



Conditional Decisions as Instrument Guarding the Supremacy of the Constitution (Analysis of Conditional Decisions of Indonesian Constitutional Court in 2003 – 2017)

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Submitted : 2020-04-30 | Accepted : 2021-04-29

Abstract: *The function of the Indonesian Constitutional Court as the guardian of the constitution is mainly conducted through the judicial review authority. From 2003 to April 2021, the Constitutional Court has received and decided 1392 petitions over judicial review. In its dictums, the Constitutional Court often declares conditionally constitutional or conditionally unconstitutional (conditional decision). The conditional decision is a decision of the Court that declares the reviewed norm conditionally constitutional or unconstitutional. The norm is constitutional if interpreted according to the Court interpretation, or the norm is unconstitutional if interpreted in specific ways. This research investigates the criteria of judicial review decisions that declare conditionally constitutional and conditionally unconstitutional according to the characteristics of norms of the law reviewed. The analysis was limited to the Court decisions from 2003 to 2017. The research result indicates that distinguishing characteristics of norms reviewed have no correlation with conditionally constitutional or conditionally unconstitutional options. Conditionally Constitutional Decision was used by the Court before replaced by Conditionally Unconstitutional Decision due to the weakness of decision implementation. For conditionally unconstitutional decisions are connected to the substance of the decision, creating a new norm that replaces, limit, or elaborate reviewed norm. The conditional decision is still required due to the following three aspects: enforcement of the supremacy of the constitution, the presumption of validity, and strengthening the execution of Constitutional Court decisions.*

Keywords: *constitutional court; conditionally constitutional; conditionally unconstitutional; supremacy of the constitution; additive decision; interpretative decision.*

I. INTRODUCTION

Since Law Number 24 of 2003 on the Indonesian Constitutional Court (CC Law) was passed on the 13th of August 2003, Indonesia was the first country in the 21st

century to establish a special judiciary to handle constitutional disputes and the 78th to establish Constitutional Court (CC). Establishing CC complies with the provision in Article 24C of the 1945 Indonesian

Constitution (the Constitution) that gives four authorities and one obligation to CC,¹ i.e., as the first and final court, and the decision is final and binding on reviewing laws about the Constitution; interbranch disputes of state institutions; political party dissolution; disputes in general election result; and House of Representatives allegation of the violation of law committed by the President and/or Vice-President in the impeachment process.

Out of four authorities and an obligation, judicial review is the most common case and has continually been accepted and adjudicated by the CC. To April 2021, CC has received and judged 1392 petitions concerning Judicial Review.² As a result, the function of CC as guardian of the supremacy of the constitution and as a final interpreter is conducted mainly through the judicial review case.

Article 56 of CC Law has set three dictums concerning the judicial review case, where the petition cannot be accepted, the petition is granted, or the petition is rejected. To date, there have been 269 decisions that grant, 498 that reject, and 455 decisions that declare 'unacceptable'.³ However, in the decisions with the dictums granting and rejecting, there are decisions stating a provision of law reviewed for conditionally constitutional or conditionally unconstitutional.⁴ This research will analyze conditional decisions from 2003 to 2017 because, since 2017, CC has only used conditionally unconstitutional decisions.

The CC first passed a decision over the judicial review with the statement of conditionally constitutional in Decision Number 058-059-060-063/PUU-II/2004 concerning judicial review of Law Number 7 of 2004 on Water Resource (Water Resources Law). In comparison, the decision with a conditionally unconstitutional dictum was first passed in Decision Number 026/PUU-III/2005 concerning judicial review Law Number 13 of 2005 on State's Budget (State Budget Law).

The emergence of the new dictums is understood as a shift of the CC from the hostile legislator to the positive legislator. The negative legislator is an organ that creates norms through the authority to review and annul certain laws. Otherwise, a Positive legislator is an organ that creates norms through the authority to make a new law or replace the old law. Through the conditional decisions, the CC formulates the requirements for the law review's constitutionality to formulate a new norm. The CC could annule specific laws and create and add certain norms in the reviewed law.

A legislator once responded to the conditional decision on Law Number 8 of 2011 on Amendment to the CC Law, where Article 57 Paragraph (2a) prohibits the CC from including the dictums other than (a) dictum to reject, to grant, or to declare 'in admissible'; (2) order addressed to the legislator; and (3) formulation of a norm replacing the norm of law deemed irrelevant to the 1945 Constitution. With Decision Number 48/PUU-IX/2011, the CC states that

¹ See also: Luthfi Widagdo Eddyono, 'The Constitutional Court and Consolidation of Democracy in Indonesia', (2018) 15(1) *Jurnal Konstitusi*, p.5; Simon Butt, 'The Indonesia Constitution Court: Reconfiguring Decentralization for Better or Worse?' (2019) 14, *Asian Journal of Comparative Law*, p.151-152

² Page source of Indonesian CC. <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU&menu=5>, retrieved on the 3rd of May 2018.

³ Ibid.

⁴ Bisariyadi, 'Legal Transplant and The Model of Constitutional Court Decision', (2018), 5 (1) *PJH*, p.11-12

Article 57 Paragraph (2a) contravenes the 1945 Constitution, and it is not legally binding.⁵ The CC argues that the prohibition contradicts the objective of the CC's establishment to enforce law and justice. This prohibition will hamper the CC from

reviewing the constitutionality of norms, filling legal loophole caused by the CC's decision, and performing judge's responsibilities to follow and understand legal values and justice existing in the society.⁶

Research related with conditional decision was once conducted by Syukri Asy'ari, Meyrinda Rahmawaty Hilipito, and Mohammad Mahrus Ali. Their research concludes that conditionally constitutional decisions are likely to maintain the constitutionality of the law reviewed under the requirements set by the CC.⁷ In another study, Faiz Rahman and Dian Agung Wicaksono elaborate the existence and characteristics of conditional decisions. The existence of conditionally constitutional decisions is to give particular interpretation and it is stipulated in the decisions with the dictum that rejects the petition. However, conditionally unconstitutional decision is also aimed to provide interpretation but it is written in the decisions with the dictum that grants the petition.⁸

Brewer-Carias confirm that the emergence of conditional decisions (called as interpretative decision and additive decision) delivered in European countries and Latin America are linked with legal norms

reviewed. Interpretative decision starts to exist when law is multi-interpreted and constitutional court tends to hold on to the constitutionality of the reviewed law. Additive decision emerges when there is legal loophole, for the legislator does not make the law required (legislative omission).⁹ The absence of norm that should exist in line with the constitution is deemed omission by the legislator. This indifference is divided into two: absolute omission and relative omission. The former takes place when there is no legislative product needed to reach an objective or to perform constitutional provisions, thus it is against the constitution. The latter is known as the "*silences of the legislator*". Relative omission happens when a required legislative product is made but not completely, or it is even disadvantageous based on constitutional perspective; the relative omission is known as "*the silences of the statues*".¹⁰

Responding to several issues detailed above, this research is aimed to describe and analyse three issues; first, the development of conditional decision; second, the background of conditional decision; third, to analyse whether conditionally constitutional and conditionally unconstitutional decision is correlated to the characteristics of norms of the law reviewed; and fourth to determine whether conditional decision should be maintained in order to perform the CC's function.

⁵ See also: Pramudya A. Oktavinanda, 'Is The Conditionally Constitutional Doctrine Constitutional?', (2018) 8(1), *Indonesia Law Review*, p. 21

⁶ Paragraph [3.13] Decision Number 48/PUU-IX/2011.

