ISSN Print 2615-5648
ISSN Online 2615-174X

Volksgeist

Editorial Office: Faculty of Sharia, Universitas Islam Negeri Profesor Kiai Haji Saifuddin Zuhri Purwokerto, Indonesia, Jalan Jend. A. Yani No. 40 A Purwokerto Jawa Tengah 531226 Indonesia
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Upholding Judicial Independence through the Practice of Judicial Activism in Constitutional Review: A Study by Constitutional Judges

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Data:
Received: Sept 13, 2023;
Accepted: Nov 30, 2023;
Published: Des 27, 2023.

DOI:
10.24090/volksgeist.v6i2.9565

Abstract

The practice of judicial activism, though not formally defined within the jurisdiction of the Constitutional Court (MK), is implicitly recognized as an integral element of independent judicial power. The importance of this independence is underscored as a fundamental necessity for the preservation of law and justice. This research utilized a normative juridical methodology, incorporating conceptual, comparative, and case-based analysis. The study findings reveal that judicial activism, as practiced within the Constitutional Court, is underpinned by independent judicial authority. Moreover, this practice aligns with the tenets of progressive legal doctrines, which not only acknowledge the significance of codified legal provisions but also endorse legal innovations for the pursuit of justice. The practice of judicial activism within the Constitutional Court is indispensable for reinforcing the principle of checks and balances. The subjective and abstract nature of judicial activism, however, necessitates objective validation through the principle of virtue jurisprudence.

Keywords: *Judicial Activism; Judicial Independence; Judicial Power; Constitutional Court; Constitutional Review.*

INTRODUCTION

The Reform Movement is believed to have initiated critical changes in Indonesia's constitutional system. This belief emerges from the various challenges during the New Order era, with a key concern being the insufficient realization and safeguarding of citizens' constitutional rights. Furthermore, state political practices that were inconsistent with the democratic and transparent principles led to widespread public disillusionment.[1] Thus, the reform was a consensus to reinstate popular sovereignty.

[1] M. Wildan Humaidi and Inna Soffika Rahmadanti, "Constitutional Design of State Policy as Guidelines on Indonesia's Presidential System Development Plan," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 6, no. 1 (June 28, 2023): 61, https://doi.org/10.24090/volksgeist.v6i1.7981.

The legal sector received significant focus due to the perception that the law's characteristics during the New Order period were elitist and traditionalist.[2] These legal reforms profoundly impacted the constitutional system, especially regarding the restructuring of power distribution among state institutions.[3] Consequently, following this redistribution, no supreme state institution remained—a role previously held by the People's Consultative Assembly (MPR).[4] Additionally, a reconfiguration of judicial power took place, no longer exclusive to the Supreme Court of the Republic of Indonesia (MA), as the Constitutional Court of the Republic of Indonesia (MK) was established through amendments to the 1945 Constitution of the Republic of Indonesia (UUD 1945).

The judicial branch plays a crucial role in ensuring the equitable enforcement of laws.[5] It operates independently, free from the influence of the executive and legislative branches.[6] Thus, the judiciary's role is of paramount importance.[7] The Constitutional Court's independence within the judicial system is a fundamental principle in a democratic nation. It is not only an essential feature of Indonesia as a rule-of-law state but also a guarantee of human rights protection and governance based on the constitution.[8] This is because every citizen is entitled to equal and fair legal protection.[9] An independent judiciary enables the Constitutional Court to effectively oversee and scrutinize state institutions' actions, thereby preventing and minimizing potential misconduct and fostering the essential principle of checks and balances.

The third amendment to the 1945 Constitution solidified the establishment of the Constitutional Court, underscoring the critical need for an autonomous judiciary. This serves as a pivotal underpinning for Constitutional Court judges to deliver substantive justice. The primary role of the Constitutional Court as the guardian of the law furthers this significance.[10] In light of the intrinsic importance of judicial independence, it requires explicit affirmation and protection in the constitution, as well as other statutes and regulations.

The 1945 Constitution, Article 24, paragraph (1), asserts the independence of judicial power. It defines this as an autonomous authority charged with administering justice to maintain law and order. This foundational principle is articulated in Article 1, point 1 of Law Number 48 of 2009

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2 Verelladevanka Adryamarthanino, "Reformasi Indonesia 1998: Latar Belakang, Tujuan, Kronologi, Dampak," Kompas, April 20, 2021, accessed 18 December 2022, https://www.kompas.com/stori/read/2021/04/20/144131779/reformasi-indonesia-1998-latar-belakang-tujuan-kronologi-dampak?page=all.

3 Hanif Fudin, "Aktualisasi Checks and Balances Lembaga Negara: Antara Majelis Permusyawaratan Rakyat Dan Mahkamah Konstitusi," *Jurnal Konstitusi* 19, no. 1 (March 28, 2022): 214, https://doi.org/10.31078/jk1919.

4 Sutan Sorik and Dian Aulia, "Menata Ulang Relasi Majelis Permusyawaratan Rakyat Dan Presiden Melalui Politik Hukum Haluan Negara," *Jurnal Konstitusi* 17, no. 2 (August 19, 2020): 381, https://doi.org/10.31078/jk1727.

5 Dahlan Sinaga, *Kemandirian Dan Kebebasan Hakim Memutus Perkara Pidana Dalam Negara Hukum* (Bandung: Nusamedia, 2018), 65.

6 Sinaga, 65.

7 Kariadi, "Kekuasaan Kehakiman Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Saat Ini Dan Esok," *Justisi* 6, no. 2 (July 1, 2020): 102, https://doi.org/10.33506/js.v6i2.971.

8 Sugiono Margi and Maulida Khazanah, "Kedudukan Mahkamah Konstitusi Dalam Kelembagaan Negara," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 1, no. 3 (June 20, 2022): 26, https://doi.org/10.52005/rechten.v1i3.48.

9 Ismail Koto, Taufik Hidayat Lubis, and Soraya Sakinah, "Provisions of Legal Protection for Terrorism Victim in Order to Realize Constitution Order," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 5, no. 2 (December 20, 2022): 243, https://doi.org/10.24090/volksgeist.v5i2.6939.

10 Abdul Latif, *Fungsi Mahkamah Konstitusi Dalam Upaya Mewujudkan Negara Hukum Demokrasi*, 1st Edition (Yogyakarta: Kreasi Total Media, 2007), 159.

concerning Judicial Power (Law on Judicial Power). It is delineated as the state's independent authority to uphold law and justice, grounded in Pancasila and the 1945 Constitution, serving as the cornerstone of the Indonesian legal system. Within this framework, an independent judicial power is a necessary precondition for the effective operation of law and justice. The Constitutional Court, in upholding this independence, derives its authority from Article 24C paragraph (1) of the 1945 Constitution, in conjunction with Article 10 paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court. This law has been amended three times, most recently through Law Number 7 of 2020 regarding the Third Amendment to Law Number 24 of 2003 on the Constitutional Court Law. This authority empowers the Constitutional Court the power to adjudicate legal matters, resolve jurisdictional disputes of state institutions as prescribed by the 1945 Constitution, handle political parties' dissolution, and address discrepancies in electoral results. It is, however, crucial to recognize that the Constitutional Court navigates dynamic shifts in exercising its authority. In response to these changing circumstances, the Constitutional Court is anticipated to adapt effectively while steadfastly upholding the principles of law and justice.

The Constitutional Court's role is not merely limited to rigidly enforcing laws and regulations; rather, it is expected to dynamically adapt to societal changes. During adjudication, the court is encouraged to delve into, comprehend, and align with societal justice norms and legal values. This approach embodies the principle of judicial activism, where the judiciary proactively interacts with the law, interpreting it in alignment with evolving societal standards and circumstances.

Judicial activism, as a methodology employed by the Constitutional Court, is often discernible in court verdicts, including dissenting views,[11] as well as a variety of judgment forms.[12] Such observations illuminate two contrasting traits displayed by constitutional judges during decision-making. Firstly, some judges lean towards procedure modification and strict interpretation adherence. Secondly, others demonstrate a propensity for judicial activism, displaying a stronger predisposition to probe into matters concerning substantive justice over procedural considerations.[13] While the practice of judicial activism falls within the jurisdiction of the Constitutional Court, comprehensive understanding is vital to prevent possible clashes with other branches. Therefore, the regulation of judicial activism through insightful academic critique is essential, as it aids in upholding the Constitutional Court's legitimacy.

