Master's Thesis of Law

Institutional Improvement of the Indonesian Constitutional Court:

Based on Comparative Study with South Korea and Germany

인도네시아 헌법재판의 제도적 개선방안:

한국 및 독일과의 비교법적 고찰을 바탕으로

February 2020

Graduate School of Seoul National University

College of Law

Constitutional Law

M. Lutfi Chakim

Institutional Improvement of the Indonesian Constitutional Court:

Based on Comparative Study with South Korea and Germany

Academic Advisor: Professor Jong-Ik Chon

Submitting a master's thesis of Constitutional Law

October 2019

Graduate School of Seoul National University

College of Law

Constitutional Law

M. Lutfi Chakim

Confirming the master's thesis written by

M. Lutfi Chakim

January 2020

Chair	Professor Woo-Young Rhee	(Seal)
Vice Chair	Professor Sang-Hyeon Jeon	(Seal)
Examiner	Professor Jong-Ik Chon	(Seal)

Abstract

Institutional Improvement of the Indonesian Constitutional Court: Based on Comparative Study with South Korea and Germany

M. Lutfi Chakim

Constitutional Law

The Graduate School

Seoul National University

The idea of the Indonesian Constitutional Court establishment is intended to resolve cases that are related to the constitutional issues in Indonesia. Since its establishment on 13 August 2003, many landmark decisions have been issued, which shows that the Indonesian Constitutional Court has been playing an important role in securing constitutional democracy, the rule of law, and fundamental rights. Despite its achievements that have been made through its landmark decisions, however, the Indonesian constitutional adjudication system also has been raised public comments and criticisms, some problems can be found in the organizational structure, jurisdictional limit, procedural law issues, and controversy of decisions. The aim of this thesis is to give an overall picture of the Indonesian constitutional adjudication system, as well as evaluating its role and performance by finding the problems and challenges facing by the Court. The study is conducted through a theoretical inquiry and comparative study with constitutional courts in other countries, such as South Korea and Germany. Due to the protection of fundamental rights continues to pose challenges, it is therefore imperative that the Indonesian Constitutional Court must always improve its adjudication system. In deciding the case, the constitutional justices shall be independent and impartial to enforce law and justice. To give maximum protection of fundamental rights, the Constitutional Court jurisdictions should be improved by adopting constitutional complaint and concrete constitutional review. Lastly, to secure the effectiveness of the

Constitutional Court decisions, a system should be built to assure the effectiveness and enforceability of the decisions, such as giving separation of legislative calendar for those statutory legislation based upon the Constitutional Court decision.

Keywords: Comparative Constitutional Law; Constitutionalism; Constitutional Adjudication; Constitutional Court; Indonesia; South Korea; Germany

Student ID: 2018-25519

Table of Contents

LIST OF TABLES

LIST OF FIGURES

LIST OF ABBREVIATIONS

CCI Constitutional Court of Indonesia / Mahkamah Konstitusi (MK)

CCK Constitutional Court of Korea / Heonbeop Jaepanso

DEHK Dewan Etik Hakim Konstitusi (Board of Ethics of Constitutional Justice)

DPR Dewan Perwakilan Rakyat (House of Representatives)

DPD Dewan Perwakilan Daerah (Regional Representative Council)

KPU Komisi Pemilihan Umum (General Election Commission)

MPR Majelis Permusyawaratan Rakyat (People's Consultative Assembly)

MKMK Majelis Kehormatan Mahkamah Konstitusi (Honorary Council of the Constitutional Court)

PUU Pengujian Undang-Undang (Constitutional Review of Law)

CHAPTER 1

INTRODUCTION

1.1. Study Background

The adoption of the principle of supremacy of the constitution raises many complex problems.[1] One key problem is how to ensure that the constitution is adhered to by all state institutions, so there will be a consistency and harmonization in the drafting of legislation and state policies by placing the constitution as the supreme law of the land. In this context, the constitutional court has come to play a central role to guarantee that all laws and government actions will not violate the constitution.

The establishment of a constitutional adjudication system in each country is triggered for a variety of reasons, however, in general, the establishment of the constitutional court is initiated by process of political change from authoritarian power into democracy. The rejection of authoritarianism has an impact on the demand for a democratic state administration which appreciates human rights.[2] Some countries that established the constitutional court, in general, the countries that were changing from an authoritarian state to a democratic country, including Indonesia and South Korea.

Albert HY Chen found that, "research into the history of constitutional drafting and the design of Asian constitutional courts has revealed that there has been learning and borrowing from foreign models. For example, the Korean Constitutional Court borrowed from the German Federal Constitutional Court model. In turn, the Korean model had a significant impact on the design of the Indonesian Constitutional Court."[3]

---

[1] The principle of supremacy of the constitution expresses the higher ranking position of basic law both in the system of law, human rights law as well as in the entire political and social system of every country.

[2] Wasis Soesetyo, 'Guarding Constitution through the Court,' University of Indonusa Esa Unggul, Jakarta, accessed 22 August 2018, http://www.ialsnet.org/meetings/constit/papers/SusetioWasis(Indonesia).pdf

[3] Albert H. Y. Chen, 'Constitutional Courts in Asia: Western Origins and Asian Practice', in *Constitutional*

Korea is often considered as one of the good references for Indonesia in terms of the constitutional adjudication system. This can be seen that prior to the establishment of the Indonesian Constitutional Court, some of the Indonesian constitutional law scholars conducted comparative study in some Asian countries, including South Korea. From the study, arguably, the Korean Constitutional Court model plays significant roles specifically in the jurisdictions and organization of the Indonesian Constitutional Court.[4]

Whereas, Germany is taken as a reference is due to the fact that Germany is one of the countries who have the most advanced and established the constitutional court system, even though it is not the oldest.[5] The Basic Law entered into effect on 23 May 1949. For the first time in German history, it provided for a constitutional court to be established. The Federal Constitutional Court began its work in the year 1951. Today, the Federal Constitutional Court can look back upon more than seventy years of history.

In terms of the establishment year, the Korean Constitutional Court is one of the oldest Constitutional Court in Asia,[6] and it has just celebrated its thirtieth anniversary since its establishment thirty years ago in 1988. South Korea began its transition from authoritarianism and military domination of the government to liberal democracy with the adoption of a new constitution in 1987. Historically, since the enactment of the first Korean Constitution of 1948,

---

Courts in Asia: A Comparative Perspective, *Comparative Constitutional Law and Policy*, eds. Albert H. Y. Chen and Andrew Harding, Cambridge: Cambridge University Press, 2018, 20.

[4] Andy Omara, 'Lessons from the Korean Constitutional Court: What Can Indonesia Learn from the Korean Constitutional Court Experience? *Korea Legislation Research Institute* 11, 2008.

[5] The Austrian Constitutional Court is the oldest Constitutional Court, which was introduced for the first time in 1919.

[6] The Taiwan's Constitutional Court is the oldest constitutional courts in Asia. It was established in 1948 under the Republic of China Constitution.

nine constitutional amendments have been made,[7] and the 9th revision (October 29, 1987) provides for the establishment of the Constitutional Court in Korean history.[8]

As the youngest Constitutional Court compared with Germany and Korea, the Indonesian Constitutional Court is only fifteen years, since its establishment on 13 August 2003. The constitutional amendment of 2001 provides for a Constitutional Court, which was duly established in 2003, and it has been playing an important role in the securing of basic democratic order, the rule of law and fundamental rights protection, and through its decisions have strengthened the constitutional system in Indonesia.

Despite the Indonesian Constitutional Court's achievements that have been made through its landmark decisions,[9] however, the Indonesian Court's performance also has been raised public comments and criticisms that influenced and impacted the Indonesian legal order, some problems can be found in the organizational structure, jurisdictional limit, procedural law issues, and controversy of decisions.

First, the organization, including justices and its supporting system. In this part, the current problems occur concerning the justices appointment system, term of office, and the weak supervision of justices, where these can influence the independence of justices. Moreover, the problem of the supporting system of justices can be found from the small number of the researcher.

Second, further criticisms rise related the Court jurisdictions, currently, the Court does not have jurisdictions to decide the case of constitutional complaint and concrete constitutional

---

[7] The history of the constitutional amendments in Korea: 1st revision (July 7, 1952), 2nd revision (Nov 29, 1954), 3rd revision (June 15, 1960), 4th revision (Nov. 26, 1960), 5th revision (Dec. 26, 1962), 6th revision (Oct. 21, 1969), 7th revision (Dec. 27, 1972), 8th revision (Oct. 27, 1980), and 9th revision (Oct. 29, 1987). See Jangseok Kang, 'The Survivability of Divided Government in the Korean Presidentialism,' *Korean Political Research* Vol. 17 No. 1 (2008): 459.

[8] Albert H. Y. Chen, 'Constitutional Courts in Asia: Western Origins and Asian Practice', in *Constitutional Courts in Asia: A Comparative Perspective*, 14.

[9] Constitutional Court of Indonesia, 'Awards and Achievements', accessed 30 October 2019, https://mkri.id/index.php?page=web.Penghargaan&id=1&pages=4&menu=8&status=1

review, where this makes the Court couldn't give maximum protection of democracy and the fundamental rights of the citizens.

Third, it didn't stop there, in terms of procedural law, some problems arise when there is no legal certainty regarding the time limit in deciding the case, especially constitutional review cases. The other procedural issues related with the role of attorney, unclear standard qualification of expert, and the consequences of the absence of statement from government and legislature in the Court hearing.

Forth, the Court decision, where many of the decisions spark controversy, some of them are related to the inconsistency of decisions and the weak binding force of the decisions. Moreover, the judicial activism of the Court in terms of making *ultra petita* (unsolicited) decisions and transforming from negative to positive legislator, which some criticisms express that no strong legal reason has been applied upon the Court arguments.

This thesis aims to evaluate the Indonesian Constitutional Court performance, finding the problems and challenges facing by the Court. The study is conducted through a theoretical inquiry and comparative analysis among constitutional courts in Indonesia, Korea, and Germany. Then offers proposals for improving the Indonesian Constitutional Court's role and institutional capacities by learning and borrowing from the Korean and the German Constitutional Courts.

1.2. Research Questions

Based on the above description, there is an expectation that the Indonesian Constitutional Court must always improve its role in the protection fundamental rights of the citizen. In that regard, the Indonesian Constitutional Court can learn from the Korean and the German Constitutional Courts in terms of improving the organization, jurisdictions, and decisions. Therefore, this thesis examines and answers the following research questions:

1) Has the Indonesian Constitutional Court exercised its functions and jurisdictions optimally? What are the problems and challenges facing by the Indonesian Constitutional Court in the protection fundamental rights of citizen?
2) What are the differences and similarities of constitutional adjudication systems in

Indonesia, Korea and Germany?

3) In terms of improving constitutional adjudication system in Indonesia. What can the Indonesian Constitutional Court learn from the Korean and the German Constitutional Courts? And what recommendations can be provided for improving the Indonesian Constitutional Court's role and institutional capacities?

1.3. Theoretical Framework

The constitutional court (sometimes called a 'constitutional tribunal' or 'constitutional council') is a special type of court that exercises the power of constitutional adjudication. This section discuss the history and theoretical framework of two main issues, namely: the idea of the Constitutional Court establishment, and the historical development of the Indonesian Constitutional Court will be explained in the second section.

1.3.1. The Idea of the Constitutional Court Establishment

The history of judicial review practices dates back to the *Marbury v. Madison* (1803) case handled by the Supreme Court of the United States of America under the leadership of John Marshall. The case of *Marbury v. Madison* deals with the process of appointing the high-ranking government officials, where the appointment procedure for Justices of the Peace required completion within a President's term. An official appointment had to be made while the President was active in his duties, and the problem occurred when William Marbury's appointment was not completed in this timeframe, this because John Adams's presidency ended before he could formally appoint Marbury.[10]

Although at that time the US Constitution didn't have any provision for granting an authority to the US Supreme Court to conduct judicial review, based on the Chief Justice John Marshall interpretation of the official oath of office requiring him to uphold the Constitution at all times, Marshall considered that the Supreme Court had the authority to declare a law as being

[10] Decision of *Marbury v. Madison case* (1803) is available from https://openjurist.org/5/us/137

contradictory to the Constitution. The case *Marbury v. Madison* established the principle of judicial review, the power of the federal courts to declare legislative and executive acts unconstitutional.[11]

The monumental event that never happened in the world of the previous judiciary is the establishment of the constitutional review system, which is attached to the Supreme Court. The constitution becomes "the supreme law of the land". Since then, all laws under the constitution it shall be subject to the constitution, in the event of a conflict, the lower rule shall be declared invalid.

Regarding the legal system, the United States adheres to the Anglo Saxon system and the institution that has functions as the guardian and the interpreter of the constitution is the Supreme Court. So it is different with Austria which embraces the Continental European system. The Austrian model has a separate judicial institution outside the Supreme Court, which carries out the function of the constitutional review. This institution is referred to as the Constitutional Court (*Verfassungsgerichtshoft*).

The proposal for the establishment of the first Constitutional Court in the world was presented when Hans Kelsen a legal expert from Austria when was appointed as a member of the reforming institution of the Austrian Constitution (*Chancellery*) in 1919-1920.[12] One of the important constitutional court jurisdiction is to review laws against the constitution, to decide whether the law is constitutionally valid and provide a remedy in cases where they are not.

---

[11] See Decision of *Marbury v. Madison case* (1803).

[12] Hans Kelsen's hierarchy of norm theory (*stufentheorie*) can be used to explain the system of legal norms in Indonesia. Both theories suggest that the legal norm is always structured in tiers and is hierarchical in nature, particularly that the lower norm is based on the higher norm until the point where it meets the highest norm which then becomes the basic norm. See Hans Kelsen, *Pure Theory of Law,* Berkeley: University of California Press, 1967.

1.3.2. The Historical Development of the Indonesian Constitutional Court

One of the historical developments resulting from the constitutional reform is that Indonesia created a new court, the Constitutional Court. The development of judicial review in Indonesia can be divided into three main periods: under the Old Order period from 1945 to 1966, the New Order period from 1966 to 1998, and the reform period from 1998 to present. To provide information about the establishment of the Indonesian Constitutional Court, this section will discuss the historical development of judicial review by examining the debates that have occurred under three main periods and constitutional amendments.

1.3.2.1. Under the Old Order Period (1945-1966)

The idea to review of the law as a mechanism of constitutional adjudication actually had been debated among the founding fathers of the nation in the preparation of the independence of Indonesia in 1945. Especially, when the founding fathers were convening to make the first constitution in the Committee for the Preparation of Independence (BPUPK) meeting held on 15 July 1945. Even so, the idea was none to be realized because of the incisive disagreement among them. Although the idea was not legally regulated, practically the judicial review process was applied especially when the new order regime was still prevailing. But the concept was not fully-implemented yet because the idea of judicial review was only executed on regulation made under the law. Initially, this power was only held by Supreme Court but it did not include the constitutional review.[13]

Muhammad Yamin was the first founding father who proposed the idea that the Supreme Court had authority to review acts in the meeting of the Committee for the Preparation of

[13] The anticipatory judicial review was one of the judicial powers given to Supreme Court which was written in Article 25 of Law Number 14 Year 1970. This article stated that Supreme Court and inferior courts could decide and give responds or recommendations on every legal problems and questions submitted by any other governmental institutions when it is demanded. But unfortunately, the judicial power was not actively exercised.

Independence (BPUPK).[14] Yamin proposed that the Supreme Court be granted the authority to "compare laws", which was no other than the authority to conduct judicial review.

