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DUALISM OF JUDICIAL REVIEW IN INDONESIA: PROBLEMS AND SOLUTIONS

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Abstract

Through the momentum of the third amendment of the 1945 Constitution of the Republic of Indonesia which was passed in 2001, Indonesia has officially adopted a dualistic judicial review system. Under such system, the authority to conduct judicial review is divided/spread to the two judicial organs, each with its own scope of review; namely, the Supreme Court/Mahkamah Agung reviews regulations below the level of Law (Undang-undang), while the Constitutional Court/Mahkamah Konstitusi reviews the same against the Constitution (constitutional review). Seen from the theoretical and practical perspective adhered to by states which adopt the formation of the Constitutional Court (centered judicial review model), the system adopted by Indonesia is uncommon, and moreover it could be considered as an error in designing the judicial review system. This is in view of the fact that in states which have a Constitutional Court, the authority to conduct judicial review is concentrated / centered upon the Constitutional Court. Such division of authority under the two review regime (legal review and constitutional review) as practiced by Indonesia is not known (except for South Korea), neither in states which use the centralized judicial review model nor in those which use the distribution judicial review model. Such distribution is bound to disrupt the judicial review itself, as the authority to review is implemented by two different institutions with different review standard. Accordingly, in the final part of this research the author puts forward the proposition to centralize the authority to conduct judicial review in the Constitutional Court thus putting an end to the practice of dualistic judicial review which has been proven to be problematic and ensuring that the judicial review system in Indonesia can be reconstructed and placed upon the correct theoretical and practical basis.

Keywords: 1945 Constitution, dualism, judicial review, Supreme Court, Constitutional Court

Abstrak

Melalui momentum Perubahan Ketiga UUD 1945 yang disahkan pada tahun 2001, Indonesia secara resmi mengadopsi sistem judicial review yang bersifat dualistik (dualisme judicial review). Dengan sistem yang dualistik ini, kewenangan judicial review menyebar/terbagi kepada dua organ yudisial dengan memisahkan cakupan pengujiannya masing-masing: Mahkamah Agung menguji peraturan di bawah undang-undang terhadap undang-undang (legal review) sementara Mahkamah Konstitusi menguji undang-undang terhadap UUD (constitutional review). Ditinjau dari perspektif teori dan praktek yang dianut oleh negara-negara yang mengadopsi pembentukan Mahkamah Konstitusi (model judicial review yang terpusat), sistem yang dianut oleh Indonesia itu ternyata sangat tidak lazim dan bahkan merupakan sebuah kekeliruan dalam merancang sistem judicial review. Sebab di negara-negara yang memiliki Mahkamah Konstitusi, kewenangan judicial review itu pasti akan dikonsentrasikan/dipusatkan kepada Mahkamah Konstitusi. Pembagian kewenangan ini ke dalam dua rezim pengujian (legal review dan constitutional review) sebagaimana dipraktikkan di Indonesia tidak pernah dikenal (kecuali di Korea Selatan) baik di lingkungan negara-negara yang menggunakan model judicial review yang terpusat maupun model judicial review yang tersebar. Sebab pembagian yang demikian akan mengacaukan pelaksanaan judicial review itu sendiri lantaran kewenangan itu akan dilaksanakan oleh dua lembaga yang berbeda dengan menggunakan standar pengujian yang juga berbeda. Untuk itu pada bagian akhir penelitian ini dikemukakan sebuah proposisi untuk memusatkan kewenangan judicial review kepada Mahkamah Konstitusi agar praktek dualisme judicial review yang terbukti bermasalah itu dapat diakhiri dan sistem judicial review di Indonesia dapat direkonstruksi dan ditempatkan pada landasan teori dan praktek yang tepat.

Kata Kunci: UUD 1945, dualisme, judicial review, mahkamah agung, mahkamah konstitusi

I. INTRODUCTION

Judicial review in general could be translated as the mechanism to review legislation carried out by judges in order to ensure its coherence/compliance towards legal rules of higher hierarchy which ordinarily culminate in the Constitution. To complete the understanding of the judicial review as briefly defined above, below is the definition of judicial review given by Henry J. Abraham:¹

“The Power of court (ordinary or special court) to hold unconstitutional and hence unenforceable any law, any official action based upon a law, or any other action by public official that it deems to be in conflict with the basic law (constitution).”²

The definition of judicial review as stated above is important in order to differentiate it from a similar but slightly different term, that is, the term “constitutional review.”³

In the global stream of thought, scholars are indeed not making a distinction between the two terms, which is because in many countries general judicial review is aimed to examine the consistency of various legislations towards the constitution (constitutional review), and ordinarily, there is no dualism in terms of the competent institution that conducts judicial review along with constitutional review.⁴ Accordingly, it can be concluded that the body authorized to conduct judicial review also holds the function of constitutional review. It means that, on a global scale, an essential difference between the terms judicial review and constitutional review can hardly be found. The definition of constitutional review can be found in judicial review, because the content and purpose of judicial review is none other than reviewing the constitutionality of various laws that are allegedly contrary to the constitution.⁵ That is why in foreign literature judicial review is often equated or identified with the term constitutional review.

However, in countries such as Indonesia which adopts the dualism of judicial review,

¹ Henry J. Abraham is the Professor of Constitutional Law (Emeritus) at the University of Virginia, the United States. He has specialized in and has written works on judiciary, constitutional law, judicial review, as well as other constitutional law issues, has published thirteen books and hundreds of articles.

² Henry J. Abraham, *The Judicial Process: an Introductory of the Court of the United States, England, and France* (London: Oxford University Press, 1975), p.280.

³ One of the scholars who discuss the difference between the meaning of ‘judicial review’ and ‘constitutional review’ is Jimly Asshiddiqie. To learn more about the differences between the two terms, see further in Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara [Models of Constitutional Review in Various Countries]*, 2nd ed. (Sinar Grafika: Jakarta, 2010), pp.2-7

⁴ The object of judicial review in many countries usually covers the entire legislation in the related country ranging from Acts, Executive Acts, or other forms of legislation (secondary legislation). In fact, in several countries such as Taiwan, Chile, and South Africa, the object of judicial review also includes the provisions of amended constitution, whereby the procedure of amendment is reviewed to assess whether or not it is constitutional (formal judicial review). In the case of Taiwan, see Art. 78 of Taiwan Constitution, for Chile refer to Art. 93 Chilean Constitution, and for South Africa see Art. 167 of the South African Constitution.

⁵ The tendencies of foreign scholars who equate and identify the term ‘judicial review’ and ‘constitutional review’ can be seen from the definition of judicial review as proposed by C. Neal Tate. According to his definition, “*judicial review is the means by which a court determines the acceptability of a given law or other official action on grounds of compatibility with constitutional forms.*” From the said short definition it is evident that Tate views judicial review as the process to assure the conformity of various legislation towards the constitution (constitutional review). In other words, in Tate’s view judicial review is the same as constitutional review. See C. Neal Tate in Danielle E. Finck, “Judicial Review: the United States Supreme Court versus the German Constitutional Court,” *Boston College International and Comparative Law Review*, Vol. 20, No. 1, (December 1997): 123.

where the jurisdiction of judicial review is divided into two jurisdictions of review, namely judicial review of the constitutionality of law (constitutional review) and judicial review of the legality of regulations (legal review), the difference between the terms judicial review and constitutional review becomes highly significant.⁶ The term judicial review in the Indonesian context does not include aspects of constitutional review⁷, hence it is clear that in the Indonesian context the terms judicial review and constitutional review cannot be equated and switched.⁸

As mentioned above, Indonesia adopts the dualism of judicial review. According to the Constitution, the authority to conduct judicial review is granted to two different judicial bodies, namely the Supreme Court and the Constitutional Court.⁹ The Supreme Court conducts review legislation of lower hierarchy against the relevant laws (legal review).¹⁰ At the same time, the Constitutional Court is vested with the authority to review laws against the Constitution (constitutional review).¹¹ The division of judicial review into two review regimes is what the writer refers to as the “dualism of judicial review”.

The dualism of judicial review as adopted by Indonesia is considered very unusual when viewed from a theoretical and comparative perspective. In other countries which also adopt the judicial review system, the authority would be centered / concentrated on the Constitutional Court (centralized judicial review) if it is not granted to the Supreme Court and other judicial bodies under it (decentralized judicial review).¹² In a theoretical and comparative perspective, once the authority is granted to the Supreme Court such as the model in the United States, or to the Constitutional Court such as the Austrian model, the authority is be fully granted to the mentioned institutions, in the sense that there is no further divisibility, subject or object of review as the case in Indonesia.¹³

Therefore it appears that, seen from the theoretical and empirical point of view, there is a difference between the judicial review system developed in Indonesia (with the dualism of judicial review system) and the system of judicial review commonly adopted by many countries around the world.¹⁴

The difference or rather unusual practice of judicial review dualism as illustrated above will be one of the main subjects in this research. This study will also review the reasons or factors that led to the adoption of Indonesia’s dualism of judicial review

⁶ See Asshiddiqie, *Model-model Pengujian Konstitusional*, pp.6-7.

⁷ In the term judicial review the emphasis is on the institution / subject who is authorized to undertake such review, namely the judge / court. Meanwhile, in the term constitutional review the emphasis is on the activity, namely the process of reviewing the consistency of a legislation vis-à-vis the constitution.

⁸ Asshiddiqie, *Model-model Pengujian Konstitusional*

⁹ See Art. 24A para (1) and Art. 24C paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia

¹⁰ See Art. 24A para (1) *Ibid.*

¹¹ See Art. 24C para (1) *Ibid.*

¹² See further explanation on the decentralized and centralized judicial review in Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989), pp.132-149.

¹³ Refer to the explanation on judicial review in general in countries that have institutionalized it, using the decentralized judicial review or centralized judicial review, in Donald L. Horowitz, “Constitutional Courts: Opportunities and Pitfalls,” <http://www.constitutionnet.org/files/E24ConstitutionalCourt-sOppsPitfallsHorowitz.pdf>, accessed on September 18, 2016.

¹⁴ Also look at the same opinion on this matter in , “Pengujian Konstitusional (Constitutional Review) di Indonesia [Constitutional Review in Indonesia],” <http://equityjusticia.blogspot.co.id/2015/02/pengujian-konstitusional-di-indonesia.html>, accessed on September 18, 2016.

system and the problems surrounding it. The end of this research will present the idea or proposition to centralize/concentrate the judicial review authority to the Constitutional Court, along with all the reasons and considerations.¹⁵

II. DISCUSSION AND ANALYSIS

A. A Short History and the Origin of Judicial Review

Judicial review as we know it today actually originates from the U.S. Supreme Court decision in the *Marbury v. Madison* case in 1803. Since then the “outbreak” of judicial review has begun to spread and finally gained important positions in the world of law as it is today.¹⁶

The case began when James Madison, the new Secretary of State in the Thomas Jefferson administration, held back the copy of the letter of appointment of a few justice of peace that had been made and stamped by the previous President John Adams with the help of the former Secretary of State, John Marshall.¹⁷ The signing of the letter was done in the final seconds before the presidential transition from John Adams to the new President Thomas Jefferson, in the night of April the 3rd, 1801 to the dawn of March the 4th, 1801.¹⁸ Some of the names that were included in the appointment letter are William Marbury,¹⁹ Denis Ramsay, Robert Townsend, and William Harper.²⁰ It can be said that the signing of the appointment letter is only administrative, because procedurally, the terms and conditions of the appointment had already been fulfilled prior to that. For example, it had received the approval of the Senate and so on.²¹

The copy of the letter of appointment was not handed over to the person concerned in time as it should have been done because the subsequent day, March 4, 1801 was

¹⁵ A similar opinion on this matter, which is the idea to concentrate and centralize the judicial review authority to the Constitutional Court was also raised by Janpatar Simamora. However, the idea is ultimately the same, namely proposing centralization of the judicial review authority to the Constitutional Court but the idea departs from a very different base point respectively. While Simamora departs from empirical facts about the ineffectiveness of the implementation of judicial review at the Supreme Court, thus putting forward the argument for transferring and centralizing the authority to the Constitutional Court, the writer departs from theoretical, historical, and comparative facts related to the disorder of the judicial review system thus arguing for the need to concentrate the authority around the Constitutional Court and remove the dualism of judicial review system. For further reference on Simamora's said ideas refer to Janpatar Simamora, “Considering Centralization of Judicial Review Authority in Indonesia Constitutional System,” *International Organization of Scientific Research of Humanities And Social Science* 21, no. 2 (February 2016), pp.26-32.

