

## JUDICIAL REVIEW AND SEPARATION OF POWERS IN INDONESIA MODERN CHALLENGES FOR CONSTITUTIONAL GOVERNANCE

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### ABSTRACT

Indonesia, as a developing democracy, faces significant challenges in implementing the principles of judicial review and separation of powers. This article analyzes the dynamics of Indonesia's constitutional governance in the post-Reformasi era, focusing on the role of the Constitutional Court, the relationships among the legislative, executive, and judicial branches, and the impacts of political modernization and digitalization. Using a qualitative approach based on normative legal analysis and literature review, the article highlights contemporary challenges in ensuring the balance of powers and the protection of constitutional rights. The findings indicate that, although judicial review mechanisms strengthen constitutional supremacy, practical obstacles remain, including political pressure, divergent legal interpretations, and the need for regulatory updates to address the digital era. The article provides strategic recommendations for enhancing constitutional governance in Indonesia.

*Keywords: Judicial Review, Separation of Powers, Constitutional Governance, Constitutional Court, Indonesia.*

### 1. Introduction

Following the 1998 Reformasi, Indonesia underwent a significant transformation in its political and legal structures, marking a shift from an authoritarian system toward a constitutional democracy. One of the most critical aspects of this transformation is the implementation of the principle of separation of powers among the legislative, executive, and judicial branches, along with the mechanism of judicial review to ensure that laws and regulations are consistent with the constitution. These principles serve as the foundation of constitutional governance but face contemporary challenges due to political modernization, digitalization, and internal political pressures. This study aims to analyze the dynamics of Indonesia's constitutional law, focusing on the practice of judicial review and the challenges associated with maintaining a proper separation of powers. Following the 1998 Reformasi, Indonesia entered an era of profound political and legal

transformation, signaling a transition from an authoritarian regime to a constitutional democracy.<sup>1</sup> One of the most fundamental aspects of this transformation is the implementation of the principle of separation of powers among the legislative, executive, and judicial branches, designed to prevent the abuse of power and to strengthen the system of checks and balances at the national level.<sup>2</sup> Alongside this, the mechanism of judicial review was strengthened through the establishment of the Constitutional Court (MK), which holds the authority to assess the conformity of laws with the 1945 Constitution (UUD 1945).<sup>3</sup> This mechanism has become a crucial instrument for constitutional protection and the enforcement of the rule of law, particularly in dealing with regulations that are controversial or potentially violate human rights and democratic principles.

As Indonesia's democracy has developed, these principles of constitutional governance have faced increasingly complex contemporary challenges. Political modernization and digitalization have introduced new dynamics into the legislative process and legal oversight. For example, the rise of the digital economy, the widespread use of social media, and information technology regulations raise new questions regarding the limits of legislative and executive power, as well as the judiciary's ability to effectively enforce constitutional law.<sup>4</sup> Moreover, internal political pressures, including interventions by political actors and certain economic interests, also affect the independence and credibility of the judicial review process.<sup>5</sup>

## I. Introduction

### Theoretical Foundations and Legal Framework

The principle of **separation of powers** serves as the foundation of modern constitutional governance in Indonesia. This theory was originally proposed by Montesquieu in the 18th century, emphasizing the necessity of dividing state power into three branches legislative, executive, and judicial to prevent the abuse of authority.<sup>6</sup> The Indonesian Constitution, namely the **1945 Constitution (UUD 1945)**, explicitly adopts this principle, particularly through the roles of the **People's**

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<sup>1</sup> A. Butt and T. Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Oxford University Press, 2018), 12–15.

<sup>2</sup> J. Lindsey, *Separation of Powers and Judicial Review in Comparative Perspective* (London: Routledge, 2019), 45–47.

<sup>3</sup> Law No. 24 of 2003 concerning the Constitutional Court, Article 24C.

<sup>4</sup> S. Butt, "Judicial Review in Indonesia: Theory and Practice," *Asian Journal of Comparative Law* 14, no. 1 (2019): 1–35.

<sup>5</sup> Constitutional Court of the Republic of Indonesia, *Decisions of the Constitutional Court 2003–2023* (Jakarta: MKRI, 2023), pp. 89–92.

<sup>6</sup> Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (London: Everyman's Library, 1994), 152–158.

