

# THE ROLE OF THE CONSTITUTIONAL COURT IN PROTECTING ECONOMIC AND SOCIAL RIGHTS IN INDONESIA

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## ABSTRACT

*One of the important elements of a constitutional democratic state is the guarantee of human rights protection for its citizens. As a constitutional democratic state, Indonesia has adopted various human rights provisions from international covenants, following the amendment of the Indonesian Constitution. However, such guarantees do not necessarily mean that human rights will definitely be respected, particularly those concerning economic and social rights. Given this situation, the judicial review mechanism of the Constitutional Court is often used by citizens to uphold their rights. This article analyzes the Constitutional Court's role in protecting citizens' economic and social rights enshrined in the Indonesian Constitution. It concludes that economic and social rights can be judicially enforced through Constitutional Court decisions in a diverse array of cases, such as electricity, oil and natural gas, water resources, national social security, the education budget, pension payments, and marriageable age.*

**Keywords:** Constitutional Court, Economic Rights, Social Rights, Judicial Review, Indonesia.

## INTRODUCTION

Human rights are generally understood as “rights which are inherent in our nature and without which we cannot live as human beings” (Reichert, 2006). The concept covers a wide range of aspects of human existence considered essential for life in dignity and security (Shiman, 1999). Some of them, which are liberty-oriented, *i.e.*, those related to the freedom of the individual to act as she or he pleases as long as that action does not infringe on others' rights and freedom, are usually called civil and political rights or CP rights (Faiz, 2016). These include freedom of speech and religion, the right to fair trial, rights to be free from torture and arbitrary arrest. While the others, which relate to conditions necessary to meet basic human needs such as food, shelter, education, health care, and gainful employment are called economic, social, and cultural rights or ESC rights (Shiman, 1999).

Experts were commonly of the opinion that the conception of human rights cannot be separated from the Western tradition of thoughts or doctrines on individual rights (Henkin, 1999). It was said that these rights were derived from and conceptualized as natural rights, while the natural rights themselves were considered part of natural law (Basu, 2003). These rights,

according to O’Byrne, are characterized by three characteristics: universal, they belong to each of us regardless of ethnicity, race, gender, sexuality, age, religion, political conviction, or type of government); inalienable, they are absolute and innate; they are not grants from states, and thus cannot be removed or denied by any authority, and they do not require, and are not neglected by the absence of, any corresponding duties); and subjective, they are properties of individual subjects who possess them because of their capacity for rationality, agency, and autonomy (O’Byrne, 2004).

Nevertheless, understanding human rights as merely a Western conception could be misleading, for it has been widely acknowledged that long before human rights were laid down in legal instruments (international or national, i.e., national constitutions), their principles or values – such as propriety, justice, and caring – were vividly rooted in numerous cultural practices and or oral traditions of people around the globe (Shiman, 1999). Deep respect for human dignity and personality and the belief in justice are also the paramount goals in doctrines and traditions of great religions – such as Islam, Christianity, Hinduism, Buddhism, as well as Confucianism and Taoism (Smith, 2007). According to Jayawickrama, many moral values which have become modern pillars of international human rights are integral parts of these great religions’ doctrines and philosophies (Jayawickrama, 2002). It would hardly be a mistake, then, to say that values and principles of human rights in general and ESC rights in particular are of universal character. Hence, it would hardly be a mistake too to say that, notwithstanding the fact that ESC rights are commonly described as “*second generation rights*,” the existence of these rights had been universally recognized for centuries, at least in terms of principles and values (Amnesty International, 2014).

The Universal Declaration of Human Rights (UDHR) – the first international legal document which introduced the term “human rights” – puts ESC rights side by side with CP rights. UDHR, despite its non-binding nature, is considered the foundational document of the modern human rights movement (Hibbert, 2017). Considering that UDHR has been widely used as the primary statement of what are considered human rights, the Declaration is often regarded as having legal significance and even considered “*customary*” international law, as well as the authentic interpretation of the references in the UN Charter (Shiman, 1999).

The UDHR, as reflected in its Preamble, emphasizes that recognition of inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. The recognition formulated in the UDHR’s Preamble has given not only a huge ideological impact to the development of human rights protection but also made the “inherent dignity of human being” the main category of normative instruments of the international legal system, either regional or universal international law (Hanski & Suksi, 2004). It was proven, undoubtedly, by the fact that the UDHR was the foundation of two subsequent legally binding international legal instruments on human rights, i.e., the International Covenant on Civil and Political Rights/ICCPR and the International Covenant on Economic, Social and Cultural Rights/ICESCR (Strydom, 2019), as well as various international legal instruments on human rights, regional or universal, adopted thereafter – such as the Convention on the Rights of the Child (CRC), Convention on the Elimination of Discrimination Against Women (CEDAW), Convention on the Elimination of All Forms of Racial Discrimination

(CERD), and many others. This development means that human rights, as enshrined in the UDHR and in its subsequent Covenants, as well as in various international human rights legal instruments, have provided a set of principles and standards by which to assess and redress inequality (National Pro Bono Research Centre, 2011).