¹⁶ Finck, “Judicial Review”, p.151.

¹⁷ William H. Rehnquist, *The Supreme Court: Revised and Update* (New York: Vintage Books – Random House, 2002), pp.21-22.

¹⁸ Jimly Asshiddiqie, “Sejarah Constitutional Review dan Gagasan Pembentukan MK [the History of Constitutional Review and the Idea of the Formation of Indonesian Constitutional Court],” <http://jimly-school.com/read/analisis/276/sejarah-constitutional-review-gagasan-pembentukan-mk/>, Accessed 20 September 2016

¹⁹

Finck, “Judicial Review”, p.151.

William Marbury himself was appointed as the Justice of Peace for the Washington D.C. area.

Since the appointment letter was signed and stamped in the final seconds before the Presidential transition from John Adams to Thomas Jefferson (March 4, 1801), William Marbury and his friends were later nick-named the “*midnight judges*.” See Rehnquist, *The Supreme Court*, pp. 26-27.

²⁰

²¹ Jimly Asshiddiqie, “Sejarah Constitutional Review”

the day of presidential transition from John Adams to Thomas Jefferson. Eventually the letters were held in the presidential office by the new Secretary of State, James Madison.²² Madison held back the letter because it was deemed irrelevant to be handed over to the above mentioned names since the president had changed from John Adams to Thomas Jefferson.²³

On the other hand, Marbury and others thought their appointment process was constitutional, thus they did not simply accept Madison's decision to hold the letter. Consequently, in March 1801, Marbury through his attorney Charles Lee (Former Federal Attorney General) filed a lawsuit to the Federal Supreme Court under section 13 of the Judiciary Act 1789, issued the Writs of Mandamus²⁴ in order for the Federal Government to hand over the copy of the letter of appointment.²⁵

After going through a long process with strong resistance from Thomas Jefferson's government and the Congress supporting them, the Supreme Court under John Marshall handed down a decision upon the case in February, 1803.²⁶

In the decision, the US Supreme Court rejected Marbury's request that the Supreme Court issue a Writs of Mandamus under the Judiciary Act 1789. Instead, the Supreme Court judged the provisions of the Judicial Act 1789 as the basis for the Marbury's request to be incompatible and contrary to Article III Section 2 of the U.S. Constitution.²⁷ That is why the Supreme Court could not grant the petition and instead cancelled Judiciary Act 1789 because it was considered unconstitutional.²⁸

It was then from that verdict that the judicial review mechanism was discovered and developed in the practice of American law. The U.S. Supreme Court has undertaken legal breakthroughs and legal discovery (rechtsvinding) at an extraordinary level that eventually gave rise to an entirely new system, not only in the United States but throughout the world. Whereas at the time the ruling was made, there was not a single article of the U.S. Constitution which authorizes the Supreme Court to annul a law on the basis of being contradictory to the constitution.²⁹

In taking this phenomenal decision, Chief Justice John Marshall put forward three

²² Rehnquist, *The Supreme Court*, pp. 26-27.

²³ See Asshiddiqie, *Model-Model Pengujian Konstitusional*, p.17.

²⁴ *The Writ of Mandamus itself in the legal system of the United States can be interpreted as a warrant issued by the Supreme Court to certain state bodies, including the Government, to do or not to do something that becomes its legal obligation.* See further explanation on Writ of Mandamus, one of them in Wikipedia, *Mandamus*, <https://en.wikipedia.org/wiki/Mandamus>.

²⁵ Under the Judiciary Act 1789, the case filed by Marbury belongs to the original jurisdiction of the US Supreme Court, this means its submission does not need to go through a court of a lower position. See the explanation of this matter in Laica Marzuki in Zainal Arifin Hoessein, *Judicial Review di Mahkamah Agung: Tiga Dekade Pengujian Peraturan Perundang-undangan [Judicial Review in the Supreme Court: Three Decades of Review of Laws and Regulations]*, Second Print. (Jakarta: Rajawali Pers, 2013), p. viii.

²⁶ Arief Ainul Yaqin, "Sejarah Judicial Review (Kasus Marbury versus Madison 1803) [The History of Judicial Review (The Marbury v. Madison Case 1803)]," <http://equityjusticia.blogspot.co.id/2014/11/sejarah-judicial-review-kasus-marbury.html>, accessed on September 22, 2016.

²⁷ The provisions of the 1789 Judiciary Act were judged to be contrary to the United States Constitution because it violated the principle of separation of powers and the limitations of the authority of the U.S. Supreme Court as outlined in Article III Section 2 of the U.S. Constitution.. See Finck, "Judicial Review", pp.139-141.

²⁸ Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional*, p.20.

²⁹ Victor Ferreres Comella, "The Consequences of Centralizing Constitutional Review In a Special Court: Some Thoughts on Judicial Activism," *SELA (Seminaro en Latinoamérica de Teoría Constitucional y Política) Paper*, p.28, http://digitalcommons.law.yale.edu/yls_sela/39, accessed on September 22, 2016.

arguments. Firstly, the judge vows to uphold the constitution, so that if any regulations are deemed to be contradictory to the constitution, the judge shall examine such law. Secondly, the Constitution is the supreme law of the land, so there must be an opportunity to test the existing rules under it in order to ensure that the contents of the constitution are not violated. Thirdly, the judge can not refuse a case so that if anyone submits a judicial review request, the request must be fulfilled.³⁰

Thus, the above is a glimpse of the history of judicial review derived from the phenomenal decision of the U.S. Supreme Court in 1803, John Marshall as Chief Justice.³¹ Although at first the ruling received reactions, controversies, even slander from many parties, the decision was ultimately accepted in the legal system of the United States.³²

The practice that occurred in the United States in 1803 was then talked about and debated amongst lawyers, not only in the United States, but around the world.³³ Until ultimately the system became studied, absorbed, and practiced by many countries in the world with their own customization and modification.³⁴

B. Two Main Models of Judicial Review: Which One is Adopted by Indonesia ?

The mechanism of judicial review, which was first discovered in the United States in 1803, has now become widespread and has been adopted by many countries in the world.³⁵ Up until now, at least more than three-quarters of all countries in the world have adopted judicial review in their constitutional system.³⁶

Based on such widespread dissemination throughout the world, experts have

³⁰ John Marshall in Mahfud M. D., *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi [Constitutional Law Debate Following the Amendment of the Constitution]*, (Jakarta: PT. Raja Grafindo Persada, 2010), p.99.

³¹ The "Marbury vs Madison" ruling is so phenomenal and extraordinary, William H. Rehnquist referred to the case as the "most famous case ever decided by the U.S. Supreme Court". See Rehnquist, *The Supreme Court: How It Was, How It Is* (New York: William Marrow, 1989), p. 114.

³² Finck, "Judicial Review", pp.132-133.

³³ Regarding the waves of the spreading idea of judicial review that originated from the U.S. Supreme Court Decision in 1803, Tom Ginsburg grouped it into three (3) waves. The First Wave., occurred in the period shortly after the emergence of the U.S. Supreme Court Decision which has spawned the practice of judicial review; The Second Wave, occurred in the 20th century marked by the establishment of the first Constitutional Court in the world on the initiative of Hans Kelsen in 1920 in Austria and subsequent periods, including post-World War II where judicial review began to be widely adopted by European countries with the centralized judicial review model or Kelsenian Model; The Third wave occurred around the decade of the 1990s up to the present time. The spread of judicial review in the third wave originally took place in the Eastern European region after the collapse of the communist regime and then continued until the early 21st century when the judicial review institution was also adopted by newly transitioning countries from authoritarian regime to democratic regime, this is when Indonesia institutionalized judicial review / constitutional review through the establishment of the Constitutional Court of the Republic of Indonesia in 2003. See Tom Ginsburg, "The Global Spread of Constitutional Review," in Keith E. Whittington *et.al.*, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), pp.81-98.

³⁴ See Cappelletti, *The Judicial Process*, pp.132-135.

³⁵ Regarding the phenomenon of the globally spreading judicial review, Tom Ginsburg expresses the words: "From its origins in the American experience, the institution has spread around the globe to become part of the standard institutional architecture of democracy." See Tom Ginsburg, "Comparative Constitutional Review," http://comparativeconstitutionsproject.org/files/constitutional_review.pdf accessed on September 22, 2016.

³⁶ Donald L. Horowitz, "Constitutional Courts: A Primer For Decision Makers," *Journal of Democracy* 17, No. 4 (October 2006), p. 125.

been trying to find and identify some common models of judicial review mechanisms that have been applied by many countries.³⁷ As a result, the world's constitutional law experts agree that there are at least two major models of judicial review developed and adopted by various countries, namely: (i) decentralized judicial review; and (ii) centralized judicial review.³⁸

The classification of the judicial review system into two models as mentioned above is based on the criteria for institutionalizing or granting the authority of judicial review to the authorized bodies; whether by disseminating it to all existing conventional judiciary bodies and culminating in the Supreme Court, or by concentrating it on a specific body called the Constitutional Court.³⁹

When the institutionalization of judicial review is carried out in a diffused manner to the Supreme Court and to all judicial courts beneath it, it is referred to as the decentralized judicial review model. This model was pioneered by the United States and has been generally followed by common law countries.⁴⁰ Meanwhile, when the institutionalization of judicial review is done centrally to a specific organ like the Constitutional Court, it is referred to as the centralized judicial review model.⁴¹ The pioneer of this model is Austria.⁴² This model is commonly followed by other Continental European countries as well as countries outside Europe that generally adhere to the civil law tradition.⁴³ In this respect, Mauro Cappelletti states as follows:

"The decentralized (or American) system gives all the judicial organs within it power to determinate the constitutionality of legislation. In contrast, the centralized (or Austrian) system confines this power to a single judicial organ."⁴⁴

To learn more about the features or characteristics of each judicial review model and to answer the question as to which model is actually embraced by Indonesia, it is further elaborated in the subsequent section.

1. Decentralized Judicial Review

This model of judicial review is often also referred to as the American Model. The name has been given quite reasonably since the system was born in and has been developed by the United States since 1803.⁴⁵

³⁷ Yaqin, "Model-Model Judicial Review"

³⁸ One of the experts who proposes the theory of judicial review classification into decentralized and centralized models is Mauro Cappelletti. In his book entitled "The Judicial Process Comperative Perspective" Cappelletti discusses the two main models of judicial review in separate sub-chapters and discusses them in sufficient detail. For a complete overview, refer to Cappelletti, *The Judicial Process*, pp.132-149.

³⁹ *Ibid.*, pp.136-137.

⁴⁰ *Ibid.*, pp.133-135.

⁴¹ Victor Ferreres Comella, "The European Model of Constitutional Review of Legislation: Toward Decentralization?," *International Journal of Constitutional Law* 2, No. 3 (July-October 2004), p. 464.

