

COMPARISON OF JUDICIAL REVIEW: A CRITICAL APPROACH TO THE MODEL IN SEVERAL COUNTRIES

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Abstract

The purpose of this study is to analyze the comparative model of judicial review in Indonesia and other countries. This research uses normative legal research. The approaches used by researchers in compiling this research are, among others: the legal approach; historical approach; and comparative approach. The results of this study indicate that in principle the constitutional review system in several countries shows a variety of color gradations that are tailored to the needs of each country. In general, there are 3 (three) constitutionality testing mechanisms that have been developed to date, namely: First, the constitutionality testing of laws is carried out by existing judicial institutions or non-special adjudication, namely the Supreme Court. The country that adopts this system is the United States of America. Second, the constitutionality test of the law is carried out by a special judicial institution, namely the Constitutional Court. Countries that have adopted this system are Indonesia, Germany, South Korea, South Africa, Russia, Thailand and Turkey. The constitutionality of the law is examined by non-judicial institutions. The country that adopted this system is France.

Keywords: *Judicial Review; Comparative Study.*

INTRODUCTION

A. Background

Previously the Judicial Review was often compared to the system that had lived in the Ancient Greek system, namely in the ancient Athens kingdom. **Mauru Cappelletti**¹ for example, explaining that the ancient Greek legal system, in the Kingdom of Athens, distinguished in principle between the term *nomoi* (constitution) and the term *psephisma* (law), which was then explained further, that whatever the content and form of *psephisma* must not conflict with the *nomoi* which has implications for its implementation, because *nomoi* is the basis for the legitimacy of the birth of the *psephism* provisions, so that the two thoughts of the state must be in harmony with each other, this is to build cohesion and harmony aimed at bringing harmony from a state administration life arrangement in a country, as has been practiced In Athens, Greece, although later at that time, there was no institution or mechanism specifically for carrying out the guarding of *nomoi* values..² Therefore, in the Indonesian context, one form of recognition regarding the existence

of law is made as an aspect of the constitution.³

Based on these arguments, it can be seen that from a constitutional point of view, it is no exaggeration to say that the rule of law can be said to be one of the goals of the Indonesian nation and state to establish this country. In this regard, the concept of the Indonesian state, among others, determines that the government is limited by the provisions outlined in the constitution, this is a form of an effort to adopt the principle of supremacy of the constitution by adopting a hierarchical system of laws and regulations proposed by Hans Kelsen through his theory that known as "stufenbau theory", in the principle of *stufenbau* theory, places the 1945 Constitution at the top of the Pyramid, while other provisions are under the constitution. (UUD 1945).

The logical consequence of this understanding is that all forms of state activity must have legal legitimacy roots so that the state system can grow properly and develop properly. One of the main issues that have also become a concern in the last few centuries, where the state needs a control mechanism for various legal

¹ Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional Di Berbagai Negara* (Jakarta: Konstitusi Press, 2005), hal.10

² Bahder Johan Nasution, *Negara Hukum dan Hak Asasi Manusia*, Cet. Ke-V. (Bandung: Mandar Maju, 2018), hal. 74

³ Ahmad, Ahmad, and Novendri M. Nggilu. "Denyut Nadi Amandemen Kelima UUD 1945 melalui Pelibatan Mahkamah Konstitusi sebagai Prinsip the Guardian of the Constitution." *Jurnal Konstitusi* 16.4 (2020): 785-808.

products issued by state institutions that make national legislation products in the form of laws, this institution carries out the function of power in the field of national legislation (in the Indonesian context is the DPR and DPD institutions together with the President).

The affirmation of the importance of maintaining harmony and conformity between norms from the top of the pyramid (basic law) to the lowest level of the pyramid (implementing rules) made by the institution entrusted with the task of making legislative products, has been warned by Hans Kelsen, that the constitutional implementation of legislation can be legally enforceable. effective only if an organ other than the legislative body is given the task of examining whether a legal product is constitutional or not, and does not enforce it if according to this organ the legal product is unconstitutional. For this purpose, special organs can be established, such as a special court called the Constitutional Court, or control over the constitutionality of laws (judicial review) given to ordinary courts, especially the Supreme Court.⁴

Because of the differences in the assessment institutions from the constitutional aspect to the products of legislation to carry out

the control mechanism in a country, such as the differences in institutions that run the judicial review mechanism between Indonesia and France, for example, it is very important to present material for comparison of the judicial review mechanism in several countries. in the world as an effort to find the ideal form of future law testing.

B. Research Problem

Based on the description of the background, the author makes a formulation of the problem that becomes the study material, as for the formulation of the problem, namely how is the comparison model for testing norms in Indonesia and other countries?