Numerous studies have delved into the concept to judicial activism, yet few have expressly focused on its practice as a means to safeguard the Constitutional Court's judicial autonomy. A notable investigation into this subject was undertaken by Oly Viana Agustine Ikon, Susi Dwi Harijanti, Indra Perwira, and Widati Wulandari in 2023, on the "Constitutional Review of Criminal Norms: Does Indonesia Need Judicial Activism?" Their research unearthed a proclivity of the Constitutional Court to overstep its formal authority by establishing novel legal norms. In light

[11] Revivo Tulaseket, "Praktik Judicial Activism Dalam Putusan Mahkamah Konstitusi Republik Indonesia," *Lex Administratum* 8, no. 3 (2020): 5, https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/29748.

[12] The Constitutional Court's decisions encompass a variety of types or variants. These include conditionally constitutional, conditionally unconstitutional, decisions that defer the implementation of rulings (limited constitutional), and decisions that establish new norms (positive legislatures). See Iskandar Muda, "Tidak Dinamis Namun Terjadi Dinamika Dalam Hal Uji Konstitusional Norma Zina," *Jurnal Yudisial* 11, no. 3 (December 26, 2018): 297, https://doi.org/10.29123/jy.v11i3.316.

[13] Galuh Nur Hasanah and Dona Budi Kharisma, "Eksistensi Judicial Activism Dalam Praktik Konstitusi Oleh Mahkamah Konstitusi," in *Souvereignty*, vol. 1, no. 4, 2017, 735–736, https://doi.org/10.13057/souvereignty.v1i4.122.

of the legality principle , they recommended that the practice of formulating criminal norms be rigorously regulated and confined.[14]

In the same year, another study by Amiruddin and Rizki Ramadani titled "Judicial Activism in Regional Head Election Dispute: The Practice and Consistency of The Indonesian Constitutional Court" was conducted. Their findings revealed that the Constitutional Court's judicial activism in regional head election disputes manifested in at least three ways: Firstly, through the decisions made by the Constitutional Court; Secondly, the Constitutional Court's readiness to consider structured, massive, and systematic (TSM) election violations; and Thirdly, the judges' audacity to disqualify regional head candidates and declare winners to ensure legal certainty. They observed that in simultaneous regional elections, judges consistently practiced judicial activism.[15]

A third pertinent study was carried out by Rahayu Prasetianingsih in 2020, titled "Judicial Activism in Indonesia: Constitutional Culture by The Constitutional Court". The study concluded that, based on several decisions, the Constitutional Court's interpretation of the constitution appears to expand or even alter the existing understanding of the 1945 Constitution, thereby transforming the Court into a superior institution. However, the Court is also anticipated to augment the Indonesian government system in line with the principle of checks and balances. A gap in previous studies is the lack of explicit focus on the practice of judicial activism as a strategy to ensure the Constitutional Court's judicial independence.[16]

RESEARCH METHODOLOGY

This study employs a normative juridical research model,[17] which primarily relies on library research as a source of secondary data. Three categories of legal materials have been utilized: primary legal materials, secondary legal materials, and tertiary legal materials. The research methodology incorporates conceptual, comparative, and case study approaches. The conceptual approach facilitates the examination and analysis of the concept of judicial activism. On the other hand, the comparative approach enables the juxtaposition of judicial activism practices across various nations. Lastly, the case study approach is harnessed to scrutinize and dissect the Constitutional Court's rulings that exhibit elements of judicial activism via constitutional review. The collected data were subject to a descriptive-qualitative analysis, aimed at systematically, factually, and accurately delineating the under investigation through the application of doctrinal analysis, and correlating them to the research objective. The doctrine employed is intertwined with the practice of judicial activism, viewed as a strategy to safeguard the Constitutional Court's judicial independence.

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[14] Oly Viana Agustine et al., "Constitutional Review of Criminal Norms: Does Indonesia Need Judicial Activism?," *The International Journal of Human Rights* 27, no. 4 (April 21, 2023): 772–88, https://doi.org/10.1080/13642987.2023.2185608.

[15] Amiruddin Amiruddin and Rizki Ramadani, "Judicial Activism in Regional Head Election Dispute: The Practice and Consistency of The Indonesian Constitutional Court," *Substantive Justice International Journal of Law* 6, no. 1 (June 20, 2023): 56–70, https://doi.org/10.56087/substantivejustice.v6i1.230.

[16] Rahayu Prasetianingsih, "Judicial Activism in Indonesia: Constitutional Culture by The Constitutional Court," *PETITA: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 2 (November 1, 2020): 160–77, https://doi.org/10.22373/petita.v5i2.106.

[17] Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1986), 51.

ANALYSIS AND DISCUSSION

Unraveling the Notion of Judicial Activism: Its Influence on the Constitutional Court' Autonomy within the Indonesia's Constitutional Framework

The concept of judicial activism, historically, was first introduced to the public sphere by Arthur Schlesinger through his piece, "The Supreme Court 1947," published in Fortune Magazine.[18] This term, in its elementary form, signifies the influence of a judge's personal bias or political affiliations on court verdicts, leading to decisions that may not strictly align with the literal interpretation of established laws. However, it also encapsulates the broader exercise of judicial power in addressing societal injustices and promoting equitable justice. Paul Mahoney further elaborates on this notion by suggesting that judicial activism materializes when judges amend existing laws through constitutional interpretation and legal construction. This process often culminates in judges replacing the decisions of elected representatives in the legislature with their own, thereby potentially transforming legal precedents.[19] As outlined in the Black's Law Dictionary (10th Edition), judicial activism is characterized as a philosophy of judicial decision-making where judges allow their personal perspectives on public policy, among other factors, to guide their verdicts. It is generally inferred from this definition that proponents of this philosophy are prone to identifying constitutional breaches and may disregard established legal precedent".[20]

Initially, judicial activism was perceived negatively,[21] primarily due to its seemingly contravention of the fundamental principles of power separation in a democratic and rule-of-law system.[22] This adverse reception originated from fears that judicial activism could destabilize the existing order of a representative democratic system, particularly in relation to legislative institutions.[23] This was predominantly due to the presumption that the concept intruded upon, and even infringed on, the authority of the legislature, the body responsible for formulating laws and regulations.

In his analysis, Pan Mohamad Faiz highlights the concerns raised by William P. Marshall about the risks judicial activism presents to democracy. Marshall identified six problematic areas, or "sins," of judicial activism:

1. Counter-Majoritarian Activism: Defined as the judiciary's unwillingness to respect the decisions of other democratically elected government entities.

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[18] Schlesinger's article provided an insightful direction of the nine Supreme Court Justices, delving into their relationships and conflicting views. The article characterized Justices Frankfurter, Jackson, and Burton as "Champions of Judicial Self-Restraint," while Justices Black, Douglas, Murphy, and Rutledge were termed as "Advocates of Judicial Activism". This article also identified a "centrist group of justices" that included Judge Reed and Chief Justice Vinson Keenan D Kmiec et al., "The Origin and Current Meanings of 'Judicial Activism,'" *Pravnik* 92, no. 5 (October 2023): 1446, https://doi.org/10.1590/2317-6172202322.

[19] Md. Mostafizur Rahman and Roshna Zahan Badhon, "A Critical Analysis on Judicial Activism and Overreach," *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* 23, no. 8 (2018): 45, https://doi.org/10.9790/0837-2308034553.

[20] Puneet Pathak, "Acceptability of Judicial Activism in India Perspective," *International Journal of Law and Legal Jurisprudence Studies* 3, no. 3 (2016): 130, https://ijlljs.in/acceptability-of-judicial-activism-in-india-perspective/.

[21] Bagus Surya Prabowo, "Menggagas Judicial Activism Dalam Putusan Presidential Threshold Di Mahkamah Konstitusi," *Jurnal Konstitusi* 19, no. 1 (March 28, 2022): 76, https://doi.org/10.31078/jk1914.

[22] Despan Heryansyah and Harry Setya Nugraha, "Relevansi Putusan Uji Materi Oleh Mahkamah Konstitusi Terhadap Sistem Checks and Balances Dalam Pembentukan Undang-Undang," *Undang: Jurnal Hukum* 2, no. 2 (March 24, 2020): 373, https://doi.org/10.22437/ujh.2.2.353-379.

[23] Pan Mohamad Faiz, "Dimensi Judicial Activism Dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 13, no. 2 (January 1, 2016): 409, https://doi.org/10.31078/jk1328.

