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The Constitutional Court as a Negative Legislator and a Positive Legislator: Implications for the Indonesian Constitutional System

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Abstrak

Penelitian ini mengkaji perkembangan Mahkamah Konstitusi Indonesia dari negative legislator menuju praktik yang dicirikan sebagai positive legislator serta implikasinya terhadap sistem ketatanegaraan Indonesia. Dengan menggunakan penelitian hukum normatif melalui pendekatan perundang-undangan, kasus, dan konseptual, penelitian ini menganalisis ketentuan konstitusi, putusan Mahkamah Konstitusi, dan kepustakaan hukum. Perbandingan Putusan Nomor 29, 51, 55, dan 90/PUU-XXI/2023 menunjukkan ketegangan antara pemulihan konstitusional dan diskresi pembentuk undang-undang, khususnya mengenai persyaratan alternatif pencalonan presiden dan wakil presiden. Temuan penelitian menunjukkan bahwa istilah positive legislator menggambarkan akibat normatif putusan pengujian undang-undang, bukan kewenangan legislasi yang berdiri sendiri. Penelitian ini mengembangkan lima parameter analisis, yaitu kebutuhan akan pemulihan konstitusional, hubungan langsung dengan norma yang diuji, kecukupan dan konsistensi ratio decidendi, penghormatan terhadap diskresi pembentuk undang-undang, serta kejelasan akibat hukum dan tindak lanjut. Parameter tersebut menawarkan kerangka untuk menilai batas konstitusional putusan yang merumuskan norma sekaligus menjaga kepastian hukum, legitimasi kelembagaan, serta checks and balances antara Mahkamah dan pembentuk undang-undang.

Kata Kunci: Mahkamah Konstitusi; pengujian undang-undang; negative legislator; positive legislator

Abstract

This study examines the development of the Indonesian Constitutional Court from a negative legislator toward practices characterized as those of a positive legislator, and the implications of that development for Indonesia's constitutional system. Employing normative legal research with statutory, case, and conceptual approaches, it analyzes constitutional provisions, Constitutional Court decisions, and legal scholarship. A comparison of Decisions Nos. 29, 51, 55, and 90/PUU-XXI/2023 reveals a tension between constitutional remedies and legislative discretion, particularly concerning alternative eligibility requirements for presidential and vice-presidential candidates. The findings show that the term positive legislator describes the normative effects of judicial review decisions rather than an independent legislative power. The study develops five analytical parameters: the necessity of a constitutional remedy, a direct relationship with the norm under review, the adequacy and consistency of the ratio decidendi, respect for legislative discretion, and the clarity of legal effects and follow-

up. These parameters offer a framework for assessing the constitutional limits of norm-formulating decisions while safeguarding legal certainty, institutional legitimacy, and checks and balances between the Court and the lawmakers.

Keywords: *Constitutional Court; judicial review; negative legislator; positive legislator*

Introduction

The Constitutional Court occupies an important position in the Indonesian constitutional system through its power to review laws against the 1945 Constitution of the Republic of Indonesia (1945 Constitution). This power serves as an instrument for upholding constitutional supremacy and for ensuring that legislation does not conflict with constitutional norms. Within the Indonesian constitutional framework, powers are divided between the lawmaking function and the constitutional review function. Article 20(1) of the 1945 Constitution vests the power to make laws in the House of Representatives (Dewan Perwakilan Rakyat, DPR), whereas Article 24C(1) confers on the Constitutional Court the power to review laws against the 1945 Constitution.[1] This division is closely tied to the Court's position as a negative legislator, namely an institution that, through judicial review, may declare a statutory norm contrary to the Constitution and devoid of binding legal force, while the formation of legal norms in principle remains within the competence of the lawmakers. The concept of the negative legislator therefore constitutes an important conceptual boundary for understanding the Court's powers within the Indonesian constitutional system.[2]

Over time, however, judicial review practice has not always been confined to the annulment of norms traditionally associated with the negative legislator concept. The Court's decisions have evolved through the use of conditionally constitutional and conditionally unconstitutional rulings, as well as specific interpretations that determine how a norm must be construed and applied. Although the Court's constitutional power remains a power of judicial review, its decisions display regulatory characteristics that the literature describes as positive legislature.[3] In this article, the term positive legislator is used in the authors' analysis, while positive legislature is retained only where it reproduces the terminology or classification used in the cited sources. This development is reflected in the study by Efendi, Muhtadi, and Saleh, which identified 107 of the 198 judicial review decisions granting petitions during 2012–2022, or approximately 54.04 percent, as positive legislature decisions.[4] That figure is the product of an academic classification based on the authors' research criteria, not an official statistic of the

[1] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945, art. 20(1) and art. 24C(1).

[2] Ika Kurniawati and Lusy Liany, "Kewenangan Mahkamah Konstitusi sebagai Negative Legislator dalam Pengujian Undang-Undang terhadap Undang-Undang Dasar 1945," *ADIL: Jurnal Hukum* 10, no. 1 (2019): 111–135, https://doi.org/10.33476/ajl.v10i1.1068.

[3] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–325, https://doi.org/10.14710/mmh.41.2.2012.315-325.

[4] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

Constitutional Court concerning legislative power. The finding nonetheless shows that the development of constitutional review can no longer be explained solely by reference to the annulment of norms; it must also account for the normative effects produced through constitutional interpretation. Accordingly, this study understands the term positive legislator as a characteristic or consequence of judicial review decisions, not as a new legislative power independently conferred on the Court by the 1945 Constitution.

This development raises the question of the limits of the Court's power vis-à-vis the lawmakers. On the one hand, the power of constitutional review requires the Court to resolve the constitutional issues brought before it, including where the mere annulment of a norm is insufficient to restore rights or to secure certainty in the application of the law. On the other hand, increasingly detailed constitutional interpretation may encroach upon the determination of legal policy that in principle belongs to the DPR together with the President. This issue relates to the concept of open legal policy, namely the policy space granted to the lawmakers insofar as it does not contravene the Constitution. Uncertainty about the permissible extent of intervention in that space may blur the distinction between the negative legislator function and positive legislator practice, while exposing the tension between judicial activism and judicial restraint and its implications for legal certainty.[5] Faiz has likewise examined the dimensions of judicial activism in the Court's decisions, demonstrating the importance of understanding the active role of judges in constitutional interpretation.[6] In this context, the positive legislator question cannot be answered merely by asking whether the Court has produced a new interpretation or formulation; it must also be asked whether that interpretation remains necessary to resolve the constitutional issue or has entered into policy choices that ought to be made through the legislative process.

The issue arises concretely in the review of Article 169(q) of Law No. 7 of 2017 on General Elections (the Election Law), which governs eligibility for presidential and vice-presidential candidates. On October 16, 2023, the Court rejected the petition in Decision No. 29/PUU-XXI/2023.[7] It also rejected the petition in Decision No. 51/PUU-XXI/2023.[8] The petition in Decision No. 55/PUU-XXI/2023 was likewise rejected.[9] On the same day, Decision No. 90/PUU-XXI/2023 partially granted a petition concerning the same provision. The Court held that the minimum age requirement of forty years was unconstitutional and lacked binding force unless interpreted to include persons who have held or currently hold an office filled through general elections, including regional head elections.[10] The decision retained

[5] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

[6] Pan Mohamad Faiz, "Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 13, no. 2 (2016): 406–430, https://doi.org/10.31078/jk1328.

[7] Constitutional Court of the Republic of Indonesia, Decision No. 29/PUU-XXI/2023, October 16, 2023.

[8] Constitutional Court of the Republic of Indonesia, Decision No. 51/PUU-XXI/2023, October 16, 2023.

[9] Constitutional Court of the Republic of Indonesia, Decision No. 55/PUU-XXI/2023, October 16, 2023.

[10] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, operative part, point 2.

the age threshold but added an alternative qualification. It is the principal case in this study because the formulation directly affects candidacy requirements previously determined by the lawmakers.

The difference in outcome between Decisions Nos. 29, 51, and 55/PUU-XXI/2023 and Decision No. 90/PUU-XXI/2023 cannot automatically be regarded as an inconsistency, since each case has its own petition structure and legal reasoning that must be examined individually. Nevertheless, the identical object of review and the proximity of the constitutional issues make it necessary to compare the legal reasoning underlying each decision, particularly regarding the application of open legal policy and the justification for adding an alternative qualification. This issue has become part of the academic debate on the consistency of the Court's reasoning on the age requirement for presidential and vice-presidential candidates.[11] The central question, therefore, is not merely why the operative parts differ, but whether the differing *ratio decidendi* in these cases provides an adequate constitutional basis for preserving the lawmakers' policy space in one case while producing an alternative interpretation in another.

The complexity of Decision No. 90/PUU-XXI/2023 is also apparent from the concurring and dissenting opinions among the Constitutional Justices.[12] Wicaksono and Hantoro analyze the decision from the perspective of a plurality decision, including the use of the "narrowest grounds" approach to identify the reasoning that supports the outcome.[13] Classification as a plurality decision is an academic interpretation, not official nomenclature of the Court. Divergent reasoning among justices supporting or opposing an outcome underscores the importance of identifying the legal reasoning that actually determines the decision. This becomes all the more relevant where a decision produces an interpretation with broad normative effects, since clarity of the *ratio decidendi* is required to assess the consistency of constitutional interpretation and the limits of the Court's power.

The implications of positive legislator practice are not confined to the relationship between the reviewed norm and the petitioner; they also concern institutional relations within the Indonesian constitutional system. Interpretations with normative effects may strengthen constitutional protection, because the resolution of a case does not always end with the annulment of a norm. However, the further a decision determines policy substance previously within legislative discretion, the greater the need to clarify the boundary between the function of constitutional adjudication and the lawmaking function. This concerns checks and balances, legal certainty, institutional legitimacy, and the effectiveness of implementation. In the study by Efendi, Muhtadi, and Saleh, 26 of the 107 decisions classified as positive legislature were found to have been followed up by their

[11] Selvi Christina Situmeang, Ardilafiza, and Ari Wirya Dinata, "Inconsistency of the Constitutional Court Regarding the Minimum Age Requirement for Presidential and Vice-Presidential Candidates: Inkonsistensi Mahkamah Konstitusi Terkait Syarat Minimal Usia Calon Presiden dan Wakil Presiden," *Jurnal Konstitusi* 21, no. 4 (2024): 609–634, https://doi.org/10.31078/jk2145.

[12] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023.

[13] Dian Agung Wicaksono and Bimo Fajar Hantoro, "Pemaknaan Putusan Pluralitas dalam Syarat Pencalonan Presiden dan Wakil Presiden: Kajian Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," *Jurnal Yudisial* 17, no. 2 (2024): 147–166, https://doi.org/10.29123/jy.v17i2.702.

addressees within the scope of that research.[14] This finding shows the importance of assessing follow-up, but does not in itself prove that the remaining decisions were not implemented. Positive legislator practice must therefore be examined not only in terms of the Court's capacity to produce normative interpretations, but also in terms of the clarity of the allocation of responsibilities and the institutional consequences it generates.

Several previous studies provide a foundation for this analysis. Martitah discusses the progressive role of constitutional justices in decisions characterized as positive legislature.[15] Faiz examines judicial activism in the Court's decisions.[16] Kurniawati and Liany discuss the Court's role as a negative legislator.[17] Satriawan and Lailam examine open legal policy in constitutional review and its relationship with lawmaking.[18] Efendi, Muhtadi, and Saleh examine decisions classified as positive legislature and their implementation.[19] Situmeang, Ardilafiza, and Dinata address the consistency of the decisions on the age requirement.[20] Wicaksono and Hantoro examine Decision No. 90/PUU-XXI/2023 through the concept of a plurality decision.[21] Together, these studies address the concepts of the positive legislator, judicial activism, open legal policy, and divergent judicial reasoning.

Nevertheless, the research gap addressed by this article lies in the need to connect studies on the changing character of the Court's decisions with a more operational framework for assessing the constitutional limits of norm formulation through judicial review decisions. The existing literature explains the development of decisions classified as positive legislature, the Court's position as a negative legislator, open legal policy, and Decision No. 90/PUU-XXI/2023. These studies were selected for their direct relevance to the four themes of this article, namely decisions with normative effects, the negative legislator construction, open legal policy, and

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[14] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

[15] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–325, https://doi.org/10.14710/mmh.41.2.2012.315-325.

[16] Pan Mohamad Faiz, "Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 13, no. 2 (2016): 406–430, https://doi.org/10.31078/jk1328.

