research methods, namely research that focuses on the study of legal norms, statutory regulations, and constitutional principles relevant to the scope of authority of the Constitutional Court (Irwansyah, 2021, p. 42). This research is prescriptive; that is, it aims to analyze and formulate the limits of the authority of the Constitutional Court based on legal objectives, values of justice, the validity of legal norms, and applicable constitutional principles. (Peter Mahmud Marzuki, 2010, p. 22). This research uses three approaches, namely the statutory approach, conceptual approach, and case approach. The statute approach is carried out through a literature study, which includes a review of statutory regulations and other legal documents relevant to the research problem. (Mamudji, 2006, p. 194). A conceptual approach provides a point of view in analyzing legal problem-solving from the legal concepts that underlie it or from the values contained in the formulation of norms for a regulation linked to a particular legal concept. This approach helps explore the philosophical and theoretical foundations of the practice of judicial activism, positive legislators, and the limits of the authority of judicial institutions according to principles of separation of powers and checks and balances. The case approach is an approach to studying cases related to legal issues raised in the research, based on a legal argumentation case approach built on the perspective of concrete cases that occur in the field, such as court decisions that have permanent legal force (Irwansyah, 2021, p. 24). In this research, three constitutional court decisions are landmarks in case studies. The legal materials used consist of primary legal materials, which are binding and consist of basic norms or basic rules, namely the Preamble and Body of the 1945 Constitution, basic regulations, statutory regulations, and uncodified legal materials, which are still in effect. (Mamudji, 2006, p.190), as well as court decisions relating to legal issues in research, namely the Constitution of the Republic of Indonesia Year 1945, Law Number 24 of 2003 concerning the Constitutional Court and its Amendments, as well as Constitutional Court Decisions Number 102/PUU-VII/2009, 90/PUU-XXI/2023, and 62/PUU-XXII/2024. Then, secondary legal materials are legal materials that explain primary legal materials, such as bills, research results, work from legal circles, and so on. (Peter Mahmud Marzuki, 2019, p. 187). Tertiary legal materials are legal materials that provide instructions and explanations for primary and secondary legal materials, including legal dictionaries and Indonesian dictionaries. (Mamudji, 2006, p. 192).

3. Result

3.1. *The shift in the role of the Constitutional Court from being a negative legislator to being a positive legislator*

The Constitutional Court has a firm legal basis in the 1945 Constitution, especially in Article 24C paragraph (1) of the Constitutional Court Law, which states that the Constitutional Court has the authority to review laws against the Constitution. This shows the position of the Constitutional Court as a negative legislator. The idea of judicial review emerged during the discussion of the Judicial Power Bill, which later became Law Number 14 of 1970, concerning judicial power in the reform era when discussing amendments to UUD NRI 1945, which changed the Indonesian constitutional system from MPR supremacy to constitutional supremacy. This fundamental change requires institutional and

constitutional mechanisms and new state institutions to overcome potential disputes between state institutions, which are now equal in the system of checks and balances (Darmadi, 2020, p. 1088).

Based on Article 24C paragraph (1) of the 1945 Constitution, the Constitutional Court's decision is final, so it has permanent legal force from when it is read at the Constitutional Court session and must be implemented (Muchamad Ali Safa'at, 2014). There are no longer any legal remedies, and all parties must obey them because of the principles that apply to the Constitutional Court's decision, which aims to protect human rights (Ningrum et al., 2022, p. 58). The Constitutional Court can regulate or control lawmakers' power, ensuring their actions and laws align with the Constitution. The Constitutional Court can address potential abuse of power by lawmakers because laws can become instruments of tyranny and a source of severe abuse (Asmal, 1991, p. 315-340).

The classic role of the Constitutional Court as a negative legislator directly impacts Constitutional Court decisions, which can cancel or issue several articles or legal provisions in law. Then, the legislative institution has the authority to reform these regulations or pass new regulations to follow the Constitutional Court's decision (Brewer-Carías, 2017, p. 73). Based on this, it can be understood that the authority of the Constitutional Court to review laws against the Constitution is a form of constitutional supremacy that has been institutionalized in the state administration system through its authority to declare a norm unconstitutional (cancellation of a norm in law). The Constitutional Court is referred to as a negative legislator, and on the contrary, the legislative institution or parliament is referred to as a positive legislator because it has the authority to form laws.

