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The Dimension of Judicial Activism of Incorporating Constitutional Complaint: an Overview on Judicial Independence

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Abtract

This paper analyzes the debate surrounding the potential for Indonesia's Constitutional Court to incorporate a constitutional complaint mechanism. While acknowledging the strong arguments for its inclusion, which are deep-rooted in the need for substantive justice and the protection of fundamental rights, this paper advocates for a cautious approach. The core argument is that the Court should refrain from expanding its jurisdiction through judicial interpretation alone. Such an act could be viewed as judicial overreach, potentially undermining the Court's legitimacy, disrupting the separation of powers, and weakening the principles of judicial accountability and judicial independence. Drawing on the historical context of human rights in Indonesia and the foundational design of the Constitutional Court, this analysis suggests that a legitimate expansion of authority should be achieved through formal, democratic processes, such as a constitutional amendment or a revision of the Constitutional Court Law. By advocating for judicial restraint, the paper emphasizes that the Court's strength and independence lies not in expanding its own power, but in strictly adhering to its constitutional mandate as a check on other branches of government. The paper concludes that not exercising restraint by incorporating a constitutional complaint mechanism through the Court's interpretative authority can lead to long-term negative effects on the Court's judicial independence, both in theory and practice.

Keywords: Constitutional complaint; Judicial accountability; Judicial independence; Judicial restraint

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I. INTRODUCTION

This writing emphasizes that the Constitutional Court should proceed and exercise caution when considering expanding its authority using constitutional interpretation, particularly regarding constitutional complaints. Arguably, the Court's primary role as a check and balance to the elected branches requires the institution to stay within constitutional limits and avoid broadening its powers in a way that could cause conflicts or weaken democratic legitimacy and the constitution. It's worth noting that the paper doesn't entirely oppose the formal legal expansion of authority, as long as it's done legitimately through the formal process of constitutional amendment or even through the revision of the Constitutional Court Law. As many highly prolific scholars in Indonesia are generally in favor of activist judges, this paper aims to present a counter-argument and offer another perspective, arguably a crucial element in a democratic nation. Furthermore, it tries to present a counter-argument to the dominant view, asserting that using judicial interpretation to expand power is controversial and could undermine judicial independence, the doctrine of separation of powers, and potentially disrupt the existing system of checks and balances.

1.1. Background

Before delving into the argument, it is necessary first to explain the landscape of the literature and previous research that specifically discuss constitutional complaints within Indonesia's constitutional law framework. Some arguments related to the benefits of incorporating a constitutional complaint into the current system can be considered to be of an empirical and philosophical nature. A common argument based on real-world experience or empirical reasoning is that many judicial review cases handled by the Constitutional Court can, in fact, be considered as constitutional complaint cases. Additionally, the philosophical reasoning would be closely tied to the rationale behind the establishment of the Constitutional Court in the first place. Those philosophical rationales include the

need for maximum protection of constitutional rights,[12] addressing the current and potential future injustice, and the manifestation of good governance.[3] Further elaboration on this can be found later in this section.

Generally speaking, the current published papers and academic opinions supporting the inclusion of constitutional complaints can be categorized into two main groups. These two groups are: the one that promotes the inclusion in general, and the second advocates for adding it to protect specific constitutional rights or address particular legal needs. For example, a constitutional complaint for a specific legal need easily reflected in the paper titled "The Need for A Constitutional Complaint Mechanism for Tax Matters in Indonesia" by Adrianto Dwi Nugroho et.al argues that a constitutional complaint is one of the viable options and mechanisms to balance the tax enforcer's and taxpayer's rights.[4] The rationale behind this argument is that the authors believed that taxpayers are vulnerable to privacy, property, and equal treatment, especially in tax matters in Indonesia. Another paper, written by Vino Devanta Anjas Krisdanar, which also endorsed the inclusion in a specific legal needs context, explores how a constitutional complaint might enhance the protection of freedom of religion as a constitutional right in Indonesia.[5]

It is safe to conclude that the current published papers on the theme of constitutional complaints in Indonesia generally favor expanding and including constitutional complaints as part of the Constitutional Court's power. To incorporate the said procedure into the system, some notable proposals consider adding both technical and substantive aspects, in addition to incorporating the said mechanism. The aforementioned technical aspect follows the reconstruction

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1 Dewa Gede Palguna, "Constitutional Complaint and the Protection of Citizens' Constitutional Rights," *Constitutional Review* 3, no. 1 (2017): 17

2 Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," Constitutional Review 2, no. 1 (2016): 111

3 Tanto Lailam et al., "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court," Jurnal Konstitusi 19, no. 3 (2022): 34.

4 Adrianto Dwi Nugroho et al., "The Need for A Constitutional Complaint Mechanism for Tax Matters in Indonesia," Constitutional Review 9, no. 2 (2023): 5

5 Vino Devanta Anjas Krisdanar, "Menggagas Constitutional Complaint dalam Memproteksi Hak Konstitusional Masyarakat Mengenai Kehidupan dan Kebebasan Beragama di Indonesia [Initiating a Constitutional Complaint to Protect Citizens' Constitutional Rights on Freedom of Religion in Indonesia]," *Jurnal Konstitusi* 7, no. 3 (2016): 204–5.

and strengthening of the judicial organization's structure, as well as proposing preliminary examinations to filter out complaints by referring them to panel judges before the actual procedure.[6] Procedure on preliminary ruling (on a different definition) for constitutional complaints endorsed by Gautama Budi Arundhati on the rationale that the practice and fulfillment of constitutional rights by the Constitutional Court is currently and has been "indirect". Hence, he argues that, in practice, the entire process does not fully adhere to the idea of a substantive rule of law.[7] Arundhati also points out an argument regarding the substantive aspect of incorporating the constitutional complaint into the system. In this case, the argument he emphasizes centers on the possibility of giving District Courts the power to refer constitutional questions directly to the Constitutional Court. He further argues that this would not only help bridge the gap between limited judicial capacity and the extensive need for individual constitutional protection, but also strengthen the substantive rule of law and ensure the constitution has a direct impact on people's daily lives in the long run.[8] Such a mechanism is often called the "concrete" form of judicial review, in contrast to the "abstract" form of judicial review currently used by the Court. This highlights the substantive and more concrete approach for the inclusion of the constitutional complaint mechanism.

