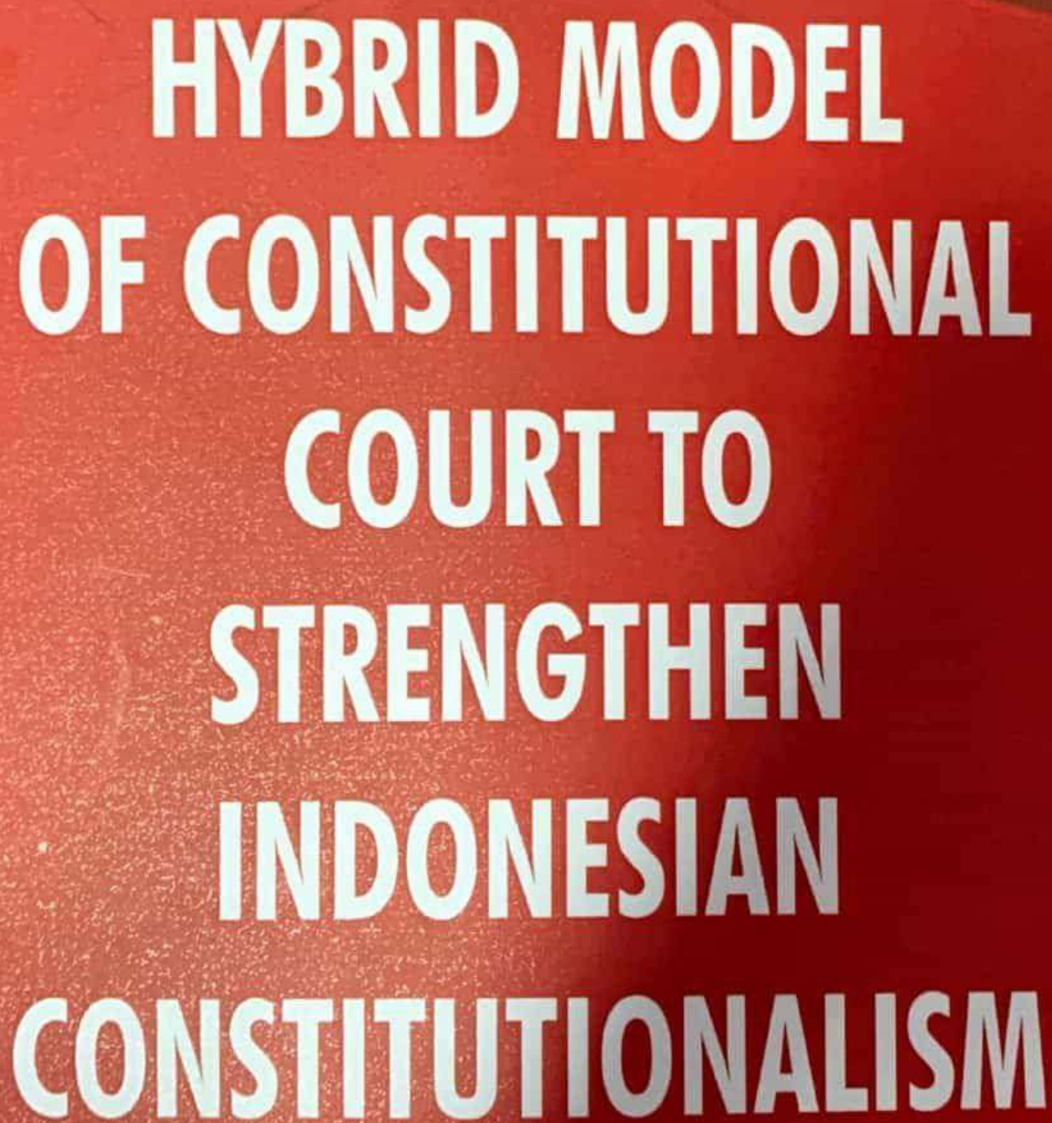
GRAHA ILMU



HYBRID MODEL OF CONSTITUTIONAL COURT TO STRENGTHEN INDONESIAN CONSTITUTIONALISM

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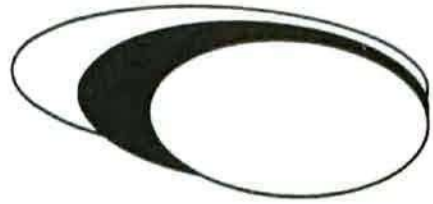

PREFACE

Constitutionalism has been a borrowed concept from Western constitutional studies in the evaluation of the development of Asian constitutions, without clearly defined, and, usually, merely applied to the constitutional text as a book; this study therefore finds the need to identify the actual modes of constitutionalism in Indonesia through identification and comparative study on Constitutional Court from different axis of Constitutional Tradition; for this purpose, this study focuses on the of Indonesian Constitutional Court since its establishment in 2003.

Under the rule of law missionaries, the spread of constitutionalism worldwide has occurred; it is assisted by numerous international contributors[1]. Since the 1990s, there have been numerous crucial steps undertaken by most Eastern European societies in reforming their legal system, including rewritten constitutions albeit encountering results that still have to be answered. The need for rule-of-law reform has been acknowledged by the Latin American governments, and they have commenced implementing steps toward it, or at least they asserted they would. In Asia, constitutionalism has been functioned as part of a formalistic rule of law reform package prominently to amplify legal reform associated with commercial affairs[2].

Authors

TABLE OF CONTENTS

Preface v

Table of Contents vii

1. Current Problem of Constitutional Court Model 1

- 1.1 Constitutionalism Transplantation 1
- 1.2 Constitutional Courts in Boom 3
- 1.3 Introduction of Constitutional Court in Indonesia 5
- 1.4 The Problem of Constitutional Court Design 8

2. Current Theory of Constitutional Court Transplantation 15

- 2.1. Functionalism 15
- 2.2. Expressionism 16
- 2.3. Bricolage 16

3. Comparative Constitutional Court Design 19

- 3.1 Introduction 19
- 3.2 Asian Studies On Constitutionalism 22
- 3.3 Methodological Approach 24

4. Institutional Mode of Indonesian Constitutional Court 33

- 4.1 Brief History of Indonesian Constitutional Court 33
- 4.2 Constitutional Adjudication Organ 39
- 4.3 Types and Timing of Constitutional Adjudication 39
- 4.4 The Procedures of Constitutional Review of Law[38] 40

4.5 Standing 43
4.6 Judges 43
4.7 Decision 44

5. Constitutional Court in Comparative Analysis 49

5.1 Anglo American Supreme Court 49
5.2 German Federal Constitutional Court 52
5.3 Japan Supreme Court 59

6. Hybrid Expressionism Model of Indonesian Constitutional Court 67

6.1 Hypotheses Restated 67
6.2 Hybrid Characteristic of Indonesia Constitutional Court 68
6.3 Final Remark 71

References 73

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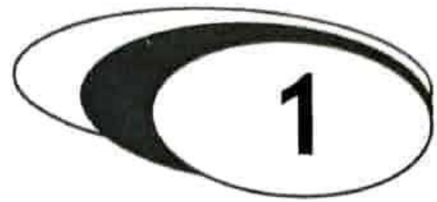

CURRENT PROBLEM OF CONSTITUTIONAL COURT MODEL

1.1 CONSTITUTIONALISM TRANSPLANTATION

Constitutionalism has been a borrowed concept from Western constitutional studies in the evaluation of the development of Asian constitutions, without clearly defined, and, usually, merely applied to the constitutional text as a book; this study therefore finds the need to identify the actual modes of constitutionalism in Indonesia through identification and comparative study on Constitutional Court from different axis of Constitutional Tradition; for this purpose, this study focuses on the of Indonesian Constitutional Court since its establishment in 2003.

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More than 95 out of the 188 member states of the United Nations (UN) made salient amendments to their constitutions in the decade between 1989

and 1999, and new constitutions have been adapted by at least 60 countries of those states. Incorporating bills of rights, fundamental rights, or numerous forms of individual or collective rights into constitutional orders have also been accomplished by 92 countries. In the meantime, adopting the form of constitutional review has been carried out by at least 70 out of the entire UN member states. Additionally, ratifying a variety of international treaties and conventions on humans rights functioning as part of legal and judicial reform has been undertaken by numerous states[3]. Subsequently, constitutional reconstruction in 1990s emerged to be tremendously intense as a result of the rule of law propaganda under the name of development[4].

However, the definition of Constitutionalism has never been clearly given by leading scholarly works on Asian constitutional studies. A quick review of prominent scholarly works will tell us that there are two contexts of Western legal thoughts incorporated in the discourse of Constitutionalism, namely, the institutional or procedural protection against the dictatorship, on one hand, and the substantive value of natural law on the other[5].

Carl Friederich[6] emphasizes that constitutionalism requires severance of power principles, accountability of government and a guarantee of human rights. In all its consecutive stages, constitutionalism possesses one salient quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; and its opposite is despotic government.[7] Mark Tushnet[8] mentioned that Constitutionalism components encompass commitment to the rule of law, a reasonably independent judiciary, and free and open elections. According to Daniel S. Lev, "Constitutionalism is a legal process implying that a political process, with or without a written constitution, is more or less oriented to public rules and institutions aimed at defining and containing the exercise of political authority[9]. Constitutionalism is beyond the discussion of merely institutional structure or a matter of the distribution of power and authority but more to the process of how political authority is bound by the legal rules."

Although this procedural requirement of rule of law is often considered as if the product of Anglo-American legal tradition, the civil law tradition has developed similar procedural control under the concept of *rechtstaat* or government by the law. The notion of constitutionalism under the tradition of civil law is totally connected with the concept of *rechstaat* or government by the law[10]. Under the *rechtstaat* notion, state action and administration shall be

based and constrained by the law[11]. This concept has been prevailing in the practice of constitutionalism in civil law countries including Germany and Japan. Before the rule of law globalization, law students and constitutional law scholars in Indonesia are more familiar with the notion of *rechtstaat*. Basically the notion of constitutionalism under the *rechtstaat* and supremacy of law is the same in principle since they came from one root of the old tradition of Germanic thought.

On the other hand, there is another stream of critiques on Constitutionalism centering on the substantive values to be attained through constitutional institution. Paul W. Kahn, for instance, mentioned that Constitutionalism does not emerge as a single set of truth, yet it signifies an underway debate dealing with the meaning of the rule of law in a democratic political order. At both the state and national levels, this debate concentrates on the notion of liberty, equality, and due process, including the structures of representative government that necessitates being aware of those values[12].

In addition, Mark Tushnet has voiced the same two elements of constitutionalism[13] in his recent publication. Tushnet shared his understanding that nowadays there are two dimensions[14] of recent studies on constitutionalism, namely institutional or governmental structure on one part[15], and human rights[16] on the other. Tushnet[17] first refers to institutional aspect which covers similar issues often discussed as a thin version of rule of law, but then goes into the overview of human rights' history as often discussed as a thick version of rule of law[18]. Hence, Constitutionalism is totally similar to the substantive rule of law or supremacy of the law[19] under the tradition of common law but not the same as the present formalistic definition of rule of law as promoted by World Bank[20].

1.2 CONSTITUTIONAL COURTS IN BOOM

The continuous presence and continuance of a new constitutional court in the world political system serving as the institutionalization of constitutional structure follow the rise of constitutionalism[21]. It seems to be a natural phenomenon demonstrating that the role of constitutional court has long been attributed to both of the aforesaid two dimensions of the Constitutionalism, namely, procedural and substantive goals. Mauro Cappeletti[22] for instance, gave an explanation on the role of constitutional

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court serving as the method for undertaking the positivization of higher values the constitution expresses. Besides the role serving as an institutional pillar in the severance of powers, a reference is made to the stream of scholars descending from Montesquieu[23] asserting that constitutional severance of powers is captiously grounded on the emergence of an independent constitutional adjudication.

The world has observed three waves of the spread of constitutional review. The first wave was the adoption of a Judicial Review into the US constitutional system and the constitutions of its constituent states. The second wave was soon after Hans Kelsen'[24] reconceptualization of constitutional review under special court, after World War II in particular, presuming that the legislature probably made a few errors in which the constitutional review could have rectified it. During the third wave of democratization, a great number of countries, in the post-Communist world in particular, including new democracies, adopted the German type of constitutional court[25].

Albeit one view that judicial review would be subject to powerful western influence[26] and that it would be tough to be compatible with Asia historical image of authoritarian regime[27], recognizing and documenting the presence of constitutional and judicial review have been properly accomplished by constitutional law scholars in this region.[28] There are a myriad of discrepancies in East Asia. South Korea and Taiwan have appeared to be civil law countries adjusting to well-regarded constitutional courts. Indonesia appears headed in this direction too though Indonesian constitutionalism still awaits consolidation. Mongolia has, likewise, had an active civil law constitutional court though some might fear too active. Meanwhile, the reverse is demonstrated by Japan and Hong Kong. The Hong Kong Basic Law provides for review on matters respecting central authority and local/central relations by "the Standing Committee of China's National People's Congress (NPC)", a seemingly centralized approach. In the meantime, Hong Kong has decentralized common law review on other matters within Hong Kong's autonomy. Japan signifies a civil law country with a naturally decentralized system modeled on the US. The Philippines has long been a hybrid in legal system terms albeit adopting American common law system emerging as their constitutional judicial review.

Upon having pride exhibiting that Japan has retained its triumphant image of constitutionalism in Asia, a new breed of constitutional court in Thailand[29] and Indonesia, after the blatant political situations in 1997, renders other probable expectations for the future legal reform and constitutionalism. In 2006, the failure of constitutionalism in Thailand as a result of Military Coup raised some crucial questions regarding why Thailand 1997 constitution-highly praised as a democratic constitution-has failed to achieve results. Erik Martinez Kuhonta[30] affirmed, "The problem of Thailand Constitutional Court[31] independency has led to the failure of constitutionalism in Thailand. Thailand's case shall become a cornerstone of more studies on this kind of issue, particularly in the South East Asia region."

1.3 INTRODUCTION OF CONSTITUTIONAL COURT IN INDONESIA

Indonesian constitutional court is one of such typical products amid the third wave of democratization. Until the introduction of Indonesian constitutional court (hereinafter referred to as MK) in 2003, neither sense of rule of law, namely the procedural sense of *rechtstaat* or the substantive sense of democracy, was within reach of the Indonesian people. "Indonesia constitutional doctrine is *rechtstaat* but not *machstaat* in which it was only written in the constitution elucidation and constitutional books but had never been realized." It is sensible to affirm that throughout Indonesian history, at dictatorial rule periods in particular, constitutional law had been assigned a minor, marginal role. Constitutionalism was not successfully implemented resulted from the drawback of the 1945 Constitution and the absenteeism of an institution for protecting the Constitution.

Politically, the Constitutional Court was formed after the fall of the Soeharto regime[32] which has been in absolute power so that the setting limits for the presidential term of office and the establishment of the Constitutional Court to exercise judicial power in addition to the Supreme Court. In this case, the Constitutional Court has also become a tangible manifestation of the democratization efforts through the granting of authority in adjudicating election disputes.[33]

Perhaps, the MK has its own historical moment involving political and economic crisis demanding substantial civic engagement. Hence, a

concise historical review of the formation process of Indonesian constitution and its related institutions will assist in understanding the path led to the constitutional court.

