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Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in a Split Jurisdiction

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Abstract

The Indonesian constitutional system contains a serious flaw that means that the constitutionality of a large number of laws cannot be determined by any court. Although the jurisdiction for the judicial review of laws is split between the Constitutional Court and the Supreme Court, neither can review the constitutionality of subordinate regulations. This is problematic because in Indonesia the real substance of statutes is often found in implementing regulations, of which there are very many. This paper argues that that is open to the Constitutional Court to reconsider its position on review of regulations in order to remedy this problem. It could do so by interpreting its power of judicial review of statutes to extend to laws below the level of statutes. The paper begins with a brief account of how Indonesia came to have a system of judicial constitutional review that is restricted to statutes. It then examines the experience of South Korea's Constitutional Court, a court in an Asian civil law country with a split jurisdiction for judicial review of laws like Indonesia's. Despite controversy, this court has been able to interpret its powers to constitutionally invalidate statutes in such a way as to extend them to subordinate regulations as well. This paper argues that Indonesia's Constitutional Court should follow South Korea's example, in order to prevent the possibility of constitutionalism being subverted by unconstitutional subordinate regulations.

Keywords: Constitutional Court, Constitutional Review, Judicial Review, Supreme Court

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> So, if a law be in opposition to the Constitution, if both the law and the Constitution apply in a particular case so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
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> United States Supreme Court, *Marbury v. Madison*, 5 US 137 (1803)

I. INTRODUCTION

The Indonesian constitutional system contains a serious flaw that means that the constitutionality of a very large number of laws cannot be determined by any court. This is because although jurisdiction for the judicial review of laws is split between the Constitutional Court (*Mahkamah Konstitusi*) and the Supreme Court (*Mahkamah Agung*), neither can review the constitutionality of subordinate regulations, that is, laws that rank below the level of statutes (*undang-undang*) produced by the DPR (*Dewan Perwakilan Rakyat*, People's Representative Assembly), the national legislature.

1.1 The Constitutional Court's Review Jurisdiction

Article 24C(1) of Indonesia's 1945 Constitution (as amended) grants the Constitutional Court the power to review the constitutionality of DPR statutes. In several decisions, the Court has held that its constitutional review powers extend to *Perppu*,[1] that is, interim emergency laws produced by the president, on the grounds that these are equivalent in effect to statutes.[2] The Constitutional Court has, however, declined to review the constitutionality of 'lower level' laws used in Indonesia, that is, any law ranked below the level of statute in the formal hierarchy of Indonesian laws as specified by Article 7 of Law 12 of 2011 on Lawmaking.[3] This applies even to subordinate regulations made pursuant

[1] *Perppu*, *Peraturan Pemerintah Pengganti Undang-undang*, Regulation in Lieu of Law. These are interim emergency statutes issued by the president. They must be confirmed as statutes or rejected by the DPR at its next sitting. They are ranked at the same level as statutes in the hierarchy of Indonesian laws described in footnote 3.

[2] Cases where the Indonesian Constitutional Court has reviewed *Perppu* include Decisions 3/PUU-III/2005; 138/PUU-VII/2009; and 1-2/PUU-XII/2014.

[3] The hierarchy is as follows: (a) the 1945 Constitution (*Undang-undang Dasar 1945*); (b) MPR Decision (*Ketetapan MPR*); (c) Statutes/interim emergency laws (*Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang*, also known as Government Regulations in Lieu of Laws); (d) Government Regulations (*Peraturan Pemerintah*); (d)

to a statute or in order to enforce a statute. The Court has, in fact, rejected applications in which it has been asked to engage in constitutional review of implementing regulations.

