

Judicial Activism vs. Electoral Justice: The Overlooked Purcell Principle in Indonesia

Rahmat Muhajir Nugroho*

*Faculty of Law Universitas Ahmad Dahlan, Yogyakarta, Indonesia,
rahmat.nugroho@law.uad.ac.id, ORCID ID 0000-0001-8567-1556*

Sobirin

*Faculty of Law Universitas Ahmad Dahlan, Yogyakarta, Indonesia,
sobirin.maliham@law.uad.ac.id, ORCID ID 0009-0004-8354-6160*

Reyhan Gymnastiar

*Faculty of Law Universitas Ahmad Dahlan, Yogyakarta, Indonesia,
reyhan2100024195@webmail.uad.ac.id, ORCID ID 0009-0002-0400-0238*

Abstract. The constitutional dilemma surrounding the authority of the Constitutional Court to review electoral laws during an ongoing election cycle reflects the complex tension between the protection of rights and the maintenance of legal order. The Constitutional Court's judicial activism, particularly when issuing landmark rulings close to or during electoral stages, often intensifies what constitutional law scholars refer to as the counter-majoritarian difficulty – a legitimacy problem that arises when a non-majoritarian judicial body invalidates laws enacted by democratically elected institutions. In this context, the Purcell Principle, a judicial restraint doctrine developed by the United States Supreme Court, offers an important framework to prevent last-minute changes to electoral regulations that may cause legal uncertainty and confusion among voters. However, directly transplanting this principle into Indonesia is problematic due to significant differences in legal systems, institutional structures, and the fragmented nature of its democratic processes. To address this challenge, this article proposes an adaptive concept called the limited Purcell principle, comprising four key pillars: (1) temporal limitation on the Constitutional Court's rulings during the election period; (2) postponement of the implementation of rulings which have fundamental legal consequences; (3) exceptions to safeguard the constitutional rights of citizens; and (4) screening mechanisms during the preliminary examination phase. This model aims to strike a balance between protecting constitutional rights and ensuring electoral stability, while encouraging the Constitutional Court to exercise its constitutional mandate more prudently and proportionally within the framework of Indonesia's constitutional democracy.

Keywords: Constitutional Court, Electoral Law, Fair Elections, Judicial Activism, Purcell Principle.

Abstrak. Dilema konstitusional seputar kewenangan Mahkamah Konstitusi untuk meninjau undang-undang pemilu selama siklus pemilu yang sedang berlangsung mencerminkan ketegangan yang kompleks antara perlindungan hak dan pemeliharaan ketertiban hukum. Unsur *judicial activism* Mahkamah Konstitusi, terutama ketika mengeluarkan putusan penting menjelang atau selama tahapan pemilu, sering kali memperparah apa yang disebut oleh para ahli hukum tata negara sebagai kesulitan kontra-mayoritas – masalah legitimasi yang muncul ketika badan peradilan non-mayoritas membatalkan undang-undang yang disahkan oleh lembaga yang dipilih secara demokratis. Dalam konteks ini, Prinsip Purcell, sebuah doktrin pembatasan yudisial yang dikembangkan oleh Mahkamah Agung AS, menawarkan kerangka kerja penting untuk mencegah perubahan mendadak pada peraturan pemilu yang dapat menyebabkan kebingungan pemilih dan ketidakpastian hukum. Namun, penerapan prinsip ini secara langsung ke Indonesia berpotensi menyebabkan masalah karena perbedaan yang signifikan dalam sistem hukum, struktur kelembagaan, dan sifat proses demokrasi yang terfragmentasi. Untuk mengatasi tantangan ini, artikel ini mengusulkan konsep adaptif yang disebut Prinsip Purcell Terbatas, yang terdiri dari empat pilar utama: (1) pembatasan temporal putusan MK selama periode pemilu; (2) penundaan pelaksanaan putusan yang berkekuatan hukum fundamental; (3) pengecualian untuk melindungi hak konstitusional warga negara; dan (4) mekanisme penyaringan pada tahap pemeriksaan pendahuluan. Model ini bertujuan untuk menyeimbangkan antara melindungi hak konstitusional dan memastikan stabilitas pemilu, sekaligus mendorong Mahkamah Konstitusi untuk menjalankan mandat konstitusionalnya secara lebih bijaksana dan proporsional dalam kerangka demokrasi konstitusional Indonesia.

Kata kunci: Mahkamah Konstitusi, Hukum Pemilu, Pemilu yang Adil, Judicial Activism, Prinsip Purcell.

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INTRODUCTION

The Purcell principle is a doctrine that maintains the consistency of the election regulations and prevents them from being changed arbitrarily, especially when the election process takes place. This principle emphasizes that courts must be careful when changing election rules in the period leading up to an election.¹ The rationale behind this principle is to prevent confusion among voters and election officials, which could undermine the legitimacy of the election results. This principle is relevant in various election contexts, including Indonesia, where election-related legal disputes often arise in the run-up to election day. The Purcell Principle was first established in the U.S. Supreme Court decision in *Purcell v. Gonzalez* (2006).² This principle arose from the need to ensure stability in the electoral process, as sudden changes to election rules or procedures can create uncertainty and confusion among voters and election administrators. Reflecting the principle of legal certainty, the Purcell principle ensures that election rules remain unchanged throughout the election process, so that election participants have a fair and equal opportunity to adapt to existing regulations.

In Indonesia, legal controversies often arise regarding changes to election regulations, including issues such as quota calculation for female candidates,³ presidential nomination requirements,⁴ and the parliamentary seat threshold.⁵ The Constitutional Court (MK), which has the authority to conduct judicial reviews of laws⁶ – including the election law – has issued several controversial rulings during the ongoing election phase. These rulings have sparked public debate and suspicion that the Constitutional Court's authority has been used to advance certain political interests. One of the most controversial rulings is the Constitutional Court Decision Number 90/PUU-XXI/2023, which changes the age requirements for presidential and vice presidential

¹ Harry B Dodsworth, “The Positive and Negative Purcell Principle,” *Utah Law Review* 5, no. 5 (2022): 1081–1134.

² Dodsworth.