**Representative Council (DPR)** as the legislative branch, the **President** as the executive, and the **Constitutional Court (MK)** and **Supreme Court (MA)** as the judicial institutions.<sup>7</sup> Alongside the adoption of this principle, Indonesia introduced the mechanism of **judicial review** as a tool to uphold constitutional supremacy. Judicial review grants the **Constitutional Court (MK)** the authority to assess the conformity of laws with the **1945 Constitution (UUD 1945)**, including the power to annul laws that conflict with the constitution.<sup>8</sup> This mechanism is regulated under **Article 24C of the 1945 Constitution (UUD 1945)** and is further reinforced by **Law No. 24 of 2003 concerning the Constitutional Court**, which establishes the procedures, jurisdiction, and authority of the Constitutional Court (MK) to hear petitions for judicial review of laws.<sup>9</sup> Judicial review has become an important instrument for the protection of constitutional rights, including human rights, political rights, and digital rights. Historically, the strengthening of the Constitutional Court (MK) and the judicial review mechanism was a response to the experience of New Order authoritarianism, during which executive power was highly dominant and the judicial institutions lacked independence.<sup>10</sup>

## 2. The Role of the Constitutional Court

The **Constitutional Court (MK)** serves as the guardian of the constitution, with its primary function being to maintain the balance of power among state institutions and to guarantee the constitutional rights of citizens.<sup>11</sup> Through **judicial review decisions**, the Constitutional Court (MK) enhances legal legitimacy by establishing constitutional standards for laws, including those related to human rights, political rights, and rights arising from developments in digital technology. However, the role of the MK is not without challenges. Political pressure from the executive and legislative branches can affect judicial independence. In addition, differences in legal interpretation among judges often result in controversial decisions, reflecting the complexity of interpreting the constitution amid contemporary socio-political dynamics.<sup>12</sup>

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<sup>7</sup> 1945 Constitution of Indonesia, Articles 20–24C; A. Butt and T. Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Oxford University Press, 2018), 12–15.

<sup>8</sup> 1945 Constitution of Indonesia, Article 24C; Law No. 24 of 2003 concerning the Constitutional Court, Articles 10–12.

<sup>9</sup> Law No. 24 of 2003 concerning the Constitutional Court.

<sup>10</sup> S. Butt, “Judicial Review in Indonesia: Theory and Practice,” *Asian Journal of Comparative Law* 14, no. 1 (2019): 3–7.

<sup>11</sup> Mahkamah Konstitusi Republik Indonesia, *Putusan-putusan Mahkamah Konstitusi 2003–2023* (Jakarta: MKRI, 2023), hlm. 25–30.

<sup>12</sup> Lindsey, *Separation of Powers and Judicial Review in Comparative Perspective*, 60–65.

### 3. Contemporary Challenges

#### a. Politics and Executive/Legislative Pressure

Controversial cases demonstrate the presence of political intervention in the judicial review process, particularly when laws touch on certain political or economic interests. This phenomenon raises questions regarding the balance of power and the credibility of judicial institutions.

#### b. The Digital Era

Regulations related to personal data, social media, and the digital economy create constitutional ambiguities. For instance, the **Information and Electronic Transactions Law (UU ITE)** poses challenges for the Constitutional Court (MK) in balancing freedom of expression with legal protection.

#### c. Implementation Gaps

Although laws exist, the practical enforcement of regulations often lags behind. For example, the protection of human rights and freedom of expression continues to face administrative and socio-political obstacles, highlighting a gap between legal norms and practical implementation.

### 4. Brief Case Studies

#### a. Constitutional Court Decisions on the Information and Electronic Transactions Law (UU ITE)

One of the most prominent examples of judicial review practice in Indonesia is the Constitutional Court (MK) decision regarding the Information and Electronic Transactions Law (UU ITE). The UU ITE, initially enacted in 2008 and later revised in 2016 through Law No. 19 of 2016, aims to regulate electronic transactions, digital information, and cybersecurity in Indonesia.<sup>13</sup> However, certain provisions of this law, particularly those related to the dissemination of information deemed harmful to others, have generated controversy because they are considered to restrict freedom of expression and have the potential to be misused for political or economic interests.<sup>14</sup> The Constitutional Court (MK) received several judicial review petitions challenging provisions of the UU ITE deemed inconsistent with the 1945 Constitution (UUD 1945), particularly articles regulating defamation and online insults. In its decision, the MK emphasized the need for a balanced constitutional interpretation, ensuring that the law not only protects individuals

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<sup>13</sup> Law No. 11 of 2008 on Information and Electronic Transactions; Law No. 19 of 2016 on Amendments to Law No. 11 of 2008.

