

# IS THE CONDITIONALLY CONSTITUTIONAL DOCTRINE CONSTITUTIONAL?

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## Abstract

*Under the conditionally constitutional doctrine, the Indonesian Constitutional Court may declare that a provision of a statute is constitutional if it is read in a way described by the Constitutional Court. In practice, this doctrine allows the Constitutional Court to create new legal norms that might not be covered or even considered in the reviewed statute. The main question is, does the Constitutional Court have any legitimate reasons to use such doctrine? This question is especially crucial because the Indonesian House of Representatives once banned the doctrine by amending Law No. 24 of 2003 on Constitutional Court in 2011 and shortly thereafter, the Constitutional Court declared that the amendment is unconstitutional. In this article, I will discuss the validity of the conditionally constitutional doctrine through the lens of various theories of legal interpretation and further conclude that given the nature of the judicial review process, attempting to answer the above question from the perspective of traditional legal interpretation theories would not be fruitful. Instead, I would recommend using a pragmatic approach in dealing with the existence of the doctrine and offer certain aspects that can be further pursued by Indonesian legal researchers to improve the use of such doctrine.*

**Keywords:** Constitutional Law, Legal Interpretation, Constitutional Court, Conditionally Constitutional Doctrine

## Abstrak

*Berdasarkan Doktrin Konstitusional Bersyarat, Mahkamah Konstitusi Republik Indonesia dapat menyatakan bahwa ketentuan dari suatu undang-undang adalah konstitusional sepanjang dimaknai sesuai dengan apa yang dinyatakan oleh Mahkamah Konstitusi. Dalam praktiknya, doktrin ini memungkinkan Mahkamah Konstitusi untuk menciptakan norma hukum baru yang sebelumnya mungkin tidak dicakup atau bahkan dipertimbangkan dalam undang-undang yang diuji. Pertanyaan utamanya adalah: apakah Mahkamah Konstitusi memiliki alasan yang sah untuk menggunakan doktrin tersebut? Hal ini menjadi krusial khususnya mengingat Dewan Perwakilan Rakyat Republik Indonesia pernah melarang penggunaan doktrin tersebut melalui amandemen atas Undang-Undang No. 24 Tahun 2003 tentang Mahkamah Konstitusi di tahun 2011, dan tak lama sesudahnya, Mahkamah Konstitusi menyatakan bahwa amandemen tersebut bertentangan dengan Konstitusi. Dalam makalah ini, penulis akan mendiskusikan keabsahan dari Doktrin Konstitusional Bersyarat dari sudut pandang berbagai teori interpretasi hukum, dan menyimpulkan bahwa mengingat sifat dari proses pengujian undang-undang, usaha untuk menjawab pertanyaan di atas dari perspektif teori interpretasi hukum tradisional tidak akan membuahkan hasil. Sebaliknya, penulis merekomendasikan untuk menggunakan pendekatan pragmatis dalam menyikapi keberadaan doktrin tersebut dan menyarankan beberapa aspek yang perlu ditelaah lebih jauh oleh para peneliti hukum di Indonesia guna memperbaiki penggunaan doktrin tersebut.*

**Kata kunci:** Hukum Tata Negara, Interpretasi Hukum, Mahkamah Konstitusi, Doktrin Konstitusional Bersyarat

## I. INTRODUCTION

Article 24C (1) of the 1945 Constitution of the Republic of Indonesia (“**1945 Constitution**”) states that the Constitutional Court (“**Court**”) has the authority to conduct a judicial review of any statute (*undang-undang*) against the 1945 Constitution and the Court’s decisions shall be final and binding.<sup>1</sup> Article 24C (6) of the 1945 Constitution states that provisions related to the Court’s procedural rules and other provisions concerning the Court will be further stipulated in a statute.<sup>2</sup>

Under Law No. 24 of 2003 on Constitutional Court (“**Law 24/2003**”), which implements the above provision of the 1945 Constitution), once the Court determines that the relevant petitioner has the required legal standing to bring a case for judicial review against a statute<sup>3</sup>, the Court is specifically authorized to decide whether such statute (or any part thereof) is in violation of or in compliance with the 1945 Constitution substantively<sup>4</sup> or formally.<sup>5</sup> If the Court finds that the statute’s provision is in compliance with the 1945 Constitution, then the Court must declare that the petitioner’s claim is rejected.<sup>6</sup> However, if the Court finds the statute’s substantive provision to be in violation of the 1945 Constitution, then the Court’s ruling must declare that such provision does not have any legal binding power.<sup>7</sup> If the Court determines that the promulgation of the reviewed statute is not in line with the procedures set out in the 1945 Constitution, then the Court’s ruling must declare that the entire statute has no legal binding power.<sup>8</sup> These provisions effectively limit the form of decision that can be made by the Court in exercising its judicial review authority.

Between 2003 and 2011, the Court developed its own doctrine to deal with the above limitation, creating a new form of legal ruling, namely, the conditionally constitutional doctrine. The doctrine was first introduced in July 2005 when the Court reviewed Law No. 19 of 2004 on the Promulgation of Government Regulation in lieu of Law No. 1 of 2004 on Amendment to Law No. 41 of 1999 on Forestry to become Law.<sup>9</sup> While the 2005 decision does not elaborate the reasoning behind the use of such doctrine, it provides a first glimpse of the doctrine, namely, in case a possibility exists that a statute’s provision might be interpreted to violate the 1945 Constitution, instead of deciding that such provision contravenes the 1945 Constitution (and therefore the Court must declare that such provision does not have any binding power as per the provision of Article 57 Paragraph (1) of Law 24/2003), the Court will declare that such provision does not contradict the 1945 Constitution if it is read in accordance with the official interpretation of the Court.<sup>10</sup>

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<sup>1</sup> The 1945 Constitution has been amended four times. Thus, for ease of reference, I am using the consolidated version of the 1945 Constitution with commentaries by Jimly Asshiddiqie. See Jimly Asshiddiqie, *Konsolidasi Naskah UUD 1945 Setelah Perubahan Keempat [Consolidation of Draft Indonesian Constitution 1945 after the Fourth Amendment]* (Jakarta: Yarsif Watampone, 2003), 55.

<sup>2</sup> *Ibid.*, pp. 58-59.

<sup>3</sup> Indonesia, *Undang-Undang tentang Mahkamah Konstitusi (Law on the Constitutional Court)*, UU No. 24 Tahun 2003, LN No. 98 Tahun 2003, TLN No. 4316 (Law No. 24 of 2003, SG No. 98 of 2003), Art. 56 (1) and (2)

<sup>4</sup> *Ibid.*, Art. 56 (3).

<sup>5</sup> *Ibid.*, Art. 56 (4).

<sup>6</sup> *Ibid.*, Art. 56 (5).

<sup>7</sup> *Ibid.*, Art. 57 (1).

<sup>8</sup> *Ibid.*, Art. 57 (2).

<sup>9</sup> Mahkamah Konstitusi, “Putusan Perkara Nomor 003/PUU-III/2005.”