However, Yamin's proposal was refuted by Soepomo, arguing that (1) the basic concept adopted in the Constitution being formulated was not the concept of separation of powers but the concept of distribution of powers; in addition to that, (2) the judges' task was to apply laws, rather than to review laws; and (3) the judges' authority to review laws was contradictory to the concept of the supremacy of the People's Consultative Assembly (MPR). Consequently, the idea of judicial review of laws against the Constitution proposed by Yamin was not adopted in the 1945 Constitution. Despite the failure to obtain approval, Yamin's ideas indicate that the drafters of our Constitution had very advanced ideas ever at that time.[15]

1.3.2.2. Under the New Order Period (1966-1998)

Under the New order period, basically Indonesia had adopted of judicial review system, but very limited. In this period, the Supreme Court was finally granted a power of judicial review which stipulated in Article 26 Law Number 14 of 1970 on the Judicial Power. However, the Supreme Court power was limited only to review of regulations against laws. The Judicial Power Law did not regulate the mechanism to review the constitutionality of laws.

Moreover, the related provisions were amended by Law Number 14 of 1985 on the Supreme Court. Article 31 (1) states that the Supreme Court is entitled to review regulation below national laws against the law on whether a regulation is legitimate or contradictory to higher laws, but not against the Constitution. In theory, this review should have been a 'checks and balances system' used by the judiciary to control the executive and legislature. However, since Soeharto controlled the recruitment of the judges, judicial review was never effective.[16]

---

[14] Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia* [The Principles of Constitutional Law], Jakarta: PT. Bhuana Ilmu Populer, 2007, 581-582.

[15] Constitutional Court of Indonesia, *Profile of the Indonesian Constitutional Court*, Jakarta: Registrar's Office and Secretariat General of the Constitutional Court, 2015, 2-3.

[16] Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making*

1.3.2.3. Under the Reform Period (1998-Present) and Constitutional Amendments

The constitutional reform in Indonesia started in 1998 with a regime change from an authoritarian state to a democratic state. During the 32 years of former President Suharto's administration, the constitution had never been amended. After the Suharto's fall in 1998, the People Consultative Assembly (*Majelis Permusyawaratan Rakyat, MPR*) amended the constitution four times in 1999, 2000, 2001 and 2002.

In line with the momentum of the amendments to the 1945 Constitution during the reform era (1999-2002). Discussion on the need of a constitutional review system re-emerged during the constitutional amendment process in 2000. After a discussion on mechanism, the MPR issued Decree Number III/MPR/2000 granting the MPR a power to review constitutionality of laws. The parliamentary supremacy doctrine served as the main foundation in establishing this mechanism. However, such cannot be categorized as a judicial review mechanism as the power would be exercised by the legislative, not by the judiciary. Thus, this mechanism is best categorized as legislative review and not judicial review. However, the MPR never exercised its power due to obscurity in the system. Therefore, the MPR members proposed to establish a judicial institution called the Constitutional Court.[17]

Then, the Constitutional Court was established under the third amendment of the 1945 Constitution in 2001,[18] and it and was officially established on 13 August 2003. The Constitutional Court has an equal position to the Supreme Court, but with a different jurisdiction. The decision to form a constitutional court is a better solution than giving the new powers to the

---

in Transition, Jakarta: Kompas Book Publishing, December 2008, 120-121.

[17] Pan Mohamad Faiz Kusuma Wijaya, 'The Role of the Constitutional Court in Securing the Constitutional Government in Indonesia,' PhD Thesis, University of Queensland, Australia (2016), 33.

[18] The third constitutional amendment in 2001 established two new institutions: the Constitutional Court and Judicial Commission. The Judicial Commission is one of the judicial institutions which has the authority to propose candidates for appointment as justices of the Supreme Court and shall possess further authority to maintain and ensure the honor, dignity, and behavior of judges. See Article 24B 1945 Constitution.

Supreme Court, given the acute corruption problems in the Supreme Court and existing lower level courts.

Under the Indonesian Constitution, the basis of the Constitutional Court establishment is contained in Article 24 (2) and Article 24C. To follow up the aforementioned mandate under the Constitution, the Government, together with the House of Representatives (DPR) was promulgated in the State Gazette Law Number 24 Year 2003 regarding the Constitutional Court as the starting point, and with reference to the principle of balance among the branches of state powers.

1.4. Research Methodology

To gather substantive material and data as well as to achieve valid outcomes, this research used a combination of both doctrinal and non-doctrinal research methodologies. The doctrinal research seeks to collect and then analyze a body of case law, together with any relevant legislations (so-called primary sources), and also include secondary sources such as journal articles or other written commentaries on the case law and legislation.[19]

Whereas non-doctrinal research observe a number of cases to assess whether there are existing procedural problems in the way in which certain parts of trial are carried out. Based on this, it can be reached a conclusion that the current law or system needs amendment, repeal, or there is a need for new law.[20]

This thesis is based on qualitative research through the conduct of library-based and field research, and using comparative analysis to make a practical contribution to the national system, in the context of the Indonesian Constitutional Court system. These approaches are chosen because it is the most appropriate evaluative research methodology for this thesis.

---

[19] Michael McConville and Wing Hong Chui, *Research Methods for Law*, edited by Mike Mcconville and Wing Hong Chui, Edinburgh: Edinburgh University Press, 2007, 19.

[20] Michael McConville and Wing Hong Chui, *Research Methods for Law*, 20.

CHAPTER 2

THE ROLE OF CONSTITUTIONAL ADJUDICATION IN PROMOTING CONSTITUTIONALISM

The main reasons for adopting constitutional adjudication is to uphold the rule of law principles, to give maximum protection for achieving democracy and the fundamental rights of the citizens.[21] Establishing a constitutional adjudication is a basic principle of constitutional democracy, because the idea of constitutionalism is that the citizens' fundamental rights should be protected to the greatest possible extent while the governmental restriction of the rights should be limited as much as possible[22]

Moreover, the other characteristic of constitutionalism is that state administration is based on and (therefore) may not contradict with the constitution. Thus, the constitution must be actually applied or complied with in practice, and in order to secure strict compliance and performance of the constitution, the idea to establish a constitutional court emerges.[23]

The constitutional court which has a function as a guardian of the constitution and fundamental rights must come to play a central role in ensuring the constitution is adhered by all state institutions so that there will be a consistency and harmonization in the drafting of legislation and state policies by placing the constitution as the supreme law of the land, especially in keeping the state institutions to a transparent and making the state institutions responsive to public opinion and criticism.[24] According to Donald L. Horowitz, many constitutional courts make invaluable

---

[21] Human rights, democracy, and the rule of law are interlinked and mutually reinforcing, and they belong to the universal and indivisible core values.

[22] Kyu Ho Youm, 'The Constitutional Court and Freedom of Expression', *Journal of Korean Law* 1 (2001): 56.

[23] I Dewa Gede Palguna, 'Constitutional Complaint and the Protection of Citizens the Constitutional Rights', *Constitutional Review* 3, no. 1 (May 2017): 2-3.

[24] The issues of fundamental rights can be accommodated and carried out to a high level of competence by

contributions to the establishment and maintenance of democratic institutions,[25] realize the principle of the rule of law, as well as to promote human rights.

In this context, the Indonesian Constitutional Courts has issued important decisions in promoting constitutionalism,[26] but the questions arise such as to what extent do the constitutional adjudication system help in protecting human rights, democracy, and the rule of law? Other than that, the important role of the constitutional courts jurisprudence in protecting values merits attention because an independent judiciary is indispensable to making constitutionalism more than an embellishment.[27] Therefore, this chapter will describe the role of constitutional adjudication in promoting the rule of law, democracy, and human rights.

2.1. Constitutional Adjudication and the Protection of Human Rights

In many countries, the protection of human rights is a very important issue, the first point of note is that human rights protection is complicated and continue to pose challenges. The idea of constitutionalism, the guarantee of the protection of human rights is one manifestation in modern democracies.

The protection of fundamental rights means that when a breach of the constitution occurs, the rights holder must be given legal remedies to maintain his or her rights, which are guaranteed by the constitution. This assurance has been supported by the establishment of various legal instruments and judicial institution in order to ensure the protection of the fundamental rights as a responsibility of the state.

In this context, the constitutional adjudication is one of the legal mechanisms designed to reinforce the guarantee of protection of citizens' rights against any state action, in all branches of

---

the constitutional court.

[25] Donald L. Horowitz, 'Constitutional Courts: A Primer for Decision Makers', *Journal of Democracy* 17, no. 4 (2006): 128.

[26] The important decisions related freedom of expression of the Indonesian and Korean Constitutional Courts will be discussed in the next chapter.

[27] Kyu Ho Youm, 'The Constitutional Court and Freedom of Expression', 37-70.

power that violates the fundamental rights of citizens. The authority to hear and decide constitutional cases have become one of the constitutional authorities of the Constitutional Court and Similar Institutions in a number of different countries. This section will describe the role of the Constitutional Court in dealing with the human rights issues, especially related with principle of equality and non-discrimination.

2.1.1. Equality and Non-discrimination: Constitutional Safeguard and Adjudication

The principle of equality and non-discrimination are complex concepts, with considerable debate on their meanings and justification. McCrudden and Prechal have explained the meaning of equality, which requires that, save where there is an adequate justification, like cases must not be treated differently, and different cases must not be treated in the same way. This implies that where two categories are treated differently, the first issue is whether the categories involved are similar or not. If they are not, there is nothing wrong with treating them differently. If they are, the question is whether the difference in treatment can be justified. In this meaning of equality, the justification that is required in order to be accepted may often be highly deferential to decisions taken by public bodies.[28]

There is a view which says that overcoming the denial of basic equality means treating people equally, regardless of race, sex, religion, culture, sexual orientation and other similar 'forbidden grounds'. That idea is strongly challenged by a second thought, more prominent recently, which claims that equal treatment, even on those grounds, is not always fair and may constitute discrimination.[29]

Although basic equality does not require equal treatment in every case, treating people

---

[28] Christopher McCrudden and Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach, European Network of Legal Expert in the Field of Gender Equality*, the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2006, 11.

[29] Christopher McCrudden and Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach, European Network of Legal Expert in the Field of Gender Equality*, 140.

as equals does mean we may not treat any person or group of persons more favourably or less favourably without good reason. It is not surprising, therefore, that many are suspicious of, and likely to scrutinize for fairness, any preferential treatment on grounds that were previously, or are currently, used for discriminatory purposes (or are similar to those which might be used).[30]

In this paper, the right to non-discrimination will be considered to have the same meaning as the right to equality before the law or to equal treatment.[31] The concept of equality before the law at stake, then, is procedural. It pertains to how legal institutions treat persons, specifically to whether such institutions treat persons equally or differently. Indeed, the concept of equality before the law is often summed up in what is sometimes referred to as an Aristotelian principle of justice that the court must "treat like cases alike."[32]

In Indonesia's constitutional system, there are two main legal sources of equality and non-discrimination, which are the constitutional provision and human rights law. A complete understanding of these concepts requires an understanding of each and how each relates to the others. As a very fundamental principle of constitution, the principle of equality and non-discrimination does only serve as the basic norm, but most importantly it functions as the source of morality for the constitution, as well as for the practice of politics, socio economics, and law in Indonesia. Moreover, the principle of equality and prohibition of discrimination must not contradict the principle of human rights as these are the basis for the status of man/women and his/her dignity.[33]

Indonesia's commitment to the promotion and protection of the principle of equality and

---

[30] Nicholas Mark Smith, *Basic Equality and Discrimination: Reconciling Theory and Law*, England: Ashgate Publishing Limited, 2011, 139

[31] Erica Howard, 'Equality: A Fundamental Right in the European Union?,' *International Journal of Discrimination and the Law*, Vol. 10 (2009): 20

[32] Frej Klem Thomsen, 'Concept, Principle, and Norm-Equally Before the Law Reconsidered,' *Legal Theory* 24 (2018): 105.

[33] Luthfi Widagdo Edyono, 'The First Ten Years of the Constitutional Court of Indonesia: The Establishment of the Principle of Equality and the Prohibition of Discrimination,' *Constitutional Review Journal*, Volume 1, Number 2 (December 2015): 123.

non-discrimination has been demonstrated in the Indonesian Constitution as mentioned in the following article:

- Article 27 paragraph (1) “All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions.”
- Article 28D paragraph (1) “Every person shall have the rights of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law” and paragraph (2) “Every person shall have the rights to work and to receive fair and proper recompense and treatment in employment.”
- Article 28I paragraph (2) “Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment” and paragraph (4) “The protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government."
- Article 28J paragraph (1) “Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state” and paragraph (2) “In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.”

These are the provisions that protect the equal rights of citizens. Furthermore, the principle of equality and non-discrimination as stipulated in the Constitution should ideally be implemented in the process of law enforcement. However, the provisions concerning the principle of equality and non-discrimination contained in the Constitution are considered insufficient to protect the citizen's right, so that Indonesia has ratified several international human rights law related to these principle.[34]

[34] See Bisariyadi, 'Referencing International Human Rights Law in Indonesian Constitutional Adjudication', *Constitutional Review* 4 (2018): 249-270.

Ratification of the international human rights law into the national law can complement the provisions in the constitution, so that the Constitutional Court can be optimal in protecting citizens' constitutional rights. Regarding the application or the principle of equality, the Indonesian Constitutional Court has used the international human rights law as a reference point in several equality and non-discrimination cases. Equality and discrimination became a central issue in a number of cases before the Constitutional Court of Indonesia. Those, mainly, on the plaintiff argument that a certain requirement to hold public office as stipulated in the law has a different treatment. The differences, according to the plaintiff, is a form of prohibited discrimination.[35]

2.1.2. The Applicant's Legal Standing Before the Constitutional Court: Reconciling Equality before the Law

The Constitution not only attempts to ensure that representative and impartial persons sit in the courts, but it also provides a right of access to the courts for the general public, particularly in constitutional cases. The right of access to a constitutional court means that the constitutional court should be accessible. Accessibility can involve the availability of a court with relevant jurisdiction, availability of interpretation, access to information and the accessibility of court judgments. It may also involve the geographical remoteness of a court, if its location prevents applicants from participating effectively in proceedings.

However, not all people or legal entities can submit an application to the constitutional court unless they fulfill the legal standing requirements set by the Constitutional Court Law. Legal standing is defined as "preliminary jurisdictional requirement, formulated at a high level of generality and applied across the entire domain of law".[36] Standing is an important issue to be reviewed because it helps us to understand the nature of constitutional litigation in Indonesia.

The parties who can have the legal standing to submit an application to the Indonesian Constitutional Court are regulated in the Indonesian Constitutional Court Law. According to

---

[35] Bisariyadi, 'Referencing International Human Rights Law in Indonesian Constitutional Adjudication'.

[36] William Flethcer, 'The Structure of Standing,' *The Yale Law Journal* 98, no. 221 (1988).

Article 51 paragraph (1), "A petitioner shall be a party who claims that his/her/its constitutional rights and/or competency have been impaired by the entry into force of a law, namely: a. an individual person of Indonesian nationality; b. a customary law community group insofar as it is still in existence and in conformity with development in society and the principles of the Unitary State of the Republic of Indonesia as prescribed by law; c. a public or a private legal entity; or d. a state institution." Then, paragraph (2) "The petitioner shall be obligated to clearly describe the petition his/her/its constitutional rights and/or competency as intended in paragraph (1)."

The ruling of legal standing enshrines under Article 56 (1) and (2) of the Constitutional Court Law, which respectively read, paragraph (1), "When the Court finds that the applicant or/and his/her submissions does not satisfy the requirements as stipulated by article 50 and 51, the Court shall declare that the case is inadmissible" and paragraph (2) "When the Court finds that the submission is reasonable, the Court shall declare that the case is admissible."

It can be concluded that the Court may declare the case inadmissible when the applicants or their submissions do not satisfy the requirements of, the legal standing as stipulated by article 51 in the same statute. However, pursuant to article 56 (2), the Court shall declare the case admissible when it finds reasonable basis in applicants submissions.

