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Constitutional Reasoning and Institutional Boundaries in Assigning Active Police Officers to Civilian Positions

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Abstract

The increasing placement of active police officers in civilian positions raises serious constitutional issues related to civilian supremacy, the neutrality of law enforcement institutions, and government accountability. Although the Constitutional Court of the Republic of Indonesia has prohibited this practice through its rulings, the constitutional reasoning and the clarity of institutional boundaries between police and civilian government functions have not been thoroughly analyzed. This study analyzes the constitutional reasoning and authority of the Constitutional Court in determining the limits of the involvement of active police officers in civilian positions, as well as its implications for the principle of separation of powers, democratic governance, and the shift in the Court's role from a negative legislator to a constitutional policy-maker. Using a normative juridical method with a statutory, conceptual, and case approach, this study finds that the



Constitutional Court has adopted a substantive approach by positioning the issue of security forces as a constitutional problem through Decision Number 114/PUU-XXIII/2025. This decision has structural implications in the form of strengthening checks and balances mechanisms, increasing accountability, and preventing the politicization of security institutions. The decision also indicates a shift in the role of the Constitutional Court towards a constitutional policy-maker that contributes to the formation of public policy directions and the affirmation of state institutional boundaries. Thus, a new conception has emerged that the Constitutional Court has positioned itself as an institutional boundary-maker within the framework of constitutional governance, which emphasizes its active role in determining the boundaries of authority between state institutions.

KEYWORDS: Constitutional Court; Civil–military relations; Civilian supremacy; Judicial review; Constitutional governance

Abstrak

Meningkatnya penempatan anggota polisi aktif dalam jabatan sipil menimbulkan persoalan konstitusional serius terkait supremasi sipil, netralitas institusi penegak hukum, serta akuntabilitas pemerintahan. Meskipun Mahkamah Konstitusi Republik Indonesia melalui Putusannya telah melarang praktik tersebut, namun dasar penalaran konstitusional dan kejelasan batas kelembagaan antara fungsi kepolisian dan pemerintahan sipil masih belum dianalisis secara mendalam. Penelitian ini menganalisis penalaran konstitusional dan kewenangan Mahkamah Konstitusi dalam memutus batas keterlibatan anggota polisi aktif dalam jabatan sipil, dan implikasinya terhadap prinsip pemisahan kekuasaan, tata kelola demokratis, dan pergeseran peran Mahkamah dari negative legislator menjadi constitutional policy-maker. Menggunakan metode yuridis normatif dengan pendekatan perundang-undangan, konseptual, dan kasus, penelitian ini menemukan bahwa Mahkamah Konstitusi telah mengadopsi pendekatan substantif dengan menempatkan isu aparat keamanan sebagai persoalan konstitusional melalui Putusan Nomor 114/PUU-XXIII/2025. Putusan tersebut memiliki implikasi struktural berupa penguatan mekanisme checks and balances, peningkatan akuntabilitas, serta pencegahan politisasi institusi keamanan. Putusan tersebut juga menunjukkan adanya pergeseran peran Mahkamah Konstitusi menuju constitutional policy-maker yang berkontribusi dalam pembentukan arah kebijakan publik dan penegasan batas-batas kelembagaan negara. Dengan demikian, muncul konsepsi baru bahwa Mahkamah Konstitusi telah memposisikan dirinya sebagai institutional boundary-maker dalam kerangka tata kelola konstitusional, yang menegaskan peran aktifnya dalam menentukan batas kewenangan antar lembaga negara.

KATA KUNCI: Hubungan sipil militer; Judicial review; Mahkamah Konstitusi; Supremasi sipil; Tata Kelola Konstitusional

Introduction

The relationship between security institutions and civil governance in a modern constitutional democracy cannot be understood as a matter of formal division of authority between branches of government. This relationship expresses the principle of civilian control over military and security, designed to ensure that the use of state force remains within the framework of democratic accountability and is not distorted by political or institutional interests.¹ Contemporary theories in civil-military relations and democracy emphasize that civilian supremacy is a formal principle and an institutional mechanism internalized within the legal framework and constitutional culture.² In this context, the monopoly of violence is not shifted to become a tool of political domination or power.³ Academic analysis shows that the unclear institutional boundaries and the practice of expanding the role of the military or security forces have the potential to affect the dividing line between civilian and coercive power. This can affect the checks and balances as well as the rule of law of constitutional democracy.⁴

The role of the constitutional court differs conceptually and practically from a judicial institution that interprets the text of the constitution. This institution functions as a normative mechanism for enforcing boundaries in

¹ Jefferson Ng and Yudha Kurniawan, "The Parliament and Cooperative Oversight of the Indonesian Armed Forces: Why Civil–Military Relations in Indonesia Is Stable but Still in Transition," *Armed Forces & Society* 50, no. 3 (2024): 683–709, <https://doi.org/10.1177/0095327x221137281>.

² Vasabjit Banerjee and Sean P Webeck, "Civil–Military Relations: Through a Perilous Lens," *Armed Forces & Society* 50, no. 1 (2024): 3–24, <https://doi.org/10.1177/0095327x221108198>.