2. Non-Originalist Activism: This occurs when the judiciary disregards the original intent or ideas during case adjudication.
3. Precedential Activism: The judiciary's failure to adhere to established legal precedent.
4. Jurisdictional Activism: The judiciary overstepping its legal boundaries and jurisdiction.
5. Judicial Creativity: The judiciary's invention of new rights and theories within the constitutional framework.
6. Remedial Activism: The judiciary's overreaching use of its power to enforce affirmative obligations on the government, or assume responsibilities of similar institutions under its purview.
7. Partisan Activism: The judiciary's use of its power to advance partisan objectives.[24]

The practice of judicial activism has sparked a spectrum of responses, from criticism to praise. Some individuals condemn it, while others commend the judiciary's bold and proactive stance in tackling various societal and legal challenges. According to Ran Hirschl's article, "Constitutional Court vs. Religious Fundamentalism: Three Middle Eastern Tales," the backlash against judicial activism often stems from a failure to grasp the historical context of court establishments, particularly constitutional courts. He argues that courts are inherently intertwined with the social, cultural, and economic realities molded by specific political system.[25] Therefore, they inevitably serve as conduits for the political and ideological values of these systems due to their involvement in these dynamics.[26]

The intricate relationship between law and politics is inseparable and mutually defining,[27] as articulated by Mochtar Kusumaatmadja. He posited that a political system devoid of law tends towards tyranny, while the absence of politics in law leads to stagnation.[28] Thus, viewing politics as a concerted effort to form, uphold, and evolve a comprehensive political system highlights the necessity of judicial involvement in this symbiotic relationship.

Within Indonesia's constitutional framework, instances of judicial activism are discernible in numerous cases. The practices is not unique to Indonesia and can be observed in other nations such as Canada (as in the case of R vs. Grant, 2009 SCC 32),[29] Australia (evident in Roach vs. Electoral Commissioner, 2007, 233 CLR 162 and Rowe vs. Electoral Commissioner, 2010, 243 CLR 1),[30] India (as showcased in National Legal Services Authority (NALSA) vs. Union of India, 2014, SCC 438),[31] Pakistan (like in the case of Watan Party and others vs. the Federation of Pakistan

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[24] Faiz, 409; See also di William P. Marshall, "Conservatives and the Seven Sins of Judicial Activism," *University of Colorado Law Review* 73, no. 4 (2002): 107–126, https://doi.org/10.2139/ssrn.330266.

[25] Ran Hirschl, "Constitutional Courts Vs. Religious Fundamentalism: Three Middle Eastern Tales," *Texas Law Review* 82, no. 7 (2004): 38, https://doi.org/https://ssrn.com/abstract=557601.

[26] Hirschl, 38.

[27] Arif Hidayat and Zaenal Arifin, "Politik Hukum Legislasi Sebagai Socio-Equilibrium Di Indonesia," *Jurnal Ius Constituendum* 4, no. 2 (October 15, 2019): 149, https://doi.org/http://dx.doi.org/10.26623/jic.v4i2.1654.

[28] Moh Mahfud MD, *Politik Hukum Di Indonesia* (Jakarta: Rajawali Press, 2014), 5.

[29] Melanie Murchison, "Making Numbers Count: An Empirical Analysis of 'Judicial Activism' in Canada," *Manitoba Law Journal* 40, no. 3 (2017): 442, https://journals.library.ualberta.ca/themanitobalawjournal/index.php/mlj/article/view/994.

[30] James Allan, "The Three 'RS' of Recent Australian Judicial Activism: Roach, Rowe and (NO)'riginalism," *Melbourne University Law Review* 36, no. 2 (2012): 745, https://espace.library.uq.edu.au/view/UQ:293472.

[31] Danish Sheikh, "Privacy in Public Places: The Transformative Potential of Navtej Johar v. Union of India," ed. Pablo Ciocchini and George Radics, *SSRN Electronic Journal*, August 22, 2019, 14, https://doi.org/10.2139/

and others PLD 2006 SC 697),[32] and Bangladesh (for instance, K. M. Asadul Bari's case against Bangladesh, 2002, 22 BLDC, HCD 129).[33] The key question this study seeks to answer is: How is judicial activism manifested in Indonesia? The exploration of this question is primarily around two judicial bodies—the Supreme Court, functioning as a general court, and the Constitutional Courts. Both these institutions fall under the umbrella of judicial power. The investigation specifically scrutinizes the Constitutional Court's exercise of judicial activism.

Judicial activism, a practice carried out by judges, involves a range of methodologies, one of which includes the evaluation of legal remedies brought forward by citizens or those seeking justice. These remedies serve as tools for assessing the alignment of laws and regulations with constitutional tenets. The review of legislation, specifically conducted by the Constitutional Court in the realm of judicial authority, symbolizes the principle of checks and balances in the Indonesian constitutional framework. This approach represents the oversight function of the Constitutional Court on legal outputs produced by the legislative and executive branches of government, which includes the House of Representatives (DPR) and the Regional Representative Council (DPD), with the President's mutual consent.[34] This evaluative power, known as judicial review, is granted to the court (judicial authority) by laws and regulations (Basic Law and ordinary legislation). It empowers the court to determine the constitutionality of laws and other governmental actions (*bestuurshandelingen*).[35]

The concept of judicial review is intrinsically linked to the undemocratic nature of law formation, characterized by minimal transparency and limited public participation.[36] This notion stems from the understanding that the realm of political power is often prone to the propensity for unlawful and arbitrary actions (*in maxima potential minima licentia*).[37] This viewpoint aligns with Lord Acton's renowned assertion that power tends to corrupt.[38]

The concept of judicial review distinctly contrasts with legislative and executive reviews. Judicial review involves scrutinizing laws or legal norms by the judiciary or judges. In contrast, legislative review refers to the inspection carried out by legislative bodies such as the House of Representatives (DPR), Regional Representative Council (DPD), and Regional House of Representatives (DPRD), while executive review is performed by executive or government institutions.[39] These distinctions are crucial to comprehend, especially within the Indonesian constitutional framework that allocates judicial authority to two separate judicial entities.

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ssrn.3896689.

32 Sajjad Ahmad Jatoi, Ghulam Mustafa, and Muhammad Saqib Kataria, "Judicial Activism and Democracy in Pakistan: A Case Study of Chief Justice Saqib Nisar Era," *Pakistan Journal of Social Research* 04, no. 02 (June 30, 2022): 5, https://doi.org/10.52567/pjsr.v4i2.445.

33 L. M. Kawser Ahmed, "Judicial Activism in Bangladesh: A Golden Mean Approach," *International Journal of Constitutional Law* 11, no. 2 (April 1, 2013): 550, https://doi.org/10.1093/icon/mot013.

34 Iwan Satriawan and Tanto Lailam, "Open Legal Policy Dalam Putusan Mahkamah Konstitusi Dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 563, https://doi.org/10.31078/jk1636.

35 Umbu Rauta and Ninon Melatyugra, "Hukum Internasional Sebagai Alat Interpretasi Dalam Pengujian Undang-Undang," *Jurnal Konstitusi* 15, no. 1 (March 29, 2018): 76, https://doi.org/10.31078/jk1514.

36 Josef Mario Monteiro, "Amendment of the Corruption Eradication Commission Act and Its Impact on the Constitution," *Jurnal Media Hukum* 28, no. 2 (December 31, 2021): 184, https://doi.org/10.18196/jmh.v28i2.10941.

37 Rauta and Melatyugra, "Hukum Internasional Sebagai Alat Interpretasi Dalam Pengujian Undang-Undang," 76.

38 Desi Sommaliagustina, "Implementasi Otonomi Daerah Dan Korupsi Kepala Daerah," *Journal of Governance Innovation* 1, no. 1 (April 18, 2019): 44–45, https://doi.org/10.36636/jogiv.v1i1.290.

39 Safi', *Sejarah Dan Kedudukan Pengaturan Judicial Review Di Indonesia: Kajian Historis Dan Politik Hukum*, ed. Safi', 1st Edition (Surabaya: Scopindo Media Pustaka, 2021), 3.