The practice of judicial activity at the Indonesian Constitutional Court does not show a smooth picture in ensuring the principle of equality before the law. Therefore, through its decision, the Court has decided that in order to establish constitutional injury for the applicant, the applicant must fulfill five requirements: the claimant has a constitutional right that is guaranteed by the Constitution; the claimant considers that his or her constitutional rights have been violated by the challenged statute; the constitutional injury should be specific and actual or at least potential in character, that is, according to normal logic, the injury is likely to occur; there should be a causal relationship (*causal verband*) between the enactment of the challenged statute and the injury; and there should be the possibility that with the issuance of a favorable decision, the constitutional injury would not occur or would not be repeated.[37]

[37] The Constitutional Court decision no. 006/PUU-III/2005 on constitutional review of the Law No. 32 of 2004 on the Regional Government [Pemerintahan Daerah, Pemda), para. 16.

2.2. Constitutional Adjudication and Democracy

It should be appreciated that the rejection of authoritarianism in Indonesia and Korea have an impact on the demand for a democratic countries by adopting constitutional adjudication. Since the existence of constitutional adjudication, the Indonesian and the Korean Constitutional Courts have contributed very important to institutionalizing freedom of expression as a permanent fixture of democracy in both countries. This section will explain the role of constitutional adjudication in the development of democracy.

2.2.1. Freedom of Expression, Democracy, and Constitutional Jurisprudence: Perspective from Indonesia and South Korea

As a basic foundation in democratic institutions, freedom of speech and expression[38] create the space for the exchange of ideas and is essential for other rights. Without freedom of expression, the enjoyment of other rights is not possible,[39] it facilitates democratic deliberation and contestation, such as searching for information, participation in political decision-making, and citizens also can supervise and criticize the state institutions activities.

However, the protection of freedom of speech and expression is a significant issue in many countries, the first point of note is that freedom of expression is complicated and continues to pose challenges. The most current issue is freedom of expression is under decline around the world, there is a worrying global risk of democratic backsliding, where governments unjustifiably limiting freedom of expression, targeting journalists, protesters, and other people who have different views from the government.[40]

---

[38] The term "freedom speech" and "freedom of expression" are sometimes used synonymously. But "freedom of expression" includes any act of seeking, receiving, and giving information or ideas.

[39] Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law', *International Journal of Speech-Language Pathology* 20, no. 1 (2018): 12-5.

[40] This situation is happening not only in a democratic transition state but also in a stable democratic state. The example countries that passed through the democratic transition period and recently experienced a

Ginsburg and Huq demonstrate that this situation can be categorized as “constitutional retrogression”, or gradual erosion to three institutional predicates of democracy occurring simultaneously: a democratic electoral system; the liberal rights to speech and association that are closely linked to democracy in practice; and the administrative and adjudicative rule of law.[41]

The main issue of this part is to discuss whether there are problems or cases related to the application of freedom of expression in Indonesia and Korea. In the context of Indonesia, which is one of the largest democracies in the world, yet currently experiencing a gradual decline in the quality of democracy, especially in the era of the current government. According to Satrio, certain actions that the government has taken are clearly dangerous for Indonesia’s democracy, where the government has used a repressive and coercive approach that has had precisely the negative effect on democracy.[42] Whereas in South Korea, which is also widely considered a functioning democracy not only in theory but also in reality.[43] However, according to Hanggard and Jong-sung, since 2008, there is growing evidence that Korea has experienced in declining the quality of freedom of expression, and they identified five problems that have contributed to the deterioration in Korea’s rankings with respect to civil liberties: abuse of criminal defamation, the rules governing election campaigns, national security limitations on free speech, restrictions

---

decline in democratic quality, such as Turkey, Poland, and Russia. Whereas, the country that has a stable democracy and experienced democratic instability, such as in the United States after the presidential election in 2016. See Aziz Z. Huq and Tom Ginsburg, *How to Save a Constitutional Democracy*, Chicago: The University of Chicago Press, 2018.

[41] Ginsburg and Huq describe that there are two modal paths of democratic decay, which are “authoritarian reversion” and “constitutional retrogression”. A "reversion" is a rapid and near-complete collapse of democratic institutions. Whereas "retrogression" is more subtle. See Aziz Z. Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy', *UCLA Law Review* 65, no. 1 (2018): 78-169.

[42] Abdurrachman Satrio, 'Constitutional Retrogression in Indonesia under President Joko Widodo's Government: What Can the Constitutional Court Do?', Constitutional Review 4, no 2 (December 2018): 271-300.

[43] Kyu Ho Youm, 'The Constitutional Court and Freedom of Expression', J. Korean L. 1 (2001): 39.

related to the internet and partisan use of state power to control the media.[44]

This section aims to explain the comparative analysis on the protection freedom of expression in the jurisprudence of the Indonesian and the Korean Constitutional Courts. The study is conducted through a case analysis, which analyzes some of the Court's most groundbreaking and important decisions in this regard, demonstrating how the jurisprudence help in protecting freedom of expression in Korea and Indonesia.

2.2.1.1. Freedom of Expression in the Jurisprudence of the Indonesian Constitutional Court

Within the same group as the USA and India, Indonesia is one of the largest democracies in the world. Indonesian has won their long struggle for democracy, the constitutional reform started in 1998 with a regime change from an authoritarian state to a democracy and created main fundamental principles, such as the principle of separation of powers and the protection of the fundamental rights guaranteed by the Constitution.

Indonesia's commitment to promote and protect freedom of expression has been demonstrated in the Indonesian Constitution as mentioned in the following article: Article 28E (3) stipulates "Every person shall have the right to the freedom of association and expression of opinion" and Article 28(f) provides "Every person shall have the right to communicate and obtain information for the development of his/her personal life and his/her social environment, and shall have the right to seek, acquire, possess, keep, process, and convey information by using all available channels."[45]

These constitutional provisions have the significant impact on the development of constitutional democracy in Indonesia today. However, the provisions concerning freedom of expression contained in the Constitution are considered insufficient to protect the citizen's right, so that Indonesia has ratified several international human rights law and enacted laws related to

[44] Stephan Haggard and Jong-Sung You, 'Freedom of Expression in South Korea', *Journal of Contemporary Asia* 45, no. 1 (2014): 1-13.

[45] The term "all available channels" mentioned in Article 28(f) means including expressions on the internet.

this freedom.[46] Although Indonesia is a member of the United Nations since 28 September 1950, but Indonesia ratified the International Covenant on Civil and Political Rights (the ICCPR) nearly thirty years later with Law No. 12/2005,[47] where the protection freedom of expression clearly stipulated in Article 19 paragraph 2, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

After Indonesia moved from an authoritarian regime to democracy, the Government introduced Law No. 9/1998 on Freedom of Expression, recognizes freedom of speech as both a right and a responsibility that must be exercised in a responsible way. Another safeguard provided by Law No. 39/1999 on Human Rights,[48] where Article 19 protects the right to seek, own, store and disseminate information, through any channel. Moreover, the specific right to freedom of speech for journalists is safeguarded by Law No. 40/1999 on the Press.

Overall, the constitutional right to freedom of expression in Indonesia is protected through constitutional and law provisions. The rights to freedom of expression conferred by the Constitution and under Indonesia's Laws are in theory compatible with the international instruments to freedom of expression as defined by the United Nations.[49]

As the guardian of the constitution, the Constitutional Court of Indonesia (the CCI) has been playing a significant role in protecting the fundamental rights and constitutional values

---

[46] The ratification of various international human rights instruments means acceptance of reporting obligations and other obligations in the implementation of the provisions of this issue. The mechanism is provided under Article 11 of the Indonesian Constitution.

[47] The ICCPR entered into force on 23 March 1976 with Indonesia assenting on 23 February 2006. See Clara Staples, 'Freedom of Speech in Indonesian Press: International Human Rights Perspective', *Brawijaya Law Journal* 3, no. 1 (2016): 41-59.

[48] The Law on Human Rights gives the 'responsibilities and obligation of the Government in the promotion and protection of human rights.'

[49] Clara Staples, 'Freedom of Speech in Indonesian Press: International Human Rights Perspective', 47.

through an impartial interpretation of the Constitution, and the CCI decisions also have strengthened the constitutional democracy in Indonesia.

In recent years, the Indonesian Constitutional Court (the CCI) has decided many constitutional reviews of statutes related freedom expression against the Constitution, for example in *the film censorship case* (2007),[50] *the lese majeste case* (2006),[51] *the hate sowing case* (2007),[52] and recently, in the case concerning *legislative members legal immunity from public criticism and criminal investigation* (2018).[53] The following sections will discuss the important constitutional review cases of the CCI on the freedom of expression.

a. Constitutionality on Film Censorship

In 2007, some Indonesian artists and film directors took similar action in *the film censorship* (2007) case.[54] They reviewed provisions in the Law No. 18/1992 on Film Law considered to restrict their freedom of expression, since every movie must pass through various stages of censorship. The applicants further argued that Indonesia is a democratic country where the people are considered capable to individually choose their own President, thus the people should also have the freedom to express themselves and decide what to watch.[55]

In its decision, the CCI confirmed that the Film Law limited the freedom of expression. However, the CCI stated that such restrictions are allowed by Article 28J (1) and (2) of the

---

[50] The Indonesian Constitutional Court decision, case no. 29/PUU-V/2007, constitutional review of the film law

[51] The Indonesian Constitutional Court decision, case no. 013/PUU-IV/2006, constitutional review of the criminal code (*lese majeste case)*

[52] The Indonesian Constitutional Court decision, case no. 6/PUU-V/2007, constitutional review of the criminal code

[53] The Indonesian Constitutional Court decision, case no. 16/ PUU-XVI/2018, constitutional review of Legislative Bodies (MD3) Law

[54] Decision no. 29/PUU-V/2007, constitutional review of the film law

[55] Luna Hapsari, 'Film Censorship in Indonesia: Contestation Between Indonesia Censorship Board (LSF) and The Public in Defining Pornography,' Thesis of University of Indonesia, July 2017.

Constitution.[56] The CCI declared that, while the Film Law is constitutional, the procedures for regulating the Film Law and corresponding institutions are not in accordance with current development. Therefore, the CCI recommended formulation of a new Film Law to regulate a new movie ratings system to be more in line with the spirit of democratization and respect for human rights.

This reviewed provision was deemed conditionally constitutional.[57] Thus, the provision remains constitutional only if it meets certain requirements provided by the Constitutional Court: (1) the implementation mechanism shall be adjusted to the spirit of the era, (2) the film community shall be given a chance to defend their films when censored; and (3) the nuances that restrain creativity in the field of arts and cinema shall be lessened.[58]

b. Defamation and Hate Speech

Defamation laws prohibit individuals from injuring the reputation of another person in the form of a spoken statement (commonly called "slander") or in writing (commonly called "libel"). In some countries, "insult" laws specifically criminalize expressions deemed to offend the honour of public officials and institutions.[59]

---

[56] Article 28J of the Indonesian Constitution, "(1) Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state. (2) In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society."

[57] Regarding the types of decisions, the Constitutional Court may make a decision of constitutional nonconformity, conditional unconstitutional, conditional constitutional, or decide the case to be unconstitutional or constitutional, and other. In this case, conditionally constitutional means that a law is constitutional if it is interpreted according to the designated way.

[58] Decision no. 29/PUU-V/2007, para. 3.23.3 and 4.1.2

[59] Human Rights Watch, 'Turning Critics into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia', accessed 9 September 2019, https://www.hrw.org/report/2010/05/03/turning-critics-criminals/human-rights-consequences-criminal-

Indonesia has adopted some form of defamation law to protect individuals from unwarranted attacks on their reputations, and the CCI have annulled many statutes against to the Constitution especially freedom expression. For example, in the *lese majeste case* (2006),[60] the applicant of this case is Eggi Sudjana, a political activist and a lawyer put on trial for insulting President Yudhoyono, because he considered violating Article 134 and 136 of the Criminal Code that regulated specific defamations against the President and Vice President. The Applicant argued that Article 134 in conjunction with Article 136 of the Criminal Code do not guarantee legal certainty, especially to obtain information as referred to in Article 28F of the Indonesian Constitution.

The CCI found that these Criminal Code Articles dated back to Dutch colonial rule, when they had been known as *haatzaai-artikelen* (hate sowing). Designed to protect the royal family and colonial administrators from criticism by ordinary citizens, the regulations had made it into Indonesia's legal codex after the country's independence in 1945.[61] The CCI concluded that that the criminalization of insults against the President and Vice-President under Articles 134 and 136 of the Criminal Code violated the Constitution and contrary to Indonesia's democracy.

Another interesting case is *hate sowing case* (2007),[62] the applicants of this case is Yusak Pakage and Filep Karma who were sentenced in April 2005 to ten and fifteen years in prison respectively for having raised the Papuan independence flag in the province of Papua. Due to their activities, the applicants were charged under Articles 154 and 155 of the Criminal Code, which criminalized "public expression of feelings of hostility, hatred or contempt toward the government" and prohibited "the expression of such feelings or views through the public media." The articles specified prison terms of up to seven years for violations. Left over from the Dutch colonial

---

defamation-law

[60] The Indonesian Constitutional Court Decision, case no. 013/PUU-IV/2006, constitutional review of the criminal code (*lese majeste case)*

[61] Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court', *Journal of East Asian Studies* 10, no. 3 (2010): 408-9.

[62] The Indonesian Constitutional Court Decision, case no. 6/PUU-V/2007, constitutional review of the criminal code

administration, these offenses were often used by the government to restrict peaceful criticism of the government. Political opponents, critics, students, and human rights defenders have been targeted and silenced under the laws.[63] On 17 July 2007, the CCI decided that two of the Criminal Code's "hate sowing" provisions, Articles 154 and 155 of the Criminal Code were unconstitutional, determining that the articles could "allow power abuse to occur," insofar as they could be easily invoked by the authorities to justify punishing citizens merely for criticizing the government, a right protected by Indonesia's Constitution. Declaring that the articles "do not guarantee legal certainty and … as a consequence, disproportionately hinder the freedom to express thoughts and the freedom to express opinions," the CCI found them contrary to the 1945 Constitution.[64]

In the other crucial area, in the *defamation* (2008) case, [65] Risang Bima Wijaya and Bersihar Lubis applied for constitutional review of provisions relating to defamation in the Criminal Code considered contrary to the freedoms of thoughts, conscience, speech and communication. In addition, the applicants argued that the provision was easily misused by those who do not like the freedoms of thought and opinion, freedoms of expression and freedoms of the press. In its legal reasons, the CCI stated that the Indonesian Constitution guarantees the rights and freedoms, so the state must protect them.

Similar decisions by the Constitutional Court can be found in the *online defamation* cases in 2009. [66] The provisions reviewed were related to actions conducted in cyberspace. In this case, the applicants, consisting of journalists, human rights activists and NGOs, filed a constitutional review for Article 27(3) of the Information and Electronic Transactions (ITE) Law, considered contrary to the principles of the rule of law and the spirit of democracy guaranteeing freedom of the press and freedom of expression as basic human rights. The CCI ruled that the article is

---

[63] Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court'.

[64] Constitutional Court decision no. 6/PUU-V/2007

[65] Constitutional Court decision No. 14/PUU-VI/2008

[66] Constitutional Court decision No. 2/PUU-VII/2009.

constitutional on the grounds that it is still necessary for balancing between freedoms of expression and the rights of honour and dignity of other people, equally guaranteed by the Constitution and international laws, inter alia, in Article 12 of the UDHR and Article 17 and Article 19 of the ICCPR.[67]

To conclude, in the *leste majeste* (2006) case and the *hate showing* (2007) case, which placed citizens in opposition to the government, the CCI made strong decisions by invalidating several provisions in the Criminal Code considered as hampering the development of democracy in Indonesia. Nevertheless, in the *defamation* case (2008) and the *online defamation* case (2009), which concern the rights and freedoms of a person in relationship to the rights and freedoms of others, the Constitutional Court tends to make compromises to maintain harmony and balance between the interests of law and the rights and freedoms of the diverse parties in the community.[68]

c. Legislators' Legal Immunity Case

The CCI didn't stop there. Recently, in 2018, in the case concerning *legislative members legal immunity from public criticism and criminal investigation* (2018),[69] the controversy of several articles in the 2018 Legislative Bodies (MD3) Law that were regulated the House of Representative (DPR) members legal immunity from public criticism and criminal investigation has ended. Not long after the enactment of the MD3 Law, a number of legal academics and civil society organizations lodged applications to review the constitutionality of several provisions contained within.