The need for a more concrete form of judicial review in Indonesia also sparks ideas among scholars to include constitutional questions alongside constitutional complaints toward the legal framework system.[9] In this case, the urgent need for substantive justice and the extensive fulfillment of constitutional rights are claimed to be the fundamental basis of the mentioned proposal. For example, former Chief Justice of the Constitutional Court, Hamdan Zoelva, proposed

6 Amarru Mutfie Holish and Aulia Maharani, "Strengthening Constitutional Complaint Authority: Enhancing Citizens' Constitutional Rights Protection in Indonesia," *Journal of Law and Legal Reform* 4, no. 3 (2023): 357-59.

7 Gautama Budi Arundhati, "Kemungkinan Penerapan Preliminary Ruling Procedure sebagai Media Constitutional Complaint di Mahkamah Konstitusi [The Possibility of Implementing a Preliminary Ruling Procedure as a Medium for a Constitutional Complaint in the Constitutional Court]," *Jurnal Konstitusi* 14, no. 4 (2018): 825.

8 Arundhati, "Kemungkinan Penerapan Preliminary," 825-826.

9 Hamid Chalid and Arief Ainul Yaqin, "Menggagas Pelembagaan Constitutional Question melalui Perluasan Kewenangan Mahkamah Konstitusi dalam Menguji Undang-Undang [Initiating the Institutionalization of Constitutional Questions Through the Expansion of the Constitutional Court's Authority in Reviewing Laws]," *Jurnal Konstitusi* 16, no. 2 (2019): 364–67.

that both constitutional complaints and constitutional questions ought to be incorporated into the Court to address the societal demand stemming from the current inadequate mechanisms for protecting constitutional rights.[10]

Historically, although the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR) unanimously approved the establishment of the Constitutional Court during the formal constitution amendment process following the Reform (*Reformasi*), the concept of a constitutional complaint was not thoroughly considered as one of its functions.[11] It was revealed that there were two significant obstacles to why the constitutional complaint was not intensively considered. First, there's concern about a potentially unmanageable increase in caseload. Second, another concern is that the additional function would possibly cause overlaps within the functions of existing courts' jurisdiction.[12]

Historically speaking, discussion about constitutional complaints in Indonesia started to gain momentum as retired Constitutional Court justices Soedarsono and Maruarar Siahaan delivered their dissenting opinions in the Constitutional Court's decision No 001/PUU-IV/2006. Former Justice Soedarsono specifically argued that the term "individual constitutional rights" in Article 51 Paragraph (1) should be interpreted broadly. As a result, he gave the Article a broad interpretation to accommodate constitutional complaints as the remedy for citizen rights violations. He arguably broadly interpreted the capacity and the authority of the Constitutional Court by arguing that the court decision (in this context, the Supreme Court's decision) should also be categorized as an object of review. Along the same lines, former justice Maruarar Siahaan emphasizes that incorporation of the constitutional complaint has a "sufficient legal basis" grounded in the 1945 Constitution's fundamental principles.[13]

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[10] Hamdan Zoelva, "Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara [Constitutional Complaint and Constitutional Question and Protection of Citizens' Constitutional Rights]," *Jurnal Media Hukum* 19, no. 1 (2012): 153–54.

[11] I Dewa Gede Palguna, "Overcoming Constitutional Obstacles in Dealing with Constitutional Complaint Issues: Indonesia's Experience" (paper presented at the International Symposium on Constitutional Complaint, Jakarta, August 2015), 147-48.

[12] Palguna, "Overcoming Constitutional Obstacles," 148.

[13] *Judicial Review of Constitutional Court Law*, Decision of the Constitutional Court No. 001/PUU-IV/2006 (Constitutional Court of the Republic of Indonesia, 2006).

In accordance with that, the discourse or landscape on constitutional complaint has currently expanded as prominent figures such as former Chief Justice of the Constitutional Court, Mohammad Mahfud MD[14], the former Justice, I Dewa Gede Palguna[15]the Head of the Constitutional Court Research Center, Pan Mohammad Faiz,[16]that have ardently published several papers emphasizing the importance of incorporating constitutional complaints into Indonesia's constitutional practice landscape. They contended that, given these comprehensive arguments, it is sensible to consider constitutional complaints as a standard procedure, since they naturally follow from Indonesia's core principles of good governance: the rule of law and the constitutional democracy.

Palguna strongly advises incorporating a constitutional complaint and argues that it is a necessary mechanism for Indonesia's legal framework to fully embrace constitutionalism, which he asserts has not yet been fully achieved. He also argues that the absence of a constitutional complaint mechanism contradicts the history and the fundamental purpose of establishing the Constitutional Court,[17] and in the long run, undermines the very foundation of the nation's constitutional democracy and the rule of law itself.[18] Another philosophical rationale, as presented by Pan Mohammad Faiz, proposes the adoption of both the constitutional question and the constitutional complaint mechanism. His point of view emphasizes the Constitutional Court's duty as the protector of fundamental rights.[19] Notably, some scholars have also conducted a comparative study of constitutional complaint best practices in this matter across several

[14] Mohammad Mahfud MD, "Rambu Pembatas dan Perluasan Kewenangan Mahkamah Konstitusi [Boundary Signs and Expansion of the Constitutional Court's Authority]," *Jurnal Hukum Ius Quia Iustum* 16, no. 4 (2009): 441–60.

[15] Palguna, "Overcoming Constitutional Obstacles," 147-152; Palguna, "Constitutional Complaint and," 2-20; I Dewa Gede Palguna, "Yang 'Terlepas' dari Kewenangan Mahkamah Konstitusi RI: Pengaduan Konstitusional (Constitutional Complaint) [Those 'Separated' from the Authority of the Constitutional Court of the Republic of Indonesia: Constitutional Complaints]," *Lex Jurnalica* 3, no. 3 (2006): 128–35.

[16] Pan Mohamad Faiz, "Masa Depan Constitutional Complaint [The Future of Constitutional Complaint]," *Majalah Konstitusi*, November 2020; Faiz, "A Prospect and Challenges," 104–21.

