

THE CONSTITUTIONALIZATION OF BUDGET FOR EDUCATION AND ITS JUDICIAL ENFORCEMENT IN INDONESIA

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Abstract

The introduction of provision concerning budget allocation for education in the amended constitution is not a common method in constitutional drafting in Indonesia. This article aims to understanding the background of the inclusion of this provision and its judicial enforcement. It argues that the establishment of this provision closely related to the fact that education was not properly funded. As a result, the quality of education was negatively affected. The constitutionalisation of budget for education opens the possibility to allocate the national budget in this field in a more sustainable way. In addition, by constitutionalizing budget for education, there is a legal avenue available to challenge the government policy if the government fails to fulfill its constitutional obligation. The newly established Constitutional Court has the power to review whether the allocation of national budget for education is consistent with the Constitution. In some judicial review cases on budget for education, the Court took legal approach and also extralegal factors in its rulings.

Keywords: Constitutionalization, Budget Education, Judicial Enforcement.

I. INTRODUCTION

The recent constitutional amendments have significantly changed the Indonesian Constitution. Beside changing the governmental structure and introducing new state institutions, the updated constitution also elaborated provisions on other important aspects such as human rights, social welfare, and education. Qualitatively, the updated constitution inserts more comprehensive

constitutional principles of a modern constitution such as separation of powers, check and balances, rule of law, and protection of human rights. Some constitutional law scholars both from Indonesia and overseas have analyzed and evaluated the recent constitutional amendments.¹ For that reason, this article does not intent to examine all updated provisions of the new constitution as have been sufficiently discussed; it instead will focus on certain constitutional provisions i.e. provisions on education. This is because updated provisions on education changed significantly, both in quality and quantity, compared to that of the previous constitutions.² In terms of quality, the new provisions add government obligations to manage national education and guarantee the right to education.³ More importantly, they explicitly stipulate certain percentage of both national and regional budgets that should be allocated by the governments for education.⁴ The inclusion of percentage on budget for education was believed the first provision in the Indonesian constitutions that spell out the quantitative measure since the first constitution established in 1945. Of course, the previous constitutions stipulated the duties of government on education and also guarantee the rights of people to education.⁵ However, these provisions were written in qualitative and abstract way. In other words, the constitutional drafters did not insert percentage or number in the constitution.

The inclusion of budget allocation for education in the constitution (or I call constitutionalization⁶ of budget for education) is not common in Indonesia. Generally, provisions of the constitution were written in a general and abstract way. This way the constitution can keep up with the recent development of the country. However, without spelling out the details in the constitution, the implementing regulations which elaborate the provisions of the constitution often

¹ Denny Indrayana, "Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition." Tim Lindsey, "Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33 of the Constitution." Kawamura, "Politics of the 1945 Constitution: Democratization and Its Impact on Political Institutions in Indonesia." Tim Lindsey and Simon Butt, *The Constitution of Indonesia: A Contextual Analysis* (Bloomsbury Publishing, 2012).

² The amended constitution contains more provisions on education. It mentions in two separate chapters: chapter on human rights and chapter on education.

³ Article 31 and article 28 of the amended constitution.

⁴ Article 31 (4) of the 1945 Constitution: The state shall prioritize the budget for education to a minimum of 20% of the State Budget and of the Regional Budget to fulfill the needs of implementation of national education.

⁵ Art 31 (1): 'Every citizen has the right to receive education. Art 31 (2): The government shall manage and organize one system of national education which shall be further regulated by law.

⁶ *Undang-Undang Dasar 1945 Konstitusi Yang Hidup, penulis. P. 565.*

simplified the very meaning of the provisions of the constitution. Therefore, the inclusion of percentage in the constitution raises questions: why did the framers of the updated constitution insert these provisions in the new constitution, while the previous constitutions never explicitly and quantitatively mentioned budget allocation for education? What factors contribute to the establishment of this provision? In practical level, are there any legal consequences if the government fails to fulfill this constitutional duty? What is the role of the new Constitutional Court if the government fails to fulfill its constitutional obligation concerning budget allocation for education? How does the constitutional court uphold these constitutional provisions?

This article aims to answer the questions mentioned above. It argues that there are multiple factors that contribute to the inclusion of budget for education in the new constitution. In addition, the inclusion these provisions will ensure the government to fulfill its constitutional obligation. In case the government fails to prioritize at least twenty percent of national and regional budget for education, there is a legal avenue available for the public i.e. judicial review to challenge the government in compliance. If the Constitutional Court is compelled to decide this case, this article predicts that the Court will likely to utilize textual interpretation as the main approach rather than extra legal factors. This is because the requirement of twenty percent budget allocation explicitly mentions in the text of the constitution.

This article will proceed as follows: Part I discusses the features of the updated constitution. It focuses on the “quantitative” aspect of the updated constitution. In doing so, this part compares some provisions in the new constitution to similar provisions in the old constitutions to show that the new constitution is more quantitative in nature. Part II examines the rationales of the drafters to include provisions on budget allocation for education through studying the minutes of the constitutional drafter when deliberating these provisions. Part III analyzes the possible the legal consequences that the government faces if the government fails to properly allocate budgets for education. Part IV analyzes the Constitutional Court approaches when it decided judicial review on budget for education. The final part provides conclusion.

II. DISCUSSION

1. The 1945 Constitution Constitution: from a “Qualitative” to a more “Quantitative” Constitution

The amended constitution is arguably better in terms of the quality compared to the previous constitutions. This can be seen, for example, it inserts some fundamental principles of the modern constitution that were absent in the previous constitutions such as check and balances, separation of powers, and rule of law. The new constitution also guarantees human rights protection.