1.2 The Supreme Court's Review Jurisdiction

Article 24A(1) of the Constitution grants the Supreme Court power to review laws below the level of statutes produced by the DPR, to ensure that they comply with higher level laws.[4] It can invalidate a legal instrument below the level of statute if it conflicts with a higher legislative instrument; or if the process by which it was enacted did not conform to legislative requirements.[5] Unfortunately, it is well-established that these powers do not extend to allow the Supreme Court to review the constitutionality of lower level laws. This is because constitutional review is the exclusive remit of the Constitutional Court, which enjoys 'first and final' jurisdiction in this regard, under Article 24C(1) of the Constitution. In fact, the Supreme Court has not had any power to conduct constitutional review of laws since 1950, and even then, the power was highly restricted, as is explained later in this paper.

The Supreme Court's already limited jurisdiction for review of regulations is, in practice, further restricted by its apparent lack of enthusiasm for reviewing them against higher-level laws. It usually takes a very formalistic approach, focused on the process by which a regulation was made. In its judgments in many such cases, the court does not discuss the substance of the law under review, the arguments of the parties, or even whether the law contradicts any higher laws.[6] In other words, the Court has been reluctant to openly consider the 'merits' of the case. In fact, it sometimes seems to seeking reasons to avoid dealing with the merits.[7]

Presidential Regulations (*Peraturan Presiden*); (e) Provincial Regional Regulations (*Peraturan Daerah Propinsi*); and (f) Regency/City Regional Regulations (*Peraturan Daerah Kabupaten/Kota*). None of these categories of law may conflict with any law higher in the hierarchy. For example, the substance of a presidential regulation must not conflict with the substance of a government regulation. Likewise, a higher-level regulation can amend or overrule a law lower than itself in the hierarchy – for example, the DPR can pass legislation to override a presidential regulation.

4 See also Law 4 of 2004 on the Judiciary (Article 11(2)(b)); and Law 14 of 1985 on the Supreme Court (Article 31(1)).

5 Article 31(2) of Law 14 of 1985 on the Supreme Court.

6 See, for example, Indonesian Supreme Court Decisions Nos 03 G/HUM/2002, 06 P/HUM/2003 and 06 P/HUM/2006.

7 See generally, Chapter Simon Butt and Tim Lindsey, *Indonesian Law,* Oxford, Oxford University Press (in press,

1.3 The Gap in Indonesia's Review System

The result of this situation is a gap in Indonesia's system for the judicial review of laws, with no judicial mechanism available to deal with the constitutional review of laws below the level of statute, of which there are very many.[8] There is therefore no way an Indonesian affected by the unconstitutionality of a lower level law can obtain relief, unless the national legislature, the DPR can be persuaded to legislate to overrule the regulation. This would usually not be a realistic alternative to constitutional review because a DPR decision would be based on political reasons rather than legal ones, and, in any case, the DPR is notoriously very slow in working through its legislative agenda.[9]

The absence of a judicial mechanism for the constitutional review of laws below the level of statute matters a great deal in Indonesia because, as Damien and Hornick have explained, the real substance of any statute is often only to found in its implementing regulations:

> [statutes] function more as policy declarations than as statutory schemes. Implementation usually depends on the enactment of subsequent legislation and the promulgation of special implementing regulations. Until such implementing rules are established, the 'basic' law operates mostly as a statement of national intention.[10]

This problem has become all the more serious since the Constitutional Court in two decisions in 2017[11] struck down provisions allowing the Ministry of Home Affairs to annul enacted Regional Regulations (*Peraturan Daerah*, *Perda*), finding that to do so usurped the power of the judicial branch. These decisions yet further restrict the avenues available for citizens to take action

2018), Chapters 2 and 3. For a discussion of some of these issues, see Simon Butt and Nicholas Parsons, "Judicial Review and the Supreme Court in Indonesia: A New Space for Law?," Indonesia 98 (April 2014): 97. See also Simon Butt, "Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanism," Sydney Law Review 32, No. 2 (2010): 177.

[8] See, for example, Tim Lindsey, *Islam, Law and the State in Southeast Asia* (London: I.B Tauris, 2012), 365.