⁷ Syukri Asy'ari, Meyrinda Rahmawaty Hilipito, and Mohammad Mahrus Ali, *Model dan Implementasi Putusan Mahkamah Konstitusi Dalam Pengujian Undang-Undang (Studi Putusan*

Tahun 2003 – 2012), (Pusat Penelitian Mahkamah Konstitusi, 2013) 8-10.

⁸ Faiz Rahman and Dian Agung Wicaksono, 'Eksistensi dan Karakteristik Putusan Bersyarat Mahkamah Konstitusi', (2016) *Jurnal Konstitusi*, 13(2), 348, 376 – 377.

⁹ Allan R. Brewer-Carias, *Constitutional Courts as Positive Legislators: A Comparative Law Study*, (Cambridge University Press, 2011) 73 – 124.

¹⁰ *Ibid*, 125 – 126.

II. MATERIAL AND METHODS

In reference to the issues studied, this research is categorised as doctrinal legal research,¹¹ conceptualising law as *in concreto* judge decision. The research data involves primary and secondary data. The former decision consists of the CC's decisions on judicial review from 2003 to 2017 with the conditionally constitutional and conditionally unconstitutional dictums or in legal consideration. There had been 116 conditional decisions from 2003 – 2017. With every conditional decision, the characters of norms of the law reviewed and the argumentation of the decisions serving as the basis of the conditionally constitutional decisions and conditionally unconstitutional decisions will be identified. The identification result will be classified according to the characters of norms of the law reviewed, followed by the analysis of the result to determine the correlation pattern and argumentation that serve as the basis. Based on the classification and analysis, the construction of criteria of the conditional decisions will be formulated.

III. RESULT AND DISCUSSION

Roles of Courts and Judicial Review

The authority of the CC to review the law to the Constitution is principally restricted to review the legal norm in certain law in comparison to the legal norm in the Constitution. Legal norm is a standard of conduct that is authoritative due to its form, substance, and also the existence of the authority that enforces it. Legal norm, on one hand, becomes the guidelines of conduct for

individuals in the society. On the other hand, legal norm serves as an instrument to direct, teach, and organise behaviour of individuals to interact in the society.¹² Legal norm is specific and different from other social norms. Law is a socially organised instrument that consists of orders and prohibitions, or authorities to guarantee its enforcement supported by sanctions.¹³

Law has to be formulated according to particular techniques and requirements so that they have certain meaning, are general and applicable at all time.¹⁴ However, recalling that legal norm is generally applicable and binding to all, the formulation must not be restricted to a certain object or phenomenon, and an act is formulated in the form of abstract concept. The concept is constructed by predicting the form and kind of conducts that are regulated, but the prediction and formulation are not always appropriate; the formulation can be too wide, where the substance could cover all conducts that are not supposed to be in the regulation, or it may be too narrow, where certain conducts are not included in the concept formulated either wholly (loophole) or partly, or it may result in vague meaning. Therefore, every legal norm has open texture that gives room for judges to sharpen, to find, or even to create new legal norm.¹⁵

In the early time, courts were needed to settle disputes. However, their roles have extended, including their role in supervising the state. This role has become the consequence of case development in courts between individual and state organs or government.

¹¹ Soetandyo Wignjosebroto, *Hukum: Paradigma, Metode dan Dinamika Masalahnya*, (Huma, 2002) 145 – 177.

¹² Satjipto Rahardjo, *Ilmu Hukum*, (Citra Aditya Bakti, 2006) 27.

¹³ Hans Kelsen, *Pure Theory of Law*, translation from the second (revised and enlarged), University of California Press, 1976) 75 – 81.

¹⁴ H. L. A. Hart, *The Concept of Law*, (Oxford University Press, 1979) 29.

¹⁵ *Ibid*, 125.

The theoretical perspective suggests that courts' roles come up when the size and complexity of the population have triggered a gap between kinship and brotherhood. The courts were initially meant to settle disputes and bring harmony into social relations; they also had the responsibility to settle disputes among individuals over properties and ownership and whether an act is considered an offense according to law, tradition, and social norms. The social task of the court is to deliver decisions accordingly without leaving both winning and losing parties with a sense of injustice.¹⁶

The role in settling disputes between parties has extended the function of the court to make public policy. When delivering a decision for a case between two parties, the court is likely to prioritize a value over another value. A rule will never be neutral, but it always has a tendency to support a particular interest, right, value, or a certain group over another. Therefore, a dispute between two individuals can grow into a dispute between two groups or even between social and economic classes. Court decisions over conflict will further affect public policy and economic development.¹⁷

In terms of a case involving an individual or a particular party and the government, the court can be authorized to supervise and assess the government's performance. This mechanism is called a judicial review that involves three elements:

1. The judge's assessment is addressed to the government's act, where this assessment is intended to determine whether the act is based on a legal framework or exceeds the authority given by the law.

2. In federal states like Australia, Germany, India, and United States, judicial review can be performed through supervision and judge's assessment concerning power distribution between state and federal government.
3. Judicial review can be understood as the court's authority to cancel or reject to enforce a regulation or an executive order since it violates the constitution.¹⁸

Murphy, Pritchett, Epstein, and Knight argue that in adjudicating process, a judge will surely start from legal text that is believed to be made by legislative body with the formulation whose meaning can be clearly understood. However, in further stage, several complexities may arise. First, legislators sometimes fail to express intended meaning in clear forms of language; it is more obvious when it comes to esoteric terms that have specific meaning in certain field. Second, although law is formulated in a language that is supposed to be generally understood, still it sparks ambiguity. Third, the complexities exist when the ambiguity actually starts from the legislator per se, especially when parties concerned fail to come to an agreement of the law made, ending up with picking inappropriate tones of language that trigger ambiguity.¹⁹

Kelsen states that there should not be any legal loophole in a legal system because every legal system must hold general norms applied. Moreover, judges are also authorised to form norms that are individual.²⁰ Judicial decision can also create general norms, binding not only for the case already receiving decision, but also for cases to come. Court decisions serve as precedent

¹⁶ Walter F. Murphy, C. Herman Pritchett, Lee Epstein, and Jack Knight, *Court, Judges, & Politics, An Introduction to The Judicial Process*, (Mc Graw Hill, 2006) 38 – 39.

¹⁷ *Ibid*, 45 – 46.

¹⁸ *Ibid*.

¹⁹ *Ibid*, 491 – 492.

²⁰ Kelsen, above n 10, 245 – 247.

creating new norm, in which the court functions as a legislative body.²¹

Judicial review, according to Kelsen, exists as hierarchical consequence of norm validity leading to basic norms. Constitutional enforcement can only be effectively guaranteed when there is a body other than legislative body that is given an authority to review whether the legislative product is constitutional or not and to declare that the product is not binding since it may violate the constitution. This body can be formed as an independent judicative body called Constitutional Court.