Recognizing human rights as the inherent dignity of human beings constitutes needs to respect, to protect, as well as to fulfill these rights. Now, on one hand, as more and more states have become parties to international human rights legal instruments, especially the two Covenants (ICCPR and ICESCR), the needs to respect, to protect, and to fulfill human rights have become international legal obligations of the states concerned. While, on the other hand, more and more states have also included human rights in their constitutions. It means that these rights have now become part of the constitutions. In other words, they have transformed as constitutional rights. Accordingly, the obligations to respect, to protect, and to fulfill these rights have now become constitutional obligations. Since a constitution binds all branches of state power (legislative, executive, and judicial), then these branches of state power are now under constitutional obligations to respect, to protect, and to fulfill these rights.

Such obligations also apply to ESC rights – despite its “*secondary*” status. In terms of ESC rights, obligation to respect means that a state is obliged to refrain from any action that would interfere with an individual’s enjoyment of economic and social rights. While obligation to protect means that a state is under obligation to ensure that economic and social rights are not infringed by third parties. And, obligation to fulfill refers to a state’s obligation to take all necessary measures (legislative, administrative, budgetary, judicial and other measures) to guarantee the enjoyment of each economic and social right at a satisfactory level.

ESC rights cover a wide range of rights, such as right to work, right to just and favorable conditions at work, right to form and join trade unions without restriction, right to social security, rights of the family and its members (including special protection for mothers, children, and young persons), right to an adequate standard of living (including basic income, food, housing, water, sanitation and clothing, and the continuous improvement of living conditions), right to health, right to education, right to take part in cultural life and enjoy the benefits of scientific progress (Art. 1-6 of ICESCR). ICESCR guarantees that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [Art. 2(2) of ICESCR]. The Covenant also affirms that restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall not be admitted on the pretext that the ICESCR does not recognize such rights or that it recognizes them to a lesser extent [Art. 5(2) of ICESCR]. In the enjoyment of ESC rights, limitations may only be determined by law and only in so far as it is compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society (Art. 4 of ICESCR).

ESC rights or human rights in general are closely related to social justice because social justice is based on equality of rights for all human beings, and their possibility to benefit from economic and social progress without discrimination (Venieris, 2013). Franklin Ibáñez says, the normative criterion or principle of social justice is that it is socially unjust to carry on a practice

that contradicts the common beliefs formally subscribed to by various groups that all people have equal moral value according to the culture of human rights in spite of the difficulty to find a normative criterion accepted by all members of societies in this contemporary world because, even in the apparently more homogenous societies, not all share the same beliefs (Ibáñez, 2012). This article does not go further into an in-depth analysis or theorizing of social justice, for it is neither my expertise nor the particular purpose of this conference. But, at least, it may be fair and acceptable enough to lay down a general assumption that the fulfillment of human rights or of ESC rights in particular, would become a significant contribution to the realization of social justice.

This article's theoretical contribution comes from investigating a new relationship among different concepts (Salamzadeh, 2020), in this case by proving the relationship between Indonesia's Constitutional Court and the protection of economic and social rights through its corrections of mistakes in legislation. This research starts by examining the amendment of the Indonesian Constitution, followed by an explanation economic and social right therein. Next, it analyzes case studies of judicial review decisions on economic and social rights, before offering its conclusion.

### **Amendment of the Indonesian Constitution**

The amendments made to the Indonesian Constitution in 1999-2002 were an important stage in the development of the Indonesian constitutional system in adopting human rights, including provisions on social and economic rights. The late President B.J. Habibie contributed greatly in changing Indonesia from an authoritarian administration, to a modern democracy (Lubis, 2014). In his brief presidency from May 1998 to October 1999, Habibie introduced bold policies to restore public confidence, building a new and more transparent and accountable system. He restored democracy, press freedom, and the rule of law. He introduced legislation that paved the way for a new Indonesia, where democracy, human rights, rule of law, regional autonomy and corruption eradication were adopted as the agenda for the future (Lubis, 2014).

The amendments to the 1945 Constitution, which were part of the reform demands, laid the foundation for the detailed regulation of human rights, enabling Indonesia to progress. According to Jimly Asshiddiqie, former Chief Justice of the Constitutional Court, the Indonesian Constitution can be regarded as one of the modern constitutions, because its scope of human rights covers almost all international legal instruments on human rights (Asshiddiqie, 2015). Thus, Indonesia recognizes the importance of the sincere protection and enforcement of human rights.

