

**THE ROLE OF THE CONSTITUTIONAL COURT AS A POSITIVE LEGISLATOR IN THE FRAMEWORK OF POWER DISTRIBUTION****Anita Vebriani<sup>1\*</sup>, Zainuddin<sup>2</sup>, Wardatun Nabilah<sup>3</sup>**<sup>1</sup>Universitas Islam Negeri Mahmud Yunus Batusangkar<sup>2</sup>Universitas Islam Negeri Mahmud Yunus Batusangkar<sup>3</sup>Universitas Islam Negeri Mahmud Yunus Batusangkar

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**Abstract:** The central focus of this thesis is to examine the boundaries of the Constitutional Court's authority as a Positive Legislator within the framework of the Doctrine of Power Distribution. The study aims to identify and define the limits of the Constitutional Court's role as a Positive Legislator while exploring its implications within the broader constitutional framework.

This research employs a normative juridical (library research) approach with a qualitative typology. Primary data sources include the 1945 Constitution of the Republic of Indonesia, Law Number 24 of 2003 concerning the Constitutional Court, Law Number 7 of 2017 concerning General Elections, and various Constitutional Court decisions. Secondary legal materials, such as relevant books and journals, complement the primary data to provide a comprehensive analysis.

The findings of this study reveal two key points. First, regarding the Constitutional Court's decisions with elements of positive legislator authority, cases such as Decision Number 60/PUU-XXII/2024 and Decision Number 90/PUU-XXI/2023 illustrate how the Court's rulings can develop and modify legal norms. These decisions demonstrate that the Constitutional Court, through its role as a Positive Legislator, may issue rulings that adapt laws to societal contexts and needs, provided they remain consistent with the 1945 Constitution of the Republic of Indonesia.

Second, concerning the limits of the Constitutional Court's authority, its jurisdiction is explicitly outlined in Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) of the Constitutional Court Law. These provisions empower the Court to review laws against the Constitution, adjudicate disputes over the authority of state institutions as defined by the Constitution, resolve cases involving the dissolution of political parties, and settle disputes over election results. In its judicial review capacity, the Constitutional Court traditionally acts as a Negative Legislator by nullifying norms that contradict the Constitution. However, in certain cases, such as Decision Number 90/PUU-XXI/2023, the Court assumes the role of a Positive Legislator by creating or introducing new legal norms, thereby expanding its influence within the legal system.

Keywords: Constitutional court, positive legislator, power distribution doctrine

## Introduction

The Constitutional Court is an institution in Indonesia authorized to exercise constitutional justice to uphold law and justice. The Constitutional Court holds an equal standing with the Supreme Court, reflecting the importance of both institutions in Indonesia's judicial system. Initially, the Constitutional Court was established to carry out the authority of judicial review.

The Constitutional Court has the authority to conduct judicial reviews, which involves assessing laws against the 1945 Constitution of the Republic of Indonesia. The legal foundation for establishing the Constitutional Court is stated in Article 24 paragraph (2) and Article 24C of the 1945 Constitution. These articles introduce two new institutions: the Constitutional Court and the Judicial Commission.

In line with the Constitutional Court's authority to review laws against the 1945 Constitution (judicial review), the principle of judicial review is well-suited for countries that adhere to a parliamentary supremacy system. In such systems, the legal products created by the parliament cannot be contested, as the parliament represents the sovereignty of the people. (Nanang Sri Darmadi, SH., 1970)

This aligns with Montesquieu's doctrine of *Trias Politica*, which emphasizes the principle of checks and balances. This principle entails that state institutions must oversee and evaluate each other's performance within their constitutionally defined powers. This mechanism ensures the implementation of a rule of law concept, where state institutions are separated and operate at the same level to prevent overlap and centralization of power. For instance, there is a delineation of powers between the legislative institution and the Constitutional Court as part of the judiciary. The legislative body is tasked with producing legal instruments such as laws, which are subject to review against the 1945 Constitution. The Constitutional Court, as a negative legislator, can annul, revoke, or invalidate legal regulations created by the legislative body if they are found to violate the 1945 Constitution. (Sari and Raharjo, 2022)