In four consecutive years from 1999-2002, more than seventy percent provision of the old constitution was amended during this series of constitutional reforms. The number of provisions in the updated constitution is three times more than the old constitutional provisions.⁷ Some provisions tend to be more “quantitative” compared to that of the old constitutions. By quantitative I mean the updated constitution inserts provisions that contain numbers, percentage, or fractions. For example, some provisions contain number of years to determine the term of office of government officials. For example, Article 7 of the (new) 1945 Constitution states the President and the Vice President can only hold an office for five years and can be reelected in the same position for two terms of office.⁸ This provision is significantly different from the old constitution which stated that the President and the Vice President hold office for five years and they can be re-elected afterward.

Article 6A (3) mentions certain percentages of total number of votes for the candidates of president and vice president in order to be declared as the President and the Vice President.⁹ The previous constitution said nothing about percentage. It stated that the President and the Vice President shall be elected by the MPR by

⁷ Denny Indrayana, “Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition.” Kompas Book Publishing 2008. p. 331. Approximately 95% of chapters, 89% of the articles and 85% of the paragraphs are either new or were alteration of the originals.

⁸ Article 7 of the 1945 Constitution says “The President and the Vice President shall hold an office for five years and can be reelected in the same office only for another term of office.” Article 7 of the old constitution said: The President and the vice President shall hold an office for a term of five years and shall be eligible for re-election.

⁹ Art. 6A (3) Any ticket of candidates for President and Vice President which have reached a poll of more than fifty percent of total number of votes during general election and an additional poll at least twenty percent of the votes in more than half of the total number of provinces in Indonesia shall be declared as the President and the Vice-President. This provision did not exist in the old constitution.

a majority vote.¹⁰ Article 7B uses fraction to determine the threshold of the MPR members to impeach the President and the Vice President and uses number as a time limit to convene a sitting to decide the proposal for impeachment.¹¹ There was no similar provision in the old constitution. There are also provisions that contain number to indicate the time limit. Article 20 (4) is the case on point. It gives time limit to the president to ratify the bill. Again, the old constitution did not mention anything about this matter. Numbers are also used to limit the number of state institution. Provisions concerning the Constitutional Court and Supreme State Audit determine that there is only one Constitutional Court and one Supreme Audit Body in Indonesia. This general observation reflects how some provisions in the updated constitution are more quantitative compared to that of the old constitution. Apart from the term of office, threshold, and time limit, numbers (either percentage or fraction) are also used to determine the budget allocation. Article 31 (4) is the perfect example. It uses percentage to require the government to prioritize at least twenty percent of national and regional budgets to be allocated for education. The old constitution did not say anything about budget for education let alone stipulated certain percentage budget for education. This new provisions raise a question why the framers of the constitution decided to include percentage in the new constitution, provided the fact that the old constitutions never mention anything about percentage? This article attempts to answer this question and analyzed its legal implication in practice.

2. Why did the Constitutional Drafters Insert Percentage for Education Budget Allocation?

Before discussing the background why the constitutional drafters include budget for education in the new constitution, it is important to understand the worldwide view regarding budget for education. Katarina Tomasevski provides

¹⁰ Article 6 (2) of the (old) 1945 Constitution.

¹¹ Art. 7 B (7) says: The decision of People's Consultative Assembly over the proposal to remove the President and/or the Vice President shall be taken during a plenary session of the People's Consultative Assembly attended by at least ¾ of the total of member and shall require the approval of at least 2/3 of total member who are present, after the President and / or the Vice President have been given the opportunity to present his. Her explanation to the plenary session of the people's Consultative Assembly. This provision did not exist in the old constitution.

four variations how countries in the world treated right to education in their constitution.¹² First, there are about 79 countries that constitutionally guarantee free and compulsory education. Second, around 37 countries guarantee right to education in their constitutions but only limited to citizens or residents. Third, about 30 constitutions partially or progressively realize the guarantee of right to education. And last, about 40 constitutions do not mention about right to education. Under this model, Katarina Tomasevski placed Indonesia in the last model. I argue that it does not represent how Indonesia treated right to education in its Constitution. The Indonesian constitution might be best placed in the second or third model –certainly not the last model. This is because Indonesian Constitution recognized right to education as explicitly stated in article 28 E and article 31. In addition, the Constitution also stipulates that budget allocation for education should be at least 20 percent of the national and regional budgets.¹³ It might be true that there is no provision in the constitution that explicitly mention education is free but the government is constitutionally responsible to fund the education.¹⁴ While the constitution does not mention about free education, basic education in Indonesia is mostly free. But this does not apply to higher education.

In Indonesian context, provisions on education have been discussed since 2000 during a series of constitutional amendments (1999-2002). While some provisions on education remained the same, there are significant additions in this Chapter including the inclusion of budget allocation for education. Indrayana argued that article 31 (4) which stipulates twenty percent of state and regional budgets for should be allocated to education is largely symbolic.¹⁵ This is because article 31 (4) does not provide clear sanction which can be applied against the government, regional authorities and/or the DPR if the budgets do not reach twenty percent.¹⁶ I do not think that article 31 (4) is symbolic. While it may be true that there is no direct sanction for the lawmakers both

¹² Katarina Tomasevski, *Manual on Rights-Based Education: Global Human Rights Requirements Made Simple*, Bangkok UNESCO 2004 p. 15.

¹³ Article 31 (4) of the 1945 Constitution.

¹⁴ Article 31 (2) of the 1945 Constitution.

¹⁵ *Ibid.*, p. 309.

¹⁶ *Ibid.*, 309-310.

in national and regional level, this provision is judicially enforceable. The court especially constitutional court can use this provision to adjudicate cases if there is an allegation that the government fails to fulfill its constitutional obligation. The court can review the government policy through its judicial review power. With regard to the constitutionalisation budget for education, there were at least three areas that have been the focus of the constitutional framers when they discussed budget allocation for education. First, what are the rationales to include (or not to include) the percentage of budget for education in the updated constitution. Second, what are the references when the drafters decided to include the percentage of budget for education in the new constitution? And last, what is the proper percentage of the national and regional budgets to be allocated for education? The following part will discuss these three areas in order.

