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JUDICIAL OVERREACH OR DUTY? THE CONSTITUTIONAL LIMITS OF ELECTORAL LAW-MAKING BY THE COURT (ANALYSIS OF DECISION NO. 62/PUU-XXII/2024)

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Abstract

This article examines the constitutional limits of judicial law-making by the Indonesian Constitutional Court in electoral legislation, with a focus on Decision No. 62/PUU-XXII/2024. This ruling invalidated the presidential candidacy threshold in Article 222 of Law No. 7 of 2017 and introduced five guidelines for the legislature to reform the presidential nomination system. These directives have raised questions about whether they constitute legitimate constitutional interpretation, a constitutional directive, or unauthorized judicial law-making that encroaches on legislative authority. Using a normative legal methodology, this study analyzes relevant statutes, case law, and scholarship on the separation of powers, judicial review, judicial activism, judicial restraint, and the doctrines of positive and negative legislation. The findings show that while judicial law-making can result from constitutional adjudication, its legitimacy depends on constitutional authority, interpretive necessity, legislative discretion, institutional competence, and the strength of the court's legal reasoning. Accordingly, the five guidelines in Decision No. 62/PUU-XXII/2024 should be viewed as constitutional directives, not legislative substitutes, as long as they serve as external parameters that protect the legislature's policy-making authority.

A. INTRODUCTION

Following the 2024 general election, the architecture of electoral law underwent a significant transformation, shaped largely by rulings of the Constitutional Court. Armed with the authority to review statutes against the 1945 Constitution of the Republic of Indonesia, the Court serves normatively as an instrument of constitutional control over legislative products. In practice, however, its rulings frequently extend beyond the mere annulment of norms. Through constitutional interpretation, the Court often introduces specific meanings, establishes conditions for norm applicability, or designs parameters that shape future legal developments. This dynamic generates a fundamental tension regarding the boundary between the judicial authority to interpret the constitution and the legislative authority to formulate public policy.¹

This boundary must be understood within the framework of the separation of powers. The 1945 Constitution does not establish a rigid separation of powers, but rather a functional distribution among state organs accompanied by checks and balances.² Article 20 vests legislative power in the House of Representatives (DPR), while Article 24C(1) grants the Constitutional Court the power of judicial review. This functional distinction forms the traditional premise of the Court as a "negative legislator," meaning it can invalidate unconstitutional norms while leaving the creation of positive norms exclusively to the legislature. The Constitutional Court may invalidate unconstitutional norms, whereas the creation of positive norms remains the prerogative of the legislature.³

Nevertheless, the practice of constitutional review demonstrates that the rigid dichotomy between negative and positive legislation is increasingly inadequate for explaining the evolution of constitutional adjudication. An extensive analysis of Constitutional Court decisions over an eleven-year period identified 107 out of 198 rulings carrying strong positive legislative characteristics, highlighting a growing trend toward regulative judicial behavior alongside persistent challenges regarding implementation and normative justification. Subsequent legal scholarship has linked this expanded judicial role directly to the mechanics of checks and balances, emphasizing

¹ Republik Indonesia, Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Pasal 20, Pasal 24, dan Pasal 24C

² Ismail Sunny menegaskan bahwa UUD 1945 hanya mengenal istilah pembagian kekuasaan (*division of power*) serta bukan pemisahan kekuasaan (*separation of power*) sebagaimana yang dimaksud oleh Montesquieu. Lihat, Ismail Sunny, *Pergeseran Kekuasaan Eksekutif*, Jakarta : Penerbit Aksara baru, 1986. Hal. 23

³ Republik Indonesia, Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Pasal 20 dan Pasal 24C; Republik Indonesia, Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi sebagaimana diubah dengan Undang-Undang Nomor 7 Tahun 2020.

the urgent need for objective criteria to constrain positive legislative rulings.⁴ Subsequent research has linked this expansion of the role to checks and balances and the need for objective criteria to limit rulings that act as a "positive legislator."⁵

This debate has become increasingly pressing as electoral law emerges as one of the most frequently litigated fields. Decision No. 90/PUU-XXI/2023, for instance, reinterpreted Article 169(q) of Law No. 7 of 2017 to expand presidential and vice-presidential age requirements—moving beyond the static 40-year minimum to include prior experience as an elected official, including regional heads.⁶ While Legal commentary on this decision underscores ongoing concerns regarding judicial consistency, the boundaries of open legal policy, and the creeping shift from negative interpretation to positive law-making.⁷

In the wake of the 2024 elections, this institutional tension assumed a new dimension in Decision No. 62/PUU-XXII/2024. On January 2, 2025, the Constitutional Court granted a petition in its entirety, declaring Article 222 of Law No. 7 of 2017—which mandated the presidential threshold—unconstitutional and void. The Court further ruled that any presidential threshold regime, regardless of percentage, violates Article 6A(2) of the 1945 Constitution.⁸

This ruling is profoundly significant not only for dismantling a threshold mechanism that had persisted for two decades, but also for the extensive reach of its legal reasoning. Beyond invalidating Article 222, the Court issued five explicit guidelines termed "constitutional engineering" directed at the legislature: first, all participating political parties are entitled to nominate presidential and vice-presidential candidates; second, nominations must not be contingent upon legislative seat percentages or national popular vote shares; third, coalitions remain permissible provided they do not produce dominant blocks that restrict voter choice; fourth, parties failing to nominate a candidate may face sanctions, including exclusion from subsequent elections; and fifth, legal reforms must incorporate meaningful public participation, explicitly including non-parliamentary parties.⁹

⁴ Efendi, M. A. F., Muhtadi, M., & Saleh, A. (2023). Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi. *Jurnal Konstitusi*, 20(4), 622-639.