In terms of the role of courts to form norms, early doctrine referred to was judicial restraint suggesting that court and its judges must have their limit. In constitutional court, judges must deliver decisions according to current law and avoid using their functional legitimacy.²² Judicial activism is a conduct performed by court or judge exceeding his/her authority and the decision made has a tendency to form a law, not to interpret it.²³ There is always a room for mistakes where a court may fail to enforce law based on its meaning clearly given in written rule (negative judicial activism) or a court may pass decision by formulating new law not mentioned in written law existing early (positive judicial activism). This decision has three drawbacks. First, it is not democratic since a judge is not an elected official. Secondly, it is not efficient since a court never has sufficient knowledge concerning how to make a good law. Thirdly, it violates

state administration since such decision is deemed arbitrariness in a legal system.²⁴

The courts' roles cannot be completely omitted from modern legal system. Rules have to be made as clearly and generally as possible to be in line with the society that keeps developing. However, rules are not always made appropriately, where there is internal inconsistency and they are inapplicable under certain circumstances.²⁵

Oliver Wendell Holmes, as cited by Wolfe, argues that a judge must be active and must act with his/her legislative character. Holmes suggests that certainty is an illusion. A state is an organism that grows and changes, not being able to be fully reached by constitution makers. He described that the formulation used by the constitution makers is like an embryo in the organism of state requiring oxygen transfer to allow it to be applicable within society that keeps growing and reaches maturity. As a consequence, in constitutional case, not only what is expressed in the constitution that has existed since a long time ago, but experiences of the state also have to be taken into account.²⁶

John Chipman Gray asserts that judges make law similar to how legislators do. Interestingly, the law made by judges is often sharper and authoritative since it is constructed in a court that determines more certain meaning of law compared to the original texts made by legislators.²⁷

To judge constitutional case, judges can encounter two public interests that are not relevant one another. To deliver a

²¹ Ibid, 250 – 256.

²² John Daley, 'Defining Judicial Restraint', in Tom Campbell and Jeffrey Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism*, (Ashgate Dartmouth, 2000) 279 – 284.

²³ Leslie Zines, 'Judicial Activism and the Rule of Law in Australia', Ibid, 391.

²⁴ Arthur Glass, 'The Vice of Judicial Activism', in Ibid, 355.

²⁵ Ibid, at 357 – 359.

²⁶ Christopher Wolfe, *The Rise of Modern Judicial Review, From Constitutional Interpretation to Judge-Made Law*, (Basic Books, Inc, 1986) 225.

²⁷ Edgar Bodenheimer, *Jurisprudence, the Philosophy and Method of the Law*, (Cambridge University Press, 1996) 439.

decision over such a case, a court has to take into account the whole social system formed by social values and thoughts of justice in the society in order to find the right answer. Judges have to fairly consider arguments of parties concerned. With this, judges will figure out the law with more conceiving argumentation.²⁸

Development of Conditional Decisions

The idea of conditionally constitutional decision appeared when the CC faced difficulties in reviewing the Law Number 7 of 2004 concerning Water Resource since the law formulated generally. The law may be interpreted and implemented both consistent or inconsistent to the constitution.²⁹ Following this, the CC started to make a breakthrough by proposing requirements in order that the provisions proposed to be relevant to the constitution. Another example of conditionally constitutional decisions is Decision Number 10/PUU-VI/2008 dated on 1st of July 2008 concerning judicial review of Law Number 10 of 2008 on General Election concerning the absence of domicile requirement for candidate of Regional Representative Council member. The conclusion of the decision states: "Article 12 and Article 67 of Law No. 10/2008 are "conditionally constitutional. Therefore, *a quo* Articles must be read/interpreted as long as include domicile requirements in the province represented by the candidates of the members of Regional Representative Council;"³⁰

In addition to conditionally constitutional decisions, there also conditionally unconstitutional decisions.

This decision based on arguments that if the CC should choose one of the three dictums mentioned by Article 56 of the CC Law, it will be difficult to review the law that is generally formulated, while the general formulation does not give clear idea whether its implementation will contravene the Constitution or not. The example of conditionally unconstitutional decisions is the Decision Number 101/PUU-VII/2009 concerning review of Law Number 18 of 2003 concerning Advocates. This case is about the single bar association membership requirement to be sworn in as advocate. Due to the dispute over single bar association, high court rejected to take the advocate's oath based on Article 4 paragraph 1 of Law Number 18 of 2003. The CC decided that Article 4 paragraph (1) of Law Number 18 of 2003 concerning Advocates is contravene to the 1945 Constitution as long as the requirement is not fulfilled that the phrase "in public hearing of high court within its jurisdiction" is not defined as "high court following the order of the law must place advocates under oath at least within two years since this dictum is declared before they perform their profession apart from their membership in an organisation of advocates that in fact exists".

Conditionally unconstitutional decisions are in reverse to the conditionally constitutional ones, meaning that the Article petitioned is declared conditionally contravening the Constitution. The reviewed Article is unconstitutional if the requirements set by the CC are not fulfilled. The existence of conditionally unconstitutional decisions is inextricable from ineffective model of

²⁸ Ibid, 441.

²⁹ Harjono, *Konstitusi Sebagai Rumah Bangsa: Pemikiran Hukum Dr. Harjono, S.H., M.C.L Wakil Ketua MK*, (Mahkamah Konstitusi, 2008) 178 – 179.

³⁰ Mahkamah Konstitusi Republik Indonesia, *Pengujian UU Nomor 10 Tahun 2008 tentang Pemilihan Umum Anggota DPR, DPD, dan DPRD terhadap UUD Negara R.I. Tahun 1945*, Nomor 10/PUU-VI/2008 tanggal 1 Juli 2008, p. 215.

conditionally constitutional decisions because the *addresat* of the decision often overlooks legal consideration. The *addresat* of the decision sees there is no need to act any further for follow-up and to give implementation since the dictum is rejected.³¹

Conditionally constitutional and conditionally unconstitutional decisions are the models not intended to revoke or to declare that norms are not binding as legal norm, but they have interpretation (interpretative decision) toward substantive materials of paragraphs, articles and/or part of the law reviewed.³²

Conditional decision was first delivered in legal consideration part of the decision 2005 on the Decision Number 058-059-060-063/PUU-II/2004 and Decision Number 008/PUU-III/2005.³³ This decision was delivered based on the assessment that the norm in the Law concerning Water Resource was deemed incomplete in terms of averment concerning the government responsibility related with the right of each individual to obtain water for minimum primary need on daily basis. Such regulation is to be formulated in operational regulation that will be made. Therefore, the arrangement of the operational regulation of Law concerning Water Resource must refer to the CC Decision. When it fails to comply with the CC Decision, re-judicial review for the Law concerning Water Resource can be proposed to the CC.³⁴

The existence of conditional decision is based on an assessment that, on the one hand, the existing norm in the Law is consistent

with the Constitution, but, on the other hand, the Law does not fully regulate the rights to water following the Constitution. The CC does not revoke the existing norm, but it declares that the norm is incomplete, and it suggests that it should contain specific provisions to be relevant to the Constitution. The norm in the Law is not revoked since it does not directly contravene the Constitution and must implement the Constitution.

The CC states that the dictums are restricted by the provisions of Article 56 of the CC Law, where they are restricted only to rejecting, granting, or in admissible. Incomplete and multi-interpreted norms should be dealt with by the amendment of Law. To encourage and identify the need for legislative review, the CC states the provisions of the Law that are reviewed as conditionally constitutional in legal consideration. This regulation is stated in legal consideration of Decision Number 14-17/PUU-V/2007.³⁵

Before the existence of conditionally constitutional concept in Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005, there were at least two decisions that could be declared as conditional decisions: first is the Decision Number 018-PUU-I-2003 concerning review of Law Number 45 of 1999 concerning the establishment of the Province of Central Irian Jaya, Province of West Irian Jaya, Paniai Regency, Mimika Regency, Puncak Jaya Regency, and Sorong city following the effectuation of Law Number 21 of 2001 concerning Special Autonomy for Papua. In this case, the CC found the issue in which the

³¹ Asy'ari, Hilipito, and Ali, above n 4, 9.

³² Ibid.

³³ The CC's Decision Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005, 430 – 431.

