

Judicial Review and Substantive Justice: Reframing the Constitutional Court's Role in Protecting Constitutional Rights in Indonesia

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Abstract

Judicial review is a principal mechanism for maintaining constitutional supremacy and protecting individual rights against excessive legislative power. In Indonesia, however, the effectiveness of constitutional adjudication cannot be measured solely by the number of statutes invalidated by the Constitutional Court. This study examines how substantive justice can provide a more coherent standard for the Court when reviewing legislation that affects constitutionally protected interests. The research employs normative legal research through statutory, conceptual, case, and comparative approaches. Four Constitutional Court decisions concerning political equality, children's civil status, indigenous peoples' customary forests, and meaningful participation in lawmaking are examined to identify patterns of rights protection and remedial reasoning. The study finds that the Court has progressively adopted rights-sensitive interpretation but has not consistently applied an analytical framework connecting constitutional injury, justification of rights limitations, judicial remedies, and implementation. This article proposes a Substantive Justice Review Framework consisting of rights identification, constitutional justification, remedial proportionality, and institutional follow-up. The framework strengthens protection without transforming substantive justice into unrestricted judicial discretion. Its application can improve consistency, transparency, and accountability while maintaining an appropriate constitutional relationship between judicial review and democratic lawmaking.

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Introduction

Indonesia's constitutional reforms between 1999 and 2002 fundamentally altered the architecture of public power. The amendments to the 1945 Constitution expanded constitutional rights, strengthened judicial independence, and established the Constitutional Court as an institution entrusted with maintaining constitutional supremacy. Judicial review consequently became a central mechanism for determining whether legislation enacted through democratic institutions remains within constitutional boundaries. This institutional transformation placed the Court in a strategic position between legislative authority and the protection of citizens against unconstitutional exercises of state power (Butt & Lindsey, 2008; Harijanti & Lindsey, 2006).

The authority to review statutes is constitutionally grounded in Article 24C paragraph (1) of the 1945 Constitution. Its significance extends beyond resolving conflicts between hierarchical norms. Constitutional review determines the practical reach of political equality, legal

certainty, religious freedom, recognition of indigenous communities, public participation, and other guarantees contained in the Constitution. Studies of Indonesian constitutional adjudication demonstrate that the Constitutional Court has become an important actor in defining the relationship between citizens, legislation, and public institutions.(Butt, 2019b; Nugraha, 2022) At the same time, institutional influence does not automatically produce coherent rights protection.

A formal conception of review primarily asks whether a statutory provision contradicts the wording of the Constitution. That inquiry remains essential because judges must anchor their authority in positive constitutional law. Yet textual compatibility alone may fail to capture the actual burden imposed by legislation. Apparently neutral provisions can maintain discriminatory classifications, exclude vulnerable communities, restrict political participation, or provide procedural legality without meaningful democratic involvement. Constitutional adjudication therefore faces a recurring tension between legal form and the material consequences of law.

The theoretical literature offers several approaches for addressing that difficulty. Kumm conceptualizes constitutional rights as principles that structure the justification of public authority (Kumm, 2004), while Alexy (Alexy, 2005, 2017) associates rights adjudication with balancing and proportionality. Barak (Barak, n.d.) similarly emphasizes structured justification when public interests interfere with protected rights. These approaches have generated significant criticism. Klatt and Meister (Klatt & Meister, 2012) warn against treating balancing as an exercise without legal discipline, while Chang and Dai (Chang & Dai, 2021) question the practical advantages often attributed to proportionality. Petersen (Petersen, 2020) and da Silva (da Silva, 2024) further demonstrate that proportionality operates differently across legal systems and should not be assumed to constitute a uniform judicial formula.

The debate is particularly relevant to Indonesia. Rights restrictions must be examined within a constitutional structure that includes Article 28J of the 1945 Constitution, democratic representation, judicial independence, and the separation of institutional functions. A rights-oriented approach cannot simply authorize courts to replace legislative judgment with judicial preferences. Harel and Shinar (Harel & Shinar, 2012) argue that judicial review should be understood within a constrained institutional relationship between courts and legislatures. (Klatt, 2015) similarly shows that the protection of rights must account for questions of institutional competence. Substantive justice must therefore remain connected to legal reasoning rather than operate as an independent moral claim.

