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The Decision of the Constitutional Court Which Is Positive Legislature and Their Implications on Substantial Democracy in Indonesia

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Abstract

The decisions of the Constitutional Court are always interesting to observe. First, the Constitutional Court's decision has a broad impact in maintaining and ensuring the guarantee of the principles of the rule of law, human rights and institutionalized democracy. Second, the decisions of the Constitutional Court are always dynamic. Not always conservative. As in the decision of the Constitutional Court, which is positive legislation, it provides a breakthrough that the Constitutional Court is no longer just a norm canceler. However, it can test or create norms on a limited basis with constitutional or conditionally unconstitutional terms. Third, it is certain that the model of the Constitutional Court's decision is positive legislation and risks causing tension with the parliament as the legislator. It is important to study and relate it to the institutionalization of substantial democracy, a democracy that brings justice and equality in the public sphere.

Keywords: *Constitutional Court; The Rule of Law; Constitution, Justice*

A. Introduction

Post-reform Indonesia is a country that is constructed to institutionalize the rule of law, democracy and proportional welfare. This is based on the traumatic experience of the New Order (Orba) period in which the design of the state tends to take the form of bureaucratic authoritarianism. Limiting the growth and development of the rule of law, democracy and welfare as the heart of state life.

The New Order indeed placed economic development as a top priority. Economic development also requires political stability. Economic development and political stability both depend on each other (Santoso, 1993, p.89). However, in the name of economic development, the New Order government tends to become an authoritarian bureaucratic regime. This is shown by the attitude of anti-critical officials. The channels of control, both at the infra and super-political levels, do not work. There is great flexibility for the state to interpret the implementation of laws that are often misused to suppress public criticism (Fatah, 2010, p. 112).

In Arbi Sanit's analysis, the New Order government in managing development also used legalistic political strategies in the form of two tactics, namely legislative tactics and judicial tactics. Legislation tactics are an attempt by the government to win the competition for power with the people. The trick is to make the legislative process just a formality. The political process is dominated by the elite. Minimal public participation. Meanwhile, judicial tactics are carried out so that the judiciary is conditioned to be more responsive to the interests of the government than the community (Sanit, 1998, p. 53). This is by taking advantage of Benny K Harman's perspective of the dualism situation of judicial power where on the one hand, the government (department of justice, ministry of religion and ministry of defense and security) is given the authority to deal with administrative, organizational and financial matters of judges. On the other hand, the Supreme Court is given the authority to deal with technical juridical issues (Harman, 1997, p. 17). So judges have two coaches, namely the government and the Supreme Court. This certainly affects the independence of the judiciary. This dualism is institutionalized in Law Number 14 of 1970 concerning the Principles of Judicial Power.

After the fall of the New Order government in 1998, the political and administrative system was deconstructed. Through the amendments to the 1945 Constitution four times (1999, 2000, 2001 and 2002) the state is designed to formulate the articles of the constitution for the principles of the rule of law, democracy and institutionalized welfare. Among them, strategic public officials are directly elected by the people through elections, namely (a) the president and vice president (Article 6A); (b) the people's representative council (Article 19); (c) regional representative councils (Article 22C) and (d) regional heads and members of regional people's representative councils (Article 18). Then, judicial control was strengthened by the Supreme Court (MA), the Constitutional Court (MK) and the Judicial Commission (KY) (Article 24, Article 24 A, Article 24 B and Article 24 C) as well as guarantees for human rights (Chapter XA starting with Article 28A). up to Article 28J).

The interesting thing about the Constitutional Court (MK). First, the design of the Constitutional Court marked the end of the supremacy of parliament in the pre-change 1945 Constitution which was transformed into constitutional supremacy in the post-amendment 1945 Constitution. Second, consequently, in the model of constitutional supremacy, the authority to examine laws against the constitution is left to the judicial power. This model, according to Benny K Harman, is a refinement of the weaknesses that are fundamental in the legislative testing model based on the understanding of parliamentary supremacy (Harman, 2013, p. 81). Third, it will be interesting to explore the implications of the relationship between the Constitutional Court on the one hand and the House of Representatives (DPR) on the other, considering that the product of the DPR and the President is that laws can be annulled by the Constitutional Court. In addition, what about the realization of substantial democracy in the Constitutional Court's decision which examines the law against the constitution, especially on the nature or nature of the Constitutional Court's decision in the form of positive legislation. The following article will explore this.

