Defending Strong Constitutional Review in a Declining Democracy: The Case of Indonesia's Eroding Limitation of Power

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Abstract

Indonesia's constitutional democracy is in constant decline. Various attacks to undermine constitutional limitation of power and to shrink civic space using legal tools were used by the current Joko Widodo's regime. The exercise of strong constitutional review by the Indonesian Constitutional Court may be the answer to prevent tyranny. Some global legal scholars, like Jeremy Waldron, believe that this is not the case. They believe that the mechanism lacks legitimacy and becomes problematic in a democratic system to resolve rights issues. This article demonstrates that in the case of a declining democracy, the Court's power to strike down unconstitutional legislation is still needed. The research was conducted using theoretical analysis to study the arguments against the practice of strong constitutional review and uses theories that defend the mechanism as a rebuttal. Historical approaches were also utilised to help explain the history of democratisation in Indonesia, the phenomena of democratic decline, and the judiciary's contribution to democratisation. The study suggests that the strong constitutional review mechanism is still the most suitable in Indonesia's decaying democracy, where the Court can contribute to the improvement of institutional checks and reform, as well as reasserting constitutional limitations. Despite the Court's openness and limitations, constitutional review remains a useful mechanism but insulation from political interference and increasing diversity of the Court can improve the robustness of the process and its legitimacy.

1 Introduction

Freedom House's report on Indonesia's democracy index in 2023 indicated that the country is yet again declining further as a flawed democracy, scoring only 58 out of 100.[1] In 2018, Indonesia scored 65 and has suffered continuous decline every year since then.[2] President Joko Widodo (Jokowi) has led various methods to minimise constitutional limitation of power to the government. Today, Indonesia is slightly returning to a more authoritarian government—something that it has tried to escape from 25 years ago.[3]

First, many civilians were criminalised on the grounds of defamation, slander, and hate speech, which threatened the freedom of expression and press.[4] Second, Jokowi's government formed a supermajority in the Indonesian legislature—the People's Representative Council (DPR) by taking advantage of the flawed party system and passing legislation that limited the opposition to compete in future elections.[5] Lastly, they barred the public from being able to participate in the legislative process, ignoring the principles of transparency and accountability, despite being obligated by the law.[6]

Indonesians can only pin their hope on their Constitutional Court. Since its establishment in 2003 through Law No. 24/2003 on the Indonesian Constitutional Court, its power to strike down unconstitutional legislation acts as a 'counter-majority' force against the government and to protect fundamental rights.[7] The Court has led the nation's democratisation process and the public has given their approval to the Constitutional Court to exercise 'judicialization of politics'[8] in Indonesia.

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[1] 'Freedom in the World 2023 Country Report: Indonesia' (*Freedom House,* 2023) <https://freedomhouse.org/country/indonesia/freedom-world/2023> accessed 17 April 2023.
[2] Ibid.
[3] See Paul J Carnegie, 'Democratization and Decentralization in Post-Soeharto Indonesia: Understanding Transition Dynamics' (2008) 81 Pacific Affairs 515.
[4] Amnesty International Indonesia, 'Indonesia: Silencing Voices, Suppressing Criticism: The Decline in Indonesia's Civil Liberties' (*ASA*, 7 October 2022) <www.amnesty.org/en/documents/asa21/6013/2022/en/> accessed 26 April 2023.
[5] Derwin Tambunan, 'The Intervention of Oligarchy in the Indonesian Legislative Process' (2023) 8 Asian Journal of Comparative Politics 10.
[6] Saru Arifin, 'Illiberal Tendencies in Indonesian Legislation: The Case of the Omnibus Law on Job Creation' (2021) 9 The Theory and Practice of Legislation 386.
[7] Hans Kelsen in Lars Vinx (tr), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015).
[8] 'Judicialization of politics' refers to 'a spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making for a and processes' in an abstract sense. However, in the context of judiciary's involvement in the political setting, Hirschl defines this as the concrete form of the term, meaning that the court's power is expanding to help guiding policy decisions and redrawing the lines to limit state powers and 'ordinary'

The enforcement of strong constitutional review is criticised by global legal scholars, despite its advantages. The institution itself is seen as undemocratic because of the appointment of the judges and the decision-making process. Notable critiques towards strong review came from Jeremy Waldron[9] and Alexander Bickel. They believed that the exercise of such a mechanism in any democratic country does not fit with political equality and democracy. A decision to strike down a statute does not value differing views of rights in the society and is made by a limited number of judges without involving the public. Meanwhile, rights issues are multifaceted, thus it is not appropriate for judges to become the sole authority to settle the dispute.[10]

However, those arguments may not be relevant to Indonesia's current condition. The increasing power gained by the political majority in both the executive and the legislative branches also increases the likelihood of disregarding constitutional limitation of power and commitment to the protection of the fundamental rights of citizens. This, in turn, further threatens democracy. A counter-majoritarian measure is needed to set boundaries and return the power to its proper constitutional democratic track—in the form of the Indonesian Constitutional Court.

This article will undertake qualitative secondary research utilising primary legal sources as well as secondary sources from various literature. Legal-doctrinal and theoretical literature will be the central reference, but it will also include some historical sources to give context on the issue. A combination of doctrinal, comparative, and historical analytic approaches will be utilised.

The first section of this article comprises theoretical findings and analysis of various legal and political phenomena that indicate a decline of Indonesian constitutional democracy. This section also explores the Indonesian Constitutional Court's role in saving democracy. The second section introduces the theoretical debate on the exercise of strong constitutional review.

rights jurisprudence. *See* Ran Hirschl, 'The Judicialization of Politics' in Robert Goodin (ed), *The Oxford Handbook of Political Science* (OUP 2011) <https://academic.oup.com/edited-volume/35474/chapter-abstract/303819594?redirectedFrom=fulltext> accessed 10 May 2023.

[9] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346.

[10] Ibid. See also Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962).

The third section challenges arguments against strong constitutional review because they fail to recognise the overall development of democracies around the world. The latter part of this section includes suggestions to avoid the institution of becoming a 'deviant' to democracy itself. Finally, it will conclude on the retention of the current model of strong constitutional review in Indonesia, and its significance to the practice of constitutional adjudication in declining democracies around the world.