In this context, the terminology used for the assessment of laws and regulations differs significantly. However, when the Constitutional and Supreme Courts undertake this process, they engage in constitutional and judicial reviews, respectively.[40] According to Jimly Asshiddiqie, judicial review encompasses a wider range of objects under scrutiny, including laws and legal products, as per the established regulation. In contrast, constitutional review concentrates on examining objects in relation to the 1945 Constitution. This distinction underscores the critical role of the Constitutional Court as the ultimate arbiter of the Constitution. Asshiddiqie, further elucidates that constitutional review consists of two core elements:

1. Safeguarding the democratic system that is predicated on the interplay among its three branches: legislative, executive, and judicial power. The aim of constitutional review is to prevent any particular branch from abusing its power, thereby ensuring a balanced and efficient governance structure. This process is indispensable for upholding democratic values and principles.
2. Shielding every citizen from potential misuse of state power that could threaten their constitutionally protected fundamental rights.[41]

The distinctions in the evaluation of laws and regulations carry substantial legal ramifications, primarily due to three key factors: Firstly, aside from the judiciary, constitutional review can also be executed by other authorized entities, including constitutionally sanctioned bodies. Secondly, judicial review encompasses a comparatively extensive spectrum of legal issues, examining laws against established norms, whereas constitutional review is focused on scrutinizing the congruence of laws with the constitution. Lastly, from the Indonesian legal perspective, the power of judicial review is vested in the Supreme Court as per Article 24A paragraph (1) of the 1945 Constitution. On the other hand, constitutional review is delegated to the Constitutional Court, as stipulated by Article 24C paragraph (1) of the 1945 Constitution.[42] This process also acts as a safeguard, ensuring that lawmakers operate within their prescribed jurisdictions, and legislative activities do not surpass constitutional boundaries.

In terms of constitutional practice and literature, constitutional review can be bifurcated into formal (*formele toetsing recht*) and material tests (*materiele toetsing recht*). Formal testing involves the authority to scrutinize whether a law has been formulated in compliance with the established procedures, encompassing planning, drafting, discussion, ratification, and promulgation. Conversely, material testing assesses the content and substance of a law, verifying its consistency with the 1945 Constitution, devoid of any contradictions.[43] The Constitutional Court functions as a pivotal judicial institution, often termed as the custodian of the constitution in various nations, and is final adjudicator on constitutional matters.[44]

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40 Latif, *Fungsi Mahkamah Konstitusi Dalam Upaya Mewujudkan Negara Hukum Demokrasi*, 20.

41 Meirina Fajarwati, "Upaya Hukum Untuk Melindungi Hak Konstitusional Warga Negara Melalui Mahkamah Konstitusi (Legal Remedies to Protect Citizen's Constitutional Rights through Constitutional Court)," *Jurnal Legislasi Indonesia* 13, no. 3 (2016): 324, https://doi.org/https://doi.org/10.54629/jli.v13i3.

42 Latif, *Fungsi Mahkamah Konstitusi Dalam Upaya Mewujudkan Negara Hukum Demokrasi*, 20.

43 Safi', *Sejarah Dan Kedudukan Pengaturan Judicial Review Di Indonesia: Kajian Historis Dan Politik Hukum*, 3–4.

44 A. Mukthie Fadjar, *Konstitusionalisme Demokrasi (Sebuah Diskursus Tentang Pmilu Otonomi Daerah Dan Mahkamah Konstitusi Sebagai Kado "Sang Penggembala" Prof. A. Mukthie Fadjar S.H., M.H.*, 1st Edition (Malang: In-Trans Publishing, 2010), 1.

The process of constitutional review, or adjudication, essentially represents the commitment of judges and courts to uphold and protect the constitution.[45] This procedure also establishes a mechanism where the constitution is interpreted by the judiciary, potentially shaping its meaning that warrants protection.[46] It underscores the independence of the Constitutional Court as a distinct judicial branch, separate from other state entities.[47] It is crucial to note that judicial independence is a fundamental aspect of maintaining justice and upholding the rule of law.[48]

The Constitutional Court's role as the arbiter and ultimate interpreter of the 1945 Constitution aligns with the principle of judicial supremacy. This principle consolidates the judiciary's unique position as the sole and authoritative entity tasked with interpreting the Constitution. It also ensures that all other state power structure abide by the judiciary's interpretation.[49] Furthermore, Keith E. Whittington underscores judicial supremacy as a critical form of constitutional leadership[50], highlighting its pivotal role within the realm of constitutionalism.

Judicial supremacy is a discourse originally rooted within the legal tradition of the United States (common law or Anglo-Saxon). This concept is often linked with court rulings exhibiting traits of judicial activism,[51] a perspective that empowers judges to render decisions based on personal or political considerations.[52] Consequently, its application within the Constitutional Court practice is viewed as a conduit for judges to administer justice to citizens seeking legal redress. It also offers the flexibility to interpret the law in a manner believed to align with justice, given its unique perspectives and values.

Judicial activism can be seen as a reflection of judges or courts' responsiveness to legislation that lacks true autonomy. Ideally, legislation—characterized as an independent system comprised of unbiased rules and objective procedures—should maintain impartiality and autonomy.[53] Thus, through constitutional review, it becomes feasible to examine and evaluate whether a law maintains its autonomy and is consistent with, or contradicts, a superior law.

In the realm of jurisprudence, the Constitutional Court's inclination towards judicial activism can be discerned through specific elements in its rulings, encompassing dissenting viewpoints and the nature of judgments rendered. Dissenting opinions, as articulated by Constitutional Judges, encapsulate their inherent liberty to pursue the substantive essence of truth. This liberty, of paramount importance, accommodates a broad spectrum of considerations.[54] It implies that while

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45 Diyar Ginanjar Andiraharja, "Judicial Review Oleh Mahkamah Konstitusi Sebagai Fungsi Ajudikasi Konstitusional Di Indonesia," *Khazanah Hukum* 3, no. 2 (2021): 74, https://doi.org/10.15575/kh.v3i2.9012.

46 Aldiansyah, "Perubahan Non-Formal Konstitusi Di Indonesia Pasca-Reformasi Berdasarkan Pemikiran Fajrul Falaakh," *AL WASATH Jurnal Ilmu Hukum* 2, no. 2 (2021): 97, https://doi.org/10.47776/alwasath.v2i2.

47 Aldiansyah, 100.

48 Rodiyah, Siti Hafsyah Idris, and Robert Brian Smith, "Mainstreaming Justice in the Establishment of Laws and Regulations Process: Comparing Case in Indonesia, Malaysia, and Australia," *Journal of Indonesian Legal Studies* 8, no. 1 (May 31, 2023): 339, https://doi.org/10.15294/jils.v7i2.60096.

49 Andiraharja, "Judicial Review Oleh Mahkamah Konstitusi Sebagai Fungsi Ajudikasi Konstitusional Di Indonesia," 75.

50 Andiraharja, 75.

51 Andiraharja, 75.

52 Prabowo, "Menggagas Judicial Activism Dalam Putusan Presidential Threshold Di Mahkamah Konstitusi," 76.

53 Emy Hajar Abra and Rofi Wahanisa, "The Constitutional Court Ultra Petita as a Protection Form of Economic Rights in Pancasila Justice," *Journal of Indonesian Legal Studies* 5, no. 1 (May 4, 2020): 205–206, https://doi.org/10.15294/jils.v5i1.35965.

54 Arbi Mahmuda Harahap, Catur Wido Haruni, and Sholahuddin Al-Fatih, "Juridical Analysis of Dissenting Opinions of Constitutional Judges in Constitutional Court Decisions," *Jurnal Scientia Indonesia* 8, no. 1 (April 30, 2022): 94, https://doi.org/10.15294/jsi.v8i1.36048.

adjudicating, particularly during constitutional review, judges are not solely confined to formal guidelines. Therefore, Constitutional Court rulings that display facets of judicial activism can be rationalized when the judges employ advanced legal doctrines that align with the pursuit of substantive justice in congruence with common sense.[55]

In the context of checks and balances principle among governmental institutions, it becomes clear that the cornerstone of this principle lies in the restriction of power via supervisory and regulatory mechanisms.[56] Within this framework, the Constitutional Court's interpretation of the constitution, as manifested in its rulings and legal rationale, functions as a constitutional directive. This mandate restricts legislators during the formulation of new laws. This is primarily because the Constitutional Court, in its capacity as a judicial institution, holds a pivotal role in adjudicating cases that mirror the public's perception of justice and serves as the final recourse for those seeking justice.[57] Furthermore, the Constitutional Court's interpretation of the constitution curtails the legislative body's latitude in executing their legislative duties.

