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The Boundaries of Constitutional Court Interpretation between Guardian of the Constitution and Norm Formation

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ABSTRACT

Purpose: This study aims to formulate objective parameters for distinguishing constitutional interpretation that remains within the Court's constitutional mandate from judicial intervention that effectively creates new norms.

Research Design and Methodology: Employing normative legal research, this study uses statutory, conceptual, case, and comparative approaches. Primary legal materials include the 1945 Constitution, relevant legislation, and Constitutional Court decisions, particularly Decisions No. 46/PUU-VIII/2010 and No. 90/PUUXXI/2023, which are analyzed through qualitative juridical analysis considering the negative legislator and living constitution theories.

Findings and Discussion: The study finds that the boundary between constitutional interpretation and judicial norm-making is determined not merely by the form of a ruling but by the intensity and character of judicial intervention in legislative policy. Constitutional interpretation remains legitimate when judicial reasoning is grounded in a clear constitutional necessity, maintains a direct link to a constitutional mandate, and employs the least intrusive form of intervention. Conversely, judicial intervention tends toward norm-making when the Court formulates new operational rules that substantially determine matters previously left to legislative discretion. Comparative analysis of Germany, South Korea, and South Africa further demonstrates that constitutional courts may develop constitutional meaning while maintaining institutional limits on legislative functions. Accordingly, this study proposes five objective parameters for assessing the legitimacy of Constitutional Court interpretation: clear constitutional necessity, direct constitutional mandate linkage, minimal judicial intervention, openness to legislative follow-up, and transparency of interpretative reasoning.

Implications: These parameters provide a framework for maintaining the balance between constitutional supremacy, judicial independence, and the principle of separation of powers.

Introduction

The establishment of the Constitutional Court marked a fundamental transformation in Indonesia's post-reform constitutional order and strengthened the transition from political supremacy toward constitutional supremacy.[1] Following the Third Amendment to the 1945 Constitution, the Constitutional Court was constitutionally established under Articles 24(2), 24C, and 7B as an independent judicial institution entrusted with reviewing laws against the Constitution, resolving

[1] Nikmah Dalimunthe and Indah Sari Br Barus, "Sinkronisasi Kerangka Hukum Nasional Dalam Bidang Ketenagakerjaan: Tinjauan Terhadap Uu Ketenagakerjaan, Uu Cipta Kerja, Dan Peraturan Pelaksanaannya," *Perahu (Penerangan Hukum): Jurnal Ilmu Hukum* 14, no. 1 (2026): hlm. 1-8, https://doi.org/https://doi.org/10.51826/perahu.v14i1.1781.

disputes concerning the authority of state institutions, deciding on the dissolution of political parties and disputes over general election results, and adjudicating the DPR's opinion concerning alleged violations by the President and/or Vice President. Within this constitutional design, the Court primarily functions as a guardian of constitutional supremacy rather than as a policy-making institution.[2] Its constitutional role is therefore closely connected to ensuring that legislation and the exercise of public power remain consistent with constitutional principles and rights.[3]

The central problem of Indonesian constitutionalism, however, has increasingly shifted from whether the Constitutional Court may interpret the Constitution to how far that interpretation may constitutionally extend.[4] The development of judicial review demonstrates that the Court's decisions do not always merely invalidate unconstitutional provisions. Through conditionally constitutional, conditionally unconstitutional, additive, and instructive rulings, the Court has at times modified the practical meaning of statutory provisions and directed lawmakers toward particular normative arrangements.[5] Such judicial creativity may be justified as necessary to protect constitutional rights and prevent legal uncertainty. Nevertheless, it simultaneously raises concerns that the Court may move beyond constitutional review and enter the legislative domain. This concern is reinforced by Article 57(1) of the Constitutional Court Law, which principally regulates the loss of binding legal force of provisions declared contrary to the Constitution rather than expressly authorizing the Court to formulate replacement norms.[6]

The tension between constitutional guardianship and judicial norm-making is particularly visible in several consequential Constitutional Court decisions. Decision No. 46/PUU-VIII/2010 concerning the civil status of children born outside marriage not only removed the previous normative restriction but also constructed a broader civil relationship between such children and their biological fathers based on scientific, technological, and other legally admissible evidence. Decision No. 14/PUU-XI/2013 concerning simultaneous elections similarly demonstrated an expansive constitutional interpretation of Article 22E of the 1945 Constitution that altered the previously separate electoral design. More recently, Decision No. 90/PUU-XXI/2023 concerning the minimum age requirement for presidential and vice-presidential candidates introduced an additional eligibility formula by allowing candidates below 40 years of age to qualify when they had previously held or were currently holding elected office through general elections, including regional head positions. These decisions illustrate that the controversy is no longer limited to whether the Court exercises judicial activism but concerns the constitutional boundary between interpreting an existing constitutional norm and formulating a new normative rule.

This boundary remains insufficiently defined in existing scholarship. Previous studies have examined the Constitutional Court as a negative and, in certain circumstances, positive legislator, including debates concerning additive and progressive judicial decisions.[7] Other scholarship has either emphasized judicial restraint and the Court's negative-legislator function or defended judicial activism on the grounds of constitutional rights protection and changing social conditions. Although these approaches provide important normative arguments, they do not adequately establish objective and operational parameters for determining when constitutional interpretation remains legitimate and when judicial intervention constitutes norm-making. The existing debate therefore tends to remain at the level of conceptual labels such as judicial activism, positive legislator, or judicial creativity without sufficiently specifying the criteria by which the boundary between interpretation

[2] Sugeng Dwiono et al., *HUKUM TATA NEGARA: Deskripsi Dan Tinjauan Kritis* (EDUPEDIA Publisher, 2023), hlm. 87.
[3] Sherly Nelsa Fitri, "Politik Hukum Pembentukan Cyber Law Undang-Undang Informasi Dan Transaksi Elektronik Di Indonesia," *Jurnal Justisia: Jurnal Ilmu Hukum, Perundang-Undangan Dan Pranata Sosial* 7, no. 1 (2022): hlm. 104-124, https://doi.org/https://doi.org/10.22373/justisia.v7i1.12719.
[4] Rahul Ardian Fikri et al., "Handling of Juvenile Brawl Crimes through Criminal Law Policy in Medan City," *Jurnal Hukum Sehasen* 10, no. 2 (2024): hlm. 481-488, https://doi.org/https://doi.org/10.37676/jhs.v10i2.7130.
[5] Jimly Asshiddiqie, Edisi Revisi, and Ketua Mahkamah Konstitusi RI, "Partai Politik Dan Pemilihan Umum Sebagai Instrumen Demokrasi," *J Urnal* 3, no. 4 (2006): hlm. 7.
[6] Wahyu Nugroho, "Politik Hukum Pasca Putusan Mahkamah Konstitusi Atas Pelaksanaan Pemilu Dan Pemilukada Di Indonesia," *Jurnal Konstitusi* 13, no. 3 (2016): hlm. 480-502, https://doi.org/https://doi.org/10.31078/jk1331.
[7] 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): hlm. 111-135, https://doi.org/https://doi.org/10.33476/ajl.v10i1.1068.

and norm formation can be assessed. This unresolved issue constitutes the principal research gap addressed by this study.

The theoretical tension underlying this gap can be examined through the negative legislator and living constitution perspectives. The negative legislator doctrine, associated with Hans Kelsen, emphasizes the Court's corrective function in removing norms that are inconsistent with the Constitution rather than substituting legislative choices with judicially formulated rules.[8] Conversely, the living constitution perspective recognizes that constitutional interpretation may need to develop dynamically in response to social transformation and the continuing protection of constitutional rights. These perspectives should not necessarily be treated as mutually exclusive.[9] Rather, their tension provides a framework for determining the point at which progressive constitutional interpretation remains constitutionally justified and the point at which judicial intervention begins to displace the legislative function.

Against this background, the main research question is: what objective parameters can be used to distinguish legitimate constitutional interpretation from judicial norm-making by the Constitutional Court? This study therefore aims to formulate a constitutional framework for determining the boundaries of the Court's interpretative authority while maintaining the constitutional protection of rights and the institutional role of the legislature. To achieve this objective, the study examines relevant Constitutional Court decisions and compares the approaches to constitutional adjudication developed in Germany, South Korea, and South Africa.

The novelty of this study lies in moving the debate from the question of whether the Constitutional Court acts as a negative or positive legislator toward the development of objective parameters for assessing the legitimacy of judicial interpretation. The study proposes five parameters for identifying this boundary: (1) clear constitutional necessity, (2) direct linkage to a constitutional mandate, (3) minimal judicial intervention, (4) openness to legislative follow-up, and (5) transparency of interpretative reasoning. These parameters are intended not to prohibit progressive constitutional interpretation, but to provide an analytical standard for determining whether judicial intervention remains connected to constitutional adjudication or has crossed into the formulation of new norms. In this way, the study contributes to the broader debate on constitutional supremacy, judicial independence, and separation of powers by offering a framework for balancing effective constitutional protection with the democratic legitimacy of legislative institutions.

Literature Review

Constitutional Court Authority and the Guardian of the Constitution

The constitutional position of the Indonesian Constitutional Court is fundamentally rooted in its function as an institution of constitutional review and as a guardian of constitutional supremacy.[10] The establishment of the Court following the constitutional reform transformed the Indonesian system of judicial review by placing constitutional adjudication within an independent judicial institution. Under Article 24C of the 1945 Constitution, the Constitutional Court is authorized to review laws against the Constitution, in addition to exercising other constitutionally assigned powers.[11] This authority establishes the Court as an institutional mechanism for ensuring that legislation remains consistent with constitutional norms and principles.[12]

[8] Teuku Saiful Bahri Johan, *Hukum Tata Negara Dan Hukum Admnistrasi Negara Dalam Tataran Reformasi Ketatanegaraan Indonesia* (Deepublish, 2018), hlm. 7.
[9] Indra Utama Tanjung, Mhd Syahnan, and Akmaluddin Syahputra, "Political and Legal Reconstruction of the Urgency That Forces the Issuance of PERPPU in Indonesia Based on Fair Benefit Values," *Pena Justisia: Media Komunikasi Dan Kajian Hukum* 23, no. 3 (2024): hlm. 1065-1079.
[10] Indra Utama Tanjung and Calvin Calvin, *PENGANTAR ILMU HUKUM: Kerangka Dasar Memahami Ilmu Hukum Secara Sistematis* (Jawa Barat: EDUPEDIA Publisher, 2026).
[11] Mirza Nasution, "Inconsistency in Legal Liability in Article 9G of Law Number 1 of 2025 Concerning State-Owned Enterprises," *Frontiers in Sociology* 11 (2026): hlm. 1791433.
[12] Fitri, *Loc., Cit.*

The concept of the Constitutional Court as a guardian of the constitution consequently implies both authority and limitation.[13] On the one hand, the Court must ensure the supremacy of the Constitution and protect constitutional rights against legislative actions that are inconsistent with constitutional requirements. On the other hand, the Court operates within a constitutional system based on the separation of powers, in which the formulation of general and binding legal policy is principally entrusted to the legislature. The Court's constitutional mandate therefore does not automatically extend to replacing legislative choices with judicially formulated policy.[14] This institutional distinction becomes increasingly significant when constitutional interpretation produces consequences that modify the substance or practical operation of statutory provisions.