2 Indonesian Constitutional Democracy in Peril

Indonesia has retained some components of constitutional democracy. First, Indonesia has not scrapped the implementation of competitive, free and fair democratic elections. Periodical democratic elections are still in place, which still opens up the possibility of a rotation of power.[11] Second, liberal freedom of speech and association that are synonymous with the practice of democracy are still promulgated in the 1945 Indonesian Constitution.[12] Despite several obstructions and suppressions by the government, Freedom House indicated Indonesian citizens still enjoy 'partly free' freedoms of expression and association.[13] Lastly, the integrity of the rule of law—which includes the legal rules, institutions, and the exercise of legal procedures to settle cases and to seek remedies—still exists and are in a stable condition.[14] Although there have been some attempts to tamper with the institutional power checks upheld by legal institutions, particularly the Constitutional Court[15] and the Corruption Eradication Commission,[16] as well as the unfinished reform of the National Police,[17] the state is still held accountable by the law. Despite retaining three components of constitutional democracy, Jokowi's government is slowly damaging democracy. The damages to constitutional democracy do not happen in an instant but in a slow, incremental and inconspicuous fashion.

[11] Marc F Plattner, 'From Liberalism to Liberal Democracy' (1999) 10 Journal of Democracy 121.
[12] Constitution of the Republic of Indonesia 1945 arts 28 and 28E(3).
[13] Freedom House (n 1).
[14] Ibid.
[15] Jimly Asshiddiqie, 'The DPR Attacks the Constitutional Court—and Judicial Independence' (*Indonesia at Melbourne*, 10 October 2022) <https://indonesiaatmelbourne.unimelb.edu.au/the-dpr-attacks-the-constitutional-court-and-judicial-independence/> accessed 10 May 2023.
[16] Thomas Power, 'Assailing Accountability: Law Enforcement Politicisation, Partisan Coercion and Executive Aggrandisement under the Jokowi Administration' in Thomas Power and Eve Warburton (eds), *Democracy in Indonesia: From Stagnation to Regression?* (ISEAS Publishing, 2020) 292–294.
[17] Fachrizal Affandi, 'Police a Missing Passenger in Indonesia's Reform Train' (*The Jakarta Post,* 1 October 2022) <www.thejakartapost.com/opinion/2022/09/30/police-a-missing-passenger-in-indonesias-reform-train.html> accessed 10 May 2023.

Azis Huq and Tom Ginsburg define this as a 'constitutional retrogression', where the decay of constitutional democracy is concealed using legal methods and institutions.[18]

During Jokowi's tenure, the incremental damages done to constitutional democracy have become more apparent. Particularly, in the way his government has tried to weaken the limitation of power that has been stipulated in the 1945 Constitution. This has been achieved by expanding the government's influence and power, as well as eliminating resistance in the society. To achieve this, Jokowi's government acquired a dominant portion of the legislature, to make sure that the opposition possessed less power.

Approximately 82% of the total seats in the DPR are now held by political parties that backed Jokowi to run for presidency in 2014 and 2019. This leaves the opposition parties with less than 18% of the total seats.[19] With this supermajority, there is less pushback for governing parties to achieve their objectives, which are to seize economic resources, win state patronage and divide power among themselves.[20] One of those objectives was realised when the governing parties adopted the new presidential threshold in the General Election Law in 2017. Each political party had to secure at least 20% of the total seats in the DPR or 25% of the national vote in the previous election to be able to nominate a presidential candidate. This played into the hands of the ruling coalition by allocating presidential candidacies only for the governing alliance and forcing the opposition to join the ruling alliance or to forever be beaten.[21]

The supermajority also attempted to expand their powers through amending laws to weaken institutional checks. In 2019 lame duck legislators decimated the anti-graft institution, the Corruption Eradication Commission (KPK), through their amendment of the KPK Law.[22] Furthermore, a rushed amendment to the Law of the Indonesian Constitutional Court led to an attempted court-packing, where political power intrudes with the composition of judges, in

[18] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 U Cal LA L Rev 94–96.
[19] Asrinaldi, Mohammad Agus Yusoff and dan Zamzami Abdul Karim, 'Oligarchy in the Jokowi Government and Its Influence on the Implementation of Legislative Function in Indonesia' (2022) 7 Asian Journal of Comparative Politics 196.
[20] Ibid 196–199. See also Marcus Mietzner, 'Indonesian Parties Revisited' in Power and Warburton (eds), n 16, 206.
[21] Mietzner (n 20) 1024–1025.
[22] Power (n 16).

order to favour the status quo.[23] Modifications to laws attempted by the supermajority demonstrate that Jokowi's regime wants to keep limiting its power as little as possible to advance their economic agenda.[24]

Attempts to undermine constitutional democratic principles did not stop there. Citizens have frequently been denied the opportunity to participate in the discussion of legislation, particularly those who are directly impacted by or have special interests in relevant topics. For instance, the Job Creation Law was found to be 'conditionally unconstitutional' by the Indonesian Constitutional Court. The deliberation process of the Law excluded some affected parties, such as indigenous communities and migrant workers unions. This violated Article 96 of Law No. 12/2011 on Legislation, which obligated a wide public participation in the discussion of a draft legislation.[25] Not only that, dissident suppression and centralisation of decision-making further advanced the goals of developmentalism. Jokowi issued a Government's Regulation in lieu of a Law on the Amendments of Mass Organisation Law (*Perppu Ormas*) to arbitrarily outlaw the existence of Hizbut Tahrir Indonesia (HTI), one of the most prominent non-party political opponents of Jokowi's government. HTI was believed to be an organisation that 'goes against the ideas of Pancasila'.[26] Furthermore, police violence cases are on the rise.[27] Cases of intimidation, persecution, use of violence, and criminalisation against critical voices using vague provisions on 'defamation', 'hate speech' and 'slander' promulgated in the Penal Code and Electronic Information and Transactions Law (ITE Law) were increasingly brought against civilians and journalists who exercise freedom of expression and freedom of press.[28] Those cases of repression threatened freedom of speech, despite being guaranteed by Articles 28 and 28E(3) of the 1945 Constitution.