<sup>10</sup> *Ibid.*, p. 18.

The Court first discussed its reasoning to use this doctrine in December 2007 when reviewing the constitutionality of Law No. 32 of 2004 on Regional Government, Law No. 23 of 2003 on Election of President and Vice President, Law 24/2003, Law No. 5 of 2004 on Amendment to Law No. 14 of 1985 on Supreme Court, and Law No. 15 of 2006 on the Audit Board of the Republic of Indonesia.<sup>11</sup> In this 2007 case, the Court was asked to decide whether the following requirement contravenes the 1945 Constitution: as a requirement to be elected to certain government, political, and judicial positions, an individual must never been imprisoned by a final and binding court's decision due to that individual committing a crime that is punishable by imprisonment for a maximum of five years or more.<sup>12</sup>

The Court determined that the above requirement does not violate the 1945 Constitution if it is read to exclude any political crimes or crimes that do not involve active criminal intent (*mens rea*).<sup>13</sup> At the same time, the Court also acknowledged the difficulties caused by Law 24/2003, which limits the possible decisions by the Court, namely, the Court can only declare that (i) the petitioner's claim is not accepted (because the claim does not meet the requirements for legal standing), (ii) the claim is granted (which means that the statute's provision will be deemed in violation of 1945 Constitution, or (iii) the claim is rejected (which means that the statute provision is deemed in compliance with the 1945 Constitution).<sup>14</sup> As such, the Court concluded that its only solution is to put the conditionally constitutional doctrine as part of the Court's reasoning and to declare in its ruling that the petitioner's claim is rejected.<sup>15</sup> The Court also suggested that the issue regarding the above election requirement can be better addressed by pursuing it through a legislative review process with Indonesian legislators.<sup>16</sup>

The Court then changed its position in July 2008 when it reviewed the constitutionality of Law No. 10 of 2008 on General Election of Members of the Indonesian House of Representatives, Regional Representative Council, and the Regional House of Representatives.<sup>17</sup> It was the first time that the Court actually made the conditionally constitutional doctrine as part of its official ruling.<sup>18</sup> This case has two other major points. First, the substantive point of the claim did not focus on whether an existing provision of a statute is in violation of the 1945 Constitution. Rather, it focused on whether the non-existence of a norm in a statute causes such statute to be in violation of the 1945 Constitution.<sup>19</sup> Second, the Court's majority claimed, without providing any explicit basis, that the Court has three options in deciding this case, namely, (i) to declare that the claim is obscure (*obscur libel*) because Law 24/2003 only permits a judicial review against the substantive matters of a statute's provision, which might implicitly mean that the provision must first exist in the statute, (ii) to declare that the disputed provision is conditionally constitutional because it does not explicitly stipulate a norm that is implicitly required by the Constitution to exist in such statute, or (iii) to declare that the disputed provision is conditionally unconstitutional

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<sup>11</sup> Mahkamah Konstitusi, "Putusan Perkara Nomor No. 14-17/PUU-V/2007."

<sup>12</sup> *Ibid.*, p. 123.

<sup>13</sup> *Ibid.*, pp. 130-132.

<sup>14</sup> *Ibid.*, p. 133.

<sup>15</sup> *Ibid.*,

<sup>16</sup> *Ibid.*, p. 133.

<sup>17</sup> Mahkamah Konstitusi, "Putusan Perkara Nomor No. 10/PUU-VI/2008."

<sup>18</sup> *Ibid.*, p. 133.

<sup>19</sup> *Ibid.*, p. 209-210.

because of the reasoning set out in (ii).<sup>20</sup>

The Court further explained that (i) if the Court decided to use the first option (obscure claim), then the Court will have to declare that the petitioner's claim is not accepted and the petitioner may bring the case again the future; (ii) if the Court opted for the second option (conditionally constitutional), then the Court will have to declare that the claim is rejected, but because the conditionally constitutional requirement is only stated in the reasoning part and not in the ruling part, the Court believed that the requirement will have no legal effect unless the regulators are willing to further implement the Court's reasoning into a valid regulation; and (iii) if the Court chose the third option, then the Court's ruling will state that the petitioner's claim is granted and the entire provision of the relevant statute will be deemed unconstitutional even though only a part of such provision is problematic.<sup>21</sup>

On the basis of the above reasoning, the Court finally took the second option and declared in its ruling that the disputed statute's provision is conditionally constitutional upon certain requirements stipulated by the Court.<sup>22</sup> The Court also implicitly acknowledged for the first time that prior uses of the conditionally constitutional doctrine did not have the proper legal effect because they were not stipulated in the rulings section of the Court's decision. As such, through the 2008 decision, the Court formally created new legal norms in its quest to ensure that the provision of a statute is in compliance with the 1945 Constitution. Consequently, the conditionally constitutional doctrine has evolved from a mere theoretical legal reasoning to become a form of official ruling, at the same time.

Apparently, the Indonesian House of Representatives ("DPR") was not pleased with the Court's "innovation" and in 2011, through Law No. 8 of 2011 on Amendment to Law No. 24 of 2003 on Constitutional Court ("**Law 8/2011**"), amended Law 24/2003.<sup>23</sup> Under Law 8/2011, the Court is expressly prohibited from making, (i) in case the Court decided that the petitioner's claim is valid, any ruling other than declaring that a statute (or any of its provisions) that contravenes the 1945 Constitution does not have any legal binding power, (ii) any order to the lawmakers, and (iii) any new legal norm to replace the norm contained in the relevant statute's provision that has been declared in violation of the 1945 Constitution.<sup>24</sup>

Within three months after the enactment of Law 8/2011 in July 2011, the Court reviewed the constitutionality of Article 57 (2a) of Law 8/2011 (based on a petitioner's motion that asked for a judicial review of Indonesian anti-narcotics law, citing that Law 8 has violated his right to ask for a judicial review under the conditionally constitutional doctrine) and declared that such provision is not in line with the 1945 Constitution and therefore has no binding power.<sup>25</sup>

To support its decision, the Court argues that Article 57 (2a) contradicts the Court's main purpose to defend the rule of law and justice, especially to defend the constitutionality of a statute against the 1945 Constitution.<sup>26</sup> Moreover, according

<sup>20</sup> *Ibid.*, p. 212.

<sup>21</sup> *Ibid.*, p. 213.

<sup>22</sup> *Ibid.*, p. 215.

<sup>23</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi (Law amending the Law No. 24 of 2003 on the Constitutional Court)*, UU No. 8 Tahun 2011, LN No. 70 Tahun 2011, TLN No. 5226.

<sup>24</sup> *Ibid.*, Art. 57 (2a).

<sup>25</sup> Mahkamah Konstitusi, "Putusan Perkara Nomor No. 48/PUU-IX/2011", 98.