C. Research Methods

The type of research used is normative legal research, where the object of study includes basic norms or rules, legal principles, statutory regulations, comparative law, doctrine, and jurisprudence. The approaches used by researchers in compiling this research are, among others: the legal approach (statue approach); the historical approach (historical approach); and a comparative approach (comparative approach). This study uses a deductive-inductive analytical perspective approach.

⁴ Fadhli Zulfahmi Nst dan Sufyan, *Op.Cit*, hal. 46-47

ANALYSIS AND DISCUSSION

Comparative Model of Norm Testing in Indonesia and Other Countries

1. Judicial Review in Indonesia

Constitutional Court in the Indonesian state administration system provides fresh air that political processes such as the formation of laws, the dissolution of political parties, and the impeachment of the President and/or Vice President run in accordance with the law. without political content. Where the Constitutional Court acts as a neutralizer or neutralizer for political institutions.⁵ After being established based on Law Number 24 of 2003 This assertion has been conveyed by Mahfud MD, that "Law is a political product so that the character of the contents of each legal product will be largely determined or colored by the balance of power or political configuration that gave birth to it."⁶

That is why then, in the provisions regarding the

Constitutional Court from the beginning it was designed as a state institution that balances the political power of national legislation which could dominate lawmaking by ignoring the constitutional aspects of the birth of a national legislation product made by the DPR RI. together with the President of the Republic of Indonesia and the DPD RI. It is stated that the decision of the Constitutional Court is final, first and last.⁷

The examination of the law is divided into two, namely material and formal examinations. According to Jimly Asshiddiqie, the different types of testing are;⁸ born from the difference in understanding between wet in material zin (Law in the material sense) and wet in formal zin (Law in the formal sense). The limitations of the proceedings can be seen in the regulations regarding the Procedural Law for Judicial Review, both those regulated in Law 24/2003, Law 8/2011, and PMK 6/2005, as well as the principles of judicial power in general.

The test results in the cancellation of part of the content material or part of the law in

⁵ Ali Marwan Hsb, "Mahkamah Konstitusi sebagai Neutralizer terhadap Lembaga Politik", *Jurnal Rechtsvinding*, Volume 2 (3), 2013, hal. 316 - 317. Lihat juga dalam Ali Marwan Hsb, Putusan Final Mahkamah Konstitusi Dalam Hal Pemakzulan Presiden dan/atau Wakil Presiden, *Jurnal Legislasi Indonesia*, Volume 14 (3), 2017, hal. 276

⁶ Moh. Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi*, (Jakarta: Rajawali Pers, 2011), hal. 64

⁷ Wicipto Setiadi, "Dukungan Politik dalam Implementasi Putusan Mahkamah Konstitusi", *Jurnal Rechtsvinding*, Volume 2 (3), 2013, hal. 300.

⁸ Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Sinar Grafika, 2010), hal. 38.

question. What is meant by the content of the law is the content of certain paragraphs, articles, and/or parts of the law, it can even be only one word, one point, one comma, or one letter which is considered contrary to the Constitution of the Republic of Indonesia. Indonesia of 1945. On the other hand, what is meant by part of the law may also be the whole of a part of the whole of a chapter of the law concerned.

These benchmarks make the concept of constitutionality not only limited to the 1945 Constitution of the Republic of Indonesia textually but in a broad sense where the Constitutional Court in examining various constitutionality cases of a law product must explore the abstract aspect, namely Pancasila, as a touchstone.

Continuing on measuring instruments and evidence, the case decided is also influenced by the judge's conviction. This can be seen in Article 45 Paragraph (1) of Law 24/2003, which reads "The Constitutional Court decides cases based on the 1945 Constitution of the Republic of Indonesia following the evidence and the judge's conviction". The pattern of the relationship between judges' beliefs in assessing evidence is divided into several theories, but the most relevant to Article 45 of Law 24/2003 is the negative pattern of

proving the law (negative wettelijk). According to Riawan Tjandra, this pattern is a combination of the theory of proof according to the law with a system of proof according to the judge's belief.⁹

The scope of the Judicial Review is inseparable from the discussion of the Decision and its legal consequences. There are 3 (three) types of decisions in the case of judicial review, namely:

- a) Application not accepted;
- b) Application is granted; dan
- c) Application rejected.

In the case of a decision that reads "the application cannot be accepted", restrictions on the content or content of the decision are regulated in Article 57 paragraph (2A) of Law 8/2011 regarding matters that are not included in the decision, namely:

- (1) Amar other than those referred to in paragraph (1) and paragraph (2);
- (2) Orders to legislators; and
- (3) The formulation of norms as a substitute for norms from laws that are declared contrary to the 1945 Constitution of the Republic of Indonesia.

Limiting the content or content of the decision, is a limitation on the authority of judges, preventing judges from playing the role of legislators in the presence of

⁹ Riawan Tjandra, *Teori dan Praktek Peradilan Tata Usaha Negara*,

(Yogyakarta: Universitas Atma Jaya, 2010), hal. 110.

substitute norms. Another form of restriction is contained in Article 45A of Law 8/2011 which reads:

“The decision of the Constitutional Court may not contain a decision that is not requested by the applicant or exceeds the applicant's application, except for certain matters relating to the subject matter of the application.”