The enactment of some controversial articles in the MD3 Law was considered back in the New Order period and makes DPR seem a superpower institution that has violated the principles

---

[67] Human Rights Watch, 'Turning Critics into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia'.

[68] Pan Mohamad Faiz Kusuma Wijaya, 'The Role of the Constitutional Court in Securing the Constitutional Government in Indonesia,' Ph.D Thesis, University of Queensland, Australia, 2016.

[69] The Indonesian Constitutional Court Decision, case no. 16/ PUU-XVI/2018, constitutional review of Legislative Bodies (MD3) Law.

of democracy. Less than six months after the applications were lodged, on Thursday (28/06/2018), the CCI decided to grant the applications partially. The Constitutional Court annulled several provisions in the MD3 Law, particularly Article 73 on the forced summoning of citizens, Article 122 on the criminalization of critics to the DPR, and Article 245 on the DPR immunity. Based on the Constitutional Court decisions, so now Indonesian citizens do not have to worry they will not be criminalized when they criticize the parliament members.

2.2.1.2. Freedom of Expression in the Jurisprudence of the Korean Constitutional Court

Chapter II of the Korean Constitution contains the constitutional rights and duties of Korean citizens, it assures human dignity, right to equality, personal liberty, civil and political rights, social-economic rights, and the other important citizens' fundamental rights. One of the fundamental rights protected by the Constitution is freedom of speech and the press, and freedom of assembly and association are enshrined in the text of Article 21, "(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association. (2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be permitted. (3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by Act. (4) Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims maybe made for the damage resulting therefrom."[70]

Even though the Constitution guarantees the freedom of expression of citizens, however, proclaiming that freedom of expression cannot be abused to violate the reputation and privacy of other citizens.[71] The State has the possibility to limit the rights of citizens as long as it meets strict requirements, as mentioned in Article 37(2) of the Korean Constitution, "The freedom and rights of citizens may be restricted by law only when necessary for national security, maintenance of

[70] Art. 21 of the Korean Constitution

[71] Kh Youm, 'Freedom of Expression and the Law: Rights and Responsibilities in South Korea (Expressive Rights in the Information Age)', *Stanford Journal of International Law* 38, no. 1 (2002): 145.

public order or for public welfare, and even in such case, the essential aspect of the freedom or right shall not be violated."[72]

The Korean Constitutional Court (the CCK) has also decided several cases related the protection of freedom of expression and assembly. Some important decisions like in *motion picture pre-inspection case* (1996),[73] *the ban on assembly near foreign diplomatic mission case* (2003),[74] similar cases related freedom of assembly can be found in *the ban on outdoor assembly adjacent to courthouse cases* (2005) and (2018),[75] and the case on *prohibition of Assemblies near the National Assembly cases* (2009) and (2018).[76] Moreover, another case related the assembly and protest is *the prohibition of night-time demonstration case* (2014).[77]

a. A Motion Picture and Freedom of Expression

A motion picture is an implementation of expression, and it should be protected by the Constitution. In this context, the Korean Constitutional Court (the CCK) handed down a historic case dealing with fundamental issues of democracy, such as the decision of unconstitutionality in the case on motion picture censorship. In October 1996,[78] the CCK struck down the requirement of motion picture pre-inspection by the Ethics Committee provided in Article 12 (1), (2) and

---

[72] Art. 37 of the Korean Constitution.

[73] The Korean Constitutional Court decision, the motion picture pre-inspection case no. 8-2 KCCR 212, 93 Hun-Ka 13 et al., Oct. 4, 1996.

[74] The Korean Constitutional Court decision, the case on banning assembly near foreign diplomatic mission no. 15-2(B) KCCR 41, 2000 Hun-Ba 67 Oct. 30, 2003

[75] The Korean Constitutional Court decision, the ban on outdoor assembly adjacent to court house, case no. 17-2 KCCR 360, 2004 Hun-Ka 17 Nov. 24, 2005 and case on banning outdoor assembly in the vicinity of all levels of courts No. 2018Hun-Ba137, July 26, 2018.

[76] The Korean Constitutional Court Decision, the case on prohibition of Assemblies near the National Assembly no. 2006Hun-Ba20 December 29, 2009 and no. 2013Hun-Ba322 May 31, 2018.

[77] The Korean Constitutional Court decision, the prohibition of night-time demonstration, case no. 26-1 (A) KCCR 324, 2010 Hun-Ka2, 13(consolidated), March 27, 2014.

[78] The motion picture pre-inspection case no. 8-2 KCCR 212, 93 Hun-Ka 13 et al., Oct. 4, 1996.

Article 13 (1) of the former Motion Picture Act after mentioning the constitutional protection of motion pictures and the principle of prohibition of censorship.[79]

The CCK argued that "a motion picture is a form of expression, and its production and showing should be protected by the Article 21 (1) freedom of speech and press. It is protected also under the Article 22 (1) freedom of Science and arts since it is often used as means to publish the results of academic research or as a form of art." The CCK confirmed that the constitutional ban on censorship, that is, the limitation on freedom of expression by censorship, is not allowed even by statute; and held that the prior inspection required by the Motion Picture Act fell under this censorship. [80]

In its decision, the CCK also provide explanation that the censorship as forbidden by Article 21 Section 2 of the Constitution, is an administrative authority's act of evaluating and screening the contents of an idea or opinion as a preventive measure, and prohibiting it from being published; in other words, it is a ban on the publication of material that has not been approved.[81]

However, the constitutional ban on censorship does not prohibit all venues of evaluating various forms of expression. Neither does it apply to the enforcement of obscenity or defamation laws through judicial processes after the publication or through prior inspection, such as motion picture rating, that aims primarily to preclude the possibility of statutory violations or to protect minors in the chain of supplies.[82]

---

[79] Article 12 (1) and (2), Article 13 (1), and Article 32 (v) of the old MPA (repealed by Act No. 5129 [the Promotion of Motion Pictures Industry Act] on December 30, 1995) require all motion pictures to be evaluated by the Ethics Committee before showing. The failure to do so is punishable by imprisonment of up to two years or a fine up to five million won.

[80] Constitutional Court of Korea, *The First Ten years of the Korean Constitutional Court*, Seoul: The Constitutional Court of Korea, 2001, 121-122.

[81] Case no. 8-2 KCCR 212, 93 Hun-Ka 13 et al., Oct. 4, 1996. See also Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea*, Seoul: The Constitutional Court, 2018, 213.

[82] Constitutional Court of Korea, *The First Ten years of the Korean Constitutional Court*, 121-122.

b. Freedom of Expression on the Internet

The CCK has protected freedom of expression on the internet by deciding the case on *the real-name verification requirement on the internet* (2012), this case held that the provisions of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. that provide for real-name verification on the internet, which require users of an internet forum or message board to verify their identity.[83]

The real-name verification requirement was introduced in July 2007 to prevent the harmful effects of vicious posts and vile comments on the internet. Initially, it was only applied to online service providers whose average number of users exceeded 300,000 per day; but since January 2009, the number of such providers increased from 37 to 153 as its coverage was expanded to those with an average of 100,000 users per day.[84]

The case began on January 25, 2010, three Korean individuals filed a constitutional complaint, arguing that the real-name verification violates several of their constitutional rights. The complainants asserted that they desired to post expressions on a number of Korea-based websites, but were unable to do so because of their refusal to comply with the real-name verification.[85]

The CCK argued that "Freedom of expression is one of the core constitutional values that serve as the basis of democracy. Restricting that freedom is thus allowed only when the public interest to be achieved by that restriction is obvious. However, there is no evidence showing that, after the implementation of the identity verification system, the posting of illegal information including defamatory information has significantly decreased. Rather, the CCK found that various problems have occurred: domestic internet users have turned to overseas companies to host websites and services; and the implementation of the Instant Provisions is being challenged due

---

[83] Case on the real-name verification requirement on the internet, no. 24-2(A) KCCR 590, 2010Hun-Ma47 et al., August 23, 2012.

[84] Art. 44-5(1) and (2) Information and Communications Network Act.

[85] John M. Leitner, 'Anonymity, Privacy, and Expressive Equality: Name Verification and Korean Constitutional Rights in Cyberspace', *Journal of Korean Law* 14, (June 2015), 167-212.

to disputes on discriminatory enforcement favoring foreign business entities over domestic ones or arbitrary enforcement." Therefore, the real-name verification violate the Constitution by infringing upon the freedom of speech and press.[86]

c. Demonstration and the Right to Freedom of Expression and Assembly

Demonstration engage both freedom of expression and assembly. In the context of protests, people will express themselves verbally, as well as through non-verbal expression, such as raising banners or placards.[87] The CCK has decided several cases concerning freedom of expression and assembly, for example in *the ban on assembly near foreign diplomatic mission* (2003) case, the CCK said that prohibiting outdoor assembly held within 100 meters from the foreign diplomatic missions is unconstitutional as imposing an excessive restriction on freedom of assembly.[88]

Similar cases related freedom of assembly can be found in *the ban on outdoor assembly adjacent to courthouse* (2005) and (2018), there are different decisions in these cases, in 2005 case, the CCK argued that the ban outdoor assembly and demonstration within 100 meters of the border surrounding courthouse was constitutional.[89] While in 2018 case, the CCK has a different argument and said that the ban is unconstitutional.[90]

It didn't stop there, the CCK has also decided the case on *prohibition of Assemblies near the National Assembly* (2009) and (2018). It's striking that in these two cases, the CCK also has

---

[86] The case no. 24-2(A) KCCR 590, 2010Hun-Ma47 et al., August 23, 2012

[87] UN Human Rights Committee. (1994). *Kivenmaa v. Finland*, Communication No. 412/1990, UN Doc. CCPR/C/50/D/412/1990. See also Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law'.

[88] The case on banning assembly near foreign diplomatic mission no. 15-2(B) KCCR 41, 2000 Hun-Ba 67 Oct. 30, 2003.

[89] The ban on outdoor assembly adjacent to court house, case no. 17-2 KCCR 360, 2004 Hun-Ka 17 Nov. 24, 2005.

[90] The case on banning outdoor assembly in the vicinity of all levels of courts no. 2018Hun-Ba137, July 26, 2018.

different decisions. In 2009 case, the CCK decided that the portion of Article 11 Item 1 of the Assembly and Demonstration Act concerning the "National Assembly building", which provides that no person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the office building, is not in violation of the Constitution.[91] Whereas, in 2018 case, the CCK overturned the 2009 decision and said that Article 11 Item 1 of the Assembly and Demonstration Act is in violation of the Constitution.[92]

The 2018 decision sought to clarify its CCK view and position with regard to the freedom of assembly. The CCK justices stressed the role of parliament as people's representatives where the people must be given the widest possible space to express their aspirations, and also explained the situation after the impeachment of former President Park Geun-hye (2017), where the peaceful culture of assembly had been settled. According to these arguments, the variability in the Court's decisions can be understood because the Constitution is a living document. In the ongoing process, the emergence of new conditions may make it possible to influence the Court's decision in forthcoming applications in cases relating to the freedom of expression.

Moreover, another case related the assembly and protest is *the prohibition of night-time demonstration case* (2014) case, the CCK decided that the prohibition of outdoor assembly and demonstration either before sunrise and after sunset is unconstitutional as long as it completely prohibits night-time demonstration, as applied to a demonstration from sunset to 24.00 of the same day.[93]

2.2.2. The Role of Constitutional Court in Preventing Democratic Backsliding

Based on the Indonesian and the Korean Constitutional Courts decisions on freedom of expression cases that have been discussed in the previous section, it shows that the Constitutional

---

[91] The case on prohibition of Assemblies near the National Assembly no. 2006Hun-Ba20 December 29, 2009

[92] The case on prohibition of Assemblies near the National Assembly no. 2013Hun-Ba322 May 31, 2018.

[93] The case on the prohibition of night-time demonstration, case no. 26-1 (A) KCCR 324, 2010 Hun-Ka2, 13 (consolidated), March 27, 2014.

Court has a vital role in keeping the state institutions to a transparent and making the state responsive to public opinion and criticism.

The CCK can be a good reference where the CCK has decided several cases concerning freedom of expression and assembly, cases on prohibiting outdoor assembly held within 100 meters from the foreign diplomatic missions, adjacent to the courthouse, and the National Assembly, as well as the prohibition of night-time demonstration, are decisions where the CCK took active steps to provide the widest possible space for the public to criticize the government, and this put the CCK as an essential judicial institution in preventing democratic backsliding.

Turning to Indonesia, the CCI has also become one of the main actors in Indonesian democracy. In the case of *leste majeste*, *hate showing*, and *legislative members legal immunity*, which placed citizens in opposition to the public authority, the CCI made strong decisions by invalidating several provisions in the Law considered as hampering the development of democracy in Indonesia. However, the CCI still has greater expectancies of preventing democratic backsliding from getting worse, especially under the current government. The government's efforts to harm democracy are still being carried out through the legislative process; in such situation, the CCI has the authority to maintain that all laws will not conflict the constitution. Therefore, there is an expectation that the CCI must always improve its role in the protection fundamental rights of the citizen.

Apart from the important role of the Constitutional Court, the mechanism to deal with the freedom of expression related to the criticism against the state power should be objective to whatever criticism people throw the way. Criticism is a natural part of the state power, so they should not use their power to criminalize public criticism. Therefore, the Constitutional Court, when dealing the freedom of expression case in any future judgement, should consider the national standards for balancing opposing rights, and focus on the proportionality test against the State arguments, which would allow the Court to determine the limitation in the case of the freedom of expression.

2.3. Constitutional Adjudication for the Rule of Law

The doctrine of the state of law emphasizes that the state power must be defined and its limits determined by law so that not only people but the government must also be subject to the law.[94] Under the *rechtstaat* concept, the state is based on the principle of supremacy of the constitution, and this principle expresses the higher ranking position of basic law in the system of law, human rights law as well as in the entire political and social system of every country.[95]

There are three traits that primarily characterize the principle of supremacy of the constitution, first, the possibility of distinguishing between the constitution and ordinary laws; second, the legislator being bound by the constitution, which presupposes special procedures for amending the constitution; and third, an institution with the authority in the event of conflict to review the constitutionality of governmental legal acts.[96]

Under the Indonesian Constitution, it confirms that "Indonesia is based on the rule of law". Broadly speaking, the rule of law requires that everyone, including governmental bodies and officials, as well as citizens, is bound by and treated equally under the law. Constitutions, meanwhile, form the central repository and ultimate safeguard of the rule of law at a national level, providing a blueprint for a functioning system of rule of law and protecting and empowering the institutions that implement and enforce this system.[97]

There are three principles that shall exist in a rule of law country, namely: supremacy of law, equality before the law and due process of law. In the implementation, those three elements are elaborated into: (1) human rights protection; (2) the freedom of judiciary and delivery of

---

[94] State of law referred to the Dutch notion of *rechtstaat* as opposed to *maachtsstaat*, that is, a state based on law rather than power.

[95] Marius Andreescu and Claudia Andreescu, "The supremacy of the constitution, Challenges of the Knowledge Society," *Nicolae Titulescu University Publishing House*, Volume 12, (01 May 2018): 376.

[96] Jutta Limbach, "The Concept of the Supremacy of the Constitution," *The Modern Law Review*, Volume 64, No. 1, (January 2001): 3.

[97] International IDEA, *Rule of Law and Constitution Building: The Role of Regional Organizations*, edited by Raul Cordenillo and Kristen Sample, Sweden: International Idea, 2014.

justice; and (3) legality of law in all aspects and forms (every state's action/government's action and citizens' action must be based on and conducted through law).[98]

With the constitutional adjudication, the issue of the rule of law can be accommodated and carried out to a high level of competence by the constitutional court. In many countries, including Indonesia and South Korea, the authority to deal with the constitutional case is in the hands of a constitutional court.

