

INTERPRETING THE INDONESIAN CONSTITUTIONAL COURT'S APPROACH IN CONDUCTING JUDICIAL REVIEW IN CASES RELATED TO ECONOMIC AND SOCIAL RIGHTS

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Abstract

One of the duties of the Indonesian Constitutional Court (Mahkamah Konstitusi - MK) is to determine whether legislation is consistent with the Constitution. If the MK determines that a statute is inconsistent with the Constitution, it declares that such statute is invalid. In such instance, the MK has the final word to determine the validity of legislation. In the view of some scholars, this feature reflects that the MK adopts strong form of judicial review. While this assertion holds true in some cases, it does not necessarily reflect the complete feature of the MK's approach in deciding cases. In some economic and social rights cases, the MK decision adopts weak form of judicial review. This paper attempts to explain that while constitutionally the MK adopts strong form of judicial review, in some economic and social rights cases it adopts weak form of judicial review.

Keyword: *interpreting, constitutional court, decision, economic and social rights, strong form of judicial review, weak form of judicial review*

Abstrak

Salah satu tugas Mahkamah Konstitusi (MK) adalah menentukan apakah suatu undang-undang bertentangan dengan undang-undang dasar. Apabila MK menentukan bahwa suatu undang-undang bertentangan dengan undang-undang dasar maka undang-undang tersebut dinyatakan bertentangan dengan undang-undang dasar. Selanjutnya undang-undang tersebut dinyatakan tidak mempunyai kekuatan hukum mengikat (invalid). Dalam hal ini MK mempunyai kekuasaan yang final untuk menentukan validitas suatu undang-undang. Bagi sebagian ahli, fitur ini menunjukkan bahwa MK mengadopsi judicial review yang bersifat kuat (strong form of judicial review). Meskipun penilaian ini benar untuk beberapa kasus, hal ini tidak serta merta menggambarkan fitur yang lengkap dari MK. Dalam beberapa kasus terutama judicial review yang berkaitan dengan hak-hak ekonomi dan hak-hak sosial, MK mengadopsi judicial review yang bersifat lemah (weak form of judicial review). Artikel ini mencoba menjelaskan bahwa meskipun secara konstitusional MK mengadopsi judicial review yang bersifat kuat, dalam beberapa kasus yang terkait dengan hak-hak ekonomi dan hak-hak sosial MK mengadopsi judicial review yang bersifat lemah.

Kata kunci: *Menafsir, mahkamah konstitusi, putusan, hak-hak ekonomi dan sosial*

I. INTRODUCTION

A number of constitutional law scholars have discussed several important aspects of the Indonesian constitutional court (*Mahkamah Konstitusi*, hereinafter *MK*).¹ They discuss topics which include the institutional structure of the *MK*, the work of the *MK* over a certain period of time, the writing style of *MK* decisions, as well as the leadership of the *MK*. In short, there are ample scholarly writings about these issues. This paper, therefore, will not discuss such issues. It will instead discuss how the *MK* decides cases of judicial review related to economic and social rights.

Some scholars argue that the *MK* adopts strong form of judicial review in deciding cases concerning economic and social rights.² This is because the *MK* has the final say to determine the validity of legislation. Others argue that the court adopts strong form of judicial review because its decisions go far beyond its constitutional mandates.³ The *MK* does not only invalidate legislation, it also determines how the legislature follows up on its decisions. This paper attempts to take a different position as opposed to what has been written by some constitutional law scholars thus far. While some scholars believe that the *MK* adopts a strong form of judicial review, this paper argues that some of the *MK*'s decisions in cases related to economic and social rights can in fact be viewed as the adoption of weak form of judicial review. That said, the *MK* does not always use its authority to invalidate a law that is inconsistent with the Constitution. In certain cases, the *MK* refrains from interfering with the legislature's authority to make/amend law.

The structure of this paper is as follows: to begin with, this paper will briefly explain the *MK*'s specific features in relation to its power to conduct judicial review. It will discuss how the Constitution and the *MK* Law formally regulate the *MK*'s power to conduct judicial review. It will then discuss how in practice the *MK*'s decisions do not always reflect what is stated in the legislation. Second, the paper will clarify the term 'strong form of judicial review' and 'weak form of judicial review'. In doing so, the paper will refer to Mark Tushnet's piece that explicitly uses this term and sufficiently explains these two terms. Third, it will briefly elaborate on some existing scholarly papers that discuss this issue and conclude that the *MK* adopts strong form of judicial review. This will be followed by an explanation of this paper's position that is different from the existing scholarly papers. This paper will specifically use Mark Tushnet's pieces as a reference to prove that in certain cases the *MK* decisions can be seen as the adoption of *weak form* of judicial review. In doing so, it will analyze two *MK* decisions on judicial review cases that are closely related to economic and social rights namely Law on Water Resources and Law on Electricity using Tushnet's pieces as reference. Finally, this paper will end with some conclusions.

II. SOME SIGNIFICANT FEATURES OF THE MK'S DECISIONS ON JUDICIAL REVIEW

The *MK* was established in 2003, a year after the recent constitutional amendments had been completed (1999-2002). Since then, it has handled many constitutional cases ranging from general election disputes, disputes of competence among state institutions, to judicial review. In line with the purpose of this paper, namely to examine the *MK*'s approach in judicial review related to economic and social rights, this paper will primarily focus on the *MK*'s power to conduct judicial review.