B. Problem Formulation

This paper at least wants to explore two basic problems, namely (a) how the relationship between the Constitutional Court and the DPR is in the frame of constitutional supremacy and (b) how the Constitutional Court's decision that is positive in legislation can have implications for the achievement of substantial democracy in Indonesia.

C. *Discussion*

1. History, Concepts and Dynamics of MK

The idea of the Constitutional Court is not something genuine from Indonesia. Instead, developments in other countries are formulated and modified according to Indonesia's needs. In the world of state administration, both in the world and in Indonesia itself, the establishment of the Constitutional

Court is something new. The basic concept of establishing the Constitutional Court as a separate institution exists because of the need for a court that specifically handles constitutional cases, including conducting judicial review of laws. Hans Kelsen was the first person to come up with the idea of the need for the establishment of the Constitutional Court and it was successfully adopted in the formulation of the Austrian Constitution in 1919-1920. According to Hans Kelsen, the implementation of constitutional rules regarding legislation can be effectively guaranteed only if an organ other than the legislative body is given the task of testing whether a legal product is constitutional or not. And do not enforce it if according to this organ the product of the legislature is unconstitutional (Kelsen, 2006, p. 224).

On the basis of the above, it is necessary to establish a special court organ called a "constitutional court" or "constitutional" supervision of a law called a judicial review which can also be given to judicial institutions (Kelsen, 2006, p. 224). This Constitutional Court institution is then often referred to as "the guardian of the constitution". Because, with its authority, it can declare the unconstitutionality of a law. So it is not surprising that such authority places it as if the position of the Constitutional Court is above the law-making institutions. In its development, the basic concept of forming the Constitutional Court in various countries is closely related to the development of modern constitutional principles and theories adopted by various countries that adhere to the principle of constitutionalism, the principle of a rule of law, the principle of checks and balances, the principle of democracy, the principle of guaranteeing the protection of human rights, principles of an independent and impartial judiciary and the political experience of each country. The existence of the Constitutional Court is very much needed in upholding these principles.

Broadly speaking, according to Jimly Asshidiqie, there are three MK models, namely the United States model, the Austrian model and the French model which are called Conseil Constitionel. The United States model is influenced by the tradition of the Supreme Court Decision in the case of Marbury vs Madison (1803) so that the constitutionality test of a law is carried out entirely by the Supreme Court. So, the Supreme Court is the highest court for both ordinary court cases and constitutional cases such as judicial review of the constitution. In the Austrian model, judicial review of the constitution is carried out by a separate body called the Constitutional Court (MK/Verfassungsgerichtshof). So, distinguished from MA. Meanwhile, the French model through the 1958 French Constitution formed a new institution called the Conseil Constitutionnel. Uniquely, France does not use the term Court (Cour) but Council (Conseil). Because the judicial review in France is an a priori review or judicial preview. That is, what is being tested is not the law but the draft law. So it is preventive (Asshdiqie, 2006, p. 44).

The idea of forming the Constitutional Court in Indonesia emerged and strengthened in the reform era when the 1945 Constitution was amended. However, in terms of the idea of a judicial review, it has actually existed since the discussion of the 1945 Constitution by the Investigative Agency for Preparatory Work for Indonesian Independence (BPUPKI) in 1945. Member of BPUPKI, Prof. M. Yamin, has expressed the opinion that the "Great Hall" (MA) needs to be given the authority to compare laws. But Prof. Soepomo rejected this opinion because he saw that the 1945 Constitution which was being drafted at that time did not adhere to the trias politica system or understanding and the conditions at that time did not have many legal scholars and had no experience of judicial review. During the validity period of the RIS constitution, Judicial Review was once one of the powers of the Supreme Court, but was limited to reviewing state laws against the constitution. This is regulated in Article 156, Article 157 and Article 158 of the Constitution of the United States of Indonesia (RIS). Whereas in the 1945 Constitution there is no law-examining institution because the law is seen as the implementation of people's sovereignty which is carried out by the government together with the DPR (Kepanitraan MK, 2010, p. 5).