The limitation is a precaution against potential Ultra Petita Decisions. As a result, in practice, there are always deliberate deviations to close the gap between written rules and regulatory requirements. The same thing also happened in the case of Judicial Review, whose decision was aimed at providing constitutional justice. To date, the Indonesian Constitutional Court has recorded some progressive progress in terms of judicial review of the 1945 Constitution of the Republic of Indonesia, but it is not uncommon for the Constitutional Court as the bodyguarding the soul of the Indonesian Constitution to fall short of the expectations and high expectations of the public towards this constitutional court.

2. Judicial review in the United States

In the United States, the Judicial Review is carried out on three key areas of constitutional interaction, namely, interactions between Federal and State governments, interactions between state organs at the national and state levels interactions between State governments and individuals.¹⁰

Functionally, judicial review authority in the United States is also exercised by ordinary courts through a decentralized or diffuse or dispersed review that is incidental, meaning that the examination is not institutional as a stand-alone case but is included in the ordinary case being examined. by judges at all levels of the court. In various judicial review cases that are examined in ordinary courts, the decisions are only binding on the parties to the dispute in the case (inter partes). Other things can be universally applicable if the decision contains the principle of stare decisis, then this requires the court in the future to be bound to follow similar decisions that have been taken previously by other judges or in other cases. (*jurisprudence*).¹¹

The implementation of judicial review in the Supreme Court institution applies hierarchically in

¹⁰ Albert P. Melon dan George Mace, *Judicial review and American Democracy*, (United States: Iowa State University Press), hal. 21.

¹¹ Ahmadi, *Konstitusional Review: Suatu Perbandingan Praktek Ketatanegaraan*, *Jurnal Al-Izzah*, Volume, 9 (1), 2014, hal. 54

the sense that the judicial review authority also applies to lower judicial institutions scattered in various areas of the federation. In principle, the judicial review authority in the United States constitutional practice is not special treatment in the judiciary. This becomes relevant when viewed from a material perspective as well as the legal culture that lives and develops in the country.¹²

The practice of constitutional review with this approach to the expansion of authority is reasonable and is the right choice for countries that adhere to the Anglo-Saxon system. In a stretch of law in a country like this, the invention, creation, and even the formation and application of law are indeed very much dominated by judges. In the sense of the word that judges in the state become 'indirect law'¹³ In the context of law formation, in an Anglo-Saxon-leaning country, the parliament does not prioritize the production of laws at all. The reverse fact that has become a tradition in countries that are based on the tradition of "civil law" or the European continental legal system, including Indonesia, the thing that becomes the focus of parliament's tasks is to continue to review and produce written laws. The

experience of the Anglo Saxon tradition and these substantial principles have then dominantly formed a judicial style regarding judicial review where this authority is sufficient to be exercised by an existing court and therefore there is no need to form a new institution to specifically handle judicial review cases. The Supreme Court has a full role as The Guardian or the Protector of the Constitution (guarding, protecting, and purifying the Constitution).¹⁴

Between the mechanism for reviewing Indonesian laws and the United States, in practice, there are differences, where Indonesia from the institutional side has formed its own institution so that the mechanism is through the concept of Judicial Review through the constitutional court institution, namely the Constitutional Court. Meanwhile, in the United States, in the practice of testing the law, there is no special judicial institution like Indonesia, but this mechanism is attached to the judicial institution of the Supreme Court, whose function, apart from testing the law against the United States constitution (court of law), also has the authority to matters of justice.

In addition to institutional differences, what is also a difference

¹² *Ibid*, hal 54-55

¹³ In the history of justice in America, the role of judges is really manifested in the principle of separation of branches of state power. In the tradition of law

formation, the common law tradition is adopted where this tradition is also known as "judge-made law".

¹⁴ *Ibid*, hal. 55

between the mechanism for reviewing Indonesian and the United States laws is related to the decision-making mechanism by the judges of the United States Supreme Court, wherein the mechanism, the Supreme Court Judge does not only base decision-making on the judge's opinion, he neglects to ask for an opinion. from the constitution-making body related to the interpretation of a constitutional provision of an article, paragraph, or other provision contained in the US constitution, so that this mechanism will make it easier for US Supreme Court Judges in giving a Decision.