<sup>14</sup> Butt, S., "Judicial Review in Indonesia: Theory and Practice," *Asian Journal of Comparative Law* 14, no. 1 (2019): 21–25.

from defamation but also safeguards freedom of expression in the digital public sphere.<sup>15</sup> This case highlights a modern legal dilemma: on one hand, the state must protect society from the dissemination of misleading or harmful information; on the other hand, individuals' constitutional rights, including freedom of expression and political rights, must not be excessively restricted. In several of its decisions, the Constitutional Court (MK) has emphasized the principles of **proportionality and human rights protection**, for example by limiting criminal sanctions for minor offenses and promoting resolution through civil mechanisms.<sup>16</sup> Moreover, the UU ITE case also reflects the challenges of legal digitalization. Social media and digital platforms evolve faster than regulations, requiring the Constitutional Court (MK) to interpret the law contextually, taking into account technological dynamics and societal digital communication practices.<sup>17</sup> This serves as a concrete example of how judicial review can function as a legal adaptation mechanism in the digital era, while also ensuring that the principle of separation of powers is maintained, as the MK acts as an overseer of the legislature.<sup>18</sup> Theoretically, this decision illustrates how the judicial review mechanism in Indonesia is not merely reactive, but also proactive in adapting regulations to social, political, and technological developments, thereby maintaining constitutional supremacy amid the complexities of the digital era.<sup>19</sup>

The MK decision regarding the UU ITE highlights the tension between freedom of expression and law enforcement, particularly in the context of information dissemination on social media. This case underscores the importance of a **balanced constitutional interpretation** to protect individual rights without neglecting public interests.

#### **b. Judicial Review Decisions Related to the Omnibus Law**

In the context of the omnibus law, the Constitutional Court (MK) emphasized the need to adjust regulations to align with the principles of power balance and the constitution. This decision demonstrates the challenges of reconciling complex legal reforms with the existing constitutional framework. The omnibus law, particularly the Job Creation Law (UU Cipta Kerja) No. 11 of 2020, is one of the most controversial legislative innovations in Indonesia over the past two decades. The law was designed to simplify regulations, accelerate investment, and enhance labor market flexibility by consolidating and revising more than 70 sectoral laws

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<sup>15</sup> Constitutional Court of the Republic of Indonesia, Decision No. 50/PUU-XV/2017.

<sup>16</sup> Ibid Butt and Lindsey, *The Constitution of Indonesia*, 112–115.

<sup>17</sup> S. Lindsey, *Separation of Powers and Judicial Review in Comparative Perspective* (London: Routledge, 2019) 88–92.

<sup>18</sup> Constitutional Court of the Republic of Indonesia, Decision No. 50/PUU-XV/2017, pp. 22–27.

<sup>19</sup> Butt, *Judicial Review in Indonesia*, 28–30.

into a single legal framework.<sup>20</sup> However, this omnibus legislative approach has raised serious concerns regarding compliance with the principle of separation of powers and the protection of constitutional rights. The Constitutional Court (MK) received several judicial review petitions from various parties, including labor unions, academics, and civil society organizations, highlighting potential violations of workers' rights, the right to a clean environment, and concerns over rushed legislative procedures.<sup>21</sup> In its decision, the Constitutional Court (MK) emphasized the need to adjust regulations to align with the principles of power balance and the constitution. The MK judges stressed that although omnibus legislation aims to enhance efficiency and accelerate economic development, it must not sacrifice citizens' constitutional rights or the principle of checks and balances between the legislative and executive branches. The MK ruling demonstrates that the judicial review mechanism functions as a crucial judicial oversight tool, balancing economic development interests with constitutional protection, particularly when legal changes are massive and complex.<sup>22</sup>

Analytically, the omnibus law case highlights several major challenges in the practice of Indonesian constitutional law:

1. **Regulatory Complexity** By consolidating multiple laws into a single statute, the MK must interpret the constitutional context across multiple legal sectors simultaneously, including labor, environment, and investment. This requires a more **holistic and multidisciplinary interpretive approach**.<sup>23</sup>
2. **Balance of Power** The MK emphasized that hastily enacted legislation by the legislative and executive branches can reduce public participation and legislative oversight, which are central to the principle of separation of powers.<sup>24</sup>
3. **Protection of Constitutional Rights** The MK must ensure that fundamental societal rights, including the right to decent work and a healthy environment, remain guaranteed even when regulations prioritize economic efficiency.
4. **Precedent for Future Legal Reform** The MK ruling on the omnibus law establishes standards for complex legislative processes: large-scale legislation must comply with constitutional procedures, consider public consultation, and

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<sup>20</sup> Law No. 11 of 2020 on Job Creation; A. Butt and T. Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Oxford University Press, 2018), 128–132.

<sup>21</sup> Constitutional Court of the Republic of Indonesia, Decision No. 91/PUU-XVIII/2020, pp. 15–20.

<sup>22</sup> Butt, S., *Judicial Review in Indonesia: Theory and Practice*, *Asian Journal of Comparative Law* 14, no. 1 (2019): 32–36.

