

## **The Right to Test the Constitutional Court in the Position as a Negative Legislator According to the 1945 NRI Constitution**

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### **ABSTRACT**

The Constitutional Court, in accordance with Article 24C paragraph (1) and paragraph (2), has the authority to test laws against the 1945 Constitution of the Republic of Indonesia, to decide on disputes over the authority of state institutions whose authority is granted by the Constitution, this authority, There are several Constitutional Court decisions that are pros and cons, both related to the right to material review and the right to formal review. In the Constitutional Court decision Number 112/PUU-XX/2022, whose ruling extended the term of office of the Corruption Eradication Commission and finally the Constitutional Court Decision No. 90/PUU-XXI/2023 Regarding the Age Requirements for Presidential and Vice-Presidential Candidates. making the Constitutional Court no longer trustworthy as a judicial institution that acts as a Negative Legislator but has acted as a Positive Legislator. Regulations regarding changes to the Law are the authority of the Legislative and Executive, but now the role of the Constitutional Court regarding the formal and material testing of laws and regulations has played a role as a Positive Legislator whose authority is to create new legal regulations with its Decisions which are final and binding. The behavior of the Constitutional Court's Decision by using its authority as a Positive Legislator is no longer guided by the authority it has.

**Keywords:** Judicial Review; Negative Legislator

### **INTRODUCTION**

The development of constitutional thought across various nations is influenced by multiple factors, including political, economic, social, and cultural aspects. In Indonesia, the history of its constitution is deeply rooted in the political struggle for independence, particularly the fight to break free from colonial rule. This historical context provides a strong factual basis for the constitution. According to Moh. Yamin, the Proclamation of August 17, 1945, serves as the supreme source of law, akin to Hans Kelsen's concept of the Grundnorm. This implies that the first constitution of the Republic of Indonesia was materially born from the Proclamation.

In the realm of constitutional theory, Hans Kelsen first introduced the concept of a "negative legislator" in his work *General Theory of Law and State*. As the founder of the world's first modern Constitutional Court in Austria, Kelsen used this doctrine to distinguish between the authority of the Constitutional Court and the Parliament. The Constitutional Court, under this framework, was designed to have the power to annul laws, not to create them, thus respecting the legislature's role as a positive legislator. The positive legislator (the Parliament) holds the active authority to create laws, while the Constitutional Court's role is limited to revoking laws that contradict the constitution.

This doctrine has since evolved and become a key principle in the separation of powers in Indonesia, particularly in distinguishing the roles of the Constitutional Court and the House of Representatives (DPR). The Constitutional Court's authority has been traditionally understood as limited to canceling laws rather than legislating new provisions. In line with Kelsen's doctrine, the Constitutional Court in Indonesia is seen as a negative legislator, ensuring that its powers do not overlap with the legislative functions of the DPR.

However, despite the constitutional legitimacy of the Court's authority as outlined in the 1945 Constitution, in practice, the Constitutional Court has, over the past decade, often exceeded this authority. Several rulings have not only revoked existing laws but also created new norms and regulations through constitutional interpretation. Notable decisions that deviate from the negative legislator doctrine include the "Election ID Cards" decision (2009), which established technical rules for using ID cards and passports in elections; the "Illegitimate Children" decision (2010), which added new phrases to the Marriage Law; the "Attorney General's Term of Office" decision (2010), which addressed gaps in the Prosecutor's Office Law; and the "Criminal Liability of Children" decision (2010), which raised the minimum age for criminal responsibility from eight to twelve years. More recently, the Court's decision No. 112/PUU-XX/2022 extended the term of office for the Corruption Eradication Commission, and Decision No. 90/PUU-XXI/2023 reviewed the age requirements for presidential and vice-presidential candidates under Article 169 letter q of Law No. 7 of 2017 concerning General Elections. These decisions demonstrate that the Constitutional Court has, in certain instances, acted as a norm-creating body, a role traditionally reserved for the DPR and the Government. This development stands in contrast to the intended function of the Constitutional Court within Indonesia's state structure, as originally envisioned by Kelsen's negative legislator doctrine.

## **METHOD**

Legal research is a process aimed at identifying legal rules, principles, and doctrines to address specific legal issues. It is conducted to develop arguments, theories, or new concepts that can serve as solutions to the problems at hand. This study employs a normative legal research method, focusing on legal principles and analyzing legislation related to the legality of judicial review by the Constitutional

Court in the lawmaking process. The research adopts several approaches: the statutory approach, the case approach, and the conceptual approach. The study relies on library resources and uses secondary data as its primary source.

