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Weak-Form Review and Judicial Independence: A Comparative Perspective

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Abstract

This article examines the Court's judicial review power that has gradually shifted from a strong-form review into a weak-form review. The shifting into weak-form review may affect judicial independence, both *de facto* or *de jure*, because Justices have considered the Legislature's responds on the Court's decisions. This approach diminishes the Court's supremacy toward lawmakers. This article explores comparative insights from various countries that utilize those reviews, notably the United States of America (strong review), and commonwealth countries (weak review). It also elaborates on some 'anomalies' from both reviews. It raises two important questions: what insights can be learned from other countries' judicial practices, particularly on the use of weak-form review? And, does weak-form review suitable to be enforced in Indonesia's context? The weak review that is manifested in conditional decisions claims to be more politically palatable. Despite that strategic reason, the practice of conditional decision is prone to misuse as it could decrease constitutionalism and judicial independence. This paper argues that the weak-form review is not suitable for Indonesia's constitutional law context, because the country lacks prerequisites and preconditions of strong control through parliament. The Indonesian Constitutional Court must return to its genuine authority as a strong-form review to strengthen legal constitutionalism.

Keywords: Judicial Review; Strong-Form Review; The Indonesian Constitutional Court; Weak-Form Review

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I. INTRODUCTION

This paper examines the shifting of the Indonesian Constitutional Court's judicial review power from a strong-form review into a weak-form review. On paper, the Court's decision is final and binding which is characterized as a 'strong-form review'.[1] In practice, the Court has often practiced conditional decisions which closely relate to 'weak-form review.' The weak review stands for the decision to review the law that can still be brought to the parliamentary institution for further consideration and scrutinized by the parliament.[2] The conditional decisions in Indonesia's context is close to the weak review because the decision provides compromised conditions for lawmakers. By having this kind of compromised approach to the Legislature, this article argues that the Court has inclined toward 'political constitutionalism', rather than 'legal constitutionalism.'[3] The shifting may jeopardize judicial independence, because Justices have considered the Legislature's responds on the Court's decisions. This approach diminishes the Court's supremacy toward lawmakers. To scrutinize the shifting and sustain the thesis statement, this article explores comparative insights from various countries that utilize those reviews, notably the United States of America (strong review), and commonwealth countries (weak review). It also elaborates on some 'anomalies' from both reviews. It raises two important questions: (1) what insights can be learned from other countries' judicial practices, particularly on the use of weak-form review? And, (2) does weak-form review suitable to be enforced in Indonesia's context?

These questions need both theoretical and legal-political explanation, thus this article employs a socio-legal/inter-disciplinary approach.[4] Also, this article employs a comparative constitutional law to compare and contrast Indonesia's experiences with other countries. The article analyses some constitutional

[1] Constitutional Court Law No. 24 of 2003, art. 10(1) (Indonesia). See also Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (London: Routledge, 2018), 78.

[2] Steven G. Calabresi, *The History and Growth of Judicial Review, Volume 2: The Courts of the United States, Switzerland, and the European Union* (Oxford: Oxford University Press, 2021), 52–53.

[3] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008), 12–34. See Mark Tushnet, "Social Welfare Rights and the Forms of Judicial Review," *Texas Law Review* 82, no. 7 (June 2004): 1895–1926.

[4] Reza Banakar and Max Travers, eds., *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005), 5.

practices from other courts with the same factual problems and purpose.[5] The article believes that the distinctive political context is pivotal as a basis of comparative law.[6] It provides a thesis statement that weak-form review is not compatible in the current Indonesia's legal-political context, because Indonesia lacks many foundational pre-requirements of democracy and Rule of Law. The practice of weak-form review through conditional decisions would be misused and may erode fragile Indonesia's Rule of Law.

This article flows as follows. First, it starts with the comparative description between weak-form review which is embedded in the common law-parliamentarian system, and strong-form review which is strongly influenced by the American legal system. The two models are dynamically merged in some countries' judicial practice. The second part deals with the Indonesian context. The analysis will focus on the constitutional court in general and its conditional decisions in particular. The third section contemplates some foundational pre-requirements of democracy and the Rule of Law that are lacking in Indonesia's context. The last part is a short conclusion.

II. FEATURES OF WEAK-FORM REVIEW AND STRONG-FORM REVIEW

Judicial body in general has two pivotal functions. *First*, a technical function, as it has duties to sustain and deduce legal propositions. It must apply, define or reinforce rules or doctrines, which eventually contribute to strengthening the structures of the social order. *Second*, the court's ideological function, involves the maintenance of currents of ideology which legal doctrine maintains, implements, and serves to legalise government and empower the social order.[7] Both adversarial and inquisitorial systems have the same functions. These functions are inseparable from each other because they contribute to the

[5] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3rd ed., trans. Tony Weir (Oxford: Oxford University Press, 1998), 34. See Mary Ann Glendon, Paolo G. Carozza, and Colin B. Picker, *Comparative Legal Traditions: Text, Materials and Cases on Western Law*, 3rd ed. (St. Paul, MN: Thomson/West, 2007).

[6] Otto Kahn-Freund, "On Uses and Misuses of Comparative Law," *Modern Law Review* 37, no. 1 (January 1974): 1–27, https://doi.org/10.1111/j.1468-2230.1974.tb02376.x.