⁵ Sulastri, D., & Sanmas, A. (2025). IMPLIKASI PUTUSAN MAHKAMAH KONSTITUSI SEBAGAI POSITIF LEGISLATOR TERHADAP PRINSIP CHECK AND BALANCE: Mahkamah Konstitusi sebagai Positive Legislator: Implikasi Putusan terhadap Prinsip Checks and Balances di Indonesia. *LITIGASI*, 26(2), 272-315.

⁶ Baca, Putusan Mahkamah Konstitusi Republik Indonesia Nomor 90/PUU-XXI/2023.

⁷ Situmeang, S. C., Ardilafiza, A., & Dinata, A. W. (2024). Inconsistency of the constitutional court regarding the minimum age requirement for presidential and vice-presidential candidates: Inkonsistensi Mahkamah Konstitusi Terkait Syarat Minimal Usia Calon Presiden dan Wakil Presiden. *Jurnal Konstitusi*, 21(4), 609-634.

⁸ Baca, Putusan Mahkamah Konstitusi Republik Indonesia Nomor 62/PUU-XXII/2024, 2 Januari 2025.

⁹ Baca, Putusan Mahkamah Konstitusi Republik Indonesia Nomor 62/PUU-XXII/2024.

These decisions bring the problem of judicial law-making directly to the fore. While the formal ruling of Decision No. 62/PUU-XXII/2024 declares Article 222 of the Election Law unconstitutional and devoid of legal binding force, its legal reasoning provides substantive directives on how lawmakers ought to design the presidential nomination regime following the abolition of the presidential threshold. The core issue extends beyond the mere constitutionality of the threshold itself; it questions whether—and to what extent—the guidelines issued by the Court constitute legitimate constitutional interpretation or encroach upon the domain of policy formulation institutionally entrusted to the House of Representatives and the President.

Scholarship surrounding Decision No. 62/PUU-XXII/2024 has grown rapidly. Hanan, Astuti, and Eddyono frame the ruling as an avenue of electoral reform that prioritizes representational values over governability.¹⁰ Other studies examine the Court's shifting stance after decades of upholding the presidential threshold.¹¹ While more recent analyses directly address the constitutional engineering emerging in the wake of the decision.¹² Concurrently, recent research on the 2024 elections establishes indicators to distinguish between constitutional interpretation and judicial law-making, focusing on departures from ordinary textual meaning, the creation of novel standards unarticulated by the legislature, direct normative consequences, and general applicability (*erga omnes*).¹³

This growing body of work confirms that research on the Constitutional Court as a positive legislator, judicial activism, judicial law-making, and electoral reform via Decision No. 62/PUU-XXII/2024 is well-established. Consequently, the novelty of this study does not rest on proving that the Court shapes norms. Instead, it lies in a more specific inquiry: determining the status and constitutional limits of the guidelines provided by the Court to lawmakers after a norm is struck down. Specifically, should these guidelines be understood as constitutional interpretation, as constitutional

¹⁰ Hanan, D., Astuti, T. S., & Eddyono, L. W. (2025). Electoral Reform Through the Indonesian Constitutional Court: Constitutionality of Presidential Candidacy Threshold in Indonesia: Reformasi Elektoral Melalui Mahkamah Konstitusi: Konstitusionalitas Ambang Batas Pencalonan Presiden Di Indonesia. *Jurnal Konstitusi*, 22(2), 260-292.

¹¹ Harahap, M. K. (2024). Berubahnya Pendirian Hakim Mahkamah Konstitusi Tentang Presidential Threshold. *Buletin Konstitusi*, 5(2). Baca juga, Firdinal, Z. (2013). Perubahan Makna Pasal 6A Ayat (2) UUD 1945. *Jurnal Konstitusi*, 10(4), 649-674.

¹² Satria, M. A. R., & Sitompul, M. N. (2026). Constitutional Engineering in the Presidential and Vice Presidential Elections (Analysis of the Constitutional Court's Decision No. 62/PUU-XXII/2024 Concerning the Elimination of The Presidential Threshold). *Inspiring Law Journal*, 4(2), 49-60.