The Rationales to Include Budget for Education in the Updated Constitution

Inserting percentage of budget for education in the constitution is arguably a new method of constitutional drafting at least in the context of Indonesia.¹⁷ Perhaps, Indonesia is one of few countries whose constitutions require the government to allocate certain percentage of national and regional budget for education.¹⁸ Since the first constitution in 1945 up to the reinstatement of the 1945 Constitution, the Indonesian constitutions never explicitly mentioned budget allocation for education. The 1945 Constitution, for example, said that every citizen has the right to receive education.¹⁹ With slightly different wordings, subsequent constitutions: The 1949 Constitution and the 1950 Constitution also stipulated similar provision on education.²⁰ Of course, it does not mean that there was no budget allocation for education during the implementation of these two constitutions. Rather, budget for education was not stipulated in the constitutions, it was regulated in the legislation such as the MPR decrees²¹ or laws.²² During the recent constitutional amendments, the MPR started to

¹⁷ Some countries such as Taiwan and Costa Rica explicitly mention percentage of national or regional budget for education in their constitution.

¹⁸ Munafrizal, Manan, "The Implementation of the Right to Education in Indonesia." *Indonesia Law Review* 5, no. 1 (2015): 56.

¹⁹ Art. 31 of the 1945 Constitution.

²⁰ Article 39 of the 1949 Constitution and Article 30 (1) of the 1950 Constitution.

²¹ These include; TAP MPRS No II/MPRS/1960, TAP MPRS No. XXVII/MPRS/1966.

²² Education law of 1950, 1954, 1989, and 2003 regulated national education system.

discuss provisions on education in 2000 -the second year of the constitutional amendments. In general, The MPR agreed in most part of the updated provisions on education. There was only minor disagreement regarding the word choice between *pendidikan* (education) or *pengajaran* (teaching).²³ In addition, the MPR also aimed to insert provision on budget for education in the constitution. The MPR intention to elaborate budget for education in the constitution reflects two important points: first, it is likely that the current budget allocation for education is not sufficient. Second, there is a need to increase the quality of education.

There are some contributing factors why the MPR want to insert this provision. First, there was uncertainty about budget allocation for education.²⁴ There was no minimum threshold or bottom line regarding the percentage of budget for education. Budget allocation may be different from time to time. It can go high in certain period but it also can go low in other period. Unfortunately, so far most of the time budget for education was relatively low.

Prior to recent constitutional amendments, budget for education was placed in the MPR decree or laws, not in the constitution. This would not be a problem if the MPR or the lawmakers, through decree or laws, funded the education adequately. In addition, there is also mechanism in place to monitor or to review the implementation of the MPR decree or laws. Unfortunately, this mechanism was absent in the past. This situation created the uncertainty regarding the percentage of budget allocation for education. It very much depended on the political will of the lawmakers or the MPR as they wer the only bodies that could amend the laws and the decree as they wish. Unfortunately, often time budget for education was not the main priority for them.

Second, there was no legal avenue available to challenge the government policy if the government did not fulfill budget allocation for education. There was no judicial review mechanism available to challenge the government policy either to challenge the MPR decree or to challenge laws. In other words, in case the

²³ TimPenyusun, *Naskah Komprehensif Proses Dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, Dan Hasil Pembahasan, 1999-2002, Buku IX Pendidikan Dan Kebudayaan*. p. 164.

²⁴ *Ibid.*, 174.

government failed to fulfill budget allocation for education, there was no mechanism to challenge it. In fact they can change the laws or the decree as they wish.

Third, the fact that from time to time budget for education was insignificant created the situation that education in Indonesia was lagged behind.²⁵ If in the past students from neighboring countries come to Indonesia to study, the opposite applies today.²⁶

Based on these factors, the MPR believed that education in Indonesian should be the main priority. One way to make education the main priority is by increasing budget for education. There is also a need to make budget allocation for education sustainable. This can be done by stipulating the bottom line budget allocation for education in the constitution –not in laws or MPR decrees. By inserting this provision in the constitution, budget for education will be constitutionally guaranteed which means there will be more certainty about its availability and its sustainability.

In addition, the introduction of judicial review in the new constitution provides legal avenue for the public to challenge the government policy if it fails to fulfill its constitutional duty. The government stipulates the allocation of annual national budget in the form of law (Law on National Annual Budget –*Undang-Undang APBN*). This law can be to the constitutional court if it is likely inconsistent with the provisions of the constitution which require at least twenty percent budget allocation for education.

During the constitutional amendment, there were two different views among the MPR members regarding whether the new provisions should provide in details budget allocation for education. Some of the MPR members²⁷ suggested the provisions of education should only contain fundamental principles and guidance for the government in managing national education. These include,

²⁵ Bivitri Susanti, "The Implementation of the Rights to Health Care and Education in Indonesia," in *Courting Social Justice: Judicial Enforcement of Economic and Social Rights in the Developing World*, ed. Varun Gauri and Daniel Brink, First (New York: Cambridge University Press, 2008), 234.

²⁶ Tim Penyusun, *Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002, Buku IX Pendidikan dan Kebudayaan*. 181.

²⁷ Jacob Tobing suggested to avoid the use of percentage or number in the constitution (p. 173), Abdul Khaliq Ahmad (p. 177), Soedirjarto (*ibid.*, p. 178) Hobbes Sinaga (*ibid.*, p. 178). Tim Penyusun, *Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002, Buku IX Pendidikan dan Kebudayaan*, Revised Ed (Jakarta, n.d.).

among other things, the goals of the national education, the obligation of the government to education, and the guarantee for the people to access to education. For them, these general and somewhat abstract wordings reflect the nature of the constitution which should keep up with the development of the country.²⁸ A constitution should not contain the details of an issue such as numbers or percentage. This is because the details often change depending on the national economic performance. Therefore, it should not be inserted in the constitution. It is more appropriate if they are included in lower legislation such as laws.