[9] Dani Prabowo, "Ini 40 RUU dalam Prolegnas Prioritas 2016," *Kompas*, January 22, 2016, http://nasional.kompas.com/read/2016/01/22/13450911/Ini.40.RUU.dalam.Prolegnas.Prioritas.2016?page=all>; 'Sepanjang 2016, 22 RUU Telah Sah Jadi UU' *Hukumonline* (27 December 2016) <http://www.hukumonline.com/berita/baca/lt5862593001f54/sepanjang-2016--22-ruu-telah-sah-jadi-uu.

[10] Eddy Damian and Robert Hornick, "Indonesia's Formal Legal System: An Introduction," American Journal of Comparative Law 20 (1972): 492.

[11] Indonesian Constitutional Court decisions 137/PUU-XIII/2015 and 56/PUU-XIV/2016. See also Kompas. 'Putusan MK Cabut Kewenangan Mendagri Batalkan Perda Provinsi', *Kompas* (14 June 2017) http://nasional.kompas.com/read/2017/06/14/22392261/putusan.mk.cabut.kewenangan.mendagri.batalkan.perda.provinsi

against inappropriate regulations. The only place this can now be done is the Supreme Court, which, as mentioned, is a reluctant reviewer of regulations at best and, in any event, can never consider their constitutionality.

Soeharto's 'New Order' regime promulgated a large number of unconstitutional laws and regulations but nothing could be done about that until after his New Order regime collapsed in 1998 because there was no means by which a court could review the constitutionality of any legislation until the Constitutional Court was established in 2003.[12] The result was, to use the words of the United States Supreme Court with which this paper began, that, under Soeharto, courts could only 'decide cases conformably to the law, disregarding the Constitution'. The establishment of the Constitutional Court did not, however, fully remedy the situation because, again, it cannot do anything about unconstitutional regulations. As matters stand, if a future government with a majority in the DPR decided to deliberately subvert the Constitutional Court by adopting New Order practice and issuing unconstitutional regulations there is nothing that could be done to repeal them. As will be shown below, this has, in fact, happened at least once in the post-Soeharto era, and that leaves Indonesians vulnerable to the possibility of unconstitutional rule.

In this paper, I argue that it is open to the Constitutional Court to reconsider its position on review of regulations in order to fill the hole in Indonesia's system of constitutional law. It could do so by interpreting its power of judicial review of statutes to extend to cover laws below the level of statutes.

More specifically, I will argue, first, that a split jurisdiction for judicial review, like that in Indonesia, should not necessarily be seen as a creating two 'siloed' jurisdictions, one for statutes and one for regulations, such that a constitutional court should be excluded from reviewing lower level laws. Second, I will argue that the power to review statutes should always extend by implication to

[12] As Soeharto controlled the legislature, which became little more than a 'rubber-stamp' for his regime's legislative program, the absence of a court of constitutional review mean there was effectively no means of restraining his government from passing unconstitutional laws. See Todung Mulya Lubis, 'The *Rechsstaat* and Human Rights' in Tim Lindsey (ed), *Indonesia: Law and Society*, 1st edition, Annandale: Federation Press (1999): 171-85; *A Nation in Waiting: Indonesia in the 1990s*, Boulder: Westview Press, (1994): 272; and Patrick Ziegenhain, *The Indonesian Parliament and Democratization*, Singapore: Institute of Southeast Asian Studies (2008): 45.

regulations made under them. To support these arguments, I will refer briefly to the experience of constitutional courts outside Indonesia.

Before doing so, however, I offer a brief account of how Indonesia came to have a system of judicial constitutional review that is restricted to statutes, showing that the current hole in the system may not have been intended - or even anticipated - by those who created it.

II. DISCUSSION

2.1. The Development of Constitutional Review in Indonesia

In the course of debate in the BPUPKI[13] or Investigating Committee for the Preparation of Independence, in the lead-up to independence in 1945, Muhammad Yamin proposed that a Supreme Court be established with the power to review the constitutionality of laws.