According to Mahfud MD, initially, the idea of a judicial review considered several alternatives. Can the test be submitted to the MA. It can also be submitted to the People's Consultative Assembly (MPR) through the Working Body or submitted to the Constitutional Court as an institution that fully

conducts judicial review. The closest alternative to the Constitutional Court is even though it must be carried out with changes or amendments to the 1945 Constitution (MD, 1999, p. 330).

The amendments to the 1945 Constitution that led to the birth of the Constitutional Court were the result of the impetus for reform. There are several reasons that become the basis for demands for constitutional changes, namely (Harman, 2013, p. 278):

(1) The desire to strengthen the principle of constitutionalism, the enforcement of human rights, hereinafter referred to as human rights and people's sovereignty;
(2) The provisions of the 1945 Constitution have provided an opportunity for authoritarian power to grow and even govern for a long period of time;
(3) The 1945 Constitution is temporary because it was made hastily;
(4) The 1945 Constitution is no longer responsive to demands for change; and
(5) The 1945 Constitution is easy to be distorted by state officials.

The idea of forming the Constitutional Court in the reform era began to be put forward at the Second Session of the Ad Hoc Committee I of the Working Committee of the MPR RI, namely after all members of the Working Body of the MPR RI conducted a comparative study in twenty-one (21) countries regarding the constitution in 2000 (sutiyono, 2010, p. 27). Historically, the establishment of the Constitutional Court (MK) was initiated by the inclusion of the idea of the Constitutional Court in the constitutional amendments carried out by the People's Consultative Assembly (MPR) in 2001 as formulated in the provisions of Article 24 paragraph (2), Article 24C, and Article 7B of the Law. The 1945 Constitution was the result of the third amendment which was ratified on November 9, 2001 (MKRI, 2020). After the ratification of the Third Amendment to the 1945 Constitution, in order to wait for the formation of the Constitutional Court, the People's Consultative Assembly (MPR) determined that the Supreme Court (MA) would temporarily carry out the functions of the Constitutional Court as stipulated in Article III of the Transitional Rules of the 1945 Constitution resulting from the fourth amendment to the DPR and the government then drafted a law. Law regarding the Constitutional Court. After going through in-depth discussions, the DPR and the government jointly agreed to become a law, namely Law Number 24 of 2003 concerning the Constitutional Court on August 13, 2003 and was ratified by the President on that day (State Gazette Number 98 and an additional State Gazette Number 4316).

On August 15, 2003, the President through Presidential Decree (Keppres) No. 147/M of 2003 concerning the Constitutional Court, the constitutional judges for the first time followed by taking the oath of office for the constitutional judges to be sworn in at the state palace on August 16, 2003. is the transfer of cases from the Supreme Court to the Constitutional Court, on October 15, 2003 which marked the start of the operation of the Court's activities as a branch of judicial power according to the provisions of the 1945 Constitution (MKRI, 2020).

To date, there have been 78 countries that have adopted the Constitutional Court system which was established separately from the Supreme Court and Indonesia is the 78th country with the promulgation of Law Number 24 of 2003 on August 13, 2003, which has been operational since the swearing in of 9 (nine) oaths.) constitutional judges on August 16, 2003 which is now changed to Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (Siahaan, 2011, p. 4).

2. The relationship between the Constitutional Court, DPR and the Constitutional Court Decision is Positive Legislature

The relationship between the Constitutional Court and the DPR in the context of reviewing the Law (UU) is confirmed to be in the position of the Constitutional Court as a counterweight to the DPR in the context of its legal products. The following is a description of how the Constitutional Court

proportionally conducts judicial review of the Constitution, especially in this paper for the period 2003-2015.

Table of Decisions on Acceptance of Applications at the 2003-2015 Constitutional Court (Out of 400 Laws Requested for Testing)

No	Year	Decision Granted
1	2003	-
2	2004	11
3	2005	10
4	2006	8
5	2007	4
6	2008	10
7	2009	15
8	2010	18
9	2011	35
10	2012	30
11	2013	22
12	2014	29
13	2015	20

From the table above, quantitatively, the Constitutional Court is actually quite objective because of the 400 requests for judicial review, very few have been granted. In fact, once in 2003 it was not granted at all. Then, 2011 was the culmination of the Constitutional Court's decision which granted 35 applications. Meanwhile, in 2007 at least, only 4 applications were granted.