The development of constitutional adjudication demonstrates that the Court's role cannot always be understood through a strict distinction between merely annulling unconstitutional norms and actively shaping their legal consequences.[15] Constitutional courts may employ different forms of rulings to ensure that constitutional rights are effectively protected, including conditionally constitutional, conditionally unconstitutional, and additive decisions.[16] Such forms of judicial intervention may be constitutionally justified when they are necessary to give effect to constitutional rights and principles. Nevertheless, they also raise a fundamental question concerning the institutional boundary between constitutional adjudication and legislative norm-making. The central concern is therefore not whether the Court may interpret the Constitution dynamically, but whether the method and consequences of such interpretation remain sufficiently connected to a constitutional mandate.

Negative Legislator, Living Constitution, and Constitutional Interpretation

The theoretical debate concerning the limits of constitutional adjudication can initially be understood through Hans Kelsen's concept of the negative legislator. In Kelsen's institutional model, a constitutional court primarily functions to remove legal norms that are inconsistent with the Constitution rather than to formulate new legal rules as a substitute for the legislature. The legitimacy of constitutional adjudication therefore rests on its corrective function: the Court determines the validity of legislative norms within the constitutional hierarchy, while the positive creation of general legal norms remains principally within the competence of the legislature.[17]

The negative legislator perspective provides an important basis for judicial restraint because it emphasizes institutional competence and democratic legitimacy. If a constitutional court freely formulates new substantive rules whenever it finds a statutory provision constitutionally problematic, the distinction between judicial review and legislation may become blurred. The problem is particularly significant in a democratic constitutional state because legislative institutions possess a direct representative mandate to formulate public policy. Judicial intervention that substantially replaces legislative choices may consequently raise concerns not only about the separation of powers but also about the democratic legitimacy of judicial decision-making.[18]

However, the negative legislator model does not fully explain the contemporary development of constitutional adjudication. Constitutional interpretation frequently involves constitutional provisions expressed in broad principles, rights, and open-ended standards. A strictly mechanical

[13] Indra Utama Tanjung, M Juang Rambe, and Anggi Ananta, "Constitutional Limits of the Constitutional Court's Interpretation Between Negative Legislators and Positive Legislators," in *Proceedings of International Conference on Islamic Community Studies*, 2025, hlm. 2428-2436.
[14] Dwiono et al., *Loc., Cit.*
[15] Geofani Milthree Saragih, Mirza Nasution, and Eka Nam Sihombing, "Judicial Review Oleh Mahkamah Konstitusi: Judicial Activism vs. Judicial Restraint Dalam Perspektif Kebebasan Kehakiman: Judicial Review by the Constitutional Court: Judicial Activism vs. Judicial Restraint in the Perspective of Judicial Freedom," *Jurnal Konstitusi* 22, no. 1 (2025): hlm. 39-65.
[16] Theresia Nolda Agnes Narwadan, Yusep Mulyana, and Fauzan Fauzan, "The Constitutional Court's Position as the Guardian of the Constitution: Between Independence and Political Intervention," *Jurnal Hukum Dan Keadilan* 2, no. 5 (2025): hlm. 18-28, https://doi.org/https://doi.org/10.61942/jhk.v2i5.427.
[17] Marieta Safta, "Developments in the Constitutional Review. Constitutional Court between the Status of Negative Legislator and the Status of Positive Co-Legislator," *Perspectives of Business Law Journal* 1, no. 1 (2012): hlm. 1-20, https://www.ceeol.com/search/article-detail?id=477221.
[18] Nabiel Ba Ramadani Ansori et al., "The Shifting Role of the Constitutional Court: From Negative Legislator to Positive Legislator," *LEXORA: LAW REVIEW JOURNAL OF CONTEMPORARY LEGAL STUDIES* 2, no. 2 (2025): hlm. 20-30, https://ejournal.fh.ubhara.ac.id/index.php/lexora/article/view/428.

approach may therefore be insufficient to address changing social conditions or newly emerging forms of constitutional harm. This concern is reflected in the living constitution perspective, which understands constitutional meaning as capable of developing through interpretation so that constitutional norms remain responsive to social transformation and continuing demands for rights protection. From this perspective, judicial interpretation may legitimately develop the meaning of constitutional provisions rather than merely reproduce their original or literal meaning.[19]

The tension between the negative legislator and living constitution perspectives should not, therefore, be reduced to a simple choice between judicial restraint and judicial activism. The former emphasizes the institutional limits of judicial power, while the latter provides a justification for constitutional development through judicial interpretation. The more fundamental issue is the boundary between the two. Progressive interpretation may remain legitimate where it derives from constitutional principles and is directed toward realizing constitutional rights. It becomes constitutionally problematic, however, when judicial reasoning ceases to interpret constitutional meaning and instead determines substantive regulatory choices that are not sufficiently grounded in the Constitution.

Judicial Activism, Judicial Restraint, and Judicial Norm-Making

The debate between judicial activism and judicial restraint provides a further conceptual framework for understanding this boundary. Judicial restraint emphasizes that judges should exercise caution when entering areas involving legislative policy choices. In the context of constitutional review, this approach is closely related to the negative legislator model because both emphasize the distinction between reviewing the constitutionality of legislation and creating new legal policy. Judicial activism, by contrast, recognizes a more active judicial role, particularly where legislative action threatens constitutional rights or where existing legal norms fail to provide adequate constitutional protection.[20] In the Indonesian context, the tension between these approaches can be observed through the development of conditional and additive rulings. A conditionally constitutional decision may preserve a statutory provision while establishing the constitutional conditions under which it may operate. A conditionally unconstitutional decision may similarly identify circumstances that render a provision unconstitutional while allowing its continued application subject to specified requirements. Additive rulings go further by attaching additional meaning or requirements to an existing legal provision. These forms of adjudication demonstrate that constitutional courts do not always operate through a simple choice between upholding and annulling legislation.[21]

Such judicial techniques create an important conceptual distinction between interpretative development and judicial norm-making. Not every judicial decision that adds meaning to a statutory provision should automatically be classified as the creation of a new norm. Constitutional adjudication may require courts to clarify ambiguous provisions, harmonize statutory rules with constitutional principles, or establish conditions necessary to make a provision constitutionally valid. The critical question is therefore the extent to which the judicial intervention remains anchored in an identifiable constitutional mandate and whether the Court merely determines constitutional meaning or instead makes a substantive regulatory choice that belongs to the legislature.

This distinction is particularly relevant to the Indonesian Constitutional Court because several decisions have been characterized as examples of expansive or progressive interpretation. Previous scholarship has examined the Court's development as both a negative and positive legislator and has discussed the legitimacy of additive and progressive decisions.[22] Other studies have emphasized either the importance of judicial restraint to preserve the separation of powers or the necessity of judicial activism to ensure effective constitutional rights protection. These studies provide important

[19] Alamul Asiroji, "Mahkamah Konstitusi Sebagai Positive Legislator: Analisis Pergeseran Paradigma Judicial Activism Dalam Putusan-Putusan Transformatif 2013–2024 Di Indonesia," *Politics and Public Policy Journal* 1, no. 2 (2026): hlm. 1-16, http://jurnal.politicsacademia.com/ppj/article/view/17.
[20] Oly Viana Agustine et al., "Constitutional Review of Criminal Norms: Does Indonesia Need Judicial Activism?," *The International Journal of Human Rights* 27, no. 4 (2023): hlm. 772-788, https://doi.org/https://doi.org/10.1080/13642987.2023.2185608.
[21] Kurniawati and Liany, *Loc., Cit.*
[22] *Ibid.*

theoretical and normative foundations, but they leave an unresolved analytical problem: what objective criteria should be used to determine when judicial interpretation remains constitutionally legitimate and when it crosses the boundary into judicial norm-making?.

The existing literature therefore reveals a significant conceptual tension but has not sufficiently transformed that tension into an operational framework for assessing judicial intervention. The negative legislator approach establishes an institutional presumption against judicial law-making, while the living constitution approach recognizes the legitimacy of dynamic constitutional interpretation. Meanwhile, scholarship on judicial activism and conditional or additive rulings demonstrates that constitutional courts may develop the practical meaning of legal norms to fulfill constitutional requirements.[23] However, these strands of literature tend to address the issue from separate theoretical positions and often rely on broad concepts such as judicial activism, judicial restraint, judicial creativity, or positive legislation.

What remains insufficiently developed is a set of objective parameters capable of distinguishing legitimate constitutional interpretation from judicial norm-making. The distinction cannot be determined solely from the label or formal type of a Constitutional Court ruling. A decision may take the form of constitutional interpretation while substantively producing consequences equivalent to the creation of a new regulatory rule. Conversely, an additive or conditional ruling does not necessarily constitute judicial legislation if the intervention is demonstrably required by the Constitution and remains within the limits of constitutional adjudication.[24]

This study occupies this unresolved space by shifting the analytical focus from the traditional binary of negative legislator versus positive legislator toward the question of the degree and character of judicial intervention. On this basis, the study develops five parameters for assessing the constitutional legitimacy of judicial interpretation: clear constitutional necessity, direct linkage to a constitutional mandate, minimal judicial intervention, openness to legislative follow-up, and transparency of interpretative reasoning. These parameters are intended to provide a more precise analytical framework for determining whether a Constitutional Court decision remains an exercise of constitutional interpretation or has moved toward judicial norm-making. Accordingly, this study contributes to the existing literature by connecting the theoretical debate on judicial restraint, judicial activism, negative legislation, and living constitutionalism with an operational framework for assessing the constitutional limits of judicial interpretation.

Research Design and Methodology

This study employs normative legal research, which examines law as a system of norms, principles, doctrines, and judicial decisions to determine the constitutional boundaries of the Constitutional Court's interpretative authority in reviewing legislation.[25] This research design is appropriate because the study focuses on the normative relationship between the constitutional mandate of the Constitutional Court, the methods of constitutional interpretation reflected in its decisions, and the institutional boundary between judicial review and legislative norm-making.

Although this study is primarily normative, limited semi-structured interviews were used as supporting material to test the practical relevance of the normative parameters developed in the analysis. The interviews supplementary supporting material for determining the constitutionality of the Court's decisions, but as supplementary perspectives from judicial practitioners, academics, and legal practitioners.