⁴² The institutionalization of judicial review under this centralized model can not be separated from the role of Hans Kelsen, a prominent jurist of the 20th century of Austrian origin. He was the very person who contributed to the formation of the Constitutional Court of Austria in 1920, which is also the first Constitutional Court in the world.

⁴³ The explanation regarding the question as to why the American model is followed and is much more suitable for common law countries, and why the Austrian model is followed and appears to be much more suitable for civil law countries can be found in Mauro Cappelletti, "Judicial Review in Comparative Perspective," *California Law Review* 58, Issue 5 (October 1970), pp. 1039-1050.

⁴⁴ Cappelletti, *The Judicial Process*, pp.132-133.

⁴⁵ See Martin Borowski, "The Beginnings of Germany's Federal Constitutional Court," *Journal Ratio*

As mentioned above, the main feature of the decentralized judicial review model that distinguishes it from the centralized model is that all courts at each level are authorized to conduct judicial review. As confirmed by Vicki Jackson and Mark Tushnet, namely as follows:

“A key characteristic of this model is that the jurisdiction to engage in constitutional interpretation is not limited to a single court. It can be exercised by many courts, state, and federal, and is seen as inherent to and an ordinary incident of the more general process of case adjudication.”⁴⁶

In addition to the basic features mentioned above, there are some features other than the typical judicial review of this model that distinguishes it from the centralized model. The features in question are as follows:

- a. The review process is not a stand-alone process solely conducted for the purpose of carrying out judicial review, but rather a relation to it and done conjunctionally with a concrete investigation that is taking place in the court. In other words, in this model the law review activity is a judicial activity conducted separately from the litigation process taking place in court.⁴⁷ In such process, when the judge reviews regulations that are contrary to the Constitution he is also conducting judicial review of the regulations in question at the same time.⁴⁸
- b. In connection with the above description of its characteristics, judicial review in this model is classified as a concrete judicial review or concrete review. That is, the judicial review process can only be undertaken if the constitutionality of a legal norm arises or is related to a concrete case that is taking place in court.⁴⁹
- c. This model does not recognize the abstract review mechanism.⁵⁰
- d. The judge’s decision regarding judicial review case only applies to the parties involved in the litigation process which became the origin of the judicial review case. It means that the binding power of a judge’s decision in judicial review is only *inter partes*, rather than *erga omnes*.⁵¹

As a closing statement on judicial review of this model it needs to be noted that in practice this model has been widespread and adopted by many countries in different parts of the world, especially countries which share the common law tradition.⁵² The

Juris 16, no. 2 (June 2003), pp.179-180.

⁴⁶ Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law*, Second Edition (New York: Foundation Press, 2006), p.465.

⁴⁷ See Alon Harel dan Adam Shinar, “Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review,” *International Journal of Comparative Constitutional Law*, Vol. 10, No. 4, (October 2012), pp.951-952.

⁴⁸ See I Gede Dewa Palguna, *Pengaduan Konstitusional (Constitutional Complaint); Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara* [Constitutional Complaint; Legal Recourse against Violations of Citizens’ Constitutional Rights], (Jakarta: Sinar Grafika, 2013), p.328.

⁴⁹ See Mauro Cappelletti, *Judicial Process Op. Cit.*, pp.136-137.

⁵⁰ *Ibid.*

⁵¹ Formally, the judge’s verdict in judicial review case is only *inter partes* or in other words it is only binding on the parties involved in the case, but in practice the verdict still has a binding force widely recognized by the principle of precedent (*stare decisis*) prevailing in the country - decentralized judicial review countries are usually common law countries. Guided by the principle of precedent (*stare decisis*), every judge’s decision, including in cases of judicial review, is to be followed by other judges so that the verdict will eventually apply in general as well. See Mauro Cappelletti, *Ibid.*, pp.138-142.

⁵² The explanation as to why this decentralized judicial review model is more suitable to be adopted

countries in question are from Europe, among others: Denmark, Ireland, Norway and Sweden. African countries adopting the said model include Botswana, Gambia, Ghana, Guinea, Kenya, Malawi, Namibia, Nigeria, and Tanzania. In Middle East Iran and Israel apply the above model. Asian countries include Bangladesh, Fiji, India, Japan, Philippines, Malaysia, Nauru, Nepal, New Zealand, Papua New Guinea, Singapore, and Tibet. At the same time, in Latin America the said model is adopted by countries such as Argentina, Bahamas, Bolivia, and Dominica.⁵³

2. Centralized Judicial Review

Similar to the decentralized judicial review model which is often associated with the birth of this model, this judicial review model is often referred to as the "Austrian Model" or frequently as the "Kelsenian Model."⁵⁴ It is in reference to the name of the initiator of this model who is none other than Hans Kelsen.⁵⁵

As noted above, the main feature of this model which distinguishes it from the decentralized model lies in the way of the institutionalization, or granting centralized authority by forming a special organ outside the Supreme Court commonly referred to as the Constitutional Court (or other similar names).⁵⁶

In addition to the above mentioned features, there are some other characteristics or distinctive features of centralized judicial review model which set it apart from the decentralized model. Such features include the following:

- a. The review process is conducted in a specific way and stands alone as a process of constitutional adjudication that is solely aimed at implementing judicial review (not mixed with case examination like in ordinary courts as applicable in decentralized systems).⁵⁷
- b. Reviews in this model include concrete reviews and abstract reviews. Unlike the previous model (decentralized model), which is limited to concrete reviews only.⁵⁸
- c. The decision of the Constitutional Court in a judicial review case is binding on all persons and all state bodies. In other words, the decision of the Constitutional Court is *erga omnes*.⁵⁹

Although this model emerged and developed much later than the American model, in 1920, with the establishment of the Austrian Constitutional Court as the first

by countries which adopt the common law law system and why it is unsuitable to be applied in countries which follow the civil law system can be seen in Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter," Faculty Scholarship Series, Yale Law School, New Haven, 2003.

⁵³ Asshiddiqie, *Model-Model Pengujian Konstitusional*, p.83.

⁵⁴ See Sara Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918-1929)," *Revista Co-herencia* 9, no. 16 (January-June 2012). p.273.

⁵⁵ *Ibid.*

⁵⁶ Comella, "The European Model", n. 42.

⁵⁷ In literature, this sort of reviewing mechanism is also called the "*principaliter*" method. It means that the process of review is conducted specifically and independently, rather than simultaneously with the examination of a case in an ordinary court as applicable in a decentralized judicial review system. See for further explanation of this "*principaliter*" judicial review mechanism in Fatmawati, *Hak Menguji (Toetsingsrecht) yang Dimiliki Hakim in Sisitem Hukum Indonesia [The Right of Judges to Conduct Review (Toetsingrecht) in Indonesia's Legal System]*, (Jakarta: RajaGrafindo Persada, 2005), pp.37-38.

⁵⁸ Comella, "The European Model", p.464.

⁵⁹ See Cappelletti, *The Judicial Process*, pp.138-142.

Constitutional Court in the world it became much more popular and has gained more followers than the former.⁶⁰ As stated by Jimly Asshiddiqie, based on the results of his research on Constitutions from countries around the world, up to 2005 alone there were at least 78 countries that have formed a Constitutional Court or other similar body. It means that the centralized judicial review model has been followed / adopted by 78 countries.⁶¹ The authors also believe that the number will continue to grow along with the wider influence and appeal of this judicial review system.⁶²

3. The Model Adopted by Indonesia

After discussing the two main models of judicial review as described above, it raises the question: which model is adopted by Indonesia?

Using the reference of the characteristics of the two models of judicial review, it can be stated that in principle Indonesia adopts the centralized judicial review model.⁶³ It can be proved first and foremost from the way the institutionalization of judicial review is undertaken by forming the Constitutional Court of the Republic of Indonesia.⁶⁴ Similarly, other characteristics of the centralized model as described above have also been fulfilled by Indonesia.

However, the construction of centralized judicial review embraced by Indonesia seems to be “confused” with the fact that there is a dualism of judicial review. Therefore, in principle, Indonesia adopts centralized judicial review model through the nation’s constitutional choice to establish the Constitutional Court as an institution to be assigned the duty and authority to carry out the judicial review of the constitutional review.⁶⁵ On the other hand, the authority of judicial review given by the 1945 Constitution to the Constitutional Court is not given fully, in the sense that it is not really concentrated only on the Constitutional Court. Because as we know, according to the 1945 Constitution, in addition to the Constitutional Court there is

⁶⁰ See Tom Ginsburg, “The Global Spread of Constitutional Review,” in Keith E. Whittington *et al.*, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), pp.81-98.

⁶¹ Jimly Asshiddiqie dan Mustafa Fakhry, *Mahkamah Konstitusi: Kompilasi Ketentuan UUD, Undang-Undang, dan Peraturan tentang Mahkamah Konstitusi di 78 Negara [The Constitutional Court: Compilation of Provisions of the Constitution, Laws and Regulations on the Constitutional Court in 78 Countries]* (Jakarta: PSHTN FH UI, 2003).

⁶² The author’s belief is not without reason. Moreover, it seems that not only writers are optimistic about the spread and development of this judicial review, in this case judicial review with the centralized model. Long ago Mauro Cappelletti has been aware of the rapidity of the development and adoption of this judicial review institution. He stated that the judicial review originally discovered and practiced in America (for the decentralized model) and in Austria (for the centralized model) has now developed and spread far beyond the boundaries of the region and the tradition from which it originated. See Cappelletti, *The Judicial Process*, p.133.

⁶³ The same opinion on this matter, stating beforehand that Indonesia has adopted the model of centralized judicial review, is also stated by Donald L. Horowitz. In this respect, he said that “..... Indonesia have followed the original Austrian model, devised after World War I, by creating a separate constitutional court in which the power to review legislative and governmental action resides.” See Horowitz, “Constitutional Courts”, p.3.

⁶⁴ See Art. 24C paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia, one of the provisions sets out that the Constitutional Court has the authority to review Laws (*Undang-undang*) against the Constitution.

⁶⁵ The Constitutional Court’s main task since it was first conceived in the discussion of amendments to the 1945 Constitution was intended to carry out judicial review of laws against the Constitution. See Pan Mohammad Faiz, “The Protection of Civil and Political Rights by The Constitutional Court of Indonesia,” *Indonesia Law Review* 6, no. 2 (May-August 2016), p. 159.

also the Supreme Court which is authorized to conduct judicial review.⁶⁶ The two judicial bodies referred to by the 1945 Constitution are indeed granted the authority of judicial review with their respective jurisdictional materials that differ from each other: (i) The Supreme Court examines laws of lower hierarchy under the legislation which is allegedly against it or judicial review on the legality of regulations (legal review); and (ii) the Constitutional Court has the authority to examine the law against the constitution or constitutional review.⁶⁷

In other words, the 1945 Constitution separates or rather divides the judicial review system into two reviewing systems:

1. The examination of Law against the Constitution (constitutional review) with the authority for review being vested in the Constitutional Court; and
2. Reviewing legislation under the law (legal review) with the authority for review being vested in the Supreme Court.⁶⁸

The reality is that Indonesia is rather unusual and unique as it divides the judicial review system into two reviewing systems. It is distinctive from the judicial review system (Austrian Model) in general, which does not recognize the existence of such dualism.⁶⁹

Based on the foregoing, the conclusion that the author can point out is that Indonesia adopts a “rather distorted” model of centralized judicial review and is inconsistent with the general principles and patterns that apply globally in the centralized judicial review system itself. In this case, on the one hand Indonesia has adopted the establishment of the Constitutional Court the basic idea of which is to concentrate all activities and authority of judicial review (both constitutional and legal review) on one body.⁷⁰ On the other hand, however, Indonesia has divided

⁶⁶ Zainal Arifin Hoessein, *Judicial Review di Mahkamah Agung: Tiga Dekade Pengujian Peraturan Perundang-undangan [Judicial Review at the Supreme Court: Three Decades of Reviewing Laws and Regulations]*, Second print (Jakarta: Rajawali Pers, 2013), p.18.