³ Ogie Nuggraha and Durohim Amnan, “Distorsi Keterwakilan Perempuan Melalui Pasal 8 Ayat (2) PKPU Nomor 10 Tahun 2023,” *Jurnal Hukum Dan Sosial Politik* 1, no. 4 (2023), <https://doi.org/10.59581/jhsp-widyakarya.v1i4.1446>.

⁴ Rahmat Muhajir Nugroho et al., “The Presidential Candidacy Threshold in Indonesia and Its Implications,” *International Journal of Social Science Research and Review* 5, no. 8 (2022), <https://doi.org/10.47814/ijssrr.v5i8.513>.

⁵ Mahesa Rannie, Retno Saraswati, and Fifiana Wisnaeni, “Does the Reform of the Parliamentary and Presidential Threshold Strengthen the Presidential System in Indonesia?,” *Srinwijaya Law Review* 8, no. 1 (2024), <https://doi.org/10.28946/slrev.Vol8.Iss1.3157.pp133-151>.

⁶ Dinda Agustin Wulandari and Winarno Budyatmojo, “Pengujian Undang-Undang (Judicial Review) Dalam Kewenangan Mahkamah Konstitusi,” *Sovereignty* 1, no. 4 (2022).

candidates in the 2024 election.⁷ The ruling, issued days before candidate registration, specifically reviewed Article 169 (q) of Law Number 7 of 2017 on Elections, which initially required candidates to be at least 40 years old. The ruling changes this requirement, allowing candidates under 40 years old to run.⁸ As a result, this decision provided an opportunity for Gibran Rakabuming Raka, the eldest son of President Joko Widodo, who was 35 years old at the time, to be proposed as a candidate for Vice President in the 2024 Election. This decision drew widespread criticism for being politically motivated and resulted in the dismissal of Anwar Usman, Gibran's uncle, as Chairman of the Constitutional Court's Honorary Council (MKMK), as he was considered to have a conflict of interest in the case.⁹ The decision was deemed to violate the principles of impartiality, integrity, competence, independence, and judicial ethics.¹⁰ This court decision shows how changes in election laws during the election process can create legal uncertainty and give rise to allegations of legal manipulation for pragmatic political interests. In this context, the idea of applying a precautionary principle to the Court when deciding cases pertaining to the election law, known as the Purcell principle, is open. This principle prohibits the court from changing the election rules during the election period in order to ensure legal certainty and justice and to prevent possible allegations of legal manipulation that could benefit or harm certain candidates. Therefore, it is important to consider the application of this principle in the decision-making process of the Constitutional Court.

The Constitutional Court's authority to review election laws in the midst of an ongoing electoral process has long been a constitutional dilemma in Indonesia. Judicial activism, characterized by the Constitutional Court's shift from a "negative legislator" to a "positive legislator," often results in decisions that substantially alter the "rules of the game" for elections. This situation exacerbates the problem referred to by

⁷ Arif Sugitanata, "Dinamika Keputusan Mahkamah Konstitusi Terkait Batas Usia Calon Presiden Dan Wakil Presiden," *Qaumiyyah: Jurnal Hukum Tata Negara* 4, no. 2 (2023), <https://doi.org/10.24239/qaumiyyah.v4i2.79>.

⁸ Elva Imeldatur Rohmah and Zainatul Ilmiyah, "Dinamika Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 Tentang Persyaratan Usia Calon Presiden Dan Wakil Presiden," *PROGRESIF: Jurnal Hukum* 8, no. 1 (2024): 100–131.

⁹ Cantika Dhea Marshanda Zulqarnain, Nararya Salsabila Zamri, and Raesa Mahardika, "Analisis Pelanggaran Kode Etik Dalam Kasus Pemberhentian Ketua Mk Anwar Usman Terkait Putusan Batas Usia Capres Dan Cawapres Pada Pemilu 2024," *Ilmu Hukum, Sosial, Dan Humaniora* 1, no. 2 (2023).

¹⁰ Sri Pujiarti, "MKMK Berhentikan Anwar Usman Dari Jabatan Ketua Mahkamah Konstitusi," Www.Mahkamahkonstitusi.Go.Id, 2023.

scholars as the counter-majoritarian difficulty¹¹ – a legitimacy issue that arises when an unelected judicial institution overturns the legal products of a democratically elected representative body. As a result, legal stability and certainty for election organizers and participants are at stake.

The Purcell principle¹² prohibits any changes to the election laws too close to election day or election stages to avoid confusion among voters and election officials. By preventing last-minute amendments to election rules, this principle upholds legal certainty for all election participants and maintains election integrity. Although the principle is useful in terms of legal certainty in election regulations, on the other hand, the Purcell principle also has limitations, as it can hinder crucial improvements to the election system during the election process. A notable example occurred in Wisconsin, United States, where strict voter identification requirements were challenged in court because they disenfranchised college students. However, the district court refused to consider whether these changes unfairly restricted voting rights.¹³ Instead, the court upheld the Purcell principle, stating that the critical issue is not whether the decision favors the plaintiff or the defendant, but rather whether the decision could create confusion before the election. This strict application of the principle limits the legal intervention that could protect the right to vote. Therefore, the Purcell principle has both advantages and disadvantages. The legal certainty that is sought to be achieved may create injustice on one end, while the electoral justice that is also sought to be achieved may give rise to uncertainty on the other end.

The need to address the tension between judicial intervention and electoral stability has sparked academic discourse on the application of the Purcell principle in Indonesia. In the existing research landscape, preliminary studies by Azmi Fathu Rohman *et.al.*¹⁴ assess the consistency of the Constitutional Court in applying the logic

¹¹ David Landaut and Rosalind Dixon, “Abusive Judicial Review: Courts against Democracy,” *Abusive Judicial Review: Courts against Democracy* 53, no. 3 (2020): 1313–88, <https://heinonline.org/HOL/License>.

¹² Danika Elizabeth Watson, “Free and Fair: Judicial Intervention in Elections Beyond The Purcell Principle and Anderson-Burdick Balancing,” *Fordham Law Review* 90, no. 2 (2021).

¹³ Ruoyun Gao, “Why The Purcell Principle Should Be Abolished,” *Duke Law Journal* 71, no. 5 (2022).