Indonesians can only pin their hope on the Constitutional Court to protect their guaranteed constitutional rights. The Court is the 'guardian of the constitution', founded to maintain constitutional order. The Court's role is increasingly becoming more predominant in the current

[23] Asshiddiqie (n 15).
[24] Power (n 16).
[25] Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020. See also Petra Mahy, 'Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments' (2022) 17 Asian Journal of Comparative Law 51.
[26] Vedi R Hadiz, 'Indonesia's Year of Democratic Setbacks: Towards a New Phase of Deepening Illiberalism?' (2017) 53 Bulletin of Indonesian Economic Studies 270.
[27] Amnesty International Indonesia (n 4).
[28] Ken MP Setiawan, 'A State of Surveillance? Freedom of Expression under the Jokowi Presidency' in Power and Warburton, n 6, 258.

situation of the state, due to their power to strongly strike down possible threats and injuries to citizens' constitutional rights.

The creation of the Indonesian Constitutional Court took inspiration from South Korea's democratisation experience.[29] Both countries have experienced leaderships of autocratic ex-military generals. South Korea, on one hand, initiated a constitutional amendment in 1987, where it established a specialised Constitutional Court. The Court was founded based on an agreement between three main political parties to liberalise the nation and reinstate constitutional supremacy.[30]

The Indonesian Constitutional Court was influential in the protection of constitutional principles and rights. The Court has a good track record in defending constitutional rights against possible or existing threats in the Indonesian legal and political system. It struck down articles from the Penal Code that contains a provision of *Lèse Majesté* that can criminalise 'alleged expressions of hate' against the Indonesian Government. The Court cited the provision's colonial character, its weaponisation during the New Order regime to punish critics, and how it violated freedom of expression stipulated in the Constitution.[31] The Court also contributed to protecting the freedom of the press from being interfered with by the state.[32] It guaranteed equal political participation to those previously accused as members or sympathisers of the banned Indonesian Communist Party.[33] Furthermore, emphasising citizens' right to participate in legislation, the Court adopted the 'meaningful participation' doctrine.[34]

[29] South Korea had been one of the most influential countries to the foundation of the Indonesian Constitutional Court. This has been explicitly stated by politicians who initiated Constitutional Amendments and conducted a comparative study in South Korea, saying that the country was a model to new democracies in Asia. Ibid 52–53. See also Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003) 210–212.

[30] Ibid. See also James M West and Dae-Kyu Yoon, 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?' (1992) 40 Am J Comp L 73.

[31] Indonesian Constitutional Court Decision No. 6/PUU-V/2007. See also Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge 2018) 82–83.

[32] Indonesian Constitutional Court Decision No. 005/PUU-I/2003.

[33] Indonesian Constitutional Court Decision No. 11-17/PUU-I/2003.

[34] This doctrine was first introduced in Indonesia after studying the case of *Doctors for Life International v Speaker of the National Assembly* from the South African Constitutional Court. 'Meaningful participation' doctrine orders lawmakers to engage in public consultation when drafting and deliberating a law, particularly to the potentially impacted communities. This engagement gives democratic legitimacy of the law, respects citizens' right to participate in governance, and avoids rights violation. See Indonesian Constitutional Court Decisions No. 32/PUU-VIII/2010 and No. 91/PUU-XVIII/2020. See also *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC) 1.

With those landmark decisions, the Court has contributed extensively to the democratic transition.[35]

The establishment of a separate and independent court that adjudicates constitutional issues in a democratic state, especially in a new democracy, does not sit well with legal and political scholars who are against the practice of strong constitutional review. Conferring the power to strike down products of a democratic process to an institution that lacks democratic legitimacy is a 'counter-majoritarian difficulty', and the establishment of such practice is an irony in a constitutional democracy.[36] This is where the Indonesian Constitutional Court and other constitutional tribunals face criticism, on whether the institution is a show of commitment to constitutional democracy or a deviant in the system.

3 Cases against Strong Constitutional Review

Despite the growing approval of some states of a strong constitutional review practice, the idea actually does not sit well with some global legal scholars. Notably, respected scholars Alexander Bickel and Jeremy Waldron have criticised the relevancy of the practice within a democratic system. The idea that a judiciary is unsuited to resolve cases on constitutional rights originally came from Bickel et al.,)[37] who highlighted issues in the judicial deliberation process. Bickel stated that the popular will was being reversed by the judiciary through the judicial review process as judges asserted themselves over the majority and dictated the course of democracy. Bickel is referring to the term 'counter-majoritarian difficulty', where popular sovereignty is not as 'sovereign' as the name suggests, thanks to the Court blocking the will of the majority. Useful examples of this can be found in various US Supreme Court cases. The US Court decided against the New Deal framework and frustrated the general will of the American people escape the Great Depression, due to some of the framework's nature to push workers beyond their boundaries in the name of economic recovery.[38] Despite the judiciary being an 'additional mode of access for citizen input into the political system', Bickel insisted that it does not mean it has some political equality.[39]

[35] Hendrianto, n 31, 81.
[36] Bickel (n 10).
[37] Barry Friedman, 'The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' 73 NY U L Rev 333.
[38] See *Morehead v New York ex rel. Tipaldo* 298 US 587 (1936).
[39] Ibid., 1395.

Jeremy Waldron took inspiration from Bickel's work and further challenged the existence of strong judicial review around the world. While Bickel's criticisms were directed towards the American system, Waldron proved that Bickel's arguments could be relevant to the general case.

Waldron begins by forming four assumptions where judicial review is not a necessity and the judiciary's involvement in legislation in redundant: (1) a well-functioning democratic legislature which was elected periodically by universal adult suffrage and featured fair competition; (2) a well-functioning judiciary to settle individual disputes and uphold the rule of law; (3) commitment by most members of the polity and most of its officials to the idea of individual and minority rights; and (4) persistent, substantial, and good faith disagreement about rights.[40] Waldron believes that legislative decision-making has more legitimacy. Legislative settings have mechanisms which allow the citizens to participate in solving issues.[41] This is where the judiciary lacks, in the aspect of what he called 'process-related reason'. The deliberation process in the court is not justifiable in terms of democratic legitimacy, since judges do not allow public participation.[42] This is supported by Justice Antonin Scalia's view—just because the public pressures the court to acknowledge their opinions, does not mean they are forced to accommodate such views because the court's independence shall prevail.[43]

A further argument that Waldron presents is that the judicial setting is less than effective compared to the legislative process in settling disagreements about rights. In the process of deciding cases, judges tend to align with one of the views on the issue that is before them and will decide in favour of one side or the other. Meanwhile, the legislature can invite various subjects and views to make the deliberation more substantial. Therefore, there is no reason why a decision by the court stands when there are multiple alternative views of the issue at hand.[44] Waldron perceives a decision coming from a strong judicial review mechanism lacks justified