In August 1945, during the independence struggle, Indonesia's current constitution was written out and it was merely aimed at being an interim document. The constitution emerged as an authoritarian one albeit comprising numerous articles dealing with human rights allowing for most of the thinly conceived rights which are crucial for democratic politics, including social and economic rights, such as those alluding to education and work. Prior to its amendments, the 1945 Constitution had emerged as the state constitution of The Republic of Indonesia for three periods[34] (from 1945 to 1949) and was ultimately substituted by the RIS Constitution and 1950 Provisional Constitution. The 1950 Constitution merely existed nine years before re-imposing the 1945 Constitution was undertaken by President Soekarno demonstrating his impatience with the blatant experiment in democracy. The 1945 Constitution was utilized to underpin an authoritarian style of government through its obscurity in the Soeharto era until its first amendment in 1999.

During the three periods mentioned above, numerous distinct models of state administration were implemented though they were grounded in the unaltered text of the 1945 Constitution. In the early years of independence, the country obeyed to liberal democracy with the parliamentarian governmental system differing from the governmental system envisaged in the 1945 Constitution[35]. In the succeeding period, broadly recognized as the Old Order era, the presidential governmental system was implemented grounded on 1945 Constitution complemented by the formation of the House of Representatives (DPR) and the People's Consultative Assembly (MPR). The democracy, that was being formed back then, was recognized as guided democracy. Nonetheless, the guided element turned to be pivotal. Ultimately, its tendency led it to authoritarianism.

During the New Order (1966 to 1998) under former President Soeharto[36], the 1945 Constitution enacted an executive heavy governmental system rendering the president vigorous power with no mechanism of checks and balances. Additionally, it rendered an attributive and delegated power to the president for regulating constitutional and fundamental affairs

with the mere laws or governmental decree since so many provisions in the constitution give the instructional to be regulated by law and subsequently regulated more detail in subsequent governmental decree[37]. The one clear of example is the membership of the MPR, which was the highest organ within Constitutional Order, and was arranged for the president's benefit through the Law on MPR and DPR Membership[38]. By this Law, 440 MPR memberships were appointed by the president, consisting of 100 members from Army and individuals, and 340 from delegates of groups; 160 members came from regional representatives elected by the Regional House of Representatives (DPRD); and 400 members were elected through general election. This shows the president's domination over the MPR. Additionally, the law making was dominated by the president due to the power he had to stipulate; and DPR was dominated by the president's supporting parties[39].

Numerous laws in that era were extensively unconstitutional, yet they could merely be altered by the legislative review (by DPR itself). Furthermore, some provisions or articles in the 1945 Constitution encompassed norms demonstrating obscurities that could be transliterated in a myriad of views grounded in the president's policy. Besides, the abuse of power often led to human rights and constitutional rights violations without any measure for constitutional appeal.

A result of this lack of effective channels for the realization of constitutional provisions was the general neglect of the constitution as a normative source. A dominant tendency in Indonesian academy was the European tradition of the first half of the 20th century viewing the constitution as an assortment of policy programs that was not probable to materialize without addressing the actions of the legislation or administrative actions[40].

In addition, the New Order's hot pursuit of economic development and stability had led the government to consider that human rights and the rule of law are expendable in pursuit of economic development, thus putting aside the constitutionalism after the economic development and stability. Therefore during the New Order period, the existence of written constitution did not make the Indonesian people feel either a procedural or substantive sense of Constitutionalism.

All those experiences and the weaknesses of the 1945 Constitution emerged as the deliberations leading to the Constitutional Court as part of judicial power executors besides the Supreme Court. The establishment of the constitutional court was regarded as one of the most enormous constitutional reforms in Indonesia after the fall of former President Soeharto in 1998[41]. Former President Habibie, the successor of Soeharto, apparently already thought of the need for constitution amendment and direct election for presidency. Habibie said that the future of Indonesian democracy lies in the constitution amendment so that Indonesia can stand firm together with other democratic nations without losing its own identity[42].

Finally, the provisions regarding Constitutional Court, together with those on the Judicial Commission, were included into the Constitution during the third amendment in 2001. The amendments to the 1945 Constitution[43], aimed at realizing a democratic constitutional state grounded in the constitutional supremacy principle, will probably encounter the similar fate to the 1945 Constitution, unless there is a constitutional control mechanism guaranteeing the the constitution implementation in the life of people, the nation, and the state.

1.4 THE PROBLEM OF CONSTITUTIONAL COURT DESIGN

This part is aimed at ascertaining the characteristics of the Constitutionalism in Asian context by way of comparative analysis on the Indonesian constitutional court through institutional design investigation, together with the attempt of comparative analysis with practices in other jurisdictions in order to further identify Indonesian characteristics.

The author contends that Constitutionalism in either sense of procedural or substantive can take different forms reflecting local contexts, even if the general consensus was that the constitutionalism takes place in a similar path pattern[44]. Within the question, the discussion in this book will find answer what model best describes Indonesian constitutional adjudication in regard to transplantation of institutional structure, and what standard of interpretation has been used by the court to achieve the constitutionalism. This study will attempt to answer this question in terms of actual function of the constitutional adjudication under the name of constitutionalism, instead of Watson-like positivist studies of a written constitution.

For the assessment goal of the adjudicative function of MK, this study focuses on the design of constitutional institution, while identifying both the institutional characteristics and the socio-legal cultural conditions enables such function. In order to consider the functional results of the different institutional design of constitutional courts, this paper should observe not only the static structure of the constitutional court as a constitutional organ but its dynamic institutional mechanisms, by looking into the relevant laws considering the legal culture and political environment.

It should be noted that this kind of comparative study is still worthy given the fact that the outcome for each country's constitutional reform shall be different even though there is general consensus on the general spread of constitutionalism around the world with a similar pattern. These discrepancies demonstrate a reflection showing the broad variances in constitutional legacies and structures, historical inheritances, and formative experiences, including non-trivial distinctions in the value systems of each nation. This viewpoint shares somewhat similar ground with Ran Hirsch proposing that "constitutions all over the world vary in models and priorities with respect to organic pattern and state institutions."[45]

Then, models involving constitutional court design will be studied, in order to ascertain the tendency of standards applied in creating constitutional court. Findings on the Indonesian constitutional court will be further compared with the preceding researches on the practice of other jurisdictions. This book aims to use the comparative study of constitutionalism in terms of institutional structure of a number of different countries to provide basis for identifying a number of key features shaping the character of the Indonesia Constitutional Court.

While numerous comparative studies concentrate on institutional structur[46] and much of the current discussion regarding constitutional interpretation concentrate on the mechanism of reconciling judicial review with democracy defined as majority rule[47], this study will go beyond that; this study will not only do a simple comparison of institutional structure and the political results, but more to find ways to improve the constitutional courts. This book will conclude the proper constitutional reform and institutional design for better Constitutional Court in Indonesia.

Accordingly, this book will start with the hypothetical questions on the Indonesian constitutional court as follows:

1. The institutional structure of Indonesian constitutional court is a hybrid of the world's historical experience, namely, a product of mixed influence mainly from the model of European constitutional court under the constitutional structure of Supremacy of Legislature, but also from the U.S. constitutional structure of Balance of Power in the detailed designs, while reflecting Indonesia's own context of integration with diversity as a socio-culturally plural society.
2. When the characteristic of Indonesian constitutional court is considered in terms of institutional structure, it implies an example of *bricolage* instead of functionalism and expressionism in the constitutional scholarly terminology differentiating the world's constitutional phenomena of constitutionalism?

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1 See detail in Thomas Carothers, Rule of Law Revival, *Foreign Affairs* 77, no. 2 (March/April 1998)

2 ibid.

3 Kevin E. Davis And Michael J. Trebilcock, The Relationship Between Law And Development: Optimists Versus Skeptics, Law & Economics Research Paper Series Working Paper No. 08-24, May 2008, New York University School Of Law.

4 Ibid, see also Carothers supra note 1.

5 Stephen M. Griffin, Constitutionalism in the United States: From Theory to Politics Oxford Journal of Legal Studies, Vol. 10, No. 2 (Summer, 1990), pp. 200-220 at p. 202.

6 Miriam Budiardjo, 1991, Dasar-dasar Ilmu Politik "Political Principles", Jakarta: Gramedia.

7 Rune Slagstad, *Liberal constitutionalism and its critics: Carl Schmitt and Max Weber*, in Jon Elster and Rune Slagstad eds: Constitutionalism and Democracy, Cambridge University Press, 1989.

8 Mark Tushnet, *Comparative Constitutional Law*: in The Oxford Handbook of Comparative Law, 2006.

9 See Daniel S. Lev, *Social Movement, Constitutionalism and Human Rights: Comments from The Malaysian and Indonesian Experiences in Constitutionalism and Democracy: Transition* in Douglass Greenberg etal eds: The Contemporary World edited by, Oxford: Oxford University Press: 1993.

10 Rudy, The Models of Constitutional Interpretation between the Constitutional Court of Indonesia and Japan: The Ccase of Verdict Regarding Illegitimate Child, Padjadjaran Jurnal Ilmu Hukum Volume 1 No. 1, 2014.

11 See Hans Kelsen, 2006, Teori Umum tentang Hukum dan Negara "General Theory of Law and State", Bandung: Nusamedia & Nuansa.

12 Paul W. Kahn, Interpretation and Authority in State Constitutionalism, Harvard Law Review, Vol. 106, No. 5 (Mar., 1993), pp. 1147-1168.

13 Mark Tushnet, Supra note 8.

14 Several scholar noted this dimension into structural constitutional law and the law of constitutional rights, see Adrian Vermeule Hume's Second-Best Constitutionalism, The University of Chicago Law Review, Vol. 70, No. 1, Centennial Tribute Essays (Winter, 2003), pp. 421-437

15 See Vicki Jackson and Mark Tushnet, Comparative Constitutional Law eds, 2005.

16 "For US legal scholars, the second dimension of constitutionalism does not emerge as the new term due to their tendency in presuming that constitutional government serves as a system of legal rules and institutional restrain on power to give a protection for private rights. For them, constitutionalism prominently comprises in inspecting the number and kinds of rights deserving constitutional protection or in determining the institutional mechanisms in which the government power is limited and balanced." See Norman Dorsen etal, 2003, Comparative Constitutionalism Case and Materials, Thomson and West; See also Robert P. Kraynak, *Tocqueville's Constitutionalism*, The American Political Science Review, Vol. 81, No. 4 (Dec., 1987), pp. 1175-1195.

17 Mark Tushnet, Supra note 8.

18 For the discussion of thick and thin version of rule of law see David Trubek, *The Rule of Law in Development Assistance: Past, Present and Future* in David Trubek & Alvaro Santos eds., 2006, The New Law and Development: A Critical Appraisal, Cambridge: Cambridge University Press.

19 The notion of supremacy of law was famously introduced by AV Dicey in Introduction to the Study of the Law of the Constitution (8th Edition with new Introduction) (1915).

20 *See* The World Bank, *Initiatives In Law and Judicial Reform 2003*, at 1-2 (Legal Vice Presidency of the World Bank, 2003).

21 Tate, C. Neal, 1995, Why the Expansion of Judicial Power? In Tate, C. Neal, & Torbjorn Vallinder, eds. 1995. *The Global Expansion of Judicial Power*. New York: New York Univ. Press.

22 Mauro Cappelletti, *Judicial Review in Comparative Perspective*. California Law Review, Vol. 58, No. 5 (Oct., 1970), p. 1017-1053.

23 Montesquieu, *The Spirit Of The Laws,* chapters XI and XII. See also Torsten Persson, Gerard Roland & Guido Tabellini, 1997, *Separation of Powers and Political Accountability*, 112 Q. J. ECON. 1163; Martin Shapiro, 1981, *Courts: A Comparative And Political* Analysis. University of Chicago Press: United States

24 Hans Kelsen, supra note 10.

25 Tom Ginsburg, *Judicial Review in New Democracies*, Cambridge University Press 2003.

26 See Samuel Huntington, 1997, *After Twenty Years: The Future of The Third Wave*, Journal of Democracy 8: 3-12; see also Roberto Unger, 1967, *Law in Modern Society: Toward Criticism of Social Theory*, New York: Free Press.

27 Derk Bodde and Clarence Morris, 1967, *Law in Imperial China*, Cambridge Mass: Harvard University Press; See also Andrew J. Nathan, *Chinese Democracy*, Berkeley and Los Angeles: California University Press.

28 Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, Law & Social Inquiry, Vol. 27, No. 4 (Autumn, 2002), pp. 763-799.

29 "In 1997, Thailand drafted a new constitution that was poised to make far-reaching reforms in the quality of its democracy. With ambitious goals, the People's Constitution sought to structure a democratic system that would consolidate a strong check-and-balance system, strengthen political parties, and uphold political, social, and economic rights. A fully elected Senate, a party list system, and the creation of numerous independent watchdog agencies were key elements of the new Constitution. Yet by most measures, democracy in Thailand since 1997 had taken a turn for the worse. Although the rural poor finally felt enfranchised under the Thaksin regime's populist programs, in

terms of liberal values such as the rule of law, civil rights, freedom of expression, and a system of checks and balances, democracy took a heavy beating. The 1997 Constitution unintentionally provided the basis for Thaksin's monopolization of power and for a subsequent military response. The Constitution's concern with political stability ironically facilitated the consolidation of electoral authoritarianism". See Erik Martinez Kuhonta, The Paradox of Thailand 1997 "People Constitution", *Asian Survey*, Vol. 48, Issue 3 May/June 2008, pp. 373–392.

30 Ibid.

31 In 2007, Kingdom of Thailand Constitution 2007 has restored the power of Thailand Constitutional Court.

32 Rudy, et.al, 18 Years of Decentralization Experiment in Indonesia: Institutional and Democratic Evaluation, Journal of Politics and Law; Vol. 10, No. 5; 2017. Pp. 132.

33 Rudy and Charlyna S. Purba, Karakteristik Sengketa Pemilukada Di IndonesiaEvaluasi 5 Tahun Kewenangan MK Memutus Sengketa Pemilukada, Jurnal Konstitusi Volume 11 No. 1, 2014. pp.195.

34 "Indonesia's constitutional history started in 1945. Before the declaration of independence on August 17, 1945, the preparation committee for the independence had started the drafting process of the constitution. The 1945 Constitution was then enacted on August 18, 1945. In 1949 due to negotiation with the Allied Forces, Indonesian territory was divided into small states under the 1949 Constitution of the United States of Indonesia. Afterward, in 1950 Indonesia gained its total freedom and the Contemporary Constitution of 1950 was enacted mandating the making of a more comprehensive permanent constitution to a Constitutional Assembly. However, the Constitutional Assembly was considered failed in 1959 so that President Sukarno declared to go back to the 1945 Constitution. From July 1959 to August 1999, the 1945 Constitution remained in place. In 1999 to 2002 amendments were made. Although major changes have been made in the four amendments, the current constitution is officially called the 1945 Constitution."

35 Liberal democracy failed due to the lack of adequate institutional backup for democracy. See Ikrarnusa Bhakti, *The Transition To Democracy In Indonesia: Some Outstanding Problems*, paper presented in Conference, "Transition Towards Democracy in Indonesia", Hotel Santika, Jakarta, 18 October 2002.

36 Soeharto's resignation occurred in 1998 and, and the collapse of the New Order took place after 32 years in power. His presidency was taken over by B.J. Habibie. After Soeharto's downfall, people (students in particular) had an intention to realize a new democratic constitution which was accountable and had a transparency. Additionally, they intended to actualize a reform of the justice system, freedom from "KKN (Corruption, Collusion and Nepotism)" and the Indonesian Armed Forces should not partake in politics. This "early stage of political transition from Suharto to Habibie" emerges as an opening to the succeeding stage of political liberalization from authoritarianism. Ibid.

37 Article 2 Para (1) of 1945 Constitution before amendment mentioned, "The General Assembly shall consist of the members of the House of Representative augmented by the delegates from the regional territories and groups as provided for by statutory regulations."

