



Constitutional Court as an Actor That Maintains Check and Balance System Through The Judicial Review Process in Indonesia

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Abstract—The Check and Balances System is one of the objectives of establishing the executive, legislative, and judicial branches, each with their own functions without overlapping powers. The Constitutional Court serves as one of the institutions that functions as a negative legislator or norm canceller in judicial review activities, providing a democratic space for the public to protect their rights from regulations that are not pro-people. This study seeks to examine how the Constitutional Court contributes to upholding the checks and balances system during the judicial review of laws in Indonesia. It employs doctrinal investigation strategies, consolidating both a statutory approach and a conceptual approach. Thus, the investigation points to underlined how the Constitutional Court's advancing part, particularly its shift towards acting as a positive legislator, raises concerns regarding potential interference in Indonesia's legislative process. However, with the limitations set by law and expert opinions, the Constitutional Court remains an institution with a negative legislator function, although under certain conditions, it can become a positive legislator. Therefore, the check and balances system between the governing institutions can still be well maintained.

Keywords—Constitutional Court; Check and Balances System; Judicial Review; Negative Legislator.

I. INTRODUCTION

Armed with the premise of a law enforcement nation, Indonesia founded a government system consisting of three levels of power: executive, legislative, and judiciary, as indicated within the 1945 Constitution of the Republic of Indonesia. The president, vice president, ministers, and non-ministerial agencies belong to the executive branch, which is in charge of implementing laws and directing government activities. The legislative branch holds the authority to draft, amend, and approve laws, represented by the House of Representatives (DPR), the Regional Representative Council (RR), and the People's Consultative Assembly (MPR). Lastly, the judiciary branch serves as the guardian of judicial power in Indonesia and includes the Supreme Court (MA), the Constitutional Court (MK), and the Judicial Commission (KPK). These institutions collaborate to guarantee viable administration in Indonesia concurring to their particular parts and obligations.

The framework of this authority system draws upon the theory of the separation of powers advocated by the renowned philosopher Baron de Montesquieu, commonly referred to as Montesquieu. In his influential work "The Spirit of Laws," Montesquieu delineates state authority into three branches: the legislative power responsible for legislation, the executive power charged with implementation, and the judicial power tasked with adjudication.[1] The underlying aim of establishing this separation of powers is to establish independent institutions operating on an equal or horizontal footing. This system is outlined to encourage corresponding oversight and control among these bodies, following the standards of checks and equalizations. As a result, this setup aims to ensure that each institution functions within its defined scope without infringing on others, thereby reducing the potential for corruption, collusion, and nepotism.

Focusing on a pivotal judicial institution, the Constitutional Court of Indonesia (then written with MK) was officially instituted under the third amendment to Indonesia's 1945 Constitution, playing a role in maintaining governmental balance. This authority is outlined in Article 24C paragraph (1) of the Constitution, empowering [2] to serve as the final arbiter in the judicial review of laws against the constitution; the MK has authority to

adjudicate both initially and definitively. Additionally, it holds jurisdiction over disputes involving state institution jurisdiction, political parties' liquidation decisions, and the settlement of disagreements regarding the results of general elections.

The establishment regarding the CCI as a judicial authority empowered to review laws is poised to trigger transformations in Indonesia's legal and constitutional framework. This growth is inextricably tied to the legislative body's dual duties as producer of laws and the judiciary as the evaluator of laws. Concurring to Hans Kelsen, as referenced by Laica Marzuki, in spite of the clashing powers between these two specialists, they work inside the same space of the authoritative work. As Laica Marzuki verbalized, "whereas the CCI capacities as a negative administrator, the parliament, which sanctions laws, is respected as a positive lawmaker." [3]

The CCI serves as the institution tasked with constitutional adjudication, dedicated to safeguarding the constitution and ensuring that its application is consistent with subordinate regulations. This responsibility is demonstrated in several aspects. Firstly, it addresses conflicts related to the application of constitutional principles. Secondly, the Court primarily relies on the constitution itself when examining and resolving cases. Despite laws defining its jurisdiction, if these laws conflict with the constitution, the CCI retains the authority to disregard or invalidate them when presented with a petition.