¹³ Retno Eko Mardani, Rengga Kusuma Putra, Fifiiana Wisnaeni, Aprista Ristyawati, dan Satriya Nugraha, "Judicial Activism and Constitutional Norm Creation in Indonesia's 2024 Elections," *JURNAL USM LAW REVIEW* 9, no. 4 (2026): 2274-2293, <https://journals.usm.ac.id/index.php/julr/article/view/14177>

directives limiting the legislature's policy space, or as judicial law-making that substantively replaces the function of the legislature?

This study carries both theoretical and practical urgency. Theoretically, the dichotomy between negative and positive legislators must be enriched by analyzing the prescriptive weight of the Court's legal reasoning. Practically, lawmakers require certainty regarding which parts of a ruling are mandatory and what policy discretion remains available. Literature on *ratio decidendi* and *obiter dictum* demonstrates that the Court's legal reasoning can incorporate directives, guidelines, or reinforcements of constitutional principles that influence legislation, yet the binding nature and follow-up mechanisms of these elements remain heavily debated.¹⁴

Building upon this background, this study addresses two primary research questions: (1) how the Constitutional Court's authority regarding judicial law-making is constructed within the framework of the separation of powers and constitutional review; and (2) what the constitutional limits of the Court's judicial law-making are in Decision No. 62/PUU-XXII/2024, particularly concerning the five constitutional engineering guidelines directed at lawmakers. The research aims to analyze these boundaries through parameters encompassing the Court's constitutional authority, interpretive necessity, legislative policy space, institutional competence, and the binding force of the ruling's legal reasoning. This study proposes an analytical distinction among constitutional interpretation, constitutional directives, and judicial law-making. The concept of a "constitutional directive" serves as an intermediate category to explain how the Court can establish constitutional parameters for the legislature without formally usurping law-making authority. Through this approach, the research avoids the blanket assumption that every judicial intervention constitutes judicial overreach, while simultaneously rejecting unbounded expansions of the Court's authority.

B. RESEARCH METHODS

This study employs a normative legal research methodology, treating law as a system of norms examined through primary and secondary legal sources. The research utilizes four distinct approaches: the statute approach, the case approach, the conceptual approach, and the constitutional approach. The statute approach is applied to examine the constitutional construction of the Court's authority, legislative powers, and the electoral legal regime. The case approach focuses primarily on Constitutional Court

¹⁴ Hakiki, Y. R., & Taufiqurrahman, T. (2023). The Idea of Structuring National Legislation Based on The Ratio of Decidendi & Obiter Dictum Constitutional Court Decision: Gagasan Penataan Legislasi Nasional Berbasis Ratio Decidendi Dan Obiter Dictum Putusan Mahkamah Konstitusi. *Jurnal Konstitusi*, 20(1), 78-99.

Decision No. 62/PUU-XXII/2024, while drawing comparisons with Decision No. 90/PUU-XXI/2023, Decision No. 60/PUU-XXII/2024, and other relevant rulings. The conceptual approach is used to dissect key theoretical frameworks, including judicial law-making, negative and positive legislators, judicial activism and restraint, constitutional interpretation, and the separation of powers.

Primary legal sources comprise the 1945 Constitution of the Republic of Indonesia, Law No. 24 of 2003 on the Constitutional Court (as last amended by Law No. 7 of 2020), Law No. 48 of 2009 on Judicial Power, Law No. 7 of 2017 on General Elections, and relevant rulings of the Constitutional Court. Secondary legal sources consist of national and international journal articles, constitutional law treatises, and prior academic studies related to the research theme. The analysis is conducted through a qualitative-prescriptive framework, guided by a systematic research protocol designed to ensure objectivity, transparency, and analytical rigor. First, the normative construction of the Court's authority is mapped based on the Constitution and statutory provisions. Second, Decision No. 62/PUU-XXII/2024 is analyzed by disaggregating the formal verdict, legal considerations (*ratio decidendi*), and directive elements. Third, the five constitutional engineering guidelines are evaluated against the parameters of the separation of powers. Finally, these findings determine whether the guidelines remain within the boundaries of legitimate constitutional interpretation or constitute judicial law-making that supplants the legislative function.

C. RESULT AND DISCUSSION

1. The Construction of the Constitutional Court's Judicial Law-Making within the Separation of Powers Framework

The concept of the separation of powers serves as the foundational benchmark for determining the boundaries of judicial authority. Originating as a doctrine to prevent the concentration of the law-making, law-enforcement, and dispute-adjudication functions in a single entity, the modern constitutional state understands this separation not as an absolute segregation, but as a functional distribution of power designed to facilitate mutual oversight through checks and balances. This structural arrangement ensures that state power is properly organized, limited, and controlled, thereby effectively preventing abuses of power.¹⁵ For a constitutional court, the primary implication of this

¹⁵ Jimly Asshidiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Konstitusi Press, 2006), Hal.74

doctrine is that judicial review operates as an instrument of constitutional oversight over the legislature, rather than as a license to supplant it.¹⁶

Article 20 of the 1945 Constitution of the Republic of Indonesia vests legislative power in the House of Representatives (DPR), while Article 24C (1) grants the Constitutional Court the authority to review statutes against the Constitution. Furthermore, Article 24(1) establishes that judicial power is an independent authority exercised to administer justice. Read together, these provisions establish two essential and complementary principles: judicial independence and legislative competence. Judicial independence is vital to empower the Court to declare unconstitutional statutes null and void, whereas legislative competence ensures that substantive policy choices retain their democratic legitimacy through the formal law-making process.