Indonesian scholarship has identified several manifestations of this institutional dilemma. Butt (Butt, 2019b) illustrates how the Constitutional Court has significantly shaped decentralization, (Butt, 2019a)demonstrates broader structural complexities arising from Indonesia's divided system of judicial review. Loo explains that statutes and subordinate regulations are reviewed within different judicial jurisdictions, creating potential fragmentation in constitutional supervision (Loo, 2019). Mahy through the Job Creation Law controversy, demonstrates how constitutional review interacts with legislative hierarchy, regulatory reform, and political responses to judicial decisions (Mahy, 2022).

Rights adjudication has also developed across socially sensitive fields. Crouch (Crouch, 2012) shows how constitutional adjudication in the blasphemy context placed religious freedom in tension with state policy and majoritarian interests. Examines constitutional recognition of indigenous beliefs and the consequences of judicial interpretation for citizens historically marginalized by official religious classifications. Nalle likewise documents how law has

operated against adherents of indigenous beliefs. These studies reveal that constitutional injury frequently arises not from the absence of legal regulation but from the distributive effects of legal categories (Nalle, 2021).

Similar problems are visible in the protection of indigenous peoples. Kadir and Murray demonstrate the persistent tension among state control, investment interests, and indigenous claims in Indonesian natural resource governance (Kadir & Murray, 2019). Gilbert explains that litigation may contribute to indigenous legal empowerment while remaining dependent on political and administrative implementation (Gilbert, 2020). Prihandono further connect indigenous participation with informed consent and legal recognition. These perspectives are relevant to constitutional adjudication because judicial recognition alone cannot guarantee that constitutional rights will be realized outside the courtroom (Prihandono et al., 2023).

Procedural democracy presents another dimension. Morison distinguishes genuine citizen participation from consultation that merely legitimizes predetermined governmental choices (Morison, 2017). Negretto similarly links citizen participation to the democratic legitimacy of constitution-making (Negretto, 2020). In Indonesia, the constitutional controversy surrounding the Job Creation Law brought this question directly into judicial review. Mahy demonstrates that defects in legislative formation cannot be separated from the legal hierarchy and the subsequent institutional response (Mahy, 2022).

An additional problem concerns the effect of Constitutional Court decisions after judgment. Butt and Murharjanti show that legislative compliance is considerably more complex than a simple distinction between implementation and non-implementation (Butt & Murharjanti, 2022). Some decisions require legislative action, while others operate without subsequent statutory amendment. Their analysis indicates that the protection of constitutional rights depends not only on the Court's reasoning but also on the form of remedy and the institutional response that follows. Comparative literature has addressed this problem through dialogic and responsive remedies that accommodate rights protection while preserving institutional competence (Dixon, 2007; Roach, 2019).

Another strand of literature raises concerns about excessive judicialization. Questions whether dependence on judicial review may allow political actors to avoid democratic accountability (Ibrahim, 2022). This concern is important for Indonesia because an expansive judicial role may protect constitutional guarantees while simultaneously transferring controversial policy questions from representative institutions to courts. Judicial intervention must consequently be assessed both by its contribution to rights protection and by the quality of the constitutional justification offered for that intervention.

Despite extensive scholarship on the Constitutional Court, proportionality, judicial remedies, compliance, constitutional interpretation, and specific categories of rights, these debates remain insufficiently integrated. Existing research largely examines separate elements of constitutional adjudication. Less attention has been directed toward constructing a unified standard that connects the identification of constitutional injury, justification for limitations, selection of remedies, and implementation of decisions within a single substantive framework.

This article addresses that gap by asking: how should substantive justice reframe the Constitutional Court's judicial review function in protecting constitutional rights without weakening democratic lawmaking and institutional boundaries? The article argues that substantive justice should be transformed from an open-ended aspiration into a structured method of constitutional review. It proposes a Substantive Justice Review Framework based

on four interrelated components: identification of the affected constitutional right and concrete injury, assessment of constitutional justification, selection of a proportionate remedy, and institutional follow-up. The framework represents the principal contribution of this study because it connects the substantive protection of rights with transparent reasoning and constitutional restraint.