The Constitutional Court's decisions inherently embody judicial activism, a crucial component of its constitutional duty. This duty primarily involves interpreting the constitution, thereby making judicial activism an intrinsic part of constitutional review. It is pivotal to understand that judicial activism embedded in these rulings should not be seen in isolation, but rather as an embodiment of the checks and balances principle. Michael Kirby, a former Justice of the Australian High Court, has argued that the constitution should be interpreted in line with contemporary societal understanding. He posits that the constitution's text should resonate with and remain relevant to successive generations.[58] Echoing this sentiment, Charles Evans Hughes, an Associate Justice of the U.S. Supreme Court, suggested that while judges are bound by the constitution, its interpretation is ultimately contingent on their insight.[59]

In light of this, as articulated in Article 5 paragraph (1) of the Law on Judicial Power, judicial activism imposes a duty on constitutional judges. This duty compels them to actively explore, adhere to, and comprehend the prevailing legal values and societal sense of justice. This notion of judicial activism aligns with the progressive legal doctrine espoused by Satjipto Rahardjo, which advocates for law to primarily serve humanity for the greater societal good.[60] In practice, this progressive law doctrine could necessitate radical alteration to the legal system to enhance human dignity, ensure happiness and well-being, and thus, yielding greater societal benefits.[61] Judicial activism, in harmony with the principles of progressive law, underscores the role of law in elevating human self-worth, promoting welfare, and ensuring its practical utility in society.

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55 Fudin, "Aktualisasi Checks and Balances Lembaga Negara: Antara Majelis Permusyawaratan Rakyat Dan Mahkamah Konstitusi," 211.

56 Heryansyah and Nugraha, "Relevansi Putusan Uji Materi Oleh Mahkamah Konstitusi Terhadap Sistem Checks and Balances Dalam Pembentukan Undang-Undang," 376.

57 Iwan Satriawan et al., "A Comparison of Appointment of Supreme Court Justices in Indonesia and Malaysia," *Journal of Indonesian Legal Studies* 7, no. 2 (December 21, 2022): 641, https://doi.org/10.15294/jils.v7i2.60862.

58 Johnny M Sakr and Augusto Zimmermann, "Judicial Activism and Constitutional (MIS) Interpretation," *The University of Queensland Law Journal* 40, no. 1 (March 26, 2021): 121, https://doi.org/10.38127/uqlj.v40i1.5643.

59 Heryansyah and Nugraha, "Relevansi Putusan Uji Materi Oleh Mahkamah Konstitusi Terhadap Sistem Checks and Balances Dalam Pembentukan Undang-Undang," 372.

60 Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Buku Kompas, 2006), 14–15.

61 Muhammad Samsuri, "Relevansi Hukum Progresif Terhadap Hukum Islam," *Mamba'ul 'Ulum* 17, no. 2 (October 28, 2021): 96, https://doi.org/10.54090/mu.48.

Satijpto Rahardjo first introduced the concept of Progressive Law in his article, "Indonesia Needs Progressive Law Enforcement," which was published in Kompas Daily on June 15, 2002.[62] Rahardjo's development of this progressive legal concept was a response to mounting concerns about the deteriorating state of the legal system. These concerns were large due to the emergence of a judicial mafia and the rampant commercialization and commodification of law.[63] A progressive legal approach equips constitutional judges, who are pivotal actors in law enforcement, with the ability to think creatively and innovate. By applying conscientious and logical reasoning, they can enhance and extend the reach of the constitutional text.[64] Consequently, judicial activism aligns seamlessly with Satjipto Rahardjo's progressive legal doctrine.

Progressive law mandates that constitutional judges, as law enforcement officials, interpret the constitution not merely through its literal but also by considering moral implications.[65] It emphasizes that legal equality must be extended to every legal entity since the law is designed not only to guarantee legal certainty but also to foster societal happiness and welfare.[66] As such, the progressive perspective of law underscores the preeminence of human factors and human behavior over legislative aspects.

Progressive law is an unceasing quest for truth. Its identity is rooted in the law itself and it stems from the practical application of law within society.[67] According to this legal approach, justice is a substantive process. Fairness, as defined by progressive law, is based on the principles of integration, balance, and the equality distribution of rights and responsibilities among legal entities. These principles of justice are discovered through the practical application of law within society, indicating that justice extends beyond the textual or literal interpretations which have limited scope. Therefore, justice should not be assessed solely based on procedural aspects that can potentially obscure its inherent values.

The Role of Judicial Activism in Bolstering the Autonomy of the Constitutional Court's Judicial Power through Constitutional Review

The concept of judicial activism, as exercised by the Constitutional Court, is deeply rooted in Article 24 paragraph (1) of the 1945 Constitution and is congruent with Article 5 paragraph (1) of the Law on Judicial Power. These legal tenets provide a framework for judges during case adjudication. The Constitutional Court, as a fundamental component of the judiciary, has intrinsic mandate to proactively foster justice within society. However, categorizing the Constitutional Court's decisions proves challenging due to the subjective and abstract nature of judicial activism.

To mitigate the subjectivity and abstractness inherent in validating or legitimizing judicial activism, the six methodologies proposed by Bradley C. Canon were utilized. Conversely,

62 M. Zulfa Aulia, "Hukum Progresif Dari Satjipto Rahardjo," *Undang: Jurnal Hukum* 1, no. 1 (June 1, 2018): 159–85, https://doi.org/10.22437/ujh.1.1.159-185.

63 Aulia, 165.

64 Noor Rahmad and Wildan Hafis, "Hukum Progresif Dan Relevansinya Pada Penalaran Hukum Di Indonesia," *El-Ahli : Jurnal Hukum Keluarga Islam* 1, no. 2 (January 15, 2021): 13, https://doi.org/10.56874/el-ahli.v1i2.133.

65 Muhammad Zulfa Aulia et al., "The Use of Progressive Law Phrase in Constitutional Court Decisions: Context, Meaning, and Implication," *Jurnal Konstitusi* 20, no. 3 (September 1, 2023): 439, https://doi.org/10.31078/jk3034.

66 Wawan Andriawan, "Pancasila Perspective on the Development of Legal Philosophy: Relation of Justice and Progressive Law," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 5, no. 1 (June 29, 2022): 8, https://doi.org/10.24090/volksgeist.v5i1.6361.

67 Andriawan, 9.

Christopher G. Buck posited that judicial activism is underpinned by four legal principles, and its adherence to these legal principles was termed virtue jurisprudence.

The six key methodologies elucidated by Bradley C. Canon are outlined as follows:

1. Majoritarianism: Policies enacted through the democratic process were overturned by judicial proceedings.
2. Interpretive Stability: This approach maintained a consistent interpretation of prior court rulings, legal doctrines, and interpretations, thereby reducing frequent changes.
3. Interpretive Fidelity: This involved varied interpretation of constitutional articles.
4. Substance or Democratic Process Distinction: Court rulings significantly influenced substantive policy creation, rather than merely maintaining the outcome of the democratic political process.
5. Specificity of Policy: This methodology scrutinized the policy implemented by the court decision, which diverged from the discretion typically exercised by other entities or individuals.
6. Availability of an Alternate Policymaker: This focused on the court decision's capacity to override significant decisions made by other governmental bodies.[68]

Christopher G. Buck proposed the following legal principles, grounded in virtue jurisprudence, as the underpinnings of judicial activism:

1. Principled implicationism: This principle recognizes the existence of inherent, albeit unwritten, citizens' rights within a constitution. It encourages a comprehensive interpretation of the constitution, extending safeguards to liberties and rights that, although not expressly stipulated, could have been reasonably anticipated by legislators.
2. Principled Minoritariansim: This principle, while not exclusively favoring minorities, pays particular attention to these groups when they are disproportionately affected by majority-driven democratic processes. This focus becomes especially critical when there is a breach of equal protection laws. It also serves as a bulwark against representative system failures, forestalling the passage of laws that discriminate against minority groups.
3. Principled Remedialism: This principle is focused on reinstatement of justice and rights within the legal and societal spheres. It stresses that when injustices have transpired, the court or pertinent authority should be empowered to initiate actions aimed at rectifying these wrongs. This may encompass initiatives such as affirmative action policies designed to redress the unjust treatment of specific individuals or groups.
4. Principled Internationalism: This principle takes into account the evolution of international law. Within this context, judicial activism often plays a crucial role in shaping certain judgments by adjusting to the ever-changing global landscape through deliberate and prudent strategies.[69]

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[68] Faiz, "Dimensi Judicial Activism Dalam Putusan Mahkamah Konstitusi," 410–11; See also Bradley C. Canon, "Defining the Dimensions of Judicial Activism," *Judicature* 66, no. 6 (1983): 239.