[7] Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 7.

empowerment of the state's sovereignty. The state governs and transmits its ideology to the people through the court decisions by applying law to the cases.[8]

In exercising its functions, judicial (constitutional) review is the most crucial and public-needed authority of judiciary.[9] The authority of judicial review can protect citizens' constitutional rights from the government's conducts and abuse of powers through legislation, because citizens' rights can only be limited through the provision of legislation.[10] Human rights violation by commission of the government is often masked as limitation of rights in the form of legislation. The Court's judicial review authority to scrutinize the legislation under review becomes so pivotal for democracy and constitutionalism. In a realist perspective, legislative and executive are 'drunk', in that kind of situation, the court should be 'sober'.[11] Through judicial review, many courts in democratic countries have undergone progressive conduct by considering exogenous aspects: economic and political conditions, leaving behind the legalism paradigm.[12] The U.S. Supreme Court in the Lochner case had been influenced by legal realism.[13] The German Constitutional Court has strongly embraced right-based judicial review.[14] The High Court of Australia has exercised political value judgment.[15] And, the South Africa Constitutional Court upholds the principle of transformative constitutionalism.[16]

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8 Shapiro and Sweet, *On Law*.

9 Aharon Barak, *The Judge in a Democracy* (Princeton, New Jersey: Princeton University Press, 2006), 67.

10 David M. Trubek, "Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs," in *Human Rights in International Law: Legal and Policy Issues*, ed. Theodor Meron (Oxford: Clarendon Press; New York: Oxford University Press, 1984), 205–17.

11 Keith E. Whittington, "Sober Second Thoughts: Evaluating the History of Horizontal Judicial Review by the U.S. Supreme Court," *University of Illinois Law Review* 2015, no. 1 (2015): 57–101, https://ssrn.com/abstract=2807259.

12 Theunis Roux, "Losing Faith in Law's Authority," in *Comparative Judicial Review*, ed. Erin F. Delaney and Rosalind Dixon (Cheltenham, UK, and Northampton, MA: Edward Elgar Publishing, 2018), 57.

13 David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011); Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review* 97, no. 3 (June 2009): 751–805, https://www.jstor.org/stable/20677894; See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993).

14 Lilly Weidemann, "Administrative Procedure and Judicial Review in Germany," in *Judicial Review of Administration in Europe*, eds. Giacinto della Cananea and Mads Andenas (Oxford: Oxford University Press, 2021). See Georg Nolte and Peter Radler, "Judicial Review in Germany," *European Public Law* 1, no. 1 (1995): 55–69, https://doi.org/10.54648/EURO1995007.

15 Michael Kirby, "Value Judgments: The Ethics of Law," *Reform* (Australian Law Reform Commission) 72 (1998), https://www.austlii.edu.au/au/journals/ALRCRefJl/1998/37.pdf.

16 Eric Kibet and Charles Fombad, "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa," *African Human Rights Law Journal* 17, no. 2 (2017): 340–66, https://doi.org/10.17159/1996-2096/2017/v17n2a1.

Despite the progressive and activism paradigm exercised by the courts, they are still prone to political influences that can erode judicial independence.

The essence of judicial power's legitimacy lies in its independence, meaning the institution must be independent from the government, particularly in the narrow sense of executive power. In a broader sense, there are influential bodies including political groups within the state system and interest and pressure groups outside it. According to Shetreet, there are four pre-requirements for the independence of the judiciary. *First*, substantive independence manifests itself when deciding cases. *Second*, personal independence is legally guaranteed for the term of office and tenure. *Third*, internal independence is essential to bring freedom from colleagues' influences. *Lastly*, collective independence allows independence to participate and regulate the court's budgeting.[17]

Judicial independence manifests in both its individual and institutional aspects. In a sense that a judge/Justice shall exercise the judicial function on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference.[18] Scope of 'independence' is so broad, encompassing from societal relationship to parties involving in a particular dispute, free from inappropriate connections with, and influence by, both the executive and legislative branches of government, and free from judicial colleagues.[19] There are several reasons why the independence of the judiciary is so crucial. *First*, it limits executive power. To limit power, it must be separated from and distributed to other branches of government. *Second*, it is a requirement of the rule of law. There will be no legal supremacy without the independence of the judiciary. *Third*, it is a guarantee of the judiciary's fairness and impartiality. *Fourth*, it promotes equality before the law as there will be no privileges within the courtroom.

[17] Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," in *Judicial Independence: The Contemporary Debate*, eds. Shimon Shetreet and Jules Deschênes (Dordrecht: Martinus Nijhoff Publishers, 1985), 590–95.

[18] *The Bangalore Principles of Judicial Conduct* (2002), adopted by the Judicial Group on Strengthening Judicial Integrity, revised at the Round Table Meeting of Chief Justices, The Hague, November 25–26, 2002.

[19] *The Bangalore Principles of Judicial Conduct*.

This section explores two types of reviews: weak and strong-form reviews, by highlighting their historical and contemporary significances on the rule of law.

