

## Examining the Constitutional Court's Positive Legislature Decisions in Indonesia's Hierarchy of Legal Norms

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Submission Track:	ABSTRACT
Received:	<b>Purpose of the study:</b> The objective of this research is to investigate the positive legislature decision of the Constitutional Court, whose hierarchy is ambiguous in the order of Indonesian legal norms.
August 22, 2024	<b>Methodology:</b> This study utilized a doctrinal legal research method with a legal realism approach. The data were sourced from primary, secondary, and tertiary legal materials. The authors employed the literature study as the method to collect data that were then qualitatively analysed.
Final Revision:	<b>Results:</b> The results of this study indicate that from a formal perspective, the positive legislature decision is a court verdict that falls under the jurisdiction of the judicial branch of power. However, from a material perspective, it encompasses elements such as regulations ( <i>regeling</i> ) that are genuinely located within the executive and legislative branches of power.
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Considering the presence of norms (*regeling*) in the Positive Legislature Decision, it is necessary to evaluate its position within the hierarchy of legal norms in Indonesia.

**Applications of this study:** Constitutional judges can use this research as a reference in making positive legislative decisions. It can also be used as a reference in forming laws as a follow-up to the Constitutional Court's decision.

**Novelty/Originality of this study:** This research revealed that the Constitutional Court's positive legislature decision includes elements of legal norms, also known as *regeling*, such as statutory regulations. Consequently, it is imperative to evaluate the position of courtly decisions within the hierarchical structure of legal norms in Indonesia. It is also crucial to find the legal reasoning for the Constitutional Court's positive legislature decision.

**Keywords:** *Constitutional Court Decisions, Positive Legislature, Legal Norms, Legal Hierarchy*

### **ABSTRAK**

**Tujuan Penelitian:** Penelitian ini bertujuan untuk mengkaji putusan perundang-undangan positif Mahkamah Konstitusi yang hierarkinya masih rancu dalam tatanan norma hukum Indonesia.

**Metodologi:** Penelitian ini menggunakan metode penelitian hukum doktrinal dengan pendekatan realisme hukum. Data yang digunakan bersumber dari bahan hukum primer, sekunder, dan tersier. Metode pengumpulan data dilakukan dengan studi kepustakaan yang kemudian dianalisis secara kualitatif.

**Hasil Penelitian:** Hasil penelitian ini menunjukkan bahwa dari segi formil, putusan perundang-undangan positif merupakan putusan pengadilan yang berada di bawah yurisdiksi cabang kekuasaan yudikatif. Namun, dari segi materiil, putusan perundang-undangan positif mengandung unsur-unsur seperti peraturan perundang-undangan (*regeling*) yang secara hakiki berada di bawah cabang kekuasaan eksekutif dan legislatif. Melihat keberadaan norma (*regeling*) dalam Putusan Perundang-Undangan Positif, maka perlu dikaji kedudukannya dalam hierarki norma hukum di Indonesia.

**Aplikasi Penelitian:** Hasil penelitian ini dapat dijadikan acuan bagi hakim konstitusi dalam mengambil keputusan perundang-undangan positif. Dapat pula dijadikan sebagai acuan dalam pembentukan peraturan perundang-undangan sebagai tindak lanjut putusan Mahkamah Konstitusi.

**Kebaruan/Keaslian penelitian ini:** Penelitian ini mengungkap bahwa putusan MK yang bersifat positif mengandung unsur norma hukum, yang juga dikenal dengan istilah *regeling*,

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*seperti peraturan perundang-undangan. Oleh karena itu, penting untuk mengevaluasi kedudukan putusan pengadilan dalam struktur hierarki norma hukum di Indonesia. Penting pula untuk menemukan alasan hukum di balik putusan MK yang bersifat positif tersebut.*

**Kata Kunci:** Putusan MK, Legislatif Positif, Norma Hukum, Hirarki Hukum

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## INTRODUCTION

Article 24C clause (1) of the Republic of Indonesia's 1945 Constitution grants the Constitutional Court various powers, including the ability to review laws in light of the Constitution (judicial review). At first, the Constitutional Court had only three decision models for judicial review cases. These models included granting the petition, declaring the petition unacceptable, and rejecting the petition as legally null and void. These three decision models are crucial to verify whether or not legislation complies with the Constitution. If the Constitutional Court's decision grants the petition, it functions as a negative legislature by nullifying the law created by the legislative institution due to its inconsistency with the 1945 Constitution (Asy'ari, Hilipito, & Ali, 2016).