[40] Disagreements about rights are merely the idea of which rights someone ought to have or ought to be prioritised over others. Such disagreements can be settled in a legislative setting, where the representation of different perspectives regarding rights are present and every issue is deliberated carefully in that forum. Waldron (n 9) 1360–1362.
[41] Ibid 1371–1372.
[42] See Richard A Posner, *How Judges Think* (Harvard University Press 2008) 3.
[43] Antonin Scalia's dissenting opinion in *Planned Parenthood of Se. Pa. v. Casey* [1992] 505 U.S. 833, 999-1000, in Waldron (n 9) 1390.
[44] Ibid 1393–1394.

authority, which he termed as an 'outcome-related reason'.[45] When cases reach appellate levels, they lose the main substance of the case, which makes the settlement process less robust. The judiciary often fails to view the multifaceted nature of rights. Its consideration to solve cases is narrowed only to provisions and interpretations of constitutional documents. This statement echoes Bickel's findings in the *Brown v Board of Education* case. US Supreme Court judges preferred to go with the best interpretation of the Due Process clause that fitted within the best set of moral values[46] in order to seek legitimacy from the available provisions and past decisions to justify their position in the case.[47]

The prevailing court's decision on an issue also affects the perception of 'judicial supremacy'. This places the judicial power in defining the meaning of constitutional texts as the authoritative one, which makes it binding to all national institutions.[48] The concept itself was originally presented to settle disagreements on rights or controversies arising under the constitution. Nevertheless, judicial supremacy becomes a problem in a constitutional democracy, since it places judicial decisions as authoritative interpretations of constitutional provisions.[49] It denies the possibility of different means of interpretations coming from other institutions or subjects. Letting the judicial review dictate the popular sovereignty does not represent democratic values, and therefore the practice and the institution is a 'deviant' to the democratic system.[50]

When the judiciary becomes supreme, it can also become tyrannical. A court's decision may not acknowledge different perspectives on the issue, but it continues to be an authoritative law of the land. On the other hand, decisions made by elected representatives, who represent the aspirations of the majority of citizens, may be more acknowledging and accommodating. Even before the voting procedure started, the deliberation process has included the voices and views of the minority and therefore the process in the legislature makes the institution less of a threat of become a tyranny.[51]

[45] Waldron (n 9) 1376–1379.
[46] Bickel (n 10).
[47] Waldron (n 9) 1379–1384.
[48] Friedman, (n 38) 352. See also Walter F Murphy, 'Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter' (1986) 48 The Review of Politics 406–412.
[49] Ibid 10–11.
[50] Bickel (n 10).
[51] Ibid 1396.

Despite all of those issues presented by Bickel and Waldron the claim that constitutional review is a deviant practice to a democracy may not be accurate for new democracies. Particularly in the context of Indonesian democracy which needs a more robust checks and balances system and constitutional protection. It is important to understand why a strong constitutional review conducted by the judiciary is still relevant to the age of democratic retrogression.

4 In Defence of Strong Constitutional Review

4.1 Where Assumptions Fail

Waldron's general case against strong review may be relevant in Indonesia's case, due to its democratic system being influenced by Western traditions. The adoption of judicial review not only followed the South Korean example but also took inspiration from the American democracy that pioneered judicial review and the system of checks and balances to control state institutions.[52] On the other hand, Indonesia also adopted Hans Kelsen's approach to the centralised judicial review system where only a single constitutional judiciary has the power to annul unconstitutional legislation as the 'guardian of constitution'.[53] Furthermore, human rights provisions stipulation in the 1945 Constitution were also inspired by Western democracies—increasing numbers of countries incorporated human rights into their constitutional documents as a consequence of 'constitutionalisation'.[54]

However, Waldron's assumptions are not relevant to the case of Indonesia. The DPR as the legislature lacks the important attributes to ensure a well-functioning legislative body. Waldron assumes that in the legislation process, the representatives are equipped with elaborate and responsible procedures, as well as a set of robust scrutiny mechanisms to ensure a substantial legislative product and accommodation of public interests and opinions.[55]

[52] Judicial review and the checks and balances system are correlated. The judiciary has the power to interfere in the legislation process, in order for them to fully consider constitutional provisions, despite the division of labour that they have. See Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 233–234.
[53] Kelsen in Vinx (n 7) 45.
[54] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).
[55] Ibid 1361.

First, the problem of the un-representativeness of political parties within DPR contributes to the failure of the first assumption. In reality, the DPR being dominated by the ruling supermajority disregards minority views. They rush the deliberation processes, refuse to engage in wider public consultations and do not provide sufficient transparency of the processes, despite being obligated by the Law of Legislation.[56] According to Mietzner, Indonesian political parties do not adequately represent a range of ideas or social classes which further distances the populace from them. Interests of elites who join the party or provide financial support—often the party leaders—are major factors in the formation of political parties.[57] This detachment of parties away from their real constituencies has led to parties being driven by their leaders' own interests. They tend to form a coalition with those who have similar agendas, resulting in a lack of representativeness and public control over political parties.[58]

Second, despite having a well-functioning judiciary most members of the society lack respect for individual and minority rights. This is a major obstacle in the attempt to achieve good-faith disagreements in what rights somebody ought to have. The lack of acknowledgement of individual and minority rights is most likely caused by deepening polarisation in the country's social and political dynamics which culminated in the highly controversial Jakarta's 2017 Gubernatorial Election. The Former Governor of Jakarta, Basuki Tjahaja Purnama (famously called Ahok), who came from a double-minority background (Christian- and Chinese-Indonesian) was openly condemned by conservative Muslim voters. Those who voted for him were accused of blasphemy. This incident made the ethnic minority's participation in the ruling government even bleaker.[59] This was made worse when Jokowi enacted the *Perppu Ormas* to disband HTI and Islam Defenders Front (FPI), both of whom are the largest conservative Muslim organisations in Indonesia.