[17] Palguna, "Constitutional Complaint and Protection", 17.

[18] Palguna, "Yang 'Terlepas' dari Kewenangan", 133.

[19] Faiz, "A Prospect and Challenges," 105.

countries, including South Korea, Germany, and other European nations, to strengthen their argument further.[20]

As mentioned above, it is safe to conclude that the majority of the discourse favors incorporating the constitutional complaint into the authority of the constitutional court. It is worth also noting that, for the most part, currently available published papers suggested three methods to incorporate constitutional complaints into the Court's authority: by formally amending the 1945 Constitution, by revising the Law on the Constitutional Court, or by extensively utilizing the Court's interpretative judicial review power to expand its jurisdiction voluntarily. While some papers strongly suggest that amending the 1945 Constitution is the safest and most holistic approach to the issue, the third option—arguably the riskiest—still remains a plausible alternative. As previously noted, this paper argues that the latter, in which is involving the Court expanding its own authority, may not be the most suitable choice and might lead to judicial overreach, potentially breaching the essential core of the separation of powers doctrine.

Looking back at the founding history of the Constitutional Court, it was designed and aimed to help "convert" Indonesia from authoritarianism to constitutional democracy.[21] Established in a post-conflict setting, the Constitutional Court is becoming an essential part of ongoing nation-building after the Reformasi.[22] Historically speaking, before the Reformasi, Indonesia had no judicial institution that had the power to interpret the Constitution, meaning the Constitution was technically not justiciable. Therefore, the Constitution used to be the object of misuse to justify the authoritarian-leaning regime for its arguably undemocratic policies and agendas.[23] Following its formal establishment

[20] M. Lutfi Chakim, "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions," *Constitutional Review* 5, no. 1 (2019): 130–31; Yunita Nurwulantari and Anna Erliyana, "Menimbang Model Pengujian Keputusan Pejabat Publik oleh Mahkamah Konstitusi Republik Indonesia (Studi Perbandingan Indonesia dan Korea Selatan) [Considering the Model of Testing Public Officials' Decisions by the Constitutional Court of the Republic of Indonesia (Comparative Study of Indonesia and South Korea)]," *Jurnal Konstitusi* 18, no. 1 (2021): 179–82; Tanto Lailam and Nita Andrianti, "Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia," *Bestuur* 11, no. 1 (2023): 83–90.

[21] Simon Butt, *Judicial Dysfunction in Indonesia* (Melbourne: Melbourne University Press, 2023), 238.

[22] Robert French AC, "The Australian Experience: Constitutional Courts-The Rule of Law," in *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia*, ed. Bertus de Villiers et al., vol. 12 (Leiden: Brill, 2024), 284.

[23] Butt, Judicial Dysfunction in Indonesia, 239.

as one of the apex judicial authorities in Indonesia, the Constitutional Court bears the responsibility of strengthening democratic institutions, promoting the rule of law, and protecting fundamental rights.[24] In fact, after 20 years since its founding, scholars credited the Court's success in preventing "rapid democratic backsliding" and a "reversion into authoritarianism".[25] The Constitutional Court managed to establish its own standard for building its reputation and ultimately set new standard for Indonesia's judiciary. As reflected in Simon Butt argument that, due to the strong leadership, the Court has managed to appear more powerful compared to any other Indonesian court.[26]

The problems arise when the Court itself, which has, on multiple occasions, broadened its authority through various rulings. It is worth noting that the expansion of the Court's authority and power, which in this case potentially exceeds its constitutional authority and encroaches on the powers of the legislative and executive branches, could be considered a significant breach of the separation of powers doctrine. These expansions include the Court's shift from supposedly being a "negative legislature" into a "positive legislature" and its "conditional" decisions. One of the justices did not deny that, in fact, the Court had effectively made law, which is arguably considered unthinkable in the context of a civil law tradition. He further argued that these actions were justified, as otherwise, the complexity of legislation would cause delays in achieving substantive justice.[27]

Scholars generally respond to this phenomenon in two ways: some support the Court's "progressiveness,"[28] while others oppose it and advocate for the Court

[24] Saldi Isra and Pan Mohamad Faiz, "The Indonesian Constitutional Court: An Overview," in *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia*, ed. Bertus de Villiers et al., vol. 12 (Leiden: Brill, 2024), 55–56.

[25] Adfin Rochmad Baidhowah, "Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding," *Constitutional Review* 7, no. 1 (2021): 128.

[26] Butt, Judicial Dysfunction in Indonesia, 238.

[27] Butt, Judicial Dysfunction in Indonesia, 253.

[28] Martitah, "Progresivitas Hakim Konstitusi dalam Membuat Putusan (Analisis terhadap Keberadaan Putusan Mahkamah Konstitusi yang Bersifat Positive Legislature) [Progressiveness of Constitutional Judges in Making Decisions (Analysis of the Existence of Constitutional Court Decisions of a Positive Legislature Nature)]," *Masalah-Masalah Hukum* 41, no. 2 (2012): 315–25; Dian Agung Wicaksono et al., "Mencari Jejak Konsep Judicial Restraint dalam Praktik Kekuasaan Kehakiman di Indonesia [In Search of Traces of the Concept of Judicial Restraint in the Practice of Judicial Power in Indonesia]," *Jurnal Hukum & Pembangunan* 51, no. 1 (2021): 200–201.

to apply restraint instead.[29] Following the flow of the argument, this paper endorses and strongly emphasizes the latter perspective; it is essential for the Court not to exceed its constitutional authority and potentially encroach upon the authority of the democratically elected branches by expanding its judicial review power to include constitutional complaints. Resisting the temptation to extend the power is a part of judicial accountability, which is arguably also an essential component of the judicial independence doctrine.