This proposal was opposed by Professor Soepomo, a supporter of authoritarianism who became the lead drafter of the current 1945 Constitution, for two reasons. First, Soepomo rightly saw constitutional review as an intrinsic part of liberal democracy and the concept of separation of powers, both of which were concepts he opposed, arguing instead for an authoritarian 'Integralistic' state, modelled on Nazi Germany and imperial Japan.[14] Second, Soepomo believed that, given the lack of lawyers and judges in the nascent republic, a court of constitutional review was simply not viable.[15] Accordingly, the 1945 Constitution he drafted was promulgated on 18 August without provision for judicial review of the constitutionality of laws.

A limited form of judicial review was, however, adopted four years later in the short-lived Federal Constitution of 1949. Article 130(2) of the Federal Constitution made it clear that federal laws could not be reviewed (*tidak dapat diganggu gugat*) but other laws, including laws of the federation's constituent states,

[13] *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia*, BPUPKI.

[14] For a brief account of these debates and Soepomo's views, see Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis*, *(Oxford: Hart Publishing, 2012), 9-12.*

[15] Saafroedin Bahar and Nannie Hudawati. *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei 1945-22 Agustus 1945*, (Jakarta: Sekretariat Negara Republik Indonesia, 1998), 183-306.

could be reviewed by the Supreme Court for compliance with the Constitution (Arts 156 to 158). However, even this limited form of constitutional review was removed by the 1950 Provisional Constitution, which replaced the federal system within just a few months. Article 95(2) of this constitution stated bluntly that laws cannot be reviewed.

This remained the position from when Soekarno reinstated the 1945 Constitution in 1959, until some four years after Soeharto came to power in 1966. Judicial review of laws below the level of statute against statutes was then introduced by Law 14 of 1970 on Judicial Powers and Article 26 granted the power to do this to the Supreme Court. It remained the case, however, that no court could review statutes or, for that matter, the constitutionality of any law, until some years after Soeharto fell from power in 1998.

As part of post-Soeharto efforts to rid Indonesia of some of the more egregious laws introduced by his New Order, the MPR (*Majelis Permusyawaratan Rakyat*, People's Consultative Assembly), then the most powerful legislative body in Indonesia, granted itself the power to constitutionally review statutes in its Decision III of 2000 on the Sources and Hierarchy of Laws. Article 5 of this Decree created a split jurisdiction to review laws. The MPR was authorised to review the constitutionality of statutes, while the review of laws below the level of statute against higher level laws (but, again, not against the Constitution) remained in the hands of the Supreme Court.

After the fall of Soeharto, the 1945 constitution was amended four times, once annually in 1999, 2000, 2001 and 2002. The Fourth Amendment of 2002 retained the Supreme Court but established a Constitutional Court, among other things. It also finally conferred the power on the Constitutional Court to review statutes. This was a watershed moment in Indonesian legal history but the debate about Indonesia's courts and their powers of review had, in fact, been revived some years earlier.

In late 1999, with euphoria over the end of the New Order still in the air, several proposals for judicial review of laws were discussed by the MPR Working

Group on amendment of the 1945 Constitution.[16] The first was to extend the Supreme Court's powers to allow it to review *all* forms of laws against the Constitution - both statutes and regulations. Hendi Tjaswadi (military/police faction), Valina Singka Subakti (Golkar or Functional Group faction), and Patrialis Akbar (National Mandate faction and later a Constitutional Court judge)[17] all argued that the Supreme Court should be given this wide power of review.