"Judicial review," which includes the examination of enactment, may be an essential specialist of the CCI. This work plays a vital part in keeping up the framework of checks and equalizations among branches of government. Legal survey includes the reassessment of laws in connection to the structure, ordinarily started by claims from citizens who contend that a particular law or control is unlawful, destructive, or opposite to open intrigued. Acting as the guardian of the constitution, the Constitutional Court fulfills its mandate by issuing decisions such as granting the petition, dismissing it, declaring it inadmissible, or endorsing the House of Representatives' position on constitutional violations involving the president and/or vice president. [4] Through these verdicts, a democratic arena is cultivated, fostering interaction between the populace and the governing administration.

The process of judicial review of laws acts as a counterbalance within the legislative process, ensuring the coherence of legislation. However, there has been a noticeable evolution in the duties of the CCI through a negative legislator towards one who increasingly influences legislation directly. This shift is exemplified by rulings like Ruling Number 102/PUU-VII/2009, Ruling Number 4/PUU-VII/2009, and Ruling Number 110-111-112-112/PUU-VII/2009, where the Court has introduced new clauses, effectively creating new legal norms. These decisions, once finalized and binding, cannot be challenged, even by the House of Representatives, which holds legislative authority. This transition prompts inquiries into how the Constitutional Court's expanded role might affect the established system of checks and balances. By introducing new clauses through its decisions, the Court moves beyond its traditional role as a negative legislator. This study seeks to analyze the Constitutional Court's impact on maintaining the checks and balances system during the judicial review of laws in Indonesia.

II. LITERATURE REVIEW

Through the third redress to the 1945 Constitution of the Republic of Indonesia, the Constitutional Court of Indonesia formed on solid groundwork, aiming to establish a constitutional safeguard institution in Indonesia. The activity for building up the CCI had been the motivation since 2000, examined amid the gatherings of the Advertisement Hoc Committee (AHC). From its initiation, the arrangement of the CCI was proposed with the objective of making an institution dependable for scrutinizing laws against the 1945 Constitution. In this way, amid the 41st entire session of the AHC, Soetjipto proposed blessing the CCI with extra specialist to settle debate between the central and territorial governments, break down political parties, and resolve debate emerging from appointive forms. [5] In addition, Jimly Asshiddiqie underlined the distinction among Supreme Court and CCI, noticing that the last mentioned holds specialist over cases concerning citizens' equity, whereas the previous is entrusted with maintaining the run the show of law and guaranteeing the precise authorization of directions, traversing from the structure to subordinate statutes. [6]

Following an extensive process, the delineation of the CCI's jurisdiction and the framework for selecting judges were eventually agreed upon and formalized. This wrapped up inside the endorsing of Law Number 23 of 2003 relating to the CCI. This enactment has experienced three corrections and was approved through Law Number 7 of 2020 relating to the Third Correction to Law Number 24 of 2003 concerning the CCI. The term "negative legislator" was presented by an Austrian expert, Hans Kelsen, who in his book "General Theory of Law and State," defined the cancellation of laws as an act of negative legislation. He used this concept to illustrate the distinction in authority between the Constitutional Court and the parliament in Austria. [7] According to Moh. Mahfud MD, the term "negative legislator" refers to the CCI's action of nullifying norms during the judicial review of laws contrary to the 1945 Constitution of the Republic of Indonesia, or allowing norms enacted by the legislative body to remain in force, guided by the primary purpose of the 1945 Constitution. [8] In Indonesia, this notion has been conceived in the framework of the process of establishing CCI as a new governmental body responsible on repealing policies that contrary to the Constitution.

A concept behind the negative legislator represents a check and balance mechanism inside the government's legislative process. Furthermore, this system can protect citizens from legal injustice committed by those in positions of authority while establishing laws and regulations.