[17] Ika Kurniawati and Lusy Liany, "Kewenangan Mahkamah Konstitusi sebagai Negative Legislator dalam Pengujian Undang-Undang terhadap Undang-Undang Dasar 1945," *ADIL: Jurnal Hukum* 10, no. 1 (2019): 111–135, https://doi.org/10.33476/ajl.v10i1.1068.

[18] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

[19] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

[20] Selvi Christina Situmeang, Ardilafiza, and Ari Wirya Dinata, "Inconsistency of the Constitutional Court Regarding the Minimum Age Requirement for Presidential and Vice-Presidential Candidates: Inkonsistensi Mahkamah Konstitusi Terkait Syarat Minimal Usia Calon Presiden dan Wakil Presiden," *Jurnal Konstitusi* 21, no. 4 (2024): 609–634, https://doi.org/10.31078/jk2145.

[21] Dian Agung Wicaksono and Bimo Fajar Hantoro, "Pemaknaan Putusan Pluralitas dalam Syarat Pencalonan Presiden dan Wakil Presiden: Kajian Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," *Jurnal Yudisial* 17, no. 2 (2024): 147–166, https://doi.org/10.29123/jy.v17i2.702.

Decision No. 90/PUU-XXI/2023, so that the review is thematic and does not claim exhaustive coverage of the literature. However, within the scope of the prior studies used in this research, no integrated discussion has been found that specifically systematizes the limits of positive legislator practice, applies them through a comparison of the *ratio decidendi* of Decision No. 90/PUU-XXI/2023 with Decisions Nos. 29, 51, and 55/PUU-XXI/2023, and connects the results to the implications for the division of powers and the implementation of decisions in the Indonesian constitutional system. This gap matters because explaining the development of regulatory decisions does not answer when, why, and to what extent the Court may produce normative formulations without exceeding its constitutional power.

In light of this gap, the novelty of this research lies in the formulation of an analytical framework for assessing the limits of positive legislator practice through five interrelated parameters: the necessity of a constitutional remedy; a direct relationship between the formulation in the decision and the norm under review; the adequacy and consistency of constitutional reasoning; respect for legislative discretion within the space of open legal policy; and the clarity of the legal effects and follow-up of the decision. These five parameters are developed as an analytical synthesis of this research, not as provisions that positive law has explicitly established as a single set. The individual elements draw on existing scholarship. Martitah examines decisions with normative effects.[22] Faiz examines judicial activism.[23] Satriawan and Lailam analyze open legal policy and legislative discretion.[24] Efendi, Muhtadi, and Saleh examine the follow-up to decisions classified as positive legislature.[25] The contribution lies in integrating them, specifying how each is assessed, and applying them separately to each decision examined; the framework does not purport to replace a full proportionality analysis. The framework is used to compare the legal reasoning and forms of remedy in the decisions examined, particularly to assess whether an interpretation that produces an alternative qualification remains a necessary consequence of constitutional review or has entered into the determination of legislative policy without adequate constitutional justification. The contribution of this research thus extends beyond identifying the development of the Court's role to formulating limits that allow judicial review practice to be assessed more measurably.

Accordingly, this study addresses two research questions. First, how has the role of the Constitutional Court developed from negative legislator toward positive legislator practice in the judicial review of laws in Indonesia, and what are the constitutional limits of interpretations that produce normative effects? Second, what are the implications of that development for the Indonesian constitutional

[22] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–325, https://doi.org/10.14710/mmh.41.2.2012.315-325.

[23] Pan Mohamad Faiz, "Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 13, no. 2 (2016): 406–430, https://doi.org/10.31078/jk1328.

[24] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

[25] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

system? The first question is answered through a comparison of the legal reasoning in the Court's decisions and the application of the analytical parameters developed herein. The study is expected to contribute to the development of constitutional law, particularly in maintaining a balance among effective constitutional protection, respect for the lawmakers' power, legal certainty, and checks and balances.

Research Method

This study uses descriptive and analytical normative legal research with statutory, case, and conceptual approaches. The statutory approach examines the 1945 Constitution and Law No. 24 of 2003 on the Constitutional Court and its amendments.[26] It also examines Law No. 48 of 2009 on Judicial Power.[27] The Election Law provides the statutory context for the four principal cases.[28] The conceptual approach examines the negative legislator, positive legislator, constitutional remedies, open legal policy, judicial activism, judicial restraint, and checks and balances as the basis for analyzing the limits of the Court's constitutional power.

The case approach examines Constitutional Court decisions selected purposively for their relevance to the development of forms of constitutional remedy, the normative effects of decisions, and the limits of the power of judicial review. Decision No. 90/PUU-XXI/2023 serves as the principal case, while Decisions Nos. 29/PUU-XXI/2023, 51/PUU-XXI/2023, and 55/PUU-XXI/2023 serve as comparators because they review provisions concerning the age requirement for presidential and vice-presidential candidates. Decisions Nos. 102/PUU-VII/2009, 48/PUU-IX/2011, and 91/PUU-XVIII/2020 are used to trace the development of decision forms and techniques of constitutional remedy. Each illustrates a distinct remedial technique: a directly applicable mechanism protecting the right to vote (102/PUU-VII/2009), the annulment of a statutory restriction on the content of operative rulings (48/PUU-IX/2011), and a conditional declaration with a period for legislative correction (91/PUU-XVIII/2020). They serve as contextual illustrations, not as a representative sample of decisions with normative effects. The comparison of the four 2023 decisions examines the object of review, the constitutional question raised, the structure of the petition, the constitutional touchstones, the *ratio decidendi*, the application of open legal policy, the operative part, and the legal effects and implementation of each decision. These units are set out for each decision in Table 1. The comparison is thus based not merely on differences in outcome but chiefly on the underlying constitutional reasoning.

The legal materials comprise primary legal materials, namely the Constitution, statutes, and Constitutional Court decisions, and secondary legal materials, namely books, journal articles, prior research, and other relevant legal literature. The materials were collected through library research by identifying, inventorying, classifying, and examining sources according to the research questions. They were then analyzed qualitatively through legal interpretation, analysis of juridical argumentation, and comparison of the legal reasoning in the decisions. The decisions were examined in their full official texts published by the Court, including concurring and dissenting opinions. The analysis treats the operative part as

[26] Republic of Indonesia, Law No. 24 of 2003 on the Constitutional Court.
[27] Republic of Indonesia, Law No. 48 of 2009 on Judicial Power.
[28] Republic of Indonesia, Law No. 7 of 2017 on General Elections.

determining the legal effect, the majority's legal considerations as the Court's reasoning, and separate opinions as evaluative material only.[29] English renderings of the Indonesian texts are the authors' paraphrases, not official translations. Where interpretations diverge, priority is given to the operative part and the majority's considerations, and departures of the authors' assessment from the Court's reasoning are stated expressly.

The analysis is directed at assessing the limits of positive legislator practice as a characteristic of Constitutional Court decisions that produce normative effects, not as a distinct legislative power. The assessment applies the five analytical parameters developed in this study: the necessity of a constitutional remedy, a direct relationship with the norm under review, the adequacy and consistency of the *ratio decidendi*, respect for legislative discretion, and the clarity of legal effects and follow-up. These parameters are used to examine the implications of positive legislator practice for the division of powers among state institutions, legal certainty, and checks and balances in the Indonesian constitutional system. Each parameter is applied separately to each of the four 2023 decisions according to the indicators and assessment rules set out in Table 2, and the results are presented in Table 3.

Results and Discussion

The Development of the Constitutional Court's Role from Negative Legislator toward Positive Legislator in the Judicial Review of Laws in Indonesia

The development of the Constitutional Court's role from negative legislator toward positive legislator practice is one of the important dynamics in the judicial review of laws in Indonesia. This development does not reflect a formal transformation of the Court into a lawmaking institution; rather, it reflects the evolving character of its decisions and of the constitutional remedies granted in the exercise of its power of review. Article 24C(1) of the 1945 Constitution empowers the Court to review laws against the Constitution, while Article 20(1) vests the power to make laws in the DPR, with deliberation together with the President as provided in Article 20(2). This division affirms the distinction between the function of reviewing the constitutionality of norms and the function of forming legal norms.[30] Under the negative legislator construction, the Court may declare a statutory norm contrary to the Constitution and devoid of binding legal force, but it does not assume a general power to determine legislative policy.[31]

This construction is reflected in Law No. 24 of 2003 on the Constitutional Court. Article 56 governs the forms of decisions in judicial review cases, while Article 57(1) and (2) determine the legal effects on statutory content or laws declared contrary to the 1945 Constitution.[32] Within this framework, the lawmakers formulate legal norms, whereas the Court exercises constitutional control over

[29] Republic of Indonesia, Law No. 24 of 2003 on the Constitutional Court, art. 45(10) and art. 47.

[30] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945, art. 20(1)–(2) and art. 24C(1).

[31] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–325, https://doi.org/10.14710/mmh.41.2.2012.315-325.

[32] Republic of Indonesia, Law No. 24 of 2003 on the Constitutional Court, art. 56 and art. 57(1)–(2).

norms once enacted. Judicial review forms part of the system of checks and balances designed to ensure that legislative power is exercised within constitutional limits. The negative legislator concept thus relates not only to the power to annul norms, but also to the principles of separation of powers and the limitation of powers among state institutions.[33]

Judicial review practice nonetheless shows that constitutional problems cannot always be resolved by annulling a norm outright. In certain circumstances, annulment may create a legal vacuum or uncertainty in application, or may fail to provide an adequate remedy for the constitutional right infringed. These circumstances have encouraged decision techniques that do not merely remove the binding force of a norm but also provide an interpretation or formulation with regulatory effects. This development is associated with the concept of positive legislature, namely the character of judicial review decisions that produce normative effects beyond conventional annulment.[34]

One manifestation of this development is the conditionally constitutional and conditionally unconstitutional decision. A conditionally constitutional decision preserves the validity of a norm provided that it is applied in accordance with a particular constitutional interpretation. Conversely, a conditionally unconstitutional decision declares a norm contrary to the Constitution unless it is construed in accordance with the conditions set by the Court. Both forms show that judicial review does not always present a binary choice between upholding and annulling a norm in its entirety. Ali, Hilipito, and Asy'ari identify the development of conditional decisions and decisions containing new norms, and highlight the problems of their follow-up.[35] In practice, conditional interpretation allows the Court to determine the constitutional meaning of a provision without necessarily abolishing it altogether.

This development raises questions about the limits of the Court's power. Under the negative legislator construction, the core question in review is whether a norm contravenes the Constitution and must therefore lose its binding force. When the Court issues a conditional interpretation, however, the question becomes how the norm must be construed to conform to the Constitution. Such an interpretation may still fall within the review function where it is necessary to eliminate a constitutional conflict. Where the Court chooses a regulatory option that the Constitution does not directly require, however, the question arises whether it is still engaging in constitutional interpretation or has entered the domain of legislative policymaking.

This study therefore distinguishes three situations. First, review may incidentally produce normative consequences, as when annulment changes the content of the law that remains applicable. Second, a conditional interpretation may

[33] Wicipto Setiadi et al., "Perisai Konstitusi: Peran dan Kewenangan Pengujian Undang-Undang (Judicial Review) oleh Mahkamah Konstitusi Berdasarkan UUD NRI 1945," *Jurnal Studi Hukum Modern* 7, no. 3 (2025): 169–193, https://journalversa.com/s/index.php/jshm/article/view/1601.

[34] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–325, https://doi.org/10.14710/mmh.41.2.2012.315-325.

[35] Mohammad Mahrus Ali, Meyrinda Rahmawaty Hilipito, and Syukri Asy'ari, "Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat serta Memuat Norma Baru," *Jurnal Konstitusi* 12, no. 3 (2015): 631–662, https://doi.org/10.31078/jk12310.

be necessary for an effective remedy, where the qualification added is derived from the defect identified and goes no further than is required to remove it. Third, the Court may select a legislative policy, where the qualification is one of several constitutionally permissible options not dictated by the violation found. The first two remain within constitutional review under Article 24C(1) of the 1945 Constitution.[36] Articles 56 and 57 of Law No. 24 of 2003 provide the statutory framework for the relevant remedies.[37] The third requires a specific constitutional justification because the choice among permissible arrangements belongs in principle to the lawmakers under Article 20(1) and (2).