Dahlan Ranuwihardjo, a member of the Expert Team (*Tim Ahli*) appointed to advise the MPR on this issue, argued that it should be the MPR, not the Supreme Court, that reviewed statutes. Ranuwihardjo, adopting classic New Order arguments, reasoned that the Supreme Court should be seen as being on the same level as the president and the DPR, so should not be able to annul the statutes they produce. The MPR, on the other hand, had a higher position and was therefore better suited to review law. Ranuwihardjo further argued that judicial review of statutes was 'American', and not suitable for Indonesia. The MPR, he said, was the 'Indonesian answer'.[18]

Ranuwihardjo's proposal was rejected by the Expert Team. Instead it proposed that a new Constitutional Court should be established and authorised to review the constitutionality of *all* laws. Jimly Asshiddiqie, another member of the Expert Team and later the founding Chief Justice of that court, argued:

> The Supreme Court is authorised to decide cases in relation to justice for the citizens, while the Constitutional Court is to guard the laws, to maintain law and order, to harmonise the constitution and all other regulations below the basic law. Therefore, judicial review should be in one court. All the reviews should be conducted by the Constitutional Court. Currently, the Supreme Court has the authority to review regulations below statute ... this authority should be moved the Constitutional Court. This Court is the one to maintain the order of laws. Not only below statute, but all laws below the constitution.[19]

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[16] Sekretariat Jenderal dan Jenderal dan Kepaniteraan Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan 1999- 2002 (Buku VI Tentang Kekuasaan Kehakiman)*, (Edisi Revisi), Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi (2010).

[17] *Ibid*, 43 – 49. Before he could complete his first term, Patrialis Akbar was discharged from the court as a result of corruption allegations. In September 2017, he was convicted at first instance by the Jakarta Anti-corruption Court and jailed for eight years.

[18] *Ibid*, 81 – 82. All translations are the author's.

[19] *Ibid,* 507.

This proposal of the Expert Team was, unfortunately, dismissed by the MPR Working Committee, without much explanation.[20] Instead, the current split jurisdiction for review of laws was created by the Fourth Amendment, which introduced Article 24C into the 1945 Constitution. This provides, as mentioned, that the Constitutional Court has the power to review the constitutionality of statutes, while Article 24A authorised the Supreme Court to review laws below the level of statute for compliance with higher level laws (but not for compliance with the Constitution).

It seems clear that the resulting situation by which the constitutionality of lower level laws cannot be tested in any Indonesian court was not properly anticipated during the amendment debates. Not only was it not discussed but no one even raised the issue. It seems, in fact, to have been an oversight. This is all the more surprising given the issue had certainly arisen in other countries well before Indonesia began amending its Constitution in 1999, as I show below.

2.2. Constitutional Courts and Review of Regulations

As a preliminary point, I emphasise that the power to review subordinate regulations is not an exclusive feature of common law systems, as Ranuwihardjo implied, and as is still sometimes suggested in Indonesia. Certainly, courts of common law countries such as the United States, Australia, and Canada do routinely constitutionally review regulations, and strike them down when they contravene constitutional protections, or otherwise exceed constitutional power. That is also true, however, for many constitutional courts in civil law countries, for example, Germany, Japan, Taiwan and Korea.

Likewise, while review of subordinate regulations is standard in jurisdictions with an apex court of mixed constitutional and appellate or general jurisdiction,[21] the power to review regulations is also found in some jurisdictions where judicial review is divided between two apex courts, as in Indonesia, that is, where a specialised constitutional court sits alongside an appellate court or court of

[20] *Ibid.*

[21] In the US context see, for example, the survey of recent US Supreme Court practice in Erica Newland, "Executive Orders in Court," *Yale Law Journal* Vol. 124 (2015): 2026.

general jurisdiction. Examples include the constitutional courts of Korea and Germany, with the latter commonly seen as the archetype of divided judicial review. Constitutional courts in many such jurisdictions have either been granted the power to review regulations, as in Germany, or have implied it as inherent to the power to review statutes, as in Korea.

In fact, Korea's Constitutional Court - a constitutional court in an Asian civil law country with a split jurisdiction for judicial review of laws - offers an excellent point of comparison in assessing Indonesia's very similar system of judicial review of laws.

2.3. The Constitutional Court of Korea

The Constitutional Court of Korea, like the Constitutional Court of Indonesia, is, as mentioned, a specialised constitutional court that sits alongside a Supreme Court. The Korean Supreme Court was explicitly assigned the power to adjudicate the constitutionality of administrative regulations, while the Korean Constitutional Court was not.