Methods

This study employs normative legal research using statutory, conceptual, case, and comparative approaches. The statutory approach examines the 1945 Constitution of the Republic of Indonesia, Law No. 24 of 2003 concerning the Constitutional Court and its amendments, and legislation relevant to the selected cases. The conceptual approach analyses judicial review, substantive justice, proportionality, constitutional rights, judicial remedies, institutional competence, and legislative compliance.

The case approach focuses on four Constitutional Court decisions selected purposively because they represent different dimensions of constitutional protection. Decision No. 011-017/PUU-I/2003 concerns political equality and eligibility for democratic participation. Decision No. 46/PUU-VIII/2010 concerns the civil status and legal interests of children born outside registered marriage. Decision No. 35/PUU-X/2012 addresses customary forests and the constitutional position of indigenous communities. Decision No. 91/PUU-XVIII/2020 concerns procedural constitutionality and meaningful participation in the legislative process. These decisions permit comparison across individual rights, collective rights, political rights, and procedural guarantees.

The comparative approach does not seek to transplant a foreign constitutional model into Indonesia. It uses international constitutional scholarship on proportionality, judicial restraint, remedies, and participatory democracy to evaluate the internal coherence of Indonesian constitutional reasoning. Secondary legal materials consist primarily of peer reviewed articles published in Scopus indexed journals across different quartiles. The materials are analysed qualitatively through legal interpretation, conceptual comparison, and prescriptive evaluation. The analysis proceeds from identifying the constitutional interest at stake to assessing the Court's reasoning, the form of remedy, and the institutional consequences of each decision.

Result and Discussion

Substantive Justice as a Constitutional Standard

Substantive justice should not be understood as an invitation for constitutional judges to decide cases according to personal perceptions of fairness. Such an understanding would weaken legal certainty and make constitutional outcomes dependent on judicial preference. A more defensible conception treats substantive justice as a standard for examining whether public power has been constitutionally justified when it affects protected rights.

The first distinction is between formal equality and the material effect of legislation. Equal wording does not necessarily produce equal treatment. A statutory classification may apply uniformly while imposing disproportionate disadvantages on a particular group. Constitutional review therefore needs to determine both the legal form of the rule and its effect on the constitutional position of those subject to it. This reasoning corresponds with the understanding of rights as claims that require public authority to justify interference rather than merely demonstrate statutory authorization (Alexy, 2017; Kumm, 2004).

Proportionality can assist this inquiry but should not be applied mechanically. Its value lies in requiring the state to articulate the objective of a restriction, the relationship between the

chosen measure and that objective, the availability of less restrictive alternatives, and the balance between public benefits and constitutional burdens (Barak, 2012; Gerards, 2013). Petersen and Chatziathanasiou show that different formulations of necessity and balancing may produce different patterns of rights protection (Petersen & Chatziathanasiou, 2022). Perju similarly emphasizes that proportionality remains connected to a broader conception of constitutional freedom (Perju, 2012).

For Indonesia, this structure must be read together with Article 28J. Constitutional rights are not uniformly absolute, but restrictions cannot be justified merely because legislation has been enacted. The existence of a legitimate public objective does not remove the judicial obligation to examine the means used to achieve it. This places justification, rather than judicial intuition, at the centre of substantive review.

A disciplined approach also responds to concerns about judicial supremacy. Yap notes that proportionality in Asian constitutional systems operates within political and institutional contexts that differ from its European origins (Yap, 2020). Ong similarly argues, in the Malaysian context, that meaningful rights review requires greater consistency in the way courts structure constitutional analysis (Ong, 2024). The Indonesian Court can draw from these insights without abandoning the specific text, history, and institutional design of the 1945 Constitution.

Constitutional Rights in Selected Judicial Review Decisions

Decision No. 011-017/PUU-I/2003 demonstrates how substantive protection can correct a formally enacted but constitutionally problematic political classification. The case concerned restrictions on legislative candidacy imposed on persons associated with the former Indonesian Communist Party and related organizations. By invalidating the restriction, the Constitutional Court rejected the continuing use of generalized political association as a basis for excluding citizens from democratic participation.