Moreover, the constitutional courts have brought an essential meaning to every constitutional enforcement effort through the implementation of its constitutional power and authorities. One of the constitutional court jurisdictions is conducting a constitutional review of laws against the constitution.[99] Through this authority, the constitutional court maintains harmony in the legal system, thus ensuring that legal acts stay within the appropriate boundaries as mandated by the constitution at all times. Another important of the constitutional court jurisdictions in many countries such as in Korea is constitutional complaint,[100] which can be described as a complaint or lawsuit filed by an individual citizen who deems his or her constitutional rights has been violated by act or omission of the public institution or public official.[101] In implementing these jurisdictions, the constitutional court plays a significant role in the efforts to guarantee the protection of fundamental rights, democracy, and the rule of law.

---

[98] Enny Nurbaningsih, 'Rule of Law and Its Development in Indonesia', accessed 05 December 2019, https://worldjusticeproject.org/sites/default/files/documents/remarks_english_drenny.pdf

[99] There are two models of judicial review: (1) Decentralized judicial review, commonly known as the American Model, such as in the USA, Australia, Canada and the Philippines; this model involves concrete review and the decision is only *inter partes*, rather than *erga omnes*. (2) Centralized judicial review, commonly known as the European model or the Kelsenian model, such as in Austria, Germany, South Africa, and Turkey; constitutional review via this model can include concrete review and abstract review and the decision of the Constitutional Court is *erga omnes*.

[100] The Indonesian Constitutional Court doesn't have the constitutional complaint jurisdiction.

[101] I Dewa Gede Palguna, 'Constitutional Complaint and the Protection of Citizens the Constitutional Rights,' *Constitutional Review* 3, no. 1, (May 2017): 2.

CHAPTER 3

THE INDONESIAN CONSTITUTIONAL ADJUDICATION SYSTEM: PROBLEMS AND CHALLENGES

Since its establishment in 2003, the Indonesian Constitutional Court has made achievements through its landmark decisions, however, despite its achievements, the Indonesian Constitutional Court's system also has been faced problems. The purpose of this chapter is to evaluate the problems and challenges faced by the Indonesian Constitutional Court, including the organizational structure, jurisdictional limit, the issue of procedural law, and the controversy of the Court decisions.

3.1. Organizational Problems: Justices and Its Supporting Systems

The Constitutional Court has nine Constitutional Justices designated by the President, the Supreme Court, and the House of Representatives who respectively nominate three-justice candidates. To carry out the constitutional duties, the justices supported by a Secretariat and a Registrar's Office of the Constitutional Court. In this section, I will discuss the organizational structure, including justices and its supporting system. The weaknesses of the Court organization are analyzed in order to improve the constitutional adjudication system.

3.1.1. Justices: Problems of Appointments and Term of Office

The Indonesian Constitutional Court shall consist of nine justices as members to be stipulated by a Presidential Decree, three of them are nominated by the President, the other three are nominated by the Parliament and the remaining three are nominated by the Supreme Court.[102] The Constitutional Court's organizational structure shall consist of a Chief Justice concurrently acting as a member, a Deputy Chief Justice simultaneously acting as a member, and seven justices

[102] Art. 18 of the Constitutional Court Law

as members. The Chief Justice and the Deputy Chief Justice shall be elected from and by Member of Justices for a term of office of two years six months as from the date on which the Chief Justice and the Deputy Chief Justice of the Constitutional Court are appointed.[103]

The main requirement for becoming a constitutional justice in Indonesia is possessing impeccable integrity and personality, being fair, and being a statesman with a good mastery of the constitution and state administration.[104] In this case, being a good statesman is a very important and essential prerequisite because the only public official in Indonesia requiring statesmanship is the position of Constitutional Justice. The other requirement is the minimum age is forty-seven years, the justice candidate shall be mentally and physically capable to perform as a justice, shall have never been sentenced with the criminal imprisonment, not being bankrupt, and shall have work experience in the field of law at least fifteen years.[105]

However, in the selection process, a problem occurs especially for incumbent who want to apply for the second term. When an incumbent, including the Chief Justice of the Constitutional Court, is to be reselected for their second term. Should they register and follow the fit and proper test again with other new candidates? The absence of clear provisions in the Constitutional Court Law has resulted in each branch of government devising their own procedures for reselecting the incumbent constitutional justices.[106]

Moreover, the problem also occur concerning the term of office, where the five-year term and can be reelected for one period as mentioned in the Court Law rises some problems, instead of focusing the Court duty, this will make the incumbent justice focus on the next election process, by building communication with the appointing institution. Consequently, it is vulnerable to intervention from the changing political cycle, so it's difficult to have justices who meet the strict requirements as mentioned in the Constitution.

---

[103] Art. 4 of the Constitutional Court Law

[104] Art. 24 (5) of the Indonesian Constitution

[105] Art. 15 (2) of the Constitutional Court Law

[106] Pan Mohamad Faiz Kusuma Wijaya, 'The Role of the Constitutional Court in Securing the Constitutional Government in Indonesia,' Ph.D Thesis, University of Queensland, Australia (2016).

3.1.2. Judicial Corruption and the Weak Supervision of Justices

This part aims to evaluate the supervisory system of constitutional justices, the results of which will provide input to the CCI, whether the monitoring system of ethics against justices applied so far has been able to maintain the honour and integrity of justices, and whether the current ethic supervisory system has provided legal certainty in its enforcement against violations of the Code of Ethics and Conduct of Constitutional Justice (the Code of Ethics).

Under the CCI Law, it is regulated that for the purpose of maintaining and enforcing integrity and an impeccable personality, justice, and statesmanship; justices shall be required to adhere to the Code of Ethics,[107] The Code of Ethics is basically adopted the Bangalore Principles, which are intended to establish standards for ethical conduct of justices.[108] They are designed to provide guidance to justices and to offer the judiciary a framework for regulating judicial conduct. Seven core values are recognized: Independence, impartiality, integrity, propriety, equality and finally competence and diligence. The Principles define their meaning and elaborate in detail on what kind of conduct is to be expected in concrete terms of the persons concerned in order to put the respective value into practice.[109]

The ethics principles of justices as mentioned above are basically clear, however, judicial corruption has destroyed the foundation of the authority of the judiciary and undermines the honor and integrity of justices. This happened several times in the Constitutional Court, at the end of 2013, the chief justice (Akil Mochtar) was arrested by the Indonesian Commission Eradication Corruption (the KPK) because of corruption issue, and the Supreme Court sentenced him to a life sentence.[110] When Akil Mochtar arrested by the KPK, this case urged the President to issue the

---

[107] Art. 27B of the Constitutional Court Law.

[108] The Indonesian Constitutional Court has the Code of Ethics of Constitutional Justices which regulated in the Constitutional Court Regulation no. 09/PMK/2006 on the Declaration of the Enactment of the Code of Ethics and Conduct of Constitutional Justice (*Sapta Karsa Hutama*)

[109] The Bangalore Principles of Judicial Conduct, accessed 30 October 2019, https://www.judicialintegritygroup.org/jig-principles

[110] The Supreme Court Decision No. 336 K/Pid.Sus/2015 (23 February 2015) concerning Aklil Mochtar

Emergency Law that regulated the justice selection mechanisms and the supervision of justices. However, the Indonesian Constitutional Court declared that the Emergency Law was unconstitutional, and ordered to re-apply the previous Constitutional Court Law.[111] It didn't stop there, in 2017, again the KPK arrested the Court Justice (Patrialis Akbar) because of accepting a bribe. Then, the Ordinary Court sentenced him to eight years in prison.[112]

The corruption cases that ensnared the two justices show the weak supervision of the constitutional justice. It is, therefore, necessary to take concrete measures to restore the image of the judiciary and maintaining the honour and integrity of justices as the main pillars of the judiciary in enforcing law and justice, this can be done by improving the justice's selection system and strengthening the ethics supervisory system of justices.

3.1.3. Dismissal of Constitutional Justices

The idea of the Indonesian Constitutional Court establishment was to uphold constitutional values, strengthen checks and balances mechanism, create the clean and good government and protect the fundamental rights of citizens. Because of this vital position, in deciding the case, the constitutional justices shall obey the seven core values as contained in the Code of Ethics.[113] However, if a justice violates these principles, he/she may be dismissed from the position as a constitutional justice.

The dismissal of the constitutional justice is divided into three types: honorable dismissal, dishonorable dismissal, and temporary dismissal.[114] A constitutional justice will be honorably

---

case

[111] Constitutional Court Decision No.1-2/PUU-XII/2014 concerning constitutional review of regulations in Lieu of Law on the Constitutional Court

[112] The Supreme Court Decision No: 156 PK/Pid.Sus/2019 concerning Patrialis Akbar case

[113] Seven core values are recognized: Independence, impartiality, integrity, propriety, equality and finally competence and diligence. See the Constitutional Court Regulation no. 09/PMK/2006 the Declaration of the Enactment of the Code of Ethics and Conduct of Constitutional Justice

[114] Art. 2 of the Constitutional Court Regulation no. 4/2012 on the Procedure of the Dismissal of Constitutional Justices

dismissed if he/she passes away, resign submitted to the Chief Justice of the Constitutional Court, has reached seventy years of age; the end of term of office, suffers from a permanent physical or mental illness for three months.[115] Then, a constitutional justice will be dishonorably dismissed if he/she is imposed with the criminal sanction of imprisonment based on a court decision which has obtained permanent legal force for having committed a criminal act which is punishable by the criminal sanction of imprisonment, commits an act of misconduct, does not attend hearings for five times in succession without valid reasons, violates the official oath or of office, intentionally delays the Constitutional Court from passing a decision within the time prescribed by Article 7B paragraph (4) of the 1945 Constitution, violates the prohibition of holding concurrent positions, no longer meets the requirements for being a Constitutional Court justice, and violates the Code of Ethics.[116] Lastly, constitutional justices are temporarily dismissed from their position under conditions where justices are suspended to defend themselves before the MKMK, and being investigated or detained on suspicion of committing a crime.[117]

3.1.4. Supporting System: Registrar and Researcher

In the implementation of the constitutional duties, nine Constitutional Justices require general and judicial administrative support from government apparatuses. A registrars' office and general secretariat shall be established at the Constitutional Court in order to provide assistance in the implementation of the Constitutional Court's tasks and authorities.[118]

---

[115] Art. 23 (1) of the Constitutional Court Law

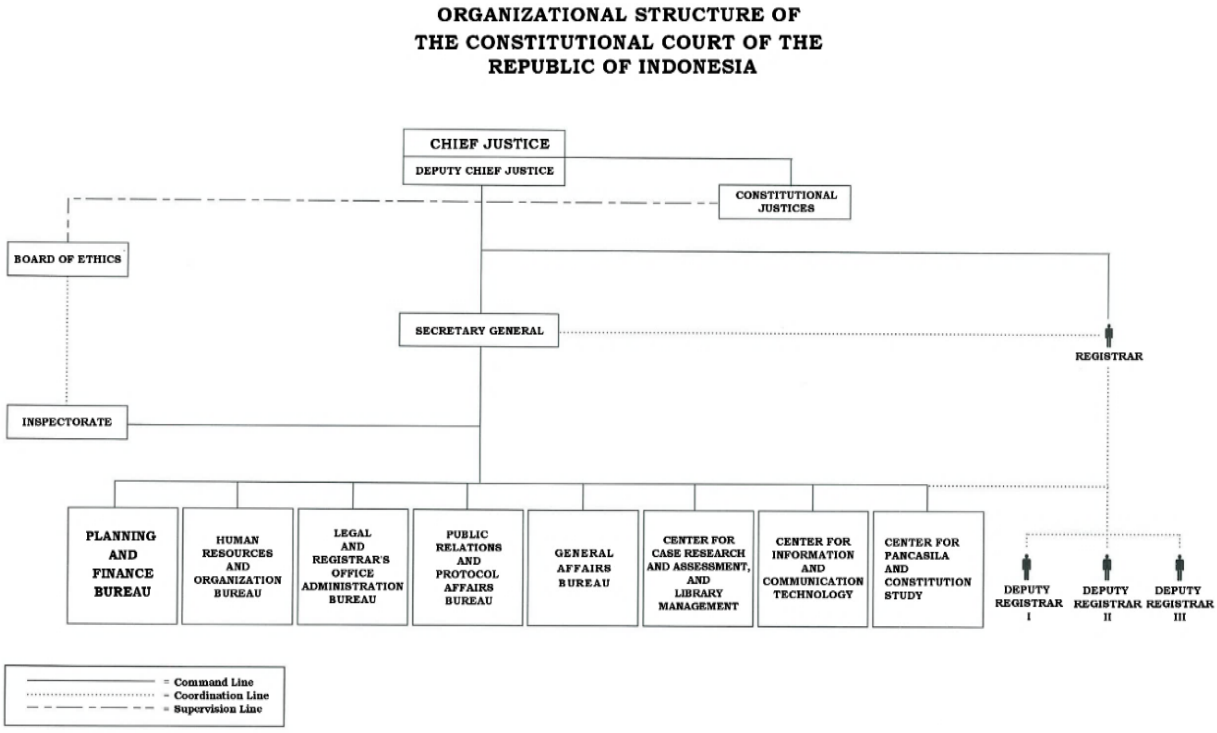
[116] Art. 23 (2) of the Constitutional Court Law

[117] The detail procedures on the dismissal of constitutional justices are regulated in the Art. 24 (1) and (2) of the Constitutional Court Law, "Prior to the dishonorable dismissal, a constitutional justice shall be temporarily suspended from his/her position by Presidential Decree upon the request of the Chief Justice of the Constitutional Court, except for the reasons for the criminal sanction of imprisonment.[117] The temporary suspension shall be for a period of no longer than sixty working days and may be extended for a further period of no longer than 30 thirty working days."

[118] Art. 7 of the Constitutional Court Law

The Court would not be able to function properly without their support. The substance, methods, and the direction of the Court's work are determined by nine Constitutional Justices along with the support of the Court's Secretariat and Registrar's Office. To understand the organization of the Court, the diagram below shows the detail information of the organizational structure of the Constitutional Court:[119]

Figure 1



The Registrar's Office of the Constitutional Court has the main task of providing support in the field of judiciary technical administrative task, including coordination of judiciary technical implementation at the Constitutional Court; development and implementation of case administration; development of technical services for judiciary activities at the Constitutional

[119] The detail organizational structure of the Indonesian Constitutional Court is regulated in the Secretary General Regulation No. 3/2019 concerning the Amendment of the Secretary General Regulation No. 13/2017 concerning Organization of the Registrar's office and General Secretariat of the Constitutional Court.

Court; and the implementation of other tasks assigned by the Chief Justice of the Constitutional Court in accordance with its field of duties.[120]

In carrying out the judiciary technical administrative tasks as stated above, the Registrar is in charge of handling various affairs, such as the registration of petitions filed by Petitioners, examination of the completeness of petitions, the recording of complete petitions in Book of Constitutional Cases Registration, as well as preparing and assisting with the implementation of the Court's hearings.[121]

The organizational structure of the Registrar's Office of the Constitutional Court consists of a number of functional positions of the Registrar. The Registrar's Office constitutes a supporting unit for Constitutional Court Justices in handling cases at the Constitutional Court. The Registrar's Office is led by 1 registrar, assisted by 3 deputy registrars, 9 senior substitute registrars, and 27 substitute registrars. The Registrar's Office of the Constitutional Court has the main task of providing support in the field of judicial administration.[122]

Whereas, the Secretary General is carrying out technical administrative tasks of the Constitutional Court, including coordination of administrative implementation within the general secretariat and the registrars' office; formulation of the plan and program for administrative technical support; implementation of cooperation with the community and inter-institutional relations; implementation of supporting facilities for court hearing activities; and the implementation of other tasks assigned by the Chief Justice of the Constitutional Court in accordance with its field of tasks.[123]

In carrying out the technical administrative tasks as mentioned above, the Secretariat General has functions: (a) planning, analysis, supervision of general administration and judiciary

---

[120] Art. 7A of the Constitutional Court Law

[121] Art 2 (4) of the Presidential Regulation No. 65/2017 concerning the Second Amendment of the Presidential Regulation No. 49/2012 concerning Registrar's office and General Secretariat of the Constitutional Court.