2.1. Weak-Form Review: A Consequences of Parliamentary Sovereignty

The model and nature of weak-form review constitutional court decisions are mostly practiced by British Commonwealth countries. In the context of British constitutionalism, the decision to review the law can still be brought to the parliamentary institution for further evaluation (further scrutinized by the parliament). It can be observed, both in the British Human Rights Act of 1998,[20] and in The New Zealand Bill of Rights Act,[21] both laws explain that the court can interpret the law, but the court cannot declare the constitutionality status of a law ("Court can construe and interpret legislation, but cannot declare its constitutionality").[22] The above description can be interpreted that the decision to review the law from the constitutional court is not final and binding because the final result of testing or evaluating the law is determined by another institution, namely the legislature or parliament.[23] Moreover, the practice of weak-form review also occurs in Canada, the Canadian Charter explains that the Canadian Parliament has the authority to give a final decision on the decision of the Supreme Court of Canada on the unconstitutionality of a law ("... Parliament has the power to decide that a statute should be operational notwithstanding its incompatibility with certain individual rights").[24] In this context, court plays the role as 'mediator agent', it mediates interests in parliament. If political parties disagree with some norms of the Act, the court will be invited to settle the constitutional question. The court can evaluate legislation, but the final review is in the legislature/parliament's hand. Nevertheless, the legislature/parliament can invite the court to perform a strong-review.[25]

[20] Human Rights Act 1998, UK Public General Acts 1998 (UK).
[21] New Zealand Bill of Rights Act 1990 (NZ).
[22] Calabresi, *The History and Growth of Judicial Review,* 52.
[23] Mark Elliott, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention," *Legal Studies* 22, no. 3 (November 2002): 340–76. Parliamentary sovereignty has two distinctive features: first, the absolute aspect where Parliament has legal authority to enact any law without limitation; second, the liberal aspect where Parliament's legal power is unlimited but subject to moral constraints.
[24] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), c. 11.
[25] Tushnet, *Weak Courts, Strong Rights*, 412.

The nature of the weak-form review decision is actually an embodiment of the doctrine of parliamentary sovereignty in the Westminster Parliament which is the antithesis of the doctrine of judge-made law. From the perspective of parliamentary sovereignty, only parliament or the legislative body can understand the true meaning of the law (legislative intent) and therefore is authorized to be the last institution to interpret the law. [26] In a constitutional system where constitutional judicial decisions are weak-form review, the constitutional court only plays the role of a 'middle man' who stands in the middle between the idealism of constitutional texts and the authority of parliament in the formation and final interpretation of legislation. Constitutional courts in constitutional disputes are required to invite all stakeholders, including members of parliament, to seek clarification or further explanation regarding the norms contained in a law submitted to the court. In the Westminster Parliamentary system, the parliament is even authorized to grant a clearance of substantive review to the judiciary to conduct a material review of legislation ("The Court only invalidates legislation, when it manifestly inconsistencies with the Constitution").[27] This system is known as the 'new Commonwealth model of constitutionalism'.[28] In this system, constitutionalism is not 'judicial constitutionalism', but 'political constitutionalism'.[29]

In the context of 'political constitutionalism', the decision of the constitutional court in a judicial review of legislation can be reviewed by a special session of parliament. The result of the review by the constitutional court can be accepted (for a strong review), or can be rejected by parliament. Tushnet states: "*The judicially created meaning may then be rejected by the political branches of government through more-or-less ordinary legislation, rather than through the substantially more burdensome method of constitutional amandement.*"[30]

[26] John Austin, *The Province of Jurisprudence Determined*, Lecture V (London: Weidenfeld and Nicolson, 1954), 95.
[27] Calabresi, *The History and Growth of Judicial Review*, 52.
[28] Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism," *American Journal of Comparative Law* 49, no. 4 (Autumn 2001): 707–60, https://dx.doi.org/10.2139/ssrn.302401.
[29] Mark Tushnet, "The Relationship between Political Constitutionalism and Weak-Form Judicial Review," *German Law Journal* 14, no. 12 (2013): 2249–61, https://doi.org/10.1017/S2071832200002753.
[30] Tushnet, "The Relationship between," 2250.

Furthermore, in the paradigm of 'political constitutionalism', the perspective is more realist-political than legal. The constitutional court is considered not to be the only state institution with a constitutional mandate to interpret laws, but rather it is the parliament that truly understands the constitutional meaning of the legislation.[31] The constitutional court system is also often referred to as the Thayerian model, where the role of the court is personified as a 'wise parent'. It is also often referred to as the dialog model, where the court opens up opportunities for parliament to correct mistakes in the legislative process ("acting as a 'wise parent' to allow the Parliament to fix the error").[32]

As a consequence, the constitutional court is also required to be able to refrain and be careful not to enter into the authority of the law-forming body: the legislature.[33] Due to the presence of the prudential principle in the judicial review of laws, the meaning of constitutionality in judicial review decisions often has different 'levels', 'gradations' and 'requirements' of constitutionality ("unconstitutional, but not too unconstitutional; an error, but not a clear error").[34] This judicial method and approach have been transplanted by the Indonesian Constitutional Court through the form of conditional decisions.

The pragmatic-political objective of the dialogue model between the constitutional court and parliament in weak-form review is to avoid unnecessary confrontation and conflict between the two institutions. In its decision, the constitutional court only explains in a declarative sense that legislation under review is inconsistent with constitutional norms. In response to the decision of the constitutional court, parliament can then respond and provide clarification in a parliamentary hearing. The decision of the parliament has two possibilities, either to accept the interpretation of the constitutional court or to ignore it. The answer and clarification from parliament can be in the form of a mechanism for

[31] Martin H. Redish, *Judicial Independence and the American Constitution: A Democratic Paradox* (Stanford, CA: Stanford Law Books, 2017), 16.