Third, the ruling government also continues to disregard the individual's right to express opinions. Jokowi's presidential administration used state apparatus to silence his political

[56] Mahy (n 25) 61. See also section 2 paragraph no. 5.
[57] Mietzner (n 20) 193–198.
[58] Burhanuddin Muhtadi, 'Jokowi's First Year: A Weak President Caught between Reform and Oligarchic Politics' (2015) 51 Bulletin of Indonesian Economic Studies 359–361.
[59] Eve Warburton, 'Deepening Polarization and Democratic Decline in Indonesia' in *Political Polarization in South and Southeast Asia: Old Divisions, New Dangers* (Carnegie Endowment for International Peace 2020).

opponents affiliated with banned organisations.[60] Illiberal actions and policies enacted by the Jokowi administration further shrank civic space such as the criminalisation cases of civilians on the grounds of 'defamation', 'treason' or 'hate speech'.[61] Amnesty International Indonesia found that between 2019 and 2022, there have been 316 cases of criminalisation using draconian provisions of the revised Information and Electronic Transactions (ITE) Law on defamation and hate speech on the internet. This affected many academics, journalists and activists.[62]

Additionally, Waldron's assumptions are not utopian, but rather more applicable to well-established democracies. Indonesia is still a relatively new democracy since the reform only kickstarted in 1998 after the fall of the authoritarian New Order regime. Indonesia was not a full-fledged democracy until the ratification of the Fourth Amendment of Indonesia's 1945 Constitution in 2002.[63] Even two decades later, Indonesia appears to be taking a step backwards in its implementation of constitutional democracy. The shrinking of civic space has limited the opposition's ability to challenge the incumbent. Furthermore, the reduction of institutional checks has been a recurring theme in Jokowi's present administration, resembling the past authoritarian regime.[64] Suharto, the autocratic leader of the New Order regime, along with his party Golkar, dominated the People's Consultative Assembly (MPR) and DPR from his re-election in 1971 until 1998. They promoted a series of developmentalist policies to minimise resistance inside the DPR, manipulated the independence and impartiality of the Supreme Court at that time, and punished dissidents by arresting, kidnapping, torturing and assassinating them.[65] Similarly, in Jokowi's regime the governing supermajority utilises their domination to stipulate partisan policies to advance their agendas,[66] while the minority remains helpless.[67] Moreover, the problematic representation of parties in the DPR also makes this worse. Mietzner explains that the flawed party system which affects the representativeness of the parties also has undesirable implications in the decision-making process in the DPR.[68] The DPR cannot

[60] Power (n 16). See also Abdurrachman Satrio, 'Constitutional Retrogression in Indonesia in the Times of Joko Widodo's Government: How the Constitutional Court Can Save Democracy?' (2018) 4 Constitutional Review 425.
[61] Ibid 69. See also Amnesty International Indonesia (n 4) and Power (n 16) 277.
[62] Amnesty International Indonesia (n 4).
[63] See Hendrianto (n 31) 43–44; Asshiddiqie (n 15).
[64] Power (n 16).
[65] Ibid.
[66] Tom Ginsburg and Azis Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 143.
[67] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 648.
[68] Mietzner (n 20).

successfully represent the interests of their constituencies. For instance, indigenous societies have been reported to have felt left out and unconsulted regarding the permits of land use stipulated in the Job Creation Law.[69]

Furthermore, Dworkin asserts that in a constitutional democratic system a decision by the majority can be declared legitimate only when the individual is assured that they have been as equally considered and respected as others.[70] The individual's interests should thus be taken seriously. Parties' aspirations, therefore, shall fully reflect the will of their constituencies. The Job Creation Law once again serves as a good example that corroborates Dworkin's view. The lawmaking process was found to have explicitly disenfranchised certain groups such as migrant workers' unions and indigenous societies. Furthermore, lawmakers had provided little to no transparency of the deliberation process. The Court declared the Law to be conditionally unconstitutional and ordered the DPR to amend the Law by accommodating previously disenfranchised groups in the deliberation process within two years.[71] Here, the Court did not completely strike down the Law, so it did not completely dictate the will of the majority as Bickel feared it would.[72]

Besides, Waldron also appears to overlook cases of strong judicial review in some parts of the world. He does not attempt to pay attention to the experiences of new or declining democracies. In those circumstances, the judiciary needs to step up to improve institutional checks and balances, so the three state institutions can walk hand-in-hand to preserve constitutional democracy. Accordingly, the Indonesian Constitutional Court does not have authority above the directly elected institution. Rather, it is a form of constitutional control and a complete package for effective checks and balances.[73] With the mechanism of strong judicial review as a means of constitutional control, the legislators are forced to be more sensitive to constitutional

[69] Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020.
[70] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 25.
[71] Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020.
[72] Bickel (n 10) 3–4.
[73] Asshiddiqie (n 15) 245–246. Asshiddiqie's statement might have been inspired by Hans Kelsen's view of constitutional adjudication. Kelsen believed that the constitution as the basic norm of a legal system gives validity to legislations and rules underneath it, since it contains foundational principles and boundaries to limit institutional powers in a polity. To guarantee the validity (or constitutionality) of legislations, there needs to be a mechanism to annul any legislative acts that are defective and not conforming to the constitution, hence the constitutional court with the power to exercise strong judicial review is needed to guarantee the basic norm. See Kelsen in Vinx (n 7) 25–48, Hans Kelsen, *The Pure Theory of Law* (University of California Press 1978), and Joseph Raz, 'Kelsen's Theory of the Basic Norm' in *The Authority of Law: Essays on Law and Morality* (OUP 1979).

responsibilities. So, whenever the legislature wants to draft a new law, they may want to pay more attention to constitutional provisions so the law does not get struck down by the Court.[74] Instead of judicial supremacy, Indonesia adopted a principle of constitutional supremacy. Indonesians pin their hope on the Constitutional Court to maintain constitutional order as a form of distrust to their political representatives. The Court's power to strongly strike down possible threats and injuries to citizens' constitutional rights caused by lawmaking is meant to function as keeping the Constitution as the supreme law of the land, in order to prevail before the interests of the political elite.