¹⁴ Azmi Fathu Rohman, Naufal Rizqiyanto, and Muhammad RM Fayasy Failaq, “Relevansi Dan Konsistensi Penerapan Prinsip Purcell Oleh Mahkamah Konstitusi Dalam Pemilihan Umum,” *Lex Renaissance* 9, no. 2 (January 13, 2025): 450–77, <https://doi.org/10.20885/JLR.vol9.iss2.art9>.

of the Purcell principle in various electoral cases. Although the study found inconsistencies in the Constitutional Court's decisions, the study tends to be evaluative and does not offer institutional or normative explanations for these inconsistencies. A similar approach was taken by Dian Agung Wicaksono and Garuda Era Ruhpinesthi,¹⁵ who traced the early emergence of argumentative patterns resembling the Purcell principle in the Constitutional Court's rulings—particularly in references to electoral stability and legal certainty—although the principle itself was not explicitly mentioned. However, their contribution remains at the level of jurisprudential identification, without delving further into the question of how this principle can be institutionalized within Indonesia's constitutional system.

In international literature, the discourse on this principle is also lively and controversial. Richard L. Hasen¹⁶ sharply criticizes the excessive use of the Purcell principle in US courts, arguing that it has become a tool for avoiding judicial responsibility rather than a principle-based standard. Although Hasen¹⁷ advocates for limiting the application of this principle, his argument remains within the specific context of the adversarial electoral litigation system in the US and does not address how this principle could be adapted to different legal systems—particularly in countries where the constitutional court acts as a positive legislator, such as Indonesia. Harry B. Dodsworth¹⁸ developed the idea of two forms of the Purcell principle: a negative version that prohibits changes to rules ahead of elections, and a positive version that requires courts to act when election rules seriously violate voting rights. However, Dodsworth's¹⁹ framework lacks clear operational criteria to distinguish between the two. More radically, Ruoyun Gao²⁰ calls for the complete abolition of this principle, arguing that procedural stability should not trump substantive justice, especially in cases involving unconstitutional election laws. However, Gao's position

¹⁵ Dian Agung Wicaksono and Garuda Era Ruhpinesthi, "Inisiasi Penerapan Purcell Principle Oleh Mahkamah Konstitusi Dalam Pengujian Undang-Undang Terkait Pemilihan Umum," *Jurnal Konstitusi* 22, no. 1 (March 1, 2025): 109–36, <https://doi.org/10.31078/jk2216>.

¹⁶ L. Hasen Richard, "Reining in The Purcell Principle," *SSRN* 43, no. 2 (2016).

¹⁷ Richard.

¹⁸ Dodsworth, "The Positive and Negative Purcell Principle."

¹⁹ Dodsworth.

²⁰ Gao, "Why The Purcell Principle Should Be Abolished."

tends to overlook the technical and logistical complexities of election administration, which could raise concerns about institutional legitimacy and democratic stability.²¹

Although these studies have successfully mapped the relevance, inconsistencies, and criticisms of the Purcell principle, the discussion tends to stop at the importance of judicial self-restraint (self-restraint by judges) in ethical or jurisprudential terms. This is where the novelty of this article lies. This research not only proposes that judges exercise self-restraint but also offers a more binding normative solution: the formal adoption of the “limited Purcell principle” into positive legal norms. The main idea is to limit the authority of the Constitutional Court not through judicial discretion alone, but through the formulation of explicit norms in the Election Law, the Judicial Power Law, and the Constitutional Court Law. Thus, this article seeks to fill a gap in the literature by formulating a conceptual framework that can be implemented legally. Considering both sides—the need for legal certainty and electoral justice on one hand, and the protection of citizens' constitutional rights on the other—this article aims to examine the possibilities of limited application of the Purcell principle in the Indonesian legal system. This research will formulate a model that can balance these competing values within the framework of Indonesia's constitutional democracy. In the context of Indonesia's constitutional system, the Purcell principle must be understood contextually by linking it to the constitutional rights of citizens to vote and be elected as guaranteed in Article 28D paragraph (1) and Article 22E paragraph (1) of the 1945 Constitution. These rights represent the manifestation of popular sovereignty, which places elections as the primary instrument of democracy. Therefore, any legal restriction on citizens' access to the Constitutional Court for the judicial review of laws related to elections must be assessed in light of constitutional justice and the principle of proportionality. In Indonesian constitutional theory, electoral justice is not merely procedural or technocratic in nature, but also embodies substantive values such as open access to remedies, guarantees of fair treatment, and protection of voting rights as fundamental rights. Thus, the adoption of the Purcell principle cannot be implemented mechanically, but must be interpreted philosophically and normatively in alignment

²¹ Gao.

with the ideals of national law, especially in balancing electoral stability with the protection of constitutional rights.

Pursuant to the background described above, this study aims to: (1) analyze the urgency of applying the Purcell principle as a doctrine of judicial restraint in dealing with the Constitutional Court's activism in reviewing election-related laws; (2) examine the ethical dilemma that arises between upholding individual justice and maintaining collective stability in Indonesia's electoral justice system; (3) formulate a "limited Purcell principle" model as a middle ground (judicial wisdom) that can be adopted by the Constitutional Court to achieve a more balanced electoral justice.

METHODOLOGY

This research used a normative legal research method. This method was chosen because the object of the research is the principles and principles of law, legal rules, legal theory, and legal doctrine.²² The data sources used are secondary data sources in the form of primary, secondary, and tertiary legal materials. Primary legal materials consist of laws and regulations, as well as several decisions of the Constitutional Court. Secondary legal materials include reference books, journal articles, and research reports. Tertiary legal materials include English dictionaries and legal dictionaries. The object of this research is the decision of the Constitutional Court on the judicial review of the Election Law. This research used the legislative approach, conceptual approach, and comparative approach. Data collection was conducted through literature review, while data analysis used qualitative descriptive analysis.

RESULTS AND DISCUSSION

The analysis in this section examines the constitutional dilemma regarding the authority of the Constitutional Court to review election laws in the midst of an ongoing election. The discussion is structured systematically to build a solid legal

²² Yati Nurhayati, Ifrani Ifrani, and M. Yasir Said, "Metodologi Normatif Dan Empiris Dalam Perspektif Ilmu Hukum," *Jurnal Penegakan Hukum Indonesia* 2, no. 1 (2021), <https://doi.org/10.51749/jphi.v2i1.14>.

analysis framework, starting from the identification of normative issues, exploring ethical dilemmas, to formulating alternative solutions in the form of a contextual Purcell principle model.