Four approaches are employed: the statutory, conceptual, case, and comparative approaches. The statutory approach is used to examine the 1945 Constitution of the Republic of Indonesia, the Constitutional Court Law, and other relevant legislation governing the Court's authority and the legal consequences of its decisions. The conceptual approach examines the doctrines of guardian of the

[23] Adithiya Diar and Albi Ternando, "Constitution-Based Positive Legislature: A Comparative Study of Indonesia, Bulgaria, and Mexico," *Limbago: Journal of Constitutional Law* 6, no. 1 (2026): hlm. 172-201, https://doi.org/https://doi.org/10.22437/limbago.v6i1.57421.
[24] Radian Salman, "Judicial Activism or Self-Restraint: Some Insight Into the Indonesian Constitutional Court," in *International Conference on Law, Governance and Globalization 2017 (ICLGG 2017)* (Atlantis Press, 2017), hlm. 228-242, https://doi.org/https://doi.org/10.2991/iclgg-17.2018.32.
[25] Indra utama Tanjung, *Dasar-Dasar Metode Penelitian Hukum* (Karanganyar: CV Pustaka Dikara, 2024), hlm. 15.

constitution, negative legislator, living constitution, judicial activism, judicial restraint, and judicial norm-making as analytical frameworks for assessing the legitimacy and limits of constitutional interpretation. The case approach examines Constitutional Court decisions that demonstrate different degrees and forms of judicial intervention, particularly Decisions No. 46/PUU-VIII/2010, No. 14/PUUXI/2013, and No. 90/PUU-XXI/2023.

The selection of these decisions is based on four criteria. First, the decisions address constitutional issues with significant implications for the meaning or application of statutory norms. Second, they demonstrate an interpretative intervention that extends beyond a simple declaration that a statutory provision is constitutional or unconstitutional. Third, the decisions have a substantive impact on the formulation or practical operation of legal norms. Fourth, the decisions represent different forms and degrees of judicial intervention, allowing the study to examine the boundary between constitutional interpretation and judicial norm-making comparatively. Decision No. 46/PUU-VIII/2010 is examined because of its development of the civil relationship between children born outside marriage and their biological fathers; Decision No. 14/PUU-XI/2013 because it demonstrates an expansive constitutional interpretation affecting the design of simultaneous elections; and Decision No. 90/PUU-XXI/2023 because it introduced an additional eligibility formula concerning the minimum age requirement for presidential and vice-presidential candidates. These decisions therefore provide representative cases for examining varying levels of judicial intervention.

The legal materials consist of primary, secondary, and tertiary legal materials.[26] Primary legal materials comprise the 1945 Constitution, the Constitutional Court Law, and other relevant statutes, as well as Constitutional Court decisions. Secondary legal materials include peer-reviewed journal articles, books, scholarly writings, and constitutional law scholarship concerning constitutional interpretation, judicial review, judicial activism, judicial restraint, negative legislation, living constitutionalism, and judicial norm-making. Tertiary materials, where necessary, are used to clarify legal terminology and concepts. The materials are selected based on their relevance to the research question and their capacity to explain the constitutional basis, interpretative reasoning, and institutional consequences of judicial intervention.

The comparative approach is employed to place the Indonesian experience within broader constitutional adjudication practices. Germany, South Korea, and South Africa are selected because their constitutional courts have developed significant practices of constitutional review and interpretation while operating within different institutional and constitutional traditions. The comparison does not seek to determine which jurisdiction provides a superior model, but to identify analytical patterns concerning the relationship between constitutional interpretation, judicial intervention, and legislative authority. The comparison focuses on five indicators: constitutional necessity, linkage to a constitutional mandate, degree of judicial intervention, openness to legislative follow-up, and transparency of interpretative reasoning. These indicators are used consistently to assess whether judicial intervention remains connected to constitutional adjudication or approaches judicial norm-making.

The analysis is conducted through several sequential stages. First, the study identifies the constitutional and statutory provisions governing the authority and limits of the Constitutional Court. Second, relevant legal materials and Constitutional Court decisions are classified according to the form and intensity of judicial intervention. Third, the Court's reasoning in the selected decisions is analyzed by examining its textual, structural, purposive, and constitutional justifications and by assessing the relationship between those reasons and the normative consequences of each ruling. Fourth, the Indonesian findings are compared with constitutional adjudication practices in Germany, South Korea, and South Africa using the five comparative indicators. Fifth, the results of the doctrinal and comparative analyses are synthesized to identify recurring criteria for distinguishing legitimate constitutional interpretation from judicial norm-making.

The legal materials are analyzed qualitatively using descriptive-analytical and prescriptive techniques. The descriptive-analytical analysis identifies and explains the constitutional reasoning, interpretative techniques, and degree of judicial intervention reflected in the selected decisions. The

[26] Jim Hoy Yam, "Refleksi Penelitian Metode Campuran (Mixed Method)," *EMPIRE* 2, no. 2 (2022): hlm. 126-134, https://doi.org/https://doi.org/10.33592/empire.v2i2.3310.

prescriptive analysis then evaluates whether such intervention remains within the constitutional mandate of the Court and formulates normative parameters for determining its legitimate boundaries. Through this analytical process, the study develops five objective parameters for distinguishing legitimate constitutional interpretation from judicial norm-making: clear constitutional necessity, direct constitutional mandate linkage, minimal judicial intervention, openness to legislative followup, and transparency of interpretative reasoning.

Findings and Discussion

Constitutional Basis for Constitutional Court Interpretation and the Limits of Its Guardian Function

The Constitutional Court emerged from the fundamental restructuring of Indonesia's constitutional system following the reform era. Through the Third Amendment to the 1945 Constitution of the Republic of Indonesia, the Constitutional Court was constitutionally established as one of the institutions exercising judicial power under Article 24 paragraph (2), with its specific authority regulated in Article 24C and its relationship with the impeachment mechanism affirmed in Article 7B. This constitutional design establishes the Court not merely as an additional judicial institution, but as a constitutional organ entrusted with protecting constitutional supremacy within Indonesia's system of checks and balances. Its authority was subsequently operationalized through Law Number 24 of 2003 concerning the Constitutional Court, which positioned constitutional adjudication as an institutional mechanism for ensuring that the exercise of state power remains consistent with the Constitution.[27]

Article 24C paragraphs (1) and (2) of the 1945 Constitution confers upon the Constitutional Court four principal powers and one constitutional obligation: reviewing laws against the Constitution, resolving disputes concerning the authority of constitutional state institutions, deciding the dissolution of political parties, adjudicating disputes concerning general election results, and deciding upon the DPR's opinion concerning alleged violations by the President and/or Vice President. The constitutional source of these powers is significant for determining the scope of judicial interpretation. Because the Court's authority derives directly from the Constitution, constitutional interpretation constitutes an exercise of judicial power rather than an unrestricted authority to formulate public policy. Article 24C paragraph (5), which requires constitutional judges to possess integrity and statesmanlike qualities as well as mastery of the Constitution and state administration, further indicates that the exercise of this authority requires not only institutional competence but also disciplined constitutional reasoning.

The institutional logic underlying this arrangement is consistent with Hans Kelsen's conception of constitutional review. In the Kelsenian model, a constitutional court is established to examine the compatibility of legislative products with the Constitution and to remove norms that are inconsistent with higher constitutional norms.[28] The Court's primary function is therefore corrective rather than substitutive. This conception subsequently developed into the doctrine of the constitutional court as a negative legislator: the Court may invalidate legislation that violates the Constitution, while the formulation of general legal policy remains principally within the competence of the legislature.[29] The significance of this doctrine, however, should not be understood as prohibiting all forms of judicial development of legal meaning. Rather, it establishes an institutional presumption that judicial interpretation should not unnecessarily replace legislative choices.

This limitation is reinforced by the constitutional principle of checks and balances. The Constitutional Court's role is to exercise constitutional control over other branches of government while remaining within the distribution of institutional authority established by the Constitution.[30]

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[27] Nugroho, *Loc., Cit*.
[28] Onny Medaline, T Riza Zarzani, and Ayumi Kartika Sari, "Revitalization of Complete Systematic Land Registration (PTSL) Program as a Form of Agrarian Reform in the Field of Socioeconomic Mapping of Society," *International Journal of Research and Review* 7, no. 10 (2020): hlm. 108-114.
[29] Baiq Setiani, "Konsep Kedaulatan Negara Di Ruang Udara Dan Upaya Penegakan Pelanggaran Kedaulatan Oleh Pesawat Udara Asing," *Jurnal Konstitusi* 14, no. 3 (2017): hlm. 489-510, https://doi.org/https://doi.org/10.31078/jk1432.
[30] Magabe T Thabo and Kola O Odeku, "Separation of Powers, Checks and Balances and Judicial Exercise of Self-Restraint: An Analysis of Case Law," *Obiter* 42, no. 3 (2021): hlm. 547-560, https://journals.co.za/doi/full/10.10520/ejc-obiter_v42_n3_a6.

Consequently, judicial review involves a dual responsibility. The Court must intervene when legislation violates constitutional requirements, but it must also exercise restraint when resolving constitutional disputes in areas that involve legitimate legislative policy choices. The constitutional legitimacy of judicial intervention therefore cannot be measured solely by whether the Court possesses formal jurisdiction to review a particular statute. It must also be assessed according to the purpose, intensity, and normative consequences of the intervention. The more an interpretation replaces a legislative policy choice with a judicially determined formula, the stronger the constitutional justification required for such intervention.

The legal consequences of Constitutional Court decisions provide an additional normative reference point. Article 57 paragraph (1) of the Constitutional Court Law establishes that, when a petition for judicial review is granted, the relevant statutory provision loses its binding legal force. Article 58 further establishes that a statute remains legally effective until the Constitutional Court declares otherwise. These provisions reflect the conventional corrective function of constitutional review: the Court determines the constitutional validity of legislation, while the legislature retains the primary authority to formulate general legal norms.[31] Nevertheless, the statutory framework does not entirely resolve the problem of interpretative boundaries because contemporary constitutional adjudication frequently produces decisions whose effects extend beyond simple invalidation.

The development of conditional decisions illustrates this difficulty. The Constitutional Court has issued decisions declaring provisions conditionally constitutional or conditionally unconstitutional and, in certain cases, has attached meanings or conditions to the continued application of statutory provisions. Such decisions can be constitutionally defensible because a purely declaratory judgment may fail to provide effective protection for constitutional rights or may create legal uncertainty. Conditional interpretation may therefore function as a technique for preserving a statutory provision while ensuring that its application conforms to constitutional requirements.[32] However, the existence of a constitutional justification for conditional decisions does not mean that every condition formulated by the Court is automatically legitimate.