Other members²⁹ viewed that besides guaranteeing the right to education and placing obligation to government on education, it is also important to explicitly state the percentage of budget allocation for education in the new constitution. This is because until today education in Indonesia never become top priority. Even though formally government allocate budget for education, it was often inadequate. Or sometimes the implementation of budget for education was smaller than what was written in the government policy plan. As a result, education in Indonesia is lagged behind compared to that of other neighboring countries.³⁰

Based on these facts, some of the MPR members suggested to explicitly state percentages of budget allocation for education in the new constitution. There are positive and negative aspects if budget allocation for education is explicitly mentioned in the constitution. On the one hand, inserting budget for education clearly guarantee the availability and the sustainability of fund for education. It also significantly increases the fund for education which has been overlooked quite some time.

On the other hand, in the real world the government should allocate the national budget in many different fields. Increasing budget in particular sector such as education may reduce fund for other important sectors such as health or infrastructure. As a result advancing one sector may be disadvantaging other

²⁸ *Undang-Undang Dasar 1945 Konstitusi Yang Hidup Op.Cit.* p. 576

²⁹ This includes, inter alia, Andi Mattalatta (FPG), Patrialis Akbar, Jacob Tobing, Hafiz Zawawi . Naskah Komprehensif p. 142.

³⁰ Based on World Development Indicators 2004, Indonesia spent less than 2% of its GDP for education. Other countries such as Vietnam, Sri Lanka, and Malaysia allocated bigger portion for education close to two percent. Gauri, Varun, and Daniel M. Brinks, eds. *Courting social justice: Judicial enforcement of social and economic rights in the developing world*. Cambridge University Press, 2008. p. 229

sectors. In addition, the national economic performance is not always good. Allocating certain percentage will likely sacrifice the fund for other important sectors.³¹ As stated by Boediono the Minister of Finance in that period, he argued “[t]he 20% specified in the constitution is too binding, especially in the current financial problem that we are facing. We all, I think, agree that education should be our priority. However, I do not think inserting an exact number into the Constitution is a good idea.”³² In fact, Every human right potentially has implication for budgetary allocation and public finance.³³

However, it is widely agreed among the MPR members that advancing education is very important. And providing sufficient funding is one of the main factors. This can be seen countries that are prioritizing sufficient budget of education for their citizens like Germany, Taiwan, and Malaysia have good quality of human resources. As a result, even though a country does not have significant natural resources, it can be a developed country with its advanced human resources.³⁴ Recognizing that education in Indonesia is lagged behind, the constitutional drafters finally agreed to insert percentage on budget for education in the updated constitution.

References of Budget Allocation for Education

The next question that should be addressed was if the MPR agreed to include percentage of budget for education in the constitution, what were the references to determine the percentage of budget for education? With regard to this matter, there are some references available that can be referred to such as the guidance from international organizations or other countries’ constitutions that include budget for education in their constitutions.

UNESCO provides guidance that budget allocation for education is at least 4% of the GDP³⁵. Taiwanese Constitution stipulates that the expenditure for

³¹ Manan stated that inserting budget for education in the constitution will potentially lead to constitutional hostage for the government as the government is compelled to fulfill this requirement regardless the actual state finance performance. Manan, Munafrizal. “The Implementation of the Right to Education in Indonesia.” *Indonesia Law Review* 5, no. 1 (2015): 56.

³² As quoted by Indrayana, “Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition.” p. 310.

³³ Nolan, O’Connell, and Harvey, “Human Rights and Public Finance.” p. 1

³⁴ Tim Penyusun, *Konstitusi Sebagai Rumah Bangsa, Pertama* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008). p. 149.

³⁵ Naskah Komprehensif, p. 89.

education at least 15% of the national government revenue, while expenditure are 25% in the provinces and 35% in local government.³⁶ Costa Rican Constitution explicitly mentions that budget for education is not less than 8% of its GDP.³⁷ Brazil Constitution requires the government to provide 18 per cent of national level and 25 per cent of regional level of tax income shall be allocated to educational sector.³⁸ There are also countries that do not explicitly mention the budget allocation for education in the constitution but they committed to allocate 4% GDP for education.³⁹

In discussing this matter, the MPR referred to the guidance of the UNESCO and looked other countries constitutions. It found out the some of the guidance and the constitution used GDP to allocate the budget for education but there were some constitutions that use their national budget as a parameter. A member of the MPR asked other member of the MPR who used to be the Minister of Finance whether it is better to use GDP or national budget as a parameter.⁴⁰ In the context of Indonesia it was basically the same whether we used national budget or GDP. He argued four percent of GDP equals to 20% of national revenue.⁴¹ The MPR finally decided to use national budget as the parameter. This was because national budget was commonly used. It stipulated in the form of law so that it was more certain and have legal authority. More importantly it could be reviewed by the court if there was an indication that the law was not consistent with the constitution.

3. The Legal Consequences of the Inclusion of Budget for Education in the Constitution

Provisions concerning budget for education was finally inserted in the updated constitution in 2002. It was stipulated in Article 31 (4). It says “The

³⁶ The constitution (Article 164) stipulates that the government’s educational expenditures at all levels account for at least 15 percent of the general government net revenues (including science and culture), while expenditures are 25 percent in the provinces and 35 percent under the local governments (including municipalities and counties) (Office of the President 2011).