[32] Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries," *Wake Forest Law Review* 38, no. 2 (2003): 813–38.

[33] Mark Tushnet, "Alternative Forms of Judicial Review," *Michigan Law Review* 101, no. 8 (2003): 2781–802, https://repository.law.umich.edu/mlr/vol101/iss8/9.

[34] Tushnet, "Alternative Forms of Judicial Review."

re-enacting a law that has been tested, or by providing revisions/improvements based on the results of the assessment of the constitutional court.[35]

Constitutional law scholars supporting 'political constitutionalism' make the claim that the model and nature of weak-form review constitutional court decisions have an impact on increasing parliamentary accountability to the objective-legal input of the constitutional court. One of the positive values is that members of parliament from both the government coalition and the opposition have many opportunities to deliberate.[36] In the context of the legislative process in the Westminster Parliament, parliament forms laws from a generalist perspective, and parliamentarians recognize that there will always be loopholes in the law. Therefore, judicial review by the constitutional court is a constitutional necessity, where the constitutional court provides input on the procedural and material aspects of the law and consideration of the constitutional rights of citizens that could be affected by the generalist regulation. In this context, 'dialogue' within the parliamentary institution regarding the decision of the constitutional court is needed.

The model and characteristics of the English weak-form review constitutional judicial decision are not without criticism and evaluation. The founding fathers of the United States and constitutional law experts from Western Europe who migrated to the United States in the period of World War II, especially Hans Kelsen, provided a lot of theoretical justification for the model and nature of strong-form review decisions which are the anti-thesis of weak-form review.

2.2. Strong-Form Review: A Legal Constitutionalism

Contrast with the constitutional court in the commonwealth countries which are only placed as an institution of constitutional interpretation, so that the decision is only declarative (weak-form review).[37] In the Kelsenian model, the authority of the constitutional court also includes constitutive

[35] Tushnet, 2251.

[36] Yuval Eylon and Alon Harel, "The Right to Judicial Review," *Virginia Law Review* 92, no. 5 (2006): 991–1022, https://ssrn.com/abstract=906460. See Alon Harel and Tsvi Kahana, "The Easy Core Case for Judicial Review," *Journal of Legal Analysis* 2, no. 1 (2010): 227–56, https://doi.org/10.1093/jla/2.1.227.

[37] Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986), 204.

law-making functions,[38] which are able to 'reshape' constitutional norms, by making comprehensive corrections to legal products and public policies made by the legislature.[39]

The idea of a constitutional court with a strong-form review decision was actually developed by Kelsen when he lived and taught at Columbia University in the United States of America. The source of inspiration is the practice of judicial review in the United States Supreme Court, which was a pioneer of strong decision power. The founding fathers of the United States deliberately reconstructed the judicial system in the United States as an antithesis to the paradigm and practice of the British judiciary which still adheres to the doctrine of parliamentary sovereignty. In reading the texts of the United States Constitution, it can be understood that the founding fathers of the United States firmly rejected all elements of parliamentary sovereignty. The founders and authors of the text of the United States Constitution believed that the power and sovereignty of parliament should be fenced by the norms of constitutional law run by an independent constitutional judiciary, namely the Supreme Court of the United States. This doctrine of judicial power became known as 'constrained parliamentarism'.[40] The Supreme Court of the United States in several of its landmark decisions has repeatedly stated that the position of its decisions is higher and superior to the legislative products of the legislature or representatives. This assertion can be observed in several decisions such as Cooper v. Aaron and Bush v. Gore.[41]

It is important to note that both Kelsenian model and the U.S model have distinctive characteristics. The U.S. applies the decentralized (or diffuse) model of constitutional review while the Kelsenian model is centralized. The U.S judicial review starts from litigation processes in a strict 'cases and controversies' or 'concrete review' doctrine, and all judicial branches under the

[38] Calabresi, *The History and Growth of Judicial Review,* 51.
[39] Niels Petersen, "The German Constitutional Court and Legislative Capture," *International Journal of Constitutional Law* 12, no. 3 (2014): 695–713, https://doi.org/10.1093/icon/mou040.
[40] Redish, *Judicial Independence and the American Constitution*, 320.
[41] Erin F. Delaney and Rosalind Dixon, eds., *Comparative Judicial Review* (Cheltenham, UK: Edward Elgar Publishing, 2018), 445.

U.S Supreme Court can exercise judicial review.[42] On the other hand, in the Kelsenian European model (in which the Indonesian system adopted), there are two branches of judicial institution, namely the Supreme Court and the Constitutional Court. In this system, the Constitutional Court has an absolute authority for constitutional review (centralized), and citizens can be more flexible to file judicial review cases as the claim of constitutional damages can be 'abstract'.[43] Despite the distinctive aspects, both the U.S. Supreme Court and Kelsenian models share similar perspective of strong-form review aiming to uphold constitutional sovereignty or 'legal constitutionalism'.

