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**LAW AND
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YOGYAKARTA, 04 – 07 APRIL 2017

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SOCIETY**

Yogyakarta, 04 – 07 April 2017

LP3M & Faculty of Law Universitas Muhammadiyah Yogyakarta
2017

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Message from Chairman

Yordan Gunawan

Chairman, International Conference on Law and Society 6,
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Assalaamu'alaikumWarahmatullahiWabarakatuh,

In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among UniversitasMuhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), UniversitiIslam Sultan Sharif Ali (UNISSA), Universiti Sultan ZainalAbidin Malaysia (UNiSZA), Fatoni University, Istanbul University, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today's joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfeltthanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only and avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu'alaikumWarahmatullahiWabarakatuh

Foreword

Trisno Raharjo

Dean, Faculty of Law, Universitas Muhammadiyah Yogyakarta

Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the Fakultas Hukum, Universitas Muhammadiyah Yogyakarta in organizing this Inaugural International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the advantages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crat a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the developmment of knowledge. This plan will only materialise with the continous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.

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Strengthening Constitutional Democracy through Constitutional Adjudication Institutions: A Comparative Study between Indonesia and Australia

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ABSTRACT

Democracy which gives power to the majority may lead to hegemony of majority which potentially threaten rights of the minority. In response to such threats some scholars have formulated a new paradigm of democracy called “constitutional democracy”. This article compares the experience of Indonesia and Australia in incorporating the principle of constitutional democracy into their Constitutions and in creating institutions that guarantee and protect constitutional rights of their citizens. This is a doctrinal research which uses comparative approach. The establishment, role and powers of constitutional adjudication institutions in realizing the goal of state in both countries are examined and assessed. The two countries adopt different model of constitutional adjudication. Indonesia follows kelsenian model as practiced in most European countries, while Australia follows the common law model which functions the high courts as constitutional adjudication institution. The study concludes that the Constitutional Court of Indonesia and the High Court in Australia are part of the realization the goal of the countries be democratic states based on the rule of law. The Courts perform their function as the guardian of the Constitution and protector the constitutional rights of citizen with varying degree of success. The constitutional adjudication in both countries also plays a role as checks and balances mechanism of other main organs in the constitutional system. The existence of the Constitutional Court in Indonesia and the High Courts in Australia has contributed to the upholding the principle of constitutional democracy and strengthening the consolidation of democracy.

Keywords: constitutional democracy, constitutional adjudication, constitutional rights

I. INTRODUCTION

The experience in particular countries shows that parliamentary sovereignty creates problem of hegemony of majority which has potentiality to ignore minority. Therefore, the concept of constitutional democracy emerged to control the tyranny of majority. In the constitutional democratic state, the power of parliament is checked and balanced by judiciary through judicial review mechanism.

Indonesia and Australia are the two countries in the world which implement the concept of constitutional democracy. This doctrine emphasizes that parliament as the representative of the will of people is subjected to the supremacy of the constitution as the supreme law of the nation. The establishment of the Constitutional Court in Indonesia in 2003 and the function of the superior courts in Malaysia is a part of realizing the concept of constitutional democracy state.

Looking at the experiences of the countries called “the new emerging democracies”, there are so many obstacles that are hampering efforts to develop an effective “rule of law” system which is expected to counterweigh the system of democracy. Firstly, all new emerging democracies in Eastern Europe such as Russia, Ukraine, Uzbekistan, Georgia, and other former Soviet Union States, as well as some Asian countries like the Philippines and South Korea, have a similar problem on how to institutionalize democratic values through law and based on the existing law, as many of them have inherited an undemocratic past.¹ Therefore, there are many laws and regulations that have to be reviewed and revised according to the present demand. Secondly, generally the new emerging democracy suffers from the “*anomia* syndrome” meaning that the integrity, the impartiality and the independence of the judiciary are seriously influenced. Under the authoritarian regimes, courts are usually politically intervened by the ruling elite.² In other words, in authoritarian regimes, courts are considered more as the attributes of the authority rather than as the attributes of justice. This situation also happened in Indonesia, in the era of the Suharto regime.³ Authoritarian regimes also produce legal professionals without integrity. As a result, judicial corruption becomes very common.

Judges play a significant role in guaranteeing the enforcement of the “rule of law”, which is the key point in achieving equilibrium in the above triadic relations among the state, civil society and the market, and between the state and its citizens. Besides, the courts and the judges play a pivotal role in controlling the practices of democracy which is usually glued to the principles of “majority rules” and a formal application of the principle of representation.⁴ Some experts argue that the Constitutional Court is less dangerous compared to political institutions like parliament. Therefore, in some new emerging democratic countries, they delegated authority to review acts to a new court i.e. constitutional court.

With the present development of the idea of constitutionalism and the increasing demand for democratization all over the world, almost all countries claim themselves to be democratic countries, despite their different democratic levels. In the course of development, there have been many new democratic countries that start their democratization agenda by reforming their constitution. Constitutional reform has been deemed as the most fundamental measure for creating a constitution that provides better assurances for the institutionalization of democratic values. This has been due to the position of the constitution as the foundation and at the same time as the framework of democratic values.⁵ The trend of new emerging democracies also shows that strengthening of checks and balancing principles among state institutions is unavoidable to create a better environment towards democracy.