The philosophy of judicial review originated in countries that embrace the premise of constitutional primacy. The term "judicial review" is particularly distinctive in the constitutional law of the United States, where it denotes the judiciary's authority to nullify any government action that contradicts the constitution. Soepomo noted that in the Netherlands, the term "judicial review" is absent, and instead, they refer to it as the "right to test" (*toetsingsrecht*). Judicial review serves as a mechanism for assessing specific legislative regulations by the judiciary. This evaluation involves scrutinizing a legislative provision against higher legislation or against the constitution, which serves as the paramount law.[9]

Lee Bridges, George Meszaros, and Maurice Sunkin emphasized that "Judicial review has been widely hailed, not least by the judiciary itself, as a way by which citizens can receive redress against coercive power of government, as well as a critical instrument for allowing the court to avert and check the abuse of executive authority." [10] The prevalence of constitutional review systems is continuously evolving globally. This mechanism is embraced as a means for modern legal states to mitigate and balance the inclination toward arbitrary power through check and balances.

III. METHOD

The paper performs normative legal studies, commonly referred to as doctrinal research, which involves analyzing legal literature and examining primary and secondary legal sources. It employs approaches such as the statutory approach and the conceptual approach. Primary legal documents are drawn from statute rules, followed by secondary legal materials that supply contextual interpretations. These can include draft legislation, academic publications, textbooks, journals, newspapers, pamphlets, brochures, and online news. Additionally, relevant non-legal materials from other fields may be considered if they contribute to the research topic. Data collection follows a deductive perspective, involving gathering, processing, and analyzing information. Throughout this normative legal research, the author focuses over the Constitutional Court's position as a negative legislator in sustaining a system of checks and balances inside Indonesia's judicial review process. By utilizing both primary and secondary legal materials, the study aims to offer comprehensive insights into the issues at hand.

IV. RESULT AND DISCUSSION

A. *Brief History of The Constitutional Court in Indonesia*

The constitutional alterations that occurred during that period were clearly affected by the political concerns of individuals and parties within congress. The political elements at the time impacted the revision handle being embraced. Be that as it may, tragically, the individuals of the People's Consultative Get together did not have adequate opportunity or time to altogether talk about the draft revisions to the 1945 Constitution of the Republic of Indonesia. Triggered by a situation mixed with political interests, there was a need to establish new governance instruments that could serve as a balance in the constitutional amendment process. This was intended to ensure that the amending process was not owned exclusively by the political body, which in the current instance was the PCAI at the time.[11] There was concern that if legal products resulting from the monopoly of political institutions, the primary goal of the constitution, which should limit power, would deviate into a tool for government power. Therefore, the CCI was established with the hope that it could provide balance and cross-check on other government institutions, primarily the legislative and executive branches.

Initially, the proposal for establishing the CCI did not envision it as a permanent institution, but rather as a court to adjudicate cases involving state officials who violate the constitution, following legal procedures. This proposition was put forward and recorded amid the 32nd assembly of the AHC on May 7, 2000. However, the process of establishing the CCI to resolve disputes among state institutions faced obstacles. Some committee members suggested that the PCAI could fulfill the functions that the CCI was intended for, thus questioning the necessity of creating a new institution. Furthermore, there were proposals suggesting that the establishment of the CCI should be contingent upon dissolving the Supreme Advisory Council, and others argued for the Court's independence from the Consultative Assembly due to the latter's political influence.

The 41st plenary session of the AHC on June 8, 2000, was a pivotal moment in the discussions about the Constitutional Court's formation and its potential authority. During this session, the focus was on fine-tuning the document and discussing ideas to broaden the Court's role. Suggestions were made to broaden the Court's authority beyond merely reviewing laws to also include resolving disputes between central and regional governments, dissolving political parties, plus settling election-related debate. Jimly Asshiddiqie proposed that the Court ought to handle cases including election issues and party dissolutions. He emphasized the difference between the CCI and the Supreme Court: the Supreme Court focuses on providing justice to citizens, whereas the CCI is primarily concerned with upholding the law and ensuring the proper application of rules, from constitutional issues to subordinate regulations. Additionally, Fajrul Falaakh suggested that establishing the Constitutional Court could serve as a check against arbitrary actions by legislative bodies.