The nature of constitutional sovereignty embodied in the U.S. Supreme Court's strong decision power is prescriptive and directive, this is because it stabilizes constitutional norms through the interpretation of constitutional judges ("judge to say what the law is").[44] This means two things: the Court has general authority to determine what the Constitution means, and the Court's constitutional interpretations are authoritative. Through the Supreme Court as the constitutional court in the United States, the balancing function is carried out in three conditions. *First*, through limiting government power, while strengthening the constitutional rights of citizens. *Second*, through strengthening the awareness of citizens' rights by providing litigation space to make corrections to government public policies. Constitutional awareness is important in an effort to avoid democratic decline ("encouraging citizens to counter democracy transgression"). *Third*, helping citizens to adapt to evolving socio-economic changes ("helping citizens to adapt to new socio-political circumstances").[45]

However, in practice, the United States Supreme Court also often uses judicial-political strategies in judicial review disputes. Sometimes the Supreme Court implements judicial restraint, where the Supreme Court is cautious and

[42] Charles G. Haines, *The American Doctrine of Judicial Supremacy* (Berkeley: University of California Press, 1914), 17; see also Redish, *Judicial Independence and the American Constitution*, 320.

[43] Petersen, "The German Constitutional Court and Legislative Capture," 716.

[44] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004), 250.

[45] Tonja Jacobi et al., "Judicial Review as a Self-Stabilizing Constitutional Mechanism," in *Comparative Judicial Review*, eds. Erin F. Delaney and Rosalind Dixon (Cheltenham, UK: Edward Elgar Publishing, 2018), 203.

tends to refrain from making progressive interpretations that can be interpreted as Supreme Court intervention in the legislature. The Supreme Court often also gives the legislature (Congress) the opportunity to make substantive revisions to the law. The caution of the United States Supreme Court in conducting a strong review of the law is a reflection of President Franklin D. Roosevelt's policy that intends to weaken the authority of the Supreme Court through the Judicial Procedures Reform Bill in 1937. The executive policy is known as *Pack the Court*, which was the result of President Franklin D. Roosevelt's anger at the Supreme Court for repressively cancelling laws in the New Deal project.[46] However, in the dynamics of constitutional practice and judicial independence, the Supreme Court also often engages in judicial activism, when Supreme Court justices feel uncertain of the goodwill of the legislature to accept and implement their decisions.[47]

Furthermore, in the context of the dynamics of political-constitutional practices in the United States, Supreme Court judges often carry out strategies that are often referred to as constitutional politics, in order to ensure that their decisions have legality as well as strong socio-political justification, but on the other hand still respect the authority and dignity of law-making institutions, with the aim of avoiding horizontal conflicts between state institutions.

The strong-form review of the U.S Supreme Court has several modifications. It implies strong legal rights protection for citizens, that require strong remedies as well. Brown v. Board of Education provides an example of how the Court supervised the desegregation processes. However, it took a decade to change, and the Court got severe political confrontation.[48] Another example is the landmark decision of Marbury v. Madison. The Supreme Court issued a decision that clearly seemed to have the character of activism and had strong decision power (strong-form review) because the Court rejected the legislature's interpretation in enacting the Judiciary Act.[49] It became a reference for many

[46] Jacobi et al., "Judicial Review as a Self-Stabilizing."
[47] Haines, *The American Doctrine of Judicial Supremacy*, 17.
[48] Strong remedy is a detailed order from the Court to the implementation of social welfare policy. The U.S Supreme Court said "weak remedies are not remedies."
[49] Redish, *Judicial Independence and the American Constitution*, 320.

legal experts in several countries (including Indonesia) regarding judicial review. However, the Supreme Court actually remained cautious by refusing to issue a writ of mandamus because such action could be considered intervening in the authority and authority of the executive branch, namely President Jefferson.[50] This was actually the application of 'strong right, but weak remedy' as the court assertively defended the rights, but provide some requirements and an unspecified timeline for the legislature.

It is also important to note that the Supreme Court in Marbury v. Madison actually only confirmed or interpreted the texts of the United States Constitution, especially in Article III related to "One Supreme Court", "the power to adjudicate all cases" and "arising under this Constitution". Therefore, Supreme Court judges, especially Chief Justice Marshall, did not merely consider social and political needs as is often claimed by proponents of the judicial-political approach to judicial activism. In a purposive textualism reading, Article III of the United States Constitution, which is often referred to as the Supreme Clause, is actually the main textual-normative basis for the granting of judicial review authority in the Marbury v. Madison decision. The decision actually only emphasizes the doctrine of constitutional supremacy.[51]

But apart from some of the strategic practices and judicial-political approaches above, the Supreme Court both in theory and practice still has strong-form review power, this is because in the construction of the United States Constitution only the Supreme Court has the exclusive authority to determine the constitutional meaning of statutory norms and the constitution itself ("... the exclusive power to determine the meaning of the Constitution").[52] In other words, when the Supreme Court has 'spoken' through its decisions, the other (institutions) must be silent ("when the Supreme Court has spoken, the conversation must end").[53]

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[50] Delaney and Dixon, *Comparative Judicial Review*, 783.

[51] Redish, *Judicial Independence and the American Constitution*, 320.

[52] Rachel E. Barkow, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy," *Columbia Law Review* 102, no. 2 (2002): 237–336, https://ssrn.com/abstract=307601.

[53] Richard Hofstadter, ed., "Preface to Virginia and Kentucky Resolutions," in *Great Issues in American History: From the Revolution to the Civil War, 1765–1865* (New York: Vintage Books, 1958), 72.