3. **Judicial review in the South Afrika**

Three specific paths were taken by the framers of the South African Constitution when drafting the constitution, First, the drafters through the Constitution created the Constitutional Court institution at the top of the judicial system. Second, the formulator through the Constitution creates a large number of rights that are rooted in the highest and can be justified through the protection of human rights. Third, the formulator through the Constitution grants the right of review to the court.¹⁵

¹⁵ Stacia L. Haynie, Structure and Context of Judicial Institutions in Democratizing Countries: The Philippines and South Africa, *Arellano Law and Policy Review Journal*, Volume 5 (2), hal. 41

Departing from the importance of the people's self-believing in its constitution, South Africa disseminated its draft constitution through radio, television, bulletins as well as seminars. As a result, it is estimated that 82 percent of the population over the age of 18 listens to constitutional radio broadcasts; Thirty-seven programs on the constitution on television received rave reviews by 34 percent of viewers; Every two weeks 160,000 Constitutional Assembly bulletins are distributed to the general public. Finally, in April 1996 before the draft constitution was completed, an independent survey concluded that the constitutional reform campaign had captured 73 percent of South African adults.¹⁶ *Last but not least* South Africa has benefited from the leadership of statesmen like President Nelson Mandela.

The establishment of the Constitutional Court is intended to increase the legitimacy of the legal system in various ways. The Constitutional Court was established to ensure legislative and executive compliance with entrenched principles and to resolve all constitutional challenges as the final arbiter of legal disputes. The Constitution stipulates that the Constitutional Court "makes the

¹⁶ Christina Murray. A Constitutional Beginning: Making South Africa's Final Constitution, *Journal University of Arkansas At Little Rock Law Review*, Volume 23 (3), 2001, hal. 809

final decision" on matters relating to the "interpretation, protection and enforcement of the Constitution."¹⁷ As is well known, the Constitutional Court of South Africa has decisions binding on all legislative, executive, and judicial bodies of the country.¹⁸ In addition, the salaries of all judges are protected from deduction, and judges can only be removed by the "President on the basis of misconduct, incompetence, or lack of adequate competence" determined by an agency or agency of the Judicial Service Commission. Thus, the Constitutional Court provides the basis for the supremacy of the constitution itself.

Various "fundamental rights"¹⁹ embedded in the new South African Constitution. These rights represent the first time in South African history that individual rights and freedoms are defined and protected by constitutional law.²⁰ In addition,

the constitution gives the judiciary the power to review legislative acts for constitutional compliance, increasing the capacity of an independent judiciary to emerge. The constitution explicitly addresses the independence of the courts. Courts are considered "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, endorsement or prejudice."²¹ In addition, "No person and no state organ can interfere with the functioning of the courts ...," and "state organs" are needed to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the judiciary. The concept of judicial review was also important in increasing the legitimacy of the courts in the eyes of the white minority population who favored

¹⁷ Chapter 8, Section 167, 1996 Constitution Republic of South Africa

¹⁸ Chapter 8, Section 165 & 167, 1996 Constitution Republic of South Africa

¹⁹ Among them are equality, human dignity, life, freedom from slavery and forced labor, religion, beliefs and opinions, privacy, expression, assembly, demonstrations and petitions, associations, political rights, freedom of movement and residence, protection of labor, economic activities, protection of property, right to housing, health care, food, water, and social security rights, protection of language and culture, protection of culture, religion and language, rights of the accused, environmental rights, protection of child welfare, and education.

²⁰ Several individual rights and liberties are retained under the common law of the apartheid-era legal system, but these rights can be revoked by simple parliamentary legislation. Only two rights are considered "rooted". One is related to the similarities between English and Afrikaans as official languages. The second is the protection of mixed-race voters in the Cape. Changing the two requires two-thirds of the Parliamentary vote. However, in the 1950s, through various political intrigues, Parliament eliminated voters of color by multiplying members of Parliament so that technically they could get the required two-thirds of the vote.

²¹ Chapter 8, Section 165, 1996 Constitution Republic of South Africa

special protection of individual rights.

The existence of a review mechanism greatly enhances the independence of the judiciary, but such guarantees mean little if court decisions are repeatedly ignored or undermined by the regime. The Constitutional Court, with judges essentially ideologically sympathetic to the regime, in general, has ruled consistently with the preferences of the ANC. However, as noted above, in some judgments, the new government has lost; However, so far the government has supported the capacity of the courts to take decisions against it. This increases the position and independence of the Constitutional Court.²²

What is interesting in the constitutional justice system in South Africa is the authority granted by the state through its Constitution, namely the authority to assess the constitutionality aspects of changes to the constitution or the constitution of this country, where the South African Constitutional Court has the authority to provide constitutionalism certification of constitutional amendments. Before giving the certification as intended, a barometer or measure of constitutional changes is first set, from there then the indicators of constitutionalism as a barometer of

change that will be used by the Constitutional Court to assess and certify the products of constitutional amendments carried out by the South African Constitutional Commission, in which there are members of representative institutions who are also the formulators of the new constitution that will be produced.