Interestingly, the relationship between the Constitutional Court and the DPR is heating up, not only in the context because the Constitutional Court annulled the law as a product of the DPR and the President, but also in some cases, the Constitutional Court was deemed to have exceeded its authority. Including the decision of the Constitutional Court which is positive legislation.

In general, based on the Constitutional Court Law, there are three models of the Constitutional Court's decision, namely (i) the Constitutional Court's decision which states that the application cannot be accepted; (ii) The Constitutional Court's decision which states that the application is rejected and (iii) The Constitutional Court's decision which states that the application is granted. These three decision models are commonly known in the judiciary and are often considered in the context of law examiners against the Constitution, which is a form of negative legislation, namely the Constitutional Court cancels a norm because it is contrary to the Constitution.

In addition to the above model of the Constitutional Court's decision, there are several decisions of the Constitutional Court whose decisions state that a norm is conditionally constitutional, both conditionally constitutional and conditionally unconstitutional. According to Martitah, a decision that is conditionally constitutional means that a norm in the law is considered constitutional if it is interpreted in accordance with what was determined by the Constitutional Court. Meanwhile, a conditionally unconstitional decision means that a norm in the law is considered contrary to the constitution if it is not in accordance with what is determined by the Constitutional Court. Decisions like this, called the Constitutional Court's decision, are positive legislation (Martitah, 2013, p. 134).

One example that emerged from the Constitutional Court's decision that was positive in legislation was the Constitutional Court's decision regarding the review of Law Number 42 of 2008 concerning the General Election of the President and Vice President (UU Pilpres) against the 1945

Constitution. The Constitutional Court's decision numbered 102/PUU-VII/2009. In the Constitutional Court's decision, it is stated in the decision, including:

Judge:

- *Granted the petition of the Petitioners in part;*
- *Stating that Article 28 and Article 111 of Law Number 42 of 2008 concerning the General Election of the President and Vice President (State Gazette of the Republic of Indonesia of 2008 Number 176, Supplement to the State Gazette of the Republic of Indonesia Number 4924) are constitutional as long as they are interpreted to include citizens who are not registered in the State Gazette of the Republic of Indonesia. DPT with the following terms and methods:*

    1. *In addition to Indonesian citizens registered in the DPT, Indonesian citizens who have not been registered in the DPT may exercise their right to vote by showing a valid Identity Card (KTP) or a valid passport for Indonesian citizens residing abroad;*
    2. *Indonesian citizens who use ID cards must be equipped with a Family Card (KK) or similar name;*
    3. *The use of voting rights for Indonesian citizens who use a valid ID card can only be used at the polling station (TPS) located in the RT/RW or similar names according to the address listed on their ID card;*
    4. *Indonesian citizens as mentioned in point 3 above, before exercising their right to vote, must first register with the local KPPS;*
    5. *Indonesian citizens who will exercise their right to vote with an ID card or passport 1 (one) hour prior to the completion of voting at the local TPS or Overseas TPS.*

The Constitutional Court's decision above is clearly called positive legislation. This is because the Constitutional Court's decision adds norms that are not regulated in the Presidential Election Law, especially Article 28 and Article 111 which do not open up opportunities for Indonesian citizens who are not registered in the DPT to exercise their right to vote. The Constitutional Court's decision means that Article 28 and Article 111 above are constitutional norms as long as they are interpreted to include citizens who are not registered in the DPT with the terms and methods including showing a valid KTP or valid passport for Indonesian citizens residing abroad. The above is a form of the Constitutional Court's decision with a conditionally constitutional formulation. The Constitutional Court's decision like this is carried out so that the human rights of citizens to vote and participate in democracy are not reduced by technical procedures for holding general elections.

In addition to the above model, the Constitutional Court often argues in its decisions that oblige the legislators to do something. This is not stated in the decision but in the legal considerations, especially in the opinion of the judge. Such as the opinion that the legislators should establish the Corruption Court Law as a special court for the criminal justice system for corruption (MK Decision No.012-016-019/PUU-IV/2006,p.289). Likewise, in the examination of the Criminal Code (KUHP), the Constitutional Court has also argued that requiring the renewal of the Criminal Code does not contain articles whose contents are the same or similar to Article 134, Article 136 bis, and Article 137 of the Criminal Code (MK Decision Number 013 -022/PUU-IV/2006, p. 61).