38 Law No. 16/1969; Law No. 5/1975; Law No. 2/1985; and Law No. 5/1995 on MPR and DPR Membership.

39 Article 5 of 1945 Constitution before amendment stated as follow: "(1) the president shall hold the power to make statutes in agreement with the DPR; (2) the President shall determine the government regulations to expedite the enforcement of laws." See also Article 7 stating "The president and the vice-president shall hold office for a term of five years and shall be eligible for re-election, this provision made president can hold the presidency

without limit of term."

40 Bagir Manan, DPR DPD dan MPR dalam UUD Baru "DPR, DPD, and MPR in New Constitution", FH UII Press, Yogyakarta, Cet II, 2004.; See also Jimly Asshiddiqie, Format Kelembagaan Negara dan Pergeseran Kekuasaan dalam UUD 1945 "State Organ and Power Shift in 1945 Constitution" FH UII Press, Yogyakarta, 2004.

41 The circumstances during Soeharto's downfall were nearly similar to the Philippines' experiences when a lot of people stood along the toll road of EDSA instructing Marcos to propose his resignation, See Valina Singka Subekti, 2008, Menyusun Konstitusi Transisi "Drafting Transition Constitution, Jakarta: Rajawali Press.

42 Ibid.

43 Valina Singka pointed out from the political standpoint by asserting, "The amendment of 1945 Constitution was not by design, but more to the accident to save the '*reformasi*' and to prevent chaos of politic. It was very different with Thailand of Philippine experience on constitutional reform." Ibid.

44 Bruce Ackerman, The Rise of World Constitutionalism, Virginia Law Review, Vol. 83, No. 4 (May, 1997), pp. 771-797; See also Ran Hirschl, Towards Juristocracy: The Origins And Consequences Of The New Constitutionalism, 2004, Harvard: Harvard University Press.

45 Ran Hirschl, Ibid.

46 Komesar argued, "Institutional considerations play a central role in constitutional decisions and that they should be a central feature of any analysis of constitutional law whether descriptive or prescriptive." See Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysi,s* The University of Chicago Law Review, Vol. 51, No. 2 (Spring, 1984), pp. 366-446; Fuller's, Raz, Tamanaha and Kleinfeld "make it reasonably clear that in their view a variety of legal and institutional arrangements are compatible with most of development goal." See Lon L. Fuller, 1969, The Morality Of Law pp 44; Brian Tamanaha, 1995, *The Lessons of Law and Development Studies*, 89 AM. J. INT'L L. 470; Rachel Kleinfeld, *Competing Definitions of the Rule of Law, in* Thomas Carothers eds, 2006, Promoting The Rule Of Law Abroad Carnegie International for Peace.

47 David Deener, *Judicial Review in Modern Constitutional Systems*, The American Political Science Review, Vol. 46, No. 4 (Dec., 1952), pp. 1079-1099

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CURRENT THEORY OF CONSTITUTIONAL COURT TRANSPLANTATION

While constitutional studies have been based on the basic models from the Western world, we actually encounter an abundance of variations in the present day of the third wave democracy. Tushnet[1] gives us a framework to comprehend such different modes of transplantation of constitutional models across borders, namely, the three types of process titled "functionalism, expressionism, and bricolage."

2.1. Functionalism

Functionalists deal with the comparison of diverse political systems resulting in common functions. Comparative constitutional study can render an assistance in identifying those functions and demonstrating how distinctive constitutional provisions serve the same function in diverse constitutional systems[2]. Grounded in functionalism, definite tasks are undertaken by political institutions in which they are not uncommon for the entire governance systems. Functionalists instinctively perceive in comparative terms, for only by investigating distinctive political systems can they examine the functions common to all and the institutions serving those functions grounded in their viewpoint[3].

The censure for functionalism is that examining the prevalent functions across constitutional systems will perpetually be problematical since it unavoidably leaves out institutional details to the compared systems. Montesque[4] pointed out the censure of functionalism emerging from what he

observed in two viewpoints. The first viewpoint is that functionalist analysis perpetually leaves out a few variables having a relevance; the second is that if a finite number of additional variables are taken into consideration, the number of cases from which one probably learns apparently becomes too small to boost any functionalist generalization.

Basically functionalism is directed to mutual comparison among Western systems, which share common fundamentals, and therefore an automatic applicability of this static view on horizontal cross-border phenomena to the dynamic context of Asia is largely questioned. It is worth mentioning the critical argument by Japanese comparative law scholars saying that functionalism has to be fundamentally modified so as to incorporate non-Western contexts[5].

2.2. Expressionism

Expressionism is, on the other hand, a mode of transplantation of foreign constitutional models led and motivated by the national desire. A constitution in this expressionist mode is understood in a dynamic process giving a national people a way of forming themselves into integrated political beings[6]. For the expressivist, constitutions emerge out of each nation's diverse history and express its diverse character.

Mary Ann Glendon[7], in explaining the expressivist view, affirms that distinctions among countries are legal manifestations of divergent, and deeply rooted, cultural attitudes toward the state and its functions. Hereof, we probably presume that the constitutions of numerous nations reveal more comprehensible stories concerning which of those nations are, or that constitutions own variances in the extent to which they shape the cultures where they are placed.

2.3. Bricolage

The *bricolage*, a term that was first introduced by Claude Levi-Strauss, is the process or activity of assembling something new from whatever materials the constructor discovered[8]. The argument commences with the most tolerable suggestion mentioning that several constitutional provisions should be comprehended to cause compromises relying on no sole coherent

principle. The *bricolage* process is likely to be comprehended effortlessly when constitution-makers and interpreters see themselves in an intellectual and political world providing them with numerous concepts at hand, not all of them are associated with each other in some coherent way. As engineers, they will concentrate on sorting through concepts and assembling them into a constitutional design which is sensible grounded in numerous overarching conceptual schemes. As *bricoleurs*, nonetheless, they utilize the first thing that happens to be compatible with the immediate problem they encounter.

Given the diversity of the historical process and the contents of Asian constitutions, reflecting each historical difference of vertical relation with Western models, including those of suzerain countries, as well as the horizontal influence within the region, we cannot automatically depend on a single mode of constitutional formation basically developed in homogeneous Europe. Perhaps, a better explanatory view is obtained when the expressionism is combined with the *bricolage*.

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1 Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, The Yale Law Journal, Vol. 108, No. 6 (Apr. 1999), pp. 1225-1309.
2 Ibid.
3 Ibid.
4 Montesque, Supra Note 22.
5 *See* Yasuyuki Noda, "The Far Eastern Conception of Law," 2 International Encycropedia Of Comparative Law (1975). *See also* Tsuyoshi Kinoshita et al., *Hou-Kannen wo shushin to-suru Sekai-Hou-Bunka no Hikaku (Legal Culture in the World: Focusing on Legal Conceptions)*, 60 Hikakuhou-Kenkyu (Comparative Law Journal) (1998).)
6 Mark Tushnet, Supra Note 45.
7 Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 535 (1992).
8 Mark Tushnet, Supra Note 45.

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COMPARATIVE CONSTITUTIONAL COURT DESIGN

3.1 INTRODUCTION

Albeit the global spread of constitutional supremacy and judicial review, there are numerous noteworthy and unchanged discrepancies between American-style constitutional law and constitutional law in other countries. Those discrepancies demonstrate a reflection on the broad variances in constitutional legacies and structures, historical inheritances, formative experiences, including non-trivial distinctions in the value systems of America, Europe and other foreign jurisdictions.

The models of constitutional court design signify the manifestation of those disparities. The models are classified into two, namely American or European models[2]. Drawing a disparity can be carried out between systems of diffuse or decentralized review, in which empowering not to apply statute, which they presume to be unconstitutional; it is undertaken by the entire courts; or, it is in the systems of centralized review in which referring the question to one central court to own a ruling the constitutionality of the statute in question should be accomplished by the courts.

The United States (US) utilizes a decentralized system of judicial review; nearly all courts—state and federal courts, and undoubtedly the Supreme Court—own the power of judicial review of constitutionality which is capable of exercising over all acts of Congress, state constitutions and statutes, including the acts of the executive and the judiciary itself. Even

the constitutional validity of treaties and legislation grounded in treaties will probably be the judicial inquiry subject. Succinctly, judicial review signifies an immanent competence of the entire courts in any category of case or controversy. [3]

Table 3.1. *Between Two Models of Institutional Design*[1]

	US Model	European Model
Organ	Diffuse d	Centralized
Type	Concrete	Abstract & Concrete
Timing	A Posteriori	A Posteriori
Procedures	General	Special
Standing	Parties Involved in Real Case	Broad Range
Judges	Appointed by President	Nomination
Effect of Judgment	Bind Parties Involved Stare Decisis	Erga Omnes

The centralized judicial review system (frequently pointing out constitutional review), conversely, is symbolized by owning a mere sole institution serving as a constitutional tribunal. The adoption of judicial review has been made by a myriad of European countries following one of the varied branches of the civil law tradition (e.g., Germany, Austria, Italy, and Spain), including by nearly all of the new democracies in post-Communist Europe. In Germany, in particular, the sole function of constitutional review (Article 93 Para (1) Germany Basic Law) is fulfilled by the Federal Constitutional Court.

Most legal systems are also allowable for one or more types of judicial review of statutes; some of which are allowable before force (*a priori* or *ex ante*) is entered by the statute in question. Nonetheless, most countries make the adoption of the posteriori (*ex post*) systems of judicial review, in which review transpires after force is entered by the statute. In these circumstances,

making a further disparity should be undertaken between abstract concrete reviews. The abstract review grants court proceedings executively dealing with the constitutionality of statutes, irrespective of their solicitation in an individual case. On the contrary, concrete review grants courts to review statutory provision in which those are pivotal for their decision in a case they deal with, and to abstain from utilizing them if they are unconstitutional[4].

In the US, only a posteriori judicial review is allowed. Judicial review of legislation emerges as a power that can merely be exercised by the courts within the context of concrete adversary litigation; that is, when the constitutional issue turns to have relevancy and necessitates a solution in the decision of the case. The European model, typically delineated by the Australian Constitutional Court initially formed with the influence of Hans Kelsen[5], some scholars distinguish between the German and the French models. In the former, filing constitutional complaints can be undertaken by common citizens; the complaints are associated with concrete disputes addressing the *ex post* constitutionality of statues. Under the French model[6], constitutional cases can merely be brought by specified state actors, in which the Court can address it merely in the abstract and before the statute under review goes into effect.[7]

From the theoretical point of view, the disparities between two systems are reflected by the different conceptions of separation of power. In the American model, limitation on legislative and executive power has been achieved by recognition of a judicial branch of power commonly known as dissociation of power with checks and balances. Checks and balances within dissociation of power empower the judicial body or court with a judicial review allowing the body to check the other governmental branches. The power of judicial review would remain with them. This doctrine leads to judicial activism in the US system, since the court may involve and actively make the law through its judgment[8].

Conversely, European constitutional theory acknowledges only executive and legislative power[9]. The legislative council is a representative body, whose purpose is to advise the guardians of the interests and needs of the people. The executive power is an auxiliary body, whose only purpose is to execute the law. The strongest reason for separating the legislative and executive branches of government is their distinct and separate functions;

as each is qualified to perform a different service, and neither is qualified to perform both functions, there is no recognition of a judicial power. In this scheme, legislative power/supremacy takes over the law making power. Accordingly, Hans Kelsen suggested, "It is necessary to build a system in which constitutional review, entrusted to a single court, institutionalized not as the third branch of power but one above the other that is charged with power to ensure that state functions are exercised within the limits set by the constitution."[10]

Along with the notion of legislative supremacy, the judicial body was rigorously proscribed from making any law. It was not in line with the view of judges' law making behavior which is usually acceptable in countries under common law system. Accordingly, the constitutional court in several countries influenced by this doctrine may give judgment over constitutionality of statues or law but cannot directly be involved in making law. Hans Kelsen signalized constitutional court in this regard as "a negative legislator (Negative Gesetzgebung) distinguished from parliament as positive legislator (Positive Gesetzgebung)."[11]

As the principle of judicial review has turned to be more extensively adopted, myriads of variances in its implementation have emerges as Kelsen suggested that it is not probable if proposing unvarying design for all constitutions is undertaken. The essence of those variances are outlined as follows: (1) the power of review has been bestowed in organs other than the ordinary courts, such as constitutional courts and constitutional committees; (2) the parties having enjoyment in the right to position the question of the constitutionality before the reviewing organ range from only a few designated official organs or people to private individuals that do not necessitate being influenced by the legislation in question; (3) not only does jurisdiction of the reviewing extend to cases encompassing the constitutionality of legislative and administrative acts, but also it entails the unconstitutional activities of political parties and private individual.

3.2 ASIAN STUDIES ON CONSTITUTIONALISM

Past researches on constitutional review in Asia and other emerging areas have concentrated on the US model, in which the system of severance of powers makes the judiciary a natural actor in the political processes. Most

academic writings measure the distance of institutional design from the US model, while limited interests have been directed to each substance of constitutional review, except for descriptive introduction of limited numbers of cases appearing in the last decade[12].

Albeit recently growing numbers of works in this field, the majority of attention has been devoted to examining the structural resemblances between each constitutional text, without adequately addressing the questions of how such constitutional texts have been interpreted in the actual practice of constitutional adjudication. Particularly in the Asia region, one may recognize Thomas Ginsburg's work on comparative constitutional court covering Taiwan, Korea, and Mongolia[13]. Ginsburg's work, nonetheless, saliently discusses the origin of judicial power including its development in the early phases of democratic liberalization, and the proliferation supporting these political circumstances.

Within Indonesian scholarship circles, Jimly Ashiddiqie's and Ahmad Syahrial's[14] works on international comparison is one example of international comparative study emphasizing the basic institutional structure of constitutional court. Ashiddiqie and Syahrial were trying to compare constitutional court in 10 countries but they were not giving any hints upon the selection of the sampled countries; the work is normative and descriptive covering the history of constitutional court, organizational structure, and jurisdiction of constitutional court, while particularly highlighting the institutional uniqueness in each country.

Numerous scholars, in the meantime, made a comparison on the jurisprudence of dissimilar jurisdictions. Some only portray the disparities in case law among the countries at the doctrine level[15]. The others inspect "the jurisprudence of one jurisdiction in the light of arguments of principle drawn from another."[16] Constitutional court has been compared in numerous ways. Albeit being the institutional base of constitutional interpretation, an enormous part of earlier comparative studies have concentrated merely on the policy making in the constitutional court, in its relation to the legislature in particular[17]. Additionally, there are comparative studies concerning the judicial behavior of judges and several legal comparisons focusing on the process of constitutional litigation[18].

One notable work that may well be connected with this concern on interpretation methods in Asian constitutional adjudication would be a compilation effort from Jeffrey Goldsworthy[19] covering six federation countries given by six respected scholars: the US, Canada, Australia, Germany, India, and South Africa. The study is descriptive and explanatory, mainly describing and comparing the interpretive method that have, in fact, been employed by courts in six countries. While focusing on the interpretation issue, the institutional setting is also discussed, including how judges are appointed, and the legal culture in which they operate. Within the study, there is weakness in the issue of case control since each of the authors from different countries has been given freedom to go beyond the outline given by the editor. Albeit having weakness, the study is influential for this dissertation since it gives a general picture of interpretive methods employed by six countries and the fundamental basis for judgment style analysis.