Viewed through a Kelsenian lens, the Constitutional Court functions primarily as a "negative legislator".¹⁷ Under this model, the constitutional court does not create positive norms in the manner of a parliament; rather, it invalidates norms that conflict with the Constitution. Hans Kelsen formulated this framework precisely to ensure that constitutional review does not obliterate the distinction between judicial and legislative functions. This principle is codified in Article 57 (1) of the Constitutional Court Law, which stipulates that any statutory provisions, articles, paragraphs, or legal components declared unconstitutional shall lose their binding legal force.

Nevertheless, institutional experience reveals that this negative function cannot always be executed in a purely mechanical fashion. The annulment of a norm frequently creates a legal vacuum, while the constitutional rights at stake often require immediate remediation. Consequently, under specific circumstances, the Court issues conditional interpretations to ensure that a norm remains applicable provided it satisfies particular constitutional criteria. Accordingly, the dichotomy between a negative and a positive legislator is more accurately conceived as a spectrum of judicial decisions rather than as mutually exclusive categories. Empirical research by Efendi et al. demonstrates that rulings bearing strong positive legislative characteristics have emerged with significant frequency in the Court's jurisprudence.¹⁸

The concept of judicial law-making helps illuminate the gray area situated along this spectrum. Judicial law-making occurs when a court decision does more than simply

¹⁶ Baca Pasal 10 Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi sebagaimana diubah terakhir dengan Undang-Undang Nomor 7 Tahun 2020 yang mengatur kewenangan MK.

¹⁷ Hans Kelsen, *General Theory of Law and State*, diterjemahkan oleh Anders Wedberg, (Cambridge, Massachusetts: Harvard University Press, 1945), Hal. 268

¹⁸ Efendi, M. A. F., Muhtadi, M., & Saleh, A. (2023). Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature oleh Mahkamah Konstitusi. *Jurnal Konstitusi*, 20(4), 622-639.

apply existing law, generating or developing norms that carry novel normative consequences. Within constitutional law scholarship, this phenomenon typically stems from statutory interpretation. Because constitutions are drafted in open-textured, principle-based language, judges cannot entirely avoid interpretive choices. However, interpretation is not synonymous with arbitrary law-making; the critical dividing line lies in the downstream consequences specifically, whether a judge merely ascertains a norm's meaning derivable from the constitutional text or instead formulates policy alternatives previously reserved for the legislature.

The doctrines of judicial activism and judicial restraint further clarify how judges navigate this interpretive space. Judicial activism refers to a court's propensity to utilize its authority proactively to correct or develop the law, whereas judicial restraint emphasizes self-limitation, particularly when the issues under review fall within the legislature's legitimate policy-making discretion. Research by Saragih, Nasution, and Sihombing illustrates that the practice of the Indonesian Constitutional Court continuously fluctuates between these two approaches¹⁹, while Dramanda emphasizes that judicial restraint can function as an effective mechanism to limit judicial power without compromising judicial independence.²⁰

At this juncture, the doctrine of open legal policy (*open juridische politiek*) becomes crucial. When the Constitution leaves a specific policy design unarticulated, the legislature retains a broad policy space to select among various constitutionally permissible alternatives. Satriawan and Lailam point out that the application of open legal policy in Constitutional Court decisions still lacks definitive boundaries, frequently triggering tensions between judicial activism and judicial restraint.²¹ Similarly, Wibowo underscores the necessity of establishing rigorous review models for open legal policy to prevent the autonomy of law-makers from degenerating into legislative arbitrariness.²²

Synthesizing these theoretical perspectives establishes a preliminary boundary: while the Constitutional Court is fully authorized to conduct constitutional interpretation even when such interpretation yields normative consequences the legitimacy of any

¹⁹ Saragih, G. M., Nasution, M., & Sihombing, E. N. (2025). 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(1), 039-065.

²⁰ Dramanda, W. (2014). Menggagas penerapan judicial restraint di Mahkamah Konstitusi. *Jurnal Konstitusi*, 11(4), 617-631.

²¹ Satriawan, I., & Lailam, T. (2019). Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang. *Jurnal Konstitusi*, 16(3), 559-584.

²² Wibowo, M. (2015). Menakar konstitusionalitas sebuah kebijakan hukum terbuka dalam pengujian undang-undang. *Jurnal Konstitusi*, 12(2), 196-216.

resulting judicial law-making depends entirely on whether those consequences are strictly necessary to resolve a constitutional violation or whether they encroach upon substantive policy choices constitutionally entrusted to the legislature. Consequently, the Indonesian model of the separation of powers does not demand absolute judicial passivity; rather, it requires that judicial intervention refrain from extinguishing the decision-making space explicitly reserved for other branches of government.