⁶⁷ Arief Ainul Yaqin, “Pengujian Konstitusional (constitutional review) di Indonesia,” [Constitutional Review in Indonesia], *Loc. Cit.*

⁶⁸ For further understanding of the concept of the division of review into what is constitutionally called (the law against the Constitution) and reviewing the legality (regulation under the law against the law) can be see further in Jimly Asshiddiqie, *Model-Model Pengujian*, *Op. Cit.*, pp.6-7. See also Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, [Procedural Law for Judicial Review], Second Edition, First Print (Jakarta: Sinar Grafika, 2010), pp.1-34.

⁶⁹ Based on the results of research conducted by the author on various countries which adopt the centralized judicial review model (states which have Constitutional Court), it has been found that outside Indonesia there is only one country which embraces the dualism of judicial review system as applicable in Indonesia, namely South Korea. Based on Article 107 of South Korean Constitution it is stipulated that the judicial review authority is divided into two reviewing regimes: (i) the judicial review authority of the law against the constitution is vested in the South Korean Constitutional Court; and (ii) reviewing regulations under the laws (regulations and decisions) and or against the constitution of its competence is vested in the South Korean Supreme Court. Bearing in mind, however, that in South Korea all types of judicial review can only be conducted in the framework of concrete reviews, unlike the abstract reviews as applicable in Indonesia.

⁷⁰ According to Hans Kelsen’s basic idea of establishing the Constitutional Court it is intended that the authority of judicial review of all rules and legal norms be centered on one body (the Constitutional Court). On this subject, Hans Kelsen states as follows: “*The application of the constitutional rules concerning legislation can be effectively guaranteed only if an organ other than legislative body is entrusted with the task of testing whether a law is constitutional, and of annulling it if – according to the opinion of this organ – it’s ‘unconstitutional.’ There may be a special organ established for this purpose, for instance a special court, a so called ‘constitutional court.’*” See Hans Kelsen, *General Theory of Law and State* (New York: Russel & Russel,

judicial review authority into two reviewing systems implemented by two different judicial bodies (*Mahkamah Konstitusi* and *Mahkamah Agung*) which obscures the centralized concept and system.

At this point, consciously or not, we have begun to detect the problems and the unconventionality of the judicial review dualism system prevailing in Indonesia, at least from a theoretical and comparative point of view. As a result of this dualism of judicial review, theoretically we have difficulties in identifying which judicial review model is adopted by Indonesia. While the discussion on judicial review models is not merely a view from the theoretical dimension, it can be used as a theoretical point of view in order to build and develop a reliable and established judicial review system in accordance with its model, whether it is decentralized or centralized judicial review.⁷¹

C. Dualism of Judicial Review in Indonesia: Problems and Solutions

1. History and Reason Behind the Institutionalization of Dualism of Judicial Review

If carefully traced with a historical approach, this system of judicial review dualism is a new system in the history of Indonesian state administration adopted through the third amendment of the 1945 Constitution in 2001.⁷² Prior to that, the original 1945 Constitution contained no provisions dealing with the issue of authority for judicial review.⁷³

Prior to the amendment of the 1945 Constitution, the institution of judicial review had been known and adopted by Indonesia since 1970.⁷⁴ However, its regulation was not based on the Constitution and was only regulated in Law No. 14 of 1970 on the Principles of Judicial Power.⁷⁵ The institution of judicial review adopted in 1970 was

1961), p.157.

⁷¹ Victor Ferrera, The Consequences of Centralizing Constitutional Review In a Special Court: Some Thoughts on Judicial Activism," *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Paper*, p.28, http://digitalcommons.law.yale.edu/yls_sela/39, accessed on September 22, 2016.

⁷² The Third Amendment of the 1945 Constitution was ratified by the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat (MPR)*) in the MPR's 2001 Annual Assembly held from November 1-9, 2001.

⁷³ Regarding the fact that the original 1945 Constitution does not recognize and does not adopt the judicial review system, Sri Soemantri states the following words: "Of all the provisions contained in the 1945 Constitution and its elucidation, there is no provision for judicial review. There is not even a hint that implies judicial review." See Sri Soemantri, *Hak Uji Material di Indonesia [The Right for Substantive Review in Indonesia]*, Second Edition, First Print (Bandung: Alunni, 1997), p.71.

⁷⁴ If we look back further, the judicial review institution was also known and adopted in Indonesia, namely during the United Republic of Indonesia (RIS) in 1949-1950. At that time, the judicial review institution was adopted by the Constitution of RIS 1949, through Articles 156-158. Based on the articles of the 1949 Constitution of the Republic of Indonesia, there is a constitutional review of the regional laws (states) for which the authority rests with the Supreme Court. As for the federal law, according to Article 130 paragraph (2) of the 1949 Constitution of the United Republic of Indonesia, it is not possible to review it because the federal law should not be contested (*de wet is onschendbaar*). However, the period of validity of the 1949 Constitution of the United Republic of Indonesia itself was very short, between December 27, 1949 - August 17, 1950. As a result, the mechanism of judicial review contained in the constitution did not become actualized, it remained a dead norm that was never applied in practice.

⁷⁵ The judicial review institution was instituted through Law No. 14 in 1970 which in itself was the actual result of a long process of struggle to adopt a judicial review institution in Indonesia. Before it was officially adopted in 1970, the idea to institutionalize the mechanism of judicial review was already raised in the sessions of the Indonesian Preparatory Committee for Preparation of Indonesian Independence (BPUPKI) in the pre-independence period. Moh. Yamin is one of the members of BPUPKI who proposed

limited only to reviewing legislation under the law against the law (legal review) with the authority to conduct it being granted to the Supreme Court.⁷⁶ Since that time up to the third amendment of the 1945 Constitution in 2001, there was neither an institution such as the one known as the Constitutional Court, neither was there constitutional review by the Constitutional Court as we know it today.

Thus it can be concluded that, historically, the institution of judicial review was adopted and practiced in the Indonesian legal system in 1970, when it was still at a very limited level⁷⁷ and was only regulated at the level of the law, not the constitution.⁷⁸

The judicial review system in Indonesia only experienced a significant change in 2001 through the momentum of the third amendment of the 1945 Constitution.⁷⁹ Through the third amendment, the official judicial review institution was included and became one of the contents of the Constitution.⁸⁰ Through the 1945 Constitution it is determined that the judicial review system arranged therein is divided into two separate review jurisdictions, called the dualism of the judicial review system.⁸¹ It is regulated in Article 24A and Article 24C of the 1945 Constitution.

Article 24A sets forth judicial review conducted by the Supreme Court whose authority is to examine legislation under the law against the law (legal review). At the same time, Article 24C regulates judicial review conducted by the Constitutional

the idea of adopting judicial review in the Indonesian Constitution which was then drawn up by BPUPKI. However, Yamin's proposal was rejected by Soepomo who did not want the inclusion of a judicial review mechanism in the Constitution. And finally the participants agreed to the opinion of Soepomo who rejected the idea of judicial review so that practically the 1945 Constitution does not recognize the existence of judicial review institutions. However, although the idea to adopt the judicial review institution ended in the body of BPUPKI with the result of not agreeing to accommodate the idea in the 1945 Constitution, the idea to adopt judicial review does not necessarily stop there. The idea to adopt judgment review continued to emerge and surface in every stage in the history of the nation's journey. And at its peak, the idea was manifested in 1970 through the Law on the Principles of Judicial Power, albeit in a very limited degree and form, even half-impressed, both in terms of the scope of the object and the process / testing mechanism. For the history of debate between Yamin and Soepomo concerning judicial review, see in Mohammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945 [The Preparatory Text of the 1945 Constitution]*, Volume I (Jakarta: Yayasan Prapanca, 1959), pp.332-334.

⁷⁶ The provisions on judicial review in Law No. 14 Year 1970 are set forth in Article 26.

⁷⁷ It is considered to be limited due to the following reasons: First, the scope of review is limited to the review of legislation below the level of law (*undang-undang*), or legal review. Second, the authority is vested in an already existing judicial body, namely the Supreme Court, rather than establishing a special institution such as the Constitutional Court. Third, in practice it is difficult to implement the Supreme Court's authority to conduct judicial review due to the requirement that judicial review cases must be examined in the process already taking place at the cassation level. It means that judicial review can not be filed directly with the Supreme Court before it goes through the examination process at the first instance and at the appeal level, while courts of the first instance and appeal courts clearly do not have the authority to examine it. Judicial review cases are within the Supreme Court's absolute competence hence the Supreme Court alone has the authority to adjudicate the same. Fourth, legal norms declared invalid due to being in contradiction with the Constitution do not automatically become void and do not automatically lose their binding force; a specific act of revocation/cancellation by the issuing authority is required. For provisions concerning the mechanism of judicial review which contains numerous flaws refer to Article 26 of Law No. 14 Year 1970 concerning the Basic Provisions on Judicial Power.

⁷⁸ See Daniel S. Lev, *Hukum dan Politik di Indonesia: Kesenambungan dan Perubahan* [Law and Politics in Indonesia: Continuity and Change], (Jakarta:LP3ES, 1990), pp.395-404.

⁷⁹ The Third Amendment to the 1945 Constitution was adopted by the People's Consultative Assembly (Majelis Permusyawaratan Rakyat (MPR)) in the Annual Assembly of MPR on November 9, 2001.

⁸⁰ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia [Constitution and Constitutionalism in Indonesia]*, 2nd Print, (Jakarta: Sinar Grafika, 2011), p.196.

⁸¹ Mahfud M. D., *Perdebatan Hukum Tata Negara*, p.60.

Court whose authority is to examine the law against the constitution (constitutional review).⁸²

There is a long history of debate until the third amendment of the 1945 Constitution adopted the judicial review institution with dualism system as we know it today. It can be traced through the history of discussion of Article 24 of the 1945 Constitution in the third amendment process in 2001.⁸³

As the idea of institutionalizing judicial review is being “discussed” by the *Ad Hoc* Committee I (PAH I)⁸⁴ of the Working Body of the People’s Consultative Assembly (Badan Pekerja Majelis Permusyawaratan Rakyat) in the context of the amendment of Article 24 on Judicial Power, there are at least two different opinions on the institutionalization of judicial review within the 1945 Constitution.⁸⁵ The first opinion requires that the authority of judicial review be submitted fully to the Supreme Court. While the second opinion requires that the authority of judicial review be submitted and centralized on a special body outside the Supreme Court commonly referred to as the Constitutional Court.⁸⁶

The debate between the two different views seemed to be very strong as each group was holding on to their own respective opinions. As a result, the discussion on the amendment of Article 24 of the 1945 Constitution, in this case concerning the institutionalization of judicial review, became difficult and did not reach an agreement.⁸⁷ Finally, as a way out to bridge the gap between the two opposing views,

⁸² *Ibid.*

⁸³ For a more specific and comprehensive understanding of the discussions concerning the amendment of Article 24 of the 1945 Constitution see Constitutional Court of the Republic of Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002*, [Comprehensive Text of the Amendment of the 1945 Constitution of the State of the Republic of Indonesia: Background, Process and the Proceedings of Discussions 1999-2002], Book IV State Governance Authority, Volume 1, Revised Edition, Jakarta, 2010.