3.3 METHODOLOGICAL APPROACH

3.3.1. Targets and Issues of Comparative Constitutionalism

While the core of study is Indonesian Constitutional Court; This book on other hand is attempting to compare four countries: "US Supreme Court, Germany Federal Constitutional Court, Japan Supreme Court, Indonesia Constitutional Court." The US and Germany are chosen since they represent two models of constitutional adjudication of common law and civil law system. Additionally, the influence of both countries upon the institutional design is undeniable. Conversely, Japan is chosen for it unique model of constitutional adjudication; the institutional structure of constitutional adjudication is the result of US model transplantation during the postwar years, while the civil law tradition of interpretation is prevailing in any legal interpretation in Japanese legal scholarship. The salient point is that, Japan has reached its success in fusing jointly a new innovative synthesis of East Asian legalism, civil law, common law, and human rights constitutionalism.

3.3.2 Comparative Basis: Two Axes of Institutional Structure of Constitutional Adjudication

The constitutional or judicial review signifies the power the court possesses in evaluating the constitutionality of the law or actions of the

public sector. This power is utilized to retain the constitution by which the people agreed live and systemize their government. Two dissimilar axes have existed: "firstly, within the common law system, the Judicial Review under the Supreme Court and the other, within the civil law system, the Constitutional Court." This section will prominently concentrate on establishing the basis of comparative study by introducing the essential aspects of the comparison from the two axes models.

The development of each constitutional review system is grounded in the diverse constitutional tradition and understanding. Those disparities denote a reflection on the extensive variances in constitutional legacies and structures, historical inheritances, and formative experiences, including non-trivial disparities in the value systems of Asia, America, Europe and other foreign jurisdictions.

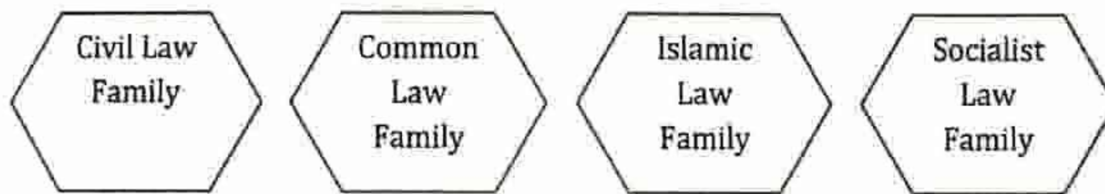

Figure 3.2. *Legal System and Classification into Legal Families*

The manifestation of those disparities is delineated in the models of constitutional court design. The models are classified into the American and the European models. Conventionally, scholars mentioned, "Those constitutional review paradigms are functioned distinctively and in a contradictory way occasionally. These classical disparities are encountered in the essence of the constitutional review (concrete or abstract), in their attribute (incidental or principal), in the court type (diffuse or concentrated), and in their effects (particular or general)." The enlargement of the American system was undertaken to render supremacy to the Judicial Power; it was stipulated by the end of the 18th Century. On the contrary, the proliferation of the constitutional court model was accomplished in the 20th Century aiming at supporting the rule of law, including the Parliament supremacy.

Table 3.2. *Target of Institutional Comparison*

Categorization	Choice of Institution
Organ	Diffused/Centralized
Type	Concrete/Abstract
Timing	A Posteriori/Posteriori
Procedures	General/Special
Standing	Parties Involved in Real Case/Broad Range
Judges	Public Election/Nomination by other Organ
Effect of Judgment	Bind Parties Involved/Erga Omnes Stare Decisis/None

The US is symbolized by the decentralized system of judicial review; nearly the entire courts – state and federal courts, and, unavoidably the Supreme Court – own the power of judicial review of constitutionality, in which, it can be exercised over "all acts of Congress, state constitutions and statutes, including the acts of the executive and the judiciary itself." Furthermore, the constitutional validity of treaties and legislation grounded in treaties will probably be the judicial inquiry subject. Succinctly, judicial review signifies an immanent competence of the entire courts in any category of case or controversy.

The centralized judicial review system (frequently pointing out constitutional review), conversely, is symbolized by owning a mere sole institution serving as a constitutional tribunal. The adoption of judicial review has been made by a myriad of European countries following one of the varied branches of the civil law tradition (e.g., Germany, Austria, Italy, and Spain), including by nearly all of the new democracies in post-Communist Europe.

Judicial review in a centralized system demonstrates a reflection on a diverse conception of the severance of power and it is grounded in a doctrine radically having a disparity with the decentralization type[20]. Countries showing their preference for this system of judicial review have a tendency to obey more substantially to the doctrine of severance of power and the legislative supremacy. Due to a phenomenon denoting numerous people presume that any judicial interpretation or invalidation statute is prominently a political one, it is occasionally perceived as the breach of exclusive power of legislature for making law. Hence, the centralized system declines to approve this power to the judiciary in general.

The essential reason for generating the severance of the constitutional court was associated with the recognition exhibiting the disparity between "constitutional review and the day-to-day work of ordinary criminal and civil courts." Judges are frequently necessitated to stipulate value-laden, quasi-political matters (e.g., whether or not a particular law or executive action renders the equal treatment for all citizens which is in line with the rule of law). Much greater discretion is exercised when those cases are decided than in the common criminal or commercial ones. It was presumed that the career judges of the continental system, functioning to render a solution for those succeeding kinds of disputes, were not probable to own the policy and political skills necessitated for constitutional review[21].

There are three preeminent reasons accounting for the adoption of the review in a rising number of civil law countries. Firstly, it deals with the conception in civil law countries of a firm severance of power among the government branches, partly expounding the centralized system of review. Secondly, it is associated with the absenteeism of the principle proportionate to the doctrine of stare decisis in civil jurisprudence making it powerless to generate a decision having a consistency. The last one is the incompatibility of the civil law judiciary assuredly establishing the necessity for a specialized court to deal with salient constitutional questions[22].

Grounded on what some commentators affirmed, the German model rivals even U.S. constitutionalism as the prominent legal system worldwide. This state of affairs is discernible in the dozens of states across Europe and Latin America adopting the German model. In Germany, the sole function of the constitutional review is fulfilled by a separate judicial body, the

Federal Constitutional Court[23]. Additionally, Italy owns a constitutional court, the Corte Constituzionale. Constitutional court does not exist in these countries; in the meantime, other institutions possess the status of the most authoritative interpreting body of the Constitution. In France, there is the Conseil Constitutionnel in which its establishment was carried out in 1958 when reforming the Constitution; and it pronounced some Bills to be in conflict with the Constitution.

Most legal systems are also allowable for one or more types of judicial review of statutes; some of which are allowable before force (*a priori* or *ex ante*) is entered by the statute in question. Nonetheless, most countries make the adoption of the posteriori (*ex post*) systems of judicial review, in which review transpires after force is entered by the statute. In these circumstances, making a further disparity should be undertaken between abstract concrete reviews. The abstract review grants court proceedings executively dealing with the constitutionality of statutes, irrespective of their solicitation in an individual case. On the contrary, concrete review grants courts to review statutory provision in which those are pivotal for their decision in a case they deal with, and to abstain from utilizing them if they are unconstitutional[24].

In the US, only a posteriori judicial review is allowed. Judicial review of legislation emerges as a power that can merely be exercised by the courts within the context of concrete adversary litigation; that is, when the constitutional issue turns to have relevancy and necessitates a solution in the decision of the case[25]. With regard to the European (Austrian or Kelsen[26] system), some scholars differentiate between the German and the French models. In the former, filing constitutional complaints can be undertaken by common citizens; the complaints are associated with concrete disputes addressing the *ex post* constitutionality of statutes. Under the French model[27], constitutional cases can merely be brought by specified state actors, in which the court can address it merely in the abstract and before the statute under review goes into effect[28].

Tracing the European experiences of constitutional review can be undertaken in "constitutional court (*Verfassungsgerichtshof*) function" in which Hans Kelsen designed it through 1920 Austrian Constitution, viewed as a jurisdictional organ, yet it had disparities in terms of its functions and attributes from the organization of the common judiciary[29]. Unlike the

American type judiciary admitting the petition caused by the conflict the two opposing parties confront with, the petition type that this constitutional court received did not totally differ from the petitions against acts of the public administration. Grounded in the principle of the *rechtsstaat*, there were numerous European states in the 19th century praising and following this kind of petition of constitutional review under Austrian Constitutional Court.[30]

Under the provision of Austrian Constitution, the access for submitting the petition to the constitutional court could merely be carried out by definite subjects. Additionally, its reviews were abstract since a concrete case was not necessitated to be brought upon; it merely needed a theoretical conflict between statute law and the Constitution. Even though constitutional law theory commonly affirms that constitutional judges taking judgment own a legislative effect, Kelsen conveyed that "constitutional court is negative legislator that is capable of putting an end to the legal force of a statute."[31]

Austrian Constitution 1920 was allowing one exception to their system of abstract review such as allowing the constitutional court itself to inspect any issues associated with the constitutionality of such legislation arising during the proceedings relating to other competence. This exception was granting it the power to raise constitutionality issues direct and indirectly related with itself when their solution has connection to the review of another type of constitutional question[32]. This kind of exception under Austrian Constitution is also allowed in Indonesia when MK decided cases that related with it.

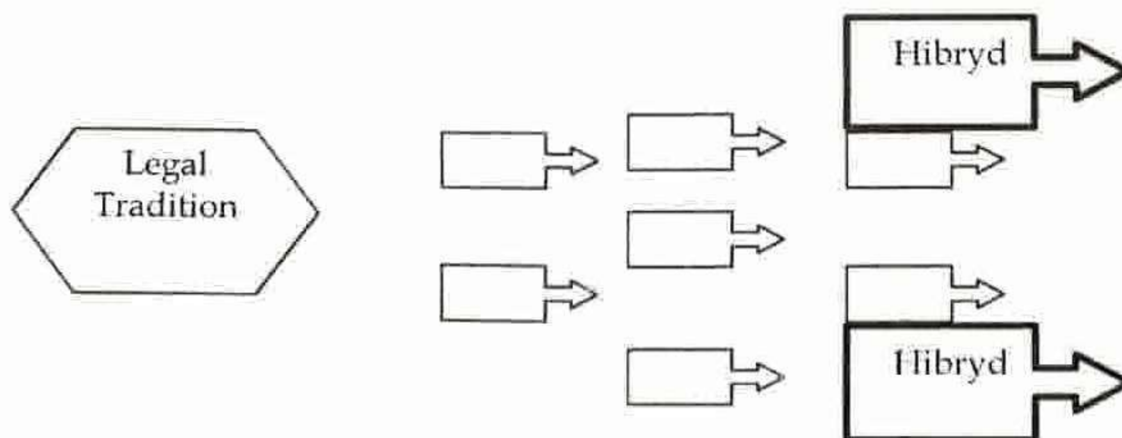

Figure 3.2. *Legal Tradition and Its Branches*

As the adoption of the judicial review principle has appeared to be more extensive, a myriad of variances in its implementation have arisen. "The majority of these variations may be summarized as follows: (1) the power of review has been vested in organs other than the ordinary courts, such as constitutional courts and constitutional committees. (2) The parties enjoying the right to place the question of the constitutionality before the reviewing organ range from only a few designated official organs or persons to private individuals who need not affected by the legislation in question. (3) Jurisdiction of the reviewing body extends not only to cases involving the constitutionality of legislative and administrative acts, but also to cases involving the unconstitutional activities of political parties and private individual".[33]

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1 Summarized from Mauro Cappeletti and Adams, Judicial Review Of Legislation: European Antecedents And Adaptations, 79 Harv. L. Review 1208 (1966); Wada, "Tairiku-gata Iken-shinsa-sei" (civil law type constitutional review), 1979; and Epstein, Knight, and Svhetsova, The Role Of Constitutional Courts In The Establishment And Maintenance Of Democratic Systems Of Government, Law & Society Review, 2001.

2 Jacob, Herbert, Erhard Blankenburg, Herbert Kritzer, Doris Marie Provine & Joseph Sanders, eds. 1996. *Courts, Law, and Politics in Comparative Perspective*. New Haven, CT: Yale Univ. Press. *See also* Finer, S. E., Vernon Bogdanor & Bernard Rudden, *Comparing Constitutions*, Oxford Univ. Press, 1995; Herman Schwartz, *The New Courts: An Overview*, Eastern European Constitutional Review 28-32, 1993; Robert F Utter, & David C. Lundsgaard, *Comparative Aspects of Judicial Review: Issues Facing the New European States*, 77 Judicature 240-47, 1994; Gerhard Dannemann, *Constitutional Complaints: The European Perspective*. The International and Comparative Law Quarterly, Vol. 43, No. 1 (Jan., 1994), pp. 142- 153.

3 As a comparison, Indonesia, the presence of the Constitutional Court has a significant influence on the product of legislation, see more at Rudy, Pembangunan Hukum di Daerah Membangun Legislasi yang Mengayomi. Bandar Lampung: AURA Publishing. 2017.

4 Gerhard Dannemann, Ibid.

5 "The Austrian Constitution of 1920 was essentially and vigorously affected by Kelsen made provision for judicial review and established Constitutional Court with jurisdiction to determine the constitutionality of a federal law. This constitutional court was regarded as the first constitutional court." See Hans Kelsen, Supra note 10; See also Hans Kelsen, Judicial Review of Legislation: A Comparative Study of Austrian and the American Constitution (1942) 4 Journal of Politic 183-200. See also David Deener, Supra note 44.

6 The development French model system was influenced by "the work of Rousseau *'volonte generale'*, the version of popular sovereignty in the hand of parliament as one pillar of separation of power. The doctrine of parliament sovereignty makes the French model only allows the review before statue goes into effect." See David Deener, Supra note 44.

7 The dominant French interpretation of the doctrine of separation of power holds that true severance bans the judiciary to have an intervention with the legislative process, particularly by way of questioning the intrinsic validity of statues, see J.W Garner, *Judicial*

Control of Administrative and Legislative Acts in France, American Political Science Review, Vol 9, pp 637-665.

8 Rafael La Porta, Florencio López-de-Silanes , Cristian Pop-Eleches, Andrei Shleifer, Judicial Checks and Balances, The Journal of Political Economy, Vol. 112, No. 2 (Apr., 2004), pp. 445-470.

9 See Mauro Cappelletti and Adam, Supra note 53; Hans Kelsen, Supra note 56; see also David Deener, Supra note 44.

10 See Hans Kelsen, Supra note 56.

11 Ibid.

12 Tate C. Neal, & Torbjorn Vallinder, ed., 1995, *The Global Expansion of Judicial Power*, New York: New York Univ. Press.

13 See Tom Ginsburg, Supra note 24; See also Tom Ginsburg, Supra note 27.

14 Jimly Ashidiqie and Ahmad Syahrial, 2006, Peradilan Konstitusi di Sepuluh Negara "Constitutional Adjudication in Ten Countries", Jakarta: Konstitusi Pers.

15 David Beatty's The Ultimate Rule Of Law Oxford University Press, Oxford, 2004; See Also Trevor Allan, Constitutional Justice: A Liberal Theory Of The Rule Of Law Oxford University Press, Oxford, 2001.

16 Sujit Choudhry, Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation, Indiana Law Journal Vol. 74:819, 1999.

17 See Ralf Rogowski and Thomas Gawron, ed., 2002, Constitutional Court in comparison: The US Supreme Court and the German Federal Constitutional Court, New York: Oxford.

18 Ibid.

19 Jeffrey Goldsworthy ed., 2006, *Interpreting Constitutions: comparative study*, Oxford University Press.

20 As a comparison, Indonesia in this case applies a decentralized state, see more at Rudy, et.al, Model Social Justice Assesment Dalam Pembentukan Peraturan di Daerah, Bandar Lampung: AURA Publishing, 2018.