The Constitutional Court's role is limited to removing or nullifying norms in laws that conflict with the 1945 Constitution. It does not have the authority to create new norms within those laws, as this remains the prerogative of the legislative body. This limitation is clearly defined in Law No. 24 of 2003, which states that the Constitutional Court's authority is confined to eliminating norms (negative legislator). (Martitah, 2016)

## Literature Review

### History of the Constitutional Court

The establishment of the Constitutional Court of the Republic of Indonesia originated from the Third Amendment to the 1945 Constitution of the Republic of Indonesia, which was officially approved during the Annual Session of the People's Consultative Assembly (MPR) in 2001. This amendment marked the beginning of a new era in Indonesia's judicial power system with the creation of the Constitutional Court.

Before the Third Amendment to the 1945 Constitution, Indonesia did not have a Constitutional Court as a judicial institution specifically dedicated to handling constitutional disputes. All powers related to the constitutionality of laws were vested in the Supreme Court, which served as the highest judicial body in Indonesia's legal system. Following the Third Amendment to the 1945 Constitution in 2001, the Constitutional Court was formally established as an institution separate from the Supreme Court. This amendment aimed to strengthen the system of checks and balances and ensure oversight of legislation issued by the government and the House of Representatives (DPR).

The Constitutional Court began its operations in 2003 with the authority to review laws against the 1945 Constitution of the Republic of Indonesia, resolve disputes between state institutions, adjudicate electoral disputes, and dissolve political parties. The establishment of the Constitutional Court was a significant effort to improve the legal system and ensure that Indonesia's constitution remains the supreme law of the land, respected and upheld in governance and society.

## Authority of the Constitutional Court

According to the provisions of Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the Constitutional Court has the authority to adjudicate cases at the first and final levels with decisions that are final. The Constitutional Court's authority includes:

- a. reviewing laws against the Constitution of the Republic of Indonesia,
- b. resolving disputes regarding the authority of state institutions whose powers are granted by the 1945 Constitution,
- c. deciding on the dissolution of political parties, and
- d. resolving disputes over election results.

## Trias Politica

The division or separation of powers, commonly referred to as *Trias Politica*, was first introduced by Montesquieu (a French philosopher in 1748). The term derives from Greek: *Tri* meaning three, *As* meaning axis or center, and *Politica* meaning power. *Trias Politica* refers to the division of state power into three branches:

- Legislative power, responsible for making laws.
- Executive power, responsible for implementing laws.
- Judicial power, responsible for adjudicating violations of laws.

Indonesia adopts the concept of *Trias Politica*, dividing power into three main branches—legislative, executive, and judicial. This separation is designed to uphold the rule of law, ensuring that state institutions operate independently and equally. The system enables mutual oversight, prevents overlapping functions, and avoids centralization of power. For instance, there is a clear separation between legislative institutions and the Constitutional Court as a judicial body. The legislature is tasked with drafting and enacting laws, while the Constitutional Court has the authority to conduct judicial reviews of the laws created by the legislature. This process ensures that no provision, article, or section of any law contradicts the 1945 Constitution of the Republic of Indonesia. By delineating these roles, the system guarantees that every law aligns with the constitution and the principles of a legal state, while also preventing abuse of power by any state institution. (Esfandiari, 2012)

## Fiqh Siyasah Dusturiyah

The term *Fiqh* originates from the Arabic word *faqiha-yafqahu-fiqha*, which linguistically means "deep understanding." Etymologically, *fiqh* can be interpreted as an explanation or understanding of a speaker's words or actions. Terminologically, *fiqh* refers to knowledge about laws aligned with *shari'ah* concerning human actions, derived from valid sources such as the Qur'an and Sunnah. (IFDIKA, 2023).