Meanwhile, in Indonesia, the mechanism for changing the constitution by granting certification is completely unknown in constitutional changes in Indonesia, so that all material changes are fully submitted to the state institution in the legislative sphere, namely the People's Consultative Assembly of the Republic of Indonesia to amend and stipulate the results of the amendment as a new constitution. The new constitution that was made did not involve other state institutions, especially the judicial power institution, namely the Constitutional Court to be involved in assessing aspects of the fulfillment of constitutionalism for new constitutional products as practiced in South Africa to certify the constitution before it was stipulated as the country's constitution. . That is why then, the practice of changing the constitution in South Africa by involving state institutions within

²² Stacia L. Haynie, Structure. *Op. cit*, hal. 46

the Judiciary (MK South Africa) to provide constitutionalism legitimacy, is considered by constitutional or constitutional law experts as the best and most successful mechanism for constitutional change that has ever been carried out in Indonesia. world.

4. Judicial Review in South Korea

Interestingly, in South Korea before the establishment of the constitutional court, the judicial review mechanism was carried out by the South Korean Supreme Court, then in 1988 the South Korean Constitutional Court was officially formed with almost the same authority as the Indonesian Constitutional Court, the only difference being that it had a wrong function. owned by the South Korean Constitutional Court which until today in Indonesia has not used this mechanism, the mechanism is the constitutional complaint. According to the South Korean constitution which was later also regulated in the Korean Constitutional Court Law, that the authority of the South Korean Constitutional Court is:

- (1) Judicial review the constitutionalism of laws
- (2) Impeachment;
- (3) Dissolution of political parties;
- (4) Authority disputes between state institutions; and
- (5) Constitutional Complaint.²³

South Korea's Constitutional Court is considered to have systematically succeeded in expanding its jurisdiction to make it more accessible to the public, create several new unwritten constitutional rights, and actively promote freedom of expression.²⁴ South Korea's Constitutional Court is also considered to have succeeded in limiting political forces and is actively involved in ongoing dialogue with other political institutions regarding the importance of limiting government power to realize a healthy democracy.²⁵ Therefore, the South Korean Constitutional Court is considered to have played a major role in developing a stronger democracy in the country.²⁶

Specifically regarding the authority to examine the constitutionalism of laws in South Korea which is carried out by the Korean Constitutional Court, the

²³ Lihat 111 Konstitusi Korea Selatan (Korean Constitution) dan Pasal 2 Undang-Undang Mahkamah Konstitusi Korea Selatan

²⁴ Jose Andre Soehalim, Pengembangan Kewenangan Mahkamah Konstitusi Dalam Penerapan Pengaduan Konstitusional di Indonesia, *Lex*

Administratum, Volume 8 (1), 2020, hal. 36

²⁵ I Dewa Gede Palaguna. *Pengaduan Konstitusional*, mengutip dari Tom Ginsbug, *Judicial Review in New Democracies. Constitutional Courts in Asian Countries*, (Cambridge: Cambridge University Press, 2003), hal. 207

²⁶ *Ibid*

power to decide the constitutionality of laws enacted by the National Assembly is the core jurisdiction of the Constitutional Court.²⁷ Although generally regarded as a model for a centralized or concentrated judicial review of laws, the Constitutional Court does not have the authority to review the constitutionality of decisions, regulations, or administrative actions. This function, according to article 107 of the Constitution, is the domain of the Supreme Court. It is also worth noting the limited nature of the provision, as it can only be triggered by a lower court's discretion, and then formally referred to the Constitutional Court by the Supreme Court.

The points of attribution are contained in articles 41, 44, 45, and 47 of the Constitutional Court Law. Basically when the constitutionality of law relevant to a case is in doubt, then the court "will ask the Constitutional Court, ex officio or by the decision on a party motion, a decision on the constitutionality of the law, and "will do so through the

Supreme Court. "²⁸ Furthermore, "the parties to the original case and the Minister of Justice may submit to the Constitutional Court and the amicus brief."²⁹ on the issue of whether a law is constitutional or not." The law also allows deciding on the constitutionality of an entire law or one of its provisions. A decision is given by the Constitutional Court to hold a statute unconstitutional has an erga omnes effect because it "will binding on ordinary courts, other state agencies, and local governments."

It should be noted that the powers granted to this Constitutional Court may remain passive, marginal, or useless unless the court is willing to refer the controversy to it. In addition, with South Korea's dominant civil law tradition, the courts may be reluctant to doubt the constitutionality of the enacted law. Therefore, does this mean that Korean citizens are left without acquittal if ordinary courts affirm the constitutionality of a law, even when that party believes otherwise?

²⁷ James West & Dae-Kyu Yoon. West, "The constitutional court of the republic of Korea: transforming the jurisprudence of the vortex?" *The American Journal of Comparative Law* 40.1 (1992): 73-119.

²⁸ Rodrigo González Quintero "Judicial review in the Republic of Korea: an introduction." *Revista de Derecho* 34 (2010): 1-17.