<sup>26</sup> *Ibid.*, p. 94.

to the Court, Article 57 (2a) also prevents the Court from (i) reviewing the constitutionality of a legal norm, (ii) filling any legal gap that might occur due to a statute's provision being declared unconstitutional, especially considering that the legislative process takes time and therefore DPR will not be able to fill such a gap quickly, and (iii) performing the constitutional judges' duty to find, understand, and follow the public's perceived values on law and fairness.<sup>27</sup> The DPR has not yet tried to propose any amendment against Law 8/2011 regarding that particular provision since the issuance of the above ruling.

Coming from a civil law country, this case is interesting if not controversial. Not only does the Court seem to simply dismiss a clear and specific rule made by the legislators, the Court basically used only a single paragraph in its 2011 ruling to explain why the Court's ruling is supported by the 1945 Constitution.<sup>28</sup> Relying on the Court's past rulings is not particularly helpful either because the reasoning provided in those previous rulings also lacked support from the 1945 Constitution, other laws, or even any other reputable sources. Indeed, the fact that the Court can go so far in establishing the use of the doctrine is highly questionable. This issue brings us to the main question of this paper: does the Court have any legitimate reasons to maintain the use of the conditionally constitutional doctrine? Or in other words, is the conditionally constitutional doctrine constitutional? Furthermore, what are the consequences of having the doctrine in our legal system?

To answer the above questions, I will use various approaches under the currently available theories of legal interpretation to determine whether any plausible theory exists that could support the doctrine's existence. Essentially, I am a pragmatist. Like it or not, the conditionally constitutional doctrine has already existed for more than 10 years, and it is unlikely that the doctrine will disappear soon (more on this prediction below). As such, the goal of this paper is not to merely justify the doctrine based on the applicable theories of legal interpretation. I have no intention to write an apologetic excuse for supporting such doctrine. Instead, I aim to demonstrate (i) the limit of traditional theories of legal interpretation that refuse to use the interpreters' substantive commitments in analyzing the existence of the doctrine (which would enable me to introduce the pragmatism approach as an alternative theory of legal interpretation), and (ii) the issues caused by having the conditionally constitutional doctrine and the factors that must be further analyzed to improve such doctrine (assuming that we have no effective measures to limit the application or fully abolish the existence of the doctrine).

## II. ANALYSIS

Before we start our analysis, the role of legal interpretation in a legal system needs to be discussed briefly. Traditionally, the term covers both interpretation and construction of legal texts, referring to an act of identifying the semantic meaning of a particular use of language in context and then applying that meaning to particular factual circumstances.<sup>29</sup> However, in practice, the concept of "meaning" might not be limited only to the semantic meaning. As argued by Richard H. Fallon Jr., the meaning of a statute's provision can refer to its literal or semantic meaning, its contextual

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> See Randy E. Barnett, "Interpretation and Construction," *Harvard Journal of Law and Public Policy* 34 (2011), p. 66.

meaning as framed by the shared presuppositions of speakers and listeners, its intended meaning, its real conceptual meaning, its reasonable meaning, or its previously interpreted meaning.<sup>30</sup> Given these different meanings, legal interpretation seems to be unavoidable. The question is, would it be possible to avoid any normative commitments in performing legal interpretation, where we assume that we can obtain a “correct” answer based on the applicable legal sources and by using a single justified theory of legal interpretation? Or is Cass Sunstein’s claim correct, namely, that in the end, there is nothing that interpretation “just is”?<sup>31</sup>

In Indonesia itself, no clear and systematic rules exist on how legal actors should read and interpret the law. I am not even sure whether Indonesian law schools teach the art of legal interpretation as part of their mandatory curriculum for their law students. It would be a pity if such class does not exist. Any law student who actually believes that a skill in legal interpretation is not necessary would be surprised to find out that in practice, legal texts could be subject to multiple readings, as discussed above. Even worse, no simple ways can be applied to resolve the issue of picking the right “meaning.”<sup>32</sup> This situation is why legal interpretation is both fascinating and frustrating. Yet we cannot avoid it and as we progress through this paper, we will see how different types of legal interpretation theories cope with the existence of the conditionally constitutional doctrine.

Let us start with the plain meaning approach: if a reading of a legal text provides a clear answer to a case, then further inquiries should end and the text must be enforced as it is.<sup>33</sup> When we apply this principle to the 1945 Constitution, we would quickly conclude that the plain meaning approach does not offer any solution. The relevant article in the 1945 Constitution concerning the Court’s authority to perform a judicial review does not explain the meaning of such term at all.<sup>34</sup> The other article that might be relevant, namely, Article 24 (1) of the 1945 Constitution, only states that judicial authority is an independent authority to perform the court’s function to enforce law and justice where pursuant to Article 24 (2) of the 1945 Constitution, the Court is part of such judicial authority.<sup>35</sup> Again, no explanation whatsoever has been given concerning the meaning of enforcing law and justice.

The above result is somehow unsurprising because we do have difficulties in explaining the meaning of a “clear statement.” H.L.A Hart has famously argued about the open texture nature of language that may affect how we read and interpret the law given the uncertainties within the relevant legal texts.<sup>36</sup> In addition, Saul Kripke has shown that plain meaning does not really exist; each word needs context to be understood and will be subject to the understanding of the relevant interpretive community.<sup>37</sup> Indeed, the full content of communication in a natural language is

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<sup>30</sup> See Richard H. Fallon Jr., “The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation,” *The University of Chicago Law Review* 82 (2015), p. 1239.

<sup>31</sup> See Cass Sunstein, “There is Nothing that Interpretation Just Is,” *Constitutional Commentary* 30 (2015) p. 193.

<sup>32</sup> See Frank Easterbrook, “Judicial Discretion in Statutory Interpretation,” *Oklahoma Law Review* 57 (2004): p. 2.

<sup>33</sup> See Abner J. Mikva and Eric Lane, *An Introduction to Statutory Interpretation and Legislative Process* (New York: Aspen Publishers, 1997), p. 10.

<sup>34</sup> Asshiddiqie, *Konsolidasi Naskah UUD 1945*, p. 55.

<sup>35</sup> *Ibid.*, p. 52.

<sup>36</sup> See further discussion in H.L.A Hart, *The Concept of Law*, 3rd edition (Oxford: Oxford University Press, 2012), pp. 128-136.