It is understandable to incorporate constitutional complaints, given the rationale mentioned above and given that the majority of the constitutional scholars in the nation are mostly in favor of it. However, as one of the essential and inseparable components for preventing democratic backsliding or fully achieving the Court's core function as the protector of constitutional rights and democracy, it is also worth noting that the Court does not need to base its decisions on popular opinion on specific issues. Instead, to serve its function of restricting the powers of other branches and upholding the rule of law, the Court must adhere strictly to the Constitution.[30]

This paper argues that extending the Court's judicial review power could be counterproductive, as it may face potential resistance from other elected branches and decrease their incentives to perform their democratic duties effectively. Before proceeding to the next section, it's essential to cite what the Supreme Court Justice of the United States said in Trump v Casa, Inc.; "When a court concludes that the Executive Branch has acted unlawfully, the answer is not for the court to exceed its power, too". As the branch responsible for policing the limits of other branches and holding the final authority on constitutional matters, the judiciary arguably should restrict itself to what the constitution specifies.

1.2. Research Question

The paper primarily argues that the Court should refrain from expanding its judicial review authority to include constitutional complaints through

[29] Dian Agung Wicaksono et al., "Mencari Jejak Konsep Judicial Restraint dalam Praktik Kekuasaan Kehakiman di Indonesia [In Search of Traces of the Concept of Judicial Restraint in the Practice of Judicial Power in Indonesia]," *Jurnal Hukum & Pembangunan* 51, no. 1 (2021): 200–201.

[30] Isra and Faiz, "The Indonesian Constitutional," 90.

interpretative methods. Such expansion could be perceived as judicial overreach, ultimately threatening the judiciary's accountability and independence. The paper emphasizes the principles of checks and balances and the separation of powers as the conceptual foundation to support this view. Specifically, the focus is on two critical aspects affecting judicial independence: judicial accountability and the potential disruption to the current check and balances system.

II. DISCUSSION

2.1. Constitutional Complaint and Indonesia's Constitutional Court Design in Human Rights Issues

Before focusing on constitutional complaints, it is essential to understand the history, discourse, and constitutional debates surrounding human rights in Indonesia, given the close relationship between the concept of constitutional complaints and human rights. Historically speaking, the incorporation of the human rights clauses in Indonesia's constitutional founding history is a history of compromise. Soepomo, a key figure among the nation's founders, argued that including human rights clauses in the constitution is unnecessary. He believed Indonesia would be founded on a family-state model, where the head of state, metaphorically like a family head, would always care for its citizens, who are viewed as children. In this case, Soepomo envisioned a leadership led by a benevolent and strong leader. Therefore, he saw no relevance in adopting human rights clauses.[31] Soekarno, one of the signatories of the Declaration of Independence, also endorses the same perspective. As a believer in the family-state model, Soekarno explicitly stated that human rights or citizen rights, in particular, should not be included in the constitution. He further explained that the incorporation of such rights could trigger the emergence of "liberalism and individualism," which he argued is a contrary concept to communitarianism that he envisioned. Additionally, he is also convinced that the incorporation of such clauses simply will not eradicate poverty and hunger.[32]

[31] Todung Mulya Lubis, *Mencari HAM: Hak Asasi Manusia: Dilema Politik Hukum Indonesia Masa Orde Baru 1966–1990* [Searching for Human Rights: The Dilemma of Indonesian Legal Politics during the New Order Era 1966–1990] (Yogyakarta: Circa, 2021), 3–5.

[32] Lubis, Mencari Hak Asasi, 124.

Another founding father, Mohammad Hatta, challenged this view. It is more than crucial to adopt human rights clauses, Hatta argued, to prevent the rise of authoritarianism. Challenging both Soepomo and Soekarno's view, Hatta stated that, precisely due to the deeply rooted communal values he also attributed to Indonesia, governance should be based on the principles of limited government, which emphasize the protection of fundamental human rights.[33] This debate ended with a compromise to include human rights clauses in the 1945 Constitution, albeit in an 'imperfect' form. To be more precise, the Initial 1945 Constitution did explicitly mention several human rights clauses; however, these clauses remained unenforceable until the executive and legislative branches created specific laws regarding human rights. In this case, human rights clauses were viewed as rights granted by the state, rather than as inherent natural rights, which is arguably a clear misconception.[34]

Discussions and debates also took place during the drafting of the new constitution within the Constitutional Assembly (*Dewan Konstituante*) in the parliamentary era. Lubis argued that the discussion was heated and fierce.[35] However, it is no longer a matter of whether to include the human rights clause, but rather which human rights should be incorporated in the constitution.[36] Adnan Buyung Nasution explained that during that period, the human rights discussion was pragmatic, emphasizing greater protection for the vulnerable and considering what to include for a well-structured limited government. It also aimed to achieve a common understanding of the values being discussed. Further explained, the human rights issue was considered just as important as the debate on the nation's ideology.[37]

This is where human rights issues begin to play a significant role in the history of the newly independent country. This was a pivotal moment for Indonesia,

[33] Lubis, Mencari Hak Asasi, 125.
[34] Lubis, Mencari Hak Asasi, 3-5.
[35] Lubis, Mencari Hak Asasi, 5.
[36] Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956–1959* [Aspirations for Constitutional Government in Indonesia: A Socio-Legal Study of the Constituent Assembly 1956–1959] (Jakarta: Grafiti, 1995), 131.
[37] Nasution, Aspirasi Pemerintahan Konstitusional, 131.

highlighting the need to foster healthy political discourse and to actively defend human rights, which should never be taken for granted.[38] Unfortunately, the Constitutional Assembly's constitution draft, which included its carefully debated human rights clauses, was never enacted due to the Presidential Decree of 1959. This decree explicitly disbanded the Assembly permanently and formally reinstated the Initial 1945 Constitution.