³ Marybeth P. Ulrich, "Civil–Military Relations Norms and Democracy: What Every Citizen Should Know," in *Reconsidering American Civil–Military Relations*, ed. Lionel Beehner, Risa Brooks, and Daniel Maurer (Oxford: Oxford University Press, 2021), 41–62.

⁴ David H Bayley, "Police Reform: Who Done It?," *Policing and Society* 18, no. 1 (2008): 7–17, <https://doi.org/10.1080/10439460701718518>.

a mature democracy.⁵ Contemporary literature shows that constitutional courts conduct judicial review of legal norms and mediate institutional conflicts by interpreting the basic principles of the constitution, including civil supremacy, human rights, and the integrity of the government process as part of substantive democracy.⁶ In practice, an independent and strong constitutional court plays a critical role in enforcing the boundaries of authority and limiting the participation of active security institutions in civilian positions when the inclusion conflicts with the constitutional democratic framework. The court also ensures that the demands of stability and security do not displace or undermine civil governance and democratic accountability.⁷

The increasing participation of active police officers in civilian positions raises fundamental constitutional concerns regarding supremacy and the neutrality of law enforcement institutions. In a constitutional democracy, the separation between coercive institutions and civil administration is organizational and normative in the context of preventing the concentration of power within a single entity.⁸ These practices risk undermining bureaucratic professionalism, distorting merit-based recruitment systems, and creating dual accountability structures. Moreover, the phenomenon reflects the persistent influence of the security sector in post-authoritarian governance.⁹ As an empirical illustration, data from the

⁵ Cristian Altavilla, "The Role of Constitutional Courts in Intergovernmental Conflict Resolution: The Argentine Case," *Constitutional Review* 11, no. 1 (2025): 1–27, <https://doi.org/10.31078/consrev1111>.

⁶ Ni Luh Dewi Sundariwati, "Judicial Activism: Between Protecting Constitutional Supremacy or Transitioning to Juristocracy," *Jurnal Konstitusi* 21, no. 3 (2024): 444–45, <https://doi.org/https://doi.org/10.31078/jk2135>.

⁷ Sri Hartati and Rubiyanto, "Implications of Judicial Review of Law No. 3 of 2025 on the Principle of Separation of Powers," *Collaborative Journal of Science* 8, no. 10 (2025): 6511–19, <https://doi.org/https://doi.org/10.56338/jks.v8i10.8943>.

⁸ Banerjee and Webeck, "Civil–Military Relations: Through a Perilous Lens."; Hakkı Taş, "Populism and Civil–Military Relations," *Democratization* 31, no. 1 (2024): 70–89, <https://doi.org/10.1080/13510347.2023.2255976>.

⁹ Yusa Djuyandi et al., "Civil–Military Relations in Indonesia: Promoting a Professional Military Character from the New Order Era to the Reform Era," *Otoritas: Jurnal Ilmu Pemerintahan* 15, no. 3 (2025): 510–26, <https://doi.org/10.26618/4d2jor15>.

Headquarters of the Indonesian National Police showed that approximately 300 active police officers occupied civilian positions in 2025.¹⁰ This condition confirms that the placement continues to persist, despite the evident gap between constitutional norms and institutional practices.¹¹ Normatively, Article 30 of the 1945 Constitution of the Republic of Indonesia, as well as Law Number 2 of 2002 on the Indonesian National Police, explicitly emphasize the principles of professionalism, neutrality, and functional differentiation between security and civilian institutions.

In response to the phenomenon, the Constitutional Court issued Decision Number 114/PUU-XXIII/2025 on the judicial review of Law Number 2 of 2002 on the Indonesian National Police. The decision addressed a petition submitted by Syamsul Jahidin and Christian Adrianus Sihite, who are law students and practicing advocates.¹² In the ruling, the Court essentially held that the phrase “or not based on an assignment from the Chief of Police” in the Elucidation of Article 28 paragraph (3) of Law Number 2 of 2002 created normative ambiguity and expanded the meaning of the principal provision. This explicitly requires police officers to resign or retire before assuming positions outside the institution. Furthermore, statutory elucidations must not introduce new norms or generate ambiguity that obscures the substance of the main provision since the conditions contravene the principle of legal certainty guaranteed under Article 28D paragraph (1) of the 1945 Constitution.

The importance of professionalism and functional differentiation is underscored between police institutions and civilian offices by referring to Article 30 paragraph (4) of the 1945 Constitution and the broader legal

¹⁰ Nicholas Ryan Aditya and Nawir Arsyad Akbar, “Mabes Polri Sebut Ada 300 Polisi Aktif Yang Duduki Jabatan Sipil,” Kompas.com, 2025, <http://nasional.kompas.com/read/2025/11/17/20314541/mabes-polri-sebut-ada-300-polisi-aktif-yang-duduki-jabatan-sipil>.

¹¹ Ismail Hasani, Halili, and Ikhsan Yosarie, “Police Transformation within Constitutional Democracy Design: Evidence from Indonesia,” *Jurnal Civics: Media Kajian Kewarganegaraan* 23, no. 1 (2026): 331–46, <https://doi.org/10.21831/jc.v23i1.96514>.