<sup>37</sup> See Saul Kripke, *Wittgenstein on Rules and Private Language* (Cambridge: Harvard University Press,

enriched by various factors and often goes beyond the meaning of the words and sentences uttered by the speaker.<sup>38</sup>

To understand such context, some interpretive theories focus on the intent of the lawmakers,<sup>39</sup> such as purposivism<sup>40</sup> and imaginative reconstruction<sup>41</sup>. In some cases, intent is translated into “the spirit of the law,” causing the expressed texts of the law to be read with the lawmakers’ purpose in mind so that the literal meaning of texts can be excluded if it can satisfy the higher purpose.<sup>42</sup>

While this approach seems sensible, I have some reservations in using the intent or purpose-based approach even if we assume that the materials used by the 1945 Constitution’s framers in drafting the relevant articles are available for research. The issue is simple: laws/regulations are often made collectively by a committee, and public choice theory has demonstrated that the legislative body/congress/agency’s committee is a “they,” not an “it,” and they do not have “intents” or “designs” that are hidden yet discoverable.<sup>43</sup> Hence, seeking such collective intent is implausible if not impossible.<sup>44</sup> How can we know whether the 1945 Constitution’s framers have the same purpose and goal in drafting the relevant provisions? If their views differ, then whose views should be given more weight, and do we have any good reasons to support someone’s view instead of other people’s view?<sup>45</sup> As an example, should we prefer the ideas of Sukarno, Mohammad Yamin, Supomo, or Mohammad Hatta in understanding certain terms of the 1945 Constitution? Suppose we choose Sukarno’s view. Is it because we have certain biases toward his ideas or because he was a founding father of Indonesia? What about the other founding fathers? In fact, we can also ask why the views of the founding fathers should matter. If they believed that

1982), pp. 96-97. In practice, the meaning of “interpretive community” is also unclear and yields multiple interpretations.

<sup>38</sup> See further discussion in Andrei Marmor, “Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech,” in *Philosophical Foundations of Language in the Law*, ed. Andrei Marmor and Scott Soames (Oxford: Oxford University Press, 2013), pp. 83-104.

<sup>39</sup> Although social convention matters in communication and texts might have different meanings, the intent of a drafter of legal texts is still important and cannot be easily disregarded. See Kent Greenawalt, *Legal Interpretation: Perspectives from Other Disciplines and Private Texts* (Oxford: Oxford University Press, 2010), pp. 20-21.

<sup>40</sup> Purposivism is defined as a method of legal interpretation that combines elements of the subjective (the intention of the author of the text) and objective (the intent of the reasonable author and the legal system’s fundamental values). See Aharon Barak, *Purposive Interpretation in Law* (New Jersey: Princeton University Press, 2005), p. 88

<sup>41</sup> Richard A. Posner defines imaginative reconstruction as a method of interpretation where a judge tries his best to think his way into the minds of the enacting legislators and imagine how they would have wanted the law to be applied to the relevant case. See Richard A. Posner, “Statutory Interpretation – in the Classroom and in the Courtroom,” *The University of Chicago Law Review* 50 (1983): p. 817.

<sup>42</sup> Holy Trinity Church v. United States can be a good example. See further discussion in Carol Chomsky, “The Story of Holy Trinity Church v. United States: Spirit and History in Statutory Interpretation,” in *Statutory Interpretation Stories*, ed. William N. Eskridge, Jr., Phillip P. Frickey and Elizabeth Garret (New York: Foundation Press, 2011), p. 5-6.

<sup>43</sup> See Frank H. Easterbrook, “Statutes Domain,” *University of Chicago Law Review* 50 (1983), pp. 547-548.

<sup>44</sup> *Ibid.*

<sup>45</sup> As an example, for some lawyers and judges, the Federalist Papers are considered an authoritative document to understand the meaning of the Constitution of the United States because the document was made by some of the United States’ most cherished founding fathers. But in reality, it is just one of many political documents in the past that were used to support or challenge the ratification of the Constitution. See further discussion in Ray Raphael, *Constitutional Myths: What We Get Wrong and How to Get It Right* (New York: New Press, 2013), 104-105.

their views were crucial to understanding the meaning of the 1945 Constitution, then why didn't they mention this as an original part of the 1945 Constitution's texts?

The next alternative is textualism, a method of legal interpretation that focuses almost exclusively on the text of the law and other intrinsic sources of meaning, including looking for the public meaning of the words used in the law as of the time the law was drafted.<sup>46</sup> The late Justice Antonin Scalia of the US Supreme Court, the godfather of textualism, explained that his interpretive method is the fair reading method, that is, determining the application of a governing text to given facts on the basis of how a reasonable reader who is fully competent in the language would have understood the text at the time it was issued.<sup>47</sup>

Scalia also adds that to understand the context of a legal text, we must embrace not just textual purposes but also the word's historical associations acquired from recurrent patterns of past usage and the word's immediate syntactic setting, namely, the words that surround it in a specific utterance.<sup>48</sup>

Another method is intratextualism, which is a branch of textualism that argues that a law should be read in unison as if implicit links exist between its clauses, if one refuses the tendency to read those clauses in splendid isolation, and if the terms that specifically used in the relevant law are employed as the main tool in revealing a community's understanding of certain legal terms.<sup>49</sup> This approach is similar to the whole-text canon that asks legal interpreters to consider a law's entire text in view of its structure and of the physical and logical relation of its many parts.<sup>50</sup>

Textualism's respect for texts and their original meaning is praiseworthy. What could be a better evidence for acknowledging the law's legitimacy other than faithfully following the texts and their surrounding contexts without falling into the trap of literalism?<sup>51</sup> From the political theory perspective, if legal texts can be easily dismissed or manipulated, then how can the law claim authority and create stability among different political branches?<sup>52</sup> However, textualism also has some major weaknesses, especially in the context of interpreting the provisions of the 1945 Constitution.

First, most of the time, the constitution of a country proceeds by briefly indicating certain fundamental principles whose specific implications will be implemented later on.<sup>53</sup> This situation is true for both the US Constitution and the 1945 Constitution. John Hart Ely argues that while some constitutional provisions are relatively specific, some are extremely open-textured, and reading or understanding these provisions is

<sup>46</sup> Linda D. Jellum, "But That is Absurd! Why Specific Absurdity Undermines Textualism," *Brooklyn Law Review* 76 (2010-2011), p. 919.

<sup>47</sup> See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 33.

<sup>48</sup> *Ibid.*

<sup>49</sup> See further discussion in Akhil Reed Amar, "Intratextualism," *Harvard Law Review* 112 no. 4 (1998-1999): pp. 788-795.

<sup>50</sup> See Scalia and Garner, *Reading Law*, p. 167.

<sup>51</sup> According to Laurence H. Tribe, fidelity to texts is essential to avoid the temptation of resorting to freeform methods of interpreting the law, which might cause people to question the authority of the law, especially the Constitution. See further in Laurence H. Tribe, "Taking Texts and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," *Harvard Law Review* 108 no. 6 (1995): 1300-1303.

<sup>52</sup> See further discussion in Frank H. Easterbrook, "Textualism and the Dead Hand," *The George Washington Law Review* 66 (1997-1998), pp. 1119-1122.

<sup>53</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), p. 1.



impossible without referring to other sources beyond the text of the Constitution.<sup>54</sup> In other words, textual meaning has its own limits because it does not always contain the information necessary to decide the case at hand.<sup>55</sup> Clearly, in our case, with such “minimalist language” within the 1945 Constitution, determining the exact meaning of “judicial review authority” in Indonesia is impossible.