This function has been showcased numerous times by the Court, for instance, in the striking down of the *Lèse Majesté* provision on the Penal Code that was used to criminalise critics of the Indonesian Government. The Court cited the provision's colonial character, since it was meant to protect the Dutch Royal Family as the Head of the Colonial States. Then, it was weaponised during the New Order regime—led by an autocratic Suharto—to punish critics in order to make developmentalism successful. In the present 1945 Constitution, with the right to freedom of expression being guaranteed by Article 28E(3) of the Constitution, and to align with the democratic character of Indonesia, the *Lèse Majesté* provision was found to be unconstitutional. Therefore, the Court decided to uphold constitutional rights protection by striking it down.[75]

Thus, the Court only operates within the boundaries set by the 1945 Constitution and the Law of the Constitutional Court to keep the government's power within constitutional boundaries. Indonesian constitutional amendment initiators believed the preconditions that led to the autocratic leadership of the New Order occurred when the government paid no regard to constitutional provisions and principles. Meanwhile, the judiciary at that time, the Supreme Court, had no real power to stop arbitrary actions and undemocratic decisions. It was necessary to allocate constitutional review power to the Constitutional Court to give the Court the ability to control the exercise of state power.[76]

4.2 Legitimacy of the Decision

[74] Dimitrios Kyritsis, 'A Moral Map of Constitutional Polyphony' in Dimitrios Kyritsis (ed), *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017) 53.
[75] Indonesian Constitutional Court Decision (n 31).
[76] Hendriant (n 31) 52.

Waldron also argued that when it comes to decision-making, the legislature possesses more democratic legitimacy than the judiciary since the members involved in the deliberation process have been elected to represent the citizens.[77] The legislature reflects the citizens' ideas and aspirations, provides equal weight to every voice and allows robust discourses. However, due to the lack of representativeness in DPR[78] and the limited involvement of citizens in the legislation process, Indonesia's legislative process lacks democratic legitimacy.[79] Dworkin's argument on equal consideration to all citizens strengthens the need for a strong judicial review mechanism—when part of the population is denied asmoral members of the decision, a judiciary therefore needs to step in to ensure they are not disenfranchised.[80] Although the deliberation in the judiciary is done by judges who are not elected by the people, it does not mean the judicial process has no legitimacy. The legitimacy of the Constitutional Court's decisions stems from its stipulation in the 1945 Constitution. In fact, it is a form of citizens' aspiration to confer power to the Court in order to control legislation.[81] Moreover, the decision made by the Constitutional Court is not limited to the moral judgments of the Constitutional Justices, due to the review system that was put in place.

First, the Court implements an '*actio popularis'* mechanism that opens the possibility for citizens to directly file a petition for constitutional review. Article 51 of the Law of the Constitutional Court allows Indonesian citizens to file an abstract constitutional review case to the Court. Applicants do not have to be involved in a specific case to present it before the Court. This makes it one of the most open and accessible constitutional courts in the world.[82] This mechanism guarantees direct involvement of citizens to check and balance the state's power, especially for those whose rights have been disregarded by the state. Despite little or no evidence on why such a mechanism was adopted,[83] Indonesia's struggle against

[77] Waldron (n 9) 1353–1374, and Friedman (n 38), 345–348. See also section 3 paragraph no. 4.
[78] Mietzner (n 20).
[79] Power (n 24) and Mahy (n 25).
[80] Dworkin (n 71) 25.
[81] Hendrianto (n 31) 45–48.
[82] Tom Ginsburg, 'Memo on Comparative Constitutional Review' <www.usip.org/sites/default/files/ROL/TG_Memo_on_Constitutional_Review%20for%202011_v4.pdf> accessed 12 May 2023.
[83] There was no real historical proof from the transcript of the Amendment Deliberation from 1999 to 2002 and the drafting process of the Law of the Indonesian Constitutional Court on why was the *actio popularis* mechanism adopted. The deliberation only focuses on the comparison with countries that have adopted a specialised constitutional court like South Korea, Italy, Austria, Hungary and many others. *See* Hendrianto (n 14) 53, and Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VI Kekuasaan Kehakiman (Comprehensive Text of the Amendments of the 1945 Constitution of the Republic of Indonesia)*, book 6 (Secretariat General of the Indonesian Constitutional Court 2010).

authoritarianism in the past could have sparked the idea. It can be assumed as a form of distrust towards the government and an endeavour to restrain the Government for the protection of individual rights. The *actio popularis* mechanism is also a form of 'public action', even when the petitioner is simply an individual citizen, it can be seen as a representation of the general public. Justice Harjono in the Court's Decision No. 2-3/PUU-V/2007 explained that constitutional rights possessed by an individual are also possessed by other citizens, and the decision of the Court can affect the general public (*erga omnes*).[84]

Second, the Constitutional Court is the only judicial institution that reviews the constitutionality of a statute. The Court is a stand-alone, centralised institution whose decision is final and binding. Cases do not need to go through time-consuming processes such as trials from the district level.[85] Waldron's worries about losing the 'meat and bone' of the issue due to the case being settled at an appellate level are thus not relevant. Petitioners can bring up the issue as it is before the justices for the first time so that the 'meat and bone' are still intact. Lastly, the Constitutional Court is sensitive to the state's political context, public opinion on the issue at hand and public perception of the Court as an institution.[86] Constitutional justices need to consider the impact of their decision since it will affect the wider public, hence they need to understand the political context surrounding the society. It is important to note that the Court not only deals with constitutional issues but also political ones (judicialization of politics). Therefore, the justices need to bear in mind that public opinion should prevail before the intention of the political majority in the DPR.[87]

To illustrate the fruit of Indonesia's strong constitutional review system, Decision No. 013-022/PUU-IV/2006 is a good example. In this case, the petitioners had asked the Court to review the constitutionality of the *Lèse Majesté* provisions on the defamation of the Heads of State (the President and Vice President) stipulated in the Penal Code. The Court struck down the provisions because they were found to be against the spirit of Indonesia's current state of

[84] Justice Harjono's dissenting opinion on the Indonesian Constitutional Court Decision No. 2-3/PUU-V/2007. See also Vicente F Benítez-R, '"With a Little Help from the People": *Actio Popularis* and the Politics of Judicial Review of Constitutional Amendments in Colombia 1955–90' (2021) 19 ICON 1023.

[85] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* [Indonesian Constitution and Constitutionalism]. (Konstitusi Press 2006) 227.

[86] According to Stephen Gardbaum, constitutional tribunals will tend to understand the circumstances surrounding them and can become sensitive to different political influences around them, like the outcome of an election and/or public opinion. See Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?' (2018) 29 Duke J Comp & Intl L 18–27.