The basis for the role of the Constitutional Court as a negative legislator was regulated initially in Article 57, paragraph (2a), letter c of Law Number 8 of 2011 Amendment to Law Number 24 of 2003 concerning the Constitutional Court, which states that the decision of the Constitutional Court may not contain the formulation of norms that replace the norms of laws that have been declared unconstitutional. However, based on Decision Number 48/PUU-IX/2011, the Constitutional Court stated that Article 57 paragraph (2a) of the Constitutional Court Law is contrary to the 1945 Constitution of the Republic of Indonesia. The shift from the traditional role of a negative legislator to a positive legislator has implications for the authority of the Constitutional Court, which not only has the authority to declare a law unconstitutional and annul it if it conflicts with the Constitution but also has the authority as a positive legislator. Formulate a norm (Constitutional Court Decision 48/PUU-IX/2011, 2011) .

The considerations of the Constitutional Court include that the provisions of Article 57 paragraph (2a) of the Constitutional Court Law are contrary to the aim of establishing the Constitutional Court, namely, to uphold law and justice to uphold the constitutionality of legal norms by the Constitution. The provisions of this article are considered to result in the obstruction of the Constitutional Court from reviewing the constitutionality of norms, filling the legal vacuum resulting from the Constitutional Court's decision declaring a norm unconstitutional. On the other hand, forming a law certainly takes a long time, so the legal vacuum cannot be implemented immediately. Another consideration is that Constitutional Court judges must explore, follow, and understand the values and sense of justice in society. (Mahanani, 2020, p. 421).

A shift from traditional roles as negative legislator to positive legislator has implications for the authority of the Constitutional Court, which not only has the authority to declare a law unconstitutional and annul it if it conflicts with the Constitution but also has the authority as a positive legislator by formulating a norm (AL-Dulaimi, 2018, p. 143). The rapid development of judicial activism is an idea that was initially born from the practice of countries with common law, which then increasingly spread to countries with civil law traditions. Regarding this development, pros and cons cannot be avoided in various

groups, such as academics, practitioners, elites, and even judges. One factor is the legal positivism paradigm, which is widely adopted by academics (Martitah, 2012, p. 317-118).

As a result of new principles that have developed, for example, the Constitutional Court has the authority to interpret the law so that it is by the Constitution, and there is no legal vacuum without having to declare that the law is unconstitutional. This happens when the Constitutional Court interprets the Constitution in several cases to fill legal gaps permanently or temporarily, which could lead to the law's cancellation. Another role that has developed progressively, which is far from the role of the Constitutional Court to cancel a law, is the authority of the Constitutional Court in terms of judicial review, not concerning existing laws, but concerning the absence of laws or omissions or exceptions made by legislators when enacting laws (Allan R. Brewer-Carías, 2010, p. 13-14).

3.2. The change in the role of the Constitutional Court as a positive legislator has an impact on the legal system and the separation of powers

Problems related to the shift of the Constitutional Court from negative to positive legislators also bring dynamics between state institutions, especially the legislature as the authority holder, and positive legislators, the real thing. At the same time, the relationship between the judiciary through the Constitutional Court and the executive and legislative branches is one of constitutional control (judicial review). Through judicial review, interactions between legislative and government institutions influence decision-making and intervene in policy development and implementation (Canello, 2014, p. 1-24). In line with the perspective of constitutionalism in the view of constitutional supremacy, laws must be based on the Constitution. They must not conflict with the Constitution through the mechanism of reviewing laws against the Constitution as one of the limitations of power. This limitation of power regulates that there is a mechanism for legislative control so that the tendency for abuse of power can be prevented and can contribute to preventing the possibility of making laws that conflict with the Constitution (Radian Salman, 2018, p. 146).

This shift raises fundamental problems regarding the right to the role of the judiciary in the context of the framework of institutional relations in the constitutional law system, by the principle of separation of powers, especially the authority of the Constitutional Court in administering proportional judicial review in a democracy. Strengthening judicial institutions has the consequence of developing the role of judicial power to act further for justice that goes beyond power and authority, which are political in the executive and legislative power domain. (Radian Salman, 2018, p. 146).