[122] Art. 3 of the Presidential Regulation concerning Registrar's office and General Secretariat of the Constitutional Court.

[123] Art. 7B of the Law on the Constitutional Court

administration, as well as organizational arrangements; (b) financial management and human resource development; (c) management of the internal organization, archives and expeditions, as well as state property; (d) implementation of public relations and cooperation, leadership administration and protocols, and registrar's office secretariat; (e) case studies, library management, and IT management; (f) Education of Pancasila and the Constitution; and (g) implementation of internal supervision.[124]

Regarding the organization, the general secretariat is led by a Secretary-General. The Secretary-General shall consist of at most five Bureaus, where each Bureau consists of at most four Sections, and each Section consists of at most three Subsections. Moreover, within the Secretariat General, an Inspectorate was formed.[125]

One of the substantial supporting system to the justices under Secretary General is the research center. The Constitutional Court has one research center called Center for Research and Case Analysis and Library Management (the Research Center), which has functions such as conducting research, case studies, preparation of legal opinion concepts, formulation of scientific papers, management of the Constitutional Court publications, formulation of draft regulations, as well as management of library and constitutional history.[126]

The Research Center is headed by a Head of Research Center and is divided into two division which are Division of Research and Case Analysis and Library Management Division. The Research Center is also supported by an Administrative Subdivision.[127] For further information about working method of the researcher can found in the figure below:[128]

---

[124] Art 11 (3) of the Presidential Regulation concerning Registrar's office and General Secretariat of the Constitutional Court.

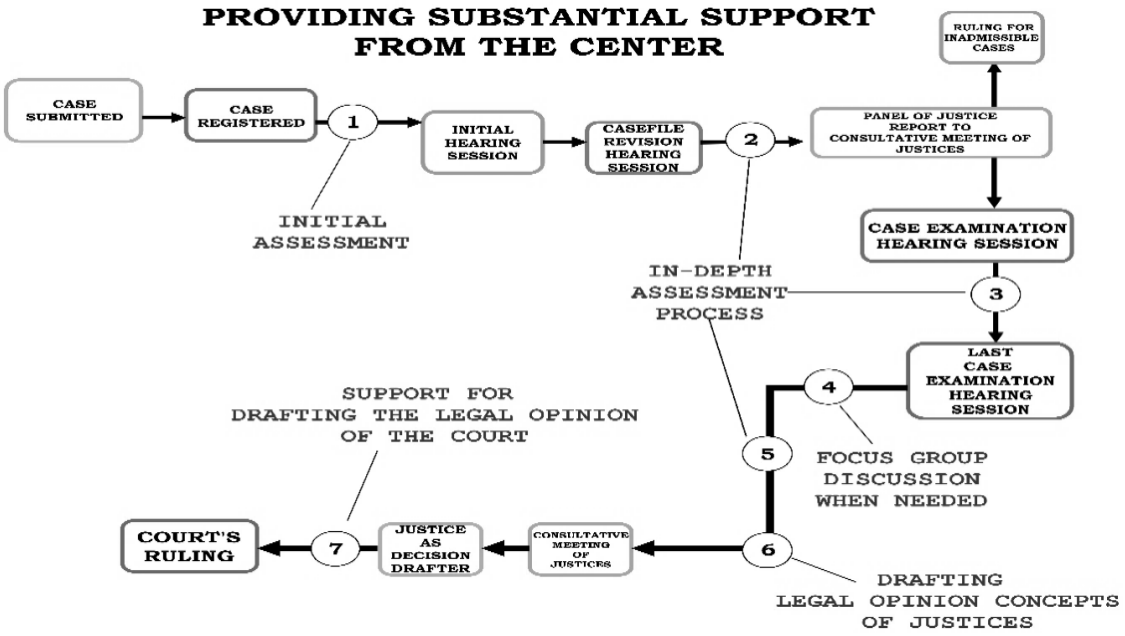
[125] Art 12 of the Presidential Regulation concerning Registrar's office and General Secretariat of the Constitutional Court.

[126] Art 86 and 87 of the Secretary General Regulation concerning Organization of the Registrar's office and General Secretariat of the Constitutional Court.

[127] Art 88 of the Secretary General Regulation concerning Organization of the Registrar's office and General Secretariat of the Constitutional Court.

[128] Constitutional Court of Indonesia, 'the Jurisdictions and Organization of the Indonesian Constitutional

Figure 2



As shown in the figure, there are seven steps in the process of substantial support provided by the researchers. The researchers would provide preliminary analysis cases that have been registered at the Court. The analysis would be submitted as an input for the Justices which can be used in the preliminary hearing. In the preliminary hearing, the Justices would scrutinize the petition, the qualification of the petitioner(s), the alleged constitutional loss they suffer and the argument on the unconstitutionality of the articles of the law submitted for a review. In this preliminary hearing, the Justices are obliged by the Constitutional Court Law to give suggestion to the petitioners to correct and make their petition clear. However, it is up to the petitioners whether they would take the advice or not. While the Justices are obliged to give the advice to the petitioners, the petitioners are not obliged to take the advice. Moreover, researchers would do an in-depth study and analysis on the constitutional issues of the case. The researcher would analyze every issue at hand including following up information obtained from the testimony of the president, parliament, experts and witnesses given during hearing sessions. The other substantial support, researchers would assist the Justices in drafting legal opinion. In this step, there will be

Court,' *presentation material of the Indonesian Constitutional Court at the 1st Research Conference of the AACC SRD*, Seoul (2018).

a series of discussion with the Justices in which the Justices would express their opinion to be drafted by the researchers.[129]

3.2. Jurisdictional Limit: No Constitutional Complaint

The 1945 Constitution of the State of the Republic of Indonesia in Article 24 affirms that judicial power is an independent power for administering a judiciary aimed at enforcing the law and upholding justice. The Constitutional Court is one of the implementers of judicial power as intended in the 1945 Constitution.

By virtue of Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution, the Constitutional Court holds jurisdiction to review laws against the 1945 Constitution; to make a decision in disputes concerning the authorities of state institution whose authorities are granted under the 1945 Constitution; make a decision concerning the dissolution of political parties; make a decision in disputes concerning the results of general elections; and make a decision concerning the opinion of the DPR that the President and/or the Vice President have/has been alleged of having violated the law in the form of treason against the state, corruption, bribery, other serious criminal act, or act of misconduct, and/or no longer fulfilling the requirements as the President and/or Vice President as intended in the 1945 Constitution.

The Indonesian Constitutional Court jurisdictions mentioned in the Constitution above is still very limited, because the important mechanism such as constitutional complaint and concrete constitutional review are not part of the Court jurisdictions. Therefore, the Court couldn't give maximum protection of democracy and the fundamental rights of the citizens.

3.2.1. Constitutional Review: No Concrete Review

The Constitutional Court has brought an essential meaning to every constitutional enforcement effort through the implementation of its constitutional power and authorities. One of

[129] Constitutional Court of Indonesia, 'the Jurisdictions and Organization of the Indonesian Constitutional Court,' *presentation material of the Indonesian Constitutional Court at the 1st Research Conference of the AACC SRD*, Seoul (2018).

the authorities of the Constitutional Court is conducting a constitutional review of laws against the constitution.[130] Through this authority, the Constitutional Court maintains harmony in the legal system, thus ensuring that it stays within the appropriate boundaries as mandated by the constitution at all times.

The jurisdiction to exercise constitutional review is the main and first power given to the Indonesian Constitutional Court. Professor Jimly Asshiddiqie, the first Chief Justice of the Constitutional Court has explained that the "constitutional review" concept, which is based on the idea of the constitutional state (rule of law), the principle of separation of powers, and the protection of fundamental rights, consists of two basic tasks, namely, first, guaranteeing the functioning of the democratic system in relations between branches of state authority: executive, legislative, judicative. Constitutional review is intended to prevent domination and/or abuse of power by those branches of state authority. Second, protecting citizens from abuse of power by state institutions in violation of the fundamental rights guaranteed by the constitution.[131]

The current judicial review follows the European or the centralized model of judicial review. The Indonesian Constitutional Court can handle constitutional review only in abstract form, and not in concrete cases. The constitutional review can be carried out in two ways, which are formal and material constitutional review. The formal review examines whether a law has been drafted or approved in accordance with the procedures and processes of lawmaking. The

---

[130] There are two models of judicial review: 1. Decentralized judicial review, commonly known as the American Model, such as USA, Australia, Canada and Philippines, this model is classified as a concrete review and the decision is only *inter partes*, rather than *erga omnes*. 2. Centralized judicial review, commonly known as the European model or the Kelsenian model, such as Austria, Germany, South Africa, and Turkey, constitutional review in this model can include concrete reviews and abstract reviews and the decision of the Constitutional Court is *erga omnes*.

[131] Jimly Asshidiqie, *Model-model Pengujian Konstitusional di Berbagai Negara* [Models of Constitutional Review in Various Countries], Jakarta: Konstitusi Press, 2005. See Also Adnan Buyung Nasution, 'Towards Constitutional Democracy in Indonesia', *Inaugural Professor Lecture, Papers on Southeast Asian Constitutionalism*, Asian Law Centre, University of Melbourne (2011), 24.

material review examines whether the substance of a law is contrary to the Constitution.[132]

When the judicial review cases are granted by the Court and the decision brought a fundamental change to certain aspects of the law. People consider that instead of waiting for the parliament to amend, abrogate or repeal a law, submitting a petition to judicial review becomes a way out to make a change. Therefore, in practice, there are many cases of judicial review, perhaps more than any other. It is the same with the Supreme Court. In Indonesia, everything is petitioned, appealed, or brought for judicial review whenever something is disliked. Of course in time, certain limitations will be applied so that only cases that are truly contrary to the Constitution are brought to the Court. Since the Constitutional Court establishment, many constitutional review cases have decided by the Constitutional Court, the figures below show the constitutional review case statistic:

Figure 3

Total Number of Constitutional Review Cases 2003 – 2018

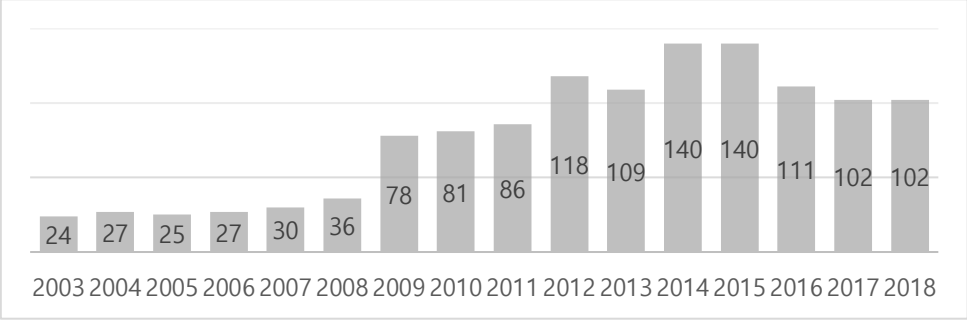
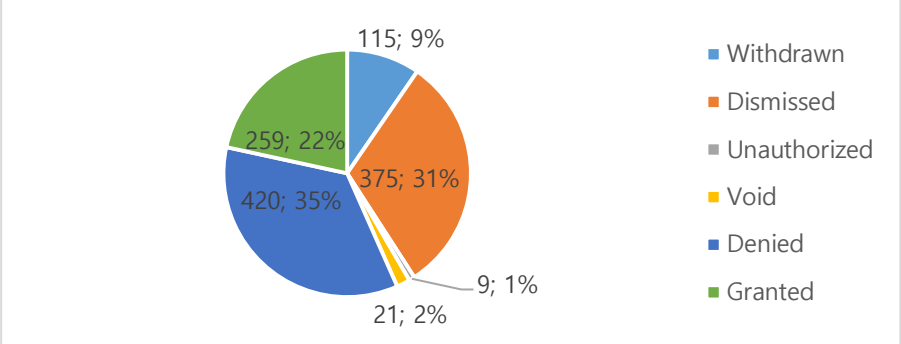


Figure 4

Decision of Constitutional Review Cases 2003 – 2018



[132] Pan Mohamad Faiz Kusuma Wijaya, 'The Role of the Constitutional Court in Securing the Constitutional Government in Indonesia,' Ph.D Thesis, University of Queensland, Australia (2016), 35.

According to the case statistic, there is interesting question why Indonesian Constitutional Court has so many law has been petitioned for Constitutional Review? The first reason is very simple. Legislation is produced by Parliament, and Parliament is composed of members of political parties. Of all the legislation that Parliament produces, most are focused on political reasons or generated by politicians who think of the immediate interests. Thus, there are many things that are not in accordance with the constitutional way of thinking. That's why it is the task of the Constitutional Court to alter, amend or annul those laws that are not in accordance with the constitution.

The Constitutional Court is a very powerful institution in Indonesia. Legislation created and adopted by 560 members of the House of Representative (DPR) can brought down by just nine justices at the Constitutional Court. That is the consequence of the power of the Constitutional Court. Thus, the Chief Justice and the Constitutional Court Justices must possess very deep knowledge about the constitution and the law; people with great wisdom, a wealth of experience and a strong ability to see problems clearly. This is in contrast to the House, which sees problems from a political angle and in light of the needs of the day, at the present time.[133]

However, this abstract constitutional review jurisdiction is not enough to protect citizens' constitutional rights. Because the protection of fundamental rights is a significant issue, complicated, and continues to pose challenges in many countries, especially in Indonesia which has the 4th largest population. Therefore, the absence of a concrete constitutional review makes the Court unable to fully protect the rights of citizens.

3.2.2. Dispute amongst State Institutions

In the Indonesian constitutional system, the relationship between one institution and another is bound by the principle of checks and balances. In that principle, the state institutions

[133] See Constitutional Court of Indonesia, 'Proceeding International Symposium on Constitutional Complaint', *the Registry and Secretariat General of the Constitutional Court of the Republic of Indonesia,* Jakarta (2015).

are known as equal. The implication of the mechanism of checks and balances on such equal relations, it is possible in the exercise of the authority of each state institution to arise differences or disputes in interpreting the Constitution. In the constitutional system which has been adopted in the 1945 Constitution, the mechanism to solve the dispute will be handled by the Indonesian Constitutional Court.

In the constitutional system which has been adopted in the 1945 Constitution, the mechanism to solve the dispute between state agencies will be handled by the Indonesian Constitutional Court. The Constitutional Court's power is limited to settling disputes between state institutions with an emphasis on the authorities belonging to state institutions, granted by the Constitution.

Therefore, the state institutions that can be applicants or respondents in a dispute are limited, namely the House of Representative (DPR), the Regional Representative Council (DPD), the People Consultative Assembly (MPR), the President, the Supreme Audit, the Regional Government or other state institutions whose authorities are granted by the Constitution.