Judicial Activism in Reviewing Election Laws and the Urgency of the Purcell Principle

As part of the judicial power, the constitutional function of the Constitutional Court is to uphold law and justice.²³ This function is carried out through its authority to examine, try, and decide certain cases based on constitutional considerations. Thus, every decision of the Constitutional Court is an interpretation of the Constitution.²⁴

One of the main authorities of the Constitutional Court is to review laws (*Undang-Undang*) against the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution).²⁵ In addition, the Constitutional Court also decides on disputes between state institutions, dissolutions of political parties, and election disputes, as regulated in Article 24C of the 1945 Constitution.²⁶ The Constitutional Court is also tasked with deciding on the opinion of the House of Representatives (DPR) regarding alleged violations committed by the President and/or Vice President against the Constitution.²⁷ The purpose of judicial review is to assess whether a law is consistent with the constitution.²⁸

The role of the Constitutional Court as guardian of the constitution has undergone significant evolution. Its authority is no longer limited to that of a “negative legislator” that merely invalidates norms, but has developed into a “positive legislator” that

²³ Gayatri Dyah Suprobawati Adna Maurilla Maharani, “Mahkamah Konstitusi: Tinjauan Kewenangan Dan Fungsi Dalam Negara Hukum Demokratis Berdasarkan UUD 1945,” *Jurnal Demokrasi Dan Ketahanan Nasional* 1 (2022).

²⁴ Dodi Haryono, “Metode Tafsir Putusan Mahkamah Konstitusi Dalam Pengujian Konstitusional Undang-Undang Cipta Kerja,” *Jurnal Konstitusi* 18, no. 4 (2022), <https://doi.org/10.31078/jk1843>.

²⁵ Tanto Lailam and M. Lutfi Chakim, “A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences,” *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023), <https://doi.org/10.22304/pjih.v10n2.a1>.

²⁶ Ibnu Sina Chandranegara, *Hukum Acara Mahkamah Konstitusi*, Cetakan 1 (Jakarta: Sinar Grafika, 2021).

²⁷ Chandranegara.

²⁸ Mohammad Mahrus Ali, *Tafsir Konstitusi*, Cetakan ke (Depok: Rajawali Pers PT RajaGrafindo Persada, 2019). Ni'matul Huda, Dodik Setiawan Nur Heriyanto, dan Allan Fatchan Gani Wardhana, “The urgency of the constitutional preview of law on the ratification of international treaty by the Constitutional Court in Indonesia”, 7 (9) *Heliyon* (2021), 4, <https://doi.org/10.1016/j.heliyon.2021.e07886>.

helps shape the law through its decisions.²⁹ This shift is a manifestation of judicial activism, where judges actively fill legal gaps to address societal dynamics.³⁰

Although often necessary, this practice of judicial activism triggers fundamental tensions when it intersects with electoral issues. Rulings that change the “rules of the game” just before or in the middle of an electoral process directly exacerbate what is known in constitutional law as the counter-majoritarian difficulty.³¹ This theory highlights the legitimacy dilemma faced by a judicial institution that is not democratically elected (non-majoritarian) when it overturns legal products of a political representative institution (majoritarian).³²

This case underscores the urgency of adopting a doctrine of judicial caution such as the Purcell principle. This principle, which originated from the jurisprudence of the U.S. Supreme Court, essentially prohibits courts from changing election regulations shortly before election day in order to prevent confusion among voters and maintain the integrity of the process.³³ In the Indonesian context, where judicial review often becomes a battleground for political struggles, the Purcell principle offers an important framework to encourage the Constitutional Court to exercise judicial restraint in a more measured manner.³⁴ Thus, the discourse on expanding the Constitutional Court's authority as a positive legislator must be directly linked to criticism of pre-election intervention practices, which form the basis of the Purcell principle's relevance.

In the last 11 years, the role of the Constitutional Court as a positive lawmaker has become increasingly prominent. This began with Decision Number 48/PUU-IX/2011, which expanded the authority of judges to issue regulatory decisions. As a result, 107 out of 198 decisions (54%) had a positive impact on legislation. However, this practice

²⁹ Martitah, *Mahkamah Konstitusi: Dari Negative Legislature Ke Positive Legislature, Mahkamah Konstitusi: Dari Negative Legislature Ke Positive Legislature*, vol. 3, 2023.

³⁰ Raden Muhammad Mahradi et al., “The Decision of the Constitutional Court Which Is Positive Legislature and Their Implications on Substantial Democracy in Indonesia,” *International Journal of Multicultural and Multireligious Understanding* 8, no. 12 (2021), <https://doi.org/10.18415/ijmmu.v8i12.3269>.

³¹ Landaut and Dixon, “Abus. Judic. Rev. Court. against Democr.”

³² Landaut and Dixon.

³³ Nicholas Stephanopoulos, “The Purcell Principle and the Federal Courts. University of Chicago Law Review Online, 84, 116–129,” *University of Chicago Law Review Online* 84 (2016): 116–29.

³⁴ Rosalind Dixon and David Landau, “Tiered Constitutional Design,” in *George Washington Law Review*, vol. 86, 2018.

is still ineffective because only 26 decisions have been implemented.³⁵ Although it has not been fully complied with, the Constitutional Court continues to issue norm-forming decisions to address legal gaps, where the cancellation of a single norm would give rise to constitutional problems in its application.³⁶

However, in certain circumstances, courts must refrain from issuing decisions that interfere with legislative authority by applying the principle of judicial limitation. This principle requires courts to refrain from making decisions that interfere with the legislative domain.³⁷ In Indonesia, judicial review by the Constitutional Court not only functions as a judicial review but also triggers tension in the separation of powers.³⁸ The interaction between the judiciary and the legislature in judicial review depends on the philosophy of the Constitutional Court. Therefore, to maintain constitutionalism and democracy, the Constitutional Court must provide limitations to its decisions.³⁹

In line with the principle of judicial restraint, the Purcell principle has emerged as an interesting discourse to ensure legal certainty and limit judicial intervention in election law. This principle originates from the U.S. Supreme Court case *Purcell v. Gonzalez* (2006), which held that courts may not issue decisions that change election rules immediately before an election. In *Purcell v. Gonzalez*, the U.S. Supreme Court overturned a Ninth Circuit Court decision that temporarily blocked Arizona's strict voter identification law.⁴⁰ The Supreme Court criticized the Ninth Circuit Court for failing to provide clear reasoning and issuing a ruling so close to the election, which risked confusing voters and election officials. The Purcell principle thus seeks to ensure electoral stability by prohibiting last-minute judicial changes to election laws, which can lead to chaos and legal uncertainty.