Second, given the difficulties in extracting the collective intent under the legislative history documents that contain the discussion of “only” several hundred people, how could we claim that we are capable of deciphering the understanding of a word by an interpretive community whose members and sources are substantially larger and more diverse? Are dictionaries reliable to solve the issue? On what authority? Note that dictionaries are not made by elected officials and have no legal authority. Why should their voices matter? Is one dictionary more valuable or better than another dictionary? Should we rely instead on newspapers, magazines, the Internet, books, or other valid historical sources? Do these sources accurately represent the intent of the community, if such a thing does exist? Who should decide and on what criteria?<sup>56</sup> Are we able to define “interpretive community” and know precisely their actual understanding of various legal terms?<sup>57</sup> I doubt that we could actually rely on Indonesian dictionaries and/or treatises to understand the meaning of judicial review. I also doubt that we can ever define the meaning of interpretive community, especially in a plural society like Indonesia. Claiming that our views are in line with the perceived values of Indonesian communities is easy; proving such a claim is a herculean task.

Third, if collective intent does not exist, then could a law have an intrinsic purpose that can be known solely from reading the law as it is? Can we really say that a law is intended to achieve x if we cannot really know the intention of its creator? Suppose a law clearly states that it is intended to achieve x. What would happen if an honest reading of that law indicates that some of its provisions are not in line at all with x? Can and should we read the law in a way that reduces conflict among its provisions?<sup>58</sup> However, if each law is a product of compromise among many people, how can we assume that a law should be read in a coherent and systematic way?<sup>59</sup>

With regard to the above third issue, consider Article 20 (1) of the 1945 Constitution, which states that DPR has the authority to draft statutes.<sup>60</sup> How should

<sup>54</sup> See further discussion in *ibid.*, pp. 13-14.

<sup>55</sup> See Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, trans. Ruth Adler and Neil MacCormick (Oxford: Oxford University Press, 2011), p. 1 and Barnett, “Interpretation and Construction,” p. 68.

<sup>56</sup> Example: is it better to rely on Black’s Law Dictionary or any other dictionary? What if dictionaries provide a competing meaning? See a fascinating discussion on the use of dictionaries and other sources by the United States Supreme Court in analyzing the meaning of “carrying” in *Muscarello v. United States* in Lawrence M. Solan, “The New Textualist’s New Text,” *Loyola of Los Angeles Law Review* 38 (2004-2005): 2050-2053. We can conclude from Solan’s discussion that the use of dictionary is really prone to cherry-picking.

<sup>57</sup> Without systematic guidance on how dictionaries should be used, the use of dictionaries has resulted in inconsistent analysis and conclusions, which have added little certainty to the law. See further in Samuel A. Thumma and Jeffrey L. Kirchmeier, “The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries,” *Buffalo Law Review* 47 (1999), pp. 301-302.

<sup>58</sup> Such as using the harmonious reading canon. See Scalia and Garner, *Reading Law*, pp. 180-181.

<sup>59</sup> In Easterbrook’s view, not only is reasoning from one statute to another impossible, but so is reasoning from one or more sections of a statute to a problem that is not resolved. See Easterbrook, “Statutes Domain,” p. 547.

<sup>60</sup> Asshiddiqie, *Konsolidasi Naskah UUD 1945*, p. 33.

we reconcile that article with Article 24 C (1) of the 1945 Constitution concerning the judicial review authority of the Court and Article 24 C (6) of the 1945 Constitution, which states that further provisions on the Court shall be governed in a statute? Can we argue with certainty that by declaring Article 57 (2a) of Law 8/2011 to be unconstitutional, the Court has essentially breached the provision of the 1945 Constitution because it usurped the authorities of the DPR? I do not think that the answer is certain. Given the lack of clarity on the meaning of judicial review, the Court can always be argued to be simply exercising its rights to interpret the provisions of the Constitution, including saying that DPR is actually the one that tried to usurp the Court's authority by limiting the form of its decisions. We will see below why this kind of interpretation will be used by the Court.

Moving on from textualism, we can try to rely on legal canons. In essence, the Court's conditionally constitutional doctrine is similar to the constitutional doubt canon in the US legal system, that is, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Supreme Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of the Congress."<sup>61</sup> An earlier version of the canon (or what is called "classical avoidance") states that in case two possible interpretations of a statute exist, one of which would make the statute unconstitutional and the other would make it valid, the Supreme Court's plain duty is to adopt that which will save the statute.<sup>62</sup>

At face value, the canon seems reasonable. Under this canon, courts are expected to respect the decision of the legislators and not to easily disregard their choice of policy by declaring their enacted statutes as unconstitutional.<sup>63</sup> In other words, the canon is made to minimize the frictions created by the institution of judicial review.<sup>64</sup> While the Court never mentioned this reasoning in its rulings, having such reasoning to defend the use of the conditionally constitutional doctrine would make sense. Another argument for defending this canon is because it supports judicial restraint. However, in reality, it is a double-edged sword because the canon can be used for either judicial activism or judicial restraint, depending on how you view the use of such canon in practice.<sup>65</sup> If we take into account the case in Indonesia, then the Court's justices clearly do not apply any restraint in declaring the unconstitutionality of Article 57 (2a) of Law 8/2011.

Indeed, this is a case where the legislators have enacted their choice of policy through a statute (as expressly authorized under the 1945 Constitution) to basically allow the Court to declare the statute as unconstitutional (without requiring the Court to make any attempt to defend the constitutionality of the statute), only to find out that their statute is unconstitutional because the Court thinks that the legislators do not appreciate the fact that letting the Court maintain the constitutionality of the

<sup>61</sup> Edward J. DeBartolo Corp. v. Fla Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). See further discussion in Gillian E. Metzger and Trevor W. Morrison, "The Presumption of Constitutionality and the Individual Mandate," *Fordham Law Review* 81 (2012-2013), p. 1717. See also a slightly different wording in Scalia and Garner, *Reading Law*, p. 247.

<sup>62</sup> *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). See further discussion in Adrian Vermeule, "Saving Constructions," *The Georgetown Law Journal* 85 (1996-1997), p. 1949.

<sup>63</sup> See John Marshall's explanation in *Ogden v. Saunders* as cited in David M. Burke, "The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty," *Harvard Journal of Law & Public Policy* 18 (1994-1995), p. 79.

<sup>64</sup> Posner, "Statutory Interpretation," p. 815.

<sup>65</sup> Frank Easterbrook, "Do Liberals and Conservatives Differ in Judicial Activism?," *University of Colorado Law Review* 73 (2002), p. 1405.

statute through a different reading would be better than declaring the statute wholly unconstitutional. Welcome to Indonesia.

This situation is why I think reviewing or analyzing the validity of a canon based on doctrinal or political analysis is futile. Exemptions will always be present, and no bulletproof mechanisms are available in making a perfect canon. Scalia and Garner established the “presumption of validity” canon (which reflects “classical avoidance”) as a fundamental canon in interpreting the provisions of a statute.<sup>66</sup> The question is, on what basis? That is still a mystery until today.