The specialist of the CCI and the strategies for selecting its judges were authoritatively set up with the third amendment to the 1945 Constitution in 2001. This revision stamped a significant step in making a system that guarantees adjustment and oversight among state taught, strengthening the run the show of law and the security of protected rights. It too tended to hole within the regulatory homes of the state, giving an organized approach to uncertain issues. This framework was formalized with the endorsing of Law Number 23 of 2003 concerning the CCI.

B. Constitutional Court as an Actor That Maintains Check and Balances System

Since its inception, Indonesia has had the goal for the CCI as outlined in the 1945 Constitution of the Republic of Indonesia to be the guardian of the existing legal basis, namely as the guardian of the constitution. The CCI, as one of the institutions exercising judicial power, has the authority to conduct judicial reviews, specifically to examine laws that violate the 1945 Constitution, as outlined in Article 24C paragraph (1). The CCI has the jurisdiction to decide if there is evidence of constitutional infractions in a lawsuit by becoming a figure who cancels norms, often known as a negative legislator. If the law is found to be in contradiction with/violating 1945 Constitution, the CCI performs its job as an eraser or canceler of a norm (negative legislator). This is done to ensure that no provisions in a law contradict with the constitution, which has become the highest and primary law in Indonesia's constitutional structure. The constitutional authority of the constitutional court exemplifies the notion of checks and balances, which places all state institutions in an equal position to mutually control and balance each other in the practice of state administration.

A critical illustration of the CCI acting as a negative lawmaker is reflected in Ruling Number 6/PUU-V/2007. In this case, the applicant looked for a protected audit of a few articles within the Indonesian Criminal Code. After altogether analyzing the case and evaluating the Criminal Code against the arrangements of the 1945 Constitution, the Court decided that Articles 154 and 155 were conflicting with Article 27 Section (1), Article 28, Article 28C Passage (1), Article 28D Section (1), Article 28E Section (1), and Article 28F of the Constitution, all of which defend the freedom of expression and the proper of Indonesian citizens to precise their conclusions.

Over time, a few corrections have been made to Law Number 23 of 2003 concerning the CCI. An eminent revision is the primary one, typified in Law No. 8 of 2011, which adjusts Law No. 24 of 2003. This revision has earned critical consideration due to its express limitations on the CCI's decision-making powers. Particularly, Article 27 section (2a) stipulates that the Court's choices cannot consists of matters that exceed those outlined in paragraphs (1) and (2); issue directives to legislators; as well as construct unused standards to replace those from laws that have been nullified due to conflicts with the 1945 Constitution. The article suggests that there are particular regulations that constrain the CCI, restricting its role to that of nullifying norms rather than creating new ones. This duty falls inside the specialist of the HRI in conjunction with the President, who serves as the lawmakers.

However, this regulation stirred controversy within the CCI itself, inevitably driving to a claim against the article and coming about in CCI Ruling Number 48/PUU-IX/2011. The solicitor started a protected survey against Article 45A and Article 57 passage (2a) letters a and c of the CCI Law, which were seen as limiting the specialist of Constitutional Judges in rendering decisions.[12] These articles were considered conflicting with the reason of setting up the CCI, which is to maintain the law and equity, especially in guaranteeing legality based on the 1945 Constitution. The nearness of these articles deterred the CCI from[13] The proximity of these articles obstructed the CCI from reviewing norms for constitutionality (the CCI assesses whether existing norms are consistent with the 1945 Constitution); Addressing legal gaps (when the Court finds that a rule disagrees with the 1945 Constitution and declares it invalid, it creates a temporary legal void. Because the legislative procedure to develop new laws is typically time-consuming, the Court plays a role in managing the interim period until new legislation can be passed); as the final one upholding Justice (constitutional judges are responsible for interpreting and upholding legal principles and a sense of justice that reflect societal norms and expectations).

Driven by the issuance of this choice, the position of the CCI as a negative administrator within the legal audit prepare has moved towards getting to be a positive administrator. It is undeniable that there are some CCI decisions resulting in *ultra petita* decisions (decisions not requested by the petitioner) which ultimately lead to intervention in legislation. This certainly raises concerns about the position of the CCI in keeping up its nobility as a negative administrator working as a standard repealer.