The role of the Constitutional Court as a negative legislature was justified by Hans Kelsen, who emphasised the court's limited authority to cancel or declare laws not legally binding (Yowell, 2019). In his book, "General Theory of Law and State", Kelsen argues that a court with the power to invalidate laws, whether on an individual or general basis, essentially acts as a negative legislature (Kelsen, 2017). According to Kelsen, it is important for Constitutional Court judges to practice judicial restraint. This means that the court should avoid excessive interference with the laws created by legislative institutions. Constitutional judges who prioritise judicial restraint aim to preserve the established laws enacted by the legislative body unless there is a compelling justification to modify them. This indicates that the Constitutional Court is restricted from making regulatory decisions, such as those made by legislative institutions, in order to ensure that its rulings remain within the boundaries of its judicial authority (Roux, 2018).

Nevertheless, the Constitutional Court began to transition from its status as a negative legislature to that of a positive legislature. This is because, over time, the cases it handled became more intricate. This function has been expanded, as evidenced by the Constitutional

Court's decision to establish new norms to replace the norms of the laws it has reviewed (Jafar, 2017). Initially, the Constitutional Court's decision was limited to granting the petition, declaring the petition unacceptable, and rejecting the petition. However, in order to address the complexities of constitutional practices, the Court also developed alternative decision models, including *conditionally constitutional* and *conditionally unconstitutional* (Mahrus Ali & Rahmawaty Hilipito dan Syukri Asy, 2015).

The Constitutional Court is perceived to have transitioned from a negative legislature to a positive legislature, as evidenced by the two aforementioned decision models. Constitutional Court Decision No. 90/PUU-XXI/2023 is an example of a positive legislature decision. This decision establishes a new standard that allows any Indonesian citizen to run for president or vice president as long as they have served as a regional head, even if they are under the age of 40. Another example is Constitutional Court Decision No. 97/PUU/XIV/2016, which also establishes new norms. This decision allows religious adherents to express their beliefs on their electronic identification cards and family cards. These two decisions are merely a small sample of the Court's positive legislative decisions. In the Indonesian context, a positive legislature decision is a form of judicial activism that is defined by a regulatory judgement that determines whether the law under review is constitutional or unconstitutional, provided that it adheres to the standards established by the Court. Acting as a positive legislature, the Constitutional Court has established itself as the third chamber in the legislative process, following the Parliament (the Republic of Indonesia's House of Representatives) and the President (Láštíc & Steuer, 2018).

The positive legislative decision of the Constitutional Court can also be referred to as a non-self-implementing decision, as it cannot be correctly implemented at the implementation level without the formation of a new law or revision. Article 10 clause (1) of Law No. 12 of 2011 on the Establishment of Laws and Regulations explicitly stipulates that the "follow-up" to the Constitutional Court's decisions must be regulated by law in order to ensure their proper implementation. This is particularly true for positive legislature decisions. Despite the fact that the Constitutional Court's decision is immediately effective and cannot be challenged (it is final and binding), it must still be implemented through revision or the creation of a law in accordance with the court's mandate (Sihombing & Hadita, 2022). Consequently, positive legislature decisions (conditionally constitutional and conditionally unconstitutional) can be

construed as a source of law for forming laws. This is due to the fact that in this context, the Constitutional Court's decision is the source of legal formation.