This development can be observed in Decision No. 102/PUU-VII/2009 concerning the review of Law No. 42 of 2008 on the Election of the President and Vice-President. The constitutional issue concerned citizens who were eligible to vote but were not registered on the final voter list. The Court did not resolve the issue merely by annulling a norm; instead, it set out an interpretation and operational conditions permitting the use of an identity card or passport to exercise the right to vote in certain circumstances. The decision thus produced a mechanism that could be applied directly to protect citizens' constitutional rights.[38]

Decision No. 102/PUU-VII/2009 demonstrates a clear relationship between the constitutional issue and the remedy granted. The problem examined was the obstruction of the right to vote owing to voter administration issues, and the identity document mechanism was designed to overcome that obstruction. The formulation was not intended to redetermine electoral policy as a whole but to provide a remedial path so that the constitutional right could still be exercised. The regulatory character of the decision may therefore be analyzed as a form of interpretation directly connected to the protection of a constitutional right.

This development relates to the discourse on judicial activism in constitutional adjudication. Faiz explains the dimensions of judicial activism in the Court's decisions, including the active role of judges in interpreting the Constitution.[39] In judicial review, such an active role may be required where annulment or a textual application of a provision cannot adequately resolve the constitutional problem. The two pairs of concepts used in this article operate at different levels. Judicial activism and judicial restraint describe the Court's attitude toward the scope of its intervention in legislative choices, whereas negative legislator and positive legislator describe the effect of a decision on the content of the norm under review. An activist approach therefore does not necessarily produce a positive legislator outcome, and a decision with normative effects may still reflect restraint where its formulation goes no further than the constitutional remedy requires. Judicial activism, however, cannot be understood as unlimited freedom to determine legal policy. The Court's actions must still derive their legitimacy from the power of constitutional review conferred by the 1945 Constitution.

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[36] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945, art. 20(1)–(2) and art. 24C(1).

[37] Republic of Indonesia, Law No. 24 of 2003 on the Constitutional Court, art. 56(3) and art. 57(1).

[38] Constitutional Court of the Republic of Indonesia, Decision No. 102/PUU-VII/2009, July 6, 2009, operative part, point 2; see also paras. [3.18]–[3.20].

[39] Pan Mohamad Faiz, "Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 13, no. 2 (2016): 406–430, https://doi.org/10.31078/jk1328.

The changing character of the Court's decisions also reveals a gap between the Court's formal power and the legal effects of its decisions. Normatively, the Court's power remains confined to reviewing the constitutionality of laws. In practice, however, its decisions may produce effects resembling norm-making where they not only remove the operation of a provision but also supply a corrective interpretation that state institutions and the public must apply. This is one basis for understanding the emergence of the positive legislator character in judicial review practice. The development of normative effects, however, does not entail a transfer of legislative power to the Court.[40]

The question of the limits of the Court's power became more apparent after the enactment of Law No. 8 of 2011 amending Law No. 24 of 2003. Through this amendment, the lawmakers introduced Article 45A and Article 57 paragraph (2a). Article 57 paragraph (2a) essentially provided that the operative part of a Constitutional Court decision may not contain any ruling other than those provided in Article 57(1) and (2), any order to the lawmakers, or any formulation of a norm replacing the provision declared contrary to the 1945 Constitution. The provision reflects the lawmakers' attempt to restrain the development of regulatory decisions and to preserve the Court's role within the negative legislator construction.[41]

In Decision No. 48/PUU-IX/2011, however, the Court declared Article 45A and Article 57 paragraph (2a) of Law No. 8 of 2011 contrary to the 1945 Constitution and without binding legal force.[42] The decision occupies an important place in the development of positive legislator practice. In terms of its operative part, the Court acted as a negative legislator by annulling statutory provisions. In terms of its institutional effect, however, the decision removed a statutory restriction on certain forms of constitutional remedy. Annulment and the expansion of the space for constitutional remedies can thus occur through one and the same decision.

Nevertheless, Decision No. 48/PUU-IX/2011 cannot be understood as conferring an unlimited legislative power on the Court. The annulment of a statutory restriction does not alter Article 20 and Article 24C(1) of the 1945 Constitution. The relevant question is therefore not whether the Court is absolutely prohibited from producing interpretations with normative effects, but in what circumstances such remedies can be justified on the basis of the power of constitutional review. In subsequent developments, Decision No. 48/PUU-IX/2011 also became an important reference point for understanding the increasing use of decisions categorized as positive legislature.[43]

This trend appears in the study by Efendi, Muhtadi, and Saleh on judicial review decisions from 2012 to 2022. Of the 198 decisions granting petitions, 107, or

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[40] Fadly Ikhsan Pradana and Wicipto Setiadi, "Putusan Mahkamah Konstitusi yang Tidak Dilaksanakan dalam Pengujian Undang-Undang Ditinjau dari Asas Erga Omnes (Analisis Putusan Mahkamah Konstitusi Nomor 1/PUU-XI/2013)," *Indonesian State Law Review* 3, no. 2 (2021): 77–88, https://doi.org/10.15294/islrev.v3i2.22998.

[41] Republic of Indonesia, Law No. 8 of 2011 on Amendments to Law No. 24 of 2003 on the Constitutional Court, art. 45A and art. 57(2a).

[42] Constitutional Court of the Republic of Indonesia, Decision No. 48/PUU-IX/2011, October 18, 2011.

[43] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

approximately 54.04 percent, were categorized as positive legislature decisions; of these, 98 were conditionally unconstitutional and nine were conditionally constitutional.[44] The finding shows that decisions with normative effects have become a significant part of judicial review practice.

These data must, however, be read proportionately. The classification of 107 decisions as positive legislature results from academic criteria, not from an official classification by the Court.[45] The figure therefore cannot support the conclusion that every decision so categorized exceeded constitutional power. Conversely, the substantial number cannot justify the view that all norm formulation through decisions is necessarily constitutional. The data are better used to demonstrate the urgency of developing parameters that distinguish necessary constitutional interpretation from the determination of legislative policy beyond what a constitutional remedy requires.[46]

A different form of remedy appears in Decision No. 91/PUU-XVIII/2020 concerning the formal review of Law No. 11 of 2020 on Job Creation. In its decision pronounced on November 25, 2021, the Court declared the enactment of the Job Creation Law contrary to the 1945 Constitution and conditionally unconstitutional. The Court gave the lawmakers a maximum of two years to cure the defects and specified the legal consequences should they fail to do so.[47]

Decision No. 91/PUU-XVIII/2020 shows that positive legislator practice does not always take the form of a directly applicable replacement norm. The Court constructed a remedial mechanism by determining the constitutional status of the law, a period for correction, the lawmakers' obligation, and the consequences of non-compliance. The Court did not take over the legislative process; instead, it afforded the competent institutions an opportunity to make corrections. The decision thus illustrates a form of constitutional remedy that still leaves room for the DPR and the President to exercise the legislative function.

The contrast between Decision No. 102/PUU-VII/2009 and Decision No. 91/PUU-XVIII/2020 shows that the form of constitutional remedy must correspond to the character of the issue examined. The former concerned the protection of the right to vote, which required a directly applicable mechanism; the latter concerned the constitutionality of the lawmaking process, which required corrective action by the lawmakers. The power of judicial review can therefore yield diverse remedies without altering the Court's formal position as an institution reviewing the constitutionality of laws.[48]

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[44] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

[45] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

[46] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–325, https://doi.org/10.14710/mmh.41.2.2012.315-325.

[47] Constitutional Court of the Republic of Indonesia, Decision No. 91/PUU-XVIII/2020, November 25, 2021, operative part, points 3–6.

[48] Wicipto Setiadi et al., "Perisai Konstitusi: Peran dan Kewenangan Pengujian Undang-Undang (Judicial Review) oleh Mahkamah Konstitusi Berdasarkan UUD NRI 1945," *Jurnal Studi Hukum Modern* 7, no. 3 (2025): 169–193, https://journalversa.com/s/index.php/jshm/article/view/1601.

A fundamental issue follows. Where the Court has several remedial options, the choice among them cannot be separated from the character of the constitutional violation found. Annulment, conditional interpretation, suspension of the effects of annulment, and an order for legislative correction each have different consequences for the lawmakers' sphere of power. Accordingly, the further a decision determines directly applicable regulatory substance, the stronger the need to explain why that remedy is constitutionally required.[49]

The doctrine of open legal policy concerns the lawmakers' policy space to regulate matters that the Constitution does not prescribe in detail.[50] In judicial review practice, the existence of that space does not mean that every legislative choice is immune from constitutional review. A policy may still be assessed where it allegedly conflicts with constitutional rights, principles, or provisions. However, the power to review a policy must be distinguished from the power to determine which policy choice is most appropriate. The distinction matters because constitutional problems do not always admit only one normative solution that the Court must determine directly.[51]

The benchmarks for that assessment must be identified in each case. A policy within the space delegated to the lawmakers, as Article 6(2) of the 1945 Constitution does for presidential candidacy requirements, is constitutionally permissible unless an identifiable provision or principle is infringed.[52] A policy that is merely unwise or undesirable is a matter for the legislative process.[53] Judicial intervention is justified where the policy is shown to infringe, for example, Article 27(1), Article 28D(3), or Article 28I(2), or fails the standards invoked in the Court's case law on open legal policy, namely conflict with morality or rationality or intolerable injustice.[54] Disagreement with the merits of a policy is therefore not in itself a constitutional defect.

In this connection, this study distinguishes two stages of assessment. The first is the assessment of the constitutionality of the norm enacted by the lawmakers, in which the Court determines whether the norm contravenes the 1945 Constitution on the basis of the constitutional arguments submitted and examined. The second is the determination of the remedy for the constitutional problem found, in which the Court must consider whether the remedy should take the form of annulment, conditional interpretation, or an opportunity for the lawmakers to make corrections. The two stages must not be conflated, because the finding of a

[49] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

[50] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

[51] Pan Mohamad Faiz, "Dimensi Judicial Activism dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 13, no. 2 (2016): 406–430, https://doi.org/10.31078/jk1328.

[52] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945, art. 6(2), art. 27(1), art. 28D(3), and art. 28I(2).

[53] Constitutional Court of the Republic of Indonesia, Decision No. 29/PUU-XXI/2023, October 16, 2023, para. [3.20].

[54] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, para. [3.13.2] and concurring opinion of Constitutional Justice Enny Nurbaningsih, para. [6.2].

constitutional defect in a norm does not automatically justify every alternative arrangement that the Court might prescribe.

This distinction is crucial in analyzing Decision No. 90/PUU-XXI/2023 on the review of Article 169(q) of the Election Law. The provision originally required presidential and vice-presidential candidates to be at least 40 years old. In that decision, the Court partially granted the petition and declared the provision contrary to the 1945 Constitution and without binding legal force insofar as it is not construed to include an alternative for persons who have held or are holding an office filled through general elections, including regional head elections.[55]

Judging from its operative part, Decision No. 90/PUU-XXI/2023 did not abolish the 40-year minimum age requirement but added an alternative qualification based on experience in an elected office. The decision thus directly altered the normative structure of the candidacy requirements, which makes it a relevant principal case for assessing the limits of positive legislator practice. The presence of an alternative formulation does not, however, in itself prove that the Court exceeded its power. The assessment must focus on the constitutional reasons underlying the alternative and its relationship with the issue examined.

To that end, Decision No. 90/PUU-XXI/2023 must be compared with Decisions Nos. 29/PUU-XXI/2023, 51/PUU-XXI/2023, and 55/PUU-XXI/2023. All four cases share the same object of review, namely Article 169(q) of the Election Law, but present different petition structures. Decision No. 29/PUU-XXI/2023 concerned a request to lower the minimum age to 35 years. Decision No. 51/PUU-XXI/2023 concerned an alternative based on experience as a state administrator. Decision No. 55/PUU-XXI/2023 likewise linked the age requirement to experience in state administration. Decision No. 90/PUU-XXI/2023, by contrast, more specifically proposed experience as a regional head at the provincial or regency/municipal level as an alternative to the minimum age requirement.

These differences in petition structure must be taken into account so that the comparison is not based solely on outcomes. In Decisions Nos. 29, 51, and 55/PUU-XXI/2023 the Court rejected the petitions, whereas in Decision No. 90/PUU-XXI/2023 it partially granted the petition and laid down an interpretation creating an alternative requirement. A difference in the operative parts cannot immediately be characterized as inconsistency, since decisions may legitimately differ where the constitutional issue, the basis of the petition, or the relevant legal argument differs. The comparison must therefore focus on the *ratio decidendi*, namely the legal reasons underlying the Court's assessment of the constitutionality of the norm and the remedy chosen.