*Siyasah* (politics) in the modern context encompasses various areas, such as public policymaking, economic regulation, national security management, foreign affairs, public services, and social welfare. Governments are responsible for formulating and implementing policies aimed at maintaining stability, security, and the welfare of the people.

Policies established by governments through *siyasah* or public policymaking must adhere to the principles of justice, democracy, and compliance with applicable laws. Below are the key principles that governments must follow in policymaking and implementation:

1. **Justice:** Policies should be designed and implemented fairly, without discrimination, and ensure equal treatment for all citizens. Social justice must be the foundation of every decision to guarantee that all segments of society receive equal rights and obligations.
2. **Democracy:** Policies must reflect the will of the people because, in a democratic system, power originates from the people. The policymaking process should involve public participation, transparency, and accountability. This also includes free and fair elections and respect for human rights.

3. **Compliance with the Law:** All government policies and actions must conform to applicable laws, including the constitution and legal regulations. This principle ensures that no one, including the government, is above the law. It also involves upholding the supremacy of law, where laws serve as the main reference in governance.

## Method

The type of research used in this study is normative juridical or library research, which is a legal study that examines the Constitutional Court's legal products containing elements of positive legislator and the limits of the Constitutional Court's authority as a positive legislator within the doctrine of the distribution of power. This is done through data obtained from literature reviews and Constitutional Court decisions. Normative legal research employs a qualitative typology, where the findings from library materials are analyzed and comprehensively described regarding the limits of the Constitutional Court's authority as a positive legislator.

## Results and Discussion

The Constitutional Court's legal products containing elements of a positive legislator reflect the Court's role as a positive legislator. However, when viewed from the perspective of authority, such actions by the Constitutional Court may exceed its jurisdiction in reviewing laws against the Constitution of the Republic of Indonesia. The Constitutional Court has four main authorities: (1) reviewing laws against the 1945 Constitution of the Republic of Indonesia, (2) resolving disputes over the authority of state institutions whose powers are granted by the Constitution, (3) deciding on the dissolution of political parties, and (4) adjudicating disputes regarding the results of general elections. The Constitutional Court's authority is primarily aimed at safeguarding the constitution and protecting the constitutional rights of citizens.

Within the framework of the distribution of power doctrine, the Constitutional Court fundamentally functions as a "negative legislator," with the authority to annul laws that contradict the constitution. However, under certain circumstances, the Court also acts as a "positive legislator" by issuing rulings that, in practice, create or amend legal norms. In the context of judicial review of laws, the Constitutional Court does not merely annul unconstitutional provisions but can also provide constitutional interpretations that guide how a law should be implemented. These interpretations can be creative, broadening the understanding or application of the law.

The Constitutional Court's decisions are final and binding. In several instances, its rulings have compelled lawmakers to draft new regulations or revise existing laws. While the Court does not directly write laws, its decisions often provide clear directions on how legislation should be framed. For example, in decisions such as the Constitutional Court Decision No. 90/PUU-XXI/2023, regarding the minimum age requirements for presidential and vice-presidential candidates, the Court introduced new legal norms into Indonesian law. Despite its role as a "positive legislator," the Constitutional Court operates within defined boundaries to prevent overreach beyond its function as a constitutional guardian. The Court cannot replace the legislative or executive branches in the formulation of public policies. Its authority is limited to constitutional interpretation and judicial review, excluding policy-making, which falls under the legislative and executive domains.

Overall, the Constitutional Court acts as a balancing force within Indonesia's legal and political system, ensuring that all governmental actions and legislation align with the constitution, democratic principles, and human rights.

## Conclusion

From the discussion presented by the author, the following conclusions can be drawn: After analyzing several Constitutional Court decisions containing elements of a positive legislator, it is evident that the Constitutional Court's limits in acting as a positive legislator involve maintaining a balance between performing its judicial functions without exceeding legislative authority and adhering to the fundamental principles of the Constitution. The limitations of the Constitutional Court in decisions with a positive legislator nature are as follows:

1. Authority of the Constitutional Court:

The Constitutional Court is authorized to review the constitutionality of laws but does not have the authority to create new laws. Its role is limited to providing guidance or principles that must be followed by the legislature when correcting or drafting new regulations.