Based on the case statistic, there are only a few cases of this competence dispute, the figures below show the case statistic:

Figure 5
Total Number of Dispute between State Agencies Cases 2003 – 2018

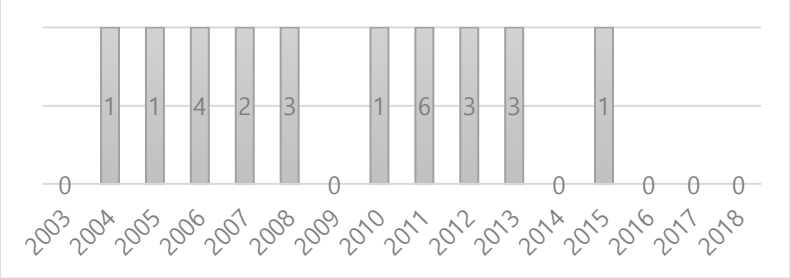
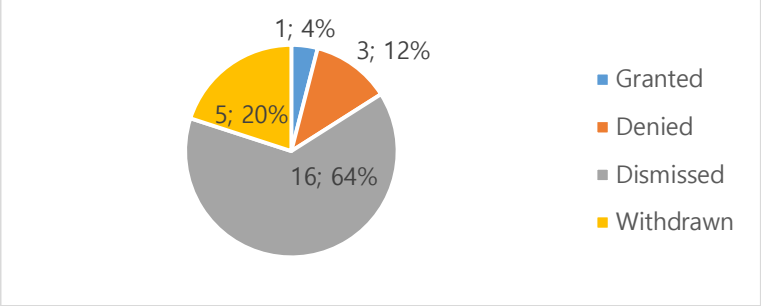


Figure 6
Decision of Dispute between State Agencies Cases 2003 – 2018



Even though, there are not many cases, but this also brings important development in Indonesian constitutional system. One of the important cases is a dispute between the President and the House of Representatives in the divestment of shares of one of mining company operating in Indonesia. The constitutional issue of the case is that whether buying the shares of the company, the government should ask for permission from the House of Representatives. In its decision, Constitutional Court states that the President should seek approval of the parliament if they want to buy the shares of this company. Such phenomena has never happened before. No state institution has been in such a state of dispute moreover with the president. But this is now possible with the establishment of the Constitutional Court.

3.2.3. Elections Disputes

The Indonesian Constitutional Court also adjudicates election disputes. This jurisdiction is to support the development of political rights and democracy in Indonesia by ensuring that election result disputes would be settled by an independent institution. Before the enactment of this provision, Indonesia had no experience of election disputes since there were, in effect, no competitive elections.[134]

Disputes concerning the results of general elections handled by the Indonesian Constitutional Court has been known in the constitutional system in Indonesia after the amendment of the 1945 Constitution. Previously the dispute concerning the results of general elections in the form of criminal election was settled in under the Supreme Court.

Elections in Indonesia can be categorized into two types, namely national election and local election. National elections can also be categorized into the legislative elections (DPR, DPD, and DPRD) and the presidential election. While the local election is to elect a regional head (governor and head of city/mayors).

---

[134] Jimly Asshiddiqie, *Kemerdekaan Berserikat, Pembubaran Partai Politik dan Mahkamah Konstitusi* [Independence of Association, Dissolution of Political Parties and Constitutional Court], Jakarta: Konstitusi Press, 2005, 194.

If there are violations on the national elections, the candidates may file electoral disputes before the Constitutional Court. The petitioners include the presidential and vice presidential candidates, political parties contesting the elections for the DPR and the DPRD members, and individual candidates for the DPD members, as well as candidates for governors and mayors.

3.2.3.1. National Elections

The national elections in Indonesia are held once every five years to elect the House of Representative (*Dewan Perwakilan Rakyat, DPR*) members, the Regional Representative Council (*Dewan Perwakilan Daerah, DPD*) members, the Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah*, *DPRD*) members and the President and/or the Vice President, as set forth in the Article 22E. Article 22E (1) says that these elections must be "direct, public, free, secret, honest, and fair" and be held every five years.

Indonesia has directly elected its president and vice president three times: in 2004, 2009 and 2014. Each time, the relevant presidential election law has stipulated that presidential elections be held three months after general legislative elections. The traditional explanation for this sequencing has been the requirement that presidents be nominated by political parties who meet the 25/20 percent threshold, discussed above. According to this explanation, parties will not know whether they will need to join with other parties to nominate a pair and, if so, which parties will have enough votes or seats to contribute in order to meet it. Presidential elections, therefore, need to be held after the general elections, after any disputes about the results have been settled, and after parties have had sufficient opportunity to negotiate the terms of any coalitions they might create in order to nominate a pair.[135]

According to the cases statistic, the Indonesian Constitutional Court has handled many cases of national election, in three times the general election period (2004, 2009, and 2014) there are 412 national election cases. It shows that no matter by how far elections are won or lost, they are still disputed. So many want to try their luck. Of course, there must be rules for what is

[135] Simon butt, 'The Constitutional Court and Indonesian Electoral Law', *Australian Journal of Asian Law*, Volume 16 Number 2 (2016): 12.

accepted by the Constitutional Court and what is not. The figures below show the detail case statistic:

Figure 7

Total Number of National Elections Cases 2004, 2009, 2014

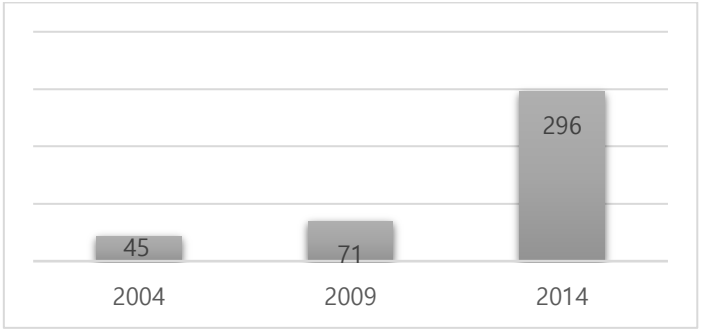
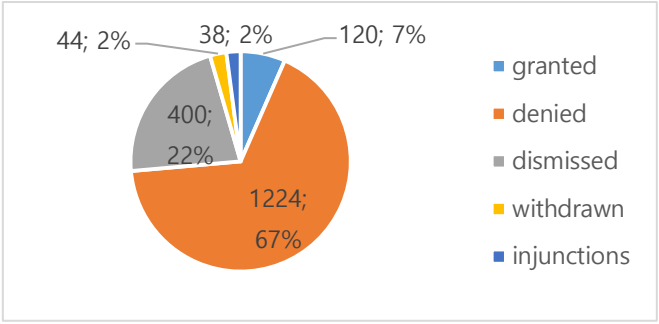


Figure 8

Decision of National Elections Cases 2004, 2009, 2014



Regarding the elections time, the legislative and presidential elections used to be held separately in the same year where legislative elections preceded the presidential election. However, based on the Constitutional Court's decision in the Simultaneous Elections (2013) case, the legislative elections and the presidential election were to be held simultaneously starting in 2019.

The decision made by the Constitutional Court on a simultaneous election can be justified as this institution has the authority to constitutional review. This implies that the decision No. 14/PUU-XI/2013 on simultaneous elections is an indication to the arrangement of the modern system of democratic government based on the rule of law and the Constitution.

3.2.3.2. Local Elections

Based on the historical background of the establishment of the Constitutional Court, handling the local election disputes is not a part of the authority of the Constitutional Court. In Article 22E of the 1945 Constitution states that general election shall be conducted to elect the members of DPR, the Regional Representative Council, the President and the Vice-President, and the Regional House of Representatives. The article states clearly that the local election in term of electing the Governor, Mayor and Regent are not the part of the authority of the Constitutional Court.[136]

Before the enactment of Election Act 2007, the Constitutional Court has only the authority to settle disputes over the result of election limited to election disputes regarding the result of election of president and vice-president, members of DPR (House of Representative), DPRD (Regional House of Representative) and DPD (Regional Representative Council). After the enactment of the Election Act 2007, the Constitutional Court also has authority to settle disputes of the local election.[137]

By the enactment of Election Act 2007, the authority of local election disputes settlement was moved from the Supreme Court to the Constitutional Court. According to Article 1 paragraph 4 of Election Act 2007, it is stated that local election for the head of regions is part of direct general election for electing the head of the regions in the unitary state of Indonesia which is based on Pancasila and 1945 Constitution.

---

[136] Iwan Satriawan, 'The Constitutional Court's Role in Consolidating Democracy and Reforming Local Election', *Constitutional Review Journal*, Volume 1, Number 1 (May 2015): 123.

[137] Based on the Election Act 2007, the term "pilkada" (pemilihan Kepala Daerah or election for head of a region) changed into "pemilukada" [pemiliha umum kepala daerah or general election for head of a region]. Since the term used is "pemilukada", therefore "pemilukada" is part of the general election which the Constitutional Court has the authority to settle the disputes. See Iwan Striawan, 'The Constitutional Court's Role in Consolidating Democracy and Reforming Local Election,' *Constitutional Review Journal*, Volume 1, Number 1 (May 2015): 105.

From 2008 to December 2018 the Indonesian Constitutional Court handling a total of 910 local election cases. And as usual, no matter by how far elections are won or lost, they are still disputed. The figures below show the detail case statistic:

Figure 9

Total Number of Local Elections Cases 2008 – 2018

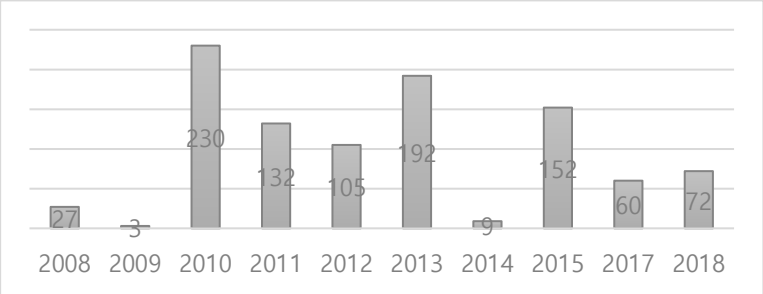
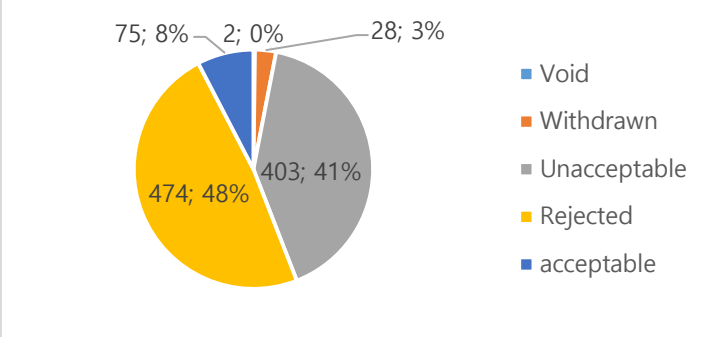


Figure 10

The Decision of Local election cases 2008 – 2018



Although the Constitutional Court is generally considered successful in exercising its jurisdiction to settle regional head electoral disputes; there was a constitutional review decision that surprised many. However, On 19 May 2014, the Court declared that the Constitutional Court's jurisdiction in handling regional head electoral disputes was unconstitutional. The Court reasoned that giving the regional head election disputes to be handled by the Constitutional Court was not in accordance with the meaning of the original intent of the Constitution.[138]

In other words, the Court amputated its own jurisdiction in dealing with regional head electoral disputes. In a transitional period, however, the Court stated in its decision that they would

[138] The Constitutional Court Decision no. 97/PUU-XI/2013 concerning constitutional review of the Regional Government Law and Judicial Power Law against the Constitution.

still exercise the power to examine regional head electoral disputes until a new law is enacted by the DPR.

3.2.4. Political Party Dissolution

Historically, there are differences in procedures for the dissolution of political parties in Indonesia, however, the procedure always involves the role of government and the judiciary. During the Old Order and New Order periods, which could be categorized as less democratic periods, the role of the government was greater than that of the judiciary. The main determinant of the dissolution of political parties is the government, while the judiciary only gives consideration.

Moving to the beginning of the reform era, the institution who has authority to handle the dissolution of political parties was given to the Supreme Court. Based on Law Number 2 Year 1999 concerning Political Parties, the authority to supervise the political parties in the hand of the Supreme Court. Based on this Law, the Supreme Court may dissolve a political party.

Faiz found that during the discussion of the third constitutional amendment in 2001, there was a debate about the state institution that would be granted a power to dissolve political parties, whether it would be given to the Supreme Court or the Constitutional Court. Members of the People Consultative Assembly (MPR) Ad Hoc Committee suggested that the Supreme Court was considered more appropriate to handle the pending cases of cassation, while the constitutional justices were better qualified to deal with cases related to the Constitution.[139]

Political party dissolution is closely tied to the implementation of people sovereignty. Therefore, the issue of dissolution of political parties is also considered to be related to the constitutional matter so that it becomes the authority of the Constitutional Court. Dissolution of political party can only be submitted by the government,[140] and at the time of this writing, there

---

[139] See Pan M Faiz, 'The Role of the Constitutional Court in Securing the Constitutional Government in Indonesia,' Ph.D Thesis, University of Queensland, Australia (2016), 52-53.

[140] Art. 68 of the Indonesian Constitutional Court Law

has not been a single application submitted by the Central Government to the Constitutional Court to dissolve a political party.

3.2.5. Impeachment of the President

Lastly, the Indonesian Constitutional Court has also authority to make a decision concerning the opinion of the DPR that the President and/or the Vice President have/has been alleged of having violated the law in the form of treason against the state, corruption, bribery, other serious criminal act, or act of misconduct, and/or no longer fulfilling the requirements as the President and/or Vice President as intended in the 1945 Constitution. This last jurisdiction is also known as deciding on impeachment, and until now, no petition for impeachment has been submitted to the Constitutional Court.

The impeachment of the President and/or the Vice President is to be proposed by the House of Representative (DPR) by first submitting a petition to the Constitutional Court. The petitioner shall be obligated to clearly describe in its petition any allegation of: (1) violation of the law committed by the President and/or the Vice President in the form of treason against the state, corruption, bribery, other serious criminal act, or act of misconduct; and/or (2) the President and/or the Vice President no longer fulfilling the requirements for President and/or Vice President by virtue of the 1945 Constitution of the State of the Republic of Indonesia.[141]

After the examination process finished, the Constitutional Court would declare whether the allegation of the House is proven and that the Court granted the petition or not proven and the Court will dismiss the petition. However, the decision on the impeachment case is not a final decision which determines the dismissal of the President and/or the Vice President. If the Constitutional Court decides that the President and/or the Vice President proved to have violated the Constitution, then the People's Representative Assembly, which consists of the House of Representative members and the Senate members, will hold a plenary session to decide the proposal of the House of Representative to impeach the President and/or the Vice President.[142]

