

Judicial Activism of the Constitutional Court in Progressive Law Discovery: Limitations, Checks and Balances, and the Threat of Becoming a Positive Legislator

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ARTICLE INFO

Keywords:

Judicial Activism;
Constitutional Court;
Separation of Powers;
Positive Legislator;
Progressive Rechtswinding.

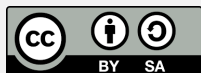
Article History:

Received: 21, Oct 2025

Revised: 23, Oct 2025

Accepted: 24, Oct 2025

Online Available: 28, Oct 2025



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ABSTRACT

This study examines the judicial activism of Indonesia's Constitutional Court as a form of progressive law discovery, assessing its implications for the doctrine of separation of powers and the risk of the Court functioning as a positive legislator. Rooted in the civil law tradition, Indonesian judges undertake Rechtswinding to bridge gaps in codified law, a mandate that intensifies under constitutional review. Employing a doctrinal legal research method, the analysis synthesizes statutory texts, case law, and scholarly commentary through hermeneutic and comparative techniques. Two landmark decisions illustrate contrasting approaches: Decision No. 46/PUU-VIII/2010, where the Court created new norms concerning the civil status of children born out of wedlock, and Decision No. 168/PUU-XXI/2023, which exercised procedural activism by issuing legislative orders on the Job Creation Law. Findings reveal a normative dilemma between fulfilling substantive justice and preserving legislative sovereignty. Excessive use of extensive interpretation risks normative incoherence and undermines checks and balances, whereas procedural activism offers a calibrated mechanism to guide legislative reform without overstepping constitutional boundaries. The study proposes codifying interpretive limits, promoting judicial self-restraint, and enhancing legislative responsiveness to maintain coherent jurisprudence and uphold constitutional supremacy. These recommendations aim to fortify Indonesia's constitutional order by balancing judicial innovation with the integrity of democratic lawmaking.

1. Introduction

Indonesia, as a country that adheres to the Civil Law system, traditionally places written legislation (codified legislation) as the main source of law in order to guarantee legal certainty. All legal products are required to be codified so that they can be known and applied uniformly by the entire community and law enforcement officials.¹

However, legal certainty sought through codification often faces social dynamics that move much faster than the law-making process. In the practice of law enforcement, judges are often faced with cases whose issues are not explicitly regulated, resulting in legal vacuums or unclear norms. This phenomenon requires judges to engage in *Rechtvindind* (legal discovery) to ensure that substantive justice and legal certainty are upheld. This judicial obligation is legitimized by the principle of *ius curia novit*, which explains that judges may not reject a case on the grounds that the law is unclear, as reinforced by Article 10 Paragraph (1) of Law Number 44 of 2009 concerning Judicial Authority. This constitutional mandate effectively compels Indonesia's Civil Law-based legal system to be responsive and adaptive to social and economic transformations.²

After the 1998 Reformation, the structure of judicial power in Indonesia underwent fundamental changes with the establishment of the Constitutional Court (MK) as an independent pillar separate from the executive branch, complementing the checks and balances structure in the state system. The MK was given central authority to review laws against the 1945 Constitution (judicial review).³

In the context of constitutional review, the obligation of *Rechtvindind* judges metamorphoses into Judicial Activism. Judicial activism is defined as the proactive behavior of judges in interpreting existing legal norms as a result of constitutional issues, particularly in the context of upholding constitutional supremacy.⁴ This activism serves as an important judicial instrument for protecting the constitutional rights of citizens and ensuring that substantive justice is achieved.⁵ However, this dynamic and creative role gives rise to theoretical and practical tensions. When the Constitutional Court uses its discretion to create or fill in new norms, there is a risk that this judicial institution will be seen as a positive legislator or political legislator, disrupting the doctrine of separation of powers and checks and balances.⁶

The main objective of this report is to analyze the theoretical framework and jurisprudential practice of the Constitutional Court in the context of judicial activism and to formulate ideal normative limitations on the doctrine of separation of powers in Indonesia. The fundamental research question is: How is the doctrine of checks and balances influenced by the Constitutional Court's practice of judicial activism, particularly in cases involving the creation of new norms (Positive Legislator) and the issuance of legislative orders. The contribution of this report is to

¹ Praise Junta W.S. Siregar, "Perbandingan Sistem Hukum Civil Law Dan Common Law Dalam Penerapan Yurisprudensi Ditinjau Dari Politik Hukum," *Dharmasiswa: Jurnal Program Magister Hukum FHUI* 2, no. 2 (2022): 1027–36, <https://scholarhub.ui.ac.id/dharmasiswa/vol2/iss2/37/>.

