CHAPTER 5

Court-Imposed Constraints

The previous Chapter discussed how the Constitutional Court has ignored or removed limitations upon the exercise of its powers imposed by the legislature, holding that those limitations violate the Constitution itself. Yet, as this Chapter explains, the Court has imposed its own limitations on its jurisdiction and decision-making, even though these limitations are neither expressly nor impliedly required by the Constitution. For example, the Court has refused to exercise its constitutional review powers in some circumstances, including to review the way statutes are implemented. The Court has also not given its decisions retrospective effect. As we shall see, this means that applicants who win cases enjoy few benefits, if any, from the Court’s decisions. Nevertheless, the Court has adhered to none of these self-made rules consistently, creating numerous exceptions as it sees fit, often in the name of ‘justice’. Unfortunately, this leaves the Court’s decisions unpredictable.

1 Review Limited to Norms

The Court has, in many cases, declared that it will review only the norms of statutes, not the way statutes are interpreted or applied in practice. In other words, the Court limits itself to the rather academic exercise of ensuring that the text of the statute under review does not contradict the text of the Constitution. The Court also continually emphasises that it will only consider the constitutionality of norms in the abstract, not their implementation or application in concrete cases – that is, in the particular circumstances of the applicant.1 As the Court has put it, the Court’s decisions apply generally (erga omnes), not just to parties involved in the disputes. This means that the Court must consider the interests of other citizens and entities when deciding its cases.2 I turn now to discuss these issues.

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1 For discussion about this concept and constitutional courts whose jurisdiction is enlivened when constitutional questions arise out of actual cases, and whose decisions then apply to those cases (‘concrete review’), see Comella (2009, p. 7).

2 See the Christian Party (2009) and Choirul Anam (2011) cases. Many of the world’s constitutional courts take a similar approach, focusing on, as Sadurski (2005, p. 5) puts it, the ‘textual
1.1 Implementation or Interpretation of Statutes
On the one hand, the Court’s distinction between norms and implementation appears to be a natural consequence of the way the Constitution divides up judicial functions. As mentioned, the Constitution expressly grants the Constitutional Court power to review statutes against the Constitution, not the application of those statutes through government action or regulations. By contrast, the Supreme Court and the courts below it are responsible for ensuring that Indonesia’s government and citizens follow the laws that bind them. Disregard or improper application of a statutory norm is thus a matter for those courts. Similarly, if a statute gives discretionary power to an institution of state, then how that power is exercised is not a matter for the Constitutional Court. In the Land and Building Tax case (2010), for example, the applicants complained that a particular law was applied to them, but not to others in similar circumstances, and was therefore discriminatory and hence unconstitutional. The Court held that, even if this were true, any discrimination occurred because of how the statute was implemented rather than because of the statute itself.

On the other hand, making the distinction between norms and their application has often left the Court appearing weak and ineffective in the face of government action that appears to be unconstitutional. Maintaining the distinction has, in effect, allowed the state to violate constitutional rights through its actions and regulations, and avoid the violation being treated as a constitutional issue. The government might be held accountable for some form of breach – in the administrative or general courts, for example – but not for violating the Constitution. This is a perverse outcome, given that a primary purpose of a Constitution is to bind the state to its principles.

Perhaps recognising the problems inherent in maintaining this distinction, the Court has in several cases resiled from strict adherence to it. Yet, as the cases to which I now turn demonstrate, the Court has provided no convincing explanations for making exceptions in these cases, but not others.

1.2 Wijaya and Lubis Case (2008)
The Court refused to consider the constitutionality of the implementation of a statute in the Wijaya and Lubis case (2008). The Court was asked whether defamation provisions in the Criminal Code (Kitab Undang Undang Hukum Pidana) breached various constitutional rights, including freedom of speech. The applicants argued that the provisions were misused against citizens merely