¹² Constitutional Court of the Republic of Indonesia, “Decision Number 114/PUU-XXIII/2025” (2025), 1.

policy framework of security sector reform. The Court granted the petition in the entirety and declared the *a quo* phrase unconstitutional and devoid of binding legal force.¹³ However, the Decision of the Constitutional Court Number 114/PUU-XXIII/2025 has generated controversy within constitutional law discourse since the context is perceived to reflect a shift in the role of the court from a *negative legislator* to a more active actor in shaping institutional boundaries through constitutional reasoning.

Several studies suggest that the decision invalidates norms inconsistent with the Constitution and substantively constructs new standards governing the relationship between police and civilian offices, directly influencing institutional design and administrative practice.¹⁴ From the perspective of administrative and constitutional law, the Court's *ratio decidendi* is viewed as extending beyond the resolution of normative disputes, contributing to the formation of operational norms internalized by policy-makers to reinforce the function as an *institutional boundary-maker*.¹⁵ The development has sparked academic debate since the context shows a tendency to assume a more proactive role in directing constitutional policy. This is regarded as a progressive step in safeguarding constitutional supremacy.

Based on the controversy surrounding Decision Number 114/PUU-XXIII/2025, this study aims to analyze the forms of constitutional reasoning and the authority of the Constitutional Court in determining the limits of active police officers' participation in civilian positions, as well as to examine the implications for the principles of separation of powers and democratic governance. Furthermore, a shift in the role of the

¹³ Antoni Putra, "Implications of Conditional Unconstitutional Decisions in The Constitutional Court Decision," *Jurnal Konstitusi* 20, no. 1 (2023): 58–77, <https://doi.org/10.31078/jk2014>.

¹⁴ Muhammad Anugerah Perdana and Mochamad Adli Wafi, "Pemaknaan Mahkamah Konstitusi Terhadap Batasan Open Legal Policy Beserta Kompleksitasnya," *Veritas et Justitia* 11, no. 2 (2026): 251–70, <https://doi.org/10.25123/vej.v11i2.9287>.

¹⁵ Kiki Firmanto, "The Binding Effect of Constitutional Court Decisions on Police Regulations (An Analysis of Constitutional Court Decision No. 114/PUU-XXIII/2025)," *IBLAM LAW REVIEW* 6, no. 1 (2026): 1–9, <https://doi.org/10.52249/ilr.v6i1.658>.

Constitutional Court is identified from a *negative legislator* to a *constitutional policy-maker*, particularly in the context of delineating institutional boundaries. This study is expected to contribute to the development of constitutional law scholarship by showing the transformative role of adjudication in shaping institutional boundaries and safeguarding civilian supremacy.

Previous studies have examined the issue from distinct and largely disconnected perspectives. Scholarship on security sector reform emphasizes the importance of depoliticization and professionalization of police institutions. Meanwhile, studies on constitutional courts focus on judicial review, protection of rights, and democratic consolidation, as reflected in the work of Rini Ristawati.¹⁶ In the comparative context, Jacco Bomhoff argued that the global expansion of proportionality review significantly strengthened judicial authority in constitutional governance. However, existing proportionality scholarship pays insufficient attention to the role of courts as institutional boundary-makers shaping the allocation of powers among state institutions.¹⁷ A. Sunarjo and Riswandi identified legal ambiguities in Law No. 2 of 2002 regarding the placement of active police officers in civilian positions.¹⁸ Tom Ginsburg and Aziz Z. Huq reported persistent compliance problems with Constitutional Court decisions, reflecting broader institutional fragmentation and governance inefficiencies.¹⁹ These strands of scholarship remain analytically fragmented because constitutional adjudication is rarely examined as a

¹⁶ Rosa Ristawati and Radian Salman, "The Role of the Indonesian Constitutional Court in Preventing Social Conflict in A Diverse Society," *Constitutional Review* 9, no. 2 (2023): 332–57, <https://doi.org/10.31078/consrev925>.

¹⁷ Jacco Bomhoff, "Proportionality Balancing and Global Governance: A Comparative and Global Approach," *The American Journal of Comparative Law* 69, no. 1 (2021): 168–72, <https://doi.org/10.1093/ajcl/avaa022>.

¹⁸ Anwar Sunarjo and Riswadi Riswadi, "Legal Uncertainty for Police Members in the Limits of Positions Outside the Police," *Journal of World Science* 3, no. 12 (2024): 1587–96, <https://doi.org/10.58344/jws.v3i12.1243>.

¹⁹ Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018), 63–69. <https://doi.org/10.7208/9780226564418>

mechanism for addressing the expansion of security institutions into civilian domains and resolving structural imbalances between coercive and civil authority.

This gap becomes increasingly relevant in the context of ongoing legal ambiguity and constitutional debate regarding the involvement of active police officers in civilian positions, which has the potential to blur the separation of powers and undermine civilian supremacy in a democratic state. This research offers conceptual novelty through the development of the idea of the Constitutional Court as an institutional boundary-maker, namely an institution that is no longer limited to the function of testing the constitutionality of norms, but also helps shape the configuration of the boundaries of authority between state organs through its constitutional reasoning. The research objectives are to analyse the controversy over the Constitutional Court's constitutional reasoning in limiting the involvement of security forces in civilian positions. Furthermore, to examine the dilemma of its authority between the function of testing the constitutionality of norms and the formation of state institutional boundaries. and to examining its implications for civilian supremacy and democratic governance in Indonesia. This research expands the discourse on the transformation of the Constitutional Court's role in the modern state architecture, particularly in responding to the tendency of the security forces' power expansion into the civilian sphere in post-authoritarian democracies.

