

Protecting Economic and Social Rights in a Constitutionally Strong Form of Judicial Review:
The Case of Constitutional Review by the Indonesian Constitutional Court

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Abstract

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The 1999-2002 constitutional amendments to Indonesia's Constitution inserted some important features of a modern constitution. These include the introduction of a comprehensive human rights provision and a new constitutional court. This dissertation focuses on these two features and aims to understand the roles of this new court in protecting economic and social rights (ES rights). It primarily analyzes (1) factors that explain the introduction of a constitutional court in Indonesia, (2) the Court's approaches in conducting judicial review of ES rights cases, (3) Factors that were taken into account by the Court when it decided cases on ES rights, and (4) the lawmakers' response toward the Court's rulings on ES rights. This dissertation reveals that, first, the introduction of a constitutional court in Indonesia can be best explained by multiple contributing factors –not a single factor. These factors include the history of judicial review in Indonesia, the impeachment of President Abdurrahman Wahid, the fragmentation of

political powers and the influence of other countries experiences. Second, Tushnet's and Young's typologies are actually quite helpful in conceptualizing and understanding the Indonesian Constitutional Court's approach to judicial review. Like most constitutional courts, Indonesia's Court has certainly not limited itself to a legal or doctrinal approach to decisions, but has taken many other factors into account in its decisions. The Court has developed several approaches to judicial review other than the approach that is expressly stated in the Constitution and the Constitutional Court Act. In general, the Court has been fairly strong in its approach to judicial review, and has not been afraid of declaring that statutes are inconsistent with the Constitution. At the same time, the Court has not consistently applied a "strong form" of judicial review in Tushnet's concept, but has moved back and forth among different approaches depending on the nature of the case, the complexity, the financial impact, and other factors.

Third, while the Court largely adopted a peremptory stance, in Young's typology, this has also not been consistent. In some instances, the Court has entered in a more interactive discourse with the government and the legislature, also depending on the nature of the case, the impact of the decision, and the concern about leaving a legal vacuum by simply rendering an important statute void. Finally, this dissertation found that the lawmakers' response toward the Court rulings has partly depended on what the Court wrote in its decisions. The Court has developed some techniques to anticipate the lawmaker's response. These techniques include null-and-void decisions, declaration of incompatibility (suspension of invalidation), judicial order directed to the lawmakers, a statement upholding a statute but requiring the lawmakers to interpret the law in conformity with the court's interpretation (conditional decision), and the invalidation of a statute in its entirety. These techniques can be explained using the five stances of Katharine G.

Young's judicial review ranging from deferential, conversational, experimental, managerial, to peremptory stances. This dissertation shows that the effect of judicial review differs across issues. Judicial review may not be likely to generate the same effective implementation in all situations. From a comparative perspective, this dissertation provides significant confirmation that the Indonesian Constitutional Court's approaches in deciding cases on economic and social rights can be analyzed through Tushnet's weak form and strong form of judicial review. It also contributes ample evidence that the relationship between the Indonesian Constitutional Court, the legislature, and the executive can be understood using Young's typology of judicial review.

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List of Abbreviations

MPR	Majelis Permusyawaratan Rakyat- People’s Consultative Assembly
MK	Mahkamah Konstitusi- the Indonesian Constitutional Court
DPD	Dewan Perwakilan Daerah- Regional Representatives Council
DPR	Dewan Perwakilan Rakyat- People's Representative Council (national parliament)
BPUPKI	Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia- Inventory Committee for the Preparation of the Indonesian Independence
PPKI	Panitia Persiapan Kemerdekaan Indonesia- Committee for the Preparation of Indonesian Independence
Dewan-Konstituante	Constitutional Drafting Committee
DPA	Dewan Pertimbangan Agung- Supreme Advisory Council
F-KKI	Fraksi Kesatuan Kebangsaan Indonesian - The United of Indonesian Nation
F-PDIP	Fraksi Partai Demokrasi Indonesia Perjuangan - Indonesian Democracy Party of Struggle
F-PBB	Fraksi Partai Bulan Bintang - Star Crescent Party
F-PDU	Fraksi Persatuan Daulat Ummat - the United of Daulat Ummat
F-PG	Fraksi Partai Golongan Karya - Golongan Karya Party
F-KB	Fraksi Kebangkitan Bangsa - National Awakening Party
F-PPP	Fraksi Partai Persatuan Pembangunan - Unity of Development Party
F TNI/Polri	Fraksi TNI/Polri - Military and Police Faction
F-UG	Fraksi Utusan Golongan - Functional Party
F Reformasi	Fraksi Reformasi- Reform Faction
F PDKB	Fraksi Partai Demokrasi Kasih Bangsa - National Love Democratic Party faction.
PAH	Panitia Ad Hoc – Ad Hoc Committee
PBHI	Perhimpunan Bantuan Hukum Indonesia –The Indonesian Legal Aids Association

PWI	Persatuan Wartawan Indonesia-the Indonesian Journalist Association
MPPI	Masyarakat Pers Indonesia –the Indonesian Press Society
AJI	Aliansi Jurnalis Indonesia-the Independent Journalist Association
KADIN	Kamar Dagang dan Industri – the Indonesian Commerce Chamber
ISEI	Ikatan Sarjana Ekonomi Indonesia – the Indonesian Economist Association
YLBHI Foundation	Yayasan Lembaga Bantuan Hukum Indonesia – the Indonesian legal Aid
IKADIN	Ikatan Advokat Indonesia – the Indonesian Advocate Association
PGRI	Persatuan Guru Republik Indonesia- the Indonesian Teacher Association
ISPI	Ikatan Sarjana Pendidikan Indonesia- the Indonesian Education Graduate Association
PMK	Peraturan Mahkamah Konstitusi – The Regulation of the Constitutional Court
BHP	Badan Hukum Pendidikan – Educational Legal Entity
WALHI	Wahana Lingkungan Hidup Indonesia – The Indonesian Environmental Organization
BP MIGAS	Badan Pelaksana Minyak dan Gas bumi– Oil and Gas Activity Agency
SKK MIGAS	Satuan Kerja Khusus Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi-The Special Task Force for Upstream Oil and Gas Business Activities
KPK	Komisi Pemberantasan Korupsi – the Indonesian Anti Corruption Commission
PT BHMN	Perguruan Tinggi Badan Hukum Milik Negara – State Owned Legal Entity Universities
Perpres	Peraturan Presiden –Presidential Regulation
NU	Nahdlatul Ulama –the largest Islamic Organization in Indonesia

List of Judicial Review Cases

Right to Education:

The Decision of the Constitutional Court No. 011/PUU-III/2005 on the 2003 National Education System Law I case

The Decision of the Constitutional Court No. 12/PUU-III/2005 on the 2004 National Budget Law case.

The Decision of the Constitutional Court 026/PUU-III/2005 on the 2006 National Budget Law case

The Decision of the Constitutional Court 026/PUU-IV/ 2006 on the 2007 National Budget Law case

The Decision of the Constitutional Court 24/PUU-V/2007 on the 2003 National Education System Law II case.

The Decision of the Constitutional Court No. 13/PUU-VI/2008 on the 2008 National Budget Law case

The Decision of the Constitutional Court No. 021/PUU-IV/2006 the 2003 National Education System Law III case

The Decision of the Constitutional Court No. 11-14-21-126 and 136/PUU-VII/2009 on the 2009 Educational Legal Entity Law case

The Decision of the Constitutional Court 33/PUU-XI/2013 the 2012 Higher Education Law case.

Right to Social Welfare:

The Decision of the Constitutional Court 001/PUU-I/2003, 021/PUU-I/2003, and 022/PUU-I/2003 on the 2002 Electricity Law case

The Decision of the Constitutional Court 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 on the 2004 Water Resources Law I case.

The Decision of the Constitutional Court 002/PUU-I/2003 on the 2001 Oil and Natural Gas Law I case

The Decision of the Constitutional Court 36/PUU-X/2012 on the 2001 Oil and Natural Gas Law II case

The Decision of the Constitutional Court 85/PUU-XI/2013 on the 2004 Water Resources Law II case

DEDICATION

To my parents

H. Suwondo, S.H. and Hj. Rachmi Hidayati

Chapter 1: The Indonesian Constitutional Court, Judicial Review, and the Protection of Economic and Social Rights

Introduction

A recent set of constitutional amendments has significantly changed the Indonesian constitution. In four consecutive years from 1999 to 2002, more than seventy percent of the provisions of the old constitution were amended during a series of constitutional reforms.¹ The amendments were largely meant to reallocate the power of the state to a number of institutions along liberal democratic lines.²

These constitutional amendments also changed some important constitutional features including the system of executive government, the parliamentary system, and the judicial system. The updated constitution, for example, strengthens the adoption of the presidential system. The old constitution stated that the president was responsible to the MPR (People Consultative Assembly).³ The role of the MPR in this old constitution was similar to a parliament in parliamentary system. The MPR could approve or reject the government's report. The updated constitution stipulates that the president is directly elected by the people, and therefore the president is responsible to the people and not the MPR.

Parliament changed from a unicameral to a bicameral system through the introduction of

¹ Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition*, at 331 (Kompas Book Publishing 2008). This book estimated that approximately 95% of chapters, 89% of the articles and 85% of the paragraphs are either new or were alteration of the originals.

² Id.

³ Indonesia "Const 1945" Art 2 and its General Elucidation.

a second chamber, namely the Regional Representative Council (the DPD).⁴ The DPD represents the interests of the regions, which were largely overlooked by previous governments under the old constitution. The structure of the judiciary changed into a bifurcated system in which there is a new judicial institution, the Constitutional Court (the MK) besides the existing Supreme Court. The introduction of a constitutional court aims to uphold the norms of the constitution through its constitutional review power.⁵ The introduction of these new state institutions was meant to enhance democracy and the rule of law. In addition, they also provide check and balance mechanisms in that they can check other state organs in line with their constitutional mandates.⁶

These constitutional amendments also inserted a new chapter concerning human rights, including provisions that were absent in the old constitution. These new provisions establish, in detail, civil political rights⁷, economic, social and cultural rights⁸ and collective rights such as the

⁴ Indonesia “Const 1945” Art 22 C.

⁵ Indonesia “Const 1945” Art 24 C. In this dissertation, the term “constitutional review” and “judicial review” are used interchangeably especially when discussing the power of the Constitutional Court to review statutes.

⁶ Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis*, at 22 (Bloomsbury Publishing, 2012).

⁷ The civil and political rights are stated in Article 28 A-J of the 1945 Constitution, among others: The right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law; The Right to work and to obtain a fair and proper remuneration in work relationship; The right to obtain equal opportunity in government; The right to citizenship status; The right to live and to maintain one’s life; The right to possess personal property rights and such property rights shall not be taken over arbitrarily by anybody; The right to found a family and to procreate through legitimate marriage; The right to the freedom to hold a belief, to express his/her thought and attitude in accordance with his/her conscience; The right to adhere to one’s religion and to worship in accordance with such religion and belief; The right to the freedom of association, and expression of opinion; The right to protect him/herself, his/her family, honor, dignity and property under his/her control; The right to feel secure and be protected from the threat of fear to do, or not to do something; The right to be free from torture or treatments degrading human dignity; The right to be free from discriminatory treatment and the right to obtain protection against any such discriminatory treatment obtain protection against any such discriminatory treatment; The right to obtain political asylum from another country; The right to the freedom to adhere to a religion and to worship in accordance with his/her religion, to choose education and teaching, to choose occupation, to choose citizenship, to choose residence in the state territory and to leave it, and shall have the right to return.

⁸ The economic, social, and cultural rights acknowledged in the 1945 Constitution, among others: The right to develop oneself through the fulfillment of basic needs; The right to obtain education and the benefits of science and

right to a healthy environment, and the right to personal development.⁹ These provisions also impose on the Indonesian government the duty to respect, to protect and to fulfil human rights.¹⁰

In summary, these constitutional amendments inserted some important constitutional provisions and principles which formerly did not exist in the old constitution, such as the rule of law (*negara hukum*), bicameralism, checks and balances, and separation of powers. While multiple constitutional issues were addressed during this series of constitutional amendments, this dissertation will primarily focus on the introduction of the new constitutional court and its constitutional powers, and, specifically, constitutional review in the context of economic and social rights. This new constitutional court and its constitutional review powers are chosen because of two important reasons. First, both were absent throughout the history of the Indonesian constitutional law prior to the most recent constitutional amendments. It is therefore interesting to investigate factors that contributed to the establishment of this Court and how this Court now conducts its constitutional authority in practice.

Second, the introduction of this new court significantly affects Indonesian constitutional law, particularly how the court works with respect to individuals. For example, unlike the decisions of general courts which bind only the disputing parties, the decisions of this court bind the disputing parties, the public in general, and the government.

technology, arts and culture; The right to advance oneself in striving for his/her rights collectively; The right to live a physically and mentally prosperous life, and to obtain proper and healthy environment; The right to health service; The right to facilities and special treatment to obtain equal opportunity and benefit in order to reach equality and justice; The right to social security; and The right to communicate and to obtain information;

⁹ Indonesia "Const 1945" Art 28 H.

¹⁰ Indonesia "Const 1945" Art 28 I.

Further, the decisions of the constitutional court are final.¹¹ There is no further mechanism available to challenge the decisions of this court. This feature is different from the decisions of the ordinary court in which such decisions can be appealed to high courts and ultimately to the Supreme Court.

In light of the fact that constitutional review was absent in the earlier history of Indonesia, the adoption of the constitutional court and its constitutional review authority in the updated constitution raises some significant questions. These include questions regarding the institutional design of this court, the authority of this court, and the position of this court among other state institutions. Why did the framers of the updated constitution decide to introduce a new specialized court rather than to add these functions to the existing Supreme Court? Why, under the new constitution, does the new constitutional court have five specified duties, including: settling dispute of competence among state institutions; dissolution of political parties; settling disputes of general election; reviewing legislation against the constitution; and providing legal opinions in impeachment process? And, what is the formal institutional relationship between the new constitutional court, the already existing courts, and other state institutions?

While this dissertation may briefly discuss the above questions to provide general background information about this new court, the primary aim here is to analyze factors that contributed to the adoption of judicial review in the updated constitution, and to analyze the constitutional court's enforcement of economic and social rights, drawing on the Court's recent cases to offer an explanation for understanding the court's approach.

¹¹ Indonesia "Const 1945" Art 24 C (1).

Research Questions

This dissertation seeks to answer four primary questions:

1. What explains the adoption of constitutional review with a strong form of judicial enforcement in the Indonesian new constitution? This question is important to understand the rationales of the framers of the updated constitution in introducing a strong form of judicial review, considering that Indonesia did not recognize constitutional review prior to the constitutional amendment.
2. While constitutionally, the new constitutional court exercises a strong form of judicial review, does the court apply this approach consistently in practice, particularly when it reviews constitutional cases related to economic and social rights?
3. What factors are taken into account when the Constitutional Court decides economic and social rights cases?
4. Finally, how are the constitutional court decisions on economic and social rights implemented in practice? How do other government branches respond to the decisions of this court?

A. Working Hypotheses

To answer the four primary questions mentioned above, this dissertation provides four working hypotheses:

1. To answer research question 1, it is hypothesized that the adoption of a strong form of judicial review in the updated constitution was motivated by a number of factors. The

contributing factors leading to the adoption of a strong form of judicial review included external factors such as the increasing global popularity of judicial review and the accompanying recognition within Indonesia of the value of successful systems of review, and internal factors such as the collapse of the authoritarian to reduce the likelihood of a repeat of authoritarianism.

2. To answer research question 2, it is hypothesized that the constitutional court does not consistently adopt a strong form of constitutional review, as appears to be mandated by the constitution. In some cases, the court applies a weak form of judicial review. In economic and social rights constitutional cases, the court is inconsistent, sometimes adopting the strong form of judicial review but also using the weak form of judicial review.
3. To answer research question 3, it is hypothesized that while formally the Court should refer to the existing legal rules, in practice the Court regularly considers extralegal factors emanating from the political context.
4. To answer research question 4, it is hypothesized that the responses from other government branches toward constitutional court rulings vary considerably. In some cases, the other branches of government are responsive toward the court decisions. In other instances, they are not responsive and do not effectively follow up on the court decisions.

Literature Review

In analyzing the adoption of constitutional review in the new constitution and the practice of constitutional review by the new constitutional court, this dissertation will contribute to four bodies of literature: first, the literature explaining the adoption of constitutional review with a strong form of judicial enforcement in the updated constitution. Second, it will supplement the literature on models of judicial review. Third, it will contribute to literature that discusses factors that may be taken into account by the court when it conducts judicial review in economic and social rights cases. Last, it will contribute to literature on the judicial enforcement of economic and social rights.

Literature on adoption of constitutional review in Indonesia

Literature that specifically focuses on the adoption of constitutional review in Indonesia is arguably underdeveloped. Most literature focuses on factors that contributed to the initial establishment of the Constitutional Court in Indonesia. Scholars argue that the establishment of a constitutional court in Indonesia was triggered by internal and external factors.¹² The impeachment of President Abdurrahman Wahid was one of the internal factors that contributed to the adoption of the constitutional court.¹³ The establishment of constitutional courts in some other Asian countries is often said to have been an external factor that influenced the

¹²Benny K Harman, *Perkembangan Pemikiran Mengenai Perlunya Pengujian Undang-Undang Terhadap Undang-Undang Dasar Dalam Sejarah Ketatanegaraan Indonesia (1945-2004)* *386 “*The Development of Thoughts on the Need of Judicial Review in the Indonesian Constitutional Law History (1945-2004)*”, (unpublished PhD dissertation, Universitas Indonesia, 2006).

¹³Jimly Asshiddiqie, *Creating a Constitutional Court for a New Democracy**1–24 (unpublished manuscript, Centre for Comparative Constitutional Studies Asian Law Melbourne Law School, 2009).

establishment of the constitutional court in Indonesia.¹⁴ While these two factors mentioned above possibly contribute to the establishment of the constitutional court, they do not specifically answer the question of why this new court was equipped with constitutional review.

Comparatively, several theories have been formulated to explain the adoption of constitutional review. Some theorists, including Martin Shapiro, argue that the practice of constitutional review is a response to governance problems on the need to coordinate among branches of government (the federalism theory).¹⁵ Similarly in *On Law, Politics, and Judicialization*, Martin Shapiro and Alec Stone Sweet say that constitutional review may act as a referee for boundary disputes between parts of government in constitutional systems that divide power among parts of government (the division of powers theory).¹⁶

Others suggest that constitutional review is an essential mechanism to protect rights and the rule of law from arbitrary government actions (the rights protection theory).¹⁷ Tom Ginsburg provides an account in which constitutional review is a form of “political insurance.”¹⁸ In this view, in a situation where there is a possibility of losing powers after the constitutional amendment, the constitution makers are likely to institute constitutional review to safeguard their political interests.¹⁹

¹⁴ Simon Butt, *Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003-2005**24 (Unpublished PhD Dissertation, The University of Melbourne, 2006).

¹⁵ Martin Shapiro, *Law and Politics in the Supreme Court: New approaches to political jurisprudence* 330-331 (New York Free Press of Glencoe, 1964).

¹⁶ Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* 161 (OUP Oxford, 2002).

¹⁷ Mauro Cappelletti, *The Judicial Process in Comparative Perspective* 169 (Clarendon Press, 1989).

¹⁸ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* 25 (Cambridge University Press, 2003).

¹⁹ Id.

There is also a growing literature that suggests that the adoption of constitutional review is influenced by international constitutional practice.²⁰ Rosalind Dixon and Eric A. Posner in *The Limits of Constitutional Convergence* assert that there are two ways to analyze how the progress of constitutional law in one country may influence the development of constitutional law in other countries.²¹ First, the development of constitutional law is independent in each country. Second, the constitutional law of one state inevitably influences and should influence constitutional law in other states. Policy makers and judges seek inspiration in constitutional development of foreign countries.²²

In the context of Indonesia, there are some studies that focus on the Indonesian Constitutional Court. Hendrianto studied the role of the Chief Constitutional Justice and the development of the Indonesian Constitutional Court up to 2008. His study suggested that the Chief Constitutional Justice Jimly Asshiddiqie played a significant role in developing the Court “from humble beginnings to a functioning Court.”²³

Another scholar, Simon Butt, studied the Indonesia Constitutional Court in the period 2003-2005.²⁴ His scholarly work focuses on several issues including the decision writing style of the Constitutional Court and the institutional design of the Court.²⁵ His study shows that the writing of the Constitutional Court’s decisions has been influenced by the French style of

²⁰ David Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 50 Cal L Rev 99, 1163-1257 (2011).

²¹ Rosalind Dixon and Eric A. Posner, *The Limits of Constitutional Convergence*, 11 Chi. J. L. 399, 399 (2010).

²² Id.

²³ Hendrianto, *From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003-2008*, (Unpublished PhD dissertation, University of Washington, 2008).

²⁴ Butt, *The Constitution of Indonesia: A Contextual Analysis* 183 (cited in note 14).

²⁵ Id.

drafting opinions in ways that tend to undermine the transparency of the constitutional court's decisions.²⁶ The Court adopts some of the “uninformative and syllogistic features” of the French style.²⁷ For example, the Constitutional Court does not use dissenting opinions in a way that increases the transparency and the accountability of majority and minority opinions, because the majority and the minority do not refer each other.²⁸ The constitutional court is also reluctant to refer to its previous decisions, although doing so might help the court to build its authority.²⁹

This dissertation is different from Butt's study in that it focuses primarily on explaining the adoption of constitutional review with strong judicial enforcement and the practice of the Court in deciding cases regarding economic and social rights, including how the court decisions are implemented. It does not examine the style of writing or the Court's institutional design, as those have been adequately addressed by Butt.

Another study conducted by Petra Stockman concluded that the Indonesian Constitutional Court has improved the rule of law in Indonesia by strengthening the democratic electoral system, strengthening the certainty through its rulings on judicial review, and strengthening human rights protections.³⁰ Her study also shows that the Court has provided a forum for citizen

²⁶Id at 99.

²⁷Id at 274. In his dissertation, Simon But frequently referred to Mitchel Lasser's article about 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' published in 1995. In fact, there is a significant development regarding the French's court decision writing style. Since 2008 the court opinions tend to be longer and put more considerations in their decisions. (based on discussion with Prof Julien Boudon of University of Reims at International Seminar on Global Legal Education UW School of Law December 11, 2015)

²⁸Id.

²⁹Id.

³⁰ Petra Stockmann, *The New Indonesian Constitutional Court: A Study Into its Beginnings and First year of Work*, 100-101 (Jakarta: Hans Seidel Foundation, 2007).

participation in the legal reform process.³¹ Stockmann's study is different from this dissertation in two ways. First, her study focuses on the work of the Court in its first year of its establishment, while this dissertation will include the more recent development of the court. Second, her work does not discuss in detail the approach of the Court in enforcing economic and social rights. This dissertation will primarily focus on those rights.

This dissertation will build upon the above-mentioned scholarly works to explain factors that contribute to the adoption of constitutional review with a strong form of judicial enforcement in the Indonesian new constitution and will also suggest how and to what extent the court can protect economic and social rights.

Literature on models of judicial review

Judicial review can be explained in several forms. Based on the number of courts that have the authority to conduct judicial review, judicial review can be categorized into centralized and decentralized judicial review.³² The centralized model is marked by the existence of a separate and specialized court, with exclusive or close-to-exclusive jurisdiction over constitutional rulings. This model assumes that matters handled by this court are different from matters handled by ordinary court. This model is also commonly called the Austrian model, the Kelsenian model or the European model.

Conceptually, this concentrated system was conceived by Hans Kelsen as being “a

³¹ Id

³² Vicki C Jackson and Mark V. Tushnet, *Comparative Constitutional Law* 456 (Foundation Press New York, 1999).

system of negative legislation.”³³ A constitutional court does not specifically decide the validity of statutes on concrete facts. Its competence is to conduct abstract review. “By forbidding the ordinary judges to abstain from enforcing the law and granting the power to declare a statute unconstitutional with erga omnes effect to the Constitutional Court the judiciary was subject to the law adopted by parliament and at the same time the primacy of the constitution over the Parliament could be maintained.”³⁴

In practice, there are various reasons that might be given for why a country adopts a centralized constitutional court to conduct judicial review. First, this might be because this country experienced authoritarian regimes in the past. By establishing a new separate special court, it is expected that the new court will be more independent because it does not have any connection with the former government. Another reason is that the existing courts have become overburdened carrying out their responsibilities. Adding more responsibility to the existing courts may not be a good option since it places more burdens on the already overburdened courts. Therefore, establishing a new separate court is more viable.

Unlike the centralized model described above, the decentralized model is characterized by the authority to engage in constitutional interpretation that is not limited to a single court. It can be exercised by various courts. In the United States, for example, state and federal courts exercise constitutional review, and this is seen as inherent to and an ordinary incident of the

³³ Thilo Tetzlaff, *Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan*, Vol. 1:2 National Taiwan University Law Review 80 (2006).

³⁴ Vicki C Jackson and Mark V. Tushnet, *Comparative Constitutional Law* 456 (Foundation Press New York, 1999). at 485.

more general process of case adjudication.³⁵

Indonesia is often said to have adopted centralized judicial review. This is based on the fact that there is only one Constitutional Court to conduct constitutional review of laws against the requirement of constitution. But this view provides an incomplete picture. While it is true that the constitutional court has the authority to conduct constitutional review, there is another judicial institution, namely Indonesia's Supreme Court, that also has judicial review power. The difference is that the Constitutional Court compares laws against the constitution and determines whether they are consistent. The Supreme Court reviews government regulations against the laws that authorize their adoption. With this unique characteristic, Indonesia does not fit neatly in centralized vs. decentralized model.

Based on the timing of when the review is conducted, judicial review also can be characterized as abstract or concrete.³⁶ When review is conducted prior to the enactment of a statute, it is often called abstract review. Thus, when a statute is enacted it has already passed the judicial review. The French Constitutional Council adopts this model. Unlike abstract review, concrete review is when a review is conducted only after the enactment and the enforcement of a statute. The U.S. generally adopts this model.³⁷

A more recent model for understanding different approaches to judicial review is a weak

³⁵ Id.

³⁶ Id.

³⁷ It should be noted that seven American states provide for court advisory opinions on legislation, including Massachusetts, Maine, and New Hampshire. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (5th ed., 2015, Wolters Kluwer, New York, N.Y.) at 2.4 p. 51 fn1.

form versus a strong form of judicial review, terms coined by Mark Tushnet.³⁸ This model is originally rooted in ways a constitution recognizes economic and social rights. A constitution can recognize economic and social rights as nonjusticiable (declaratory) rights or justiciable rights.³⁹ Economic and social rights are nonjusticiable if they are recognized or mentioned in the constitution but are not judicially enforceable.⁴⁰ Rights are justiciable if they are enumerated in the constitution and are judicially enforceable.⁴¹

Within the justiciable rights category, there are two further divisions “weak substantive rights” and “strong substantive rights.”⁴² By weak substantive rights, Tushnet means that the court is able to enforce economic and social rights but leave significant discretion to the legislature in the realisation of these rights.⁴³ Conversely, strong substantive rights give significant power to the courts to enforce economic and social rights and to take substantial parts in the realisation of these rights.⁴⁴ In strong judicial review, the court does not give as much deference to legislative judgements.

In *New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries*,⁴⁵ Tushnet sets the debate between a strong and a weak form of judicial review in a slightly different way. Unlike the model described above, this model focuses on how far the

³⁸ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009).

³⁹ Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 Tex L Rev 895 at 1902-1906 (2003).

⁴⁰ Id at 1898.

⁴¹ Id at 1902.

⁴² Id at 1902, 1906.

⁴³ Id at 1902.

⁴⁴ Id at 1906.

⁴⁵ Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries*, 38 Wake Forest L Rev 813 (2003).

judiciary carries out its constitutional review and enforcement authority. If “courts’ interpretative judgments are final and unrevisable,” courts exercise a strong form of judicial review.⁴⁶ But, if courts have the power to interpret a statute in light of a constitution and if they can declare the incompatibility of a statute under the constitution, but they do not have the power to invalidate such statute, then these courts apply a weak form of judicial review.⁴⁷

Joel I. Colon-Rios extends this weak/strong judicial review model from the power of judges to strike down legislation to striking down legislation that amends constitutional principles.⁴⁸ Using India, Belize and some Latin American countries experiences of judicial review as examples, Colon-Rios introduces “a new typology of judicial review” which includes two additional forms of judicial review: what he calls “strong basic structure review” and “weak basic structure review,”⁴⁹ besides the existing models of weak and strong forms of judicial review. By strong basic structure review, he means that judges are not only able to strike down laws that are inconsistent with the provisions of the constitution, but also to strike down a constitutional amendment which is inconsistent with the fundamental principles on which the constitution rests (such as separation of powers, the rule of law, and the protection of fundamental rights).⁵⁰ Under this model, judges truly have the final say on the validity of the legislation. A weak basic structure review provides judges with the power to strike down the ordinary and constitution-amending legislation, but the final word on the validity of the

⁴⁶Id at 817.

⁴⁷Id at 821.

⁴⁸Joel I. Colon-Rios, *A New Typology of Judicial Review of Legislation*, 3 *Global Constitutionalism* 144 (2014).

⁴⁹Id.

⁵⁰Id at 152.

legislation is in the hands of the people through their constituent assembly.⁵¹

In addition, Mark Tushnet and Rosalind Dixon have asserted that in the Asian context the weak form of judicial review has largely been absent at the constitutional level.⁵² Typically, constitutional courts adopt a strong form of judicial review in which they have the final word on constitutional interpretation.⁵³ The Courts have broad authority to invalidate statutes for inconsistency with the constitution, similar to the power exercised by the German Constitutional Court.⁵⁴ On a practical level, some Asian countries, such as South Korea, have exercised powers of judicial review that are strong both in form and in practice. Other Asian countries, such as Japan, have tended to be restrained in exercising their powers of constitutional review, thereby creating a weaker model of judicial review in practice.⁵⁵

These three models of judicial review (centralized vs. decentralized, abstract vs. concrete, and weak vs. strong (including the weak basic structure and strong basic structure review)) are significant for this dissertation. However, their importance is different in degree. The first two models are important to identify the general characteristics of the Indonesian Constitutional Court. The final models (weak vs. strong) are important to answer questions related to the court's approach when the court carries out its constitutional mandates.

While this dissertation discusses Tushnet's and Colon-Rios's theories, it will primarily

⁵¹Id at 157.

⁵² Mark Tushnet and Rosalind Dixon, *Weak form review and its constitutional relatives: An Asian perspective* in Rosalind Dixon and Tim Ginsburg eds, *Comparative Constitutional Law in Asia* 103 (Edward Elgar Publishing, 2014).

⁵³Id at 104.

⁵⁴Id at 103.

⁵⁵ Id.

use Tushnet's weak form/strong form of judicial review model to answer its primary questions. Tushnet's model is appropriate to address the Constitutional Court's approach in deciding judicial review cases related to economic and social rights because it provides guidance in deciding whether or not the court has the final say to decide judicial review cases.

Based on my initial observation, while, constitutionally, Indonesia's Constitutional Court has been granted a strong form of judicial review, in practice the court does not necessarily end up invalidating statutes even when those statutes might conflict with the constitution. Why does the court adopt this approach in practice? On what issues does the court frequently apply a weaker form of judicial review? Does this mean that the court applies the weak form of judicial review within constitutionally strong form judicial review? In this context, Mark Tushnet's theory of weak/strong form of judicial review is relevant and should be helpful as a tool to analyze the Indonesian Constitutional Court's practices.

This weak/strong form of judicial review likely influences the way economic and social rights are enforced especially concerning which institutions have the greater role in the implementation of economic and social rights. In the weak form of judicial review, the legislature, and not the court, has the final say on the protection of these rights. The role of the legislature in this type of judicial review is greater than that of the court. Conversely, in the strong form of judicial review, courts have greater power in the implementation of economic and social rights. Not only do the courts have the final word on the protection of economic and social rights, but they also provide the details and timeline on the realization of these rights.

Literature on judicial decision-making process

How does an appellate court reach decisions? Tracey E. George and Lee Epstein describe two models on how a court reaches decisions: the legal model and the extralegal model.⁵⁶ The legal model suggests that a court decides primarily based on the rule of law. The legal rules, and the legal doctrine (and the precedents in common law countries) are the key determinants. It assumes that judicial decision making is generated by legal doctrine or past cases (precedent). Judges are seen as constrained decision makers and that their opinions will be based on legal doctrines and previous court decisions. This model is often termed as positivist,⁵⁷ analytical jurisprudence⁵⁸ or mechanical jurisprudence.⁵⁹ This is because the process to reach the decisions is highly structured. In this model, legal rules are perceived to be clear and can be applied neatly to cases. In Edward H. Levi's words, the steps of legal reasoning termed as "reasoning by example" which include (1) observing the similarity between cases, (2) announcing the law inherent in the first case, and (3) applying that rule to the second case.⁶⁰

The other model, the extralegal model, posits that factors outside legal rules such as sociological, psychological and political factors produce judicial outcomes. Oliver Wendell Holmes, in *The Common Law*, stated that "the life of law has not been logic; it has been experience... It cannot be dealt with as if it contained only axioms and corollaries of a book of

⁵⁶ Tracey E. George and Lee Epstein, *On the Nature of Supreme Court Decision Making*, 2 *American Political Science Review* 323 (1992).

⁵⁷ Robert L Hayman, Nancy Levit, and Richard Delgado, *Jurisprudence: Classical and Contemporary: From Natural Law to Postmodernism* 74 (Thomson West, 2002).

⁵⁸ *Id.* at 81.

⁵⁹ *Id.*

⁶⁰ Edward H. Levi, *An Introduction to Legal Reasoning* 501 (University of Chicago Press, 2013 (originally published in 1948)).

mathematics.”⁶¹ Unlike the mechanical nature of legal model, Holmes believed that factors outside legal rules influence the judicial outcomes. For Roscoe Pound labelled extralegal model as “sociological jurisprudence.”⁶² For him, legal rules should be tested by their practical application not solely by logical deduction from legal rules. For this reason, he made a distinction between law in book and law in action. For Roscoe Pound,

What is law depends not merely upon the facts of the past and of the present but also the will of those who prescribe and those who administer rules of conduct by authority of the state; and this will is determined not a little by their theory of what they do and why they do it. The rules are not prescribed and administered for their own sake but rather to further social ends.⁶³

If the Court decisions are products of factors not only internal but also external to the Court, what factors may involve in court decision making process? Marc Galanter reveals that disputing parties, litigants, and attorneys can affect the case outcome.⁶⁴ “Repeat players”⁶⁵ will have more chance to affect the court outcome (as opposed to “one shotters”⁶⁶). In the long run, litigants who are “repeat players” shape the development of law by playing for favourable rules and likely to produce rules that promote their interests.

The court decisions may also be influenced by other branches of government. Political pressure from outside the legal system can also affect case outcomes. The fact that the executive

⁶¹ Oliver Wendell Holmes, *The Common Law* 5 (Harvard University Press, 2009 (originally published in 1881)).

⁶² Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence. I. Schools of Jurists and Methods of Jurisprudence*, Harv L Rev 591-619 (1911).

⁶³ Id.

⁶⁴ Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, Law and Society Review 95-160 (1974).

⁶⁵ “Repeat players” define as a person, business, or organizational entity that participates having repeated litigation and has some resources to pursue long term interests. See id at 97.

⁶⁶ A “one shotter” is a person, a business, or an organizational entity that deals with the legal system infrequently. See id.

and the legislative play significant role in appointing judges, determining the salaries of judges, amending the existing legislation and allocating budgets for the judiciary, is likely to affect case outcome. In this context, Lee Epstein, Jack Knight and Olga Shvetsova argue that courts, especially constitutional courts can be seen as unconstrained actors or constrained actors.⁶⁷ Constitutional courts are relatively unconstrained actors because they have the final say on the matters that receive their attention.⁶⁸ However, courts can also be seen as constrained actors in which they must be attentive to preferences and likely actions of other government branches in the system of government.⁶⁹ This is important if they wish to issue enforceable decisions - decisions that other branches of governments will respect and with which they will comply.

The court outcomes may also be affected by the democratic societies in which they function. In his article on *The Supreme Court and Public Opinions: Judicial Decision Making in the Post –New Deal Period*, David Barnum suggests that while the Supreme Court responsibilities often related to the countermajoritarian activism such as strike down the legislation or protect the minority, it turns out that the Supreme Court decisions during this period did not significantly deviate from the preferences of the existing majoritarian regime.⁷⁰ His study shows that on the issue of minority rights where public opinions were in the direction of greater support to this issue, the Court would decide in favour of the right of minorities and still enjoy the support of the majority. His study also suggests that when public opinion was

⁶⁷ Lee Epstein, Jack Knight, and Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government* 35 *Law and Society Review* 117, 123 (2012).

⁶⁸ *Id.* at. 124.

⁶⁹ *Id.* at. 125.

⁷⁰ David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 (2) *The Journal of Politics* 652 (1985).

highly negative, the Court tend to refrained from ruling.

Literature on judicial enforcement of court decisions on economic and social rights

There are ongoing debates about whether economic and social rights should be included in a constitution. Some scholars believe that economic and social rights should be included, but others argue that inclusion is not necessary. In practice, the vast majority of constitutions include economic and social rights. Mila Versteeg and Emily Zackin assert, “No less than 87 percent of all current national constitutions contain at least one explicit socioeconomic rights, and over half contain at least three such provisions.”⁷¹ The main objection to the constitutionalization of economic and social rights focuses on the justiciability of such rights.

In *The Core of the Case Against Judicial Review*, Jeremy Waldron argues that there is no reason to suppose that rights are better protected by judicial review than they would be by a democratic legislature. Further, he argues that judicial review is democratically illegitimate.⁷² Mark Tushnet, in *Taking the Constitution Away from the Courts*, suggests several ways to limit the role of the court in constitutional interpretation and he also proposes what he called “the populist constitutional law.”⁷³

In his article on *Against Positive Rights*, Cass Sunstein argued that inserting social rights

⁷¹ Mila Versteeg and Emily Zackin, *American Constitutional Exceptionalism Revisited* 81 U. Chi. L. Rev. 1682-83 (2014).

⁷² Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L J, 1346-1406 (2006).

⁷³ Mark Tushnet, *Taking the Constitution Away from the Courts*. (Princeton Press, 2000). Populist constitutional law means the constitution belongs to the peoples collectively as people act in political dialogue whether in the voting booth or in the legislature. Judicial declarations deserve no special consideration.

in the new constitutions of post-communist European States was a large mistake.⁷⁴ He suggested that government should not be forced to interfere the free market. In addition, social rights are unenforceable by court because they lack bureaucratic and policy tools.⁷⁵

This view is based on the assertion that economic and social rights are different from civil and political rights.⁷⁶ Scholars generally agree that civil and political rights should be included in a constitution. This is because the nature of such rights aims to prevent government intervention in the enjoyment of these rights.⁷⁷ The characteristics of these rights are arguably different from the economic and social rights, whose fulfillment needs state active involvement. Therefore, the state, and not the judiciary, is the right institution to ensure economic and social rights.

Waldron argues that a court is not an appropriate avenue to deal with the economic and social policy because a court may lack the democratic legitimacy to do so.⁷⁸ The fact that in most countries judges are unelected and undemocratic in nature, creates problem of legitimacy.

Waldron suggests that economic and social rights should be the domain of elected representatives of the people and not the sole domain of an undemocratic institution.⁷⁹ Judicial enforcement interferes with the citizens deciding economic and social rights through debate.

⁷⁴Cass Sunstein, *Against Positive Rights*, 2 E. Eur. Const. Rev 35 (1993).

⁷⁵Cass R. Sunstein, *Against Positive Rights, in Western Rights? Post-Communist Application*, in Andrass Sajo, ed (1996), See also Vicki C Jackson and Mark V. Tushnet, *Comparative constitutional law* 1483. (Foundation Press, 1999).

⁷⁶ Malcolm Langford, *Social Right Jurisprudence: Emerging Trends in International and Comparative Law* 29 (Cambridge University Press, 2008).

⁷⁷ Right to the freedom of expression and right to the freedom of association are two examples of civil political rights.

⁷⁸Waldron, 115 Yale L J 1363 (cited in note 72). See also Jeff King, *Judging Social Rights* 152 (University College London 2012).

⁷⁹ Id.

Therefore, the enforcement of such rights should be in the hand of elected institutions such as the executive and the legislature.

In addition, Frank B. Cross argues that the judiciary lacks the capacity to enforce highly abstract and open textured economic and social rights provisions in the context of concrete cases.⁸⁰ There is a multitude of ways of realizing these rights. A decision to enforce social and economic rights is one of great distributive impact and complexity.⁸¹ Jeff King asserts that the court may also lack information regarding the rationales and the implications of certain economic and social policy.⁸² Judges may lack experience and information regarding the special nature of the economic and social policy, including financial and policy nature.⁸³

The opposing viewpoint is that while economic and social rights arguably may be the domain of elected representatives of the people, the judiciary has a significant role in enhancing democratic governance by reviewing government decisions and actions.⁸⁴ The democratic legitimacy of judicial review is to ensure that the rights of minorities are not violated by majoritarian decision making. Also, when people through democratic process agree to grant particular state institutions (i.e. the courts) an authority to enforce economic and social rights, these judicial institutions can be regarded as democratic institutions because they gain their constitutional mandates through a democratic process. Whether judges are democratically

⁸⁰ Frank B Cross, *The Error of Positive Rights* 48 UCLA Law Review 857 (2001).

⁸¹ Dennis Davis, *Socio-Economic Rights: Has the Promise of Eradicating the Divide between First and Second Generation Rights Been Fulfilled?* in Rosalind Dixon and Tom Ginsburg eds. *Comparative Constitutional Law* 519, 528 (2011).

⁸² Jeff King, *Judging Social Rights* 248 (University College London 2012)

⁸³ Id.

⁸⁴ Id.

elected by the people or appointed by certain state institutions may influence the level of democratic character of judges. But even when judges are appointed by a president, they are appointed by a democratically elected institution, i.e., the president. As a result, judges are also democratic figures. It certainly acknowledges that there is a difference in degree between the democratic character of the judges and the members of legislature who are directly elected by the people.

In addition, in adjudicating economic and social rights, judges do not deal with policy on economic and social rights. The expertise of judges is not necessarily dealing with the nature of the policy. It is within the expertise of judges to review the policy and actions of the government against the requirement of the law.

King argues that a court is not a proper avenue to adjudicate economic and social rights because the realization of such rights has complex impacts that will extend beyond the parties and beyond the factual situation before the court.⁸⁵ Generally, a court will only consider facts and evidence that are brought by the specific litigants. A court will not go beyond facts and evidence presented by disputing parties before court. As a result, a court's decision will be based, and will not go beyond, all the facts and evidence presented to that court. In fact, the realization of economic and social rights is far beyond what occurred in court. Court decisions in a particular case may significantly affect the fulfilment of 'other' economic and social rights on the ground. Therefore, this adversarial nature and the limitations on the types of evidence presented

⁸⁵Id at 189.

before court,⁸⁶ will not sufficient to protect economic and social rights.

King suggests that in some instances, in fact, a court may be give better consideration of the competing rights of those who do not have adequate access to political decision-making process.⁸⁷ It may address an impact of policies that were not foreseen by the government and may reveal alternative remedies that were not considered by the legislature or executive.⁸⁸

Debate on whether human rights specifically economic and social rights should be included in the Indonesian Constitution, and whether such rights should be judicially enforceable, came up during the drafting of the first constitution in 1945, in 1956, and again the constitutional amendment in 1999-2002. What explained the reluctance of the framers of the old constitution to include such rights and judicial review of those rights in the constitution? In answering this question, the above discussion may be a useful tool. Were there any other arguments raised on this issue during the constitutional drafting?

The above concepts are also useful tools in analyzing the debate during the recent constitutional amendment in 1999-2002. Unlike the framers of the old constitution, the drafters of the recent constitutional amendments agreed to insert detailed human rights provisions and judicial review. What explain those changes? What contributing factors were involved in the recent constitutional amendments so that the drafters of the constitution agree to include extensive rights and judicial review provisions in this updated constitution?

Comparatively, different countries may adopt different approaches regarding the

⁸⁶Id.

⁸⁷Id at 165.

⁸⁸Id.

enforcement of economic and social right in their constitution. Some countries explicitly recognize economic and social right as justiciable rights in their constitutions. In these constitutions, economic and social rights are judicially enforceable. Therefore, courts are authorized to adjudicate economic and social rights cases.

Some countries recognize economic and social rights as nonjusticiable rights. This means that these rights might be judicially recognized but are not judicially enforceable. It does not mean that these rights are not somehow enforceable, but rather that the enforcement of these rights is not in the hand of the judiciary but instead is in the hands of the legislature or the executive.

Countries like India and Ireland recognize economic and social rights as nonjusticiable rights in their constitutions. The term “Directive Principle of State/Social Policy” stated in these countries’ constitutions show the nonjusticiable character of these rights.⁸⁹ These directive principles aim to give guidance to the legislatures when they make law. These principles do not apply to the court. Article 45 of the Irish Constitution (1937) explicitly mentions a Directive Principles of Social Policy. This article stipulates that:

The principles of social policy set forth in this article are intended for the general guidance of the Oireachtas (the parliament). The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this constitution.

The Indian Constitution adopts a similar approach with slightly different terminology. It uses the principles of state policy. Article 37 explicitly stipulates that “the Directive Principles contained

⁸⁹India “Const,” Art 37 and Ireland “Const,” Art 45.

in Part IV shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.” In other words, this article declares that no court may enforce the provisions (Article 36-51). It is the role of the state to apply them when creating legislation. In these constitutions, economic and social rights are intended to be non-justiciable, which means the government and not the judiciary that enforce economic and social rights. However, these principles may guide the court in its interpretation of statutes.

Other constitutions, such as the Hungarian Constitution, explicitly structure economic and social rights as justiciable rights.⁹⁰ Article 70 K explicitly stipulates that “claims arising from infringement on fundamental rights and objections to the decisions of public authorities regarding the fulfilment of duties may be brought before a court of law.”⁹¹ In this constitution, economic and social rights are judicially enforceable. There is also an instance --South Africa-- where a constitution does not explicitly state one way or the other whether economic and social rights are justiciable.⁹²

In light of the fact that there are different views about which institutions should enforce economic and social right i.e. the legislature (legislative supremacy) or the judiciary (judicial review), Stephen Gardbaum suggests a middle way that he called “new commonwealth constitutionalism.”⁹³ This new model is intermediate between the legislative supremacy and

⁹⁰ Hungary “Const,” archived at http://lapa.princeton.edu/hosteddocs/hungary/1989-90%20constitution_english.pdf.

⁹¹ Hungary “Const,” Art 70 http://lapa.princeton.edu/hosteddocs/hungary/1989-90%20constitution_english.pdf.

⁹² South Africa “Const,” Art 26, 27, 29.

⁹³ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *The American Journal of Comparative Law* 707-760 (2001).

judicial supremacy. A new commonwealth constitutionalism is an attempt “to create institutional balance, joint responsibility, and deliberative dialogue between courts and legislatures in the protection and enforcement of fundamental rights.”⁹⁴ It authorizes some form of judicial review of legislation by the courts, but gives the legal power of the last word to the legislature.⁹⁵ This model decouples the power of judicial review from judicial supremacy.

Gardbaum’s new commonwealth constitutionalism is similar to the constitutional dialogue theory (coined by Rosalind Dixon) in that both provide an intermediate approach of judicial enforcement of constitutional rights.⁹⁶ A constitutional dialogue, like a new commonwealth constitutionalism, provides a dialogue between courts and legislature in the enforcement of constitutional rights. Constitutional dialogue theory does not assume that a court should intervene in the political process; rather it allows the court to intervene if there are failures of responsiveness from the political process.⁹⁷ Court intervention aims to introduce new ideas and perspectives into political process so that it encourages the legislature to reconsider its policy.⁹⁸ However, unlike new commonwealth constitutionalism, which focuses on constitutional rights in general, constitutional dialogue specifically focuses on economic and social rights.⁹⁹ In addition, the term “dialogue” shows clearly cooperative constitutionalism which analyzes the

⁹⁴Id at 707.

⁹⁵Id at 708.

⁹⁶ Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 *International Journal of Constitutional Law* 393 (2007).

⁹⁷Id at 407.

⁹⁸ Id.

⁹⁹ Id.

appropriate scope of the legislative and the judicial roles.¹⁰⁰

These two intermediate approaches of judicial enforcement of constitutional rights are further discussed by Katharine G. Young, who introduces a typology of economic and social rights adjudication.¹⁰¹ Using the South African Constitutional Court experience as an example, Young defines five stances of judicial review: deferential, conversational, experimental, managerial, and preemptory.¹⁰² By deferential, she means that the court assumes that the decision making authority is placed primarily in the legislature. By conversational, she means the court relies on the ability to have interbranch dialogue to resolve the determination of rights. The experimental stance assumes that the court seeks to involve the relevant stakeholders, including the government, in resolving the economic and social rights problems. Managerial stance means that the court assumes direct responsibility in interpreting substantive rights and supervising their protection with strict and detailed plans. And the preemptory stance assumes that the court is superior in interpreting the rights and in commanding and controlling and immediate response. Young labels these five stances “the catalytic function of judicial review” because they may enhance the relationship between the court and the legislature to achieve a rights protective outcome.¹⁰³ These three theories (Gardbaum, Dixon, and Young) provide new approaches on how the economic and social rights should be adjudicated. These new approaches, which to a certain extent require inter-branch dialogue, may address the problems of legislative supremacy

¹⁰⁰Id at 393.

¹⁰¹ Katharine G. Young, “*A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*,” 8 *International Journal of Constitutional Law* 385 (2010).

¹⁰² Id.