The regulation of human rights in the Constitution was ratified by the People's Consultative Assembly on August 18, 2000, following heated debates over the pros and cons of draft amendments. Proponents argued that greater protection of human rights in the Constitution was needed to prevent a repeat of the types of violations of Soeharto's authoritarian regime. On the other hand, opponents believed that human rights were already accommodated in laws, and did not need to be regulated more comprehensively in the Constitution. This faction claimed the inclusion of human rights articles in the Constitution would destroy the "special characteristics

and spirit” of Indonesia’s 1945 Independence, without explaining what the “characteristics” and “spirit” entailed (Indrayana, 2007).

Despite this resistance, it was agreed that human rights would be regulated in the Constitution. Such regulation is a commitment of the state to fulfill the requirements of the rule of law. The Constitution regulates human rights in both its Preamble and Provisions. The Fourth Paragraph of the Preamble states that, “... *in order to form a Government of the State of Indonesia that shall protect the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general prosperity, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice...*”

### **Economic and Social Rights in the Indonesian Constitution**

Indonesia is a constitutional democratic state. It is clearly stated in the Preamble as well as in the provisions of its Constitution, namely the Constitution of 1945 or Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 in Indonesian language (hereinafter the Constitution). Article 1 paragraph (2) of the Constitution stipulates that sovereignty shall be in the hand of the people and shall be applied pursuant to the Constitution, while paragraph (3) stipulates that Indonesia shall be based on rule of law.

In every such state, human rights are constitutionally guaranteed. The Constitution stipulates the guarantee of human rights in Chapters X and XA, involving CP rights as well as ESC rights. As for economic and social rights, the Preamble of the Constitution unequivocally states that the Government of the Republic of Indonesia established under the Constitution, shall among others advance public welfare and promote education of the nation’s life. The same paragraph of the Preamble also enshrines the state foundation of Indonesia, called *Pancasila* though the term “*Pancasila*” itself is not explicitly used in the Preamble as *Philosophische Grondslag*. The state foundation consists of five basic principles: (1) A belief in the Oneness of God the Almighty, (2) A just and civilized Humanity, (3) The Unity of Indonesia, (4) Democracy with the guidance of wisdom in assembly/representation, and (5) Social Justice for all people of Indonesia. In this context, the preamble of a constitution is a solemn introduction expressing the political, moral, and religious ideas which the constitution is intended to promote. The preamble also gives a constitution a greater dignity and thus a heightened efficacy (Kelsen, 1961)

The spirit to uphold social justice and to advance public welfare enshrined in the Preamble is elaborated further in various articles of the Constitution related to economic and social rights (Omara, 2020), such as right to form a family and the rights of every child to be entitled to viability, to grow up, and to be developed, as well as rights to protection from violence and discrimination (Article 28B); rights to be entitled to self-development through the fulfillment of basic needs, to acquire education and to obtain benefits of science and technology, art, and culture for the sake of enhancing quality of life and for the welfare of mankind [Article 28C paragraph (1)]; right of all individuals to work and to obtain fair and proper remuneration and treatment in employment [Article 28D paragraph (2)]; and rights to be physically and

spiritually prosperous, to have a place to reside, and to acquire a good and healthy living environment, and to obtain health care [Article 28H paragraph (1)].

Meanwhile, the Constitution also emphasizes constitutional obligations upon the state to ensure the fulfillment of citizen's constitutional rights related to economic and social rights. These include, for example: every citizen shall follow basic education and the government shall be under the obligation to finance it [Article 31 paragraph (2)]; the state shall prioritize the education budget by allocating at least 20% of the state budget and of regional budgets [Article 31 paragraph (4)]; the state shall control sectors of production which are important for the state and which are vital for the livelihood of the people [Article 33 paragraph (2)]; the state shall control land, water and natural resources therein and they shall be utilized for the optimum welfare of the people [Article 33 paragraph (3)]; the state shall develop a social security system for all people and shall empower those who are poor in accordance with human dignity [Article 34 paragraph (2)]; and the state shall be responsible to provide decent health care and public service facilities [Article 34 paragraph (3)].