³⁷ Article 78: For the State education, superior [education] included, the public expenditure will not be inferior to the annual eight percent (8%) of the gross domestic product, in accordance with the law, without prejudice to that established in Articles 84 and 85 of this Constitution.

³⁸ Manan, Munafrizal. “The Implementation of the Right to Education in Indonesia.” *Indonesia Law Review* 5, no. 1 (2015): 57.

³⁹ These include the USA, Germany, the Netherland, South Korea, Taiwan and Malaysia. Naskah Komprehensif .p. 89.

⁴⁰ *Ibid.*, p. 173.

⁴¹ *Ibid.*, p.

state shall prioritize the budget for education to a minimum of 20% of the State Budget and of Regional Budgets to fulfill the needs of implementation of national education.” There are two different views regarding the inclusion of this new provision. The first view believes that this article is arguably one of the most significant new provisions besides new provisions on human rights protection. It clearly and explicitly requires the government to allocate twenty percent of the national budget and of the regional budgets for education. The government is constitutionally obliged to do so. If the government fails to satisfy this provision, there is a possibility that the government will face complaints from people through judicial review mechanism to the newly established Court –the Constitutional Court. The new Court has the authority to conduct judicial review of laws against the Constitution. Since the national budget is stipulated in a statute, it is possible for the people to challenge it if they believe that the statute is inconsistent with the constitution.

The second view believes that this new article is symbolic or aspiration. Beside there is no sanction stated in this article, the word “prioritize” in this article does not automatically bind the government to allocate twenty percent budget for education. Prioritize means “to organize (things) so that the most important thing is done” or “dealt with first or to make (something) the most important thing in a group.”⁴² Therefore, while it is suggested that the government places education in its priority, the government still have the flexibility to determine the percentage to be allocated to educational sector.

In other words, twenty percent budget allocation for education as stated in this new provision is not binding the government so that the government must achieve this percentage. It is possible that the government achieve this percentage when the national economic performance is good. However, it is also possible that the government does not achieve this target if the national financial performance is not good.

It is interesting to see how this provision is interpreted differently by the constitutional framers. It is true that this article does not mention sanction.

⁴² <http://www.merriam-webster.com/dictionary/prioritize> accessed 26 September 2016.

Therefore, the argument that concludes there is no sanction if the government fails to fulfill twenty percent requirement can be understood. In addition, the word “prioritize” does not legally binding the government to allocate twenty percent of its budget for educational sector. Textually, that is what we may understand when we read article 31 (4). But it is still and open ended question as to whether this is the correct interpretation of this article? Or perhaps there were other interpretations.

One way to understand the more reliable interpretation regarding the meaning of this new provision is by looking at the legislative history. This can be done by reading and understanding the statements delivered by of the constitutional framers during the deliberation/formulation of this article. Reading and understanding the minutes of the constitutional drafters may help understand the purpose of the framers when the inserted these provisions in the constitution. However, sometime it is not easy to identify whose opinions were prevailed among other competing opinions. During the deliberation different persons may give different opinions so that there are multiple opinions regarding one thing. As a result, it is not easy to find the more authoritative interpretation regarding the meaning of this provision.

Another way to understand the meaning of this provision is by looking at how the judiciary especially the newly established Constitutional Court interpreted this provision. The Constitutional Court has the power to conduct constitutional review –the power to examine whether a statute is consistent with the constitution. In examining the consistency of a statute toward the constitution, this Court will look at the provision of the constitution and give meaning/certain interpretation to this provision and then the Court applies this provision to the statute. It is possible that different justice may have different opinions or interpretation regarding the provision of the constitution. However, in the end of the day the Court will use the opinions of the majority in rendering the decision. Compared to understanding the legislative history, this method is perhaps less difficult in understanding the meaning of the provision of the constitution. Except in the special circumstances when all framers of the new constitution had exactly the

same opinion regarding the meaning of the provision of the constitution which I believe is unlikely to happen.

The following part will examine how the Constitutional Court interpret article 31 (4) when it decided cases on budget for education. It will answer whether the court's approach is the similar to the interpretation of the constitutional framers or will its approach differ from the constitutional drafters. In addition, this part will also answer whether the court interprets the word 'prioritize' as a constitutional obligation or it is only a constitution symbol.

4. The Constitutional Court Approach in Deciding Judicial Review Cases on Budget for Education

This part examines five cases of the judicial review on budget for education to understand the judicial enforcement of this new provision on the ground. These cases are selected not only because they are closely related to budget for education but also because it require significant resources to fulfill this right. There are three important issues that will be answered in these five cases. First, whether the fulfillment of 20 percent budget for education can be done gradually. Second, there is a fact that budget for education has not yet achieved 20 percent. And last, whether the educator's salary is excluded (or included) in calculating budget for education.⁴³

These five cases indicated how the Court, through its rulings, response the branches of government when the government reluctantly complied its constitutional duty. What is the strategy of the Court in deciding these cases so that the government willing and can achieve its constitutional obligation concerning budget for education? To answer this question, this part will use legal and extra legal approach of the court decision.⁴⁴ Legal approach is broadly defined as the judge discovers and applies legal principles as stated in the law. In a broader context, legal approach also takes into account the legislative history of

⁴³ Tim Penyusun, *Putusan Mahkamah Konstitusi Tanpa Mufakat Bulat: Catatan Hakim Konstitusi Soedarsono, Pertama* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008). p. 725

⁴⁴ Tracey E. George and Lee Epstein, "On the Nature of Supreme Court Decision Making," *American Political Science Review* 86, no. 2 (1992): 323.

the law and the decisions of the court in similar cases in the past (precedents). Extra legal approach, on the other hand, is defined as the judges consider factors outside the law such as the social, financial, and political aspects.

As has mentioned above, the updated Constitution explicitly stipulates Chapter on Education.⁴⁵ In this Chapter, the state has several constitutional obligations including to fund the basic education, to manage and organize one educational system, and to prioritize the budget for education to a minimum of 20% of national budget and of the regional budget.