2. Decision No. 62/PUU-XXII/2024 and the Shift from Negative Legislator to Constitutional Directive

Decision No. 62/PUU-XXII/2024 originated from a judicial review of Article 222 of the Election Law, which mandated that presidential and vice-presidential tickets be nominated exclusively by political parties or coalitions meeting a threshold of at least 20 percent of DPR seats or 25 percent of the national valid vote share in the preceding legislative election.²³ Following a series of prior rulings upholding the presidential threshold, the Constitutional Court reversed its stance on January 2, 2025, declaring the threshold regime unconstitutional. The Court reasoned that the constitutional defect lies not merely in the specific percentages of 20 or 25 percent, but in the existence of a candidacy threshold regime itself, which conflicts with core constitutional principles.²⁴

This reversal represents a significant milestone in constitutional review. Hanan, Astuti, and Eddyono note that Decision No. 62 reflects a fundamental reorientation away from governability toward representativeness.²⁵ In other words, the Court transcended a literal reading of Article 6A (2) of the Constitution to account for the real-world consequences of the presidential threshold on voter choice and political party participation. From the perspective of constitutional interpretation, this approach demonstrates that the Court treats the Constitution as an active framework applied to contemporary realities rather than as a static text.

After ruling Article 222 of the 2017 Election Law unconstitutional, the Court asserted that lawmakers retain the prerogative to undertake "constitutional engineering" to prevent the nomination system from yielding an unmanageable

²³ Republik Indonesia, Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum, Pasal 222.

²⁴ Mahkamah Konstitusi Republik Indonesia, "*Presidential Threshold Bertentangan dengan Konstitusi*," 2 Januari 2025.

²⁵ Hanan, D., Astuti, T. S., & Eddyono, L. W. (2025). Electoral Reform Through the Indonesian Constitutional Court: Constitutionality of Presidential Candidacy Threshold in Indonesia: Reformasi Elektoral Melalui Mahkamah Konstitusi: Konstitusionalitas Ambang Batas Pencalonan Presiden Di Indonesia. *Jurnal Konstitusi*, 22(2), 260-292.

multitude of candidates. The five guidelines issued by the Court reflect an effort to prevent a regulatory vacuum following the abolition of the threshold.²⁶

The first guideline—stipulating that all participating political parties hold the right to nominate presidential and vice-presidential candidates—and the second guideline—prohibiting any requirement based on legislative seat or vote percentages—are closely tied to the *ratio decidendi* because they directly resolve the core constitutional issue presented in the case. Conversely, the third guideline concerning political coalitions possesses a more open-ended character. The Court does not prohibit coalitions entirely; rather, it mandates that coalitions must not generate a dominant bloc that severely restricts voter choice. This guideline functions more as a constitutional parameter than as a rigid legislative formula, leaving the legislature ample discretion to determine the form, scale, and regulatory mechanisms of coalitions, provided they avoid unconstitutional restrictions on voter alternatives.

The fourth guideline, which introduces sanctions for political parties failing to nominate a candidate, represents the most problematic element from the standpoint of judicial law-making. Establishing electoral sanctions goes beyond interpreting Article 6A(2); it touches directly on institutional design and legal liabilities for political parties. By mandating a sanction prohibiting non-nominating parties from participating in subsequent elections, the Court ventured into a policy domain requiring deliberate legislative formulation. Consequently, this fourth guideline must be treated as a parameter necessitating legislative implementation rather than as a self-executing penal norm.

The fifth guideline requiring that subsequent amendments to the Election Law incorporate meaningful public participation—highlights a distinctly dialogic model. Instead of dictating the final statutory text, the Court regulated the quality of the legislative process itself. Scholarship on the downstream effects of Constitutional Court decisions suggests that *ratio decidendi* and legal considerations containing constitutional directives serve as vital inputs for lawmakers. Hakiki and Taufiqurrahman even advocate for institutionalizing constitutional dialogue to ensure that the constitutional messages embedded in court rulings are translated into legislation legitimately and effectively.²⁷

These five guidelines cannot be treated as a homogenous category. The first two possess a strong substantive link to the invalidation of the norm; the third establishes

²⁶ Baca Putusan Mahkamah Konstitusi Republik Indonesia Nomor 62/PUU-XXII/2024.

²⁷ Hakiki, Y. R., & Taufiqurrahman, T. (2023). The Idea of Structuring National Legislation Based on The Ratio of Decidendi & Obiter Dictum Constitutional Court Decision: Gagasan Penataan Legislasi Nasional Berbasis Ratio Decidendi Dan Obiter Dictum Putusan Mahkamah Konstitusi. *Jurnal Konstitusi*, 20(1), 78-99.

outer limits for coalition design; the fourth constitutes a policy directive requiring detailed legislative design; and the fifth articulates a procedural principle governing the legislative process. This analytical differentiation is crucial because it reveals that the prescriptive weight of the Court's legal reasoning varies across distinct functions. The concept of a "constitutional directive" provides a valuable analytical tool for understanding this dynamic. A constitutional directive is distinct from a novel statutory norm; rather, it is a constitutional directive derived from a court ruling and directed at lawmakers to ensure that subsequent legal reforms do not replicate constitutional flaws. Accepting this concept repositions the Court not as a legislative substitute, but as a guardian of constitutional boundaries operating within a policy space rightfully filled by the legislature.