II. DISCUSSION

1. Constitutional Democracy and Constitutional Adjudication

Historically, constitutional adjudication is much older and more deeply entrenched in the United States than in Europe. Judicial review as a part of constitutional issues has been implemented continuously in the United States since the Supreme Court’s landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803). While constitutional review in Europe, however, is largely a post-World War II phenomenon.⁶ In pre-World War II in Europe, democratic constitutions could typically be revised at the discretion of the legislature. They prohibited review of the legality of statutes by the judiciary and they did not contain substantive constraints, such as rights, on the legislative authority.

The rule of legislative supremacy meant that conflicts between a statute and a constitutional

norm were to be either ignored by judges, or resolved in favour of the former.⁷ One of the remarkable political developments of the twentieth century has been the development of constitutional democracy in Europe after World War II. The defeated powers in the western part of continent adopted new constitutions that embrace notions of individual rights and limited government.⁸ In other words, since the end of World War II, 'a new constitutionalism' has emerged and widely diffused. Human rights have been codified and given a privileged place in the constitutional law and quasi-judicial organs called constitutional courts have been charged with ensuring the normative superiority of the constitution. Such courts have been established in Austria (1945), Italy (1948), the Federal Republic Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985), and after 1989, in the post-Communist Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, the Baltic's, and several states of the former Yugoslavia.⁹

2. The Concept of Constitutional Adjudication

Grimm defines constitutional adjudication as:

"a system of rectifying, in the name of the constitution, violations of constitutional values and thereby maintaining the fundamental value-order inherent in the constitution. It refers to a system that seeks to protect the people's basic rights by making sure the constitution is respected as the supreme law in actual practice. More concretely, it seeks to protect the constitutional order and implement the constitution by having either regular courts or a separate constitutional institution to make an authoritative determination according to the constitution when cases arise in which violations of the constitution (e.g., infringement of basic rights) are alleged".¹⁰

Constitutional adjudication is as old as democratic constitutionalism. But for a long period of time, the United State of America remained alone in subjecting democratic decision-making to judicial review. While constitutions had become widely accepted already in the 19th century, it took almost 200 years for constitutional adjudication to gain world-wide recognition.¹¹ Rosenfeld also argues that constitutional adjudication is much older and more deeply entrenched in the United State than in Europe.¹²

Before the 20th century, the idea of constitutional adjudication was rejected by most European states, except in Switzerland for a particular area. Grimm further explains that the reason for the rejection of constitutional adjudication in the 19th century was its alleged incompatibility with the principle of monarchical sovereignty which governed most of the European states at the time. When the monarchy collapsed and was replaced by popular sovereignty as in France in 1871 and in many other states after World War I, constitutional adjudication was found to be in contradiction with democracy. Parliament as representation of people should be under no external control. The only exception was Austria, which in its Constitution of 1920 established a constitutional court with explicit power to review acts of legislature. Austria thus became the model of a new type of constitutional adjudication: by a special constitutional court.¹³

In response to the idea of constitutional adjudication, especially to review the acts enacted by parliament (constitutional review), there are differences among the countries. In many countries, so-called constitutional adjudication is based on constitutional law. Generally speaking, there are two types of constitutional adjudication institutions.¹⁴ One type establishes the Constitutional Court as a special court, while the other type indicates that constitutional adjudication is conducted by general courts, especially by the Supreme Court in the final instance, without other

special courts.¹⁵ Some common law countries like USA, Australia, India, and Malaysia¹⁶ put constitutional adjudication powers on the Supreme Court, while continental European countries and some Asian countries like Austria, Germany, Eastern Europe, South Korea and Indonesia,¹⁷ delegate the powers to a new court: the constitutional court, with a different scope of authority. Elliot points out that the most striking thing in this issue is that the review of acts must be justified constitutionally and evaluated normatively. Therefore, it must be justified by reference to relevant constitutional principles. He further explains that different types of power thus raised different challenges of justification.¹⁸

In the case of Indonesia, Hendrianto and Ginsburg state that in studying the emergence of the constitutional court in new democracies, some scholars have concluded that the political dynamics in a country in transition to democracy are one of the main driving forces behind the creation of constitutional courts. Hendrianto further adds that Indonesia and South Korea have the same background in terms of the reason of the establishment of the constitutional courts. In the context of the establishment of the Korean Constitutional Court, the decision to adopt a designated court was the result of compromise between the ruling party and the opposition parties. Korean constitutional court had influenced Indonesian politicians to look to the Korean Constitutional Court as a model.¹⁹

Hendrianto also concludes in his article that the Indonesian Constitutional Court, in fact, cannot avoid politically sensitive cases because its jurisdiction to review constitutionality of laws and government policies. The Court will always deal with constitutional issues that the powerful impact on the political realm. Consequently, the Court needs the leadership of a heroic Chief Justice who can command the institution in sometimes stormy waters of constitutional politics.²⁰ In other words, the Chief Justices of the Constitutional Court have to understand their position as the leader who lead the Court in functioning the Court as the guardian of the Constitution which must be able to correct the executive and legislative organ policies.

Lindsey argues that if effective, the new Constitutional Court has the potential to radically transform the Indonesian judicial and legislative relationship and formulates a new check on the conduct of lawmakers and the presidency.²¹ Therefore, it is a meaningful effort if a more comprehensive evaluation is conducted after a decade of the emergence of the constitutional court.