Specifically, Article 107 of the Constitution of the Republic of Korea splits the jurisdictions of the Courts as follows:

> (1) When the *constitutionality of a law* is at issue in a trial the courts shall request a decision of the *Constitutional Court,* and shall judge according to the decision thereof.
> (2) *The Supreme Court* shall have the power to make a final review of the *constitutionality or legality of administrative decrees, regulations* or actions, when their constitutionality or legality is at issue in a trial. [Emphasis added]

In other words, the power conferred on the Korean Constitutional Court is to review laws or statutes, while the Supreme Court has the power to review laws below that level, that is, administrative decrees, regulations or actions.

Despite these seemingly clear provisions, the Korean Constitutional Court has been able to expand its powers to constitutionally invalidate subordinate regulations. It has done this in two ways.

First, it has restrictively interpreted the primary legislation such that it constitutionally invalidates sub-regulations. In other words, it has held that when provisions in a statute are struck down, administrative regulations made under those provisions will now longer have any legal basis and so must necessarily also be void. As well as having compelling legal logic, this position reflects the fact that, as a matter of practicality, many subordinate regulations lose all coherence once terms, definitions, procedures or institutions in the statute they are intended to apply fall away.[22]

2.4. The Scriveners' Case: Implied Jurisdiction

Second, and more significantly for the Indonesian case, the Korean Constitutional Court has asserted an implied jurisdiction over administrative regulations, with the implication arising from its clear power to review statutes.

In a landmark decision in the *Rules Implementing the Certified Judicial Scriveners Act Case*[23] of 1990, the Court held that it had an implied jurisdiction to constitutionally review rules and regulations, at least where rules and regulations directly infringe people's basic rights in principle, and irrespective of actual implementation or enforcement. The Court describes this as the "direct infringement by law" requirement:

> The requirement of "direct infringement by law" means that the complainant's rights and freedoms are directly infringed by the law itself of which he/she complains, not by any specific executive action taken to implement it. [Even if] a law is expected to be implemented by further administrative action, if the law by itself has directly changed people's legal rights and duties or already determined people's legal status before any specific act has taken place to implement it, thereby irrefutably concluding people's legal rights and duties to the extent that such rights and duties cannot be changed by

[22] As Ginsburg observes, discussing the jurisprudence of the Constitutional Court of Korea, 'The question of the constitutionality of an administrative regulation frequently requires interpretation of the relevant statutory text. [For example, a] restrictive interpretation of a statute will tend to void on constitutional grounds any administrative action taken under it, where those actions rely on a broad reading on the statute'. Tom Ginsburg, 'The Constitutional Court and the Judicialization of Korean Politics' in Andrew Harding and Pip Nicholson (eds), *New Courts in Asia*, Abingdon, Routledge (2009): 153.

[23] South Korean Constitutional Court: *Rules Implementing the Certified Judicial Scriveners Act Case* (1990) 89 Hun-Ma 178. Judicial scriveners are a kind of legal professional found in Japan and South Korea, who assist clients in commercial and real estate registrations and in preparing documents for litigation.

> any further administrative action, the requirement of directness is regarded to be fulfilled.[24]

This aspect of the Court's reasoning to justify an implied jurisdiction to review subordinate regulation rests on several bases. Most importantly, it considered that Article 107(2) of the Constitution, properly read, did not *exclusively* assign the constitutional review of *all* administrative action (including regulations) to the Supreme Court but only that "at issue in a trial". Because only implemented or enforced regulations could be put at issue in trial, the Supreme Court's constitutional review jurisdiction was not available for persons whose rights had been directly infringed – that is, infringed by the fact of regulation, rather than its implementation or, in other words, infringed in principle. That such persons merited constitutional review and relief was made plain, the Court held, by provision for individual constitutional complaints alleging violations of basic rights.