This analytical framework aligns closely with the issues raised in Petition No. 98/PUU-XXIII/2025, where petitioners explicitly challenged whether the Court should be strictly confined to the role of a negative legislator without formulating new norms. Although the Court dismissed the petition on standing grounds²⁸, the mere emergence of the case underscores that debates regarding the scope of the Court's normative authority remain highly relevant.²⁹

3. Parameters of the Constitutional Limits of Judicial Law-Making in Decision No. 62/PUU-XXII/2024

Drawing upon the separation of powers doctrine and the aforementioned theoretical frameworks, the outer bounds of judicial law-making can be systematically evaluated through seven discrete parameters. These criteria are not intended to function as a rigid mathematical formula, but rather as an analytical benchmark to assess the constitutional legitimacy of a ruling by the Constitutional Court.

First, constitutional authority (*constitutional authority*). Every normative consequence of a court decision must be firmly anchored in the Court's statutory mandate under Article 24C of the 1945 Constitution. In Decision No. 62, the formal annulment of Article 222 falls squarely within the scope of judicial review. Difficulties arise, however, when the Court issues directives that substantively dictate subsequent legislative design. At this stage, the foundational basis of authority cannot rely solely on practical necessity; it must be explicitly tied to the primary function of safeguarding constitutional supremacy.

²⁸ Baca, Putusan Mahkamah Konstitusi Republik Indonesia Nomor 98/PUU-XXIII/2025, 17 Juli 2025.

²⁹ Mahkamah Konstitusi Republik Indonesia, "Menyoal Pemaknaan MK sebagai 'Negative Legislator' dan Bukan 'Positive Legislator'," 24 Juni 2025. <https://www.mkri.id>. Diakses pada 25 Juni 2025

Second, interpretive necessity (*interpretive necessity*). The closer a directive is linked to resolving the specific constitutional violation under review, the stronger its legitimacy. The first two guidelines in Decision No. 62 satisfy this parameter because they directly address the core rationale for invalidating the presidential threshold. Conversely, the provision concerning sanctions for political parties that fail to field a candidate sits at a greater distance from the immediate object of review, thereby demanding heightened institutional caution.

Third, normative innovation (*normative innovation*). This parameter distinguishes mere constitutional interpretation from active norm creation. When the Court simply construes the meaning of an existing norm or establishes outer constitutional boundaries for a policy option, it remains closely aligned with interpretation. However, when the Court prescribes novel sanctions, administrative mechanisms, or technical formulas that previously did not exist, the degree of normative innovation escalates significantly. The higher the level of normative innovation, the stronger the institutional imperative to defer final formulation to the legislature.

Fourth, legislative discretion (*legislative discretion*). This represents the most vital parameter derived from the separation of powers. A constitutionally sound ruling must leave meaningful room for the House of Representatives and the President to determine how best to achieve constitutional objectives. If the Court merely sets goals or boundaries, legislative discretion remains intact. Conversely, if the Court simultaneously dictates the objective, the precise instrument, the formula, the sanction, and the procedural mechanics in exhaustive detail, the ruling edges perilously close to legislative substitution.

Fifth, institutional competence (*institutional competence*). While the Constitutional Court possesses the definitive institutional competence to evaluate whether a norm conforms to the Constitution, the legislature holds superior competence to craft policy designs that demand complex technical, administrative, fiscal, and political considerations. In the architecture of general elections, for instance, determining candidate registration mechanics, verification protocols, campaign rules, penal sanctions, and administrative consequences requires policy choices that cannot be exhaustively resolved through constitutional adjudication alone.

Sixth, democratic legitimacy (*democratic legitimacy*). The formulation of electoral law carries direct, far-reaching consequences for political competition and popular representation. Consequently, the broader the substantive policy content mandated by a court, the greater the necessity that such decisions be forged through an open, participatory legislative process. Interestingly, the fifth guideline of Decision No.

62—which mandates meaningful public participation—serves precisely as a structural safeguard to preserve this democratic legitimacy.

Seventh, binding force and doctrinal placement within the ruling (*binding force and doctrinal position*). Decisions of the Constitutional Court are final and binding upon pronouncement. However, to determine which portions carry prescriptive legal weight, a clear distinction must be drawn between the formal verdict (*amar*), the core legal reasoning (*ratio decidendi*), and incidental statements (*obiter dictum*). Hakiki and Taufiqurrahman emphasize that the *ratio decidendi* constitutes the operative reasoning determining the verdict, whereas *obiter dictum* lacks equivalent binding status.²⁶ Furthermore, Maulidi reminds us that final and binding constitutional rulings often encounter implementation hurdles when they require auxiliary legal instruments or threaten the harmonious balance of power among co-equal branches of government.³⁰

This seventh parameter yields a critical legal consequence: while the formal verdict of Decision No. 62 explicitly strikes down Article 222, the five constitutional engineering guidelines are not formulated as replacement norms within the verdict itself. Consequently, these guidelines cannot be treated as if they constitute a self-executing, newly minted "Article 222." Their proper status is that of constitutional arguments or directives that bound the legislature's policy choices, with varying degrees of normative strength determined by their proximity to the *ratio decidendi*.