Table 1. Comparison of Decisions Nos. 29, 51, 55, and 90/PUU-XXI/2023

Element	**29/PUU-XXI/ 2023**	**51/PUU-XXI/ 2023**	**55/PUU-XXI/ 2023**	**90/PUU-XXI/ 2023**
Petitioners	Partai Solidaritas Indonesia and four individual petitioners	Partai Garda Perubahan Indonesia (Partai Garuda)	Five incumbent regional heads or deputy regional heads	One individual citizen (student)

[55] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, operative part, point 2.

Element	29/PUU-XXI/ 2023	51/PUU-XXI/ 2023	55/PUU-XXI/ 2023	90/PUU-XXI/ 2023
Relief requested	Minimum age of 35 years	40 years or experience as a state administrator (*penyelenggara negara*)	Same formula as in Decision 51	40 years or experience as a regional head at the provincial, regency, or municipal level
Provisions invoked (1945 Constitution)	Arts. 8(3), 27(1), 28D(1), 28D(3)	Arts. 6, 6A(2), 28D(1), 28D(3), 28I(2)	Arts. 28D(1), 28D(3), 28I(2)	Arts. 27(1), 28D(1), 28D(3), 28I(2)
Legal standing	Recognized by the majority; Suhartoyo would deny it	Recognized by the majority; Suhartoyo would deny it	Recognized, including by Suhartoyo	Recognized by the majority ([3.6]); Suhartoyo would deny it
Majority reasoning	Age is a policy choice delegated by Art. 6(2); the Court cannot fix a different age ([3.20]–[3.21])	Reasoning in Decision 29 applies *mutatis mutandis* ([3.13.2]); diversity of state administrator offices requires restraint ([3.14.1]–[3.14.2])	Age is open legal policy with reference to Decisions 29 and 51 ([3.15]); diversity of offices and restraint ([3.16])	Earlier petitions distinguished by the focus on elected offices ([3.12]); open legal policy not absolute ([3.13.2]); elected experience as indicator; intolerable injustice ([3.14]–[3.15])
Operative part	Petition rejected in its entirety	Petition rejected in its entirety	Petition rejected in its entirety	Partially granted: "at least 40 years old or has held/is holding an office elected through general elections, including regional head elections" (point 2)
Separate opinions	Dissents: Suhartoyo; M. Guntur Hamzah	Dissents: Suhartoyo; M. Guntur Hamzah	Dissents: Suhartoyo; M. Guntur Hamzah	Concurring: Enny Nurbaningsih; Daniel Yusmic P. Foekh. Dissents: Wahiduddin Adams; Saldi Isra; Arief Hidayat; Suhartoyo

Element	29/PUU-XXI/ 2023	51/PUU-XXI/ 2023	55/PUU-XXI/ 2023	90/PUU-XXI/ 2023
Normative effect	Norm unchanged	Norm unchanged	Norm unchanged	Directly applicable alternative qualification

Source: Authors' analysis of the official texts of the decisions. Bracketed numbers refer to paragraphs of the Court's legal considerations; the English wording of the operative part is the authors' rendering.

Table 1 shows that the legally relevant differences lie chiefly in the relief requested and the reasoning, rather than in standing, which the majority recognized in all four cases, or the largely overlapping constitutional provisions invoked. The petitioners in Decision No. 55/PUU-XXI/2023 themselves held elected regional offices.[56] In Decision No. 90/PUU-XXI/2023, the Court nevertheless distinguished the earlier cases by the formula requested.[57]

In Decision No. 29/PUU-XXI/2023, the principal issue concerned the determination of the minimum age for presidential and vice-presidential candidates. Article 6(2) of the 1945 Constitution leaves the further regulation of the requirements for becoming President and Vice-President to statute.[58] Within that framework, the determination of a specific age was treated as a matter of legislative policy. This reasoning is significant because it shows that the Court distinguished the power to assess the constitutionality of an age requirement from the power to determine the most appropriate age itself.[59]

The implication is that disagreement with the chosen minimum age does not in itself establish a constitutional violation. Where the Constitution does not prescribe a specific age, the lawmakers have room to determine the requirement on policy grounds, albeit within constitutional limits. In reviewing an age provision, therefore, what must be shown is not merely that another age would be more suitable, but that the existing requirement violates a clearly identifiable constitutional provision or principle. The distinction between a permissible choice and impermissible arbitrariness therefore turns on the constitutional benchmarks identified above, not on the existence of a more suitable alternative. In Decision No. 29/PUU-XXI/2023, the Court itself considered that fixing a different age would raise the same objection for citizens below the new threshold and could prompt further petitions concerning age requirements for other public offices.[60]

Decision No. 51/PUU-XXI/2023 is more closely related to Decision No. 90/PUU-XXI/2023 because it not only challenged the minimum age but also proposed experience as a state administrator as an alternative qualification. The

[56] Constitutional Court of the Republic of Indonesia, Decision No. 55/PUU-XXI/2023, October 16, 2023, paras. [3.5] and [3.15]–[3.16].

[57] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, para. [3.12].

[58] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945, art. 6(2).

[59] Constitutional Court of the Republic of Indonesia, Decision No. 29/PUU-XXI/2023, October 16, 2023, paras. [3.20]–[3.21].

[60] Constitutional Court of the Republic of Indonesia, Decision No. 29/PUU-XXI/2023, October 16, 2023, para. [3.20].

Court nonetheless rejected the petition.[61] Its reasoning on judicial self-restraint in determining which state offices may serve as an alternative to the age requirement is important because it reflects an awareness of the lawmakers' policy space. Determining which offices deserve equivalence with the age requirement involves a substantive choice among several possible arrangements.

In Decision No. 51/PUU-XXI/2023, the Court treated the diversity of state administrator positions as a reason for restraint in determining which positions could substitute for the minimum age requirement.[62] Decision No. 55/PUU-XXI/2023 restated that reasoning.[63] The Court therefore treated both the age requirement and alternative experience as matters within legislative policy. Its restraint rested on a substantive view of the lawmakers' policy space rather than a bare refusal to alter the norm.

From the perspective of the division of powers, this reasoning shows that the question of office-based experience concerns not only the protection of the right to equal opportunity in government, but also the power to set eligibility standards for presidential and vice-presidential candidates. Where several offices could serve as indicators of governmental experience, the choice to include or exclude a particular office requires a normative basis. The Court's restraint in prescribing alternative offices can therefore be understood as respect for legislative discretion, provided that no constitutional violation requires the adoption of a specific alternative.

Decision No. 55/PUU-XXI/2023 reinforces this point because the petition likewise concerned experience in state administration as an alternative to the age requirement. In paragraphs [3.15] to [3.17] of its legal considerations, the Court referred to Decisions Nos. 29 and 51/PUU-XXI/2023, affirmed that the minimum age requirement is an open legal policy within the lawmakers' competence, and stated that it found no justification for declaring the norm unconstitutional or conditionally unconstitutional.[64] Decision No. 55/PUU-XXI/2023 thus shows continuity with the preceding decisions in respecting the lawmakers' power.

Taken together, Decisions Nos. 29, 51, and 55/PUU-XXI/2023 reflect a broadly consistent approach. All three place the determination of the age requirement and possible alternatives based on office-based experience within the lawmakers' policy space. The decisions do not share an identical *ratio decidendi*. Decision No. 29/PUU-XXI/2023 relies on the delegation in Article 6(2).[65] Decision No. 51/PUU-XXI/2023 adds the diversity of state administrator positions as a reason for restraint.[66] Decision No. 55/PUU-XXI/2023 applies that reasoning to petitioners who held

[61] Constitutional Court of the Republic of Indonesia, Decision No. 51/PUU-XXI/2023, October 16, 2023, paras. [3.14]–[3.15] and operative part.

[62] Constitutional Court of the Republic of Indonesia, Decision No. 51/PUU-XXI/2023, October 16, 2023, paras. [3.14.1]–[3.14.2].

[63] Constitutional Court of the Republic of Indonesia, Decision No. 55/PUU-XXI/2023, October 16, 2023, para. [3.16].

[64] Constitutional Court of the Republic of Indonesia, Decision No. 55/PUU-XXI/2023, October 16, 2023, paras. [3.15]–[3.17].

[65] Constitutional Court of the Republic of Indonesia, Decision No. 29/PUU-XXI/2023, October 16, 2023, paras. [3.20]–[3.21] and dissenting opinion of Constitutional Justice Suhartoyo.

[66] Constitutional Court of the Republic of Indonesia, Decision No. 51/PUU-XXI/2023, October 16, 2023, paras. [3.13.2]–[3.14.2] and dissenting opinion of Constitutional Justice Suhartoyo.

elected regional offices.[67] Views on standing also differed, as Constitutional Justice Suhartoyo would have denied it in Decisions Nos. 29 and 51/PUU-XXI/2023 but not in Decision No. 55/PUU-XXI/2023. This approach does not mean that the Court loses its power to review norms categorized as open legal policy. The more accurate conclusion is that altering such a policy requires a sufficient constitutional basis, so that the Court's assessment does not become a determination of policy choices that ought to be made through the legislative process.

Unlike those three decisions, Decision No. 90/PUU-XXI/2023 adopted an approach that produced direct normative effects. In paragraph [3.12], the Court first explained why the case differed from Decisions Nos. 29, 51, and 55/PUU-XXI/2023. It held that the earlier petitions did not directly concern the category of offices filled through general elections. According to the Court, the term "state administrator" used in Decisions Nos. 51 and 55/PUU-XXI/2023 is broader and potentially ambiguous because it covers offices obtained through appointment, designation, or election, whereas the petition in Decision No. 90/PUU-XXI/2023 specifically linked regional head experience to an elected office.[68]

This reasoning shows that the Court did not ignore its previous decisions but sought to distinguish the constitutional issue before it. That distinction is key to understanding the shift in the Court's approach. From the standpoint of constitutional analysis, however, a difference in petition structure does not by itself answer whether the Court had a sufficient basis to prescribe an alternative requirement. A difference in the object of interpretation may explain why a petition is examined differently, but it does not automatically establish that the requested alternative must be laid down directly in the operative part.

In paragraph [3.13], the Court connected the candidacy requirements with the principle of popular sovereignty under Article 1(2) of the 1945 Constitution, the rule-of-law principle under Article 1(3), and the conduct of democratic elections. The Court treated general elections as a means of exercising popular sovereignty and emphasized citizens' opportunity to participate in government. In paragraph [3.14], it further reasoned that experience in an office obtained through general elections is one indicator of a person's maturity and experience for contesting the presidential and vice-presidential election.[69]

This reasoning shows that the Court did not simply substitute a different minimum age but linked electoral experience to democratic principles and the opportunity to participate in government. One issue nonetheless requires further scrutiny. Experience in obtaining an electoral mandate may indeed be considered an indicator of political or governmental experience, but that link does not in itself demonstrate that the Constitution requires such experience to serve as an alternative to the age requirement. A distinction must therefore be drawn between reasoning showing that a policy alternative has a rational basis and reasoning

[67] Constitutional Court of the Republic of Indonesia, Decision No. 55/PUU-XXI/2023, October 16, 2023, paras. [3.15]–[3.16] and dissenting opinion of Constitutional Justice Suhartoyo, para. [6.1].

[68] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, para. [3.12].

[69] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, paras. [3.13]–[3.14].

proving that the alternative is a constitutional remedy that must be laid down by the Court.

In paragraph [3.15], the Court concluded that Article 169(q) of the Election Law had caused intolerable injustice and therefore had to be declared conditionally unconstitutional.[70] That conclusion became the basis for the alternative formulation in the operative part. From the perspective of the *ratio decidendi*, the key question is whether the relationship between the injustice found and the alternative prescribed has been adequately explained. This assessment is necessary because a norm deemed unjust does not always admit only one remedial option. Where several regulatory options are equally permissible under the Constitution, the choice among them may fall within the lawmakers' discretion.

In paragraph [3.14.1], the Court characterized applying the same age threshold to young persons holding an electoral mandate as disproportionate treatment resulting in intolerable injustice and considered that they deserve equal opportunity in government.[71] That reasoning echoes Article 28D(3), but Article 6(2) leaves candidacy requirements to statute and does not itself make electoral experience a qualification.[72] In this study's assessment, as distinct from the Court's findings, the reasoning shows that an experience-based alternative is a rational policy option; it does not show that the Constitution requires the Court to adopt it, since the age requirement applies equally to all citizens and no unjustified differential treatment of comparable persons is demonstrated.