[69] Faiz, "Dimensi Judicial Activism Dalam Putusan Mahkamah Konstitusi," 411–12; See also Gary Anderson, *Encyclopedia of Activism and Social Justice*, ed. Kathryn G. Herr, *SAGE Publications*, 1st Edition (Thousand Oaks: SAGE Publications, Inc., 2007), 785, https://doi.org/10.4135/9781412956215.n713.

Considering virtue jurisprudence as a concept, its application in constitutional review could serve as a useful indicator for interpreting the constitution in Indonesia. This would ensure that decisions are not solely based on court discretion, but are also informed by a broader legal and ethical perspective.

Table 1: *Constitutional Review Cases Overview*

No	Case Number	Details Constitution Review Cases
1	16/PUU-XVI/2018	The extensive legal revision in Indonesia, Law Number 2 of 2018, also known as the Second Amendment to Law Number 17 of 2014, pertains to the People's Consultative Assembly, House of Representatives, Regional Representative Council, and Regional House of Representatives, colloquially known as the MD3 Law. This amendment aims to refine and elucidate numerous provisions pertaining to the roles, authority, and conduct of legislative members.
2	20/PUU-XVII/2019	The review of Law Number 7 of 2017, which pertains to General Elections, and its alignment with the principles of the 1945 Constitution.
3	39/PUU-XVII/2019	Inspection of Law Number 7 of 2017, related to General Elections, for its compatibility with the 1945 Constitution.
4	56/PUU-XVII/2019	Investigation of Law Number 10 of 2016, the Second Amendment to Law Number 1 of 2015, which established Government Regulation in lieu of Law Number 1 of 2014, pertaining to the Election of Governors, Regents, and Mayors, for its conformity with the 1945 Constitution.
5	91/PUU-XVIII/2020	Formal Examination of Law Number 11 of 2020, related to Job Creation, and its compliance with the 1945 Constitution.
6	96/PUU-XVIII/2020	Review of Law Number 7 of 2020, the Third Amendment to Law Number 24 of 2003, related to the Constitutional Court, in relation to its alignment with the 1945 Constitution.
7	112/PUU-XX/2022	Investigation of Law Number 19 of 2019, the Second Amendment to Law Number 30 of 2002, regarding the Corruption Eradication Commission, and its accordance with the 1945 Constitution.
8	26/PUU-XXI/2023	Inspection of Law Number 14 of 2002, concerning the Tax Court, for its compatibility with the 1945 Constitution.

Source: *Data obtained from the Constitutional Court website, under the Judgment Recapitulation section, at https://www.mkri.id/index.php?page=web.Putusan&id=1&kat=1&menu=5*

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1. Case Number 16/PUU-XVI/2018

The scrutiny of the Second Amendment of Law Number 17 of 2014, commonly referred to as the MD3 Law (Law Number 2 of 2018), has unveiled several critical presumptions. Firstly, it was found that the term 'summons and requests for information' in relation to any criminal occurrences not linked to duty implementation—mentioned in Article 224—must secure written consent from the President as outlined in Article 245 paragraph (1) of the MD3 Law. This stipulation was deemed contradictory to the 1945 Constitution, as it lacks legal potency unless strictly applied in the context of summoning members of the House of Representatives (DPR) suspected of criminal activities. Secondly, the Honorary Court of the Council's deliberation in Article 245 paragraph (1) of the MD3 Law was also found to be inconsistent with the 1945 Constitution, and hence devoid of binding

legal force. As a result, a revision was called for in Article 245 paragraph (1) of the MD3 Law. It should state that the President's written consent is required to summon and request information from DPR members suspected of criminal activities unrelated to their duties, as mentioned in Article 224, without the need for the Honorary Court's consideration. These rulings have three substantial implications: The DPR does not have the power to forcibly summon and detain individuals; the Honorary Court lacks the authority to convict, sue, or take other actions against the public or legal entities; and DPR members can be summoned and interrogated with the President's written permission if they are suspected of criminal conduct.

The decision of Constitutional Court number 16/PUU-XVI/2018 is linked to six dimensions of judicial activism, as proposed by Canon. One such dimension is Majoritarianism, which has three significant legal consequences. Firstly, it suggests that the DPR has no power to forcibly summon and detain individuals. Secondly, it indicates that the Honorary Court has lost the authority to prosecute, sue, or take other actions against the public or legal entities. Lastly, it emphasizes that DPR members can be summoned and interrogated only with the written consent of the President. This decision also aligns with Buck's virtue jurisprudence principle, namely Principled Minoritarianism.

2. Case Number 20/PUU-XVII/2019

Upon meticulous comparison of Law Number 7 of 2017, pertaining to General Elections, with the 1945 Constitution, the Constitutional Court arrived at a significant decision. As per ruling declared in Constitutional Court Decision Number 20/PUU-XVII/2019, dated March 28, 2019, several provisions within the Election Law were conditionally deemed unconstitutional. This specific provision under scrutiny was the obligatory possession of an e-ID card for citizens to exercise their voting rights, as stipulated in Article 348 paragraph (9). Additionally, constraints were placed on the voter registration period for the Supplementary Voter List (DPTb), previously set at 30 days according to Article 210, paragraph (1). The ruling also addressed the time constraint for the vote counting at polling stations, as defined in Article 383, paragraph (2). This landmark ruling bears several repercussions. Firstly, citizens whose names do not feature in the Permanent Voter List (DPT) can also vote by presenting an e-ID card recording certificate issued by the population and civil registration office (Disdukcapil) or other similar institutions. Secondly, the registration period for the Supplementary Voter List (DPTb) has been curtailed to a maximum of seven days. However, this limitation is reserved exclusively for voters encountering specific circumstances, such as illness, natural disasters, incarceration, or duty-bound commitments. Lastly, the timeline for vote counting at the stations has been extended to a maximum of 12 hours from the conclusion of polling day.

Interpreting the Constitutional Court Decision Number 20/PUU-XVII/2019 through Canon's six dimensions of judicial activism unveils the Substance/Democratic Process Distinction. This dimension presents two notable implications: Citizens not enlisted in the Permanent Voter List (DPT) are now authorized to use a certificate of e-ID card recording issued by the population and civil registration service (Disdukcapil) or similar agencies as a valid voting instrument. Moreover, the registration period for the Supplementary Voter List (DPTb) has been extended to a maximum of seven days, although this restriction applies exclusively to voters encountering specific

circumstances at the time of voting. In addition, the vote-counting process has been extended to a maximum of 12 hours from the end of polling day, reflecting the principle of virtue jurisprudence proposed by Buck, specifically Principled Implicationism.

3. Case Number 39/PUU-XVII/2019

An all-embracing judicial review revealed that certain clauses within the General Elections Law Number 7 of 2017 were in conflict with the provisions of the 1945 Constitution. The Constitutional Court Decision, in Case Number 39/PUU-XVII/2019, dated September 30, 2019, culminated with the declaration that Article 416 paragraph (1) of the Election Law was constitutionally incongruous. The article was henceforth rendered inoperative unless it was interpreted as non-applicable to presidential and vice-presidential general elections, only contested by two candidate pairs. In instances where only two candidate pairs vie for Presidential and Vice-Presidential positions, the winning pair is the one that garners the majority votes, as per Article 6A, paragraph (4) of the 1945 Constitution. This eliminates the need for re-election by popular vote.

The Constitutional Court's Decision, numbered 39/PUU-XVII/2019, is coherently linked with Canon's six dimensions of judicial activism, specifically highlighting Interpretive Fidelity. This decision pertains to circumstances where only two candidate pairs are contesting for the Presidency and Vice Presidency. According to this context, the victorious pair is the one that secures the most votes, as mandated by Article 6A, paragraph (4) of the 1945 Constitution. As a result, a re-election by popular vote becomes unnecessary. This aligns with the principle of virtue jurisprudence, as proposed by Buck, particularly, Principled Remedialism.