Webber argues in his paper by quoting the concept of Dahl that Indonesia today may be described as a democracy and it would have completed transition to democracy after having legislative elections in 1999.²² Meanwhile, in terms of consolidation of democracy, Webber views - by using the definition of democratic consolidation made by Schneider and Schmitter - that Indonesia has most of the attributes of a consolidated democracy.²³ He further concludes that by using the Schneider and Schmitter criteria, Indonesia almost all older 'third wave democracies' in terms of the extent of consolidation of democracy. However, Schneider and Schmitter confess that their conceptualization of democratic consolidation has an electoral bias. In a wider perspective, democratic consolidation may attach a greater importance to, for example, the implementation of the rule of law, should be the yardstick for measuring the degree of democratic consolidation. If the rule of law used as one of indicator, Indonesia's post-1998 performance will certainly look less impressive.²⁴

3. The Constitutional Democracy and Constitutional Adjudication in Indonesia

3.1. The Framework of Constitutional Adjudication

This sub-topic will elaborate more about the framework of constitutional adjudication in Indo-

nesian constitutional system. There are some state organs that need to be discussed regarding the framework of constitutional adjudication in Indonesia, namely, DPR (House of Representatives), President, Supreme Court and Constitutional Court. The DPR and the President are relevant to be discussed since both organs have authority in the enactment of laws which can be reviewed by the Constitutional Court. The Supreme Court is also discussed in this sub-chapter in relation to clarify the different authority of both the Constitutional Court and the Supreme Court in term of judicial review.

3.1.1. The House of Representatives (DPR)

DPR is a legislative organ which has the authority to enact laws. To enact laws, the DPR has to discuss together with and approved by the President. Besides, there are some functions of the DPR namely 1) legislative function, 2) budgeting function and scrutinizing function.²⁵ In exercising the functions, every member of the DPR shall hold the rights of interpellation, investigation and to declare an opinion.²⁶ Every member of the DPR shall also hold the rights to submit questions, to propose suggestions and opinions, and the rights of immunity.²⁷

Based on Article 20 of the 1945 Constitution, the DPR is considered as the legislative organ or legislator. In the context of law-making by the DPR, the 1945 Constitution highlights as follows:

1. The DPR shall hold legislative powers, not the President or the DPD;²⁸
2. The President is the organ which signs bills jointly approved by the House of Representatives becomes a law;²⁹
3. The bill which is officially enacted is compulsory promulgated;
4. Each bill shall be discussed by the House of Representatives and the President to reach joint approval;³⁰
5. If the bill is initiated by the DPR, the DPR as an institution will face the President as an institution may reject the bill, wholly or partly. If a bill fails to reach joint approval, the bill shall not be reintroduced within the same House of Representatives term of sessions.³¹ In this sense, position of the House of Representatives and the President are equal;
6. If a bill is initiated by the President, the House of Representatives also has right to receive or reject, partly or wholly. The DPR may have "voting" to receive or reject the bill proposed by the President;
7. If a bill has been approved in the meeting of the House of Representatives and enacted in the meeting, substantively the bill shall be legally become law. However, legislation of the law does not yet bind generally because the President does not sign yet and promulgated. Although the President may not change the materials, but as a law it has been legalized;
8. A bill which has been enacted by the House of Representatives as a law may enter into force as a law if achieving some conditions: a) Signed by the President to legalize the bill; b) within 30 days after decision, the bill shall legally become a law.³² (substantive enactment by the House of Representatives, formal enactment by the President).

The House of Representatives shall hold legislative, budgeting and scrutinizing functions.³³ Legislative function means the function to establish law jointly approved by the President. Budgeting function means the function of deciding National Budgeting together with President. Scrutinizing function is the function of the House of Representatives to supervise the implementation of laws exercised by the President.

In carrying out its functions, the House of Representatives shall hold some rights which may be divided into institutional rights as well as individual rights. Institutional rights of the House of Representatives are the rights of interpellation, investigation, and opinion declaration.³⁴ As indi-

viduals, the members of the House of Representatives shall hold the rights to submit questions, to propose suggestions and opinions, and the right of immunity.³⁵

3.1.2. The President

Based on the amendment of the 1945 Constitution, the President and Vice President shall hold an office for a term of five years and may subsequently be re-elected to the same office for one further term only.³⁶ The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.³⁷ In exercising his/her duties, the President shall be assisted by a Vice-President.³⁸

The President shall be entitled to submit bills to the House of Representatives.³⁹ Besides, the President may issue government regulations as required to implement laws.⁴⁰

The President and the Vice-President shall be elected as a single ticket directly by the people.⁴¹ Each ticket of candidate for President and Vice-President shall be proposed prior to the holding of general election by political parties or coalitions of political parties which are participants of the general election.⁴²

With the approval of the House of Representatives, the President may declare war, make peace, and conclude treaties with other countries.⁴³ In making other international treaties which will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or which will requires an amendment to or the enactment of an act, the President shall obtain the approval of the House of Representatives.⁴⁴ Besides, the President may declare a state emergency. The conditions for such declarations and the subsequent measures regarding a state emergency shall be regulated by law.⁴⁵

3.1.3. The Supreme Court

The Supreme Court of the Republic of Indonesia is the independent judicial arm of the state. It maintains a system of courts and sits above the other courts and is the final court of appeal. It can also re-examine cases if new evidence emerges.