Constitutionally, the *MK*'s authority to conduct judicial review is stipulated in

¹ These include Simon Butt, Petra Stockmann, Hendrianto, Fritz Siregar and Jimly Asshidiqqe. This list is just to name a few. There are other constitutional law scholars who have written on a similar topic.

² Philippa Venning, "Determination of Economic, Social and Cultural Rights by the Indonesian Constitutional Court," *Australian Journal of Asian Law* 10, no. 1 (2008), pp.100-132.

³ *Ibid.*

article 24 C. It states, among other things, that the *MK*'s authority is to review laws against the Constitution.⁴ The same article also determines that the *MK*'s decision is final and binding.⁵ At the legislation level, the *MK* Law limits the power to conduct judicial review. The *MK* can only review laws that are enacted after the recent constitutional amendments (1999-2002).⁶ This Law also limits the legal standing of the parties that can file petitions with the *MK*.⁷

In practice, the *MK* does not necessarily follow the provisions of the Constitution and legislation. For example, the *MK* extends its authority from reviewing laws that have been issued after the constitutional amendments to reviewing any laws regardless of whether they were enacted before or after the recent constitutional amendments.⁸ In other instances, the *MK* limits legal standing. For example, the Constitution stipulates that the right to life belongs to every individual (not necessarily Indonesian citizens). In actual fact, there has been a case where the *MK* has declined the petition filed by foreign citizens.⁹ There has also been a case where the *MK* loosens the legal standing. The *MK* Law stipulates that petitioners should prove that there is a close connection between the petition and the constitutional damages they suffered. In practice, there have been cases where the *MK* accepted a petition in which the connection between the petition and the constitutional damages was relatively weak. Such has been the case when the *MK* accepts a petition based on the argument that the petitioners are tax payers.¹⁰

In regard to the nature of the *MK*'s decisions, article 24 C of the Constitution states that the *MK*'s decisions are final and binding.¹¹ Being final means that the decisions of the *MK* cannot be challenged. There is no legal avenue available to appeal against the *MK*'s decisions. Being binding means that the *MK*'s decisions are binding on all individuals including state institutions once the decision is announced. The *MK* Law reiterates this article. In this regard, there is no significant difference between the provisions of the Constitution and legislation and what the *MK*'s practices, except for the fact that the *MK* has produced several different types of decisions. Simon Butt asserts that the *MK* has adopted at least four different techniques besides those prescribed in the Constitution and the *MK* Law.¹² The four types of decisions are as follows: first, the *MK* has declared that its decisions will operate only in the future. This type of decision has softened the impact of its decisions on other branches of government. Second, the *MK* has decided that a law is inconsistent with the Constitution but refused to invalidate it. In this regard, the *MK* appears to have considered the great impact of potential invalidation. Third, the *MK* has declared a law unconstitutional but did not invalidate it. The *MK*, instead, has set a deadline for the legislature to follow up on the *MK*'s decision. And finally, the *MK* has declared a law conditionally constitutional. It means that such law can be deemed as constitutional to the extent that it is interpreted in a manner the *MK* deems to be constitutional.¹³

⁴ Article 24 C (1) of the 1945 Constitution of the State of the Republic of Indonesia.

⁵ *Ibid.*

⁶ Article 50 of Indonesia, *Undang-undang tentang Mahkamah Konstitusi (The Law on Constitutional Court)*, UU No. 24 tahun 2003, LN No. 98 tahun 2003, TLN No. 4316 [Law No. 24 of 2004, SG No. 98 of 2003], hereinafter referred as "2003 MK Law"

⁷ Article 51 (1) of the 2003 *MK* Law.

⁸ Constitutional Court Decision Number 004/PUU-I/2003 regarding judicial review of the Supreme Court Law No. 14/1985.

⁹ Constitutional Court Decision Number 2-3/PUU-V/2007; Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill, 2015), p. 50.

¹⁰ *Ibid.*, pp 54-5.

¹¹ Article 24 C (1) of the 1945 Constitution of the Republic of Indonesia.

¹² Simon Butt, "Indonesia's Constitutional Court: Conservative Activist or Strategic Operator?," in *The Judicialization of Politics in Asia*, ed. Björn Dressel (New York: Routledge, 2012), p. 108.

¹³ *Ibid.*, p.110.

III. TYPOLOGY OF JUDICIAL REVIEW

Judicial review can be explained in several ways. 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.¹⁴ 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 such court are different from matters handled by ordinary court. This model is also commonly referred to as the Austrian model, Kelsenian model or the European model.

Conceptually, this concentrated system was conceived by Kelsen as being “a system of negative legislation.”¹⁵ A Constitutional Court does not specifically decide the validity of statutes on a concrete single fact. 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 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.”¹⁶

In practice, there are various reasons for a country adopting a centralized constitutional court to conduct judicial review. First, the country concerned may have 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 government in the past. Another reason is that the existing courts may have become overburdened in carrying out their responsibility.¹⁷ Adding more responsibility to the existing courts may not be a good option since it places an even greater burden on the already overburdened courts. Therefore, establishing a new separate court may be a more feasible option.