## **RESULT AND DISCUSSION**

### **The Authority of the Constitutional Court in the Indonesian Legal System**

Since its establishment, the Constitutional Court has issued several rulings that clarify the role of Explanations in laws, notably in Constitutional Court Decisions No. 005/PUU-III/2005, No. 011/PUU-III/2005, and No. 42/PUU-XIII/2015. These rulings consistently confirm the function of Explanations in legislation. The guidelines established in Decision No. 005/PUU-III/2005, which are referenced in subsequent rulings, state that Explanations serve as an official interpretation of legislative intent concerning specific norms within a law's body. Furthermore, the Constitutional Court's decision in case No. 90/PUU-XXI/2023, concerning the review of Article 169(q) of Law No. 7 of 2017 on General Elections, related to the age requirements for presidential and vice-presidential candidates, further demonstrates this principle.

The Constitutional Court plays a crucial role as a guardian of democracy, with the constitution serving as the highest law regulating the state's administration based on democratic principles. Through its decisions, the Court upholds these principles as enshrined in the constitution. A thorough analysis of the Constitutional Court's position, authority, and obligations, as defined in the Third Amendment to the 1945 Constitution of Indonesia, reveals four primary functions: (1) guarding the constitution (the guardian of the constitution), (2) interpreting the constitution (the sole interpreter of the constitution), (3) protecting democracy (the guardian of democracy), and (4) safeguarding citizens' constitutional and human rights (the protector of human rights). While fulfilling these roles, the Court must exercise judicial restraint and avoid becoming a "super body" with disguised veto power over legislation.

In the context of lawmaking, three categories of constitutional substance are identified: (1) full authority is granted to lawmakers to regulate and determine certain matters, (2) lawmakers may regulate and determine matters within specific qualifications or limitations, and (3) lawmakers are not authorized to regulate certain issues, as they are already prescribed by the constitution itself. The Constitutional Court's authority, as established by the 1945 Constitution of Indonesia, reflects the strengthening of the rule of law. A key pillar of this principle is found in Article 1(2) of the Constitution, which asserts that sovereignty resides with the people and is exercised in accordance with the constitution. Alongside the Supreme Court, the Constitutional Court exercises judicial power under Article 24(2) of the 1945 Constitution. Article 24C grants the Court authority to try cases at the first and final level, with decisions that are final. The Court is also tasked with

ruling on the People's Representative Council's opinion regarding alleged violations by the President or Vice President.

The Constitutional Court's authority can be classified into two categories: primary and additional. The primary authority includes judicial review of laws, resolving disputes between state institutions vested with constitutional authority, dissolving political parties, resolving election disputes, and issuing rulings on the People's Representative Council's opinion regarding alleged legal violations by the President or Vice President. Judicial review, the power to test laws against the Constitution, can be divided into formal review (*formale toetsingsrecht*) and material review (*materiele toetsingsrecht*). All laws and regulations must be consistent with the 1945 Constitution. If a law is found to contradict the Constitution, it can be invalidated through judicial review by the Constitutional Court. Legal scholars, such as Sri Soemantri and Harun Alrasid, have defined formal review as the authority to assess whether legislative procedures comply with applicable laws. Article 51(3)(a) of Law No. 8 of 2011 regulates formal testing and requires the applicant to clearly demonstrate that a law's formation process did not adhere to constitutional requirements.

Law No. 12 of 2011, concerning the Formation of Legislation, defines "law" as legislation enacted by the People's Representative Council with the President's joint approval. Several Constitutional Court rulings, such as Decisions No. 1/PUU-XI/2013, No. 3/PUU-XI/2013, No. 46/PUU-XIV/2016, and No. 27/PUU-VII/2009, demonstrate the Court's material and formal review authority. Public debate continues regarding the Constitutional Court's authority to test laws against the Constitution. While the Court is seen as a final, independent authority, some decisions have raised concerns about whether it has overstepped its bounds. In exercising its authority, the Court should not only adhere strictly to formal procedures but also consider societal laws and exceptional circumstances that may necessitate an *ultra petita* decision. Nonetheless, the Court must remain cautious to ensure that it does not exceed its constitutional mandate or encroach on other powers.