Mahfud MD emphasizes that in working out its control, especially when assessing laws for their adherence to the 1945 Constitution, the CCI ought to decipher the Constitution based on the initial expectation shaped amid the wrangles about by authorized taught. It's important to recognize that the 1945 Constitution prohibits the Court from engaging in legislative activities. Instead, the Court's role is strictly that of a negative legislator—it can only annul or uphold the norms created by the legislature, and this must be done with strict adherence to the original intent of the Constitution.

As quoted from Mahfud MD's statement[4], there are ten violations that the CCI must avoid, serving as important guidelines. *First*, when conducting substantive reviews of laws, the CCI should not make normative or regulatory decisions, as this falls within the prerogative of the legislative body. *Second*, the Court must dodge issuing directions that are *ultra petita* amid substantive audits, as this would move its part from a negative to a positive administrator. *Third*, the CCI ought to not utilize the law beneath audit as a premise for canceling other laws. *Fourth*, the Court must not meddle in decision-making forms that the structure depends on the council, which ought to resolve these things through their own political choices. *Fifth*, the Court's decisions should not rely on theories not clearly outlined in the constitution, as choosing one theory over another could lead to conflicts, given the wide range of theoretical perspectives.

Moving on to the *sixth* point, the CCI must follow the guideline of *nemo judex in causa sua*, meaning it ought to not choose on things where it contains an individual intrigued. *Seventh*, CCI judges are denied from freely examining or communicating conclusions on particular cases being checked on by the Court, counting amid classes and official talks. *Eighth*, CCI judges cannot record cases by welcoming anybody to yield a claim or request to the court. *Ninth*, judges must abstain from proactively advertising to intercede in political debate between state educated or political substances, as such activities are political instead of legal. At long last, the *tenth* point emphasizes that the CCI ought to not express conclusions on the presence or need of revising or keeping up the Constitution.

To ensure the checks and balances system functions effectively, the CCI, traditionally a respected negative legislator, may occasionally take on a more active role as a positive legislator in specific instances. This shift is governed by defined limits, as outlined in Martitah's book, "Constitutional Court Switches from Negative Legislature to Positive Legislature." The book writes about when and how the Court was permitted to embrace this expanded function[14], in the order of, the factors of justice and societal welfare, urgent crises, and filling legal gaps (*rechtsvacuum*) to prevent legal anarchy in society.

The CCI, governed by the 1945 Constitution, primarily functions as a negative legislator rather than a positive one. Established to safeguard against political interference during the creation and review of laws, the Court operates within the boundaries defined by legal statutes and expert guidance. Whereas it every so often accepts the part of a positive administrator, this is often drained in a way that keeps up an agreeable adjustment between the legal and the assembly, guaranteeing a successful framework of checks and equalizations.

V. CONCLUSION

The Constitutional Court of Indonesia, a key portion of the nation's legal framework, was built up to guarantee adjusted relationships among government bodies. It works independently, free from political weights, with the command to evaluate laws and bearings to ensure they alter with the 1945 Constitution of the Republic of Indonesia. As communicated in Article 24C entry (1) of the Constitution, the Court has the control to create final choices on cases at both the starting and final stages. Its obligations include looking into the dependability of laws, settling clashes between government substances, deciding the legitimacy of political party dissolutions, and settling debate over decisions. Moreover, The CCI, as an institution with negative legislator authority, has been empowered to deliver actions on lawsuits that are accepted, rejected, or inadmissible including decisions that strengthen/confirm the HRI on sacred breaches by the president and/ or vice president. Over time, the CCI's part has advanced from being a negative lawmaker to taking on a positive administrative work. To guarantee the compelling working of the check and equalizations framework between the legal and the assembly, impediments are vital. The Court may act as a positive administrator amid legal surveys in circumstances including social equity, critical circumstances, or to fill legitimate holes and anticipate legitimate chaos. This approach permits the CCI to maintain its part as the gatekeeper of the structure whereas keeping up the check and equalizations framework.

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