The Court therefore concluded that constitutional review of administrative action other than action "at issue in trial" must be within the jurisdiction of the Constitutional Court. Were Article 107(2) read otherwise, there would be a jurisdictional vacuum, in that there would be no possibility of constitutional review or remedies for individuals whose rights were directly infringed by a subordinate regulation.

This is, of course, precisely the problem that has arisen in Indonesia, where the Constitutional Court has jurisdiction to determine constitutional rights (but not to review regulations), while the Supreme Court deals with appeals from trials (and has not power of constitutional review), so there is no possibility of constitutional review or remedies for individuals whose rights are directly infringed by subordinate regulation.[25]

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[24] South Korean Constitutional Court: *Prior Review of Broadcast Advertisements Case* (2008) 2005 Hun-Ma 506.

[25] Further, and less relevant to the Indonesian situation, the Korean Constitutional Court interpreted its jurisdictional statute, the Constitutional Court Act, which renders "governmental power" subject to its constitutional adjudication, as necessarily referring to *all* governmental powers including legislative, judicial and administrative powers.

2.5. Responses to the *Scriveners' Case*

As would undoubtedly be the case if a similar decision was made by the Indonesian Constitutional Court, the *Scriveners' Case* decision proved immediately controversial in Korea. The Korean court's reading of Article 107(2) received a mixed academic response and there was even some discussion of impeaching Justice Byun, who issued the Court's judgment.[26] Unsurprisingly, the Korean Supreme Court vigorously objected to what it saw as a usurpation of its jurisdiction, issuing a "statement … condemning the Constitutional Court decision, and saying that it had 'gone beyond its domain."[27]

However, this controversy quickly abated and the judgment in the *Scriveners' Case* was complied with. The Supreme Court, despite its protests, did ultimately conduct the judicial scriveners' licensing examination as the Constitutional Court had found it should.[28] What is more, the Constitutional Court has since continued to assert jurisdiction over rules and regulations with little of the pushback seen in the immediate aftermath of the *Scriveners' Case*. It now appears well-settled in the jurisprudence of the Korean Constitutional Court that it can exercise jurisdiction over subordinate regulations where the "direct infringement of law" requirement is met, that is, where a regulation in principle infringes the Constitution, regardless of whether it has been implemented.

For example, in the *Billiard Hall Entry Restriction* case,[29] the Korean Constitutional Court struck down subordinate regulations issued under the *Installation and Utilization of Sports Facilities Act* that required billiard halls to post signs prohibiting the entry of minors. The Court held that the rules were beyond the scope of the primary statute, violated the Constitutional right of equality by discriminating against billiard hall operators, and, by barring a significant proportion of billiard hall clientele from entry, violated

[26] Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court,* Constitutional Court of Korea, Seoul: Republic of Korea (2001).
[27] Tom Ginsburg, "The Constitutional Court and the Judicialization of Korean Politics," in New Courts in Asia, ed. Andrew Harding (New York: Routledge, 2009), 154.
[28] Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court*: 53.
[29] (1993) 92 Hun-Ma 80; *Ibid*: 202.

the constitutional right to freedom of occupation. The Ministry of Culture and Sports complied by amending the rules, and eliminated the signage requirement.

More recently, in the *Prior Review of Broadcast Advertisements Case*,[30] the Court struck down an enforcement decree and a regulation under the *Broadcasting Act* that prohibited a broadcaster from broadcasting an advertisement without prior review by a review board on the basis that the prior review amounted to constitutionally prohibited censorship.

III. CONCLUSION

There are four conclusions to draw from the experience of the Korean Constitutional Court that are relevant to Indonesia's system of constitutional review. First, while the constitutional review of subordinate regulations is well within the jurisdiction of apex courts with mixed jurisdiction constitutional and appellate jurisdictions, such as Australia, the United States, Canada and, in Asia, Japan, it also not uncommon among specialist constitutional courts. This is true even in systems, including civil law systems, where judicial review is divided between constitutional and generalist courts, as in Germany, Taiwan and Korea. In fact, the Constitutional Court of Indonesia's failure to review subordinate regulations puts it out of step with some of the most effective constitutional courts in the region, such as those in Taiwan, South Korea, and Japan.