The constitutional significance of the ruling lies in its treatment of political citizenship. A legislative restriction based on historical affiliation may possess a political rationale, yet its validity depends on whether individual exclusion can be justified under contemporary constitutional guarantees. The Court shifted attention from collective stigma toward individual constitutional status. This orientation is consistent with the broader post-authoritarian transformation identified by Harijanti and Lindsey, in which constitutional adjudication became an additional safeguard against political restrictions inherited from earlier governance structures.

Decision No. 46/PUU-VIII/2010 offers a different illustration. The contested Marriage Law provision limited the civil relationship of a child born outside registered marriage to the mother and the mother's family. The Court conditionally reformulated the provision so that a civil relationship with the biological father could arise when biological paternity was established according to science and law.

The reasoning is relevant because the constitutional burden was experienced by a child who had no control over the legal status of the parents' relationship. A purely formal interpretation could preserve the statutory distinction by referring to marriage registration. A substantive examination asks whether the resulting deprivation of civil recognition can constitutionally be imposed on the child. The decision therefore shifted the focus from institutional status to the concrete rights of the person affected.

Its remedial form is equally significant. The Court did not simply eliminate the provision. It altered the conditions under which the norm could remain constitutionally valid. Conditional decisions demonstrate a capacity to prevent a legal vacuum while correcting constitutional injury, but they also increase the need for careful reasoning. Butt and Murharjanti show that

the effects of Constitutional Court judgments cannot always be reduced to annulment because the legislative response depends heavily on the type and content of the ruling.

Decision No. 35/PUU-X/2012 extends the analysis to collective constitutional interests. By removing customary forests from the category of state forests, the Court changed the legal relationship among indigenous communities, forest territory, and state authority. The decision reflects constitutional recognition that customary communities cannot be treated simply as administrative objects within a state ownership framework.

This judgment is particularly important when read against research on natural resource governance. Demonstrate that Indonesian resource policy often involves competing state, investor, and indigenous interests (Kadir & Murray, 2019). Gilbert cautions that successful litigation does not automatically produce effective empowerment because administrative recognition and implementation remain decisive (Gilbert, 2020). Substantive constitutional protection consequently cannot be assessed solely by the declaratory content of a judgment. Its relevance also depends on whether public institutions give practical effect to the constitutional position recognized by the Court.

Decision No. 91/PUU-XVIII/2020 brings substantive justice into the procedure of lawmaking. In examining the formation of the Job Creation Law, the Court developed the requirement of meaningful participation. This reasoning transformed public involvement from a ceremonial component of legislation into a constitutionally relevant aspect of the lawmaking process.

The distinction matters because procedural legality can coexist with democratic exclusion. Morison explains that consultation may fail to provide meaningful influence even when opportunities to participate formally exist (Morison, 2017). Democratic legitimacy therefore depends partly on whether affected persons receive access to information, opportunities to express views, and a genuine possibility that those views will be considered. Mahy shows that the Job Creation Law controversy exposed broader questions concerning legislative hierarchy, procedural regularity, and institutional response to judicial review (Mahy, 2022).

The four cases reveal a common pattern. Political equality requires the Court to look beyond historical classification. Protection of children requires attention to the consequences of legal status. Indigenous rights require recognition of legal relationships that predate administrative categorization. Meaningful participation requires assessment of whether legislative procedure performs a genuine democratic function. Each illustrates movement from formal validity toward examination of constitutional effects.

Yet the jurisprudence does not reveal a consistently articulated method linking those effects to a common standard of review. The Court may arrive at rights-protective outcomes without clearly identifying the intensity of interference, the state's justification, the availability of less restrictive alternatives, or the criteria used to select the remedy. This methodological variation can weaken predictability even where the result advances constitutional protection.