³⁴ Law concerning Water Resource was petitioned for judicial review to Constitutional Court through

a case Number 85/PUU-X/2013 and it was entirely declared irrelevant to the 1945 Indonesian Constitution because six Government Regulations made were deemed to be irrelevant to the previous Constitutional Court Decision

³⁵ The CC's Decision Number 14-17/PUU-V/2007, paragraph 3.14.

Law Number 45 of 1999 was constitutional but only until the effectuation of Law Number 21 of 2001, while Law Number 45 of 1999 was effectively implemented with the establishment of the Province of West Papua, and some provisions in the Law were not implemented regarding the establishment of Central Papua. Regarding this case, the CC chose the dictum not related to substantive materials of the Law, but it is related with the effectuation that contravenes the Constitution following the effectuation of Law Number 21 of 2001.

The second is Decision Number 002/PUU-II/2004 examining the use of the term 'population' in Article 1 point 7 and 8 of Law Number 12 of 2003 concerning General Election which is defined as "citizens of the Republic of Indonesia whose domicile is in the area of the Republic of Indonesia or in other countries". However, Article 26 Paragraph (2) Constitution has stated "the populations are Indonesian citizens and foreigners living in Indonesia." The CC cannot state that the term 'population' contravenes the Constitution since the content of the Article mentions Indonesian citizens living in Indonesia that have suffrage despite the fact where the definition of 'population' in Law concerning General Election is different from that in the Constitution. The CC re-affirms in the consideration of the decision that 'population' must be defined as operational part of the Law concerning General Election. In addition, Constitutional Court requires that formulation of the Law take into account the definition given in the Constitution.³⁶

Furthermore, through the Decision Number 29/PUU-V/2007 reviewing Law concerning Cinematography, conditionally constitutional clause is given in 'conclusion'.

This indicates that the mandate in the decision must be considered by the legislator. The CC sees the Law Number 8 of 1992 concerning Cinematography contravenes the Constitution since it is not in line with the new spirit intended to respect democracy and Human Rights. However, if this law is revoked, it will leave legal loophole or it will even deactivate film censorship that is still needed to implement the Constitution. The CC states that Law concerning Cinematography, especially the film censorship, still applies as long as the implementation is in line with the new spirit that respects democracy and Human Rights. The CC also mandates the establishment of a new agency through a new law.

Conditionally constitutional Decision put in dictum part that grants was first given in Decision Number 10/PUU-VI/2008 reviewing the absence of the provision concerning the requirement of domicile for the candidate members of Regional Representative Council (DPD). The provisions reviewed involve Article 67 letter c of Law Number 10 of 2008 concerning General Election. The review is not for the formulation of the existing norm, but it is based on the situation where certain norm is not given, such as requirement of domicile in the province where the candidates of the DPD will be elected. As a consequence, the CC cannot revoke Article 67 letter c of Law concerning General Election, but the CC reviews whether the requirement of domicile should constitutionally exist. The CC states that this court can state that an article, paragraph, and/or part of the law not implicitly containing the constitutional norm are attached to the certain article of the

³⁶ The CC's Decision Number 02/PUU-II/2004, 24.

constitution as conditionally constitutional or conditionally unconstitutional.³⁷

The CC considers the decision it will make. First, petition can be declared unacceptable because the petition is unclear, recalling that it reviews the absence of norm. Second, the CC declares something as conditionally constitutional in legal consideration and it gives implication to the dictum that rejects. However, it will not affect the effectuation of Article 12 and Article 67 of Law Number 10 of 2008, unless the formulation of Law and General Election Commission give follow-up with the new regulation. Third, the CC declares something as conditionally unconstitutional so that the dictum grants the petition. As a consequence, all the provisions in Article 12 and Article 67 is not legally binding, including other requirements.³⁸

The CC combines the second and the third. It declares conditionally constitutional but the CC puts it in the dictum. With this, it is expected that the decision by the CC, on one hand, will not revoke all articles reviewed, which they, in fact, are constitutional. On the other hand, this decision adds new norm, giving a strong legal force to execute because the statement is included in the dictum, not only in the legal consideration.

Following the Decision Number 10/PUU-VI/2008, all conditionally constitutional decisions are included in the dictum that grants. This sparks an issue over the relevance between what the dictum says and the content of the dictum. The dictum that 'grants' should be for the issue where the provision reviewed is declared inconsistent with the Constitution, but in conditionally

constitutional decision, it is still declared 'constitutional'³⁹ or 'conditionally constitutional'⁴⁰.

The conditionally constitutional decision was used until 2010, with the Decision Number 147/PUU-VII/2009 last delivered on the 30th of March 2010. Another decision often used is conditionally unconstitutional which was initially included in part of dictum that grants. The first conditionally unconstitutional was in Decision Number 54/PUU-VI/2008 concerning judicial review of Law Number 39 of 2007 on Customs. Conditionally unconstitutional clause is stated with the formulation "... inconsistent with the 1945 Indonesian Constitution as long as..." and "... is not legally binding as long as...".

The change from conditionally constitutional to conditionally unconstitutional is based on the CC assessment that the conditionally constitutional decision is not immediately given follow-up. When it is declared conditionally unconstitutional and when the requirements set by the CC are not fulfilled, the provision is not legally binding. In other words, the decisions of the CC have their own mechanism by law, not that they have to be executed based on the formulation of law as in conditionally constitutional decisions. The following is the legal consideration regarding conditionally unconstitutional decision in Decision Number 54/PUU-VI/2008.⁴¹

Considering that some conditionally constitutional decisions for the Law are declared contravening the Constitution, and they keep failing to comply with the Constitution, the dictums are not effective. To enforce

³⁷ The CC's Decision Number 10/PUU-VI/2008, paragraph 3.25.

³⁸ Ibid, paragraph 3.26.

³⁹ As in dictum Number 10/PUU-VI/2008.

⁴⁰ As in dictum of the CC's Decision Number 10/PUU-VI/2008.

⁴¹ As in dictum of the CC's Decision Number 102/PUU-VII/2009.

the Constitution, either by implementers or the legislators, the court, suggesting that the petition proposed by a quo petitioner is acceptable, partly grants the petition by stating that Article that is petitioned for review is conditionally inconsistent with the Constitution. In other words, the Article is deemed unconstitutional when requirements set by the Constitutional Court are not fulfilled, in which the petitioner from the province where tobacco is produced has right to be given fund for customs of tobacco yield levied by the government. Therefore, articles proposed for review no longer have any binding legal force when the requirements are not fulfilled during the implementation;

There is an issue that was previously declared conditionally constitutional, but when it was re-petitioned, it was declared conditionally unconstitutional. This case is concerning “never been sentenced due to criminal act” as requirement to become candidate of the members of parliament in the Law concerning General Election. Decision Number 14-17/PUU-V/2007 has declared conditionally constitutional, and in 2009 the CC declared conditionally unconstitutional in Decision Number 4/PU-VII/2009. In the consideration of the decision, the conditionally constitutional decision was not responded by the legislators; they even added tougher requirements. The following is the legal consideration of the Decision Number 4/PUU-VII/2009⁴².

“...To date, it has not received any responses yet. However, the legislators

have set tougher restriction and/or tougher violation by changing the phrase “at the moment not..” to ‘never’. Therefore, the Constitutional Court suggests that further encouragement to declare the Articles over the cases conditionally unconstitutional is needed. With this, the Constitutional Court recommends that legislators work harder to perform judicial review for all laws, where the ex-inmates’ rights to vote must be made based on this decision.”

