
Reconstruction of the Constitutional Court's Authority from a Negative Legislator to a Positive Legislator for the Sake of Substantive Justice

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ABSTRACT

The Constitutional Court of Indonesia, initially established as a negative legislator following Hans Kelsen's doctrine, possesses the authority to annul laws that contradict the 1945 Constitution. Over the past two decades, strict adherence to this model has revealed critical limitations, as annulment of statutory norms often generates legal vacuums, uncertainty, and potential infringement on citizens' constitutional rights. This study addresses the evolving role of the Constitutional Court as a positive legislator to ensure substantive justice, particularly when legislative delays hinder the enforcement of citizens' rights. The research aims to analyze the legal, philosophical, and sociological foundations underpinning this transformation and evaluate the mechanisms through which the Court addresses legal deadlocks. Employing normative legal research, the study examined secondary data from statutory laws, Constitutional Court decisions, legal literature, and scholarly analyses. Data were collected through systematic library research and document review, and analyzed qualitatively using descriptive, interpretative, and conceptual techniques. Findings indicate that the Court's conditional constitutional and unconstitutional rulings enable the formulation of transitional norms, preventing legal chaos while safeguarding substantive justice. The reconstruction of the Court's authority allows it to act as an emergency legislator, filling normative gaps without supplanting legislative power. This approach ensures citizens' constitutional rights are effectively protected, demonstrating a balance between judicial activism and the principles of separation of powers.

INTRODUCTION

The establishment of the Constitutional Court (MK) in Indonesia through the Third Amendment to the 1945 Constitution was the culmination of the spirit of reform to uphold the principle of constitutional supremacy. As the guardian of the constitution, the MK was given the primary mandate to conduct judicial review of laws against the Constitution (Suharto & Kwe, 2020). Doctrinally, the initial idea for the establishment of this institution drew on the thinking of Hans Kelsen, who positioned the Constitutional Court as a negative legislator. In this concept, the Court's authority is limited to revoking or abolishing legal norms that conflict with the constitution, without the capacity to create or formulate new norms (Al-Dulaimi, 2018; Safta, 2012). This separation of roles is an effort to maintain the sanctity of the principle of separation of powers. The legislative and executive branches are tasked with creating laws (positive legislation), while the judiciary is tasked with reviewing and annulling

constitutionally flawed laws. However, over the course of two decades of its practice in Indonesia, the rigidity of the negative legislature doctrine has begun to face serious challenges (Muhammad, 2025).

Legal reality shows that the revocation of a norm often leaves a gaping hole or legal vacuum (*rechtsvacuum*), which actually triggers new uncertainty and broader losses of citizens' constitutional rights (Blokker, 2024; Schroeder, 2025). Problems arise when the Constitutional Court is faced with a statutory norm that is substantively unconstitutional, but if immediately revoked, would lead to legal chaos (Rahman & Wicaksono, 2024). Herein lies the moral and legal dilemma for constitutional judges. If the Constitutional Court remains a passive, negative legislator, it risks allowing injustice to persist due to legislative delays in responding to decisions. Conversely, if the Constitutional Court fills this vacuum, it will be accused of judicial activism that exceeds its authority (*ultra vires*) (Julian, 2025).

History records that the Indonesian Constitutional Court has repeatedly "deviated" from the negative legislator model. Through conditionally constitutional and conditionally unconstitutional decisions, the Constitutional Court has begun to formulate transitional norms (Albert, 2015; Perju, 2024; Safa'at, 2021). This phenomenon demonstrates that the Constitutional Court is no longer merely an "executioner" of laws, but has transformed into a policymaker on a significant scale. This tension has generated a heated academic debate: whether the Constitutional Court's move represents a safeguard for people's rights or a threat to democracy by taking over the role of representatives in parliament. The shift in the Constitutional Court's role toward a positive legislator did not arise from a vacuum, but rather from demands for substantive justice (Muttaqin, Labib, et al., 2025). This type of justice no longer values formalistic and legalistic procedures but focuses on protecting fundamental rights (Hesselink, 2016).

In Indonesia, the establishment of the Constitutional Court (MK) following the Third Amendment to the 1945 Constitution aimed to strengthen constitutional supremacy. Initially designed following Hans Kelsen's concept of a negative legislator, the Court's authority was limited to annulling laws that conflicted with the Constitution, leaving law-making exclusively to legislative bodies. However, practical experience over two decades revealed that purely negative intervention often resulted in legal vacuums, creating uncertainty and sometimes infringing on citizens' constitutional rights.

The specific issue arises when the Court faces laws that are substantively unconstitutional but whose immediate annulment would lead to systemic disruptions, such as in taxation or civil registration frameworks. Indonesia's experience demonstrates that strict adherence to the negative legislator doctrine can leave citizens without effective legal protection, highlighting a critical dilemma for constitutional judges: whether to act proactively to ensure justice or remain passive and risk perpetuating injustice.