A further issue concerns the difference between the petition and the operative part of Decision No. 90/PUU-XXI/2023. The petitioner requested an alternative based on experience as a regional head at the provincial or regency/municipal level. The operative part, however, adopted a broader category, namely experience in an office filled through general elections, including regional head elections. This broadening has normative consequences, because it covers not only the regional head offices on which the petition focused but also potentially other elected offices.

This difference does not necessarily show that the Court exceeded its power. In judicial review, the remedy may involve a constitutional interpretation that does not textually mirror the formulation requested. However, the wider the gap between the petition and the operative part, the more important it is to ensure that the broadening bears a direct relationship to the constitutional issue examined. The question to be answered is therefore not only whether the category of elected offices remains connected to Article 169(q), but also why that broader category was necessary to resolve the constitutional problem identified by the Court. In paragraph [3.12], the Court framed the issue as the shared characteristic of offices filled through general elections, treating regional head offices as one instance.[73] On that premise the broader category follows from the Court's rationale, but the premise treats all elected offices as equivalent indicators of readiness for the

[70] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, para. [3.15].

[71] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, paras. [3.14.1]–[3.15].

[72] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945, art. 6(2) and art. 28D(3). The English rendering in the text is the author's paraphrase, not an official translation.

[73] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, para. [3.12].

presidency, which the petition did not advance. This study has not found in the majority's considerations an explanation of why a formulation confined to the category petitioned, the narrower formula of the concurring justices, or, hypothetically, a declaration leaving the alternative to the lawmakers within a deadline, as in Decision No. 91/PUU-XVIII/2020, would have been insufficient.

The adequacy of the legal reasoning is also reflected in the divergent opinions of the justices in Decision No. 90/PUU-XXI/2023. The decision contains concurring and dissenting opinions revealing different assessments of the age requirement, the lawmakers' policy space, and the justifiable form of remedy. The two concurring justices, Enny Nurbaningsih and Daniel Yusmic P. Foekh, took a narrower approach by treating experience as a governor as the relevant alternative, whereas the operative part adopted the broader category of elected offices.[74] This shows that even among the justices who accepted the possibility of an alternative requirement, the appropriate scope of the norm remained contested. To avoid inferring a shared rationale from the outcome alone, this study treats a proposition as having majority support only where at least five justices expressly endorsed it in the principal or a concurring opinion. On that basis, an alternative based on elected-office experience was supported by five justices, but its extension to every elected office, including regency and municipal heads, only by the three justices of the principal opinion, since Constitutional Justice Enny Nurbaningsih limited it to governors and Constitutional Justice Daniel Yusmic P. Foekh to provincial regional heads.[75] Nor did the dissents share one rationale: Wahiduddin Adams and Saldi Isra would have rejected the petition, Arief Hidayat considered that its withdrawal should have been granted, and Suhartoyo found no legal standing.[76]

The dissenting opinions in Decision No. 90/PUU-XXI/2023 also reveal objections to the departure from the Court's previous decisions. These objections are analyzed here not as grounds for disregarding the binding force of the operative part, but as a means of assessing the quality of the constitutional justification for the change in the norm. In this context, the divergent opinions show that the limits of open legal policy and the scope for formulating alternative norms cannot be reduced to the question whether a petition is granted or rejected.

From the perspective of a plurality decision, the divergent reasoning supporting the outcome must be distinguished from the binding force of the operative part. The operative part of Decision No. 90/PUU-XXI/2023 retains the legal effect determined by the Court. Academic analysis of the *ratio decidendi*, however, must consider whether the reasoning supporting the alternative formulation is sufficiently consistent and has a clear constitutional basis. This becomes all the more important where a decision not only annuls a norm but also lays down an arrangement that can be applied directly in the conduct of

[74] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, concurring opinions of Constitutional Justices Enny Nurbaningsih, para. [6.7], and Daniel Yusmic P. Foekh, para. [6.8].

[75] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, concurring opinion of Constitutional Justice Enny Nurbaningsih, para. [6.7], and concurring opinion of Constitutional Justice Daniel Yusmic P. Foekh, para. [6.8], point 22.

[76] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, dissenting opinions of Constitutional Justices Wahiduddin Adams, para. [6.24]; Saldi Isra, para. [6.25]; Arief Hidayat; and Suhartoyo.

government.[77] Indonesian procedural law has no rule comparable to the narrowest grounds doctrine: absent unanimity, a decision is taken by majority vote, differing opinions are included in it, and it acquires permanent legal force once pronounced.[78] The approach is therefore used here only as an academic tool, not as a rule determining or limiting the binding force of the operative part.

The comparison of Decisions Nos. 29, 51, 55, and 90/PUU-XXI/2023 thus shows that differences in outcome cannot be assessed solely on the basis of a shared object of review. Differences in petition structure and in the constitutional issues examined must be taken into account. Yet those differences cannot serve as an automatic justification for a change in the Court's approach. The more decisive criterion is whether the change in interpretation is supported by constitutional reasons explaining why a particular remedy was necessary and why the choice of alternative could not be left to the lawmakers.

In this context, this study considers that the principal problem of Decision No. 90/PUU-XXI/2023 is not the mere presence of a new formulation in the operative part, but the adequacy of the relationship between the constitutional reasons relied upon and the alternative norm prescribed. Reasoning based on popular sovereignty, the opportunity to participate in government, and electoral experience helps explain the direction of the Court's interpretation. That reasoning must nonetheless be assessed by asking whether the alternative prescribed was a constitutional necessity or a regulatory option that, in principle, could be determined by the lawmakers.

On the basis of this development, this study formulates five analytical parameters for assessing the constitutional limits of positive legislator practice. They are developed through an analysis of the power of judicial review, the character of the Court's decisions, and the principle of separation of powers. They are not intended as formal rules explicitly established by the Court in any single decision, but as academic criteria for assessing when, why, and to what extent the Court may formulate norms through its decisions without exceeding its constitutional power.

The first parameter is the necessity of a constitutional remedy. It asks whether there is a constitutional problem requiring a remedy through an interpretation with normative effects, and whether annulment or an opportunity for the lawmakers to act would be insufficient to resolve it. In Decision No. 102/PUU-VII/2009, the need for a remedy concerned the protection of citizens' right to vote, which had to be capable of exercise. In Decision No. 91/PUU-XVIII/2020, the remedy was directed at correcting the lawmaking process through action by the lawmakers. In Decision No. 90/PUU-XXI/2023, the question is whether the addition of a qualification based on office-based experience was a constitutional necessity that had to be determined directly by the Court.

[77] Dian Agung Wicaksono and Bimo Fajar Hantoro, "Pemaknaan Putusan Pluralitas dalam Syarat Pencalonan Presiden dan Wakil Presiden: Kajian Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," *Jurnal Yudisial* 17, no. 2 (2024): 147–166, https://doi.org/10.29123/jy.v17i2.702.

[78] Republic of Indonesia, Law No. 24 of 2003 on the Constitutional Court, art. 45(7), art. 45(10), and art. 47.

The second parameter is a direct relationship between the remedy and the norm under review. It asks whether the formulation prescribed bears a clear relationship to the object of review, the constitutional issue, and the constitutional conflict examined. In Decision No. 102/PUU-VII/2009, the identity document mechanism related directly to the obstruction of the right to vote. In Decision No. 90/PUU-XXI/2023, the alternative formulation remains connected to the candidacy requirements under review. That connection, however, is insufficient to justify the entire substance of the formulation: a relationship with the object of review must be distinguished from a need to prescribe a particular alternative.

The third parameter is the adequacy and consistency of the *ratio decidendi*. It asks whether the legal reasoning adequately explains the constitutional grounds justifying the remedy, particularly where earlier decisions examined related issues. In comparing Decisions Nos. 29, 51, 55, and 90/PUU-XXI/2023, this parameter assesses whether the change in approach to the age requirement and office-based experience was sufficiently justified. Different operative parts do not automatically indicate inconsistency. However, when an approach that previously left the determination of qualifications to the lawmakers gives way to the prescription of an alternative through a decision, reasons explaining the basis for that change are required.

The fourth parameter is respect for legislative discretion. It asks whether the Court continues to distinguish constitutional problems that must be resolved through judicial review from policy choices that the DPR and the President may still constitutionally determine. In Decision No. 91/PUU-XVIII/2020, the Court left room for the lawmakers to make corrections, whereas in Decision No. 90/PUU-XXI/2023 it prescribed a directly applicable alternative qualification. The two forms of remedy thus affect the legislative policy space to different degrees. Where several alternatives are equally permissible under the Constitution, the choice among them should in principle respect the lawmakers' power.

The fifth parameter is the clarity of legal effects and follow-up. It asks whether the decision provides certainty as to the applicable norm, the institution responsible for implementation, and the further action required. Decision No. 102/PUU-VII/2009 produced a mechanism applicable to the exercise of the right to vote; Decision No. 91/PUU-XVIII/2020 imposed an obligation to correct within a deadline; and Decision No. 90/PUU-XXI/2023 produced a formulation directly affecting the application of the candidacy requirements. Clarity of legal effects must therefore be assessed according to the character of the decision. A clearly worded operative part, however, does not in itself prove that the substance of the remedy is adequately justified under the Constitution.

Table 2 sets out each parameter's foundation, indicator, evidence, and assessment rule. Each is assessed qualitatively as fulfillled, partially fulfillled, or not demonstrated, or as not engaged where no remedy was granted. No numerical score is assigned, because the parameters are analytical criteria, not binding rules of positive law.[79]

[79] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945, art. 6(2), art. 20(1)–(2), and art. 24C(1).

Table 2. Operationalization of the Five Analytical Parameters

Parameter	Foundation	Indicator and evidence	Assessment rule
1. Necessity of a constitutional remedy	Art. 24C(1) 1945 Constitution; Arts. 56–57 Law 24/2003; Decision 48/PUU-IX/2011	Defect identified and reasons why annulment, a narrower reading, or legislative correction would not cure it (legal considerations)	Fulfilled: both shown. Partially: defect shown, insufficiency of less intrusive remedies not explained. Not demonstrated: no defect requiring the remedy
2. Direct relationship with the norm under review	Art. 56(3) Law 24/2003	Formulation concerns the provision reviewed; scope matches the defect and the petition (petition; operative part)	Fulfilled: scope matches. Partially: wider scope unexplained. Not demonstrated: extends beyond the provision
3. Adequacy and consistency of the *ratio decidendi*	Art. 45(3), (7), (10) Law 24/2003; Situmeang et al.; Wicaksono and Hantoro	Majority-supported reasoning carries the full operative scope and explains departures from earlier decisions (majority and separate opinions; earlier decisions)	Fulfilled: full support, departures explained. Partially: partial support or departure not fully explained. Not demonstrated: no supporting reasoning
4. Respect for legislative discretion	Arts. 6(2), 20(1)–(2) 1945 Constitution; Satriawan and Lailam	Whether several permissible arrangements existed and why the choice could not be left to the lawmakers (considerations on open legal policy; alternatives in petition and separate opinions)	Fulfilled: one arrangement only, or choice left to lawmakers. Partially: minimum criteria set, details left. Not demonstrated: one option prescribed without explanation
5. Clarity of legal effects and follow-up	Art. 24C(1) 1945 Constitution; Art. 47 Law 24/2003; Efendi et al.; Pradana and Setiadi	Applicable norm, addressee, and required action or deadline identified (operative part; implementation)	Fulfilled: all clear. Partially: norm clear, addressee or action unclear. Not demonstrated: norm unclear

Source: Formulated by the authors.

The parameters do not carry equal weight. The first, second, and fourth concern the constitutional justification of the remedy, the third the reasoning carrying it, and the fifth implementation. A deficiency under the first or fourth weighs most heavily, since it indicates a policy choice not shown to be constitutionally required; a deficiency under the fifth concerns follow-up and does not by itself impair the justification of the remedy or the binding force of the operative part.

Applying the five parameters to Decision No. 90/PUU-XXI/2023 shows that the relationship between the alternative formulation and the norm under review can be directly identified, since the interpretation remains connected to the requirements for presidential and vice-presidential candidates under Article 169(q) of the Election Law. That direct relationship, however, does not resolve the

questions of remedial necessity and the limits of legislative discretion. Adding an alternative based on experience in an elected office is a substantive choice requiring its own justification.

As to the adequacy and consistency of reasoning, the comparison with Decisions Nos. 29, 51, and 55/PUU-XXI/2023 shows the need to explain the shift in approach to open legal policy. In the earlier decisions, the age requirement and alternative office-based experience were placed within the lawmakers' policy space, whereas Decision No. 90/PUU-XXI/2023 produced a directly applicable alternative qualification. That difference need not be read as inconsistency merely because the outcomes differ, but the shift requires reasons explaining why the character of the constitutional issue in Decision No. 90/PUU-XXI/2023 justified a form of remedy not used in the related cases.