Along with their development, the conditionally unconstitutional decisions do not always refer to the formulation of phrase ‘conditionally unconstitutional’ or ‘conditionally constitutional’. Some phrases used in conditionally unconstitutional dictums involve: ‘contravene the 1945 Indonesian Constitution, conditionally’; ‘contravene the 1945 Indonesian Constitution as long as they are not defined...’⁴³; ‘they are unconstitutional as long as they are defined...’⁴⁴; ‘contravene the 1945 Indonesian Constitution when they are defined...’; ‘conditionally unconstitutional’; or ‘conditionally contravene’.

Number of Conditional Decisions

Conditional decisions had increased in number from 2003 to 2017. In 2003 and 2004, there were no conditional decisions, and they started to exist back in 2005. The highest number of conditional decisions was in 2015, accounting for 18 decisions.

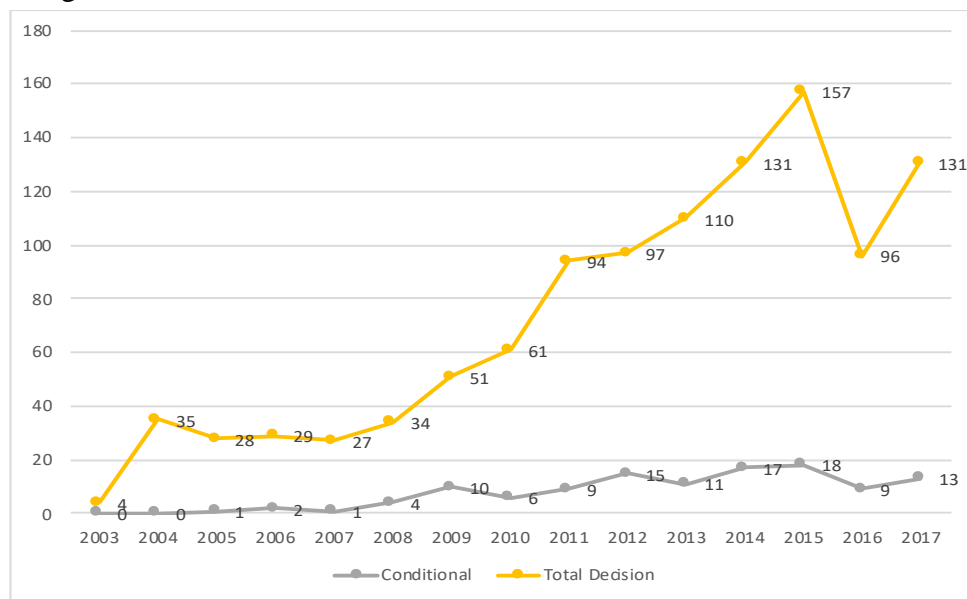
The Figure below compares the number of conditional decisions and the total number of decisions annually.

⁴² The CC’s Decision Number 4/PUU-VII/2009, paragraph 3.19.

⁴³ The CC’s Decision Number 127/PUU-VII/2009.

⁴⁴ The CC’s Decision Number 2/PUU-IX/2011.

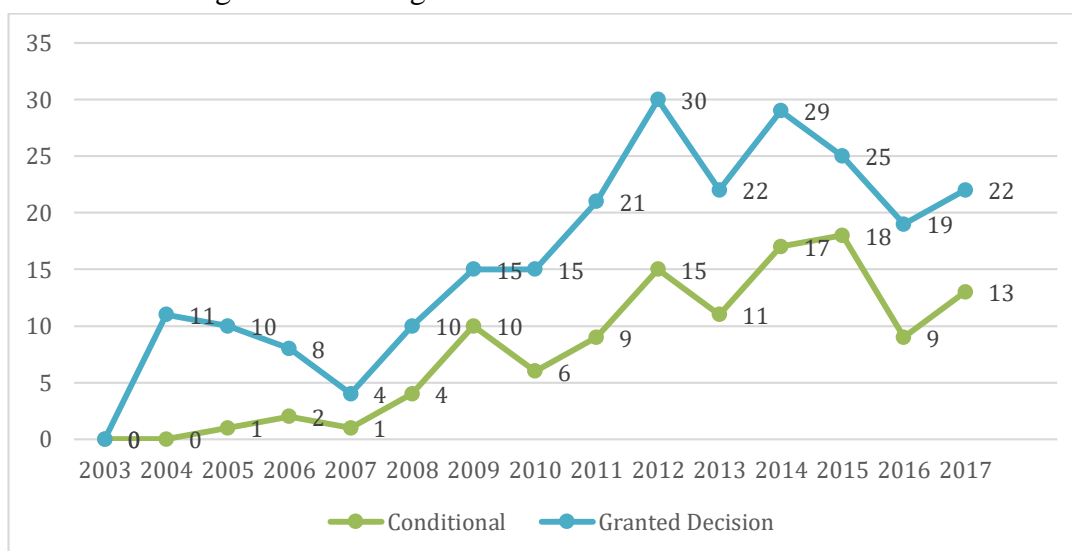
Figure 1. Number of Decisions and Conditional Decisions 2003 – 2017



Compared to granting decisions, the number of conditional decisions had increased since 2008, accounting for 50% of granting decisions. It indicates that conditional decisions serve as the main instrument for the CC to resolve

constitutional issues stemming from the cases that are faced to guard supremacy of the constitution. The following Figure indicates the change in granting decisions and conditional decisions.

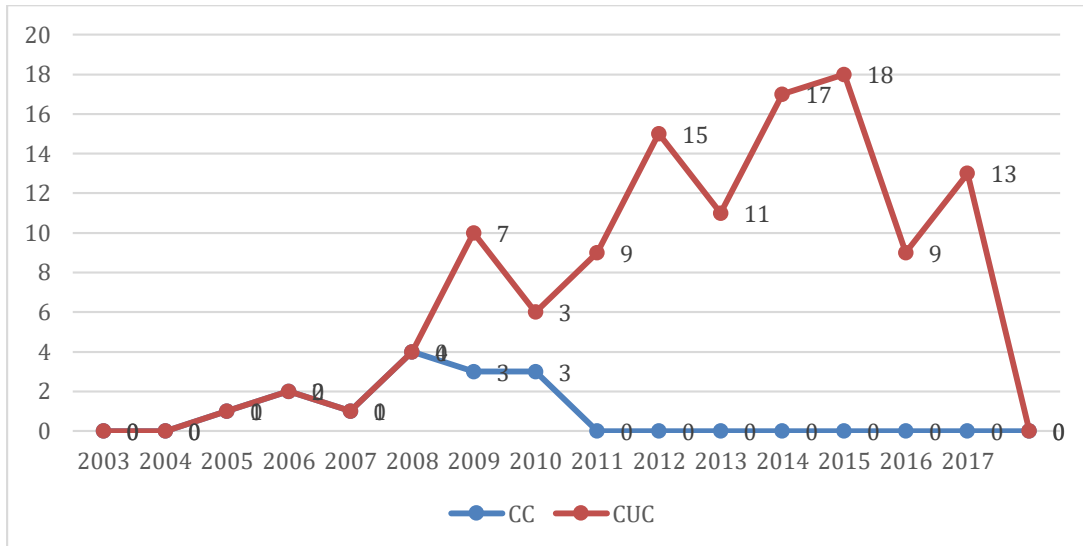
Figure 2. Granting Decisions and Conditional Decisions



Conditional decisions comprise conditionally constitutional and conditionally unconstitutional decisions. The former was often delivered during the time the CC was initially established to 2010. The latter, however, started to be delivered in

2009, and since 2011 it has been the only conditional decisions delivered. The conditionally constitutional decisions had no longer been delivered since 2011. The following are conditionally constitutional and conditionally unconstitutional decisions:

Figure 3 Conditionally Constitutional and Conditionally Unconstitutional Decisions