³⁵ Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, "Positive Legislature Decisions by the Constitutional Court," *Jurnal Konstitusi* 20, no. 4 (2023), <https://doi.org/10.31078/jk2044>.

³⁶ Ni'matul Huda, *Kekuatan Eksekutorial Putusan Mahkamah Konstitusi*, Cetakan 1 (Yogyakarta: FH UII Press, 2018).

³⁷ Syaifullahil Maslul, "Judicial Restraint Dalam Pengujian Kewenangan Judicial Review Di Mahkamah Agung," *Jurnal Yudisial* 15, no. 3 (2023), <https://doi.org/10.29123/jy.v15i3.496>.

³⁸ Radian Salman, Sukardi Sukardi, and Mohammad Syaiful Aris, "Judicial Activism or Self-Restraint: Some Insight into The Indonesian Constitutional Court," *Yuridika* 33, no. 1 (2018), <https://doi.org/10.20473/ydk.v33i1.7279>.

³⁹ Salman, Sukardi, and Aris.

⁴⁰ Richard, "Reining in The Purcell Principle."

However, the Purcell principle has also faced criticism for being too rigid and failing to accommodate urgent election law reforms that protect voters' rights. In general, the Court has interpreted the principle as a bright-line rule prohibiting any judicial intervention close to an election and has used the principle exceptionally well to enforce voting restrictions. The U.S. Supreme Court has often interpreted it as a strict rule prohibiting judicial intervention close to an election, especially to enforce voting restrictions. Critics argue that the principle should not be a blanket justification for maintaining restrictive voting laws.⁴¹ For example, in the *Republican National Committee v. Democratic National Committee* (formerly *Democratic National Committee v. Bostelmann*), a Wisconsin district court issued a temporary injunction extending the deadline to request and receive absentee ballots. However, the U.S. Supreme Court, in a 5–4 decision, ruled that this extension violated the Purcell principle.⁴²

Courts have interpreted the Purcell principle as prohibiting judicial intervention in the period leading up to an election and have applied it to restrict voting rights. When parties seek legal relief to suspend or modify these types of election requirements, courts have sometimes denied their requests based on the Purcell principle. The Purcell principle states that courts may not change election rules “on the eve of an election.” While last-minute changes can certainly lead to more confusion and chaos in elections, the ambiguity of the Purcell principle leads to even more political and social problems.⁴³ When parties seek to suspend or change election requirements through legal action, courts have sometimes denied their requests under the Purcell Principle. This principle states that courts may not change election rules “on the eve of Election Day.” While last-minute changes can certainly cause confusion and disruption in elections, the ambiguity of the Purcell Principle has, in turn, created greater political and social challenges.

In Indonesia, the discourse on the application of the Purcell principle explicitly appears in the Constitutional Court Decision Number 60/PUU-XXII/2024, as

⁴¹ Dodsworth, “The Positive and Negative Purcell Principle.”

⁴² Watson, “Free and Fair: Judicial Intervention in Elections Beyond The Purcell Principle and Anderson-Burdick Balancing.”

⁴³ Gao, “Why The Purcell Principle Should Be Abolished.”

conveyed by Constitutional Justice Guntur M. Hamzah in a dissenting opinion. Guntur recommends that the Constitutional Court should start applying the Purcell principle to refrain from changing election rules close to the election period, except in special circumstances that could damage the principle of justice itself. Moreover, the public and political parties have begun to exploit legal loopholes by filing judicial review requests ahead of voting day.⁴⁴ This argument is justified, because several Constitutional Court decisions have changed election rules in the middle of election. Decision Number 60/PUU-XXII/2024, for example, lowered the threshold for regional head nominations from the original provision of a minimum of 20% of House of Representatives seats or 25% of valid votes to a minimum of 6.5% to 10%, depending on the number of registered voters.⁴⁵

Unfortunately, Guntur M. Hamzah's argument is inconsistent, the Purcell principle should have been applied when deciding case Number 90/PUU-XXI/2023 which changed the provisions on the age of presidential and vice presidential candidates. At that time, Guntur M. Hamzah supported the application, so that there was a change in the rules when the election was underway. Therefore, the Constitutional Court judges must be consistent in deciding when to exercise judicial restraint and when to exercise active judicial control. Clear, measurable, and accountable regulations are needed so that the Constitutional Court can apply the Purcell principle while still ensuring legal certainty and justice.

Changes to election regulations during the election process have far-reaching consequences for candidates, voters, and election organizers, potentially creating legal uncertainty and unfairness. Candidates may struggle to adjust to new rules, while the General Election Commission (KPU) must enforce regulations that have not been officially revised. A notable example is when the KPU accepted Prabowo and Gibran's

⁴⁴ Mahkamah Konstitusi, “Putusan Mahkamah Konstitusi Nomor No. 60/PUU-XXII/2024” (2024), file:///D:/Downloads/putusan_mkri_11003_1724130779 (3).pdf.

⁴⁵ Jicn Jurnal, Cendikiawan Nusantara, and Hasim Hartono, “Urgensi Putusan MK Nomor 60 / PUU-XXII / 2024 Terhadap Penyelenggaraan Pilkada Tahun 2024 The Urgency Of Mk Ruling Number 60 / PUU-XXII / 2024 Regarding The Organization Of The 2024 Election,” no. September (2024): 5374–83. Al Mas’udah, “The Presidential Threshold As An Open Legal Policy In General Elections In Indonesia”, *Prophetic Law Review*, 2(1) (2022), 37–58. <https://doi.org/10.20885/PLR.vol2.iss1.art3>

candidacy despite pending legal changes, leading to sanctions from the Election Organizer Honorary Council (DKPP) for violating ethical standards.⁴⁶

Changes in legal rules in the middle of the election process can disrupt legal order, thus contradicting the main function of law, which is to create stability. In the formation of legal rules, the main principle that is built to create clarity regarding legislation is the principle of legal certainty. The idea of the principle of legal certainty was initially introduced by Gustav Radbruch in his book entitled *Einführung in die Rechtswissenschaften*. Radbruch wrote that in law there are three basic values: Justice (*Gerechtigkeit*), Benefit (*Zweckmassigkeit*) and Legal Certainty (*Rechtssicherheit*).⁴⁷

The sudden change in election regulations also impacted KPU's performance. The Constitutional Court's ruling on nomination requirements left the KPU with no time to change the KPU regulations (PKPU), as they had to consult with the House of Representatives first. With the registration deadline approaching, the KPU was forced to accept presidential candidates temporarily, which ultimately resulted in DKPP sanctions.⁴⁸ Therefore, the application of the Purcell principle finds its relevance in preventing broad implications that are even detrimental to organizers, as experienced by the KPU during the 2024 Election.