2. Principle of Separation of Powers:

The Constitutional Court must adhere to the principle of separation of powers (*trias politica*), where legislative authority remains vested in the House of Representatives (DPR) and the government. The Court must exercise caution to avoid overstepping its bounds by fully assuming legislative functions.

3. Context of Cases:

The Constitutional Court typically acts as a positive legislator in cases where there is a legal vacuum or ambiguity that could result in violations of constitutional rights. Its actions as a positive legislator should be understood in the context of improving or supplementing existing norms, rather than creating entirely new norms from scratch.

4. Substantive Limitations:

The Constitutional Court cannot impose new norms that contradict the fundamental principles of the Constitution. Any norms proposed by the Court must align with the 1945 Constitution of the Republic of Indonesia and must not conflict with the fundamental rights guaranteed by the Constitution.

The Constitutional Court's actions as a positive legislator, when examined in terms of authority, indicate that such actions occasionally exceed its mandate to review laws against the Constitution of the Republic of Indonesia. The Constitutional Court holds four (4) primary powers, which include:

- Reviewing laws against the 1945 Constitution,
- Resolving disputes over the authority of state institutions as granted by the 1945 Constitution,
- Deciding on the dissolution of political parties, and
- Resolving disputes concerning election results.

The Constitutional Court's primary role in Indonesia is to serve as the guardian of the Constitution and the protector of citizens' constitutional rights. Within the context of the doctrine of separation of powers (distribution of power), the Constitutional Court fundamentally functions as a "negative legislator" with the authority to annul laws that conflict with the Constitution.

While the Constitutional Court may occasionally take on a role that can be considered that of a "positive legislator," clear boundaries are necessary to prevent it from exceeding its function as the guardian of the Constitution. The Court cannot replace the legislative or executive branches in the formulation of public policy. Its authority is limited to the interpretation and review of constitutionality and does not extend to policy-making, which is the domain of the legislative and executive branches.

Overall, the Constitutional Court serves as a balancing force in Indonesia's legal and political systems, ensuring that all governmental actions and legislation comply with the Constitution and uphold democratic principles and human rights.

## References

Ali Akhbar Abaib Mas rabbani Lubis, M. (2019) *Ilmu Hukum Dalam Simpul Siyasah Dusuriyah Refleksi atas Teori dan Praktek Hukum Tata Negara di Indonesia*. Yogyakarta: Semesta Aksara.

Asshidiqie, J. (2009) *Pengantar Ilmu Hukum Tata Negara*. Jakarta: Raha Grafindo.

Sudirman, A. (2007) *Hati Nurani Hakim dan Putusannya: Suatu pendekatan dari Perspektif Ilmu Hukum Perilaku (Behavioral Jurisprudensi) Kasus Hakim Bismar Siregar*. Bandung: Citra Aditya Bakti.

Syah, I.M. (1999) *Filsafat Hukum Islam*. Jakarta: Bumi Aksara.

Syarifuddin, A. (2011) *Ushul Fiqh 1*. Jakarta: Prenada Media Group.

Handoko, D. (2015) *Kekuasaan Kehakiman Di Indonesia*. Pekanbaru: Hawa dan Ahwa.

Huda, D.N. (2019) *Teori & Peraturan Perundang-Undangan*. Bandung: Nusa Media.

Iqbal, M. (2016) *Fiqh Siyasah: Kontekstualisasi Doktrin Politik Islam*. Jakarta: Prenadamedia Group.

Jimly Asshiddiqie (2006) *Setengah Abad Jimly Assiddiqie, Konstitusi dan Semangat Kebangsaan*. Jakarta: PT. Sumber Agung.