21 Mauro Cappelletti, Supra note 21.

22 Ibid.

23 Ran Hirsch, Supra note 41.

24 Gerhard Dannemann, Supra note 54.

25 Ran Hirsch, Supra note 41.

26 David Deener, Supra note 44 and also Tom Ginsburg, supra 24 stating that this kind of system was essentially designed by Kelsen, and its adaption has been implemented in numerous countries.

27 See David Deener, Supra note 44.

28 J.W Garner, Supra note 58.

29 David Deener, Supra note 44.

30 Alessandro Pizzorusso, Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies, The American Journal of Comparative Law, Vol. 38, No. 2 (Spring, 1990), pp. 373-386.

31 Ibid.

32 Ibid.

33 Hans Kelsen, Supra note 56.

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INSTITUTIONAL MODE OF INDONESIAN CONSTITUTIONAL COURT

4.1 BRIEF HISTORY OF INDONESIAN CONSTITUTIONAL COURT

The establishment of the Constitutional Court was a result of a long debate on having a constitutional adjudication in Indonesia. The debate started in 1945, when the first Constitution was drafted[1], and occurred again in 1970 during the making of Law Number 14 of 1970 regarding the Judicial Power. The debate centered on whether or not to grant the power of constitutional adjudication to the Supreme Court as in the US model[2]. At that time, the Supreme Court was not granted the power of constitutional review with consideration that 1945 Constitution does not have the provision of constitutional review. In addition to that, Indonesia adopted a distribution of power principle along with legislative supremacy tradition. According to these principles, the control mechanism is not allowed among the branch of power[3].

However, during the amendment process after the departure of authoritarian regime, the debate upon constitutional review has been expanded to the possibility of constitutional adjudication in the form of German type Constitutional Court[4]. Initially, there were three options of institutions proposed to be granted with the authority to carry out judicial review of laws against the 1945 Constitution, namely the People General Assembly (MPR), the Supreme Court (MA) and the Constitutional Court (MK). The notion of granting the authority to MPR was ultimately ruled out

because, aside from the fact that the MPR was not positioned as the highest state institution anymore, a group of law and constitution experts were not constituted, but instead representatives of organizations and political interest groups[5].

During the amendment, NGO coalition consisting of, among others CETRO, AJI, ELSAM, Rector Forum, etc. had been consistently providing the input for the amendment, upon both the substance and the procedural aspect of constitution amendment.

The combining force of more than 60 NGOs in Indonesia formed this coalition during that time[6]. The contribution from NGOs was tremendously significant in the process of amendment, such as in building public issue by holding the public discussion regularly and giving the recommendation to the constitutional amendment committee. In the specific issue of human rights, they were giving the example of constitutional provision on human rights from other jurisdictions[7].

Several members of the constitution committee were very concern upon the enthusiasm of NGOs and they were afraid that the involvement of NGOs had been influenced by the International donor hidden agenda of constitutional provision transplantation. Amin Arjoso from PDIP (Indonesia Democratic Party) and A.S.S. Tambunan had voiced their concerns that the amendment process was the problem of our nation and the process should have not been influenced by foreign transplantation of democratic values and American self-interest[8]. For example CETRO, funded by USAID, was actively influencing the committee through advocating and socialization of bicameral system and direct election for presidency. Other NGOs like IDEA, IFES, NDI, IRI, funded by UNDP, were actively suggesting the electoral reform[9].

Albeit the abundant interest in the amendment process from NGOs, little has been known about their involvement on the specific provision of constitutional court. During the process of amendment, Ikadin (Indonesian Advocates Association), YLBHI (Indonesian Legal Aid), and PBHI (Indonesian Legal Aid Association) have submitted their suggestions on the judicial power chapter. Both NGOs have stressed the importance of MA independency and raised an issue of judicial review as the part of MA

jurisdiction. The MA independency as a part of judicial independency should be prioritized during the amendment process[10].

Albeit highly opinionated factions within committee members[11], NGOs and legal scholars[12] to give the power of judicial review on the MA[13]; the notion of granting the authority to review laws to the MA finally could not be accepted either, the first reason was because the MA itself had excessive workload in handling cases that fell under its competence. Zain Badjeber from the PPP (Development Unity Party) Faction had argued that the excessive workload of the MA should be one point of argument to consider giving more thought to, so as to prevent future problems[14]. The second reason was the deteriorated image of the MA from the point of view of Indonesian citizen.

On the contrary, the introduction of a separate constitutional court was unheard of during the beginning sessions of amendment process; it was initially delivered in the 32nd sessions of ad hoc committee I after a member of the committee came back from a regions and study trip. The member from the Regions Representatives Faction argued that constitutional court is suitable with the continental legal system while pointing out Korean and Thailand constitutional courts as an example. PDI Faction added the point of argument that the MA should be the judicial power handling the pure matter of law while Constitutional Court should be the judicial power handling more political issues[15]. This suggestion of separation is very much similar to the idea of Germany Federal Constitutional Court.

During the 41st session, the voice to establish constitutional court was stronger. Five factions from eleven factions within the constitution committee had submitted the suggestions for constitutional court establishment. The proponents of constitutional court argued that constitutional court should be given the constitutional review power in addition to other authority and several constitutional law scholars had argued the need for constitutional court establishment within the judicial system. Even the public support for constitutional court establishment was stronger during the last minutes of committee conclusion.

In their last presentation, an expert team had given two alternative suggestions about the establishment of constitutional court. One option was

to establish the constitutional court under the authority of MA; the other was to establish the constitutional court separately from the MA. However the recommendation from an expert team was to establish the independent constitutional court outside the MA considering that the constitutional court in the future may encounter the case of State Organs conflict in which the MA may be involved[16].

Later at the end of the session, authority to review law against the 1945 Constitution was eventually granted to a separate institution, namely the MK as one of the actors of judicial power. In 2001, the proposal to have a German Model of Constitutional Court proposed in 2000 was accepted. The authorities the MK owns encompass: "(1) reviewing laws against the Constitution, (2) hearing disputes over the authorities of state institutions whose power is rendered by the Constitution, (3) overseeing the dismissal of political parties, (4) hearing disputes associated with the results of a general election, and (5) conveying the notion on the president and/or the vice-president impeachment established individually from the MA."

As one pillar of judicial power, MK independency has been guaranteed by article 24[17] (1) of Indonesian 1945 Constitution. Grounded on the article III of Transitional Rules of 1945 Constitution 4th Amendment, the deadline for the constitutional court establishment was 17th August 2003. For that reason, MA held constitutional court authority. During the transitional period, MA received 14 constitutional cases, but MA judged none of them[18].

In order to fulfill constitutional order upon the MK establishment, the government, together with DPR drew up MK law. The DPR having its responsibility for drafting legislation commenced working as early as 2001[19]. Unfortunately, the time taken to formulate the draft was not succinct until the draft found its way into the plenary session of the DPR, in which it was agreed as a DPR law initiative, and even longer until setting up special committee for further considerations was accomplished. By that time it was already May 2003; only three months left until the constitutional deadline of August 17th, 2003. At the end of June, the Ministry of Justice and Human Rights submitted a list of 355 items perceived as problematical in the law[20].

It was speculated that the deferment was intentionally carried out since one of Special Committee members and Golkar Party Slament Effendy

Yusuf was quoted as uttering: "The government really seems intent on not bringing about the MK at this moment, as it considers such an authority of the MK as huge"[21]. However, the Justice Ministry's representative Abdul Gani proposed a schedule on how the constitutional deadline could be fulfilled. Grounded on what he calculated, 30 days were necessitated by presuming that 10 items would be expounded in each session[22].

A discussion marathon was held, yet the recess for parliament was called off. On August 6th, 2003, nearly a week later than scheduled and in the middle of the annual session of the MPR, the extraordinary plenary session to pass the law ultimately took place. Tough considerations went on during the season n before reaching the agreement at midnight. The ultimate two challenged items were the educational requirements for constitutional judges and a transient constraint of the court's jurisdiction. Regarding educational requirements, the entire factions, except one, conveyed their agreement to the government in terms of stipulating a compulsory law degree. Representatives of the Reform Faction, nonetheless, picked an extensive access to the bench. They probably perceived the example of neighboring Thailand in which reserving three out of the 15 seats was intended to political scientists. In the end, nevertheless, the Reform Faction's representatives gave in[23].

The other challenged issue was associated with the scope of the MK's jurisdiction. Again, there was merely one faction refusing to go along with the government's position, this time PDI-P. The prominent standpoint was that "the judicial review authority of the court would have a constraint to the laws passed after the First Constitutional Amendment of October 19th, 1999." Without this constraint, the court would probably be filled with applications for judicial review. The distinct standpoint was conveyed by PDIP. Its spokesperson, Zaimal Arifin, uttered, "We think that the Constitutional Court has the right to review all laws, without limitation."[24]

With only four days left until the deadline given by the 1945 Constitution, the formulation of the law had been agreed by both the government and DPR on 13th August 2003 and legally announced by former President Megawati Soekarnoputri in the form of "Law No. 23 Year 2003 on Constitutional Court." At that time, Indonesia was the 78th country forming a constitutional court institution and the first in the 21st century[25].

8 years after establishment, Constitutional Court Law No. 24 Year 2003 has been amended partially thorough Law No. 11 Year 2011. After 8 years, Apparently, not all people regarded constitutional courts in a bright light. In particular, the constitutional review function of constitutional courts has been subject to criticism as it has a conflict with the concept of parliamentary sovereignty. From a democratic theory standpoint, it is perceived as problematical in which the power of abrogating legislation enacted by democratically legitimized legislators is wielded by a small group of people with no well-known mandate.

Alexander Bickel[26] has termed it the counter majoritarian difficulty reminding that it has emerged as the central concern of normative scholarship on judicial review for decades. Linked with this normative problem are the frequently heard fears that a constitutional court, envisaged by its proponents to limit the power of other constitutional organs and might itself turn into a super body. Even not expressed by the DPR itself, the case of the amendment is regarded as the limitation of this highly regarded institution in Indonesia.

The salient points of amendments raised here can be summed up as follows:

1. The amendments made it clear that the MK does not have the power to issue verdicts that are ultra petita. It demonstrates that the MK will be banned from determining a matter it in which has not been instructed to make a decision.[27]
2. Further amendments view the inclusion of a lawmaker and a member of the "Judicial Commission on Honorary Council for the MK." Overseeing, including inquiring into the ethical conduct of officials and judges emerges as its goal.[28]
3. A third amendment would preclude the court from altering articles in a law; it deemed unconstitutional. The whole law can be thrown out, or certain articles can be called off, yet the regulation in question cannot be clarified.[29]

Reacting to the enactment of the law, several scholars and lawyers argued that several provisions above may limit and constrain constitutional court in the future. They argued that the amendment of law was the DPR way to limit MK power. Ultra Petita limitation will limit the court interpretation

and bring back the judges to the role of law voice. Following the debate is the petition to ask MK to judge the unconstitutionality of several articles above.

MK in its judgment No. 49/PUU-IX/2011[30] revoke several articles above considering that those articles may impede the consolidation of democracy and rule of law in Indonesia by limiting the authority of the court. The court departs from the initial task given by constitution to pursue the constitutional supremacy in dealing with the case. This is first test from the legislative branch to constrain court function.

4.2 CONSTITUTIONAL ADJUDICATION ORGAN

The provisions regarding MK, together with those on the Judicial Commission, were added to the Constitution during the third amendment in 2001. The amendments to the 1945 Constitution[31], aimed at realizing a democratic constitutional state grounded in the constitutional supremacy principle, will probably encounter the similar fate to the 1945 Constitutio. Nonetheless, it won't occur if there is a constitutional control mechanism guaranteeing the constitution implementation in the life of people, the nation, and the state.

Indonesia established two branches of judicial power under MA and MK. Constitutional adjudication follows the civil law pattern by generating the centralized Kelsenian model of constitutional court outside of the regular judicial establishment[32]. Hence, MK is viewed as the independent branch of judicial power beside the MA with dissimilar jurisdiction pursuant to article 24 (2) Indonesian 1945 Constitution:

"The judicial power shall be implemented by a MA and judicial bodies underneath it in the form of public courts, religious courts, military tribunals, and administrative courts, and by a MK."

4.3 TYPES AND TIMING OF CONSTITUTIONAL ADJUDICATION

Pursuant to Article 24C of the 1945 Constitution, the MK has four authorities, namely to: "(1) conduct judicial review to ensure that laws are in compliance with the Constitution; (2) make decisions in disputes related to the authority of state agencies the authority for which is bestowed by the Constitution[33]; (3) make decisions on the dissolution of political parties[34] and;

(4) Resolve disputes related to the results of general elections[35]." MK is also necessitated making decisions as to DPR's opinions associated with alleged violations the president or the vice President committed in an abdication under the 1945 Constitution[36].

MK authority of reviewing law is perceived as abstract review allowing court proceedings concerned prominently with the constitutionality of statutes, irrespective of its implementation in an individual case. Nonetheless, the petition should demonstrate the relation on "how the law enactment impairs the constitutional right." The timing of the constitutional review is presumed as posteriori denoting that the statue question can be reviewed only after it is passed by legislature.

Apart from performing constitutional review of law against constitution in the form of abstract review as its main duty, MK is also granted with the authority to hear disputes on general election results and on the authorities of state institutions whose authorities are granted by the constitution, as well as to decide on dissolution of political parties. Since 2008, the MK authorities have also included hearing disputes on regional head general election results. The last three jurisdictions of the court are considered as the concrete type since they require the concrete case to be presented in front of the court.

The jurisdiction does not involve constitutional complaint as regularly conducted in Germany. MK judges have raised the growing need for the constitutional complaint mechanism since the fact that many constitutional rights that are impeded may not fall under the authority of constitutional court or any other judicial mechanism[37].

4.4 THE PROCEDURES OF CONSTITUTIONAL REVIEW OF LAW[38]

One of the MK authorities is to carry out constitutional review, among others to inspect, justify, and determine petition of constitutional review of law both formal[39] and material[40] against the 1945 Constitution of the Republic of Indonesia. It has special procedures as regulated in "Law No. 11 Year 2011 on the Amendment of Law No. 24 Year 2003 on MK and based on Constitutional Court Regulation (PMK) No. 06/PMK/2005 on The Procedures of Constitutional Review of Law."

The petition shall be made in writing in Indonesian language by the Petitioner or its attorney-at-law encompassing the details on the petition reasons which include[41]: "(1) the Court's authority; (2) the legal standing of the Petitioner specifying the details of the Petitioner's assumption on either his/her constitutional rights and/or authority having been disadvantaged by the enactment of the law being reviewed; (3) the reasoning factors of petition for constitutional review which must be described clearly and in detail."

The summary of the constitutional case registration and notification in terms of constitutional review is expounded as follows[42]:

1. Complete and requirements-complying petition shall be registered in the Constitutional Court Registration Book (BRPK) and labeled with its respective case number.
2. Issuing a certificate as the written evidence of case registration shall be carried out by the Court Registrar.
3. The Court shall present the copies of the petition to the DPR and president respectively, through a letter undersigned by Court-Registrar within at least 7 (seven) working days of the petition being registered in the BRPK.
4. Informing the MA shall be carried out by Court through a letter signed by the Chief Justice notifying the constitutional review of certain law, and request the MA to terminate "the constitutional review of laws and regulation under the law being reviewed as specified in article 55 Law No. 24 Year 2003 on the MK, within at least 7 (seven) working days of the petition being registered in the BRPK."
5. Court Bailiff forwards the copy of petition and notification. It shall be proven by the records of delivery.
6. In the event exhibiting that the petitioner withdraws the the petition registered in the BRPK, issuing an "Annulment Certificate of Petition Registration" shall be undertaken by the Court Registrar while in the meantime returning all the petition documents to the Petitioner.