Unlike the centralized model, 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 different 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 more general process of case adjudication.¹⁸ 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 Constitution. However, this view provides an incomplete picture. While it is true that the Constitutional Court has the authority to conduct judicial review, there is another judicial institution, namely the Supreme Court which also has judicial review power. The difference is that the Constitutional Court compares laws against the Constitution and determines whether they are consistent with the Constitution. The Supreme Court reviews government regulations against the laws that authorize their adoption. With this unique characteristic, Indonesia does not fit neatly in the centralized vs. decentralized model.

Based on the timing of conducting it, judicial review can be characterized as abstract or concrete judicial review.¹⁹ When review is conducted prior to the enactment of a statute, it is often called abstract review. Thus, at the time a statute is enacted it has already passed judicial review. The French Constitutional Council adopts this model.

¹⁴ Vicki C Jackson and Mark V. Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999), p. 456.

¹⁵ Jimly Asshiddiqie, *Perihal undang-undang di Indonesia [About Laws and Regulations in Indonesia]* (Jakarta: Mahkamah Konstitusi RI, Sekretariat Jenderal dan Kepaniteraan, 2006), p. 485.

¹⁶ Jackson and Tushnet, *Comparative Constitutional Law*, p. 485.

¹⁷ Andy Omara, “Lessons from the Korean Constitutional Court: What Can Indonesia Learn from the Korean Constitutional Court Experience?” Korea Legislation Research Institute research paper, Sejong, 2008.

¹⁸ Jackson and Tushnet, *Comparative Constitutional Law*, p. 485.

¹⁹ *Ibid.*

Unlike abstract review, concrete review occurs when a review is conducted only after the enactment and the enforcement of a statute. The U.S. adopts this model.

A more recent typology is strong form vs. weak form of judicial review. Unlike the first two typologies of judicial review, the weak vs. strong form of judicial review focuses on whether the court has the final say in determining the validity of laws. If the court has the final say to invalidate laws, it adopts a strong form of judicial review. If the court has the power to determine whether a law is consistent with the Constitution but it does not have the authority to invalidate such law, it adopts a weak form of judicial review.

This paper will primarily use strong vs. weak form of judicial review typology to analyze the *MK's* in deciding judicial review cases related to economic and social rights. This typology is believed to be the most appropriate model because it explains certain possibilities that could occur when the court conducts judicial review in cases related to economic and social rights, ranging from 'strong form' whereby the court has the final say, to 'weak form' where the court can only declare the incompatibility of the law without the authority to invalidate it.²⁰

The strong vs. weak form of judicial review model has been coined by Mark Tushnet, a prominent U.S. comparative constitutional law scholar. 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.²¹ Economic and social rights are nonjusticiable if they are recognized or mentioned in the constitution but are not judicially enforceable.²² Rights are justiciable if they are enumerated in the constitution and are judicially enforceable.²³

Within justiciable rights category, there are two further divisions "weak substantive rights" and "strong substantive rights."²⁴ By weak substantive rights, he means that the court is able to enforce economic and social rights but leaves significant discretion to the legislature in the realization of such rights.²⁵ Conversely, strong substantive rights give significant power to the courts to enforce economic and social rights and to take substantial part in the realization of such rights.²⁶ Under strong judicial review, the court does not give as much deference to legislative judgments.

In *New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries*,²⁷ Tushnet sets the debate between strong and weak form of judicial review in a slightly different way. Unlike the model described above, this model focuses on the extent to which the judiciary implements its constitutional review and enforcement authority. If "courts' interpretative judgments are final and unreviewable," courts exercise a strong form judicial review.²⁸ However, if courts have the power to interpret a statute in light of a constitution or they can declare the incompatibility of a statute under the constitution, but they do not have the power to invalidate such statute, then the courts apply a weak form of judicial review.²⁹

²⁰ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2009).

²¹ Mark Tushnet, "Social Welfare Rights and the Forms of Judicial Review," *Texas Law Review* 82 (2003), pp.1902-1906.

²² *Ibid*, p.1898.

²³ *Ibid*, p.1902.

²⁴ *Ibid*, p.1902, 1906

²⁵ *Ibid*, p.1902.

²⁶ *Ibid*, p.1906.

²⁷ Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries," *Wake Forest Law Review* 38 (2003), p.813.

²⁸ *Ibid*, p 817.

²⁹ *Ibid*, p.821.

IV. REVIEW OF SOME SCHOLARLY PAPERS THAT DISCUSS THE MK'S APPROACHES IN CONDUCTING JUDICIAL REVIEW

There are some scholarly papers that discuss the *MK's* approach in conducting its judicial review power.³⁰ Petra Stockman, for example, discusses the early work of the Indonesian Constitutional Court after its establishment in 2003.³¹ Another scholar, Stefanus Hendrianto, examines the significant roles of the first Chief Justice of the Constitutional Court in developing this new Court.³² While both articles discuss broader themes concerning the Constitutional Court, they do discuss also the work of the Constitutional Court in conducting judicial review.