⁸⁴ Ad Hoc Committee I or often abbreviated as PAH I is a committee consisting of 44 members of the People’s Consultative Assembly in 1999. Ad Hoc I committee is in charge of preparing and drafting the amendment of the 1945 Constitution from the second to fourth (2000-2002). At the beginning of its establishment in 1999, PAH I was only assigned to prepare the draft of the People’s Consultative Assembly Decree on the Guidelines of State Policy (GBHN). In addition to PAH I, there was also PAH II in charge of preparing the draft of the People’s Consultative Assembly Decree Non-Outline State Policy and PAH III in charge of preparing the draft amendment to the 1945 Constitution. However, PAH III was only in charge of preparing the draft amendments to the 1945 Constitution for the 1999 period. As for the next period, namely the year 2000-2002 (the second change until the fourth change), the task of preparing and discussing the amendment of the 1945 Constitution was implemented by PAH I. For further history on the formation and distribution of tasks among the said three *Ad Hoc* Committees formed by the Working Body of MPR resulting from the 1999 General Election see in I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint); Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara* [Constitutional Complaint: Legal Recourse against Violation of Citizens’ Constitutional Rights], (Jakarta: Sinar Grafika, 2013), p.495.

⁸⁵ For a more comprehensive understanding the existence of two different opinions in the body of PAH I BP MPR that views / determines the institution to which judicial review authority is to be granted, refer to Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif*, pp.3-132.

⁸⁶ It should be noted, however, that at this stage the idea to divide the judicial review authority into two jurisdictions was not yet there: legal review and constitutional review were developed and agreed upon later. It should also be noted that initially, the idea of establishing the Constitutional Court itself was divided into three clusters. First, the Constitutional Court as part of the MPR. Secondly, the Constitutional Court as part of the Supreme Court. Third, the Constitutional Court as an individual judicial institution. See Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar* [Constitutional Court of the Republic of Indonesia, Text of Amendment to the Constitution...], *Op. Cit.*, p.443.

⁸⁷ Mahkamah Konstitusi Republik Indonesia, *Ibid.*

an alternative resolution was agreed namely that the judicial review authority would be divided and granted to two judicial bodies, namely the Supreme Court and the Constitutional Court.⁸⁸

In the end, the term “dualism of judicial review” was the one agreed upon by the formulators of the amendment of the 1945 Constitution. It is the formulation that regulates the judicial review authority vested in the Supreme Court as set forth in Article 24A paragraph (1), while regulating the authority of judicial review vested in by the Constitutional Court as set forth in Article 24C paragraph (1) of the 1945 Constitution.

The establishment of a judicial review dualism system that continues to grant the Supreme Court the authority to examine legislation under the law (legal review) is in fact based on only historical and practical reasons because the authority had already been held and practiced by the Supreme Court long before the amendment of the 1945 Constitution.⁸⁹ Therefore, as the momentum of change of the 1945 Constitution emerged, whereby one of the material changes included the institutional judicial review system, the reality seems to have greatly affected the formulators of changes in the Constitution in designing the judicial review system.⁹⁰ As a result, formulators of the amendment of the Constitution continue to maintain the authority of judicial review already possessed by the Supreme Court by attaching it to Article 24A Paragraph (1) of the 1945 Constitution.⁹¹

Other than the historical and practical reasons as noted above, there are other underlying reasons on the preservation of the Supreme Court’s authority to examine legislation under the law. The reason for this is the result of a comparative study of the prevailing judicial review system in South Korea that adopts a dualism judicial review system.⁹² As stated by Jimly Asshiddiqie who used to be a member of the Team of Experts in the process of amendment to the 1945 Constitution, South Korea was the object of comparison and source of inspiration for PAH I members in formulating judicial review system in Indonesia which then we now know used a dualism system.⁹³

As a result, the judicial review system adopted by the 1945 Constitution does

⁸⁸ See Article 24A paragraph (1) dan Article 24C paragraph (1) of the 1945 Constitution.

⁸⁹ The Supreme Court had indeed already possessed such judicial review authority since 1970 through Law No. 14 Year 1970 concerning the Basic Provisions on Judicial Power. However, the said authority was only exercised and put into practice by the Supreme Court in 1993 following the issuance of Supreme Court Regulation No. 1 Year 1993 concerning the Right for Substantive Review (*Hak Uji Materiil*).

⁹⁰ See Asshiddiqie, *Konstitusi dan Konstitusionalisme*.

⁹¹ On this issue, Jimly Asshiddiqie puts forward a critique. According to him, the decision to maintain the judicial review authority already possessed by the Supreme Court gives the impression that the formulation on judicial review in the Third Amendment of the 1945 Constitution is conducted in a patchy manner as if the conception of the right to examine the material of the existing laws in the Supreme Court is not affected by the existence of the right of review granted to the Constitutional Court. Such formulation seems less based on the conceptual idea of judicial review itself. Jimly Asshiddiqie, *Konsolidasi Naskah UUD 1945 Setelah Perubahan Keempat* [Consolidation of the Text of the 1945 Constitution After the Fourth Amendment], (Jakarta: Yarsif Watampone, 2003), p.53.

⁹² Based on Article 107, in South Korea it is stipulated that the judicial review authority is divided into two reviewing regimes: (i) the judicial review of the law against the constitution with the authority vested in the South Korean Constitutional Court; and (ii) reviewing of regulations under the laws (regulations and decisions) and or against the constitution of its competence with the authority for review granted to the South Korean Supreme Court. It needs to be noted, however, that in South Korea all types of judicial review can only be conducted in the framework of concrete reviews, not abstract reviews as applicable in Indonesia.

⁹³ Asshiddiqie, *Konstitusi dan Konstitusionalisme*.

indeed “mimic” the system in South Korea, which divides judicial review authority to two different bodies (*Mahkamah Agung* and *Mahkamah Konstitusi*) with testing objects that are also different from each other.⁹⁴ A judicial review system that is very unusual in countries that adopt the establishment of the centralized judicial review that usually centralizes all its judicial review authority to one body and does not share it with other institutions.⁹⁵

2. Dualism of Judicial Review Problems and the Proposal to Centralize the Authority of Judicial Review to the Constitutional Court

The description above seems sufficient in providing insight into the judicial review system that is applied in Indonesia and its comparison in general with the judicial review system adopted by other countries. From the above description it becomes evident that Indonesia adopts an unusual judicial review system and tends to be inconsistent with the theory and practice of judicial review commonly applied by other countries.⁹⁶

As explained earlier, Indonesia has theoretically adopted a model of centralized judicial review.⁹⁷ The main feature of this model is centralization of judicial review authority to only one body, in this case, the Constitutional Court. Thus according to this model the Constitutional Court becomes the only institution authorized to uphold the orderly hierarchy of legislation from the lowest to the highest degree.⁹⁸ If there is a violation of the hierarchy of laws and regulations then the Constitutional Court will examine and annul any legal norms that are contrary to the constitution. The purpose of centralizing judicial review authority on only one organ is to create consistency and unity of law hierarchy from the lowest level of law to the constitution.⁹⁹

However, with the adoption of the dualism of judicial review system by Indonesia, the above described matters are automatically faced with obstacles and problems. The establishment of the dualism of judicial review system has in fact caused a number of problems within the Indonesian state administration system in general and the

⁹⁴ See Article 24A paragraph (1) dan Article 24C paragraph (1) of the 1945 Constitution.

⁹⁵ For example, of all the 11 countries which have adopted the centralized judicial review model or who have a Constitutional Court (Austria, Germany, Italy, Hungary, Taiwan, Chile, Russia, Croatia, South Korea, South Africa and Thailand), only South Korea has adopted the system of judicial review dualism. The dualism of judicial review system in South Korea was then followed by Indonesia. Thus it is clear that the system of judicial review dualism as adopted by South Korea and Indonesia seems unusual in the environment of countries which adhere to centralized judicial review models that theoretically and empirically do indeed want only one body to carry out the function of judicial review, namely the Constitutional Court.

⁹⁶ See again explanation on this matter in footnote number 110.

⁹⁷ See for instance the writing of Donald L. Horowitz who states that “.... Indonesia have followed the original Austrian model, devised after World War I, by creating a separate constitutional court in which the power to review legislative and governmental action resides.” See Horowitz, “Constitutional Courts”, p. 3.

⁹⁸ As an example on this matter, refer to Herbert Hausmaninger’s statement which essentially explains that with the existence of the Austrian Constitution, normative control over all laws and regulations in Austria is carried out (only) by the Austrian Constitutional Court. Here’s the original statement: “One should note that in the Austrian legal system, examination of all general norms, i.e., statutes, administrative regulations, and international treaties, as to their constitutionality or legality is monopolized by a single institution, the Constitutional Court.” See Herbert Hausmaninger, “Judicial Referral of Constitutional Questions in Austria, Germany, and Russia,” Paper presented in *The Tulane European and Civil Law Forum*, Tulane Law School, Winter 1997, p. 2.

⁹⁹ Mahfud. M. D., *Perdebatan Hukum Tata Negara*, p. 60.

constitutional enforcement system in particular.¹⁰⁰

In connection to this, the author has identified at least three main problems due to the application of the dualism of judicial review system in Indonesia.

First, the adoption of the dualism of judicial review system can potentially disrupt the enforcement of the legal norm¹⁰¹ hierarchy as a unified system, composed of the lowest to the highest degree of legislation.¹⁰² It is due to the fact that there are two judicial institutions which have the authority to carry out judicial review of legislation, namely the Supreme Court and the Constitutional Court. The Supreme Court conducts review within the legal framework, while the other, the Constitutional Court carries out the reviewing within the framework of constitutional review.¹⁰³

With the authority of judicial review divided to two judicial bodies, each with its own reviewing object and factor different from each other, the enforcement of the hierarchy of legislation as a system is bound to become blurred, unclear, and create double standards.¹⁰⁴ As a result, it would be difficult (if not impossible) to enforce the hierarchy of legislation consistently, in an integrated manner and thoroughly from the lowest to the highest (constitution) rule since there is a dividing line between the law enforcement hierarchy at the level of Law (*Undang-undang*) and the laws below the same. As noted above, the law under the law is subject to a legal review regime within the authority of the Supreme Court, while the law is subject to a constitutional review regime for which the authority rests with the Constitutional Court.¹⁰⁵

Second, the division of judicial review authority into two judicial bodies can potentially cause problems at the implementation level. With the dualism of judicial review system, it is possible at some point in time that the Supreme Court and the Constitutional Court are involved in the process of reviewing two different types of rules but have vertical linkages or relationships where the decisions of the two institutions are different and even contradictory to each other.¹⁰⁶ As a matter of illustration, an instance when the Supreme Court faces a request for a judicial review of a Government Regulation suspected to be contradictory to a law and the Supreme Court granted it because it considers the Government Regulation to be contrary to the

¹⁰⁰ There are many experts in Indonesia who also see the phenomenon of this dualism of judicial review as a problem or a problematic system, such as Jimly Asshiddiqie. See further on Jimly Asshiddiqie's view on the issues raised by adhering the dualism system of judicial review in in Asshiddiqie, *Konsolidasi Naskah UUD 1945*, p. 53.

¹⁰¹ The types and hierarchies of regulations in Indonesia are clearly regulated in Article 7 of Law no. 12 Year 2011 on the Establishment of Laws and Regulations. Under this article, the types and hierarchies of legislation consist of (from the highest to the lowest): (a) the 1934 Constitution (b) the Decree of the People's Consultative Assembly (c) the Laws and Government Regulations in Lieu of Law (d) Government Regulation (e) Presidential Regulation (f) Provincial Regulation (g) Regency / Municipality Regulation (h) and other regulations. .

¹⁰² See similar view on this matter in Mahfud M. D., *Perdebatan Hukum Tata Negara*, p. 60.

¹⁰³ See Article 24C paragraph (1) of the 1945 Constitution.