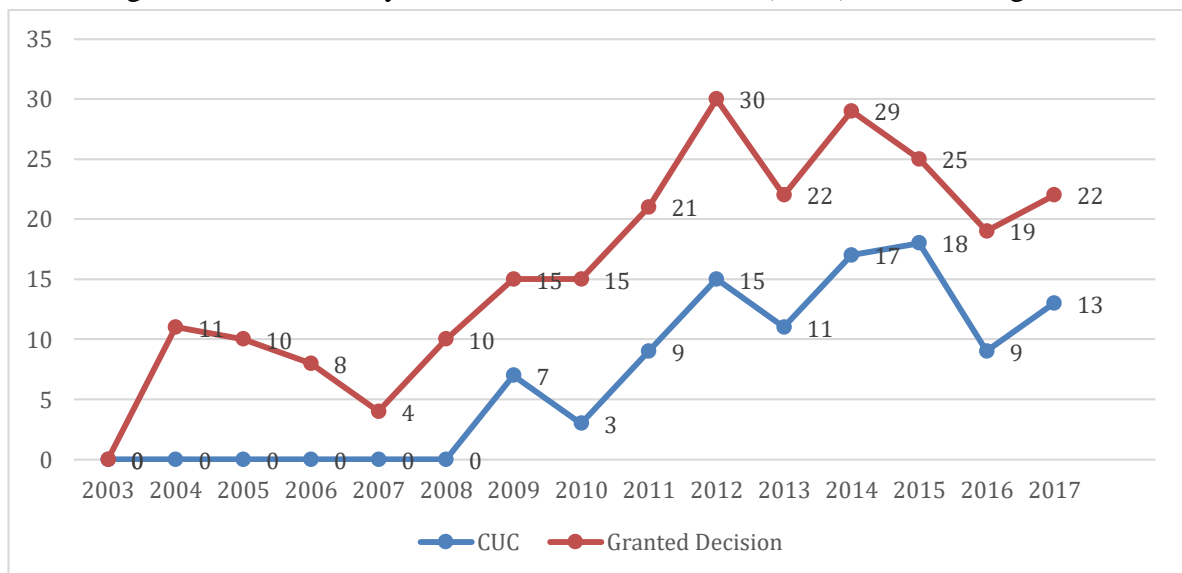


CC: conditionally constitutional
 CUC: Conditionally unconstitutional

Conditionally unconstitutional decisions mostly used by the CC as part of its authority to perform judicial review authority can also be seen from the ratio between conditionally unconstitutional decisions and

granting decisions, in which since 2011, the annual average of conditionally unconstitutional decisions has accounted for a half of the total of granting decisions, as presented in Figure 4.

Figure 4. Conditionally Unconstitutional Decisions (CUC) and Granting Decisions



Characters of Norm and Types of Conditional Decision

In terms of the substance, the norms reviewed in conditionally decisions can be classified into three:

- a. The norms of the Law reviewed contravene the Constitution. When the norms reviewed are found contravening the Constitution, they should be declared as inconsistent with the Constitution and not legally

binding, meaning that the norms are revoked. Following the revocation, the legal norms are null.

In terms of the case handled, deciding between constitutional or unconstitutional principally cannot be performed by revoking norms. The CC is in its position not only to determine whether the norms of a law contravene the Constitution or not, but it should also determine the norms that are consistent to the Constitution. When the CC is only responsible for declaring the norms inconsistent with the Constitution without determining the norms that should be consistent to the Constitution, legal loophole may arise, which may lead to another problem in reinforcing supremacy of the constitution. This can be learned from the Decision Number 1/PUU-VIII/2010 reviewing the age limit in Law concerning Juvenile's Court. The CC decided that the age limit of a child stipulated in the Law is 8 years old, which is inconsistent with the Constitution. However, the CC must not revoke the requirement of eight years old or it will lead further to a legal loophole, paralysing the Law concerning Juvenile's Court. The CC suggests that the proper age limit is 12 years old. This is then stipulated in the dictum stating that phrase 'eight years old' in Law concerning Juvenile's Court is inconsistent with the Constitution, unless it is defined as 'twelve years old'. By this dictum, the CC has performed two actions: revoking the age limit of 'eight years old', and stating 'twelve years old' as a constitutional norm replacing the revoked norm.

- b. The norms of the Law reviewed are multi-interpreted.

A multi-interpreted norm has more than one meaning or unclear meaning. This can happen because the substantive meaning of the norm is murky, leading to wider definition that includes things that may even make the norms inconsistent with the Constitution. There are three possibilities in the content of the decisions related with this norm: formulating norm that is not multi-interpreted, formulating norm that restricts interpretation, formulating exception norm, or formulating more elaborative norm.

The example of the decision examining the multi-interpreted norm is in Decision Number 19/PUU-IX/2011 concerning the review for provisions in termination of employment due to emergency circumstances in Law concerning Labour. One of the emergency circumstances ruled in Article 167 of Law concerning Labour is the closedown of company that may lead to two interpretations of whether temporarily or permanently closed. When it is defined as temporarily closed, it is inconsistent with the Constitution. The CC has passed a conditionally unconstitutional decision by forming a norm that is not multi-interpreted, stating that the closed companies are restricted to 'companies closed permanently or companies closed not temporarily'.

Another example of the decision that restricts interpretation can be seen in Decision Number 35/PUU-XI/2013, which reviews the authority of the House of Representative (DPR) to add "star sign" on State Budget that has

been approved, indicating that further session is needed and, thus, the budget cannot be cashed yet. This authority is based on Article 71 (g) of Law concerning Parliament (MD3 Law) that is understood as that further discussion still takes place following the approval and validation of the State Proposed Budget. The CC restricts the interpretation of Article 71 (g) of MD3 Law by declaring inconsistent with the Constitution as long as it is defined as 'there is following session after the State Budget bill is enacted to State Budget'.

The decision regarding exception norm can be seen in Decision Number 38/PUU-XI/2013 concerning legal entities of private hospitals. This decision excludes public hospitals that are run under non-profit legal entities from the obligation to become legal entities that only operate in hospital-related fields.

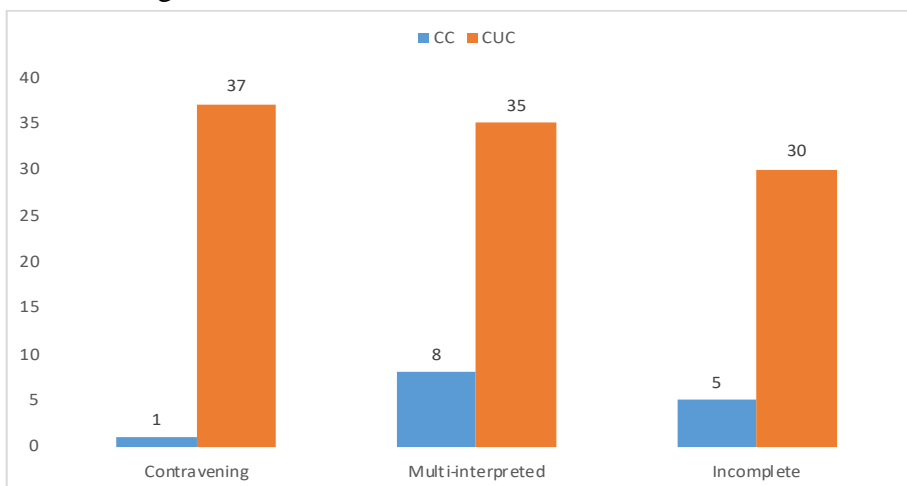
Decision Number 135/PUU-XIII/2015 is the example of the decision that is aimed to form more elaborative norm that is not multi-interpreted. This decision is concerning the right to vote for a person with mental illness. Article 57 paragraph (3) of Law concerning Local Government Head Election (Local Election Law) states that the right to vote is only restricted to those with no mental illness, while mental illness itself has its varied stages in which some with mental illness are still allowed to vote. In such a case, the CC, with this decision, forms more elaborative norm by putting "being in permanent mental illness/memory

impairment that, according to mental health professionals, causes the sufferers to lose their ability to vote in general elections".