² Gamal Abdul Nasir, "Kekosongan Hukum & Percepatan Perkembangan Masyarakat," *Jurnal Hukum Replik* 5, no. 2 (September 1, 2017): 172–83, <https://doi.org/10.31000/jhr.v5i2.925>.

³ Herlambang P Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics," *Federal Law Review* 50, no. 3 (September 1, 2022): 314–30, <https://doi.org/10.1177/0067205X221107404>.

⁴ Reyman Dhani Erwansyah and M. Rizqi Senja Virawan, "Judicial Activism on Indonesia's Constitutional Court Verdict on the Judicial Review of Job Creation Bills Number 6 of 2023," *Indonesian Journal of Administrative Law and Local Government* 1, no. 02 (April 10, 2025): 85–92, <https://doi.org/10.26740/ijalgov.v1i02.39279>.

⁵ Andy Omara, "The Indonesian Constitutional Court and the Democratic Institutions in Judicial Review," *Constitutional Review* 3, no. 2 (August 21, 2018): 189–207, <https://doi.org/10.31078/consrev323>.

⁶ Radian Salman, Sukardi Sukardi, and Mohammad Syaiful Aris, "Judicial Activism or Self-Restraint: Some Insight Into the Indonesian Constitutional Court," *Yuridika* 33, no. 1 (February 8, 2018): 145–170, <https://doi.org/10.20473/ydk.v33i1.7279>.

provide an in-depth analysis based on Constitutional Law that links classical *Rechtvinding* theory with modern constitutional doctrine in Indonesia, relevant for scientific publications that prioritize academic quality.

2. Research Methods

The doctrinal legal research method entails a systematic examination of statutory texts, case law, and regulatory instruments to elucidate the prevailing legal framework governing a particular issue. By critically analyzing primary sources such as legislation, judicial decisions, and administrative regulations alongside authoritative secondary materials like scholarly articles and commentaries, this approach seeks to identify legal principles, interpret norms, and assess their coherence and applicability. Emphasis is placed on hermeneutic techniques to resolve ambiguities, comparative analysis to benchmark against other jurisdictions, and doctrinal synthesis to construct a cohesive doctrinal proposition. Ultimately, the doctrinal method produces a normative evaluation of the law's current state, highlights gaps or inconsistencies, and informs recommendations for legislative reform or enhanced judicial interpretation.

3. Result and Discussion

3.1. Philosophical Foundations and Structure of Judicial Power in Indonesia

3.1.1. The Doctrine of the Rule of Law and the Basis of *Rechtvinding*

The basic concept underpinning the authority of judges in finding law is the recognition that the Republic of Indonesia is a state based on the rule of law. The logical consequence of this principle of the rule of law is the establishment of a judiciary that is independent and free from interference from any party, as mandated in the 1945 Constitution.⁷

The obligation of judges to discover the law is not merely a matter of pragmatic discretion but a direct constitutional mandate. Article 5(1) of Law No. 48 of 2009 on Judicial Authority explicitly requires judges and constitutional judges to explore, follow, and understand the legal values and sense of justice that exist within society. This obligation arises as a response to the limitations of written law, especially considering that written law often lags behind events (*Het recht hink achter de feiten aan*).⁸ If there are no clear legal provisions, Article 10 Paragraph (1) prohibits courts from refusing to examine, adjudicate, and decide cases. Through this mandate, the Indonesian legal system is effectively required to be responsive and adaptive, overcoming legal vacuums in order to achieve substantive justice.

3.1.2. The Bifurcated Judicial System and the Principle of *Checks and Balances*

After the amendment of the 1945 Constitution, the judicial power system in Indonesia underwent significant changes, moving towards the doctrine of separation of powers that adopted the principle of checks and balances. Although Indonesia does not adhere to Montesquieu's pure separation of powers, the judicial structure now adheres to a bifurcated system, divided into two main branches: the ordinary courts led by the Supreme Court (MA) and the constitutional courts run by the Constitutional Court (MK).⁹

The establishment of the Constitutional Court as an independent pillar of judicial power aims to uphold the dignity and supremacy of the constitution. The Constitutional Court is given sole

⁷ Dian Agung Wicaksono, "Dynamics of Granting Legal Standing to the Indigenous Community in Constitutional Review of Law," *Jurnal Konstitusi* 20, no. 3 (September 1, 2023): 494–513, <https://doi.org/10.31078/jk3037>.