The critical issue is therefore not the formal classification of a decision as conditional, additive, or interpretative, but the substantive degree of judicial intervention. A conditional ruling remains within the function of constitutional guardianship when the condition imposed by the Court clarifies or restores a constitutional meaning that can be derived from the Constitution and is necessary to prevent an identified constitutional violation. By contrast, the intervention becomes more problematic when the Court introduces a substantive condition, category, exception, or regulatory formula that cannot be sufficiently traced to a constitutional mandate and that effectively determines a policy choice previously left to the legislature. Accordingly, the distinction between interpretation and norm formation cannot be established merely from the wording of the operative part of a judgment; it requires examination of the constitutional basis, reasoning, necessity, and normative consequences of the judicial intervention.

This distinction also clarifies the relationship between judicial activism and judicial restraint. Judicial activism may be necessary when constitutional rights cannot be effectively protected through a purely textual or passive approach. The Constitution cannot be treated as a static document incapable of responding to changing constitutional circumstances. At the same time, judicial activism cannot constitute an unlimited authorization for judicial policy-making. Judicial restraint remains necessary to preserve the separation of powers and the democratic legitimacy of legislation. The appropriate constitutional position is therefore not an absolute choice between activism and restraint, but a calibrated approach in which the intensity of judicial intervention corresponds to the strength of the constitutional justification for that intervention.

On this basis, the boundary between the Constitutional Court's role as guardian of the Constitution and judicial norm-making can be formulated through several analytical criteria. First, constitutional necessity requires that judicial intervention respond to a concrete constitutional problem that cannot adequately be resolved through ordinary interpretation or simple invalidation.

[31] Fahri Bachmid, "Pembentukan Peraturan Pemerintah Pengganti Undang-Undang Pasca Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020," *Reformasi* 13, no. 2 (2023): hlm. 195-203, https://doi.org/https://doi.org/10.33366/rfr.v13i2.4479.
[32] Irsyam Risdawati and T Riza Zarzani, "Juridical Review Of Health Service Facilities Based On Law No 17 Of 2023," in *International Conference on Health Science, Green Economics, Educational Review and Technology*, vol. 5, 2023, 15–20.

Second, direct constitutional mandate linkage requires a demonstrable connection between the judicially formulated meaning and a constitutional provision, principle, or right. Third, minimal intervention requires the Court to employ the least intrusive interpretative solution necessary to restore constitutional conformity, rather than replacing the legislature's policy choice with its own preferred design. Fourth, legislative follow-up openness requires that the ruling leave sufficient institutional space for the legislature to determine further regulatory details where those details involve policy choices. Fifth, transparency of interpretative reasoning requires the Court to clearly explain the constitutional basis and methodological steps through which it arrives at the additional meaning or condition imposed on a statutory provision.

These criteria provide a more precise distinction between legitimate constitutional interpretation and judicial norm-making. An intervention that satisfies the five criteria is more appropriately understood as an exercise of constitutional guardianship because the Court remains directed toward restoring constitutional conformity while preserving the institutional role of the legislature. Conversely, the further a decision departs from these criteria particularly where it creates a new regulatory formula without a sufficiently direct constitutional mandate, determines substantive policy choices, and leaves little or no room for legislative follow-up the stronger the basis for characterizing the intervention as judicial norm-making rather than constitutional interpretation.

The distinction is particularly important for assessing the Constitutional Court's controversial decisions. The relevant question is not simply whether the Court has "created a norm," because constitutional interpretation inevitably produces normative consequences. The more precise question is whether the normative consequence constitutes a necessary development of constitutional meaning or an autonomous judicial determination of regulatory policy. This distinction allows the Court's interpretative authority to remain sufficiently dynamic to protect constitutional rights while preventing the judicial function from displacing the legislature's constitutionally assigned role.

Accordingly, the function of the Constitutional Court as guardian of the Constitution should not be understood either as requiring absolute judicial passivity or as authorizing unrestricted constitutional creativity. Its legitimacy lies in maintaining a constitutional equilibrium: the Court must possess sufficient interpretative capacity to ensure the effectiveness of constitutional norms, while the legislature must retain meaningful authority to formulate general legal policy. The five criteria above consequently serve as an analytical framework for determining the point at which constitutional interpretation remains within the Court's guardianship function and the point at which judicial intervention begins to assume the character of judicial norm-making.

Typology of Constitutional Court Decisions: From Constitutional Review to Judicial Norm Formation

The development of Constitutional Court jurisprudence demonstrates that constitutional review can no longer be understood exclusively through a binary distinction between constitutional and unconstitutional norms. In exercising judicial review, the Constitutional Court has developed various forms of judgments, including declaratory, conditionally constitutional, conditionally unconstitutional, nonconformity, and remedial decisions.[33] These developments indicate that the Court's intervention may occur at different levels of intensity. Accordingly, the distinction between the Constitutional Court as a negative legislator and its potential movement toward judicial normmaking should not be determined solely by the formal wording of the operative part of a judgment.

It should instead be assessed through the Court's legal reasoning, the intensity of its intervention in legislative policy, and the normative consequences generated by the judgment.[34] On this basis, this study develops an analytical typology consisting of three categories: (1) constitutional principle-assessing decisions, (2) transitional or remedial decisions, and (3) normforming decisions. This typology is not intended to establish rigid or mutually exclusive categories. A single decision may contain characteristics belonging to more than one category. The purpose of the typology is instead

[33] Risdawati and Zarzani.
[34] Ni'matul Huda, "Peran Dan Fungsi Mahkamah Konstitusi Dalam Pembangunan Politik Hukum Pemerintahan Daerah," *Jurnal Hukum Ius Quia Iustum* 19, no. 3 (2012): hlm. 337-362, https://doi.org/https://doi.org/10.20885/iustum.vol19.iss3.art1.

to identify the dominant function of a decision based on three analytical dimensions: the character of the Court's legal reasoning, the degree of intervention in legislative policy, and the normative consequences of the judgment. The greater the Court's intervention in determining substantive regulatory choices, the stronger the constitutional justification required to establish that the intervention remains an exercise of constitutional interpretation rather than judicial legislation.

The first category consists of constitutional principle-assessing decisions. In this category, the Constitutional Court primarily determines whether a statutory provision is compatible with constitutional principles, rights, and structural requirements. The Court may interpret constitutional provisions extensively, but the interpretation remains directed toward evaluating the validity of an existing legislative choice. The essential characteristic is the absence of a substantive replacement formula determined by the Court. The legislature therefore retains its discretion to formulate or reformulate the relevant policy. From the perspective of the negative legislator doctrine, this category represents the closest approximation to the classical constitutional review function because the Court's intervention remains corrective rather than substitutive.[35]

The second category consists of transitional or remedial decisions. These decisions go beyond a simple declaration of constitutionality or unconstitutionality because the Court considers the practical consequences of immediately invalidating a statutory provision.[36] The Court may postpone the effect of invalidity, identify a constitutionally permissible direction, prohibit a particular unconstitutional interpretation, or provide a framework within which the legislature can correct the identified constitutional defect. The distinguishing feature is that the Court intervenes to remedy a constitutional problem while preserving meaningful legislative discretion. Such decisions therefore occupy an intermediate position between judicial restraint and judicial activism. They may involve substantial judicial intervention, but their legitimacy depends on whether the intervention remains remedial and whether the legislature continues to possess sufficient space to determine the final regulatory design.

The third category consists of norm-forming decisions. In this category, the Court's intervention moves beyond assessing the constitutionality of an existing norm or providing a temporary remedy.[37] The Court establishes a new normative formula, adds a new category or condition, or substantially reconstructs the meaning of a statutory provision in a manner that determines the substance of a legal policy.[38] The central issue is not whether the Court uses new words in the operative part of its judgment, but whether the judgment produces a binding regulatory content that previously did not exist or that substantially differs from the legislative design. When such intervention determines the substantive policy choice itself and leaves little meaningful space for legislative follow-up, the Court's function approaches judicial legislation rather than constitutional review.

The distinction among these three categories can therefore be formulated through the following analytical indicators. First, legal reasoning examines whether the Court derives its conclusion primarily from constitutional text, principles, and rights or whether it independently constructs a regulatory solution. Second, degree of intervention examines how far the Court enters the legislative policy space, ranging from merely assessing constitutionality to prescribing a remedial direction and ultimately determining substantive regulatory content. Third, normative consequence examines whether the judgment merely invalidates or upholds an existing norm, temporarily regulates its application, or creates a new generally applicable normative formula. These indicators provide a more objective basis for classifying decisions than relying solely on the terminology used in the judgment.

[35] Matthew R Christiansen and William N Eskridge Jr, "Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011," *Texas Law Review* 92, no. 6 (2014): hlm. 1317.
[36] Alexandre Marcotte, "A Question of Law:(Formal) Declarations of Invalidity and the Doctrine of Stare Decisis," *National Journal of Constitutional Law* 42, no. 1 (2021): hlm. 1-24.
[37] Tom Gerald Daly, "Constitutional Repair: A Comparative Theory," *The American Journal of Comparative Law* 73, no. 1 (2025): hlm. 1-48, https://doi.org/https://doi.org/10.1093/ajcl/avaf005.
[38] Howard Schweber, "Introduction: The 2024–2025 Term: A Tale of Two Courts (and Two Constitutions?)," in *SCOTUS 2025: Major Decisions and Developments of the US Supreme Court* (Springer, 2026), hlm. 1-16, https://link.springer.com/chapter/10.1007/978-3-032-10231-7_1.

Table 1.
Analytical Typology of Selected Constitutional Court Decisions Based on Legal Reasoning, Judicial Intervention, and Normative Consequences

No.	Constitutional Court Decision	Main Constitutional Issue	Main Legal Reasoning	Degree of Intervention	Normative Consequence	Analytical Category
1	73/PUU-XX/2022	Presidential nomination threshold.	The Court assessed the constitutional compatibility and rationality of the threshold and treated its determination as falling within the legislative policy space.	Low	The existing regulatory choice remained in force; no alternative threshold was formulated by the Court.	Constitutional principle-assessing.
2	114/PUU-XX/2023	Open or closed proportional electoral system.	The Court assessed the compatibility of the open electoral system with constitutional principles while recognizing that the choice of electoral design involves legislative policy.	Low	No substitute electoral formula was created by the Court.	Constitutional principle-assessing.
3	14/PUU-XI/2013	Simultaneous elections.	The Court interpreted the constitutional structure of elections and determined that separate legislative and presidential elections were inconsistent with the constitutional design, while postponing the legal effect of the decision.	Moderate	The Court established a constitutional direction and postponed implementation, leaving room for legislative and institutional preparation.	Transitional/remedial.
4	55/PUU-XVII/2019	Constitutional design of simultaneous elections.	The Court recognized several constitutionally permissible models and emphasized	Moderate	The Court provided constitutional parameters without prescribing one	Transitional/remedial.

			that determining the specific electoral model remained within the legislative domain.		final regulatory model.	
5	46/PUU-VIII/2010	Civil relationship of children born outside marriage.	The Court interpreted the statutory provision considering constitutional protection and reconstructed the legal relationship between a child and his biological father when supported by legally recognized evidence.	High	The judgment produced an additional normative meaning that affected the substantive content of the statutory provision.	Norm-forming.
6	90/PUU-XXI/2023	Presidential and vice-presidential age requirement.	The Court found the existing age requirement constitutionally problematic in a specific context and introduced an alternative condition concerning persons who had held or were currently holding elected positions.	High	A new alternative qualification was incorporated into the operative meaning of the statutory provision.	Norm-forming.