To implement these constitutional duties, the government and the legislature enact laws. The contents of these laws must be in line with the constitution provisions as the constitution is the supreme law of the land. In practice, the laws are not always consistent with the constitution. This is because Laws are created by political agencies that have different political interests. The political interests may influence the contents of the laws. To maintain the fidelity of laws toward the constitution, there is a specialized court namely the Constitutional Court that has the power to conduct judicial review.

The National Budget Law Case (2005)

The drafters of the updated Constitution see education as human rights and the right of citizens. Article 28 C (1) of Chapter XA on Human rights says 'Every person shall have the right to get education.' Article 31 of Chapter XIII on Education reemphasizes 'every citizen has the right to receive education.' The Constitution also puts obligation to the state to fund the basic education⁴⁶ and allocates of twenty percent of the national budget and regional budget for education.⁴⁷

The first judicial review on budget to education was occurred in 2005. Teachers of elementary and middle schools and education activists filed a petition to the Constitutional Court.⁴⁸ They questioned the constitutionality of the elucidation of Article 49 (1) of the National Education Law (Undang-Undang

⁴⁵ Chapter XIII on Education consists of 2 articles and 7 sub articles.

⁴⁶ Art. 31 (1) of the 1945 Constitution.

⁴⁷ Art. 31 (4) of the 1945 Constitution.

⁴⁸ Constitutional Court Decision No 011/PUU-III/2005.

Sistem Pendidikan Nasional)⁴⁹ that allowed the state to incrementally fulfill 20 per cent of the state budget and regional budgets for education.

The petitioners argued that this elucidation violated Article 31 (4) of the Constitution that required the education budget of minimum of 20 per cent. In addition, the petitioners also claimed that this Law infringed their right to work and to receive fair and proper remuneration and treatment employment, and enjoy physical and spiritual prosperity, as well as the right to social security.

The majority ruled in favor of the petitioners and declared that the Elucidation of Article 49(1) that allowed the fulfillment of 20 per cent of state budget for education can be done incrementally was unconstitutional.⁵⁰ The Court acknowledged that Article 31(4) explicitly require the state to allocate at least 20 per cent of state budget for education. The Court also addressed that education in Indonesia is lagged behind and it is the time that education should be the priority. This can be done, among other things, through increasing budget for education up to a minimum 20 per cent of state budget.

It appears that when deciding this case, the majority adopt legal model i.e. the plain meaning. The majority stated that “the 1945 Constitution *expressis verbis* has determined that budget for education should be prioritized at a minimum 20% of the National Budget and Regional Budget. This requirement cannot be altered by lower rank of legislation.”⁵¹ The word *expressis verbis* which essentially means explicitly or expressly written in the majority opinion reflects the adoption of plain meaning. The majority interpret Article 31 (4) as it is written in the text of the constitution. However, the majority also considered the real problem on the ground by acknowledging that education in Indonesia is lagged behind. This opinion is not based on the text of the constitution.

Three Justices⁵² dissented. They questioned the legal standing of the petitioners especially whether they really experienced damage because of the

⁴⁹ Law 20/2003 on National Education System

⁵⁰ *Ibid.*, 102.

⁵¹ The original text is as follow: “UUD 1945 secara *expressis verbis* telah menentukan bahwa anggaran pendidikan minimal 20% harus diprioritaskan yang tercermin dalama 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.

⁵² Justice Natabaya, Justice Achmad Roestand, and Justice Soedarsono. Constitutional Court Decision No 011/PUU-III/2005. p. 103.

existence of this law.⁵³ These Justices believed that there was no constitutional damage toward the petitioners because of the Elucidation of Article 49 (1). Even if there is a constitutional damage, such constitutional damage is not because of the Elucidation of Article 49 (1). Therefore, the petitioners were not eligible to file this petition to the Court.

They also believed that the word ‘incrementally’ cannot be interpreted as a violation or contradiction toward Article 31 (4) of the Constitution.⁵⁴ The word ‘incrementally’ explains the way in which the government will fulfill constitutional requirement of 20 per cent for education since Article 31 (4) does not mention how 20 per cent budget for education should be fulfilled.⁵⁵

In this case, the dissenters take slightly different approach by acknowledging that while the constitution requires 20 per cent of national and regional budgets for education, there is no requirement that the fulfillment of 20 per cent should be done at once. It is the domain of the executive and the legislature to determine how such requirement should be fulfilled. It appears that the dissenters also use legal approach i.e. the plain meaning as it is written in the constitutional text. It is interesting that even though both of them use the same approach, they come up with two different outcomes. The majority opinion placed stricter rule to the executive in the way they will fulfill the requirement while the minority provides more flexibility to the executive in satisfying of the requirement.

The Calculation of Budget for Education: How to Calculate Budget for Education?

In the same year, the Court received a petition from teachers and individuals activists. The petitioners challenged the constitutionality of Law 36/2004 on National Budget on the basis that this Law only allocated 6% of national budget for education yet the Constitution requires 20% of national budget for education at minimum.⁵⁶ The Court, in split decision, ruled in favor of the petitioners. The Court ruled that Law on National Budget was inconsistent with

⁵³ TimPenyusun, *Kontroversi Atas Putusan Mahkamah Konstitusi: Catatan Hakim Konstitusi Soedarsono*. p. 237.

⁵⁴ TimPenyusun, *Ikhtisar Putusan Mahkamah Konstitusi 2003-2008*. p. 496.

⁵⁵ *Ibid.*,

⁵⁶ Constitutional Court Decision No 26/PUU-III/2005.

the Constitution. The Court, however, did not declare the Law unconstitutional. In its opinion, the Court considered that there will be a negative consequence if the Court invalidated this Law. This is because the invalidation of this Law will require the government to apply last year the national budget. In fact the previous budget allocation for education was even smaller compared to the recent budget allocation.