Hence, constitutionally speaking, as far as Indonesia is concerned, fulfilling the enjoyment of economic and social rights together with advancing social justice are an integral part of the state's obligations. Such obligations entail constitutional responsibility upon the state, especially the government of Indonesia. Article 28I paragraph (4) of the Constitution stipulates, *"The protection, advancement, enforcement and fulfillment of human rights shall be the responsibility of the state, particularly the government."*

Furthermore, Indonesia has also become party to the ICESCR by ratifying the Covenant through Law Number 11, 2005. Indonesia has also become party to many other international legal instruments related to ESC rights, such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC); and Convention on the Rights of Persons with Disabilities (CRPD). Accordingly, Indonesia's obligations to respect, to protect, and to fulfill ESC rights stipulated in the ICESCR and other international legal instruments have now become the country's international legal obligations as well.

To some extent, the development mentioned above was, on one hand, undoubtedly a significant achievement of the country in the pursuit of becoming an advanced constitutional democratic state. While, on the other hand, it also sent a strong message to the international community pertaining to the country's honest effort to uphold human rights upon which, among others, the international community's members share their common foundation for cooperation.

However, just because those fundamental rights are guaranteed and protected constitutionally, it does not mean they will definitely be respected. Their implementation depends on institutional infrastructure, mechanisms, and commitments of state administrators, including the regulation of those rights in legislation. To avoid laws that are detrimental to the interests of the community, the processes and procedures for the formation of laws are arranged within a framework of checks and balances.

Nevertheless, all these processes are not enough to eliminate the suspicion of the emergence of oppressive or despotic laws (Agresto, 1984). Jeremy Waldron, in his book *The Dignity of Legislation*, expressed concern *"that legislation and legislatures have a bad name in*

*legal and political philosophy, a name sufficiently disputable to cast doubt on their credentials as respectable sources of law”* (Waldron, 1999). There is also the possibility of laws conflicting with the Constitution. To prevent this problem, it is necessary to assess the constitutionality of laws as part of the checks and balances.

Of the many constitutional law concepts that influence the debate about the legislative body and the legislative process, the concept of judicial review is an important one. It relates not only to the review of laws, but also to the concept of constitutionalism, where judicial review is closely related to maintaining the highest set of values and rules in the constitution.

Control in the form of judicial review becomes a necessity, especially if the majority of the legislative body supports the president. The judicial review can therefore be viewed as an instrument to purify laws produced by the legislature. Similarly, Hans Kelsen recognized the need for an institution with power to control or regulate legislation (Ferejohn, 2001). The basic notion is purifying legislation that contradicts the constitution. Without the control of the judiciary, strong political interests in the legislative body could produce legislation that harms the public.

### **Constitutional Court and Judicial Review of Laws**

Taking into account the general discussion above, a question arises as to what is the role of the Indonesian Constitutional Court (hereinafter referred to as “*the Court*”) in protecting human rights, particularly economic and social rights? In general, the Court – as other courts of its kind in many countries – was established to ensure that the Constitution, as a fundamental law, shall be upheld in real life. As Thomas Paine famously declared, “*A constitution is not a thing in name only, but in fact. It is not an ideal, but a real existence; and whenever it cannot be produced in a visible form, there is none*” (Paine, 1958). A constitution can only be regarded fundamental if, among others, there is an authority to say that any law which is in contradiction with the constitution is unconstitutional and, consequently, the law loses its legally binding power (Basu, 2003).

Such an authority is, according to judicial supremacy doctrine, in the hands of the judiciary (Whittington, 2007; Clinton, 1989; Chemerinsky, 2017; Fallon, 2018). John Marshall, the late Chief Justice of the U.S. Supreme Court, was generally acknowledged as the person who introduced the doctrine in his famous *Marbury v. Madison* (1803) ruling, in which he stated that a constitution was a fundamental law. This ruling was also regarded as the foundation of judicial review. Marshall’s bold statement in the ruling, as frequently cited by academics who study constitutional law, from which he derived his argument on the fundamental character of a constitution, says:

*“The constitution is either a superior, paramount law, unchallengeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall be pleased to alter it. If the former part of the alternative is true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable (Clinton, 1989).”*

He elaborated further that those who drafted the (U.S.) Constitution intended the constitution to be a fundamental law, the supreme law of the (American) land. Since the constitution was a fundamental law, consequently, he concluded, any law repugnant to the constitution was void (Knappman, 2002). The question is who has the authority to void a law? According to Marshall, such authority must be in the hands of the judiciary:

*“It is emphatically the province and duty of the judicial department to say what the law is. Those who play a role to particular cases must of necessity expound and interpret that rule. If two laws conflict which each other, the court must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution must apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty (Clinton, 1989).”*

The majority of experts consider Marshall’s ruling in *Marbury v. Madison* inspired the establishment of constitutional courts around the globe, starting in the early twentieth century in Austria and (then) Czechoslovakia, with the main function being to maintain the constitution as a fundamental law. And to that end, constitutional courts were equipped, especially; with the authority to review the constitutionality of laws and to declare these laws unconstitutional if they are proven contradictory to the constitution (Enders, 2020; Karamysheva, 2020).