⁸ Cecep Mustafa, "The View of Judicial Activism and Public Legitimacy," *Crime, Law and Social Change* 76, no. 1 (August 6, 2021): 23–34, <https://doi.org/10.1007/s10611-021-09955-0>.

⁹ Krisnadi Nasution, "Indonesian Judicial Power Post Amendment," *Mimbar Keadilan* 13, no. 1 (January 24, 2020): 85–95, <https://doi.org/10.30996/mk.v13i1.2997>.

authority to review laws against the 1945 Constitution. Through the addition of new institutions in the judicial field (the Constitutional Court and the Judicial Commission), the constitution seeks to ensure checks and balances between powers to prevent abuse of authority and achieve a harmonious balance of state powers.¹⁰

3.2. The Spectrum of Judicial Discretion: From Conventional Methods to Constitutional Activism

3.2.1. Conventional Method of *Rechtvinding*

In general courts, *Rechtvinding* functions as a judicial instrument to concretize legal regulations so that they can be adapted to specific events that occur in society. Legal discoveries made by judges place judges in the position of determining whether legislation can be applied or not, especially in cases of legal vacuums or ambiguities.¹¹

Methodologically, there are two main models of *Rechtvinding*: the method of interpretation and the method of legal reasoning (legal construction). The method of interpretation includes:

- a. Grammatical Interpretation: Analysis of the meaning of each sentence in the regulation.
- b. Historical Interpretation: Examining the origins of the regulation's formation.
- c. Teleological/Sociological Interpretation: Examining the relevance of regulations to the current state of society.
- d. Extensive Interpretation: Expanding the meaning of a legal regulation.

As an example of implementation in civil courts, Decision Number 535/Pdt.G/2014/PN.Jkt.Pst. shows that judges used an extensive interpretation of Article 1245 of the Civil Code (KUHPer) to introduce the concept of *hardship*. The concept of *Hardship*, which has not been codified in the KUHPer, was applied to resolve a dispute over breach of contract due to a monetary crisis that caused a change in the balance of power between the parties to the agreement. The judge expanded the meaning of the phrase "prevents the fulfillment of obligations" in the article to include difficult circumstances, and then ordered the parties to make a new agreement that was a win-win solution.

This *hardship* case shows that the dynamic role of judges in bridging legal gaps has become ingrained in the Indonesian judicial system, serving as a catalyst for the modernization of adaptive national law. When this *Rechtvinding* role was transferred to the constitutional realm by the Constitutional Court, its discretion took on greater weight in the form of constitutional activism.

3.2.2. The Concept and Triggers of *Judicial Activism* in the Constitutional Court

Judicial Activism in the Constitutional Court is an extension of *Rechtvinding*, which proactively interprets norms to ensure constitutional supremacy. This judicial activism is often seen in complex cases where formal law is considered inadequate, or when judges critically question and determine the direction of policies made by non-judicial institutions, particularly the legislature.

The main trigger for the Constitutional Court's activism is the urgent need to protect constitutional rights and realize substantive justice, going beyond a rigid positivist approach to law. The Constitutional Court, through a progressive legal approach, produces decisions that aim to achieve

¹⁰ Dhani Erwansyah and Senja Virawan, "Judicial Activism on Indonesia's Constitutional Court Verdict on the Judicial Review of Job Creation Bills Number 6 of 2023."

¹¹ Eko Budi Susilo, Tri Susilowati, and Naya Amin Zaini, "The Urgency of Strengthening Judges' Authority in the *Rechtvinding* Process," *Ranah Research: Journal of Multidisciplinary Research and Development* 7, no. 1 (November 19, 2024): 95–104, <https://doi.org/10.38035/rj.v7i1.1266>.

substantive justice. For example, activism is evident in sensitive cases such as the review of laws related to the COVID-19 pandemic and regional head election disputes, where judicial intervention is necessary to maintain electoral integrity.¹²

The differences in the spectrum of judicial discretion between the general courts and the Constitutional Court can be summarized in the following comparative table:

Table 1. Manifestations of Judicial Discretion in the Indonesian Judicial System

Aspects of Judicial Discretion	General Courts (Supreme Court)	Constitutional Court (MK)
Legal Basis	Article 5(1) & 10(1) of Law No. 48/2009 on Judicial Power.	Article 24C of the 1945 Constitution; Constitutional Court Law (Principle of <i>Upholding Constitutional Supremacy</i>).
Focus of <i>Rechtvindng</i>	Filling legal gaps and concretizing laws (<i>jurisprudence</i>).	Testing the constitutionality of laws and protecting constitutional rights (<i>Judicial Review</i>).
Key Methods	Interpretation (Extensive, Teleological), Analogy (e.g., <i>Hardship</i> Case).	Proactive/Progressive Interpretation; Substantive Justice Approach.
Institutional Risks	Law lags behind facts.	Overstepping the bounds to become a <i>Positive Legislator</i> or <i>Political Legislator</i> .