The main aim of the Constitutional Court is to limit the implementation of legislative or administrative decision-making, which shows a relationship between supervision and control. The relationship between judges and legislators is described as complex in the context of advancing the supremacy of law, indicating a multifaceted interaction involving aspects of dispute resolution, rights protection, and setting legal precedents. Apart from that, the role and function of the Constitutional Court in the separation of powers system include its involvement in the effective implementation of the system of checks and balances, protection of the Constitution, and the exercise of legal control over politics (Hutchinson, 2017, p. 137). So, the Constitutional Court is an institution that gives meaning to the rule of law towards legislative actions that exceed the limits, which are a response from the Constitutional Court; the relationship between the Constitutional Court and checks and balances legislative power.

Implementing the progressive role of the Constitutional Court should primarily focus on protecting the fundamental rights of citizens, such as equality and non-discrimination.

In this context, the intervention of the Constitutional Court in legislative functions is considered valid and by constitutional values because it aims to protect the rights and guarantees of citizens. However, this progressive role sometimes goes beyond protecting fundamental rights and extends into the political realm. In Eastern European countries, for example, the constitutional court plays an important role in establishing new democratic regimes and the rule of law. Although intended to protect fundamental rights and strengthen democratic principles, these measures risk encroaching on legislative power and ignoring the principle of separation of powers. This risk is not just a theoretical concern but has become a tragic reality, especially in authoritarian countries. Some constitutional courts even act with absolute impunity by supporting and legitimizing the government's unconstitutional actions. The Constitutional Court usurped legislative power without adequate legal consideration, with decisions based on vague «state interests.» In extreme cases, the Constitutional Court has even become a tool to support authoritarian governments and limit citizens' constitutional freedoms (Brewer-Carías, 2011, p. 5-12).

3.3. Case study of constitutional court decision: When can positive legislators be justified?

Research reveals that the judicial review of the Constitutional Court during the period (2012-2022) had a significant tendency towards the positive role of legislators. Of the 198 decisions granted by the majority (54%), 107 were classified as positive legislative decisions in that period (Efendi et al., 2023, p. 628). So, these figures indicate a gap between the judicial practice of the Constitutional Court and the juridical basis that regulates it. No formal legal basis explicitly gives the Constitutional Court the authority to act as a positive legislator.

On the one hand, the positive legislative role of the Constitutional Court is needed to maintain legal certainty and substantive justice. However, on the other hand, without a juridical basis, the role of the Constitutional Court has the potential to give rise to a tendency towards an authoritarian judiciary and ultimately can damage the principle of checks and balances, as well as a sense of justice that is ignored (Martitah, 2016, p. 216). Thus, it is important to analyze further when the Constitutional Court can be justified in acting as a positive legislator and when its limits must be enforced to maintain a balance of authority between state institutions. In this case, an analysis of three Constitutional Court decisions, which are landmark decisions that have different characteristics, will provide a clearer picture of the criteria that must be met so that the Constitutional Court can act in this capacity without exceeding its authority.

Decision Number 102/PUU-VII/2009 is a landmark decision that is a positive legislator and shows the flexibility of the Constitutional Court's interpretation in its decisions. In its decision, the Constitutional Court granted the request for review of Article 28 and Article 111 of Law Number 42 of 2008 concerning the General Election of the President and Vice President in part. In the Constitutional Court decision Number 102/PUU-VII/2009, the Constitutional Court provided a constitutional interpretation that allows citizens who are not registered on the Permanent Voter List (DPT) to exercise their right to vote by using a valid Resident Identity Card (KTP) or Passport. This decision stipulates that voters who use KTPs must fulfill several requirements, such as completing documents with a Family Card, can only vote at the TPS according to the KTP address, and must register first with the local Voting Organizing Group (KPPS). In addition, the right to vote can be used within one hour before the end of voting at the polling station. (Aritonang, 2013, p. 373). In its legal considerations, the Constitutional Court views the DPT as an administrative procedure that must not hinder citizens' constitutional right to vote. Procedural aspects should not eliminate a citizen's substantive rights in the general election process. The Constitutional Court emphasized the need to find a solution to

guarantee citizens' constitutional rights so that administrative incompatibilities do not eliminate their opportunity to participate in general elections. The DPT must be viewed as a flexible technical instrument, not as a rigid barrier to the implementation of citizens' democratic rights (FH-Universitas Brawijaya, 2016, p. 146). This decision shows that the Constitutional Court can interpret its role more flexibly to protect citizens' constitutional rights while also showing the potential for evolution from the strictly negative role of the legislator to a more constructive one. This shift does not occur without limitations. The Constitutional Court is still careful in only taking a positive role as a legislator in certain urgent cases, where this decision was pronounced in the Plenary Courtroom of the Constitutional Court precisely two (2) days before the voting process for the 2009 Presidential and Vice-Presidential Election, namely on Monday, 6 July 2009. This is directly related to citizens' voting rights, where, in the run-up to the 2009 presidential election, many citizens who should have had the right to vote were not registered in the Permanent Voter List (DPT), while some who should not have been listed were listed. This chaos did not only occur in the presidential and legislative elections, hampering citizen participation in voting. (Rachman, 2016, p. 248-146).