The Constitutional Court in its decisions, often deviates from the general teachings of the procedural law regarding ultra petita (a decision that exceeds what the applicant has requested). The reason, according to Bagir Manan, is that the ultra petita in the Constitutional Court's decision is justified as long as in the petition for a judicial review of the contents of the law, the petitioner includes the petition ex aequo et bono (to decide for justice). This is opposed by Moh Mahfud MD. The cancellation should not be carried out on articles that are not requested because it is the authority of the legislative body itself through legislative review (Rubaie, 2017, p. 97).

As a result of the decision model as described above, the DPR reacted quite strongly. In 2007, Almuzzamil Yusuf, for example, as Deputy Chairman of Committee III of the House of Representatives, once argued that it was the Constitutional Court's job to assess whether a law product was in line with the Constitution. Not judging whether the law is good from its side. Because for him, matters outside of that are the authority of the legislature as a law maker. Similarly, member of Commission III of the FPDI-P, Eva Kusuma Sundari, in the same year, came to the view that it was necessary to trim the authority of the Constitutional Court. Because according to him, how can the Constitutional Court, which only has nine judges, be able to annul the products of the law made by 550 members of the DPR together with the government. Likewise, Akil Mochtar from the Golkar Party faction saw and agreed that the MK's authority needed to be limited (Suroso, 2018, p. 272).

The polemic due to the Constitutional Court's decision which is considered to exceed its authority is a controversial debate that creates a stigma that there is competition between the DPR and the President and the Constitutional Court. One of them is according to constitutional law expert Irman Putra Sidin, stating that secretly there is competition between the DPR as positive legislature and the Constitutional Court as negative legislature. This happens because there are two views from the group that the DPR as a legislative body considers that the people's will must be carried out within the corridor of law. However, the Constitutional Court considered that the people's will must be realized and the obstacles must be removed. This has led to the emergence of pros and cons in the implementation of the Constitutional Court's decision which is positive legislation. The Constitutional Court is considered to have broken through the legislative door, where the Constitutional Court gives decisions that have the dimension of legal discovery or makes decisions that contain new norms, giving rise to concerns and accusations that the Court is a superbody institution, which can implement not only decisions to cancel norms but also involve decisions that are discovery law (Marselina, 2021, p. 101).

It is certain that the Constitutional Court has a reason for making a positive legislature model decision. In 2010, MK Judge Maria Farida Indrati stated that the basis of the MK's making rulings that had a regulatory nature was the element of urgency, the element of substantial justice and expediency. Likewise, Constitutional Justice Harjono in the same year (2010) stated that the basis for the Constitutional Court judges to make decisions is to resolve legal problems experienced by interpreting the 1945 Constitution. Therefore, the Constitutional Court's decision is not a matter of right or wrong but rather tends to realize justice and benefit. community (Martitah, 2013, p. 169).

In other words, the Constitutional Court wants to correct the legal tradition of the homeland which is dominated by the fulfillment of procedural justice. Justice is simply realizing the sound of the articles. Transformed by the Constitutional Court into substantial justice. More essential justice. Photographing and realizing what is considered by the public as "a sense of community justice".

Of course, this does not mean that the Constitutional Court in realizing substantial justice simply ignores procedural justice. The Constitutional Court does not have to be free or arbitrarily out of the provisions of the law and ignore procedural or statutory provisions. In the event that the law has clearly regulated and is deemed fair, the judge must adhere to the law. The Constitutional Court is allowed to make decisions that are outside the law only if the law hinders or hinders the Constitutional Court's belief in upholding justice (Marselina, 2021, p. 71).

1. The Constitutional Court's Decision Encourages the Realization of Substantial Democracy

Donny Gahral Adian wrote a philosophical reflection on the defects of procedural democracy. Donny wrote, procedurally, the law made by parliament was not problematic. This logic rests on parliament as the representative majority vote for legislative matters. As the philosopher Rousseau stated, the majority vote must represent the public interest. This means that laws made by parliament in a democratic regime are not a manifestation of individual or group interests (Adian, 2006, p. 97).

However, the problem is that the parliament resulting from democratic elections substantially does not necessarily represent the public interest. Especially when a republic is undergoing a democratic transition. It is worth reflecting on, procedural democracy with a majority vote does not guarantee the absence of sectarianism and the status quo in the political arena. It is possible that the parliament as a result of democratic elections is even cynical about democratic rights (Adian, 2006, p. 98).