4. Case Number 56/PUU-XVII/2019

The Constitutional Court's scrutiny of Law Number 10 of 2016, pertaining to the Second Amendment to Law Number 1 of 2015 on the Enactment of Government Regulation in Lieu of Law Number 1 of 2014 on the Election of Governors, Regents, and Mayors led to a landmark decision. The ruling focused on Article 7, paragraph (2) point g of Law Number 10 of 2016, which set forth explicit eligibility criteria for those seeking office as Governor, Vice Governor, Regent, Vice Regent, Mayor, and Vice Mayor. The stipulation dictates that candidates should possess no prior criminal conviction with court decisions of permanent legal force. However, in cases where candidates have a criminal past, they are mandated to disclose their status as ex-convicts publicly and transparently. The provision faced a constitutional challenge by the Indonesia Corruption Watch (ICW) and the Association for Elections and Democracy (Perludem). The bone of contention was Article 7, paragraph (2) point g, which merely required ex-convicts to publicize their status, leading to allegation of dishonest and inequitable disclosure, contradicting the principles of direct, public, free, confidential, honest, and fair elections. In addressing this contention, the Constitutional Court, through Decision Number 56/PUU-XVII/2019 dated December 11, 2019, declared that Article 7, paragraph (2) letter g of Law Number 10 of 2016 was antithetical to the 1945 Constitution and thus, non-binding. This ruling held, provided a period of five years had passed since ex-convicts had served their prison sentence, validated by a court decision of permanent legal force.

The Constitutional Court's decision number 56/PUU-XVII/2019 was evaluated within the framework of Canon's six dimensions of judicial activism, concentrating on the Substance/

Democratic Process Distinction. The verdict clarified that Article 7 paragraph (2), was conditionally non-binding, unless interpreted to mandate a five-year waiting period subsequent to ex-convicts serving their prison sentence, validated by a court decision with permanent legal force. This interpretation aligns with Buck's virtue jurisprudence principle, termed as Principled Implicationism.

5. Case Number 91/PUU-XVIII/2020

In an official review of Law Number 11 of 2020, titled "Job Creation," against the backdrop of the 1945 Constitution, the Constitutional Court declared its verdict through Decision Case Number 91/PUU-XVIII/2020, dated November 25, 2021. The court pronounced that the formulation of Law Number 11 of 2020, commonly known as "Job Creation Law" (Law 11/2020), was in conflict with the 1945 Constitution, thus holding it conditionally non-binding. This law was given a lifeline of a maximum of two years from the judgment date, contingent upon substantial improvements within the period. If the necessary amendments were not implemented within this two-year grace period, the law would be considered permanently unconstitutional. If the legislative body failed to revise within this stipulated period, the provisions that Law 11/2020 had either revoked or amended would revert to their original status. Consequently, this judgment led to the suspension of all strategic initiatives and policies bearing significant implications, and the prohibition on issuing new implementation regulations associated with Law 11/2020.

The Constitutional Court's Decision number 91/PUU-XVIII/2020 was examined through the lens of Canon's six dimensions of judicial activism, with a special emphasis on the Substance/ Democratic Process Distinction. This dimension was pertinent considering the ruling that Law 11/2020 could remain in force for a maximum of two years from the judgment date, subject to substantial improvements. In the absence of any significant amendments within this two-year grace period, Law 11/2020 would be rendered permanently unconstitutional. This interpretation aligns with Buck's proposed principle of virtue jurisprudence, known as Principled Internationalism.

6. Case Number 96/PUU-XVIII/2020

The Constitutional Court's scrutiny of Law Number 7 of 2020, relating to the Third Amendment to Law Number 24 of 2003 on the Constitutional Court within the context of the 1945 Constitution, culminated in a crucial judgment. This evaluation was encapsulated in Constitutional Court Decision Number 96/PUU-XVIII/2020, pronounced on June 20, 2020. The verdict deemed Article 87 letter a of Law 7/2020 as inconsistently aligned with the 1945 Constitution, thereby lacking any associated legal enforcement. To circumvent any administrative implications emanating from this decision, the Constitutional Court mandated that the incumbent Chairman and Deputy Chief Justice retain their roles until the election of their successors, as prescribed by Article 24C, paragraph (4) of the 1945 Constitution. Hence, the electoral process for these positions must be instituted within a maximum span of nine months from the date of this judgment.

The Constitutional Court's Decision number 96/PUU-XVIII/2020 was dissected through the prism of Canon's six dimensions of judicial activism, stressing particularly on the dimension of Interpretive Fidelity. Applicable to this scenario, the court's ruling pivots on the interpretation of Article 24C, paragraph (4) of the 1945 Constitution to avert any administrative complexities.

Furthermore, the existing Chairman and Deputy Chief Justice were instructed to maintain their duties until their successors are elected, a process that must be executed within a nine-month deadline from the judgment date. This interpretation resonates with Buck's proposed principle of virtue jurisprudence, referred to as Principled Implicationism.

7. Case Number 112/PUU-XX/2022

An examination of Law Number 19 of 2019, pertaining to the Second Amendment to Law Number 30 of 2002 on the Corruption Eradication Commission (KPK), in line with the 1945 Constitution, brought forth a pivotal matter. This matter is concerned with the tenure of KPK leaders as delineated by Article 34 of the KPK Law. In a legal evaluation presented by Constitutional Judge Suhartoyo, the Constitutional Judges' Panel disputed the four-year term of office enjoyed by KPK leaders. The original Article 34 stipulated that the KPK's head served a four-year term, with the possibility of one re-election. This provision was suspected to be at odds with the 1945 Constitution and was deemed conditionally enforceable, provided the KPK's head had held a five-year term with the potential for a single re-election. In rendering this legal judgment, the Court modelled the current KPK leadership tenure framework. The objective was to avert an overlap of terms between KPK leaders and the President and DPR, thereby preventing the potential for KPK leaders to be chosen twice within a brief period. This examination is expected to remain valid for at least the next two decades. By extending the KPK leadership term to five years, it was resolved that the selection of leaders would occur once during the 2019 to 2024 term, and subsequently in the 2024 to 2029 term, in synchronization with the terms of the President and the DPR. This strategy was devised to provide stability and inhibit frequent transitions in KPK leadership, thereby ensuring commission's effectiveness and consistency.

The Constitutional Court's Decision Number 112/PUU-XX/2022 was scrutinized through the lens of Canon's six dimensions of judicial activism, with an emphasis on Majoritarianism. This dimension became conspicuous as the Constitutional Court mandated a five-year term for the KPK Chairman, with eligibility for a single re-election. In this scenario, the decision exhibits a commitment to Majoritarianism, which underscores the endorsement of the prevailing majority perspective or societal consensus. The principle steered the court's ruling concerning the tenure limit for the KPK Chairman. This interpretation aligns with Buck's virtue jurisprudence principle, known as Principled Implicationism.

8. Case Number 26/PUU-XXI/2023

In an analysis of Law Number 14 of 2002, concerning the Tax Court, against the backdrop of the 1945 Constitution, the Constitutional Court delivered a decisive verdict. The Court deemed the insertion of the term "Ministry of Finance" in Article 5, paragraph (2) of Law Number 14 of 2002, as incongruous with the 1945 Constitution. Moreover, this provision was deemed devoid of legal authority unless construed to mean that the Supreme Court would progressively execute this transition, no later than December 31, 2026. The amended Article 5, paragraph (2) of Law 14/2002, stipulates that the Tax Court's organizational, administrative, and financial development should be supervised by the Supreme Court, with the transition being fully implemented no later than December 31, 2026.

The Constitutional Court's Decision Number 26/PUU-XXI/2023 is typically evaluated within the framework of Canon's six dimensions of judicial activism, with an emphasis on the Substance/ Democratic Process Distinction. This dimension is underscored by the decision's momentous shift in relocating the Tax Court under the Supreme Court's jurisdiction. In this regard, the ruling concentrates on the substance change, which influences the democratic process and the distribution of power. This interpretation aligns with Buck's principle of virtue jurisprudence, known as Principled Implicationism.

Hence, the Constitutional Court's judicial activism is deemed permissible and well-grounded. The Constitutional Court is urged to exercise judicial activism while handling specific cases.[70] From the Indonesian legal perspective, the practice of judicial activism in the Constitutional Court can also be vindicated. This is because the Indonesian legal system does not solely rely on the civil law system; rather, it is multifaceted, encompassing a blend of various legal systems. Key elements are extracted from and established on Pancasila and the 1945 Constitution.[71]

As the ultimate constitutional adjudicator, the Constitutional Court generally draws the principle enshrined in the constitution rather than the legislative products of parliament.[72] Consequently, the specifics of the constitutional norms carry significant weight in the context of judicial authority. The succinct yet powerful provisions of Parliament's procedures, which serve as a foundation for complex, intractable issues, are supplemented by judicial activism.