The Purcell principle underscores the importance of judicial consistency in decision-making, as inconsistency undermines public trust and institutional credibility.⁴⁹ Therefore, it is urgent to integrate the Purcell principle into the election regulations to uphold legal certainty and electoral justice. However, the Purcell principle should not be adopted into the legal system without clear limitations and regulations. The application of this precautionary principle must be done carefully.

⁴⁶ Vitorio Mantalean dan Icha Rastika, "Ketua KPU Diputus Langgar Etik Karena Loloskan Pencalonan Gibran," Kompas.com, 2024, <https://nasional.kompas.com/read/2024/02/05/11151871/ketua-kpu-diputus-langgar-etik-karena-loloskan-pencalonan-gibran>.

⁴⁷ Mario Julyano and Aditya Yuli Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum," *CREPIDO* 1, no. 1 (2019), <https://doi.org/10.14710/crepido.1.1.13-22>.

⁴⁸ Vitorio Mantalean dan Icha Rastika, "Ketua KPU Diputus Langgar Etik Karena Loloskan Pencalonan Gibran."

⁴⁹ Aep Hendar Cahyad et al., "2024 Elections and the Power Struggle: Legal and Political Perspectives," *Formosa Journal of Sustainable Research (FJSR)* 3, no. 6 (2024): 1317–32, <https://journal.formosapublisher.org/index.php/fjsr>.

Individual Justice versus Collective Stability: Ethical Dilemmas in Election Law Enforcement

The electoral justice system is an essential instrument for upholding the rule of law and ensuring the full implementation of democratic principles through free, fair, and honest elections. The electoral justice system is designed to prevent and identify electoral irregularities, serves as a mechanism to correct such irregularities, and as a means to sanction violators.⁵⁰ Actions, procedures, or decisions that violate election laws are considered election violations. Since such violations can lead to election disputes, the electoral justice system plays an important role in preventing disputes and ensuring fair elections.

The application of the Purcell principle in the Constitutional Court's authority to review election laws can help reduce electoral injustice caused by petitioners who seek to change election rules for their interests. Electoral justice is the basis of a modern democratic electoral system based on the principles of protecting the rights and freedoms of citizens as well as the equal access for all to the electoral process based on the principles of transparency, impartiality, and fairness.⁵¹

The Purcell principle serves to temporarily limit the authority of the Constitutional Court, so that it cannot issue significant decisions during an election. This will also encourage lawmakers to ensure that election laws comprehensively regulate all aspects of elections, so that there are no sudden changes after the election process begins. There must be no amendments to election-related regulations, especially at the legislative level, during the election period. This includes KPU regulations, Election Supervisory Body regulations, and DKPP regulations, all of which must remain in line with the election law. These limitations are necessary to maintain election stability, legal certainty, and justice.

The nature of the Constitutional Court's decision is that it applies forever, meaning that the Constitutional Court's decision is valid after being read out by the Panel of

⁵⁰ Kamal Fahmi Kurnia, "Menakar Penegakan Hukum Praktik Politik Uang (Money Politic) Dalam Mewujudkan Keadilan Pemilu (Electoral Justice)" 25, no. 2 (2024): 80–100.

⁵¹ Alexey Szydlowski, "The Brazilian Electoral Justice," *Legal Concept*, no. 4 (2021), <https://doi.org/10.15688/lc.jvolsu.2021.4.10>.

Judges in a plenary session.⁵² The Constitutional Court's decision is not retroactive, but prospective. The nature of the Constitutional Court's decision has the same meaning as the Purcell principle which requires court decisions on changes to election rules to apply for the future. The court must be careful and must not change the election rules even during the election stages. The Purcell principle limits the court from intervening in the election rules that are currently in effect because it can cause confusion for voters and organizers. In this case, the Purcell principle is relevant to the prospective nature of the Constitutional Court's decision.

Dian Agung argues that the concept of the Purcell principle is suitable to be applied to the authority of the Constitutional Court in reviewing laws because there is a conformity in the essence of the decision between the Purcell principle and the Constitutional Court's decision as a legal consequence.⁵³ However, there is a difference in the validity period, namely that the Constitutional Court's decision is valid from the time it is read, while the Purcell principle is interpreted to be valid outside the election stage or the next election.⁵⁴

However, the Purcell principle is not only seen from one aspect related to the implementation of the Constitutional Court's decision which is prospective in nature, which means that the Constitutional Court's decision will be effective after the election or for the upcoming election. This interpretation will close the possibility of weaknesses in the Purcell principles, namely the loss of citizens' constitutional rights protection during the election period due to the enactment of the election law. The norms of the law are binding everyone, and during the election stages, these norms may violate citizens' constitutional rights. If the risk of violations is allowed to occur and the restoration of their rights is postponed for five years, can it be justified constitutionally?

⁵² M. Agus Maulidi, "Menyoal Kekuatan Eksekutorial Putusan Final Dan Mengikat Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 2 (2019): 339, <https://doi.org/10.31078/jk1627>.

⁵³ Wicaksono and Ruhpinesthi, "Inisiasi Penerapan Purcell Principle Oleh Mahkamah Konstitusi Dalam Pengujian Undang-Undang Terkait Pemilihan Umum."

⁵⁴ Wicaksono and Ruhpinesthi.

In modern constitutional law, the conflict between two constitutional values that are both good often gives rise to a tragic choice.⁵⁵ This is not simply a conflict between right and wrong, but rather a conflict between two opposing forms of good: individual justice and collective stability. The application of the Purcell principle reflects this classic dilemma. It is a fundamental ethical dilemma: a conflict between two equally noble constitutional values, namely individual justice and collective stability.