Indonesia’s Constitutional Court was established in 2003 as a result of the amendment of the Constitution following the so-called “*Reform Movement*” pioneered by students and pro-democracy activists that marked the fall of President Soeharto’s “*New Order Regime*,” which had ruled the country for more than three decades. The Court was the first constitutional court established in the twenty-first century and the 76<sup>th</sup> constitutional court in the world (Asshiddiqie, 2005).

The Constitution entrusts the Court the judgment of which is final authorities to adjudicate, at the first and final instance, cases concerning the review on the constitutionality of laws, the settlement of authority disputes among state institutions whose authorities are given by the Constitution, the dissolution of a political party (Faiz, 2016), and the settlement of disputed general election results (Kelliher, 2019). The Court is also granted the power to render a judgment on a petition submitted by the House of Representatives pertaining to an alleged violation (or violations) by the President and/or Vice President pursuant to the Constitution.

The Court’s authority which is relevant to the protection of human rights issues is its authority to review the constitutionality of laws commonly known as judicial review. According to Article 51 paragraph (1) of the Constitutional Court Law, those who deem their constitutional rights and/or authorities have been infringed by a law in force have a standing to submit a petition to the Court asking the Court to declare the law unconstitutional. They consist of (a) an Indonesian citizen (or a group of Indonesian citizens), (b) traditional communities (on conditions that they remain exist and their existence is in line with the development of society and with the principle of the Unitary State of the Republic of Indonesia, which is regulated by laws), (c) public or private legal entities, and (d) state organs. In addition, since the very beginning of its operation, the Court had also admitted non-governmental organizations’ standing to file a



petition on judicial review of laws on the condition that the purposes or activities of such organizations were relevant to issues covered by the reviewed laws (Palguna, 2018).

In case of potential violations in laws, the Indonesian Constitution provides space for them who feel that their rights have been violated, to challenge such laws through a judicial review to the Constitutional Court. The judicial review mechanism should maintain a balance in the implementation of checks and balances between the branches of state power. It indicates that the Constitutional Court provides the forum for various groups to struggle for their interests (Karjoko, 2021). It also raises the principle of prudence among lawmakers when discussing bills because the judicial review authority of the Constitutional Court aims to control the legislative power, the President, and the Regional Representatives Council (Isra, 2010; Indrayana, 2007). More important, is ensuring that laws and regulations do not deviate from the Constitution and that the constitutional and human rights of citizens remain protected (Harman & Hendardi, 1991).

The Constitutional Court's authority to review laws is an instrument to ensure that the substance of the Constitution is not distorted by the legislature, as well as to ensure that citizens' constitutional and human rights are not violated by legislation. These rights include social and economic rights. Admittedly, due to varying interests of constituents, laws are very likely to be separated from the substance of the Constitution. In this context, the judicial review mechanism is a way to maintain guarantees of the social and economic rights that the Constitution requires.

The role of the Constitutional Court in reviewing laws against the Constitution is the development of modern ideas about a democratic administration system based on the rule of law, the principle of separation of power, and protection of human rights (Asshiddiqie, 2015). In a rule of law, there must be constitutionalism, where no laws and regulations may be in violation of the Constitution. One basic principle of the rule of law is an independent and impartial judiciary that enables formal and substantial legality, and recognition and protection of fundamental human rights. If citizens, either individuals, communities, or legal entities, feel that their constitutional rights are harmed by the enactment of a law, they may file a judicial review petition to the Constitutional Court. This is because one of the Constitutional Court's main duties is the protection of individual citizens from abuse of power by state institutions that violate the fundamental rights guaranteed by the Constitution (Asshiddiqie, 2005).

The Constitutional Court became Indonesia's new hope for the protection of human rights and citizen's constitutional rights. The Court's role as protector of human rights cannot be separated from the 1998 Reform movement, which required the judiciary to be independent and impartial. Before the Reform era, the judiciary was under the control of the executive, so judicial independence was nonexistent (Lubis, 2014).

The Constitutional Court was conceptualized as one of the constitutional guarantor institutions that should be obeyed by all state administrators. In addition, the judicial review of the laws is expected to achieve legal certainty as a prerequisite for the rule of law. The judicial review gained basic lessons learned in the form of human rights adaptation according to the legal ideals (*rechtsidee*) of Indonesia's state ideology. Protection of social and economic rights through the Constitutional Court's decisions is needed for clear legal rules in legislation.