The doctrine of judicial independence, or the judiciary's autonomy, is inextricably tied to the concept of power separation or distribution. This concept, as initially posited by the author, has reconfigured the Indonesian constitutional system through the establishment of a checks and balances mechanism. As elucidated by Mahfud MD, judicial independence is a pivotal trait of any democratic legal state, given that a nation cannot be deemed democratic in the absence of an independent judiciary.[73] When connected to Article 24 of the 1945 Constitution, one could argue that a cornerstone of the Indonesian legal system is the assurance of autonomous judicial authority, which dispenses justice in the pursuit of upholding law and equity.

According to Jimly Asshiddiqie, the presence of a checks-and-balances system ensures that state power is appropriately regulated, constrained, and monitored. This mechanism prevents and efficiently manages the misuse of power by state administration officials occupying positions in state institutions.[74] In Indonesia, the governmental power is divided into executive branch, led by the President and Vice President; the legislative branch, represented by House of Representatives (DPR); and the judicial branch, held by the Supreme Court and the Constitutional Court. The DPR, as the legislative power holder, undertakes legislative, budgetary, and supervisory roles. As the primary institution responsible for regulation development, the DPR's legislative or regulatory function is manifested in its law-making capacity.

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70 Mexsasai Indra, Geofani Milthree Saragih, and Tito Handoko, "Pseudo-Judicial Review for the Dispute over the Result of the Regional Head Election in Indonesia," *Lentera Hukum* 10, no. 1 (May 28, 2023): 120, https://doi.org/10.19184/ejlh.v10i1.36685.

71 Indra, Saragih, and Handoko, 120.

72 Zsolt Szabó, "Judicial Control of Parliamentary Procedure: Theoretical Framework Analyses," *Constitutional Review* 9, no. 1 (May 31, 2023): 7, https://doi.org/10.31078/consrev911.

73 Romi Librayanto et al., "Penataan Kewenangan Mahkamah Konstitusi Dalam Memperkuat Independensi Kekuasaan Kehakiman," *Amanna Gappa* 27, no. 1 (2019): 45, https://doi.org/https://doi.org/10.20956/ag.v27i1.7312.

74 Jimly Asshiddiqie, *Konstitusi Dan Konstitusionalisme Indonesia*, Cetakan 2 (Jakarta: Sinar Grafika, 2018), 74.

The House of Representatives (DPR) is fundamentally a political institution, with its members elected through general elections by various political parties.[75] This setup creates a potential for legislative action to be influenced by political interests, which may result in laws conflicting with the Constitution. In this context, the role of the Constitutional Court becomes paramount as it acts as a custodian of legal consistency in Indonesia, tasked with the authority to review the constitutionality of laws.[76] Should the DPR, in exercising its legislative function, enact a law contrary to the 1945 Constitution, the Constitutional Court holds the power to scrutinize this law, and if necessary, declare its clauses null and void.

Hans Kelsen, the architect behind the concept of the Constitutional Court, articulated that its authority stemmed from the legislative power typically vested in Parliament (DPR) in numerous nations. Owing to this, the Constitutional Court often earned the moniker of a 'negative legislator' due to its primary function to invalidate norms or laws deemed unconstitutional. Meanwhile, the Parliament, being actively involved in crafting and implementing new policies, was often referred to as the 'positive legislator'.[77] This differentiation highlighted the Constitutional Court's role in examining and nullifying existing laws that violated constitutional principles. However, in practice, these decisions sometimes veered into a quasi-legislative realm, straying from its inherent function as a negative legislator.[78]

Three key factors enable the transformation of the Constitutional Court into a constructive legislative body when delivering regulatory rulings. These include:

1. The pursuit of public justice and practicality

   There may be circumstances where the Constitutional Court veers from legal stipulations to uphold the community's substantive justice. Constitutional judges are duty-bound to delve into societal perspectives on justice, which often takes precedence over practicality.
2. Urgent circumstances

   This includes time-sensitive situations, potential constitutional infringements, or impending disorder.
3. Bridging legal gaps to prevent social disorder or legal turmoil

   The annulment of a law by the Constitutional Court can influence its enforcement, prompting the Court to innovate in order to fill the ensuing legal void.[79]

Consequently, the Constitutional Court's transition from a scrutinizing to a constructive legislative body is not necessarily permanent shift but a response to specific situations that demand

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75 Else Suhaimi, "Eksistensi Pemerintahan Partai Dalam Sistem Ketatanegaraan Indonesia," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 19, no. 2 (2019): 183, https://doi.org/https://doi.org/10.19109/nurani.v19i2.4417.

76 M. Adib Akmal Hamdi, Xavier Nugraha, and Gio Arjuna Putra, "Konstruksi Kewenangan Majelis Permusyawaratan Rakyat Dalam Memberikan Keterangan Pada Perkara Pengujian Undang-Undang Di Mahkamah Konstitusi," *Widya Yuridika: Jurnal Hukum* 6, no. 2 (2023): 298, https://doi.org/https://doi.org/10.31328/wy.v6i2.4255.

77 Pan Mohamad Faiz, "Relevansi Doktrin Negative Legislator," *Majalah Konstitusi* (Jakarta, February 2016), 6, https://www.mkri.id/public/content/infoumum/majalahkonstitusi/pdf/Majalah_109_1. February 2016 Edition .pdf.

78 Decision No. 102/PUU-VII/2009, Decision No. 4/PUU-VII/2009, and Decision No. 110-11-112-113/PUU-VII/2009. See Martitah, *Mahkamah Konstitusi Dari Positive Legislature Ke Positive Legislature*, 1st Edition (Jakarta: Konstitusi Press, 2013), 11.

79 Xavier Nugraha, Risdiana Izzaty, and Alya Anira, "Constitutional Review Di Indonesia Pasca Putusan Mahkamah Konstitusi Nomor 48/PUU-IX/2011: Dari Negative Legislator Menjadi Positive Legislator," *Rechtidee* 15, no. 1 (June 14, 2020): 10–11, https://doi.org/10.21107/ri.v15i1.5183.

the Court's consideration when addressing cases with constructive legislative elements. If the Constitutional Court consistently assumes the role of a constructive legislator, it risks infringing upon the legislature's authority as the primary constructive legislator.

When we situate the Constitutional Court within the theoretical framework proposed by Rober B. Sideman and William J. Chambliss concerning legal operation, it becomes apparent that the functioning of the legal system is not exclusively regulated by the rule of law. It requires appreciation of how socio-political forces act as public beacons of justice.[80] This aligns with instances where the Constitutional Court's rulings are viewed as favorable by legislators, as per Article 45 of Law Number 7 of 2020, which amends for the third time Law Number 24 of 2003 regarding the Constitutional Court. This article mandates that judges, during their decision-making process, must ensure the coherence of the 1945 Constitution with the evidence presented in the trial and their personal convictions. This indicates that judges' personal beliefs could potentially foster opportunities or ambiguities for constitutional juries.

CONCLUSION

In summing up, the Constitutional Court's sustained practice of judicial activism aligns well with the percepts of judicial independence and progressive legal theories. Progressive law recognizes the importance of codified legal provisions while preserving the adaptability necessary to transcend normative limitations in the pursuit of justice. The presence of judicial activism within the Constitutional Court should not be dismissed as it fortifies the principle of checks and balances, serving as an indispensable tool for scrutinizing and counterbalancing the activities of other governmental divisions. Furthermore, it is crucial to acknowledge that the inherently subjective and abstract nature of judicial activism necessitates objective validation. This is frequently attained through the application of virtue jurisprudence principles. The practice of judicial activism has indeed led to a transformation of the Constitutional Court's role from mere negative legislation. However, this shift is not absolute. There are specific circumstances that the Constitutional Court must consider. If the Constitutional Court consistently positions itself as a positive legislator in every case, it risks encroaching on the jurisdiction of other institutions.

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[80] Kamaruddin Jafar, "Menguji 'Positive Legislature' Sebagai Kewenangan Mahkamah Konstitusi," *Halu Oleo Law Review* 1, no. 2 (March 14, 2018): 248–49, https://doi.org/10.33561/holrev.v1i2.3644.

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