Methods

This study adopts a normative legal method with the statute, conceptual, and case approaches that focus on legal norms, principles, and doctrines embodied in statutory regulations and judicial decisions.²⁰ The statute approach is used to examine the consistency of norms within the

²⁰ Terry Hutchinson, *Researching and Writing in Law* (Pymont: Thomson Reuters, 2018), 7–9.

1945 Constitution of the Republic of Indonesia and regulations governing the police sector, while the conceptual approach is applied to analyze key concepts such as civilian supremacy, separation of powers, and constitutional policy-making. The case approach is adopted to conduct an in-depth examination of legal reasoning in Decision Number 114/PUU-XXIII/2025 as the primary object.²¹ This study is doctrinal-analytical in nature, combining normative analysis of the constitution and statutory regulations with an interpretative approach to the Constitutional Court's legal considerations.

The types and sources of data consist of primary and secondary legal materials. The primary legal material is the Constitutional Court Decision Number 114/PUU-XXIII/2025 concerning the judicial review of Law Number 2 of 2002 on the Indonesian National Police. This is analyzed as the principal source for understanding the patterns of constitutional reasoning and the implications for delineating authority boundaries. Secondary legal materials include academic literature on theories of constitutional courts as policy-making institutions (*constitutional policy-making*), studies on democratic civilian control over the security sector, as well as scholarly journal articles addressing post-authoritarian constitutionalism as well as civil-military and security relations. Data collection is conducted through a library study, including a systematic review of court decisions, statutory regulations, and relevant academic literature.

All legal materials are analyzed qualitatively using a constitutional reasoning analysis method by identifying the interpretative approaches used by the Constitutional Court, particularly systematic and teleological interpretation, as well as principle-based reasoning. Systematic interpretation situates norms within a coherent normative structure, interpreting provisions in harmony with other articles, fundamental

²¹ Marzuki Peter Mahmud, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2021), 133–35.

principles, and the design established by the Constitution. In contrast, teleological interpretation emphasizes the normative objectives (*constitutional purpose*) of a provision, directing the context toward the protection of democratic values, civilian supremacy, and effective governance.²² To ensure analytical validity, a pattern-based reasoning analysis is adopted by examining the consistency, structure, and patterns of the Court's argumentation across the legal considerations.²³ This approach enables a more comprehensive evaluation of the Constitutional Court's shifting role from a *negative legislator* to a *policy-maker* within the system.

Discussion

Controversies in the Constitutional Reasoning of the Constitutional Court

The Constitutional Court Decision No. 114/PUU-XXIII/2025 marks a critical juncture in the development of Indonesian law, particularly concerning the limits on the placement of active police officers in civilian positions. In this decision, the Court conducted a normative review of statutory provisions and developed a teleological and systematic interpretative approach to the 1945 Constitution, particularly Article 30, as well as Law No. 2 of 2002 on the Indonesian National Police. The Indonesian National Police must be positioned as a professional and politically neutral civilian institution operating within the framework of civilian supremacy in a democratic rule-of-law state.²⁴

Substantively, the reasoning is built on three principal pillars, namely professionalism, political neutrality, and civilian supremacy. First, the Court interprets police professionalism as technical competence and an

²² Aharon Barak and Sari Bashi, *Purposive Interpretation in Law* (Princeton University Press, 2005), 110–15, <http://www.jstor.org/stable/j.ctt7pg5z>.

²³ Ivan Habernal et al., "Mining Legal Arguments in Court Decisions," *Artificial Intelligence and Law* 32, no. 3 (2024): 1–38, <https://doi.org/10.1007/s10506-023-09361-y>.

²⁴ Constitutional Court of the Republic of Indonesia, Decision Number 114/PUU-XXIII/2025.

implicit constitutional principle requiring a clear separation between law enforcement functions and civilian administrative positions.²⁵ This view is consistent with the results in Indonesian scholarly literature, showing that the dual role of security apparatus in civilian offices may undermine institutional independence and create conflicts of interest within the bureaucracy.²⁶ Second, the principle of political neutrality is understood substantively as an institutional obligation to maintain distance from all structures of civil power. Empirical studies suggest that the participation of security personnel in civilian posts often correlates with bureaucratic politicization and the erosion of administrative impartiality. Third, the principles are connected to the doctrine of civilian supremacy, which is regarded as a fundamental prerequisite of post-authoritarian democracy to prevent security sector dominance in governance.

However, the argumentative construction has generated significant academic debate, including within Indonesian legal scholarship. This is viewed as progressive since the context strengthens constitutional governance and prevents the concentration of coercive and administrative power within a single institution.²⁷ Several studies in reputable Indonesian journals argued that the Court's active role in limiting the penetration of security power constituted a corrective function against deviations within the presidential system.²⁸ Critics stated that the Court exceeded the traditional role as a negative legislator and moved toward acting as a

²⁵ Lukas Muntingh et al., "Democratic Policing: A Conceptual Framework," *Law, Democracy and Development* 25 (2021): 132–36, <https://doi.org/10.17159/2077-4907/2021/ldd.v25.5>.