For the purpose of this paper, however, it utilizes two scholarly papers in particular, namely *Determination of Economic, Social and Cultural Rights by the Indonesian Constitutional Court* written by Philippa Venning³³ and *Indonesia's Constitutional Court: Conservative activist or strategic operator?* written By Simon Butt³⁴ as the primary references to understand the *MK's* approach in conducting judicial review including judicial review on laws related to economic and social rights.³⁵ The use of these two scholarly papers is significant because both papers discuss a similar topic and draw relatively similar conclusions. This paper, to a certain extent, draws different conclusions from these two papers. The difference, however, is not necessarily contradictory.

Venning's article examines the approach of Indonesia's Constitutional Court in conducting judicial review in cases related to economic, social, and cultural rights. Her article partly uses Mark Tushnet's weak vs. strong judicial review model as a reference to understand the *MK's* approach. Comparatively, her article also looks at different approaches employed by Courts in other countries such as South Africa, India, and the Philippines in dealing with economic, social and cultural rights. Her article argues that Indonesia's Constitutional Court adopts strong form of judicial review which partly resembles the one adopted by the Philippines' Supreme Court. She argues further that the Indonesian Constitutional Court's approach is significantly different from the one taken by the South Africa Constitutional Court. Her argument is based on the fact that in some judicial review cases on laws related to economic and social rights, not only did the *MK* invalidate the laws, it also provided guidance to the legislature on way in which the *MK's* should be followed. Since the *MK* went too far beyond its constitutional mandate, namely to declare the law unconstitutional, based on Venning's article, the *MK* adopts strong form of judicial review.

Another scholarly paper written by Simon Butt elaborates on the different approaches employed by the *MK* in conducting judicial review. It focuses partly on examining the two types of the *MK's* decisions, namely conditionally constitutional and conditionally unconstitutional type of decisions. His article argues that while these two types of decisions seem to prevent the *MK* to be an activist, this type of decision in fact enables the *MK* to become a more activist court in the long run. He

³⁰ These include: Petra Stockmann, *The New Indonesian Constitutional Court: A Study Into Its Beginning and First Years of Work* (Jakarta: Hanns Seidel Foundation, 2007); Philippa Venning, "Determination of Economic, Social and Cultural Rights by the Indonesian Constitutional Court," *Australian Journal of Asian Law* 10, no. 1 (2008), pp. 100-132; Butt, "Indonesia's Constitutional Court"; Hendrianto, "From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003-2008" (Dissertation, University of Washington, 2008); Mardian Wibowo, "Justices' Freedom of Constitutional Interpretation Method in the Indonesian Constitutional Court," *Mimbar Hukum* 25, No. 2 (2013), pp.284-299.

³¹ Stockmann, *The New Indonesian Constitutional Court*.

³² Hendrianto, "From Humble Beginnings."

³³ Venning, "Determination of Economic, Social and Cultural Rights," pp.100-132.

³⁴ Butt, "Indonesia's Constitutional Court," pp.98-116.

³⁵ *Ibid.*

labels these types of decisions as 'disguised activism'.³⁶ That said, the *MK* does not automatically invalidate the laws but it does effect legal change since it requires these laws to be interpreted in a certain way. In their respective articles, both Venning as well as Butt use some similar judicial review cases that are closely related to economic and social rights such as the judicial review of the Law on Electricity and the Law on Water Resources.

Based on the analysis and conclusions drawn from the two scholarly articles described above, this paper offers a different explanation. This paper argues that in conducting judicial review, especially on matters related to economic and social rights, the *MK*'s approach has been inconsistent. The *MK* does not always adopt a strong form of judicial review in the sense that it automatically invalidates the law that is contradictory to the Constitution. In some cases, the *MK* adopts a weak form of judicial review. That said, the *MK* does not automatically invalidate a law even though it declares that such law is inconsistent with the Constitution. The *MK* gives an opportunity to the legislature and the executive to comply with the provision of the Constitution. This paper will show how, in some cases, the *MK* adopts a weak form of judicial review. In doing so, it will use two articles written by Mark Tushnet, namely *New Forms of Judicial Review and the Persistence of Rights –and Democracy-Based Worries*³⁷ and *Social Welfare Rights and the Forms of Judicial Review* as primary references.³⁸ These two articles are utilized because they provide the most recent models of judicial review that explain different approaches of the court in deciding judicial review cases related to economic and social rights.

V. THE MK'S APPROACH IN THE JUDICIAL REVIEW OF ECONOMIC AND SOCIAL RIGHTS IN TUSHNET'S LENS: WEAK OR STRONG FORM OF JUDICIAL REVIEW?

Tushnet's article on *New Forms of Judicial Review and the Persistence of Rights –and Democracy-Based Worries* explains how weak forms of judicial review try to respond to the criticisms of strong forms of judicial review that struggle to avoid criticisms of judicial activism and judicial restraint. Weak forms of judicial review try to protect liberal rights in a way that reduces the possibility of wrongful interference with the legislature. This promise, however, may not be fulfilled. Tushnet argues that weak forms of judicial review are unstable. In the long run weak forms of judicial review may lead to judicial or parliamentary supremacy.³⁹

His article builds on the discussion of judicial review from distinguishing strong and weak form of judicial review to identifying several subcategories of weak review. Through this discussion he examines several approaches of judicial review, including those used in Canada, New Zealand, Great Britain and South Africa.

This paper uses Tushnet's article to examine the *MK*'s approach in conducting judicial review. This paper would argue that, in some cases, the Indonesian system may reflect a weak form of judicial review, resembling a system more similar to that of the South Africa system than the strong review system of the United States.