The practice of judicial activism in this decision can be categorized as positive legislator because the Constitutional Court not only annulled unconstitutional norms but also added regulations regarding the use of voting rights with ID cards and passports as alternatives to facilitate voter access. In this context, the role of the Constitutional Court as a positive legislator is crucial to maintaining legal certainty and substantial justice. Therefore, the decision of the Constitutional Court, which formulates provisions regarding the use of KTPs and passports in elections, is considered the right step to overcome the legal vacuum and ensure the protection of fundamental constitutional rights, namely citizens' right to vote. This approach is in line with the view of (Maruste, 2007, p. 8), which emphasizes that the Constitutional Court has a central role in democracy but must remain within a clear constitutional framework. The role of the Constitutional Court as a positive legislator is to overcome legislative negligence, namely when laws have been passed but are not entirely by what should be regulated by the Constitution (AL-Dulaimi, 2018, p. 4). In this case, citizens' rights will be neglected if the Constitutional Court does not take urgent active steps to guarantee the right to vote in conditions that are not ideal.

The decision regarding using KTPs is considered an example of a technical decision that has exceeded the limits of the Constitutional Court's authority in the context of the separation of powers. Nevertheless, the judicial activism in this decision was well received by various parties, individuals, academics, legal activists, the government, Parliament, political parties, KPU, the National Human Rights Commission, and other institutions (Faiz, 2009, p. 5). The provisions of this article are considered to result in the Constitutional Court being prevented from reviewing the constitutionality of norms, filling the legal vacuum resulting from the Constitutional Court's decision, which declared a norm unconstitutional. On the other hand, forming a law certainly takes a long time, so the legal vacuum cannot be implemented immediately. Another consideration is that Constitutional Court judges should explore, follow, and understand the values and sense of justice in society.

In case 90/PUU-XXI/2023, the Constitutional Court partially granted the request regarding the age limit provisions for presidential and vice presidential candidates by stating Article 169 letter q of Law Number 7 of 2007 concerning General Elections by adding the phrase «at least 40 (forty) years of age or has/is currently holding a position elected through general elections, including regional head elections.» Determining the ages of presidential and vice-presidential candidates is the domain of lawmakers, in this case, the DPR and the President. Constitutional Court Decision Legal strategy, to a certain extent, empowers judges to make political decisions that should be decided in the legislative realm. However, the Constitutional Court showed inconsistency in

its decision because it rejected several other requests for judicial review with similar arguments. These applications include case number 29/PUU-XXI/2023, case number 51/PUU-XXI/2023, and case number 55/PUU-XXI/2023; the Constitutional Court rejected all of these applications because limiting the age of presidential and vice presidential candidates is an open legal policy area (open legal policy), which is the authority of lawmakers (Subandri, 2024, p. 138). In its legal considerations, the Constitutional Court emphasized that the right to be elected is a political right protected by the Constitution and must not be limited by discriminatory or unfair conditions. The Constitutional Court considers that the minimum age limit of 40 years for candidates for president and vice president can reduce the participation of the younger generation in elections, which will result in limited leadership options. Therefore, the Constitutional Court considers this policy to be reviewed to maintain fairness and openness in the democratic process. The Constitutional Court considered that although the 1945 Constitution does not set an age limit, the age limit should be adjusted to the position's needs and not be discriminatory. Apart from that, according to the Constitutional Court, age policies can be changed if they conflict with the principles of justice and the Constitution, as reflected in several previous decisions, such as the Constitutional Court decision Number 112/PUU-XX/2022. The Constitutional Court also considered that experience as a regional head could be an alternative to the age limit because it shows the leadership abilities needed to run for office (Constitutional Court Decision Nomor 90/PUU-XXI/2023, 2023). This decision shows the tendency of the Constitutional Court to enter the area of legal politics, which is constitutionally the domain of the President and DPR as legislators, primarily because Article 6, Paragraph 2 of the 1945 Constitution states that the conditions for becoming President and Vice President are regulated in law so that they can be categorized as open legal policy. The difference in stance towards the petition occurred when the Constitutional Court accommodated the petition by adding new norms. At the same time, in other cases with similar arguments, the Constitutional Court rejected it for reasons of open legal policy, resulting in allegations of inconsistency and selectivity in judicial considerations. Furthermore, the argument for the protection of political rights to be elected by the Constitutional Court as the basis for the argument that the age of 40 is not determined solely based on the principles of substantive justice, equating age restrictions with juridical discrimination, is a dangerous simplification. Then, the analogy that «experience as a regional head» can be an alternative to the age requirement can shift the objective criterion (age) towards very situational and political criteria because not all regional head positions guarantee the quality of national leadership. Its replacement through the court's interpretation opens ambiguous space regarding the leadership quality parameters the political selection system should develop.