Previous research has explored the evolution of judicial review mechanisms and the emergence of judicial activism in various countries. Studies by Suharto & Kwe (2020) and Rahman & Wicaksono (2024) show that conditional rulings and transitional norms can prevent legal chaos while still respecting legislative prerogatives. Meanwhile, Muhammad (2025) and Julian (2025) argue that the Court's proactive role is essential to fulfill its duty in protecting substantive rights, though concerns about overreach persist. These studies underline the tension between judicial intervention and democratic legitimacy.

Despite these contributions, a research gap exists concerning the philosophical and sociological foundations behind the Constitutional Court's transformation from a negative to a positive legislator in Indonesia. While prior analyses describe specific rulings and mechanisms, there is limited comprehensive examination of how these shifts reconcile judicial activism with constitutional principles and ensure substantive justice. Understanding this transformation is essential for both legal theory and practical governance.

The urgency of addressing this gap is amplified by recurring instances where legislative inertia hampers the protection of citizen rights. Delays in law-making or political reluctance to enforce Court decisions risk rendering constitutional protections symbolic rather than actionable. Therefore, evaluating the Court's emerging positive legislative role provides a framework to mitigate systemic injustices and reinforces public confidence in judicial institutions.

The novelty of this research lies in framing the Constitutional Court not merely as an adjudicatory body but as a dynamic actor capable of formulating intermediate norms to address legal vacuums. By situating judicial activism within a normative and philosophical context, the study moves beyond descriptive accounts of conditional rulings, offering a model that balances judicial initiative with respect for legislative authority, thereby advancing the discourse on adaptive constitutional governance.

This research aims to examine the legal, philosophical, and sociological underpinnings of the Constitutional Court's authority reconstruction. It investigates how positive legislative actions, such as conditional constitutional and unconstitutional rulings, provide practical solutions to legal deadlocks and systemic injustices. By doing so, it seeks to clarify the legitimate scope and limits of judicial activism in a constitutional democracy.

The study contributes to constitutional law scholarship by offering insights into how courts can actively safeguard citizens' rights without encroaching unduly on legislative functions. It provides a reference for policymakers, legal practitioners, and scholars in designing mechanisms that balance procedural legality with substantive justice. The findings are also relevant for other jurisdictions facing similar dilemmas in judicial review and rights protection.

The research objectives are to (1) analyze the legal justification for the Constitutional Court's transition from a negative to a positive legislator, (2) evaluate the mechanisms through which the Court mitigates legal vacuums, and (3) assess the extent to which these measures uphold substantive justice. Ultimately, the study benefits citizens by enhancing the predictability and effectiveness of constitutional protections, ensuring that judicial decisions translate into real societal impact rather than remaining abstract principles.

METHOD

This study employed normative legal research as its primary research type, focusing on examining existing legal norms, doctrines, and principles rather than empirical field data. The population consists of all relevant legal documents, including the 1945 Constitution of the Republic of Indonesia, the Constitutional Court Law (Law No. 24 of 2003 and amendments), the Law on the Formation of Legislation, and judicial decisions of the Constitutional Court. The sample was purposively selected based on relevance to the Court's transformation from a negative to a positive legislator, including landmark rulings such as Decisions 91/PUU-

XVIII/2020 and 102/PUU-VII/2009. Sampling techniques applied were purposive and criterion-based to ensure that only documents reflecting substantive legal reasoning and conditional rulings were included. The research instruments consisted of structured document analysis guides and checklists to capture key legal provisions, interpretive principles, and transitional norm formulations.

To ensure validity, the study applied content validity by comparing interpretations across multiple legal texts, scholarly articles, and expert opinions (e.g., Hans Kelsen, Mauro Cappelletti). Reliability was maintained through triangulation of sources, including legal literature, academic journals, and Constitutional Court documentation, ensuring that interpretations remained consistent across multiple references. Data collection was conducted via systematic library research and official documentation retrieval, with rigorous cataloging and indexing of all legal materials. The procedure involved identifying relevant laws and rulings, coding them according to research categories (negative legislator, positive legislator, conditional ruling, substantive justice), and synthesizing findings to evaluate trends and patterns.

For data analysis, qualitative techniques were used, including descriptive, interpretive, and conceptual analysis, to explain the philosophical, legal, and practical implications of the Constitutional Court's authority reconstruction. Software tools such as NVivo were employed to manage document coding, categorize themes, and visualize relationships among legal doctrines and Court decisions. This approach allowed systematic interpretation of complex legal texts, highlighting both doctrinal consistency and innovations in judicial practice. The analysis culminated in synthesizing normative insights to assess how the Court's positive legislative role addresses legal vacuums and promotes substantive justice for citizens in Indonesia.