The Supreme Court is independent as of the third amendment to the Constitution of Indonesia. The Supreme Court has oversight over the high courts (*Pengadilan Tinggi*) of which there are about 30 throughout Indonesia and district courts (*Pengadilan Negeri*) of which there are around 347 with additional district courts being created from time to time.⁴⁶

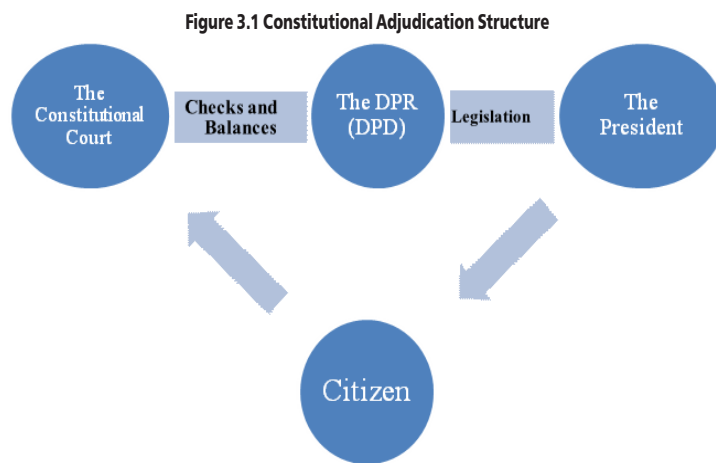
Regarding the judicial review, the Supreme Court shall have authority to review legislations lower than the laws such as Government Regulation, Presidential Regulation and Regional Regulation. These are 'the judicial review' exercised by the Supreme Court, while judicial review of laws exercised by the Constitutional Court is also popularized specifically as the 'constitutional review'.

3.1.4. The Constitutional Court

The Constitutional Court of Republic of Indonesia is a new state organ in the Indonesia constitutional system as the result of the Third Amendment of the 1945 Constitution.⁴⁷ As a constitutional organ, the Constitutional Court of Republic of Indonesia is designed to be the guardian as well as the sole interpreter of the constitution through its decisions.

In exercising of its constitutional duties, the Constitutional Court aims at implementing its vision, "enforcement of the constitution in the context of realizing the goal of the rule of law state and democracy for a dignified life as a nation and state". This vision is then manifested into two missions of the Constitutional Court, (1) realizing a modern and accountable Constitutional Court as one of the actors exercising judicial power, (2) building Indonesian constitutionality and the culture of constitutional awareness.⁴⁸

STRUCTURE OF CONSTITUTIONAL ADJUDICATION



The DPR as Parliament which enacts laws with approval of the President, since the amendments, has become a very powerful legislative body. Denny quoted Saldilsra said that the amendments have, in fact, resulted in a 'supreme DPR and the Constitution have thus shifted from being an executive-heavy Constitution to a DPR-heavy Constitution.⁴⁹ In other words, in term of legislation, the DPR has stronger position rather than executive body.

Following Indonesia's independence and the replacement of and amendments to the Constitution, the idea of judicial review continued to develop over time. However, as the 1945 Constitution, which became applicable again as of July 5, 1959, did not adopt such an idea, the idea of judicial review had never been realized. Only following the amendment of the 1945 Constitution in 1999, 2000 and especially 2001, namely in the third amendment to the 1945 Constitution, and was reaffirmed in the fourth amendment in 2002.

a. Powers of the Constitutional Court

The four functions of the Constitutional Court are performed through the implementation of four authorities and one duty as listed in article 24C (1, 2) UUD 1945 as follows:

1. To review Acts.
2. To decide dispute on jurisdiction among the state organs which the authorities are given by the 1945 Constitution.
3. To decide dissolution of political parties.
4. To decide dispute over the result of election.

b. Nature and Procedures

Historically, the establishment of the Constitutional Court began with adoption of idea of the constitutional court in the amendment of the 1945 Constitution by the People Consultative Assembly in 2001 as formulated in Article 24 (2), Article 24C, and Article 7B of the Third Amendment of the 1945 Constitution on 9 November 2001. The idea to establish the Constitutional Court is one of the results of legal thought and modern constitutional law in 20th century. Then the existence of the Constitutional Court was asserted again in Constitutional Court Act 2003.

4. The Issues Facing Constitutional Adjudication in Indonesia

However, after a decade, some constitutional law experts conclude that there are some prob-

lems facing the constitutional adjudication in Indonesia. Firstly, as a new state organ, the Constitutional Court tends to be a super body institution without strong supervision either internally or externally. For instance, in case of judicial review of Judicial Commission Act in 2006, the Constitutional Court had nullified the authority of the Judicial Commission to supervise the Constitutional Court Judges. This is a kind of breach of principle of impartiality where the judges may not judge their own interest. Without having strong supervision, the code of ethics of the judges may not be enforced well. Internal supervision becomes weak when the problems lie in the hands of judges of the Constitutional Court. One of the results of this situation was in 2014, AkilMochtar, the chairman of the Constitutional Court was arrested by the Anti-Corruption Commission on bribery case relating to local election in Borneo.