Scholars who view that Indonesia adopts strong form of judicial review primarily base their view on the argument that the *MK* has the final say in determining the constitutionality of a statute.⁴⁰ This view is in line with the provisions in the Constitution stating that the *MK* has the power to determine the validity of a legislative

³⁶ *Ibid*, p. 99.

³⁷ Tushnet, "New Forms of Judicial Review," p. 813.

³⁸ Tushnet, "Social Welfare Rights," p. 1895.

³⁹ Tushnet, "New Forms of Judicial Review," pp. 813-14.

⁴⁰ Moh Mahfud MD, "Separation of Powers and the Independence of Constitutional Court in Indonesia" (presentation, the 2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro, Brazil, 16-18 January, 2011); Butt, "Indonesia's Constitutional Court," p. 110.

statute.⁴¹ The *MK* has the power to declare whether a statute is consistent with the Constitution and has the ultimate power to invalidate a statute that is contradictory to the Constitution. This feature resembles the feature of judicial review in the United States. This paper, however, holds the view that in certain cases, notably in the Water Resources Law case and the National Budget Law case, the *MK* used a weak form of judicial review which resembles the weak form of judicial review implemented in South Africa.

In *Grootboom*⁴², the South African Constitutional Court adopted a weak form of judicial review which is also referred to as democratic experimentalism.⁴³ The democratic experimentalism model involves several stages. First, the Court states the constitutional principles at a high level of abstraction.⁴⁴ The Court then provides incomplete principles meaning applied to particular contexts.⁴⁵ Following that, the Court asks other branches of government namely the executive and the legislature to develop and implement their plan in line with the incomplete principle as required by the Court.⁴⁶ The Court finally assesses the result of such experiment.⁴⁷

The following section will use the democratic experimentalism stages described above to explain how judicial review in the Water Resources Law case resembles the weak form of judicial review practiced by the South African Constitutional Court. The Water Resources Law⁴⁸ was filed with the Constitutional Court on two occasions. The first set of petitions was filed with the *MK* in 2004, while the second petition was filed in 2013. In the 2004 petition, the petitioners claimed that the Water Resources Law was contradictory to Article 33 of the Constitution.⁴⁹ This was due to the petitioners' belief that Water Resources Law opened up the possibility to privatize water resources. The Water Resources Law allowed the private sector to participate, and impose fee for, the provision and management of certain types of water resources such as drinking water and irrigation. The Law also introduced the right to exploit (*hak guna usaha*) water resources. The petitioners believed that allowing the private sector to participate in water resources management was contradictory to Article 33 of the Constitution which states that: "The land, water and natural resources contained therein shall be controlled by the State and shall be used to the greatest extent for the welfare of the people."⁵⁰ [Unofficial translation]

In this case, the *MK* started out with the constitutional principles stated at a high level of abstraction. The *MK* interpreted Article 33, specifically the phrase 'controlled by the State' as follows: "... provided the state with the mandate to determine policies and to conduct acts of administration, regulation, management, and supervision in order to achieve the greatest welfare for the people."⁵¹ This stage is similar to the first step that was taken by the South African Court in *Grootboom*, in the sense that the

⁴¹ Article 24 of the 1945 Constitution of the Republic of Indonesia.

⁴² South Africa v Grootboom 2000 (11) BCLR 1169 (CC) (S. Afr.).

⁴³ Michael C. Dorf and Charles F. Sabel, "A Constitution of Democratic Experimentalism," *Columbia Law Review* 98 (1998), p. 267.

⁴⁴ Tushnet, "New Forms of Judicial Review," p. 822.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p.823.

⁴⁸ Indonesia, *Undang-undang tentang Sumber Daya Air (Law on the Water Resources)*, UU No. 7 tahun 2004, LN No. 32 tahun 2004, TLN No. 4377 (Law No. 7 of 2004, SG No. 32 of 2004).

⁴⁹ Article 33 (2) (3) of the 1945 Constitution of the Republic of Indonesia. "A sector of production which is vital and affects the livelihood of the people at large shall be under the control of the state" and "water... shall be under the control of the state and shall be used to the greatest extent for the benefit of the people." [Unofficial translation].

⁵⁰ Article 33 of the 1945 Constitution of the Republic of Indonesia.

⁵¹ Indonesian Constitutional Court Decision No.058 -059-060-063/PUU-II/2004 and No.008/PUU-III/2005, p.514.

Court also stated the constitutional principles.