<sup>23</sup> Lindsey, S., *Separation of Powers and Judicial Review in Comparative Perspective* (London: Routledge, 2019), 1

<sup>24</sup> Constitutional Court of the Republic of Indonesia, Decision No. 91/PUU-XVIII/2020, pp. 25–30.

account for citizens' constitutional rights.<sup>25</sup> Thus, this case study reinforces the role of the MK as a **proactive constitutional overseer**, not merely a reactive one, in addressing rapid and extensive legal reforms. The MK's decisions do not only assess procedural legality but also provide **normative analysis** of the principles of power balance and the protection of fundamental rights, which remain major challenges in contemporary Indonesian constitutional governance.<sup>26</sup>

## Conclusion

**Judicial review** and the **separation of powers** are fundamental pillars of constitutional governance in Indonesia. Although legal mechanisms have strengthened constitutional supremacy, contemporary challenges including political pressure and digital regulation require greater attention. Strengthening the independence of the Constitutional Court (MK), clarifying digital regulations, and providing legal education for the public are strategic measures to ensure a balance of power and the protection of constitutional rights. Judicial review and the principle of separation of powers remain central to Indonesia's constitutional governance. The judicial review mechanism through the Constitutional Court has reinforced constitutional supremacy, ensuring that laws and government regulations comply with the 1945 Constitution (UUD 1945) and provide protection for citizens' constitutional rights.<sup>27</sup> However, developments in politics, the economy, and technology present complex modern challenges. Political pressures, whether from the executive or legislative branches, can test the judiciary's independence and the integrity of the Constitutional Court.<sup>28</sup> Meanwhile, digitalization and regulations related to information technology including social media, the digital economy, and personal data protection create constitutional gray areas that require adaptive yet accurate legal interpretation.<sup>29</sup> Cases such as judicial review of the UU ITE and the omnibus law highlight this dilemma on one hand, the state must ensure legal compliance and protect public interests; on the other hand, rights such as freedom of expression, the right to work, and environmental rights must not be diminished.<sup>30</sup> To address these challenges, several strategic measures are crucial:

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<sup>25</sup> Butt and Lindsey, *The Constitution of Indonesia*, 134–137.

<sup>26</sup> Constitutional Court of the Republic of Indonesia, Decision No. 91/PUU-XVIII/2020, pp. 40–45.

<sup>27</sup> Lindsey, S., *Separation of Powers and Judicial Review in Comparative Perspective* (London: Routledge, 2019), 60–65.

<sup>28</sup> Constitutional Court of the Republic of Indonesia, Decision No. 50/PUU-XV/2017; Decision No. 91/PUU-XVIII/2020.

<sup>29</sup> Butt and Lindsey, *The Constitution of Indonesia*, 128–137

<sup>30</sup> S. Butt, "Judicial Independence and Constitutional Governance in Indonesia," *Indonesia Law Review* 9, no. 2 (2020): 45–52.

## 1. Strengthening the Independence of the Constitutional Court

The Constitutional Court (MK) must be protected from political intervention and external pressures, including in the selection of judges and operational funding, to ensure that judicial review decisions are free from bias and short-term interests.<sup>31</sup>

## 2. Clarification of Digital Regulations

Laws related to information technology, personal data, and the digital economy should be drafted with clear constitutional principles, balancing individual rights with public interests, and providing adaptive judicial oversight mechanisms.

## 3. Public Legal Education

Legal awareness among the public is an important component of constitutional governance. Educating citizens about constitutional rights, legislative processes, and judicial review mechanisms can enhance civic participation and reduce the misuse of law.<sup>32</sup>

## 4. Strengthening Inter-Institutional Coordination

Legislative processes and law implementation should involve coordination among the legislative, executive, and judicial branches, so that the principle of separation of powers is not only a normative concept but also an effective practice in state governance.<sup>33</sup>

Overall, **judicial review** and the **separation of powers** function not only as mechanisms of control over legislation and executive actions but also as instruments for legal adaptation in the modern era. Constitutional supremacy can be maintained if judicial institutions are strengthened, regulations are drafted contextually, and public participation is synergistically integrated. This way, Indonesia can balance legal and economic development with the protection of citizens' fundamental rights, while safeguarding democratic stability and sustainable constitutional governance.<sup>34</sup>

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<sup>31</sup> Law No. 11 of 2008 on Information and Electronic Transactions; Law No. 19 of 2016.

<sup>32</sup> Lindsey, *Separation of Powers and Judicial Review in Comparative Perspective*, 92–95.

<sup>33</sup> Constitutional Court of the Republic of Indonesia, *Decisions of the Constitutional Court 2003–2023*, pp. 30–35.

<sup>34</sup> Butt, S., *Judicial Review in Indonesia: Theory and Practice*, *Asian Journal of Comparative Law* 14, no. 1 (2019): 3–7.

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