²⁶ Harun, Harun. "New development: The Indonesian police—reform in an oligarchic democracy." *Public Money & Management* (2026): 1–6. <https://doi.org/10.1080/09540962.2026.2614323>

²⁷ Aziz Z Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (2017): 1–78, <https://doi.org/http://dx.doi.org/10.2139/ssrn.2901776>.

²⁸ Zainal Arifin Mochtar, "Guarding Democracy: Judicial Activism in the Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes," *Constitutional Review* 11, no. 1 (2025): 36–62, <https://doi.org/10.31078/consrev1112>.

constitutional policy-maker.²⁹ In Indonesian law discourse, this phenomenon is often associated with the rise of judicial activism in the post-reform era, which may generate tensions with the executive and legislative branches.³⁰

Controversy arises in relation to the interpretative method used. The Constitutional Court's teleological approach, as developed by Aharon Barak, emphasizes the normative purposes of the Constitution, but risks affecting the boundary between legal interpretation and the creation of new norms.³¹ According to Bivitri Susanti, the reliance on progressive interpretative approaches often produces innovative decisions, but invites criticism concerning democratic legitimacy and the proper limits of judicial authority.³² In this context, the debate between the *living constitution* approach and originalism becomes particularly salient, specifically when the Court invokes substantive democratic values to delineate the scope of institutional powers.³³

Several studies show that the placement of security personnel in civilian offices reflects a form of post-authoritarian path dependency, where security sector reforms have not fully dismantled the legacy of entrenched relationships between the military, the police, and the civilian bureaucracy.³⁴ This decision reflects a broader global trend in which courts assume an active role in maintaining the balance of civil–military or civil–

²⁹ Yaniv Roznai, Rosalind Dixon, and David E Landau, "Judicial Reform or Abusive Constitutionalism in Israel," *Israel Law Review* 56, no. 3 (2023): 292–304, <https://doi.org/10.1017/S0021223723000171>.

³⁰ I Dewa Gede Palguna and Bisariyadi Bisariyadi, "The Power of Constitutional Court to Settle Disputes on Local Election Results," *Jurnal Konstitusi* 20, no. 1 (2023): 1–18, <https://doi.org/10.31078/jk2011>.

³¹ Barak and Bashi, *Purposive Interpretation in Law*.

³² Bivitri Susanti, "The Rise of Judicial Power in Indonesia," *Asian Journal of Comparative Law* 15, no. 2 (2020): 255–276, <https://doi.org/https://doi.org/10.1017/asjcl.2020.23>.

³³ Rosalind Dixon, "Constitutional Drafting and Distrust," *International Journal of Constitutional Law* 13, no. 4 (2015): 819–46, <https://doi.org/10.1093/icon/mov068>.

³⁴ Marcus Mietzner, "Fighting Illiberalism with Illiberalism: Islamist Populism and Democratic Deconsolidation in Indonesia," *Pacific Affairs* 91, no. 2 (2018): 261–82, <https://doi.org/10.5509/2018912261>.

security relations when compared to constitutional adjudication practices in other jurisdictions. Tom Ginsburg and Aziz Z. Huq stated that constitutional courts frequently acted as key actors in preventing democratic erosion by constraining the power of coercive institutions.³⁵ This decision may be understood as a judicial effort to increase institutional reform through the articulation of clearer constitutional boundaries. The effectiveness depends on political compliance and administrative implementation within the executive branch.³⁶

Constitutional Court Decision No. 114/PUU-XXIII/2025 is an ordinary judicial ruling and a site of contestation among competing approaches to constitutional interpretation in global and domestic scholarship. In the Indonesian context, the decision shows an ongoing tension between the imperative to strengthen civilian supremacy and the risks associated with the expansion of judicial power. Therefore, Indonesian constitutional law is in a transitional phase, where the court plays a strategic and controversial role in shaping the architecture of state power.

The Dilemma between the Constitutional Court's Authority and Institutional Boundary-Making

The Constitutional Court Decision No. 11/PUU-XXIII/2025 confirms the strengthening of the Court's role as an actor that reviews the constitutionality of norms and actively shapes institutional boundaries (*institutional boundary-maker*). In this decision, the Court is not limited to abstract judicial review but establishes a clear demarcation between the function of the police as a security institution and civilian positions within the governmental structure. A boundary-setting function is substantively exercised by rejecting the placement of active members of the Indonesian

³⁵ Ginsburg and Huq, *How to Save a Constitutional Democracy*, 181–85.

³⁶ Ni'matul Huda, "Problematisasi Substantif Perppu Nomor 1 Tahun 2013 Tentang Mahkamah Konstitusi," *Jurnal Konstitusi* 10, no. 4 (2016): 557, <https://doi.org/10.31078/jk1041>.