The human rights clause in the 1945 Constitution remained unchanged until the fall of the authoritarian-leaning regime of the New Order (*Orde Baru*). Soeharto, the second President who was in charge of the regime, was arguably not very keen on human rights as a concept. Instead, he was emphasizing the importance of fundamental obligations (*kewajiban asasi*)[39] which focuses more on the duty as a citizen rather than the rights they are entitled to. Todung Mulya Lubis argued that the New Order regime justified human rights violations by claiming that the state grants rights; therefore, it also means that the state has the authority to put them aside.[40]

It is now clear that Indonesia has experienced fluctuations in its human rights record, both at the normative and practical levels. As Nasution pointed out, human rights served as a unifying element in the Constitutional Assembly debate because it was a unanimously accepted concept, even though each interest group (the nationalists, religious groups, and the socialists) interpreted it in different terms. These interest groups concur on at least two points: human rights are integral to the aspiration for independence, and they are also a fundamental part of the nation's core values and identity.[41]

The 1998 Reform was arguably one of the most significant turning points in the development of Indonesia's human rights regime. The Second Amendment of the 1945 Constitution has significantly expanded human rights provisions to the point of incorporating most of the provisions of the Universal Declaration of Human

[38] Nasution, Aspirasi Pemerintahan Konstitusional, 132.
[39] Lubis, Mencari Hak Asasi, 124.
[40] Lubis, Mencari Hak Asasi, 5.
[41] Nasution, Aspirasi Pemerintahan Konstitusional, 132-134.

Rights.[42] Additionally, the Fourth Amendment established the Constitutional Court as a judicial institution to ensure that incorporated constitutional rights are not violated. It is also evident that, since its establishment 20 years ago, Indonesia's Constitutional Court has been recognized as one of the key safeguards of rights in the country.[43][44] The history of Indonesia's Constitutional Court is strongly connected to efforts to promote human rights in the country. It is not an exaggeration to say that the Constitutional Court is one of the key factors in realizing justice based on human rights in Indonesia, precisely, after two consecutive authoritarian-leaning regimes and several cases of human rights violations, and after the long and comprehensive debate to incorporate well-crafted human rights provisions in the Constitution itself. It is safe to conclude that the Constitutional Court is an embodiment of the nation's continuous effort to be a healthy democracy under the rule of law.

Arguably, a healthy democracy under the rule of law and the protection of human rights are two sides of the same coin; one cannot be achieved without the other. Discourse on why constitutional scholar and some Justices of the Constitutional Court advocates incorporating constitutional complaint as a part of judicial review could be identified by the very nature of the mechanism itself. The Encyclopedia of Contemporary Constitutionalism defined constitutional complaint as "an extraordinary legal remedy that protects against the violation of specific constitutional rights and freedoms" or "an individual claim against the state for the protection of his or her fundamental rights in a special proceeding before a constitutional court".[45] While the constitutional complaint systems differ across countries, they share a common foundation and similarities in the substantive conditions for filing complaints or cases. As cited from the same encyclopedia, the standard requirements for bringing complaints are: to have a personal interest in bringing the complaint; to have a legal interest in bringing a complaint; to prove

[42] Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Hart Publishing, 2012), 22.

[43] Janedjri M. Gaffar, "Peran Putusan Mahkamah Konstitusi dalam Perlindungan Hak Asasi Manusia Terkait Penyelenggaraan Pemilu [The Role of Constitutional Court Decisions in Protecting Human Rights Related to Election Implementation]," *Jurnal Konstitusi* 10, no. 1 (May 20, 2016): 12–14.

[44] Pan Mohamad Faiz, "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia," *Indonesia Law Review* 6, no. 2 (2016): 162–76.

[45] J. Cremades and C. Hermida, eds., *Encyclopedia of Contemporary Constitutionalism* (Cham: Springer, 2021), 2.

that the violation of rights and freedoms has already happened, and to exhaust in advance all other legal remedies/exhaustion of the court proceedings.[46] Clearly, according to the definition and basic requirements, the primary purpose of the constitutional complaint is to serve as a remedy or mechanism for safeguarding fundamental and human rights in a democratic nation.

It is worth noting that the purpose of a constitutional complaint and the reasons for establishing the Constitutional Court likely share the same core goal: offering a remedy for violations of human or fundamental rights. Given the current constitutional limitations faced by the Court, it is a logical step to propose expanding its judicial review authority to include handling constitutional complaint cases. It is safe to assume that if a constitutional complaint were to be implemented in Indonesia, citizens would have a more comprehensive platform to obtain remedies for any rights violations. In fact, given the philosophical, empirical, and urgent needs, it is essential to adopt a constitutional complaints mechanism into the legal system. Again, this paper does not explicitly reject such a proposal, as its main aim is to persuade the constitutional court to proceed cautiously and consider all possible outcomes if it chooses to expand its judicial review power through interpretation. I Dewa Gede Palguna, a former Justice of the Constitutional Court, in one of his published papers, expressed that, and quoted;

> "First, the capacity of constitutional judges to develop legal interpretations when exercising the authority given to the Constitutional Court by the constitution should be clarified. Therefore, if in the future the Constitutional Court decides to hear and decide on constitutional complaint cases, it must be explained that this action remains within the scope of the authority granted by the 1945 Constitution."

Although this is a compelling and layered argument, should the Constitutional Court aims to stay within the authority granted by the 1945 Constitution—upholding principles like separation of powers and constitutionalism—arguably, it should refrain from using its interpretative power to expand its own authority.

[46] Hermina, eds., *Encyclopedia of Contemporary Constitutionalism*, 3.

2.2. Dimension of Judicial Overreach, Activism, and Expansion of the Constitutional Court of Indonesia

"Courts should be restrained from doing the wrong thing, but they should be active in doing the right thing. Of course, there is little agreement on what counts as the wrong thing or on how courts ought to exercise the power they wield." This quote from Keith E. Wittington, a constitutional law scholar from Yale University,[47] might be fitting to open this section. This section explores judicial overreach, judicial activism, and examining how the Constitutional Court has repeatedly expanded its own power and jurisdiction might be leading to those two concept altogether. This paper's discussion of activist courts does not aim to judge whether activism in general is beneficial or harmful to the Indonesian legal environment. The term "activist court" is used neutrally here, meaning that the paper neither endorses nor opposes the concept of judicial activism in general, therefore following Corey Rayburn Yung that simply define the concept simply as certain type of judicial activity that does not have to be "inherently good or bad".[48] However, it is important to note that the paper's argument is leaning toward suggesting the court to practice restraint in the light of potential expansion to the Court's power and authority.