[87] Dominic Nardi, 'Indonesia's Constitutional Court and Public Opinion' (*New Mandala*, 22 February 2018) <www.newmandala.org/indonesias-constitutional-court-public-opinion/> accessed 8 June 2023.

constitutional democracy. The petitioners, in the name of the Indonesian people, felt their guaranteed constitutional right to freedom of expression was violated by the provisions stipulated in the Penal Code. The Court's sensitivity to the political context also played a very important role in the annulment of those provisions. The Court found that *Lèse Majesté* provisions are no longer relevant to the current governmental setting that uses a presidential system, and, in order to protect the people's sovereignty above the state, the Court decided to repeal the provisions since nobody is higher than the people themselves.[88]

4.3 Authority of the Decision

The finality of the Constitutional Court's decision is absolute, but the decisions not only solve disputes between the different perspectives of rights. They also force the government not to neglect already existing rights guaranteed by the 1945 Constitution. It needs to be recalled that the problem with Indonesian democracy is not about settling the debates on what rights the people ought to have, but rather pushing the government to commit to the rights guaranteed by the Constitution.[89] Therefore, the Court's level of authority is justified. Dworkin claims that the majority's choice does not always mean it is the best for the general public. Decisions are sometimes forced upon the minority regardless of whether the question of political equality or any moral question has been answered after its promulgation is cleared.[90] To use Waldron's terms, decisional and topical majority decisions may spark moral questions on whether the decisions suit the existing constitutional principles.

Even in the case of Indonesia, the decisional majority—which is at present the governing supermajority in the DPR—may be different from the topical majority in certain issues. The decisional majority agreed to the Job Creation Law while the topical majority pushed for wider public participation and transparency. Similarly, the decisional majority back in the age of the Dutch Colonial Government promulgated the *Lèse Majesté* clause in the Penal Code. This was later retained by the Indonesian national government in its infancy, but further exploited by the ruling majority during the authoritarian New Order era.[91] In order to keep the legislature and their legislation within the boundaries of constitutional democracy, the Court must have the

[88] Indonesian Constitutional Court Decision No. 013-022/PUU-IV/2006.
[89] Kelsen in Vinx (n 7) 45.
[90] Dworkin (n 71) 16.
[91] Setiawan (n 28).

authority to force the state to meet the Constitution's demands. According to Ackerman, this is how to put constraints on the political majority in the legislature—forcing them to follow the principles upheld by the people and laid out in the Constitution as well as preventing them from disregarding popular sovereignty.[92]

Moreover, giving such authority to the Court not only allows it to strike down legislation which violates the 1945 Constitution, but it also serves as a counter-majoritarian institution. The strong review mechanism is utilised to provide adequate institutional checks and balances. The supermajority is still subject to public scrutiny as mandated by the Constitution, further safeguarding citizens' rights and consolidating constitutional democracy.[93] So, the proposition to reject judicial supremacy by Waldron, and Bickel respectively, can be only agreed upon to a certain extent. The Court cannot always enter the political sphere and interfere with its process, but without the Court being one of the key players in pushing for institutional reform through its exercise of constitutional review, constitutional limitation of power will not be realised in Indonesia.[94]

Additionally, giving only a limited amount of authority to the Constitutional Court could also mean rejecting the notion of a 'juristocracy'—a condition that Hirschl finds happening in most democratic countries. The rise of juristocracy is caused by expanding the authorities of the judiciary to promote judicial supremacy and better limitation of power.[95] Expansive power is never good, even for the judiciary. Indonesia made the correct decision to equip the Constitutional Court with the power not to completely annul a law (conditionally constitutional). Furthermore, it may only limit reviewing legislation that is petitioned by citizens and other recognised legal subjects if the petitioners possess constitutional rights that were violated by the law.[96]

Hendrianto also believes that Hirschl's thesis does not fit in the Indonesian context. The authority of the Indonesian Constitutional Court was allocated due to the strong will of both

[92] Ackerman (n 68) 668–669.
[93] Hendrianto (n 31) 7. See also Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court' (2010) 10 Journal of East Asian Studies 397.
[94] Kyritsis (n 75).
[95] Hirschl calls this the 'hegemonic preservation' theory, where politicians strategically allocate bigger powers to judges in order to help them defend their authority. Hirschl (n 55).
[96] Asshiddiqie (n 15).

the politicians responsible for constitutional amendments and the wider public at that time to enforce stronger limitations on the ruling government's power.[97] In that spirit, the Court's decision is understood as not something that cancels what the democratic process has established, but as help in improving the democratic process itself. It is in the nature of the judicial review process that the judiciary simply forces the state to follow the law and gives impact to the legislature's intention.[98]

The points discussed above are well reflected in the recent case of the Job Creation Law whereby the Court declared the Law conditionally unconstitutional. The Law lacked 'meaningful participation' mandated by Article 96 of Law No. 12/2011 on Legislation, due to the DPR not including impacted groups of citizens.[99] The Court helped the DPR and the President to respect the Constitution and to fulfil the right to the participation in government of citizens. It is also important to note that the decision of conditional unconstitutionality gives some room for the Law to be implemented under certain conditions. This, in turn, does not undermine the importance of the democratic process. The Court respects the political majority's decision but still ensures the Law aligns with constitutional principles.

4.4 An Answer to Tyranny of the Majority

Waldron's question on whether strong judicial review is the right answer to tyranny of the majority will be discussed next. As explained in the previous sections, Indonesia's democratic institution is not in good working order. The supermajority bars the public from actively participating—the House of Representatives is unlikely to represent the citizens as discussed previously—and from seeing a transparent decision-making process in the government. Punishment for dissidents and interventions in other state institutions are also swift. The combination of all those phenomena strongly hints the state is becoming tyrannical. Those tyrannical signs can only be tackled by a mechanism of strong constitutional review. Waldron also argues that even a judicial decision can become tyrannical when it does not recognise, or even disregards, different perspectives on the disagreements of rights issues. Seeing how the

[97] Hendrianto (n 31) 50.
[98] *Osborn v Bank of the United States* 22 US 738 (1824).
[99] Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020. See also Mahy (n 25).

judiciary can be one-sided when adjudicating a case on such matters, it can be said that the judicial institution does not allow the contrary viewpoint to be more considered.[100]

However, the case of the Indonesian Constitutional Court is different in this aspect. The Indonesian Constitutional Court's involvement in the political sphere is a control mechanism towards political power to ensure respect for the constitution as the apex law. The 1945 Constitution contains the fundamental norms that lay down the foundation of the state.[101] By entrusting the Court with the power to assert the dominance of constitutional principles, interbranch checks will become more effective and the process will encourage institutional reform for both the executive and legislative branches.[102] Alternatively, the mechanism serves as a channel for the people, particularly for minorities, to be acknowledged whenever the legislature fails to do so, such as in the case of Job Creation Law.