Corrections to procedural democracy are urgently needed. Because there are many studies in post-colonial countries, including Indonesia, democracy stagnates because public interests are depoliticised. The public interest is considered solely as a matter of technocratic government or undergoes privatization in the market mechanism, if it is not absorbed by communalism, patronage and networks between elites who have privileges. This generally occurs because the quality of representation reflected in parliament is low as a result of the exclusion of people-politics from the institutionalization of democracy which only takes place to fulfill elite interests in an oligarchic configuration. Moreover, there is a tendency to focus on democracy being limited to only two aspects, namely electoral competition and good governance. There is no gap for wider public participation except at the invitation of mobilization from oligarchic circles either through political parties, parliaments or business networks (Samadhi, 2014, p. 419).

In the context above, the Constitutional Court has a fairly heavy mandate. First, the Constitutional Court not only ensures that the sound of the law is not diametrically opposed to the constitution, but also institutionalizes the spirit of the constitution that requires the establishment of the rule of law and democracy in the laws produced by parliament. Second, on the basis of the first argument, the Constitutional Court must have the foresight to ensure not only the approach to the text of the articles but also the issue of alignments and implications of a legal norm when applied to the wider public interest. This cannot be resolved through the Constitutional Court's decision which is merely negative legislation, but must also be accompanied by a positive legislative decision by the Constitutional Court. Thus, the Constitutional Court has a strategic role to fill the shortcomings of procedural democracy through a substantial democratic approach which is attached to a process of seeking substantial justice which requires that procedures do not necessarily deny justice. The procedure must be placed within the framework of the realization of substantial justice as one of the objectives of legal authenticity.

Substantial democracy actually wants to establish three things, namely (i) freedom; (ii) equality and (iii) justice. These three things often cannot be achieved through a procedural approach. In this context, the Constitutional Court's decision with a positive legislature character must be able to accommodate the three things above as principles in correcting the laws produced by the parliament. Because it is unavoidable, in the parliament in formulating laws, often the dominance of transactions of political interests is more prominent. The majoritarian principle becomes more advantageous. Meanwhile, on the other hand, such as justice or partiality to marginalized groups, they are marginalized. It is the duty of the Constitutional Court to correct it so that the balance of the law as a political product as well as a legal product can be guaranteed.

Of course, the Constitutional Court in giving decisions that are positive legislation must also be formulated in the procedural law, such as if there is no such model of the Constitutional Court decision, there will be a legal vacuum. In addition, the elements of expediency and justice as well as substantial democracy are the main references. This includes the Court's judges' caution in making selective decisions so that decisions are positive legislation that do not create new moral problems that harm the public interest.

Conclusion

The Constitutional Court's design was formed from the beginning to balance the parliament in the formation of laws. Parliament produces laws as part of public representation through elections. However,

the problem is that there is always a gap between public aspirations and what the parliament is doing. It is possible that the laws enacted by the parliament are contrary to public aspirations or even contrary to the constitution. Therefore, the Constitutional Court was formed to correct the shortcomings of the law on parliamentary products. There is a transformation from parliamentary supremacy to constitutional supremacy carried out by the Constitutional Court.

The problem is, the Constitutional Court is often limited by procedural law which requires the Court to decide only if it is negative legislation or cancels norms. The Court is not encouraged to make a positive legislative decision because it is considered the authority of the legislative body. In practice, the Constitutional Court cannot avoid the positive legislature decision model, especially to meet the demands of justice and substantial democracy. As in the Constitutional Court's decision regarding the possibility of citizens who are not registered in the Permanent Voter List (DPT) but are still allowed to vote by showing their Identity Card (KTP) due to the general election situation that is getting closer while without a breakthrough in making new norms in the Presidential Election Law, it will occur. deprivation of citizens' right to vote. Yet this is a form of human rights that must be guaranteed.

However, in order for the Constitutional Court's decision to be positive and not counter-productive, it is necessary to arrange the rules in the legislation related to the Constitutional Court's events so that on the one hand justice and substantial democracy are achieved but on the other hand the potential for arbitrariness can be avoided from the Constitutional Court.

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