Faiz, M.P. (2016) *Relevansi Doktrin Negative Legislator*. Jakarta: Majalah Konstitusi.

Konstitusi, T.P.H.A.M. (2010) *Hukum Acara Mahkamah Konstitusi, Sekertariat Jendral Mahkamah Konstitusi*.

Kusnardi, M. (1983) *Pengantar Hukum Tata Negara Indonesia*. Jakarta: CV. Sinar Bakti.

Dr. Maruarar Siahaan, S.H. (2011) *Hukum Acara Mahkamah Konstitusi republik Indonesia*. edisi ke 2. Jakarta: Sinar Grafika.

Dr. Ni'matul Huda, SH, Mhum& R. Nazriyag, SH, M. (2019) *Teori & Peraturan Perundang-Undangan*. Bandung: Nusa Media.

Qamar, N., & Rezah, F. S. (2020). *Ilmu dan Teknik Pembentuka Peraturan Perundang-Undangan*. CV. Social Politic Genius (SIGn).

Ranggawidjaja, R. (1996) *Teknik Perancangan Peraturan Perundang-Undangan*. Bandung: Cita Bhakti Akademika

Martitah (2016) *MAHKAMAH KONSTITUSI dari Negative Legislature ke Positive Legislature?*

Mardian, W. (2019) *Kebijakan Hukum Terbuka dalam Putusan Mahkamah Konstitusi Konsep dan Kajian dalam Pembatasan Kebebasan Pembentuk Undang - Undang*. Depok: Rajawali Pers.

Mohhamd Mahrus Ali (2019) *Tafsir Konstitusi dan Legalitas Norma Menguji Konstitusionalitas dan Legalitas Norma*. Depok: Rajawali Pers.

Ulamai, H.A. (2016) *Konsep Nasikh Dan Mansukh Dalam AlQuran*.

Widayati (2015) *Rekonstruksi Kedudukan TAP MPR Dalam Sistem Ketatanegaraan*. Yogyakarta: Genta Publishing.

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

Undang-Undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman

Undang-Undang No.24 tahun 2003 tentang Mahkamah Konstitusi

Undang-Undang Nomor 7 tahun 2017 Tentang Pemilihan Umum

Putusan Mahkamah Konstitusi Nomor 60/PUU-XXII/2024

Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023

Putusan Mahkamah Konstitusi Nomor 28/PUU-XI/2013

Putusan Mahkamah Konstitusi Nomor: 1/PUUXI/2013

Putusan Mahkamah Konstitusi Nomor 75/PUU-VIII/2010

Putusan Mahkamah Konstitusi Nomor 102/PUU-VII/2009

Ali, M.M. (2015) 'Konstitusional dan Legalitas Norma dalam Pengujian Undang-Undang Terhadap Undang-Undang dasar 1945', *Jurnal Konstitusi*, 12

Berry, M.F. (2018) 'Pembentukan Teori Peraturan - Perundang-Undangan', *Muhammadiyah Law Review*, 2(2), p. 89.

Busthami, D. (2018) 'Kekuasaan Kehakiman Dalam Perspektif Negara Hukum Di Indonesia', *Masalah-Masalah Hukum*,

Cholilalah, Rois Arifin, A.I.H. (1967) 'Penerapan Penggunaan Irah-Irah "Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa" Dalam Konteks Pencapaian Keadilan', *Angewandte Chemie International Edition*.

Esfandiari, F. dkk (2012) 'Positive Legislature Konstitusi di Indonesia', *Jurnal Hukum* [Preprint].

Falen, B. (2019) 'KEWENANGAN DEWAN PERWAKILAN RAKYAT DALAM HAL PEMANGGILAN PAKSA PASCA PUTUSAN MAHKAMAH KONSTITUSI NO. 16/PUU-XVI/2018 PERSPEKTIF FIQH SIYASAH DUSTURIYAH', *repository radenintan*, (2), pp. 1-13.