Two Justices provided concurring opinions⁵⁷ while the other two Justices⁵⁸ dissented. One of the concurring justices believed that the recent national budget has been allocated in many different fields and the government was bound by this budget allocation.⁵⁹ It would be difficult for the government to fulfill the 20 per cent budget allocation for education since this means reducing the fund allocation for other sectors. This will lead to significant economy instability for the country.

In addition, whether the 20 percent budget for education has been achieved depends on how we calculate budget allocation. If budget for education include the salary for teachers and instructors, the 20 percent requirement may be already achieved. The other Justice questioned the legal standing of the petitioners and also believed that granting this petition will disadvantage the petitioners. Two dissenters⁶⁰ believed that there is no contradiction between this Law and the Constitution. The Law provides gradual increase to achieve the intended percentage. The 20 percent budget allocation for education will be achieved in 2009.⁶¹

This decision shows that the Court took different approach. It adopted legal model in the sense that the court seriously considers the provision of the Constitution and decided the case based on that provision. The Court ruled that the provision of the Law did not confirm the Constitution. The Court, however, did not invalidate the Law. The Court considered other aspects outside the constitution. The Court took into account the real world facts and possible

⁵⁷ Justice I Dewa Gedhe Palguna and Justice Soedarsono. *Ibid.*, p. 88.

⁵⁸ Justice Ahmad Roestandi and Justice Natabaya *Ibid.*, 92-98.

⁵⁹ *Ibid.*, p. 66.

⁶⁰ Justice Achmad Roestandi and Justice Natabaya. *Ibid.*, 92-98

⁶¹ *Ibid.*, p. 67.

problems faced by the government such as financial chaos if the Court grant the petition. Considering the significant impact that may occur if the Court invalidated the Law, it declared that the Law is inconsistent with the Constitution but did not invalidate the provision of the law.⁶² In this case, the Court used two different approaches. In determining whether the law is consistent with the constitution, the Court adopted legal approach. In determining whether the Court should invalidate the law; its approach is beyond the legal model. The Court adopted strategic approach in rendering this decision. It took into account the consequence and difficulty of other branches of government if the Court invalidated the law.

The National Budget Law Case (2006)⁶³

In 2006, The Indonesian Teacher Association and some individuals filed a petition to the Constitutional Court questioning the constitutionality of Law on National Budget 2007 specifically on allocation of educational budget. ⁶⁴ This Law allocated 11, 8% for education which was allegedly inconsistent with the Constitution that requires 20% at minimum for education. In its ruling, the Court considered its previous decisions in 2005 in which the court agreed that budget for education was excluded the salary of teachers and also the fulfillment of 20% budget for education cannot be done incrementally. The Justice who dissented in the previous decisions did not dissent anymore since he was bound by the Court previous decision.⁶⁵ It was the hope of the Court that through 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. Considering that since 2004 up to 2007 the national budget for education never achieve 20%, the Court believed that the lawmakers have not done optimally to increase the education budget. The Court, therefore, stated the provision of the law that stated budget for education 11,8% was in consistent with the Constitution and declared it un constitutional.

⁶² Tim Penyusun, *Menegakkan Tiang Konstitusi: Memoar Lima Tahun Kepemimpinan Prof. Dr. Jimly Asshiddiqie, S.H. Di Mahkamah Konstitusi, Pertama* (Jakarta: Sekretariat jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008). p. 174-175.

⁶³ Constitutional Court Decision 026/PUU-IV/ 2006.

⁶⁴ *Ibid.*, p. 93.

⁶⁵ *Ibid.*,

It appears that in rendering this decision, the Court was consistent referring its previous decisions in similar cases.⁶⁶ The Court summarized these decisions in its opinion and used them as a reminder for the lawmakers in allocating the national and regional budgets for education.⁶⁷

The Government argued that in calculating the allocation of budget for education, the Court should not refer to legislation below the Constitution. The Court should refer to the Constitution. In responding this statement, the Court stated that this formulation is determined by the lawmakers who have the power to determine how budget for education will be allocated based on the constitution.

The Court in this case adopted legal model in two ways. First, it refers to the relevant constitutional provisions related to budget for education as appears in article 31 (4). Second, in rendering its ruling the Court also consistently referred its previous decisions in similar cases namely the 2006 decisions on budget of education. Apart from legal model approach, the Court also warned to the government to fulfill the constitutional mandate of 20% budget for education or else it will invalidate the national budget law for its entirety in the future in there is a similar case filed to the Court.⁶⁸

Educators Salary Case⁶⁹

In 2007 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. The petitioners argued that provisions in this Law do not benefit teachers and lecturers as one of elements in education because it excluded the salary of educators from 20% of National and regional budget.

The Majority stated that Article 31(4) does not elaborate what will be included in the 20% of budget for education, however, it does not mean that Article 31(4) can be interpreted differently by Article 49 (1) of Law 20/2003. The majority believed that Article 49 (1) is inconsistent with Article 1(3) and (6) of this law and narrowed the meaning of Article 31 (4) of the Constitution.⁷⁰ The

⁶⁶ Constitutional Court Decisions No. 012/PUU-III/2005 and 026/PUU-III/2005.

⁶⁷ Constitutional Court Decision No. 026/PUU-IV/2006.

⁶⁸ *Ibid.*, p. 95.

⁶⁹ Constitutional Court Decision No. 24/PUU-V/2007.

⁷⁰ *Ibid.*, p. 84.

Court, in split decision, ruled that the salary of educators should be included in calculating 20% budget for education.