¹⁰³ Id.

and judicial supremacy. While this dissertation will discuss the three theories mention above, it will primarily use Young's theory as a reference to answer research question number four (how economic and social rights are implemented in practice) because it provides the most comprehensive typology on how the role and the relation of the court and the legislative/the executive in effectuating the constitutional court's decisions on economic and social rights cases.

Theoretical framework and relevance to the literature

This dissertation will develop a better historical narrative about the adoption of judicial review in the current constitution of Indonesia. To obtain a better understanding regarding the process of the adoption of judicial review in the updated constitution, it will include a discussion of this topic in the context of the drafting of the first constitution in 1945. This historical narrative is important to understand the dynamic thoughts of the framers of the constitution toward the adoption of judicial review in the constitution since the first constitution up to the new constitution. It will provide an alternative narrative /explanation about factors contributing to the adoption of judicial review in the updated constitution.

Further, this dissertation will systematically explore the way in which the constitutional court conducts its judicial review power, especially on issues related to economic and social rights. With a better understanding of the process by which the judicial review was adopted in the updated constitution and how in practice the court implemented its judicial review power, this dissertation will supplement the existing theories of the adoption of judicial review put forward

by Martin Shapiro,¹⁰⁴ Tom Ginsburg,¹⁰⁵ and Rosalind Dixon and Eric A Posner.¹⁰⁶ It will also contribute to theories of constitutional court's approach in adjudicating economic and social rights coined by Mark Tushnet,¹⁰⁷ and furthered discussed by Joel I. Colon-Rios.¹⁰⁸ This dissertation will also contribute to discussion about factors that might be taken into account by the court when it decides economic and social rights cases. Last, it will enrich the discussion about theories of judicial enforcement of economic and social rights as discussed by Katharine G. Young¹⁰⁹ and Stephen Gardbaum.¹¹⁰

In line with Shapiro's, Ginsburg's and Dixon's theories, this dissertation, first, identifies various possible explanations regarding factors that contribute to the adoption of strong form of constitutional review in the updated constitution. Among these three theories which theory is the best to explain the case of Indonesia? Or are there any other explanations fit with the Indonesian case.

Second, constitutionalization of strong form of judicial review is not necessarily followed by a strong form of judicial enforcement in practice. In this case, Mark Tushnet's theory is important to analyze the court approach in adjudicating economic and social rights. Third, legal and extralegal model as described by Tracey E George and Lee Epstein are significant to

¹⁰⁴ Martin Shapiro, *The Success of Judicial Review*, in Sallu J. Kenney, William M. Reisinger, and John C. Reitz eds. *Constitutional Dialogues in Comparative Perspective* (Macmillan Publishers Limited 1999).

¹⁰⁵ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003)

¹⁰⁶ Dixon and Posner, 11 *Chi. J. L.* at 399 (cited in note 21).

¹⁰⁷ Tushnet, *Weak Courts, Strong Rights* (cited in note 38).

¹⁰⁸ Colon-Rios, 3 *Global Constitutionalism* at 144 (cited in note 48).

¹⁰⁹ Young, 8 *International Journal of Constitutional Law*, at 385 (cited in note 101).

¹¹⁰ Gardbaum, 49 *The American Journal of Comparative Law* at 707-760 (cited in note 93).

understand factors that might be taken into account by the court when it reaches decisions.

Katharine G. Young's, Rosalind Dixon's and Stephen Gardbaum's theories on models or forms of judicial enforcement of constitutional rights are relevant to see how judicial decisions are implemented considering that enforcing such rights need "cooperation" among branches of government.

Research Methodology

Research in constitutional law may use quantitative or qualitative approaches or combination between the two. It depends on the purpose of the study. If the purpose of the study is to understand a comprehensive examination of a single phenomenon¹¹¹(small-n) or to understand the detail, richness, completeness and wholeness of the subject of the study a qualitative approach is likely the right approach to be used. If the purpose of the study is to understand the broader phenomena using a large number of data sets (large-n) a quantitative research (large-n) is likely a more appropriate approach. It is often said that a qualitative approach is "knowing more about less (small-n)." A quantitative approach is "knowing less about more (large-n)."¹¹²

In line with the purpose of this dissertation i.e. to study in detail the judicial protection of economic and social rights in Indonesia, by utilizing a particular type of evidence (e.g. textual, historical and field research),¹¹³ this dissertation uses a qualitative method (small-n) as opposed

¹¹¹ John Gerring, *Case Study Research: Principles and Practices* 17(Cambridge University Press 2006).

¹¹²Id at 49.

¹¹³Id at 17.

to a quantitative method (large-n). It uses textual analysis and interviews as tools to gather and analyze necessary data and information. The textual analysis considers the best method to understand and gain insight how the judges speak and think.¹¹⁴

This dissertation first analyzes the decisions of the Indonesian Constitutional Court on economic and social rights cases to understand how the court reasons and decides the cases and how it justifies its decisions.¹¹⁵ It also analyzes the court's annual reports and the summary of cases, news briefs, and articles about Constitutional Court.

In addition, this dissertation analyzes academic writings, practitioner's arguments and/or internal judicial or other government documents¹¹⁶ to enrich different perspectives and discourse. Biographies of Constitutional Justices, articles and books written by Constitutional Justices are also analyzed to understand the insights of each individual justice.¹¹⁷

Textual analysis is used to answer questions regarding factors that contribute to the adoption of strong judicial review in the updated constitution and furthered regulated in the 2003 Constitutional Court Law and its subsequent amendment. In doing so, written documents of the constitutional drafting such as the minutes of the meetings (both the first constitution and the

¹¹⁴ Michel de S-O.-l'ELasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*. 11(OUP Oxford, 2004)

¹¹⁵ Id.

¹¹⁶ Id.12

¹¹⁷ These include: Moh. Mahfud MD and Rita Triana Budiarti, *On the Record: Mahfud MD Di Balik Putusan Mahkamah Konstitusi* "On the record: Mahfud MD Behind the Constitutional Court Rulings" (Murai Kencana, 2010). H M Marzuki Laica, *Berjalan-Jalan Di Ranah Hukum* "A Walk in the Law Area" (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006). Harjono, *Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Republik Indonesia*, "The Constitutional Court within the Indonesian Constitutional Law" 4 Jurnal Legislasi Indonesia 2012. Jimly Asshiddiqie and Zainal A M Husein, *Hukum Tata Negara Dan Pilar-Pilar Demokrasi: Serpihan Pemikiran Hukum, Media, Dan HAM* "The Constitutional Law and the Pilars Democracy: Pieces of Legal Thoughts, Media, and Human Rights" (Konstitusi Press, 2005).

updated constitution) and the minutes of meetings of the drafting of the 2003 Constitutional Court Law and its subsequent amendment are studied. Scholarly writings of constitutional law experts and media coverage are analyzed. Insights of scholars, opinions of politicians, statement of governments in the media are collected and analyzed.

To supplement this archival research, this study employs interviews to confirm the written documents that have been collected. The interviews are mainly conducted in person if possible interview were also conducted through emails, Skype, phone, or online chats. The interviews used structured and semi-structured approaches. The structured in-depth interview was used to interview key figures such as the Constitutional Justices, Members of Parliament and Government officials.¹¹⁸ The semi-structured interviews were used to interview lawyers, academics, and representatives of NGOs.

I have collected data for this study through both library research and field research. I conducted library research at the University of Washington libraries, Universitas Gadjah Mada library, Universitas Indonesia library, the library of the Indonesian Constitutional Court, the DPR library, and the collection in the Department of Justice and Human Rights. In these libraries, I collected the Constitutional Court decisions, the literature relevant to my dissertation topic, the annual report of the Constitutional Court, books written by the Constitutional Justices, articles, journals, parliamentary reports, and newspapers clippings.

In addition to library research, I conducted field research in Jakarta, Yogyakarta, and Bali (April-May 2016). I interviewed two high rankings officials of the Directorate General of

¹¹⁸Layla Mosley, *Introduction* 6 in Layla Mosley (ed) *Interview Research in Political Science* (Cornell University Press 2013).

Legislation of Department of Justice and Human Rights. In the Indonesian Constitutional Court, I interviewed two Constitutional Court Justices, three Constitutional Court researchers, and the Secretary General of the Constitutional Court. While I could not interview some Constitutional Court justices because the Court was so busy deciding cases on regional elections disputes and judicial review cases, I was fortunate that the Constitutional Court librarians helped me find books regarding the constitutional justices' views when they decided cases on judicial review and their background. Each Constitutional Court Justice, especially during the first period of the Constitutional Court (2003-2008). These books by the justices were very helpful in understanding the Justices' views when they determined outcome.

In the DPR, I interviewed two officials who were in charge in monitoring and following up the implementation of laws. My data collection was also benefitted from the participants of three academic conferences that I participated as one of the speakers. Some participants of these conferences are academics (from private and public law universities) and NGOs that focused on law and human rights. They gave meaningful insights which are relevant with the topic of my dissertation.

Overview of the dissertation

The focus of this dissertation is to answer four important questions. First, it reveals the background of the adoption of a strong form of judicial constitutional review in the updated Indonesian constitution. Second, it explains the approaches used by the Court in deciding judicial review cases related to economic and social rights. Third, it examines factors that might be taken into account by the court when it decides economic and social rights cases. Last, it analyzes the

response of other branches of government i.e. the executive and the legislature toward the constitutional court decisions concerning economic and social cases.

Chapter One serves to set the context of the discussion. It presents the core questions of the study, literature review, theoretical frameworks and the methodology of the dissertation.

Chapter Two presents the debate over two important ideas, namely judicial review and human rights in the history of Indonesia constitutional law. First, it presents the debate on whether judicial review and human rights provisions should have been included in the first constitution of the Republic of Indonesia in 1945. Second, it presents the development of judicial review and human rights in the subsequent Constitutions, namely the 1949 Federal Constitution, the 1950 Provisional Constitution and the reinstatement of the 1945 Constitution during the New Order government. I argue that the exclusion of judicial review and human rights provisions in the first constitution does not mean that the framers of the constitution overlooked to see these important constitutional features. Rather, it provided a middle way of two contradictory views regarding the importance of including judicial review and human rights during constitutional drafting.

Chapter Three focuses on constitutionalization of economic and social rights and constitutional review. It discusses factors contributing to the establishment of the new Constitutional Court, its formal grant of judicial review and the inclusion of human rights provisions in the recent constitutional amendment (1999-2002). To answer the question about factors contributing to the establishment of the Constitutional Court with its formal judicial review, the existing theories put forward by Shapiro, Rosalind Dixon, and Tom Ginsburg are

referred to. The discussion includes controversies of these three issues (new court, judicial review, and human rights) during the constitutional amendments. It is followed by a brief discussion of the features of the new constitutional court (centralized vs. decentralized and abstract vs. concrete judicial review) and its institutional design.

Chapter Four analyzes the approach of the Indonesian Constitutional Court in deciding cases related to economic and social rights. To analyze the court approach, this dissertation primarily applies Tushnet's model of a weak and a strong form of judicial review. This chapter further analyzes factors that may contribute when the court decided Economic and Social rights cases.

Chapter Five analyzes how the court decisions on economic and social rights were implemented in practice. This part primarily focuses on how other branches of government such as the executive and the legislature respond the court decisions. In this part, Katharine G. Young's theory is utilized to analyze "the dialogue" between the court and other government branches in enforcing such rights.

Chapter Six summarizes the findings and the contribution of this dissertation. This chapter answers four central questions of this dissertation, and explains the contribution of this dissertation toward literature in constitutional law discussed above.

The findings of this dissertation are: first, the introduction of a constitutional court in Indonesia can be best explained by multiple contributing factors including the history of judicial review in Indonesia, the impeachment of President Abdurrahman Wahid, the fragmentation of political powers, and the influence of other countries experiences. Second, Tushnet's and

Young's typologies are quite useful in understanding the Indonesian Constitutional Court's approach to judicial review. The Court has not restricted itself to a legal or doctrinal approach to decisions, but has taken many other factors into account in its decisions. In addition, the Court has been fairly strong in its approach to judicial review, and has not been afraid of declaring that statutes are inconsistent with the Constitution. At the same time, the Court has not always applied a "strong form" of judicial review in Tushnet's concept, but has moved back and forth among different approaches depending on the nature of the case, the complexity, the financial impact, and other factors. Third, while the Court mostly adopted a peremptory stance, in Young's typology, this has also not been consistent. In some instances, the Court has entered in a more interactive discourse with the government and the legislature, also depending on the nature of the case, the impact of the decision, and the concern about leaving a legal vacuum by simply rendering an important statute void. In other words, while the Constitution grants the Constitutional Court the authority to declare laws null and void, the Court has not been mechanical in its approach to cases, but has been sensitive to the political and practical context. Finally, this dissertation found that the lawmakers' response toward the Court rulings has partly depended on what the Court wrote in its decisions. The Court has developed some techniques to anticipate the lawmaker's response. These techniques include null-and-void decisions, declaration of incompatibility (suspension of invalidation), judicial order directed to the lawmakers, conditional decision, and the invalidation of a statute in its entirety.

Chapter 2: Judicial Review and Human Rights Provisions in the Old Constitutions: From Resistance to Acceptance of Both Judicial Review and Human Rights Provisions

This chapter discusses the formulation of judicial review and human rights provisions in Indonesia's early constitutions (the 1945 Constitution, the 1949 Federal Constitution, and the 1950 Provisional Constitution). It explains why the first constitution (the 1945 Constitution) did not explicitly mention the phrase "human rights" and did not recognize judicial review, while the two subsequent constitutions (the 1949 Federal Constitution and the 1950 Provisional Constitution) contained express human rights provisions. A limited judicial review was recognized by the 1949 Federal Constitution but not in the 1950 Provisional Constitution. The ideological differences among constitutional drafters influenced the formulation of judicial review and human rights provisions in these three different constitutions. The sharp ideological differences among the constitutional drafters of the first constitution led to the rejection of judicial review provisions and the inclusion of only brief, scattered, and vague human rights provisions in that constitution. A more coherent ideology among constitutional drafters and the influence of the formal recognition of international human rights declaration explains why the two subsequent constitutions inserted more detail and structured human rights provisions, and also recognize limited judicial review.

Why were the constitutional drafters of the first constitution reluctant to include judicial review and human rights provisions? Part I sheds light on this question, largely by discussing the debate among the constitutional drafters during the development of the first constitution. Part II

examines the constitutional drafting of judicial review and human rights provisions in the two subsequent constitutions: the 1949 Federal Constitution and the 1950 Provisional Constitution. It aims to answer why human rights provisions were constitutionally recognized in these two constitutions while judicial review was recognized in only a limited way. Part III describes an effort to establish a new, permanent, and democratic constitution after the 1950 Provisional Constitution. Specifically, it discusses how the constitutional drafters agreed to include judicial review and human right in this new constitution. This part also explains why this effort was unsuccessful. This part ends with the reinstatement of the 1945 Constitution, which marked the end of the full recognition of human rights and judicial review provisions in the constitution.

Understanding the context of the first constitutional drafting process

During the years of struggle for independence against the Dutch between 1945 and 1950, Indonesia based its authority on the 1945 Constitution. This Constitution was drafted just before the Japanese surrender and promulgated on August 18, 1945.¹ This is the reason why the first constitution has been commonly called a revolutionary constitution.² The unstable situation in 1945 resulted in a short period for drafting the constitution, and this left the final product brief and concise.

Two committees worked on the document: the *Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia* (Inventory Committee for the Preparation of the Indonesian Independence or BPUPKI) and the *Panitia Persiapan Kemerdekaan Indonesia* (Committee for

¹J.A.C Mackie, *Indonesia Constitution 1945-60*, in Richard Neville Spann, *Constitutionalism in Asia* at.178 (Asia Publishing House, 1963).

²Saafroedin Bahar and Nanie Hudawatie, *Risalah Sidang BPUPKI Dan PPKI "Minutes of the BPUPKI and the PPKI Meetings"* at. 544 (Jakarta: Sekretariat Negara, 1995).

the Preparation of Indonesian Independence or PPKI).³ The BPUPKI drafted the initial version of the Constitution. The PPKI put the document into final form and ratified it. The entire process took only less than two months final work of these two Committees became the first Constitution of Indonesia.⁴

While formally these committees were established by the Japanese colonial government as the realization of its promise to grant independence to the Indonesian people, these committees were in fact established when the Japanese were about to lose World War II.⁵ Members of these committees were appointed by the Japanese colonial government.⁶ There were sixty-two members of the BPUPKI and twenty-seven members of the PPKI. Members of these committees were relatively diverse in terms of their ethnicities and religions.⁷ The majority of the BPUPKI and the PPKI members had been educated in Western Europe or had attended schools that were based on the Dutch educational system.⁸

³Padmo Wahjono, *Democracy in Indonesia: Pancasila Democracy in Lawrence W. Beer (ed) Constitutional Systems in Late Twentieth-Century Asia* at 462 (University of Washington Press 1993). Some scholars use term BPUPK instead of BPUPKI. This is because "I" which stand for Indonesia did not exist yet when this committee was established. For the purpose of this dissertation, I use BPUPKI. This is because BPUPKI is more familiar for many people. It also indicates that this committee worked to prepare the independence of Indonesia.

⁴ Saafroedin Bahar and Nanie Hudawatie, *Risalah Sidang BPUPKI Dan PPKI "Minutes of the BPUPKI and the PPKI Meetings"* (Jakarta: Sekretariat Negara, 1995). There were several meetings held by the BUPKI to draft the first Constitution. These include: first session May 28th to June 1st 1945, second session July 10th to July 17th 1945, July 10th to Auguts 17th 1945. On August 6th 1945, the BPUPKI was replaced by the PPKI. The PPKI then continued the BPUPKI work to draft the constitution.

⁵ Dorothea Rini Yunarti, *BPUPKI, PPKI, Proklamasi Kemerdekaan RI "BPUPKI, PPKI, Proclamation of the Independence of Indonesia"* at 8 (Penerbit Buku Kompas, 2003).

⁶ Bahar and Hudawatie, *Risalah Sidang BPUPKI Dan PPKI "The Minutes of the BPUPKI and PPKI Meetings"* at xxvii (cited in note 2).

⁷ The committee members included representatives from Java and also outside Java such as Sumatra, Sulawesi, Banjarmasin, and Moluccas. In addition, some of them were Chinese descendent or Arab descendent. With regard to religions, there were Muslims, Christians and other belief on this Committee.

⁸ MPB. Manus et all, *Tokoh-tokoh Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia I & II "Leading*

The influence of western educational background of these committee members was clearly seen when they drafted the constitution.⁹ They inserted some important constitutional principles which closely related to western ideas such as the distribution of powers, rule of law (*rechtstaat*), and limited government. It should be noted, however, that not all important constitutional principles were accommodated. These include the absence of a judicial review provision, and brief and only vague human rights provisions. This is in part due to the circumstances when the constitution was drafted and the conflicting ideologies among constitutional drafters. Some drafters viewed a strong, integrated state as the right ideology for Indonesia, while others believed that Indonesia should adopt a liberal democracy that acknowledged the rights of the people. As a result, the rights features of the first constitution remained short, vague, and somewhat abstract.

The influence of western ideas can also be seen from the language used in the constitution. While the main idiom of the first constitution was the Indonesian language (Bahasa Indonesia), the text of the constitution also included some western terms, including Dutch, French, German, and English words or phrases.¹⁰

Figures of Committee for the Preparation of the Indonesian Independence”, (Departemen Pendidikan dan Kebudayaan Jakarta 1993). Such as Universiteit Leiden, Nederlandsch Handelshoogeschool, Rotterdam, Amsterdam, Berlin and Paris.

⁹ Id at 318-333.

¹⁰ This includes the use of the following words and phrases in the first Constitution: *droit constitutionnel, loi constitutionnelle, geistlicher hintergrund, rechtsidee, gestaltung, machtstaat, Die gezamte staatgewalt lieght allein bei der Majelis, Vertretungsorgan des Willens des Staatsvolkes, neben, untergeordnet, concentration of power and responsibility upon the President, Gezetsgebug, Staatbergroting, pouvoir reglementair, eenheidstaat, staat, zelbesturende landschappen, volksgemeeschappen, village, begrooting, and noodverordeningsrect.*

Drafting human rights provisions in the first constitution: The fight between the integrated state idea and liberal democracy

The discussion about judicial review in Indonesia started when Indonesia was about to gain independence in 1945. In fact, judicial review had been practiced long before 1945. S.M Amin, as quoted by Benny K. Harman, argues that judicial review was recognized while the Dutch governed Indonesia,¹¹ mentioning two court decisions that were closely associated with that topic. In 1921, a court decision determined whether a court had the power to conduct judicial review.¹² The court decision declared that judges have the authority to examine whether or not a governor-general made laws based on his authority and competence. In 1933 and 1934, another Court in Medan declared that a governor-general's regulation was invalid because it was in conflict with a higher regulation.¹³ Unfortunately, Harman does not provide further explanation regarding these two court decisions.

On August 17, 1945, Indonesia declared its independence. One day after its independence, the PPKI officially promulgated the first Indonesian Constitution --the 1945 Constitution. As noted above, that constitution was drafted during the struggle for independence. The tumultuous situation led to a consensus that a new state should be a strong state. With this belief in mind, there was an accompanying view that if necessary, individual liberty could be

¹¹ Benny K. Harman, *Mempertimbangkan Mahkamah Konstitusi: Sejarah Pemikiran Pengujian UU Terhadap UUD*, "Considering the Constitutional Court: The History of Thoughts on Judicial review" 148 (Kepustakaan Populer Gramedia, 1st ed, 2013).

¹² Id. Arrest Hooggerechtshof 21 April 1921

¹³ Id. Court (Raad van Justitie) decision Medan 15 June 1934 and 6 October 1933.

temporarily sacrificed for the sake of achieving a strong, independent country.¹⁴ The role of the state in this context was important to maintain harmony. Rights were not considered to be natural rights possessed by people, but rather rights granted by the state. Duties would prevail over rights.¹⁵

During the drafting of the first constitution, there were some competing ideologies among constitutional drafters when they discussed fundamental principles. These include, among other things, diverse ideas on the form of state (federal vs. unitary) (secular vs. a state based on a particular religion), human rights (individualism vs. collectivism), judiciary (judicial review v. no judicial review power), and the national economy (liberal economy vs. a state-directed economy).

With regard to the form of state, for example, there were two different ideas, i.e., whether Indonesia should adopt a federal or a unitary state or whether Indonesia should be a secular state or a state based on a specific religion. The constitutional framers agreed that Indonesia should adopt a unitary state approach, as opposed to a federal state.¹⁶ They argued that a unitary state established one state one entity instead of several states.¹⁷ A unitary state, they believed, would create a strong country.¹⁸ Hatta agreed with this idea. He further reminded the BPUPKI regarding the importance of decentralizing the government powers between central government

¹⁴ Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* 59 (PT Gramedia Pustaka Utama, 1993).

¹⁵ *Id.*

¹⁶ Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* "The Preparation of the 1945 Constitution" at 118, 166 in *Proklamasi Dan Konstitusi Republik Indonesia* "Proclamation and the Constitution of the Republic of Indonesia" (Jajasan Prapantja, 1959).

¹⁷ *Id.*

¹⁸ Bahar and Hudawatie, *Risalah Sidang BPUPKI Dan PPKI* at 205 (cited in note 2).

and local government.¹⁹ The bad experience of colonialism in Indonesia, such as the division of Indonesians into the natives, the Europeans, and the foreign orientals, was likely the reason why the framers of the constitution believed that Indonesia should adopt a unitary state.²⁰

Regarding whether Indonesia should adopt a secular state or a state based on religion, some constitutional drafters suggested that Indonesia adopt a state based on a particular religion, i.e., Islam.²¹ This was because Muslim people were the majority.²² Hatta's view was that Indonesia should be a secular state. He stated that the unitary state of Indonesia should separate state affairs and religious affairs.²³ While the Muslim population was the majority, other religions existed in Indonesia. Adopting an Islamic state would not unite all Indonesian people.²⁴ Based on these two views, the 1945 Constitution adopted the middle way between state based on particular religion and secular state. It did not mention Islam or any other religions as the official religion(s) in Indonesia but it guaranteed freedom of religion, as stipulated in article 29.²⁵

These competing ideologies also occurred when the drafters of the constitution discussed whether Indonesia should adopt a liberal economy or a "socio-economy" (a state-directed economy).²⁶ They chose socio-economy, is based on togetherness and brotherhood. They

¹⁹ Id at 61.

²⁰ Adrian Vicker, *A History of Modern Indonesia*, 28,115-16 (Cambridge University Press 2005).

²¹ Id at 42. This includes Ki Bagoes HadiKoesoemo (member of the BPUPKI).

²² Id at 46. It was estimated about 90% of the Indonesian population were Muslim.

²³ Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* 167 (cited in note 16)." See also Bahar and Hudawatie, *Risalah Sidang BPUPKI Dan PPKI* at 117 (cited in note 2).

²⁴ Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* at 117 (cited in note 16)." See also Bahar and Hudawatie, *Risalah Sidang BPUPKI Dan PPKI* at 59 (cited in note 2). This statement was also echoed by Soepomo.

²⁵ Article 29: (1) The state shall be based upon the belief in the One and Only God. (2) The state guarantees all persons' freedom of religion and freedom to worship according to their religion and belief.

²⁶ Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* at 100 (cited in note 16).

believed that the liberal approach would lead to capitalistic economy which only gave privileges to capital holders, not people in general.²⁷

In line with the purpose of Chapter Two, this part primarily analyzes the Committees' deliberation regarding provisions on human rights as well as deliberation on judicial review. The explanation in this part largely relies on the minutes of the BPUPK and the PPKI meeting when they drafted the constitution. There were three publications of the BPUPK and PPKI meetings: The State Secretariat,²⁸ Muhammad Yamin²⁹ and AB Kusuma books.³⁰ All three will be utilized to enrich the understanding on the constitutional debate regarding these two important issues.

During the BPUPK deliberation, there were two opposing views regarding the inclusion of human rights provision in the constitution. The first view believed that inserting human rights provisions in the constitution was necessary. This view was presented by Yamin and Hatta.³¹

Yamin believed that inserting human rights provisions was important, and that there was no argument to deny the importance of human rights in the Constitution. In his words, "all constitutions in the world, old and new, have those basic protection clauses."³² He further emphasized that the inclusion of human rights provisions in the constitution had nothing to do

²⁷ Elucidation of Article 33. Article 33 contains economic democracy; production is carried out by all, for all based on the leader or members of society. People welfare is the top priority, not individual welfare.

²⁸ Saafroedin Bahar and Nanie Hudawatie, *Risalah Sidang BPUPKI Dan PPKI* (Jakarta: Sekretariat Negara, 1995, 1998)

²⁹ Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* (cited in note 16).

³⁰ RM AB Kusuma, *Lahirnya Undang-Undang Dasar 1945* (Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta, 2004).

³¹ Lubis, *In Search of Human Rights* at 262-63 (cited in note 14).

³² Muh.Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* at 330 (cited in note 16). He mentioned the Constitution of Japan, of the Republic of the Philippines and the Republic of China as examples.

with liberalism.³³ These provisions aimed to protect freedoms that had to be guaranteed by the constitution. Yamin cited the U.S. Declaration of Independence and Bill of Rights to show how important to include human rights in the constitution.³⁴

In addition, Hatta believed that the inclusion of these provisions would protect the right of individuals (the people) from arbitrary government actions.³⁵ For him, these provisions were also meant to limit the government's actions toward its citizens. While the government held power to govern the country, it could not do so by violating human rights. Inserting such rights in the Constitution would also oblige the government to respect human rights.

Hatta further reminded the BPUPK,

... the state we are establishing will not become an authoritarian state; we want to have a representative government; we want to create a society based on mutual cooperation and goals: to reform the society. For this reason, we should not grant unlimited power to the state because it might lead to an authoritarian state. Therefore, it is important to have in one of its provisions, for instance, on citizens' rights, that aside from all citizen rights possessed by every citizen of Indonesia.³⁶

The opposing view was that it was not necessary to include human rights provisions in the constitution. This view was presented by Soekarno and Soepomo who rejected the idea of inserting human rights provisions in the national basic law. For them, the inclusion of human rights provisions in the constitution reflected individualism, and their view was that individualism was not in line with the communitarian values reflected in Indonesian society.³⁷ In

³³Id 330.

³⁴Id. See also Kusuma, *Lahirnya Undang-Undang Dasar 1945* at 26 (cited in note 30).

³⁵Muh.Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* at 354-355 (cited in note 16).

³⁶Id at 299. See also Kusuma, *Lahirnya Undang-Undang Dasar 1945* at 255 (cited in note 30).

³⁷Yamin, *Naskah Persiapan Undang-undang Dasar 1945* at 109-121 (cited in note 16) Kusuma, *Lahirnya Undang-Undang Dasar 1945* at 255 (cited in note 30).

a communitarian society, they argued, the state is viewed as an embodiment of the people.³⁸ The state and its people were always united and the people serve as the reason for the state's existence. Therefore, it was not necessary to grant political rights explicitly to the people because granting such rights to the people may negate the very notion of the state itself.³⁹

Soekarno,⁴⁰ who later became the president, explained why human rights should not be included in the constitution. He said that Indonesia was based on the family principle (asas kekeluargaan).⁴¹ Therefore, there was no need to have provisions concerning human rights. He further elaborated that the inclusion of human rights might cause conflict within the state because it could lead to liberalism and individualism.⁴² In Soekarno's words, "...if we truly want to based our nation on the family principle, mutual cooperation and social justice, let us get rid of any idea of individualism and liberalism."⁴³ Unlike other BPUPK members, Soekarno had oratorical talents that made him an effective nationalist leader. He used his great talent to build national sentiment. He could speak directly to the hearts of the people. His talent was likely a factor contributing the acceptance of his ideas during the BPUPK meetings.

In addition, Soepomo argued:

The constitution we are drafting is based on the family principle, not based on the doctrine of individualism we have rejected. Inserting the freedom of assembly and

³⁸ Yamin, *Naskah Persiapan Undang-undang Dasar 1945* at 110-121 (cited in note 16).

³⁹ Herbert Feith and Lance Castles (eds.) *Indonesia Political Thinking 1945-195*, at 188-192 (Cornell University Press 1970) See also Yamin, *Naskah Persiapan Undang-undang Dasar 1945* at 109-121 (cited in note 16)

⁴⁰ The word "Soekarno" was based on the old spelling. The letters "oe" were read as "u". In the new spelling "oe" changed to "u". Therefore "Soekarno" in the new spelling changed to "Sukarno". This Chapter uses old spelling "Soekarno" to maintain its authenticity.

⁴¹ Bahar and Hudawatie, *Risalah Sidang BPUPKI Dan PPKI* at 236 (cited in note 2).

⁴² Yamin, *Naskah Persiapan Undang-undang Dasar 1945* at 287 (cited in note 16).

⁴³ Id 297.

association in the constitution means adopting the doctrine of individualism, so that if we declare the freedom of assembly and association in our constitution, we will challenge the rationality of the family principle doctrine.⁴⁴

Soepomo further argued that” ...[I]n the system of family principle, the attitude of the citizen is not always asking “what is my right?” but asking what is my duty as member of the big family, that is, this Indonesian State.⁴⁵

Both Soepomo and Soekarno believed that the *integralistic* state (integrated state) presented the most appropriate ideology for Indonesia.⁴⁶ An integrated state perceived “the inner spirit and spiritual structure of Indonesia people is characterized by the ideal of the unity of life, the unity *kawulo Gusti*, that is, of the outer and the inner world of the macro cosmos and the micro cosmos of the people and their leaders.”⁴⁷ There is no dichotomy between state and citizens. There is no conflict between these two entities. Therefore, citizens’ rights and fundamental freedom are not necessary to be included in the constitution.

In regard to this statement, Hatta further pointed out that in fact Indonesian society had recognized right to dissent, the right to petition and the right to freedom of movement for many years,⁴⁸ even though the notion of rights was not explicitly articulated.

This sharp ideological difference was also evident among other the PPKI members. The ideological difference between protecting individual rights (individualism) and collectivism

⁴⁴ Id. See also Kusuma, *Lahirnya Undang-Undang Dasar 1945* at 353 (cited in note 30).

⁴⁵ Yamin, *Naskah Persiapan Undang-undang Dasar 1945* at 275-76 (cited in note 16).

⁴⁶ Id at 55.

⁴⁷ Feith and Castles (eds.) *Indonesia Political Thinking 1945-1965*, at 188-192 (cited in note 38). See also Yamin, *Naskah Persiapan Undang-undang Dasar 1945* at 55 (cited in note 16).

⁴⁸ Mohammad Hatta, *Colonial Society and the Ideals of Social Democracy* at 38 in Herbert Feith and Lance Castle, eds., *Indonesia Political Thinking, 1945-1965* (Ithaca: Cornell University, 1975).

among the PPKI members created a challenge especially when the constitutional drafters attempted to write it in the text of the constitution. Not to mention that this intense constitutional debate occurred in a situation where people and the founding fathers focused their efforts on fighting the colonial government and preparing for independence.

Considering that the primary goal at that moment was to proclaim independence at the earliest possible time, the PPKI members finally agreed not to prolong the debate on these issues. They believed that these particular provisions could be discussed later after freedom was won. The compromise among the PPKI members was finally achieved i.e., the constitution would have the provisions on citizens' rights but the implementation of these rights would have further implementing regulations.⁴⁹ As a result, the 1945 Constitution mentioned few articles concerning human rights.

What did the human rights provisions look like in the first constitution? The ideological difference among constitutional drafters between those who wanted to include human rights provisions in the constitution and those who did not want to have them affected how the few human rights provisions in the constitution were formulated.

It is important to note that in the Indonesian context, the rights and the responsibilities of an individual are determined by his relations with others. There are no human rights which are independent of these interrelations. While there were no explicit words of human rights, the 1945 Constitution mentioned certain rights which can be associated with both civil and political rights and economic social and cultural rights.

⁴⁹ Yamin, *Naskah Persiapan Undang-undang Dasar 1945* at 357-396 (cited in note 16).

Concerning economic, social, and cultural rights, the 1945 Constitution recognized the right to work (art.27), the right to a reasonable standard of living (art. 27), the right to education (art. 31), and guarantee for the poor (art. 34). While all these rights are protected by the Constitution, further formulation of these provisions was in the form of statutes insofar as has been necessary to keep pace with the development of society.

Some argue that there were six⁵⁰ or seven⁵¹ articles in the 1945 Constitution that could be treated as relating to human rights. One scholar, however, argued that it was in fact only one provision, Article 29 (2), that explicitly dealt with human rights i.e. right to religion.⁵² This is because religious freedom was the only right that did not require the status of the Indonesian citizenship to qualify for protection. In this regard, Asshiddiqie has argued that the right to religion should be considered as a human right because this right belongs to both citizens and noncitizens. The other six rights provisions did not really deal with human rights because they guaranteed citizens positive right which were not applicable to noncitizens.⁵³ Unlike Asshiddiqie, Lubis has suggested that the six rights in the constitution should be considered as human rights. He did not go further discussing whether they are citizens or non-citizens' rights.⁵⁴ In fact there is no single human rights phrase explicitly written in the first constitution.

⁵⁰Lubis, *In Search of Human Rights* at 74 (cited in note 14). He mentions the six articles dealing with human rights (Articles 26-31): the right to citizenship, equality before the law, employment, association, speech, religion, national defense, and education.

⁵¹Jimly Asshiddiqie, *Konstitusi dan Hak Asasi Manusia*, "the Constitution and Human Rights" paper presented to commemorate the 10th years of KontraS, Jakarta March 26, 2008. at 12-13. He adds the 7th human right i.e. the right of deprived people and abandoned children to be taken care of by the state.

⁵²Indonesia "Const" Art 29 (2).

⁵³Asshiddiqie, *Konstitusi dan Hak Asasi Manusia*, at 12 (cited in note 51).

⁵⁴Lubis, *In search of Human Rights* at 74-75 (cited in note 14).

The difference of ideologies among constitutional drafters during the constitutional drafting also influenced the formulation of human rights provisions. The wording of the few rights provisions in the 1945 Constitution was vague. For example, Article 28 states "Freedom to associate and to assemble, to express verbal and written expression and the like shall be further regulated by law." This provision basically did not say anything about protection of these rights. It did not guarantee the existence or the enforcement of these rights. It indicated only that the implementing laws would regulate these matters.

Similarly, with regard to economic and social rights, the first constitution mentioned a very limited the right to work⁵⁵ and the right to education.⁵⁶ It did not acknowledge other important economic and social rights such as the right to housing, the right to health service, and the right to water. The constitution also did not mention the duty of the government to respect, to protect, to promote, and to fulfill these latter human rights.

As mention earlier, the vague and brief human rights provisions in the first constitution needed further implementing regulations to give them effect. Without explicitly providing certain guidance in the text of the constitution on how these rights should be protected, the constitution basically gave a blank check to the government to regulate human rights. Unfortunately, subsequent laws did not fully implement the rights of the individual citizen stipulated by the Constitution.

⁵⁵ Indonesia "Const" Art 27: (1) All citizens have equal status before the law and in government and shall abide by the law and the government without any exception. (2) Every citizen has the right to work and to live in human dignity.

⁵⁶ Indonesia "Const" Art 31: (1) Every citizen has the right to education. (2) The government shall establish and conduct a national education system which shall be regulated by law.

Drafting of judicial review provisions in the first constitution: Another example of resistance to liberal democracy principles

The importance of having a judiciary that has authority to conduct judicial review can be traced through the minutes of the BPUPKI meetings. On July 11, 1945, in the BPUPKI plenary session Mohammad Yamin discussed the importance of having a judicial review mechanism. He stated, “This Supreme Court is the highest (judicial institution), so that in comparing laws this Court will decide whether such laws are in line with adat law, sharia law and the constitution.”⁵⁷

He reiterated his idea about the importance of judicial review as part of the Supreme Court constitutional mandates in the BPUPKI meetings on July 15, when this body discussed the draft of the constitution prepared by the Panitia Perancang UUD (Constitutional drafting committee).⁵⁸ In this meeting, Yamin stated:

The Supreme Court (Balai Agung) does not only conduct judicial matters but it should also be a body that compares, whether laws created by the parliament (the DPR) do not violate the Constitution or contradict with adat law, or do not contradict with sharia law. Thus, within this Supreme Court, there should be civil court and criminal [Court], but also Customary/ Adat Court and High Islamic Court that their work do not only conduct judicial matters but also compare [laws] and give report about their opinions to the President concerning all matters that violate fundamental law, adat law and sharia law.⁵⁹

⁵⁷ Bahar and Hudawatie, *Risalah Sidang BPUPKI Dan PPKI* at 183 (cited in note 2). The original text is as follow: “Mahkamah inilah jang setinggi-tingginja, sehingga dalam membanding undang-undang, maka balai Agung inilah jang akan memutuskan apakah sedjalan dengan hukumadat, sjariah dan undang-undang dasar”

⁵⁸ The Panitia Perancang UUD had 18 members, one special member and one chair (chaired by Soekarno).

⁵⁹ Id at 295. The original text is as follow: “Balai Agung djangan sadja melaksanakan bagian kehakiman tetapi djuga hendaknya mendjadi badan jang membanding, apakah undang-undang jang dibuat oleh Dewan Perwakilan Rakyat, tidak melanggar undang-undang dasar republic atau bertentangan dengan hokum adat jang diakui, ataukah tidak bertentangan dengan sjariat agama Islam. Djadi, dalam Mahkamah Tinggi itu hendaknya dibentuk badan sipil dan kriminil, tetapi djuga Mahkamah Adat dan Mahkamah Islam Tinggi jang pekerdjaanja tidak sadja mendjalankan kehakiman tetapi djuga membanding dan memberi laporan tentang pendapatnja kepada Presiden Republik tentang segala hal jang melanggar hukum dasar, hukum adat, dan aturan sjariah.”

This statement was delivered by Yamin after Soepomo, the chief of the constitutional drafting committee, did not mention anything in his written report and speeches about the responsibility of the Supreme Court (Balai Agung) to conduct judicial review, as has been proposed by Yamin in the BPUPKI earlier meeting.

Soepomo stated that “regarding judicial power, an authority that is universally guaranteed, Article 24 of this Constitution states, (1) Judicial power is carried out by a Supreme Court and other judicial bodies and (2) the structure and the powers of these judicial bodies is regulated by laws. And according to Article 25 the requirement to be judges is stipulated by laws. This is the judicial power.”⁶⁰

Toward what had been proposed by Yamin regarding the importance of the judges to have judicial review power, Soepomo rejected Yamin’s ideas on three grounds. First, the authority to conduct judicial review was closely related to liberal democracy and separation of powers (*trias politika*). But in fact, the draft of the constitution did not adopt liberal democracy and separation of powers. This meant under this constitution the judiciary would not control the lawmaking authority. This statement was reflected in Soepomo’s speech:

In my opinion, Mr. Chairman, in this draft of the constitution, we do not adopt a system that in principle differentiates these three bodies, which means it is not, that judicial power will control lawmaking body. A system that is proposed by Yamin is that the judiciary controls the lawmaking body.⁶¹

⁶⁰ Id. See also Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*. at 267, 311 (cited in note 16). The original text is as follow “Tentang kekuasaan kehakiman, jang djuga suatu kekuasaan jang dimana pun di djamin, pasal 24 dalam Undang-Undang Dasar itu bunjinja (1) kekuasaan kehakiman dilakukan oleh sebuah Mahkamah Agung, dan lain-lain badan kehakiman. (2) Susunan dan kekuasaan badan-badan kehakiman itu diatur dengan Undang-Undang. Dan menurut Pasal 25 sjarat untuk mendjadi hakim ditetapkan dengan undang-undang. Itulah tentang kekuasaan kehakiman.”

⁶¹ Bahar and Hudawatie, *Risalah Sidang BPUPKI Dan PPKI* at 305 (cited in note 2). The original text is as follow “menurut pendapat saja, tuan Ketua, dalam rantjangan undang-undang dasar ini kita memang tidak memakai

Second, there was no conclusive agreement among constitutional law experts regarding the authority of the judiciary to conduct judicial review. In this regard Soepomo stated:

Obviously among constitutional law experts there is no conclusive view regarding that matter. Some are pros others are cons. What causes [such disagreement]? A constitution contains basic rules and commonly they are very broad, so that it can be interpreted as follows, the opinion of A can be inline [with the constitution] the opinion of B can also be inline [with the constitution]. In practice, if there is a dispute whether a law is in conflict with the constitution, that is not a juridical question, it is a political question. Therefore, it is possible in practice that there is a dispute between laws and constitution. Thus, in my opinion, this system does not fit with Indonesia, which we will establish.⁶²

Soepomo believed that disputes between laws and constitution should be addressed by parliament (political bodies) and not by the courts because “it is a political question” and not a juridical question.⁶³ Therefore, a political body, i.e., parliament was the most appropriate institution address this matter.

Third, the Indonesian legal scholars did not have experience in dealing with judicial review. In this regard Soepomo stated:

...we explicitly state that the Indonesia legal scholars do not have experience in these matters (judicial review) and the proposal from Mr. Yamin should consider that in Austria, Czechoslovakia and Germany in time of Weimar (this power did) not belong to

sistim jang membedakan principieel tiga badan itu, artinja tidaklah, bahwa kekuasaan kehakiman akan mengontrol kekuasaan membentuk undang-undang. Memang maksud sistim jang diadjukan oleh Yamin, ialah supaja kekuasaan kehakiman mengontrol kekuasaan undang-undang.”

⁶²Id at 306. The original text is as follow “...ternyata bahwa antara para ahli tata negara tidak ada kebulatan pandangan tentang masalahitu. Ada jang pro ada jang contra-kontrol. Apa sebabnya? Undang-undang dasar hanja mengenai semua aturan jang pokok dan biasanja begitu lebar bunjinya, sehingga dapat diberi interpretasi demikian, bahwa pendapat A bisa selaras, sedangkan pendapat B pun bisa djuga. Djadi dalam praktik, djikalau ada perselisihan tentang soal, apakah sesuatu undang-undang bertentangan dengan undang-undang dasar atau tidak, itu pada umumnja bukan soal juridis tetapi soal politis; oleh karena itu mungkin – dan disini dalam praktik begitu, pula ada conflict antara kekuasaan sesuatu undang-undang dan undang-undang dasar. Maka menurut pendapat saja sistim ini tidak baik untuk buat Indonesia, jang akan kita bentuk.”

⁶³Id. See also Kusuma, *Lahirnya Undang-Undang Dasar 1945* at 390 (cited in note 30).

Supreme Court, it belonged to specialized court, *constitutioneelhof*, a specialized court that specifically deals with constitution. We should acknowledge that our human resources are few. And we should add more human resources, scholars who expert on this matter. Therefore, for a young country, I believe it is not yet the time to do that.⁶⁴

After Soepomo gave his opinion, there were no further comments and thoughts from other the PPKI members, including Yamin, even though he strongly disagreed with Soepomo's ideas.⁶⁵ This debate ended with voting.⁶⁶ The result of the voting appeared that the majority of the PPKI members agreed with Soepomo's ideas. As a result, Soepomo concepts, as reflected in the constitutional draft prepared by the Constitutional committee, was accepted and used. This constitutional draft finally became the first Constitution of Indonesia after the PPKI officially announced it on August 18, 1945. This left the first constitution without any provision concerning judicial review.

Drafting human rights provisions and judicial review in the 1949 Federal Constitution: More coherent ideologies among the constitutional drafters and external influence

The first constitution was established in a revolutionary situation and it acted as a provisional constitution. Soekarno stated that "this constitution would be replaced by a better one

⁶⁴ Bahar and Hudawatie, *Risalah Sidang BPUPKI Dan PPKI* (cited in note 2) The original text is as follow "... kita dengan terus terang akan mengatakan bahwa para ahli hukum Indonesia pun sama sekali tidak mempunyai pengalaman dalam hal ini, dan tuan Yamin harus mengingat djuga bahwa di Austria, Ceko-Slowakia dan Jerman waktu Weimar bukan MA, akan tetapi pengadilan special, *constitutioneelhof*, sesuatu pengadilan spesifik, jang melulu mengerdjakan konstitusi. Kita harus menambah tenaga-tenaga, ahli-ahli tentang hal itu. Djadi buat negara muda saja kira belum waktunja, mengerdjakan persoalan itu." See also Kusuma, *Lahirnya Undang-Undang Dasar 1945* at 390 (cited in note 30).

⁶⁵ Id. See also Kusuma, *Lahirnya Undang-Undang Dasar 1945* at 391 (cited in note 30).

⁶⁶ Benny K. Harman, *Mempertimbangkan Mahkamah Konstitusi* at 154 (cited in note 11).

as soon as circumstances permitted.”⁶⁷ The second constitution, the 1949 Federal Constitution, was created with the involvement of the United Nations during “the Round Table Conference,” which was held primarily to end the dispute between Indonesia and the Dutch after four years of armed conflict and protracted negotiations.⁶⁸ The revolutionary period had continued after 1945 because the Dutch were not prepared to give up their interests in Indonesia unconditionally.⁶⁹

The discussion of drafting a new constitution was resumed in 1946 after the Dutch, with the help of the English, once again gained the foothold in Indonesia. Initially, there was the 1946 Linggarjati agreement between the Netherlands and the Indonesian government to form a Netherlands – Indonesian Union.⁷⁰ This Union aimed to create a new sovereign state, the United States of Indonesia. This agreement then was followed up by the Round Table Conference held in The Hague from August 23 to November 2, 1949. This Conference produced three important results: the establishment of the United States of Indonesia (including the establishment of the 1949 Federal Constitution); transfer of sovereignty to the United States of Indonesia; and the establishment of United States of Indonesia – Dutch Union.⁷¹ The result of this Conference was then officially declared by the Dutch Queen Juliana before the delegations in December 27, 1949. With the Queen’s declaration, The 1949 Federal Constitution and all the results of the Round Table Conference were formally applied.

⁶⁷ Id. See also Kusuma, *Lahirnya Undang-Undang Dasar 1945* at 479 (cited in note 30).

⁶⁸ P.J. Drooglever, *The Genesis of the Indonesian Constitution of 1949*, *Bijdragen* 153, no. 1997 at 65 (1997).

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Majda El-Muhtaj, *Hak asasi manusia dalam konstitusi Indonesia: Dari UUD 1945 sampai dengan Amandemen UUD 1945 tahun 2002* “Human Rights in the Indonesian Constitutions: From the 1945 Constitution to the Amendment of the 1945 Constitution in 2002” 74 (Kencana, 2005).

Who were the actors who contributed to the formulation of the 1949 Constitution? Was it created by the Indonesians or was it dictated directly or indirectly by the Dutch? It was agreed that this new Constitution was something that should be determined by Indonesia.⁷² However, the Netherlands would have a say in the composition of the constitutional assembly. The new constitution would be based on principles of democracy, federalism, and respect fundamental human rights. In 1948, a further agreement was achieved with the assistance of a Committee of Good Offices provided by the United Nations.

The Indonesian delegates headed by Soepomo presented a draft of the new constitution. This draft laid out some important principles such as the division of powers, democracy, the Pancasila⁷³, and human rights.⁷⁴ The human rights provisions would refer to the United Nations Charter (Universal Declaration of Human Rights). The establishment of human rights provisions in this constitution constituted historical evidence of a commitment to human rights. The inclusion of human rights provisions in this new constitutional draft was significantly different from the old constitution that had not sufficiently elaborated human rights provisions.

More importantly, Soepomo, who had rejected the inclusion of human rights provisions in the first constitution, was one of the actors behind the drafting of this new constitution.⁷⁵ There were other actors involved in this process including Hatta, Natsir, and Sjahrir, all of who were in favor of liberal democracy.

⁷² Id.

⁷³ The Pancasila (the five precepts/principles) is Indonesia's state philosophy. It contains (1) Belief in Almighty God (2) Just and Civilized Humanity (3) The Unity of Indonesia (4) Guided by Deliberation amongst Representatives (5) Social Justice.