National Police outside the police institution.³⁷ However, the Court's role as an institutional boundary-maker leads to a fundamental constitutional dilemma, namely the tension between judicial authority and the potential expansion of judicial power. From a theoretical perspective, this practice is consistent with modern constitutional thought that views courts as key actors in managing the fragmentation of power and preventing overlapping institutional competencies.³⁸

In the view of Tom Ginsburg and Aziz Z. Huq, constitutional courts play a crucial role in maintaining the balance of power and preventing the concentration of authority.³⁹ This expansion of the role has attracted criticism for potentially exceeding the traditional function as a *negative legislator*. Rosalind Dixon and David Landau reported that the *judicialization of politics* evolved into *abusive judicial review*, where courts used interpretative authority to substantively shape public policy.⁴⁰ In the Indonesian context, this tendency was identified by Zainal Arifin Mochtar, where the post-reform Constitutional Court increasingly assumed an active role in directing constitutional policy.⁴¹

The dilemma becomes more pronounced in the context of limiting executive discretion. Conceptually, discretion refers to the authority of public officials to make decisions in situations not explicitly regulated by law. In this context, the decisions remain subject to the principles of legality, proportionality, and accountability.⁴² Before the decision, the placement of

³⁷ Constitutional Court of the Republic of Indonesia, "Decision Number 11/PUU-XXIII/2025" (2025).

³⁸ Ni Ketut Sari Adnyani et al., "The Constitutional Law in Contemporary Times: Comparison of India and Indonesia," *Jurnal Suara Hukum* 6, no. 2 (2025): 385–412, <https://doi.org/10.26740/jsh.v6n2.p385-412>.

³⁹ Ginsburg and Huq, *How to Save a Constitutional Democracy*, 175–80.

⁴⁰ Roznai, Dixon, and Landau, "Judicial Reform or Abusive Constitutionalism in Israel," 1313–87.

⁴¹ Mochtar, "Guarding Democracy: Judicial Activism in the Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes," 161–86.

⁴² Mark Elliott and Jason Varuhas, *Administrative Law: Text and Materials* (Oxford: Oxford University Press, 2020), 1041–48.; Paul Daly, "Introduction," *Apex Courts and the Common Law*, 2019, 1–22, <https://doi.org/10.3138/9781487530167-002>.

active police officers in civilian positions was often justified on the grounds of administrative necessity and bureaucratic efficiency. However, the Court firmly restricts the discretionary space by establishing binding constitutional standards. From the perspective of Aharon Barak, this limitation reflects the application of the principle of proportionality in controlling the exercise of state power.⁴³

From a governance perspective, the institutional boundary-setting function carries significant implications. The decision prohibits certain practices and establishes new constitutional standards governing the relationship between security institutions and civilian administration. Within the framework of governance theory, as articulated by Mark Bevir, a clear division of authority and robust accountability mechanisms are essential prerequisites for democratic governance.⁴⁴ The ruling functions as a normative instrument to prevent the normalization of security apparatus inclusion in civilian power structures.

In the context of a post-authoritarian state such as Indonesia, the intervention faces substantial implementation challenges. Several studies show that the practice of placing security personnel in civilian offices reflects a form of path dependency.⁴⁵ Therefore, the effectiveness of the Court's decision depends on the strength of judicial reasoning as well as political compliance and institutional readiness within the executive branch.

The dilemma between judicial authority and institutional boundary-making reflects broader global dynamics in constitutional adjudication. Comparative literature shows that constitutional courts in transitional

⁴³ Aharon Barak and Doron Kalir, "Proportionality: Constitutional Rights and Their Limitations," *American Journal of Comparative Law*, Cambridge studies in constitutional law, 69, no. 1 (2012): 168–172, <https://doi.org/https://doi.org/10.1093/ajcl/avaa022>.

⁴⁴ Mark Bevir, *Governance: A Very Short Introduction* (OUP Oxford, 2012), 1–12.

⁴⁵ Evan A Laksmana, "Reshuffling the Deck? Military Corporatism, Promotional Logjams and Post-Authoritarian Civil-Military Relations in Indonesia," *Journal of Contemporary Asia* 49, no. 5 (2019): 806–36, <https://doi.org/10.1080/00472336.2019.1613556>.

democracies often play an active role in constraining non-civilian actors and restructuring power relations along democratic lines.⁴⁶ However, excessive judicial intervention may generate inter-branch tensions and raise concerns regarding democratic legitimacy.

Constitutional Court Decision No. 11/PUU-XXIII/2025 reflects an inherent dilemma in the role of the court as the guardian of the Constitution, responsible for ensuring clear boundaries as well as the principle of checks and balances. The decision shows that the Court functions as a *negative legislator* and actor in *constitutional governance*. This role is both strategic and controversial in the evolution of Indonesia's constitutional democracy.

Implications of Constitutional Reasoning and Institutional Boundary-Making by the Constitutional Court

The decision rejecting the appointment of active members of the Indonesian National Police to civilian positions constitutes an act of constitutional review and manifestation of *institutional boundary-making* through prescriptive reasoning. In this framework, the Court no longer operates solely as a *negative legislator* in the Kelsenian sense, but assumes a more active role in articulating binding parameters governing inter-branch relations and institutional design.⁴⁷

The first implication of constitutional reasoning is the reinforcement of the principle of *separation of powers*. As observed in the Indonesian context, the Constitutional Court assesses the validity of statutory norms and shapes the dynamic interaction between the legislative and executive branches through various forms of decisions, including conditional rulings and declarations of incompatibility.⁴⁸ This practice shows that

⁴⁶ Huq and Ginsburg, "How to Lose a Constitutional Democracy," 78–169.