III. AN INDONESIA CONTEXT: CONDITIONAL DECISIONS

Looking at the context of Indonesian state administration in general, and the dynamics of the decisions of the Indonesian Constitutional Court in particular, it can be seen that on paper, the power of the Constitutional Court's decision is final and binding. Law Number 24 of 2003 concerning the Constitutional Court, Article 10 Paragraph (1) states: "The Constitutional Court has the authority to hear cases at the first and last instance and its decision is final to: (a) to test laws against the Constitution of the Republic of Indonesia Year 1945." However in practice, it is often the opposite. The existence of the constitutional politics of the Constitutional Court and the binding force (final and binding) of the decisions of the Constitutional Court, especially in the early period of Asshiddiqie's leadership, received a lot of neglect and resistance, both from the executive and the legislature. The nullification of constitutional norms through unconstitutional decisions by the 9 (nine) Constitutional Judges was considered to violate the principle of 'parliamentary sovereignty' and the original authority of representative institutions in the process of forming legislation.[54]

With the purpose to avoid these counter-productive conflicts, the Constitutional Court in the first period modified the type and power of judicial review decisions, by adding a 'requirement' clause or conditionalities, especially in decisions that are 'sensitive' to the interests of the lawmaking body. Whereas it is well known in Law Number 24 of 2003, Article 56, it is stated that the ruling of the Constitutional Court is limited to: the application cannot be accepted, the application is granted, and the application is rejected. The modifications of these conditional decisions are as follows: (1) The first is a conditionally constitutional decision, contained for the first time in a judicial review of Law Number 7/2004 on Water Resources. The interpretation or political-strategic meaning of the 'conditionally constitutional' decision is that the law under review is decided to be constitutional, but the degree of constitutionality depends on the requirements that have been given by the Constitutional Court. In other words,

[54] Hendrianto, *Law and Politics of Constitutional Courts*, 724.

if the implementation of the law deviates from the constitutional requirements set by the Constitutional Court, the law can be reviewed.[55]

The second modification is a conditionally unconstitutional decision, which means that the articles or laws being tested are declared unconstitutional, however, the status of unconstitutionality can be changed if the requirements by the Constitutional Court are carried out by the lawmaker, in this case the government and the legislature. The model and power of the decision can be seen in the examination of Law Number 18/2003 on Advocates. [56] The duration of the unconstitutionality status of the tested law can also be determined by the court's decision. In other words, through a conditional unconstitutional decision, the binding force of a law is suspended (suspended declaration) until the time determined by the Constitutional Court. In addition, the nature of the two conditional decisions above can also only have a prospective ruling, for example in the judicial review of Law Number 16 of 2003 concerning the Enactment of the Anti-Terrorism Law.[57]

Based on the analysis from the first period of the Constitutional Justices leaded by Asshiddiqie, in which the 'conditional' decision firstly implemented. There is one finding can be considered. The leadership of the Chief Justice is pivotal to drive opinions and discourses among Justices. From this experience, it can be concluded that the 'conditional' decision aimed as a strategic mechanism to ease tension with the Legislature. However, as the judicial approach/ interpretation depends on the quality and integrity of Justices (mostly the Chief Justice), the 'conditional' decisions are being misused by the next Justices to please the Legislature. Consequently, it diminishes the supremacy of the court as the sole interpreter of the Constitution. One example can be described. In the context of the formal judicial review of the Law on Job Creation, the norms of the law *a quo* are still considered to have legality during the two year period for comprehensive revision.[58] For this reason, the government asserts that the

[55] Hendrianto, *Law and Politics of Constitutional Courts*.
[56] *Judicial Review of Advocate Law*, Decision No. 101/PUU-VII/2009, Constitutional Court of Indonesia.
[57] *Judicial Review of Criminal Code*, Decision No. 013/PUU-I/2003, Constitutional Court of Indonesia.
[58] *Judicial Review of Job Creation Omnibus Law*, Decision No. 91/PUU-XVIII/2020, Constitutional Court of Indonesia.

derivative regulations from the Job Creation Law are still valid and can serve as legality for government technical policies in the field. In this context, the interpretation of 'conditional unconstitutional' becomes wild.

It is interesting to see the analysis of previous research by Rahman (2020), which states that "there is no substantial difference between decisions with 'conditional constitutional' clauses and decisions with 'conditional unconstitutional' clauses".[59] In addition, the argument was based on the examination of seven conditional decisions that in their legal considerations stated that the norm being tested was 'conditionally constitutional', but in the verdict, it was declared 'conditionally unconstitutional'.[60] This clearly creates inconsistency and legal ambiguity in the Constitutional Court's decision.

Furthermore, in analyzing the *ratio legis* of conditional decisions, especially the conditionally constitutional, the conditional was anchored in the opinion of the Constitutional Court itself through Decision Number 19/PUU-VII/2010 which stated that a conditional constitutional decision is issued if: "... a norm petitioned for review can be interpreted differently, where the difference in interpretation can cause legal uncertainty which causes violation of the constitutional rights of citizens, so that a conditional constitutional decision is imposed to provide a certain interpretation so as not to cause legal uncertainty or violation of the rights of citizens."[61] However, the Constitutional Court later recognized the weakness of conditional constitutional decisions, because often the law-making body (*addresaat*) understands that it does not need to follow the Court's requirements because the norm being tested is declared constitutional. In other words, the parties' lawsuit is rejected. Therefore, the *addresaat* does not feel obliged to make substantive changes to the law.[62]

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[59] Faiz Rahman, "Anomali Penerapan Klausula Bersyarat dalam Putusan Pengujian Perundang-undangan terhadap Undang-Undang Dasar [Anomaly of Conditional Decisions of Judicial Review]," *Jurnal Konstitusi* 17, no. 1 (2020): 57–79, https://doi.org/10.31078/jk1712.