Having said the above, we finally arrive at our last method of legal interpretation, namely, pragmatism, which concentrates on the potential impact/consequences of our choice of interpretation on practical legal problems not only to the parties directly involved in the case but also the systemic and institutional consequence of such choice of interpretation.<sup>67</sup> The main difference of this method with the previously discussed methods is that pragmatism clearly supports the use of the interpreter’s substantive commitment in interpreting legal texts, whereas the other methods prevent (or at least appear to prevent) the use of such substantive commitment.

The usual primary criticism against pragmatism is that it gives too much discretion to judges to follow their policy preferences. In an interview with C-SPAN, Chief Justice John G. Roberts of the US Supreme Court emphasized that the Supreme Court is not a political branch. Consequently, when the Supreme Court decides a case, it is based on the law and not on policy preference.<sup>68</sup> The idea is simple: tenured judges who are not democratically elected cannot be trusted with too much power.<sup>69</sup> They are not omniscient and they surely make mistakes, especially when they face complex problems with limited information. Thus, limiting their ability to interpret the law to avoid significant problems would make sense.<sup>70</sup> Some scholars also argue that limiting judges’ power to interpret laws (by focusing on the text and only the text) will encourage legislators to be more disciplined in drafting them.<sup>71</sup>

Nonetheless, the same criticism can also be made against the use of history, textual analysis, dictionaries, and canons of construction, as previously discussed above. A smart judge can use those various methods to support his own policy preferences while still looking as if he is restraining himself.<sup>72</sup> Like it or not, judges care about the

<sup>66</sup> Scalia and Garner, *Reading Law*, p. 66.

<sup>67</sup> See Richard A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), pp. 395-403.

<sup>68</sup> See Brian Lamb, Susan Swain, and Mark Farkas, ed., *The Supreme Court: A C-Span Book Featuring the Justices in Their Own Words* (Philadelphia: Public Affairs, 2010), p. 6.

<sup>69</sup> See Frank H. Easterbrook, “What’s So Special About Judges?,” *University of Colorado Law Review* 61 (1990), pp. 776-777.

<sup>70</sup> See Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge: Harvard University Press, 2006), pp. 289-290.

<sup>71</sup> *Ibid.*, at 119. Although the evidence for this claim is also questionable. See Adrian Vermeule, “Interpretive Choice,” *New York University Law Review* 75 (2000), pp. 94-95.

<sup>72</sup> See Richard A. Posner, “Against Constitutional Theory,” *New York University Law Review* 73 (1998): 3-4. For further elaboration in judicial strategic decision making, see Duncan Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997), pp. 180-212. As Cass R. Sunstein stated: “the meaning of any text, including the Constitution, is inevitably and always a function of interpretive principles, and these are inevitably and always a product of substantive commitments.” See Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1994), p. 8. With respect to history, it could be argued that judges can construct law’s own history in the process of deciding present cases through a complex genealogical operation that accords them enormous discretion yet allows them to claim that they are being bound by the past. See Austin Sarat and Thomas R. Kearns, “Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction,” in *History, Memory, and the Law*, ed. Austin Sarat and

impact of their decisions.<sup>73</sup> The grand question is, why aren't we being honest with that? Why do not we focus on defining things that really matter, especially given the fact that law is ubiquitous in our life?<sup>74</sup>

I am not claiming in this paper that judges are the sole savior of the legal system nor do I claim that all constitutional problems must be settled by judges via pragmatism, as I have no intention to grant a rubber stamp for the Court's action. I am simply reminding the Indonesian legal community that the law may affect people's life and to a certain extent, we should care about the impact of our choices and results of legal interpretation, especially in relation to our supreme laws that affect the entire country. Whether this task should be dominated by judges, executive agencies, or legislators is an institutional problem that will not be thoroughly discussed in this paper.

A discussion on pragmatism itself cannot be separated from the law and economics movement.<sup>75</sup> It should be noted though that the application of law and economics is controversial in constitutional interpretation because of its endorsement of typically a single social goal, namely, resource allocation efficiency.<sup>76</sup> Meanwhile, considering the constitution's status as the supreme law, constitutional debates often involve selecting the correct primary social goals, which may include protection of property, egalitarianism, social justice, fairness, and many more.<sup>77</sup> Why should we prioritize resource allocation efficiency? Consider also the difficulties in defining "welfare/well-being," which provokes some commentators to argue that the concept is useless for policy analysis.<sup>78</sup> Moreover, the assumption of rationality seems to be weak as people often behave inconsistently in pursuing their self-interest and maximizing their welfare.<sup>79</sup> How can we build a theory of legal interpretation based on such a flawed assumption?

Those are fair criticisms that deserve some quick replies before we can move on to our main analysis. First of all, we need to remember that the most important concept of economics is actually the principle of scarcity.<sup>80</sup> If no scarcity exists, then allocation

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Thomas R. Kearns (Ann Arbor: The University of Michigan Press, 2002), p. 5.

<sup>73</sup> See Frank H. Easterbrook, "The Inevitability of Law and Economics," *Legal Education Review* 1 (1989): 4. Or as eloquently stated by Justice Oliver Wendell Holmes Jr.: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." See Oliver Wendell Holmes Jr., *The Common Law* (Cambridge: The Belknap Press of Harvard University Press, 2009), p. 3.

<sup>74</sup> See further elaboration in Sunstein, *The Partial Constitution*, p. 4-5.

<sup>75</sup> The law and economics approach uses microeconomic theory and rationality assumption in analyzing various legal issues. In this paper, the term also refers to normative law and economics that focuses on how to maximize the welfare of society through legal instruments in the most efficient manner. See further discussion in Richard A. Posner, *Economic Analysis of Law*, 8<sup>th</sup> edition (New York: Aspen Publisher, 2011), pp. 3-20.

<sup>76</sup> See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: The University of Chicago Press, 1994), p. 4.

<sup>77</sup> *Ibid.*

<sup>78</sup> As an example, should we define well-being as the satisfaction of preferences? Can we properly define preferences? Or suppose that the satisfaction of preferences is not always in line with well-being. Can we set out an agreed list of objective state of affairs that promote well-being? See further discussion in Daniel M. Hausman, *Preference, Value, Choice, and Welfare* (Cambridge: Cambridge University Press, 2012), pp. 78-87.

<sup>79</sup> See comprehensive discussion on this subject in Richard Thaler, *Misbehaving: The Making of Behavioral Economics* (New York: W.W. Norton & Company, inc., 2015).

<sup>80</sup> See Milton Friedman, *Price Theory* (New Brunswick: Transaction Publishers, 2008), pp. 1-2.

is not needed. Law would be useless, and life will most likely be boring.<sup>81</sup> But scarcity exists, its power is absolute, and we need to cope with it in pursuing our end goals, including choosing the social goals to be pursued among many available goals.

Second, well-being is perhaps difficult to define,<sup>82</sup> but this is not its exclusive problem because other morality principles also face the same problem. Michael Sandel, to name one, criticizes the welfare maximization principle for making justice and rights as mere calculation and not principle, and offers “justice as the common good” as a better principle, focusing on defining the meaning of a good life beyond utility and the rights of freedom.<sup>83</sup> But what is the common good anyway? What are its fundamental differences with the all-encompassing definition of well-being discussed by Steven Shavell and Louis Kaplow in their seminal book, *Fairness versus Welfare*?<sup>84</sup> Moreover, pursuing the common good is not free; it will involve costs and may affect the well-being of the people.<sup>85</sup> How do we decide the extent to which we will sacrifice well-being against the so-called common good?