¹⁰⁴ The purpose of centralizing and uniting the authority of judicial review in one judicial body is the very reason for the establishment of the Constitutional Court, namely to ensure the establishing the legal hierarchy principle of law so that there is no conflict between the legal norms in the hierarchy system. And the enforcement of the hierarchy system should ideally be done by a single organ named the Constitutional Court in order to guarantee consistency in enforcing the hierarchy system. Thus Hans Kelsen thought when he designed the establishment of the Austrian Constitutional Court in 1919-1920 as the first Constitutional Court in the world. For a complete understanding, read the complete work of Hans Kelsen on this issue in Hans Kelsen, *Pure Theory of Law* (New Jersey: The Lawbook Exchange, 2005), p.221-278.

¹⁰⁵ See a similar view on this matter in Mahfud M. D., *Perdebatan Hukum Tata Negara. Cit.*

¹⁰⁶ See a similar view on this matter in Hoesein, *Judicial Review*, pp.318-319.

law in question. Meanwhile, the law that was used as the fundamental reason in the Supreme Court's decision was being reviewed by the Constitutional Court because it was allegedly contrary to the Constitution and was subsequently annulled by the Constitutional Court because the Constitutional Court considered that the law did in fact violate the constitution.¹⁰⁷

It means that in a system such as the dualism of judicial review, it is very likely that the law used as the basis for the Supreme Court to review and cancel a regulation has in fact a constitutionality problem at the same time hence it should not be used as the basis of review.¹⁰⁸

A situation like this is certainly an irony and a contradiction in the enforcement of hierarchy of laws and regulations. It would not have occurred if enforcement had been done under an integrated judicial review system and implemented by one body, namely the Constitutional Court which was intended to establish a centralized and exclusive judicial review (not shared with other institutions).¹⁰⁹

The problems illustrated above have indeed occurred and are proven to exist in the practice of reviewing the laws and regulations. One of the cases that can be presented in this research is the case of judicial review conducted by the Supreme Court Regulation of the General Elections Commission (KPU) No. 15 of 2009 on the procedures for determining elected legislative members and the case of judicial review conducted by the Constitutional Court on Law No. 10 of 2008 concerning the Election of Legislative Members.¹¹⁰

In the above case, the Supreme Court subsequently cancelled several articles of KPU Regulation No. 15 of 2009 because it was considered contrary to the provisions of Article 205, Article 2011, and Article 212 of Law No. 8 Year 2009.¹¹¹ The decision on

¹⁰⁷ *Ibid.*

¹⁰⁸ See and compare with the opinion of Janpatar Simamora who considers this matter from the point of view of "overlap" and "mutual exclusion" between Supreme Court Decisions and Constitutional Court Decisions if both of these institutions are involved in the *judicial review process of regulations of different type and hierarchy while having a vertical relationship*. See in Simamora, "Considering Centralization", pp.27-30.

¹⁰⁹ Hans Kelsen's basic idea of the establishing the Constitutional Court is intended that the authority of judicial review of all rules and legal norms is centered on one organ (the Constitutional Court). On this subject, Hans Kelsen states as follows: "*The application of the constitutional rules concerning legislation can effectively guaranteed only if an organ other than legislative body is entrusted with the task of testing whether a law is constitutional, and of annulling it if - according to the opinion of this organ - it's 'unconstitutional.'* There may be a special organ established for this purpose, for instance a special court, a so called 'constitutional court'" See Hans Kelsen, *General Theory of Law and State*, Russel & Russel, New York, 1961, p.157.

¹¹⁰ This judicial review, both brought before the Supreme Court and the Constitutional Court, stems from a dispute over the method of distribution and determination of legislative seats resulting from the 2009 General Election between a number of legislative candidates and certain political parties with the General Election Commission.

¹¹¹ The judicial review concerning Regulation of the General Elections Commission No. 15 of 2009 was filed in several petitions by several petitioners, the verdict also consists of several decisions, namely Supreme Court Decision. 13 P / HUM / 2009, Supreme Court Decision No. 15 P / HUM / 2009, Supreme Court Decision No. 16 P / HUM / 2009, and Supreme Court Decision No. 18 P / HUM / 2009. In Decision of Supreme Court No. 13 P / HUM / 2009, Article 38 paragraph (2) letter b and Article 37 letter b were examined and cancelled. In Decision of Supreme Court No. 15 P / HUM / 2009, Article 22 letter c and Article 23 paragraph (1) and (3) were tested and cancelled. In Decision of Supreme Court No. 16 P / HUM / 2009, Article 45 letter b and Article 46 paragraph (2) letter b were tested and cancelled. While in Supreme Court Decision. 18 P / HUM / 2009, Article 25 was tested and annulled. In principle, the said articles contain material on the procedures for the distribution and determination of legislative seats based on the vote of political parties in the general election of legislative members.

cancellation by the Supreme Court was dropped on July 22, 2009.¹¹² However, not long afterwards, a petition was filed with the Constitutional Court to examine the articles of Law No. 10 of 2008 which had been used as a basis by the Supreme Court to annul the above stated KPU Regulation.¹¹³ The Petitioners alleged that the articles which had been used as a basis for the verdict by the Supreme Court actually contained problems in terms of constitutionality hence they had to be cancelled by the Court. In its legal considerations, the Constitutional Court did see a problem of constitutionality for judgment if interpreted wrongly. On that basis, the Constitutional Court declared a “conditionally constitutional” ruling against the articles in question.¹¹⁴ That is, it was declared that the articles are constitutional as long as their application follows the interpretation and guidance given by the Constitutional Court in its decision. Otherwise, the articles will become unconstitutional.¹¹⁵

From the above case we can learn and conclude that with the existence of duality of judicial review, it is very likely that there is a contradiction of judgment regarding judicial review issued by the Supreme Court and the Constitutional Court.¹¹⁶ Referring to the example of the case above, it is quite possible that the Supreme Court examines and annuls a lawsuit under a law when the law itself is questionable in terms of its constitutionality or is clearly in conflict with the constitution.

With a dualism of judicial review system, such irony can not be avoided and we can not blame the Supreme Court for the cause of the problem. It is due to the fact that the framework and standard of judicial review at the Supreme Court is limited to legal review, a judicial review system that only uses the law to be reviewed against, rather than the Constitution.¹¹⁷ Thus it is not possible to expect the Supreme Court to participate in taking into consideration and to assess the constitutionality of a law that becomes the basis for its judicial review activities, as it would be within the realm of the authority of the Constitutional Court, rather than the Supreme Court.¹¹⁸

Thirdly, with the dualism of judicial review system embraced by the 1945 Constitution that separates the judicial review on the legality of regulation and the judicial review on the constitutionality of law, it can be ensured that there is a void of constitutional control for regulations that rank beneath the law. In short, there is no constitutional review mechanism by the judicial body for regulations ranking beneath the law. Because according to the 1945 Constitution only laws (*Undang-Undang*) can be reviewed for their constitutionality.¹¹⁹ As for regulations under the law against

¹¹² See Kompas, “MA Batalkan Putusan KPU,” [Supreme Court Cancels KPU Decision]. July 23, 2009:1.

¹¹³ The articles tested in the case of this judicial review are Article 205, Article 211, and Article 212 of Law No. 10 of 2008 concerning the Election of Legislative Members. In principle, the said articles govern the procedures for the distribution and determination of legislative seats based on the vote of political parties in the general election of legislative members.

¹¹⁴ Constitutional Court of the Republic of Indonesia, “Decision No. 110-111-112-113/PUU-VII/2009.”

¹¹⁵ See also a brief overview of the case of judicial review of Law No. 10 Year 2008 in Fritz Edward Siregar, “The Political Context of Judicial Review in Indonesia,” *Indonesia Law Review* 5, No. 2 (May-August 2015): 224.

¹¹⁶ This concern has also been expressed by Jimly Asshiddiqie in his writings that criticize the dualism of judicial review system in Indonesia. According to him, the dualism of judicial review system can lead to a substantive clash between the Supreme Court’s Decisions and the Constitutional Court’s Decisions. See further on this matter in Jimly Asshiddiqie, *Konsolidasi Naskah UUD 1945*, p.53.

¹¹⁷ Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*. [Development and Consolidation of State Institutions in the Post-Reform Era]. 2nd Ed., (Jakarta: Sinar Grafika, 2012), p.136.

¹¹⁸ *Ibid.*

¹¹⁹ See Article 24C paragraph (1) of the 1945 Constitution.

which they are being reviewed, review can only be done within the framework of testing the legality; whether they are in accordance with the law or not, hence it is not a test of constitutionality.¹²⁰

The facts, in historical, theoretical, and empirical terms, have emerged from the basic idea of judicial review which from the beginning was intended to enforce the constitution and rule out the violations done by the existing laws under it.¹²¹ When John Marshall and other American judges practiced judicial review for the first time in history, it was to ensure that the contents of the constitution are strictly adhered to by all the organs of the state and by all the laws and regulations under it.¹²² On the other hand, there can be no rule in a country that is contrary to the constitution, because the constitution is the supreme law of the land or the highest law existing in a country.¹²³ It is clear that from the beginning that the judicial review is actually an instrument or mechanism to enforce the supremacy of the constitution.¹²⁴

The philosophy or basic idea of judicial review has been maintained up until now, although the judicial review body has been practiced by many countries with various models. Judicial review in theory and practice is clearly aimed at enabling examination of all laws and regulations against the constitution so that the constitution is not stepped over by the rules under it.¹²⁵ If the rules overlap the constitution then there will be no order and structure in a legal system.¹²⁶ As briefly described by Abbe de Siyes, “a constitution is a body of obligatory laws, or it is nothing.”¹²⁷

The practices that take place in Indonesia through a dualism of judicial review system do not allow for constitutional review of regulations under the law.¹²⁸ If there is any direct contravention of the rule under the law with constitutional material, no judicial body may conduct judicial review of such regulation.¹²⁹ In fact there are more regulations under the law than the number of laws itself.¹³⁰ Even with fewer

¹²⁰ See Article 25A paragraph (1) of the 1945 Constitution.

¹²¹ For the history of judicial review and its underlying fundamental idea, see further in Rehnquist, *The Supreme Court*, pp.21-35.

¹²² Finck, “Judicial Review”, pp. 123-125.

¹²³ *Ibid.*

¹²⁴ That is why in countries which adopt and maintain the principle of parliamentary supremacy (rather than constitutional supremacy) such as the United Kingdom and the Netherlands, this judicial review institution is not known. Because indeed in those countries the idea of constitutional reviewing, in particular the law, is considered irrelevant and violates the principle of parliamentary supremacy that upholds the law as a product of parliament which the judges should not test. For further explanation on the phenomenon of non-existence of judicial review in countries upholding such parliamentary supremacy such as the United Kingdom and the Netherlands, see among others in Jurgen C.A. de Poorter, “Constitutional Review in the Netherlands: A Joint Responsibility,” *Utrecht Law Review* 9, issue 2 (March 2013).

¹²⁵ Mahfud M. D., *Perdebatan Hukum Tata Negara*, p.99.

¹²⁶ Jimly Asshiddiqie in Hoessein, *Judicial Review*.

¹²⁷ Abbe de Siyes in Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford University Press, New York, 1992, p.35.

¹²⁸ See the same view on this matter in Simamora, “Considering Centralization”, pp. 26-27.

¹²⁹ See provisions of Article 24A paragraph (1) and Article 24C paragraph (1) of the 1945 Constitution. Neither of those articles provide for the possibility to conduct constitutional review of legislation under the level of laws.