⁷⁴ P.J. Drooglever, *The Genesis of the Indonesian Constitution of 1949* at 71 (cited in note 68).

⁷⁵ Id 81.

There are three possible explanations regarding the inclusion of human rights provisions in this new constitution. First, it is possible that Soepomo, in line with the significant development of human rights discussion in 1948, changed his views regarding the importance of human rights provisions in the constitution. Or other actors such as Hatta, Natsir, and Sjahrir successfully prevailed on him to insert provisions on human rights in this new constitution.

Second, it is possible that other delegates, such as the Dutch or the member of Good Office of the United Nations, strongly urged the inclusion of these provisions in the new constitution. This is because, for Western European countries like the Netherlands, human rights protection is a fundamental principle.

Last, the establishment of Universal Declaration of Human Rights in 1948 influenced the inclusion of human rights provisions in this new constitution. This can be seen by how closely the human rights provisions in this new constitution resemble the provision of UDHR 1948. As mentioned by Lubis, “almost all human rights provisions of the UDHR were adopted, making the 1949 Constitution eligible to be regarded as part of human rights success represented by UDHR.”⁷⁶ For him, the 1949 Constitution constitutes historical evidence of a commitment to human rights and follows the revival of interest in human rights concerns in the west.⁷⁷ As a result, this new federal constitution provided comprehensive provisions on human rights. There were approximately twenty-six articles concerning basic rights and freedom of man, eight provisions regarding basic principles of human rights, and some articles concerning social

⁷⁶Lubis, *In Search of Human Rights* at 64 (cited in note 14).

⁷⁷Id.

economic and cultural rights.⁷⁸

Interestingly, unlike the formulation of human rights provisions, the drafting process of the new 1949 Constitution did not include much discussion about judicial review, particularly judicial review of federal law. Harman provides three explanations regarding this matter.⁷⁹ First, the new constitution did not recognize judicial review of federal laws because the federal law was created by the government, legislature, and the senate. These three state institutions were the highest state institutions and they reflected popular sovereignty. Therefore, laws created by these three institutions cannot be invalidated by the judiciary.

It is also likely that Soepomo played a significant role in drafting these provisions. From the drafting process of the first constitution, it appeared that Soepomo was not favorably disposed toward judicial review. Last, the Dutch system that did not recognize judicial review and this might have influenced the formulation of this new constitutional provision.

While there was no judicial review mechanism in the federal level, judicial review was practiced at state level. Under the 1949 Constitution, the Supreme Court had the power to conduct judicial review of state laws. This is because the Supreme Court was the highest judicial institution nationwide. In short, the content of this new constitution was a mixture of the Western European system of government (Dutch), the North American (US) and the Indonesian.⁸⁰ This conclusion was supported by the UN Commission for Indonesia report which stated: “the Partners [to the Netherlands – Indonesian Union] undertake to base their form of

⁷⁸ Indonesia “1949 Const” Art 7-33, 34-41.

⁷⁹ Harman, *Mempertimbangkan Mahkamah Konstitusi* at 163(cited in note 11).

⁸⁰ Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* at 43 (Equinox Publishing, 2006).

government on democracy, to aim at an independent judiciary, and to recognize fundamental human rights and freedoms....”⁸¹

The adoption of the features of liberal democracy in the new constitution can be explained as follows: first, as mentioned above, there was significant influence from the Dutch during the Round Table Conference concerning the idea of liberal democracy. Fundamental principles such as protection of human rights and an independent judiciary are recognized in the Dutch Constitution.

Second, in practice since the end of 1945, without the formal amendment of the constitution, Indonesia had adopted liberal democracy through the assumption of a parliamentary system. During the adoption of the parliamentary system, people were guaranteed the exercise of their rights. These include a right to establish political parties, rights to associate, right of assembly, and right of expression.

Last, figures in power during this period were strong supporters of liberal democracy. These included Hatta, Natsir, Sjahrir, Djuanda, and Sjafruddin Prawiranegara, all among those who believe public liberties and the rule of law to be of great importance. Having these big names in power, it is likely that the idea of including fundamental principles, such as public liberties and rule of law, would be supported or even encouraged.

⁸¹ UN Commission for Indonesia, Special Report to the Security Council, UN Security Council Document S/1417, Nov. 10, 1949.

Drafting human rights and judicial review provisions in the 1950 Provisional Constitution: advancing human rights provisions yet rejecting judicial review

The 1950 Provisional Constitution was established as a response of the majority of people who wanted to return to a unitary state instead of a federal state. Indonesia did not have strong federal roots. Indonesia had never experienced a federal government in its history. In addition, the federal government symbolized the remnants of Dutch colonialism.⁸² The Dutch governed Indonesia in somewhat federal fashion. It applied three different laws for the society depending on their origins. There were specific laws for each group: Indonesian Natives, Europeans, and Foreign Orientals (such as Chinese descendants and Middle Eastern descendants).⁸³ The federal arrangement reflected the final settlement between Indonesian and the Dutch to form a Republic of the United States of Indonesia (RUSI) in association with the Netherlands.⁸⁴ As stated by Adrian Vickers,

The settlement reached on 27 December 1949 was one of which the new Indonesia was a Federation, linking the Republican core to the Dutch- sponsored state.⁸⁵ For many Indonesians, this was an unacceptable structure and as a result, federalism has for ever more had bad connotations in Indonesian politics.⁸⁶

As reflected in the drafting process of the 1949 Federal Constitution, the Dutch favored governing Indonesia in a federal manner. The establishment of this federal state strengthened the motivation of some states such as East Indonesia and Pasundan “moved closer and closer to a

⁸²Lubis, *In Search of Human Rights* at 66 (cited in note 14).

⁸³Vickers, *A History of Modern Indonesia* at 115 (cited in note 20).

⁸⁴Steven Drakeley, *The History of Indonesia* at 81 (ABC-CLIO, 2005).

⁸⁵Vickers, *A History of Modern Indonesia* at 115 (cited in note 20).

⁸⁶*Id* at 115.

position of partnership with the Republic (Indonesia).”⁸⁷ In Kahin’s words,

The movement was energized by the almost immediate popular reaction against the primarily Dutch-created federal political order with which The Hague Agreement had endowed the new Indonesia state. Until this vestige of the repudiated neo-colonial order had been shaken off, many Indonesians would feel that their newly won political independence was not complete. It was the reaction of the inherited federal system and its replacement by unitarian form of government that constituted what the Indonesians referred to the unitarian movement.⁸⁸

Unlike a unitary state where the central government has significant power toward local governments, in a federal system the national government has limited powers to manage the states. With the federal arrangement, there was a possibility that it would be difficult to unite all regions because the various regions might have substantially different interests. With a unitary state, the central government would have more power to unite the disparate regions. For many Indonesians, a unitary state was preferable. Soekarno in particular favored centralism over federalism.⁸⁹ He used his powerful speeches to build national sentiment throughout the islands. This resulted in many states/local governments desiring to return to a unitary state. The government responded by deciding to draft a new constitution, the 1950 Federal Constitution. In this regard Feith stated:

On August 17, a new Republic of Indonesia was in existence. In formal terms, the new state was successor to RUSI (United States of Indonesia). Its constitution was enacted as an amendment of the 1949 Constitution... Politically, however, the new state represented a triumph for the nationalism of the revolution. Its very name, as well as the date on which its inauguration was celebrated, signified the moral victory of the republic of

⁸⁷ El-Muhtaj, *Hak asasi manusia dalam konstitusi Indonesia: dari UUD 1945 sampai dengan Amandemen UUD 1945 tahun 2002* at 74 (cited in note 70).

⁸⁸ Feith, *The Decline of Constitutional Democracy in Indonesia* at 71 (cited in note 39).

⁸⁹ Vickers, *A History of Modern Indonesia* at 115 (cited in note 20).

Indonesia proclaimed five years earlier.⁹⁰

This new constitution was initiated by two groups: the delegates from the Federal Government of Indonesia (headed by Hatta) and the delegate from the Republic of Indonesia (headed by Abdul Halim).⁹¹ It furthered by the establishment of a committee for the preparation of the Constitution of the unitary state.⁹² This committee deliberated for about two months.

Apart from discussing many important constitutional principles such as the return to a unitary state and the formation of a unicameral legislative system, this committee also formulated directive principles for the new constitution. The charter of rights in the 1949 Constitution, which had been largely drawn up on the basis of the UN Declaration of Human Rights, was maintained in its entirety. For Lubis, it was even more than just adopting the 1949 Constitution is rights language, “The 1950 Constitution not only adopted all human rights provisions from the 1949 Constitution but also enlarged upon them.”⁹³

The inclusion of the human rights provisions in 1950 could be seen as representing the aspiration of most members of the constitutional drafting committee.⁹⁴ The need of economic assistance and foreign investment from western countries might also play role in the inclusion of

⁹⁰ Feith, *The Decline of Constitutional Democracy in Indonesia* at 99 (cited in note 39).

⁹¹ The Republic of Indonesia was a state among other states under the Federal Government of Indonesia.

⁹² *Id* at 93. This committee jointly headed by RUSI Minister of Justice, Soepomo, the Republic Deputy Prime Minister Abdul Halim and a non-party (independent) man. This committee consists of 14 members, with seven members appointed by each of the government.

⁹³ Lubis, *In Search of Human Rights* at 67 (cited in note 14). The right to strike which was previously absent in the 1949 Constitution, was recognized by the 1950 Constitution.

⁹⁴ Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio- Legal Atas Konstituante 1956-1959* "The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante, 1956-1959" (Pustaka Sinar Harapan, 1992).

these provisions.⁹⁵ The 1950 Provisional Constitution, similar to the 1949 Federal Constitution, contained fundamental rights and freedoms⁹⁶ such as right to work, right to education, and even right to strike. These rights, however, could be limited by law for the purpose of securing the indispensable recognition and respect for the rights and freedoms of others and to comply with “the just requirement of public order morality and welfare in democratic community.”⁹⁷

Overall, this new constitution represented an ongoing commitment to human rights. As mentioned by J.A.C. Mackie, ‘the Provisional Constitution contained a substantial catalogue of fundamental rights and freedoms, ranging from the statement of legal rights guaranteeing equality before the law and just legal procedures to statements of aspirations such as the right to work, to education, and to ownership of property.’⁹⁸ Similar to Mackie, Lubis argues “this constitution is the most liberal that Indonesia ever had, if liberalism is to be measured by the number of human rights provisions.”⁹⁹

Although human rights provisions gained full recognition in this new constitution, the 1950 Constitution did not include judicial review. On the contrary, it explicitly stated that a law could not be reviewed.¹⁰⁰ This meant no single authority had the power to review a law –not the judiciary nor other branches of government. The only body that could review a law was the lawmakers themselves.

⁹⁵ Kahin McT. George, *Nationalism and Revolution in Indonesia* at 1945–46 (Cornell University Press 1, no. 952 (1952). There is recognition of the right to own property (article 26) which may explain the need of foreign investment.

⁹⁶ Indonesia “1949 Const” Art 7-34.

⁹⁷ Indonesia “1949 Const” Art 33.

⁹⁸ J.A.C. Mackie, *Indonesian Constitutions 1945-60* at 189 (cited in note 1).

⁹⁹ Lubis, *In Search of Human Rights* at 67 (cited in note 14).

¹⁰⁰ Indonesia “1950 Const” Art 90 (2): Undang-undang tidak dapat diganggu-gugat “Laws are final /unreviewable “.

The enactment of this provision was influenced by the popular sovereignty theory. Because a law was created by two popularly elected branches of governments (the legislative and the executive) that represented the sovereignty of the people, this law had the highest status. If a law could be reviewed by the judiciary, it meant that this law was not the product of the highest state institutions. This provision largely resembled a provision in the 1949 Constitution, which similarly stated that a federal law could not be reviewed by the judiciary.

While the 1950 Constitution was promising in protecting human rights, did it realize anything in practice? During the 1950s there were severe political conflicts among political parties, ethnic groups, religions, and classes. Political parties were unable to manage their conflicts. As a result, there was no stable cooperation among the competing ethnic and interest groups. This resulted in a very unstable political situation in the country leading, among other things, to difficulty in implementing the human rights guarantees in the constitution.

Drafting human rights and judicial review provisions: Post 1950 Constitution

The 1950 Constitution was created by a committee that did not have strong political legitimacy¹⁰¹ because it was not elected by the people. Therefore, the status of the 1950 Constitution was provisional. Recognizing the temporary nature of that Constitution, there were attempts to prepare for general elections to elect members of the DPR and constitutional drafting committee (the Konstituante).¹⁰² The general elections for the DPR and the Konstituante were held in 1955 in a fair and democratic situation.

¹⁰¹Feith, *The Decline of Constitutional Democracy in Indonesia* at 93 (cited in note 39).

¹⁰²Drakeley, *The History of Indonesia* at 95 (cited in note 83).

After the Konstituante was established in 1955,¹⁰³ this committee worked to formulate a new, permanent constitution. This committee consisted of individuals from different political parties with different political ideologies. It is unsurprising that this committee faced difficulties in reaching decisions when they deliberated the content of the new constitution.

Interestingly, it was not the case when the Konstituante discussed human rights issues. Members of the Konstituante had similar views regarding the importance of having human rights provisions in the constitution even though they had different views regarding the reasons why it was important to entrench these rights.¹⁰⁴ For Islamic and other religious political parties, human rights were seen as a gift from God that should be respected and maintained.¹⁰⁵ For the communist and nationalist parties, human rights were seen as tools to fight against capitalism and colonialism.¹⁰⁶ For the social-democrat party, human rights were seen as a prerequisite to building a humane and democratic society.¹⁰⁷

There was an extensive discussion about the inclusion of human rights in this new constitution. The committee thought in terms of four categories of human rights.¹⁰⁸ The first category was a group of rights that was already agreed by the committee to be included in the

¹⁰³ There were 514 of the Konstituante members. In addition, there were 30 representatives from minority groups: 12 Chinese descendants, 12 Indo-European descendants, and 6 representatives from Irian Barat. Nasution *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante, 1956-1959* at 34 (cited in note 92).

¹⁰⁴ *Id* at 133.

¹⁰⁵ *Id* at 134.

¹⁰⁶ *Id* at 134.

¹⁰⁷ *Id* at 133.

¹⁰⁸ For thorough discussion see Nasution, *Aspirasi Pemerintahan Konstitusional Indonesia*, pp 139-143. See also Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante, 1956-1959*.

constitution.¹⁰⁹ These include the right of living, freedom, and personal security; the right to obtain legal aid; anti-slavery, no arbitrary arrest, and presumption of innocence. The second category was a group of rights that was not yet agreed by the committee whether such rights would be granted to every individual or only for citizens.¹¹⁰ These include equality before the law, freedom of speech, freedom of association, and freedom of movement. The third category was a group of rights that considered as controversial rights.¹¹¹ These include the right to asylum, the right to self-determination, and Islam as the official religion. And the last category was a group of positive human rights that was likely not to be included in the constitution.¹¹² These include economic, social, and cultural rights such as the right to employment, the right to education, and the right to establish worker union.

The Konstituante believed that a group of rights in the last category were not suitable for insertion into human rights chapter. They were more appropriate to be adopted as policy principles. This meant these rights were not justiciable or could not be adjudicated. However, they acted as an important guidance for the government in fulfilling economic and social rights.¹¹³ The Konstituante believed that democratically elected institution such as the legislature and executive branches were the right agencies to realize these rights -- not the judiciary. The policy principles adopted in this new constitution were similar to the Irish and the Indian Constitutions in that they acknowledged economic and social right as state/social directive

¹⁰⁹Id at 139.

¹¹⁰Id at 141.

¹¹¹Id at 143.

¹¹²Id at 145.

¹¹³Id at 138.

principles. In these two constitutions, economic and social rights are non-justiciable rights.¹¹⁴

With regard to judicial review, during the Konstituante deliberation, there was basic argument that a law could be judicially reviewed to determine whether it was consistent with the Constitution. However, there was a question concerning which institution that should hold this power. Hermanu Kartodiredjo, a member of the Konstituante, suggested three options: (1) the parliament, (2) the Supreme Court, or (3) a special court with the power to declare whether a law was constitutional.¹¹⁵ The majority agreed that the judiciary was the right branch to examine the constitutionality of laws. This is because the judiciary was perceived as an independent body, as opposed to parliament, a clearly a political body.

The process of drafting the new constitution was relatively slow. By 1958, the Konstituante had been working for about three years, yet there was little progress. This was because there were different perspectives among constitutional drafters about the state ideology which would be the foundation of the new constitution.¹¹⁶ As supported by Drakeley, “the constituent assembly had made considerable progress on its task but predictably had become bogged down over the issue of the philosophical basis of the state.”¹¹⁷ There was no indication that the Konstitutante could not continue and finish its tasks. In fact, it had produced some

¹¹⁴Irish “Const (1937)” Art 45: The principles of social policy set forth in this article are intended for the general guidance of the Oireachtas (the parliament). The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this constitution.

India “Const” Art 37: “the Directive Principles contained in Part IV shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

¹¹⁵ Nasution, *Aspirasi Pemerintahan Konstitusional Indonesia* at 238 (cited in note 92).

¹¹⁶*Id* at 317.

¹¹⁷ Drakeley, *The History of Indonesia* at 105 (cited in note 83).

important provisions such as state organization and human rights protections.¹¹⁸

Unfortunately, the insufficient progress of the Konstituante's work became the president's concern. In 1959, the Konstituante was dismissed by President Soekarno. There are at least two explanations regarding the dismissal of the Konstituante. One view believed that the Konstituante was dismissed because it failed to continue its tasks.¹¹⁹ Others believed that this was the way of the government to regain its significant powers through "guided democracy."¹²⁰

It is likely that the second argument was the case especially when the government stated under the parliamentary system as adopted by the 1950 Constitution, the President could not be actively involved in overcoming the frequent change of the cabinets.¹²¹ This was because under parliamentary system, the President acted as the head of state –not as the chief executive. The situation might be different if Indonesia had adopted the executive provisions of the 1945 Constitution, because it had provided for a presidential system in which the President had significant power to govern the country, including strong actions against political instability. Under the presidential system, the president had dual roles as a chief executive and a head of government. The government, therefore, recommended that the Konstituante end its work and return to the 1945 Constitution.¹²²

¹¹⁸ Nasution, *Aspirasi Pemerintahan Konstitusional Indonesia* at 317 (cited in note 92).

¹¹⁹ Daniel. S. Lev, *The Transition to Guided Democracy: Indonesian Politics, 1957-1959* at 131 (Cornell Modern Indonesia Project, 1966). See also Howard Palfrey Jones, *Indonesia: The Possible Dream* at 240-41 (Singapore/Jakarta Gunung Agung 1971). See also Ismail Sunny, *Pergeseran Kekuasaan Eksekutif: Suatu Penyelidikan dalam Hukum Tatanegara* "The Shift of the Executive Powers: An investigation in the Constitutional Law" at 192 (Jakarta Aksara Baru, 1977).

¹²⁰ Howard Palfrey Jones, *Indonesia: The Possible Dream* at 241 (Singapore/Jakarta Gunung Agung 1971).

¹²¹ Nasution, *Aspirasi Pemerintahan Konstitusional Indonesia* at 317-318 (cited in note 92).

¹²² *Id* at 106.

Some major political parties rejected this recommendation because of what was perceived to be serious weaknesses in the 1945 Constitution.¹²³ The 1945 constitution had granted significant power to the President, which in their view could lead to a dictatorship. The 1945 Constitution also did not sufficiently regulate human rights and did not recognize judicial review.¹²⁴

The Konstituant could not reach conclusive decisions regarding the government's recommendation, and when voting was conducted at this point it did not reach the minimum threshold.¹²⁵ Some major political parties boycotted the voting. The government worried about this uncertain situation. To address this, the President simply issued a Presidential Decree dismissing the Konstituante and to reinstating the 1945 Constitution.¹²⁶

The issuance of this Decree raised the question of why, when there was an effort to establish a framework for democratic constitutional state, did the authoritarian state concept emerge instead? To make sense this situation, it is important to understand the broader context during this period.

During 1956-59, Indonesia experienced a deep economic recession. Economic nationalization during this period had not achieved the intended purpose of improving the Indonesian economy.¹²⁷ It instead created economic stagnation. This is because the implementation of this policy was determined by non-economic considerations. As a result, the

¹²³ Id at 328.

¹²⁴ Harman, *Mempertimbangan Mahkamah Konstitusi* at 173-174 (cited in note 11).

¹²⁵ Nasution, *Aspirasi Pemerintahan Konstitusional Indonesia* at 401 (cited in note 92).

¹²⁶ Id at 314. See also Vickers, *A History of Modern Indonesia*.at 144 (cited in note 20).

¹²⁷ Vickers, *A history of Modern Indonesia*, at 144 (cited in note 20).

takeover of the Dutch and the Chinese-owned enterprises did not work well.¹²⁸

In addition, there was huge monetary inflation in 1957. The government spent most of the national budget for military purposes to fight against the rebels in several regions such as South Sulawesi, Mollucas (Maluku), West Java, and Aceh. As a result, there was large budget deficit.¹²⁹ This deficit forced the government to issue more money, which exacerbated the inflation.¹³⁰

Another factor was that the integrity of the state was at stake. There was a potential conflict between Java and other islands.¹³¹ This was because the central government treated Java and non-Java islands differently.¹³² Java was the most developed island in the country in many aspects: education, transportation, infrastructure, and government. Java is the center of government (Jakarta the capital city of Indonesia is located on Java Island), business, finance, and trade. More than fifty percent of the population lives in Java. However, Java heavily depends on other islands which most of them have significant of natural resources. It is not surprising that people other islands felt that they were exploited by Javanese. As a result, the tensions between Java and non-Java areas heightened. Also, there was a sharp ideological difference between nationalist, communist and Islamic parties. During the general election in 1955, this sharp ideological difference was accentuated.

¹²⁸ Id at 145.

¹²⁹ Drakeley, *The History of Indonesia* at 97 (cited in note 83).

¹³⁰ Id at 266. In 1957 the IDR exchange rate increase increased 58% against the USD. Prices generally increased 66% in Java and Madura, 55% in Jakarta and 48% in Palembang.

¹³¹ Nasution, *Aspirasi Pemerintahan Konstitusional Indonesia* at 267 (cited in note 92). See also Drakeley, *The History of Indonesia*, at 97 (cited in note 83).

¹³² Nasution, *Aspirasi Pemerintahan Konstitusional Indonesia* at 267 (cited in note 92). See also Drakeley, *The History of Indonesia*, at 99 (cited in note 83).

The resignation of the Vice President Mohammad Hatta also contributed to political uncertainty.¹³³ There were some significant differences in strategy and political orientation between President Soekarno and Vice President Hatta. Soekarno supported an “integrated state” (a strong state where community rights prevail over individual rights) while Hatta was more in favor of a liberal constitutional state (protection of rights – where individual rights would be guaranteed). Furthermore, Hatta emphasized economic development while Soekarno focused on nation building. The difference in their political orientations can also be seen in how each man expressed his opinions on human rights and judicial review during the 1945 Constitution drafting process. Hatta decided to resign from his vice presidency because he disagreed with Soekarno in so many respects. Since then there was no more competing perspectives when Soekarno made policy.

The economic recession and the problem of state integrity above-mentioned had created a crisis in political legitimacy. The public began to lose confidence in the government. To regain its power, the government believed that it was important to have a strong governmental system to overcome the crisis. This idea was supported by the army. As a result, the government with the support of the army issued a presidential decree. This decree marked the end of the work of the Konstituante and the beginning of the “Guided Democracy” through the reenactment of the 1945 Constitution.

After the 1959 presidential decree, the presidency became the most powerful institution

¹³³Nasution, *Aspirasi Pemerintahan Konstitusional Indonesia* at 276 (cited in note 92). See also Drakeley, *The History of Indonesia* at 100 (cited in note 83).

in the country. The reinstatement of the 1945 Constitution created a huge setback regarding constitutional guarantees of human rights and judicial review. This situation was made worse by the tendency of the government to gather more power and to act in a more authoritarian fashion. Under Guided Democracy, the president controlled the legislative and the judiciary. The President integrated some state institutions such as the DPR (House of Representative), the MPR (People Consultative Assembly), and the DPA (Supreme Advisory Body) and put the head of these institutions into his cabinet.¹³⁴ The President also controlled the judiciary, and the government could interfere the judicial branch.

Nevertheless, during this period, it can be said that while there was significant progress on the human rights and judicial provisions in the new constitution, because of the political situation, the new, permanent, and democratic constitution remained unfinished and the first constitution was reenacted as a result.

After the fall of the Soekarno “Old Order” in 1967, the constitutional situation remained the same. The Soeharto “New Order” era adopted the same Constitution. The brief and flexible nature of the 1945 Constitution was used by the New Order government to maintain its power. For example, because the constitution granted the President concentrated power and responsibility, the government effectively interfered two other branches of governments, the legislature, and the judiciary. The constitution also did not expressly limit the president’s terms of office. As a result, the sitting President maintained his position for 32 consecutive years.

With regard to human rights protections and judicial review, since the implementation of

¹³⁴Drakeley, *The History of Indonesia* at 106 (cited in note 83).

human rights provisions in the constitution heavily depended on the implementing regulations to effectuate those provisions, the political will of the government to introduce laws on human rights was critical. Unfortunately, the government did not enact laws concerning human rights nor did the government introduce judicial review. The latter was because the constitution did not formally mention judicial review. But from the political standpoint, the introduction of judicial review would have provided a way to challenge the government policy --which the government tried to avoid.

Conclusion

This chapter has reviewed the exclusion or inclusion of human rights and judicial review provisions in the various constitutions drafted during Indonesia's first decade of existence. In the history of Indonesia, whether or not a constitution stipulated certain provisions depended on multiple factors, including the internal factors (such as the background and the ideology of the drafters) and external factors (the situation during the constitutional drafting and the international events that happened during the constitutional drafting).

When drafting the first constitution, the ideology of the drafters and the situation during the constitutional drafting influenced the process and the end result. For instance, the sharp ideological differences among constitutional drafters (the integrated state vs. liberal democracy) determined the exclusion of judicial review in the constitution. The conflicting ideologies among the framers of the first constitution (communitarian vs. individualism) and the situation during the drafting of the constitution (struggle for independence) produced vague, brief, and scattered

human rights provisions. Further, the very limited time for drafting the constitution left it brief and in many respects vague.

While the first constitution did not recognize judicial review and only briefly acknowledged human rights provisions, this did not mean that the drafters of the constitution had entirely overlooked to discuss these issues during the drafting process. In fact, there was intense discussion and debate regarding these two important subjects.

The situation changed significantly when it came to the drafting of the second constitution, the 1949 Constitution. There was a more coherent ideology among the drafters of this constitution when formulating human rights and judicial review provisions. The involvement of the Indonesian leading figures that were in favor of liberal democracy, the Dutch officials, and the United Nations officials, influenced the content of the 1949 Constitution which consequently recognized some important principles of liberal democracy such as human rights protections and judicial review.

Apart from the commonality of the ideology among the constitutional drafters, external factors such as the issuance of Universal Declaration of Human Rights in 1948 (UDHR) also influenced how human rights provisions were written in this constitution. Human rights provisions were written in a more detail and elaborative nature both in quantity and quality closely resembled the 1948 UDHR. The recognition of limited judicial review was likely influenced by western legal systems, particularly the Dutch.

Recognition of human rights remained in the next constitution, the 1950 Constitution, which largely remained the same as in the 1949 Constitution. This was because the rights content

of the 1950 Constitution was originally from the 1949 Constitution. Only a few structural articles concerning federal government were omitted so that the nation could change into unitary state.

It can be said that there was significant progress regarding the constitutional guarantee of human rights and judicial review from the first constitution to the second and third constitutions. While there was significant resistance to include judicial review and human rights provisions in the first constitution, the drafters of the second and the third constitution accepted the inclusion of robust human rights in these two subsequent constitutions. The second constitution recognized limited judicial review while the third constitution did not contain judicial review.

This situation seemed even more promising when a democratic body i.e. the constituent assembly (the Konstituante) was established. The Konstituante was assigned to draft a new and permanent constitution to replace the 1950 Provisional Constitution. The establishment of this body was important to improve the legitimacy of the new constitution since the drafters of the 1950 Constitution had not been democratically elected. The Konstituante consisted of many different political parties with different ideologies. Surprisingly, these ideological differences did not prevent this body from reaching agreement to include human rights provisions and judicial review in the new constitution, other than the exclusion of certain positive rights that were left to the political process for implementation.

However, the government of the day, with the support of the army, forced a return to the first Constitution. This was because the government viewed that there had been insufficient progress regarding the work of this body, a situation potentially leading to political uncertainty. The government finally dismissed the Konstituante. With the reinstatement of the 1945

Constitution, judicial review was lost from the constitution while human rights provisions remain brief, vague, scattered and unenforceable. This situation remained throughout New Order era, after the ouster of Soekarno. As a result, during this period of substantial political repression and the denial of human rights, the constitution provided neither protection of human rights.

Chapter 3: The Constitutional Court, Judicial Review, and Human Rights in the Updated Constitution

Chapter II has explained factors that contribute to the exclusion or inclusion of judicial review and human rights provisions in the first three constitutions –the 1945 Constitution, the 1949 Federal Constitution, and the 1950 Provisional Constitution. In line with this topic, Chapter III discusses the inclusion of constitutional court, judicial review, and human rights provisions in the most updated constitution –the 1945 Constitution as amended in 1999-2002. It aims to answer the following questions: (1) what factors contributed to the establishment of the new Constitutional Court, its formal grant of judicial review, and the inclusion of human rights provisions in the recent constitutional amendments (1999-2002)?, (2) Why did the framers of the updated constitution decide to insert provisions regarding a constitutional court, judicial review, and comprehensive human rights provisions provided that were absent in the previous 1945 constitution?, (3) Do the existing theories put forward by comparative constitutional law scholars including Shapiro, Rosalind Dixon, and Tom Ginsburg, provide useful interpretive guidance to understanding these phenomena?

Part I briefly describes the background of the recent constitutional amendments. What factors contributed to this constitutional amendment, considering that in more than three decades the 1945 Constitution had never been amended? Part II analyses the reasons of the constitution's framers to include provisions regarding constitutional court and judicial review in the updated constitution. It begins with the description of theories put forward by Martin Shapiro, Rosalind

Dixon, and Tom Ginsburg concerning the reasons to introduce a constitutional court with judicial review power. These theories will be used to explain the introduction of the constitutional court with judicial review power in Indonesia. It is followed by an analysis of the constitutional drafters' deliberation when they formulated these topics in the new constitution. In doing so, it utilizes the minutes of the People's Consultative Assembly, relevant scholarly articles, and media coverage. Part III explains the background of the constitutional framers' decision to insert more comprehensive human rights provisions in the updated document. It includes a review of minutes of the constitutional drafters when discussing human rights in the second constitutional amendments in 2000. Finally, Part IV describes the institutional design of the new constitutional court. This description is necessary to understand what the new court looks like and how it works in practice.

Recent constitutional amendments

Contrasting literature provides different views regarding the most appropriate time to amend a constitution. Some argue that amending a constitution should be conducted in “calm and undisturbed condition”¹ or when a country has reached “its political and legal maturity.”² Changing a constitution in an “immature” political and juridical context can create a “premature codification” which may bring a country to an “act of futility.”³

Others believe a constitutional amendment is likely to happen when the configuration of

¹ Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*.45 Duke L J 364, 394 (1995).

² Edward Mc. Whinney, *Constitution-making: Principles, Process, Practice* 15 (University of Toronto Press 1981).

³ Id.

politics changes drastically or when political turmoil occurs.⁴ Such crises provide the momentum to cause constitutional amendments. For example, a crisis might stimulate a wave of democratization – a transition from authoritarian government to a democratic regime including a change of the existing constitution to a more democratic one through a constitutional amendment.

The second approach described above seems more appropriate for describing the most recent constitutional reforms in Indonesia (1999-2002). The Indonesian Constitutional reforms were definitely not conducted in a calm and undisturbed situation of the type described by Elster and Whinney. They were instead triggered by an economic and financial crisis that resulted in a political upheaval. The Constitutional amendment process started one year after the financial crisis hit Asia in general and Indonesia in particular. This crisis severely affected the Indonesian economy's stability. The Indonesian currency Rupiah dropped from \$1 = 2,400 (August 1997) to \$1 = 14,500 (January 2008).⁵ Many corporations and banks went bankrupt. People lost jobs. The number of unemployed increased significantly. Prices skyrocketed. This situation severely affected purchasing power. As Charles Harvie summarizes:

Within the space of one year, Indonesia saw its currency fall in value by 80 percent, inflation soar to over 50 percent, the economy swing from rapid growth to even more rapid contraction, unemployment climb rapidly, and the stock exchange lose much of its value. Foreign creditors have withdrawn, and investors have retreated. Capital and entrepreneurs have fled. Long standing defects in governance, earlier camouflaged by rapid growth, have now been unmasked as fatal flaws.⁶

⁴Vernon Bogdanor, *Constitutions in Democratic Politics* 153 (Gower Publishing Company, 1988).

⁵Charles W.L. Hill, *The Asian Financial Crisis*, (20 September 2016) archived at <http://www.wright.edu/~tdung/asiancrisis-hill.htm>.

⁶ Charles Harvie, *Indonesia: Recovery from Economic and Social Collapse* *22 (Oct 17, 2016) <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1007&context=commwkpapers>.

This situation led to political instability. People started losing confidence in the government. They believed that this financial crisis was not only caused by the contagious effect of the financial crisis from neighbouring countries but it was also caused by lack of good governance (corruption, collusion, and nepotism) in the Soeharto administration.⁷ In addition, the centralized model of government and the frequent violations of human rights during the Soeharto administration made people demand substantial reform of the government.

People urged the government to conduct comprehensive reforms such as decentralizing the government (regional autonomy), respecting human rights, and implementing good governance principles (eradication of corruption, collusion, and nepotism). To achieve this goal, people demanded that the government amend the 1945 Constitution.⁸

Many believe that the 1945 Constitution contained serious weaknesses.⁹ It granted significant power to the president over other state institutions.¹⁰ While constitutionally there was a distribution of powers between a president, legislature, and judiciary, the president's power was dominant compared to the other two branches of government. The president could control the legislature and the judiciary. Thus, in practice, there was a lack of check and balances.

Besides, the text of the constitution was also problematic. It was brief and vague. The lack of clarity and the ambiguous provisions of the constitution were often used by the

⁷ Charles W.L. Hill, *The Asian Financial Crisis* (cited in note 5). See also id.

⁸ Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition* 158 (Penerbit Buku Kompas 2005).

⁹ Id. See also Moh.Mahfud MD, *Amandemen Konstitusi Menuju Reformasi Tata Negara* 67-67 (LP3ES 1999).

¹⁰ Moh.Mahfud MD, *Amandemen Konstitusi Menuju Reformasi Tata Negara* 66-67(1999).

government to advance its political interests, including maintaining power over three decades.¹¹

The existence of many delegating articles in the 1945 Constitution also opened the possibility for the government to further regulate these provisions through enacting statutes. Rather than protecting people's rights, the laws were often used by the government to limit people to exercise their rights.

The 1945 Constitution lacked fundamental constitutional principles such as separation of powers, check and balances, judicial review, and human rights protections. This is in part due to the conflicting ideas among constitutional drafters. This was also because the situation during the accelerated constitutional drafting process had not been conducive. The 1945 Constitution was drafted during the struggle against the Dutch colonial government. There was very limited time available to draft the constitution, and as a result the 1945 Constitution was brief and intended to be provisional.¹²

In 1999, the MPR agreed to amend the Constitution through its General Session. These constitutional amendments aimed to add some fundamental principles that reflected a more democratic and modern constitution. This included provisions relevant to the rule of law, separation of powers, check and balances, and constitutionalism. The amendment process was conducted over four years from 1999 to 2002.

Over eighty percent of the provisions in the 1945 constitution were amended during the

¹¹For more discussion about the process of constitutional amendment and its evaluation see id. See also Valina Singka Subekti, *Menyusun Konstitusi Transisi: Pergulatan Kepentingan Dan Pemikiran Dalam Proses Perubahan UUD 1945* (Rajawali Pers, RajaGrafindo Persada, 2007).

¹²Risalah Rapat ke 2 Badan Pekerja MPR RI 6 Oktober 1999, dalam Buku II Jilid 3 Risalah Rapat Paripurna Badan Pekerja MPR RI at 18. "Minutes of Working Group of the MPR Oct 6, 1999 in Book II Seri 3 Minutes of the Plenary Meeting of the MPR Working Group."

course of these constitutional amendments.¹³ This is why some argue that instead of amending the constitution, the package of constitutional amendments in fact delivered a new constitution.¹⁴ In line with the topic of this chapter, this part will specifically analyze factors that contributed to the introduction of the constitutional court, judicial review, and human rights provisions in the updated constitution.

Reasons to establish a constitutional court: A comparative perspective

Comparative constitutional law scholars have attempted to describe why a country introduces a constitutional court --a judicial institution which may constrain government actions. Traditionally, the introduction of constitutional courts aims to protect human rights and democracy after the end of authoritarian regimes (the rights protection theory).¹⁵ Others believe that the existence of constitutional court is crucial to ‘police the boundary’ among state institutions horizontally (among state institutions in the same level) or vertically (between states and federal government or between local government and central government).¹⁶ The constitutional court plays an important role in preventing the possibility of one state institution intruding upon other state institutions.

There are several other recent explanations regarding the emergence of a constitutional court. Tom Ginsburg explained factors that contribute to the development of powerful

¹³Indrayana, *Indonesian Constitutional Reform 1999-2002* at 331 (cited in note 8).

¹⁴Id. These include Anton Dajwamaku (the 1945 Constitution has almost no trace of its original form), Goenawan Mohamad (He has named the updated constitution the 2002 Constitution), and Denny Januar Ali (although the updated constitution has the same name the 1945 Constitution, we effectively have a new Constitution).

¹⁵Mauro Mauro Cappelletti, *The Judicial Process in Comparative Perspective* 169 (Clarendon Press, 1989).

¹⁶Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* 161(OUP Oxford, 2002).

constitutional courts in countries during their political transition. Using Taiwan, Thailand, South Korea, and Mongolia as case studies, he found out that cultural tradition, receptivity of the society to foreign ideas, and prior history of judicial review, are all factors that are relevant to the conditions for the successful emergence of constitutional review.¹⁷

Why would the framers of the constitution decide to insert judicial review provisions in the constitution that might constrain the government actions in the future? Ginsburg has argued that the introduction of judicial review in a constitution depends on the prospective power of the constitutional drafters after the new constitution is established.¹⁸ If the framer of the constitution is likely to lose power in the future, a constitutional court with significant power of judicial review will more likely be established. The constitutional tribunal provides a legal avenue to challenge government policy in the future. This legal avenue is important for the potential losing parties to minimize their losses. The court can protect their interests from the policy of a future majority. Ginsburg calls this the “insurance model of judicial review.”¹⁹ Ginsburg predicts: “Explicit constitutional power of and access to judicial review will be greater where political forces are diffused than where a single dominant party exists at the time of constitutional design.”²⁰ Ginsburg’s argument, however, does not discuss why constitutional courts are also introduced in countries not undergoing transition.

In this regard, Ran Hirschl argues that the emergence of constitutional courts with

¹⁷ Tom Ginsburg, *Constitutional Courts in New Democracies: Understanding Variation in East Asia*, at 19 1Global Juris Advances 2002.

¹⁸ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* 24 (Cambridge University Press, 2003).

¹⁹ *Id.* at 25.

²⁰ *Id.*

judicial power in countries not undergoing transition can be explained as “self-interest hegemonic preservation.”²¹ The dominant political elites try to preserve their interests through the hand of the constitutional court to face the possibility of future actions by the increasingly robust of opposition groups and interests.²² With the establishment of the constitutional court equipped with judicial review power, political elites can preserve their interests in the future.

Another scholar suggests that the inclusion of the constitutional court in the constitution may also attract investors. Tamir Moustafa’s study on Egypt’s Supreme Constitutional Court shows that even in an authoritarian country like Egypt, the presence of a constitutional court is significant. His research indicates that the Supreme Constitutional Court of Egypt can attract domestic and international investors. The constitutional court provides a legal avenue for the investors to guarantee their rights, particularly property rights, from arbitrary authoritarian government policies such as the nationalization of assets.²³

Another reason is that introducing a constitutional court in the new constitution may stabilize democracy.²⁴ The court helps to prevent against one-party consolidation of power.²⁵ Using the East European countries as examples of emerging democracies of the post-Soviet period, Samuel Issacharoff argues that the constitutional court plays an important role in

²¹ Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 *Indiana Journal of Global Legal Studies* 89, (2004).

²² *Id.*

²³ Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Reform in Egypt* 5 (New York: Cambridge University Press, 2007).

²⁴ Donald L. Horowitz, *Constitutional Courts: A Primer for Decision Makers*, 17 *Journal of Democracy* 125 (2006). However, not all constitutional courts advance democracy. There were some countries with un democratic government have such courts. This suggests there is no clear causal link between the establishment of constitutional court and advance democracy.

²⁵ Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 *Geo. LJ* 961(2010).

guaranteeing democratic integrity in transitional countries.²⁶ The constitutional courts can help maintain democratic order and prevent efforts to re-centralize power through “one-partyism.”²⁷

Issacharoff suggests that constitutional courts may play certain roles in protecting democratic competition for office. For example, the constitutional courts have the power to conduct judicial review, which can invalidate laws that are in favour of one-partyism. It is likely that because of the long practice of authoritarian government in the past, some government officials can still hold on to significant power through the present time. As a result, they prefer to maintain one-partyism, as implemented in the past.

For Constitutional drafters, the establishment of a constitutional court can strengthen their commitment to the provisions of the constitution.²⁸ The constitutional courts make the commitment of the constitutional drafters enforceable in practice. The court can use the provisions of the constitution as a rule to examine whether the acts of the government are consistent with the constitution. The constitutional courts can also limit politics and guard against democratic excesses.²⁹

Finally, international influences are significant factors in the introduction of constitutional court in a particular country.³⁰ The international influences can be explained at least through three ways: constitutional learning, constitutional competition, and constitutional

²⁶ Id.

²⁷ Id at 965.

²⁸ Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* 88-174. (Cambridge University Press, 2000).

²⁹ Issacharoff, 99 Geo. LJ at 996 (cited in noted 25).

³⁰ Rosalind Dixon and Eric A. Posner, *The Limits of Constitutional Convergence*, 11 Chi. J. L. 399 (2010).

conformity.³¹

A country establishes a constitutional court through a learning process from another state that has successfully adopted a constitutional court, with the hope that it will achieve a similar result. This view reflects the belief that a successful constitutional court can be replicated across different nations.

A country needs to have a commitment to the protection of rights, i.e., property rights, human rights, and civil liberties to succeed in the international marketplace.³² The introduction of constitutional courts has been an important factor in attracting the investors and winning this economic competition. This court is believed to protect these rights from the government's arbitrary actions. As a result, the introduction of this tribunal could create confidence in those who are considering investing their money in the country.

Constitutional conformity is necessary to countries especially those that want to be recognized by the world society.³³ Adopting constitutional principles, including establishing constitutional court, helps a country to gain international acceptance.

Reasons to introduce a new constitutional court, judicial review and human rights in the new Constitution

In this Part, we consider whether the above-mentioned methods persuasively explain the introduction of a constitutional court with judicial review power in Indonesia. We argue that the

³¹ David S. Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 California LawReview 1163, 1173 (2011).

³²Id at 1175.

³³Id at 1177.

introduction of a new, separate constitutional court equipped with judicial review power is best explained not by just one of the causes suggested by the scholars mentioned above, but rather by multiple factors. In Indonesia, those factors include the history of the nation's history of judicial review, the President Wahid – DPR disputes, and the influence of international constitutional practice.

A. Historical Account Regarding the Need of Constitutional Court

Why did the framers of the updated constitution decide to introduce a new Constitutional Court? As has been analyzed in Chapter II, the importance of having a body with the power to conduct judicial review was discussed before the Indonesian independence. The fact that the framers of the first constitution did not include judicial review did not mean that they altogether neglected this issue during constitutional drafting. In fact, this idea always came up when the framers drafted constitutions or when the government developed laws on judicial power.³⁴

In the Soekarno Old Order era, the government did not recognize the value of a constitutional court, as reflected in the first three constitutions: the 1945 Constitution, the 1949 Constitution, and the 1950 Constitution. However, the idea of having a judiciary with judicial review was kept alive. When the Konstituante (Constituent Assembly) drafted a new and permanent constitution to replace the 1950 Provisional Constitution, that body discussed in detail the importance of incorporating a judicial body with judicial review. They agreed to insert judicial review powers in the provisions of the new constitution. But, this idea did not come to

³⁴ Tim Penyusun, *Menegakkan Tiang Konstitusi: Memoar Lima Tahun Kepemimpinan Prof. Dr. Jimly Asshiddiqie, S.H. Di Mahkamah Konstitusi* at 5 "Upholding the Pillar of the Constitution: Memoar five years of the Leadership of Prof. Dr. Jimly Asshiddiqie" (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 1st ed, 2008).

fruition because the government dismissed this constituent assembly and decided to return to the 1945 Constitution.

In the early years of New Order era, judicial review was absent both in the constitution and legislation. The New Order government started recognizing limited judicial review when the MPR issued Decree No. VI/MPR/1973. It stipulated “The Supreme Court has the power to conduct judicial review only toward regulations beneath laws.”³⁵ This meant that the judiciary could conduct judicial review of administrative regulations against statutes but that it could not review the statutes against the constitution. In this way, laws themselves remained unreviewable by the judiciary. The argument that was most often used in response to criticism was that the Supreme Court, the DPR, and the President had equal positions in the governmental system. Review, then, could be conducted only by a state institution that had a higher position than the DPR and President.

The limited judicial review was continually recognized in the subsequent legislation, i.e., Law 14/1985 on the Supreme Court and the MPR Decree No III/MPR/1978. This power, however, was rarely used by the Supreme Court. The Supreme Court was very dependent on the government both administratively and financially.³⁶ Some NGOs, academics, and professional organizations urged the government to adopt a legal mechanism for judicial review, but the government rejected this idea.³⁷

³⁵The MPR Decree No.III/MPR/1978 Art.11 (4).

³⁶ Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* 77 (Bloomsbury Publishing, 2012).

³⁷ TimPenyusun, *Menegakkan Tiang Konstitusi: Memoar Lima Tahun Kepemimpinan Prof. Dr. Jimly Asshiddiqie, S.H. Di Mahkamah Konstitusi* at 5 (cited in note 34).

The collapse of New Order regime in 1998 opened the possibility of establishing a more democratic state. Constitutional amendments in 1999-2002 significantly altered the content of the constitution. The introduction of principles such as constitutionalism, separation of powers, checks and balances mechanisms, and the establishment of several new state organs in the updated constitution, all played important roles in the establishment of the constitutional court. These constitutional principles needed an institution to uphold and enforce them in practice. The new constitutional court, which acts as the guardian of the constitution, was deemed the most appropriate body to carry out this task.

The above explanation confirms that the idea of having a judiciary with judicial review power had never vanished between 1945 and 1998, when the New Order regime collapsed. A constitutional court with judicial review functions was finally incorporated in the Constitution when Indonesia conducted constitutional reforms in 1999-2002. The inclusion of constitutional review was possible because there was a political transition from an authoritarian regime to an emerging democracy. This situation was in line with Ginsburg's hypothesis that "democratization has been easier in those countries where the authoritarian regime had displaced prior democracies."³⁸

Also, there was political fragmentation in the 1999 general election. During the New Order era (1966-1998) only three political parties, i.e., PPP, Golkar, and PDI, participated in the elections.³⁹ Golkar was the ruling party during this era. In 1999, forty-eight political parties

³⁸ Tom Ginsburg, *Constitutional Courts in New Democracies* (cited in note 17).

³⁹ PPP (Development Unity Party) is an Islamic-affiliated political party, Golkar (Functional Party) is a national political party. This was the government party and the ruling party during the New Order era. Civil servants and

participated in the general election.⁴⁰ This political fragmentation meant that a power holder could not predict its political future after the election. Introducing a constitutional court could have been its “political insurance”⁴¹ in case that power holder lost the election. The Court could be a legal avenue for a losing party to challenge majority policy. In this instance, the Constitutional Court could have acted as a referee to settle disputes on elections and also to conduct judicial review.

In the context of Indonesia, this political insurance theory served in slightly different way. The introduction of the constitutional court was proposed by the winning parties (PDIP and Megawati),⁴² not the losing party as Tom Ginsburg suggested in his theory. They proposed a constitutional court because they worried that the impeachment of President Wahid could happen to Megawati, who later became a president replacing President Wahid.⁴³ Hendrianto has suggested that a constitutional court could serve as their political insurance to secure their power.⁴⁴

B. President Wahid – The DPR Disputes

Some constitutional law scholars argue that the introduction of the constitutional court in the updated constitution was influenced by the events that occurred during the constitutional

Military were the backbone of this political party. PDI (Indonesian Democratic Party) is a national political party. PDI was also well known for Christians or non-Muslims.

⁴⁰ Indonesian General Election Commission archived <http://kpu.go.id/index.php/pages/index/MzQz>

⁴¹ Tom Ginsburg, *Constitutional Courts in New Democracies* at 20 (cited in note 17).

⁴² Hendrianto, *From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003-2008* 57 (PhD dissertation unpublished University of Washington, 2008).

⁴³ Blar King, *Empowering the Presidency: Interest and Perceptions in Indonesia's Constitutional Reforms, 1999-2002*, 116 (PhD dissertation, the Ohio State University, 2004).