RESULTS AND DISCUSSION

Legal and Philosophical Justification for the Constitutional Court's Transformation from a Negative to a Positive Legislator

Conventionally, based on Article 24C of the 1945 Constitution and the Constitutional Court Law, the Constitutional Court's authority is to review laws against the Constitution. Further regulations are implemented through Law Number 24 of 2003 concerning the Constitutional Court, as amended by its second amendment, Law Number 7 of 2020 concerning the second amendment to Law Number 24 of 2003. The technical implementation of the Constitutional Court's authority regarding the judicial review of a law is stipulated in Constitutional Court Regulation Number 06 of 2005 concerning Guidelines for Proceedings in Judicial Review Cases (Hasibuan & Rumisten, 2023).

Requests for judicial review of the constitutionality of a legal product, in this case a law against the 1945 Constitution, can be classified into two types. First, a material review, which is a review of the material content of the law. Second, an informal review, which questions or concerns the constitutionality of the legal drafting process. It examines whether it complies with standard operating procedures (SOPs) or whether it contradicts them (Firdaus & Huroiroh, 2023).

This can be seen in the conditional unconstitutional ruling, which has become a hot topic in the community since the issuance of Decision 91/PUU-XVIII/2020. In this ruling, the

Constitutional Court declared Law Number 11 of 2020 concerning Job Creation unconstitutional based on a formal review. If the judge grants the request for formal review, the entire law should be annulled. The Constitutional Court's decision is binding and final, taking effect immediately without the need for further enactment through new legislation. Therefore, Law Number 11 of 2020 should be annulled entirely and reverted to the law in effect prior to the regulation. This creates a form of legal uncertainty as a result of the issuance of the conditional, unconstitutional ruling.

Based on reflection on the *a quo* decision, significant legal issues arise. A law that should have been annulled due to formal flaws remains in effect after being ratified by the Constitutional Court (MK) regarding the flaws in the Job Creation Law. Therefore, it is crucial to create a solution mechanism to address this issue. This mechanism is a preventative approach to correct the constitutionality of a legal product before it is enacted, or while it is still in the drafting stage, known as the judicial preview mechanism.

The Hans Kelsen doctrine positions the Constitutional Court as a negative legislator, authorized only to "abolish" norms. However, studies show that practice in Indonesia has exceeded this limit through progressive judicial interpretations. The Constitutional Court is often faced with situations where simply annulling an article (striking down) would create legal chaos. For example, if a tax law is annulled without a temporary replacement norm, the state would lose its basis for tax collection, resulting in a paralysis of public services. The Constitutional Court created the "Conditional Constitutional" and "Conditional Unconstitutional" ruling mechanisms (Rabbani et al., 2026). In this model, the Constitutional Court no longer annuls a norm but also imposes certain conditions for a norm to remain valid or orders the creation of a new norm within a specified timeframe. This is substantively a positive act by legislators because the Constitutional Court "writes" a message or intermediate norm that must be obeyed.

Philosophically, this transformation is justified by the theory of Judicial Activism. Constitutional judges should not be passive "mouths of the law" if the law violates citizens' rights. This reconstruction shifts from merely maintaining formal legal certainty to safeguarding substantive justice. From a more critical perspective, some legal scholars argue that Judicial Activism lacks strong legitimacy in a democratic context and could be considered a violation of the principle of separation of powers. They argue that if judges have too large a role in creating legal norms, this could undermine the continuity of the basic principle of democracy, which requires a clear division of power between the legislative, executive, and judicial branches. However, if we look at it more objectively and consider the broader context, Judicial Activism actually makes a significant contribution to creating justice and fulfilling the needs of democracy (Bernard et al., 2019).

The Positive Role of Legislators in Achieving Substantive Justice

This discussion explores how the Constitutional Court's "positive" role provides a solution to legal deadlock and systemic injustice. The Constitutional Court's role as a positive legislator becomes crucial when the legislative body (the House of Representatives and the President) is slow to respond to its decisions. By formulating temporary norms in its decisions, the Constitutional Court ensures that citizens' constitutional rights remain protected during the transition period before new laws are enacted. Often, laws born from the political process in parliament only represent the interests of the majority. The Constitutional Court, through its

positive legislator role, acts as a counter-majoritarian. The Court can incorporate protection clauses neglected by the legislature into its interpretation of norms, ensuring that justice is enjoyed not only by capital owners or election winners, but also by all citizens substantively.