²⁹ Amicus Curiae is a legal term, which comes from Latin which means "friend of the court," or "friend of the court." In other words, a person, group of people, or an organization, as a third party who

is not a party to a case, but has an interest or concern for the case, and then provides information, both orally and in writing, to assist the court that examines and decides the case, because it is voluntary and on its initiative, or because the court requests it. Even though the information given is considered important by the giver statement, the decision to receive the information is left entirely to the court. The panel of judges has no obligation to consider it in deciding the case.

The answer is no, because "if the motion made under article 41 paragraph (1) for the decision on the constitutionality of the law is rejected, the party can file a constitutional objection to the Constitutional Court." However, this is not an avenue that requires a review of lower court decisions rejecting referrals, but rather is a new case before the Constitutional Court stating whether the law is constitutional.

The Constitutional Court has adopted, in practice, the German custom of passing decisions on the constitutionality of laws on different categories, apparently to avoid tiresome confrontation with other branches of government. This practice permits a kind of dialogue between state organs, which serves as a guide for institutions regarding the application of statutory laws, and persuades some public officials to reconsider decisions illuminated by constitutional interpretations..³⁰ Thus, using the effect grading technique and in addition to restraining the unconstitutionality of the law, the Court may pronounce a law "incompatible" with the Constitution, "limitedly

unconstitutional", or "limitedly adaptable."³¹

5. Judicial Review In German

In Europe, acceptance of the Judicial Review idea developed in 3 (three) stages. First, developments in Germany and Italy after World War II. Second, it "was after the collapse of the Spanish and Portuguese authoritarian governments, and the Greek dictatorship about a quarter-century ago."³² Third, "followed the collapse of the Soviet Union about ten years ago."³³ according to Schwartz:

Before World War II, few European States had constitutional courts, and virtually none exercised any significant judicial review over legislation. After 1945 all that changed. West Germany, Italy, Austria, Cyprus, Turkey, Yugoslavia, Greece, Spain, Portugal and even France...Judicial Reviewed tribunals with power to annul legislative enactments inconsistent with constitutional requirements. Many of these courts have become significant even powerful actors.³⁴

³⁰ Tom Ginsburg, "Confucian constitutionalism? The emergence of constitutional review in Korea and Taiwan." *Law & Social Inquiry* 27.4 (2002): 763-799.

³¹ *ibid*

³² Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism", *American Journal of*

Comparative Law, Volume 49 (4), 2001, hal. 714-715.

³³ Rett R. Ludwikowski, "Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe", *Cordozo Journal of International & Contemporary Law*, Volume. 3 (1), 1995, hal. 73.

³⁴ Herman Schwartz, "The New Eastern European Constitutional Courts",

On the other hand, the judges of the Federal Constitutional Court of Germany are divided into two Senate in deciding the judicial review according to a particular case. Eight judges are appointed to each Senate. Three of the eight judges must be selected from the German Supreme Court who has served a minimum of 3 years under Article 2 of the Federal Constitutional Court Act of Germany. The duties of the First Senate are explained in Article 14 paragraph (1) of the German Constitutional Court Law, "...The First Senate of the Federal Constitutional Court must have competence for judicial review (Article 13 no. 6 and 11)". Cases in Articles 13 no.6 and 11 concerning conformity of Federal or state law with the Constitution or conformity of state law with federal law are the jurisdiction of the First Senate. On the other hand, the duties of the Second Senate are explained in Article 14 paragraph (2), "The Second Senate of the Federal Constitutional Court must have competence in the case referred to in Article 13 no. 1 to 5, 6a to 9, 11a, 12, and 14, as well as judicial review trials and constitutional complaints not assigned to the First Senate". They are competent in the case of Article 13 no. 1 to 5, 6a to 9, 11a,

12, and 14 as well as judicial review and constitutional complaint trials that were not assigned to the First Senate.

6. Judicial Review In Dutch

One of the interesting things for researchers as writers is that until this moment, the Netherlands does not have a judicial institution that specifically handles the issue of constitutionality testing of legal products, but there is a discourse to form a special judicial institution that handles constitutional cases like Indonesia by establishing Constitutional Court. This assertion was conveyed by the Dutch Supreme Court judge Edgar du Perron who was a resource person in the recharging program activity held by the Constitutional Court (MK) for the employees of the Constitutional Court in the Constitutional Court's Conference Room..³⁵

Concerning the judicial review of fundamental constitutional rights, the Netherlands has always been somewhat of a stranger in Europe. Comparators usually describe the way that judicial review of legislation in Europe is structured somewhat differently from the American system, where the Supreme Court has essentially empowered itself to review the constitutionality of statutes. Therefore, the power to pass laws in

Michigan Journal of International Law,
Volume. 13 (4), 2002, hal. 763

³⁵ Mahkamah Konstitusi, Hakim MA Belanda Apresiasi Keberadaan MKRI.