⁴⁴ Hendrianto, *From Humble Beginnings to a Functioning Court*, 57 (cited in note 42).

amendment namely dispute between President Wahid and the DPR. Jimly Ashidiqie, a constitutional law professor at Universitas Indonesia, has asserted that President Wahid - DPR conflict in 2000 was the reason why a constitutional court was inserted in the updated constitution.⁴⁵

This dispute started with the allegation by the DPR that President Wahid was involved in two corruption scandals: the “Buloggate” and the “Bruneigate.”⁴⁶ The DPR attempted to call the President to explain his actions, but the President refused to come. After a second warning, the DPR invited the MPR to convene a special session to determine the president’s responsibility.⁴⁷ In this special session, the MPR asked for the president’s explanations and determine whether the President violated the Constitution. If the MPR believed that the President violated the constitution, the MPR would likely withdraw the President’s mandate. In other words, the MPR would impeach the President. There was, however, no clear mechanism in the constitution for impeaching a president.⁴⁸ For example, the Constitution did not stipulate the reasons why a president could be impeached like the US Constitution, which specifies that the President’s “high crimes and misdemeanors” may be used as a basis for impeachment.

The President responded to the MPR invitation by issuing a presidential decree declaring a state of emergency and dissolving the MPR and the DPR. But this presidential decree was not

⁴⁵ Jimly Asshiddiqie, *Creating a Constitutional Court for a New Democracy*, 1–24 in Centre for Comparative Constitutional Studies Asian Law Melbourne Law School, (2009)

⁴⁶ Tony Allison, *Day of judgement for Wahid, and Indonesia* (accessed 29 September 2016) archived <http://atimes.com/se-asia/CA31Ae02.html> . Bullogate was an allegation of 35 billion rupiahs (\$3.9 million) corruption at State Logistic Agency (Bulog). Bruneigate involved an allegation of a \$2 million payment from Sultan of Brunei.

⁴⁷ The MPR Decree No. VI/MPR/1973 Art. 17 on The Status and the Relation between the Highest State Institution and / or among State Institutions.

⁴⁸ Simon Butt, *The Constitutional Court and Democracy in Indonesia* 12 (BRILL, 2015).

supported by the military. As a result, the MPR convened a special session to remove President Wahid. Surprisingly, the MPR allegation against the president completely shifted from corruption scandals to presidential action to dismiss the DPR and the MPR. This offense was likely to be a more successful basis for impeachment. The body of the constitution did not mention the legal basis for impeachment, but the elucidation⁴⁹ of the Constitution said that President and the DPR are equal.⁵⁰ Implicitly, the President could not dismiss the DPR, let alone the MPR --the highest state institution in the country. This unclear impeachment mechanism, coupled with the absence of the judicial involvement in the impeachment, made the process purely political. Whether President Wahid violated the constitution was solely decided by a political body --the MPR. President Wahid was politically weak because his party was polling only reached 13%.⁵¹ As a result, President Wahid was impeached by the MPR and replaced by Vice President Megawati.

For Ashidiqie, this event was an important factor in causing the introduction of a constitutional court. The fact that there was no clear mechanism for impeachment resulted in a purely political process. He argues that the involvement of a constitutional court in the impeachment process would prevent this process from purely political interests. If the

⁴⁹The (Old) 1945 Constitution consists of three parts: Preamble, Body, and Elucidation. The Preamble contained: the declaration of independence, the national goals, and the Pancasila. The body consists of 37 Articles, 2 Provisional Articles, and 2 Additional Articles. The elucidation of the 1945 Constitution was located after the body of the constitution. There are two types of elucidation: General Elucidation and Elucidation of Articles. General Elucidation explains fundamental principles of the Constitution. Elucidation of Articles explains each of provisions of the Constitution. The elucidation is not a commentary, but it is an integral part of the text of the constitution.

⁵⁰Indonesia "Const 1945" General Elucidation.

⁵¹Theodore Friend, *Abdurrahman Wahid, The Indonesian Republic, and Dynamic in Islam* <https://www.fpri.org/article/2010/01/abdurrahman-wahid-the-indonesian-republic-and-dynamics-in-islam> (accessed 29 September 2016).

constitutional court were to exist, the DPR allegation could be verified by the court during impeachment proceedings.

In addition, Ashidiqqie has also suggested that the new constitution established several new state institutions such as the DPD (Regional Representative Assembly), the MK (constitutional court), and the KY (judicial commission). As more state institutions were created, there were more possibilities that disputes among them would occur. Therefore, it was seen as important to establish a new judicial “referee” to provide a mechanism for settling disputes among state institutions.⁵² Ashidiqqie’s arguments explain the importance of having a court that can resolve disputes among state institutions and also take a role in an impeachment proceeding. The introduction of a constitutional court in this case aimed to police the boundary among state agencies. This argument is in line with what Martin Shapiro and Alec Stone Sweet call as the “division of powers” theory, where the court acts as an umpire for boundary dispute among branches of government.⁵³

The arguments mentioned above explain the importance of having an independent and accountable court in the updated constitution. They also demonstrate the importance of having a judicial institution involved in the impeachment process, as well as settling disputes among state agencies. However, they do not explain why the Indonesian constitutional court has other additional authority, such as dissolving political parties. It is likely that this power comes from other countries’ experiences and constitutional provisions.

⁵² Jimly Asshiddiqie, *Gagasan Dasar Tentang Konstitusi Dan Mahkamah Konstitusi* "Basic Ideas of a Constitution and the Constitutional Court" 1–28 (unpublished manuscript, The Indonesian Constitutional Court, 2008), (on file with author).

⁵³ Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* 161(OUP Oxford 2002).

C. International Influence

International practices seem to have influenced the introduction of the constitutional court in Indonesia. There was a perception among constitutional drafters that establishing a constitutional court meant building internationally legitimate institutions under international standards for emerging democracies.⁵⁴ The existence of constitutional courts in other countries appeared to inspire the constitutional drafters of the updated constitution.⁵⁵ Conceptually, the Indonesian Constitutional Court adopted the Austrian or “Hans Kelsen” model as opposed to the U.S. model.⁵⁶ This model, similar to the German constitutional court, separates the Supreme Court from the constitutional court. Worldwide, Indonesia is the 78th country to have adopted this model.⁵⁷

In practice, the establishment of constitutional courts in some Asian countries, specifically South Korea, likely influenced the introduction of a constitutional court in Indonesia.⁵⁸ During the first year of constitutional amendments in 1999, only a small number of

⁵⁴ Donald L Horowitz, *Constitutional Change and Democracy in Indonesia* 28 (Cambridge University Press 2013). See also Butt, *The Constitutional Court and Democracy in Indonesia*, at 18 (cited in note 48)

⁵⁵ Butt, *The Constitutional Court and Democracy in Indonesia*, at 18 (cited in note 48) See also Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan 1999-2002 Buku VI Kekuasaan Kehakiman* 358 (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2010).

⁵⁶ Maruarar Siahaan, *Uji Konstitusionalitas Peraturan Perundang-Undangan Negara Kita: Masalah Dan Tantangan*, 7 *Jurnal Konstitusi* 30 (Setjen MKRI 2010).

⁵⁷ Jimly Asshiddiqie, *Sejarah Constitutional Review dan Gagasan Pembentukan Mahkamah Konstitusi*, “The History of Constitutional Review and the Ideas of the Introduction of the Constitutional Court” (the Three E Lecture Series Jakarta June 18, 2012), archived at http://www.jimlyschool.com/read/analisis/276/sejarah-constitutional-review-gagasan-pembentukan-mk/#_ftn1. See also Tim Penyusun, *Menegakkan Tiang Konstitusi: Memoar Lima Tahun Kepemimpinan Prof. Dr. Jimly Asshiddiqie, S.H. Di Mahkamah Konstitusi* 5 (cited in note 34).

⁵⁸ Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court*, in Andrew Harding and Penelope Nicholson eds, *New Courts in Asia*, 158, 158-89 (Routledge 2010). See also Andy Omara, *Lessons from the Korean Constitutional Court: What Can Indonesia Learn from the Korean Constitutional Court Experience?* (KLRI 2008). Some the MPR members went to South Korea to see how the Korean Constitutional Court works in this Country.

the MPR members were engaging in introducing a new constitutional court.⁵⁹ This was because the focus of the 1999 amendment was to limit the power of the president and empower the legislature. In 2000, some members of parliament visited more than twenty countries to conduct research about constitutional amendments, including studying the value of a constitutional court.⁶⁰ They found that in most instances countries adopting constitutional courts separated this court from the Supreme Court.⁶¹ The MPR then used this study as a reference in discussing the institutional design of the new constitutional court.⁶²

Hendrianto has specifically argued that the Indonesian constitutional court largely resembled the Korean Constitutional Court.⁶³ He further suggests that the birth of constitutional courts in these two countries originally came from similar “political dynamics” during the transition.⁶⁴ The establishment of the Korean Constitutional Court was the result of a compromise between the ruling party and the opposition parties. The ruling party wanted to introduce a new constitutional court while the opposition parties wanted constitutional review power lodged in the Supreme Court.⁶⁵ The compromise was that the opposition party agreed to the proposal from the ruling party so long as the new court would have power to settle constitutional complaints.⁶⁶ The ruling party accepted this offer. As a result, a constitutional court was vested with the power to settle constitutional complaints.

⁵⁹ Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court* at 160 (cited in note 58).

⁶⁰ Id 158.

⁶¹ Tim Penyusun, *Menegakkan Tiang Konstitusi* 34 (cited in noted 34)

⁶² Butt, *The Constitutional Court and Democracy in Indonesia*. 18 (cited in note 48)

⁶³ Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court* at 160 (cited in note 58).

⁶⁴ Id.

⁶⁵ Id at 159.

⁶⁶ Id.

Similarly, the Indonesian constitutional court was introduced as a compromise between three groups within the MPR (People's' Consultative Assembly): a group that wanted to introduce a new separate court, a group that wanted to maintain the judicial review power in the Supreme Court, and a group that preferred that the MPR itself hold this review power.⁶⁷ When the idea to introduce a new, separate constitutional court was proposed, these last two groups did not agree with the concept. After significant debate, all three groups reached a compromise and agreed to have a new constitutional court, but with the new court sharing its judicial review power with the Supreme Court.⁶⁸ The new constitutional court would be an independent court, with authority limited to reviewing statutes. The Supreme Court would have the authority to conduct judicial review of regulations beneath the statutes.

The institutional structure of the two courts is similar. Both the Korean constitutional court and the Indonesian constitutional court have the power to conduct judicial review, to be involved in impeachment proceedings, and to dissolve political parties. The constitutional courts in both countries are centralized. The number of constitutional Justices is the same: nine. The appointment process of justices is also similar. The nine constitutional justices come from three different state institutions: the executive, the legislature, and the judiciary. Each state institution internally appoints three individuals to be constitutional justices. The adoption of the Korean constitutional justices' appointment method was reflected in the deliberation of constitutional amendments. A member of the MPR stated, "Why then should we go through hardship by debating the selection method, when we can just follow the Korean model and everything will go

⁶⁷Id at 160.

⁶⁸ Id.

easily because we will not have any debate.”⁶⁹ The constitutional drafters finally chose this internal selection method to recruit the Indonesian Constitutional Court Justices.

Also, in at least two judicial review cases, the Indonesian Constitutional Court adopted the approach of the Korean Constitutional Court. When deciding judicial review cases regarding the Law on Electricity and the Law on Truth and Reconciliation Commission, the Court invalidated the statutes in their entirety, although the petitioners had only asked the court to dismiss some of the provisions.⁷⁰ In its opinion, the Court mentioned Article 45 of Law on Korean Constitutional Court. It stated, “The Constitutional Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional: Provided, that if it is deemed that the whole provisions of the statute are unable to enforce due to a decision of unconstitutionality of the requested provision, a decision of unconstitutionality may be made on the whole statute.” The Court used this rule as a reference to invalidate these laws for their entirety even though that there was no similar express provision in Law on the Constitutional Court of Indonesia.

These above-mentioned arguments confirm that the structure and approach of the Indonesian Constitutional Court heavily influenced by the Korean Constitutional Court. The similar background of the courts, the same institutional design, the international study conducted by some MPR members, and the adoption of the Korean constitutional court decision-making approach by the Indonesian constitutional court show the Indonesian constitutional court largely

⁶⁹ As quoted by Hendrianto, see Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court* at 161 (cited in note 58).

⁷⁰ The Decision of the Constitutional Court No 006/PUU-IV/2006 at 126.

referred to the Korean Constitutional Court. The international influence in this instance was what Law and Versteeg call ‘constitutional learning.’⁷¹ Indonesia established a constitutional court through the learning process from South Korea that had successfully adopted a constitutional court with the hope that Indonesia would achieve a similar result.

Why establish a new, separate court?

When the constitutional amendment process commenced in 1999, there were three alternate proposals regarding the institutional design of the constitutional court. The initial draft placed the new constitutional function in the Supreme Court,⁷² and the Supreme Court was still the highest judicial institution in the country. Three factions in the MPR i.e. F-UG, F-KKI, and – F-PDIP, supported this draft.⁷³ It was not clear, however, whether the new court would be the fifth court⁷⁴ under the Supreme Court or it would be a separate chamber within the Supreme Court. There are four different courts under the Supreme Court, i.e., general courts, religious courts, administrative courts, and military courts. If the new court was the fifth court under the

⁷¹ David S. Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism* 99 California Law Review 1173 (2011).

⁷² Draft Art. 25B (1) says: Di dalam lingkungan Mahkamah Agung dibentuk Mahkamah Konstitusi. (The constitutional court is established within the Supreme Court).

⁷³ TimPenyusun, *Menegakkan Tiang Konstitusi* at 33. (cited in note 34).

⁷⁴ Hendrianto, *From Humble Beginnings to a Functioning Court*. at 42 (cited in note 42). In the 1999-2002 Constitutional Amendments, the MPR consisted of 11 factions, these include F-KKI- Fraksi Kesatuan Kebangsaan Indonesian - The United of Indonesian Nation), F-PDIP (Fraksi Partai Demokrasi Indonesian Perjuangan - Indonesian Democracy Party of Struggle), F-PBB (Fraksi Partai Bulan Bintang - Star Crescent Party), F-PDU (Fraksi Persatuan Daulat Ummat - the United of Daulat Ummat) F-PG (Fraksi Partai Golongan Karya - Golongan Karya Party), F-KB (Fraksi Kebangkitan Bangsa - National Awakening Party), F-PPP (Fraksi Partai Persatuan Pembangunan - Unity of Development Party), F TNI/Polri (Fraksi TNI/Polri - Military and Police Faction), F-UG (Fraksi Utusan Golongan - Functional Party), F Reformasi (Fraksi Reformasi- Reform Faction), and F PDKB (Fraksi Partai Demokrasi Kasih Bangsa - National Love Democratic Party faction).

Supreme Court institutional structure, it potentially created a problem because its power to review laws established by the executive and the legislature would make it structurally equal to the Supreme Court.

The second proposal was to create a new, separate, constitutional court.⁷⁵ F-TNI/POLRI, F-PPP, F-Reformasi, F-PDU, F-PDKB, and F-PDIP agreed with this proposal.⁷⁶ There would be two different courts: the current Supreme Court (and its lower courts) and a new constitutional court. The third approach, supported by Golkar, PKB, and PDIP, was a new institution neither part of the Supreme Court nor a new separate court. It should be part of the People of Consultative Assembly (the MPR), the highest state institution.⁷⁷ Among these three options, the MPR considered the first and the second options and put aside the third proposal. The MPR's rejection of the third proposal was because the MPR was a political body and not a judicial institution.⁷⁸

These three proposals reflected the political transition from authoritarian to emerging democracy in Indonesia.⁷⁹ There were competing ideas on whether the judiciary should be a strong state agency or a weak institution. F-PDIP strong intention to have a new constitutional court reflected in a way it agreed with these three proposals. Golkar preferred to have the MPR carry out this function. Having the MPR to perform this function, Golkar's interest could be served better because Golkar, as a major political party in the MPR, could play a significant role.

⁷⁵TimPenyusun, *Menegakkan Tiang Konstitusi* at 34 (cited in note 34)

⁷⁶Hendrianto, *From Humble Beginnings to a Functioning Court* at 43. (cited in note 42)

⁷⁷ Benny K. Harman, *Mempertimbangkan Mahkamah Konstitusi: Sejarah Pemikiran Pengujian UU Terhadap UUD 308* (Kepustakaan Populer Gramedia, 1st ed 2013).

⁷⁸ Id. 315.

⁷⁹Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court*, at 159-60 (cited in note 58).

Some new and small political parties were in favor of having a new, separate court. For them, having different court would serve them better compared to the MPR since they did not hold significant power in the MPR. These two differing ideas became the battleground during the amendment discussions.

The process of including provisions concerning the judiciary in the updated constitution was far from simple. It took four years (1999-2002) to work things out. In the MPR's Working Body Meeting, Hamdan Zoelva and Valina Singka Subekti were the first persons who proposed the importance of empowering the judiciary in the updated constitution.⁸⁰ They believed that it was significant to explicitly mention that the Supreme Court has the power to review all legislation beneath the constitution. By acquiring this power, the Supreme Court could play its control function with respect to the legislative and executive branches. Zoelva stated that the existing constitution put more emphasis on the executive/president (an executive heavy constitution).⁸¹ He asserted that the updated constitution, therefore, should stipulate a more balanced position among the three branches.⁸² In this regard, Subekti stated that empowering the Supreme Court by granting judicial review should be the priority in the constitutional amendments.⁸³

Members of the MPR agreed that the Supreme Court should have judicial review power, but they had different views on how far judiciary should be permitted to exercise this power. One

⁸⁰Rapat Badan Pekerja MPR Risalah Rapat ke-3 Badan Pekerja MPR RI 96 (Jakarta Sekretariat Jenderal MPR RI 1999).

⁸¹ Id.

⁸² Id 28.

⁸³ Id 51.

group believed that Supreme Court should have judicial review power to all types of legislation including statutes.⁸⁴ Granting broad judicial review would enhance the Supreme Court's ability to play an influential role as a check and balance mechanism among branches of government. They argued that there existed many law and regulations that might be inconsistent with the constitution.⁸⁵ The judiciary, however, could not do anything because it did not have the power to review these laws. The judiciary should have judicial review power over statutes to overcome this situation.⁸⁶

Other MPR members asserted that while the Supreme Court should continue to review regulations, it should not be empowered to review statutes.⁸⁷ A statute was established by the President and the parliament. These two political bodies have an equal position with the Supreme Court and therefore, the Supreme Court should not be able to overturn laws enacted by those democratically elected institutions. Only a state institution with a higher position than the President and the parliament would be able to review a statute. Accordingly, they argued that the Supreme Court should have limited judicial review power –reviewing regulations beneath laws. Alimarwan Hanan from F-PPP stated “The Supreme Court is authorized to invalidate all governments’ actions and decisions or regulations beneath laws. Petitions to declare that all government’s action and decisions or regulations beneath laws is carried out at cassation level or special examination...”⁸⁸

⁸⁴ These include Fraksi Partai Bulan Bintang, Fraksi Utusan Golongan, and Fraksi Partai Kebangkitan Bangsa.

⁸⁵ Benny K Harman, *Mempertimbangkan Mahkamah Konstitusi* at 305 (cited in note 77) .

⁸⁶ Id.

⁸⁷ These include Fraksi Partai Golkar, Fraksi Reformasi, and Fraksi TNI/Polri.

⁸⁸ Benny K Harman, *Mempertimbangkan Mahkamah Konstitusi* at 303 (cited in note 77).

As there were these starting contrasting views, the MPR decided to invite three constitutional law experts -Professor Ismail Sunny, Professor Harun Al Rasyid, and Professor Suwoto Mulyosudarmo,⁸⁹ to give their opinions on this matter. These three constitutional law experts all concurred that the Supreme Court should have broad judicial review. Professor Sunny suggested that Indonesia could adopt the U.S. judicial review system that had been practiced more than 200 years.⁹⁰ For Professor Rasyid, the adoption of a broad judicial review was a logical consequence if Indonesia admitted that the Constitution, not the judiciary, was seen as the highest law the hierarchy of legislation.⁹¹ If lower legislation were inconsistent with the constitution there needed to be a mechanism to determine that.

Unlike Professor Rasyid, Professor Suwoto put more emphasis on the implications of the judicial review. For him, the Supreme Court should have the power to declare that a law was inconsistent with the Constitution, but not to invalidate it.⁹² Only the lawmakers would have the authority to override the law.

Unlike the opinions of these three invited Professors, Professor Bagir Manan, a constitutional law expert at the University of Padjadjaran, reminded the MPR that in some

⁸⁹TimPenyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, Dan Hasil Pembahasan, 1999-2002, Buku VI Kekuasaan Kehakimann*, 62 (SETJEN MKRI Revised Ed (Jakarta, n.d.). p. 62. See also Jimly Asshiddiqie, *Menegakkan Tiang Konstitusi: memoir Lima tahun kepemimpinan Prof. Dr. Jimly Asshiddiqie, S.H. di Mahkamah Konstitusi (2003-2008)*, Sekretariat Jenderal dan kepaniteraan Mahkamah Konstitusi 2008, p 20 see also Risalah Rapat ke 6 Panitia Ad Hoc III Badan Pekerja MPR 12 Oktober 1999 (Jakarta : Sekretariat Jenderal MPR 1999) p 38.

⁹⁰ Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, Dan Hasil Pembahasan, 1999-2002, Buku VI Kekuasaan Kehakiman* 63 (Setjen MKRI Revised ed 2010).

⁹¹Id at 63.

⁹²Id at 65.

countries laws cannot be reviewed by the judiciary.⁹³ These countries believed that a law is a reflection of people's will even though it is possible that it is not consistent with the constitution. Therefore, only the lawmakers could review the law. The adoption of separation of powers principles is another reason why a law could not be reviewed by the judiciary. In those countries, judicial review would be considered as a violation of this principle. A country adopting parliament supremacy could also prevent the court from reviewing a law.

In 2001, the MPR invited two more legal experts, Prof. Jimly Asshiddiqie and Prof. Maria W. Sumardjono, to give their insights on judicial review. Prof. Jimly stated that the new constitutional court should be a separate body outside the Supreme Court. This new court would have the power to settle disputes among state institutions, and the Supreme Court might be one of the parties that involved in this conflict. To avoid the possibility of a conflict of interest, having a separate court which has an equal position to the Supreme Court was strongly recommended.⁹⁴ He further stated that the new constitutional court should have authority to review all types of legislation. This statement was in line with Prof. Sumardjono's opinion, who suggested the Supreme Court should focus on legal service for people. So far, the Supreme Court was still struggling with a backlog of cases in its docket. If the Supreme Court were also authorized to conduct judicial review, it would be further overburdened. She also stated that conceptually, the duty of the Supreme Court was different from the duty of the constitutional court. The Supreme Court aims to settle disputes among citizens, while the constitutional court

⁹³ Benny K. Harman, *Mempertimbangkan Mahkamah Konstitusi* at 296 (cited in note 77).

⁹⁴ *Id* at 324.

is authorized to maintain the consistency of legislation with the Constitution.⁹⁵

Some of the MPR members agreed with the experts' views that the constitutional court should be a separate body with the power to conduct judicial review of all types of legislation. In this regard, Asnawi Latief (F PDU) stated that the Supreme Court had a backlog of more than ten thousand cases that needed to be settled.⁹⁶ He further argued that the Supreme Court had a bad reputation. Thus, the Supreme Court needed time to regain its status.⁹⁷ Latief's view is consistent with Horowitz's argument that "Another potent reason to create a new constitutional court is the common failure of the existing court to develop the rule of law in ways that support democratic institutions. That certainly was the rationale for a fresh start in Indonesia and some other countries, where sitting judges were frequently accused of corruption and incompetence."⁹⁸

Other MPR members agreed on the establishment of a constitutional court but asserted that it should be within the Supreme Court.⁹⁹ They rejected the idea of granting the constitutional court power to review all types of legislation. They argued that the constitutional court would be so powerful (super body) if it is authorized to conduct judicial review to all kinds of legislation.¹⁰⁰ There is also no guarantee that the new constitutional court will make the system more democratic.

These diverse views were then brought to the Commission A (Komisi A) of the MPR to be finalized. The majority of the Komisi A agreed with the experts that the new court should be

⁹⁵ Id at 326.

⁹⁶ Id at 332.

⁹⁷ Id.

⁹⁸ Donald L. Horowitz, *Constitutional Courts: A Primer for Decision Makers* 17 *Journal of Democracy* 126 (2006).

⁹⁹ Benny K Harman, *Mempertimbangkan Mahkamah Konstitusi*, at 332 (cited in note 77).

¹⁰⁰ Id.

independent and completely separate from the Supreme Court. The different nature of the cases, the bad reputation of the existing courts, and the overburdened of the existing courts appeared the primary arguments of the constitutional drafters to establish a new court. However, they did not agree that the new court should review all types of legislation because it would lead to the superpower court. In other words, the new court would have the power to conduct judicial review laws against the constitution, while judicial review of regulations would remain in the hands of the Supreme Court.

These three proposals regarding the institutional structure of the new court and its possible challenges and benefits can be seen in Table 1 below:

Table 1: The institutional structures of the new court and its possible consequences

Proposal	The Institutional Structure	Possible challenges or benefits	Endorsed by
First	The new Court was within the Supreme Court. This proposal seems to adopt the American Model in which the Supreme Court has the power to review statutes against the Constitution	<ul style="list-style-type: none"> - The Supreme Court was already overburdened. - The problems of the Supreme Court's performance in the past. - The types of the cases are likely different from the cases that were normally handled by the Supreme Court 	F-UG, F-KKI, and –F-PDIP
Second	A new, separate Court apart from the Supreme Court. This proposal likely to adopt the Austria-German Model	<ul style="list-style-type: none"> - requires institutional set up - It does not carry the bad reputation of the already existing institution. - Types of cases fit better within this new Court jurisdiction 	F-TNI/ POLRI, F-PPP, F-Reformasi, F-PDU, F-PDKB, and F-PDIP
Third	The court function is attached to Peoples Consultative Assembly (the MPR). This model is largely similar to the France Constitutional Council.	<ul style="list-style-type: none"> - While the MPR was the highest state institution, it was not a judicial institution. - Possible conflict of political interests. 	Golkar, PKB, and PDIP

After taking into consideration all possible challenges and benefits of the three proposals mentioned above, the MPR finally agreed to establish a new, separate court resembled the Austria-German Model. This court, however, would have limited power in conducting judicial review i.e. reviewing the constitutionality of statutes. It does not have the power to review all types of legislation. The MPR finally included the provision on the constitutional court in the updated constitution in 2001. The following part will discuss how this new court was structured in the new constitution. It will discuss the responsibilities of the court, the institutional structure, and parties that are eligible to file petitions to the court (legal standing).

Institutional design of the new constitutional court: The new court and standing

Provisions concerning Constitutional Court were finally inserted in Article 24 C of the updated Constitution in the third constitutional amendment in 2001. It stipulates:

- (1) The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections.
- (2) The Constitutional Court shall possess the authority to issue a decision over an opinion of the DPR concerning alleged violations by the President and /or Vice-President of this Constitution.
- (3) The Constitutional Court shall be composed of nine persons who shall be constitutional justices and who shall be confirmed in office by the President, of whom three shall be nominated by the Supreme Court, three nominated by the DPR, and three nominated by the President.
- (4) The Chair and Vice-Chair of the Constitutional Court are elected by and from the constitutional justices.
- (5) Each constitutional justice must possess integrity and a personality that is not dishonourable, and shall be fair, shall be a statesperson who has a command of the Constitution and the public institutions, and shall not hold any position as a state official.
- (6) The appointment and dismissal of constitutional justices, the judicial procedure, and other

provisions concerning the Constitutional Court shall be regulated by law.

Article 24 C grants significant judicial review authority to the new Constitutional Court. The court has power to declare and invalidate a law that is inconsistent with the constitution. The decision of the court is final and binding, which means there is no legal avenue available to challenge its decisions. However, unlike most constitutional courts, which are authorized to review all types of legislation, this new court can only review statutes against the constitution -- not other types of legislation such as regulations. This limited scope of judicial review is problematic. As Lindsey and Butt argue, “the need for an effective review of lower-level laws is arguably more acute than for statutes, because most of these regulations are issued without the transparent debates that often accompany a statute’s passage in the national legislature.”¹⁰¹

To give sufficient time for the lawmakers to prepare all things that were needed to implement Article 24 C, the updated constitution contained a transitional provision which stated “The Constitutional Court shall be established at the latest by 17 August 2003, and the Supreme Court shall undertake its functions before it is established.”¹⁰² The government and the DPR worked to establish Law on Constitutional Court as the legal basis for the operation of the new court. Law No. 24/2003 on Constitutional Court was finally promulgated on August 13, 2003. The new Constitutional Court officially operated on August 17, 2003.

Institutionally, the features of this new court are similar to the German Constitutional Court, i.e., a separate and centralized court. In this model, a single court monopolizes the

¹⁰¹Butt and Lindsey, *The Constitution of Indonesia* at 109 (cited in note 36).

¹⁰²Indonesia “Const 1945” Clause III Transitional Provision.

competence to declare laws unconstitutional and void. This model is different from a decentralized model where judicial review is conducted by ordinary courts. This new constitutional court, as stipulated in Article 24 C, has five responsibilities: conducting judicial review, settling disputes of competence among state institutions, settling disputes on general elections, dissolving political parties and providing legal opinions in the impeachment motion.

For Horowitz, some of these powers do not deal with constitutional adjudication¹⁰³ such as the authority of the court to settle general election disputes. This power, Horowitz argued, would be better left to an independent commission.¹⁰⁴

Of these five responsibilities, the new court has mostly dealt with judicial review and settling general election disputes. In the judicial review function, the court can only review laws that have been promulgated to determine whether they are consistent with the constitution. The court can act to declare a law unconstitutional and void, but it does not have the express power to insert words into the law or to dictate revision to the legislature. This limit on judicial power aims to prevent the court's encroachment of other branches of government, and to avoid judiciary politicization.¹⁰⁵

The new constitutional court consists of nine constitutional justices. They are appointed by three different state institutions: the President, the DPR (national legislature), and the Supreme Court. Each state institution autonomously selects three justices. Under this representative mechanism, each state agency appointed one-third of the total number of the

¹⁰³ Horowitz, *Constitutional Courts: A Primer for Decision Makers* 131 (cited in note 98).

¹⁰⁴ Id.

¹⁰⁵ Benny K Harman, *Mempertimbangkan Mahkamah Konstitusi*, at 332 (cited in note 77).

constitutional justices. This model of appointment is different from the pure judicial appointment (where judiciary autonomously appoints the constitutional justices) or cooperative model (where two or more institutions participate in the selection).¹⁰⁶ This representative model guarantees that none of the state agencies can dictate the outcome, because each state institution only appoints one-third of the total number of the constitutional justices. Ginsburg argues this representative mechanism may provide an incentive for moderate appointments.¹⁰⁷

Constitutional justices have five-year terms and each term is renewable for a single second term. There have been criticisms that the renewable term of office may reduce the constitutional justices' independence in the first term, especially when they desire to be appointed in the second term. However, I share Meitzner's view that the "multitrack recruitment system," as reflected in the recruitment of the Indonesian Constitutional Court Justices, ensures a diverse composition of the bench.¹⁰⁸ With the possibility of selecting non-career justices, this system provides an opportunity for legal scholars or other legal practitioners to give balance view to legalistic view of their colleagues from the Supreme Court judges.¹⁰⁹ This system may also minimize the dependence of the justices on their nominators because there are alternate avenues of appointment available if they intend to seek a second term.¹¹⁰ For example, Justice Jimly Asshiddiqie, the first Chief of Constitutional Justice, was nominated by the President in his

¹⁰⁶Ginsburg, *Judicial Review in New Democracies* 45 (cited in note 18).

¹⁰⁷ Id.

¹⁰⁸ Marcus Mietzner, *Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court*, 10 *Journal of East Asian Studies* 104 (2010). archived at <http://journals.rienner.com/doi/abs/10.5555/jeas.2010.10.3.397>.

¹⁰⁹ Id.

¹¹⁰ Id.

first term (2003 -3008), but in his second term, he was appointed by the DPR. Similarly, Justice I Dewa Gede Palguna was selected by the DPR as Constitutional Justice in 2003-2008 period. But he was named by the President as Constitutional Justice in 2015-2020 period.

The new Court and standing

Concerning legal standing, different rules apply depending on the types of cases filed in the court. For general election disputes, the eligible parties include the candidate of the Regional Representative Assembly, president and vice president candidates, and political parties.¹¹¹ In the dissolution of political party cases, only the government has the legal standing to file a case to the court. The potential petitioners for disputes of competence among state institutions cases were the state agencies that have direct interests toward the contested competence.¹¹²

For judicial review cases, five different entities are eligible to file petitions to the constitutional court: (1) individual citizens of Indonesia; (2) the union of customary law community; (3) public legal entities; (4) private legal entities; and (5) state institutions.¹¹³ In other words, all Indonesian individuals and legal entities, both private and public, can file for judicial review by the court. It appears that this rule excludes foreign entities and individuals.

How in practice has the new Constitutional Court applied the rule of legal standing in judicial review cases? To be eligible to file petitions in judicial review cases, persons or entities should show that they experienced constitutional damage or potentially experienced

¹¹¹The Constitutional Court Act of 24/2003, Art 68, amended by the Constitutional Court Act of 8/2011.

¹¹²The Constitutional Court Act of 24/2003, Art 61, amended by the Constitutional Court Act of 8/2011.

¹¹³The Constitutional Court Act of 24/2003, Art 51, amended by The Constitutional Court Act of 8/2011.

constitutional damage because of the enactment of laws.¹¹⁴ As the updated constitution contained an extensive range of rights, the petitioners did not find any difficulties to find rights as the basis to file petitions to the court.

In its early operation, the new court applied lenient rules on legal standing. The Court allowed a petition using the arguments that they were taxpayers as the legal basis to file judicial review of law relevant to the economy. This can be seen in judicial review of Law on Electricity.¹¹⁵ The Court said: “Every taxpayer has a constitutional right to dispute each law relevant to a sector of the economy which affects their welfare.”¹¹⁶ This lenient rule was also utilized by the Court when it conducted judicial review on Water Resource Law.¹¹⁷ If taxpayer argument can be used to file petitions to the court, this means every Indonesian individual can file a request to the court regardless whether they experienced constitutional damages. The taxpayer argument, however, does not automatically guarantee that the court will grant the request.

In determining the legal standing of legal entities as petitioners in judicial review cases, the court adopted a similar approach. Legal entities such as associations could act as petitioners in judicial review cases as long as their aims to fight for public interests relevant to the filed petitions as appear in judicial review of Law on Oil and Gas¹¹⁸ and judicial review of Law on

¹¹⁴ Id.

¹¹⁵ The Decision of the Constitutional Court on judicial review of Electricity Law 001/PUU-1/2003, 021/PUU-1/2003, and 022/PUU-1/2003 at 327.

¹¹⁶ Id.

¹¹⁷ The Decision of the Constitutional Court on Water Resource Law 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 at 478.

¹¹⁸ These include APhi (Asosiasi Penasehat Hukum dan Hak Asasi Manusia “Lawyers and Human Rights

Electricity.¹¹⁹

The court's broad approach concerning the legal standing of individuals and legal entities opened more opportunities for the public to file petitions in judicial review cases. The court had provided better access for the public to defend their rights. For the newly established court, this approach also helped the court to gain its popularity. It can be predicted that the more lenient the rule of standing applied by the court, the more possible applicants are eligible to file petitions to the court. However, this approach potentially leads to flood of cases, which may cause case backlogs if the court is not equipped with sufficient resources. Table 2 below shows various types of petitioners in judicial review cases.

Table 2: Types of petitioners and their legal interests in judicial review (2003-2016)¹²⁰

Petitioners	direct	direct - indirect	not expressly stated	indirect	total
Private legal entities	39	10	13	33	95
Private legal entities and traditional community		1			1
Private legal entities and individuals	32	11		21	64
Public legal entities	19	2	4	4	29

Association”), PBHI (Perhimpunan Bantuan Hukum Indonesia “The Indonesian Legal Aids Association”), dan SNB (Solidaritas Nusa Bangsa “Nation Solidarity).

¹¹⁹ These include APhi (Asosiasi Penasehat Hukum dan Hak Asasi Manusia), PBHI (perhimpunan Bantuan Hukum Indonesia), and Yayasan 234 (234 Foundation).

¹²⁰ Veri Junaidi, Adelline Syahda, Adam Mulya Bunga Mayang, *Konstitusi Dan Demokrasi (Kode) Inisiatif, Tiga Belas Tahun Kinerja Mahkamah Konstitusi Dalam Memutus Pengujian Undang-Undang “Thirteen Years of the Constitutional Court’ Work in Judicial Review”* (Jakarta 2016) at 5.

Public legal entities and individuals		7	1	9	24
Private/public legal entities	1			3	4
Public/private legal entities, and individuals		2			2
Traditional community					3
State institutions	6			1	7
Individuals	418	60	77	155	710
Individuals and local government		1			1
Petitioner were not expressly stated			1		1
Foreign individuals	2				2
Total	528	94	96	226	944

The above table indicates that, in practice, there are more variations in terms of petitioners that can file their petitions to the court. This figure is true when we compare it with the provision of the Constitutional Court Law which limit the petitioners into five groups i.e. individuals, public legal entities, private legal entities, state institutions, and traditional (*adat*) community.

Can the new constitutional court review all statutes? Article 50 of Law 24/2003 on Constitutional Court, purposely limited the statutes that could be reviewed by the Court. It stated, “Acts which are requested to be reviewed are acts issued after the amendment of the 1945 Constitution of the Republic of Indonesia.” This means the acts that could be reviewed were the

ones that were enacted after the first amendment of the Constitution was conducted in October 19th 1999.¹²¹ The Court expanded its judicial review power by invalidating this Article in its early operation when the Court decided judicial review of Law 14/1985 on Supreme Court in December 30, 2003.¹²² In 6 to 3 split decision, the majority was of the opinion that the Constitution did not limit the Court to review laws after constitutional amendments.¹²³ If the Court cannot review laws that were enacted before constitutional amendments, there would be no institutions that could examine these laws.¹²⁴ In other words, these laws would remain unreviewable. In addition, if the Court applied Article 50, it applied a double standard: on the one hand, certain laws can be reviewed by the court on the contrary other laws remained unreviewable.¹²⁵ The majority stated:

It must be understood that the Constitutional Court is a state institution. The powers and jurisdiction of which are determined by the Constitution. The Court is not an organ of legislation, but rather is a body of the Constitution. Therefore, the basis upon which the Constitutional Court carries out its constitutional tasks and exercises its constitutional jurisdiction is the Constitution. Every person and every institution must adhere to legislation and other laws, but only laws that do not conflict with the Constitution”.¹²⁶

The dissenters were of the opinion that Article 50 did not limit the Court in conducting judicial review. Article 50 of Law 24/2003 on Constitutional Court is the implementing legislation to elaborate Article 24 C of the Constitution. Legislature had the power to establish this law including formulating Article 50. By invalidating this article, the Court has acted

¹²¹The Constitutional Court Act 24/2003 Elucidation of Art 50.

¹²²The Decision of the Constitutional Court No.004/PUU-I/2003.

¹²³ Id.

¹²⁴ Id.

¹²⁵ Id.

¹²⁶The Decision of the Constitutional Court 066/PUU-II/2004 at 55.

beyond its mandate.¹²⁷ In addition, the dissenters argue, it is unfair to review laws that were stipulated under the old constitution using the provisions specified in the new constitution.¹²⁸

Article 50 is also necessary to prevent the flood cases to the constitutional court. Since Article 50 determines the constitutional court power, the Court should refrain itself from deciding this case because the court may have a conflict of interest. Since then, the Court has reviewed all laws without regard to when the laws were enacted.

The introduction of human rights provisions in the updated constitution

Under the 1945 Constitution, the New Order government did not sufficiently respect human rights. Repressive activities inconsistent with human rights norms had become important to maintaining its power. Nadirsyah Hosen has observed:

Popular protest movements were routinely repressed by violent means, and dissidents were often imprisoned after farcical trials. The victims were alleged communists, and communist sympathisers, who were massacred or imprisoned in large numbers at the beginning of the New Order era, in 1965-66; Muslim political opponents were imprisoned in their hundreds in the 1980s. Gross violations also occurred during military operations in provinces where separatist or independence movements are or were active, including Aceh and Irian Jaya, as well as in East Timor.¹²⁹

This situation changed significantly when the Soeharto New Order government was about to collapse. There was substantial pressure from the international community and the people to improve human rights condition in Indonesia. Domestically, people demanded at least three areas of human rights improvement. First, that the government should include a bill of

¹²⁷Id at 57.

¹²⁸Id at 59.

¹²⁹Nadirsyah Hosen, *Reform of Indonesian Law in the Post-Soeharto Era (1998-1999)* 222 (Unpublished PhD Dissertation, University of Wollongong 2004).

rights to guarantee human rights protection in the constitution. The 1945 Constitution did not explicitly recognize provisions on human rights.¹³⁰ Second, that the government should investigate human rights violations that occurred during New Order era and punish those who were responsible.¹³¹ Third, that the government should guarantee freedom of the press.¹³² The public believed that this could be done by enacting new laws or repealing any legislation that contradicted with human rights.

Internationally, financial institutions such as the World Bank raised its concerns about the human rights situation in East Timor and urged the Indonesian government to take significant efforts to address those violations. The World Bank emphasized the need to conduct necessary reform as conditionality “for the international financial community to be able to continue its full support.”¹³³ As a result, the subsequent government, the Habibie administration with the legislature passed legislation concerning human rights, ratified international conventions on human rights, and established human rights monitoring institutions.¹³⁴ In 1998, the MPR issued a decree relating to human rights,¹³⁵ which was considered the first human rights charter in Indonesian history. A year later, the government passed a law on human rights.¹³⁶

¹³⁰ Id at 223.

¹³¹ Id.

¹³² Id.

¹³³ Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability* 15 Harvard Human Rights Journal 205 (2002).

¹³⁴ Such as the establishment of National Commission for the Elimination of Violence towards Women and National Human Rights Commission.

¹³⁵ TAP MPR XVII MPR 1998.

¹³⁶ Human Rights Act 39/1999.

The updated human rights provisions: detailed or general?

When the constitutional reform process started in 1999, human rights were one of the most contentious issues for possible insertion in the updated constitution. Other hot topics included provisions on the limitation of presidential power and empowerment of the legislature. Human rights issues were discussed during the second amendment in 2000.

The second constitutional amendment was conducted as follows:¹³⁷ initially, the MPR established a Working Body to prepare the materials for the 2000 MPR Annual Session. This Body then formed three Ad Hoc Committees (the PAH): the PAH I, the PAH II, and the PAH III. The PAH I was responsible for preparing amendment drafts. The draft from the PAH I was then furthered discussed by the Komisi A (Commission A). Finally, the MPR in its plenary Meeting would ratify the second Amendment. The Working Body had 90 members. The Committee had 44 members, and the Commission A had 227 members. The members of these bodies were the representatives of all eleven factions¹³⁸ (political parties or joined political parties) of the MPR in proportion to the number of their seats in the MPR.

The discussion in this part was occurred in the PAH I. The constitutional drafters agreed about the importance of including more human rights protection in the new constitution.¹³⁹ They

¹³⁷ Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition* at 186 (cited in note 8).

¹³⁸ They are: F-UD (Fraksi Utusan Daerah - Regions delegates), F-KKI (Fraksi Kesatuan Kebangsaan Indonesia - The United of Indonesian Nation), F-PDIP (Fraksi Partai Demokrasi Indonesia Perjuangan - Indonesian Democracy Party of Struggle), F-PBB (Fraksi Partai Bulan Bintang - Star Crescent Party), F-PDU (Fraksi Persatuan Daulat Ummat - the United of Daulat Ummat) F-PG (Fraksi Partai Golongan Karya - Golongan Karya Party), F-KB (Fraksi Kebangkitan Bangsa - National Awakening Party), F-PPP (Fraksi Partai Persatuan Pembangunan - Unity of Development Party), F TNI/Polri (Fraksi TNI/Polri - Military and Police Faction), F-UG (Fraksi Utusan Golongan - Functional Party), and F PDKB (Fraksi Partai Demokrasi Kasih Bangsa - National Love Democratic Party faction).

¹³⁹ Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, Dan*

acknowledged that the 1945 Constitution contained very few human rights provisions and did not include the most recent types of human rights provisions seen internationally. Arguments were made that the updated constitution should include these kinds of human rights.¹⁴⁰

The constitutional drafters, however, had different views on the number and character of human rights provisions that would be included in the updated constitution. One group believed that it was necessary to insert comprehensive and detailed human rights provisions in the updated constitution. This group consisted of small or new political parties including F-KKI, F-PDU, F-PDKB, F-UG, F-PPP, F-PBB. Another group asserted that human rights provisions should be simple. This group included the main political parties i.e. F-PDIP, F-Golkar, and TNI/Polri Faction. One plausible explanation as to why the small and new political parties were in favour of detailed provisions of human rights while the major political parties were not, was because these different positions would likely safeguard their interests.

This part analyzes the arguments of these two groups to obtain a better understanding of the process of the inclusion of human rights provisions in the new constitution. The first group believed that even though there was legislation such as MPR Decree /XVII/ 1998 on Human Rights and the Law on Human Rights, constitutional protection of human rights was still needed.¹⁴¹ This constitutional guarantee would provide better human rights protections and place

Hasil Pembahasan, 1999-2002, Buku VIII Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama "A Comprehensive Document on Process and Result of the Amendment of the 1945 Constitution: Background, Process, and Result of Deliberation, 1999-2002, Book VIII Citizens and Residents, Human Rights and Religions" (Setjen MKRI Revised ed, 2010).

¹⁴⁰Id at 315, 318, 320. These include A. Rosyad Sholeh (F-UG), Muhammad Ali (F-PDIP), G. Seto Harianto (F-PDKB).

¹⁴¹Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945*, at 315, 318, 320 (cited in note 139).

more pressure on the government to respect human rights. As stated by Vincent Radja (F-KKI), “human rights protection should be included in detail in the updated constitution.”¹⁴² Asnawi Latied (F-PDU) recognized the need “to expand human rights; the 1945 Constitution was very brief compared to Declaration of Human Rights.”¹⁴³ Inserting human rights provisions in the new constitution was seen as strengthening the state’s commitment to guarantee human rights protections¹⁴⁴ and demonstrate Indonesia’s commitment to human rights protection toward the international community. In this regard, Hamdan Zoelva (F-PBB) said that human rights had to be included in the updated constitution because they reflected a modern constitution.¹⁴⁵

Agun Gunandjar Sudarsa (F-PG) believed that the inclusion of human rights provisions in the updated constitution would improve the constitutional guarantee of human rights.¹⁴⁶ Tumbu Saraswati (F-PDIP) stated, in general, the need for the implementation of human rights, recognition and acknowledgment of minority groups and the willingness to improve public welfare.¹⁴⁷ Abdul Khaliq Ahmad (F-KB) voiced the opinion that it was important to explicitly stated human rights provisions. It is true that the 1945 Constitution implicitly contained human

¹⁴²Id 213. See also Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun sidang 1999* 22 (Sekretariat Jenderal MPR-RI, 2008).

¹⁴³Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945*, at 213 (cited in note 139). See also Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun sidang 1999* 24 (cited in note 142).

¹⁴⁴Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945* (cited in note 139) at 214. Statement by Gregorius Seto Harianto (FPDKB)

¹⁴⁵Id at 226.

¹⁴⁶Id at 219 Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun sidang 1999* 89 (cited in note 142).

¹⁴⁷Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945* at 217(cited in note 139). See also Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun sidang 1999* 618 (cited in note 142).

rights provisions. But that is not enough.¹⁴⁸

Civil society organisations echoed this view. Hendardi of the PBHI (an NGO providing legal aid) argued that it was not sufficient to regulate human rights in the form of law or regulations.¹⁴⁹ Based on hierarchy of legislation, these types of legislative enactments could be swept aside by other laws. Inserting comprehensive and detailed human rights provisions in the constitution would secure the protection of these rights.

In addition, Diana Fauziah Arifian (Indonesian Political Science Association) added that inserting more human rights provisions in the updated constitution was important, but that it was more important to have clear and detailed rules to implement human rights.¹⁵⁰

The second group believed that while it was crucial to include more human rights provisions, the updated provisions of human rights language should be simple.¹⁵¹ They argued that the existing legislation has included comprehensive human rights provisions. Inserting more human rights provisions in the updated constitution would lead to (1) unnecessary repetition and (2) eliminate the unique character of a constitution.

In this regard, Nusa J. Toendan (F-PDIP) stated “If we see provisions on human rights, there was an impression that they are too detailed and their content is [similar to] the content of the law... [Therefore] we can simplify them.”¹⁵² Hatta Mustafa (F-PG) acknowledged “there was an MPR Decree on Human Rights and there was a time constraint to discuss all provisions, so

¹⁴⁸Id 220. See also Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesian Tahun 1945 (1999-2002) Tahun sidang 1999* at 93 (cited in note 142).

¹⁴⁹Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945* at 256 (cited in note 139).

¹⁵⁰Id at 256.

¹⁵¹Id at 325, 328. These include Siti Hartati Murdaya (FUG), Nusa J. Toendan (F PDIP).

¹⁵²Id at 325.

where should we put this decree.”¹⁵³ Similarly, Siti Hartati Murdaya (F-PD) agreed that, “provisions on human rights were too specific, too detailed and overlapped; many of them could be put in statutes, the MPR decrees, and strengthened by government regulations.”¹⁵⁴

In addition, some of the MPR members worried that inserting more human rights provisions would diminish the special character of the 1945 Constitution. Slamet Effendi Yusuf (F-PG) stated that the content of the constitution varied from country to country depending on its history, ideology, culture, and political system. He asserted that Indonesia could determine the content of its own constitution, and did not have to adopt the other country constitution because in doing so may lose its distinctive character.¹⁵⁵

Similarly, Muhammad Ali (F-PDIP) argued Law on Human Rights and the MPR Decree on Human Rights had adequately guaranteed human rights protection. Adding more details of human rights provisions in the constitution would lead to diminishing the unique character of the 1945 constitution.¹⁵⁶ For Siti Hartati Murdaya (F-PD), “these significant reforms were made in short period, I worried the majority of the people did not want to lose the special spirit and soul of 1945 when the independence was proclaimed.”¹⁵⁷ There was no further explanation concerning the special character of the 1945 Constitution. However, it was widely understood that the nature of the (old) 1945 Constitution was brief and flexible (*singkat dan supel*) as it was

¹⁵³Id 214. Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun sidang 1999* 27 (cited in note 142).