On April 1, 2025, a joint hearing was held by the U.S. House of Representatives' Subcommittees on Courts, Intellectual Property, Artificial Intelligence, and the Internet, along with the Subcommittee on the Constitution and Limited Government. The focus of the hearing was on the perceived judicial overreach by Federal courts, particularly regarding nationwide injunctions issued against the current Administration's policies. Emphasized in this hearing are the judiciary's role within the democracy, namely to interpret the law and protect citizens' rights. The hearing also revealed that the judiciary should serve as a critical check on the authority of the elected branches; this is essential for respecting the constitutional roles of the other branches of government. Courts are never

[47] Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (Lawrence: University Press of Kansas, 2019), 1.

[48] Corey Rayburn Yung, "Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts," *Northwestern University Law Review* 105, no. 1 (2011): 10.

intended to have the ability to decide beyond what the Constitution, in this case Article III of the Constitution of the United States, to decide the constitutional questions unilaterally. This preposition is based on the constitutional design intended by the Framers; judges are unelected and were never given the power to "legislate from the bench."[49] Courts are not responsible for creating laws; they are responsible for interpreting them as they apply, in the context of a case or controversy.[50] Based on this hearing, it is safe to conclude that judicial overreach refers to a situation where courts exceed their authority or interfere excessively in the functions of the legislative or executive branches of government.

Discourse on judicial overreach is often linked to judicial activism. Arguably, this discussion stems from the development of theories and practices related to judicial review and judicial discretion, if not referred to as judicial law-making. Scholars like Nilanjana Jain offer a different perspective by viewing judicial overreach as a "continuation" of judicial activism, which is described as when the judiciary oversteps its limits and assumes the functions of another branch.[51] Jain characterized judicial activism as judges taking an active role in addressing social injustices through public interest litigation, thereby representing the role of the court within the framework of a constitutional democracy. Activism in the judiciary is often justified as a means to take a proactive role in judicial engagement, prioritizing the protection of rights and the pursuit of justice. Wittington defines activism as a court striking down laws inappropriately, thus acting more like a "superlegislature" than a court, and acting willfully rather than judiciously.[52]

On the other hand, judicial overreach is described as the judiciary's intervention in legislative processes or executive decisions, which can undermine the doctrine of separation of powers. Jain further explains that while both concepts are distinct, the separating line between the two concepts is a thin one.[53] Margaret

[49] Congress, House Committee on the Judiciary, "Judicial Overreach and Constitutional Limits on the Federal Courts," hearing, 119th Cong., 1st sess., published April 1, 2025.
[50] Congress, "Judicial Overreach."
[51] Nishant Jain, "Judicial Power: From Judicial Review to Judicial Overreach," *Indian Journal of Public Administration* 56, no. 2 (2017): 331–42.
[52] Wittington, *Repugnant Laws,* 4
[53] Jain, "Judicial Power," 340-341.

L. Moses describes the exceeding line as the "judicial boundaries".[54] Crossing the boundaries, in this context, could mean disrupting the "harmonious functioning" of the three branches: the judiciary, legislative, and executive.[55]

The concern about judicial overreach arises because what has occurred is often viewed as contrary to the "proper role" or the nature of the judiciary, which is sometimes described as the "least dangerous branch".[56] By acting with excessive discretion while at the same time crossing the boundaries, the Court is assumed to have seen the case as a vehicle for changing the law in a way that the majority of the Court felt was desirable. Therefore, it no longer acts as a court; instead, it acts as a politician in a robe.[57] Meaning that the Court is considered overstepping its judicial role and acting more like a legislative body. The core value of constitutionalism is that no power should be unchecked. When courts exceed their discretion in interpreting the Constitution, they risk turning into the most dangerous branch of government, with little to no checking.[58] Clearly, perspectives on what constitutes a proper role of the court can vary; however, they are arguably shaped by various legal theories and traditions.[59] Regardless of the shape or view on this matter, the power of the judiciary is supposed to be and should be designed to be limited.[60]

Proper role of the court, in this case, could also arguably be identified by looking at the constitutional design. Established in 2003 through the Fourth Amendment, the Constitutional Court was founded to address the constitutional crisis that arose from the flawed system of checks and balances prior to the 1998 Reform. Butt described that the Court was built upon several rationales. First and foremost, the Court was necessary to restore the nation from the crisis. Other factors, such as political (including the impeachment of Abdurrahman Wahid, Indonesia's fourth president), historical, and international influences,

[54] Margaret L. Moses, "Beyond Judicial Activism: When the Supreme Court Is No Longer a Court," *University of Pennsylvania Journal of Constitutional Law* 14, no. 1 (2011): 165.
[55] Jain, "Judicial Power," 342.
[56] Alexander Hamilton, "The Federalist Papers No. 78," accessed September 3 2025.
[57] Moses, "Beyond Judicial Activism," 163.
[58] Moses, "Beyond Judicial Activism," 165
[59] Moses, "Beyond Judicial Activism," 70.
[60] Moses, "Beyond Judicial Activism," 163.

also contributed to its founding.[61] The Constitutional Court was established as the authority responsible for making definitive, initial, and final decisions, with its judgments being conclusive. It reviews national legislation to ensure its compliance with the Constitution[62] and the Bill of Rights. National legislations or Laws, in this context, are by-products of the House of Representative (*Dewan Perwakilan Rakyat*—DPR), with the joint approval of the President.[63] Therefore, it can be concluded that laws in Indonesia are a product of both the elected branch. Hence, it is evident that the authority of judicial review in Indonesia, specifically that belongs to the Constitutional Court, has a direct influence on the by-products of both elected branches, as the Constitution explicitly states that its judgments are final and binding.

Although the Constitution grants the Constitutional Court judicial review authority, Article 24C (6) stipulates that the Court's internal operations—including the appointment and dismissal of justices, procedural law, and other related provisions—are to be regulated by separate national legislation.[64] This creates a notable gap in the system: the Constitutional Court, which is constitutionally empowered to review laws passed by the executive and legislative branches, technically has the authority to review the very laws that govern its own structure and procedures. This grants the Court the authority to review legislation that affects itself. That "notable gap" has, in fact, been used by the Court to expand its own power and authority in the realm of judicial review.