Diakses dari:
<https://www.mkri.id/index.php?page=web.Berita&id=14560> pada 20 Maret 2021.

the New World is exercised by the judiciary at large and it is the highest court of appeals that ultimately decides the matter.

In contrast, the European tradition is closely linked to the existence of 'Kelsenian' constitutional courts that specialize in reviewing the constitutionality of statutes and executive acts. Such courts exist primarily in Germany, Italy, Austria, Spain, and Belgium, but also in relatively younger liberal democracies such as Poland and the Czech Republic. Constitutional courts are almost by definition engaged in critical dialogue with national legislatures. When Hans Kelsen famously described constitutional courts as 'negative legislators', he was referring to their power to overturn legislative acts.³⁶

It was at this point that the Netherlands differed from most of their European neighbors. Their legal system does not involve concentrated review by specialized constitutional courts. This is mainly because judicial review of primary laws is traditionally prohibited under Article 120 of the Dutch Constitution. It was clear from the start that this prohibition on judicial review reduced the need for special

courts. However, one would be wrong to conclude that there is no review of fundamental judicial rights in the Netherlands. In contrast, Dutch courts usually carry out executive action, and sometimes Act Parliaments carry out rigorous fundamental rights reviews in a way that Mark Tushnet would probably describe as "strong judicial review".³⁷ This kind of study is widespread in the sense that it is carried out by any court in the country. They do so based on another provision in the Dutch Constitution, Article 94. It contains an obligation to override any kind of regulation, whether statutory or not if the application of the regulation contradicts the provisions of the contract law.

In this sense, it can be argued that the Dutch judiciary is in an activist way which is sometimes rigorous, sometimes cautious, and sometimes properly involved in reviewing the rights to parliamentary statutes. As we will note, case law from the highest courts shows a tendency to take on a positive law-making role in several cases.³⁸

What is interesting, although specifically regarding the right to

³⁶ Jerfi Uzman, Tom Barkhuysen, and Michiel L. van Emmerik. "The Dutch Supreme Court: A Reluctant Positive Legislator?" *Netherlands Report to the Eighteenth International Congress of Comparative Law*. 2010.

³⁷ Mark Tushnet. *Weak courts, strong rights: judicial review and social welfare*

rights in comparative constitutional law. (Princeton: Princeton University Press, 2009). Hal. 33

³⁸ Jerfi Uzman, Tom Barkhuysen, and Michiel L. van Emmerik. "The Dutch, *Op Cit*

conduct constitutionality tests, the Dutch judiciary does not have the right to do so, but under certain conditions the Dutch Supreme Court can do this, as was the case with the Dutch Supreme Court in 1989, when a group of short-term civil servants were promised pension benefits which in the end the government was not willing to provide them. In the short term Volunteer In this case, the government argues that civil servant pensions are carefully regulated by parliamentary legislation. Since the law has not included the promise, denial of benefits is a matter of parliamentary legislation and courts are not allowed to vote on the matter.³⁹ The Court decided differently and allowed an appeal, the Dutch Supreme Court considered that Parliament had not intentionally refused to fulfill its obligations and therefore the Court was in a position to reject the law.⁴⁰

7. Judicial Review In Thailand

Regarding the judicial review in Thailand, the constitutional court established specifically for such cases is the Thai Constitutional Court. Before the establishment of the Constitutional Court, Thailand had tried several models of constitutional review. Thailand's

first constitution of 1932 gave Parliament the power to interpret the constitution. However, the Supreme Court in 1946 declared the War Crimes Act unconstitutional because the disputed Act, retroactively punishing the Thai government for joining the Axis in World War 2, contradicted the Constitution's guarantee of rights and freedoms. The decision alarmed the legislature, which saw it as an arbitrary expansion of judicial powers. Parliament then responded by establishing a Constitutional Panel.⁴¹

The Constitutional Court in Thailand is one of the new institutions in the constitution as an institution of judicial power in addition to the Supreme Court, Administrative Court, and Military Court. The judicial review of the Constitution by the Constitutional Court in Thailand is somewhat different. The subject matter of the dispute in the Constitutional Court is a petition where a rule of law is following or contrary to the constitution. To file a lawsuit, it must go through two stages, namely through the ombudsman and then selected to determine which is appropriate to be submitted at the trial of the Constitutional Court. A

³⁹ *ibid*

⁴⁰ Lihat, misalnya, putusan Mahkamah Agung tanggal 9 Juni 1989. Dikutip dalam Uzman, Jerfi, Tom Barkhuysen, and Michiel L. van Emmerik. "The Dutch Supreme Court: A Reluctant Positive Legislator?" *Netherlands Report to the*

Eighteenth International Congress of Comparative Law. 2010.