Second, the Korean Constitutional Court's view that the power to review a law must necessarily include subordinate regulations issued under that law is a logical and persuasive one. It also has the virtue of preventing a situation arising where a government can pre-empt the consequences of a statute being struck down by simply passing a similar regulation, thus defeating the whole purpose of constitutional review.

In fact, as indicated earlier, something like this has happened before in Indonesia.[31] In 2005, the Constitutional Court struck down the Law 20 of 2002

[30] (2008) 2005 Hun-Ma 506.

[31] As is discussed in more detail in Simon Butt and Tim Lindsey, "Economic reform when the Constitution matters: Indonesia's Constitutional Court and Article 33", *Bulletin of Indonesian Economic Studies*, Vol 44, No. 2, (2008): 239-261.

on Electricity[32] and the Yudhoyono government responded by issuing a regulation two months later that was 'not much different'[33] to the Law and was, in fact, described at the time as a re-enactment of it 'in new clothes'.[34] Likewise, when the Court began hearings began in relation to Law 7 of 2004 on Water Resources, the government, apparently concerned that the court might strike it down, issued a Government Regulation that had a very similar effect to a significant part of the Law.[35] In the end, the court did not invalidate provisions of the Water Resources Law in its decision but the government seems to have issued the regulation as form of 'regulatory insurance'. If this tactic was used more often by governments to exploit the absence in Indonesia of judicial review of the constitutionality of regulations, it could, as suggested earlier, render the judicial review of statutes futile, and thus render the Constitution if not meaningless, at least of greatly diminished importance.

Third, the example of Korea effectively demonstrates that apparent constitutional barriers to the constitutional review of regulations by the Constitutional Court may be overcome through a principled but pragmatic approach to the interpretation of jurisdictional divisions in the Constitution. While there are differences between the relevant Korean and Indonesian jurisdictional provisions, the broad outlines of the interpretative approach adopted by the Constitutional Court of Korea may be transferable: a constitutionally *split* jurisdiction need not be read as creating two *exclusive* jurisdictions – it could, rather, be seen as *dual*, bifurcated system, where both courts can review regulations, one against higher level laws and the other against the Constitution.

Instead, the current narrow reading of the jurisdictional split in Indonesia has, as mentioned, created a jurisdictional vacuum that, in important cases, limits the availability to citizens of constitutional review, and thus, constitutional rights. It is open to Indonesia's Constitutional Court to follow the example of

[32] Indonesian Constitutional Court Decision 001-021-022/PUU-I/2003.
[33] Fultoni, Secretary of the National Legal Reform Consortium (*Konsorsium Reformasi Hukum Nasional)* cited in Butt and Lindsey, "Economic reform when the Constitution matters: Indonesia's Constitutional Court and Article 33": 259.
[34] Hotma Timpul, a Jakarta Lawyer, cited in *Ibid*: 259.
[35] Government Regulation 16 of 2005 on the Development of a Drinking Water Availability System. See also Indonesian Constitutional Court Decisions 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005.

Korea's court and fill that hole, by implying a right to constitutionally review regulations, thus providing a remedy for individuals whose constitutional rights are infringed by subordinate regulation. Then, at last, Indonesian courts might be able to 'determine cases' involving regulations 'conformably to the Constitution' and not be obliged to follow regulations even if they are 'in opposition to the Constitution', as is currently the case.

Fourth, the example of Korea indicates that although implying a right to review subordinate regulation as inherent in the power to review statutes can be expected to be immediately controversial it may be politically viable in the longer term. In Korea, initial sharp criticisms were not sustained. The Korean case suggests that it is reasonable to expect that the consistent and principled assertion by a Constitutional Court of a broader review jurisdiction that extends to regulations may eventually be complied with, and coalesce into accepted jurisdictional reality.

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