The the constitutional case hearing in terms of constitutional review is summed up follows[43]: "(a) the Court Registrar forwards the registered case documents to the Chief Justice to determine the composition of Panel of Justices assigned to the examination of the case after the Court Registrar

appoints the Substitute Court-Registrar; (b) the chairman of Panel of Justices shall, within 14 (fourteen) working days of the petition being registered in BRPK, set up the first hearing session; (c) the stipulation of court hearing specified in paragraph (2) is notified to the Petitioner and announced to the public; (d) announcement prescribed in paragraph (3) shall be displayed in a specially designed announcement board for that purpose and also published in the Constitutional Court's website as well as in printed and electronic media."

The session usually starts with a preliminary hearing, in which the judges would examine the petition to make sure that all requirements are fulfilled before the case is tried. The preliminary hearings are usually conducted not in full bench. The hearing then begins with the presentation about the case by the petitioner or his/her lawyer. Grounded in the MK judges[44], "Pre-trial advice as the authority and rights of the MK judge is important to make the petition better and in some degree may be the device to avoid debatable ultra petitum given by constitutional court."

Afterward, the MK invites the government and the DPR, as the lawmakers according to Constitution, to present their arguments. Then experts from both the petitioner's and from the government and the House's sides are heard[45].

During the session, any organizations may file a submission to be heard in session as indirectly related party insofar as they can show their connection with the case and their legal standing. There is no limitation upon how many parties may be involved with the judicial review process as long as the parties can present the legal relation with the case[46]. The indirectly related parties would be heard after all experts from the Petitioner's side as well as the government's and the DPR sides are heard. After all hearings, the judges will decide on the case. Dissenting opinion is allowed[47].

The first ground of the review will be associated with "whether the required formality has been fulfilled and the Act being reviewed emerges as a product of competent and authorized organ."[48] The second ground will be grounded in a question of "whether or not the substance of the law is in line with the values and principles contained in the constitution as legal ideals of the people in the objective of their will to create a State."[49]

4.5 STANDING

The Petitioner of constitutional review of law against the 1945 Constitution may be:[50] "(1) any individual person as an Indonesian citizen or a group of people having the same interest; (2) a Union of Customary Law Community provided that it still exists and complies with the society development condition and the principles of the Unitary State of the Republic of Indonesia as regulated by Laws; (3) public or private legal entity; (4) State institution."

The drawback the MK judges confessed is saliently within the constitutional court proceeding encompassing a vague limitation on the legal standing for Adat community[51]. In assisting this community, the court encounters another way in addressing the Adat community constitutional question without bringing them as a party with legal standing[52]. It happened in the Noken case discussed later in next chapter.

4.6 JUDGES

The MK encompasses nine judges; three of them are selected by DPR. Three judges are appointed by the government, and MA selects the other three. There are no complete provisions on the series of activities in selecting the candidate judges in each institution. However, there is an obvious provision that "nomination of constitutional judge candidates shall be undertaken in a transparent and participatory manner. The term of office of a constitutional judge is five years, following which he/she may be re-elected for only one subsequent term."[53]

The requirements for holding the office of justice should be: "(a) to possess a strong integrity and good personality; (b) just; and (c) a statesman who has sufficient knowledge of the Constitution and state administration." Law number 8 Year 2011 on the Amendment of Law No. 24 of 2003 MK adds these requirements for candidacy with: "(a) must hold Indonesian citizenship; (b) must hold at least a doctoral degree; (c) must be aged at least 47 (forty seven) years old at the time of appointment and a maximum 67 (sixty seven) years old; (d) must never have been imprisoned based on enforceable court decision for committing a crime punishable by at least 5 (five) years of imprisonment; (e) must not have been declared bankrupt by

court decision, and (f) must have experience in the field of law for at least 15 (fifteen) years."

4.7 DECISION

The decision of MK is considered as *erga omnes* binding on all the parties within the legal system. "The decision shall be made in deliberate meeting in the presence of at least 7 (seven) Constitutional Justices and shall be read/ pronounced in the plenary, publicly open session attended by at least 7 (seven) Constitutional Justices. Any opinion of the Constitutional Justices differing from the final decision shall be written down in the decision, unless the concerned justice(s) state otherwise"[54]. The MK, however, does not have law making power as signalized by Kelsenian Constitutional Court; it merely acts as negative legislator by giving the works upon law making into the hands of the DPR. It poses some problems in some cases where the need for law revision is urgent but the law making process is slow.

The injunction of constitutional review decision may be given as follow[55]:

1. **Declare that the petition is to be denied,** in the event that the petition does not satisfy the requirements as prescribed in Article 56 (fifty-six) paragraph (1) and (2) of Law Number 24 of 2003[56].
2. **Grant the Petitioner's petition**
   - Declare that the material content of the paragraphs; articles; and/or parts of the said Law contravenes the 1945 Constitution;
   - Declare that the material content of the paragraphs; articles; and/ or parts of the said Law has no binding legal force, on the ground that the Petitioner contemplates reasons as specified in Article 56 (fifty-six) paragraph (2), paragraph (3), and Article 57 (fifty-seven) paragraph (1) of Law Number 24 of 2003.[57]
3. Grant the Petitioner's petition:
   - Declare that the establishment of said Law does not comply with the law-establishing requirements based on the 1945 Constitution.
   - Declare that law does not have binding legal force, on account of the fact that the Petitioner contemplates reasons as specified in Article 56 (fifty-six) paragraph (4), and Article 57 (fifty-seven) paragraph (2) of Law Number 24 of 2003[58];

4. **Declare that the petitioner's petition is rejected,** on account of the fact that the Law proposed to be judicially reviewed does not contradict the 1945 Constitution, both in terms of its formation and its partial as well as entire material content.

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1 See chapter I for the history of Indonesia constitution.

2 This debate signified the continuance of the debate during the constitutional making process in 1945. The debate dealing with the power of the judiciary in evaluating the constitutional validity of legislation was prolonged. M. Yamin conveyed that vesting this authority in the Supreme Court should be carried out. On the contrary, as affirmed by Soepomo, this authority was merely proper in the case of a system supporting a severance of authority (the *trias politica* concept). The 1945 Constitution did not espouse this system. Hence, having authority over the legislature was inappropriate for the judiciary. The 1945 Constitution was aimed at forming extensive outlines, and its interpretation could be perceived in distinct fashions. If a conflict associated with proposed legislation was encountered, resulting out of political deliberations appeared to be a possibility. Accordingly, for the Supreme Court, holding this authority would not be in Indonesia's national interest. As mentioned by Supomo, in countries such as Austria, Czechoslovakia, and Germany, vesting this authority did not occur in the Supreme Court, but rather in a special court in which adjucating on constitutional issues emerged as its salient function. In the meantime, an inadequate number of legal experts were found, and the experience in terms of wielding this authority was not entirely encountered in them. Eventually, the BPUPKI and the PPKI declined the proposal in granting the Supreme Court judicial power over the 1945 Constitution. See "Documentation of the proceedings of the Explorative Council on Preparatory Efforts for Indonesia's Freedom", May 28-June 1 & July 10-17, 1945 and of the Committee for the Preparation of Indonesia's freedom, August, 18-22, 1945.

3 See Zainal Arifin Husein, Judicial Review di Mahkamah Agung: Tiga Dekade Pengujian Peraturan Perundang-undangan (Judicial Review in Supreme Court: Three decades of Judicial Review), Rajawali Pers, Jakarta, 2009.

4 "Members of the MPR, in the change of constitutional amendment realized that several states had lately introduced constitutional jurisdiction into their system of government, among others Thailand and South Korea. Study tours abroad seemingly have further invigorated their conviction that constitutional jurisdiction emerged as a salient component in a system grounded in the severance rather than the integration of powers." See Mahkamah Konstitusi, 2008, Comprehensive Record on Amendment of 1945 Constitution: Book VI on Judicial Power, Constitutional Court Secretariat General.

5 "One of the impetuses for the debate concerning the notion of establishing the Court was the controversial impeachment of President Abdurrahman Wahid in 2000. He was unseated grounded in political reasons, and it was stipulated in a political forum grounded on the votes dominating it. Amid the controversy surrounding the impeachment of Abdurrahman Wahid, a notion was put forward to draw up a constitutional arrangement dealing with impeachment procedure, so that the president accused of committing a crime could be brought before a court of law, rather than a political forum (e.g. MPR)."

6 Mahkamah Konstitusi, Supra note 115.

7 Ibid.

8 Ibid; See also Dr. Darsono P, 2006, Ekonomi Politik Globalisasi "Globalization of Political Economy", Jakarta: Diadit Media.

9 Valina Singka Subekti., Supra note 38.
10 See Mahkamah Konstitusi, Supra note 115.
11 The strong proponents of giving judicial review in the hand of Supreme Court were Reform Faction, Golkar Party Faction, and Police/Army Faction. Ibid
12 Legal scholars had been divided between the proponent of Supreme Court and Constitutional Court, Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
17 The judicial power shall be independent and shall possess the power to organize the judicature in order to enforce law and justice.
18 Mahkamah Konstitusi, 5 Tahun Mahkamah Konstitusi (5 years Constitutional Court), Constitutional Court Secretariat, 2008.
19 Ibid.
20 Petra Stockman, The New Indonesian Constitutional Court A: study into its beginnings and first years of work, Hanns Seidel Foundation, 2007.
21 Saldi Isra, Satu Tahun Sang Penjaga Konstitusi, in: *Menjaga Denyut Konstitusi. Refleksi Satu Tahun Mahkamah Konstitusi*, ed. by Refly Harun, Zainal A.M. Husein & Bisariyadi, Jakarta 2004.
22 Petra Stockman, Supra note 131.
23 Ibid.
24 Ibid
25 Mahkamah Konstitusi, Supra note 129.
26 Alexander Bickel, Less Dangerous Branch, Bobbs-Merrill, 1962.
27 Article 45A Law No. 8 Year 2011 on Amendment of Law No. 24 Year 2003 on MK.
28 Article 27A (2c), Article 27A (2d), Article 27A (2e) Law No. 8 Year 2011 on Amendment of Law No. 24 Year 2003 on MK
29 Article 59 (2) Law No. 8 Year 2011 on Amendment of Law No. 24 Year 2003 on MK.
30 The judgment is in bahasa version and translated by author, can be read and downloaded from: http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_49%20PUU-telah%20baca.pdf
31 Valina Singka has pointed out that from the political standpoint, the amendment of 1945 Constitution did not emerge intentionally; it was associated with to saving the *reformasi* instead, including precluding chaos of politic. It was totally dissimilar to Thailand of Philippine experience on constitutional reform. See Valina Singka Subekti, Supra note 38.
32 The centralized system of constitutional review, designed by Hans Kelsen for Austria has been pivotal in the recent wave of democratization, Hans Kelsen, Supra note 56.
33 The petitioner having legal standing in such a dispute is the State's institution deriving its authority from the Constitution and has direct interest in the disputed authority. 34 See Law No. 24 Year 2003 on MK as amended by Law No 11 year 2003 on MK.
35 The petitioner having legal standing in such a case is the Government i.e. Department of Justice, basing its petition on ground that "ideology, principles, programs and activities of a definite political party contravenes the 1945 Constitution." If the petition is not declined and if it is declared by the court judgment, the Constitution will unavoidably contravened. Additionally, the political party will be terminated, and nullifying its registration will be the thing the Government undertakes. Ibid.
36 "Filing the petition will be undertaken by candidate of Regional Representative Council, the pair of candidate for presidency/vice presidency, and political party partaking in in the general election. It is aimed at making efforts in challenging the decision of the

General election Committee (KPU) on the result of national general election affecting the determination of the winner candidate and the number of seat the political party attains serving as the KPU participant. The petitioner provides an explanation and demonstrates the errors found in the vote computation the KPU carried out, including the accurate computation grounded in the petitioner in which the declaration is undertaken by the Constitutional Court. Ibid. See also Law No. 12 Year 2008 on Local Government."

37 See Article 24 (2) Amended Constitution 1945.
38 Interview with MK Chief Justice Mahfud MD in Lampung on 6th August 2010.
39 Based on The Constitutional Court Regulation (PMK) No. 06/Pmk/2005 on The Procedures of Constitutional Review of Law.
40 Formal constitutional review signifies a constitutional review associated with the enactment process of law and others excluding the materially constitutional review, See article 4 (3) of PMK No. 06/Pmk/2005.
41 Material constitutional review signifies a constitutional review on the material content of the articles, sections and/or the sub-section /part of the Law considered violating the 1945 Constitution, See article 4 (2) of PMK No. 06/Pmk/2005.
42 See article 5 of PMK No. 06/Pmk/2005.
43 See article 7 of PMK No. 06/Pmk/2005
44 See article 8 of PMK No. 06/Pmk/2005.
45 Interview with MK Chief Justice Mahfud MD and MK Justice Maria Farida in August 2010.
46 See article 10-30 of PMK No. 06/Pmk/2005 for the detail procedures of trial session.
47 Interview with constitutional court judges during august 2010.
48 Ibid.
49 See formal judicial review supra note 150.
50 See Material Judicial Review supra note 151.
51 See article 3 of PMK No. 06/Pmk/2005.
52 Interview with constitutional court judges during august 2010.
53 Ibid.
54 Law number 8 Year 2011 on the Amendment of Law No. 24 of 2003 on MK.
55 See article 31-32 of PMK No. 06/Pmk/2005.
56 See article 36 of PMK No. 06/Pmk/2005.
57 This article essentially regulates jurisdiction and proceeding requirements.
58 Materially contravenes constitution.
59 Formally contravenes constitution.

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CONSTITUTIONAL COURT IN COMPARATIVE ANALYSIS

5.1 ANGLO AMERICAN SUPREME COURT

In the Constitution, Article III, sections 1 and 2, describe the composition of the federal judiciary and the scope of its power:

> "Section 1. The judicial Power of the United States [sic] shall be vested in one supreme [sic] Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme [sic] and inferior Courts, shall hold their offices during good Behavior [sic], and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in office."
>
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — [between a State and Citizens of another State; -] between Citizens of different States; — between citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects]. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme [sic] Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme [sic] Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

5.1.1 Constitutional Adjudication Organ

Supreme Court has the final authority as to the meaning of the Constitution. This power typically goes under the name judicial review. As usually understood, it is the principle by which the Supreme Court can declare an act of the executive branch or a law of the legislative branch unconstitutional. Since the power is not found in Article III, sections 1 and 2, a question that naturally comes up is: what is the source of this power? The answer usually given is that in the case of Marbury v. Madison[1], which was decided during President Thomas Jefferson's first term of office in 1803, the Supreme Court declared that it had the final say as to the Constitution's meaning. The Chief Justice, John Marshall, asserted in that case, "It is emphatically the province and duty of the judicial department to say what the law is."

In actuality, it was not until 1958 in the case of Cooper v. Aaron that the Supreme Court really asserted its exclusive authority to determine the meaning of the Constitution, but it used Marbury v. Madison to defend this position:

> "Article VI of the Constitution makes the Constitution the supreme Law of the Land. In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as the fundamental and paramount law of the nation declared in the notable case of Marbury v. Madison, 1 Cranch 137, 177, that it is emphatically the province and duty of the judicial department to say what the law is. This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

A primary attribute of the American model of constitutional review is the decentralization that it embodies. No single court monopolizes the power of review. Naturally, a system of decentralized review requires some mechanism that can ensure consistency and coherence. In common law countries, this mechanism consists of the hierarchical organization of the judiciary coupled with the possibility for appeal and the principle of stare decisis. The appeals process ensures that litigants who lose but expect a more favorable outcome in the appeals court face incentives to appeal lower court verdicts. Stare decisis obliges lower courts to follow the established

precedents of higher courts. As a result of the interplay of both components, the American model lodges ultimate judicial authority in the Supreme Court, which stands at the apex of the judicial hierarchy. But it does not grant this court exclusive jurisdiction over constitutional questions.