The Constitutional Court, in its early years, declared the unconstitutionality of limitations imposed upon it by Article 50 of Law No. 24 of 2003 on Constitutional Court Law, which primarily restricts the Court's ability to review national legislation enacted before the formal amendment of the 1945 Constitution. Furthermore, the Court determined that it also has the constitutional authority to conduct judicial review of Government Regulation in Lieu of Law (or Emergency Law) on the basis that it has the same legal hierarchy and substance as a law passed

[61] Simon Butt, "The Constitutional Court and Democracy in Indonesia," in *Indonesia: Law and Society*, ed. Timothy Lindsey (Sydney: Federation Press, 2012), 47–55
[62] *The 1945 Constitution of the Republic of Indonesia*, art. 24C(1).
[63] *The 1945 Constitution of the Republic of Indonesia*, art. 20(1)-(2).
[64] *The 1945 Constitution of the Republic of Indonesia*, art. 24C(6).

by the House of Representatives. Simon Butt identifies two categories where the Constitutional Court has expanded its jurisdiction beyond the limits set by the Constitution: first, cases where the Court is asked to assess whether national legislation complies with the constitutional right to legal certainty; second, the conditional constitutional decisions—meaning that an article or law is deemed constitutional if interpreted in the way the Court has interpreted it.[65] The House of Representatives has actually attempted to restrict the Court's jurisdiction as a reaction to conditional constitutional decisions. They proposed a revision to the Constitutional Court Law (Law No. 8 of 2011) to add Article 57 (2a), which would prohibit the Court from issuing conditionally constitutional decisions. The Court then responded by declaring the article unconstitutional, so it no longer has any binding force.

Through this series of event, it is noticeable that the Court is a powerful actor in interpreting its own authority of judicial review. It is evident by the way the Court expanded its judicial review power, simultaneously based on cases and controversies presented to the Court. Pramudya A. Oktavinanda argues that the 1945 Constitution exhibits "language minimalism," particularly in its treatment of the judiciary. Although the Constitution grants the Court the authority to conduct judicial review, the Constitution itself never actually defines the term. Similarly, the phrase "enforce law and justice" attached to the judiciary power also lacks any explanation of what that enforcement entails.[66] This minimalist language makes it nearly impossible to determine the precise meaning and the scope of the Court's authority, leaving the Constitutional Court itself as the sole interpreter of its own powers.

While it may be premature to definitively state that the Constitutional Court has engaged in judicial overreach, and that is not the primary focus of this paper, the evidence indicates the Court has, especially in light of recent developments, become an activist court. Determining judicial overreach arguably requires a more comprehensive and empirical study. A definitive judgment on this

[65] Butt, "The Constitution Court," 130.
[66] Pramudya A. Oktavinanda, "Is the Conditionally Constitutional Doctrine Constitutional?" *Indonesia Law Review* 8, no. 1 (2018): 22–24.

conjecture would need a profound and thorough analysis of the whole body of the Court's decisions, their impact on policy, and the political reactions to them. However, classifying the Constitutional Court as an activist court in this context is relatively straightforward. Examples include declaring legislative restrictions on its jurisdiction unconstitutional and establishing the doctrine of "conditional constitutional decisions," both of which exemplify this approach. This also reflected the recent trend of shifting from a role as a supposedly negative legislature to a positive one. However, because the term 'judicial review' is not clearly defined, the Court can justify its actions by asserting that the subject is justified to fall within its jurisdiction of judicial review. Thus, based on the same reasoning, a similar thought process of interpretation might occur with the adoption of the constitutional complaint; in this case, arguably, the Court is the only entity that can restrict itself to not turn itself into the "most dangerous branch".

2.3. Between the Court's Activism and Judicial Independence

Given the establishment's context and the Constitutional Court's significant role, it is understandable for it to take on an activist stance. This approach helps meet the needs of people whose fundamental rights have been violated and who previously lacked a platform for justice. The Court's presence can be seen as a refreshing development. However, it currently lacks comprehensive and robust tools to handle post-conflict issues effectively. The idea of a fair and functional judiciary differs across countries. Although international factors may have partly influenced the establishment of the Court, the true effectiveness of the judiciary should be rooted in the nation's history, traditions, and core values. While the Constitutional Court has built a strong reputation due to its strong leadership[67] and the Court itself has not been free from controversy. The ability to exercise some restraint is arguably essential, given how courts sometimes involve themselves and decide cases in ways that undermine the responsibility of policymakers. To name the few, it is should be the case for the troubling case that led to the Constitutional Court Decision Number 90/PUU-XXI/2023 on the Provision on

[67] Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*, 1st ed. (London: Routledge, 2018), 68–97.

Age Requirements for President and Vice President, and it is also most likely should also be the case for the recent Constitutional Court Decision Number 135/PUU-XXII/2024 on Separation between National and Regional Election.

Analysis and criticism of the Constitutional Court often associate its actions with overreach into the legislative and executive branches. Critics argue that the Court undermines democracy by involving itself not only in constitutional issues but also deeply into policy questions and technical matters. The court is also believed to have blurred the lines between the branches of power on multiple occasions.[68] Of course, claims like "undermining democracy" and "blurring the boundaries between branches" are pretty strong allegations. It is not easy to make such statements without conducting thorough research and providing evidence to support these claims. Furthermore, suppose the argument centers on the Court's lack of constitutional legitimacy for acting in such a manner. In that case, the Court could also present its own counterargument for the case to support the rationale behind its institution's legitimacy to do so. It is perhaps not an exaggeration to assume that the Constitutional Court has the potential to be a "super-body" institution given the final and binding nature of the Court's decision and the absence of any current mechanism to review or "check" those decisions. The Court also has little to no oversight or checking power beyond its own self-supervision mechanism, which focuses on maintaining the Court's integrity and is arguably unrelated to monitoring or balancing the Court's authority decisions.[69] Observing the public's enthusiasm and still-high expectations for this judicial institution, while it is also clear that the legislature, specifically the House of Representatives, is "conveniently" shifting the accountability for their legislative outputs and processes to the Constitutional Court[70]—it is difficult to see this pattern of activist courts fading away anytime soon. While the Court assumes they should take appropriate action, such as activism, filling legal gaps, or fulfilling "substantive justice", making this assumption and claim is easy.

[68] Nathaniel Rayestu, "When the Court Writes the Law: MK's Judicial Overreach," *Think Policy Indonesia* (blog), published July 25, 2025.