Several studies of the Constitutional Court decision Number 90/PUU-XXI/2023 show that this decision is closely related to politics. Firstly, the object of the submitted application is related to the requirements for nominating presidential and vice-presidential candidates. Second, the momentum of filing this petition coincided with the registration opening for presidential and vice-presidential candidates (Furqon et al., 2024, p. 416). According to John Rawls, this decision violates the principles of justice primarily related to equality of opportunity and justice. This decision also shows indications of a conflict of interest that could damage the independence and integrity of the Constitutional Court. As a result, this decision can potentially weaken the checks and balances system and reduce the institution's credibility in the public's eyes. Besides that, changing rules in the middle of the political process is considered unfair for all parties involved (Azhar, F, 2024, p. 245-246).

Application Number 90/PUU-XXI/2023 also has formal legal defects, especially concerning the applicant's legal standing. The applicant cannot show actual constitutional losses; they are only based on potential losses. The petitioner failed to explain the relationship between the losses experienced and the 40-year age limit stated

in Law Number 7 of 2017 concerning elections. Supposedly, because of this formal defect, the application should be rejected. However, regarding the applicant's legal standing, the Constitutional Court still considers that the applicant has legal standing because the application object violates his constitutional rights, namely the right to elect a younger presidential candidate. The applicant also mentioned several inspiring young regional leaders, including Gibran Rakabuming Raka, who is considered a candidate who meets the criteria for young leadership (Rizky et al., 2024, p. 151).

Regarding the review process in Case Number 90/PUU-XXI/2023, it also shows inconsistencies with the procedural law of the Constitutional Court, which can be seen from the registration, which was then revoked and withdrawn, and the application for judicial review should have been submitted directly by the party who felt their constitutional rights had been violated. Then, regarding the conflict, irregularities arose when the Chief Judge of the Constitutional Court, Anwar Usman, was present at the Judges' Deliberation Meeting for Application 90/PUU-XXI/2023 but was not involved in the trial of other similar cases. This creates the impression of a conflict of interest in the Constitutional Court, worsening the credibility of the legal process (Rizky et al., 2024). This is reinforced by the decision of the Honorary Council of the Constitutional Court (MKMK) in Decision Number 02/MKMK/L/2023 (Apriansyah et.al, 2024). The existence of intervention outside the judiciary indicates that this country's checks and balances system is still weak. Therefore, it is necessary to review the authority of the Constitutional Court to avoid abuse of power (Raga Nata & Ramadhani Baskoro, 2023, p. 105). Decision Number 90/PUU-XXI/2023 shows how the Constitutional Court seems to have exceeded its normative role as a negative legislator because it is involved in excessive judicial activism. This can be seen in the Court taking part in making laws or creating new norms in the process of reviewing laws. The Constitutional Court should refocus on its primary role as the veto force, the guardian of the Constitution, the public reasoner, the institutional interlocutor, and the deliberator. By adhering to this role, the Constitutional Court can avoid abuse of authority, or «*détournement de pouvoir*,» and ensure that checks and balances operate effectively between the three branches of state power (Rohmah, 2024, p. 100). The Constitutional Court Decision Number 90/PUU-XXI/2023 has also shown symptoms of excessive judicial activism. This is marked by the involvement of the court in the formation of new norms, which should be the domain of lawmakers (DPR and president). Although the Constitutional Court does not rule out the possibility that open legal policy can test its constitutionality, the Constitutional Court, in its considerations, did not show that the principles of morality, rationality, and justice were violated regarding the implementation of the provisions regarding the minimum age limit of 40 years for presidential and vice-presidential candidates, and especially the Constitutional Court showed inconsistencies in making decisions on similar cases. Apart from that, there are strong indications of conflicts of interest and violations of procedural and substantive justice principles.