3.3. Normative Dilemma: Judicial Activism and the Limits of Positive Legislators

3.3.1. The Boundary Between Negative Legislator and Positive Legislator

Doctrinally, within Indonesia's system of checks and balances, the Constitutional Court essentially operates as a negative legislator, an institution with the authority to annul or declare a legal norm unconstitutional (contrary to the 1945 Constitution). This function limits the authority of the Constitutional Court to the annulment of legal norms.

A normative dilemma arises when the Constitutional Court, in the context of progressive *Rechtvindng*, exceeds its negative legislative role and produces new legal norms, thereby transforming itself into a positive legislator or political legislator. The ambiguity of these authority boundaries makes the Constitutional Court, as a judicial institution, vulnerable to being perceived as taking over the role of a political law-making institution. This criticism is the main focus of two important jurisprudential case studies below.

¹² Zainal Arifin Mochtar, "Guarding Democracy: Judicial Activism in the Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes," *Constitutional Review* 11, no. 1 (May 31, 2025): 36–62, <https://doi.org/10.31078/consrev1112>.

3.3.2. Case Study I: The Creation of Constitutional Civil Norms (Positive Legislative Activism)

Constitutional Court Decision Number 46/PUU-VIII/2010 regarding the status of children born out of wedlock is a classic example of judicial activism labeled as positive legislator. This decision examined Article 43 Paragraph (1) of Law Number 1 of 1974 concerning Marriage, and decided that children born out of wedlock not only have a civil relationship with their mother and maternal family, but also with the man who can be proven to be their father based on science and technology and/or other evidence.¹³

This action by the Constitutional Court judges constitutes a form of activism because it substantively creates a new legal status and civil relationship that was previously strictly limited by positive law and religious interpretations in Indonesia. However, this ruling raises broad implementation issues and has sparked criticism for being considered too intrusive into the legislative domain. By creating new civil relations (such as potential inheritance or lineage rights) that conflict with codified marriage law norms, the Constitutional Court effectively disrupts the coherence of the national legislative system. This normative conflict is a direct consequence of the choice of radical substantive justice, which leads to the abandonment of existing legal certainty.¹⁴

3.3.3. Case Study II: Procedural Intervention Through Legislative Orders (Procedural Activism)

The latest case study shows a shift in strategy in Constitutional Court activism, namely through procedural activism. Decision No. 168/PUU-XXI/2023 analyzes the judicial review of Law No. 6 of 2023 (Job Creation Law). Instead of repealing the entire law or creating new norms directly, the Constitutional Court used its authority to issue a legislative order to the House of Representatives (DPR).

This activism was evident when the Constitutional Court ordered the creation of separate sectoral labor laws, with content that accommodated old and new norms in an acculturative manner, driven by the constitutional goal of strengthening worker protection and welfare. The Constitutional Court used its power to dictate *how* and *what* public policies should be revised.

This procedural judicial activism can be seen as a self-correction strategy by the Constitutional Court. By ordering the legislature to act, the Constitutional Court maintains strong control over the legislative process and ensures that parliament fulfills its constitutional objectives (social justice). This method allows the Constitutional Court to achieve substantive justice and fill legal gaps without directly touching on the controversial territory of positive legislators that sparked polemics in Decision 46/PUU-VIII/2010.

¹³ Djumikasih Djumikasih, "Implikasi Yuridis Putusan Mk Nomor 46/Puu-Viii/2010 Terhadap Akta Kelahiran Anak Luar Kawin," *Arena Hukum* 6, no. 2 (August 1, 2013): 204–17, <https://doi.org/10.21776/ub.arenahukum.2013.00602.4>.

¹⁴ Sabilal Rasyad, "Status Hukum Anak Di Luar Perkawinan Dalam Hukum Islam Dan Implementasinya Dalam Perkembangan Peraturan Perundang-Undangan Di Indonesia (Studi Tentang Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010)," *JURNAL HUKUM ISLAM* 15, no. 1 (June 30, 2017): 155–79, <https://doi.org/10.28918/jhi.v15i1.978>.