[69] *Constitutional Court Regulation Number 1 of 2023 on the Honorary Council of the Constitutional Court*.

[70] Ratu Durotun Nafisah, "Excessive Reliance on Judicial Review in Indonesia: A Tactic to Avoid Democratic Accountability?" *Indonesian Journal of International & Comparative Law* 10, no. 1 (2023): 97.

However, as cited from Pramudya, proving such claims is a herculean task.[71] The court's decision must be well-reasoned, meaning it should be grounded in a logical legal basis. To 'stand by things decided" is a form of accountability, so the Court should be able to show a clear and rational process leading to its conclusion, and ought to be able to provide the explanation why it will not work the other way around. Regarding this concern, Butt criticized the Court for sometimes exercising its freedom without proper regard for its responsibilities and accountability.[72] The court's independence, arguably, has come at the cost of what it calls accountability.

Sometimes, the constitution embodied a form of balance between accountability and independence for its judicial power. For example, in the United States Constitution, Article III explicitly states that the judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[73] The Constitution, in brief, guarantees judges' independence by providing them with compensation during their tenure and appointing them for life. However, it also emphasizes that judges are accountable, as they shall hold office "during good behaviour," which implies they can be impeached if they do not act within the good conduct. The 1945 Constitution also allows for judges to be removed from office through procedures regulated by national laws.[74] Considering the article formulation, the Constitution itself can be assumed to hold judges to a low degree of accountability, at least in the aspect of their removability or impeachment.

A balance between the concepts of judicial accountability and judicial independence is crucial. It is also why it is essential to balance the two, and how these concepts should be played out in the Indonesian legal framework landscape. First, it is essential to follow the premise or the perspective that judicial independence and judicial accountability, rather than opposing forces, are

[71] Oktavinanda, "Is the Conditionally Constitutional Doctrine Constitutional?" 25.
[72] Butt, *Judicial Dysfunction in Indonesia*, 247–48.
[73] *The Constitution of the United States of America*, art. III.
[74] *The 1945 Constitution of the Republic of Indonesia*, art. 24C(6).

complementary elements, as cited by Stephen B. Burbank. These are inseparable elements crucial to enhancing the performance of courts and the judicial system as a whole.[75] Judicial independence, in this context, has to be given meaning extensively and not simply by "independence from" and "independence to", which Viet D. Dinh boldly refers to as "exists just to benefit the judges". Dinh further explicitly emphasizes that judges aren't meant to be "platonic guardians" who can act without any checks or balances. Instead, their role is "carefully circumscribed" by the constitutional system.[76] The equilibrium between independence and accountability should be viewed as an essential component for the judiciary to remain respected as one of the branches of government, effectively capable of upholding the rule of law and responsive to democratic principles.[77] Furthermore, this equilibrium is a significant factor in minimizing potential political friction and pressure from the elected branches.

In fact, some members of the House of Representatives have expressed their resistance to the recent Constitutional Court Decision Number 135/PUU-XXII/2024 on the separation between national and regional elections.[78] Should the Court continue its pattern of being activist judges, and as the friction becomes more frequent, it would potentially disrupt the current system of checks and balances. Additionally, it should be noted that Courts need both the legislative and executive to enforce their decision, as the Court possesses "no purse nor swords."[79] Courts rely on other branches to function, so it may be best not to cross certain judicial boundaries and practice activism by incorporating the constitutional complaint into the current judicial review power, using its own interpretative authority, considering that the very object of the constitutional complaints is an act of public authorities, including executive and legislative

[75] Stephen B. Burbank, "Judicial Independence, Judicial Accountability, and Interbranch Relations," *Georgetown Law Journal* 95, no. 4 (2007): 1-28.

[76] Viet D. Dinh, "Threats to Judicial Independence, Real and Imagined," *Georgetown Law Journal* 95, no. 4 (2007): 905-17.

[77] John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," *New York University Law Review* 77, no. 4 (2002): 962–1037.

[78] Haura Hamidah, "Tanggapan DPR dan Pemerintah atas Putusan MK soal Pemilu [The DPR and the Government's Response to the Constitutional Court's Decision on Elections]," *Tempo*, accessed September 1, 2025; Sapto Yunus, "Mengapa DPR Anggap Putusan MK soal Pemilu Salahi Konstitusi? [Why the House of Representatives Considers the Constitutional Court's Election Decision Unconstitutional?]," *Tempo*, accessed September 2, 2025.

[79] Hamilton, "Federalist No. 78."

action. Self-expanding authority in this form primarily breaches the separation of powers doctrine and constitutional principles, and could also be seen as an act of aggression toward other branches. Therefore, failing to exercise restraint and incorporating a constitutional complaint mechanism through interpretative authority, both theoretically and practically, can result in long-term negative impacts on the Court's judicial independence.

III. CONCLUSION

The debate over incorporating a constitutional complaint mechanism into Indonesia's legal framework highlights a fundamental tension between judicial activism and judicial restraint. While a strong proposal exists for a constitutional complaint to enhance the protection of fundamental rights and address gaps in justice, in other words, to achieve substantive justice, this paper argues that the Constitutional Court should not expand its jurisdiction through judicial interpretation alone. Such an approach risks being perceived as potential judicial overreach, which could undermine the Court's legitimacy and disrupt the crucial balance of power among the other branches of the government, on top of that the elected branch of government. The 1954 Constitutional design, along with its minimalist language management, allows the Constitutional Court to be the sole powerful actor in defining what judicial review is, arguably without checks. Therefore, restraint is arguably needed for the Court not to cross the boundaries of adding a constitutional complaint by itself. Judicial independence is not the freedom to act without checks, but rather the capacity to exercise power with accountability and restraint. The Court's most vital role is to act as a guardian of the Constitution, not a substitute for the democratically elected legislature. Therefore, any expansion of its powers should be achieved through the formal, legitimate processes of constitutional amendment or legislative revision. By demonstrating self-imposed restraint, the Constitutional Court can maintain its institutional integrity and continue to serve as a cornerstone of Indonesia's constitutional democracy, as well as upholding the rule of law.

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