Idris, M. and Umar, K. (2020) 'Dinamika Mahkamah Konstitusi Dalam Memutus Perkara Judicial Review', *Siyasatuna: Jurnal Ilmiah Mahasiswa Siyasah Syar'Iyyah*,

IFDIKA, I. (2023) 'PEMBERHENTIAN HAKIM MAHKAMAH KONSTITUSI MENURUT HUKUM TATA NEGARA DAN FIQH SIYASAH DUSTURIYAH (STUDI TERHADAP PEMBERHENTIAN HAKIM ASWANTO)'.

Katrina, I. (2021) 'Peraturan Presiden Nomor 10 Tahun 2021 Tentang Bidang Penanaman Modal Perspektif Siyāsah Tasyrī'iyyah', *Staatsrecht: Jurnal Hukum Kenegaraan dan Politik Islam*, 1(2). Available at: <https://doi.org/10.14421/staatsrecht.v1i2.2474>.

Nurhayati, S. (2015) 'Mahkamah Konstitusi Sebagai Positive Legisture Dalam Pengujian Undang-Undang Terhadap Undang-Undang Dasar 1945', *Jurnal Online Mahasiswa Fakultas Hukum*.

Nanang Sri Darmadi, SH., M. (1970) 'KEDUDUKAN DAN WEWENANG MAHKAMAH KONSTITUSI DALAM SISTEM HUKUM KETATANEGARAAN INDONESIA Oleh: Nanang Sri Darmadi, SH., MH Dosen Fakultas Hukum UNISSULA', *Kedudukan dan Wewenang Mahkamah Konstitusi*, 2

Pujiastuti, E. (2016) 'Penerapan Konsep Trias Politica dalam Sistem Pemerintahan republik Indonesia", *Jurnal Dinamika Sosial Budaya* [Preprint].

Raihan, W. A. (2021). Pengertian Negara.

Rais, M. (2022) 'Negara Hukum Indonesia: Gagasan dan Penerapannya', *Jurnal Hukum Unsurbar*

Rahmalia, A. and Putra, R.P. (2022) 'Nasikh Wa Al-Mansukh', *El-Mu'Jam. Jurnal Kajian Al Qur'an dan Al-Hadis*, 2(1), pp. 28-38.

Revivo Tulaseket, Toar Neman Pailingan, L.S. (2020) 'Praktik Judicial Activism dalam Putusan Mahkamah Konstitusi Republik Indonesia', *lex admininetratum*,

Rosidin, D.U. (2018) 'Implementasi Prinsip Check and Balance dalam Sistem pemerintahan Indonesia: Menyoal Kasus Pencatutan Nama Presiden'.

Sari, A.F.P. and Raharjo, P.S. (2022) 'Mahkamah Konstitusi Sebagai Negative Legislator Dan Positive Legislator',

Saunders, C. (2021) 'Constitutional Review', *The Constitution of Australia*,

Sari, A.F.P. and Raharjo, P.S. (2022) 'Mahkamah Konstitusi Sebagai Negative Legislator Dan Positive Legislator'

Sihombing, R.R. (2019) 'Implikasi Putusan Mahkamah Konstitusi Republik Indonesia Yang Memuat Norma Baru Dalam Sistem Ketatanegaraan Indonesia (Analisis Putusan Mahkamah Konstitusi No. 102/PUU-VII/2009)', *Tesis*, 7(5), pp. 1-170.

Sugiono Margi and Maulida Khazanah (2022) 'Kedudukan Mahkamah Konstitusi dalam Kelembagaan Negara', *Jurnal Rechten: Riset Hukum dan Hak Asasi Manusia*, 1(3).

Syuhada, S. dkk (2021) 'Analisis siyasah Al-Qadhaiyah terhadap putusan Mahkamah Agung Nomor 39 P/Hum/2018 Tentang uji Materil peraturan Gubernur Aceh Nomor 5/2018', *Jurnal Hukum Pidana dan Politik Hukum*