The 1945 Constitution is also referred to as a “social justice constitution”. It requires that all norms reflected in various policies and regulations and other written policy documents, as well as all government actions reflected in development programs along with the respective state and regional budgets, are oriented to improve the quality of social justice for all Indonesians (Asshiddiqie, 2015).

### **Constitutional Court Decisions on Economic and Social Rights**

The growing awareness of Indonesian citizens of their constitutional rights resulted in the increasing trend of judicial review cases submitted to the Court year after year. It is a positive trend, viewed from the perspectives of democracy and rule of law, at least in terms that lawmakers would never pass a law solely on the basis of political compromise, ignoring the Constitution as had commonly happened in the past, prior to the amendment of the Constitution. Since its establishment in 2003, the Court has handed down 1,410 decisions concerning petitions on judicial review of laws, 272 of which were granted partly or entirely. Some of the granted petitions were related to economic and social rights.

#### **Electricity Case (2003)**

In Decision No. 001-021-022/PUU-I/2003 concerning judicial review of Law Number 20 of 2002 on Electricity, the Court ruled that the principle of unbundling stipulated in the reviewed Law was contradictory to Article 33 paragraph (2) of the Constitution, which states, “*Sectors of production which are important for the state and which are vital for the livelihood of the people shall be under State control.*” According to the principle of unbundling, the electricity business should be carried out separately by different business entities. Hence, it was clear that this concept would absolutely prevent any intervention of the State in the electricity business, let alone its control. The unbundling principle was formulated in Article 8, Article 16, and Article 17 of the Law, as follows:

Article 8: The electricity business consists of electricity supply business and supporting electricity business.

The electricity supply business includes the following types of business:

1. Electricity generation,
2. Electricity transmission,
3. Electricity distribution,
4. Electricity sales,
5. Electricity sales agents,
6. Electricity market management; and
7. Electrical power systems management.

Article 16: The electricity supply business as referred to in Article 8 paragraph (2) is carried out separately by different business entities.

Article 17: The electricity generation business as referred to in Article 8 paragraph (2) shall be carried out based on competition; Business entities in the field of electric power generation in a competition area are prohibited from dominating the market, based on this Law. Considering the unbundling principle contained in those articles was the “heart” of the Law, in which the whole articles of the reviewed Law referred to the principle, the Court then declared the entire Law on Electricity unconstitutional.

### **Oil and Natural Gas case (2003)**

In Decision No. 002/PUU-I/2003 concerning judicial review of Law No. 22 of 2001 on Oil and Natural Gas, the Court referred its ruling to Article 33 paragraph (3) of the Constitution, which states, “*Land and water and all natural resources contained therein shall be under State control and shall be utilized for the maximum welfare of the people.*” Accordingly, there was no doubt that a law on oil and natural gas was subject to the provision stipulated in Article 33 paragraph (3) of the Constitution. It was even clearly stated in the Law’s “*Consideration letter a*” which stated that oil and natural gas are non-renewable strategic natural resources which are under State control and are vital commodities that affect the livelihood of the people and play an important role in the national economy, hence their management ought to be conducted in a way that gives maximum welfare to the people. The Court stated further, however, that it did not mean that the private sector was prohibited from businesses concerning oil and natural gas. The involvement of the private sector was justified and should be considered constitutional, as far as it does not exclude the State’s control. The Court emphasized that the State must have a determining vote in deciding the price of oil and natural gas. It means that the price of oil and natural gas should not be left to the market mechanism alone. Accordingly, the Court ruled that articles of the reviewed Law which left the price of oil and natural gas solely to the market mechanism were unconstitutional.

### **Water Resources Case (2004)**

In Decision No. 058-059-060-063/PUU-II/2004 concerning judicial review of Law Number 7 of 2004 on Water Resources, the Court again referred its ruling to Article 33 paragraph (3) of the Constitution. Consequently, privatization of water resources which completely excludes the control of the State must be considered unconstitutional. But, in this case, the Court was not sure whether the reviewed Law’s articles were contradictory to Article 33 paragraph (3) of the Constitution because they were formulated in such a way that made them open to more than one interpretation. If they were interpreted in one way, they were constitutional; whereas, if they were interpreted in another way, they would be unconstitutional. The only way to prove which of the two contending interpretations were true would depend on how the reviewed articles would be implemented by further implementing regulations in the future. By the time the Court handed down its decision, those implementing regulations had not yet been adopted. Such a situation made the Court rule that the reviewed articles were conditionally constitutional, meaning that if the implementing regulations to be adopted in the

future were in line with the spirit of Article 33 paragraph (3) of the Constitution, the reviewed articles must be declared constitutional. On the contrary, if such implementing regulations were in contrast with the above spirit, the reviewed articles must be declared unconstitutional.