The *MK* then elaborated on its interpretation breaking it down to more specific functions:

The operating function of the State is implemented by the government under its authority to issue and revoke permits, licenses, and concessions. The regulatory function is carried out through legislative powers by the DPR (House of Representatives) and the President, and regulation by the Government. The managing function is carried out through share-holding mechanism and or through direct involvement in the management of State-owned enterprise or state-owned legal entities as an institutional instrument through state represented c.q. the government uses its control over resources to be used for the greatest benefit of people's welfare. Also supervision function by the State c.q. government in order to supervise and manage so that the implementation of powers by the state in sectors of vital production and /or dominate the need of many people shall be truly conducted for the greatest welfare of all people.⁵²

The second stage, as the court in *Grootboom* offered the specification of requirement of the plan. Here also the *MK* offered the conditions that should be fulfilled by the executive when establishing implementing regulations. Conditions that should be fulfilled in implementing regulations are as follows: first, the utilization of water may not disrupt, derogate or reduce the people's right to water. Second, the State must fulfill the people's right to water. Third, the utilization of water must take into account sustainability of the environment. Fourth, water management and water supervision by the state are absolute in nature. Lastly, in water resources management and supervision priority should be given to state-owned enterprises or local-owned enterprises.⁵³

The *MK* then proceeded to the next stage by asking the executive branch to implement the above described conditions when establishing implementing regulations. While giving an opportunity to the executive branch to include such conditions in its implementing regulations, the *MK* declared that the constitutionality of the Law was conditional on such conditions being fulfilled.⁵⁴ The *MK* declared that '...if this Law in its implementation is interpreted differently from the manner as intended in the *MK*'s consideration above, there is a possibility to re-file [this law] for review (conditionally constitutional).'⁵⁵

Nine years after the first decision, through the second judicial review of the Water Resources Law, the *MK* examined the implementing regulations enacted by the executive. The *MK* assessed whether such implementing regulations were compliant with the *MK*'s guidance. After assessing the contents of the implementing regulations, the *MK* declared that the implementing regulations derived from the Water Resources Law did not comply with the *MK*'s guidance. As a result, the *MK* declared that the 2004 Water Resources Law was unconstitutional.

The judicial review of the Water Resource Law illustrates how the process of judicial review in this case largely resembles the weak form of judicial review adopted by the South African Constitutional Court in *Grootboom*. Similar to *Grootboom* where the Court provided guidance to the government in implementing the plan, in the Water Resources Law case the *MK* also provided guidance to the government in establishing implementing regulations. In addition to the above, in the *Grootboom* case the Court

⁵² *Ibid*, p.515.

⁵³ *Ibid*, p.492-495.

⁵⁴ *Ibid*, p.295.

⁵⁵ *Ibid*, p.495.

examined the implementation of the plan. Likewise, in the Water Resources Law case the Court assessed the implementing regulations issued by the government. The interaction between the Court and the government in both cases leads to the possibility of the Court 'to revise' its decision. The revisability of the Court's decision reflects the weak form of judicial review.

The weak form of judicial review that this paper argues is significant in clarifying that, in the case of Indonesia, strong form of judicial review is not consistently applied in every case. Weak form of judicial review may be used by the *MK* in certain cases. The use of weak form of judicial review provides certain advantages. Unlike the strong form of judicial review that may potentially lead to tension between the Court and branches of government, the weak form of judicial review potentially reduces such tension. This is because unlike in the strong form of judicial review where the Court often ends up invalidating the law, in the weak form of judicial review the Court does not automatically declare that a law is unconstitutional. Rather than that, the Court provides guidance which can be used by the government to implement its plan. After the government implements its plan, the Court finally examines the government's implementation and declares whether the plan complies with the Court's guidance.

VI. WILL WEAK FORM OF JUDICIAL REVIEW STAY WEAK IN THE LONG RUN?

In view of the adoption of weak form of judicial review in some judicial review cases decided by the *MK*, will such weak form of judicial review stay weak in the long run? In considering this question, it is important to understand whether weak form of judicial review is in fact stable. This section will attempt to answer this question by looking at the *MK*'s decision in the judicial review of the National Budget Law. In analyzing this case, Tushnet's second article entitled *Social Welfare rights and the Forms of Judicial Review* will be used as reference.⁵⁶

In his said article, Tushnet examines the weak and strong form of judicial enforcement in connection with social welfare rights. He asserts that both forms of judicial enforcement have certain benefits and drawbacks. Tushnet is particularly interested in weak form of enforcement because it provides middle course between strong form of judicial enforcement and non-judicial enforcement. Unlike the strong form of judicial enforcement where the Court elaborates in great details what government must do, weak form of judicial enforcement offers guidance from the Court to the government in planning what the government should do.⁵⁷ Due to such cooperation, weak form of judicial enforcement may avoid resistance from the government. Weak form of judicial enforcement, however, may provide little incentive to the legislature to comply with the Court's order.

In weak form of judicial enforcement, the Court initially asks the government to develop reasonable plans to fulfill its constitutional obligations. Once the plan is developed, the government implements the plan independently. The Court merely provides light supervision in the implementation of such plan. The success or the failure of implementation heavily depends on the willingness of the government to execute the plan.

It is possible that there is little that happens or nothing happens at all. In this case, the court will potentially strengthen its order in order to compel the government to put more effort into the realization of social welfare rights. The Court possibly asks for a more detailed plan and a deadline for the accomplishment of the goal. The Court, in this instance, moves from weak form of judicial enforcement to strong form of judicial enforcement.

⁵⁶ Tushnet, "Social Welfare Rights," p. 1895.

⁵⁷ *Ibid.* p. 1902.

Comparatively, in his article, Tushnet uses the Kyalami Ridge⁵⁸ case and the U.S. experience in school desegregation⁵⁹ cases to explain how weak form of judicial enforcement works in the real world.⁶⁰ In Kyalami Ridge, the property owner demanded the government to provide shelter for people who lost their house because of flood. The Court rejected the petition and declared that the government had the duty “to devise, fund, implement, and supervise measure to provide relief to those in desperate need.”⁶¹ As long as the government can show its plan to realize its constitutional obligation, the Court will likely declare that the government complies with its constitutional obligation. This decision indicates the language of weak form of judicial enforcement.