In Constitutional Court Decision Number 62/PUU-XXII/2024, the Court indicated the form of judicial activism through an in-depth approach to the norms of Article 222 of Election Law, which regulates presidential threshold. The Constitutional Court, in its decision, stated that Article 222 of the Election Law is contrary to the 1945 Constitution and does not have binding legal force. The Constitutional Court stated that even though these norms fall within the area of open legal policy, this does not rule out the possibility of being tested constitutionally. The Constitutional Court emphasized that a norm in open legal policy must still be subject to the principles of morality, rationality, and tolerable justice. When these provisions give rise to real injustice and cannot be tolerated, the Constitutional Court can cancel them (Constitutional Court Decision Number 62/PUU-XXII/2024, 2024). This is reflected in the Court's consideration that the threshold for presidential and vice-presidential nominations has created inequality in the democratic process, narrowing the space for new and minor political parties to

nominate candidates and ultimately limiting voters' rights to obtain diverse choices. The Constitutional Court considered that this provision violated the moral substance of democracy and normative morality in the form of legal certainty. The Constitutional Court considers that the 20% presidential threshold is no longer rational in the context of simultaneous elections because it is not relevant to use as a basis for legitimizing candidacy. The Constitutional Court recorded many examples where potential candidates failed to run simply because they did not have formal support from major parties, even though they had been internally selected democratically. Furthermore, the Constitutional Court stated that applying Article 222 of the Election Law had created candidacy exclusivity, which alienated voters from the democratic process, closed the space for equal participation, and created structural injustice (Constitutional Court Decision Number 62/PUU-XXII/2024, 2024).

Previous studies have also shown that implementing the presidential threshold in the 2024 presidential and vice-presidential general elections has negatively impacted the rights of political parties in Indonesia. These impacts include the limited constitutional rights of political parties as election participants in nominating candidates for president and vice president, the obstruction of the right to nominate themselves as candidates for president and vice president, and the emergence of injustice between political parties. This injustice is visible because fifteen political parties still cannot nominate candidates for president and vice president in the 2024 general election (Dani Setidayanti, 2025, p. 8). The implementation of the presidential threshold is also seen as a constitutional instrument that weakens democratic consolidation and encourages the widespread practice of political oligarchy in a multiparty presidential system, which ultimately hinders democratic consolidation (Sukmawan & Pratama, 2023, p. 556). In addition, these provisions limit political representation by marginalizing small parties and independent candidates and reducing the diversity of voter choices. Even though it aims to strengthen political stability through coalitions, the PT risks undermining inclusive democracy. Changes in the number of presidential candidates in 2004-2019 saw fewer candidates, so PT significantly influenced political competition (Achmad Hariri, 2025, p. 1). Implementing the presidential threshold is also not in line with the heterogeneous characteristics of Indonesian society. In a pluralistic society like Indonesia, there should be many presidential candidates with diverse backgrounds so that each community group feels represented by the presence of the presidential and vice presidential candidates (Prabowo, 2022, p. 74). The presidential threshold is considered unconstitutional because it contradicts Article 6A paragraph (2) of the 1945 Constitution. It clearly states that presidential and vice-presidential candidate pairs are proposed by political parties or combinations of political parties without including threshold requirements (Rannie et al., 2024, p. 133). The high threshold makes it difficult for small parties or new parties, making it almost impossible to nominate candidates. Several constitutional law experts view the implementation of the presidential threshold as an aberration in the presidential system. However, the Constitutional Court rejected the request for judicial review of the presidential threshold 36 times, only then in Decision Number 62/PUU-XXII/2024. The Constitutional Court agreed and declared that the threshold provisions for presidential and vice-presidential nominations were unconstitutional.