The role of the Indonesian Constitutional Court also highlights the importance of 'judicialisation of politics'. Hirschl describes this as a channel for the people to further assert constitutional provisions over the executive and the legislature through the process of adjudication. This means the judiciary has more political influence than ever to limit state institutions, despite only being a negative legislator.[103] However, an effective judicialisation of politics can only be achieved by fulfilling certain conditions. Justices shall have their own ideological preferences that are independent of the government or the legislature. Whenever Constitutional justices are faced with constitutional questions, they are not always inclined to defend what the state wants, even if there is a principle of presumption of validity (*praesumtio iustae causa*) that applies in every constitutional review case. Variations in justices' preferences, regardless of which institutions they were appointed by, are going to ensure robust constitutional control and their interpretations can go beyond mere formalism.[104]

Unfortunately, the lack of variations of ideological preferences recently led to a decline in the quality of the Indonesian Constitutional Court in the past few years. This decline is due to various circumstances, ranging from the deference of Constitutional justices to the members of the government to the sudden replacement of Constitutional justices. For instance, the case of

[100] Waldron (n 9) 1379–1384.
[101] Asshidiqie (n 86) 226.
[102] Ginsburg and Huq (n 18) 214.
[103] Hendrianto (n 31) 18.
[104] Huq and Ginsburg (n 18) 146.

Justice Arief Hidayat who was reported for lobbying several DPR representatives to endorse and re-elect him as the Chief Justice.[105] Other cases include the amendment of the Law of the Constitutional Court and the sudden dismissal of Justice Aswanto—who had two years left to his tenure—by the DPR because he went 'against' the government's agenda.[106] In fact, political power's intervention in judicial institutions can be damaging to the independence and impartiality of the Court, and those attempts can be seen as ways to pack the Court to align with the supermajority's preferences in which the Court loses its 'judicial heroism'.[107] Further, judicial heroism is an important aspect that contributes to the effectiveness of a strong review system. Despite being a very difficult term to define, Cass Sunstein defines it as judges being 'entirely willing to invoke an ambitious understanding of the Constitution to invalidate the decisions'.[108] Of course, Sunstein's definition must come with conditions. The conditions include that the decisions in question have been found to ignore constitutional rights and the Court has some clear limitations on their powers so that the Court would not be tyrannical.

The Court must be faithful to the protection of individual liberties. Whenever the citizens petition for a review of a provision or a statute that is violating their fundamental freedom, the Court must prioritise its protection. Failure to exercise this protection will result in governing institutions being more susceptible to abuse of power and repression of opposition groups. For instance, when President Jokowi passed the Government Regulation in Lieu of Law on Mass Organisation,[109] the Constitutional Court should have been the institution to strike down the Law when a petition to review the constitutionality of the Law was filed as its delivery had now shrunk the freedom of association in the country.[110] Furthermore, giving expanded power and authority to a judiciary could also undermine the protection of citizens' rights.

The Thai Constitutional Court serves as an example of an overly-expanded judicial authority. They submitted themselves to the ruling military junta and disbanded several pro-democracy parties from 2015 to 2018, resulting in the repression of civil and political rights.[111] In 2017, the Thai military dictatorship held a referendum to draft and ratify a new Constitution.

[105] Hendrianto (n 31) 231–232.
[106] Asshiddiqie (n 15).
[107] Hendrianto (n 31) 15.
[108] Cass R Sunstein, 'Constitutional Personae' (2014) 2013 The Supreme Court Review 436.
[109] See sub-section 2.1.
[110] Satrio (n 61) 279–280.
[111] Eugénie Mérieau, 'Democratic Breakdown through Lawfare by Constitutional Courts: The Case of Post-"Democratic Transition" Thailand' (2022) 95 Pacific Affairs 475..

Unfortunately, the drafting process was limited so that only the members of the military government could have a vote in the deliberation. Nonetheless, the newly ratified Constitution now allocates greater power to the Court, such as dismissing the membership of representatives and dissolving political parties based on citizens' petitions. This is by no means a good thing, as it encourages the removal of opposition party members, allowing the military government to fill those seats with their own candidates and consequently decrease the resistance in governance.[112] As a result of the increased power, the Court is more committed to protecting the longevity of the military government, undermining the effectiveness of separation of power and weakening the protection of freedom of association. Thus, the allocation of judicial power—especially when the judiciary often interacts with constitutional and political issues—must be proportional. Extensive power may turn the Court tyrannical, but keeping it to a bare minimum will not guarantee to save constitutional democracy.

5 Defensible Practice for a Decaying Democracy

By observing the experiences of Indonesia, from its blooming democracy at the beginning of the 21st century to its regression in the last five years, it is clear that the Indonesian Constitutional Court is still the preferred institution to solve constitutional issues in the nation. Despite criticisms of the global practice of strong constitutional review conducted by judiciaries around the world, it should not be scrapped for Indonesia's new but declining constitutional democracy. The mechanism was meant to impose constitutional limitation of powers to the political power-holders and to preserve the supremacy of the 1945 Constitution. The Court has had democratic legitimacy since it was born from the public's demands to prevent the rise of another authoritarian regime. It is also an alternative channel for citizens to fight for their rights when the DPR fails to consider them. Moreover, the Court's decision does not always result in the annulment of laws but can be decided as conditionally constitutional to improve political process in the DPR. This mechanism is the best way to prevent the supermajority in the government from becoming tyrannical. Of course, Indonesia's constitutional democracy cannot be saved through the practice of strong review without keeping a number of things in mind. The mechanism still has some flaws. Constitutional tribunals should expand the diversity of ideologies between Constitutional justices to maintain

[112] Eugénie Mérieau, 'Democratic Breakdown through Lawfare by Constitutional Courts: The Case of Post-"Democratic Transition" Thailand' (2022) 95 Pacific Affairs 475.

robustness in the decision-making process. Full commitment to the protection of fundamental rights is a must for the Court. Although there is a principle of *presumptio iustae causa,* the principle of 'constitutional supremacy' should prevail. With those things applied, the strong constitutional review can become the best mechanism to preserve constitutional limitation of power, which in turn can save Indonesian democracy.