This brings us to the rights-based approach. Why don't we favor this over the welfare maximization principle? Eric Posner argues that given the vast list of rights (and the generality of those rights) plus the differences of conditions and needs among many countries (which lead to inconsistent implementations), the rights-based approach has failed to improve the well-being of the societies that need it the most.<sup>86</sup> This idea does not mean that human rights are not important in the calculation of well-being. It simply means that focusing too much on rights might cause us to miss the important aspect of well-being, which further means that we need to conduct a proper cost-benefit analysis (CBA) in analyzing the priority of our social goals, which is essentially a program of law and economics.<sup>87</sup>

Last but not least, on irrationality, Gary Becker eloquently shows that in the presence of scarcity, even the most irrational person must yield because he could not maintain a choice that was no longer within his opportunity set, forcing him to act “rationally.”<sup>88</sup> A recent empirical paper also supports this idea, that is, in circumstances

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<sup>81</sup> See Easterbrook, “The Inevitability of Law and Economics,” p. 3.

<sup>82</sup> Well-being might be difficult to define, but considerable work has been done to provide a compelling definition of well-being, and this cannot be easily dismissed. See further discussion in Matthew D. Adler, *Well-Being and Fair Distribution* (New York: Oxford University Press, 2012), pp. 155-236.

<sup>83</sup> See Michael Sandel, *Justice: What's The Right Thing to Do* (New York: Farrar, Straus and Giroux, 2010), pp. 260-261.

<sup>84</sup> See Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Cambridge: Harvard University Press, 2002), pp. 465-466.

<sup>85</sup> Just like pursuing fairness can also cost people's well-being. *Ibid.*

<sup>86</sup> See the more comprehensive discussion in Eric A. Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014), pp. 137-148.

<sup>87</sup> In this paper, the term “CBA” refers to conceptual CBA, namely, the idea that CBA can function as a disciplined framework for specifying baselines and alternatives, for ensuring that the costs and benefits of a rule are considered, and for encouraging reliance on evidence rather than solely on intuitive judgment. See John C. Coates IV, “Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications,” *The Yale Law Journal* 124 (2015): 893. As for quantifying the CBA, I am still agnostic between choosing monetary-based CBA and happiness-based CBA. I believe that both can be useful depending on the issues at hand. For further discussion on monetary-based CBA as a welfare-maximizing decision procedure, see Matthew D. Adler and Erick A. Posner, *New Foundations of Cost-Benefit Analysis* (Cambridge: Harvard University Press, 2006), pp. 62-100. For further discussion on happiness-based CBA, see John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Happiness & the Law* (Chicago: The University of Chicago Press, 2015), pp. 27-58.

<sup>88</sup> See Gary Becker, “Irrational Behavior and Economic Theory,” *The Journal of Political Economy* 70,

that require valuation of items whose worth is vague, scarcity leads people to rely on relatively consistent, internally generated standards.<sup>89</sup> As we move further, we will see why scarcity (usually in the form of budget constraint) really matters in formulating laws and ultimately in interpreting those laws.

By utilizing pragmatism, focusing on the ends rather than means and implementing CBA, we can quickly analyze several major issues with the reasoning made by the Court to defend the use of the conditionally constitutional doctrine, especially because we know that most of the reasons stated by the Court were not explicitly discussed in the text of the 1945 Constitution and the Court itself has acknowledged in certain instances that it acted pragmatically. First, a highly doubtful notion—if not entirely wrong—is that the fact that the Court can only choose between two alternatives of ruling actually prevents the Court from reviewing the constitutionality of a statute. The Court can of course still review the constitutionality of such statute even if the Court has only these two options because the options are related only to the available forms of ruling and not the Court's authority to review the statute.

Second, the idea that the Court should fill any legal gap caused by the unconstitutionality of a statute seems to be stretched too far. While it is true that legislators often take a long time to enact new laws (for example, at least three years passed from when the Court used the conditionally constitutional doctrine in its official ruling in 2008 before the DPR issued Law 8/2011, while the Court took only three months to deem the Law's provision unconstitutional), it does not necessarily mean that the Court suddenly has a new task to support the DPR's role. As briefly argued above, by using its authority to declare that a statute is unconstitutional, the Court can actually impose higher discipline on DPR and the president in drafting and designing the statutes. Why? Because given the costs of making new statutes and the risks associated with the unconstitutionality of the statutes, the DPR and President would have more incentives to ensure that the statutes are acceptable by the Court.

By creating new legal norms without proper differentiation and reasoning, the Court provides unwarranted incentives to various petitioners to bring claims to the Court for changing the meaning of the statutes instead of fighting their interests through the political institution, confusing the role of the Court and DPR. In the dissenting opinion to the Court's 2008 decision, H.A.S Natabaya, I Dewa Gede Palguna, and Moh. Mahfud MD argued that creating new legal norms through the conditionally constitutional doctrine is not in line with the authority of the Court as a negative legislator because the creation of new legal norms is the main task of DPR.<sup>90</sup> Furthermore, because the Court's decision is final and binding, once the Court agrees to add new legal norms, the Court will not be able to reject similar motions in the future.<sup>91</sup> Consequently, not only the Court will turn into a positive legislator, but it could also turn into a political institution instead of a judicial institution.<sup>92</sup>

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no. 1 (1962): 12.

<sup>89</sup> See Anuj K. Shah, Eldar Shafir, and Sendhil Mullainathan, "Scarcity Frames Value," *Psychological Science* 26, no. 4 (2015): 409. It should also be noted that scarcity can at the same time tax the mind and cause people to follow decisions that are detrimental to their well-being. See further discussion in Sendhil Mullainathan and Eldar Shafir, *Scarcity: The New Science of Having Less and How It Defines Our Lives* (New York: Picador, 2013), pp. 39-66.

<sup>90</sup> Mahkamah Konstitusi, "Putusan Perkara Nomor No. 10/PUU-VI/2008." p. 222.

<sup>91</sup> *Ibid.*, Indeed, in line with this reasoning, although Moh. Mahfud MD was among the dissenting judges in the 2008 ruling, when he later became the Chief Justice of the Court, he was among those who ruled unanimously to effectively allow the use of the conditionally constitutional doctrine in 2011.

<sup>92</sup> *Ibid.*, at 233.

If the Court seriously believes that preserving the constitutionality of a statute's provision would be better than destroying it, then does any guarantee exist that the Court will yield a better result by preserving such provision? If the justices have only two extreme alternatives, namely, declaring the statute to be constitutional or unconstitutional, then it is true that cases may exist where choosing one of the extreme options will be highly problematic. As an example, if the Court declares a statute to be wholly unconstitutional, then it will cause extreme hurdles to legal enforcement, whereas if the Court declares that the statute is fully constitutional, then the Court is unable to fix the underlying constitutional problem of the statute. What should the justices do in such a case, taking into account that each option will impose costs to society?