⁴¹ Khemthong Tonsakulrungruang. "The Constitutional Court in Thailand: from activism to arbitrariness." *Constitutional Courts in Asia* (2018).

public petition cannot be submitted directly to the Constitutional Court but must pass an ombudsman selection.⁴²

The establishment of the Constitutional Court in Thailand is a response to the transition period in Thailand since 1987. The transition period was marked by the shift of the power of the military government to civilian which began with the formation of a new constitution. Entering 1997, Thailand again succeeded in formulating a new constitution which was the result of a draft constitution commission consisting of 99 people who were directly elected by the people. The Constitutional Court is one of the new institutions in the constitution established by the constitutional commission. The position of the Constitutional Court as regulated in Articles 255-270 is one of the institutions of judicial power in addition to the Supreme Court, Administrative Court, and Military Court. The Constitutional Court in carrying out its duties remains based on the principle of justice in general which is based on law and is carried out on behalf of the king.⁴³

The subject matter of the dispute in the Constitutional Court is a petition where a rule of law is following or contrary to the constitution. A public petition cannot be directly submitted to the Constitutional Court but must go through an ombudsman selection. And the ombudsman institution is a selection agency for petitions that can be submitted to the Constitutional Court. Cases that can be submitted to the Constitutional Court are categorized as follows: First, the constitutionality of laws, draft laws, and decrees. Second, the qualifications of members of parliament, members of the senate, ministers, and high-ranking state officials. Third, the qualifications and legality of political parties and their members. Fourth, the unconstitutionality of the rules of procedure for the parliament, the Corruption Eradication Commission, and the General Elections Commission. Fifth, other cases submitted to the Constitutional Court under the authority of other laws such as political party and election laws.⁴⁴

The Constitutional Court consists of 15 (fifteen) judges with a

⁴² Daniek Okvita K. *Kewenangan Mahkamah Konstitusi Dalam Pengujian Peraturan Pemerintah Pengganti Undang-Undang Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Skripsi (Surakarta: Fakultas Hukum Universitas Sebelas Maret, 2010), hal. 93

⁴³ Surkati, Achmad. "Kedudukan dan Wewenang Mahkamah Konstitusi Ditinjau Dari Demokrasi Konstitusional Studi Perbandingan di Tiga Negara: Indonesia, Jerman, Thailand." *Jurnal Equality* 11 (2006). Hal. 44

⁴⁴ *Ibid*

term of service of 9 years with a retirement period of 70 years, a presiding judge, and 14 (fourteen) member judges who are appointed with the approval of the king. Five Supreme Court justices who are internally elected by the Supreme Court in closed elections, two Supreme Court justices from the Administrative Court, five people with legal expertise, and three people with political science expertise.⁴⁵ More details are described in the following table:

source of the proposing agency	Number of judges
Supreme Court	5
Administrative Court	2
Legal Expert (Practitioner/academic)	5
Political Expert (Practitioner/academic)	2

As it is known that one of the most important authorities possessed by Thailand is to conduct Reviewing Law and Lawmaking. This is the main function of the judicial power of the Constitutional Court. If a provision of a law is found to be unconstitutional, the law will be annulled. The term “statutory provisions” refers to statutes approved by the people's representatives, therefore, constitute organic statutes and ordinary parliamentary statutes.

⁴⁵ *Ibid*

However, constitutional review of an organic law is mandatory, whereas ordinary law review is only optional. Before the presentation of an organic law to the King for signature, it must be submitted to the Constitutional Court. For ordinary deeds, there are several ways to convey it. As a bill, the second member of the DPR can ask the Constitutional Court to review its constitutionality. Once the bill becomes law, it can be submitted to the Constitutional Court through four channels. First, a person who feels that his rights have been violated by an act can file a lawsuit to the Constitutional Court. This is a new idea from the 2007 Constitution. However, to avoid many lawsuits, the applicant must first take other legal remedies before being eligible to file a petition. Second, the complaint is submitted to the Ombudsman, after receiving the complaint, the Ombudsman can send the law to the Constitutional Court for review. Third, through Komnas HAM.⁴⁶

⁴⁶ Khemthong Tonsakulrungruang. "The Constitutional Court in Thailand, *Op Cit*, hal. 8

5. Conclusion

In general, there are 3 (three) constitutionality testing mechanisms that have been developed to date, namely: First, the constitutionality testing of laws is carried out by existing judicial institutions or non-special adjudication, namely the Supreme Court. The country that adopts this system is the United States of America. Second, the constitutionality test of the law is carried out by a special judicial institution, namely the Constitutional Court. Countries that have adopted this system are Indonesia, Germany, South Korea, South Africa, Russia, Thailand, and Turkey. The constitutionality of the law is examined by non-judicial institutions. The country that adopted this system in France. The author also recommends using a judicial review approach such as that used in the US and South Africa that is open to providing listening input outside the judiciary.

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