The U.S. school desegregation case shows how the court initially adopted weak form of judicial enforcement but then moved to strong judicial enforcement because the weak form did not lead to significant change.⁶² In this case, the Court declared that segregation of school was unconstitutional. This means that the government must put efforts to end the practice of school desegregation. The Court did not supervise the desegregation process. As a result, nothing much happened. The Court then asked the government to provide a detailed plan and it closely supervised the implementation of the plan. In this case the Court converted its judicial enforcement from weak to strong form of judicial enforcement.

The following part will use Tushnet’s argument that the weak form of enforcement may be prove to be unstable, leading to the adoption of strong form of judicial review⁶³, to explain the judicial review of the National Budget Law in Indonesia. The National Budget Law was initially challenged at the *MK* in 2005. The petitioners claimed that the Law, in particular with regards to budget allocation for education, was inconsistent with Article 31 of the Indonesian Constitution. The said article states that “The State shall prioritize the budget for education at the minimum of 20 percent of the State Budget and of the Regional Budget in order to fulfill the needs of the implementation of national education.”⁶⁴ The 2005 National Budget Law in fact allocated only seven percent to the educational sector. In this case, the government argued that the word ‘prioritize’ implies that the fulfillment of 20 percent for educational sector can be carried out gradually, as long as the government progressively makes a reasonable effort to achieve the intended purpose and reasonably utilize the existing recourse to realize the intended purpose.⁶⁵

The *MK* acknowledged that the legislature and the executive have increased the percentage of the allocation for educational sector. That increase, however, did not achieve 20 percent. The *MK* responded that the constitutional provision on the allocation of 20 percent for education did not mean that the fulfillment of such obligation could be carried out gradually. The *MK* ruled that the 2005 Law on State Budget violated the Constitution because it failed to meet the 20 percent constitutional requirement. While the *MK* declared that the Law was in conflict with the Constitution, it did not automatically invalidate the existing Law.⁶⁶ The *MK* expected that by

⁵⁸ Constitutional Court of South Africa, *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*, 2001 (7) BCLR 652 (CC) (S. Afr.).

⁵⁹ US Supreme Court, *Brown v. Board. of Education.*, 347 U.S. 483.

⁶⁰ *Ibid.*

⁶¹ South African Constitution Chapter 2, Article 27.

⁶² Kim Lane Scheppele and Gerald N. Rosenberg, “The Hollow Hope: Can Courts Bring about Social Change?,” *Contemporary Sociology* 21 (1992), doi:10.2307/2075854.

⁶³ *Ibid.*

⁶⁴ Constitution of the Republic of Indonesia, Article 31 (4).

⁶⁵ Decision of the Indonesian Constitutional Court Number 012/PUU-III/2005, p.61.

⁶⁶ The *MK* did not invalidate the Law because it may create uncertainty in budgetary and financial administration in the country. In addition, the invalidation of the 2005 State Budget Law would require the government to use the previous State Budget Law (the 2004 State Budget Law) in which allocation for

pronouncing such decision, the government would fulfill its constitutional obligation in the 2006 State Budget Law. The said decision also reflected that the *MK* refrained from interfering in the legislature's authority to amend the Law.

In 2005, the *MK* also made a decision on the 2005 State Budget Law⁶⁷; it once again declared that as long as the budget for education did not reach 20 percent, the State Budget Law would be contradictory to the 1945 Constitution. The *MK*, however, would only invalidate provisions related to the education budget, rather than the entire State Budget Law. As a consequence, the budget for education may be higher compared to the budget stated in the State Budget Law if there is a surplus of funds or additional revenue from the 2006 State Budget Law.

This decision reflects the adoption of weak form of judicial enforcement by the *MK*. Instead of invalidating the existing Law on the grounds that the Law was in conflict with the Constitution, the *MK* maintained the constitutionality of the Law and provided an opportunity to the government to fulfill its constitutional obligation through legislative review. In the said decision, the *MK* did not provide for a detailed plan, did not determine a time frame and did not require strict supervision of the government in fulfilling its obligation. The *MK*'s approach in this case reflects the characteristics of weak form of judicial enforcement, in that the legislature did not immediately increase the portion of the budget dedicated to education to 20 percent.

In 2006, two petitions were brought to the *MK*, namely petitions against the 2006 State Budget Law and the 2003 National Educational System. The petitioners claimed that the 2006 State Budget Law was in conflict with Article 31 (4) of the Constitution⁶⁸ because it had allocated only 9.1 percent for the educational sector. They argued that the government did not demonstrate good faith to fulfill its constitutional obligation. They also claimed that the government had not respected the *MK*'s decision in the 2005 State Budget Law case.⁶⁹ Based on the fact that between 2004 and 2006 the state budget for education never achieved 20 percent, the *MK* concluded that there was no significant effort from the government and the legislature to comply with their constitutional obligation. The *MK* warned lawmakers to take the *MK*'s decision seriously so that the court would not find it necessary to invalidate the State Budget Law for its entirety in the future.⁷⁰ The *MK* declared that provisions in the 2006 State Budget which allocated funds for education were unconstitutional. This decision required the government and the *DPR* (House of Representatives) to revise the 2006 State Budget Law during the midyear adjustment of the state budget law in order to comply with the constitutional provision.⁷¹ While the lawmakers did revise the 2006 State Budget Law, and increased the percentage of educational fund allocation, such increase did not fulfill the *MK*'s decision.