The discussion finds that Constitutional Court decisions, which are positive legislation, have permanent and binding legal force (*erga omnes*). It forces state administrators to immediately adjust public policies to the Court's interpretation of justice. Although often criticized for interfering in the legislative sphere, this action is seen as an effective form of checks and balances to prevent legislative arbitrariness in allowing unjust norms to remain in effect. The reconstruction of the Constitutional Court's authority to become a positive legislator does not mean that the Constitutional Court takes over all legislative functions, but rather carries out the function of "emergency legislation" or "constitutional legislation" to ensure the constitution remains alive and can provide real protection for citizens' rights.

Textually, Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia does not mention the Constitutional Court's authority to formulate norms. However, the primary legal basis for this transformation lies in Article 24 paragraph (1) of the 1945 Constitution, which emphasizes that judicial power is exercised to "uphold law and justice." The term "justice" here should not be interpreted merely as procedural justice (adherence to the text of the law), but rather as substantive justice. According to Jimly Asshiddiqie, the Constitutional Court is the "final interpreter of the constitution." As an interpreter, the Constitutional Court must not allow a legal vacuum (*rechtsvacuum*) to occur due to the annulment of a norm. The legal justification is that if the Constitutional Court merely annuls a norm without providing a solution (intermediate norm), then the Constitutional Court would violate its constitutional obligation to uphold justice and fair legal certainty as stipulated in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

In constitutional law, the doctrine of "Implied Powers" is known. This justification states that in order to exercise its primary authority (reviewing laws), the Constitutional Court automatically has the additional authority necessary for its primary function to be effective. If a law is declared unconstitutional, but its annulment results in social or economic chaos, the Constitutional Court is "forced" to take on a positive legislative role by formulating transitional norms. This aligns with Mauro Cappelletti's view on Judicial Activism, where judges are no longer merely "the mouth of the law" (*la bouche de la loi*) but rather active actors filling legal gaps to protect citizens' fundamental rights from legislative negligence.

Meanwhile, the principle of *erga omnes* is a logical consequence of the Constitutional Court's role as guardian of the constitution and protector of the principles of the rule of law. Therefore, any statutory norm declared by the Constitutional Court to conflict with the 1945 Constitution of the Republic of Indonesia is no longer legally binding on all citizens and all government organs. When the Constitutional Court decides that an article or norm of a law conflicts with the constitution, that norm loses its legal force from the moment the decision is announced in a plenary session open to the public. It is emphasized in Article 47 of the Constitutional Court Law, which states that "the Constitutional Court's decision shall have permanent legal force after it has been pronounced in a plenary session open to the public (David et al., 2020; Tanya et al., 2019).

Legally, the Constitutional Court's decision is final and binding and *erga omnes* (applicable to all). When the Constitutional Court issues a conditionally constitutional or

conditionally unconstitutional decision, the ruling automatically becomes a positive legal norm that must be complied with. A concrete example is Constitutional Court Decision Number 102/PUU-VII/2009 concerning the use of ID cards in elections. In this decision, the Constitutional Court not only annulled the rules that restricted voting rights, but also formulated "new norms" regarding the procedures for using ID cards as a substitute for passports/Voter Lists. From a legal perspective, the Constitutional Court (MK) takes positive legislative action to safeguard citizens' constitutional rights threatened by inflexible regulations.

Although Indonesia does not have a formal constitutional complaint mechanism, judicial review of laws at the Constitutional Court often involves constitutional complaints from individual citizens. To provide effective remedies, the Constitutional Court cannot simply annul articles. The legal justification is the Principle of Effectiveness of Decisions, which states that merely negative decisions are often non-executable. Therefore, reconstruction into a positive legislator is a legal effort to ensure that every Constitutional Court decision has real force and utility in society.

CONCLUSION

The shift in the Constitutional Court's (MK) role from negative legislator to positive legislator reflects a significant phenomenon in judicial review in Indonesia, particularly through the mechanism of conditional constitutional decisions. This analysis demonstrates that reconstructing the Constitutional Court's authority to act as a norm-maker is a crucial step in achieving substantive justice and addressing the existing legal vacuum. Even though there may be some overlap with legislative responsibilities, this role is essential for safeguarding the constitutional rights of citizens. These rights can't just be brushed aside or revoked; they demand a thoughtful approach that recognizes their significance in our society. However, it is crucial to establish clear boundaries and legal guidelines for each regulatory Constitutional Court decision to prevent new legal uncertainty and abuse of judicial power. Furthermore, the Constitutional Court must apply the principle of self-limitation to ensure its decisions remain within the scope of authority established by the 1945 Constitution. With this progressive approach, the Constitutional Court can continue to safeguard citizens' constitutional rights, even though its decisions often influence legislative policy. Overall, this role transformation not only reflects adaptation to dynamic legal needs but also emphasizes the Constitutional Court's responsibility to ensure more substantive justice and responsiveness to social changes in society. The success of the Constitutional Court in carrying out this role will depend greatly on its ability to maintain a balance between judicial power and the principle of checks and balances in the system of government.

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