Source: Author's normative legal analysis based on the 1945 Constitution of the Republic of Indonesia, relevant legislation, and Constitutional Court decisions.

The first category can be illustrated by Decisions Number 73/PUU-XX/2022 and 114/PUUXX/2023. In Decision Number 73/PUU-XX/2022, the Court was confronted with a challenge concerning the presidential nomination threshold. Rather than determining a new threshold or replacing the legislative policy with a judicially preferred figure, the Court examined whether the existing arrangement violated constitutional principles and recognized the relevance of legislative policy considerations.[39] The significance of this decision lies not merely in the rejection of the petition, but in the Court's institutional restraint. The Court did not convert constitutional review into an opportunity to design a new electoral policy.

A similar pattern can be observed in Decision Number 114/PUU-XX/2023 concerning the electoral system. The Court assessed whether the open proportional system was constitutionally permissible

[39] Simon Butt, *The Indonesian Constitutional Court: The Evolution of a Judicial Institution*, vol. 16 (Martinus Nijhoff Publishers, 2026).

but did not replace it with a closed proportional system through judicial determination. The Court's reasoning therefore remained directed toward constitutional assessment rather than regulatory substitution. From the perspective of the negative legislator doctrine, these decisions demonstrate that constitutional review does not necessarily require the Court to determine the policy that it considers most desirable. The Court may recognize the existence of constitutional limits while leaving legitimate policy choices to the legislature.

The significance of these decisions becomes clearer when contrasted with the second category. Decision Number 14/PUU-XI/2013 demonstrates that constitutional adjudication may require a remedial technique when immediate invalidation would create institutional or legal difficulties.[40] The Court determined that the constitutional design required simultaneous legislative and presidential elections and declared the previous arrangement unconstitutional but postponed the effect of its decision until the 2019 elections. The postponement was not merely a procedural detail. It reflected the Court's recognition that constitutional correction had consequences for the organization of the electoral system and therefore required institutional preparation. The Court thus intervened substantially in constitutional design while still allowing the legislature and relevant institutions time to determine the detailed implementation.

Decision Number 55/PUU-XVII/2019 further illustrates this intermediate position. Rather than establishing one mandatory model of simultaneous elections, the Court recognized that several models could potentially satisfy constitutional requirements and emphasized the role of the legislature in selecting the appropriate design.[41] The Court therefore provided a constitutional framework without transforming that framework into a complete regulatory formula. From the perspective of judicial restraint, this is significant because the Court exercised constitutional guidance while preserving legislative discretion.

The second category therefore demonstrates that judicial intervention cannot automatically be classified as judicial legislation merely because the Court's decision has consequences beyond simple invalidation. A remedial decision may alter the legal situation substantially while remaining constitutionally legitimate if three conditions are present: the intervention responds to a concrete constitutional necessity, the Court does not unnecessarily determine substantive legislative choices, and meaningful space remains for legislative follow-up. The relevant distinction is consequently between remedial intervention and substitutive intervention. The former seeks to restore constitutional conformity; the latter replaces legislative choice with judicially determined regulatory content.

The distinction becomes more pronounced in Decisions Number 46/PUU-VIII/2010 and 90/PUUXXI/2023. In Decision Number 46/PUU-VIII/2010, the Court did not merely declare Article 43 paragraph (1) of the Marriage Law constitutional or unconstitutional.[42] It reconstructed the legal meaning of the provision by recognizing a civil relationship between a child born outside marriage and his biological father where the relationship can be established through scientific evidence, technology, or other legally recognized evidence. The constitutional reasoning was closely connected with the protection of the child's rights and legal status. Nevertheless, the normative consequence extended beyond the simple removal of an unconstitutional provision because the Court established a new interpretative formulation governing the legal relationship in question.

This feature places the decision closer to the norm-forming category. The decisive factor is not that the Court interpreted the statute because interpretation is unavoidable in constitutional adjudication but that the interpretation produced a concrete and generally applicable legal consequence that substantially reconstructed the operation of the statutory norm. The decision therefore illustrates the tension between constitutional protection and the negative legislator

[40] Satriadi Satriadi et al., "The Authority of the Constitutional Court in Redesigning the Electoral System: A Normative Analysis of Decision Number 135/PUU-XXII/2024," *Constitutional Law Review* 5, no. 1 (2026): hlm. 108-123, https://doi.org/https://doi.org/10.30863/clr.v5i1.6029.
[41] Luh Putu Vera Astri Pujayanti, "Judicialization of Politics in Indonesian Electoral Law Reform: An Analysis of the Constitutional Court's Role in Shaping the Direction of Constitutional Policy," *International Journal of Scientific Research* 3, no. 1 (2026): hlm. 22-32, https://doi.org/https://doi.org/10.62894/24kc8h47.
[42] Umarwan Sutopo, Endrik Safudin, and Kholili Badriza, "Judicial Ethics, Legal Reasoning, and the Validity of Court Decisions: The Paradox of Constitutional Adjudication in Indonesia," *Al-Syakhsiyyah: Journal of Law and Family Studies* 8, no. 1 (2026): hlm. 143-166, https://doi.org/https://doi.org/10.21154/syakhsiyyah.v8i1.13333.

doctrine, the Court may have a compelling constitutional justification for intervention, yet the strength of that justification must be assessed against the extent to which the Court determines the content of the resulting legal rule.

Decision Number 90/PUU-XXI/2023 presents an even more pronounced example of judicial norm formation. The issue concerned the statutory minimum age requirement for presidential and vice-presidential candidates.[43] Rather than merely determining whether the age requirement was compatible with constitutional principles, the Court introduced an alternative qualification concerning persons who had held or were currently holding elected positions through general elections, including regional head elections. The significance of the decision lies in the fact that the alternative qualification was not simply a clarification of an existing statutory phrase. It produced an additional normative pathway through which a person could satisfy the candidacy requirement.

From the perspective of judicial intervention, the difference between Decisions 46/PUUVIII/2010 and 90/PUU-XXI/2023 and the decisions in the first two categories is therefore substantive. In the former, the Court's interpretation directly affects the operative content of the legal norm. The Court does not merely determine the constitutional validity of a legislative choice; it establishes how the norm must operate after the judgment. This does not automatically establish that the Court acted illegitimately, because constitutional rights may in some circumstances require strong judicial intervention. However, it does mean that the decision requires a higher level of constitutional justification because the Court has moved closer to the legislative policy space.

The three categories can consequently be understood as a continuum of judicial intervention rather than three isolated boxes. Constitutional principle-assessing decisions represent relatively low intervention and are closest to the negative legislator model.[44] Transitional or remedial decisions represent moderate intervention because the Court actively manages the consequences of constitutional review while preserving legislative space. Norm-forming decisions represent high intervention because the Court determines substantive elements of the legal rule itself. The classification is therefore determined by the dominant function and effect of the decision, not merely by whether the Court's judgment contains additional language.

This continuum also provides a more precise relationship between judicial activism and judicial restraint. Judicial restraint is most apparent where the Court limits itself to constitutional assessment and recognizes legislative discretion.[45] Judicial activism becomes more visible in remedial decisions because the Court assumes a more active role in ensuring that constitutional rights and constitutional structures remain effective. Yet activism becomes constitutionally more sensitive when it results in a substantive normative formula that replaces or substantially narrows legislative choices. The relevant question is therefore not whether activism exists, but whether its intensity remains proportionate to the constitutional problem that the Court seeks to remedy.

The distinction can also be explained through the negative legislator doctrine. Under the classical model, the Court's principal function is to remove unconstitutional norms rather than formulate their substitutes. Nevertheless, contemporary constitutional adjudication demonstrates that strict adherence to this model may be insufficient where immediate invalidation produces serious constitutional or legal consequences. Remedial techniques may therefore be compatible with constitutional adjudication. The constitutional difficulty arises when remedial reasoning becomes a justification for determining the substantive content of a new rule without sufficient constitutional mandate or without preserving meaningful legislative participation. At that point, the Court's function begins to resemble judicial legislation.

The Indonesian typology becomes more meaningful when placed within comparative constitutional practice. The comparison with Germany, South Korea, and South Africa is not intended

[43] Abin Rifa Aldani, Ali Abdurrahman, and Lailani Sungkar, "The Application of Judicial Activism in the Constitutional Court Decision Number 90/PUU-XXI/2023 Regarding the Age Requirements for Presidential and Vice Presidential Candidates in Relation to the Theory of Legal Purpose," *KRTHA BHAYANGKARA* 18, no. 3 (2024): hlm. 587-595, https://doi.org/https://doi.org/10.31599/krtha.v18i3.3231.
[44] Rashmi Singh et al., "International Collaboration for Conservation of the Environmental Pollution Regulation," *Journal of Law and Legal Research Development* 3, no. 3 (2026): hlm. 1-14, https://doi.org/https://doi.org/10.69662/jllrd.v3i3.69.
[45] Emily Baker, "Judicial Activism versus Judicial Restraint: Safeguarding Democratic Principles in Contemporary Constitutional Systems," *Law, Governance & Social Justice JournalStack* 1, no. 1 (2026): hlm. 1-5, https://journals.journalstack.org/index.php/lgsj/article/view/59.

to establish that one constitutional system should simply be transplanted into another. Rather, these jurisdictions are selected because they demonstrate different institutional techniques for addressing the tension between constitutional review, judicial remedies, and legislative authority. Germany illustrates a relatively restrained remedial model; South Korea demonstrates the institutionalization of conditional and nonconformity decisions; while South Africa demonstrates a strong remedial jurisdiction expressly connected to constitutional invalidity and legislative correction.

Table 2.
Comparative Typology of Constitutional Court Intervention in Germany, South Korea, and South Africa

Jurisdiction	Principal Technique	Judicial Degree of Intervention	Legislative Space after Judgment	Relevance to Indonesian Analysis
Germany	Declaration of incompatibility/invalidity and remedial directions.	Moderate.	Generally substantial; legislature retains responsibility for corrective legislation.	Demonstrates strong judicial restraint in the formulation of substitute norms.
South Korea	Unconstitutional, nonconformity, conditionally unconstitutional, and conditionally constitutional decisions.	Moderate to high.	Preserved through formalized remedial and interpretative mechanisms.	Demonstrates that conditional interpretation can be institutionalized without necessarily eliminating legislative authority.
South Africa	Declaration of invalidity and just-and-equitable remedies, including suspension of invalidity.	Moderate to high.	Preserved through corrective authority of competent institutions.	Demonstrates that strong judicial remedies can coexist with legislative correction.