Secondly, the function of constitutional adjudication in the Constitutional Court has disturbed by incorporating local election disputes become a part of the authority of the Constitutional Court. The Constitutional Court has the authority to settle local election disputes since Election Act No. 22 of 2007 and Amendment of Local Government Act No. 12 of 2008 states that local election is a part of the general election. However, article 22E of 1945 Constitution states that: "the general election shall be conducted to elect the members of the House of Representative, the Regional Representative Council, the President-Vice President, and the Regional House of Representatives".

Thirdly, after a decade of the existence of the Constitutional Court, there is an evaluation on the scope of the authority of the Constitutional Court whether the Constitutional Court has to have authority in settling disputes over the result of the local election or the scope of authority added by incorporating the authority to decide on constitutional complaints.⁵⁰

Fourthly, in term of disputes on jurisdiction among the state organs, the Constitutional Court had not given a significant role in functioning as mechanism of constitutional adjudication due to two reasons, first, unclear concept of *subjectum litis* of the petitioners to have legal standing in the Court. Second, lack of understanding of the subject matter jurisdiction (*objectum litis*) of the Court.

Based on the previous discussion, it is believed that there is a need to comprehend the amendment of the 1945 Constitution since there are some weaknesses in the Constitution. Constitution is a political consensus among the citizens in a country. It is a resultant of social and political situation of particular country. Accordingly, social and political factors also take important roles in relation to the amendment of the Constitution. To amend the Constitution, of course, there is what it is called as a political reform or a political pressure which pushes the member of People's Consultative Assembly to amend the Constitution as what happened after the collapses of Soeharto regime.

5. Constitutional Democracy and Constitutional Adjudication in Australia

5.1 The Framework of Constitutional Adjudication

The Australian law of standing to raise constitutional issues is built on a private law paradigm,⁵¹ one which sees 'administrative [and constitutional] review as concerned with the vindication of private and not public rights'.⁵² It is reinforced by disparate elements of substantive and procedural law: the federal courts have jurisdiction only in relation to 'matters', a concept at whose core is the concrete dispute about the applicant's rights and duties on facts pertaining to their own situation; the requirement that in most cases an applicant have a special interest in the subject matter of the action; the limited role of interveners and amici curiae. It is also reinforced

by structural features of the legal system: the integration of public law and private law litigation in the one system of courts; the shared common law methodology in public law and private law; and the lack of a specialized corps of public law judges. Australian courts have not embraced with any enthusiasm the idea that they might have a role in overtly and deliberately shaping the interpretation of the Constitution to meet the governmental needs of the Australian people.⁵³

Judges in constitutional cases are also potentially faced with a chaotic universe of relevant factors. First, there are higher-order interpretative decisions about the classes of materials that they will look at, such as constitutional drafting debates, the decisions of previous courts, the decisions of foreign courts, international law, religious law, the views of the population at the time of constitution making, and the views of the population now. These higher-order decisions may be made consciously and articulated as a commitment to a particular theory of constitutional interpretation; in Australia, for example, Justice Kirby has placed himself in the progressivist interpretative tradition⁵⁴ and Justice Heydon in a particular form of originalism.⁵⁵

5.2 The High Court and Its Power

The High Court sits at the apex of the court system in the Australian federation and is both the constitutional court and the final court of appeal. It was established in 1901 by Section 71 of the Constitution. As in other common law countries and legal system the Common-law doctrine of precedent is established on the hierarchical structure of the court system where lower courts follow precedents set by higher courts. Being a federal country, Australia has both a federal court structure and a state court structure.

The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts. The meaning and application of the Australian Constitution can be tested in the High Court of Australia which is the highest court in the Australian judicial system. The court interprets the Constitution and settles disputes about its meaning. It has the power to consider Commonwealth or state legislation and determine whether such legislation is within the powers granted in the Constitution to the relevant tier of government.

Constitutional narratives are not the sole creation of judges and legal theorists, but are also culturally- and politically-created conceptions.⁵⁶ Thus constitutional narrative is created – sometimes deliberately and sometimes not – by governments, legislators, litigants, religious leaders, historians, civil society movements, and newspaper editors who at various points attempt to push the narrative of the constitution in one direction or another. However, the judge is the primary storyteller in constitutional adjudication and does not merely unwittingly reflect back whatever cultural, political or other social values happen to exist at the time; the constitutional narrative has to be compelling to the legal mind as well.

6. Constitutional Adjudication: A Comparison between Indonesia and Australia

Based on the previous description of both countries on constitutional adjudication, it may discuss some similarities and differences as follows:

6.1 Similarities

First, the constitutional adjudication in both countries is a part of realizing the goal of the rule of law state and democracy.⁵⁷ In a country based on the rule of law and democracy, there is no authority or organs higher than the Constitution. The authority and organs are subject to the supremacy of the Constitution as the supreme law of the nation. This is a formula of modern state

for striving a dignified life of the nations. The existence of the constitutional adjudication is also a part of fundamental rights of citizen.

Second, exercising of judicial review in both countries is a part of mechanism of constitutional adjudication. Having this mechanism, the constitutional adjudication in both countries plays the role as check and balance mechanism of the main organs in their constitutional and political systems. This mechanism also prevents the trend of abuse of powers among the state organs.