The Purcell principle states that courts should not change election rules close to election day, in order to prevent voter confusion and maintain the integrity of the electoral process. However, on the other hand, when a citizen successfully demonstrates that his or her right to vote has been violated by a legal norm, a delay in restoring that right raises serious questions from the perspective of procedural fairness and human rights.

This condition explores the contrasting ethical frameworks between utilitarianism and deontology in the context of justice and individual rights. Utilitarianism advocates actions that maximize overall happiness,⁵⁶ which could potentially justify delaying the restoration of rights to maintain electoral stability. In contrast, deontology emphasizes the inviolability of individual rights,⁵⁷ by asserting that courts must restore voting rights when there are violations. This dichotomy raises the ethical dilemma of prioritizing systemic stability over individual justice, a concept further elaborated by the tragic choice framework, Sandel and Nussbaum.⁵⁸

Utilitarianism focuses on maximizing overall welfare and justifies actions that may violate individual rights if they benefit the majority.^{59,60}, and it may also conflict with

⁵⁵ Dale Snauwaert, "Social Justice and the Philosophical Foundations of Critical Peace Education: Exploring Nussbaum, Sen, and Freire," *Journal of Peace Education* 8, no. 3 (December 2011): 315–31, <https://doi.org/10.1080/17400201.2011.621371>.

⁵⁶ Endang Pratiwi, Theo Negoro, and Hassanain Haykal, "Teori Utilitarianisme," *Jurnal Konstitusi* 19, no. 2 (2022).

⁵⁷ Piers Rawling, *Deontology* (Cambridge University Press, 2023), <https://doi.org/10.1017/9781108581196>.

⁵⁸ Snauwaert, "Social Justice and the Philosophical Foundations of Critical Peace Education: Exploring Nussbaum, Sen, and Freire."

⁵⁹ Ben Eggleston, "Utilitarianism," in *Philosophy* (Oxford University Press, 2022), <https://doi.org/10.1093/obo/9780195396577-0431>.

⁶⁰ David Weinstein, "Utilitarianism," in *The Encyclopedia of Political Thought* (Wiley, 2014), 3762–65, <https://doi.org/10.1002/9781118474396.wbep1019>.

human rights, as seen in cases where rights are sacrificed for greater social efficiency.⁶¹ While deontology asserts that individual rights are absolute and must be upheld regardless of the consequences.⁶² Courts have a moral obligation to restore rights when they are violated, emphasizing justice for the individual over collective stability.⁶³ While utilitarianism may offer a pragmatic approach to governance, it risks undermining fundamental rights by highlighting the tension between collective welfare and individual justice.

Based on the aforementioned two theories, the Purcell principle is not always interpreted singly regarding the implementation of the Constitutional Court's decision, but also as a precautionary principle to accommodate the constitutional rights of citizens who are disrupted by the implementation of election regulations. Although the Purcell principle aims to protect the general election process, its rigid application can cause significant weaknesses, especially in dealing with the issue of citizen's voting rights. This highlights the need for a balanced approach that considers stability and citizen rights.

Thus, the Purcell principle can be used to limit the authority of the Constitutional Court in making judicial review decisions on the election law during the election period. On the other hand, it can provide a chance for the community to have their cases decided regarding the election, during the election period because they have violated the citizens' constitutional rights. The 2009 election is a concrete example. Regarding voter registration, many Indonesian citizens were not listed in the Permanent Voters List (DPT),⁶⁴ so that they are at risk of losing their right to vote in the 2009 Election. Meanwhile, the voting is only 2 days away.⁶⁵ Then there was a request from the community to cancel the provisions in the election law pertaining to the mechanism for

⁶¹ Yang Jikai, "Discussion on Utilitarianism and Rights," *Academic Journal of Humanities & Social Sciences* 7, no. 6 (2024): 26–30, <https://doi.org/10.25236/ajhss.2024.070605>.

⁶² Rawling, *Deontology*.

⁶³ Alexis Aguilar Domínguez, "Utilitarismo y Derechos Humanos: ¿un Binomio Irreductiblemente Separable?," *Revista Especializada En Investigación Jurídica*, no. 6 (2019): 61–88, <https://doi.org/10.20983/reij.2020.1.3>.

⁶⁴ Risdiana Izzaty and Xavier Nugraha, "Perwujudan Pemilu Yang Luberjurdil Melalui Validitas Daftar Pemilih Tetap," *Jurnal Suara Hukum* 1, no. 2 (2019), <https://doi.org/10.26740/jsh.v1n2.p155-171>.

⁶⁵ Bagus Anwar Hidayatulloh, "Implikasi Putusan Mahkamah Konstitusi Terkait Penggunaan KTP Dan Paspor Dalam Pemilihan Presiden Dan Wakil Presiden Dalam Kerangka Menjamin Hak Memilih Dalam Pemilu," *Justisi Jurnal Ilmu Hukum* 3, no. 1 (2019), <https://doi.org/10.36805/jjih.v3i1.505>.

using voting rights at the polling station. The Constitutional Court responded to the request by issuing Decision Number 102/PUU-VII/2009 which protects citizens' voting rights by providing alternative proof of participation using Identity Card (KTP) or Passport, even though they are not registered in the DPT. Citizens' voting rights were protected by the sudden decision of the Constitutional Court.

If the Constitutional Court had applied the Purcell principle rigidly at the time, many citizens would have lost their right to vote. In the United States, on the other hand, the 2020 election season put enormous pressure on the U.S. electoral system. In a politically polarized country grappling with the COVID-19 pandemic, American voters challenged various election regulations and sought legal relief from laws that made voting extremely difficult under extraordinary circumstances. However, the Supreme Court denied these petitions, adhering to the Purcell principle, thereby harming voters' rights.⁶⁶ This raises important considerations if Indonesia wishes to adopt the Purcell principle.