¹³⁰ Based on data from the National Legal Development Agency of the Ministry of Justice and Human Rights, it is noted that about 1,604 laws have been enforced in Indonesia since independence up to October 2016. While during the same period, Government Regulations and Presidential Regulations classified as regulations under the level of law totalled 4,249 and 5,847 respectively. Not to mention the types of regulations under other laws such as Ministerial Regulations or State Institutions Non-Ministry, Regional Regulations, and so forth. Based on these data it is evident that the number of regulations under the law is

laws (as opposed to regulations under the law), there are issues of constitutionality to it. What about regulations under the law, which are not only greater in numbers than the laws, but are also established through procedures that are not as restrictive as the law? Hypothetically we can say that the potential of discovering problems regarding constitutionality of such regulations is so much greater.

Therefore, it is necessary to provide a mechanism of constitutional review for regulations so that the contents of the constitution are not only protected against possible violations by the laws, but are also protected against potential violations by all existing laws under the Constitution. It is important in order to uphold the constitution as the supreme law of the land.¹³¹ After all, it is illogical that on the one hand we close the gap of conflict between the law and the Constitution, while on the other hand we allow a gap of conflict between the rules under the law and the Constitution.

Such are some of the examples of problems caused by the adoption of the dualism of judicial review system in Indonesia. These issues require appropriate attention and solutions for the future of the judicial review system in Indonesia in order to make it much better than it is today. So what are the steps and solutions that can be taken in order to solve these problems?

One of the steps that can be taken in order to solve the problem is by centralizing the judicial review authority to the Constitutional Court. By doing so, the dualism of judicial review which is still "hampered" in the constitutional system in Indonesia, can be terminated in order for the authority to fully review all laws and regulations, if concentrated on one body only, namely the Constitutional Court.¹³²

The idea of centralizing the judicial review authority into the hands of the Constitutional Court is certainly not without reason. From a theoretical perspective there is clearly a very strong reason why the judicial review authority should be concentrated to the Constitutional Court. As discussed previously in the section above, with the establishment of the Constitutional Court of the Republic of Indonesia in the Third Amendment of the 1945 Constitution, the choice of legal politics actually gave rise to the consequence that it should only be to the Constitutional Court that the judicial review authority was institutionalized and centered to.¹³³ In other words,

far greater than the number of laws. See Badan Pembinaan Hukum Nasional, "Perundang-undangan Pusat," [Central Laws and Regulations]. <http://bphn.go.id/peraturan/perpu>, accessed on October 20, 2016.

¹³¹ As John Marshall himself stated when conducting judicial review for the first time in the history, the purpose behind it is not to maintain and enforce the constitution of possible violations committed by the rules under it. See again about the three principal reasons of John Marshall for conducting judicial review in Mahfud M. D., *Perdebatan Hukum Tata Negara*, p.99.

¹³² In the meetings for formulating the amendment of the 1945 Constitution in the body of *Ad Hoc* Committee I MPR, the Legal Expert Team chaired by Professor Ismail Sunny proposed this idea, the idea of centralizing the judicial review authority to the Constitutional Court. However, the proposal of the Legal Expert Team was not applied and it was proven by the institutionalization of judicial review authority to the two judicial organs by separating the object of their respective review as set forth in Article 24A paragraph (1) and Article 24C paragraph (1) of the 1945 Constitution. See Proceedings of the 11th to the 15th Meeting of PAH I Badan Pekerja MPR (April 20 – May 15, 2001) During the 2001 Session, Secretariat General of MPR Year 2001.

¹³³ As an example of this matter, refer to Herbert Hausmaninger's statement which essentially explains it with the existence of the Austrian Constitution, normative control over all laws and regulations in Austria is carried out (only) by the Austrian Constitutional Court. The original statement is quoted as follows: "One should note that in the Austrian legal system, examination of all general norms, i.e., statutes, administrative regulations, and international treaties, as to their constitutionality or legality is monopolized by a single institution, the Constitutional Court." See Hausmaninger, "Judicial Referral", p.2.

when the Indonesian nation agreed to establish the Constitutional Court, Indonesia should also accept the consequence that the judicial review authority on all laws and regulations should be entirely focused on the Constitutional Court.¹³⁴ Because that is the basic and philosophy of the establishment of the institution, namely to carry out the function of judicial review in a centralized and exclusive manner, in a sense of no longer being divided to other institutions outside the Constitutional Court.¹³⁵

Only South Korea and Indonesia practice a system that “somewhat” deviates from the theory and the practice of judicial review in countries that constitute the Constitutional Court or that embrace a centralized model of judicial review by applying a dualism of judicial review system.¹³⁶ Even in countries that have their own decentralized judicial review model, such as for instance the United States, the judicial review authority is disseminated in the sense that it is given to all judicial organs culminating in the Supreme Court without dividing the authority into two reviewing regimes (legal review and constitutional review)¹³⁷ as adopted by Indonesia. In other words, once such authority is distributed to the Supreme Court and all the courts under it, authority shall be fully granted to the said institution, in the sense that no further division is given, in terms of the subject or the object of the review.¹³⁸ This indicates that in countries where there is a scattered judicial review system, there has never been any division or separation of regulatory review into two reviewing regimes as practiced by Indonesia. On the other hand, the position and role of the Supreme Court in countries that already have a Constitutional Court is usually focused on adjudicating law cases where its main activity is to apply the law. Meanwhile, the position and role of the Constitutional Court is focused on trying cases of judicial review / constitutional review where the main activity is to examine the conformity of laws and regulations to the constitution.¹³⁹ As Victor Ferreres Comella states:

“I propose that we say that the centralized model is based on a dualist structure, for it divides the judiciary (understood in a broad sense) into two parts: “ordinary courts”, on the one hand, and the “Constitutional Court”, on the other. It assigns different tasks to each of them. To simplify, it assigns ordinary courts the “ordinary judicial function”, which consists of applying legislation to decide concrete cases, while it entrusts the Constitutional Court with the “constitutional function”, which consists of reviewing the validity of legislation under the Constitution.”¹⁴⁰

¹³⁴ See further explanation about the consequences of concentrating judicial review authority to the Constitutional Court of a country which has adopted the institutionalization of judicial review by forming a Constitutional Court (centralized judicial review model) in Comella, “The Consequences of Centralizing Constitutional Review”.

¹³⁵ Hans Kelsen; s basic idea of the establishment of the Constitutional Court is intended to ensure that the authority of judicial review of all rules and legal norms is centered on one organ (the Constitutional Court). On this matter, Hans Kelsen states as follows: “*The application of the constitutional rules concerning legislation can effectively guaranteed only if an organ other than legislative body is entrusted with the task of testing whether a law is constitutional, and of annulling it if – according to the opinion of this organ – it’s ‘unconstitutional.’ There may be a special organ established for this purpose, for instance a special court, a so called ‘constitutional court.’*” See Kelsen, *General Theory*, p.157.

¹³⁶ See Asshiddiqie, *Konstitusi dan Konstitusionalisme*, p.196.

¹³⁷ See explanation on the mechanism of judicial review in general in countries which have developed it, both those adopting decentralized judicial review as well as those applying centralized judicial review, in Horowitz, “Constitutional Courts”.

¹³⁸ See Tim Koopmans, *Court and Political Institutions: a Comparative View* (Cambridge: Cambridge University Press, 2003), pp.34-35.

¹³⁹ Comella, “The Consequences of Centralizing”, pp.2-3.

¹⁴⁰ *Ibid.*

With clear and separated formulation of tasks it is expected that there will be a balance of execution between the Supreme Court and the Constitutional Court since each of them is given different jurisdictions / competencies.¹⁴¹

Based on the explanation above it is clear that theoretically there is a very strong reason to centralize the judicial review authority to the Constitutional Court. Thus there is no theoretical obstacle to make this idea a reality. In fact, the materialization of such idea is a pressing issue which needs to be accomplished in order to correct the system of judicial review dualism which has been adopted and proven to cause a number of problems.

With the centralization of judicial review authority to the Constitutional Court, the consistency of enforcing legislation hierarchy from the lowest to the highest level (constitution) would be more secure as there would be only one institution which can implement it.¹⁴² Similarly, the potential of conflicts or contradictions between the Supreme Court decision and the Constitutional Court judgment in the matter of judicial review would no longer exist because the judicial review authority would only rest with the Constitutional Court. In such a way, each of the judicial organs (*Mahkamah Agung* and *Mahkamah Konstitusi*) could focus on different areas of jurisdiction: the Supreme Court focusing on non-judicial review cases, whereas the Constitutional Court would be focusing on handling statutory review cases (as well as other matters that fall within its authority according to the 1945 Constitution).¹⁴³ In addition to the above, the currently prevailing problem of vacancy or the absence of a constitutional review mechanism against the legislation could also be eliminated as the authority would be part of the judicial review authority held by the Constitutional Court.¹⁴⁴

In order to materialize the idea of centralizing judicial review authority to the Constitutional Court as proposed above, the only way that can be pursued is through amendment of the 1945 Constitution. In this case, specifically by amendment to Article 24A paragraph (1) and Article 24C paragraph (1), bearing in mind that the provisions regarding judicial review using the dualism system as we know it was indeed established and sourced directly from the norms laid out in the 1945 Constitution.¹⁴⁵

Furthermore, at the level of implementation / operation, the amendment of the 1945 Constitution which regulates the authority for judicial review must certainly be followed by the amendment of the Supreme Court Law and the Constitutional Court Law along with other technical regulations in order to ensure that the new system (judicial review centered to the Constitutional Court) can be practiced fully and correctly.

¹⁴¹ See similar opinion on this matter in Asshiddiqie, *Konstitusi dan Konstitusionalisme*, p.196.; See also Mahfud M. D., *Perdebatan Hukum Tata Negara*, p.60.

¹⁴² *Ibid.*

¹⁴³ Other authorities outside the judicial review referred herein shall include the dissolution of political parties, disputes of authority of state institutions whose authorities are granted by the Constitution, disputes on election results, and deciding upon alleged violations of law perpetrated by the President at the proposal of the Parliament (impeachment)). See Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution.

¹⁴⁴ This idea was intended to centralize the authority of constitutional review of all types of laws and regulations to the Constitutional Court. The prevailing system still limits the constitutional review authority held by the Constitutional Court to the law only (excluding statutory regulation) .

¹⁴⁵ The authority of the Supreme Court to review legislation below the level of law against the law is provided for in Article 24A paragraph (1). At the same time, the Constitutional Court's authority to review laws against the Constitution is provided for in Article 24C paragraph (1).

III. CONCLUSION

Based on all of the foregoing analysis it can be concluded that the dualism of judicial review system adopted by Indonesia contains a number of problems which are the “congenital defects” of the system. Its existence in the constitutional system in Indonesia demonstrates the existence of “accidents as well as errors of history” because it brings together two ideas of different and contradictory judicial reviews. On the one hand, the involvement of the Supreme Court in judicial review is characterized as the judicial review system pioneered by the United States of America. Meanwhile, on the other hand, the establishment of the Constitutional Court as a special body tasked to carry out exclusive judicial review is a characteristic of the most powerful judicial review system. Unfortunately, Indonesia mixed the two very different systems to create a dualism of judicial review system: to accept the idea of institutionalizing judicial review by forming the Constitutional Court while maintaining the authority of reviewing regulations under the law against the laws already owned by the Supreme Court.

As a result, the system that from the beginning was built on a “patchwork” overlapping the foundation has proven to produce a number of issues that became “homework” for the future of judicial review in Indonesia. That is why attempts to correct the problematic dualism of judicial review system are a matter of high urgency. One way is to concentrate / centralize the authority of judicial review of all laws and regulations to the Constitutional Court. Endeavors to materialize such effort must be pursued through the process of amendment of the 1945 Constitution. For the existence of the dualism of judicial review system itself is regulated and sourced directly from the 1945 Constitution.