From a logical and rational point of view, this general power of all judges and courts to act as constitutional judges is the obvious consequence of the principle of judicial supremacy of the Constitution. If the Constitution is the supreme law of the land, in case of conflict between a law and the Constitution, the latter must prevail and it is the duty of the judiciary to determine the issues in each case.⁵⁸ This is the impact of the emergence of idea of constitutional democracy where the parliament is not considered as the final and absolute element of democracy. In this sense, even the parliament as the representative of the will of people needs to be controlled by the courts in the light of the spirit of the constitution as the highest law.

6.2 Differences

However, both countries have differences in some ways. First, both countries follow different model of constitutional adjudication. Australia follows the common law model⁵⁹ with functions the superior courts as organs of the constitutional adjudication, while Indonesia follows kelsenian models⁶⁰ by establishing a new court, namely the Constitutional Court. American model is usually called also as John Marshall's doctrine. According to this doctrine, judicial review is conducted on every case relating to constitutional issues by all ordinary courts through a decentralized or diffuse or dispersed review.⁶¹ This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review.⁶² In other words, in this model of constitutional adjudication, the review is not separate but includes in other cases that are ongoing process in every level of court. Therefore, all levels of courts have the power of judicial review.

The concentrated system of judicial review is characterized by the fact that the constitutional system empowers one single state organ of a given country to act as a constitutional judge. It is the only state organ to decide upon constitutional matters regarding legislative acts and other state acts with similar rank or value, in a jurisdictional way. This state organ can be either the Supreme Court of Justice of the country, in its character as the highest court in the judiciary hierarchy, or it can be a particular constitutional court, council or tribunal, specially created by the Constitution and organized outside the ordinary judicial hierarchy.⁶³

Continental model has adopted by numerous countries all over the world. Off course, each country also modifies this model into various formulas. Some general features of continental model can be summarized as follows:

1. Constitutional review is implemented variously depending on the system in each country.
2. Constitutional review is exercised by an independent organ.
3. In case of constitutional complaint cases, they settle the case by separating the mechanism from ordinary courts.
4. The constitutional position of the constitutional court is guaranteed through independent administration and budgeting.
5. The constitutional court has monopolistic authority in exercising the constitutional review.
6. There judiciary has power to nullify the legislative acts.
7. The constitutional court judges are usually elected by bodies of political power.

8. The nature of decision made by the constitutional court is legal as well as political, although the constitutional court may have a purely consultative function.
9. The continental model of constitutional adjudication is generally repressive in nature, although in a small numbers, preventive review is also implemented in practice.⁶⁴

Second, as the consequence of the models, Australia has an appeal mechanism of the constitutional adjudication because it may start from the High Court, while Indonesia which has a centralized model, has no appeal mechanism because the Constitutional Court's decision is first and final.

III. CONCLUSION

The establishment of the Indonesian Constitutional Court in 2003, and the functions of the superior courts in Australia are part of realizing the goal of the rule of law state and democracy. The constitutional adjudication through the Courts in both countries plays the role as checks and balances mechanism of the main organs in their constitutional systems.

However, both countries follow different model of constitutional adjudication. Australia follows the common law model which functions the superior courts as an organ of the constitutional adjudication, while Indonesia follows kelsenian models by establishing a new court, namely the Constitutional Court. The development and experiences of the institutions in both countries not only shed more lights of constitutional democracy, but also influenced the process of democratic consolidation in the region.

ENDNOTES

- ¹ Article 134, 136 and 137 of *Kitab Undang-Undang Hukum Pidana* (Indonesian Penal Code) had been nullified by the Constitutional Court of Indonesia because the Court opined that those articles were not in line with the 1945 Constitution. This act is one of the legacies of Dutch Colonialism which was used by Suharto's Regime to muzzle his enemies or any person who criticized his policy during his 32 years in power.
- ² Jimly Asshiddiqie, Access to Justice in Emerging Democracies: The Experiences of Indonesia, A Proceeding of Workshop "Comparing Access to Justice in Asian and European Transitional Countries, Indonesia, 27-28 June 2005, in Bertrand Fort (Ed) (2006), *Democratizing Access to Justice in Transitional Countries*, Jakarta, at 10.
- ³ Many political scientists and constitutional law experts describe the era of the Suharto regime as bureaucratic-authoritarian regime which controls every single aspect of the nation, including judicial power.
- ⁴ Jimly Asshiddiqie, n. 2 at 11.
- ⁵ See Mohammad Mahfud MD. (2010), *Remarks of Chief Justice of the Constitutional Court of the Republic of Indonesia*, A Proceeding of the 7th Conference of Asian Constitutional Court Judges, Jakarta, 12-17 July, at 9.
- ⁶ See Michel Rosenfeld (2004), "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast", No. 4, *International Journal of Constitutional Law* (2004). See also Anna Gamper, "The Justifiability and Persuasiveness of Constitutional Comparison in Constitutional Adjudication", Vol. 3, No. 3, *Online International Journal of Constitutional Law* (2009), at 154.
- ⁷ Alec Stone Sweet (2000), *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, at 31.
- ⁸ John Ferejohn and Pasquale Pasquino (2004), "Constitutional Adjudication: Lesson from Europe", Vol. 82, No. 7, *Texas Law Review*, at 1.
- ⁹ Alec Stone Sweet, n. 7, at 31.
- ¹⁰ Constitutional Court of South Korea (2008), *Annual Report: Twenty Years of the Constitutional Court of Korea*, at 64.
- ¹¹ Dieter Grimm, (?) "Constitutional Adjudication and Democracy", Vol. 32, No. 1-4 and Vol. 33, No. 1, *Israel Law Review*, (?) at 193-196.