As to respect for legislative discretion, Decision No. 90/PUU-XXI/2023 directly affected the substance of the candidacy requirements. The limits of the Court's power must therefore be assessed by asking whether the prescription of alternative office-based experience was a necessary consequence of overcoming a constitutional conflict or merely one of several policy options that could be formulated through the legislative process. Where several regulatory options remain constitutionally permissible, their existence is a reason to consider the lawmakers' role in determining the final formulation.

Table 3 applies the parameters separately to each of the four 2023 decisions.

Table 3. Application of the Five Parameters to Decisions Nos. 29, 51, 55, and 90/PUU-XXI/2023

Parameter	29/PUU-XXI/ 2023	51/PUU-XXI/ 2023	55/PUU-XXI/ 2023	90/PUU-XXI/ 2023
1. Necessity of a remedy	Not engaged: no defect found	Not engaged: no defect found	Not engaged: no defect found	Partially fulfillled: defect identified as intolerable injustice ([3.15]); insufficiency of narrower or legislative remedies not explained
2. Direct relationship	Not engaged	Not engaged	Not engaged	Partially fulfillled: same provision, but the operative scope (elected offices) is wider than the petition (regional heads)

Parameter	29/PUU-XXI/ 2023	51/PUU-XXI/ 2023	55/PUU-XXI/ 2023	90/PUU-XXI/ 2023
3. Ratio decidendi	Fulfilled: reasons for not fixing another age stated ([3.20]–[3.21])	Fulfilled: applies Decision 29 and explains restraint as to offices ([3.13.2]–[3.14.2])	Fulfilled: applies Decisions 29 and 51 ([3.15]–[3.16])	Partially fulfillled: departure addressed ([3.12]), but the full operative scope is supported only by the principal opinion
4. Legislative discretion	Fulfilled: age left to the lawmakers	Fulfilled: qualifying offices left to the lawmakers	Fulfilled: qualifying offices left to the lawmakers	Not demonstrated: one of several permissible alternatives prescribed without an explanation why the choice could not be left to the lawmakers
5. Legal effects and follow-up	Fulfilled: norm unchanged	Fulfilled: norm unchanged	Fulfilled: norm unchanged	Fulfilled as to normative certainty: directly applicable reading binding on election management bodies; argumentative certainty affected (see parameter 3)

Source: Authors' assessment based on Tables 1 and 2.

Note: "Not demonstrated" means that the judgment does not show that the criterion is met. It is not a finding that the decision is invalid or that its operative part lacks binding force.

This analysis shows that positive legislator practice cannot be assessed solely by reference to the benefits of a decision, the aim of constitutional protection, or the presence of an alternative formulation in the operative part.[80] The more decisive questions are whether the remedy has a sufficient constitutional basis, is necessary to resolve the issue examined, and does not usurp policy choices still within the lawmakers' competence.[81] The limits of positive legislator practice must therefore

[80] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–325, https://doi.org/10.14710/mmh.41.2.2012.315-325.

[81] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

be assessed through the relationship among the constitutional issue, the *ratio decidendi*, the form of remedy, and the division of powers among state institutions.[82]

The question of limits also bears on the effectiveness of implementation. Efendi, Muhtadi, and Saleh record that 26 of the 107 decisions classified as positive legislature, or approximately 24.30 percent, were found to have been followed up by their addressees.[83] This figure cannot, without further examination, support the conclusion that all other decisions were not implemented. It nonetheless indicates a problem concerning the effectiveness of follow-up to decisions with normative effects.

This problem is all the more relevant because the final and binding nature of the Court's decisions is not always identical to their effective implementation. The Court's decisions apply generally, or *erga omnes*, but the realization of certain legal effects may require action by the lawmakers or other state institutions. Pradana and Setiadi examine the non-implementation of Constitutional Court decisions in relation to the *erga omnes* principle.[84] Positive legislator practice therefore raises questions not only about the power to formulate norms but also about the clarity of institutional responsibilities once a decision has been pronounced.

The broader the normative effect of a decision, the more important it is to identify the institution that must implement it. Directly applicable decisions require certainty as to the meaning of the norm after review, whereas decisions requiring legislative amendment require clarity as to the lawmakers' responsibilities and, where specified, the deadline for compliance. The assessment of positive legislator practice is thus inseparable from the relationship between the Court, the DPR, and the President, the institutional consequences of which are discussed in the next section.

Positive legislator practice in the judicial review of laws in Indonesia cannot be understood as a change in the Court's formal power into that of a lawmaking institution. It is better understood as a change in the character of decisions and in the techniques of constitutional remedy capable of producing normative effects. Decision No. 102/PUU-VII/2009 illustrates a remedy through an operational mechanism protecting the right to vote; Decision No. 48/PUU-IX/2011 illustrates the annulment of provisions restricting the forms of the Court's decisions; Decision No. 91/PUU-XVIII/2020 illustrates a remedy through an obligation to correct the legislative process; and Decision No. 90/PUU-XXI/2023 illustrates the prescription of an alternative qualification that directly alters the application of a statutory norm.

These differences show that the limits of positive legislator practice cannot be drawn through an absolute prohibition of every decision with normative effects. Such a prohibition would risk ignoring the need for a constitutional remedy where

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[82] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

[83] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

[84] Fadly Ikhsan Pradana and Wicipto Setiadi, "Putusan Mahkamah Konstitusi yang Tidak Dilaksanakan dalam Pengujian Undang-Undang Ditinjau dari Asas Erga Omnes (Analisis Putusan Mahkamah Konstitusi Nomor 1/PUU-XI/2013)," *Indonesian State Law Review* 3, no. 2 (2021): 77–88, https://doi.org/10.15294/islrev.v3i2.22998.

annulment alone fails to protect a constitutional right or principle. Equally, positive legislator practice cannot be justified merely by the aim of providing a solution deemed better. What is required is reasoning showing that the remedy is a consequence of the power of constitutional review and does not exceed what is needed to resolve the issue examined.

The principal finding of this study is therefore that the boundary between constitutional interpretation and the creation of new norms must be drawn according to the quality of the relationship between the constitutional violation found and the remedy prescribed. A decision may still be understood as an exercise of the power of review where its normative formulation is necessary to overcome a constitutional problem, is directly related to the norm under review, is supported by an adequate *ratio decidendi*, respects legislative discretion, and produces clear legal effects. Conversely, where a decision prescribes one of several policy choices not specifically required by the Constitution, a stronger justification is needed to prevent the review function from shifting into a usurpation of legislative power.

With respect to Decision No. 90/PUU-XXI/2023, the principal issue is not merely that the Court produced an alternative to the age requirement, but whether that alternative was adequately justified in comparison with the approach taken in Decisions Nos. 29, 51, and 55/PUU-XXI/2023. The comparison highlights the importance of distinguishing the Court's power to review open legal policy from a power to determine directly applicable policy alternatives. Assessing the limits of positive legislator practice must thus address when normative interpretation is necessary to uphold the Constitution, why a particular remedy must be chosen, and to what extent the formulation may be prescribed without encroaching on the lawmakers' policy space.

The analytical contribution of this section therefore lies in the formulation of five limiting parameters: the necessity of a constitutional remedy, a direct relationship with the norm under review, the adequacy and consistency of the *ratio decidendi*, respect for legislative discretion, and the clarity of legal effects and follow-up.[85] These parameters provide a framework for assessing positive legislator practice more measurably, rather than merely on the basis of the presence of a new norm or differences between operative parts.[86] The framework also forms the basis for analyzing the implications of positive legislator practice for the division of powers, checks and balances, legal certainty, and inter-institutional relations in the Indonesian constitutional system.[87]

The framework is not merely confirmatory: a decision that does not fully satisfy one parameter may remain defensible. Decision No. 102/PUU-VII/2009 prescribed operational conditions, such as presenting a family card with the identity card, voting at the polling station matching the card's address, prior registration

[85] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945.

[86] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature)," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–325, https://doi.org/10.14710/mmh.41.2.2012.315-325.

[87] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

with the polling committee, and voting only in the final hour.[88] The Constitution does not prescribe such details, so the fourth parameter is, in this study's assessment, only partially fulfillled; yet the remedy remains defensible because, without a directly applicable mechanism, unregistered citizens could not have voted in the election governed by the law under review. Hypothetically, a remedy confined to an unconstitutionally excluded group that fails to specify which institution must adjust implementing regulations would only partially fulfill the fifth parameter, yet would remain justified and binding.

Implications of the Constitutional Court's Development as a Positive Legislator for the Indonesian Constitutional System

The development of positive legislator practice in judicial review has implications extending beyond changes in the form of the Court's operative rulings. It affects the division of powers among state institutions, checks and balances, legal certainty, the effectiveness of implementation, and the institutional legitimacy of constitutional adjudication. In the Indonesian constitutional system, Article 20(1) of the 1945 Constitution vests the power to make laws in the DPR, while Article 24C(1) confers on the Court the power to review laws against the 1945 Constitution. That division affirms the distinction between the legislative function and the function of constitutional review. However, when the Court not only annuls a norm but also lays down an interpretation that determines the validity or application of a provision, the effects of its decision may intersect with the domain of norm-making. This is why positive legislator practice warrants analysis in terms of the relationship between effective constitutional protection and the limits of institutional power.[89]

The first implication concerns the strengthening of constitutional rights protection and the effectiveness of constitutional remedies. Under the negative legislator concept, judicial review essentially results in the removal of the binding force of a norm that contravenes the Constitution. Annulment, however, does not always resolve a constitutional problem adequately; in some circumstances the disappearance of a provision may create a legal vacuum or uncertainty as to which rule applies after the decision is pronounced. The development of conditionally constitutional and conditionally unconstitutional decisions therefore enables the Court to provide more operational remedies through specific interpretations, deadlines for correction, or the regulation of the legal effects of its decisions.

This development can be seen in Decision No. 102/PUU-VII/2009, which established a mechanism allowing citizens who were eligible to vote but not listed on the final voter list to use certain identity documents. The decision shows that constitutional interpretation can overcome obstacles to the exercise of the right to vote without relying solely on annulment.[90] Decision No. 91/PUU-XVIII/2020 reflects a different remedy: a declaration that the enactment of the Job Creation Law was conditionally unconstitutional, coupled with an opportunity for the lawmakers

[88] Constitutional Court of the Republic of Indonesia, Decision No. 102/PUU-VII/2009, July 6, 2009, paras. [3.18]–[3.20] and operative part, point 2.

[89] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

[90] Constitutional Court of the Republic of Indonesia, Decision No. 102/PUU-VII/2009, July 6, 2009, operative part, point 2.

to make corrections within a specified period.[91] Both decisions show that the form of a constitutional remedy must be tailored to the character of the issue, whether it concerns the protection of rights or compliance with lawmaking procedures.

The Court's capacity to grant more operational remedies does not mean, however, that every constitutional problem must be resolved through a new normative formulation. Conditional decisions may prevent legal vacuums and provide certainty in application, but they may also broaden the regulatory effects produced through the judicial process. Naue et al. discuss the development of conditional decisions and the problems associated with the exercise of the power of review.[92] Accordingly, the effectiveness of a remedy cannot be measured merely by a decision's ability to produce a directly applicable provision; it must also be assessed by the relationship between the remedy and the constitutional violation found.

There is thus a difference between a remedy necessary to uphold the Constitution and the determination of a policy that judges consider better. Where an interpretation is a necessary consequence of eliminating a conflict with the Constitution, it may be understood as part of the review function. Conversely, where several regulatory options are equally permitted by the Constitution, the choice among them in principle lies within the lawmakers' policy space. The effectiveness of positive legislator practice must therefore be assessed according to the need for a constitutional remedy, not solely according to the practical benefits of the resulting formulation.

Effectiveness also concerns implementation. The study by Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, published in Jurnal Konstitusi, shows that of the 198 judicial review decisions granting petitions during 2012–2022, 107, or approximately 54.04 percent, were classified as positive legislature, and that 26 of these were found to have been followed up by their addressees within the scope of the study.[93] Although published in a journal under the institutional auspices of the Court, that classification and those findings are the results of the authors' academic research, not official statistics or an institutional position of the Court. The number of decisions recorded as followed up cannot therefore be taken to mean that all other decisions were not implemented. The finding more accurately shows that the Court's capacity to produce normative interpretations and the effectiveness of their implementation are two distinct issues requiring separate analysis.