The Parliament and the President, in their capacity as legislators, must comprehend that Constitutional Court decisions are not elective sources of law; rather, they are obligatory. This implies that the President and the Parliament must enact laws that align with the Court's decision (Hunafa, 2019). This provision is applicable due to the fact that the Constitutional Court's decision is final and binding, which means that it is immediately granted permanent legal force upon its pronouncement and that no legal action can be taken (Soeroso, 2016). Consequently, legislators must acknowledge that they are unable to implement "legal resistance" against the Constitutional Court's decision, despite the existence of compelling and logical arguments against it. Consequently, positive legislative decisions have a significant impact on the development of positive law in Indonesia. This is because such decisions are subsequently transformed into a legal source that is binding on the President and Parliament in the formation of laws.

The construction of a positive legislature decision ultimately raises two crucial questions: *Firstly*, can a positive legislature decision be classified as a legal rule in the sense of *regeling*, similar to a statutory regulation? It is crucial to respond to this inquiry in order to determine the classification of the decision as a legal product. This is because formally, a positive legislature decision is a court verdict in the area of the judicial branch of power. However, from a material perspective, a positive legislature decision contains the content of norms, just like regulations (*regeling*) that actually exist in the area of the legislative branch of power.

*Secondly*, are positive legislature decisions admissible within Indonesia's hierarchical legal framework? In spite of the fact that positive legislature decisions are derived from the judiciary, their content contains elements of norms. In addition, the formation of laws must follow these decisions, giving them a status superior to the law itself. In the state of Indonesia, the hierarchical structure of laws and regulations is governed by orderly norms. The 1945 Constitution serves as the highest ruling authority, followed by Decree of the People's Consultative Assembly, Laws/Government Regulation in Lieu of Law, Government Regulations, Presidential Regulations, and Regional Regulations (Asshiddiqie, 2006). Given that positive legislature decisions include the characteristics of norms, their inclusion in the hierarchy of laws and regulations is worthwhile to inquire.

The responses to the two aforementioned inquiries will contribute novelty to the study of positive legislature decisions made by the Constitutional Court in Indonesia. This is particularly significant as there are currently no explicit regulations pertaining to the Constitutional Court's authority in making positive legislature decisions, and the legal status of such decisions remains ambiguous. After conducting a literature study, the author has not come across any research that investigates positive legislature decisions in Indonesia's legal hierarchy. The novelty of this research is expected to offer a fresh viewpoint on comprehending the structure, substance, and status of the Constitutional Court's Positive Legislature Decision.

## RESEARCH METHOD

The study employed the doctrinal legal research method to address the two concerns mentioned above, namely examining the classification of the Constitutional Court's positive legislator decisions as legal products and their status in Indonesia's hierarchical legal framework. Wignjosoebroto (2002) defined doctrinal legal research as the process of conceptualising and developing law based on the doctrine that the conceptualizer follows. According to Wignjosoebroto, there are three primary doctrines in doctrinal legal research, namely: (1) law is conceptualised as a principle of justice in a philosophical system, which adheres to the doctrine of the natural law school; (2) law is conceptualised as a statutory rule in accordance with the doctrine of positivism in legal science; and (3) law is conceptualised as a judge's decision *in concreto*, which adheres to the realist functionalism doctrine in legal science (Wignjosoebroto, 2002).

The research employed the third doctrine, which involved examining the *ratio decidendi* (the reasons for decisions) of Constitutional Court judges who made positive legislature decisions, within the framework of the realist functionalism doctrine. To complement this doctrine, this study also employed a legal realism approach to identify the background of the positive legislature decisions' emergence. This research utilized secondary data which were gathered from a literature review as its primary data source. Subsequently, the data was qualitatively analysed through an interpretation process. The authors analysed the data to obtain an in-depth understanding of the context and implications of the Constitutional Court's decision on the legal norm system in Indonesia.

## RESULTS & DISCUSSION

### *Constitutional Court: Transitioning from a Negative Legislature to a Positive Legislature*

As mentioned in the introduction, the Indonesian Constitutional Court was originally established with the purpose of serving as a negative legislature. It originally had the role of granting the applicant's request in a judicial review case by declaring a law to be in violation of the Constitution, thereby rendering it legally invalid. Nevertheless, due to the growing complexity of the cases it faced, the Constitutional Court transitioned from its previous role as a negative legislature to a positive legislature (Huda, 2019). Operating as a positive legislature, the Constitutional Court holds the power of a judicial institution, as it is capable of making decisions that not only review existing norms but also establish new ones (Láštík & Steuer, 2018).