- ¹² See Michel Rosenfeld (2004), "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast", No. 4, *International Journal of Constitutional Law*, at 633
- ¹³ Dieter Grim, n. 11, at 195
- ¹⁴ Donald L. Horowitz, (2006), "Constitutional Courts: A Primer for Decision Makers", *Journal of Democracy* Vol. 17, Issue 4, at 129.
- ¹⁵ Jibong Lim (1999), "A Comparative Study of the Constitutional Adjudication System of the US, Germany and Korea," *Tulsa Journal of Comparative and International Law*, at 123.
- ¹⁶ F.A. Trindade, & H.P. Lee (1988), *The Constitution of Malaysia-Further Perspectives and Developments*, Petaling Jaya, Penerbit Fajar Bakti SDN. BHD, Pp 101-122.
- ¹⁷ Taylor Cole (1958), "The West German Federal Constitutional Court: After Six Years", vol. 20, No. 2, *the Journal of Politics*, at 278-307.
- ¹⁸ Mark Elliot (2001), *The Constitutional Foundations of Judicial Review*. Oxford-Portland: Hart Publishing, at 56.
- ¹⁹ Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court*, in Andrew Harding & Penelope (Pip) Nicholson (eds.) (Year?), *New Courts in Asia*, New York: Routledge, at 160. See also Tom Ginsburg, n. 19, at 140.
- ²⁰ Hendrianto (2016), "The Rise and Fall of Heroic Chief Justices, Constitutional Politics and Judicial Leadership in Indonesia", *Washington International Law Journal*, at 67-68.
- ²¹ Tim Lindsey (2002), Indonesian Constitutional Reform: Muddling Towards Democracy, *Singapore Journal of International and Comparative Law*, at 244-304.
- ²² In his book, Dahl proposes the concept of democracy as comprising elected officials, free, fair, and frequent elections, inclusive of suffrage and citizenship, freedom of expression, alternative sources of information and associational autonomy is taken as the yardstick. See also Douglas Webber (2005), "A Consolidated Patrimonial Democracy? Democratization in Post Suharto Indonesia", Paper presented at the Workshop on "Post-Cold War Democratization in the Muslim World: Domestic, Regional and the Global Trends", Joint Session of the European Consortium of Political Research, Granada, <http://www.casaasia.es/pdf/520551939PM1115047179830.pdf>, viewed on 7 December 2013, at 5.59 pm, at 2. See also Bunte & Ufen (2009), *Democratization in Post-Suharto Indonesia*, City?: Routledge, at 49.
- ²³ Schneider and Schmitter propose the definition of democratic consolidation as the process that makes mutual trust and reassurance among the relevant actors more likely, leading to the institutionalization of the practice of "contingent consent", namely the willingness of actors to compete according to pre-established (democratic) rule and, if they lose, to consent to the winners right to govern - contingent upon the right of the losers to compete fairly and win honestly in the future. They construct a behaviourally-oriented scale of democratic consolidation comprising 12 components or items. Whether a country is a consolidated democracy depends on whether all 'significant political parties' basically accept the existing constitution, whether elections have been regular, free, and fair and their outcomes accepted by government and opposition (s), whether electoral volatility has diminished significantly, whether there has been at least one 'rotation-in-power' or significant shift in alliances of parties in power, whether elected officials and representatives are constrained in their behaviour by non-elected veto groups within the country, and whether formal and informal agreement has been reached over the rules governing the formation and behaviour of associations, the territorial division of competencies and the rules of ownership and access to mass media. See Douglas Webber, n. 33, at 2-3.
- ²⁴ Douglas Webber, n. 30, at 2-3.
- ²⁵ Article 20A (1) of the 1945 Constitution of Republic of Indonesia.
- ²⁶ Article 20A (2) of the 1945 Constitution of Republic of Indonesia.
- ²⁷ Article 20A (3) of the 1945 Constitution of Republic of Indonesia.
- ²⁸ Article 20 (1) of the 1945 Constitution of Republic of Indonesia.
- ²⁹ Article 20 (2) of the 1945 Constitution of Republic of Indonesia.
- ³⁰ Ibid.
- ³¹ Article 20 (3) of the 1945 Constitution of Republic of Indonesia.
- ³² Article 20 (5) of the 1945 Constitution of Republic of Indonesia.
- ³³ Article 20A (1) of the 1945 Constitution of Republic of Indonesia.
- ³⁴ Article 20A (2) of the 1945 Constitution of Republic of Indonesia.