5.1.2 Type and Timing of Constitutional Review

A second central feature of the American model is the requirement that courts review legislation in the context of a case or controversy. In this sense, the exercise of constitutional review under the American model is incidental to the resolution of a specific dispute that has reached the court.

5.1.3 Procedures

Usual judicial procedural law (parties autonomy in evidence) but the role of *amicus curiae* is increasingly admitted.

5.1.4 Standing

In order to decide a constitutional question, a court in the American model must first be confronted with a concrete dispute between two parties. Hence, the legal standing for the constitutional review is parties involved in concrete dispute.

5.1.5 Judges

The US Constitution protects judicial Independence in US; article III section 1 state as follows:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office ..."

Article II of the US Constitution stated, "The president of the United States appoints justices by and with the advice and consent of the Senate." Presidents mostly nominate candidates extensively sharing their ideological standpoints though a justice's decisions will probably end up being contrary to what the president expects. Due to the fact the Constitution does not

set the qualifications for service as a justice; it is probable for anyone to be nominated by a president, subject to Senate confirmation.

5.1.6 Decision

Effect is limited to the parties involved in concrete cases, but there is the effect of Stare Decisis.

5.2 GERMAN FEDERAL CONSTITUTIONAL COURT

5.2.1 Constitutional Adjudication Organ

Paving the path for an autonomous and independent third power was successfully pursued by the the constitutional movement of the 19th century. At the end of the 19th century in Germany, there was reinforcement for the judiciary position when checking acts of administration and declaring them unlawful were carried out by the judges since they owned a power for that. Establishing the administrative branch of the judiciary was accomplished between 1863 and 1875. Other branches (e.g. the finance courts) were ultimately established in 1919, the labor courts in 1927, and the social jurisdiction in 1951[2].

In the meantime, developing a judicial review system was also begun by judiciary in which assessing the constitutionality of the civil law was the thing they carried out. The development stage was initially commenced by encompassing a formal analysis in which examining the legality of the law's creation and structure was the activity the judiciary accomplished. After the World War I, the second step of the review was also undertaken, namely "performing an analysis on the substantive contents of the law for compatibility with the constitution." Ultimately, constitutional jurisdiction was possessed by the judiciary allowing it to perform a checking on the law in formal and substantive ways. The old form of the bill for the sovereign had now become a bill for "the Federal Constitutional Court (Art. 100 Basic Law) in which authentic interpretation took place", and it became the ultimate arbiter on matters of interpretation[3].

On September 1, 1948, less than four years after the unconditional surrender of Nazi Germany to the Allied Nation, a convention charged with drafting a constitution for a West German state convened in Bonn. Following

the Federal Constitutional Court." The impeachment procedure emerges as another task in assigning the court. Either legislative chamber, upon the vote of two-thirds of its members, may impeach the Federal President before the FCC for willful violation of the Basic Law or other federal legislation.

5.2.2 Types and Timing of Constitutional Review

Besides having a monopoly over the resolution of constitutional questions, constitutional courts, in Kelsen's model, are typically endowed with the power in deciding constitutional questions in the absenteeism of a concrete dispute. Under proceedings of abstract judicial review, certain political actors are entitled to appeal to the court to rule on the constitutionality of a statute immediately following parliamentary passage or carried out in Posteriori timing. Accordingly, abstract judicial review proceedings open up the important possibility of immediate constitutional challenges to decisions taken in the political process[12].

5.2.3 Procedures of Constitutional Review and Constitutional Complaint

The procedures of the Court are determined by the Basic Law and by complementary federal statutes, particularly the FCC Act. A prominent characteristic of most European constitutional courts is the remarkably broad jurisdiction they enjoy, coupled with open rules of access enabling a wide variety of actors to raise constitutional questions before the court. Typically, three types of proceedings dominate the docket of constitutional courts: referrals of constitutional questions by lower courts (concrete constitutional review), complaints by individual citizens (constitutional complaints), and abstract proceedings initiated by specified political actors (abstract constitutional review)[13].

Not all European courts allow individuals to challenge the constitutionality of governmental action directly in front of the constitutional court. However, where such constitutional complaints are possible, they typically generate, by far, the greatest number of cases on the court's docket. This is true in Germany, where the constitutional complaint allows any person (including legal entities) to file a complaint against an alleged violation of his basic rights by state authorities. The procedure for filing a

complaint is easy and inexpensive. No legal representation, special forms, or fees are required. In fact, "most complaints are handwritten and prepared without the aid of a lawyer"[14]. The only restriction is that an appellant has exhausted all other legal remedies before appealing to the FCC (and even this requirement can be waived). Given these open rules, it is no surprise that the court has been swamped by constitutional complaints.

Like most constitutional courts in Europe, the FCC does not have a discretionary docket or certiorari. This means that unlike the US Supreme Court, which can choose which cases to review and which to dismiss without making a decision on the merits, a European constitutional court is obligated to decide all cases that are properly initiated. Given the sheer volume of constitutional complaints, it would, of course, be impossible for the senates of the FCC to decide all the cases that are brought to the court. When a constitutional complaint reaches the court, a three-judge panel called a chamber initially reviews it. If all three judges agree that the complaint is inadmissible or has no hope of success, they may dismiss it. If at least one judge considers the complaint to have some prospect of success, it is forwarded to the relevant senate for decision[15].

In 1986, the chambers were also granted limited power to decide cases. Provided that all judges in a chamber agree that a complaint falls clearly under established precedent and raises no new constitutional issues, the chamber may rule in favor of the complainant without forwarding the case to the full court. However, only a full senate may declare a statute unconstitutional. The vast number of constitutional complaints is handled by the chamber system. Most of these decisions involve highly individualized cases that do not touch on a broader statutory question and have few implications beyond the immediate ruling (many, for example, challenge the constitutionality of a specific ruling by a trial judge in a particular case). It is important to note that this screening procedure does not amount to the full discretionary control of the docket that the US Supreme Court enjoys[16].

The judicial remedy of a constitutional complaint was merely provided in a small number of European countries, such as Austria, Germany and Spain. Germany and Spain permit constitutional complaints against any act of public authority, including statutes and court decisions. Constitutional complaints are signalized by four factors[17]: "(1) they provide a judicial

remedy against violations of constitutional rights; (2) they lead to separate proceedings which are concerned only with the constitutionality of the act in question and not with any other legal issues connected with the same case; (3) they can be lodged by the person adversely affected by the act in question; (4) the court deciding the constitutional complaint has the power to restore to the victim his or her rights."

In addition to these three primary proceedings: constitutional complaints, concrete judicial review, and abstract judicial review; The FCC has jurisdiction over a number of other important, though much less prominent, types of cases. It resolves disputes among political institutions and actors about their respective powers.

5.2.4 Standing

Germany enjoys a broad range of legal standing for the constitutional review from individual to political organ. In case of constitutional complaint, until recently Germany emerged as the only country having no constraints of constitutional complaint type. It demonstrates that "a constitutional complaint can be lodged against any act or omission of the executive, the judiciary or the legislature, including complaints directed against Acts of Parliament and even against changes in the constitution. However, a requirement that complainants must be directly affected by the act in question restricts appeals directed against statutory provisions."[18]

Under German law, "Local authorities are also allowed to lodge constitutional complaints directed against statutory provisions on the grounds that they violate their constitutional right to self-government under Article 28 of the Basic Law." In general, lodging a constitutional complaint can merely be carried out by the one getting affected by the challenged act directly. Additionally, in German law, it is necessity that the act in question affects an individual legal interest of the complainant, or, synonymously, complainants are capable of demonstrating a a legitimate legal interest in lodging the complaint[19].

A constitutional complaint can merely be encountered in the allegation that a constitutional right of the complainant has been violated. There is a necessity for the complainant to demonstrate the allegedly infringed

constitutional right. The exhaustion of other remedies before lodging a constitutional complaint is possible to be undertaken emerges as the thing the Germany necessitates so that complainants must exhaust all possibilities of appeal. Grounded in German law, two exceptions are allowable. For instance, "If the matter is of general relevance or if prior recourse to other courts would entail a serious and unavoidable disadvantage for the complainant."[20]

5.2.5 Judges

The FCC has sixteen judges, sitting in two division of senate appointed for a fixed term of twelve years. They are elected half by the Bundesrat and half by Bundestag. The Ministry of Justice writes out two lists of eligible candidates, "one entailing judges from the highest federal court, and the other of all persons proposed by parties in the Federal Parliament or various Lander governments." The choice of candidate requires two-third majority so that there is general agreement among the political parties[21].

5.2.6 Decision

According to Article 20 subsection 3 of the Basic Law, "All the three branches of the state: legislative, executive and judicial are bound directly by the constitution." It demonstrates the Erga Omnes effect of the FCC decision. The court has a range of decisions available in disposing of a case. At the most basic level, the court can choose to find no constitutional violation or to raise constitutional objections to a government action (be it a statute, an administrative ruling, or a court decision). Beyond this basic distinction, the court has wide latitude in defining the scope and severity of its decisions, particularly when it finds constitutional violations. This variety is most easily explained with reference to decisions on the constitutionality of a law.

When striking down a statute, the court can affirm the statute unconstitutional in its entirety, but it is also free to attack only specific provisions. In fact, as in Europe generally[22] partial annulments are the norm. Besides, the court has two versions of an unconstitutionality ruling at its disposal. It can affirm a law null and void or merely incompatible with the Basic Law. A law that is ruled null and void ceases to have force immediately, while a law that is not compatible with the Basic Law can usually be applied

pending a legislative revision. In such cases, the court increasingly provides for explicit deadlines by which legislative revision of the statute is supposed to be completed[23].

Politically, an incompatibility ruling is significant since it allows the court to put other political actors on notice that it expects an issue to be addressed, but it spares these actors the immediate ramifications of the decision. As Donald Kommers has observed, "the practice of declaring a legal provision unconstitutional but not void is . . . used by the court to soften the political impact of its decisions"[24]. The Italian Constitutional Court makes use of a similar tactic to raise constitutional concerns without the immediate imposition of an annulment's consequences by announcing "that a legislative provision will be struck down as unconstitutional in future cases, if the legislature does not alter it beforehand"[25].

5.3 JAPAN SUPREME COURT

5.3.1 Constitutional Adjudication Organ

Pursuant to article 81 of the 1947 Constitution, "The whole judicial power is vested in a Supreme Court." This article is establishing a degree of judicial independence from the other branches of government, which had not existed under the Meiji constitution. Article 81 of the constitution echoing Marbury v. Madison, makes the Supreme Court "the court of last resort with power to determine the constitutionality of any law, order, regulation of official act". Its disparity from the US constitution is that the power of judicial review is clearly stated in the Japan Constitution.

Pursuant to Article 76 paragraph 1 and 2 Japanese Constitution, "The courts are given the whole judicial power and no extraordinary tribunal shall be established, nor shall any organ or agency of the executive be given final judicial power." By this article 81, the Supreme Court has been expected to be the guardian of the constitution and the defender of human rights. It is the final court of appeal and judges on such questions as alleged unconstitutionality, error of, or problem with, the construction of the law, and incompatibility with Supreme Court precedent. These provisions mean that judicial power belongs to Supreme Court granted by the constitution. These provisions also negate the Privy Council that existed under the Meiji

Constitution. The power of judiciary becomes stronger and its judiciary power is broadened compared to what had been under Meiji Constitution[26].

Albeit its power granted by article 81, the Japanese Supreme Court frequently plays a secondary role in determining the constitutionality of government acts[27]. The Japanese Supreme Court maintained a self-restrained attitude in its ruling on constitutionality of legislative and executive actions. Several scholars claimed that "the courts are not totally powerful at times in rendering a protection for rights by striking down legislation or other official acts as unconstitutional. A few have demonstrated their exaggeration concerning the relevance and influence of the Cabinet for the independent courts."[28]

Hidenori Tomatsu briefly explains that there are three reasons why Supreme Court has continued to take self-restrained attitude throughout the history of constitutional adjudication. First is the relationship between the judiciary and the legislature; if the legislature does not respond promptly to Supreme Court ruling, the court may refrain from handing down the rulings that require such response. Second is the relationship between judiciary and executive as judiciary is often following executive lead. Finally the lack of interest from the citizens in judiciary and judicial matters may be the last element of court self-restraint[29].

5.3.2 Types and Timing of Constitutional Review

Supreme Court decision in 1952 confirms the concrete type posteriori timing of constitutional review[30]:

> "What is conferred on our court under the system in force is the right to exercise judicial review, and for this power to be invoked a concrete legal dispute is necessary. When no concrete dispute is invoked, our court cannot exercise the power to make abstract judgment on doubts and disputes existing around constructions of the constitution and other statues etc., with respect to their application in future."

By this decision, The Supreme Court decides issues of constitutionality only in the context of concrete controversies involving parties with proper standing. Precedent does not bind courts in subsequent cases on the same issue; therefore the American doctrine Stare Decisis is not accepted. Hence, although courts have favored consistency, it is possible for judicial opinion

to shift over the course of years.

5.3.3 Procedures of Constitutional Review

The procedure of Constitutional Review is usual judicial proceeding depending on the nature of the case, whether it is criminal, civil or administrative.

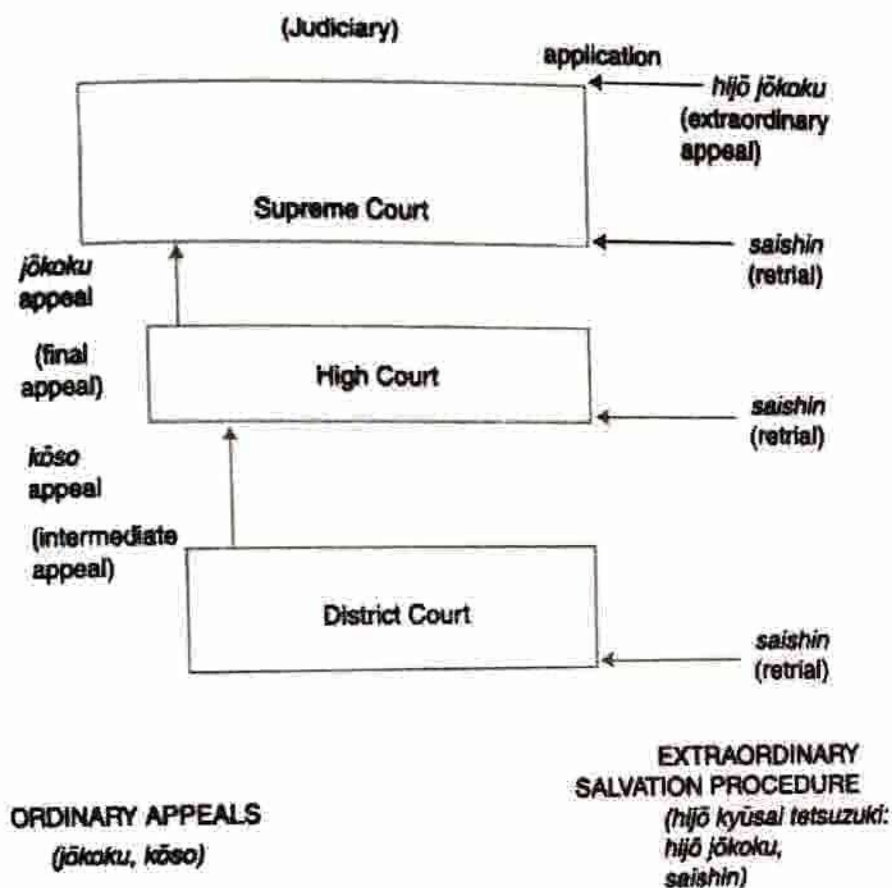

Figure 3.1 *Japan Judicial Proceeding*

5.3.4 Standing

The legal standing for the constitutional review is parties involved in concrete dispute.