Table 1. Mapping the Normative Character and Constitutional Limits of the Guidelines in Constitutional Court Decision No. 62/PUU-XXII/2024

Court Guideline	Substance	Normative Character	Constitutional Boundary
Universal nomination right (All parties may nominate candidates)	Abolishes the threshold as a barrier to candidacy	Direct consequence of norm invalidation	Directly tied to the <i>ratio decidendi</i>
No seat/vote percentages	Prohibits formulas based on the old threshold	Substantive parameter	Leaves technical design to the legislature
Non-dominative coalitions	Prevents the restriction of voter choice	Constitutional parameter	Legislature retains freedom to choose the mechanism
Sanctions for non-nominating parties	Determines legal consequences for political parties	Highly prescriptive	Must be realized through legislative enactment

³⁰ Maulidi, M. A. (2019). Menyoal Kekuatan Eksekutorial Putusan Final dan Mengikat Mahkamah Konstitusi Questioning the Executorial Force on Final and Binding Decision of. *Jurnal Konstitusi*, 16(2), 339-362.

Meaningful public participation	Regulates the quality of the statutory formation process	Procedural directive	Strengthens constitutional dialogue
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Source: Compiled by the author based on Constitutional Court Decision No. 62/PUU-XXII/2024 and the study's theoretical framework (2026).

This analytical mapping demonstrates that the five guidelines do not possess an identical degree of judicial law-making intensity. The first and second guidelines operate primarily as logical consequences of invalidating the presidential threshold. The third guideline serves as a constitutional boundary governing coalition design. The fourth guideline approaches the threshold of positive legislation because it introduces a new penal consequence. Finally, the fifth guideline functions as a procedural directive, governing the quality of the legislative process rather than dictating substantive statutory content.

Consequently, the term "judicial law-making" must be applied with analytical precision. A strict distinction must be maintained between provisions carrying direct binding force and directives requiring legislative implementation. Conversely, dismissing all guidelines as mere *obiter dictum* devoid of normative relevance would ignore the vital constitutional function of court rulings in guiding future law-making. A more accurate doctrinal stance views Decision No. 62 as an exercise in constitutional dialogue, wherein the Constitutional Court establishes the outer constitutional boundaries, while lawmakers retain the discretion to formulate concrete policy choices within those limits.

This paradigm fosters a balanced institutional relationship between the judiciary and the political branches. The Constitutional Court preserves its role as the guardian of the constitution, while the House of Representatives and the President retain their institutional prerogative to choose policy instruments. Within this framework, judicial law-making is not an independent power detached from constitutional checks, but rather an interpretive consequence whose legitimacy and outer boundaries are strictly bounded by the separation of powers.

These findings also mark a distinct contribution relative to existing literature. While prior studies on the Constitutional Court as a positive legislator have primarily identified a broad trend toward regulative rulings, and analyses of Decision No. 62 have focused on the Court's shifting stance and its broader impact on electoral reform, this study advances to the next analytical tier. By examining the status and normative boundaries of the Court's post-invalidation guidelines, the research avoids an absolute prohibition against judicial norm-creation, establishing instead the precise conditions

under which interpretive consequences remain legitimate versus when they cross the line into legislative substitution.

4. Judicial Activism, Judicial Restraint, dan Model Constitutional Dialogue

Decision No. 62 demonstrates that judicial activism and judicial restraint need not be treated as a binary choice. The Constitutional Court can adopt an active posture when correcting a presidential threshold regime deemed contrary to political rights and popular representation, while simultaneously exercising restraint by leaving the final formulation of the nomination design to lawmakers. This approach closely mirrors "bounded judicial activism" that operates strictly within constitutional boundaries while preserving the institutional autonomy of the legislature. This balancing act is crucial because excessive judicial restraint risks rendering constitutional protection toothless, whereas unbridled judicial activism can lead to a juristocracy, a condition where critical policy decisions shift away from democratically elected political bodies to judges, while Sundariwati frames this ongoing dilemma as the tension between whether judicial activism reinforces constitutional supremacy or precipitates a transition toward juristocracy.³¹

The model of *constitutional dialogue* offers a viable middle ground. Under this framework, the Constitutional Court does not function as a final policy-maker; instead, it establishes structural boundaries and constitutional reasoning that lawmakers must respect. The legislature then translates these principles into operational rules. Hakiki and Taufiqurrahman emphasize the vital necessity of institutionalizing this constitutional dialogue during the follow-up phase of court ruling.³²

This dialogue becomes increasingly indispensable because the mere abolition of the presidential threshold does not automatically resolve the broader complexities of electoral design. Lawmakers must still determine candidate nomination models, coalition mechanics, administrative requirements, party liabilities, and a myriad of technical variables. While the Court can establish the binding boundary that such a design must not reintroduce unacceptable restrictions on voter choice, it should not arrogate the task of filling every policy detail.