Institutional Limits of Rights-Oriented Judicial Review

A substantive approach must account for the institutional limits of the Constitutional Court. The first difficulty concerns Indonesia's divided judicial review structure. Statutes are reviewed by the Constitutional Court, while subordinate regulations are reviewed by the Supreme Court against higher legislation. Loo demonstrates that this division can produce fragmented constitutional supervision (Loo, 2019). Butt likewise identifies problems in judicial reasoning and review within the Supreme Court (Butt, 2019b).

The division becomes significant when a constitutional injury originates in regulations implementing a statute. A statutory framework may withstand constitutional review while an

implementing rule produces the practical restriction. This creates the possibility that constitutional rights are examined through different legal standards depending on the hierarchical form of the contested norm. Reform therefore requires greater doctrinal coherence between the two review jurisdictions rather than unilateral expansion of the Constitutional Court's authority.

The second difficulty concerns remedial legitimacy. Courts traditionally associated with the concept of the negative legislator invalidate unconstitutional laws, while contemporary constitutional adjudication increasingly employs conditional interpretation, suspended invalidity, prospective effects, and other flexible remedies. Dixon and Roach show that remedial design can facilitate institutional dialogue rather than forcing a binary choice between complete judicial supremacy and legislative autonomy (Dixon, 2007; Roach, 2019). Dixon and Yap further develop responsive remedies that calibrate judicial intervention according to institutional circumstances.

Such techniques are valuable but require limits. When a court supplies detailed regulatory content, the distinction between interpretation and lawmaking may become uncertain. Harel and Shinar (Efendi, 2024) support judicial review while emphasizing constraints on judicial authority (Harel & Shinar, 2012). Indonesian concern by questioning whether reliance on the Constitutional Court can permit democratic actors to transfer responsibility for politically difficult decisions to judges. Substantive justice therefore cannot be equated with maximum judicial intervention (Efendi, 2024).

A third issue is implementation. A final and binding judgment may remain normatively important while producing limited practical change. Butt and Murharjanti demonstrate that compliance with Constitutional Court decisions has multiple forms and cannot always be measured by whether Parliament enacts a new statute (Butt & Murharjanti, 2022). The relevant question is whether the legal system ultimately removes or prevents the constitutional injury identified by the Court.

This distinction is especially important in cases involving indigenous communities, administrative policy, or complex legislative schemes. Judicial protection may require subsequent acts by ministries, Parliament, local authorities, or other institutions. Effective constitutional review therefore needs a method that anticipates institutional consequences without converting the Court into an administrative supervisory body.

A final limitation concerns interpretive openness. Butt, Bisariyadi, and Siregar find that the Indonesian Constitutional Court uses international law in several different ways, but the basis for that use is not always clearly articulated. International and comparative materials can enrich rights reasoning, yet they should function as persuasive interpretive resources rather than substitutes for Indonesian constitutional authority. Constitutional legitimacy ultimately depends on demonstrating how external materials illuminate guarantees contained in the 1945 Constitution.

Reframing the Constitutional Court Through a Substantive Justice Review Framework

The findings support a more structured conception of the Constitutional Court's role. The proposed Substantive Justice Review Framework does not create a new judicial jurisdiction. It provides an analytical sequence for exercising existing constitutional review powers more consistently.

The first component is identification of the constitutional right and concrete injury. The Court should state precisely which constitutional guarantee is implicated, who bears the burden of the contested rule, and how that burden operates. This prevents adjudication from relying on broad references to justice, democracy, or legal certainty without identifying the specific constitutional interest at stake. In cases involving equality, analysis should distinguish formal

differential treatment from material disadvantage. In procedural cases, the Court should identify how the defective process impaired a constitutionally relevant opportunity to participate.

The second component is constitutional justification. Once an interference has been established, judicial reasoning should examine whether the restriction is based on law, pursues a constitutionally legitimate objective, is rationally connected to that objective, is necessary in light of available alternatives, and imposes a burden proportionate to the benefit pursued. This sequence draws on proportionality scholarship but adapts it to Indonesia's constitutional structure (Alexy, 2005; Barak, 2012; Klatt & Meister, 2012).