⁴⁷ Pablo Castillo-Ortiz, "The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions," *Law and Philosophy* 39, no. 6 (2020): 617–55, <https://doi.org/10.1007/s10982-020-09378-3>.

⁴⁸ Andy Omara, "The Indonesian Constitutional Court and the Democratic Institutions in Judicial Review," *Constitutional Review* 3, no. 2 (2018): 189–207, <https://doi.org/10.31078/consrev323>.

constitutional adjudication extends beyond the annulment of norms and functions as an instrument directing the implementation of constitutional mandates. Therefore, institutional boundary-making is developed as a logical extension of the evolving practice of judicial review.

The Court normatively constrains executive discretion in managing the placement of security personnel through the reasoning grounded in the principles of civilian supremacy, professionalism of security institutions, and political neutrality.⁴⁹ Before this decision, the assignment of the Indonesian National Police members to civilian posts was frequently treated as an administrative prerogative justified by technocratic or bureaucratic considerations. However, the constitutional reasoning of the court reclassifies the practices as matters subject to strict constitutional limitations.⁵⁰

From the perspective of modern constitutional theory, the development reflects the transformation of constitutional courts into *institutional boundary-makers*. These institutions assess the constitutionality of norms and substantively delineate the limits of authority among state organs.⁵¹ In this context, the Constitutional Court safeguards formal boundaries between branches of government and actively constructs functional limits that prevent the expansion of power capable of undermining constitutional equilibrium.

The second implication relates to *democratic governance*. In post-authoritarian contexts such as Indonesia, the participation of security apparatuses in civilian offices risks eroding the principle of civilian supremacy and opens the possibility of remilitarization or resecuritization

⁴⁹ Jan Komárek, "National Constitutional Courts in the European Constitutional Democracy: A Rejoinder," *International Journal of Constitutional Law* 15, no. 3 (2017): 815–25, <https://doi.org/10.1093/icon/mox052>.

⁵⁰ Constitutional Court of the Republic of Indonesia, Decision Number 11/PUU-XXIII/2025.

⁵¹ Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2019), 91–94.

of the civil bureaucracy.⁵² Comparative scholarship has shown that the expansion of security institutions into civilian domains often serves as an indicator of democratic backsliding in transitional democracies.⁵³ Therefore, constitutional courts play a crucial role as mechanisms of structural correction by establishing long-term normative standards that bind policymakers.⁵⁴

The Indonesian Constitutional Court's jurisprudence reflects its function by contributing to democratic consolidation through the strengthening of legitimacy and the protection of fundamental rights.⁵⁵ Moreover, the Court plays a strategic role in maintaining social stability and preventing conflict by ensuring that state policies remain within constitutional bounds.⁵⁶ Constitutional reasoning carries implications that extend beyond institutional structure to include the quality of substantive democracy and social cohesion.

In relation to Decision Number 11/PUU-XXIII/2025, the Court clearly performs the function. The reasoning resolves a normative dispute and constructs a governance framework affirming that security institutions must remain within the professional domain and must not encroach on civilian administrative and political offices. Therefore, this decision contributes to enhancing democratic quality by limiting the role of coercive apparatuses within civilian governance structures.⁵⁷

⁵² Aurel Croissant and David Kuehn, "Patterns of Civilian Control of the Military in East Asia's New Democracies," *Journal of East Asian Studies* 9, no. 2 (2009): 187–217, <https://doi.org/10.1017/s1598240800002988>.

⁵³ Thomas Carothers and Benjamin Press, *Understanding and Responding to Global Democratic Backsliding* (Washington DC: Carnegie Endowment for International Peace, 2019), 23–27.

⁵⁴ Kim Lane Scheppele, "Autocratic Legalism," *The University of Chicago Law Review* 85, no. 2 (2018): 545–84, <https://www.jstor.org/stable/26455917>.

⁵⁵ Susanti, "The Rise of Judicial Power in Indonesia," 255–76.

⁵⁶ Jan Komárek, "Constitutional Courts and Democratic Governance," *International Journal of Constitutional Law* 19, no. 1 (2021): 84–110, <https://doi.org/10.1093/icon/moaa081>.

⁵⁷ Ulrich, "Civil-Military Relations Norms and Democracy: What Every Citizen Should Know," 41–62.