Bibliography

Legal Documents

Chile. *Constitution of the Republic of Chile*.

Constitutional Court of Republic of Indonesia. "Decision No. 110-111-112-113/PUU-VII/2009."

Indonesia. *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (The 1945 Constitution of Republic of Indonesia).

Indonesia. *Undang-Undang tentang Mahkamah Konstitusi (Law regarding the Constitutional Court)*. UU No. 24 Tahun 2003, LN No. 98 Tahun 2003 (Law Number 24 Year 2003, SG No. 98 Year 2003).

Indonesia. *Undang-Undang tentang Perubahan atas Undang-Undang No. 24 Tahun 2003 tentang Mahkamah Konstitusi (Law regarding Amendment of Law Number 24 Year 23 regarding the Constitutional Court)*. UU No. 8 Tahun 2011, LN No. 70 Tahun 2011 (Law Number 8 Year 2011, SG No. 70 Year 2011).

Indonesia. *Undang-Undang tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman (Law Regarding Basic Provisions of Judiciary Power)*. UU No. 14 Tahun 1970, LN No. 74 Tahun 1970 (Law Number 14 Year 1970, SG No. 74 Year 1970).

Indonesia. *Undang-Undang tentang Pembentukan Peraturan Perundang-Undangan (Law Regarding Statutory Law Making)*. UU No. 12 Tahun 2011, LN No. 82 Tahun 2011 (Law Number 12 Year 2011, SG No. 82 Year 2011).

South Africa. *South Africa's Constitution of 1996*.

South Korea. *1948 Constitution of Republic of South Korea*.

Taiwan. *Taiwan's Constitution of 1947*.

Supreme Court of Republic of Indonesia. "Decision No. 13 P/HUM/2009."

Supreme Court of Republic of Indonesia. "Decision No. 15 P/HUM/2009."

Supreme Court of Republic of Indonesia. "Decision No. 16 P/HUM/2009."

Supreme Court of Republic of Indonesia. "Decision No. 16 P/HUM/2009."

Books

Abraham, Henry J. *The Judicial Process: an Introductory of the Court of the United States, England, and France*. London: Oxford University Press, 1975.

Asshiddiqie, Jimly and Ahmad Syahrizal. *Peradilan Konstitusi di 10 Negara*. Jakarta: Sinar Grafika, 2012.

Asshiddiqie, Jimly and Mustafa Fakhry. *Mahkamah Konstitusi: Kompilasi Ketentuan UUD, Undang-Undang, dan Peraturan tentang Mahkamah Konstitusi di 78 Negara*. [The Constitutional Court: Compilation of Provisions of the Constitution, Laws and Regulations on the Constitutional Court in 78 Countries] Jakarta: PSHTN FH UI, 2003.

Asshiddiqie, Jimly. *Konsolidasi Naskah UUD 1945 Setelah Perubahan Keempat*.

- [Consolidation of the Text of the 1945 Constitution After the Fourth Amendment], Jakarta: Yarsif Watampone, 2003.
- . *Hukum Acara Pengujian Undang-Undang*. [Procedural Law for Judicial Review], Second Edition, First Print. Jakarta: Sinar Grafika, 2010.
- . *Model-Model Pengujian Konstitusional di Berbagai Negara*. [Models of Constitutional Review in Various Countries], Second Edition, 1st Print. Jakarta: Sinar Grafika, 2010.
- . *Konstitusi dan Konstitusionalisme Indonesia*. [Constitution and Constitutionalism in Indonesia]. 2nd Print, Jakarta: Sinar Grafika, 2011.
- . *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*. [Development and Consolidation of State Institutions in the Post-Reform Era] 2nd Ed., Jakarta: Sinar Grafika, 2012.
- Cappelletti, Mauro. *The Judicial Process Comparative Perspective*. Oxford: Clarendon Press, 1989.
- Fatmawati. *Hak Menguji (Toetsingsrecht) yang Dimiliki Hakim dalam Sistem Hukum Indonesia*. [The Right of Judges to Conduct Review (Toetsingrecht) in Indonesia's Legal System], Jakarta: RajaGrafindo Persada, 2005.
- Ginsburg, Tom. *Judicial Review in New Democracies; Constitutional Court in Asian Case*. New Jersey: Princeton University Press, 2003.
- Hoessein, Zainal Arifin. *Judicial Review di Mahkamah Agung: Tiga Dekade Pengujian Peraturan Perundang-undangan*. [Judicial Review in the Supreme Court: Three Decades of Review of Laws and Regulations], Second Print. Jakarta: Rajawali Pers, 2013.
- Jackson, Vicki C. & Mark Tushnet. *Comparative Constitutional Law*. Second Edition. New York: Foundation Press, 2006.
- Kelsen, Hans. *General Theory of Law and State*. New York: Russell & Russell, 1961.
- . *Pure Theory of Law*. New Jersey: The Lawbook Exchange, 2005.
- Koopmans, Tim. *Court and Political Institutions: a Comparative View*. Cambridge: Cambridge University Press, 2003.
- Lev, Daniel S. *Hukum dan Politik di Indonesia: Kesenambungan dan Perubahan*. [Continuity and Change]. Jakarta: LP3ES, 1990.
- Mahfud M.D. *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi*. [Constitutional Law Debate Following the Amendment of the Constitution], Jakarta: PT. Raja Grafindo Persada, 2010.
- Mahkamah Konstitusi Republik Indonesia. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002*. [Comprehensive Text of the Amendment of the 1945 Constitution of the State of the Republic of Indonesia: Background, Process and the Proceedings of Discussions 1999-2002], Book IV State Governance Authority, Volume 1, Revised Edition, Jakarta, 2010.
- Manan, Bagir and Susi Dwi Harijanti. *Memahami Konstitusi: Makna dan Aktualisasi*. [Understanding the Constitution: Essence and Actualization]. Jakarta: PT Raja GrafindoPersada, 2014.

- Palguna, I Dewa Gede. *Constitutional Complaint (Pengaduan Konstitusional) Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*. [Constitutional Complaint; Legal Recourse against Violations of Citizens' Constitutional Rights], Jakarta: Sinar Grafika, 2013.
- Rehnquist, William H. *The Supreme Court: How It Was, How It Is*. New York: William Marrow, 1989.
- . *The Supreme Court: Revised and Update*. New York: Vintage Books – Random House, 2002.
- Soemantri, Sri. *Hak Uji Material di Indonesia*. [The Right for Substantive Review in Indonesia]. Second Edition. First Print Bandung: Alumni, 1997.
- . *Hukum Tata Negara Indonesia: Pemikiran dan Pandangan* [Indonesia's Constitutional Law: A Reflection and View]. (Bandung: PT. Remaja Rosdakarya, 2014.
- Sweet, Alec Stone. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. New York: Oxford University Press, 1992.
- . *Governing with Judges*. Oxford: University Press, 2000.
- Whittington, Keith E. *et.al., The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 2008.
- Yamin, Mohammad. *Naskah Persiapan Undang-Undang Dasar 1945*. [The Preparatory Text of the 1945 Constitution], Volume I. Jakarta: Yayasan Prapanca, 1959.

Articles

- Borowski, Martin. "The Beginnings of Germany's Federal Constitutional Court." *Journal Ratio Juris* 16, no. 2 (2003): 155-186.
- Faiz, Pan Mohammad. "The Protection of Civil and Political Rights by The Constitutional Court of Indonesia." *Indonesia Law Review Vol. 6 No. 2* (May-August 2016): 158-179.
- Comella, Victor Ferreres. "Is the European Model of Constitutional Review in Crisis." Paper presented for the 12th Annual Conference on the "Individual Vs. the State", Central European University, Budapest, June 18-19, 2004.
- . "The European Model of Constitutional Review of Legislation: Towards Decentralization?" *International Journal of Constitutional Law Vol. 2 No. 3* (July-October 2004): 461-491.
- Cappelletti, Mauro. "Judicial Review in Comparative Perspective." *California Law Review* 58, issue 5 (October 1970): 1017-53.,
- Finck, Danielle E. "Judicial review: The United States Supreme Court Versus the German Constitutional Court." *Boston College International and Comparative Law Review* 20, no. 1 (December 1997): 123-157.
- Harel, Alon and Adam Shinar. "Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review." *International Journal of Comparative Constitutional Law* 10, no. 4 (October 2012): 950-975.
- Hausmaninger, Herbert. "Judicial Referral of Constitutional Questions in Austria, Germany, and Russia." *Tulane European and Civil Law Forum* 12 (Winter

1997): 25

Horowitz, Donald L. "Constitutional Courts: A Primer For Decision Makers." *Journal of Democracy* Volume 17, no. 4 (October 2006): 125-137.

Kompas. "MA Batalkan Putusan KPU." [The Supreme Court Cancels KPU Decision]. (July 23, 2009).

Lagi, Sara. "Hans Kelsen and the Austrian Constitutional Court (1918-1929)." *Revista Co-herencia* 9, No. 16 (January-June 2012): 273-295.

Simamora, Janpatar. "Considering Centralization Of Judicial Review Authority In Indonesia Constitutional System." *IOSR Journal of Humanities and Social Science* 21, no. 2 (February 2016): 26-32.

Siregar, Fritz Edward. "The Political Context of Judicial Review in Indonesia." *Indonesia Law Review* Vol. 5 No. 2 (May-August 2015): 208-237.

Sweet, Alec Stone. "The Politics of Constitutional Review in France and Europe." *International Journal of Constitutional Law* 5, No. 1 (January 2007): 69-92.

———. "Why Europe Rejected American Judicial Review and Why it May Not Matter." Faculty Scholarship Series. Yale Law School. New Haven. 2003.

Website

Asshiddiqie, Jimly. "Sejarah Constitutional Review dan Gagasan Pembentukan MK. [The History of Constitutional Review and the Idea of Establishing the Constitutional Court". <http://jimlyschool.com/read/analisis/276/sejarah-constitutional-review-gagasan-pembentukan-mk/>. Accessed on September 20, 2016.

Badan Pembinaan Hukum Nasional. "Perundang-undangan Pusat." ["Central Legislation"]. <http://bphn.go.id/peraturan/perpu>. Accessed on October 20, 2016.

Ferreres, Victor. "The Consequences of Centralizing Constitutional Review in a Special Court: Some thoughts on Judicial Activism." http://digitalcommons.law.yale.edu/yfs_sela/39. Accessed on September 22, 2016.

Ginsburg, Tom. "Comparative Constitutional Review." http://comparativeconstitutionsproject.org/files/constitutional_review.pdf. Accessed on September 22, 2016.

Horowitz, Donald L. "Constitutional Courts: Opportunities and Pitfalls." <http://www.constitutionnet.org/files/E24ConstitutionalCourtsOppsPitfallsHorowitz.pdf>. Accessed on September 18, 2016.

Yaqin, Arief Ainul. "Pengujian Konstitusional (Constitutional Review) di Indonesia." ["Constitutional Review in Indonesia"]. <http://equityjusticia.blogspot.co.id/2015/02/pengujian-konstitusional-di-indonesia.html>. Accessed on September 18, 2016.

———. "Model-Model Judicial Review: Decentralized Judicial Review dan Centralized Judicial Review." ["Judicial Review Models: Decentralize Judicial Review and Centralized Judicial Review"]. <http://equityjusticia.blogspot.co.id/2016/05/model-model-judicial-review.html>. Accessed on September 22, 2016.

———. "Sejarah Judicial Review (Kasus Marbury versus Madison 1803)." [The History of Judicial Review (Marbury v. Madison Case of 1803)]. <http://equityjusticia.blogspot.co.id/2014/11/sejarah-judicial-review-kasus-marbury.html>. Accessed on September 22, 2016.