5.3.5 Judges.

The Supreme Court itself encompasses fifteen justices appointed by the Cabinet from people recommended by the Supreme Court but not all of them necessitate to have been judges, or even members of the legal

profession. The fifteen-Justice Court commonly encompasses "no fewer than five (commonly six) former career judges, two to three retired prosecutors, up to five practicing lawyers, usually one Justice appointed from a leading law faculty, and one or two former administrative officials, prominently from the ranks of those serving on the Cabinet Legislation Bureau." Due to the fact the average age of justices upon appointment hovers around sixty-four, and retirement is compulsory at seventy, few Justices ever serve longer than eight or nine years[31].

5.3.6 Decision

Judgment effect is limited to the direct parties (US influence), and there is no principle of Stare Decisis.

5.3.7 Comparison of Institutional Design

Table 5.2. *Summary of Institutional Comparison*

	US Constitutional Adjudication	Germany Constitutional Adjudication	Japan Constitutional Adjudication	Indonesia Constitutional Adjudication
Organ	Diffue d	Centralized	Diffue d	Centralized
Type	Concrete	Abstract & Concrete	Concrete	Abstract & Concrete
Timing	A Posteriori	A Posteriori	A Posteriori	A Posteriori
Procedures	General	Special	General	Special
Standing	Parties Involved In Real Case	Broad Range	Parties Involved In Real Case	Broad Range Including Indigenous Community
Judges	Nomination	Nomination	Nomination	Nomination
Effect of Judgment	Bind Parties Involved Stare Decisis	Erga Omnes	Bind Parties Involved Stare Decisis	Erga Omnes

The US and Japan constitutional adjudications share a similar design with the exception that Japan does not have stare decisis doctrine. On the other hand, Germany and Indonesia share similarities with the exception

that Indonesia accommodates the specific indigenous community standing but does not have the constitutional complaint institution.

Albeit the recognition of the rights of Indigenous peoples, their horrible experiences in the past have unavoidably generated rise to new awareness and demands. These conventional communities do not need their way of life anymore, including natural resources, the regulation, alteration, and plan in the government system followed by the lessened rights without their participation in making a decision. Nonetheless, their partaking in constitutional adjudication has been constrained by the legal fact that the legal standing of indigenous community has not been expounded yet in statutes.

The one of legal standing positioning petition to constitutional court signifies a union of customary law community provided that its existence remains and complies with the society development condition and the principles of "the Unitary State of the Republic of Indonesia as regulated by Laws". The provision clearly requires the existence of Adat communities stipulated in specific law. The required law is not drafted yet in Indonesia and this makes the Court have limitations on accepting the Adat law recognition case from specific Adat communities. In this regard, the MK needs legislation as foundation to accept more petitions on Adat law recognition. MK judges have also voiced this need during the interviews.

Unlike systems adopted in German FCC, the MK does not have the authority to handle cases of constitutional complaints. A constitutional complaint is commonly expounded as a request the citizens make to the court for adjudication on infringements of their fundamental rights in which the Constitution renders a guarantee for that because of the presence of the public power or state action. The necessity for the constitutional complaint in Indonesia surfaces particularly since the MK declines the constitutional rights infringements resulting from jurisdiction or legal standing matter.

During author interview, Indonesia Chief Constitutional Court Justice Mahfud MD has spoken of one specific case that needs constitutional complaint institution. The case happened in one region of Indonesia involving the candidate of regency head. General Election Committee (KPU) had disqualified the candidate for the reason of a health problem. This

candidate, who was actually an incumbent, cannot see surrounding areas in some degree but can clearly see in a straight direction and this health condition, had passed the health examination in the previous local election. The candidate filed the petition into Administrative Court and won; the Administrative Court ordered the KPU to allow the candidate join local election but KPU said they would argue in appeal and cassation. The appeal and cassation process however will take years and the local election will not wait for such appeal and cassation process. The candidate put his hope to MK but legal standing rule said that the legal standing in election case should be the person who participates in the election itself. MK could not accept the petition even though there was infringement of constitutional rights by the KPU. Accordingly, there is necessity of particular institution of constitutional complaint in MK; even it is not as simple as it seems because the new institution of constitutional complaint will give more casework to the MK.

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1 For more detail on Marbury v. Madison case, see G. Edward White, The Constitutional Journey of Marbury v. Madison, Virginia Law Review, Vol. 89, No. 6, Marbury v. Madison: A Bicentennial Symposium (Oct., 2003), pp. 1463-1573

2 Michael Stolleis, Judicial Interpretation In Transition From The Ancien Régime To Constitutionalism In Morigiwa Yasutomo Etal Ed, Interpretation Of Law In The Age Of Enlightenment From: The Rule Of The King To The Rule Of Law. Springer 2011.

3 Ibid.

4 Georg Vanberg, The Politic of Constitutional Review in Germany, Cambridge University Press 2005.

5 Ibid.

6 Donald P. Kommers, The Jurisprudence of Germany Federal Constitutional Court, 1997.

7 See Mauro Capelletti, Supra note 21.

8 "Since the principle of stare decisis is foreign to civil law judges, a system that allowed each judge to decide for himself the constitutionality of statutes could result in a law being disregarded as unconstitutional by some judges, while being held constitutional and therefore applied by others. Furthermore, the same court that had one day disregarded a given law might uphold it the next day, having changed its mind about the law's constitutionality." Ibid.

9 "Continental judges are usually 'career judges' who enter the judiciary at a very early age and are promoted to the higher courts largely on the basis of seniority. Their professional training develops skills in technical application of statutes rather than in making policy judgments. The exercise of judicial review, however, is quite different from the usual judicial function of applying the law." Ibid.

10 Ibid.

11 Gunter Kisker, The West German Federal Constitutional Court as Guardian of the Federal System, Publius, Vol. 19, No. 4, Federalism and Intergovernmental Relations in West Germany: A Fortieth Year Appraisal (Autumn, 1989), pp. 35-52

12 Mauro Cappelletti, Supra note 21.
13 Georg Vanberg, Supra note 173.
14 Donald Kommers, Supra note 175.
15 Georg Vanberg, Supra note 173.
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20 Michael Singer, The Constitutional Court of the German Federal Republic: Jurisdiction over Individual Complaints, The International and Comparative Law Quarterly, Vol. 31, No. 2 (Apr., 1982), pp. 331- 356
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27 Junichi Satoh, Judicial Review In Japan: An Overview Of The Case Law And An Examination Of Trends In The Japanese Supreme Court's Constitutional Oversight, Loyola of Los Angeles Law Review Vol. 41:603
28 Ibid.
29 Hidenori Tomatsu, Supra note 195.
30 Ibid.
31 John O. Haley, Constitutional Adjudication In Japan: Context, Structures, And Values, Washington University Law Review Vol. 88:1467

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6

HYBRID EXPRESSIONISM MODEL OF INDONESIAN CONSTITUTIONAL COURT

6.1 HYPOTHESES RESTATED

Since the early 1990s, the past two decades have witnessed salient developments in the constitutional law and the institution in the world, as frequently called a phenomenon of constitutionalism, and Indonesia is among such phenomenon. This development is calling for a comparative approach to constitutional law, which can help in highlighting what is distinct about one's own system and what it shares with other systems.

The Indonesian Constitutional Court (Mahkamah Konstitusi, or MK) has been established since the amendment of the 1945 Constitution in 2001 and practically began its role in 2003. Since then, the MK has taken an active role while dealing with a total of 580 cases, and passing judgments for 346 cases already. At this moment, a decade since its establishment, academic review is highly anticipated. It is important to emphasize that, as one of the justices personally interviewed by the author recalled, the MK has truly been a struggle started from nothing, in the sense that Indonesia had lacked any experience of constitutional adjudication both in terms of procedural and substantive, because of the four decades of authoritarian regime in the preceding Soeharto era. This analysis has been motivated by a strong need to ascertain the comparative characteristics of this new phenomenon of Indonesian constitutional adjudication, with an ultimate purpose of identifying its position amid the worldwide phenomenon of constitutionalism.

Accordingly, this analysis has intended to take a comparative approach to the MK, while incorporating both the institutional structure and the judgment studies with a focus on constitutional interpretive methods in its dynamic function. Discussion in the previous chapters in this dissertation have been dedicated to the comparative analysis to identify the institutional structure of the MK (Chapter II), to review the prominent judgments at the MK (Chapter III), and to compare the constitutional interpretative methods with the world typical traditions of the U.S., Germany, and Japan (Chapter IV). Key hypothetical questions have been set as follows:

"The institutional structure of Indonesian constitutional court is a hybrid of the world's historical experience, namely, a product of mixed influence mainly from the model of European constitutional court under the constitutional structure of Supremacy of Legislature but also from the U.S. constitutional structure of Balance of Power in the detailed designs, while reflecting Indonesia's own context of integration with diversity as a socio-culturally plural society."

In the following sections in this last chapter, conclusive discussion will be made according to each of these original hypotheses.

6.2 HYBRID CHARACTERISTIC OF INDONESIA CONSTITUTIONAL COURT

In order to answer the first hypothesis on the hybrid nature of institutional structure of Indonesian Constitutional Court, the finding from the comparative approach taken by this analysis can be summarized as shown in Table 8 below, according to the seven pillars of institutional function; namely, (i) structure of jurisdiction (concentration/or diffusion of constitutional organs having jurisdiction of constitutional adjudication), (ii) type of disputes (whether constitutional adjudication can be available for abstract/or concrete type of disputes), (iii) timing of constitutional adjudication (before or after the introduction of pertaining legislation), (iv) procedures (whether the constitutional adjudication is made on special or normal procedural law); (v) standing (whether the parties are limited to individuals who have directly and actually had infringements of their personal constitutional rights); (vi) mode of selection of judges (public

election/nomination by other organs); (vi) effect of judgment (erga omnes/ or affecting only direct parties; stare decisis/or not).

Table 6.1 *Summary of Institutional Structure Comparison*

	US Constitutional Adjudication	Germany Constitutional Adjudication	Japan Constitutional Adjudication	Indonesia Constitutional Adjudication
Organ	Diffue d	Centralized	Diffue d	Centralized
Type	Concrete	Abstract & Concrete	Concrete	Abstract & Concrete
Timing	A Posteriori	A Posteriori	A Posteriori	A Posteriori
Procedures	General	Special	General	Special
Standing	Parties Involved in Real Case	Broad Range	Parties Involved in Real Case	Broad Range including Indigenous Community
Judges	Nomination	Nomination	Nomination	Nomination
Effect of Judgment	Bind Parties involved Stare Decisis	Erga Omnes	Bind Parties Involved Stare Decisis	Erga Omnes

Institutional system of the MK shares a general similarity with the German Constitutional Adjudication in the sense that it is a centralized constitutional organ separated from the Supreme Court in the normal judicial system, which purely deals with practical legal disputes. However, there is a difference between German and Indonesian systems in that the judicial review of administrative regulations and judicial court verdicts exclusively lies with the Supreme Court, which seems to be an influence from the constraints among national bodies under the US balance of power, while in Germany, Federal Constitutional Court functions as a separate legal body with exclusive jurisdiction over constitutional questions. Ordinary courts are prohibited from adjudicating constitutional issues. In Germany, if a court believes "that a constitutional question must be adjudicated in deciding a particular case, the court halts its proceedings and refers the question to the constitutional court."

Another disparity between German and Indonesian systems lies in the allowance of concrete disputes raised by individual parties asserting

infringements of constitutional rights, apart from abstract review of constitutionality of legislation. MK generally lacks jurisdiction on concrete disputes apart from the authority to hear disputes on general election results and on the authorities of state institutions in which constitution grants the authorities and decides on dissolution of political parties requiring the concrete case to be presented in front of the court (see Art. 61, Art. 68, and Art. 74 of Law No. 24/2003 on MK). Since 2008, the MK has commenced expanding its interpretation on jurisdiction toward hearing concrete disputes on results of general election of regional heads.

Also, unlike systems adopted in German Federal Constitutional Court (see p. 65 in section C.2.3, Chapter II), the MK does not have a general basis of authority to handle cases of constitutional complaints the citizens make to the court for adjudication on infringements of their fundamental rights the Constitution guarantees because of the exercise of public power or state action beyond the explicit jurisdiction or legal standing.

There is specific difference between Indonesia MK and German Constitutional Court on the standing. Although the standing in MK is narrower in terms of the admission of concrete cases and the general chance of constitutional complaints as aforementioned, the Indonesian system has a unique feature in admitting the standing of indigenous community as a group to raise disputes before the MK (see p. 54 in section A.5, Chapter II). The inclusion of indigenous community is different from the Western constitution based on the individualism, while reflecting Indonesia's uniquely pluralistic socio-cultural condition, respect of which is explicitly recognized in the 1945 Constitution Art. 18B and Art. 28I (3). However their involvement in constitutional adjudication has been constrained by the legal fact that the legal standing of indigenous community has not yet been defined in statues.

These specific similarities and differences have shown the hybrid characteristic of the MK basically follows the European model with concentrated structure while incorporating unique balance-of-power style constraints in terms of the constitutionality of administrative regulations put under the Supreme Court as the head of normal judicial system. The hybrid characteristic is also observed in its struggle in an attempt to expand the originally narrow jurisdiction and standing focusing basically on abstract

review, which is the transplant of European model, toward the potential to fit better for Indonesia's own local and historical context of socio-cultural pluralism. Accordingly, it is an implication that the institutional structure of the MK is not a simple transplant of any particular foreign model but in the process of its own development. The law and the practice of the MK should be studied and improved in a view to affirmatively recognize such dynamism, instead of simply evaluating based on the degree of achievement or deviation from the foreign models.

6.3 FINAL REMARK

The notion of constitutionalism, either restated as *rechtstaat* or the rule of law, has evolved from the true necessity for limiting the powers of government and safeguarding against arbitrary or despotic rule. Indonesia, before the constitutional amendments taking place in 1999 through 2001, had been a typical case of this, long-dominated under decades of arbitrary or despotic rule by the authoritarian regime, where the emergence of constitutionalism was truly awaited. The introduction of the Constitutional Court by the constitutional amendment in 2001 must be remembered as the initiation of Indonesian constitutionalism. However, it must also be emphasized that the introduction of constitutional institution is necessary, yet it is not an adequate condition for achieving the goal of deepening of constitutional values. Constitutionalism in Indonesia must be distinguished from a mere majoritarianism, and it has to be identified by the commitment to nothing other than the clarification and deepening of Indonesia's own constitutional normative order. The MK has to be continuously studied for its actual dynamic process of fulfilling the requirement of a clear hierarchy of laws, supported by a legal culture in the local society.

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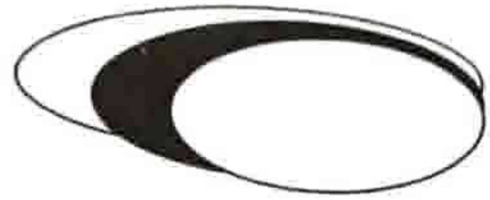

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