[60] Rahman, "Anomali Penerapan Klausula," 31-39.

[61] *Judicial Review of Health Law*, Decision No. 19/PUU-VII/2010, Constitutional Court of Indonesia; see Rahman, "Anomaly of Conditional Decisions," 36.

[62] *Judicial Review of Excise Law*, Decision No. 54/PUU-VI/2008, Constitutional Court of Indonesia; see Rahman, "Anomaly of Conditional Decisions," 37.

The paper argues that the opinion of the Constitutional Court regarding the conditional decision above is very problematic because the Constitutional Court should be the sole interpreter of the Constitution, which gives meaning and single-authoritative interpretation to statutory norms, instead of opening a debate on the constitutional interpretation of a tested law. The inconsistency of conditional decisions has the potential to violate the principle of legality, which is one of the important foundations of the principle of the rule of law. The principle of legality is a moral requirement. Where a legal product, both legislation and judicial decisions, must not have a contradictory meaning (the principle of non-contradictory), but must be clear and not vague or ambiguous (the principle of clarity).[63] In addition, conditional decisions also undermine the principle of real legal certainty,[64] where it is emphasized that judges' decisions must contain clarity of meaning and solve problems, instead of opening up room for wild interpretation (clear and precise rules, so that everyone knows where they stand).[65]

Furthermore, the former Constitutional Court Judge, Harjono provided justification regarding conditional decisions as follows:

> "Therefore, we (Justices) create the conditional decisions by proposing a requirement: if a provision whose formulation is general is later implemented in the form of A, then the implementation of A is not contrary to the Constitution. However, if the general formulation is later implemented in the form of B, then B will be contrary to the Constitution. Thus, it can be tested again."[66]

The above argument seems very sociological by considering the implementation actions of the laws being tested, but keep in mind, *first*, the Constitutional Court is a constitutional court with a Kelsenian model which aims to carry out the process of validating statutory norms against the highest law or the Constitution. The Constitutional Court with the Kelsenian model is

[63] Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71, no. 4 (1958): 630–72, https://www.jstor.org/stable/1338226.

[64] Adriaan Bedner and Barbara Oomen, eds., *Real Legal Certainty and Its Relevance: Essays in Honour of Jan Michiel Otto* (Leiden: Leiden University Press, 2018), 11.

[65] Bedner and Oomen eds., "*Real Legal Certainty*."

[66] Rahman, "Anomaly of Conditional Decisions," 36.

not theoretically oriented towards supervising the implementation of the norms of the laws being tested.[67] *Second*, the Constitutional Court is not authorized and has no control mechanism over the implementation of the laws being tested. The Indonesian Constitutional Court is centralized, in contrast to the United States Supreme Court which is decentralized so that it can supervise the implementation or execution of its judges' decisions.[68] Therefore, the reason based on the implementation of the law for conditional decisions can be debunked. *Lastly*, the judicial approach of weak review is also considered as part of Justice's judicial interpretation which should be protected by the principle of judicial independence. However, this article argues that Justices should refrain to interpret the validity of the decision which is implicitly stated on the Constitutional Court Law. The power of strong-form review of the Court's decision is crystal clear on legislation, thus should be applied consistently by the Justices.

The two models of strong-strategic decision power in conditional decisions are clearly the result of constitutional politics from the judges of the Constitutional Court, the purpose of which is to give time to lawmaking institutions to make substantive and formal revisions to the laws being tested. In addition, the main objective is of course to avoid conflict and institutional tension between the Constitutional Court and the government and representative institutions as lawmaking institutions. Conditional decisions with weak-form review aim to flex political tension (making decisions politically palatable). This practice occurs in almost all constitutional courts in post-authoritarian contexts and democratic transitions. In other words, this paper argues that the true reason for the modification of conditional decisions is more political-pragmatic, rather than merely the effectiveness or implementation of the tested law and substantive justice.

[67] Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 1945), 401. See Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Clark, NJ: The Lawbook Exchange, 2005), 314.
[68] *Brown v. Board of Education*, 347 U.S. 483 (1954).

IV. PRECONDITIONS OF WEAK-FORM REVIEW

Tushnet argues that both models of the power of constitutional judicial decisions, both strong-form review and weak-form review, can actually be chosen according to the needs and social urgency in society.[69] In other words, a normative-constitutional constitutional court whose decision is final and binding can also adopt a weak-form review model, and vice versa. But of course with some legal-political consequences of its own. This paper argues that both models: weak-form review and strong-form review have their own historical-philosophical context. Therefore, both have their own truth claims. However, this paper argues that the constitutional court model with the nature and power of weak-form review is more suitable in the context of countries with a parliamentary political culture, which is mostly adopted by common law countries and/or former British colonies (the Commonwealth countries).