¹⁵⁴Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945* at 328 (cited in note 139).

¹⁵⁵Id at 234.

¹⁵⁶Id. Statement by Siti Hartati Murdaya (F-PD).

¹⁵⁷Id at 328.

explicitly stated in the elucidation of the (old) 1945 Constitution.¹⁵⁸ The Constitution was brief because it only contained 37 Articles and several general guidelines/provisions. Flexible means that the constitution could keep up with new developments or situations as it provided general guidance --and not going to the details. The most important thing was the spirit of government in governing the country.¹⁵⁹

It appeared that there was a tendency of small political parties such as F-KKI, F-PDU, and F-PBB, to favor more elaborative human rights provisions. The main political parties such as F-PDIP, F-PD, and F-PG preferred to keep human rights provisions general. Why did these two groups have different preference on how the new constitution included human rights provisions? The explanation by all speakers mentioned above had been partly answered this question. Another plausible explanation is that for small and new political parties, having detailed and extensive human rights provisions would provide a guarantee when they exercised their rights. These provisions would protect them from the arbitrary actions of the government (the ruling parties). Comprehensive human rights provisions would also limit the power of the government when carrying out its constitutional duties.

For major political parties such as Golkar, simple human rights provisions were preferable. Golkar was the ruling party during the New Order government. Keeping human rights provisions simple would likely prevent the prosecution of past human rights violations. This indication can be seen when the majority of the constitutional drafters finally agreed to include more comprehensive human rights provisions, Golkar then proposed a non-retroactivity

¹⁵⁸ The General Elucidation of the (old) 1945 Constitution.

¹⁵⁹ Id.

rule to be included in the constitution.¹⁶⁰ While Golkar denied that it influenced in drafting non-retroactivity provision,¹⁶¹ the minutes of the meeting showed that Golkar proposed the inclusion of this provision.¹⁶² Even though it is not easy to find the reason why Golkar introduced this provision, it would not have been a mere coincidence that Golkar have been closely linked to human rights abuses during the New Order regime.¹⁶³

Besides, for major political parties, there was an argument to keep human rights provisions simple. They argued that people could use the Law on Human Rights as the legal basis for filing claims to the ordinary/general courts, even if there was no comprehensive human rights protection in the constitution. However, with the overburdened and the reputation of regular courts, it was hard to rely on them for responsiveness.

What should be inserted in the new human rights provisions?

After discussing the method of accommodating human rights provisions, specifically whether to be detailed or simple, the MPR members deliberated the specific content of human rights provisions. This part describes the deliberation of the constitutional drafters when they formulated the content of human rights provisions. It further explains the different positions of actors - the MPR, experts/academics, and NGOs- who were involved in drafting these provisions. It appears different actors contribute different perspectives in formulating these

¹⁶⁰Indrayana, *Indonesian Constitutional Reform 1999-2002* at 220-221 (cited in note 8).

¹⁶¹ Id at 220-221.

¹⁶² The Minutes of the 43rd Meeting of the Ad Hoc Committee June 13, 2000. See also Indrayana, *Indonesian Constitutional Reform 1999-2002* at 220-221 (cited in note 8).

¹⁶³ Indrayana, *Indonesian Constitutional Reform 1999-2002*. at 221 (cited in note 8).

articles. For example, the MPR tend to propose general principles and detailed provisions of human rights provisions. Experts and academics provided the broader context about the importance of having human rights provisions in the constitution. The NGOs suggested more specific, concrete, and detailed insights depending on the issue they focus on. The different positions among those groups when deliberating human rights provisions were more complementary than contradictory.

The MPR's views

Taufiqurrohman Ruki (F-TNI POLRI) stated that the updated constitution should include, among others, the state guarantee of human rights protection; non-derogable rights; women's rights; and limitation in exercising rights.¹⁶⁴ In addition, he argued that these rights should be put in separate provisions,¹⁶⁵ Asnawi Latief (F-PDU) added that it was important to include Universal Declaration of Human Rights in the new constitution.¹⁶⁶

Another constitutional drafter, Slamet Effendi Yusuf (F PG), suggested that the updated constitution should emphasize human rights protection. These include a right to life, a right to establish a family and to procreate, self-determination, a right to justice, a right to freedom and a right to information, a right to security, and a right to welfare.¹⁶⁷ It should also include non-derogable rights.

Unlike the above-mentioned constitutional drafters who argued for general provisions,

¹⁶⁴ Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945* at 227 (cited in note 139).

¹⁶⁵ Id.

¹⁶⁶ Id at 213.

¹⁶⁷ Id.

Valina Singka (F-UG) elaborated types of human rights that should be inserted in the new provisions. She explained that human rights were not only about civil and political rights and economic, social, and cultural rights, but it also included women's rights and environment rights.¹⁶⁸ In addition, she suggested six important principles that should be adopted in the new provisions.¹⁶⁹ First, she asserted that the document should take into account the domestic and the international covenant concerning human rights especially those that have been ratified by Indonesia.¹⁷⁰ Second, it should also include the non-derogable rights principle¹⁷¹ of the international covenants on human rights.¹⁷² Third, it should contain rights to development such as a right to pursue a good living, right to obtain health environment, and customary/adat rights.¹⁷³ Fourth, the new provisions should contain a gender equality principle, guarantee equality [principle], no discrimination based on sex or gender, and women's rights. Fifth, it should ensure child rights such as a right to get good education and right to be loved. And the last principle is that there should be a limitation in exercising rights.¹⁷⁴

It appears that the position of the MPR members in determining the content of human

¹⁶⁸Id at 232.

¹⁶⁹Id at 169.

¹⁷⁰ Id. The international covenants on human rights that should be taken into account include (1) Universal Declaration of Human Rights 1948, (2) International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR), (3) Vienna Declaration 1993, and (4) Universal Declaration of Human Responsibilities. The domestic legislation that should be referred to includes: the MPR Decree No. XVII/1998, Law 39/1999 on Human Rights, the 1998 GBHN (the 1998 State Guideline) and the Old Constitutions (1949 Constitution, 1950 Constitution, and the draft of Human Rights provisions of the Konstituante).

¹⁷¹ Id. The non-derogable rights include right to life, right not to be torture, right not to be slaved, and right to religion.

¹⁷² List of Non-derogable rights and Freedoms under Article 4 of the ICCPR
<http://www.legislationline.org/documents/id/7775> accessed 13 October 2016.

¹⁷³Tim Penyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945*, 169 (cited in note 139).

¹⁷⁴Id at 169.

rights provisions was consistent with their views when they deliberated the method of accommodating human rights provisions in the constitution.

Civil Society's view

Besides internal insights from the MPR members, the constitutional drafters also invited civil society element such as experts, professional associations, and NGOs, to give their insights about the contents of human rights provisions. Professor Bagir Manan, a constitutional law professor at the University of Padjadjaran, stated that a modern constitution contained human rights, even the Soviet Union constitution.¹⁷⁵ In a similar vein, Professor Philipus M. Hadjon of the University of Airlangga stated that a constitution aims to limit the government power to guarantee human rights protection. Therefore, human rights protections should be included. Professor Dewa Gede Atmadja of Universitas Udayana added “The essential functions of the constitution... how we limit the power of the existing state institutions including guarantee human rights. Provisions related to human rights [in the 1945 Constitution] were too general. There was the MPR Decree XVII/MPR/1998 on Human Rights. But human rights were the content of the constitution.”¹⁷⁶

The invited professional groups and NGOs included: Indonesian Journalist Association (PWI), Indonesian Press Society (MPPI), Independent Journalist Association (AJI), Indonesian Commerce Chamber (KADIN), Indonesian Economist Association (ISEI), Indonesian legal Aid Foundation (YLBHI) and Center of Legal Aid and Human Rights (PBHI).

¹⁷⁵Id at 230.

¹⁷⁶Id at 235-236.

Tarman Azam (PWI- Indonesian Journalist Association) specifically suggested that Article 28 of the 1945 Constitution should be maintained. This article has been elaborated by the MPR Decree No XVII/MPR/1998. Didik Supriyanto (AJI-Independence Journalists Alliance) disagreed with Azam, asserting that Article 28 should be amended. He pointed out that this article was internally contradictory and did not explicitly guarantee freedom of expression. He also argued that it needed an implementing regulation to do so.¹⁷⁷ Similarly, Leo Batubara (MPPI-Indonesian Press Society) suggested that Article 28 should be amended so that no laws reduce or eliminate freedom of the press.¹⁷⁸ One plausible explanation as to why the PWI took a different position from the two other journalist organizations was that the PWI was the only government-related journalist association established since New Order era.¹⁷⁹ During this authoritarian government, freedom of press was quite limited. The PWI was the only Press organization and was dependent on the government of the day. As a result, it became the government's press organization rather than an independent press institution.¹⁸⁰ The AJI and the MPPI were established later on by those who did not agree with the PWI vision.¹⁸¹ It was very likely that the PWI gained benefit from the existing constitutional provisions.

Ichsan Tandjung of ISEI (Indonesian Economists Association) explained that it is necessary to include women's rights, children rights, and a right to healthy environment in the

¹⁷⁷ Id at 256.

¹⁷⁸ Id at 259.

¹⁷⁹ Sekilas Sejarah Pers Nasional archived at <http://pwi.or.id/index.php/sejarah/770-sekilas-sejarah-pers-nasional>

¹⁸⁰ H P Wiratraman, *Does Post-Soeharto Indonesian Law System Guarantee Freedom of the Press?* 106 Human Right in South East Asia Series 1 *Breaking the Silence*, Southeast Asian Human Rights Studies Network, (Bangkok, Thailand 2011).

¹⁸¹ Id.

constitution because the violation of these rights would affect the economy. He gave examples of how a product was rejected by international market because this product was made by exploiting children and women.¹⁸² Similarly, when a product was made without considering the negative impact on the environment, this product was likely rejected by the international market.

Hendardi (PBHI-legal aid and human rights association) recommended, “the Indonesian constitution must define and guarantee fundamental rights of citizens, specifically including: ¹⁸³

1. Protection of human dignity;
2. Guarantee of individual freedom;
3. Equality before the law;
4. Freedom of religion and faiths;
5. Freedom of expression;
6. Freedom of association and union;
7. Right to domicile and freedom to move;
8. Rights to work and get adequate income;
9. Right to property and inheritance.

Bambang Widjojanto (YLBHI-Indonesian legal aid foundation) further explained “respect human rights, or citizens’ rights are important. This argument is in line with constitutionalism.”¹⁸⁴ Frans Hendra Winata (Ikadin-Indonesian Advocate Association) stated that the 1945 Constitution was one of the worst constitutions in the world.¹⁸⁵ It was brief and did not guarantee human rights comprehensively. It also did not recognize the division of powers.¹⁸⁶

It is fair to say that there were relatively coherent views among constitutional drafters as well as the civil society regarding the inclusion of comprehensive human rights provisions in the

¹⁸²Id at 244.

¹⁸³Id at 246.

¹⁸⁴Id at 247.

¹⁸⁵Id at 251.

¹⁸⁶ Id.

new constitution. While there were few differences, the differences were not so much about the type of human rights that should be inserted in the updated constitution. It was about how to include these vast arrays of human rights provisions in the updated constitution so that the new constitution contained more human rights provisions but at the same time it remained simple.

After several deliberations, the MPR finally agreed to incorporate expanded human rights provisions in Chapter XA, which contains Article 28A to 28 J. This Chapter substantially reflected the Universal Declaration of Human Rights, international covenants on human rights, the MPR Decree on Human Rights, and Indonesia's Law on Human Rights. It contained some fundamental principles such as non-derogable rights, a non-retroactive principle, and limitations on human rights. It also stipulated the government's responsibility to respect, protect, and fulfil human rights. In brief Chapter XA contains:

Right to life; right to establish family and procreation; right to self-betterment, right to justice, freedom of religion, speech, education, employment, citizenship, place of residence, association and expression; freedom of information; personal security; right of well being including social security and health provision; right to personal property; right to seek political asylum; freedom from torture and degrading treatment; protection and non discrimination, including freedom of conscience, traditional cultural identity, recognition under the law and unacceptability of retrospective criminal legislation; the primary responsibility of the government to protect, advance and uphold human rights; the obligation to uphold human rights of others and to be bound by the law for this purpose; and the restriction of the application of human rights provisions on justified grounds of moral and religious values or of security and public order.¹⁸⁷

It appears that the constitutional drafters did not put a clear division between civil and political rights (CP rights), and economic, social, and cultural rights (ESC rights). They did not specifically divide these two groups of rights into two different sections in the new provisions.

¹⁸⁷Indrayana, *Indonesian Constitutional Reform 1999-2002* at 217-218 (cited in note 8).

In addition to Chapter XA, there are other provisions outside Chapter XA that were closely associated with human right protections. These include Article 27 on Equality, Article 28 on freedom to associate, to assemble and, to express opinions, Article 31 on the right to education, Article 32 on a right to culture, Article 33 on natural resources, and Article 34 on rights to social security and health. It is fair to say that the new constitution contains a plethora of economic and social rights.¹⁸⁸

The updated constitution does not mention whether economic and social rights are meant to be justiciable. However, there is a solid argument that these rights are justiciable. This is because, under Article 28I (4) of the Constitution, the government has the duty to respect, to protect, and to fulfill human rights.¹⁸⁹ If the government did not respect human rights, there must a judicial mechanism through constitutional court or an ordinary court that can be imposed on the government to fulfil its constitutional duties. This can be done through judicial review and filing a case to the ordinary courts.

Conclusion

This chapter has explained factors that influenced the introduction of the constitutional court with judicial review power and human right provision in the updated Constitution. It appears that the establishment of the Indonesian constitutional court may be best explained by multiple contributing factors –not by a single factor. The introduction of human rights provisions

¹⁸⁸ Timothy Lindsey, *Indonesia: Devaluing Asian Values, Rewriting the Rule of Law*, in Randall Peereboom *Asian Discourse of Rule of Law* 286, 311 (Routledge 2004).

¹⁸⁹ Indonesia “Const 1945” Art 28 I (4).

was influenced by both internal and external factors.

Factors that influenced the establishment of the constitutional court include the history of judicial review in Indonesia, political fragmentation in 1999, President Wahid removal, and the international influence. The fact that the old constitutions – the 1945 Constitution, the 1949 Federal Constitution, and the 1950 Provisional Constitution - did not recognize a judicial institution that has power to conduct judicial review did not mean that this idea disappeared. This idea kept alive as can be reflected when the framers drafted the first constitution in 1945 and also when the Konstituante drafted the permanent constitution in 1956.

During the New Order government, this idea was partially implemented through the recognition of limited judicial review. However, this idea was not included in the constitution until the most recent constitutional amendment took place in 1999-2002. The transition from authoritarian to emerging democracy started in 1998 opened more possibility for the public to demand human rights protection which was absent in the previous government. The establishment of the constitutional court, in this case, is in line with what Cappelletti called as the protection of human rights and democracy.

The political fragmentation in 1999 also contributed to the introduction of the constitutional court. This court was established because the ruling party wanted to safeguard its power by preventing a purely political impeachment as experienced by President Wahid. In such a politically fragmented situation, it is difficult to reach a majority in the legislature. As a result, the ruling party needs a mechanism to prevent political impeachment. This can be done by involving an impartial institution such as the constitutional court in the impeachment process.

This way, political parties do not have the ultimate power to impeach the President (from the ruling party). The introduction of constitutional court in this case may act as “political insurance” for the ruling party.

In addition, a dispute between President Wahid and the DPR which ended with the removal of the President also influenced the introduction of an impartial referee i.e. a constitutional court to settle disputes among state institutions and to involve in the impeachment process. Having a judicial institution involved in the impeachment will prevent the process from a purely political mechanism. The constitutional court acts to “police the boundary” among state institutions, as suggested by Martin Shapiro.

The establishment of constitutional courts in some emerging democracies also influenced the introduction of the new, separate court in Indonesia. “The constitutional learning” conducted by some of the MPR members to study constitutional court in other countries produced very similar institutional design between the new Indonesian Constitutional Court and the South Korean Constitutional Court.

The liberal legal standing to file judicial review petitions to the Constitutional Court makes the process relatively accessible to the public. Individual citizens of Indonesia, the union of customary law community, public entities, private entities, and state institution are eligible to file petitions to the Constitutional Court. The Court has applied relatively lenient rules of legal standing especially in its early operation. Both written rules of legal standing and the practice of the Court in determining the legal standing of the petitioners created a welcome environment for the public to file petitions to the Court especially if they believe that constitutional rights have

been violated.

With regard to human rights, the inclusion of human rights provisions in the new constitution was influenced by internal and external factors. Domestically, people demanded full recognition of human rights provisions in the new constitution. The brief and vague human rights provisions in the 1945 Constitution were often used by the New Order government to limit peoples' rights rather than to guarantee such rights. Therefore, people demanded that the new constitution elaborated human rights provisions and also put duty for the government to respect and protect human rights. The international financial institutions also exert pressure on the government to respect human rights by putting conditions that should be fulfilled by Indonesia to receive funding.

The constitutional amendment drafters responded by including human rights protection as one of the main agendas that would be discussed during the amendment process. There was a more coherent ideology among framers regarding the importance to include comprehensive human rights provisions in the new constitution. As a result, the updated constitution had full recognition of human rights. In addition, the new constitution also put obligation to the government to respect, to protect, and fulfil human rights. The new Constitution also provides a new judicial mechanism, i.e. judicial review, if the government fails to do so.

Chapter 4: The Indonesian Constitutional Court's Approaches to Judicial Review on Cases Related to Economic and Social Rights

Chapter III has clarified that the development of Indonesia's constitutional court, judicial review, and human rights in the updated Constitution is best explained by multiple contributing factors –not by a single factor. Chapter IV focuses on how the Constitutional Court has carried out its duties in practice. In particular, it examines the constitutional court's approaches in rendering decisions on cases related to economic and social rights.

The purpose of this Chapter is to answer two important questions. First, has the Constitutional Court consistently applied a strong form of judicial review when reviewing laws related to economic and social rights? Second, what factors were taken into account when the Constitutional Court has decided economic and social rights cases? Did the Court's decisions solely refer to the existing legal rules (i.e., doctrine) or did it also consider extra-legal factors?

To answer the first question, this chapter utilizes Mark Tushnet's strong-form/weak-form of judicial review a reference model. To respond to the second question, it uses Tracey E. George's and Lee Epstein's "legal and extralegal" model, which can be further elaborated in a legal, attitudinal, and strategic model as explained by Richard L Pacelle Jr, Brett W Curry, and Bryan W Marshall. Philip Bobbit's six constitutional interpretations (textual, historical, structural, doctrinal, ethical, and prudential) will also be used to understand the court's approach in deciding these economic and social rights cases.

This chapter proceeds as follows: Part I begin with an explanation of these two models:

(1) strong form and weak form of judicial review and (2) legal and extralegal factors. It then specifically describes legislation relevant to the Indonesian Constitutional Court's decision-making methods to clarify the claim of this dissertation that the Indonesian Constitutional Court has adopted a strong form of judicial review. Part II applies the theories mentioned above to the Court's practice. To begin with, this part selects and groups the Constitutional Court decisions based on the similarity of the issues/cases. Each group represents court rulings on particular economic and social rights such as the right to education and the right to social welfare. The discussion on the right to education focuses on the petitions that used Article 28 C and Article 31 of the 1945 Constitution as their primary legal arguments. On the right to social welfare, the analysis focuses on the petitions that refer to Article 33 (2) and (3) of the 1945 Constitution as their main legal basis.¹ These two provisions explain that the duty of the state to control natural resources and important production sectors should be utilized for the optimal welfare of the people. The phrase "should be utilized for the optimal welfare of the people" shows the constitutional recognition of the right to social welfare. This part then summarizes these selected cases to understand the context of each case. These court rulings are then analyzed to answer two research questions mentioned above. After all cases are analyzed, it then reviews all court decisions to determine whether there is a pattern or a tendency when the Court decided judicial review cases on particular economic and social rights.

This chapter reveals that first, the Constitutional Court has been fairly strong in its

¹ Article 33 (2) and (3) stipulate that (2) "Production sectors important for the state and vital for the livelihood of the people at large shall be controlled by the state. (3) The land and water and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people."

approach to judicial review and has not been afraid of declaring that statutes are not in line with the Constitution. However, it has not applied this approach consistently. The Court has moved back and forth among various approaches depending on the nature of the case, the complexity, the monetary impact, and other factors. Second, The Constitutional Court has not limited itself to a legal or doctrinal approach to decisions, but has taken into account many other factors in its rulings.

An explanation of two models

Model 1: Strong form and weak form of judicial review

Strong form and weak form of judicial review are ways of conceptualizing the court's approach, application, and enforcement of constitutional rights –in this instance economic and social rights. Mark Tushnet explains the strength of judicial review is whether the court decisions are final and binding. A strong form of judicial review is said to exist when the court rulings are final and unreviewable.² The court's ruling about the substance of the law is not formally reviewable.³ The court's constitutional interpretations are authoritative and binding on the other branches.⁴ When a court can only interpret statutes or declare their incompatibility under a constitution of laws against the constitution –but cannot invalidate those statutes, the court

² Mark V. Tushnet, *New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries*, 38 Wake Forest L. Rev 813, 817 (2003).

³ Mark V. Tushnet, *Forms of Judicial Review as Expressions of Patriotism*, 22 Law & Phil. 353 p. 361(2003).

⁴ Mark V. Tushnet, *Alternative Forms of Judicial Review*, 101 Mich. L. Rev. 2781, 2784 (2003).

exercises a weak form of judicial review.⁵ A weak form judicial review allows an interaction between the legislature and the courts in responding the court's interpretation or declaration.⁶

In the context of the Indonesia's Constitution, Tushnet's definition of strong form/weak form judicial review can be seen in Article 24 C of Indonesia's Constitution. It states that the decisions of the Constitutional Court are final and binding. This means the Court not only has the power to declare that a statute is inconsistent with the Constitution but also to invalidate it. In other words, the Indonesia's Constitution grants the new Court the final says in determining the validity of statutes. As we can see below, a single court can readily move back and forth between strong form and weak form of judicial review.

Model 2: Legal and extralegal model

The legal and extralegal model focuses on how a court reaches a decision. The legal approach posits that a court renders its decisions based principally on legal rules, i.e., a doctrinal approach. The extra-legal model suggests that the court considers outside legal rules, such as sociological, psychological and political factors, in deciding cases. How strongly do extra-legal factors influence judges' consideration when they decide cases? Do judges put aside extra-legal forces and decide cases based on what the legal doctrine says? Or do they believe that in deciding cases they consider not only the law but also how the law ought to be applied in particular situation and how their notions of justice may be served?

If judges have a common understanding about the rules, and no significant difference

⁵Tushnet, *New Forms of Judicial Review and the Persistence of Right-and Democracy-Based Worries* (cited in note 2) at 821. See also *Id* at 2786.

⁶ Tushnet, *Forms of Judicial review as Expression of Patriotism* (cited in note 3) at 362.

among them in how they understand the law to drive a particular issue, it is likely that the judges will come up with the same legal considerations in their decision. In practice, it is not unusual that judges provide different analysis when they write opinions in the same case under the same law in the same court. Based on these facts, it is likely that extra-legal factors influence judicial decisions.

Similar to the legal and extra-legal model, Robert G. Scigliano introduces two theories, the “mechanical theory” and the “theory of free legal decisions,”⁷ to examine constitutional court behavior in reaching judicial decisions. The mechanical theory states that in making the decision, the court should simply discover and apply the legal principles which existed before all court decisions. This method is also known as a judicial slot machine.⁸ It assumed that provisions have been made in advance for legal principles so that it is merely necessary to put facts into the machine and draw from there a proper decision. This theory believes that it is the nature of law to require a mechanical application of its rules and principles.

Unlike the mechanical theory, the free legal decision approach assumes that it is necessary for judges to exercise discretion and make choices as the legal rules to be applied. This theory posits that existing laws are never complete and are never rigid. As a result, they cannot be mechanically applied to specific cases in the real world. For mechanical theory proponents, it is not the function of judges to make or to change the law. For them, the free legal decision is dangerous because it gives significant discretion to judges in deciding cases.

⁷ Robert G Scigliano, *The Courts: A Reader in the Judicial Process* 131-32 (Little, Brown, 1962).

⁸ *Id.* It is important, however, that using a slot machine does not mean that the outcome can be predicted. In many cases, we do not know what the result will be.

A more recent model provides three alternate explanations of judicial decision making: the legal model, the attitudinal model, and the strategic model.⁹ The legal model is relatively similar to mechanical model while attitudinal model and strategic model are similar to the free legal decisions approach. For the legal model, a statute is the determinant factor for judges in rendering decisions. The judges' duty is to find the law, not to make the law. They are supposed to remain faithful to the norms derived from a statute or constitution. The important elements of legal factors include the intent of the framers, the use of neutral principles, and precedent.¹⁰

The legal model is commonly perceived as constraining toward judge's individual preferences. This model, however, may nevertheless advance the judges' preferences. For example, judges are bound by precedent or by the original intent of the framers, but which precedent or which framers' intention they will adopt may be determined by their preference. As a result, judges' personal view may affect the court decisions. Relying on the existing text of the constitution/ or a statute is also challenging. The language of the text is sometimes ambiguous. The text often does not provide bright line answer to the actual problems.

The attitudinal model states that judges' individual preferences/attitudes influence when they decide cases because the legal text, the framers' intention, and the precedent are ambiguous.¹¹ Two attitudes that may influence judges when they decide cases: attitudes toward objects (the petitioners who come to the Court) and attitudes toward situations (facts of the case).

⁹Richard L Pacelle Jr, Brett W Curry, and Bryan W Marshall, *Decision Making by the Modern Supreme Court* 28 (Cambridge University Press, 2011). See also David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 *Geo. Wash Int'l L Rev* 691 (2005).

¹⁰Pacelle Jr, Curry, and Marshall, *Decision Making by the Modern Supreme Court* at 29 (cited in note 9).

¹¹Landau, 37 *Geo. Wash Int'l L Rev* at 693 (cited in note 9).

This model focuses on the individual judge; as a result, it neglects the collective opinion of the court as reflected in the decisions.

The strategic model holds that a court's rulings and its justices are subject to some internal and external constraints.¹² Internal limitations include the constraints among judges themselves. Judges are strategic actors who understand that their ability to achieve their goals depends on a consideration of other judges, the choice they expect others to make, and the institution in which they act.¹³ Judges act strategically when they take into account the effect of their choices on a collective result. This strategic action is carried out to gain the most desirable result in their court and the government.¹⁴ In other words, the strategic model suggests that a judge may sacrifice his personal preference in response to his colleagues. In a broader context, a court moves from its institutional policy choice to avoid a negative response from other government branches. In this case, the court is constrained by external factors namely the other government offices that implement the court decisions.

In this regard, Philip Bobbitt's constitutional interpretative approach is important to be referred to especially to understand what the court's consideration in deciding these cases. Bobbitt lays out six factors, any or all of which the court may refer to when it renders decisions. These six factors include: textual (the court looks at the meaning of the text of the constitution); historical (the court relies on the intentions of the framers of the constitution); structural (the court infers rules from the relationships that a constitution creates among governments and

¹²Id. p 694.

¹³Lee Epstein and Thomas G Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints* (Cq Press, 1998). p xiii.

¹⁴Pacelle Jr, Curry, and Marshall, *Decision Making by the Modern Supreme Court* at 40 (cited in note 9).

citizens); doctrinal (the court applies rules generated by previous court decisions); ethical (the court derives rules from the basic principles or moral commitments of the political ethos that are embodied in a constitution) and prudential (the court seeks to balance the cost and benefits of a particular interpretation, in the context of political and economic circumstances).¹⁵

This dissertation will use the broad category of the legal and extralegal model to understand factors that influence the court decisions making. The use of the legal and the extralegal model in this part is because it provides wide spectrum of factors that may be taken into account by the court when it rendered decision. This model is largely similar to mechanical theory and free legal decision and legal, attitudinal, and strategic model. In applying the legal/ extralegal approach, Bobbitt's six constitutional interpretation will be utilized to further explain the court's strategy when it decided cases on economic and social rights cases. This model will be used to explain the approach of the Indonesia's Constitutional Court as expressed in specific judicial rulings. This part studies court decisions, media coverage, relevant scholarly articles, scholarly writing of the constitutional court justices, and interviews to answer the research questions.

The nature of the Indonesian Constitutional Court decisions

This dissertation argues that the Indonesian Constitutional Court adopts a strong form of judicial review. This argument is based on the nature of the Indonesian Constitutional Court decisions, which are final and unrevisable. The adoption of this approach is reflected in

¹⁵ Philip Bobbitt, *Constitutional interpretation* 12 (Blackwell, 1991).

documents such as the provisions of the Constitution, Law on the Constitutional Court, and the internal Regulation of the Constitutional Court (the PMK).

Article 24 C (1) of the updated Constitution grants the Constitutional Court authority to “hear cases at the first and final level the decisions which shall be final,” in conducting judicial review of laws in view of the Constitution.¹⁶ The phrases “the first and final level the decisions” and “shall be final” mean that there is no further legal avenue available to challenge the court rulings. The finality of the court decision appears in this provision reflects the formal adoption of a strong form of judicial review.

The implementing legislation for Article 24C¹⁷ confirms the official adoption of a strong form of judicial review. Article 56 of Law on Constitutional Court stipulates that if the Constitutional Court believes that an application is reasonable, the decision will state that the

¹⁶Indonesia “Const 1945” Art 24C (1).

¹⁷Law 24/2003 (as amended by Law 8/2011) on the Constitutional Court.

Article 24 C of the 1945 Constitution

- (1) The Constitutional Court shall have the authority to hear cases at the first and final level the decisions which shall be final, in conducting judicial review of laws in view of the Constitution, deciding disputes concerning the authorities of state institutions whose authority are provided by the Constitution, making decisions on the dissolution of political parties, and deciding disputes concerning the result of general elections.
- (2) The Constitutional Court shall be required to pass decisions on the opinion of Dewan Perwakilan Rakyat concerning alleged violations by the President and the Vice President in accordance with the Constitution.
- (3) The Constitutional Court shall consist of nine Constitutional Justices stipulated by the President, comprising three justices nominated by the Supreme Court, three justices nominated by Dewan Perwakilan Rakyat, and three justices nominated by the President.
- (4) The Chief Justice and the Deputy Chief Justice of the Constitutional Court shall be elected from among and by constitutional justices.
- (5) Constitutional Justices must possess integrity and a flawless personality, (they must be) just, statesmen mastering the constitution and constitutional law and shall not currently serve as state officials.
- (6) The appointment and dismissal of constitutional justices, the law of proceedings, and other provisions concerning the Constitutional Court shall be regulated by law.

application is to be granted.¹⁸ The legal consequence, if a petition is granted, is that sub-articles, articles, or parts of the act are invalid and not legally binding. The action of invalidating provisions reflects a strong form of judicial review.

The Constitutional Court Regulation (the PMK 06/PMK/2005) further emphasizes the formal adoption of a strong form of judicial review. Article 36 stipulates that if the Court grants a petition, the court verdict states “the article or part of the law does not have binding force.” In addition, Article 39 says, “The Court rulings are final and effective since the verdict is announced by the Court in a plenary session opened to the public.” Further, Article 38 states; “A law which is reviewed by the Court is valid until there is a court verdict that declares that this law is inconsistent with the 1945 Constitution.” These three Articles confirm that the Court is not only capable declaring a law is inconsistent with the constitution, but also can invalidate the provisions of laws. These court rulings are final and unreviewable.

Based on the legislation mentioned above, it is fair to say that the Indonesian Constitutional Court has been vested with a strong form of judicial review, as defined by Tushnet’s definition of strong form and weak form of judicial review. These features are different from a weak form of judicial review, where a court does not have the final say. A court applying a weak form of review can declare the incompatibility of laws against the constitution but it cannot invalidate them.

¹⁸ Article 56 Law 24/2003 stipulates three types of court decisions. (1) If the Constitutional Court believes that the petitioners or the petitions do not fulfill the requirements, the decision will state that the application is denied. (2) If the disputed act does not contravene the Constitution, the decision will state that application is rejected. (3) If the Constitutional Court believes that the application is reasonable, the decision will state that application is granted.

Applying theories to practice: The Constitutional Court's approaches in judicial review of Laws related to economic and social rights

The cases presented in this chapter do not intend to cover all economic and social rights cases that have been decided by the Court since its establishment. This is because there are over 1000 petitions that had been decided by the Court since its inception in 2003 until 2016.¹⁹ We will instead focus on analyzing court decisions related to the right to education and the right to social welfare. The court rulings in these two areas are selected because they effectively illustrate how, in the field of economic and social rights, the court has been inconsistent in applying the strong form of judicial review that was granted to it. The court rulings on the right to education, for instance, demonstrate that the Court has moved back and forth from a strong form of judicial review to a weak form, and then to a stronger form. The court decisions on social welfare illustrated the court's tendency to shift from a strong form of judicial review to a much stronger version of judicial review.

On the right to education, this chapter will study the court rulings on the Budget for Education cases and the Education Legal Entity (*Badan Hukum Pendidikan*-the BHP) cases. On right to social welfare, it will focus on decisions in the Electricity Law case, the Water Resources Law cases, and the Oil and Natural Gas Law cases.

¹⁹The 2016 Annual Report of the Indonesian Constitutional Court, *Harmoni Sosial dan Budaya Demokrasi yang Berkeadilan*, (Setjen MK 2016) at 9. archived at http://www.mahkamahkonstitusi.go.id/public/content/infoumum/laporantahunan/pdf/LaporanTahunan_61_LT%202016%20oke.pdf.

The back and forth of the Court’s approaches on right to education: From a strong, to a weak, to a stronger form of judicial review

The updated Constitution perceives education as a human right and a right of Indonesian citizens. Article 28 C (1) says ‘Every person shall have the right to get an education.’ Article 31 emphasizes ‘every citizen has the right to receive an education.’ The Constitution also places a duty on the state to fund the basic education²⁰and allocates of twenty percent of the national and local budgets for education.²¹

The following part will show how and why the Court utilized various approaches in deciding cases related to the right to education approaches, approaches other than those expressly recognized by the Constitution. To address this, this part will examine the court rulings on the budget for education cases and education legal entity (the BHP) cases.

A. Budget for Education cases

The provisions on education were arguably one of the most radical changes in the updated Constitution. Unlike the education provisions in the old constitution, which were presented in general and somewhat abstract terms, the updated constitution explicitly stated that the State should prioritize 20 percent budget for education. This “quantitative” provision provided an exact percentage for the community to check whether the government’s annual budget satisfied this constitutional requirement. It was not surprising that this provision became one of the most frequent articles used by the petitioners to file a complaint with the

²⁰Indonesia “Const 1945” Art 31 (1).

²¹Indonesia “Const 1945” Art 31 (4).

Constitutional Court.²²

The first judicial review of the right to education was in 2005. Teachers in elementary and middle schools, together with education activists, filed a petition to the Constitutional Court (*National Education System I*).²³ They questioned the constitutionality of the Elucidation of Article 49 (1) of the National Education Law (Undang-Undang Sistem Pendidikan Nasional),²⁴ which had allowed the state to gradually build up to 20 percent of the state budget and local budgets for education. The petitioners argued that this elucidation was inconsistent with Article 31 (4) of the Constitution which stipulated, “The State shall prioritize the budget for education to a minimum of 20 percent of the State budget and of the Regional Budgets to fulfill the needs of implementation of national education.” The Elucidation of Article 49, the petitioners argued, potentially violated their constitutional rights to receive free basic education, receive a decent salary as educators, and get good education facilities.²⁵ This was because the gradual increase of budget for education could not maximize the fulfillment of their right to education.

The Court, in a split decision, ruled for the petitioners and declared that the Elucidation of Article 49(1) was inconsistent with Article 31 (4) of the Constitution. The majority stated, “the 1945 Constitution had expressly determined that budget for education of minimum 20 percent must be prioritized in national and regional budgets, and that could not be put aside by

²² There had been at least seven petitions that were submitted based on Art. 31 (4) of the 1945 Constitution. See Veri Junaidi, Adelline Syahda, Adam Mulya Bunga Mayang, *Konstitusi Dan Demokrasi (Kode) Inisiatif, Tiga Belas Tahun Kinerja Mahkamah Konstitusi Dalam Memutus Pengujian Undang-Undang “Thirteen Years of the Constitutional Court’ Work in Judicial Review”* (Jakarta 2016) at 28.

²³ The Decision of the Constitutional Court No. 011/PUU-III/2005.

²⁴ National Education System Act 20/2003.

²⁵ The Decision of the Constitutional Court No. 011/PUU-III/2005. P. 101.

legislation.”²⁶ They reasoned, “the implementation of this provision [Article 31 (4)] should not be delayed.”²⁷ The Court stated, “the Elucidation of Article 49 (1) created a new norm that obscures the norm of Article 49 (1).”²⁸ The majority were of the opinion that Article 31(4) explicitly required the state to allocate at least 20 percent of the state budget and local budgets for education. Additionally, the majority believed, “education in Indonesia was behind and it was time that education should be the top priority. Improving the quality of education can be done, among other things, through increasing budget for education up to a minimum 20 percent of the national budget.”²⁹ In its ruling, the Court declared that the Elucidation of Article 49 (1) of Law 20/2003 was inconsistent with the 1945 Constitution and therefore it did not have legally binding force.³⁰

Three Justices³¹ dissented. They questioned the legal standing of the petitioners. The dissenters asserted that, “the petitioners did not experience constitutional damage. Even if there were a constitutional harm, that constitutional damage was not because of the Elucidation of Article 49 (1).”³² Therefore, they concluded that the petitioners did not have legal standing to file the petition.

The dissenters also disagreed that the Elucidation of Article 49 (1) was not in line with the Constitution. They stated, “the word ‘incrementally’ in the Elucidation of Article 49 could

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id at 102.

³⁰ Id at 102-103.

³¹ Justice Natabaya, Justice Achmad Roestandi, and Justice Soedarsono, id at 103.

³² Id at 104-105.

not be interpreted as a violation or contradiction of Article 31 (4) of the Constitution.”³³ This word, the dissenters believed, explained the way the government would fulfill constitutional requirement of 20 percent for education. Article 31 (4) did not mention how the government should fulfill 20 percent budget for education. Therefore, the government could determine the method of fulfilling this duty. In this case, the government chose to fulfill its obligation gradually “depending on the state financial condition.”³⁴

The Court’s decision, in this case, reflected a strong form of judicial review. The Court not only declared that the Elucidation of Article 49 (1) was inconsistent with the Constitution but also determined that it did not have binding force. This ruling was final which means there is no further legal avenue available to challenge this decision. The Court seems did not elaborate in detail how the lawmakers should follow up this decision such as by setting deadline or schedule for the realization of its decision. But it actually did so by declaring that the fulfillment of 20% should be done at once. By declaring that the 20 percent budget for education should take place at once, the court essentially played a substantial role in the realization of the government’s budget allocation.

It appears that when deciding this case, the majority applied a specific legal model i.e. the plain meaning or textual interpretation. The majority stated, “the 1945 Constitution *expressis verbis* had determined that budget for education should be prioritized at a minimum 20% of the National Budget and Regional Budgets. Lower rank of legislation could not alter this

³³Id at 105.

³⁴Id at 105.

requirement.”³⁵ The words “*expressis verbis*” which mean explicitly or expressly were written in the majority opinion. These two words reflected the adoption of plain meaning. The majority interpreted Article 31 (4) as was written in the text of the constitution. However, the majority failed to explain the word “prioritized” which also written in that provision.

While the majority acknowledged that Article 31 (4) did not mention how to achieve the 20 percent, they considered the real-world situation (extralegal factors), “education in Indonesia lagged behind, thus it is the time to put education in the top priority. This can be done through providing sufficient budget allocation.”³⁶ The majority considered that the government’s plan to gradually increase the budget for education was not sufficient to satisfy this provision.

The dissenters took a slightly different view by acknowledging that while the constitution requires 20 percent of the national and regional budget for education, there is no explicit requirement on whether the fulfillment of 20 percent should be at once. They were of the opinion that, “the achievement of 20 percent budget for education which is conducted gradually, according to the Elucidation of Article 49 (1) Law No.20 of 2003, did not conflict the Constitution, because the Constitution stipulated general provisions that should be elaborated by the lawmakers.”³⁷ Thus, they concluded that it was the domain of the executive and the legislature to determine how to reach the 20 percent requirement.

³⁵ UUD 1945 secara *expressis verbis* telah menentukan bahwa anggaran pendidikan minimal 20% harus diprioritaskan yang tercermin dalam APBN dan APBD tidak boleh direduksi oleh peraturan perundang-undangan yang secara hierarkis berada dibawahnya. The Court used the German phrase *expressis verbis* to show that the constitution explicitly and expressly requires 20 percent.

³⁶The Decision of the Constitutional Court No. 011/PUU-III/2005 at 102 (cited in note 23).

³⁷Id at 105. The original text says, “pencapaian dana 20% untuk anggaran pendidikan yang dilakukan secara bertahap, menurut Penjelasan Pasal 49 ayat (1) UU No. 20 Tahun 2003, tidaklah bertentangan dengan konstitusi, mengingat UUD 1945 merupakan ketentuan yang mengatur secara umum, yang harus dijabarkan oleh pembentuk undang-undang.”

It appears the dissenters also applied a legal approach, i.e., the plain meaning (textual) as was written in the text of the constitution. They believed that Article 31(4) did not determine how to achieve the 20 percent. It stated that the government should prioritize at least 20 percent. They suggested that it is the domain of the government to determine whether the fulfillment of 20 percent budget for education would be done at once or gradually. The dissenters restrained themselves from taking a substantial part on the realization of this provision (deferral).

It appears that the majority opinion placed a stricter rule on the executive in how the government was to fulfill the 20 percent requirement. The minority provided more flexibility for the executive. Using Tushnet model, I conclude that the court applied a strong form of judicial review. It had the final say to determine the constitutionality of the law and its decision was final and unrevisable.

In addition, the Court ruling in this case seems beyond the court's original jurisdiction. It went far into the government's domain in law making process by determining how the government was required to fulfill its constitutional obligation. The immediate effect of this ruling was that the Elucidation of Article 49 (1) could not be used by the government to carry out its duty. This meant the government was required to fulfill the 20 percent budget for education at once. The government responded this court ruling by increasing the percentage of a budget for education in the next annual national budget.³⁸ The increase of the budget for education, however, did not reach 20 percent.

The government's inadequate response in *National Education System I* caused another

³⁸ Law 36/2004 increased budget for education to six percent.

petition from teachers and individuals activists (most of them were petitioners in the first budget for education case) to the Court. They challenged the constitutionality of Law 36/2004 on National Budget (*Education Budget I*)³⁹ on the basis that this Law only allocated 6% of the national budget for education while the Constitution required a minimum 20% of the budget. The government argued that in allocating budget for education, it should also consider the budget for other fields and the financial condition of the state.⁴⁰ The 20 percent budget for education, the government argued, would be achieved in 2009.⁴¹

In a split decision, the Court ruled that Law on National Budget was inconsistent with Article 31 (4) of the 1945 Constitution.⁴² The Court, however, did not automatically declare that the Law was not legally binding. The majority considered the alternative consequences if it invalidated this Law, such as, (1) the then current national budget would not have a legal basis,⁴³ (2) the DPR and President should reallocate the current budget to fulfill the 20% budget for education,⁴⁴ and (3) the government would have to apply the previous national budget.⁴⁵

The majority also acknowledged that increasing the budget for education meant reducing the budget allocation for other sectors. This budget reallocation, the majority wrote, would create “legal uncertainty” and “difficulty in financial administration.”⁴⁶ In addition, invalidating the current annual budget could reduce the percentage of budget for education because such an

³⁹The Decision of Constitutional Court No. 12/PUU-III/2005.

⁴⁰Id at 37.

⁴¹Id at 40.

⁴²Id at 61.

⁴³Id.

⁴⁴Id at 62.

⁴⁵Id.

⁴⁶Id.

invalidation required the government to apply the previous year's national budget, which was smaller in percentage compared to the most recent budget allocation for education. It appeared that the majority took into account both the text of the constitution and the practical consequences if it invalidated this provision. The Court seems here to have used both textual and prudential approaches.

Two Justices provided concurring opinions⁴⁷ while the other two Justices⁴⁸ dissented. One of the concurring justices suggested that the government had allocated the national budget in many different fields and it bound the government.⁴⁹ “It would be difficult for the government to fulfill 20 percent budget allocation for education since this meant reducing the fund allocation for other sectors.”⁵⁰ This budget reallocation would lead to a significant economic impact on the country. Also, the concurring opinion stated, “whether the budget allocation had reached the 20 percent depends on how we calculate the budget allocation. If the budget for education included the salary for teachers and instructors, the 20 percent requirement had been met.”⁵¹ Another concurring Justice questioned the legal standing of the petitioners, and also believed that granting this petition would disadvantage the petitioners. This is because the government would apply the previous national budget that allocated smaller percentage budget for education.⁵²

Two dissenters⁵³ believed that there was no contradiction between this Law and the

⁴⁷ Justice HAS Natabaya and Justice I Dewa Gede Palguna Id at 63, 67.

⁴⁸ Justice Achmad Roestandi and Justice Soedarsono.

⁴⁹ The Decision of the Constitutional Court No. 12/PUU-III/2005 at 65 (cited in note 39).

⁵⁰ Id.

⁵¹ Id at 66.

⁵² Id at 68-9.

⁵³ Justice Achmad Roestandi and Justice Soedarsono.

Constitution. They concluded that the Law had provided for a gradual increase to achieve the intended percentage, and that the 20 percent budget allocation for education would be completed in 2009.⁵⁴

The court ruling in this second education case reflected a weak form of judicial review. The Court declared that the provision of the law was inconsistent with the Constitution, but it refused to declare that the law not legally binding. The Court also gave an opportunity to the lawmakers to change the law so that it was consistent with the Constitution. In this ruling, the court did not set up a deadline or ordered the lawmakers to provide a plan. It did not take a substantial part in how its decision should be followed up by the lawmakers. Effectively, the court's decision was not final because it shifted determination of the solution back to the legislative branch.

The *Education Budget I* decision showed the Court using two different approaches at once: the legal and extralegal factors. In declaring whether the law was inconsistent with the Constitution, the Court adopted the legal model, particularly textual and doctrinal approaches. This can be seen (1) the Court took into account the relevant provision of the Constitution in deciding this case; (2) the Court consistently referred to its previous decision which determined that the fulfillment of 20% should be at once.

The Court's reluctance to invalidate the statute reflected extralegal factors beyond the provisions of the constitution. The Court took into account the real-world facts, i.e., the possibility that the current national budget might lose its legal basis. Also, increasing up to 20

⁵⁴The Decision of the Constitutional Court No. 12/PUU-III/2005 at 67 (cited in note 39).

percent of the budget for education would reduce the budget allocation in other fields. In addition, it also took into consideration problems that might be faced by the government if the Court granted the petition such as the difficulty in financial administration. In Bobbitt's constitutional interpretation, this court ruling reflected a "prudential" consideration, where the court weighed the advantages and the drawbacks of invalidating this law in a broader political and economic context.

In the same year, the case of the budget for education continued. The Indonesian Teachers Association (PGRI), Indonesian Education Graduates Association (ISPI), and several individuals submitted a petition to the Court claiming that the 2006 Annual Budget Law (*Education Budget II*), which allocated only 9.1% to education, was unconstitutional.⁵⁵ The petitioners argued that this law was not in line with Article 31, which required the minimum 20 percent budget for education. This annual budget, the petitioners stated, potentially violated their constitutional right to education.

In a split decision, the Court ruled for petitioners, declaring that allocating 9.1 percent for education was not in line with Article 31 (4) of the Constitution. The majority wrote,

while allocating budget for education less than 20 percent did not diametrically contradict the constitution, it could be seen that this provision was not consistent with the constitution because the percentage stated in the constitution was one of the parameters to determine the constitutionality of this law.⁵⁶

Two justices -Palguna and Soedarsono-concurred, and the other two Justices -Roestandi

⁵⁵The Decision of the Constitutional Court 026/PUU-III/2005.

⁵⁶Tim Penyusun, *Kontroversi atas Putusan Mahkamah Konstitusi: Catatan Hakim Soedarsono, "Controversies over the Constitutional Court Decisions: The Notes of Justice Soedarsono"* 238 (Sekretariat jenderal dan kepaniteraan MKRI, 2008).

and Natabaya- dissented. The two concurring Justices stated that only lecturers and teachers were the appropriate petitioners to file the case.⁵⁷ One of the dissenters, Justice Roestandi, was of the opinion that the current budget for education, which was less than 20 percent, did not necessarily mean that it was inconsistent with the constitution.⁵⁸ He purposed that the current budget for education was “left behind that could be increased in the next annual budget.”⁵⁹ Another dissenter, Justice Natabaya, wrote, The Law on Annual Budget was a special law that did not directly bind the public at large. As a result, the petitioners did not have legal standing to file this petition to the court.”⁶⁰

The majority decision in this case reflected a strong form of judicial review. The Court declared that the provision of the budget statute was inconsistent with the constitution and it invalidated this provision as a result. The court ruling was final and binding. In rendering the decision, the majority referred to a 20 percent requirement stated in Article 31(4). The reference to the words of the constitution reflected the adoption of textual approach. Toward this court ruling, the government responded by increasing the budget allocation for education. However, the increase of budget for education did not meet the 20 percent, as required by the Constitution.