Source: Author's comparative normative analysis based on the constitutional and judicial-review frameworks of Germany, South Korea, and South Africa.

The German model demonstrates a relatively strong distinction between constitutional adjudication and legislative replacement. The Federal Constitutional Court may declare a statutory provision incompatible with the Basic Law and may provide the legislature with a period to remedy the constitutional defect.[46] The importance of this model for the present analysis is not that the German Court never affects the operation of legislation, but that the Court generally preserves the legislature's responsibility for determining the detailed substitute rule. The constitutional judgment identifies the defect; the legislature retains a meaningful role in determining the normative correction.

South Korea provides a different model because its constitutional jurisprudence formally recognizes several forms of conditional and nonconformity decisions. The Constitutional Court may declare a provision incompatible with the Constitution while allowing it to remain temporarily effective and requiring legislative correction.[47] It may also establish an interpretation under which a provision remains constitutional or prohibit a particular unconstitutional interpretation. This model

[46] Monika Polzin, "Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law," *International Journal of Constitutional Law* 14, no. 2 (2016): hlm. 411-438, https://doi.org/https://doi.org/10.1093/icon/mow035.
[47] Woo-Young Rhee, "Decision of the Korean Constitutional Court of Nonconformity of Statute with the Constitution and the Subsequent National Assembly Legislative Process in Korea's Constitutional Democracy," *J. Korean L.* 20, no. 1 (2021): hlm. 1-55.

demonstrates that constitutional courts can exercise substantial interpretative authority without necessarily assuming complete legislative responsibility. The crucial institutional feature is the continued distinction between judicial identification of constitutional requirements and legislative formulation of the detailed regulatory response.

South Africa similarly illustrates the legitimacy of strong remedial intervention. Article 172 of the South African Constitution requires a court deciding a constitutional matter to declare legislation or conduct inconsistent with the Constitution invalid to the extent of its inconsistency, while authorizing the court to make any just and equitable order.[48] Such authority includes, in appropriate circumstances, limiting the retrospective effect of invalidity or suspending the declaration to allow the competent authority to correct the constitutional defect. The South African model therefore confirms that effective constitutional protection does not require courts to choose between simple invalidation and unrestricted norm creation. A court can adopt a strong remedy while preserving the institutional responsibility of the competent law-making authority.

The comparative analysis reveals an important point for Indonesia. The existence of remedial or conditional judicial techniques does not by itself demonstrate that a constitutional court has become a positive legislator. Germany, South Korea, and South Africa all demonstrate that constitutional courts may exercise substantial influence over the operation of legislation while maintaining some form of legislative follow-up. The decisive question is therefore where the final responsibility for determining substantive regulatory content remains. Where the court identifies the constitutional defect, establishes constitutional requirements, and leaves meaningful room for legislative correction, the intervention remains closer to constitutional adjudication.[49] Where the court itself determines the substantive regulatory formula and leaves little meaningful discretion to the legislature, the intervention moves toward judicial norm formation.

This comparative perspective reinforces the analytical typology developed above. The distinction between constitutional review and judicial legislation should not be determined by the mere existence of conditional, additive, or remedial elements in a judgment. Rather, it should be assessed through the relationship among constitutional justification, judicial reasoning, intervention intensity, and legislative follow-up. The Indonesian Constitutional Court may legitimately employ interpretative and remedial techniques, but the constitutional legitimacy of such techniques depends on whether the Court remains directed toward restoring constitutional conformity or begins to determine the substantive policy choices that belong to the legislature.[50]

Accordingly, the typology developed in this subsection provides the analytical bridge to the central argument of this article. The three categories demonstrate that Constitutional Court decisions exist along a spectrum of intervention, and that the boundary between constitutional guardianship and judicial norm formation cannot be identified solely from the formal classification of a judgment. The boundary must instead be determined by objective criteria concerning constitutional necessity, direct linkage to a constitutional mandate, minimal judicial intervention, preservation of legislative follow-up, and transparency of interpretative reasoning. These criteria will subsequently be applied to the selected Indonesian Constitutional Court decisions to determine whether the Court's intervention remains within legitimate constitutional interpretation or has crossed into judicial norm formation.

Constitutional Limits of the Constitutional Court's Interpretation

The preceding analysis demonstrates that the constitutional boundary of the Constitutional Court's interpretation cannot be determined merely by asking whether a judgment contains an additional formulation. Constitutional adjudication inevitably requires interpretation, and in certain circumstances interpretation may produce consequences that affect the operation of statutory

[48] Shanelle Van der Berg, "A Capabilities Approach to Remedies for Systemic Resource-Related Socioeconomic Rights Violations in South Africa," *African Human Rights Law Journal* 19, no. 1 (2019): hlm. 290-316, https://doi.org/https://doi.org/10.17159/1996-2096/2019/v19n1a14.
[49] Ryan Fachryan Lesmana Putra and Nandang Pamungkas, "Kedudukan Constitutional Complaint Dalam Mahkamah Konstitusional The Position of Constitutional Complaint in the Constitutional Court," *Journal of Dual Legal Systems* 2, no. 1 (2025): hlm. 25.
[50] *Ibid.*

norms.[51] The more relevant question is therefore whether the Court's intervention remains directed toward restoring constitutional conformity or whether it determines substantive regulatory choices that should remain within the legislative domain. This distinction requires an analytical standard capable of measuring the intensity and justification of judicial intervention.

Article 24C of the 1945 Constitution establishes the Constitutional Court's authority to review laws against the Constitution, while Article 57 paragraph (1) of the Constitutional Court Law establishes the principal legal consequence of a successful review as the loss of binding legal force of the unconstitutional norm. This constitutional and statutory framework provides the initial basis for understanding the Court as a constitutional reviewer rather than a substitute lawmaker. Nevertheless, the development of conditional, interpretive, and remedial decisions demonstrates that constitutional adjudication cannot always operate through simple invalidation. The existence of judicial remedies beyond annulment is therefore not, by itself, evidence of judicial legislation.[52] What matters is the extent to which the Court's remedy determines the substance of the norm and restricts the legislature's remaining policy choices.

Within this framework, this study proposes five cumulative parameters for determining the constitutional legitimacy of the Court's interpretive intervention: (1) clear constitutional necessity, (2) direct linkage to a constitutional mandate, (3) minimal judicial intervention, (4) openness to legislative follow-up, and (5) transparency and verifiability of the interpretive method. These parameters are not intended to prohibit progressive constitutional interpretation. Rather, they function as a structured test for determining whether progressive interpretation remains a constitutional remedy or has crossed the boundary into judicial norm formation.

1. Clear Constitutional Necessity

The first parameter concerns whether there is a sufficiently clear constitutional necessity that justifies judicial intervention beyond ordinary constitutional review. The existence of an undesirable or outdated statutory provision is not, by itself, sufficient.[53] The Court must demonstrate that the challenged provision produces a concrete constitutional problem, such as an impairment of a fundamental right, a violation of constitutional equality, a conflict with the constitutional structure, or a constitutional vacuum that cannot adequately be addressed through simple invalidation.

This parameter is important because constitutional interpretation should remain connected to the constitutional problem that gives rise to the Court's jurisdiction. The greater the intervention proposed by the Court, the stronger the constitutional necessity that must justify it. A minor constitutional defect should not automatically authorize the Court to construct a comprehensive alternative regulatory arrangement.[54]

This parameter can be applied to Decision No. 46/PUU-VIII/2010 concerning the civil relationship of children born outside marriage. The constitutional problem identified by the Court was closely connected with the legal position and constitutional rights of children whose civil relationship with their biological father was not adequately recognized under the existing statutory construction. In this context, a purely declaratory annulment could potentially leave the underlying constitutional problem unresolved. The Court's intervention therefore had a discernible constitutional necessity: preventing the statutory provision from producing a legal consequence that undermined the constitutional protection of the child.

The same parameter produces a more demanding question in Decision No. 90/PUU-XXI/2023 concerning the age requirement for presidential and vice-presidential candidates. The Court's intervention cannot be justified merely by the existence of alternative political considerations

[51] Nanda Setya Darmawan, "Justice, Expediency, and Legal Certainty in Indonesia's Constitutional Adjudication of the 2024 Presidential Election," *As-Siyasi: Journal of Constitutional Law* 6, no. 1 (2026): hlm. 363-388, https://doi.org/https://doi.org/10.24042/as-siyasi.v61.32390.
[52] Jarosław Szymanek, "Evolutionary Interpretation in Constitutional Law: Between Accommodation and Instrumentalization," in *Institution of Law Enforcement and Constitutional Developments-Emerging Trends and Enduring Debates* (IntechOpen, 2025).
[53] Bart Van der Sloot and Yvette Wagensveld, "Deepfakes: Regulatory Challenges for the Synthetic Society," *Computer Law & Security Review* 46, no. 1 (2022): hlm. 105716.
[54] Antonio Aloisi, "Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead," *European Labour Law Journal* 13, no. 1 (2022): hlm. 4-29, https://doi.org/https://doi.org/10.1177/20319525211062557.

regarding eligibility. The relevant question is whether the Constitution itself created a sufficiently clear necessity to introduce an additional eligibility pathway for persons below the statutory age who had held or were holding elected positions. The distinction is significant. If the constitutional problem can be resolved through an interpretation of existing constitutional principles without creating a new eligibility formula, the necessity for judicial norm formation becomes weaker. Thus, the constitutional necessity parameter establishes a threshold principle: the more extensive the judicial intervention, the more concrete and compelling the constitutional necessity must be.

2. Direct Linkage to a Constitutional Mandate

The second parameter requires a direct and demonstrable connection between the judicial formulation and a constitutional mandate. A constitutional court cannot justify every policy preference by referring generally to constitutional values. The proposed interpretation must be traceable through a rational chain from constitutional text, constitutional structure, constitutional rights, or constitutional principles to the conclusion reached by the Court.[55]

This parameter distinguishes constitutional interpretation from judicial policy-making. Constitutional values may guide interpretation, but they do not automatically authorize the Court to choose among several equally plausible legislative policies. Where several regulatory alternatives are constitutionally permissible, selecting one of those alternatives becomes increasingly difficult to justify as an exclusively judicial function.

In Decision No. 46/PUU-VIII/2010, the Court's construction can be connected directly to constitutional protection of legal equality, human dignity, and the rights of children. The Court's interpretation sought to prevent the statutory norm from producing a discriminatory legal consequence toward children born outside marriage. The normative construction therefore had a relatively direct relationship with constitutional rights.