Although transplanting the approach and strategy of weak-form review can also be used in constitutional courts with the Kelsenian model, the author argues that the system and practice of weak-form review can only be implemented by fulfilling various democratic preconditions, as follows. First, a country must have a representative system or parliament with a strong control function, as well as a high degree of public accountability. In weak-form review, the revision of legislation suggested by the constitutional court through its 'conditional' decision ultimately depends on the political willingness of the representative body or parliament. Without a strong parliamentary control system, submitting revisions to legislation through the 'conditional' route is futile.

The second prerequisite is intertwined with the parliamentary control system. It is recognized that the 'political machines' of parliament are political parties. Therefore, one way of parliamentary reform is through strengthening the political-legal system and culture of political parties in parliament, which must be idealistically oriented towards 'public accountability'. The adherence of members of parliament to always be accountable to their voters or constituents

[69] Tushnet, *Weak Courts, Strong Rights*.

aims to realize responsible governance for all actions, implementation and strategic policies carried out by the government (responsible government). In contrast, the British parliamentary system of government has long embraced a culture of responsible government and upholds public accountability. Realistically, it will take a long time to transplant this political-legal constitutional culture to post-authoritarian countries such as Indonesia.

The third prerequisite is still related to political parties in the dynamics of constitutional politics in representative institutions or parliament. Weak-form review which authorizes parliament to make the final revision of a constitutional court decision requires a strong, accountable and competitive parliament. Therefore, political parties in representative institutions must be in a competitive as well as ideological party system (vigorous party competition), so that the deliberation process for the formation of legislation can run more critically and dynamically as well as constitutionally meaningful. According to Landau, there is a link between the process of judicial review and the constellation of government coalitions, "the stronger and more dominant the coalition of government parties, the less competitive the debate in parliament, and this leads to the weak objective-legal aspirations of the constitutional court in the debate in parliament." [70] This anomaly can be further exacerbated by the choice of proportional representation, which requires a large coalition to govern (government by majority). The tendency to form large or 'fat' coalitions correlates with the 'politics of harmony' which is actually a manifestation of the ruling party's pragmatic political consolidation. These pragmatically formed coalitions are allegedly not friendly to judicial review of legislation, because the political interests of the majority in parliament have been consolidated and the opposition/minority in parliament is weak. In the worst case scenario, the pragmatic grand coalition can become State Capture, where the coalition of government political parties can do anything and violate constitutional norms, including ignoring court decisions.[71]

[70] David Landau, "Courts and Support Structures: Beyond the Classic Narrative," in *Comparative Judicial Review*, eds. Erin F. Delaney and Rosalind Dixon (Cheltenham, UK: Edward Elgar Publishing, 2018), 226–43.

[71] Tom Ginsburg, Aziz Z. Huq, and Mila Versteeg, "The Coming Demise of Liberal Constitutionalism," *University of Chicago Law Review* 85, no. 2 (2018): 239–55, https://chicagounbound.uchicago.edu/uclrev/vol85/iss2/12.

The last fourth prerequisite is related to citizens' rights who must have an established awareness and culture of constitutionalism as well as being critical of the government's actions. Every citizen must be aware of their constitutional rights enshrined in the constitution as citizens. With a strong awareness and culture of constitutionalism, citizens can more often file material and formal challenges to legislation that has the potential to harm their constitutional rights. Therefore, civic education becomes very important to be given to citizens, so that they can understand their constitutional rights, as well as understand their obligations, and more importantly can understand the obligations of the government as a duty bearer in the institution of human rights. Ultimately, it is the citizens themselves who are able to 'punish' or 'reward' (reward and punishment) the performance of political parties and governments through elections and constitutional justice mechanisms.

V. CONCLUSION

The power of constitutional judicial decisions is a reflection of constitutional relations between state institutions. In a parliamentary system of government that is more widely known in the tradition and practice of constitutional courts in common law countries, the system is oriented towards the control function of parliament over the government, the weak-form review model of constitutional judicial decision power can be relied upon to create a political balance between the three branches of power, namely: executive, legislative and judicial (classic Trias Politica). However, the system and model of constitutional justice must be supported by several prerequisites and preconditions of a strong rule of law and democracy. In the context of the Indonesian Constitutional Court with its conditional decision practice, this paper argues that the construction of the conditional decision has a political rather than legal background. With a conditional decision, the Constitutional Court provides an 'opportunity' for lawmaking institutions to make revisions/improvements in accordance with the direction and advice of the Constitutional Court, the power of weak decisions (weak-form review) is believed to reduce conflict or friction between the

constitutional judicial body and lawmaking institutions. With this strategy, the decision of the Constitutional Court can be more politically accepted by the lawmaking body (politically palatable).

Reflecting on the current political reality in the Indonesian parliament, this paper argues that Indonesia does not have the prerequisites and preconditions for democracy and a strong rule of law to support the model and nature of weak-form review decisions. Therefore, a conditional Constitutional Court's decision has the potential to be misused to maintain political-economic interests in the law, while degrading the dignity of the constitutional court and constitutionalism. This paper provides constructive suggestions to the Constitutional Court to apply the model and power of strong-form review decisions, as it has been implicitly stated on the Constitutional Court Law. The choice of strong-form review indeed has the consequence that some decisions of the Constitutional Court may be ignored by the legislative body, as well as can complicate the relationship between the constitutional court and other high state institutions. Although it seems not strategic, strong-form decisions are needed to provide real legal certainty and effective remedies to citizens who are directly or indirectly affected by laws and regulations.

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