In 2013, the Law on Water Resources was reviewed for a second time. The petitioners to this case claimed the Law was unconstitutional because its implementing regulations did not meet the conditions set forth by the Court's previous decisions. This time, the Court concurred with the petitioners' claim and ruled, accordingly, that the Law was unconstitutional. The Court pointed at the Law's implementing regulations in the form of six government regulations as evidences that the Law had been interpreted contrary to the conditions stated in the Court's previous decision. In its ruling, the Court said, among others:

Based on all the considerations described above, it appears that the State's right to control over water is the "spirit" or "heart" of the Law, as mandated by the 1945 Constitution. Therefore, the next thing for the Court to consider is, have the implementing regulations for the Water Resources Law been drafted and formulated in accordance with the Court's interpretation, so as to guarantee that the State's right to control water will actually be realized? The only way for the Court to answer this question is by carefully examining the implementing regulations of the Water Resources Law, in this case the Government Regulations. Taking this step does not mean that the Court will examine the statutory provisions of the Law, but this step is to be done only because the constitutionality requirements of the law being tested (c.q. the Water Resources Law) depend on the observance of the implementing regulations of the Law concerned in applying the interpretation of the Court. This means that as the implementing regulations for the Law, the Government Regulations are the evidence that explains the real intent of the Law being tested for constitutionality before the Court, so that if its intent turns out to be contrary to the interpretation given by the Court, it indicates that the Law in question is contrary to the Constitution.

### **National Social Security System Case (2005)**

In Decision No. 007/PUU-III/2005 concerning judicial review of Law Number 40 of 2004 on the National Social Security System, the Court ruled that regional governments shared constitutional responsibility to develop social security systems. Accordingly, some articles of the reviewed Law which explicitly or implicitly prevented regional governments from developing their regional social security system ought to be declared unconstitutional. In the ruling, the Court cited, among others, Article 34 paragraph (2) of the Constitution, which states, "*The State shall develop a social security system for all people and empower the poor and incapable societies in accordance with human dignity.*" In the opinion of the Court, the term "State" ought not to be interpreted solely as the Central Government. Accordingly, the regional social security systems which had already existed prior to the enactment of the Law on the National Security System should not automatically be considered void.

### **Education Budget Case (2008)**

In Decision No. 13/PUU-VI/2008 concerning judicial review of Law Number 16 of 2008 on the Amendment of Law Number 47 of 2007 on the State Budget for the Year of 2008, the Court forced the government to fulfil their constitutional obligation on education budget. The petitioner considered that the State Budget Law contradicted the Constitution because the allocated education budget of 9.1% did not meet the minimum amount as set out in Article 31 paragraph (4) of the Constitution, which reads, *“The state shall prioritize the education budget to at least twenty percent of the state budget of income and expenditure as well as from the regional budgets of income and expenditure to fulfill the needs for the implementation of national education.”* Therefore, according to the petitioner, the state must allocate an education budget of at least 20% of the National Budget and Regional Budgets.

In its considerations, the Court noted that the mandatory budgetary allocation of 20% was a constitutional measure of the State Budget Law and must be guaranteed. According to the Court, education must be prioritized without denying other fields that are also important for the nation and state. The Court considered that the importance of education for the Indonesian people makes education not only a citizen’s right, but also a state obligation. Observing that the education budget allocation of 9.1% did not conform to the mandate of the Constitution, the Court granted the petition in part by declaring the State Budget Law unconstitutional. This became a milestone decision for similar cases thereafter.

### **Pension Payment Case (2016)**

In Decision No. 15/PUU-XIV/2016 concerning judicial review on Law Number 1 of 2004 on the State Treasury, the Court stated that the right of retired civil servants to receive a pension payment should not be subject to expiry or lapse of time. Article 40 paragraph (1) of the State Treasury Law stated that, *“The right to collect the state or regional debt burden shall be expired after five years since the debt is due, unless otherwise stipulated by the law.”* In their application, the petitioners considered the State Treasury Law did not provide a clear definition of state debt. In addition, this provision has prevented Civil Servants from receiving pension rights because according to the petitioners, they did not obtain a decent living and did not receive proper compensation and fair treatment in their employment.

Responding to the petition, the Constitutional Court was of the opinion that pension and old age benefits are not state debts, but rights that must be guaranteed by the state. Therefore, no time should be deducted from receiving pension and old-age benefits because this does not apply to the expiration provision in the State Treasury Law. With this consideration, the Constitutional Court stated that Article 40 paragraph (1) of the State Treasury Law contradicts the Indonesian Constitution insofar as it applies to pension and old-age benefits.