Decision No. 90/PUU-XXI/2023 presents a more complex situation. The Court's recognition of an alternative eligibility route for persons who had held or were holding elected positions must be assessed against the question of whether that particular formula follows directly from the Constitution or represents one policy choice among several possible ways of regulating presidential and vicepresidential eligibility. The distinction is crucial. If the Constitution requires protection against a particular form of discrimination, the Court may have a strong constitutional basis for intervention. However, if the Constitution leaves several institutional or policy options open, choosing one specific formula may exceed the function of constitutional interpretation.

Accordingly, the second parameter requires not merely the existence of a constitutional value but a direct argumentative linkage between the constitutional mandate and the specific normative consequence produced by the judgment.

3. Minimal Judicial Intervention

The third parameter concerns the intensity of the Court's intervention. Even where constitutional necessity and constitutional mandate are established, the Court should select the least interventionist judicial technique capable of resolving the constitutional problem. This principle does not require judicial passivity. Rather, it requires proportionality between the constitutional defect and the remedy imposed.[56]

The distinction can be expressed through three levels of intervention. At the first level, the Court merely upholds or invalidates the challenged provision. At the second level, the Court provides a constitutional interpretation or remedial direction while preserving legislative discretion. At the third level, the Court establishes a detailed and generally binding normative formula that determines the

[55] Muhamad Dzadit Taqwa, "Improving Judicial Reasoning in Constitutional Rights Cases: The Case for a Structured Proportionality Test in the Indonesian Constitutional Court," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 13, no. 1 (2026): hlm. 1-23.
[56] Ladislav Vyhnánek et al., "The Dynamics of Proportionality: Constitutional Courts and the Review of COVID-19 Regulations.," *German Law Journal* 25, no. 3 (2024): hlm. 386-406.

substance of the rule. The movement from the first toward the third level represents increasing judicial intervention.

Decision No. 46/PUU-VIII/2010 demonstrates intervention beyond simple invalidation because the Court reconstructed the meaning of the statutory provision concerning the civil relationship between a child and his biological father. The legitimacy of that intervention therefore depends on whether the additional construction was necessary to remedy the identified constitutional defect and whether the formulation remained proportionate to that purpose.

Decision No. 90/PUU-XXI/2023 represents an even stronger intervention because the judgment introduced an alternative pathway through which the statutory age requirement could be satisfied. The Court therefore did not merely remove an unconstitutional limitation but determined an additional normative condition. Under the minimal intervention parameter, the critical question is whether such an alternative formulation was the least interventionist means of addressing the constitutional problem. If the constitutional objective could have been achieved through a declaration of incompatibility or through a direction to the legislature to formulate a constitutionally compliant rule, the justification for directly establishing the new formula becomes more demanding.

This parameter therefore provides an important distinction between remedial interpretation and substitutive norm formation. The former corrects a constitutional defect while minimizing judicial displacement of legislative authority; the latter risks replacing legislative choice with judicially determined content.

4. Openness to Legislative Follow-up

The fourth parameter examines whether the judgment preserves a meaningful opportunity for the legislature to participate in the subsequent formulation or adjustment of the relevant legal norm. This parameter is particularly important because constitutional adjudication operates within a system of separation of powers. The Court may identify constitutional requirements, but the legislature ordinarily possesses democratic legitimacy to determine detailed policy and regulatory design.[57]

A decision remains closer to constitutional adjudication where the Court identifies the constitutional defect and establishes the constitutional boundaries within which the legislature must act. Conversely, the possibility of judicial norm formation becomes stronger where the Court's formulation is immediately binding, operationally complete, and leaves little substantive discretion for legislative follow-up.

Decision No. 46/PUU-VIII/2010 demonstrates that judicial interpretation may have immediate normative consequences while still leaving certain matters of implementation to the legal and institutional framework. The existence of further legislative or regulatory space is therefore relevant to assessing the degree of judicial displacement.

Decision No. 90/PUU-XXI/2023 requires more critical scrutiny under this parameter. By establishing an additional route through which the age requirement could be satisfied, the Court's ruling directly affected the operation of the statutory eligibility requirement. The critical question is therefore whether the legislature retained meaningful authority to determine the broader regulatory design after the Court's ruling. Where the essential policy choice has already been determined by the Court, legislative follow-up may become merely formal rather than substantive. In such circumstances, the distinction between constitutional interpretation and judicial legislation becomes increasingly difficult to maintain.

The legislative follow-up parameter therefore asks a practical institutional question: after the Court has spoken, does the legislature still have a genuine constitutional choice, or is it merely required to implement a normative formula already determined by the Court?.

[57] Zim Nwokora, "Constitutional Design for Dynamic Democracies: A Framework for Analysis," *International Journal of Constitutional Law* 20, no. 2 (2022): hlm. 580-610, https://doi.org/https://doi.org/10.1093/icon/moac030.

5. Transparency and Verifiability of the Interpretive Method

The fifth parameter concerns the transparency of the Court's interpretive reasoning. Judicial legitimacy does not depend solely on the outcome of a decision but also on the ability of legal actors and the public to understand how the Court moved from constitutional sources to its conclusion.[58]

An interpretive method is transparent when the Court clearly identifies the constitutional provision or principle relied upon, explains the relationship between that constitutional source and the statutory provision under review, identifies the constitutional defect, and provides a rational explanation for why the chosen remedy is necessary and proportionate. This requirement is especially important where the Court adopts an interpretation that produces an effect equivalent to adding or changing statutory content.

Applied to Decision No. 46/PUU-VIII/2010, the Court's reasoning can be examined by tracing the relationship between the constitutional protection of children and equality and the reconstruction of the civil relationship recognized in the judgment. The more clearly this chain of reasoning is established, the stronger the claim that the new interpretation constitutes constitutional adjudication rather than an autonomous policy choice.

In Decision No. 90/PUU-XXI/2023, the same test requires closer examination of the reasoning connecting the constitutional principles relied upon by the Court to the specific alternative eligibility formula that was introduced. The issue is not whether the Court's reasoning is extensive, but whether the reasoning sufficiently demonstrates why that particular formula follows from the Constitution and why alternative, less interventionist remedies were inadequate.

The transparency parameter therefore serves as a safeguard against what may be described as policy preference disguised as constitutional interpretation. The more normatively creative the decision, the greater the burden of argumentative justification imposed upon the Court.

The normative analysis above is further examined against practical perspectives obtained through informal semi-structured interviews with judges of district courts in Medan and North Sumatra, constitutional law academics, and legal practitioners. The interviews were not intended to transform this study into empirical legal research, but rather to provide practical validation of the normative problem concerning the boundary between constitutional interpretation and judicial norm formation. The respondents were therefore selected purposively based on their professional engagement with adjudication, constitutional law, or legal practice. Their identities are anonymized and presented through professional codes.

The interviews reveal three broadly distinguishable positions. The first supports progressive constitutional interpretation. From this perspective, the Constitutional Court cannot always protect constitutional rights merely by invalidating an unconstitutional provision. In certain circumstances, particularly where annulment would create a legal vacuum or leave constitutional rights inadequately protected, conditional or interpretive rulings may constitute a legitimate remedial technique. One judicial practitioner emphasized that a new meaning may still be regarded as constitutional interpretation when there is a direct relationship between the meaning formulated by the Court and the constitutional right or principle requiring protection. This position is consistent with the living constitution approach, which recognizes that constitutional adjudication must remain responsive to changing social conditions.

The second position emphasizes judicial restraint. Judicial practitioners and academics holding this view distinguish sharply between interpreting the constitutional meaning of an existing norm and determining the substantive policy that the norm should contain. In their view, when the Constitutional Court establishes a new requirement, category, exception, or operational formula that was not previously formulated by the legislature, the Court risks moving beyond constitutional review into judicial legislation. The concern is not merely institutional but also democratic: the legislature possesses political legitimacy to determine general legal policy, whereas the Court derives its legitimacy from adjudicating constitutional questions. Consequently, the more detailed and policyoriented the formulation becomes, the stronger the justification for judicial restraint.

[58] Anastasia Nefeli Vidaki and Vagelis Papakonstantinou, "Democratic Legitimacy of AI in Judicial Decision-Making," *AI & SOCIETY* 40, no. 8 (2025): hlm. 6025-6035, https://link.springer.com/article/10.1007/s00146-025-02411-w.

The third position adopts a conditional or proportional approach. According to this view, the distinction cannot be determined categorically by asking whether the Court has introduced a new formulation. A limited degree of norm specification may be justified when it is constitutionally necessary, directly derived from the Constitution, and required to prevent a legal vacuum or continuing infringement of constitutional rights. Nevertheless, the Court should not select among several equally constitutional policy alternatives that remain open to the legislature. The greater the number of policy choices available to the legislature, the stronger the reason for the Court to refrain from determining the substantive choice itself.

These divergent perspectives provide important support for the five parameters proposed in this study. First, the requirement of a clear constitutional need responds to the concern that judicial intervention should not occur merely because the Court prefers a particular policy outcome. Second, the requirement of a direct constitutional mandate linkage prevents the Court from deriving new regulatory choices solely from judicial preference. Third, the principle of minimal intervention addresses the concern that the Court should formulate only what is necessary to restore constitutionality rather than redesigning the regulatory framework in detail. Fourth, the requirement of legislative follow-up openness preserves the legislature's institutional authority to develop the broader policy framework after the Court has identified the constitutional defect. Fifth, the requirement of a transparent interpretative method enables the Court's reasoning to be examined and distinguished from policy-making disguised as constitutional interpretation.

The practical perspectives therefore do not establish that one side is categorically correct. Rather, they reveal a common constitutional problem underlying the disagreement: the absence of sufficiently objective criteria for determining when progressive interpretation remains constitutionally legitimate and when it becomes judicial legislation. This finding strengthens the normative argument of this study that the boundary should be assessed through the intensity and consequences of judicial intervention rather than through the formal existence of new wording in the Court's ruling.

The practical perspectives also provide a basis for reassessing Decisions No. 46/PUU-VIII/2010 and No. 90/PUU-XXI/2023. In both cases, the relevant question is not simply whether the Court introduced a new formulation, but whether such formulation satisfied the five proposed criteria. Decision No. 46/PUU-VIII/2010 can be examined in terms of whether the new interpretation was directly necessary to restore constitutional protection for children born outside marriage and whether the formulation constituted the minimum intervention necessary to remedy the constitutional defect. Decision No. 90/PUU-XXI/2023 raises a more difficult question because the Court introduced an additional eligibility route for presidential and vice-presidential candidates. The critical issue is therefore whether this additional route was a direct constitutional consequence that was necessary to remedy a constitutional violation, or whether it represented a policy choice among alternatives that should have remained available to the legislature.

Accordingly, the interviews function as a practical test of the proposed limitation model rather than as an independent source for determining constitutional validity. The convergence of the respondents around the need for clearer limits, despite differences concerning the permissible degree of judicial intervention, reinforces the central proposition of this study: constitutional interpretation should remain sufficiently dynamic to protect constitutional rights, but its legitimacy depends upon necessity, constitutional derivation, proportionality of intervention, preservation of legislative space, and transparency of reasoning.