The third implication concerns the shift in the authority from a *negative legislator to a constitutional policy-maker*. Under Kelsen's classical doctrine, the courts are confined to annulling norms inconsistent with the constitution without determining substantive policy directions.⁵⁸ In contrast, the present decision reports that the Court invalidates or rejects certain practices but formulates prescriptive and forward-looking constitutional standards.⁵⁹

The role as a constitutional policy-maker is evident in the capacity to constitutionally restrict executive discretion. Previously, the assignment of security personnel to civilian positions was treated as an administrative matter within executive prerogative, often justified by efficiency or technocratic necessity. However, the Court firmly situates the practices within non-negotiable constitutional limits.⁶⁰ This corrects existing practices and actively redirects the governance of security institutions in line with democracy and the rule of law. This policy-oriented role shows the function of constitutional courts as *structural correction mechanisms* in post-authoritarian states. Comparative literature shows that the expansion of executive power and the normalization of security sector inclusion in civilian affairs are recurring phenomena.⁶¹ In this context, constitutional courts frequently act as balancing institutions, using judicial authority to establish structural and long-term governance standards. The Court's ruling on the assignment of active Indonesian National Police members exemplifies this function by setting normative limits that extend beyond the immediate case and serve as guidance for future legislative and executive policymaking. To clarify the transformation, a conceptual comparison is

⁵⁸ Castillo-Ortiz, "The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions," 617–55.

⁵⁹ Muhammad Reza Baihaki, "Assessment of Elements of Abuse of Authority (Detournement De Pouvoir) Based on the Decision of the Constitutional Court," *Jurnal Konstitusi* 20, no. 1 (2023): 103–7, <https://doi.org/10.31078/jk2016>.

⁶⁰ Constitutional Court of the Republic of Indonesia, Decision Number 11/PUU-XXIII/2025.

⁶¹ Scheppele, "Autocratic Legalism," 545–50.

presented between the *negative legislator and constitutional policy-maker* models, which constitute the main analytical framework of this study.

Table 1. *The Role of the Constitutional Court: Negative Legislator vs. Constitutional Policy-Maker*

Dimension	Negative Legislator	Constitutional Policy-Maker
Theoretical Basis	Hans Kelsen's classical doctrine limits courts to annulling unconstitutional norms.	Constitutional governance theory views courts as active institutional actors.
Core Function	Review and annul unconstitutional laws without shaping policy	Establish prescriptive constitutional parameters for public policy
Reasoning Approach	Textual and legalistic	Systematic and teleological, integrating constitutional principles
Decision Output	Annulment or rejection of norms	Normative standards, policy guidance, institutional limits
Policy Implications	Minimal and indirect	Direct and binding across sectors
Relation with Executive	Passive, deferring to discretion	Corrective and restrictive
Role in Separation of Powers	Guardian of formal boundaries	Institutional boundary-maker
Power Control Model	Ex post review	Ex ante–ex post constitutional guidance
Main Risk	Judicial underreach	Judicial overreach
Relevance in Post-Authoritarian States	Limited	High (structural correction function)
Illustration	Norm annulment decisions	Decision No. 11/PUU-XXIII/2025

Source: *Compiled from Castillo-Ortiz (2020); Ginsburg and Huq (2018); Scheppele (2018).*

From a constitutional theory perspective, this shift is consistent with the concept of *constitutional governance*, which conceptualizes constitutional courts as active agents in shaping and directing state practice.⁶² In this framework, courts are not passive and neutral arbiters but institutions normatively engaged in safeguarding democratic quality through the formulation of policies. The decision on the assignment of active police officers shows the function of judicial reasoning as a policy-regulating instrument without exceeding constitutional legitimacy, provided the context remains anchored in fundamental constitutional principles. This transformation also includes important normative implications, which strengthen democratic civilian control over security institutions and prevent the development of power configurations dominated by coercive apparatuses. Strong argumentative discipline and institutional restraint are necessary to avoid excessive judicial activism that could affect the boundary between constitutional interpretation and political decision-making.⁶³ Therefore, the Court's decision may be regarded as a legitimate example of policy-making since the context is grounded in the principles of constitutional democracy, civilian supremacy, and the rule of law.

Conclusion

The Constitutional Court has evolved beyond the traditional role as a *negative legislator* by adopting a substantive approach that frames the inclusion of security actors in civilian positions as an issue grounded in the principles of civilian supremacy, professionalism, and institutional neutrality. This institution constrains executive discretion and establishes binding constitutional standards that shape design and reinforce the principle of separation of powers. The ruling carries structural implications

⁶² Ginsburg and Huq, *How to Save a Constitutional Democracy*, 175–81.

⁶³ Tushnet, *Advanced Introduction to Comparative Constitutional Law*, 101–5.

for democratic governance by strengthening checks and balances, enhancing accountability, and preventing the politicization of security institutions, functioning as a corrective mechanism within a post-authoritarian constitutional order. This study identifies a significant shift in the Court's role toward *constitutional policymaker*, as reflected in the forward-looking and prescriptive reasoning that contributes to shaping public policy and institutional relationships. The expanded role of the includes the potential risk of judicial overreach. These limitations of the study are the reliance on normative analysis of a single decision without examining the empirical implementation and institutional impact. Future studies must adopt more comprehensive approaches, including empirical and comparative methods, to assess the effectiveness of the Court's decisions within governance practices. This study recommends strengthening the consistency and depth of the constitutional reasoning, developing clear doctrinal parameters to delineate the limits of judicial intervention in the policy domain, and harmonizing sectoral regulations to ensure the effective implementation of judicial decisions without generating legal uncertainty. Therefore, a balance between judicial activism and democratic legitimacy can be maintained while enhancing the academic contribution and practical relevance of this study.

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