Interestingly, even though this decision has the character of judicial activism because it interferes with the realm of lawmakers, this approach aligns with the principle of constitutionality because the Constitutional Court protects human rights and the principles of substantive justice. This decision remains within the limits of the court's authority as a negative legislator because it does not add new norms to the law but only cancels norms contrary to the Constitution. Decision Number 62/PUU-XXII/2024 has a strong argumentative basis and departs from criticism of the systemic inequality evident in democratic practice.

Decision Number 102/PUU-VII/2009, Decision of the Constitutional Court Number 62/PUU-XXII/2024, and Decision Number 90/PUU-XXI/2023 show variations in the approach of the Constitutional Court. In Decision 102/PUU-VII/2009, the Constitutional Court took the role of a positive legislator because it not only canceled norms but also established new norms regarding the use of KTPs and passports in elections as a solution to the legal vacuum leading up to the 2009 Presidential Election. The court's intervention was corrective to legislative negligence and relied on substantive justice principles and constitutional rights protection. Meanwhile, in Decision 90/PUU-XXI/2023, the Constitutional Court also acted as a positive legislator, but with controversial content, because it added a new norm to Article 169 letter q of the Election Law without legal considerations, indicating that the principles of morality, rationality, and justice were violated. This decision raises allegations of inconsistency and selectivity because there are three decisions with requests to review the same article. The Constitutional Court ignores the principle of open legal policy, which was previously used to reject similar requests. It can violate the principle of checks and balances and ethical aspects due to potential conflicts of interest within the Constitutional Court (Subandri, 2024, p. 139).

Unlike these two decisions, Constitutional Court Decision Number 62/PUU-XXII/2024 still shows judicial activism within a legal and constitutional framework. This decision does not create new norms but cancels norms considered substantially unfair, namely Article 222 of the Election Law concerning the presidential threshold. Decision Number 62/PUU-XXII/2024 is the result of a long process, namely 36 trials, with consistent, in-depth constitutional arguments, and accompanied by evidence of a real impact on democratic participation. Decision Number 62/PUU-XXII/2024 contains elements of judicial activism; its position remains within the negative limits of the legislator.

3.4. Limits and parameters of the constitutional court to act as a positive legislator in the future

The Indonesian Constitutional Court has demonstrated various practices in carrying out its role. Constitutional Court Decision Number 102/PUU-VII/2009 is an ideal example of using the role of the Constitutional Court in a corrective and temporary manner in guaranteeing citizens' voting rights. On the other hand, Decision Number 90/PUU-XXI/2023 invited controversy because the Constitutional Court included new norms in legal provisions that were open legal policy, which, in legal consideration, was not strong enough to prove that there had been a violation of morality, rationality, or justice. There were also conflicts of interest and inconsistencies in the judge's stance, which changed in an instant. Meanwhile, Decision 62/PUU-XXII/2024 displays a constitutional form of judicial activism because it only cancels norms detrimental to the principles of justice and political representation without adding new norms.

Mahfud MD has formulated ten signs so that in a judicial review, the Constitutional Court does not exceed the limits or enter the authority of other institutions. Several signs that are closely related to when the Constitutional Court can act as a judicial activist include the following: the Constitutional Court may not make regulatory decisions (can only cancel, cannot rearrange); the Constitutional Court may not interfere with the authority/matters that the Constitution has delegated to legislative institutions; Constitutional Court judges may not decide cases related to their interests; and Constitutional Court judges must not proactively offer themselves as mediators in political disputes (Mahfud MD, 2009, p. 453-454).

Furthermore, in Martitah's research, he formulated three main requirements for the Court to act as a positive legislator (Martitah, 2016, p. 216). The principles of justice and tangible benefits for society must be fulfilled; the existence of urgent conditions to avoid violations of constitutional rights and a legal vacuum (*rechtvacuum*) has the potential to give rise to legal uncertainty and instability.

Concerns regarding the Constitutional Court's judicial activism reflect institutional dominance, which has the potential to give rise to closeness to political interests. Especially after decision number 90/PUU-XXI/2023 indicated excessive judicial activism. However, according to Martitah, the practice of judicial activism in the positive practice of legislators in Constitutional Court decisions is a legitimate form of judge's discretion. It is not an intervention in legislative authority if it is based on constitutional considerations and justice. However, the absence of clear boundaries regarding the scope of this discretion can cause the Constitutional Court to play an overly dominant role and tend to overpower in reviewing laws related to legislative policies (Efendi et al., 2023, p. 629).