- ³⁵Article 20A (3) of the 1945 Constitution of Republic of Indonesia.
- ³⁶Article 7 of the 1945 Constitution. The limitation for two period of presidency was the result of First Amendment of the 1945 Constitution. The limitation was due to bad history of long period of Soeharto as President. More than 30 years in the presidents had lead Soerharto became a very authoritarian and bureaucratic regime which had violated fundamental rights of citizen through any restrictions, punishment, and corruption.
- ³⁷Article 4 (1) of the 1945 Constitution of Republic of Indonesia.
- ³⁸Article 4 (2) of the 1945 Constitution of Republic of Indonesia.
- ³⁹Article 5 (1) of the 1945 Constitution of Republic of Indonesia.
- ⁴⁰Article 5 (2) of the 1945 Constitution of Republic of Indonesia.
- ⁴¹Article 6A (1) of the 1945 Constitution of Republic of Indonesia.
- ⁴²Article 6A (2) of the 1945 Constitution of Republic of Indonesia.
- ⁴³Article 11 (1) of the 1945 Constitution of Republic of Indonesia.
- ⁴⁴Article 11 (2) of the 1945 Constitution of Republic of Indonesia.
- ⁴⁵Article 12 of the 1945 Constitution of Republic of Indonesia.
- ⁴⁶In late 2011, the Chief Justice of the Supreme Court, Harifin A. Tumpa, said that the Indonesian government could only aim to establish district courts in 400 of the nation's 530 provinces, regencies (kabupaten) and municipalities (kotamadya). See also www.mahkamahagung.go.id.
- ⁴⁷See Anonymous (2010), *Profile of the Constitutional Court of the Republic of Indonesia*, Secretariat-General and Registry Office of the Constitutional Court, at 2.
- ⁴⁸Ibid, at 9.
- ⁴⁹Denny Indrayana, n. 67, at 363.
- ⁵⁰Some scholars argue that local election is not a part of the general election as stated in article 22E of the 1945 Constitution. Therefore, local election is not a part of the authority of the Constitutional Court. Incorporating local election disputes become a part of authority of the Constitutional Court has disturbed the main function of the Constitutional Court as the guardian of the constitution and democracy. I DewaGedePalguna further argues that it is better for the Constitutional Court to adopt authority of resolving constitutional complaints of the citizen than handling local election disputes.
- ⁵¹See Simon Evans and Stephen Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Richard S Kay (ed), *Standing to Raise Constitutional Issues* (Bruylant, 2005) at 115, 137; and at greater length, Simon Evans and Stephen Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Gabriël A Moens and RodolpheBiffot (eds)(2002), *The Convergence of Legal Systems in the 21st Century: An Australian Approach* (CopyRightPublishing) at 53, 97 8.
- ⁵²4 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247, 262 [37] (Gaudron, Gummow and Kirby JJ) ('*Bateman's Bay*')(noting the need for caution in extrapolating from that model in the development of publiclaw review in Australia).
- ⁵³But contrast *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 600 (Kirby J); *Eastman v R* (2000) 203 CLR 1, 79 80 [242] (Kirby J).
- ⁵⁴Justice Michael Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne University Law Review* 1; "Living with Legal History in the Courts" (2003) 7 *Australian Journal of Legal History* 17, 21-4.
- ⁵⁵*Roach v Electoral Commissioner* (2007) 233 CLR 162, 224-5 (Heydon J).
- ⁵⁶Cover, above n 6 at 26-40 discusses the way in which interpretative communities, in his case religious communities, can create competing constitutional narratives.
- ¹⁴See, for example, Legrand, Pierre (1997) 'The Impossibility of Legal Transplants' 4 *Maastricht Journal of European and Comparative Law* 11; Watson, Alan 'Aspects of Reception of Law', (1996) 44 *American Journal of Comparative Law* 335.
- ⁵⁷Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution of Indonesia were:(1) the principle of constitutional democracy, and (2) the principle of democratic rule of law or "demokratischerechtsstaat". See Further JimlyAsshiddiqie (2009), *Creating A Constitutional Court for A New Democracy*, Paper presented at Seminar held by Melbourne Law School, March 11th, at 2.
- ⁵⁸See Allan R. Brewer-Carias (1989), *Judicial Review in Comparative Law*, Cambridge University Press, at 127.

- ⁵⁹ This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review. Although in case of Malaysia, it limits the authority of judicial review to the superior courts. In the US, as first model of the common law, judicial review may be exercised by all level of courts. See further Allan R. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge University Press, 1989, at 89.
- ⁶⁰ Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is contrast to the “American” model, whereby all courts have authority to adjudicate constitutional issues in the course of deciding legal cases and controversies. See further Victor FerreresComella, “The European Model of Constitutional Review of Legislation: Toward Decentralisation?”, 2004, Volume 2, issues 3, the *International Journal of Constitutional Law*, at 461.
- ⁶¹ Ibid, at 47. See also Richard H. Fallon, Jr, *The Dynamic Constitution: An Introduction to American Constitutional Law*, Cambridge University Press, 2004, at 13. In this book, Fallon states that Marshall gave the ruling for which Marbury is famous: It would defeat the purpose of a written constitution if the courts had to enforce unconstitutional statues. The courts must exercise judicial review because the Constitution is law, and it is the essence of the judicial function “to say what the law is.”
- ⁶² See Allan R. Brewer-Carias, n. 78, at 91.
- ⁶³ Allan R. Brewer-Carias, n. 136, at 185.
- ⁶⁴ Jimly Asshiddiqie (2006), *Model-Model Pengujian Konstitusional di Berbagai Negara*, Konstitusi Press, at 54-55.

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