Formulation of the “Limited Application” Model of the Purcell Principle as Judicial Wisdom

As a middle ground, this article proposes the adoption of the Purcell principle within the framework of “limited application”. It is important to emphasize that this model is not designed to limit the substantive authority of the Constitutional Court through ordinary legislation (laws), as this would risk violating the principle of judicial independence guaranteed by Article 24 of the 1945 Constitution. Instead, this idea is aimed at strengthening the procedural parameters and internal judicial ethics of the Constitutional Court. This model is based on two main theoretical pillars: the principle of legal certainty and the political question doctrine. The aim is to ensure that the election law is reliable, while encouraging the Constitutional Court to wisely refrain from issues that have the potential to cause major political turmoil.

This limited application model is formulated through three strategic elements:

⁶⁶ W U Codrington III, “Purcell in Pandemic,” *New York University Law Review* 96, no. 4 (2021).

1. **Introduction of a Proportionality-Based Feasibility and Urgency Review.** The Constitutional Court can introduce a screening mechanism at the preliminary examination stage through a Constitutional Court Regulation (PMK). For petitions filed during the election period, the Panel of Judges will conduct a “feasibility and urgency review.” Methodologically, this review aligns with the globally recognized proportionality analysis. The Constitutional Court will consider whether the petitioner's legitimate aim of enforcing constitutional rights can be achieved without causing greater uncertainty for the election as a whole (necessity and balancing). Thus, the question shifts from “is this norm unconstitutional?” to “is it constitutional to change this norm now?”
2. **Substantive Distinction: Right to Vote vs. Competition Rules.** The bright-line rule in applying this principle is the substance of the norm being reviewed. This principle of caution does not apply to cases that directly and fundamentally concern the right to vote and to be elected, such as voter registration requirements or voting mechanisms. In such cases, individual justice must take precedence. Conversely, for norms that are more related to the mechanism of competition between election participants (e.g., parliamentary thresholds, vote conversion systems, or technical requirements for candidacy that do not fundamentally restrict rights), the Constitutional Court can fully apply the principle of prudence. These criteria provide clearer and more reviewable boundaries.
3. **Optimizing Judicial Discretion through Prospective Overruling.** If a norm is proven unconstitutional but the decision has the potential to disrupt stability, the Constitutional Court can use its judicial discretion to postpone the decision's enforcement (prospective overruling). The decision is declared valid for the next election cycle. It is important to emphasize that this is not a legal obligation imposed by law, but rather a choice based on institutional prudence and judicial ethics. This approach aligns more closely with the spirit of the Purcell principle in its country of origin, which is not a rigid legal norm but rather a living standard of jurisprudence within the judicial power.

By internalizing this model as a “new ethical guideline,” the Constitutional Court can navigate the tension between upholding constitutional rights, its authority as the final interpreter, and its responsibility to maintain the stability of fair elections.

Based on the above discussion, it can be concluded that the Purcell principle cannot be fully applied in the Indonesian legal system as it is in the U.S. legal system. Differences in the structure of judicial institutions, the constitutional legal framework, and the principles used in the Indonesian legal system require an adaptive and contextual approach.

Proposing the Limited Purcell Principle: A Balanced Framework for Judicial Restraint in Electoral Law Review

This article proposes a new concept called the limited Purcell principle, which can be adopted into the authority of the Constitutional Court, particularly in the review of election laws. This concept aims to maintain a balance between two aspects: the protection of citizens' constitutional rights and the stability of the electoral process. The limited Purcell principle is built on four pillars:

1. Temporal Limitation of Constitutional Court Decisions

The Constitutional Court is not permitted to rule on cases related to substantial changes to election rules (e.g., the electoral system, candidacy requirements, vote counting methods) while the election process is ongoing, unless the ruling does not directly affect the ongoing process and does not create legal uncertainty.

2. Postponement of the Implementation of Fundamental Rulings

To avoid chaos in the conduct of elections, the Constitutional Court may determine that the implementation of decisions that alter the substance of election rules be postponed until the next election. This is to maintain continuity and orderliness in the electoral process.

3. Exceptions to the Protection of Individual Constitutional Rights

The limited Purcell principle must provide an exception for petitions concerning serious violations of citizens' constitutional rights, such as the loss of voting rights due to administrative errors or discriminatory legal provisions.

In this case, the Constitutional Court may still adjudicate and issue a ruling even during the election period, as long as the purpose is to protect the constitutional rights of citizens, not to change the electoral system.

4. Screening of Cases at the Preliminary Examination Stage

To systematically apply the limited Purcell principle, the Constitutional Court needs to conduct screening at the preliminary examination stage. This mechanism will help the Constitutional Court decide whether a case is eligible for examination during the election period or should be postponed/declared inadmissible (NO) because it has the potential to disrupt the stability of the ongoing election period. This screening can consider the urgency of the constitutional rights violation, the timing of the petition submission, and its impact on the election process.

By establishing this limited Purcell principle model, the Constitutional Court can continue to fulfill its constitutional function as the guardian of the constitution and citizens' rights, while also helping to maintain the stability of the election process. This model avoids two extremes: on one hand, it does not allow the Constitutional Court to intervene recklessly in the ongoing election process; on the other hand, it also does not allow citizens' constitutional rights to be neglected solely for formalistic reasons of the election process.

CONCLUSION

This study shows that the Constitutional Court's judicial activism in reviewing election laws has evolved from a negative legislator role to a positive legislator role that helps shape legal norms. However, this development has caused constitutional tensions, especially when the Constitutional Court issues rulings that change election rules in the middle of an ongoing election process. In this context, the Purcell principle, which originates from the jurisprudence of the U.S. Supreme Court, is relevant as a doctrine of judicial restraint, as it offers a framework for maintaining electoral stability, preventing voter confusion, and protecting the integrity of the democratic

process. However, this principle cannot be adopted in its entirety in Indonesia due to differences in legal systems and institutional structures.

As a solution, this article proposes a formulation of a limited Purcell principle that is adaptive to the Indonesian legal system. This model is built on four main pillars: (1) temporal restrictions on court decisions during the election period; (2) postponement of the implementation of fundamental decisions; (3) exceptions for violations of individual constitutional rights; and (4) case screening mechanism at the preliminary examination stage. By applying this model, the Constitutional Court is expected to balance the enforcement of individual justice and the protection of citizens' rights on one hand, while maintaining legal stability and certainty in the electoral process on the other. This model serves as a constitutional alternative that prevents reckless intervention, while ensuring that constitutional rights are not overlooked for the sake of formalistic electoral procedures.

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There are no conflicts of interest in the publication of this article.

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