The framework should also recognize criticism of proportionality. Chang and Dai caution against assuming that proportionality necessarily improves rights outcomes (Chang & Dai, 2021), while da Silva distinguishes balancing from the complete proportionality test (da Silva, 2024). Petersen similarly shows that the German model should not be universalized (Petersen & Omori, 2020). For this reason, proportionality is proposed here as a method of justification rather than a formula that automatically determines the result. Its principal function is to make judicial reasoning contestable and transparent.

The third component is remedial proportionality. After finding a constitutional violation, the Court should explain why the chosen remedy corresponds to the identified injury. Total invalidation may be appropriate where a provision is constitutionally indefensible and severable from the statutory scheme. Conditional interpretation may be preferable where the problem arises from one possible meaning of a provision. Delayed effect may be justified when immediate invalidation would create a serious regulatory vacuum. The choice should follow from constitutional necessity rather than institutional convenience.

This aspect responds to the tension between effective rights protection and legislative competence. A narrowly tailored remedy can preserve democratic policy space while ensuring that unconstitutional consequences do not remain binding. Comparative scholarship on dialogic and responsive remedies confirms that judicial effectiveness need not depend on the breadth of judicial intervention (Dixon, 2007; Roach, 2019).

The fourth component is institutional follow up. Finality should not mark the end of constitutional responsibility when a decision requires legislative or administrative implementation. A transparent follow-up mechanism could record which judgments require statutory amendment, regulatory action, administrative recognition, or no further institutional measure. Parliament and the executive could periodically publish the status of responses to Constitutional Court decisions. Such a mechanism would improve accountability without granting the Court power to enact legislation or directly administer government programs.

This final component is particularly relevant to Indonesia because implementation problems may separate judicial recognition from practical rights protection. It also creates a response to concern about excessive reliance on judicial review. Political institutions would remain responsible for the policy choices that fall within their constitutional competence, while the Court would retain authority to define the minimum constitutional limits within which those choices operate.

The proposed framework consequently changes the focus of judicial review in a limited but important way. The central question is no longer only whether a provision should survive or be invalidated. Review should establish what constitutional interest has been harmed, whether the state can justify that burden, which remedy is necessary to remove the violation, and which institution must act afterward. This approach integrates rights, reasoning, remedies, and implementation without collapsing the distinction between adjudication and legislation.

Substantive justice thus acquires a legal rather than rhetorical function. It provides criteria for evaluating the consequences of legislation while preserving the requirement that every judicial intervention be grounded in constitutional text, reasoned justification, and institutional competence. The Constitutional Court's authority becomes stronger not because judges receive broader discretion, but because constitutional reasoning becomes more transparent, predictable, and capable of explaining why intervention is necessary in a particular case.

Conclusion and Suggestions

Judicial review in Indonesia has developed from a mechanism primarily associated with normative control into an important instrument for defining the practical content of constitutional rights. Decisions concerning political participation, children's civil status, customary forests, and meaningful public participation demonstrate that the Constitutional Court has already moved beyond purely textual comparison by considering the effects of legislation on citizens and communities. The principal weakness lies not in the absence of rights-sensitive jurisprudence but in the lack of a consistently articulated analytical structure connecting constitutional injury, justification, remedy, and implementation. This study therefore proposes the Substantive Justice Review Framework, consisting of identification of the affected right and concrete burden, evaluation of constitutional justification, selection of a proportionate remedy, and transparent institutional follow-up. The framework does not authorize unrestricted judicial activism and does not diminish the constitutional role of Parliament. Instead, it requires stronger justification whenever judicial review affects democratically enacted legislation. The Constitutional Court should develop more explicit standards for assessing rights limitations, explain the relationship between each constitutional violation and the remedy imposed, and distinguish circumstances requiring invalidation from those requiring conditional interpretation or delayed effects. Parliament and the executive should complement this approach through a publicly accessible mechanism for monitoring responses to judgments requiring legislative or administrative action. Greater doctrinal coordination between the Constitutional Court and the Supreme Court is also necessary to reduce fragmentation within Indonesia's dual judicial review structure. These measures would position substantive justice as a disciplined method of constitutional adjudication capable of protecting constitutional rights while maintaining legal certainty, democratic accountability, and appropriate institutional boundaries.

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