Within the constitutional system's framework, the Constitutional Court's role must be placed in the context of an appropriate separation of powers, namely being able to balance and evaluate other institutions without harming the principles of checks and balances (Maes, 2020). Rupert Scholz's view also emphasizes that the Constitutional Court must always comply with the political limits of the Constitution and strictly limit itself from substantive legislative interference (Faiz, 2009, p. 5).

Thus, the role of the Constitutional Court as a positive legislator does not have to be avoided; it needs to be limited by strict criteria and carried out carefully so that it does not turn into a form of judicial deviation or judicial pathology. Therefore, in the following section, several substantive criteria and constitutional limits will be formulated that must be met when the Constitutional Court wishes to act outside its role as a negative legislator:

1. The Court may only take an active role when it is proven to be the case of a legal vacuum closely related to the implementation of citizens' constitutional rights (Martitah, 2016, p. 216). For example, in Decision Number 102/PUU-VII/2009, the intervention of the Constitutional Court is justified when there is an absolute legal vacuum, and the Court can add temporary norms to ensure the continuity of constitutional rights.

2. Role-positive legislator The Constitutional Court must function as a «legal bridge», not as a substitute for the legislature. This means new norms or rules created through decisions are only transitional and not long-term binding. This also encourages constitutional dialogue between the judiciary and the legislature. (Simović & Simović, 2020, p. 64-77).

3. One of the characteristics of a violation of the principle of separation of powers is when the Constitutional Court formulates new norms as if it were a lawmaker (pure legislator). As in Decision 90/PUU-XXI/2023, the Constitutional Court inserted new norms regarding the age of presidential candidates without submitting the reformulation to the DPR. This is contrary to the principle of limitation of authority judicial review. The Constitutional Court's intervention should only be temporary, giving lawmakers room to follow up.

4. The Constitutional Court must show that the norms it annulled or drafted (in a limited way) conflict with the principles of substantive justice, are irrational, or violate democratic morality. This principle is strongly reflected in Decision 62/PUU-XXII/2024, which cancels the presidential threshold provisions because they close the space for fair political competition. Meanwhile, Decision 90/PUU-XXI/2023 cannot prove that the 40-year age requirement violates the principles of constitutional justice and instead gives birth to a problematic new standard.

5. The integrity of the Court is the foundation of the legitimacy of its decisions. Decisions made in conditions full of conflicts of interest or inconsistent with previous decisions without strong new arguments will reduce the credibility of the Constitutional Court and weaken public trust in the legal system. Decision 90/PUU-XXI/2023 shows that positive legislators can be dangerous if used in a context full of conflicts of interest due to the non-neutrality of the legal review process.

4. Conclusions

This research shows that the role of the Court has shifted from negative legislator to positive legislator, which is a real phenomenon in Indonesian constitutional practice; in a number of its decisions, the Constitutional Court has shown a tendency to form new norms in response to legal vacuums or the urgent need to protect citizens' constitutional rights. However, the role of a positive legislator cannot be carried out without limits. A comparison of three important decisions, Decision Numbers 102/PUU-VII/2009, 90/PUU-XXI/2023, and 62/PUU-XXII/2024, shows that the constructive and constitutional role of the Constitutional Court can only be justified if it is carried out in a framework that is transparent, rational, and free from conflicts of interest. Decisions 102/PUU-VII/2009 and 62/PUU-XXII/2024 show legitimate and urgent intervention in the context of protecting constitutional rights, while Decision 90/PUU-XXI/2023 shows signs of judicial overreach, which risks injuring the system of checks and balances and reducing public confidence in the independence of the judiciary.

Referring to the theory of judicial activism and positive legislators, according to Brewer-Carías and the criteria developed by Martitah, the role of the Constitutional Court in formulating norms can only be justified in certain situations. In this research, several substantive criteria have been formulated that can be used as future guidance so that the Constitutional Court does not exceed its constitutional limits but rather carries out its functions proportionally to maintain constitutional supremacy, guarantee substantive justice, and maintain the balance of power between state institutions.

Thus, the provisions regarding the role of the Constitutional Court as a positive legislator should be regulated explicitly in the Constitutional Court Law. This arrangement is important so that this authority has a firm legal basis and is accompanied by clear boundaries and parameters. Thus, the Court's constitutional actions remain within the framework of the Constitution and do not interfere with the principle of checks and balances between state institutions.

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