### **Position of the Constitutional Court as a Negative Legislator in Testing Laws**

One of the Constitutional Court's key roles, as outlined in the 1945 Constitution, is to review laws for their constitutionality. In this process, the Court examines specific phrases, paragraphs, or entire articles of a law in relation to the 1945 Constitution. The Court is often referred to as the "guardian of the constitution" and the "sole interpreter of the constitution." It serves as the guardian because it ensures legislative products align with the constitution, and it interprets the constitution through its authority in judicial review. This authority to interpret arises inherently from the need to verify whether laws comply with the constitution, giving the Court its interpretative power.

The Constitutional Court, established in 2003 through Law No. 24 of 2003, functions as a judicial body with the power to invalidate legal norms (negative legislator), while norm creation is the role of the legislature (the DPR and the president). However, over time, the Court's judicial review decisions sometimes extended beyond merely invalidating laws, venturing into norm creation (positive legislator), where the Court established new norms. The absence of clear restrictions in the initial law led to this development, which was later addressed by Law No. 8 of 2011. Article 57 of this law explicitly limited the Court's authority, stating that it could not: a) Issue orders beyond those specified; b) Direct lawmakers; c) Formulate new norms to replace invalidated ones.

Despite these restrictions, Article 57, paragraph (2a), letter c, was later deemed unconstitutional in Constitutional Court Decision No. 48/PUU-IX/2011. The Court argued that these limitations hindered its role in upholding law and justice, particularly in maintaining constitutional order. The constraints also prevented the Court from addressing urgent gaps in legal frameworks, which could result in legal chaos if not immediately remedied. Furthermore, these restrictions undermined the Court's duty to consider societal values and the prevailing sense of justice. The Constitutional Court, as provided by Article 24C paragraph (1) of the 1945 Constitution, has several key responsibilities: conducting judicial review of laws, resolving authority disputes between state institutions, deciding on the dissolution of political parties, and adjudicating election disputes. In exercising its judicial review authority, the Court can review laws both formally (examining the law-making process) and materially (examining the content). This authority allows the Court to act as a negative legislator, only canceling or upholding norms created by the legislature.

Jimly Asshiddiqie and Mahfud MD both emphasize that the Court is limited to invalidating norms, with the power to create or modify norms resting solely with the legislature. While the Court can temporarily amend laws to address urgent needs, these changes are provisional until the DPR and the president enact new legislation. In cases where the Court's decisions require follow-up, Article 10 paragraph (1) letter d of Law No. 12 of 2011 mandates that the DPR and the president take action to prevent a legal vacuum. Maria Farida Indrati explains that when the Court grants a judicial review request, the affected sections of the law lose their efficacy but remain part of the text until formally amended.

The Constitutional Court's decisions, which carry *erga omnes* (universal) effect, impact not only the involved parties but also the general public. Given Indonesia's recognition of unwritten law (living law), the Court must take societal values into account when ruling on laws. Its decisions, both normative and progressive, should guide lawmakers in creating laws that better serve the public interest, thus fostering greater societal respect for and adherence to the law. Nonetheless, the Court must always observe clear limitations to prevent overreach in exercising its authority. Legislative procedures, as specified by Law No. 12 of 2011, must be followed strictly to ensure the timely and orderly enactment of laws.

## CONCLUSION

According to Article 24C, paragraph 1 of the 1945 Constitution, the Constitutional Court is granted the authority to examine, adjudicate, and decide constitutional disputes, serving as a "negative legislator" with the power to annul or invalidate legal norms through judicial review of laws against the Constitution. However, in practice, the Constitutional Court has sometimes acted beyond this limited role, functioning as a "positive legislator" by creating or modifying legal norms, especially following Constitutional Court Decision No. 48/PUU-IX/2011. This shift in legal policy stems from the need for the Court to effectively protect human rights and ensure substantive justice. In specific circumstances—such as promoting fairness and public welfare, addressing urgent situations, and filling legal vacuums to prevent societal legal chaos—the Constitutional Court may assume the role of a positive legislator. Outside of these exceptional conditions, however, the Court should refrain from acting in this capacity, as its primary function remains that of a negative legislator, tasked with judicial oversight rather than norm formulation. Future regulations governing the Constitutional Court must ensure that the Court operates strictly within the bounds of its constitutional authority. Expanding the Court's role as a positive legislator could disrupt the balance of the legal system and undermine the separation of powers. Clear limitations should be enforced to prevent unintended legal consequences.

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