In regard to the National Educational System, the petitioners claimed that the exclusion of teachers' salaries from the 20 percent educational budget was unconstitutional. The *MK* concluded that teachers' salaries should be included in calculating the educational funds. The inclusion of salary increased the percentage of educational funds. The *MK* concluded that because the inclusion of salary would help the government achieve the 20 percent constitutional requirement, there should be no further excuse for not fulfilling such constitutional requirement.

In 2008 a similar petition was brought to the Court. In this case the petitioners claimed that the 2008 Amended State Budget Law which allocates 15.6 percent for

education was even smaller than that in the 2005 State Budget Law.

⁶⁷ Indonesian Constitutional Court Decision Number 026/PUU-III/2005.

⁶⁸ Constitutional Court Decision, No. 026/PUU-IV/2006: Judicial Review of the 2006 State Budget Law.

⁶⁹ *Ibid*, pp.46-7.

⁷⁰ *Ibid*, p.95.

⁷¹ *Ibid*.

education did not meet the 20 percent constitutional requirement.⁷² The *MK* once again declared that the provisions concerning the 15.6 percent educational fund allocation was unconstitutional. The *MK* also warned lawmakers to fulfill their constitutional obligation, failing which the *MK* would invalidate the Law in its entirety. The *MK* used the same language to compel lawmakers to abide by its decision. In the said decision, the *MK* also determined a time frame for the government to fulfill its obligation. Lawmakers were required to fulfill their constitutional obligation by allocating 20 percent of the national budget to the educational sector by no later than the 2009 State Budget Law. The government frequently used poor financial conditions resulting from the financial crisis as an excuse for not complying with the *MK*'s decision. In its decision, the *MK* declared that the benchmark of 20 percent would have to be complied with in the 2009 State Budget Law. It was an important matter in order to avoid the Law being declared unconstitutional in its entirety. Eventually, the 2009 State Budget Law achieved 20 percent allocation for the educational sector.

The *MK*'s decisions in the above described cases were not appropriately followed up by the government as reflected in the follow up on its decisions in the State Budget Law cases in 2005, 2006 and 2007 respectively. While the *MK* acknowledged that there was gradual increase in the budget allocation for education, such increase did not meet the constitutional requirement. It appears that there has been a consistent constitutional violation. The 2006 *MK* decision demonstrates how the court shifted from the weak form of judicial enforcement to strong form of judicial enforcement. Unlike the 2005 decision where the *MK* provided an opportunity to the government and the *DPR* (House of Representatives) to fulfill their constitutional obligation, in the 2006 decision the *MK* observed that there had been no significant efforts on part of the government and the *DPR* (House of Representatives) to comply with their constitutional obligation. The *MK* consequently invalidated the provisions related to budget allocation for education and required the government to revise the 2006 State Budget Law specifically in view of the provisions concerning the educational sector. The *MK* also determined a time frame in its 2008 decision in the National Budget Law case ordering that the requirement of 20 percent allocation for education be included in the 2009 National Budget Law.

VII. CONCLUSION

Based on the analysis of the two judicial review cases considered, namely the Water Resources Law and the National Budget Law described above, it can be concluded that: first, the *MK*'s approach in deciding judicial review cases related to economic and social rights, as reflected in the Water Resources Law case and the National Budget Law case respectively, can be interpreted as the adoption of weak form of judicial review. The judicial review of the Water Resources Law illustrates that the process of judicial review in this case largely resembles weak form of judicial review whereby the *MK* provided guidance to the government for implementing the latter's plan. The *MK* also assessed the implementing regulations issued by the government. The interaction between the *MK* and the government in this case may lead to the possibility of the *MK* 'to revise' its decision. The revisability of the *MK*'s decision reflects the weak form of the judicial review.

Second, this paper has also proved that Tushnet's argument that weak form of judicial enforcement in the long run is likely to shift to strong form of judicial enforcement can be used to explain the judicial review of the State Budget Law in Indonesia. In this case the weak form of judicial review emerged when the *MK* declared that the State Budget Law was inconsistent with the Constitution while it refrained from invalidating the Law. Such decision of the *MK* was based on the

⁷² Indonesian Constitutional Court, Decision No. 13/PUU-V/2008.

expectation that the legislature would amend the Law in order for it to be consistent with the Constitution. In actual fact, the *MK*'s expectation did not materialize. The *MK* subsequently moved from weak form of judicial review to strong form of judicial review. In this case, the *MK* determined a time frame for the fulfillment of its decision. This paper has also proved that the promise that weak form of judicial enforcement would resolve problems associated with strong form of judicial enforcement or problems associated with non-judicial enforcement seems difficult to be achieved. In this instance, Tushnet's theory appears to be correct in that the form of judicial enforcement eventually changes to from weak to strong form of judicial enforcement.

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