This insufficient response from the government led to yet another petition being submitted to the Constitutional Court. In 2006, The Indonesian Teacher Association (PGRI) and four individuals (a teacher, two housewives, and an entrepreneur) filed a petition to the Constitutional Court (*Education Budget III*). They brought a petition to the Court because they

⁵⁷ Id.

⁵⁸ Id 238.

⁵⁹ Id.

⁶⁰ Id.

claimed that the 2007 National Budget Law violated their constitutional rights to obtain a good and affordable education. They argued that the 2007 National Budget Law, which allocated at 11.8 percent for education,⁶¹ was inconsistent with the Constitution. The Court unanimously declared that provisions of Law 2007 National Budget setting the budget for education at 11.8 percent was unconstitutional. In rendering this case, the Court referred to its previous decisions in 2005 which determined (1) budget for education excluded the salary of teachers and (2) the fulfillment of 20 percent should be made at once.⁶²

The Court expected that as a result of these two rulings, the lawmakers would amend the law so that it was consistent with the Constitution. The Court acknowledged that it did not have the authority to force the lawmakers to amend the law.⁶³ However, the court rulings should be taken into account by the lawmakers when they revised the National Budget Law.

The Court further stated,

Since 2004 up to 2007, the national budget for education never achieves 20% as mandated by Article 31 (4) of the 1945 Constitution. The Court was of the opinion that the government and the DPR had not put efforts optimally to increase education budget so that the mandate of the Constitution could be fulfilled.⁶⁴

The Court further stressed, “the 20 percent budget for education of the national budget should be prioritized and seriously implemented, otherwise the Court would declare the Law on National Budget was unconstitutional in its entirety.”⁶⁵ The Court, therefore, stated the provision of the law that state budget for education 11.8%, was inconsistent with the Constitution and

⁶¹ The Decision of the Constitutional Court 026/PUU-IV/ 2006 at 93.

⁶² Id at 93.

⁶³ Id at 94

⁶⁴ Id at 94-95.

⁶⁵ Id at 95.

declared it unconstitutional.

It appears that in rendering this decision, the Court consistently utilized legal factors by referring its previous decisions (doctrine) and the provisions of the constitution (textual).⁶⁶ The Court summarized these decisions in its opinion and used them as a reminder for the lawmakers in allocating the national and regional budget for education.⁶⁷ In response, the government argued that in calculating the allocation of budget for education, the Court should not refer to legislation below the Constitution.⁶⁸ The Court should consult the provision of the Constitution.⁶⁹ The Court responded that the calculation the court referred to was the one that was determined by the lawmakers.⁷⁰

In this case, the court adopted a strong form of judicial review. It declared the provision of the law was inconsistent with the constitution and then invalidated it. That said the court had the final say and its ruling was unrevisable. Besides, the court took a legal model in two ways. First, it referred to the relevant constitutional provisions related to the budget for education as appears in Article 31 (4). The Court interpreted the words of Article 31 (4) and concluded, “this provision required the government to allocate a minimum 20 percent budget for education.”⁷¹ This approach reflected a textual interpretation. Second, the Court also consistently referred to its previous decisions in similar cases, namely the 2006 decisions on the budget of education. The Court adopted doctrinal interpretation by following its earlier decisions.

⁶⁶The Decision of the Constitutional Court 012/PUU-III/2005 and 026/PUU-III/2005.

⁶⁷The Decision of the Constitutional Court 026/PUU-IV/2006 (cited in note 61).

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id at 92.

⁷¹ Id.

Apart from a legal model approach, the Court ruling also warned the government to fulfill the constitutional mandate of 20 percent the budget for education. It stated that in the “budget for education a minimum 20 percent must be prioritized and materialized, so that the Court did not have to invalidate the Law on Annual Budget in its entirety.”⁷² That said, the Court suggested that would invalidate the entire national budget law if there was a similar petition in the future. This portion of Court’s opinion illustrates the Court’s effort to force the government to abide its ruling. This Court decision showed a stronger form of judicial review.

In 2007, another similar case was submitted to the Court. This time a teacher and a lecturer filed a petition to the constitutional court and challenged the constitutionality of Article 49(1) of Law 20/2003 on National Education System (*National Education System II*).⁷³ The petitioners argued that this provision did not benefit teachers and lecturers as one of the important elements in education. It excluded the salary of educators in calculating the 20 percent of National and Regional Budgets. As a result, the 20 percent budget for education would not give significant benefits to educators.

The majority stated, “Article 31(4) of the Constitution did not elaborate what would be included in calculating 20 percent of the budget for education. However, it did not mean that Article 31(4) can be interpreted differently by Article 49 (1) of Law 20/2003”⁷⁴ which excluded the salaries of the educators from the 20 percent budget for education. Article 1(3) and (6) of Law 20/2003 stated that educators were one of the important elements in education. Article 49

⁷²Id at 95.

⁷³The Decision of the Constitutional Court 24/PUU-V/2007.

⁷⁴Id at 84.

(1), however, excludes the educators' salaries from 20 percent budget for education. The Court ruled that Article 49 (1) of Law 20/2003, which excludes the educators' salaries, was not in line with Article 1(3), (6) of the same statutes which acknowledged the important roles of the educators in education.

The majority, therefore, declared that Article 49 (1) of the statute was inconsistent with Article 1(3) and (6). The Court specified the meaning of Article 31 (4) of the Constitution by determining that educators' salary should be included in calculating 20 percent budget for education.⁷⁵ The Court, in a split decision, ruled that the 20 percent budget for education included educators' salaries.

The majority further stated that there had been three court rulings in this case and the government had not implemented them. The Court predicted, "there would be a continuous violation if the Court consistently applied the same rules i.e. excluding the educator salary in calculating the budget for education."⁷⁶ Instead of consistently excluding the educators' salaries as a component of budget for education, the Court acted strategically by granting the petition and explicitly including the teachers' salary as one of the elements of the budget for education.

The Court stated, "by including the salary of the educators in the calculation of budget for education, it would be easier for the government and the DPR to carry out its obligation fulfilling 20 percent budget for education in the National Budget Law."⁷⁷ The majority further stated, "there was no reason for the government to delay its constitutional duty to achieve 20 percent

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ The Decision of the Constitutional Court No. 24/PUU-V/2007 at 86.

budget for education. Justice delayed, justice denied.”⁷⁸

Three Justices dissented.⁷⁹ They believed that there was no constitutional damage experienced by the petitioners because of Article 49 (1),⁸⁰ and therefore they did not have legal standing to file a petition to the Court. In fact, they concluded the decision of the Court in this case might disadvantage the budget allocation for education because the inclusion of teachers’ salary would reduce the number of rupiahs that would be allocated for education.⁸¹

The dissenters further reminded their colleagues that based on the previous court rulings on *Education Budget II* (Constitutional Court Decision 026/PUU-IV/ 2006), the Court had agreed with the lawmakers’ decision to exclude educators’ salary in calculating 20 percent budget for education.⁸² Therefore, for the sake of the consistency of the court rulings, the Court should decide that Article 49(1) was constitutional.⁸³ The Court should let the lawmakers to determine whether or not Article 49 (1) should be amended. The Court should not review and declare Article 49 (1) was inconsistent with the Constitution.

The dissenters understood that the government would perhaps continually violate the Constitution if the government did not fulfill the 20% budget for education, and as a result, it might de-legitimate the Constitution and the Court’s existence.⁸⁴ But the Court said that it should be consistent with its previous rulings. The dissenters cited *Brown v. Board of Education* to

⁷⁸ Id.

⁷⁹ Justice Abdul Mukthie Fadjar, Justice Maruarar Siahaan, and Justice Harjono.

⁸⁰ The Decision of the Constitutional Court 24/PUU-V/2007 at 90 (cited in note 77).

⁸¹ Id.

⁸² Id at 90.

⁸³ Id.

⁸⁴ Id at 93.

illustrate how it took ten years for *Brown* to be fully implemented.⁸⁵

This case demonstrates the court's adoption of a strong form of judicial review. It declared that Article 49 (1) of Law 20/2003 was inconsistent with Article 1 (3), (6) and was not in line with Article 31 (4) of the Constitution. As a result, the Court invalidated this provision. In addition, the Court adopted unique approaches both legal and extralegal approach. It used a legal model i.e. the textual approach, to determine that Article 49 (1) was inconsistent with Article 1 (3), (6) and Article 31 (4) of the Constitution. It analyzed the meaning of the words in these provisions and the words of the constitution. At the same time, however, the Court did not refer to its prior decisions, i.e., *Education Budget II* (Constitutional Court Decision 026/PUU-IV/2006) which excluded educators' salary. It did not follow the doctrines that had been set up in its prior decision. The Court instead acted strategically to narrow the gap between the 20 percent requirement and the real budget for education on the ground.

The Court also adopted the extra-legal approach. It took into consideration factors beyond the text of the constitution and its prior decisions. It considered the difficulty of the government in fulfilling 20 percent budget allocation and the possibility of continued violations. The Court seems to have adopted a prudential approach by balancing the political and economic consequences of its rulings. It weighed the cost and benefits of its decision in a broader political and economic context.

The most recent case on the budget for education was decided in 2008. The Indonesian Teacher Association (PGRI) once again filed a petition to the Court challenging the

⁸⁵ *Id.*

constitutionality of Law on National Budget 2008, which had allocated 15.6 percent for education (*Education Budget IV*).⁸⁶ The Court highlighted that it had issued four rulings in this case since 2005.⁸⁷ The lawmakers, however, kept ignoring the court decisions. In its opinion, the Court stated, “the Court had given enough time for the lawmakers to establish a law that guarantee the fulfillment of budget for education as mandated by the Constitution. Therefore, for the sake of upholding the Constitution as the highest law.... the Court must declare that the 2008 Law on National Budget was inconsistent with the Constitution.”⁸⁸ The lawmakers were responsible for these constitutional violations. The Court demanded that the 2009 budget meet the full constitutionally-required component for education. The Court, however, allowed the underfunded budget to stand until the 2009 national budget cycle took effect.⁸⁹ The Court stated, “Even though the 2008 Law on National Annual Budget contradicted the Constitution, to avoid chaos in administering state finance, the 2008 Law would remain valid until the enactment of the 2009 Law on National Annual Budget.”⁹⁰ The Court reminded that if the 2009 national budget failed to fulfill 20 percent for education, the Court would invalidate the national budget law in its entirety.⁹¹

In deciding this case, the Court adopted a weak form of judicial review and then it shifted to a stronger one. Initially, the Court declared the 2008 National Budget to be inconsistent with

⁸⁶The Decision of the Constitutional Court No. 13/PUU-VI/2008.

⁸⁷The four rulings are the Court Decision 012/PUU-III/2005; the Court Decision 026/PUU-III/2005; the Court Decision 026/PUU-IV/2006; and the Court Decision 24/PUU-V/2007.

⁸⁸The Decisions of the Constitutional Court No. 13/PUU-VI/2008 at 100 (cited in note 86).

⁸⁹Id at 101.

⁹⁰Id at 101.

⁹¹Id at 101.

the Constitution, but did not invalidate it. This approach reflected the adoption of a weak form of judicial review. But the Court took a further step of warning the government and the parliament that it would completely invalidate the National Budget Law if they kept ignoring the court rulings. Also, the Court set a deadline and reminded the lawmakers that they should fulfill their constitutional duty to provide 20 percent budget for education in 2009 at the latest. This part of the decision reflected the court shifted from a weak form to a stronger form of judicial review. The Court took a significant role in the realization of the court decision by setting the deadline.

From the five cases related to the right to education mentioned above, some significant features can be identified. First, the Court largely adopted a legal model i.e. textual and doctrinal approach. In rendering the decisions, the Court referred to its previous decisions (doctrinal) and the provisions of the constitution (textual). This approach, however, was not consistently used by the Court in the later cases.

In the educator salary case (*National Education System II*), the Court ignored its previous rulings (*Education Budget II*) concerning the method of calculating the budget for education. It accepted the petitioner's argument which stated that teacher salary should be included in the budget for education. This decision was contrary to its previous ruling which excluded educator salary in the calculation of budget for education.

The inclusion of teacher pay was the Court's strategy to narrow the gap between the 20 percent constitutional obligation and the reality on the ground. The court expected that by granting this petition, the government would finally fulfill its duty. The court seems to have adopted a prudential approach by assessing the possible impact of its decision.

Second, The Court did not consistently use a strong form of judicial review. It utilized both strong form and weak form judicial review. In its initial decision on *National Education System I*, the court adopted a strong form of judicial review by setting a high bar that the fulfillment of 20 percent should be at once. In its subsequent decisions (*Education Budget I, II, and III*) however, the Court shifted to a weak form of judicial review. It declared that the law was inconsistent with the Constitution but at the same time it refused to invalidate the provisions of the law. The Court adopted this weak form approach in several right to education cases. The adoption of a weak form of judicial review was partly because the court tried to balance between the costs and the benefits which may occur when the Court rendered its decision. By applying this approach, the Court provided adequate time for the government to follow up the Court ruling. Also, this approach would avoid the possibility that the state financial administration would be chaos. This approach reflected the adoption of a prudential approach. The Court assessed the advantages and drawbacks which may occur when they decided this case.

Knowing that there was no significant response from the government regarding the fulfillment of 20% budget for education, the Court shifted its approach to a stronger form of judicial review. It invalidated the provisions of the law and set a deadline in the realization of 20 percent budget for education. The court also acted strategically by including the educator's salary in calculating the 20 percent budget for education. For the Court, this decision might end the government from ignoring the court decision. For the government, this decision provided a significant incentive in its efforts to fulfill 20 percent budget for education. This case was finally settled in 2009 as the national budget finally allocated 20 percent budget for education.

Third, most of the court rulings in these cases were not unanimously decided. While the majority agreed to grant the petitions, some justices dissented and provided a significant legal argument to the majority why they took different positions.

The Educational Legal Entities (the BHP) cases: Another example of the Court's inconsistent approach

A. National Education System Law case:⁹² a strong form of judicial review in disguise.

For decades, Indonesian's public educational institutions were part of the government bureaucracy. Besides, there were also private education institutions in the form of foundations or associations. In 2003, the government changed this system by issuing Law 20/2003 on the National Education System. Article 53 (1) of this law stated that formal education institutions were the ones that were managed by the government or the ones that were managed by the community in the form of educational legal entities.⁹³ Article 53 (4) stipulated, "The details regarding educational legal entity will be furthered by law."⁹⁴ The new system would likely eliminate the possibility of using foundations or associations for gaining profit. These provisions significantly changed the existing system. Under this system, education institutions could be in various forms such as foundations (*yayasan*) or associations (*persyarikatan*). There are in fact over 3000 private universities in Indonesia.⁹⁵ Some of them are in the form of foundations or

⁹²The Decision of the Constitutional Court No. 021/PUU-IV/2006.

⁹³National Education Act 20/2003 Art 53 (1).

⁹⁴National Education Act 20/2003 Art 53 (4).

⁹⁵ Jumlah perguruan tinggi swasta di Indonesia 2016 archived at

associations.⁹⁶

This new law made existing private educational institutions that did not fit with the new form of educational legal entity (the BHP) feel uncertain about their future. The passage of this statute resulted in 16 private educational institutions,⁹⁷ which did not fit with this new law, filing a petition (*National Education System III case*) to the Constitutional Court arguing that Article 53 (1) and (4) of Law 3/2002 contradicted the Constitution.⁹⁸ They stated, “the Constitution implicitly guaranteed the existence of foundations as an expression of the rights stated in Article 27 (1). Their educational institutions were also legitimate under the old law.”⁹⁹ The government argued that the introduction of the BHP would help the existing education institutions to improve their legal status.¹⁰⁰ This way they could improve their quality by building more cooperation among education institutions. The government further argued, “concluding that article 53 (1) and (4) were inconsistent with the Constitution was a premature judgment. For the time being, the legislature (the DPR) had not yet discussed the bill of the BHP, and even the initial draft of this bill had not been formulated.”¹⁰¹ Therefore, the term “education legal entity” (the BHP) was not yet final. These two provisions did not mention anything other than the acknowledgement of the

<http://kelembagaan.ristekdikti.go.id/index.php/statistik-5/> . accessed November 9, 2017.

⁹⁶ Jumlah lembaga pendidikan muhammadiyah lebih dari 10 ribu. “the number of muhammadiyah educational institutions is over ten thousand. It has over 170 universities in the form of persyarikatan (association) <http://nasional.republika.co.id/berita/nasional/umum/15/08/02/nsgkgj361-jumlah-lembaga-pendidikan-muhammadiyah-lebih-dari-10-ribu>. It does include the number of private universities in the form of foundations (yayasan) accessed November 9, 2017.

⁹⁷ Among the 16 educational institutions, there are 15 institutions that were established in the form of foundation, and one institution in the form of association.

⁹⁸ Articles 27 (1), 28C (1), (2), 28E (1), 31 (1), (2), (4), (5) of the Constitution. These articles largely said about the right to education and the duty of the government to fulfill the right to education.

⁹⁹ The Decision of the Constitutional Court No. 021/PUU-IV/2006.

¹⁰⁰ Id.

¹⁰¹ Id at 129.

new form of education institutions -the educational legal entity (the BHP). To be properly operated, these provisions need implementing regulations to elaborate these two articles.

In its opinion, the Court provided four principles that should be accommodated by the lawmakers when they drafted this implementing regulation. These four principles include: (1) acknowledging the state's duty to educate the people, the obligation of the state and the government in education, and the right of the citizens on education; (2) acknowledging the facts that there are educational institutions in the form of foundations and associations; (3) the existence of the BHP should not reduce the state duty to fulfill the right to education; and, (4) this new law should take very seriously the voice of the community so that it would not create chaos or new problems.¹⁰²

The Court agreed with the government's argument and declared, "the petitioners did not have legal standing because they did not actually suffer constitutional damage because of these two provisions. As a result, this petition should be declared inadmissible (*tidak dapat diterima*)."¹⁰³ The Court concluded, "Article 53 (1) did not say anything about the existence of the BHP other than briefly mentioned the BHP."¹⁰⁴ It needs further implementing regulation to elaborate this provision.

The case mentioned above was the very first case regarding the educational legal entities (the BHP). The approach in case reflected a strong form of judicial review as the Court's declaration was final and unrevisable. One important aspect of this Court ruling is that, in its

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id at 135.

opinion, the Court provided four primary guides for the lawmakers when they enacted a law on the BHP. The court expected that the lawmakers would refer to these principles when they drafted the BHP law. This way the law would remain constitutional. The court guidance stated in the court opinion reflected a strong form of judicial review because the Court directed the lawmakers on how they should determine the content of the BHP law.

B. The Educational Legal Entity Law (the BHP-*Badan Hukum Pendidikan*) case:¹⁰⁵ a weak form of judicial review?

In 2009, the government enacted Law on Educational Legal Entity to follow up Article 53 (4) of Law 3/2002. This law granted state universities the autonomy to regulate themselves and to finance their activities, including allowing them to obtain financial support from private enterprises.

Several private universities, college students, and individuals challenged the constitutionality of this Law (*the BHP I case*). They argued this law threatened the existence of private universities because they would have to change their existing institutional structures such as foundation (*yayasan*) or association (*persyarikatan*) to the new educational legal entity (the BHP) structure. This law also did not guarantee that private universities would receive funds from the government. For students and parents, this law would potentially increase the tuition fees that they had to pay.

The petitioners further argued that granting autonomy would make the state universities susceptible to the interests of corporations which might lead to the privatization of state

¹⁰⁵The Decision of the Constitutional Court No. 11-14-21-126 and 136/PUU-VII/2009.

universities.¹⁰⁶ Besides, the petitioners wrote, the change of legal status of an education institution to the BHP would result in the state avoiding its constitutional obligation to fund education; causing higher tuition fee that make higher education unaffordable for many people.¹⁰⁷ This would create inequality, and violate the right of the people to receive an education.

In its ruling, the Court referred its previous decision on *National Education System III* (Court Decision 021/PUU-IV/2006), which declared that Article 53 (4), endorsing the establishment of educational legal entity, was consistent with the Constitution. In this decision, the Court provided four guiding principles that should be followed by the lawmakers when they establish Law on the BHP.¹⁰⁸

Concerning the new BHP law, the Court stated, “assuming that all educational institutions had the same capability was not based on the reality that they had different capability. Treating them equally would disturb the education activities.”¹⁰⁹ The Court rule that the, “Law on the BHP created legal uncertainty and jeopardized the efforts to achieve the national educational goals.”¹¹⁰ The Court, however, stated that the BHP principles such as the required nonprofit nature could be adopted. The Court declared Article 53 (1) Law on the BHP conditionally constitutional. It declared that Article 53 (1) “was constitutional insofar as it was

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id at 32-33. The guiding principles include: (1) the government’s primary function on education; (2) the Law aims to elaborate the responsibility of the state on education not to reduce the government responsibility on education; and (3) the formulation of the law should accommodate everyone’s aspirations.

¹⁰⁹ Id. 397

¹¹⁰ Id 398.

interpreted as a function of education and not as a legal entity.”¹¹¹ This means that the Court ruled that the Article was constitutional only if it was interpreted in a way consistent with the court interpretation.¹¹² The Court did not automatically grant or reject the petition, or declare whether the law was constitutional. Rather, it provided conditions so that would enable the law to be constitutional. This way the Court could maintain the constitutionality of the statute.

This decision seems reflected a weak form of judicial review because the Court did not automatically invalidate the law and its decision did not finally settle the legal issues involved. Therefore, there was a possibility that the court decision would be revised if its ruling were not implemented. Whether the Court would invalidate the law would depend on whether or not the lawmakers followed the court’s guidance.

Under Tushnet’s typology, these court decisions could be interpreted as a weak form of judicial review because the Court’s conditional decision could be revised in the future. This approach is different from the strong form of judicial review which determines that the Court had the final say and its decision is unreviewable.

This court ruling, however, was not an absolutely weak form of judicial review because the Court effectively changed the meaning of “education legal entity” in Article 53(1) from legal entity as an institution to legal entity as a function of education, i.e., the nonprofit nature. In other words, the Court has altered the meaning of Article 53 (1) from what had been written by the lawmakers.

In this case, the Court adopted the legal model i.e. textual, historical, and doctrinal

¹¹¹ Id.

¹¹² David Landau, *Geo Wash Int’l L Rev* 729 (cited in note 9).

interpretations. The Court took into account the provisions of the constitution. It referred to several articles relevant to the right to education such as Articles 31 and 28. In addition, the Court also took into account the intention of the founders as expressed in the Preamble of the Constitution. The Court cited the nation's goals, "to improve public welfare, to educate the life of the people, and to participate toward the establishment of a world order based on freedom, perpetual peace, and social justice." The Court also referred to its previous decisions/precedent. It looked the court decisions in 2005 and 2009 in similar cases (doctrine).

In addition to the legal approach, the Court also took into account extralegal factors, i.e., the fact that there was an unequal condition among universities in Indonesia. The capabilities, the capacities, and the conditions among universities in Indonesia were not all the same. Assuming that they are all had the same capacities would be not based on the real-world situation.

The *BHP I* case illustrates how the Court through its decision tried to maintain the constitutionality of the law. At the same time, it advanced its institutional goals to uphold the norms of the constitution by rendering a conditional decision. In doing so, the Court employed a conditional decision.

C. Higher Education Law case¹¹³

The controversy regarding the existence of the Education Legal Entity (the BHP) continued in 2012 when the government enacted Law 12/2012 on Higher Education. College students, parents, and a student organization filed a petition (*BHP II case*) to the Court arguing

¹¹³The Decision of the Constitutional Court 33/PUU-XI/2013.

that the Law 12/2012 on Higher Education,¹¹⁴ which granted autonomy to universities, violated the right to education as stipulated in Article 31¹¹⁵ of the Constitution. The petitioners argued, “granting autonomy to universities potentially disturbed access to education, increased the cost of education, and negatively impacted the fulfillment of the right to education especially access to higher education.”¹¹⁶ In addition, they also argued that giving autonomy to universities may create problem on accountability.¹¹⁷

In rendering the decision, the Court referred to the Constitution, particularly Article 31, and to its previous decisions. The Court was of the opinion that this law which granted autonomy to state universities was consistent with Article 31 of the Constitution because “the state’s responsibility to fully fund education is on basic education level as mentioned in Article 31 (2) of the Constitution. On the higher education level, the participation of society in financing higher education was an option, i.e., not mandatory and that is not inconsistent with the Constitution.”¹¹⁸ The Court was of the opinion that Law 12/2012 does not make the government ignores its constitutional duty on education because under this law the government has a

¹¹⁴ Higher Education Act 12/2012 Art 63, 64, 65, and 78.

¹¹⁵ Article 31: (1) Every citizen has the right to receive education.

(2) Every citizen has the obligation to undertake basic education, and the government has the obligation to fund this.

(3) The Government shall manage and organize one system of national education, which shall raise the level of spiritual belief, devoutness and moral character in the context of developing the life of the nation and shall be regulated by law.

(4) The state shall prioritize the budget for education to a minimum of 20% of the state budget and of the regional budgets to fulfil the needs of implementation of national education.

(5) The government shall advance science and technology with the highest respect for religious values and national unity for the advancement of civilization and prosperity of humankind.

¹¹⁶ The Decision of the Constitutional Court 33/PUU-XI/2013 at 280 (cited in note 113).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 283.

significant influence in guaranteeing that higher education is affordable, nonprofit and a public service, --not a business commodity.

The Court also referred its previous decisions, i.e., Court Decision 103/PUU-X/2012 and Court Decision 11-14-21-126 and 136/PUU-VII/2009 (*BHP I*), which had declared, “granting autonomy to universities does not mean that the state/government gives up its responsibility for education.”¹¹⁹ The government still possessed the power to determine the standard of operational cost of higher education that will be implemented in the universities. This way the government can ensure that higher education can be widely accessed.

Regarding the petitioners’ argument that autonomy may lead to a lack of accountability, the Court was of the opinion that this statute mentioned about accountability (Article 78). This law also mentioned administrative sanction if there is a violation of this principle. The Court concluded that Law 12/2012 was consistent with the Constitution. As a result, the Court denied the petition.

It appeared that in rendering the decision, the Court mainly considered legal factors. It referred to the text of the Constitution and its previous decisions (doctrine). The Court did not take into consideration extra-legal factors such as how, in practice, the cost to access higher education increased significantly.

In deciding this case, the Court tended to be restrained. It deferred to the lawmakers. The Court stated that the law had accommodated the principle of accountability. However, it failed to explain why this law did not mention anything about the structure and the authority that has the

¹¹⁹ *Id.*

power to impose an administrative sanction. The Court believed that this would be the authority of the government to do so.

The court ruling reflected a strong form of judicial review. It declared that the law was not inconsistent with the constitution and its decision was final. Substantively, however, the Court restrained itself from providing guidance for the government. The Court acknowledged that it was the government's authority to determine and elaborate the content of the law. Also, it did not provide guiding principles that should be followed by the lawmakers. This ruling tended to maintain the consistency of its decisions and its compliance with the provisions of the constitution. It also tended to restrain itself from intervening the lawmaker legislative function.

Analysis

From the right to education-related cases presented above, it appeared that the Court was inconsistent in implementing the strong form of judicial review it possessed. The Court in some cases applied strong form of judicial review by declaring the laws unconstitutional and invalidating them. The Court also adopted a weak form of judicial review by maintaining the constitutionality of the statute even though the law was arguably inconsistent with the Constitution. In other cases, the court ruled conditionally constitutional decisions. In other words, a law would remain constitutional if the lawmakers satisfied the Court's guiding principles. This type of decision could be interpreted as weak form of judicial review because the Court did not automatically invalidate the law and instead it gave the opportunity to the lawmakers to revise the law. Conditionally constitutional decisions, however, can also be

interpreted as Court adoption of strong form of judicial review if the court provide guidance for the legislative in following up the court ruling. By providing guidance in its decisions, the Court dictated the lawmakers on what should be included in the law.

In the Budget for Education cases, the Court approaches moved from a strong form of judicial review, a weak form of judicial review, to a stronger form of judicial review. While in its initial decision the Court declared the provision of the law unconstitutional, in the next education budget case, the court maintained the constitutionality of the law, the court then moved to a stronger form of judicial review in its subsequent rulings because the government seemed reluctant to follow the Court decision. This was done by giving a deadline for the government in complying with the Court ruling. In the BHP cases, the Court's approaches moved from a strong form of judicial review by declaring the law was consistent with the Constitution to a weak form of judicial review by issuing a conditional constitutional decision.

Based on the cases presented above, it can be said that whether the Court would likely to apply a strong of judicial review or a weak form of judicial review when one or more of the following conditions is satisfied: (1) the Court was of the opinion that the provisions of the Constitution were clear and unambiguous; (2) the Court concluded that the law or the provision of the law submitted to the court for review were clearly inconsistent or consistent with the Constitution; (3) the Court believed that the implementing agencies needed time to implement the Court rulings; (4) the Court believed that the consequences of invalidating the law or provisions of the statute were significant; or (5) the Court concluded that the statutory provisions submitted for review were somewhat unclear.

With regard to factors taken into account by the Court, it appeared that the Court primarily considered legal factors. It referred to the text of the Constitution, its previous decisions (doctrine), and the intention of the framers. However, in some instances, the Court also took into consideration extra-legal factors such as the difficulty of the government to reallocate budget, the complexity of the case, and other factors.

The Court's approach on right to social welfare cases: a weak form, a strong form, and a super strong form of judicial review

The following part will examine the Court's approach in deciding cases related to social welfare rights. The analysis focuses on the petitions that refer to Article 33 (2) and (3) of the 1945 Constitution as their main legal arguments. These two provisions stipulate that the constitutional duty of the state to control natural resources and significant production sectors must be utilized for the optimal welfare of the people. The phrase “must be utilized for the optimal welfare of the people” shows the constitutional recognition of the right to social welfare. This part will analyze the court rulings in the Electricity Law case, Water Resources Law cases, and Oil and Gas Law case. Instead of consistently adopting a strong form of judicial review as expressly indicated by the Constitution, in deciding cases related to the right to social welfare, the Court utilized several different approaches i.e. a weak form, a strong form, and a “super strong” form of judicial review.

A. Electricity Law case: Super strong form of judicial review?

In its early operation, the Constitutional Court received three petitions¹²⁰ from individuals and NGOs focusing on human rights advocacy, who questioned the constitutionality of several articles¹²¹ of Law 20/2002 on Electricity under Article 33 (2) (3) of the Constitution. These articles of the statute, the petitioners argued, opened the possibility of privatizing the supply of electricity. These articles, therefore, potentially conflicted with Article 33 (2) and (3) of the Constitution, which contained the following language:

(2) Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.

(3) The land, the waters, and its natural riches within shall be under the powers of the State and shall be used to the optimal welfare of the people.

The petitioners asserted that Article 33 guaranteed that the significant sectors of production must be under the state's control. The Law on Electricity, however, allowed an unbundling¹²² mechanism in providing the electricity. These provisions opened the possibility of privatizing electric power. They also raised the state's responsibility for the protection of human rights, specifically the right to electricity and the right to work.¹²³

In deciding this case, the Court first defined the meaning of state control over sectors of

¹²⁰ The Decision of the Constitutional Court 001/PUU-I/2003, 021/PUU-I/2003, and 022/PUU-I/2003.

¹²¹ Articles 8, 16, 17, 22, and 68 of Law 20/2002.

¹²² Unbundling practice in this case means that activities related to providing the electricity power were carried out by several companies. For example, the production of electricity is carried out by one company. The distribution of the electricity is conducted by different company. Article 8 defines unbundling as activities related to: power plan (usaha pembangkitan), transmission (transmisi), distribution (distribusi), sale (penjualan), distributor (agen penjualan), Market Manager (pengelola pasar), electric power management (Pengelola Sistem Tenaga Listrik).

¹²³ List of human rights provisions that are potentially violated; art 27 (2), art 28D (2), art 28H (1), art 28H (3), art 33 (3), art 28A, art 28C (1), art 27 (1), art 27 (3), art 28, art 28C (2), art 28E (3) The 1945 Constitution.

production which are important. The Court stated, “state control in Article 33 had broader and higher meaning than the definition of ownership in civil law.”¹²⁴ It means that the state holds one of these five following authorities: formulating the policy (*mengadakan kebijakan*), managing (*tindakan pengurusan*), regulating (*pengaturan*), participating (*pengelolaan*), and supervising (*pengawasan*) these natural resources for the greatest benefit of people’s welfare.¹²⁵ With respect to these five powers, The Court further explained,

the role of the state in formulating policies could be done through issuing permits, licensing, and concessions. The regulating function could be carried out through enacting legislation. The state played its managing role through ownership of shares and involved in managing the state-owned enterprises. And the supervision function could be conducted directly by the government.¹²⁶

The Court was of the opinion,

Article 33 was not an anti-market economy. It did not reject privatization as long as this would not lead to the reduction of state control. The government was the one to determine business policies in economic sectors.¹²⁷

The Court further declared that only state-owned enterprises could manage electric power businesses. National and foreign private enterprises could participate if they were invited by a state-owned enterprise.¹²⁸

With regard to the unbundling mechanism, the Court was of the opinion that this mechanism would reduce state control over natural resources. It used the petitioners’ arguments that stated that in countries like Korea, Mexico, and Latin America, unbundling practices did not always

¹²⁴The Decision of the Constitutional Court 001/PUU-I/2003, 021/PUU-I/2003, and 022/PUU-I/2003.at 332 (cited in note 120).

¹²⁵Id at 334.

¹²⁶ Id.

¹²⁷ Id. at 336.

¹²⁸Id at 334.

work well. They were not always profitable and not necessarily more efficient.

The Court concluded,

Articles 16, 17 (3), and 68 of Electricity Law were inconsistent with the Constitution and therefore (they) should be declared not legally binding. Even though only Articles 16, 17 (3), and 68, specifically concerning unbundling and competition, were declared as contrary to the constitution, these articles were the heart (jantung) of Law 20/2002...which was not in line with the spirit of Article 33 (2) of the Constitution which considered as the fundamental norm of the Indonesian economy.¹²⁹

The Court was of the opinion that the invalidation of those provisions would lead to Law 20/2002 could not being properly implemented, which may lead to “uncertainty and chaos.”¹³⁰

For these reasons, instead of invalidating those provisions, the Court invalidated the law in its entirety.¹³¹

To prevent a legal vacuum, the Court reinstated the 1985 Electricity Law and explained that all agreements, contracts, and business licenses signed and issued under the annulled law were valid until they expired, as this ruling applied prospectively.¹³²

The case presented above indicates the court’s adoption of a super strong form of judicial review, instead of a strong form of judicial review. This can be seen that while the Court declared that the provisions of the Law were inconsistent with the Constitution, it not only invalidated those provisions, but instead invalidated the law in its entirety. This ruling was the first case in which the Court granted a remedy greater than what the petitioners had asked for.

The Court took into consideration both legal and extralegal factors in its ruling. It

¹²⁹ Id. at 349.

¹³⁰ Id.

¹³¹ Id. at 349-50.

¹³² Id at 350.

referred to relevant articles of the Constitution and interpreted the meaning of state control as mentioned in the Constitution. The Court, however, failed to explain why it interpreted ‘state control’ as five different types of authority, as it did in this ruling. The Court did not provide sources or an explanation why it determined these five activities to be state control.

The consideration of extralegal factors can be seen when the Court cited the government’s argument about the actual situation faced by the government, such as the limited of the state budget and the need for a fair competition to create a more transparent mechanism for providing electricity.¹³³ While the Court acknowledged this situation, it disagreed that the unbundling mechanism was the solution because it reduced the government’s control. The Court was more convinced with the petitioners’ argument that England, which used to apply unbundling mechanism, eventually reintegrate the companies. In addition, the petitioners stated that South Korea, Brazil, and Mexico canceled the unbundling mechanism in its efforts to restructure the electricity as they believed that it potentially created problems.¹³⁴

B. Water Resource Law I case:¹³⁵ A weak form of judicial review?

In 2004-2005, three individual activists and two NGOs (Indonesian Legal Aid Foundation-YLBHI, Indonesian Environmental Organization -WALHI) submitted four separate petitions to the Court questioning the constitutionality of Law 7/2004 on Water Resources. They argued that some provisions of this Law¹³⁶ opened the possibility of privatizing water resources.

¹³³Id at 337.

¹³⁴Id at 342.

¹³⁵The Decision of the Constitutional Court 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005.

¹³⁶Some Provisions of Law 7/2004 which opened the possibility to privatize water resources include: art 6 (3), art

That statute accorded private corporations control over water resources. They believed that these provisions were not in line with Article 33 of the Constitution.

In deciding this case, the Court referred to the definition of “state control” that had been established in the previous case (Law on Electricity case). In a split decision, the majority was of the opinion that the criteria of state control was fulfilled by this Law. They concluded that, while the Law on Water Resource opened the possibility for private corporations to obtain water utilization rights, it did not mean that private corporations would take over water resources. The state control in this law remained in the form of administrating, managing, and supervising the water resources sector. The majority concluded, “the government duty to fulfill the right to water is reflected in the responsibility of the central government, provincial government, and municipal government to regulate, to stipulate, and to issue the permit for supplying and utilizing water.”¹³⁷

The majority stated that while under this law the private sector might obtain ‘water utilization rights’ and ‘water licenses,’ it did not mean that the control of the water was being transferred to the private sectors.¹³⁸ They further wrote, “the state’s control in this law could be done through the facility of licensing and the control of water. The government, through licensing mechanism, determined the venue and the quantity of water to be used.”¹³⁹ The involvement of both private sectors and the public as much as possible, as stated in this ruling, did not mean that this law endorsed privatization as it applies to both private sectors and public.

7 (1) (2), art 8 (2) c, art 9 (1), art 26 (7), art 29 (3) (4), art 29 (5), art 38 (2), art 40 (1), (4) (7), art 45 (3) (4), art 46 (2), art 91, art 92 (1), (2) (3).

¹³⁷The Decision of the Constitutional Court 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 at 490-491 (cited in note 135).

¹³⁸Id at 503-504.

¹³⁹Id at 503-504.

Two Justices dissented. Justice Mukthie Fadjar and Justice Maruarar Siahaan were of the opinion that the petitions should be partially granted. In their view, some provisions¹⁴⁰ of this law were not in line with Article 33 of the Constitution because they allowed private sector players to obtain the right to utilize water. These provisions reflected a form of water privatization. Justice Fajar wrote, “The State should only manage water resources so that it can be used for the greatest benefit of the people. The State should not grant certain rights to individuals or private corporations to utilize water.”¹⁴¹

Justice Siahaan further stressed,

Water privatization would always profit-oriented public service was not the character of private corporations.... Therefore, it was hard to expect that private corporations would dedicate themselves to conduct public service. Water resources should be the responsibility of the government to protect, guarantee, and to fulfill for the sake of the community as part of human rights.¹⁴²

Both Justices concluded that water utilization should be in the hands of the government or state-owned enterprises. In a 523-page decision, the Court denied the petitions and declared that the Law on Water sufficiently reflected the government’s obligation to respect, to protect, and to fulfill the right to water. In addition, the Court in its opinion established six principles to maintain the constitutionality of this law. These six principles include: (1) Water utilization should not disturb people’s right to water; (2) The state must acknowledge *adat* right to water/ traditional community right to water; (3) Water utilization right should be interpreted as an extension of right to life (as guaranteed by the 1945 Constitution) and therefore water use should

¹⁴⁰ Articles 6(3), 7(1), 9(1), 11(3), 26 (7), 29(3), 38 (2), 39, 40(4), 41(5), Law 7/2004.

¹⁴¹ The Decision of the Constitutional Court 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 at 507 (cited in note 135).

¹⁴² *Id* at 519-520.

take into account environmental sustainability; (4) Water should be interpreted as non-commercial /economic resources; (5) Water supervision and water management were in the hand the state; and (6) State-owned companies or region-owned companies should get first priority in water utilization.¹⁴³

The Court underlined that these principles also applied to implementing regulations derived from Water Resources Law.¹⁴⁴ If there was a discrepancy between implementing regulations and the court ruling, this law might be submitted to the Court for further review. In other words, the Court provided a conditionally constitutional decision.

The Court's ruling on water resources seemed to adopt a weak form of judicial review. The Court did not automatically invalidate the provisions of the law. It maintained the constitutionality of this statute by declaring that the law was constitutional with a certain condition. By establishing the six principles that should be followed by the government to maintain the constitutionality of the law, the court decision in this case arguably was not final. This was because there is a possibility that the Court's decision would be further reviewed if the implementation of this law or its implementing regulations did not follow the court interpretation. The weak form of judicial review is reflected from the Court's conditional decision-not because the Court upheld the law. Upholding laws without any conditions mirrors a strong form of judicial review. The Court has the final say to determine the constitutionality of the law.

In this case, the Court adopted legal factors (i.e. textual and doctrinal) which can be seen

¹⁴³ Id at 492-495.

¹⁴⁴ Id at 295.

from its reference to the text of the constitution and to its previous decision (Court decision on Electricity Law). While the Court applied similar criteria with its previous decision on the Electricity Law, the judges ended up with a completely different decision in *Water Resource*. In the Electricity Law case, the Court had found that the law was inconsistent with the constitution, while in this present case the Court did not find that there was a violation of the constitution. The Court, through these two rulings, rejected the argument that unbundling violated the Constitution, and permitted private corporations to participate in important sectors of production such as water resources.

However, the Court anticipated that a violation of the constitution might occur in the implementing regulations. Therefore, the Court declared that the decision on water resources, including the six Court principles that the Court established in its opinion, also applied to the implementing regulations derived from this Water Resources Law.

C. Oil and Natural Gas Law I case:¹⁴⁵ A strong form of judicial review?

In 2003, five NGOs related to human rights, legal aids, and democracy,¹⁴⁶ and an individual, filed a petition to the Court arguing that some provisions¹⁴⁷ of Law 22/2001 on Oil and Gas contravened with Article 33 of the Constitution. The petitioners asserted that because oil and gas were important natural resources and significant for the people, all activities related to oil and gas should be under the state control as explicitly stated in Article 33 of the

¹⁴⁵ The Decision of the Constitutional Court 002/PUU-I/2003.

¹⁴⁶ Indonesian Human Rights Aid Association-PBHI, Indonesian Lawyer and Human Rights Association -APHI, Yayasan 324, Solidaritas Nusa Bangsa, SP KEP FSPSI Pertamina.

¹⁴⁷ Articles 12 (3), 1(5), 10, 60, 44 (3), 28(2), 31, 23(2), 22.

Constitution.¹⁴⁸ In addition, the petitioners argued that the unbundling mechanism (separating upstream and downstream activities) adopted by this law would likely increase the price of oil and gas.¹⁴⁹

In deciding this case, the court stated that to appropriately understand this statute, the various provisions of this law should be viewed as being systematically connected.¹⁵⁰ In other words, each article connected with other articles. Therefore, it should not be interpreted individually (article by article). The Court also cited the Preamble of the Constitution to emphasize the national goals. The Court found that the provisions in this law were in line with Article 33 of the Constitution.

The Court partially granted the petition. It declared that Articles 12 (3), 22(1), and 28 (2) (3) of Law on Oil and Gas were not in line with the Constitution.¹⁵¹ The Court held that these statutory provisions did not guarantee that the management of Oil and Gas would be utilized for the greatest benefit of the people as required by Article 33 of the Constitution.

With regard to the unbundling mechanism, however, the Court declared that the provision was in conformity with Article 33 of the Constitution. This was because while the unbundling mechanism was adopted in this law, Pertamina, the oil and gas state-owned company, played significant roles in representing the state. It has exclusive rights in determining policy related to oil and gas.

It appeared that the Court adopted a strong form of judicial review in the Oil and Natural

¹⁴⁸The Decision of the Constitutional Court 002/PUU-I/2003 at 230 (cited in note 145).

¹⁴⁹Id at 225.

¹⁵⁰Id at 223.

¹⁵¹Id at 002/PUU-I/2003 P 231, 232.Oil and Gas Law 22/2001 Art 12 (3), 21 (1), and 28.

Gas Law case. The Court declared that some provisions of the Law were inconsistent with the Constitution and invalidated them. The Court decision was also final. With regard to unbundling mechanism, the Court declared that these provisions were in line with Article 33 of the Constitution.

The Court took into account the legal factors as the main approach in deciding this case. It analyzed the text of each relevant article of the Constitution and also connected one article with other relevant articles. The Court also referred its previous decisions in similar cases. The Court seemed did not take into account the extralegal as its primary approach. It did not look at the Indonesian experience or other countries experiences in this matter like what the Court had decided in the electricity law case.

D. Oil and Natural Gas law II case¹⁵²: A strong form of judicial review?

In 2012, twelve Islamic-associated organizations and thirty individuals¹⁵³ filed a petition to the Constitutional Court arguing that some provisions of Law on Oil and Gas¹⁵⁴ which mandated the government to establish a Regulatory Agency (BP Migas) to supervise the oil and gas upstream sector, reduced state control over natural resources.¹⁵⁵ This, the petitioners claimed, meant these resources could not be utilized to the greatest benefit of the people as mandated by

¹⁵²The Decision of the Constitutional Court 36/PUU-X/2012.

¹⁵³These include Muhammadiyah (the second largest Islamic organization in Indonesia) and thirty individuals (among them were prominent individuals such as Hasyim Muzadi, former chairman of Nahdlatul Ulama (NU), the largest Islamic organization in Indonesia; Salahudin Wahid, the younger brother of the late President Abdurrahman Wahid and a leading NU figure; Fahmi Idris, former Minister of Labor and Minister for Industry in President Susilo Bambang Yudhoyono (SBY) administration; and Komaruddin Hidayat, Rector of Syarif Hidayatullah State Islamic University).

¹⁵⁴Oil and Gas Act 22/2001 Art 1 (19) and (23), Art 3 (b), Art 4 (3), Art 6, Art 9, Art 10, Art 11 (2), Art 13, and Art 44.

¹⁵⁵The Decision of the Constitutional Court 36/PUU-X/2012.at 17-19 (cited in note 152).

Article 33 (3).¹⁵⁶ The petitioners also claimed that the privatization of oil and gas industries infringed the petitioners right to social welfare as constitutionally guaranteed by article 28H (1).

In rendering the decisions, the Court cited its 2003 and 2010 decisions¹⁵⁷ to interpret the phrase “state control” and to explain that the state control over natural resources should give the greatest benefit of the people. In a split decision, the Court declared that the existence of BP Migas as a legal entity to work on oil and gas activities did not fully represent the government. The majority were of the opinion that BP Migas as a legal entity was not part of the government. Therefore, its existence could limit the state control to manage natural resources. As a result, the state could not use its power to provide the greatest benefit of the people. This meant this provision was not in line with Article 33 of the Constitution.

The majority stated that state-owned enterprises would be the most appropriate entity to manage natural resources, as they clearly represented the state.¹⁵⁸ This statement seemed in line with the petitioners’ demand. It also implied the return of Pertamina (the state-owned company on oil) to its previous dual roles as both regulator and operator.

Justice Harjono dissented. He questioned the legal standing of the petitioners to file a petition to the court. In his view, only those who were directly affected by the issuance of this law should have the legal standing to be heard in court.¹⁵⁹ He did not see that the petitioners in this case had experienced constitutional damage. In addition, he wrote, the majority did not

¹⁵⁶Id at 15.

¹⁵⁷The Decision of the Constitutional Court 002/PUU-I/2003 and 3/PUU-VIII/2010.

¹⁵⁸The Decision of the Constitutional Court 36/PUU-X/2012.at 111 (cited in note 152).

¹⁵⁹Id at 118.

sufficiently examine the constitutional damage of the petitioners.¹⁶⁰ Therefore, the petition should be dismissed. With regard to the existence of BP Migas, Justice Harjono believed that BP Migas was the state representative since it was established by law which meant the government with the legislature approval established this body.¹⁶¹

The Court concluded that the 2001 Law on Oil and Natural Gas especially provisions concerning the establishment of BP Migas was in contradiction with Article 33 of the Constitution.¹⁶² Therefore, this body needed to be changed. The Court, however, emphasized that all contracts that had been entered into by BP Migas would remain valid until they expired.

It appeared that the Court adopted a strong form of judicial review. It invalidated some provisions related to BP Migas. It disbanded BP Migas and subject to a transition period. The Court's decision in this case was final. As a result, there was no legal avenue to challenge the Court's ruling.

The majority primarily took into account the legal factors, i.e., Article 33 of the Constitution and its previous rulings. The Court referred to Article 33 of the Constitution that was used by the petitioners to file its petition. It also applied principles that have been established by the court in its 2003 and 2010 decisions regarding the meaning of state control. The Court interpreted state control as follows formulating the policy, regulating, managing, and supervising these natural resources. In this case, the Court extended these principles by ranking them in order of importance. Managing and regulating were the most important aspect of state

¹⁶⁰ Id.

¹⁶¹ Id at 118-119.

¹⁶² Id at 115-116. Articles 1 (23), 4(3), 11(1), 20, 41 (2), 44, 45, 48, 49, 59, 61, and 63 were inconsistent with the 1945 Constitution.

control then followed by other forms of state control.

E. Water Resources Law II case:¹⁶³ From a weak to a strong form of judicial review

In 2013, four organizations (including Muhammadiyah, sojupek, vanaprastha, and Al jami'yatul Washliyah) and seven individuals (among them were prominent figures such as Rachmawati Soekarnoputri, the daughter of the first President of Indonesia Soekarno, Fahmi Idris former minister in SBY's Administration, Adhyaksa Dault, former Youth and Sport Minister, and Laode Ida, a member of Regional Representative Council (the DPD)) filed a petition to the Constitutional Court claiming that Water Resources Law 7/2004 contravened the Constitution.