Table 2. Comparative Analysis of the Constitutional Court's Judicial Activism: *Norm Creation vs. Legislative Mandate*

Dimension of Activism	Ruling No. 46/PUU-VIII/2010 (Children Born Out of Wedlock)	Decision No. 168/PUU-XXI/2023 (Job Creation Law)
Issue Focus	Constitutional Rights of Children (Civil Status/Human Rights).	Procedures for Formulating Laws and Worker Welfare (Public Policy).
Type of Decision	Creation of New Norms (<i>Positive Legislation</i>).	Legislative Orders (<i>Conditional Decision/Procedural Activism</i>).
Checks and Balances Issues	Directly entering the Legislative/Civil jurisdiction (Norm Creation).	Directing legislative policy, but still providing room for the House of Representatives to act.

3.4. Constitutional Implications and the Direction of Strengthening the National Legislative System

3.4.1. The Impact of Activism on the Principle of Separation of Powers

The practice of judicial activism by the Constitutional Court fundamentally challenges the classical interpretation of the separation of powers in Indonesia. The role of the Constitutional Court has expanded from a passive judicial function to an active political-constitutional function.

Within the framework of checks and balances, judicial activism strengthens horizontal judicial control over the legislature. This control is essential, especially when political institutions are considered slow, unresponsive, or even produce laws that undermine the constitutional rights of citizens. In other words, activism is a corrective mechanism that ensures that the sovereignty of the people, as represented by the legislature, is subject to the supremacy of the constitution. However, this judicial control must remain limited so as not to violate the sovereignty of the legislature in terms of pure policy formulation.

3.4.2. Consistency of Jurisprudence and Substantive Justice

Although the goal of judicial activism is to achieve substantive justice and uphold human rights, inconsistency or overly progressive rulings without a strong normative basis can lead to legal uncertainty. For example, a radical ruling in a civil case (46/PUU-VIII/2010) must be harmonized with a more cautious ruling in a public case (168/PUU-XXI/2023) within the framework of comprehensive human rights protection.

The progressive legal approach adopted by the Constitutional Court must remain based on the interpretation of the constitution as a cohesive whole. The use of extensive or teleological interpretations must be guarded against so as not to produce *ultra petite* decisions, i.e., decisions that go beyond the petitioner's request, which could erode confidence in the coherence of jurisprudence.

3.4.3. The Need for Codification of Constitutional Interpretation Limits

Given the real risk of positive legislator, it is necessary to develop stricter guidelines on the use of progressive and extensive interpretation methods in the constitutional context, similar to conventional *Rechtvindung* methodology.

The doctrine of judicial self-restraint must be promoted. This doctrine emphasizes that constitutional judges must refrain from making policies that fall within the political domain, except in situations where constitutional rights are fundamentally threatened and there is no other normative solution. The proper application of self-restraint will enable judges to uphold justice without taking over the role of the legislature, thereby maintaining the essential balance of power in Indonesian constitutional law.

4. Conclusion

The obligation of legal discovery (*Rechtvindung*) as stipulated in the Judicial Authority Law is the normative basis for the Constitutional Court's practice of judicial activism. This activism plays a vital role in the modernization of law and the protection of human rights in post-reform Indonesia.

Case law analysis shows that the Constitutional Court has exceeded its role as a negative legislator in several cases, particularly in Decision Number 46/PUU-VIII/2010 (Illegitimate Children), by creating new legal norms (positive legislator). This risk threatens the principle of separation of powers and can create normative inconsistencies. However, the Constitutional Court has also demonstrated a more cautious strategy, such as in Decision Number 168/PUU-XXI/2023 (Job Creation Law), by applying Procedural Activism through legislative orders. This method allows the Constitutional Court to guide the legislative process towards substantive justice and worker protection, strengthening checks and balances without completely violating the function of norm cancellation. With the following recommendations

- a. Strengthening Doctrinal Consistency and Interpretation Limits: Judicial institutions, particularly the Constitutional Court, must explicitly formulate and codify limits on the use of extensive and progressive interpretation, to ensure that progressive decisions do not create normative inconsistencies that undermine the coherence of national law.
- b. Harmonization of Responsive Legislation: Legislative institutions (the House of Representatives and the Government) must respond effectively and in a timely manner to Constitutional Court decisions that are legislative in nature, as required in the Job Creation Law Decision. This is crucial to maintain the effectiveness of the law and prevent the Constitutional Court from feeling the need to intervene further judicially.
- c. Development of Constitutional Self-Restraint Theory: Academics and legal practitioners need to collaborate in reformulating the doctrine of Judicial Self-Restraint in line with the needs of a progressive constitutional state, ensuring that constitutional judges can uphold justice and protect human rights without taking over policy roles that should be the domain of electoral politics.

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