In theory, even if the justices have only those two extreme options, the justices can still conduct CBA. If the overall costs of maintaining the constitutionality of the statute are higher than the overall costs of declaring such statute to be unconstitutional, then the justices should eventually choose to declare such statute unconstitutional, or vice versa. In our above example, if the costs to the society due to hurdles in the legal enforcement are 100 while the society's costs of not fixing the inherent constitutional problem in the statute are 50, then the justices should choose to maintain the statute as it is. Opening the possibility for the Court to decide in a different manner, namely, reading the statute in a different way, might change the above costs and benefits calculation. However, one thing is certain: no guarantee exists that the new alternative will reduce costs and produce more benefits compared with the other two extreme options.

The next question is, can we then trust the Court to make the alternative reading? Again, this question cannot be answered with political or classical theory of legal interpretation. It is essentially a question of CBA and institutional capacity that requires further empirical study.<sup>93</sup> Some examples of issues to be followed up to assess the capacity of the justices are the following:

- i) Do the justices satisfy the technical requirements in analyzing the case or at least use the service of experts who are qualified for such a case?
- ii) Do we have a proper conflict system to ensure that no conflict of interest will occur when the justices handle the case?
- iii) Does the ruling improve the well-being of the petitioners and any other citizens who are impacted by such ruling?
- iv) Are the justices consistent in applying their analysis? Do they have any biases?
- v) Are the rulings being effectively implemented by other political, government, and judicial branches? If yes, to what extent? If no, why? What are the impacts?

The same is applicable to the overall legal system. We establish certain rules for our government officials to perform their respective roles. The rules might not be perfect, but as long as the roles are generally being applied in a sound manner with minimum disruption to the society, we will stick with such rule. Analysis can be performed on whether the rule maximizes the welfare of the society, and improvements can always be recommended. But to do so, we must appreciate the fact that the most important analyses to be used would be economic analysis and CBA.

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<sup>93</sup> As a good starting point to understand the issue of institutional capacity and its effect on legal interpretation, see Cass R. Sunstein and Adrian Vermeule, "Interpretation and Institutions," *Michigan Law Review* 101 (2002-2003): 885-951.

Classical and doctrinal analyses are limited in a sense that at the fundamental level, the source of their validity is mainly derived from head counting, namely, how many judges actually comply with such doctrine. As for political analysis, an issue that is also unclear is why we should use one approach instead of another approach. For example, why do judges need to put more weight on the supremacy of the legislators' authority in issuing statutes? Because legislators are democratically elected? Why do we need to do that when we know that legislators are rational actors whose action may or may not conform to the public interest? Is it because justices are unelected officials? But what if the unelected officials have better knowledge and abilities than the legislators? Should we still follow the legislators' enacted statute? The list can go on and on.

Take for example the third argument from the Court to support the use of the conditionally constitutional doctrine, namely, that it is in line with the justices' duty to adhere to the public's living values of law and justice (which would conform to typical doctrinal/political approach). First, this duty is not written in the 1945 Constitution. Rather, it is written in the statute relating to the Indonesian Supreme Court and its system of lower courts. Second, suppose we take for granted that such a "moral" duty exists for the justices of the Court. The statement itself is too vague to provide any meaningful analysis on the relationship between such duty and the existence of the conditionally constitutional doctrine. One can always argue otherwise that such duty can be implemented by focusing only on the two permissible forms of rulings as initially stipulated in Law 8/2011. Why? Because the standard is not clear and can be easily abused to basically support anything that we want. Let us be honest. Who has the capacity to determine the living values of Indonesian citizens? It is similar to the problem faced by textualism when we try to determine the meaning of interpretive community.

Despite the above problems surrounding the conditionally constitutional doctrine, I doubt that it can be resolved by another statute. Given that the Court holds absolute authority on defining the meaning of judicial review, unless we amend the 1945 Constitution, the Court can always declare that any prohibition to such doctrine in a statute is unconstitutional even if no reasonable basis exists to maintain the doctrine. From the economics perspective, this is the logical consequence of granting such authority to the Court. If you have absolute authority to decide cases involving yourself, then instead of recusing yourself from the case, you would have all the incentives in this world to ensure that the case will always be in your favor.<sup>94</sup> In such case, does it mean that the Court will turn into an abusive institution?

While it is true that nothing prevents the Court from using the doctrine at the moment and the Court can claim its absolute authority over the judicial review process, the Court should realize that it does not have any clear enforcement mechanism. In practice, members of each political branch can read the 1945 Constitution's texts and interpret the meaning by themselves, yet their understanding might differ from the Court's understanding, and they might not always comply with the Court's interpretation.<sup>95</sup> In other words, friction could happen. In fact, it already happens among

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<sup>94</sup> Jimly Asshiddiqie warned us about this issue back in 2003 when he recommended more expansive provisions relating to the Court in the 1945 Constitution instead of having those provisions in a statute because the Court can always review such statute and make changes to it. See Asshiddiqie, *Konsolidasi Naskah UUD 1945*, p. 59.

<sup>95</sup> For a comparison of this issue in the US, see further discussion on the limit of judicial supremacy in Mark Tushnet, "Marbury v. Madison and the Theory of Judicial Supremacy," in *Great Cases in Constitutional*



our government and judicial institutions. If the Court continues to use a controversial doctrine and the doctrine is not acknowledged by other government branches, then we would end up in legal chaos with no clear directions on what to follow. If that truly happens, then the Court's argument that it has a duty to fill any legal gap would not make any sense because in the end, the conditionally constitutional doctrine only adds unnecessary problems instead of solving problems and might actually defeat the entire purpose of having the doctrine in the first place. Whether the balance among the political, government, and judicial institutions in Indonesia would eventually limit the Court in exercising the conditionally constitutional doctrine is still questionable and is subject to further research.

### III. CONCLUSION

Based on the Indonesian experience, analyzing the conditionally constitutional doctrine on the basis of political doctrine or classical theories of legal interpretation brings us nowhere. The provisions of the 1945 Constitution are too minimalist to allow us to establish proper reasoning to support or prevent the use of the doctrine. Moreover, given its current authority, unless we amend the 1945 Constitution, the Court can always make excuses in shaping its decision and the doctrine might be used to support various opposing ideas, depending on the creativity of its users.

This situation does not mean that the doctrine is completely problematic. It is too soon to determine that. It simply means that in analyzing the doctrine, we need to be pragmatic, and we need to pay attention to the doctrine's effects and how it is actually used in practice. This would require us to perform a proper CBA and analyze the whole set of data relating to the Court's decisions that use the conditionally constitutional doctrine. While I acknowledge that CBA can yield wrong results, at least it is testable, refutable, and can be constantly improved. Hopefully, this direction could lead to a new, exciting field of research for Indonesian legal researchers.

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