## Marriageable Age Case (2017)

In Decision No. 22/PUU-XV/2017 concerning judicial review on Law Number 1 of 1974 on Marriage, the Court ruled that Article 7 paragraph (1) of the Law which allowed the minimum age of 16 for a girl to get married was unconstitutional. Such age, the Court said, was within the definition of a child. Accordingly, allowing a girl of such age to get married would prevent the girl from enjoying her constitutional rights as a child. It was inconsistent with the Constitution's Article 28B paragraph (2), which states that every child shall be entitled to viability, to grow up, and to develop as well as be entitled for protection against violence and discrimination. It was also inconsistent with the Constitution's Article 31 paragraphs (1) and (2), which guarantee the rights of every citizen to education since by allowing a girl of such age to get married would be prone to preventing the girl from enjoying even her right to basic education, which was constitutionally obligatory.

Those judicial review cases are examples where in the process of forming legislation, the legislature is not free from mistakes, be it driven by certain interests or simply negligence. Ideally, mistakes that result in human rights violations should not occur. However, in practice, many mistakes have occurred. This has highlighted the importance of the judicial review by the Constitutional Court. Those decisions also prove, at least partly, how Indonesia has taken human rights issues seriously. Hence, it is not an exaggeration to say that the Court has a significant role in the development of democracy and rule of law in Indonesia.

## CONCLUSION

Since the adoption of the UDHR by the United Nations, issues on human rights have become more and more important in the contemporary development of international relations and in international law for its close relations to democracy and rule of law. Now, the quality of respect for and protection, as well as fulfillment, of human rights has become a universal benchmark to gauge the development of democracy and rule of law in a particular state which claims to be a constitutional democratic state in which the guarantee of human rights is a *conditio sine qua non*.

Indonesia, as a constitutional democratic state, had adopted human rights as integral parts of its Constitution. Accordingly, these rights have now become the Indonesian citizens' constitutional rights as well. Consequently, it is a constitutional obligation for the State of Indonesia to respect, to protect, and to fulfill these rights. Meanwhile, Indonesia had also become party to the ICCPR, ICSECR and many other international legal instruments on human rights. It means that there is also an international legal obligation for the Country to respect, to protect and to fulfill human rights. As part of efforts to meet these obligations, Indonesia established an institution – *i.e.*, the Court – with authority to deal with, among others, human rights issues.

The role of the Court is indispensable in protecting the human rights of Indonesian citizens, including their economic and social rights. The Court was established with a view to safeguard the Constitution, *i.e.*, to guarantee that the Constitution is obeyed in the daily practice of State activities. The Court, especially with its authority to review the constitutionality of laws,

assures that no unconstitutional law will be left unchecked since the constitutionality of any law, either its deliberation process or its substance, passed by the lawmaker will always be subject to public scrutiny. This vindicates Omara's conclusion that the Court may address the shortcomings in the economic and social rights protection (Omara, 2020). It also confirms the finding of Triyana that such rights are part of constitutional mandates (Triyana, 2015).

Every single Indonesian citizen who claims her or his constitutional rights are infringed by a law in force has a standing to file a judicial review petition to the Court, asking the Court to declare the law, either its process of deliberation or its substance, unconstitutional. Such a standing is also given to traditional communities, public and private legal entities, and state organs. As for traditional communities, it is important to note that giving these communities a standing to file a judicial review is based on the consideration that, pursuant to Article 18B paragraph (2) of the Constitution, the State recognizes and respects them together with their traditional rights as far as they remain in existence and in line with development of society and with the principle of the Unitary State Republic of Indonesia as regulated by laws. Furthermore, the Court has also given non-governmental organizations the standing to file a petition for judicial review, as far as their purposes or activities were relevant to issues covered by the reviewed law.

Year after year, the amount of petitions submitted to the Court concerning cases for judicial review tends to increase. This signifies the raising of citizens' awareness of their constitutional rights and it is, undoubtedly, a positive sign in the development of democracy and rule of law in the country. The existence of the judicial review mechanism, to some extent, prevents lawmakers from passing laws without carefully consulting the Constitution, for such acts are prone to face challenges before the Court. Since its establishment in 2003, the Court had adjudicated thousands of judicial review petitions. Hundreds of them were granted by the Court. Among the granted petitions were those concerned with protection of economic and social rights.

To put it concisely, the Indonesian Constitution recognizes and protects human rights, in particular social and economic rights, adequately. The Constitution's articles on human rights prove that Indonesia is a rule of law committed to recognizing and respecting human rights. To ensure the recognition and ratification of these human rights, the Constitution authorizes the Constitutional Court to examine the constitutionality of laws. With this authority, potential violations of human rights by laws passed by the state can be minimized.

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