The second implication concerns the relationship among the Court, the DPR, and the President within checks and balances. The power of judicial review places the Court in the position of exercising constitutional control over legislation. Annulling a norm that contravenes the 1945 Constitution is an exercise of the review function, not a usurpation of the lawmaking power. The matter becomes more complex, however, when the Court lays down an interpretation that directly

[91] Constitutional Court of the Republic of Indonesia, Decision No. 91/PUU-XVIII/2020, November 25, 2021, operative part, points 3–5.

[92] Atiek Pratiwi Putri Naue et al., "Inkonstitusional Bersyarat dan Problem Kepastian Hukum dalam Pengujian Peraturan Perundang-Undangan," *AHKAM: Jurnal Hukum Islam dan Humaniora* 5, no. 1 (2026): 734–757, https://doi.org/10.58578/ahkam.v5i1.9286.

[93] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

determines the substance of the norm after the decision is pronounced. In such circumstances, the decision not only limits the operation of a provision enacted by the DPR and the President, but may also affect the space for applying policies previously determined through the legislative process.

This problem is evident in Decision No. 90/PUU-XXI/2023 on Article 169(q) of the Election Law, which originally required presidential and vice-presidential candidates to be at least 40 years old. By partially granting the petition and declaring the provision conditionally unconstitutional insofar as it is not construed to include persons who have held or are holding an office filled through general elections, including regional head elections, the Court did not abolish the 40-year minimum but prescribed an alternative qualification that changed the scope of application of the candidacy norm.[94]

The normative effect of Decision No. 90/PUU-XXI/2023 shows that constitutional interpretation can change the scope of a statutory provision without a textual amendment by the DPR and the President. After the decision was pronounced, Article 169(q) of the Election Law could no longer be applied solely on the basis of the original age requirement but had to be read together with the interpretation laid down by the Court. In this respect, positive legislator practice displays a constructive character, since the decision did not merely negate the operation of a norm but determined a formulation that became part of its application.

That change in normative effect does not in itself prove that the Court usurped legislative power. Constitutional assessment must focus on the reasons for prescribing the alternative, including whether it was necessary to resolve a constitutional conflict or was one of several policy options that the lawmakers could have determined. The distinction matters because not every decision producing a new norm violates the separation of powers, just as not every remedy deemed effective can be justified without limit.

Within checks and balances, the relationship among the Court, the DPR, and the President should not be understood as one of mutual substitution. The DPR and the President exercise the lawmaking function, while the Court ensures that its products conform to the Constitution. The lawmakers' power cannot be used to maintain a norm contrary to the 1945 Constitution; conversely, the power of review cannot serve as a basis for the Court to determine every policy choice still within legislative discretion. This boundary is essential to keep constitutional control effective without blurring the division of powers among state institutions.[95]

This study therefore considers that the remedy chosen by the Court must take account of the lawmakers' position within the constitutional system. Where a constitutional problem can be resolved by annulment or by an interpretation directly related to the constitutional violation, the remedy falls within the review function. Where the solution requires choosing among several equally constitutional regulatory options, however, the policymaking space of the DPR and

[94] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, operative part, point 2.

[95] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

the President must be respected. Positive legislator practice thus requires increasingly strong justification as a decision's effects reach further into the substance of legislative policy.

The third implication concerns the limits of the open legal policy doctrine and the consistency of constitutional interpretation. The doctrine grants the lawmakers room to determine policy on matters not regulated in detail by the Constitution, but that room does not place a provision beyond constitutional review. The Court remains empowered to assess whether a legislative policy contravenes the rights, principles, or provisions of the 1945 Constitution. What must be distinguished is the Court's power to review the constitutionality of a policy and a power to determine which policy alternative ought to apply.

Where more than one constitutionally acceptable arrangement exists, Article 24C(1) empowers the Court to assess constitutionality, while Article 20(1) and (2) preserve the legislative function of the DPR and the President.[96] One response is to identify the defect and allow the lawmakers to correct it within a deadline, as in Decision No. 91/PUU-XVIII/2020.[97] Another is to prescribe minimum corrective criteria while leaving details to the lawmakers, as illustrated by Justice Enny Nurbaningsih's concurring opinion in Decision No. 90/PUU-XXI/2023, which links the alternative to experience as a governor under requirements prescribed by law.[98] A directly applicable mechanism may also be used where a right cannot await legislative correction, as in Decision No. 102/PUU-VII/2009.[99] These illustrate differing degrees of intervention, rather than a hierarchy established by positive law.

The four 2023 decisions illustrate the issue. Decision No. 29/PUU-XXI/2023 rejected a request to change the age threshold, treating the requirement as legislative policy.[100] Decision No. 51/PUU-XXI/2023 rejected a proposed alternative based on experience as a state administrator.[101] Decision No. 55/PUU-XXI/2023 likewise left the proposed alternative within the lawmakers' policy space.[102] Decision No. 90/PUU-XXI/2023 partially granted the petition and added an alternative based on experience in an elected office.[103]

The difference in outcome cannot immediately be taken as proof that the Court is barred from changing its interpretive approach. Cases reviewing the same provision may differ in petition structure, grounds of review, or the constitutional

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[96] Republic of Indonesia, Constitution of the Republic of Indonesia of 1945, art. 20(1)–(2) and art. 24C(1).

[97] Constitutional Court of the Republic of Indonesia, Decision No. 91/PUU-XVIII/2020, November 25, 2021, operative part, points 3–5.

[98] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, concurring opinion of Constitutional Justice Enny Nurbaningsih, para. [6.7].

[99] Constitutional Court of the Republic of Indonesia, Decision No. 102/PUU-VII/2009, July 6, 2009, operative part, point 2.

[100] Constitutional Court of the Republic of Indonesia, Decision No. 29/PUU-XXI/2023, October 16, 2023, paras. [3.20]–[3.21].

[101] Constitutional Court of the Republic of Indonesia, Decision No. 51/PUU-XXI/2023, October 16, 2023, paras. [3.13.2]–[3.14.2].

[102] Constitutional Court of the Republic of Indonesia, Decision No. 55/PUU-XXI/2023, October 16, 2023, paras. [3.15]–[3.17].

[103] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, paras. [3.12]–[3.15] and operative part, point 2.

issue raised. Decision No. 90/PUU-XXI/2023 itself states that open legal policy is, in principle, the lawmakers' policy space but does not lie wholly beyond constitutional review. Characterizing a policy as open legal policy does not, therefore, remove the Court's power to assess its constitutionality.[104]

A shift in approach across a series of decisions on the same object of review nonetheless calls for more measured constitutional reasoning. A difference in petition structure is not a sufficient reason unless the decision explains why that difference is constitutionally relevant and how it justifies the remedy chosen. Situmeang, Ardilafiza, and Dinata analyze the shift in the Court's approach across the decisions on the age requirement as a problem of consistency.[105] That assessment is an academic conclusion of its authors, not an official acknowledgment by the Court of inconsistency in its decisions.

The more fundamental issue in Decision No. 90/PUU-XXI/2023 is not merely the difference in outcome from the three earlier decisions, but the relationship between the constitutional reasons relied upon and the alternative norm prescribed. Arguments based on popular sovereignty, the opportunity to participate in government, and experience in elected office may support the relevance of a qualification. However, reasons showing that a policy alternative deserves consideration must be distinguished from reasons showing that the Constitution requires the alternative to be laid down directly by the Court. The distinction matters because the review of a legislative policy need not always end with the judiciary substituting its own policy choice.

The debate on consistency is also reflected in the configuration of judicial opinions in Decision No. 90/PUU-XXI/2023. The decision contains concurring opinions by Constitutional Justices Enny Nurbaningsih and Daniel Yusmic P. Foekh, and dissenting opinions by Constitutional Justices Wahiduddin Adams, Saldi Isra, Arief Hidayat, and Suhartoyo. In his dissent, Saldi Isra questioned, among other things, the shift in approach to Article 169(q) of the Election Law compared with Decisions Nos. 29, 51, and 55/PUU-XXI/2023. That criticism is a dissenting opinion, not reasoning representing the Court as a whole. Its existence nonetheless shows that the limits of open legal policy, the consistency of interpretation, and the justification of constitutional remedies were contested in the adjudication of the case.[106]

The implication of positive legislator practice for the open legal policy doctrine therefore lies in the need to clarify the parameters of review and the reasons for prescribing remedies. The Court must distinguish whether a policy contravenes the Constitution, whether that conflict requires a particular interpretation, and whether the interpretation chosen is a necessary consequence of review. Changes in interpretive approach remain possible, but they must be accompanied by legal

[104] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, para. [3.13.2].

[105] Selvi Christina Situmeang, Ardilafiza, and Ari Wirya Dinata, "Inconsistency of the Constitutional Court Regarding the Minimum Age Requirement for Presidential and Vice-Presidential Candidates: Inkonsistensi Mahkamah Konstitusi Terkait Syarat Minimal Usia Calon Presiden dan Wakil Presiden," *Jurnal Konstitusi* 21, no. 4 (2024): 609–634, https://doi.org/10.31078/jk2145.

[106] Constitutional Court of the Republic of Indonesia, Decision No. 90/PUU-XXI/2023, October 16, 2023, dissenting opinion of Constitutional Justice Saldi Isra.

reasons explaining the relationship among the constitutional issue, the grounds of review, and the normative effects of the decision.

The fourth implication concerns the clarity of the *ratio decidendi* and legal certainty in decisions with normative effects. Legal certainty depends not only on the clarity of the operative part but also on the relationship between that part and the legal reasoning underlying it. In a decision annulling a norm, the principal legal effect is the loss of binding force of a provision. In a decision prescribing an interpretation or alternative formulation, the legal effects may include the determination of requirements, exceptions, or mechanisms for applying the norm. The broader the normative effect, the more important the clarity of the constitutional reasons supporting the formulation.

Decision No. 90/PUU-XXI/2023 is relevant here because the justices supporting the partial grant did not share identical reasoning. The decision has been analyzed as a plurality decision because the five justices supporting the outcome did not all rely on the same grounds: three formed the principal opinion and two wrote concurring opinions. Wicaksono and Hantoro analyze this problem through the narrowest grounds approach, which seeks to identify the most limited reasoning capable of explaining the common ground among the justices supporting the outcome.[107]

The narrowest grounds approach in that study is an academic construct for understanding the *ratio decidendi* of a decision with divergent reasoning, not a rule that automatically alters or limits the operative part of Decision No. 90/PUU-XXI/2023. The distinction matters because the operative part retains its legal effect as formulated by the Court. From an academic perspective, however, divergent reasoning among the justices may raise the question of the extent to which a particular rationale can be regarded as the common basis supporting the scope of the norm in the operative part.[108]

Legal certainty in this context has two interrelated dimensions. The first is normative certainty, namely clarity as to which provision applies after the decision is pronounced. The second is argumentative certainty, namely clarity as to the constitutional basis justifying that provision. Normative certainty enables state institutions and the public to know which rule to apply, while argumentative certainty enables changes in interpretation to be understood as the product of constitutional review with a legal basis, rather than as a policy choice of the judges.

Legal certainty does not require the Court always to maintain the approach taken in its previous decisions. Constitutional interpretation may evolve where a legal basis and a constitutional issue justify it.[109] A change in approach must,

[107] Dian Agung Wicaksono and Bimo Fajar Hantoro, "Pemaknaan Putusan Pluralitas dalam Syarat Pencalonan Presiden dan Wakil Presiden: Kajian Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," *Jurnal Yudisial* 17, no. 2 (2024): 147–166, https://doi.org/10.29123/jy.v17i2.702.

[108] Dian Agung Wicaksono and Bimo Fajar Hantoro, "Pemaknaan Putusan Pluralitas dalam Syarat Pencalonan Presiden dan Wakil Presiden: Kajian Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," *Jurnal Yudisial* 17, no. 2 (2024): 147–166, https://doi.org/10.29123/jy.v17i2.702.

[109] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

however, be explained openly, particularly where a decision produces a generally applicable norm affecting the exercise of the powers of state institutions. The consistency of the *ratio decidendi*, the clarity of the reasons for changing an interpretation, and the coherence between legal reasoning and the operative part are therefore essential to legal certainty in positive legislator practice.[110]

The fifth implication concerns institutional legitimacy and the ethical accountability of constitutional justices. Positive legislator practice heightens the importance of independence, integrity, and transparency in judicial decision-making, owing to the broad legal effects that judicial review can produce. When a decision not only annuls a norm but also lays down an interpretation affecting the implementation of state policy, public confidence in the independence and quality of the decision-making process becomes integral to the legitimacy of constitutional adjudication.