- c. The norms reviewed are incomplete. Incomplete norm reviewed occurs when certain condition is not anticipated or when there is a loophole in the Law. When a norm is found incomplete, the CC forms a new norm that completes the norm without revoking the existing norm. The case over incomplete norm can be seen in Decision Number 84/PUU-XI/2013 regarding time period for General Meeting of Shareholders (RUPS) in Law concerning Limited Liability Companies. The provision of Article 86 paragraph (9) of Law concerning Liability Companies governs the second and the third RUPS, while the RUPS is possibly held in reference to court decision in which the time period is not governed in the Law. Therefore, the CC decides that the RUPS must be held at least within 21 days after court decision is delivered.

The different characters of the norm reviewed are not related with whether a decision is conditionally constitutional or conditionally unconstitutional. This is obvious in the decisions with the characters of norms inconsistent with the Constitution, multi-interpretation, or incompleteness, where, despite those characters, some decisions are conditionally constitutional and some others are conditionally unconstitutional, as can be seen in the following Figure.

Figure 5. Characters of Norms and Conditional Decisions

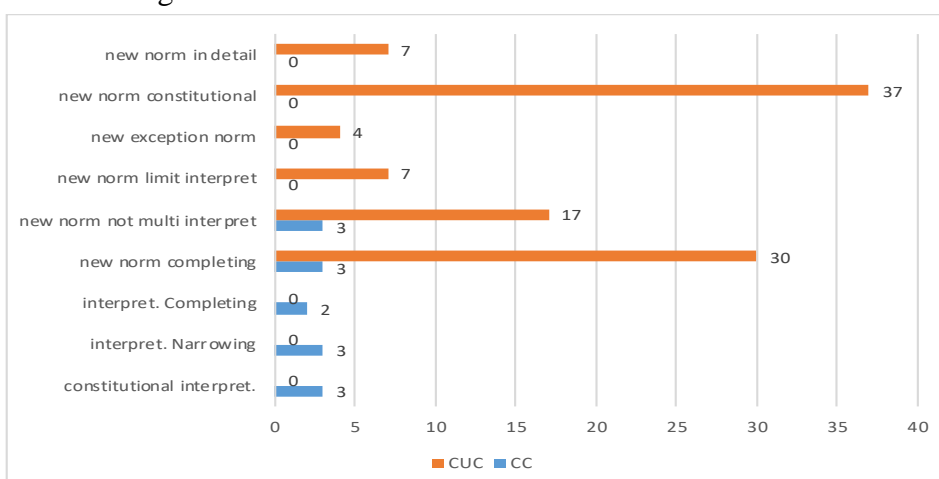


Either conditionally constitutional or conditionally unconstitutional decisions are principally intended to change, add, or elaborate norm reviewed according to the CC opinion. What differentiates is the location of the conditional statement. If in legal consideration and conclusion, the CC only gives interpretation that has to be further responded by legislators. When the statement is in the dictum, the CC has formed a new norm.

For conditionally constitutional decisions, the CC sometimes gives

interpretation and it sometimes forms a new norm. When giving interpretation, it is put in legal consideration. However, when the norm is formed, it is inserted in the dictum. Since forming norms is performed in conditionally unconstitutional decisions, these decisions are always included in the dictum. The evolution of the conditional decisions is conditionally constitutional in the legal consideration, conditionally constitutional in the dictum, and conditionally unconstitutional in the dictum.

Figure 6. Conditional Decisions and Substance of Decisions



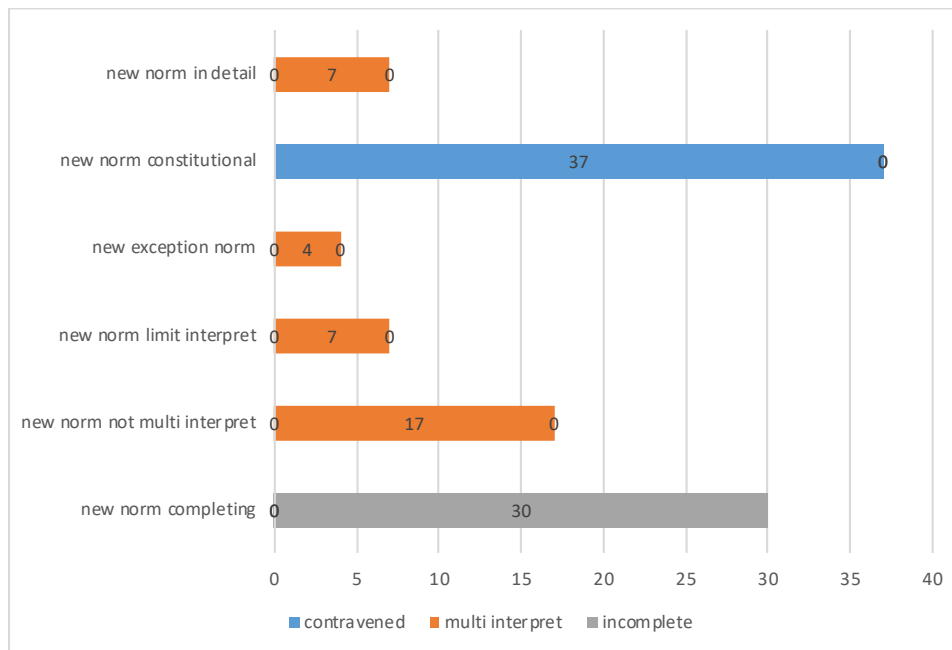
Especially for conditionally unconstitutional decisions, the characters of reviewed norm are connected to the substance of the decision given. The

characters of reviewed norm that is inconsistent with the Constitution will result in a decision forming new norm that is consistent with the Constitution. The

characters of reviewed norm for multi-interpretation result in the substance of decision that can be classified into four, comprising an exceptional new norm, new norm restricting interpretation, non-multi-

interpretation new norm, or more elaborative new norm. The norm reviewed for incompleteness results in decision forming new norm that supplements the incomplete, as shown in the following Figure.

Figure 7. Norm characters reviewed and Substance of Conditionally Unconstitutional Decisions



Reconstruction of Conditional Decision Model

1. Urgency of Conditional Decision

Recalling that one of the substance of the conditional decisions are the formation of norms, these decisions are classified as judicial activism since they are off the existence of the CC as negative legislator that can only revoke Law. One of the definitions of judicial activism is when judge's decision is deemed formation of law instead of interpretation of law⁴⁵.

Along the progress of courts, especially constitutional court, it is common to discover some laws are not appropriately formulated, where there is internal inconsistency that is not applicable in certain condition. The

internal inconsistencies will lead to uncertainty and discrimination that against the Constitution. Therefore, judicial activism, Campbell argues, is required after stages performed by the judge in deciding a case.⁴⁶ The law formed by judge is sharper and holds strong authority since it is constructed through court that determines more conceiving meaning of a rule.⁴⁷

The progress of conditional decisions passed by the CC can also be seen in European Countries and Latin America. Constitutional Courts do not only act in traditional way as negative legislator, but also as courts that supplement or assist legislative body to run its function to form law.⁴⁸

⁴⁵ Leslie Zines, 'Judicial Activism and the Rule of Law in Australia', in *Campbell and Goldsworthy* (eds.), above n.19 391.