The Constitutional Court's expanding function as a positive legislature was evident in its regulatory decisions, which were characterised by the *conditionally constitutional* and *conditionally unconstitutional* models (Buana, 2020). The following are examples of Indonesian Constitutional Court decisions that employ these two models:

First, *conditionally constitutional*. This implies that the legal material under review will only be deemed constitutional if it aligns with the criteria established by the Constitutional Court's decision (Safa'at & Widiarto, 2021). Decision Number 102/PUU-VII/2009 is an illustration of a Constitutional Court decision that employs the *conditional constitutional* model. This decision evaluates Law No. 42 of 2008, which pertains to the general election of the president and vice president. The law stipulates that only Indonesian citizens who are registered on the Permanent Voter List are eligible to vote in the general election. The Constitutional Court issued a positive legislature decision after reviewing the law, stating that Article 28 and Article 111 of Law No. 42 of 2008 are constitutional, provided that they are interpreted to include the following: Indonesian citizens who are not registered in the Permanent Voter List may still exercise their right to vote as long as they present their identity card, family card, or passport at the voting venue that corresponds to their hamlet/neighborhood of origin (Gaffar, 2016). This decision is considered positive legislature because it establishes positive norms, such as legislative institutions, that regulate the eligibility of Indonesian citizens to exercise their right to vote. This includes not only those who are registered with the Permanent Voter List but also those who can present their identity card, family card, or passport at the voting venue.

Second, *conditionally unconstitutional*. This refers to a ruling that declares a law under review to be unconstitutional if certain conditions set by the Constitutional Court are not satisfied (Safa'at & Widiarto, 2021). Decision No. 112/PUU-XX/2022 is one of the Constitutional Court's decisions that utilizes this model. This decision evaluates Article 34 of Law No. 30 of 2002, which pertains to the Corruption Eradication Commission. The article stipulates a four-year term for the appointment of the Corruption Eradication Commission chairperson. Nevertheless, the Constitutional Court declared in its ruling that this article was conditionally in violation of the constitution, provided that it was not interpreted as "The head of the Corruption Eradication Commission holds office for five years and can be re-elected for only one term." The Constitutional Court's role as a positive legislature is evident in this case, as the court's decision changed the Corruption Eradication Commission leadership's term of office from four years to five years (Aji, 2023).

The role of the Constitutional Court has sparked numerous debates among legal professionals and scholars. Mahfud MD, the former Chief Justice of the Indonesian Constitutional Court from 2008 to 2013, outlined 10 guidelines that the Court should adhere to. One of these guidelines emphasises that the Court should avoid making decisions that have a regulatory impact. For instance, a decision to annul is accompanied by the necessary steps to reorganise the contents of the repealed law, including the methods and institutions involved. Mahfud MD made this statement as the regulatory field falls under the legislative domain (MD, 2009). Therefore, the Court is limited to determining whether a law is constitutional or unconstitutional without the necessity of stating specific circumstances.

In her dissertation titled "*Problematika Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature* (Problems of the Constitutional Court's Decisions with a Positive Legislature Characteristics)," Martitah (2013) highlights the original purpose of establishing the Constitutional Court as a norm canceler rather than a norm shaper. Nevertheless, Martitah provided a thorough explanation for the transformation of the Constitutional Court into a positive legislature, citing a compelling *ratio legis*. According to her research findings, it is evident that certain Constitutional Court decisions prioritise justice over the law. These decisions have made significant progress in bridging the gap between the law and societal development, ultimately leading to the attainment of substantive justice (Martitah, 2013).

Even, Mahfud MD admitted that not all of the boundary signs he had formulated could be valid and maintained. Current developments and legal demands finally overturned several



of these barriers, including the ability to make positive legislative decisions in order to create substantive justice (Martitah, 2013). According to Steamer and Wolfe, the shift in the role of the court from negative legislature to positive legislature also occurred in the United States Supreme Court with the strengthening of the principle of "judge-made law" in the constitutional field. The reason is that laws drafted by legislative institutions often experience gaps in societal developments and other legal regulations, both vertically and horizontally (Steamer & Wolfe, 1987). As a result, judges are required to exercise activism in interpreting the constitution (judicial activism) and go beyond the boundaries of interpretation that have been considered standard (judicial restraint) (Claus & Kay, 2009).