This became evident after Decision No. 90/PUU-XXI/2023 was pronounced. In Decision No. 02/MKMK/L/11/2023, the Constitutional Court Honorary Council (Majelis Kehormatan Mahkamah Konstitusi, MKMK) found that Constitutional Justice Anwar Usman had violated several principles of the Code of Ethics and Conduct of Constitutional Justices, including impartiality, integrity, competence and equality, independence, and propriety and decorum. The MKMK imposed the sanction of removal from the office of Chief Justice of the Constitutional Court.[111]

These ethical findings and sanctions must be clearly distinguished from the validity of Decision No. 90/PUU-XXI/2023. The MKMK proceedings concerned the ethical accountability of a constitutional justice, whereas the constitutionality of the norm and the legal effects of the decision fall within the framework of the power of judicial review. The MKMK decision therefore cannot be treated as annulling Decision No. 90/PUU-XXI/2023. The distinction is necessary so that the assessment of judicial conduct is not conflated with the legal status of the operative part already pronounced.[112]

Although they operate within different accountability frameworks, both aspects bear on the institutional legitimacy of the Court. The finality of decisions demands respect for their legal effects, while judicial independence requires mechanisms safeguarding the integrity of judges. Finality does not exempt judicial conduct from ethical accountability; conversely, an ethical violation does not automatically nullify the legal effects of a decision already pronounced. The legitimacy of constitutional adjudication must therefore be maintained through the quality of legal reasoning, the independence of proceedings, the integrity of judges, and effective ethical oversight.

In positive legislator practice, preserving that legitimacy becomes all the more important because the normative effects of decisions may directly affect state policy. Strengthening accountability should therefore not take the form of empowering

[110] Selvi Christina Situmeang, Ardilafiza, and Ari Wirya Dinata, "Inconsistency of the Constitutional Court Regarding the Minimum Age Requirement for Presidential and Vice-Presidential Candidates: Inkonsistensi Mahkamah Konstitusi Terkait Syarat Minimal Usia Calon Presiden dan Wakil Presiden," *Jurnal Konstitusi* 21, no. 4 (2024): 609–634, https://doi.org/10.31078/jk2145.

[111] Constitutional Court Honorary Council, Decision No. 02/MKMK/L/11/2023, November 7, 2023.

[112] Constitutional Court Honorary Council, Decision No. 02/MKMK/L/11/2023, November 7, 2023.

political institutions to control the substance of the Court's decisions. It is better pursued through the enforcement of ethical standards, transparency of legal reasoning, the management of conflicts of interest, and accountability mechanisms exercised in accordance with the powers of each institution. In this way, the independence of constitutional adjudication can be preserved without neglecting the demand for institutional integrity.

The sixth implication concerns the implementation of decisions and the responsibilities of state institutions. The final and binding nature of the Court's decisions provides certainty as to their legal status once pronounced. That binding force does not, however, mean that all the normative effects of a decision materialize without further action. In some cases a decision can be applied directly by the implementing institutions; in others, implementation requires statutory amendment, adjustment of implementing regulations, or administrative action by the competent institutions.

Decision No. 90/PUU-XXI/2023 illustrates a decision that directly changes the candidacy norm. Once the Court laid down its interpretation of Article 169(q) of the Election Law, the election management bodies were required to observe it in exercising their powers. A judicial review decision can thus affect the conduct of constitutional processes without awaiting a textual amendment of the statute through the legislative process.

Positive legislator practice therefore has consequences beyond the relationship between the Court and the parties. A normative interpretation laid down in a decision may have generally applicable, or *erga omnes*, legal effects that bind the state institutions responsible for applying the relevant norm. The *erga omnes* character, however, cannot be equated with a capacity on the part of the Court to implement all the effects of its decisions itself. The Court exercises the function of constitutional review, while implementing action remains with the institutions competent in the relevant field.

The effectiveness of implementation must therefore be differentiated according to the character of the legal effects. First, some decisions produce interpretations or norms that can be applied directly. Second, some require the adjustment of implementing regulations or administrative action. Third, some require action by the lawmakers to correct an arrangement found constitutionally defective. The distinction matters because each type has different institutional consequences and cannot be measured by an identical yardstick of follow-up.

The findings of Efendi, Muhtadi, and Saleh on the follow-up of positive legislature decisions show that the normative effects of a decision do not in themselves guarantee its implementation.[113] The assessment of follow-up must nevertheless take into account the form of the decision, the type of action required, and the institution responsible. A directly applicable decision does not necessarily require statutory amendment, whereas a decision affording the lawmakers an opportunity to make corrections requires legislative action. The measure of effective implementation must accordingly correspond to the obligations actually arising from each decision.

[113] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

From the perspective of the relationship among the Court, the DPR, and the President, this calls for clearer follow-up mechanisms without altering the constitutional division of powers. The DPR and the President remain responsible for the legislative function, including amending laws where necessary to conform to the Court's decisions, while implementing institutions must observe the legal effects of those decisions in exercising their powers. Such follow-up must not be understood as a re-examination of whether the Court's decision was right, but as the performance of constitutional obligations in accordance with each institution's powers.

This study therefore considers that effective implementation requires clarity on three matters: first, the nature of the legal effects, namely whether the interpretation laid down is directly applicable or requires further action; second, the institution with the power and responsibility to give effect to those legal effects; and third, the form of action required, whether administrative adjustment, amendment of implementing regulations, or statutory correction. Clarity on these three matters is necessary for the final and binding nature of the Court's decisions to be realized in the practice of state administration.

These six implications show that positive legislator practice cannot be assessed solely by its capacity to strengthen constitutional protection. It also affects inter-institutional relations, the consistency of constitutional interpretation, legal certainty, judicial legitimacy, and the effectiveness of implementation.[114] The greater the normative effect of a decision, the stronger the need to ensure that the interpretation laid down has an adequate constitutional basis and does not usurp policy choices that remain within the lawmakers' competence.[115]

Building on the foregoing, this study develops the institutional implications of the five limiting parameters formulated in the preceding section. The first parameter, the necessity of a constitutional remedy, requires the Court to explain why annulment alone is inadequate to resolve the constitutional problem. The second, a direct relationship between the remedy and the norm under review, ensures that the interpretation laid down does not go beyond the constitutional issue examined. The third, the adequacy and consistency of the *ratio decidendi*, is particularly important where the Court departs from its previous approach. The fourth, respect for legislative discretion, requires a distinction between interpretation necessary to uphold the Constitution and the determination of policy alternatives that the lawmakers may still choose. The fifth, the clarity of legal effects and follow-up, is necessary to ensure that the resulting norm can be applied in accordance with the powers of the relevant state institutions.

Applying these parameters has consequences for the relationship among the Court, the DPR, and the President. Where a constitutional problem can be resolved by annulment without creating a legal vacuum that impedes constitutional protection, that remedy should be considered first. Where outright annulment risks

[114] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 20, no. 4 (2023): 622–639, https://doi.org/10.31078/jk2044.

[115] Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–584, https://doi.org/10.31078/jk1636.

uncertainty or requires the rearrangement of the regulatory framework, the Court may consider a conditional interpretation or afford the lawmakers an opportunity to make corrections. A directly applicable normative formulation, by contrast, requires stronger constitutional reasons, especially where it determines policy substance previously within the legislative domain.

This framework is not intended as an absolute hierarchy of remedies, since the character of a constitutional problem may call for different solutions. It nonetheless provides a basis for assessing whether the degree of normative intervention through a decision is proportionate to the remedial need identified. The remedy with the broadest regulatory effect should therefore not be chosen merely because it is deemed more effective or practical, but because constitutional reasons explain why it must be prescribed.

Applied to Decision No. 90/PUU-XXI/2023, this framework shows that the assessment cannot stop at the difference in outcome from Decisions Nos. 29, 51, and 55/PUU-XXI/2023. The more fundamental question is whether the constitutional reasoning relied upon adequately justifies the prescription of an alternative qualification with direct normative effects. Institutionally, that alternative affects the scope for applying candidacy requirements previously determined by the lawmakers. The analysis of Decision No. 90/PUU-XXI/2023 must therefore connect the need for a constitutional remedy with the limits of legislative discretion, rather than assessing only the benefits or practical consequences of the change in the norm.

This study argues that positive legislator practice is constitutionally defensible where the remedy prescribed is a necessary consequence of judicial review and does not go beyond the constitutional issue examined. Where several regulatory alternatives are equally permitted by the Constitution, the Court must give specific reasons if it chooses to prescribe one of them directly. Absent such justification, there is a risk that the power of review will be used to determine policy substance that properly belongs to the legislative process. Conversely, if the Court were entirely unable to provide a normative remedy where annulment fails to protect a constitutional right, the review function would risk losing its effectiveness.

The development of the Court's role as a positive legislator thus has dual implications for the Indonesian constitutional system. On the one hand, it may strengthen constitutional supremacy, the effectiveness of judicial review, and the protection of constitutional rights through remedies not confined to annulment. On the other hand, it creates a need to preserve the boundary between the review function and the legislative function, the consistent application of open legal policy, legal certainty, the effective implementation of decisions, and the legitimacy and accountability of the Court as an institution.

Positive legislator practice must accordingly be understood as a characteristic or consequence of the exercise of the power of constitutional review, not as a new legislative power vested in the Court. Its use requires strong, transparent, consistent, and proportionate constitutional justification so that the review function remains effective in protecting the Constitution without blurring the division of powers established by the 1945 Constitution.

Conclusion

The development of the Constitutional Court's role from negative legislator toward positive legislator practice does not signify a change in the Court's

constitutional power into that of a lawmaking institution; rather, it reflects the evolving character of its decisions and of the techniques of constitutional remedy employed in the exercise of judicial review. This development is evident in the use of conditionally constitutional and conditionally unconstitutional decisions, as well as other remedies producing normative effects. The presence of a normative formulation in a decision does not in itself indicate an excess of power; the assessment must rest on the need for a constitutional remedy, the relationship between the norm under review and the remedy, and the limits of the Court's power within the separation of powers. The comparison of Decisions Nos. 29, 51, 55, and 90/PUU-XXI/2023 shows that differences in petition structure may affect the constitutional assessment but do not automatically justify a shift in approach to open legal policy. The prescription of an alternative candidacy requirement in Decision No. 90/PUU-XXI/2023 underscores the importance of distinguishing the Court's power to review legislative policy from a power to determine regulatory choices that remain within the lawmakers' discretion. This study therefore formulates five parameters for assessing the constitutional limits of positive legislator practice: the necessity of a constitutional remedy, a direct relationship with the norm under review, the adequacy and consistency of the *ratio decidendi*, respect for legislative discretion, and the clarity of legal effects and follow-up.

Positive legislator practice also has implications for the Indonesian constitutional system, particularly for the protection of constitutional rights, the relationship among the Court, the DPR, and the President, the application of open legal policy, legal certainty, institutional legitimacy, and the effectiveness of implementation. On the one hand, interpretations with normative effects can strengthen judicial review where annulment alone fails to provide an adequate constitutional remedy. On the other hand, such practice risks blurring the boundary between review and lawmaking where the Court determines policy alternatives without sufficient constitutional justification. The principal finding of this study is that the limits of positive legislator practice are determined not by the mere presence of a new norm in the operative part, but by the extent to which that formulation is a necessary consequence of constitutional review. The exercise of that power must be supported by strong, consistent, and proportionate legal reasoning while respecting the power of the DPR and the President as lawmakers.

As to its application, the findings suggest that the Court should provide more measured legal reasoning when laying down an interpretation or normative formulation, by explaining the constitutional violation found, why annulment alone is inadequate, and the direct relationship between the issue reviewed and the remedy prescribed. In cases concerning open legal policy, the Court should clearly distinguish the power to review the constitutionality of a policy from the determination of regulatory alternatives that remain within the lawmakers' discretion, and should explain any departure from previous decisions consistently through its *ratio decidendi*. The DPR and the President, for their part, should improve the accuracy and consistency of their follow-up to the Court's decisions in accordance with their constitutional powers, supported by a more systematic mechanism for monitoring implementation that distinguishes decisions that are directly applicable, those requiring adjustment of implementing regulations, and those requiring statutory amendment, while preserving the independence of the

Court, the ethical accountability of constitutional justices, and the division of powers among state institutions. Future studies could test the five parameters against a broader set of decisions beyond the cases examined here and could trace empirically how decisions with normative effects are implemented by the relevant institutions.

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