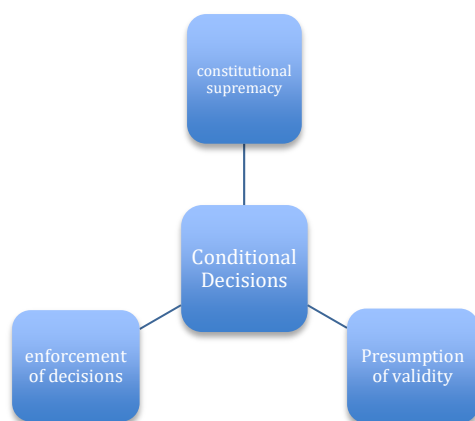
⁴⁶ *Ibid* 357 – 359.

⁴⁷ Bodenheimer, above n 24, 439.

⁴⁸ Brewer-Carias, above n 6, 73.

According to the analysis of conditional decisions passed by CC in other countries, conditional decisions are always required or they can be called as consequences of three principles: enforcement of constitutional supremacy, presumption of validity, and strengthening implementation of CC decisions.

Figure 8. Grounds for Conditional Decisions



Through its authority to deliver decisions over judicial review, the CC is to guard the supremacy of the Constitution. The Constitution should be positioned as the highest Law whose enforcement is guaranteed by Law, and it is passed down to lower regulations gradually. This function to guard the Constitution cannot be entirely performed when the CC only determines whether the Law reviewed is constitutional or not. When the CC decides whether a norm is constitutional or not, the CC per se has to interpret the Constitution and decide what norm is constitutional. Suppose the CC is only restricted to revoking norms reviewed without forming another constitutional norm. In that case, the Constitution cannot be enforced, let alone when the legislator forms a different norm inconsistent with the Constitution in the following days. The function to guard supremacy of the Constitution cannot be enforced when constitutional norms that are supposed to be

enacted in Law are not included or incomplete. To make the Constitution enforceable, the CC needs to supplement constitutional norms into the norms of the Law reviewed, unless the authority of CC is only restricted to revoking norms of the Law reviewed.

The principle of presumption of validity is not only limited to the definition that the norm reviewed stays valid until the judge's decision stating otherwise is delivered but it is also understood as the condition where the constitutionality of a norm is determined by the substance of the norm per se, not by another norm. Legal norms formulated by legislators can possibly be multi-interpreted where one of the interpretations may be inconsistent with the Constitution. One of it that is inconsistent should not be the sole ground for deciding that the norm is inconsistent with the Constitution since there might be another relevant interpretation that is constitutional. What can be done is sorting out which interpretation is inconsistent with the Constitution and which one is not.

Similarly, when there is a loophole or incompleteness in a particular norm, it cannot be taken because the entire norm is inconsistent with the Constitution. For example, when a norm determines requirements for a person to sit in an official position X involve a, b, c, and d, while based on the Constitution the requirements that have to be fulfilled involve a, b, c, d, e, it cannot be considered that the provisions in the Law are inconsistent to those in the Constitution, or it may be constitutionally beneficial when requirement e is added instead of when all requirements in the Law are revoked.

Like constitutional courts in Europe and Latin America, when a rule, either consistent or inconsistent to the Constitution,

can be interpreted, the CC tends to keep its validity by interpreting what is consistent with the Constitution and rejecting any interpretation inconsistent with the Constitution.⁴⁹ The CC's Decisions are likely to be declared as conditional decisions instead of revoking norms in the Law.

In the third principle, the enforcement of decisions can be seen from the progress of conditional decisions as elaborated earlier in this article. The conditional decisions that were initially conditionally constitutional in the judge's consideration turning to conditionally unconstitutional in the granting dictum are seen as an attempt of the CC to assure the enforcement of the CC decisions.

2. Conditionally Unconstitutional

In line with the consideration and the progress of the decisions delivered by the CC, conditional decisions used are conditionally unconstitutional ones. Conditionally constitutional decisions are not appropriate to be enforced due to the following reasons:

- a. Conditionally constitutional decisions are to be appropriately put in legal consideration, or they are irrelevant when put in granting dictum. However, in terms of the way they are enforced, the decisions have some shortcomings since several parties believe that it is the dictum that is binding, not the legal consideration.
- b. The ratio of the CC given in legal consideration is only as interpretation of norms, not as a legal binding norm.
- c. When inserted into granting dictum, conditionally constitutional decisions are not in line with granting dictums since the first dictum grants the petition but the following dictum declares that

the norm reviewed is constitutional but under certain conditions. Conditionally unconstitutional dictums have the following strengths:

- 1) Since they are included in the dictums, there is no doubt over their binding capacity.
- 2) It is appropriate when inserted into the dictum that grants since the first dictum grants the petition, followed by the second dictum declaring the norm reviewed is inconsistent with the Constitution.
- 3) When they are placed in the dictums, the CC not only makes legal interpretation, but it also forms legal norm, making the reviewed norm constitutional.
- 4) When requirements set by the CC in conditionally unconstitutional decisions are not fulfilled, based on the law, provisions reviewed no longer serve as legal norms, thus, they no longer need any further enforcement such as amendment made by legislators or judicial review by the Constitutional Court.

The norms reviewed and declared conditionally unconstitutional consist of those inconsistent with the Constitution, multi-interpreted, or incomplete. Conditionally unconstitutional decisions can contain new norms required to transform the norms reviewed from unconstitutional to constitutional:

- a. When the norms reviewed are inconsistent with the Constitution, conditionally unconstitutional decisions form new norms to replace the norms that are declared irrelevant to the 1945 Constitution.

⁴⁹ Ibid 74.

- b. When the characters of the norms reviewed are multi-interpreted, conditionally unconstitutional decisions form new norms that are not multi-interpreted, in exclusion, more elaborated, or restrict interpretation.
- c. When the norms reviewed are incomplete, conditionally unconstitutional decisions form new norms that supplement the norms reviewed.

IV. CONCLUSION

In conclusion, distinguishing the characters of norms reviewed is not related to whether decisions are conditionally constitutional or conditionally unconstitutional. It is obvious that several decisions with the characters of reviewed norms irrelevant to the 1945 Constitution, multi-interpreted, incomplete, declared conditionally constitutional, or declared conditionally unconstitutional.

For conditionally unconstitutional decisions, the characters of the reviewed norm are connected to the substance of the decision given. The characters of the reviewed norm that is inconsistent with the Constitution will result in a decision forming a new norm that is consistent with the Constitution. The characters of the reviewed norm for multi-interpretation result in the substance of decision that can be classified into four, comprising an exceptional new norm, new norm restricting interpretation, non-multi-interpretation new norm, or the more elaborative new norm. The norm reviewed for incompleteness results in a decision forming a new norm that supplements the incompleteness.

The authors conclude that the conditional decision is inevitable due to the function of the CC in guarding the supremacy of the Constitution and as the final interpreter

of the Constitution. Conditional decisions, either in the interpretative decision or in the additive decision, are required or can even be said as a consequence of the following three principles: enforcement of constitutional supremacy, the presumption of validity, and strengthening the implementation of the CC decisions. In line with the consideration and progress of the CC decisions, conditional decisions used are the conditionally unconstitutional ones. The norms reviewed and declared conditionally unconstitutional consist of the norms inconsistent with the Constitution, multi-interpreted, and incomplete.

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