Since the Constitutional Court is a judicial institution, it must be careful and thorough when issuing a positive legislative decision. The Court cannot be an independent lawmaker (Blom-Cooper, 2014). The Court can assist the legislative body in fulfilling its functions. However, the Court cannot replace the legislative house and enforce laws or use political discretion to create legal norms or provisions that do not exist in the Constitution (Brewer-Carías, 2012). Only in urgent cases should the Court issue regulatory decisions, such as to achieve substantive justice that cannot be achieved by cancelling the law being reviewed (Salman, 2017). Thus, the Constitutional Court Law needs to be revised to clearly and firmly state under what conditions the Court can make positive legislature decisions, as there are currently no firm regulations.

### ***The Position of the Constitutional Court's Positive Legislature Decision in Indonesia's Hierarchy of Legal Norms***

As previously mentioned, the Constitutional Court's decision to set new norms to replace the statute being examined changed the Court's position from negative legislature to positive legislature. According to Láštík and Steuer (2018), as a judicial institution with legislative authority, the Constitutional Court has become "The Third Legislator", allowing it to revise and create new norms.

The construction of positive legislature decisions ultimately poses two critical questions within the context of the Indonesian legal system. The initial question is whether a positive legislature decision can be classified as a legal rule in the regulatory sense, similar to a statutory regulation. Subsequently, does this decision have a position in the hierarchy of laws and regulations? In response to the initial inquiry, positive legislature decisions cannot

be compared to statutory regulations that require special formation procedures in accordance with the mandate of Law No. 12 of 2011, such as those that must be established by the appropriate institution or officials. Additionally, there is a conformity between the type, hierarchy, and content material of these regulations and those of other regulations. Furthermore, positive legislature decisions cannot be regarded as a legal rule, as the Constitutional Court lacks the capacity to enact new laws, unlike the Legislative House and the President. This decision can merely modify or introduce new standards within existing laws. Consequently, this decision model is not associated with Law No. 12 of 2011.

Nevertheless, upon examination of the evidence, as legal norms (*regeling*), positive legislature decisions exhibit similarities to statutory regulations. Indrati (2000) clarified that legal norms are general, abstract, and continuous. *General* refers to the fact that legal norms are intended to be applied to a wide range of individuals rather than a limited number of them. *Abstract* refers to the legal norm's intended application to a variety of specific legal events. Lastly, *continuous* (*dauerhaftig*) indicates that the legal repercussions of the regulation will persist until it is repealed or replaced by new regulations (Indrati, 2000).

The Constitutional Court's positive legislature decision also possesses three of the legal norms mentioned above: generality, abstraction, and continuity. Initially, the Court's decision is of a general nature due to the application of the *erga omnes* principle, which states that the decision is applicable to all Indonesians, not just the parties engaged in the case. Secondly, the Constitutional Court's decision is also abstract, as it can be used as a legal foundation for responding to a variety of legal events rather than just one specific legal event. Third, the court's decision is not only applicable once, but it is also indefinitely applicable to address a variety of future legal events.

Constitutional Court Decision No. 97/PUU-XIV/2016, which reviews Law No. 23 of 2006 *juncto* Law No. 24 of 2014 on Population Administration illustrates the three characteristics of legal norms, namely general, abstract, and continuous. This is a crucial decision issued by the Constitutional Court in 2016. This decision allows religious beliefs to be included in the religion column on the resident identity card and family card, addressing concerns that the previous law did not accommodate them. The decision ruled that religious beliefs could be added to these documents, which previously only listed officially recognised religions. The word "religion" in Article 61 clause (1) and Article 64 clause (1) of Law No. 23 of 2006 *juncto* Law No. 24 of 2013 was found contradictory to the 1945 Constitution if it was

not read to include "beliefs." This was part of the legal consequences of Constitutional Court Decision No. 97/PUU-XIV/2016, which requires the state to oblige Indonesian believers to fill in the religion column on population documents like electronic identification cards, family cards, marriage certificates, birth certificates, etc. (Hermawan, Rizal, Haryumeinanda, & Oktiviasti, 2021).