This petition was a request to the Court to conduct a further review of the Law on Water Resources case which had been decided in 2005 (court decision 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005). In the 2005 ruling, the Court declared that if the implementing regulations of water resources law were interpreted differently with the court opinion, this law could be furthered reviewed, i.e., conditional constitutionality.

The petitioners claimed that six implementing regulations derived from Water Resources Law were inconsistent with Article 33 of the Constitution.¹⁶⁴ They argued that these regulations were in favor of both water resources monopoly and commercial purposes.¹⁶⁵ Also, these regulations did not follow the court principles that had been established in its 2005 decision (Court Decision 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005).

¹⁶³The Decision of the Constitutional Court 85/PUU-XI/2013.

¹⁶⁴ *Id* at 20-23.

¹⁶⁵ *Id*.

To determine whether the implementing regulations derived from this law were inconsistent with the Constitution, the Court examined the six implementing regulations of Law on Water Resources against the 1945 Constitution and the court guiding principles. The Court ruled that the state control of water resources was the “soul” or “heart” of this Law, as mandated by the Constitution.¹⁶⁶ It found out that these regulations were inconsistent with both the Constitution and the court guiding principles. This decision demonstrated that the Court would broaden its power by reviewing implementing regulations against the Constitution, notwithstanding the constitutional language to the effect that the Constitutional Court could only review laws against the constitution, but not implementing regulations.

The Court declared that Law on Water Resources was inconsistent with the 1945 Constitution. Further, the Court was of the opinion “because this petition was closely related to the “heart” of the Law on Water Resources, it granted the petition and invalidated the water resources law in its entirety.¹⁶⁷ The Court further declared, “because Law on Water Resources was inconsistent with the Constitution and to anticipate legal vacuum on water resources, therefore while waiting the lawmakers to establish a new law which comply with the court ruling, the Court reinstated Law 11/1974 on Pengairan (Irrigation).”¹⁶⁸

The Court ruling indicated the adoption of a strong form of judicial review at least in three ways. (1) The Court declared the law inconsistent with the Constitution and the Court guiding principles and invalidated it for its entirety. The Court decision, in this case, was final

¹⁶⁶Id at 143.

¹⁶⁷Id at 146.

¹⁶⁸Id at 145.

and binding. There is no legal venue available to challenge this ruling. (2) The (super) strong form of judicial review also appeared when the court invalidated the law for its entirety. By invalidating the entire law on water, the Court exceeded the petitioners' request. (3) The Court action to review the implementing regulations derived from water resources law was also seen as the adoption of a strong form of judicial review. This was because the Court judicial review power was very limited to review law against the constitution. It did not have the power to review implementing regulations. Reviewing implementing regulations is the domain of the Supreme Court. In this case, the Court largely took into account legal factors. It referred to the provisions of the Constitution and the Court's previous decisions.

Analysis

In the right to social welfare cases, the Court tended to adopt a strong form or a super strong form of judicial review. With the exception of Water Resources Law I case, the Court declared the Law on Electricity and Law on Oil and Gas unconstitutional. The Court invalidated the Electricity law in its entirety. In Oil and Gas Law, the Court dismissed the BP MIGAS. In the water resources law II case, the Court again declared the water law unconstitutional and invalidated this law in its entirety which reflected a super strong form of judicial review.

The adoption of these approaches was rooted in the Court's interpretation of Article 33 of the Constitution. The Constitution clearly states that natural resources must be controlled by the state for the greatest benefit of the people. Sectors of production which are important for the people were also to be under the state control. The Court interpreted state control in five different

activities ranging from possessing the majority of the shares up to issuing a license or permit to explore or exploit natural resources. The Court was consistent in citing these five principles to determine whether a statute was consistent with Article 33 of the Constitution. From the five cases mentioned above, the Court tended to restrict the involvement of private sectors in exploring natural resources. When the Court was of the opinion that there was a tendency that a law opened the possibility of privatization, the Court eventually declared the law unconstitutional. The Court determined “state control” as the heart and soul of Article 33 of the Constitution. When it found any laws which were not in line with the heart and the soul of Article 33, those laws would likely be invalidated in its entirety. In other words, the Court would likely adopt a super strong of judicial review.

In rendering the decisions, the Court largely took into account legal factors such as the provisions of the constitution and the Court's previous rulings. This can be seen how the Court consistently referred to the Constitution and its decisions to determine the constitutionality of the law. In at least one decision, the Court considered other countries experience in conducting unbundling mechanism.

Conclusion

Chapter 4 has analyzed the approaches and the factors that were taken into account by the Constitutional Court when it decided judicial review cases related to economic and social rights, specifically the right to education and the right to social welfare in the utility and natural resources context. While constitutionally the Constitutional Court has been provided with a

strong form of judicial review, in practice, it did not apply this approach consistently. The Constitutional Court adopted quite different approaches in adjudicating these economic and social rights cases.

In its early operation, the Court adopted a strong form of judicial review and then started introducing a weak form of judicial review. It also introduced conditionally constitutional decisions and conditionally unconstitutional decisions. These new approaches had the character of a weak form of judicial review. Conditional decisions constitute a kind of a weak form of judicial review because it maintained the constitutionality of the law even though the Court declared the law was not in line with the constitution. This way the Court gave an opportunity for the lawmakers to revise the law so that it would be in line with the court interpretation. The constitutionality of the law depended on how the lawmakers would respond the court decision. Court conditional decisions arguably were not final. It was possible for the Court to further review the Law to determine whether the lawmakers' response satisfied the court condition.

The Court adoption of a strong form of judicial review or a weak form of judicial review approaches were not always in line with the types of economic social rights cases the court dealt with. For instance, in budget for education cases, the Court employed a strong form, to a weak form and then moved to a stronger form of judicial review. But the Court applied a strong form of judicial review and also declared conditional decisions on the BHP case. In social welfare cases, the Court tends to move from a strong form of judicial review to a super strong approach to judicial review. The Court strict interpretation of Article 33 seemed to influence the court rulings.

The tendency of the Court to utilize a weak form of judicial review was when the Court was of the opinion that invalidating the laws would result in significant burden to the government. The National Budget Law cases were the in point. The Court took into account the significant consequences for the executive and the legislature if it invalidated this law such as the cost of budget reallocation. By maintaining the validity of these laws, the Court gave an opportunity to the executive and the legislature to revise the law so that it was consistent with the Constitution and the court rulings. In the BHP case, the Court decision was more reconcilable for the lawmakers. It provided time for the lawmakers to comply with the Court's ruling.

The Court conditional decisions also reflected a weak form of judicial review. The Court maintained the validity of the law under certain conditions. In Water Resources Law case, the Court provided six conditions (principles) that should be fulfilled by the government in issuing implementing regulations to keep this law constitutional. If the government failed to adopt these six principles, the Court would declare this law unconstitutional. By providing these six principles, the Court expected that the government had clear guidance on how to follow up the Court rulings. Unfortunately, it did not happen, the implementing regulations issued by the government did not comply with the court's guidance. As a result, the Court declared the Law on Water Resources unconstitutional and invalidated it in its entirety.

The Court would likely adopt a strong form of judicial review when the laws clearly violated the constitution and the impact of invalidating these laws was not so great. The Court adoption of a weak form of judicial review would likely change to stronger judicial review if the court rulings were not promptly and properly followed up by the government.

The response of the government and the legislature toward the court decision would likely determine the Court's subsequent decisions in the similar cases whether the court would maintain the constitutionality of the law or invalidated it.

With regard to the Constitutional Court decision making, multiple factors including legal and extralegal factors were considered by the justices when they decided judicial review on economic and social rights cases. These include legal factors such as the text of the constitution, the relevant laws, international covenants, the court's previous decisions and the intention of the framers.

In addition, the Justices also considered the external factors such as the real situation on the ground, the response of their Justices' colleagues and the possible response of the other branches of government. In short, the Court considered numerous legal and extralegal factors.

Judicial review cases presented in this chapter suggest that there was no consistent pattern when the Court used legal factors or extralegal factors. In a certain case, such as in budget for education cases, the Court took into serious consideration the real situation on the ground. In other cases, such as in social welfare-related cases, the Court focused on the wording of the constitution or the law as its main consideration to decide cases.

The legal authorities that the Court used as a legal argument in rendering its decisions were numerous. In most cases, the provisions of the constitution were the primary legal basis for the court to decide cases. In doing so, the Court also checked the history of the provisions of the constitution. How particular provisions were discussed by the founding fathers. In at least one case, the Court cited the provisions of the law (not the constitution) as the legal basis to render

decisions.

The court also cited foreign legal materials, relevant international covenants, (such as ICCPR and ICESCR), scholarly writings (Joseph Stiglitz's *Globalization and its Discontent*), and the decision of the Constitutional Courts or Supreme Court in other countries (such as *Brown vs. Board of Education*). Again, there is no consistent pattern on how the Court used legal authority in formulating its opinion.

Chapter 5: Implementation of the Constitutional Court Decisions on Judicial Review Cases Related to Economic and Social Rights and the Reactions from the Other Branches

Introduction

The implementation of Indonesian Constitutional Court decisions is arguably a new field of research in Indonesia. This is partly because the Court was so recently established. Also, it is frequently assumed that the Court's decisions were automatically followed up by implementation because, according to the Constitution, the nature of the Court decision are final and binding. There is some reported research concerning the implementation of the Indonesian Constitutional Court decisions.¹ These authors mainly examine the implementation of the court rulings with the Constitutional Court itself as the sole focus of discussion. This chapter contributes to the discussion in two aspects: first, it specifically focuses on the judicial implementation of economic and social rights. Second, this section broadens the discussion by focusing on the role of the court in the context of two other branches of government, i.e. the executive and the legislature, who are responsible for implementing the Court rulings. It aims to answer two important questions: (1) what were the Constitutional Court's strategies, as mentioned in its rulings, regarding the implementation of its decisions? (2) How did the government respond the

¹ Simon Butt, *The Constitutional Court and Democracy in Indonesia* 68-9 (BRILL, 2015). Maruarar Siahaan, *Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi*, "The Roles of the Constitutional Court in Upholding the Law of Constitution" 3 *Jurnal Hukum*, 363-69 (2009). Mohammad Mahru Ali, Meyrinda Rahmawati Hilipito, Syukri Asy'ari, *Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru*, "The Implementation of the Conditionally Constitutional Decision and Decisions Which Add New Norms of the Constitutional Court" 3 *Jurnal Konstitusi* 631-62 (2015).

decisions of the court?

The government and the DPR are two institutions that are directly or indirectly affected by the Court's decisions. This is because they are the lawmakers. The Court's duty is to determine the constitutionality of laws made by the executive and the legislature. When the Court invalidates a statute, the product of these two institutions is directly affected. In many judicial review cases, these two institutions are expected to follow up on the Court decisions, such as by amending an existing statute, enacting a new statute, or allocating financial resources.

This Chapter will use Katharine G. Young's typology of judicial review to understand the spectrum of the Court's rulings and the Court's interaction with other branches in economic and social rights cases. Young's typology suggests that in judicial review of economic and social rights, court decisions will likely reflect one of the five stances. These five stances include whether a court, (1) places greater decision authority on the legislature (deferential), (2) assumes inter-branches dialogues (conversational), (3) involves more parties in resolving the economic and social rights problems (experimental), (4) supervises and provides the other branches with strict detailed plans (managerial) or (5) is dominant in controlling and supervising the response to the court rulings (superior).² These five stances of court decisions will further explain the role of the court and whether it acts as a detached court (deferential review), an engaged court (conversational or experimental review), or a supremacist court (managerial or preemptory

²Katharine G. Young, *Constituting Economic and Social Rights* 174 (Oxford University Press, 2012). See also Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 8(3) *Int J. Constitutional Law* 385 (2010).

review).³

The use of Young's typology in this chapter does not mean that the Indonesian Constitutional Court directly referred to her typology when it decided cases on economic and social rights. The Court formally has referred to the constitution and relevant legislation. However, in practice, the Court has developed other approaches supplementing the formal documents when dealing with a variety of economic and social rights cases. Young's typology is arguably the most appropriate tool to explain the Court's approaches. It provides a broad spectrum on how the Court adjudicates economic and social rights cases. Based on the Court various approaches in deciding economic and social rights cases, this chapter will further analyze how the government and the DPR, as the implementing agencies, respond to the Constitutional Court decisions in this area.

This chapter demonstrates that first, the Court employed various strategies, as stated in its rulings, regarding the implementation of its decisions. These strategies largely resemble the five stances of Young's typology of judicial review. The Court in some instances has entered into an interactive discourse with the government and the legislature depending on the nature of the case, the impact of the rulings, and the concern about leaving a legal vacuum by simply declaring a statute void. Second, the court decisions and the response of the implementing agencies were closely related. The implementation of the Court decisions varies widely. The Court rulings were not always translated into effective implementation. In some instances, the government did not

³Id at 194. Young's typology of roles conception of the court is as follows detached court (deferential and conversational review), engaged court (conversational and experimental review), and supremacist Court (peremptory and managerial review).

promptly respond to the Court decisions. This was particularly true when implementing the Court ruling required a substantial cost. The government would be likely to enforce the court decisions quickly if doing so was in line with the interest of the government and the legislature.

In other words, the likelihood of the executive and the legislature following up on the court decisions depends on, first, whether the Court ruling significantly affected the content of the existing law or whether the court had provided a temporary solution in its decisions and second, whether the content of the law was significant for the government in advancing its policies.

This chapter begins with an overview of the relationship between the Constitutional Court, the government, and the legislature in judicial review. This includes a discussion of various factors that likely influence the implementation of the Court's decision. This is followed by an analysis of the Court's implementation of decisions in cases related to the right to education and the right to social welfare (state control of natural resources), as has been described in Chapter Four. This part of the analysis includes, first, what the Court expressly mentioned in its rulings regarding the implementation of its decisions, and second, how the implementing agencies, i.e., the executive and the judiciary, responded the Court rulings. This Part will end with a conclusion.

Before discussing the implementation of the Constitutional Court decisions when reviewing laws related to economic and social rights, it is important to understand what implementation means in this context. Charles A. Johnson and Bradley C. Canon, in their book titled *Judicial Policies Implementation and Impact*, provide an important explanation regarding

this matter.⁴ As reflected in the title of their book, “impact” in judicial policies means the general reactions following a judicial decision. “Implementation” means the effectuation of judicial decisions by other branches of government.⁵ Using this definition, this chapter defines judicial implementation as the implementation or the follow-up of the constitutional court decisions on cases related to economic and social rights by the government and the legislature.

The 1945 Constitution and the 2011 Law on the Constitutional Court do not explicitly regulate the implementation of the Constitutional Court’s decisions. The Constitution sets the structure and the powers of the Constitutional Court. The Constitutional Court Law elaborates on the provisions of the Constitution and stipulates the procedural law of the Constitutional Court.⁶ However, it does not specify how the government should respond the Court’s decisions. The Court did not have the express power to enforce its decisions or to impose a sanction if the implementing agencies fail to comply with the Court’s rulings.⁷

The Constitution and the Constitutional Court Law state that the Court’s decisions are final and binding. As a consequence, it is often assumed that the Constitutional Court decisions are self-enforcing.⁸ In addition, the Court decisions on judicial review typically state that its rulings are “legally binding”⁹ and thus have the same legal status as laws. In some cases, the

⁴ Charles A. Johnson and Bradley C. Canon, *Judicial Policies: Implementation and Impact* (Cq Press, 1984).

⁵ *Id* at 14-15.

⁶ Chapter V Procedural Law of the 24/2003 Law on Constitutional Court as amended by Law 8/2011.

⁷ Butt, *The Constitutional Court and Democracy in Indonesia* 68 (cited in note 1).

⁸ Art 47 of the 24/2003 Law on Constitutional Court as amended by Law 8/2011.

⁹ The 24/2003 Law on Constitutional Court as amended by Law 8/2011 stipulates that the Constitutional Court decision is final and binding.

Court's rulings state by whom the decisions are to be executed.¹⁰ Even though legally binding, it is generally known that not all court decisions affect the legislature and other branches of government in the same way.

The Constitutional Court Law outlines the legal effect and the authority of the Court's decisions; however, it does not capture the processes of implementation.¹¹ The Court does not have an implementing agency. Therefore, the Court depends on other branches of government to implement its decisions. To be effectively implemented, the Court decisions should square with the views of the implementing bodies or at least the implementing bodies must be willing to carry out those decisions. Sometimes, what the Court intends to achieve through its judicial decisions is simply not achieved. It is the implementing bodies, and not the Court, that determine the execution and the implementation of the judicial decisions.

When deciding judicial review cases, the Court interprets the law and the constitution, and then decides whether the law is consistent with the constitution. Interpreting a statute is different from implementing it. A court interpretation of a law gives it meaning that determine the scope of the executive and the legislative in implementing the Court interpretation.

Factors that may influence the implementation of court decisions

In *Judicial Impact and State Supreme Courts*, G. Alan Tarr observes that the various responses of the government and the legislature toward Supreme Court decisions may be

¹⁰ For example, in the BP Migas case, the Court disbanded the BPMigas and ordered the government to replace the BP Migas with another body which represents the state. Also, when the Court invalidated a law for its entirety, it orders the government to issue a new law that takes into account the Court guidance.

¹¹ The 24/2003 Law on Constitutional Court as amended by Law 8/2011.

influenced by “the perceived finality of the standards enunciated by the Supreme Court, the clarity of the standards, and the persuasiveness of the Court justification of its decisions.”¹² The finality of the court decisions can be seen whether the decisions were supported by a majority; or whether the court has decided similar cases in the past.¹³ The clarity of the court decisions, which is reflected in the court rulings, minimizes the uncertainty of the government agencies when they implement the court decisions.¹⁴ It also minimizes the possibility of miscommunication between the court and the implementing agencies. The persuasiveness of the court decisions is reflected in the quality of the arguments.¹⁵

In the same vein, Laurence Baum asserts three different tendencies of the implementing agencies in carrying out court decisions.¹⁶ First, the willingness of the implementing bodies to accept and follow the court decisions does not always translate into effective implementation. Second, the implementation behavior varies widely. Some court decisions are better followed by the implementing bodies than others. Court decisions that require a substantial cost for the government and the legislature to implement are less likely to be promptly executed. Third, there are differences in the implementation behavior of different branches of governments.

What factors contribute to different attitudes of the implementing bodies in enforcing the

¹²G. Alan Tarr, *Judicial Impact and State Supreme Courts* (Lexington Books Lexington, MA, 1977).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Laurence Baum, *The Implementation of United States Supreme Court Decisions*, in Ralf Rogowki & Thomas Gawron eds. *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* p. 223 (Berghahn Books New York 2002). See also Laurence Baum, *Implementation of Judicial Decisions: An Organizational Analysis* 4 *Am. Pol. Q* 86 (1976): 87-88, and Darren A. Wheeler, *Actor Preference and the Implementation of INS v. Chadha*, *BYU J. Pub. L.* 23 (2008): 87.

court decisions? Ralf Rogowski and Thomas Gawron mention three main factors that contribute to the different behaviors of the implementing bodies.¹⁷ First, it is possible that the implementing bodies do not know what they supposed to do. In this case, it is likely that there is a problem of communication. Second, it is possible that the implementing bodies are not capable of carrying out what is required. In this case, there is a problem of capability. And last, it is perhaps because they simply are not willing to act as required.¹⁸

In addition, there is another possible explanation: the attitude of implementing bodies is closely related to their interests, goals, or missions as institutions.¹⁹ The interests of the implementing bodies can be in the form of whether the court decisions are in line with their institutional approaches. In these institutional approaches, there are a variety of factors that may influence the way the implementing bodies enforce the court decisions such as cost, organization structure, how officials understand the decisions, the cost of compliance, agreement with decisions, the obligation to comply and official personal interests.²⁰ The various factors mentioned above will help to understand factors that may influence the government and the legislature in enforcing the Indonesian constitutional court decisions.

¹⁷ Ralf Rogowski and Thomas Gawron, *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court* 225 (Berghahn Books, 2002).

¹⁸ *Id.*

¹⁹ Wheeler, 23 *BYU J. Pub.L* at 87 (cited in note 16).

²⁰ *Id.*

The relationship between the Constitutional Court, the government, and the legislature in judicial review

Conceptually, it is the duty of the legislature to pass the laws, the duty of the executive to carry out those laws and the duty of the court to interpret and enforce the laws. In judicial review, the court is the primary actor. It examines the validity of the law made by the government and the legislature, and determines whether the law is in line with the Constitution. If the court declares a law is unconstitutional, the government and the legislature, as the lawmakers and administrators, are expected to follow up the court rulings by revising the law or changing its implementation.

When it comes to implementation, the court's primary role has ended. It does not have a significant physical power to ensure the implementation of its rulings. The government and the legislature as the lawmakers play the major roles at this stage. Whether or not the court rulings will be appropriately carried out depends on the will of the government and the legislature to respond positively to the judicial decisions.

In understanding judicial implementation that involves other branches of government such as the executive and the legislature, it is important to know how this legal enforcement process works. One may think that when a judicial decision has been declared, other branches of government will automatically follow up and carry out that decision. This is not always the case in practice. Court rulings are not always treated as sovereign commands when it comes to

the implementation.²¹ After the court has rendered its decision, it would typically let the implementing agencies follow up. The implementing agencies would find whether the court decision was in fact executable. It is the interest of the court and the implementing bodies to maintain a non-confrontational relationship. This good relationship may give positive impact to the effective implementation of the court decisions.

However, tensions may occur when court opinions are significantly at odds with the desire of the executive and the legislature. The implementing agencies' preferences affect compliance. Agencies that support judicial decisions enough will faithfully implement the court decisions.²² Those that strongly opposed to those decisions will ignore or resist its enforcement whenever and wherever possible.

Sometimes the implementation of judicial decisions is different from the court's intention. A court has limited capacity to control the implementation process. It does not possess 'the sword and the purse.'²³ It is also possible that the court decisions may be unclear, incomplete, or contradictory. This is because an actual case and the evidence presented to the court might be very specific and not amenable to a decision that is clear, coherent, and generalizable. As a result, while the court ruling may be appropriate for that particular case, it may not necessarily serve as a guide to all cases. This may create difficulty on how the implementing bodies will follow up a court decision.

²¹ Martin M. Shapiro, *The Supreme Court and Administrative Agencies* 271 (Mac Millan 1968).

²² *Id.*

²³ Alexander Hamilton, Federalist Paper No. 78. Archived http://avalon.law.yale.edu/18th_century/fed78.asp. Accessed 31 October 2017. See also Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986).

Sometimes court rulings limit the party who will implement these rulings, how it is done, and with what resources. In Indonesia, when a petitioner questions the constitutionality of a statute to the Constitutional Court, the Court often asks the government and the legislature to explain the history of a statute to obtain more perspective about the statute. If the Court decides that the law is unconstitutional, then the government and the legislature are expected to follow this ruling, which is contrary to the position they had defended for months or even years.

Lawmakers may respond the court decision differently. As Johnson and Canon stated, lawmakers may decide to accept or decline court decisions.²⁴ But it is possible that they may find ways to meet the court decisions and also ways to circumvent them. Or they might implement court decisions and at the same time retain as many of the lawmakers' goals as possible.²⁵ The likelihood of a court becoming involved in enforcing its decisions is likely based on the response of the lawmakers. If the lawmakers do not put significant effort into complying with the court decisions, the court likely will have to act, through subsequent rulings, to ensure the implementation of the court rulings. Public support may also influence the implementation of the court decisions. The greater public support to implement a court's decision, the more influential and effective a court will be.

Legislation on the implementation of the Constitutional Court rulings

There is no Indonesian legislation that specifically regulates the implementation of the Constitutional Court rulings. There are, however, some laws and regulations that indicate how

²⁴ Johnson and Canon, *Judicial Policies* at 80 (cited in note 4).

²⁵ *Id* at 80.

the Constitutional Court's decisions are to be enforced or followed up. Law 12/2011 on the Formulation of Legislation briefly stipulates that the content of statutes, among other things, is meant to respond to the Constitutional Court rulings.²⁶ In addition, it also stated that implementation of the court rulings was to be carried by the President and the DPR.²⁷ Law 12/2011 was further elaborated by the Presidential Regulation 87/2014 and the DPR Regulation 1/2014, which stipulate that the President and the DPR would establish a law to implement a Constitutional Court decision, even if the content of this law is not listed in the then-current National Legislation Program.²⁸

While the laws and regulations mentioned above indicate that the follow-up of a Constitutional Court decision must be in the form of law, there are other views to the effect that stated that the Court decisions are not necessarily to be followed up in the form of a statute.²⁹ Some court decisions are self-executing because the nature of the specific decision is declarative.³⁰

In this regard, former Constitutional Court Justice Dr. Maruarar Siahaan underlines, "the constitutional court decisions on judicial review can be categorized into self-implementing and

²⁶ Art 10 of Law 12/2011. The content of laws aims to (1) implement the provisions of the Constitution, (2) implement the provision of Laws, (3) ratify the international treaties, (4) implement the decisions of the Constitutional Court, (5) fulfills societal legal need.

²⁷ Art 10 (2) of Law 12/2011.

²⁸ The National Legislation Program is a list of titles of bills that would be considered by the President and the DPR for one year and five years period. This list is mutually agreed by the President and the DPR.

²⁹ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi*, (MKRI 2006). See also Muchamad Ali Safa'at, *Kekuatan Mengikat dan Pelaksanaan Putusan MK*, archived at http://www.academia.edu/6376661/Kekuatan_Mengikat_dan_Pelaksanaan_Putusan_MK (accessed 3 November 2016).

³⁰ *Id.*

non-self-implementing decisions.”³¹ The self-implementing decisions mean that the Court’s decisions are fully be effective without further follow-up such as the amendment of a law. He further explains that once the Court has declared the provisions of a statute are inconsistent with the constitution and invalidated those provisions, the Court decision can be enforced.³² This means the provisions of the law that were invalidated by the Court cannot be used in legal proceedings regardless of whether or not a replacement statute has been enacted.

The requirement to follow up on the Court decision with a statute has significant consequences. On the one hand, a Constitutional Court ruling has an immediate effect. After the Court renders a decision declaring that a law is inconsistent with the constitution, the provisions of the law became invalid. On the other hand, the process to carry out the Court’s decision, i.e. to revise the law or to introduce a new law, often takes substantial time. As a result, there is a possibility that there will be a legal vacuum between the time when the court delivers its decision and the time when the lawmakers revise a law or enact a new law.

Problems may occur if the impact of the Court decision is immediate and significant. It likely creates confusion and uncertainty if the executive and the legislative branches do not promptly respond to a Court ruling. To accommodate this delay, in practice the government often issues a government regulation or a presidential regulation to help adjust to the Court ruling. These regulations can be unilaterally formulated by the government without parliament’s approval. Some believe that the Court’s rulings should be followed up with revision of a statute

³¹ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* “The Procedural Law of the Constitutional Court of Republik Indonesia” 242 (Setjen dan Kepaniteraan MKRI, 2006).

³² *Id.*

or enactment of a new statute, and not issuance of a government regulation,³³ because the Court invalidates a statute and not a regulation.

Some challenges in enforcing the Constitutional Court decisions

The implementation of Indonesian Constitutional Court rulings is not a perfect process. The government and the legislature sometime fail to appropriately follow up on a Court's ruling even though the Constitutional Court decision is final and binding. On one occasion, the first Chief Justice of the Indonesian Constitutional Court, Prof. Jimly Asshiddiqie, sent a letter to President Susilo Bambang Yudhoyono, when the government responded to the Court's decision on Oil and Gas Law by issuing Presidential Regulation 55/2005.³⁴ The Chief Justice stated that the issuance of this Presidential Regulation was clearly not in line with the Court's decision.³⁵ Asshiddique wrote that the proper response to a Constitutional Court decision should be in the form of a statute, not a presidential regulation which hierarchically has lower status than a properly enacted statute.³⁶ This event illustrates that the Constitutional Court decisions sometimes have not received a proper response from the government and the legislature, even though the nature of the Constitutional Court decisions are meant to be final and binding. Lumbuun noted that there were some court decisions such as the Court Decision 001/PUU-I/2003 and 022/PUU-I/2003 on Electricity law and Court Decision 002/PUU-I/2004 on Oil and

³³ Topane Gayus Lumbuun, *Tindak Lanjut Putusan Mahkamah Konstitusi Oleh DPR RI*, "The Follow-up of the Constitutional Court Decisions by the DPR (the national parliament)" 6 (3) *Jurnal Legislasi Indonesia* 493, 495 (2012).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 495-496.

Gas Law that have not been appropriately followed up by the government and the legislature.³⁷

My interview with one key official in the national parliament (the DPR) confirmed: “there is no provision in the DPR internal regulation which specifically regulates how to follow up on the Constitutional Court’s decisions.”³⁸ This means, he stated, that the mechanism to follow up the constitutional court decision is similar to the mechanism to establish a law, even if the Constitutional Court only invalidated a few articles of a statute.³⁹

This mechanism poses another challenge for the implementing agencies to appropriately implement a constitutional court decision. There are several steps that should be followed by the government and the parliament to establish laws such as preparing the academic draft, formulating a draft of the bill, first reading, second reading, approving the bill by the government and the DPR, to ratifying the law by the President.

In addition, when the DPR discusses a bill to follow up on a constitutional court decision, it should not just focus on the provisions that had been invalidated by the court, but also other provisions of the law. As stated by one official of the DPR, “there is a tendency that the discussion is not only limited to the provisions that were invalidated by the court but also other provisions of the law.”⁴⁰ This situation often delayed the process to follow-up the court rulings.

³⁷ Id at 495.

³⁸ Interview with Mr. Rudi Rochmansyah, an official in charge in monitoring the implementation of laws in the DPR May 19, 2016.

³⁹ Id.

⁴⁰ Interview with Mr. Rudi Rochmansyah, May 19, 2016.

The Constitutional Court techniques in dealing with economic and social rights cases

When delivering his speech during Constitution Week at Bali's Udayana University in 2016, Chief Justice of the Constitutional Court, Prof Arif Hidayat, acknowledged the challenge of implementing constitutional court rulings. He identified three factors that lead to difficulties in enforcing Constitutional Court rulings.⁴¹ First, he said, the Court does not have the resources to enforce its rulings. Second, the Court must depend on other government branches in enforcing its decisions. And last, the implementation of the court rulings requires a collective consciousness and collaborative actions among government branches.⁴² Other justices⁴³ have shared the view with the Chief Justice that the court depends on the government and the legislature in enforcing its rulings.

The Chief Justice further stated that the Constitution is the key to overcome this difficulty. However, he did not elaborate how the provisions of the Constitution could overcome this problem. From his speech, it is likely that the provisions of the Constitution that govern the responsibilities of the government branches and the relationship among them may help the court to overcome this challenge. By determining the responsibilities of each government branch and

⁴¹ *Ketua MK: Konstitusi Kunci Utama Menjalankan Putusan MK* (Chief Justice of the Constitutional Court: The Constitution is the primary key to implementing the Court Rulings) at 6 September 2016, archived at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=13285&menu=2#.V85LoMXHv6Q>.

⁴² *Id.*

⁴³ Justice Harjono, Justice Maruarar Siahaan, Justice Ashiddiqie, Justice Mahfud MD. Their opinion on this matter is reflected in their book, their scholarly articles, and interview. Justice Harjono, *Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Republik Indonesia* 4 Jurnal Legislasi Indonesia 2012. Justice Harjono, *Konstitusi Sebagai Rumah Bangsa: Pemikiran Hukum Dr. Harjono, S.H., M.C.L. Wakil Ketua MK* (Konpress, 2008), Justice Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi* (Konpress 2005), Justice Ashiddiqie, *Menegakkan Tiang Konstitusi: Memoar Lima Tahun Kepemimpinan Prof. Dr. Jimly Asshiddiqie S.H. di Mahkamah Konstitusi (2003-2008)* (Konpress, 2008), Justice Mahfud MD, Rita Triana Budiarti, *Biografi Mahfud MD, Terus Mengalir*, (Konpress, 2013). Former Constitutional Court Justice Mahfud MD shared this view when I interviewed him in Yogyakarta Mei 10, 2015.

the relation among government branches in the constitution, each branch has clear mandates and is constitutionally responsible for carrying out its constitutional responsibilities. Having said that, the DPR and the government, which constitutionally have the duty to establish law, should carry out their duty whether or not the Court ordered them to do so.

The implementation of the Court's decision is often based on the political will of the government and the legislature. However, the implementation of a decision also partly depends on how the Court has formulated its ruling. What was written in the Court's opinions often become the reference or the guidance of the implementing agencies when they follow up the court decisions. The Law on the Constitutional Court stipulates that a Court decision should contain a declaration as to whether a law was consistent with the constitution. If the Court rules that a law was inconsistent with the constitution, the Court must declare the law null and void.⁴⁴

In practice, the Constitutional Court has developed four different techniques which may influence the implementation of its rulings. These techniques include (1) the declaration of law being null and void, (2) the declaration of a law's incompatibility with the constitution, (3) a judicial order directed to the lawmakers, and (4) a statement upholding a statute but requiring the lawmakers to interpret the law in conformity with the court's interpretation.⁴⁵

The null-and-void decisions are the Court rulings that are officially recognized by both

⁴⁴ The Law on the Constitutional Court. Art. 56 of Law 24/ 2003.

⁴⁵ Simon Butt, *Indonesia's Constitutional Court: Conservative Activist or Strategic Operator?* in Bjorn Dressel (ed) *The Judicialization of Politics in Asia* 98–116 (2012). See also Thomas Gawron and Ralf Rogowski, *Implementation of German Federal Constitutional Court Decisions: Judicial Orders and the Federal Legislature* in Thomas Gawron and Ralf Rogowski (eds) *Constitutional Courts in Comparison: the U.S. Supreme Court and the German Federal Constitutional Court* 239-256 (2002).

the Law on the Constitutional Court and the Constitution. The Constitutional Court has the express constitutional power to nullify the provisions of the law if they are held to be inconsistent with the Constitution. When the Court declares that some articles of the law are invalid, these articles were no longer legally binding. As a result, the law becomes incomplete. This situation often leads to a legal vacuum and confusion.

To minimize this consequence, Indonesia's Constitutional Court introduced a new type of decision, i.e., a declaration of incompatibility with the Constitution. The Court declares that a law is incompatible with the Constitution but it does not invalidate the statute concerned. This way, the court sends a message to the lawmakers that the law is inconsistent with the Constitution and expects that they would follow up the Court decisions. For example, the 2005 Court decision on the Budget for Education⁴⁶ declared that the 2004 Annual Budget Law, which allocated 12 percent the budget for education, was inconsistent with the Constitution. The Court, however, did not invalidate that statute. Instead, the Court gave an opportunity to the lawmakers to comply with the Court's ruling in the next annual budget. Unlike the null and void decision, the incompatibility declaration does not invalidate the law. As a result, there is no legal vacuum.

Sometimes, the Court rulings set a deadline how long the law or the provisions of the law will still be treated as constitutional. This means that the government and the legislature are expected to respond to the court rulings before the deadline otherwise the law or the provisions of the law would be considered unconstitutional. For example, the Court decision on judicial review of the Law 30/2002 on Anti Corruption Commission (2002 KPK Law) declares that

⁴⁶The Decision of the Constitutional Court No. 12/PUU-III/2005 at. 61.

Article 53 of this Law is inconsistent with the Constitution.⁴⁷ In addition, the Court determines that Article 53 remains valid and legally binding until it is revised (by the lawmakers) within three years at the latest since the Court rendered this case.⁴⁸

This type of decision warns the lawmakers that the law will be unconstitutional in the future unless the lawmakers revise the law in question. This method maintains the dialogue between the Court and the lawmakers and provides flexibility for the lawmakers to follow up the court rulings. For others, setting a deadline means limiting the lawmakers in implementing the court rulings.

In some cases, the Court rulings order the lawmakers to comply with the Court guidance in order to maintain the constitutionality of the statute in question. In the Water Resources Law case,⁴⁹ the Court ruled that the Law was conditional if the lawmakers took into account the Court's six-point guidance in enacting the regulations derived from Water Resources Law.⁵⁰ In this type of decision, the Court provided direction to the government and stated that the law would remain constitutional if the government satisfied the court's guidelines. If not, the law would be deemed unconstitutional. There has been some criticism regarding this type of decision. For some, this Court ruling went too far beyond the Court's original powers. Critics suggest that the Court has the power to apply the law to the case but it does not have the power

⁴⁷The Decision of the Constitutional Court 012-016-019/PUU-IV/2006 at. 290.

⁴⁸Id.

⁴⁹The Decision of the Constitutional Court 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005.

⁵⁰Id at 492-95.

to guide the legislature in how to follow up upon the Court's rulings.⁵¹

In other cases, the Court has provided specific interpretations of the provisions of the law, thus effectively reshaping the statute. For instance, the Court decision on the BHP Law⁵² declared that the educational legal entity (the BHP) approach would remain constitutional if it were interpreted as a function and not as an institution as stated in the law. As reflected in that case, the Court's interpretation could be different from the original intention of the lawmakers. The Court was able to do this in part because the provisions of the law were somewhat abstract or unclear. The Court's interpretation of the statute's provisions resulted in these provisions remaining valid. The Court often then requires that the legislature and executive follow the judicial interpretation. If not, the law would then be deemed as unconstitutional.

The Court's above-mentioned techniques can be explained using Young's typology of judicial review. The null-and-void decision closely reflects the preemptory stance of judicial review. In the null-and-void decisions, the court declares a statute is consistent with the constitution or is inconsistent with the constitution. Similarly, in a preemptory stance the Court invites either overturn or uphold a statute. In both approaches, the court is superior in controlling the realization of economic and social rights. It does not provide much room for the executive, legislative, and the court, to negotiate in the realization of economic and social rights.

The Court's declaration of incompatibility largely resembles a conversational stance or

⁵¹ hukumonline, Sepuluh Rambu Hakim Konstitusi ala Profesor Mahfud "The Ten Guides of the Constitutional Court Justices" archived at <http://www.hukumonline.com/berita/baca/hol18749/sepuluh-rambu-hakim-konstitusi-ala-profesor-mahfud> accessed at 5/19/2017. See also Rita Triana Budiarti, *Biografi Mahfud MD: Terus Mengalir "The biography of Mahfud MD: Continue flowing"* (Konstitusi Press Jakarta 2013).

⁵² The Decision of the Constitutional Court No. 021/PUU-IV/2006.

an experimental stance. The court decisions when applying in these three methods do not automatically invalidate the relevant statutes. They instead provide an opportunity for the legislative, the executive, and the government to discuss the implementation of the court decision.

The Court rulings that provide guidance or a certain interpretation are similar to a managerial stance. In both approaches the court examines the government action in implementing the court ruling. It goes beyond a conversational stance. The court supervises the government action by providing guidance or a particular interpretation, to ensure the implementation of the court ruling.

Apart from the four techniques mentioned above that are used to shape the Court's ultimate orders in various cases, there are two types of court decisions that determine how the court rulings are enforced i.e. self-executing decisions and non-self-executing decisions. Self-executing decisions mean that once a court issues its opinions, there is no further action necessary to implement the court rulings. If a court declares a provision of a law unconstitutional and the government believes that such declaration does not significantly impact the law as a whole, the government might not revise or establish a new law that is similar to the one invalidated.

The non-self-executing decisions need other branches of government, i.e. the executive and the legislature, to implement the court decisions such as to revise the law or to establish a new law. For example, if the court rulings contained certain conditions, such as conditionally constitutional decisions, conditionally unconstitutional decisions, or if the court decisions are

likely created a legal vacuum, follow-up by the legislature or if the government is likely necessary.

The implementation of the Constitutional Court rulings on judicial review cases related to economic and social rights

The following part will examine the implementation of the court decisions related to the right to education and the right to social welfare (state control over natural resources). It will specifically analyze the Court's decisions and the response of the executive and the legislature toward the Court's rulings. The analysis will utilize Katharine G. Young's typology of judicial review. Young's typology provides a spectrum on how the court enforces economic and social rights ranging from deferential stance to peremptory stance.

It seems that in practice, the Constitutional Court utilizes several different techniques in adjudicating economic and social rights. In addition, the legislature and the executive also responded the Court rulings in various ways. It appears that the Court decisions and the government's response toward the court rulings were closely related. Some court rulings were promptly implemented by the other branches, other court decisions were not. What explains these different attitudes of the legislature and the government in responding the court decisions?

Do the Constitutional Court justices anticipate the legislature's and the government's possible responses when they deliver decisions? On the legislature and the government side, do they consider the cost of compliance when responding the court decision? Is the Constitutional Court more deferential when the cost of compliance for the legislature and the government high?

Or is the Court more superior when the cost of compliance is relatively low?

Judicial Implementation on the right to education

Budget for Education case: From conversational to managerial

The analysis of Court decisions on the education budget is important for two reasons. On the Court's side, it explains how and why the Court decisions moved from a peremptory, to a conversational, to a managerial stance. On the implementing agencies' side, it clarifies why the legislature and the government reluctantly responded these Court rulings. These cases also show how the Court, as a primary actor in adjudication, could not control its implementation even though it tried to cause the lawmakers to implement its rulings. In these cases, the Court eventually modified its rulings to be more palatable for the lawmakers and more readily implemented.

As explained in Chapter 4, the first Court ruling on the *National Budget Case*⁵³ determined that the fulfillment of the constitutionally-required twenty percent budget for education, should be carried out at once.⁵⁴ This meant that the education budget could not be increased incrementally. In examining this case, the Court largely relied on the text of the Constitution which required the government to prioritize at least 20 percent of the national budget for education.

This decision seemed did not consider the government's practical challenges in

⁵³The Decision of the Constitutional Court No. 011/PUU-III/2005.

⁵⁴Id.

reallocating the existing national budget. The Court also did not anticipate the cost of compliance of the government in order to follow up this ruling. As a result, while the government increased the budget for education, that increase did not meet the Court's requirement. In its subsequent decisions,⁵⁵ the Court declared that Law on National Budget was inconsistent with the Constitution because the education portion did not reach 20 percent. However, the Court did not nullify this law. The Court seemed instead to consider the challenges of the government in fulfilling its ruling. By declaring the law inconsistent with the Constitution and at the same time maintaining its validity, the Court expected that the lawmakers would have sufficient time to respond to the court rulings i.e. revising Law on National Budget. The majority wrote, "Invalidating the provision of the law would result in the chaos in financial administration and therefore the revision of the law provisions should be conducted for the next annual budget."⁵⁶

Applying Young's typology, the Court's first ruling resembled a peremptory stance. A peremptory stance assumes that the court controls the realization of economic and social rights. The Court decision either invalidates or upholds the law. Similarly, in this case, the Court's edict directed the realization of the education budget by declaring that the 20 percent budget for education must be implemented at once. This decision did not allow the Court and the lawmakers to discuss the realization of economic and social rights.

The Court's subsequent decisions reflected a more conversational stance among the Court, the executive, and the legislature. The conversational stance presumed that in

⁵⁵The Decision of the Constitutional Court 012/PUU-III/2005; the Decision of the Constitutional Court 026/PUU-III/2005; the Decision of the Constitutional Court 026/PUU-IV/2006.

⁵⁶ *Id.*

implementing economic and social rights, there was to be an interbranch dialogue between the Court, the government, and the legislature. The implementation of economic and social rights was negotiated between the court and the elected branches. In Young's words, "dialogic interaction may arise if the court issues a suspended declaration of invalidity."⁵⁷

Likewise, in this second case, the Court through its ruling conveyed to the legislature that the budget law with less than 20 percent for education was inconsistent with the Constitution. The Court, however, declined to invalidate the law but instead suspended a declaration of invalidity and provided time and opportunity for the lawmakers to revise the education provisions in the next annual budget. The Court expected that the legislature would follow up on this ruling. The legislature responded the decision by issuing a new annual budget which increased the budget for education. The lawmakers, however, did not adequately respond to the court rulings. While the lawmakers increased the percentage of the budget for education, it did not reach 20 percent as required by the Court. In subsequent years, there were similar petitions submitted to the Court that questioned the allocation of budget for education which did not reach 20 percent. The Court again declared that the gradual increase of budget for education was not in line with the Constitution.

Knowing that the legislature's response did not satisfy the Court's decision, through its 2008 decision the Court set a deadline for the lawmakers to fulfill 20 percent budget for education. This Court ruling now mirrored Young's managerial stance. The managerial stance suggests that the court has scrutinized a government action and "called on the state to account for

⁵⁷Young, 8 (3) Int J Constitutional Law 385 (2010) (cited in note 2).

the implementation of the plan at later, assigned dates....”⁵⁸ The Court’s suspended declarations can be seen as a reflection of a managerial stance. It required supervision that goes beyond the reciprocal stance of conversational review.⁵⁹ Likewise, in this instance, the Court tried to closely supervise the implementation of its decision by setting a deadline for the legislature in fulfilling the court requirement.

These series of court decisions on the education budget showed how the court moved in turn from peremptory, to conversational, to managerial stances. In its initial decision, the Court set a rule that should be followed up by the lawmakers. In its subsequent rulings, the Court sent a message to the legislature that the law was inconsistent with the constitution because it did not comply with the court’s previous ruling. However, the Court maintained the validity of the law until the lawmakers comply with the court ruling in its next annual budget. The Court expected a positive dialogue with the legislature in revising the law because this ruling provided time and opportunity for the lawmakers to revise the law so that it comply the Court’s decisions.

The Court did not see that the legislature was fully committed to following up on the judicial rulings. The lawmakers did not reach 20 percent budget for education. As a result, in its subsequent ruling, the Court employed a managerial stance by setting a deadline for the legislature to comply the Court decision after knowing that the legislature did not satisfy its previous rulings.

There are some plausible explanations why in these cases the lawmakers did not

⁵⁸ *Id.*
⁵⁹ *Id.*

promptly follow up the Court rulings. First, the Court's initial decision required the government and the legislature immediately to reallocate the national budget. Given that the existing budget for education was slightly over 10 percent, increasing the education portion to 20 percent was a huge step.⁶⁰ This budget reallocation was not a simple thing to do especially because the government understood that there were many other important needs that required significant financial resources. Adding budget resources in one area likely meant reducing the budget in other areas.⁶¹ As mentioned by the Minister of Finance Sri Mulyani Indrawati when she explained how the government would comply with the Court ruling, "there are several posts that would have to be eliminated to fulfill the 20 percent budget for education."⁶²

Second, the fact that the Court rulings in this case were not unanimously decided by all Constitutional Court Justices, added another important factor enabling the legislature to delay the follow-up of this decision. For example, one of the dissenters, Justice Ahmad Roestand, stated that a gradual increase of the budget for education did not contravene the constitution.⁶³ He agreed with the government argument that gradual increase of education budget did not necessarily conflict with the Constitution because the Constitution did not specify how the 20

⁶⁰The Decision of the Constitutional Court 026/PUU-IV/2006 at 93.

⁶¹Tim Penyusun, *Ikhtisar Putusan Mahkamah Konstitusi 2003-2008* (Resume of the Constitutional Court Decisions 2003-2008) 502 (Setjen dan Kepaniteraan MKRI 2008).

⁶²Menkeu: Pemerintah Patuhi Putusan MK, Anggaran Pendidikan 20 Persen (Minister of Finance: the government to comply with the Constitutional Court Ruling, 20 percent budget for education) *Kompas* August 14, 2008. Archived at <http://www.antaraneews.com/berita/112838/menkeu--pemerintah-patuhi-putusan-mk-anggaran-pendidikan-20-persen> (accessed at April 20, 2017).

⁶³Tim Penyusun, *Ikhtisar Putusan Mahkamah Konstitusi 2003-2008* at 496 (cited in note 61). See also *The Decision of the Constitutional Court No. 011/PUU-III/2005*. P. 105.

percent budget for education should be achieved by the government.⁶⁴ In addition, three other dissenting Justices (Justice Natabaya, Justice Achmad Roestand, and Justice Soedarsono) stated that there was no constitutional damage by the issuance of the national budget law.⁶⁵ The dissenters' opinions in this case could have been an important factor in the legislature's delay in implementing of the court decision.⁶⁶ This was echoed by a former Member of Parliament, Gayus Lumbuun, who said, "dissenting opinions presented by some Justices on the court ruling may be controversial. Court decisions that were controversial and created public criticism of the content of the court decision could have been an important factor for the legislature in following up on the Court ruling."⁶⁷

Third, the fact that the government had set a five-year plan to satisfy the 20 percent requirement likely influenced how the government would comply with the court rulings.⁶⁸ In the court proceeding, the government explained its annual plan to fulfill the 20 percent requirement, which had been approved by the parliament. It showed the gradual increase of the budget for education from 2004 to 2009. This annual budget plan indicated the government plan and commitment to fulfill 20 percent budget for education. On the government side, enforcing the Court decisions at once would be difficult for the government because it would have to revise its plan and seek approval from the parliament.

⁶⁴ Id.

⁶⁵ Id. See also The Decision of the Constitutional Court No. 011/PUU-III/2005 at 103.

⁶⁶ Lumbuun, 6 (3) Jurnal Legislasi Indonesia 493, 502 (cited in note 33).

⁶⁷ Id at 502-03.

⁶⁸ The Constitutional Court Decision 012/PUU-III/2005 p. 40. The Government explained its plan regarding the fulfillment of 20 percent budget for education. In 2004 budget for education would increase to 6.6%. In 2005, 9.3%. In 2006, 12%. In 2007, 14.7%, In 2008, 17.4%, In 2009, 20.1%. This plan has been discussed with the parliament to be included in the annual budget.

Fourth, the fact that the increase in the education budget never reached 20 percent led the Court eventually to modify its opinion in subsequent rulings. Ultimately, the Court included the salary of educators in calculating 20 percent budget or education.⁶⁹ This adjustment significantly narrowed the gap between the existing budget for education and the 20 percent budget requirement. This way the court made it easier for the government to achieve 20 percent budget for education as required by the Constitution.⁷⁰ The government finally responded this ruling by enacting an annual national budget which fully allocated 20 percent budget for education in 2009, right on the constitutional target.