The application of the five parameters demonstrates that the two decisions represent different degrees of judicial intervention, even though both contain substantial interpretive elements.

Table 3.
Application of the Five-Parameter Constitutional Interpretation Test

Parameter	Decision VI/2010	No. 46/PUU-VIII/2010	Decision XXII/2023	90/PUU-XXI/2023	Analytical Significance
Clear constitutional necessity.	Stronger justification because the existing norm raised a concrete issue concerning the legal protection and civil status of children.	Requires stronger justification because the additional eligibility route constitutes a specific regulatory choice.	The stronger the constitutional necessity, the stronger the justification for intervention.	-	-
Direct constitutional mandate.	Closely connected with the constitutional protection of rights, equality, and legal status.	Requires examination of whether the specific alternative eligibility formula follows directly from the Constitution.	Constitutional values alone are insufficient where several policy options remain available.	-	-
Minimal intervention.	Substantial interpretive reconstruction but directed toward correcting the constitutional consequences of the existing norm.	High intervention because an additional eligibility pathway was incorporated into the statutory meaning.	Higher intervention requires stronger constitutional justification.	-	-
Legislative follow-up openness.	Further regulation and implementation may remain within the legislative/regulatory sphere.	More limited where the essential eligibility formula is already determined by the Court.	Meaningful legislative discretion is an indicator of remedial rather than substitutive intervention.	-	-
Transparency and verifiability.	The reasoning can be assessed through the connection between constitutional rights and the statutory construction.	Requires particularly scrutiny of the argumentative link between constitutional principles and the new eligibility formula.	The more creative the interpretation, the higher the burden of reasoning.	-	-

Source: Author's normative analysis based on Constitutional Court Decisions No. 46/PUU-VIII/2010 and No. 90/PUU-XXI/2023.

The table indicates that the five parameters should not be understood as independent checkboxes. They operate cumulatively. A decision cannot be considered constitutionally restrained merely because it satisfies one parameter while failing the others. For example, the existence of a

legitimate constitutional objective does not automatically justify a highly interventionist remedy. Similarly, a strong constitutional argument does not eliminate the need to preserve legislative space where several constitutionally permissible policy options remain available.

The analysis also demonstrates why Decision No. 46/PUU-VIII/2010 and Decision No. 90/PUUXXI/2023 should not simply be placed in the same category of "activist" decisions. The more important issue is the quality and intensity of the judicial intervention. Decision No. 46/PUU-VIII/2010 can be understood as a stronger form of constitutional rights-protective interpretation because its normative reconstruction responds to a concrete constitutional problem concerning the legal status and protection of children. Decision No. 90/PUU-XXI/2023, by contrast, requires greater scrutiny because the Court's intervention introduced a specific alternative qualification into an electoral eligibility rule, an area closely connected to institutional and political policy.

This distinction does not necessarily mean that one decision is automatically constitutional and the other unconstitutional. The purpose of the five-parameter model is not to substitute the Court's judgment with the researcher's judgment. Rather, it provides a structured method for assessing the degree of constitutional justification required by the intensity of judicial intervention. The higher the intervention, the greater the Court's burden to demonstrate constitutional necessity, direct constitutional authorization, proportionality, preservation of legislative space, and methodological transparency.

The proposed five-parameter model is also supported by comparative constitutional practice. The experiences of Germany, South Korea, and South Africa demonstrate that constitutional courts may adopt remedies extending beyond simple invalidation without necessarily assuming the complete function of the legislature.

Germany illustrates the importance of legislative follow-up openness. The Federal Constitutional Court may identify an unconstitutional situation and provide a period or framework within which the legislature must correct the defect. The Court therefore plays an active constitutional role while preserving the legislature's responsibility to formulate the detailed legal response. This supports the proposition that remedial intervention remains more constitutionally defensible when the legislature retains meaningful normative discretion.[59]

South Korea demonstrates the importance of methodological classification and transparency. Its recognition of unconstitutional, nonconformity, conditionally unconstitutional, and conditionally constitutional decisions illustrate that judicial intervention can take different forms, but those forms are doctrinally distinguishable. The Korean experience therefore supports the need for clear argumentative standards when a court departs from a simple declaration of constitutionality or unconstitutionality.[60]

South Africa demonstrates the importance of constitutional necessity and remedial proportionality. Article 172 of the South African Constitution allows courts to issue just and equitable orders, including the suspension of invalidity to enable the competent authority to correct constitutional defects. The model demonstrates that strong judicial remedies need not eliminate the institutional responsibility of the competent law-making authority.[61]

The comparative experience therefore does not provide a single model that can simply be transplanted into Indonesia. Instead, it supports three propositions relevant to the Indonesian context. First, constitutional courts may legitimately employ remedial techniques when simple invalidation would not adequately protect the Constitution. Second, remedial intervention should be accompanied by identifiable doctrinal standards. Third, the legislature should retain meaningful responsibility for determining the detailed content of a substitute norm where several constitutionally permissible policy options remain available.

These comparative lessons strengthen the proposed five-parameter model. Constitutional necessity explains why intervention is justified; direct constitutional mandate establishes its constitutional source; minimal intervention limits its intensity; legislative follow-up openness preserves the separation of powers; and transparent interpretive methods provide the argumentative

[59] Aleksandra Miśkiewicz and Alexander Vadokas, *Loc.,Cit*.
[60] Rhee, *Loc., Cit*.
[61] Van der Berg, *Loc., Cit*.

basis for judicial legitimacy. Taken together, the five parameters transform the abstract distinction between judicial interpretation and judicial legislation into an analytical framework that can be applied to concrete constitutional judgments.

Based on the preceding analysis, the boundary between legitimate constitutional interpretation and judicial norm formation can be formulated as a structured constitutional test. A Constitutional Court interpretation should remain within the sphere of constitutional guardianship when five conditions are cumulatively satisfied: there is a demonstrable constitutional necessity; the judicial formulation has a direct connection with a constitutional mandate; the intervention is limited to what is necessary to restore constitutional conformity; meaningful legislative follow-up remains possible; and the interpretive method is transparent and objectively verifiable.

Conversely, the risk of judicial norm formation increases when the Court establishes a regulatory formula without demonstrating a sufficiently concrete constitutional necessity, derives the formula primarily from policy considerations rather than a direct constitutional mandate, adopts a remedy more extensive than necessary, leaves little meaningful space for legislative correction, or fails to explain adequately why the particular normative formula follows from the Constitution. The model can therefore be represented conceptually as follows:

Constitutional Interpretation → Constitutional Necessity → Constitutional Mandate → Minimal Intervention → Legislative Follow-up → Transparent Reasoning → Legitimate Constitutional Adjudication

Where one or more of these elements are substantially absent, particularly where the Court determines a detailed regulatory formula and simultaneously eliminates meaningful legislative discretion, the decision moves toward:

Judicial Interpretation → Substantive Normative Choice → Reduced Legislative Space → Judicial Norm Formation

The model does not establish an absolute prohibition against judicial creativity. Such a prohibition would be inconsistent with the realities of constitutional adjudication and with the living constitution perspective. Instead, it establishes a graduated constitutional boundary in which the legitimacy of judicial intervention is assessed proportionately to its intensity. This approach reconciles the need for an effective constitutional guardian with the democratic legitimacy of the legislature.

The principal contribution of this study therefore lies in moving the debate beyond the binary classification of the Constitutional Court as either a negative legislator or a positive legislator. The more precise question is whether a particular judicial intervention satisfies the constitutional conditions necessary to justify its intensity. Through the five-parameter model, the distinction between constitutional interpretation and judicial norm formation can be examined in a more objective, transparent, and consistently applicable manner.

The findings also have procedural implications. First, the Constitutional Court should strengthen the argumentative standards governing conditional, additive, and remedial decisions by expressly identifying the constitutional necessity, constitutional mandate, proportionality of intervention, and available legislative follow-up. Second, decisions that substantially reconstruct statutory norms should explain why less interventionist remedies would be inadequate. Third, where a decision creates a significant normative consequence but does not require immediate judicial implementation, the Court should preserve an identifiable opportunity for legislative follow-up. Finally, the procedural framework governing constitutional review should be developed to provide greater doctrinal clarity regarding the permissible forms and limits of conditional and remedial judgments.

In this way, constitutional interpretation can remain dynamic and responsive to constitutional rights without allowing the living constitution approach to become an unrestricted justification for judicial policy-making. The boundary between constitutional guardianship and judicial legislation is therefore best understood not as a rigid prohibition on judicial creativity, but as a proportionality

based institutional boundary measured through constitutional necessity, constitutional mandate, intervention intensity, legislative space, and argumentative transparency.

Conclusion

This research demonstrates that the constitutional limits of the Constitutional Court's interpretation cannot be measured solely by the presence or absence of new formulations in its rulings, but rather by the degree of the Court's intervention in the policy space of lawmakers. If the Constitutional Court merely assesses, corrects, and restores the conformity of norms with the 1945 Constitution of the Republic of Indonesia, the Court remains in its guardian of the constitution function and remains in line with the legislator's negative doctrine. However, when the Court begins to establish conditions, categories, or operational formulas not previously formulated by the legislator, the interpretation has moved towards the formation of new norms. In this context, Decisions No. 46/PUUVIII/2010 and No. 90/PUU-XXI/2023 serve as important examples demonstrating that the Court's rulings no longer merely assess principles or constitutionality but have formed normative constructions that are general and operational in nature.

Through comparisons with Germany, South Korea, and South Africa, this study also found that Indonesia's main problem lies not in the fact that the constitutional court can issue remedial decisions, but rather in the absence of clear and measurable doctrinal boundaries regarding when interpretative decisions are still justifiable and when they have become judicial legislation. Therefore, this study emphasizes the need for a model of limitations based on clear constitutional needs, a direct link to constitutional mandates, minimal intervention, continued openness for legislative follow-up, and a transparent and testable interpretation method. With such boundaries, the Constitutional Court can continue to carry out its progressive function in protecting the constitution without losing legitimacy in a democratic legal system.

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Statement on the Use of Generative Artificial Intelligence (AI)

During the preparation and revision of this manuscript, the authors used ChatGPT (OpenAI) as an AI-assisted tool to support language refinement, improve academic readability, and assist in restructuring and clarifying certain parts of the manuscript. The tool was also used to generate preliminary suggestions for improving the presentation of arguments and the organization of the text. All AI-generated suggestions were critically reviewed, revised, and verified by the authors. The authors take full responsibility for the accuracy, originality, integrity, and final content of this manuscript, including all legal analyses, interpretations, arguments, and conclusions. Generative AI was not considered an independent source of legal authority or scholarly evidence.

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