This paradigm also imparts new meaning to meaningful participation. Public participation is no longer treated as a mere procedural formality in the legislative

³¹ Sundariwati, N. L. D. (2024). Judicial Activism: Between Protecting Constitutional Supremacy or Transitioning to Juristocracy; Judicial Activism: Diantara Melindungi Supremasi Konstitusional Atau Transisi Menuju Juristocracy. *Jurnal Konstitusi*, 21(3), 432-447.

³² Hakiki dan Taufiqurrahman, "The Idea of Structuring National Legislation Based on The Ratio of Decidendi & Obiter Dictum Constitutional Court Decision."

process, but rather as an essential mechanism to test whether the policy choices adopted by the legislature genuinely reside within constitutional boundaries. By incorporating non-parliamentary political parties as directed by the Court—the legislative process successfully circumvents the dominance of incumbent actors who previously reaped advantages from the old presidential threshold system.

From an institutional standpoint, this approach fortifies the mechanisms of checks and balances. The Constitutional Court executes constitutional oversight; the House of Representatives and the President execute legislation; the public and political parties participate in the process; and the resulting legislation remains subject to subsequent judicial review should it deviate from the Constitution. Consequently, defining the limits of judicial law-making does not require rendering the Constitutional Court passive; rather, it demands a clear constitutional division of labor.

Building upon this foundation, this study proposes three definitive characteristics of a legitimate constitutional directive. First, the directive must bear a direct, substantive relationship to the constitutional violation adjudicated by the Court. Second, it must take the form of a binding principle or boundary, rather than a wholesale usurpation of policy instruments. Third, it must actively preserve the legislature's discretionary space to choose the most appropriate means for achieving constitutional objectives. When these three criteria are satisfied, the Court's directives can be properly understood as components of a healthy constitutional dialogue. Conversely, if these thresholds are ignored, the directives risk degenerating into unauthorized judicial law-making.

In the context of Decision No. 62, the first, second, third, and fifth guidelines largely satisfy these three characteristics, whereas the guideline concerning sanctions must be interpreted with strict limitations. While the Court is fully justified in highlighting the constitutional necessity of preventing political parties from exercising nomination rights opportunistically, the specific form of the sanction must remain a matter for legislative enactment.

D. CONCLUSION

This study demonstrates that judicial law-making within the jurisprudence of the Constitutional Court cannot be adequately evaluated through the rigid dichotomy of a negative versus a positive legislator. Constitutional review inherently demands interpretation, and in specific cases, constitutional interpretation can yield normative consequences that shape legal development. However, the legitimacy of these consequences is strictly bounded by the separation of powers, the Court's statutory

mandate, legislative discretion, and the respective institutional competencies of each branch of government. In Decision No. 62/PUU-XXII/2024, the Constitutional Court firmly exercised its function as a negative legislator by declaring Article 222 of the Election Law unconstitutional and devoid of legal binding force. Nevertheless, the Court subsequently issued five constitutional engineering guidelines directed at lawmakers. These guidelines do not possess a uniform normative character: some operate as immediate consequences of the *ratio decidendi*, others function as broad constitutional parameters, and certain provisions particularly those concerning sanctions require explicit legislative enactment to attain positive legal form.

The constitutional limits of judicial law-making can be systematically measured through seven parameters: constitutional authority, interpretive necessity, normative innovation, legislative discretion, institutional competence, democratic legitimacy, and the doctrinal binding force of different sections of a ruling. These criteria indicate that the more prescriptively the Court dictates policy content and the narrower the discretionary space left to the legislature the stronger the justification for categorizing the action as judicial law-making that borders on legislative substitution. Building upon this framework, this study proposes the concept of a "constitutional directive" as a vital analytical category for understanding court guidelines situated precisely between constitutional interpretation and judicial law-making. A constitutional directive is justified provided it stems directly from the adjudicated constitutional violation, is formulated as a binding principle or boundary, and preserves meaningful discretionary space for lawmakers to select policy instruments. In Decision No. 62/PUU-XXII/2024, the majority of the guidelines fall comfortably within this category, whereas the guideline concerning sanctions must be understood as a directive requiring further legislative implementation rather than as a self-executing penal norm. Ultimately, the institutional relationship between the Constitutional Court and the political branches should be anchored in a model of constitutional dialogue. Under this paradigm, the Court establishes constitutional boundaries and provides binding reasoning within its sphere of authority, while the House of Representatives and the President retain the ultimate responsibility for formulating the architecture of electoral law. This model safeguards constitutional supremacy without undermining the democratic legitimacy of the legislative process. For lawmakers, Decision No. 62/PUU-XXII/2024 serves as a critical momentum to design a presidential nomination regime that is more representative, open, and participatory, while simultaneously preserving the functional effectiveness of the presidential system.

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