The BHP case: Peremptory stance?

In this case, the Court granted a conditionally constitutional decision declaring that the BHP (education legal entity) as an entity was inconsistent with the Constitution.⁷¹ The Court further stated that the law would remain constitutional if the BHP were interpreted as a function of education and not as an entity. The Court decision also provided guidance for the legislature so that the new law would be in line with the Constitution. This ruling largely reflects the Court's adoption of a peremptory stance. The Court invalidated the law because it found that the law was inconsistent with the Constitution.⁷² But at the same time, peremptory stance was also seen when the Court upheld the law as reconceptualized i.e., with an appropriate amendment.⁷³ In this

⁶⁹The Decision of the Constitutional Court 24/PUU-V/2007.

⁷⁰ Id.

⁷¹The Decision of the Constitutional Court No. 021/PUU-IV/2006.

⁷²Young, *Constituting Economic and Social Rights* at 162 (cited in note 2).

⁷³ Id.

instance, the Court provided clear guidance to the government how to follow up on the Court's decision. This ruling in fact affected the constitutionality of the BHP law, particularly on the status of BHP as an educational legal entity.⁷⁴

The Court anticipated that the government and the legislative would implement this decision by revising or enacting a new law that complied the court guidance. On the government side, there was a need to promptly follow up on the ruling.⁷⁵ This was largely because there was no equivalent law in place after the court invalidated the BHP law. The absence of a workable statute would likely create confusion for the eight universities that operated under this law. The government's quick response is illustrated by President Yudhoyono's instructions to the Minister of National Education to find a solution within a week.⁷⁶ The government planned to issue a government regulation to substitute the invalidated law--not revising or establishing a new law.⁷⁷ The rule-making approach was chosen because doing so was much faster than enacting a new statute, which needed parliamentary approval. This also avoided the uncertainty that may occur because of the absence of equivalent law in place.

The government acted by issuing Government Regulation (PP) No. 66 of 2010. This regulation explicitly referred to the court decision on BHP.⁷⁸ This PP provided that the state

⁷⁴ Aregas Desafti Hapsari, *Court Revokes Education Entities Law*, the Jakarta Post 1 April 2010; Kompas, *UU Badan Hukum Pendidikan Dibatalkan* 1 April 2010; Media Indonesia, *MK Putuskan UU BHP Inkonstitusional* 1 April 2010

⁷⁵ Seputar Indonesia, *SBY Instruksikan Cari Solusi UU BHP*, (SBY Instructed to Find Solution for Law on the BHP) 6 April 2010.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ The consideration of PP 66/2010 stated, "...based on the decision of the Constitutional Court 11-14-21-126-136/PUU-VII/2009, Law 9/2009 was declared null-and-void".

universities that had implemented BHP should return to the previous system within three years.⁷⁹ It also stated that in returning to the previous system, these universities should take into account the Court decision on the BHP. Taking into account the Court decision was important to maintain the constitutionality of this regulation. Otherwise, the Court would conduct further review if this regulation did not comply with the Court ruling.

Three years after the invalidation of the BHP law, the lawmakers passed Law 12/2012 on Higher Education to further align the higher education system with the court decision. The BHP case showed how the executive could promptly respond to a court decision that invalidated a statute. The government issued the government regulation in the same year as the court action, and there are some reasonable explanations why the government did so.

First, since the drafting of the BHP law, there was a significant resistance from civil society regarding the content of this law.⁸⁰ They believed that this law would lead to the liberalization of education. They also asserted that it reduced the government's duty to fund education. As a result, soon after this law was enacted, some lecturers, students, NGOs, and some private universities filed petitions to the Constitutional Court arguing that this law was not in line with the Constitution.⁸¹

The petitioners argued that the BHP law had significantly increased the cost of education.

⁷⁹ Article 220A Government Regulation 66/2010.

⁸⁰ Nurdin, *Pro Kontra Undang-Undang BHP Dalam Konteks Mutu Pendidikan "Pros Cons Law on BHP in Quality of Education Context"* 9 (1) *Jurnal Administrasi Pendidikan* 34-50 (2009). See also Satya Arinanto, Makhfud, Rofiqul Umam Ahmad, Abdul Wahab, *Ekseminasi Putusan Mahkamah Konstitusi Terkait Dewan Perwakilan Daerah Republik Indonesia "Examining the Decision of the Constitutional Court in relation with the Regional Representatives Council"* 53 (DPD RI 2015).

⁸¹ *Id.*

This law also tended to dismiss the state duty to provide good and affordable education for all. The resistance of civil society regarding this law seemed to put more pressure on the government to find an alternative to substitute this law. As a result, once the court invalidated the BHP law, the government promptly responded to the court ruling.

Second, it is also likely that because the BHP law was the primary legal basis for the management of higher education, the invalidation of this law led to the elimination of any statute regulating higher education. This legal vacuum created confusion for some universities that had transferred their institutional status to the PT BHMN.⁸² This uncertain situation forced the government to issue regulatory guidance for these universities. There was no benefit for the government to delay the implementation of Court decision. Rather, there would possibly be a significant impact and cost if the government delayed the implementation of the court decision such as the confusion of some public universities, which would disturb the operation of those universities.

The Education right cases: Analysis and conclusion

The Constitutional Court decisions on the right to education show that the Court utilized various approaches when it decided cases related to this right. The Court's approaches and the response of the implementing agencies seem closely related. There are some explanations as to why the court used different approaches in the right-to-education cases.

In the budget for education cases, the Court initially adopted a peremptory stance by

⁸² Perguruan Tinggi Setelah UU BHP Dibatalkan "Higher Education After the Invalidation of Law on BHP" archived at <http://news.kompas.com/read/2010/04/08/15443223/ Perguruan.tinggi.setelah.uu.bhp.dibatalkan>.

declaring that the 20 percent budget for education should be fulfilled at once. In its subsequent rulings, the Court changed this approach to a conversational stance by suspending the declaration of invalidity. The Court took into account the government's difficulty in achieving the court rulings if the court were to have adopted a peremptory stance. However, the government did not appropriately follow up the court decisions. As a result, the Court shifted to a managerial stance by setting a deadline for the government fulfilling the court decision. These cases showed how the court used several different approaches in deciding cases which had a significant impact on the government. The court used these evolving approaches so that its decisions would be more palatable for the lawmakers and would be more readily implemented.

On the government side, these cases illustrated how the government responded to the court decisions if doing so would lead to a significant cost. There was an obvious tendency for the government to delay in implementing the Court's ruling. The government tried to gradually increase the percentage of the budget for education --not at once as the court ruling mandated. In its subsequent decisions, the court declared that the law on the budget for education was inconsistent with the constitution. However, there was no significant response from the government to the court rulings. As a result, the court modified its ruling so that the implementing agencies would be more likely to satisfy the court rulings. The BHP law case illustrates that the government would respond to the court ruling promptly if doing so would avoid the negative impact of the government in advancing its policy. The Court decision which invalidate the BHP status force the government to introduce a new regulation to replace the BHP. This regulation is important to avoid legal uncertainty.

Judicial implementation of the constitutional right to social welfare in the national resources context

The following part will analyze the court rulings in the *Electricity Law* case, *Water Resources Law* cases, and *Oil and Gas Law* cases through the lens of Katharine G. Young's analytical framework. It will analyze whether the court rulings in these cases reflected one or more of Young's stance categories: deferential, conversational, experimental, managerial, or peremptory. This part will also explain why the court utilized these various approaches. In addition, it will also analyze how the government and the legislature responded the court rulings to understand whether the government and the legislature were consistent in following up the court rulings.

The Electricity Law case: A peremptory stance

In the *Electricity law case*,⁸³ the Court declared that some provisions of Law on Electricity were inconsistent with Article 33 of the Constitution, which mandates that the state must control important sectors.⁸⁴ The Electricity Law allowed an unbundling practice⁸⁵ and also

⁸³The Decision of the Constitutional Court 001/PUU-I/2003, 021/PUU-I/2003, and 022/PUU-1/2003.

⁸⁴ Art. 33 (2): Sectors of Production which are important for the country and affect the life of the people shall be under the powers of the State. (3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.

⁸⁵ Unbundling practice means that activities in providing the electricity were carried out by several companies. For example, the production of electricity was carried out by one company. The distribution of the electricity was conducted by different company. Article 8 of Law on Electricity defines unbundling as activities related to plan (usaha pembangkitan), transmission (transmisi), distribution (distribusi), sale (penjualan), distributor (agen

permitted the national and foreign enterprises to participate in electricity production, regardless whether they were invited by a state owned enterprise.⁸⁶ The Court was of the opinion that it reduced the state control on important sectors. The Court further stated, “These articles were the heart of the law.”⁸⁷ By the heart of the law, the Court meant that if these provisions were invalid, the remaining provisions of the law could not work as they should. Rather than invalidating these specific provisions which might leave the law less effective, the Court invalidated the law on electricity in its entirety.

To prevent a legal vacuum, the Court reinstated the old law (the 1985 Law on Electricity) giving the lawmakers breathing space to enact a new law. This decision showed that the Court was comfortable with its authority to interpret the provision of the law and ability to command and control how the implementation of the Court decision should be conducted. This was done by the Court by invalidating the law in its entirety, an action that exceeded the petitioners’ request.

In Young’s typology, this Court decision largely reflects a preemptory stance. A preemptory stance reflects judicial review that either strikes down or upholds the legislation.⁸⁸ It involves a thorough examination of the government legislation. If the Court finds a constitutional infringement, it overturns the legislation. Similarly, in this case, the Court rigorously scrutinized

penjualan), market manager (pengelola pasar), electric power management (pengelola sistem tenaga listrik).

⁸⁶The Decision of the Constitutional Court 001/PUU-1/2003, 021/PUU-I/2003, and 022/PUU-i/2003. P. 334. unbundling practice which means that activities in providing the electricity were carried out by several companies. For example, the production of electricity was carried out by one company. The distribution of electricity was conducted by different companies.

⁸⁷The Decision of the Constitutional Court 001/PUU-I/2003, 021/PUU-I/2003, and 022/PUU-1/2003.

⁸⁸Young, 8(3) Int J Constitutional Law 385 (2010) (cited in note 2).

the content of Electricity Law, particularly regarding whether the Law was consistent with Article 33 of the Constitution. It found a constitutional infringement and invalidated the statute.⁸⁹ Unlike a peremptory stance, in this case, the Court invalidated the Electricity Law in its entirety. The court acted as a “superior” court in Young’s typology, controlling the realization of economic and social rights by reinstating the old law to temporarily replace the 2002 Electricity Law, and leaving no legal vacuum. Thus, the immediate implementation of the Court ruling did not depend on the government’s response, and the Court’s ruling was self-executing.

With such a self-executing decision, the government, as an implementing agency, did not have to follow up the Court decision immediately. There was no urgent need for the government to establish or to amend the law because the court had reinstated the old law. There was no legal vacuum. However, it did not mean that the government did not intend to establish a new law reflecting its policy goals. In fact, within two months of the Court’s ruling, the government issued Government Regulation 3/2005 on the Provision and Exploitation of Electricity. Substantively, this government regulation appeared to be intended to reinstate of Electricity Law.⁹⁰ This way the government could advance its policy and at the same time it circumvented the Court’s decision. This is because the Constitutional Court does not have the authority to review government regulations. However, the issuance of the government regulation was criticized by the Court. The Court was of the opinion that the proper reponse of the cour ruling was enacting or amending a relevant statute –not issuing a government regulation. This is

⁸⁹The Decision of the Constitutional Court 001/PUU-I/2003, 021/PUU-I/2003, and 022/PUU-1/2003.

⁹⁰Peraturan Pemerintah Nomor 3 Tahun 2005 tentang Penyediaan dan Pemanfaatan Tenaga Listrik.

because the Court invalidated a statute not a government regulation.

Consequently, the government eventually followed up on this court decision in 2009 by enacting a new electricity law –Law 30/2009 (the 2009 Electricity Law). Similar to the 2002 Law and the 1985 Law, the 2009 Electricity Law regulated many aspects of electricity ranging from production to distribution. This statute was again submitted to the Constitutional Court⁹¹ for review. The petitioners argued that some provisions of this law implicitly opened the possibility for an unbundling mechanism. For instance, Article 10 (2) of the statute stipulated that efforts to provide electricity for the public could be conducted integrally. While the wording of this article seems to be positive towards an integrated mechanism, the petitioners argued that it implicitly did not prohibit unbundling system.

In the 2009 Electricity Law case, the Court rendered a conditionally unconstitutional decision. This meant Article 10 (2) would be unconstitutional if it were interpreted as allowing unbundling mechanism. Unlike the Court’s previous decision in 2003, in this case the Court did not invalidate the law in its entirety. Instead, the law deemed was constitutional if the Court’s condition was fulfilled. The Court’s conditionally unconstitutional ruling implicitly changed the interpretation of Article 10 (2). This was because the Court determined the constitutionality of this law based on its interpretation. If the law were not interpreted and implemented in line with the court opinion, the statute would be deemed unconstitutional. In this instance, the court applied a technique that required the government and the legislature to comply with the court interpretation. The Court wrote, “to avoid uncertainty and at the same time to guarantee a

⁹¹The Decision of the Constitutional Court 111/PUU-XIII/2015.

uniform interpretation and legal certainty, the Court must declare that Article 10 (2) Electricity Law will be inconsistent with the Constitution if this Article is interpreted that unbundling mechanism in providing electricity is permitted.”⁹² In addition, the Court declared, “Article 10(2) of the 2009 Electricity Act was conditionally inconsistent with the Constitution and did not have binding force if this Article was interpreted that the unbundling was allowed in providing Electricity for the public (because) it reduced the state control....”⁹³

The Court’s approach in this case resembled a peremptory stance. In a peremptory stance, the Court acted superior in controlling and commanding the realization of economic and social rights. This was done by invalidating the law or providing certain interpretation of the provisions of the law. But in this instance, the court decided to uphold the law but it provided a particular interpretation that would allow the statute to continue in effect.

How did the government respond the court ruling? The government did not amend or introduce a new law. This was partly because the Court did not specifically order the government to amend or to issue a new law. In addition, the Court had provided a particular interpretation to this law so that the law would remain constitutional. As long as the law was interpreted and carried out in line with the Court interpretation, the law would remain constitutional. In other words, there was no urgent need for the government to revise or introduce a new law, as there was no statutory vacuum as a result of this Court ruling.

⁹²The Decision of the Constitutional Court 111/PUU-XIII/2015 at 109.

⁹³Id at 120.

Judicial implementation of the right to water resources

The 2005 Court ruling⁹⁴ declared that Law on Water Resources was deemed conditionally constitutional. But this Court decision appeared to be contradictory with the Court's decision on the Electricity Law, which had been declared conditionally unconstitutional. While the labeling of these two court rulings was different, in essence they were not so different. Both types of decisions would effectively declare a law constitutional only if it was interpreted and implemented consistent with the Court's guidance, and unconstitutional if it were not carried out in line with the Court's approach.

In the Water Resources Law case, the Court concluded that the law sufficiently reflected the government's obligation to respect, to protect, and to fulfill the constitutional right to water. The Court provided six guiding principles to be followed by the lawmakers in order to maintain the constitutionality of this law. These six principles included: (1) Water utilization should not disturb people's right to water; (2) The state must acknowledge *adat* right to water/ traditional community right to water; (3) Water utilization right should be interpreted as the extension of right to life (as guaranteed by the 1945 Constitution) and therefore water use should take into account environmental sustainability; (4) Water should be interpreted as non-commercial /economic resources; (5) Water supervision and water management were in the hand the state; and (6) the state-owned company or a region-owned company should get first priority in water

⁹⁴The Decision of the Constitutional Court 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005. The court stated that this law sufficiently reflected government obligation to control important sectors as stated in article 33 (2) and (3) of the Constitution: (2) Sectors of Production which are important for the country and affect the life of the people shall be under the powers of the State. (3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.

utilization.⁹⁵ The Court stated, “ these six guiding principles were not only applied to Water Resources Law but also applied to implementing regulations derived from this Law.”⁹⁶ This means the implementing regulations should also take into account these six principles.

This was the first Court decision which declared that the Court ruling was applicable not only to the concerned law, but also to the government regulations promulgated to implement the statute. This was an unusual decision because, under Article 24 C of the Constitution, the Court is only authorized to review statutes. From the Court’s perspective, this type of decision was understandable. When a specific law was invalidated by the Constitutional Court, the government often tried to find a way to advance its policy. One of the ways was by issuing a government regulation or a presidential executive order to accommodate the content of the invalidated law.⁹⁷ This way, there would be no way for the Constitutional Court to review the regulation because the Court power was in principle limited only to the review of statutes. The Court seemed to understand this situation and therefore tried to extend its ruling beyond the concerned statute. The government responded this Court decision by issuing at least seven implementing regulations related to water resources.⁹⁸

In 2013, the Law on Water Resources was submitted to the Court for further review.⁹⁹ As

⁹⁵ The Decision of the Constitutional Court 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 P 492-495.

⁹⁶ Id at 495.

⁹⁷ Ali, Hilipito, and Asy’ari, 12 (3) Jurnal Konstitusi 631-662 (2015) (cited in note1).

⁹⁸ These include Government Regulation 16 /2005 on The Development of Drinking Water Supply System; Government Regulation 20/2005 on Irrigation (Pengairan); Government Regulation 42/ 2008 on Water Resources Management; Government Regulation 43/2008 on Land Water (Air Tanah); Government Regulation 37/2010 on Dam (Bendungan); Government Regulation on River (sungai); and Government Regulation 73/2013 on Swamp (Rawa).

⁹⁹ The Decision of the Constitutional Court 85/PUU-XI/2013.

mentioned in the previous 2005 decision, the Court examined this statute as to whether it contravened the Constitution by examining the implementing regulations derived from a potentially unconstitutional law. It examined six of seven government regulations that had been issued. One regulation was not reviewed because it was issued after the Court commenced its judicial review proceeding.

The Court examined these government regulations to determine whether these rules were consistent with the provisions of the Constitution and the court guidelines. The Court declared that these six implementing regulations contravened the Constitution as well as the Court's guidelines. These rules, the Court stated, reduced the state control of water resources by allowing the private sector to play significant roles in water resource management.¹⁰⁰ The Court stated that "state control" was an essential part of water resources management.¹⁰¹ These six implementing regulations, in fact, did not reflect the state control. As a consequence, the Court invalidated the Law on Water Resources in its entirety.¹⁰²

In this case, the Court ruling largely reflected a peremptory stance. Young's peremptory review assumed that the Court would overturn or sustain legislation if it found legislation was consistent or inconsistent with the Constitution. Similarly, in this case the Court found the implementing regulations of Water Resources Law were inconsistent with the Constitution. As a result, the Court overturned Law on Water Resources. This ruling removed further delay which might occur when the Court issued a suspended declaration of invalidity. It provided the

¹⁰⁰ Id at 144-145.

¹⁰¹ Id at 140.

¹⁰² Id at 145.

immediate legal effect. In this case, the Court anticipated the legal consequences of the immediate effect of its decisions by reinstating Law 11/1974 on Irrigation (pengairan).

The Court stated, “While waiting for the establishment of a new law that abide the constitutional court guidelines by the lawmakers, Law 11/1974 on Irrigation (Pengairan) was reinstated.”¹⁰³ This ruling did not consider the likelihood of a favorable legislative or executive response.¹⁰⁴ The Court statement assumed that the lawmakers would follow up the Court ruling by introducing a new law.

In fact, the government employed two strategies to follow up the Court rulings. First, the government issued implementing regulations based on Law 11/1974.¹⁰⁵ These implementing regulations were important to be immediately issued to ensure that people's right to water was not disturbed. Second, the government would introduce a new law on water resources because Law 11/1974 was not compatible with the recent condition especially with the implementation of regional autonomy.¹⁰⁶ The government has not yet enacted a new law on water resources.

¹⁰³The Decision of the Constitutional Court 85/PUU-XI/2013 at 145.

¹⁰⁴Young, *Constituting Economic and Social Rights* 165 (cited in note 2).

¹⁰⁵*Tindak Lanjut Putusan MK Terhadap UU No. 7/2004 Tentang SDA* “The Follow up of the Constitutional Court Decision on Law 7/2004 on Water Resources” archived at <http://dsdan.go.id/index.php/239-putusan-mahkamah-konstitusi-oleh-kementerian-pupr> accessed 2 Feb 2017.

¹⁰⁶J Galu Bimantara, *Pemerintah Akan Susun RUU Baru Pengelolaan Sumber Daya Air* “The Government will Introduce a new Bill on Water Resources Management” 4 March 2015 archived at <http://print.kompas.com/baca/ipitek/lingkungan/2015/03/04/Pemerintah-Akan-Susun-RUU-Baru-Pengelolaan-Sumber; Undang-Undang Lama Selamatkan Situasi> “The Old Law saves the situation” http://print.kompas.com/baca/ipitek/lingkungan/2015/03/12/Undang-undang-Lama-Selamatkan-Situasi?utm_source=bacajuga (accessed 2 February 2017).

Judicial implementation of Oil and Gas Law I and II cases

The petitioners in Oil and Gas law I¹⁰⁷ questioned the unbundling mechanism that was adopted in this law and argued that it was not in line with the Constitution.¹⁰⁸ This petition was similar to the petition on the Electricity Law, which also questioned the unbundling mechanism. In this case, however, the Court provided a very different opinion. In the Electricity law case, the Court had declared that the unbundling mechanism was not in line with Article 33 of the Constitution. As a result, the Court invalidated the electricity statute. In the Oil and Gas I case, however, the Court declared that unbundling mechanism was in line with the Constitution. The following part will examine the Court ruling on both Oil and Gas Law I and Oil and Gas Law II to understand the Court's varied approaches. In addition, this part will also explain the response of the lawmakers regarding the Court's ruling.

The Court decision on Oil and Gas Law I partially granted the petition. It declared that some articles of the statute were not in line with the Constitution because they did not guarantee the greatest benefit of the people. With regard to unbundling mechanism, however, the Court disagreed with the petitioners' argument and declared that the unbundling mechanism in this law was in line with the Constitution.

Why, in this case, did the Court provide a very different opinion compared to its decision on Electricity law? The short answer is because the Court adopted a different analytical

¹⁰⁷The Decision of the Constitutional Court 002/PUU-I/2003.

¹⁰⁸Article 33 (2) and (3) of the Constitution: (2) Sectors of Production which are important for the country and affect the life of the people shall be under the powers of the State. (3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.

approach. In this case, the Court adopted a systematic interpretation, which it had not done in approaching the Electricity Law. The petitioners argued that Article 1 (5) was not in line with the Constitution because it detached transportation and sale of oil and gas from the government's authority. The petitioners argued the exclusion of transportation and sale of oil and gas likely reduced the state control.

In examining this case, the Court did not only examine Article 1 (5) but it also systematically connected this Article to other relevant Articles such as Article 4, 6, and 7. The Court declared that unlike the petitioners' allegation, these Articles sufficiently reflected the significant power of the state over oil and gas. As a result, the allegation of the petitioners was not proven. The Court, however, agreed with the petitioners' arguments that Article 12,¹⁰⁹ 22¹¹⁰ and 28¹¹¹ of this law were inconsistent with Article 33 of the Constitution. These provisions potentially reduced the state control in managing natural resources as mandated by Article 33. As a result, the Court declared that these provisions were not legally binding.

The decision in this case showed the Court's adoption of a peremptory stance.

Peremptory review assumes that a court would invalidate or sustain a law once the court found that the law was consistent or inconsistent with the constitution. Likewise, in this case the Court

¹⁰⁹ Article 12 (3), "Ministry (of Energy and Mineral Resources) determines a business entity or a permanent business entity which is authorized to conduct exploration and exploitation... (Menteri menetapkan Badan Usaha atau Bentuk Usaha Tetap yang diberi wewenang melakukan kegiatan usaha Eksplorasi dan Eksploitasi pada wilayah Kerja sebagaimana dimaksud dalam ayat (2)).

¹¹⁰ Article 22 (1), "A business entity or a permanent business entity is obliged to render 25% at the most of its production to fulfill national need." (Badan Usaha atau Bentuk Usaha Tetap wajib menyerahkan paling banyak 25% (dua puluh lima persen) bagiannya dari hasil produksi Minyak Bumi dan/atau Gas Bumi untuk memenuhi kebutuhan dalam negeri)

¹¹¹ Article 28 (2), "The price of oil and natural gas is based on a fair and reasonable business competition." (harga bahan bakar minyak dan harga gas bumi diserahkan pada mekanisme persaingan usaha yang sehat dan wajar)

upheld the provision on unbundling mechanism. But the Court invalidated provisions which were inconsistent with Article 33 of the Constitution. By rendering this decision, the Court essentially controlled the realization of economic and social rights. The Court determined that the unbundling mechanism in Oil and Gas was constitutional but it declared some other provisions were inconsistent with Article 33. This ruling did not provide an opportunity for the other branches of government to discuss with the court regarding the realization of these rights. In other words, this ruling did not consider the likelihood of a favorable legislative or executive response.

After the Court rendered its decision, the government did not immediately issue or propose a new statute to respond the court ruling. This was because the legal consequences of the Court decision in this case were not as significant as the Court ruling on the Electricity Law. In Oil and Gas Law case, only a few articles were declared not legally binding, while in the Electricity Law the entire law had been declared invalid. The government believed that the oil and gas ruling was arguably self-executing, i.e., the decision could be executed without necessarily amending the existing law. In practice, this law was still legally binding except the articles that were invalidated by the Court. In 2005, the government issued Presidential Regulation 55/2005 on Oil and Gas Price for Domestic Consumption to respond the Court's ruling.¹¹² The issuance of a presidential regulation aimed to partially respond the Court ruling. The Court, as reflected in the Chief of Justice of Constitutional Court statement, was of the

¹¹² Peraturan Presiden Nomor 55 Tahun 2005 tentang Harga Jual Eceran BBM Domestik.

opinion that issuing a government regulation was not a proper response.¹¹³ The appropriate response was enacting a new statute or an amendment of the existing statute since the Court invalidate provisions of Law not a government regulation.

Nine years after the Court first decision on Oil and Gas Law I, the Court again reviewed Oil and Gas Law (Oil and Gas Law II case).¹¹⁴ The Court declared that the existence of BP MIGAS --an agency that have a duty to manage oil and gas-- was unconstitutional. The Court determined that BP MIGAS did not reflect the obligation of the state to control important natural resources i.e. oil and gas as mandated by Article 33 of the Constitution. The majority stated, “the existence of BP MIGAS has reduced the state power to manage (oil and gas) or to directly appoint a state-owned company to manage oil and gas, yet managing was an important manifestation of state control...to achieve the greatest benefits of the people.”¹¹⁵ As a result, the Court disbanded the BP MIGAS. The Court decided to transfer the management of oil and gas from BP MIGAS to the government. In other words, the Court required that this body should be replaced with a new entity that was under direct state control. The Court ruling in this case had significant consequences because BP MIGAS was the only body that managed oil and gas.

To anticipate the legal uncertainty which might emerge because of this decision, the Court declared that the decision was to be prospective. This meant while the Court disbanded BP MIGAS, all agreements signed by BP MIGAS remained valid until they had expired. This was

¹¹³ See Lumbuun, *Tindak Lanjut Putusan Mahkamah Konstitusi Oleh DPR-RI 242* (cited note 33). See also Bachtiar, *Problematika Implementasi Putusan Mahkamah Konstitusi Pada Pengujian UU terhadap UUD*, Jakarta Raih Asa Sukses 2015, p 13.

¹¹⁴ The Decision of the Constitutional Court 36/PUU-X/2012.

¹¹⁵ *Id* at 105.

important to ensure the legality of all agreements that had been signed by BP MIGAS. The majority further stated that the BP MIGAS obligations to third parties would be transferred to the government or a state-owned company.

This decision reflected Court adoption of a peremptory stance. The Court invalidated provisions on BP MIGAS, and declared that BP MIGAS was fundamentally unconstitutional. The Court disbanded BP MIGAS and ordered the government to manage oil and gas or to appoint a state-owned company which represents the state control to replace BP MIGAS. The Court's disbandment of BP MIGAS and the Court's order to the government illustrates that the Court controlled the realization of economic and social rights. This ruling it did not provide an opportunity for the government and the legislature to have conversation with the Court in the realization of economic and social rights.

The government responded to this ruling promptly. A few hours after the Court handed down its decision, President Yudhoyono issued a Presidential Regulation (Perpres 95/2012 on the Transfer of Tasks and Functions of Upstream Oil and Gas Activities) to follow up on the Court ruling.¹¹⁶ This presidential regulation addressed the decision by appointing Ministry of Energy and Minerals Resources (headed by Mr. Jero Wacik) to carry out the duties of BP MIGAS until the parliament was able to establish a new law. This Regulation also reiterated the Court decision that all existing agreements and cooperation with BP MIGAS would remain valid until they were expired.

¹¹⁶ Simon Butt and Fritz Siregar, *Analisis Kritik terhadap Putusan Mahkamah Konstitusi Nomor 36/PUU-X/2012* "A Critical Analysis on the Constitutional Decision Number 36/PUU-X/2012" 25 *Mimbar Hukum* 1, 9 (2013).

One plausible explanation for the government's quick response is that this ruling had such a significant impact on the government in managing oil and gas. BP MIGAS played substantial roles in managing the upstream activities of oil and gas in the country. In addition, BP MIGAS was the only body that managed the upstream activities of oil and gas in Indonesia. As a result, the disbandment of BP MIGAS created problems on the ground because there was no equivalent body ready to manage oil and gas resources. It was in the interest of the government to promptly respond the Court ruling because doing so would avoid the possibility of legal uncertainty in managing upstream activities of oil and gas. The quick response from the government reflected the government's political will to enforce the court ruling. More importantly, it eliminated the negative effect that might occur as a result of the court ruling such as the uncertainty in oil and gas management which may lead to the uncertainty of the investors of oil and gas in Indonesia.

Within two months after the issuance of Perpres 95/2012, the government issued another presidential regulation, Perpres 9/2013, to elaborate Perpres 95/2012. Perpres 9/2013 established a new agency called SKK MIGAS to manage upstream activities of oil and gas. In addition, this Perpres also changed the roles of Ministry of Energy and Minerals Resources from managing oil and gas to supervising and coordinating the oil and gas activities. Under this new regulation, the SKK MIGAS was the implementing agency in managing the upstream activities of oil and gas while the duty of Ministry of Energy and Minerals Resources was to supervise the SKK MIGAS.

The establishment of SKK MIGAS with Perpres 2013 raised some criticisms, as described below. First, the issuance of Perpres 2013 was said not to appropriately follow the

court ruling which required the revision or the introduction of new law. Second, the establishment of SKK MIGAS did not reflect the state control over oil and gas as stated by the Court. Rather, it was another similar body to BP MIGAS but under a different name.¹¹⁷ The individuals in charges in these two bodies were largely the same. Rudi Rubiandini was one of the deputies in BP MIGAS, and he became the head of the SKK MIGAS.¹¹⁸ Member of Parliament Drajat Wibowo was skeptical with the establishment SKK Migas. For him, the status of SKK Migas under the Ministry of Energy and Minerals Resources could be used for political interest of the ruling party.¹¹⁹ In the same vein, the Constitutional Court Justice, Akil Mochtar, stated, “ it only changed the name, changed its casing but the people in charge remained the same.”¹²⁰ Some civil society organizations such as Muhammadiyah, Gerakan Indonesia Bersih shared this view.¹²¹ The Court decision ordered the government to manage oil and gas, through its relevant ministry or state owned company, until the new oil and gas law was enacted. The criticisms mentioned above asserted that Perpres 9/2013 did not appropriately follow up the Court ruling, which may potentially to be submitted to the court for further review.

¹¹⁷ Oscar Ferri, BP Migas Ganti Casing jadi SKK Migas “BP Migas changes Casing to SKK Migas. “Archived at <http://news.liputan6.com/read/688226/bp-migas-ganti-casing-jadi-skk-migas-karyawan-ada-perubahan> accessed May 16, 2017. See also Hadi Supropto and Alfin Tofler, MK: SKK Migas Cuma BP Migas yang Berganti Baju “the MK: SKK Migas is only BP Migas that changed clothes” archived at <http://m.viva.co.id/kemenpar/read/436680-mk--skk-migas-cuma-bp-migas-yang-berganti-baju> accessed May 16, 2017.

¹¹⁸ Id.

¹¹⁹ Michael Agustinus, Pembubaran BP Migas, Tampan dunia migas Indonesia, “The Disbandment of BP Migas is a slap to the Oil and Gas sectors in Indonesia. <https://ekbis.sindonews.com/read/700588/90/pembubaran-bp-migas-tampan-dunia-migas-indonesia-1356412697>

¹²⁰ Id.

¹²¹ Id.

Analysis

The court rulings on social welfare rights showed the court's tendency to adopt a peremptory stance. The Court was likely to invalidate the law or to prescribe guidelines for the lawmakers in order to maintain the validity of the law. For instance, in Electricity Law and Water Resources Law II, the Court declared these laws were inconsistent with the Constitution and invalidated these two laws in its entirety. In Water Resources Law I, the Court laid down six principles that should be followed by the lawmakers in drafting the implementing regulations.

These social welfare cases showed how the Court played a significant role in determining the implementation of social welfare rights. It controlled how the government should determine policy on social welfare rights. The Court did so by invalidating a law or effectively rewriting a statute based on its interpretation. This meant the lawmakers should have to proceed with interpreting the law based on the court's interpretation, or pass a new law. If the government did not follow the Court guidelines, the Court would declare the law unconstitutional. In these cases, the Court largely did not provide an opportunity for the court, the executive, and the judiciary to discuss the implementation of social welfare rights.

Since the Court played a significant role in enforcing social welfare rights, the government did not have much choice in how it followed up the court rulings. This was because the Court, through its decisions, has been involved in the realization of the social welfare rights. For example, when the Court invalidated the Electricity Law case and Water Resources Law II case, the Court also decided to reinstate the old laws. This way the Court had determined that the government should adopt the old law to implement its policy on electricity and water. The

lawmakers were required to follow this old law until they revised the statute or enact a new law. The lawmakers also had to take into account the court's guidelines when they established a new law to substitute for the invalidated law.

Prior to enacting a new law of both the Electricity Law case and the Oil and Gas Law, the government responded the Court ruling by issuing a government regulation and a presidential regulation. For the government, issuing a government regulation or a presidential regulation is simpler and faster compared to revising or enacting a new law because the government can act unilaterally. At the same time the government can perhaps circumvent the Court decision and also advance its policy. Issuing a regulation prevents the Court from further review because the Court does not have authority to review regulations.

In the Water Resources Law I case, the Court provided guidelines for the lawmakers to maintain the constitutionality of this law. The government responded to the court ruling by introducing implementing regulations. However, the Court was of the opinion that the government's response did not meet the court requirement. As a result, the Court invalidated the Law on Water Resources in its entirety. In this case, the court exceeded its authority by reviewing implementing regulations. Constitutionally, the court can only review laws against the constitution.

The Court decisions that invalidated Electricity Law and Water Resources Law in their entirety reflected the superiority of the Court in enforcing social welfare rights. The Court granted the petitions beyond what was requested by the petitioners, and also provided guidance for the lawmakers in determining its policy on electricity and water.

In the BP MIGAS case, the Court disbanded BP MIGAS. The invalidation of the BP MIGAS arrangement showed the Court's supreme role in controlling the realization of social welfare. The government did not have other choices other than responding to the Court decision by establishing a new body which may represent the state control on managing oil and gas. In this case, the government responded to the Court's ruling immediately. The government issued two government regulations to follow up the court ruling in less than two months. This was because BP MIGAS was the only body in charge to manage the government did not have other choice other than quickly responded the court ruling because there was no equivalent legislation in place.

These social welfare cases showed that the government responded to the court rulings in various ways. In some cases, the government was very quick in responding the court ruling. But that was not always the case; the government sometimes did not act promptly. Whether the government promptly follow-up the court decisions likely depends on whether did so was necessary to advance the government policy or to avoid unexpected consequences.

Conclusion

This Chapter has answered two important questions (1) what were the Constitutional Court strategies, as illustrated by its rulings, in implementing its decisions on economic and social rights cases? (2) How did the government and the DPR respond these court rulings? We have demonstrated that the Court utilized various approaches in deciding economic and social rights cases. These approaches include the null-and-void decisions, the declaration of

incompatibility, the suspension of invalidity, the amendment of the law through the court interpretation, and the invalidation of a statute in its entirety. The use of these approaches can be explained through Young's typology of judicial review. The Court was likely to utilize one of the five stances of judicial review: deferential, conversational, experimental, managerial, or peremptory stances. The court declaration of incompatibility and the court suspension of invalidity were largely similar to the conversational or experimental stances. While the null-and-void decisions and the court interpretation of laws were comparable with a peremptory stance.

This Chapter has shown that the Court adoption of conversational and experimental stances aimed to make the court decisions was more palatable for the government. The Court applied these approaches specifically when the Court was of the opinion that enforcing Court rulings carried significant cost and time to the implementing agencies. The Court adoption of a peremptory stance was to show the lawmakers that the law was clearly inconsistent with the constitution. In some cases, the Court anticipated the immediate consequences of its decision by reinstating the old law or providing particular interpretation.

In the right-to-education cases, the Court adopted peremptory, conversational and managerial stances, depending on the specific situation. The Court adoption of these varying approaches was partly because it recognized that the lawmakers might face significant challenges if they had to implement the court decisions immediately. The Court, therefore, sent a message to the lawmakers that the law was inconsistent with the Constitution but it did not invalidate the law. It gave time for the lawmakers to implement the Court rulings.

The Court had a very different approach when it decided cases on social welfare rights. It

was inclined to utilize a strictly peremptory form of judicial review. When the court found that a law was inconsistent with Article 33 of the Constitution, it simply declared the statute was invalid. In several cases, the Court invalidated the law in its entirety. The Court did so when the court was of the opinion that the articles of the statute were the heart of the law. When the Court invalidated the law in its entirety, it often provided a temporary solution. It reinstated the old law to replace the existing statute until the lawmakers establish a new law. The Court did so to avoid a legal vacuum.

The Court decisions and the response of the implementing agencies were closely related. In practice, the Court rulings were not always translated into effective implementation. The implementation of the Court decisions varied widely. In some instances, the government did not promptly respond the Court decisions. This was particularly when implementing the Court ruling requires a substantial cost. The government would likely to effectuate the court decisions quickly if doing so was in line with the interest of the government and the legislature.

The likelihood of the executive and the legislature following up the court decisions appropriately depends on at least two important factors. First, it depends on how the Court has constructed its rulings. When the Court rulings declared the law null-and-void and the Court did not provide an immediate solution, the government would likely respond the court decisions promptly. However, when the Court ruling did not significantly affect the content of the existing law or the Court had provided a temporary solution in its decisions, the government likely delayed the implementation of the court rulings.

Second, the government's interests regarding the content of the law also determined the

pace of the government in following up the Court rulings. The government would be likely to respond the court rulings promptly if the government believed that the content of the law was significant for the government in advancing its policies or if delaying the implementation of the Court rulings would disadvantage the government. But if the government believed that the Court's decisions did not significantly affect the government policy, the government would likely to delay the implementation of the Court ruling.

Chapter 6: Conclusion

Conclusion

The introduction of a Constitutional Court with the power to conduct judicial review is often viewed as an important factor of making a transition to democracy. As stated by Donald L. Horowitz, constitutional courts are likely to support “the transition to and consolidation of a stable democratic regime.”¹ Therefore, some emerging democracies, including Indonesia, introduce a constitutional court in their updated constitutions. After almost 60 years during which the Indonesian constitutions did not recognize a constitutional court, the most recent constitutional amendments (1999-2002) finally introduced a Constitutional Court. Even though relatively new, The Indonesian Constitutional Court appears to be playing a very active role in conducting judicial review. In about a decade of its existence, the Court had reviewed over 1000 statutes.²

In conducting judicial review, the Court examines the validity of a statute created by the executive and the legislature. When the Court invalidates a statute, the executive and the judiciary are expected to follow up this ruling by revising or introducing a new statute. The Court needs other branches of government to implement its rulings. Therefore, it is important to

¹ Donald L. Horowitz, *Constitutional Courts: A Primer for Decision Makers*, 17 *Journal of Democracy* 125, 128 (2006).

² The 2016 Annual Report of the Indonesian Constitutional Court, *Harmoni Sosial dan Budaya Demokrasi yang Berkeadilan*, (Setjen MK 2016) at 9. archived at http://www.mahkamahkonstitusi.go.id/public/content/infoumum/laporantahunan/pdf/LaporanTahunan_61_LT%202016%20oke.pdf

understand the interaction between the Court, the executive, and the legislative in this process.

This dissertation focuses on three important topics: human rights, judicial review, and the relation between the Constitutional Court, the government, and the legislature. It attempts to answer four research questions (1) what explains the adoption of Constitutional Court with a strong form of judicial review in the updated constitution? (2) Does the Court consistently apply the strong form of judicial review in practice when it reviews constitutional cases related to economic and social rights? (3) What factors are taken into account when the Constitutional Court decides economic and social rights cases? Finally, (4) how are the Constitutional Court decisions on economic and social rights implemented in practice?

Based on this four research questions, this dissertation has found that first, the introduction of a Constitutional Court with judicial review power may be best explained by multiple contributing factors -- not a single factor. These include the history of judicial review in Indonesia, the fragmentation of political parties, the removal of President Wahid, and the international constitutional influence. Second, while constitutionally the Court adopted a strong form of judicial review, it did not follow this approach consistently in practice. When deciding cases on economic and social rights, the Court adopted both a weak form of judicial review and a strong form of judicial review. Third, the Court took into account multiple factors--legal and extralegal factors-- when it decided cases related to economic and social rights. And finally, the implementation of the Court rulings varies widely. Some Court rulings were promptly followed up by the government, but that was not always the case. The government's response likely

depended on both the Court rulings and the interest of the implementing agencies.

Chapter 2 further explained the history of judicial review in Indonesia. It found that historically, the idea to establish a judicial institution that has a power to conduct judicial review had been discussed since the drafting of the first Constitution in 1945. However, it was never expressly stated in that Constitution. The different of ideologies among the founding fathers influenced the formulation of human rights and the absence of judicial review in the first Constitution.

In 1956, human rights and judicial review were discussed again when the *Konstituante* drafted a new constitution to replace the 1949 Provisional Constitution. The *Konstituante* included human rights and judicial review provisions in the draft of the new constitution. However, these two important provisions were never implemented in the constitution because the *Konstituante* was dismissed by the government before the new constitution was completed. The government decided to return to the 1945 Constitution which did not recognize judicial review and only briefly mentioned human rights provisions. The shift of government from the Old Order to the New Order marked the decline of judicial review and human right recognition in the Constitution.

Chapter 3 examined the continuing efforts to introduce a Constitutional Court, judicial review, and human rights provisions in the most recent constitutional amendments (1999-2002). It clarified that after in several occasions the framers of the constitution failed to introduce a constitutional court and human rights in the constitution, these two fundamental provisions were

finally included in the updated constitution. Chapter 3 found that the introduction of a Constitutional Court with the strong form of judicial review and human rights provisions in the updated Constitution were largely because of several factors. These include (1) the shift of government from authoritarian to an emerging democracy, (2) the history of judicial review in Indonesia, (3) the fragmentation of political parties, (4) the impeachment of President Wahid, and (5) the global popularity of judicial review.

The shift of government from an authoritarian to an emerging democracy opened the possibility for the public to demand human rights protection that was largely absent during 32 years of the Soeharto New Order government. This includes the inclusion of human rights and judicial review provisions in the updated constitution. In addition, history of judicial review in Indonesia and the growth of political parties also encouraged the inclusion of human rights and judicial review in the updated constitution. Judicial review provides a legal avenue for political parties to challenge the policy of the ruling party. In addition, human rights protection will guarantee political parties from arbitrary action of the government. The removal of President Wahid by the MPR also played a significant role in the introduction of a Constitutional Court. President Wahid's impeachment, that was solely based on a political process, motivated the framers of the updated Constitution to include a judicial institution in this process. This way the impeachment process could avoid being seen as based on purely political motives. The impeachment would hence forward proceed through both political and legal considerations. And lastly, the success story of judicial review in some emerging democracies such as the South Korean Constitutional Court, inspired the drafters of the updated constitution to include the

constitutional court provisions. As stated by Davidson, the establishment of the Indonesian Constitutional Court was also driven by an “intrinsic desire among state elites to join the world's community of democracy.”³ In the 1980s and 1990s, South Africa, South Korea, and Thailand had introduced their constitutional courts. These countries’ experience informed the drafting of both the recent constitutional amendments and the 2003 Law on Indonesian Constitutional Court.

Chapter 4 analyzed the Constitutional Court’s approaches in deciding economic and social rights cases. It utilized Tushnet’s typology of a weak form and a strong form of judicial review. This chapter also investigated factors that were taken into account by the Court when it decided judicial review on the right to education and the right to social welfare. It found that the Court did not apply a strong form of judicial review consistently. The Court’s adoption of a strong form or a weak form of judicial review approaches was not always inherent with the types of economic social rights cases that the Court dealt with. For instance, in the Budget for Education cases, the Court start out strong form of judicial review, then get weak form of judicial review and then get a stronger form of judicial review. But the Court applied a strong form of judicial review and also declared conditional decisions on the BHP case. In social welfare cases, the Court tends to move from a strong form to a super strong of judicial review.

There is a tendency that the Court will apply a strong form or weak form of judicial review when one or more of the following conditions satisfied: (1) when the Court is of the opinion that the provisions of the Constitution are clear and unambiguous; (2) when the Court has concluded that the provisions of the law submitted to the Court for review were clearly

³ Jamie S. Davidson, *Dilemmas of Democratic Consolidation in Indonesia*, 22 the Pacific Review 293, 298 (2009).

inconsistent or consistent with the Constitution; (3) when the Court believed that the implementing agencies need time to satisfy the Court rulings; (4) when implementing the Court's decisions would impose significant costs; or (5) the Court concluded that the statutory provisions submitted for review were somewhat unclear.

With regard to court decision making, the Constitutional Court justices took into account multiple factors, including legal and extralegal factors, when they decided judicial review on economic and social rights cases. These include legal factors such as the text of the Constitution, the applicable laws, international covenants, the Court's prior decisions and the intention of the framers. In some cases, the Justices also examined the external factors such as the actual situation on the ground, the reaction of their Justices' colleagues and the possible response of the other branches of government. The Constitutional Court Justices did not only consider the constitutional text, legal principles, or the original intent of the framers; they also took into account the likelihood of the implementing agencies to follow up the Court ruling. This does not mean that the Indonesian Constitutional Court is not an influential judicial institution. In some cases, the Court ordered the government to follow the court guide to maintain the constitutionality of the statute or the Court invalidated the statute in its entirety.

It appeared that there was no consistent pattern when the Court took into account legal factors or extralegal factors. In the budget for education cases, the Court took the factual situation very seriously. In social welfare-related cases, the Court focused on the wording of the Constitution or the law as its main consideration in deciding these disputes.

The legal authority that the Court used as a legal argument in rendering its decisions was

numerous. In most cases, the provisions of the Constitution were the primary legal basis for the Court's decisions. In doing so, the Court also checked the history of the provisions of the constitution. In at least one instance, the Court cited the provisions of the law (not the Constitution) as the legal basis to render decisions. The Court also cited foreign legal materials, relevant international covenants, scholarly writings, and the court decisions in other countries.

Finally, Chapter 5 examined the Court's strategies to implement its rulings and the followed-up of the judicial decisions by the executive and the legislature. The Court utilized various techniques in deciding economic and social rights ranging from a null-and-void decision, the declaration of incompatibility, suspension of invalidation, to the invalidation of a statute in its entirety. These methods largely resemble one or more of the five stances of Young's typology of judicial review (deferential, conversational, experimental, managerial, and preemptory stances). The Court was inconsistent in adopting of these approaches. In the right to education cases, the court largely utilized conversational, managerial, and move to a preemptory stance. The Court had a different tendency when it decided cases on social welfare cases. It was inclined to utilize a preemptory judicial review.

The implementation of the Court decisions varied widely. In some cases, the government did not promptly respond the court decisions. This was particularly when the Court ruling requires a substantial cost from the government to effectuate the Court decisions. The government and the legislature would be likely to carry out the court decisions promptly if doing so would promote the interest of the government and the legislature.

It appears that the likelihood of the executive and the legislature conscientiously

following the court decisions depends on at least three aspects. First, it depends on how the Court wrote its rulings. The Court decisions which amended several provisions would likely be handled differently by the lawmakers compared to a Court rulings that invalidated the statute in its entirety. The Court rulings which provided guidance for the lawmakers on how to implement the decisions would likely treat differently compared to a null-and-void decision or a conditional decision.

Second, the government's interests regarding the content of the statute also determine the government's pace in following up the Court decisions. The government would likely to respond the Court rulings more quickly if the content of the law was significant to advance its policies; or if delaying the implementation of the court rulings would disturb the government's plan.

The third is the possible impact that might affect the government because of the Court rulings. If the Court decision did not pose a significant consequence, the government might not follow up on the court decision as fast as if the court rulings likely present significant impacts for the government's program.

This dissertation has shown that the impact of judicial review varies across issues for the same court. Even if conducted within the same institutional framework, judicial review would not be likely to produce an equally effective implementation in all circumstances.

From a comparative point of view, this dissertation has provided considerable evidence that the Indonesian Constitutional Court approaches in deciding cases on economic and social rights can be analyzed through Tushnet's weak form and strong form of judicial review. It also

has contributed substantial confirmation that the relationship between the Indonesian Constitutional Court, the legislature, and the executive can be interpreted using Young's typology of judicial review.

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