Three characteristics of legal norms are identified in Decision No. 97/PUU-XIV/2016, i.e., general, abstract, and continuous. It is referred to as a *general* rule because it is applicable to followers of other believers throughout Indonesia, along with the applicant. Then, it is referred to as *abstract* because the decision above is not only a response to legal events experienced by the applicant. However, it is also a response to other legal events related to population administration for believers. Due to its *general* and *abstract* nature, Decision No. 97/PUU-XIV/2016 must be *continuous*. This means that this decision applies to respond to similar events or legal cases in the future. Based on the three characteristics of legal norms mentioned earlier, the Constitutional Court's positive legislature decision can be classified under the *regeling* category, similar to statutory regulations.

This positive legislature decision then raises further questions, namely: What is the position of the positive legislature decision in the hierarchy of laws and regulations in Indonesia? According to Article 7 and Article 8 of Law No. 12 of 2011, the Constitutional Court's decision does not include the types and hierarchy of laws and regulations. However, the content of the Constitutional Court Decision can be classified as regulatory content (*regeling*). Even, Article 10 clause (1) letter d of Law No. 12 of 2011 stipulates that one of the content materials that must be regulated by law is the follow-up to the decision of the Constitutional Court.

The presence of a positive legislature decision such as this highlights a curious paradox: the decision possesses tangible substance similar to a legal norm, yet it lacks a specific form of legislative regulation. In order to address this paradox and prevent it from lingering, there are two possible alternatives to consider. The first option is to incorporate positive legislative decisions into the existing hierarchy of laws and regulations. The second option is to restrict Constitutional Court judges from making positive legislative decisions. Out of these two options, it is clear that the second option is not a wise choice. This is because many positive legislative decisions made by the Constitutional Court have become significant milestones, as they have successfully delivered substantive justice for the applicant (Patra,

2022). One such example is Decision No. 97/PUU-XIV/2016. The positive legislature decision is also widely regarded as a testament to forward-thinking laws that have effectively overcome the constraints that hinder people's perception of fairness (Martitah, 2013).

Consequently, it would be more judicious to incorporate the Constitutional Court's positive legislature decision into the hierarchy of laws and regulations. This can be accomplished by amending the law on the establishment of laws and regulations. This decision can be positioned above the law in the hierarchy of laws and regulations, as it was issued to negate or revise laws that conflict with the 1945 Constitution. This decision can be designated as part of the *staatsgrundgesetz* from the perspective of *stufenbau* theory, as the Constitutional Court's decision is the most authoritative interpretation of the 1945 Constitution. It is anticipated that its inclusion in the hierarchy of laws and regulations will bolster the legitimacy of the Constitutional Court's decision as a legal norm that is final, binding, and *erga omnes*. Consequently, the decision will be required to be implemented by the legislators and adhered to by all members of Indonesian society.

## CONCLUSION

The Constitutional Court's decision in judicial review cases has undergone a significant transformation, moving from a negative legislature to a more proactive approach towards a positive legislature. Functioning as a positive legislature, the Constitutional Court has the power to modify and establish new norms, thereby evolving into a judicial institution with legislative authority. At this point, the decision model is ambiguous because, formally, a positive legislature decision does not fit the mold of statutory regulation in terms of its formal structure. However, upon closer examination of its material, it exhibits the qualities of a legal norm (*regelung*) as it fulfills the general, abstract, and continuous characteristics.

Given its status as a legal norm, this positive legislature decision needs to be considered within Indonesia's hierarchy of legal norms. This can be achieved by revising the Law on the Establishment of Laws and Regulations. In the hierarchy of legal norms, these decisions can be placed at a level above laws, considering that they are intended to negate or revise laws that conflict with the 1945 Constitution.

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