Three Justices dissented.⁷¹ They believed that there was no constitutional damage experienced by the petitioners because of Article 49(1). Thus, they did not have legal standing to file petitions to the Court. In fact, the decision of the Court in this case might disadvantage the allocation of budget of education since the inclusion of teacher salary in the budget of education would reduce the amount of rupiahs that will be allocated for education.

The dissenters, further, reminded that based on the Court previous rulings, whether educators' salary will be included in 20% budget for education is the domain of the lawmakers to decide. Therefore, for the sake of consistency of the court rulings, the Court should consider what stated in article 49(1) is constitutional.⁷² The Court should allow the lawmakers to determine whether or not Article 49(1) should be amended. The Court should not review and declare Article 49(1) is inconsistent with the Constitution and invalidate Article 49(1).

The Dissenters understand the government will perhaps continually violate the Constitution if the government does not fulfill the 20% budget for education and as a result it may de-legitimize the Constitution and the Court existence. But the Court should consistent with its rulings. In doing so, the dissenters cited *Brown v. Board of Education* which needs 10 years to be fully implemented.⁷³

In rendering this decision, the Court adopts a unique approach. The Court seemed to adopt legal model i.e. by referring other articles of the reviewed law (Article 1 (3), (6)) and Article 31 (4) of the Constitution in determining the constitutionality of Article 49 (1). At the same time, however, the Court rejected the legal model in which it did not refer to its previous decisions in its ruling. There have been three court rulings in this case and none of them are fully implemented by the government. The majority believed that it is likely there will be continuous violation of the constitution if the court consistently applies the same rules i.e. excluding the educators salary from budget for education.

⁷¹ Justice Abdul Mukthie Fadjar, Justice Maruarar Siahaan, and Justice Harjono. *Ibid.*,

⁷² *Ibid.*, p. 90.

⁷³ *Ibid.*, p. 93.

The Court granted the petition and explicitly mentioned that by including the teachers' salary as the components of budget for education, there is no reason for the government to delay its constitutional duty to achieve 20 percent budget for education.

The National Budget Law Case (2008)⁷⁴

The final case on budget for education was decided in 2008. The Indonesian Teacher Union (PGRI) filed a petition to the Court to challenge the constitutionality of Law on National budget 2008, which allocated 15,6 percent for education. The Court highlighted that it has issued four rulings in this case. The lawmakers, however, keep ignoring the court rulings. In its opinion, the Court stated that it had given enough time for the lawmakers to satisfy their constitutional duty. It declared the state budget unconstitutional.⁷⁵

The lawmakers were responsible for these constitutional violations. The Court demanded that the full allocation should be made in the 2009 budget. Surprisingly, the Court allowed the underfunded budget to stand until the 2009 national budget cycle took effect to avoid financial disaster.⁷⁶ The Court reminded that if the 2009 national budget failed to fulfill 20 percent for education, the Court would referred this decision to invalidate the national budget.

In deciding this case, the Court referred to its previous rulings and emphasized that the lawmakers did not take seriously the court decisions. The Court took further step by warning the government and the parliament that the Court would invalidate the national budget law in its entirety if they keep ignoring the court rulings. The Court also gave deadline for the lawmakers and once again reminded the lawmakers that they should fulfill their constitutional duty to provide 20 per cent budget for education in 2009 at the latest.

From the five judicial review cases mentioned above, there are some significant features that can be identified. First, in these cases, the Court largely adopted legal model. In rendering the decisions, it referred to written provisions of the law and the constitution. This approach, however, is not consistently adopted by

⁷⁴ Constitutional Court Decision No. 13/PUU-VI/2008.

⁷⁵ *Ibid.*, p. 100.

⁷⁶ *Ibid.*, p. 101.

the Court in the later cases. In one case, the Court ignored its previous rulings (precedent) concerning the method to calculate budget for education. At the same time, the Court accepted the argument of the petitioners which was based on the Article of the law that stated that teacher salary should be included in budget for education. The inclusion of teacher salary is a way for the Court to narrow the gap between the 20 percent of constitutional obligation and the reality on the ground. The Court expected that by rendering this decision the government will finally fulfill its constitutional duty and at the same time the court decision will be easier to be materialized by the lawmakers.

Second, the Court rulings in these cases are not unanimously decided. While the majority agreed to grant the petitions, some Justices dissented and provided significant legal arguments to the majority why they took different positions.

III. CONCLUSION

This paper has reviewed that the establishment of provision on budget for education in the updated constitution constitutes an uncommon method in drafting the constitution in Indonesia. Unlike many other provisions in the Constitution that are written in general and more qualitative ways, this particular provision explicitly mention the percentage of the national and regional budgets that should be allocated by the government for education. It quantitatively mentions twenty percent of the national budget and the regional budgets for education.

The paper has also explained some factors that contribute to the stipulation of this provision. The fact that in the past budget allocation was stipulated in laws or in the MPR decree created less certainty. This was because laws and the MPR decree were easier to be amended. In addition, the absence of legal mechanism to challenge the government policy created difficulty for the public to monitor the implementation of government policy. This resulted in fund for education was relatively low which significantly affected the quality of the education.

Since the recent constitutional amendments (1999-2002), the updated Constitution explicitly stipulates a provision on the percentage of budget for education. This provision is significant because it provides constitutional guarantee on budget for education. In addition, there is a potential legal consequence through judicial review if the government fails to fulfill its constitutional duty.

The Constitutional Court took article 31 (4) very seriously. There were at least five different judicial review cases that closely related to this provision. In general, the Court employed several approaches in deciding these cases. Even though legal approach became the main approach, the Court also considered factors beyond the text i.e. the real problem on the ground. This resulted in the court rulings declared that the law was inconsistent with the constitution but it did not invalidate it at the first place. This reflected the understanding of the Court that decisions on these cases have significant financial consequences in which the government needs some time to appropriately fulfill its constitutional duties on this matter.

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