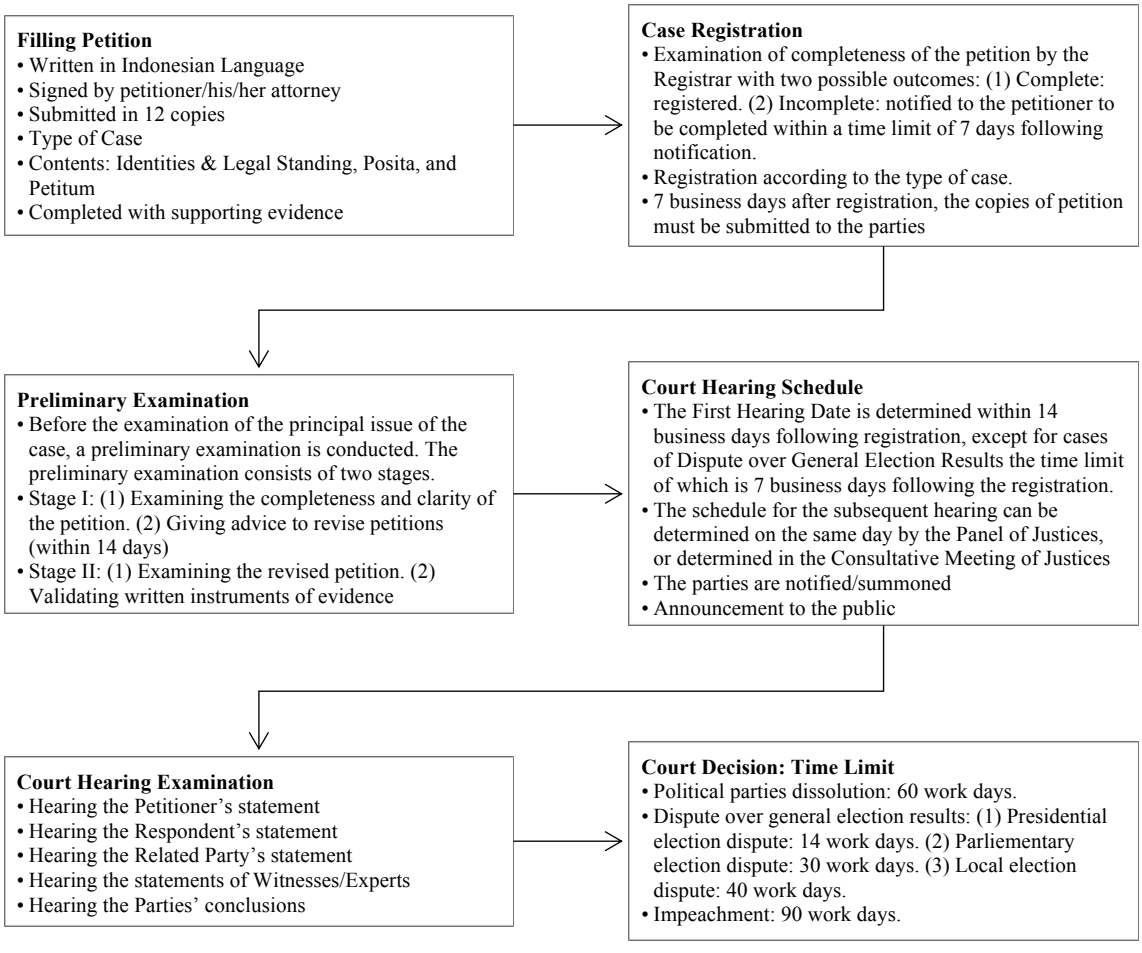
[141] Art. 80 of the Constitutional Court Law

[142] Art. 83 of the Constitutional Court Law

3.3. Procedural Law and Its Problem

The procedural law of the Indonesian Constitutional Court is regulated in the Law Number 8 of 2011 on Amendment to Law Number 24 of 2003 on the Constitutional Court.[143] The Constitutional Court shall examine, adjudicate, and render a decision in a plenary hearing of the Constitutional Court with 9 (nine) justices, except for extraordinary circumstances with 7 (seven) justices which shall be presided over by the Chief Justice of the Constitutional Court.[144] The detail procedures of the constitutional adjudication, which is started from application submission to decision will be described in the figure below:

Figure 11
Procedure from Application Submission to Decision



[143] The procedure for Judicial Review Article 50 to 60; Procedure for dispute amongst state institution Art. 61 to 67; Procedure for Political Party Dissolution Article 68 to 73; Procedure for election dispute Art. 78 to 79; Procedure for Impeachment Article 80 to 85.

[144] Art. 28(1) of the Law of the Indonesian Constitutional Court

The figure above shows the procedure from the application submission to decision. The first step is started from filling of petition or application, the applicants shall be filed with the Constitutional Court in writing in the Indonesian language, and the application must be made with a clear description of the each jurisdictions.[145] The application also must at least indicate the petitioner's name and address; description of the subject matter serving as a basis for the petition; and matters in respect of which a decision is being sought.[146]

The applicant must also attach the evidence in the application, the means of evidence shall be as follows: a) documents or writing; b) witness statement; c) expert statement; d) statement by the parties; e) indication; and f) other means of evidence in the form of information uttered, received, or stored electronically by way of optical instruments or similar device.[147] Then, the Constitutional Court shall determine whether or not the means of evidence are admissible in a hearing of the Constitutional Court,[148] and the Constitutional Court shall assess the means of evidence presented in a hearing by observing the relevance of one means of evidence against another.[149]

Before starting to examine the main issue of the dispute, the Constitutional Court shall conduct an examination on the completeness and clarity of the substance of the petition. In the examination process, the Constitutional Court must advise the petitioner to complete and/or to rectify the petition within a period of no longer than 14 (fourteen) days.[150]

The Constitutional Court carries out hearing processes in adjudicating cases filed by applicants. The hearings are open to the public, except for the deliberation sessions of the justices,[151] and hearings shall include the following: a) examination of the main issue of the Petition; b) examination of written evidence; c) hearing the statements of the disputing parties; d)

---

[145] Art. 29 and 30 of the Law of the Indonesian Constitutional Court

[146] Art. 31 of the Law of the Indonesian Constitutional Court

[147] Art. 36 of the Law of the Indonesian Constitutional Court

[148] Art. 36(4) of the Law of the Indonesian Constitutional Court

[149] Art. 37 of the Law of the Indonesian Constitutional Court

[150] Art. 39 of the Law of the Indonesian Constitutional Court

[151] Art. 40(1) of the Law of the Indonesian Constitutional Court

hearing witness statements; e) hearing expert statements; f) hearing related party statements; g) examination of the relevance of series of data, information, acts, conditions, and/or events to other means of evidence which may be used as indication; and examination of other means of evidence in the form of information uttered, transmitted, received, or stored electronically by means of optical instruments or similar to such means of evidence.[152]

Basically, there are three types of hearings at the Constitutional Court, namely panel hearing, consultative meeting of justices (RPH), and plenary session. First, panel hearing is a hearing which consists of 3 (three) Constitutional Court Justices assigned to carry out the task of conducting preliminary examination, this hearing is conducted to examine the applicants' legal standing and the substance of petitions. Second, deliberative meeting of justices (RPH), which is a closed and confidential meeting, this meeting can only be attended by the Constitutional Court Justices and the Registrar. Third, Plenary Session is a hearing conducted by the panel of Constitutional Court Justices attended by at least 7 (seven) Constitutional Court Justices. The hearing is open to the public with the agenda of hearing examination or decision pronouncement. Hearing examination includes listening to the applicant, the statements of witnesses, experts, and the related parties as well as examination of instruments of evidence.[153]

After all the trial process is done, then the Court decided the case in the hearing open to the public, and the decision shall be considered of the 1945 Constitution in accordance with the means of evidence and the justices' firm belief. The Constitutional Court's decision granting a petition must be based on at least 2 (two) means of evidence.[154]

---

[152] Art. 41(4) of the Law of the Indonesian Constitutional Court

[153] The Indonesian Constitutional Court, 'Profile of the Indonesian Constitutional Court', Registrar's Office and Secretariat General of the Constitutional Court (2015), 73-74.

[154] Art. 45 Paragraph (1) and (2) of the Law on the Indonesian Constitutional Court.

3.3.1. Rules of Procedure before the Constitutional Court

Basically, each of the Constitutional Court jurisdictions have their own rule of procedure which regulate the applicant and its requirements, hearing, and time limit.[155] To understand more specifically about procedural law of the Constitutional Court, the following sections will discuss the procedural law in each jurisdiction.

3.3.1.1. Procedure for Constitutional Review

In conducting review of a law against the Indonesian Constitution, an application shall be a party who claims that his/her/its constitutional rights and/or competency have been impaired by the entry into force of a law, namely: (1) an individual person of Indonesian nationality; (2) a customary law community group insofar as it is still in existence and in conformity with development in society and the principles of the Unitary State of the Republic of Indonesia as prescribed by law; (3) a public or a private legal entity; or (4) a state institution.[156]

There are two different types of constitutional review applications, formal and material review. The matters submitted for adjudication in the petition for formal constitutional review shall explain that the formulation of the law concerned does not comply with the provisions on the formulation of laws based on the Indonesian Constitution and stating that the law concerned does not have binding legal force. While, the application for material review shall describe that the material substance of paragraph(s), article(s), and/or part(s) of the law concerned is/are contradictory to the Indonesian Constitution and stating that the material substance of the paragraph(s), article(s), and/or part(s) of the law concerned does not/do not have binding legal force.[157] The applicant for both formal and material constitutional shall be obligated to clearly describe the petition his/her/its constitutional rights and/or competency.

The description of matters constituting the basis of the petition for the review of a law shall include the following: (1) the Constitutional Court's competence to conduct review; (2) the

---

[155] The rule of procedures include steps and requirements needed in handling cases.

[156] Art. 51(1) of the Constitutional Court Law

[157] Art. 51A(4) of the Constitutional Court Law

petitioner's legal standing including a description of the petitioner's constitutional rights and/or competence which are claimed to have been impaired by the entry into force of the law that is being petitioned for review; and (3) the reasons underlying the Petition for review shall be described clearly and in detail.[158]

After receiving the application, the Constitutional Court shall convey for information, to the DPR and to the President, as well as notify the Supreme Court of petitions which involve the review of laws within seven working days from the time at which such petitions are recorded in the Registry of Constitutional Cases.[159] During the examination process, the Constitutional Court may request the MPR, the DPR, the DPD, and/or the President for information and/or minutes of meetings pertaining to the petitions being examined.[160]

3.3.1.2. Procedure for Dispute amongst State Institution

The Indonesian Constitutional Court has authority to handle the disputes related to the authorities of state institutions whose authorities are granted under the constitution. The applicant shall be a state institution whose authorities are granted under the 1945 Constitution of the State of the Republic of Indonesia which have a direct interest in the disputed authority(-ies).[161]

Based on this provision, it can be concluded that the state institutions that can be applicants or respondents in a dispute are limited, namely the DPR, the DPD, the MPR, the President, the Supreme Audit, the Regional Government or other state institutions whose authorities are granted by the Constitution.

The petitioner shall be obligated to describe clearly in its petition the petitioner's direct interest and to specify the authorities that are subject to the dispute concerned as well as to state clearly the state institution which constitutes the respondent.[162] During the examination process,

---

[158] Art. 51A(2) of the Constitutional Court Law

[159] Art. 52 and 53 of the Constitutional Court Law

[160] Art. 54 of the Constitutional Court Law

[161] Art. 61(1) of the Constitutional Court Law

[162] Art. 61(2) of the Constitutional Court Law

the Constitutional Court may issue a stipulation ordering the petitioner and/or the respondent to temporarily suspend the exercise of the authority(-ies) which is/are the subject of dispute until a decision of the Constitutional Court is available.[163]

3.3.1.3. Procedure for Political Party Dissolution

Jurisdiction to resolve the dissolution of political parties is one of the powers possessed by the Indonesian Constitutional Courts. The procedure to file an application shall be the Government. The petitioner shall be obligated to describe clearly in its petition the ideology, the principles, the objectives, the program and the activities of the political party concerned, deemed to be contradictory to the 1945 Constitution of the State of the Republic of Indonesia.[164]

After receiving the application, the Constitutional Court shall convey the petition which has been recorded in the Registry of Constitutional Cases to the political party concerned within seven working days as from the time at which the petition is recorded in the Registry of Constitutional Cases.[165]

The decision of the Constitutional Court concerning a petition for the dissolution of a political party must be passed within sixty working days from the time at which the petition is recorded in the Registry of Constitutional Cases. The decision of the Constitutional Court on the dissolution of a political party shall be conveyed to the political party concerned.[166]

3.3.1.4. Procedure for Election Disputes

As has been discussed in the previous section that the elections in Indonesia are divided into two categories, the national and local elections. The national elections can be categorized into the legislative elections, which are the House of Representative (DPR), the Regional Representatives' Council (DPD), and the Regional People's Legislative Assembly (DPRD) and

[163] Art. 63 of the Constitutional Court Law

[164] Art 68 of the Constitutional Court Law

[165] Art 69 of the Constitutional Court Law

[166] Art. 71 and 72 of the Constitutional Court Law

the presidential election. In this jurisdiction, Petitioners shall be an individual person Indonesian citizen competing in the general election as candidate member to the DPD; a President and Vice President Candidate pair competing in the general election for the presidency and vice-presidency; and a political party competing in the general election.[167]

In the petition filed, the petitioner shall describe the error(s) in the ballot count as announced by the Election Commission (the KPU) and the result(s) thereof which the petitioner believes to be the correct result(s); and a request for the annulment of the ballot count as announced by the KPU and for the latter to determine the result(s) of the ballot count which the petitioner believes to be the correct result(s).[168]

The decision of the Constitutional Court concerning a petition on a dispute on the results of the national election shall be rendered within fourteen working days from the time at which the petition is recorded in the Registry of Constitutional Cases, in the case of elections for the presidency and vice-presidency; and thirty working days from the time at which the petition is recorded in the Registry of Constitutional Cases, in the case of the election of members to the DPR, the DPD, and the DPRD.[169] The decisions of the Constitutional Court on Disputes Concerning the Results of General Elections shall be final and binding.[170]

Whereas, the Constitutional Court authority to handle local election disputes is currently regulated in Law Number 10/2016 concerning the Election of Regional Heads. According to Article 157, it is stipulated that the local election results disputes are examined by a special judicial body. However, while waiting for the President and Parliament preparing of the special judicial body establishment, the local elections disputes are examined by the Constitutional Court.[171]

---

[167] Art. 74(1) of the Constitutional Court Law

[168] Art. 75 of the Constitutional Court Law

[169] Art. 78 of the Constitutional Court Law

[170] Art 79(3) of the Constitutional Court Law

[171] Art 157(1), (2), and (3) of the Law no. 10/2016 on the Election of Regional Heads

The procedure of the local election also regulated in Law Number 10/2016, the Election Participants may submit a request for cancellation of the Local KPU decision to the Constitutional Court. The applicants shall submit applications to the Constitutional Court no later than three working days after the announcement of the Local KPU decision.[172] After the examination finished, the Constitutional Court shall decide the local election dispute no later than forty-five working days from the receipt of the application. The decision of the Constitutional Court is also final and binding.[173]

3.3.1.5. Procedure for Impeachment

Another jurisdiction of the Constitutional Court is to give opinion of the House of representative (DPR) on the allegation of violation committed by the President and/or the Vice President.in this case, the petitioner shall be the DPR. The petitioner shall be obligated to clearly describe in its petition any allegation of: (1) violation of the law committed by the President and/or the Vice President in the form of treason against the state, corruption, bribery, other serious criminal act, or act of misconduct; and/or (2) the President and/or the Vice President no longer fulfilling the requirements for President and/or Vice President by virtue of the 1945 Constitution of the State of the Republic of Indonesia.[174]

After receiving the application, the Constitutional Court shall convey to the President the petitions which have been recorded in the Registry of Constitutional Cases within seven working days as from the time at which the appeal is recorded in the Registry of Constitutional Cases.[175] During the process of examination by the Constitutional Court, the President and/or the Vice President resigns from office, the examination process shall be discontinued and the petition concerned shall be declared null and void by the Constitutional Court.[176] The decision of the

[172] Art. 157(4) and (5) on the Election of Regional Heads

[173] Art 8 and 9 of the Law on the Election of Regional Heads

[174] Art. 24C of the Indonesian Constitution

[175] Art. 81 the Law on the Constitutional Court

[176] Art. 82 the Law on the Constitutional Court

Constitutional Court on a petition concerning the opinion of the DPR on allegations of violations must be rendered within ninety days from the time at which the petition is recorded in the Registry of Constitutional Cases.[177]

However, the decision on the impeachment case is not a final decision which determines the dismissal of the President and/or the Vice President. If the Constitutional Court decides that the President and/or the Vice President proved to have violated the Constitution, then the MPR, which consists of the DPR members and the DPD members, will hold a plenary session to decide the proposal of the DPR to impeach the President and/or the Vice President. The session shall be conducted for not more than 30 days and it can only be held when it is attended by three-fourths of the MPR members. In addition, the decision can only be taken if it is approved by at least two-thirds of the MPR members who are present.[178]

3.3.2. No Time Limit for Some Jurisdictions

In deciding the constitutional case, the Constitutional Court should pay attention with the time limit, however, under the Indonesian Constitutional Court Act, the time limit can only be found in political party dissolution, general election dispute, and impeachment. But there is no time limit for other important jurisdiction, such as constitutional review and dispute amongst institution.

Table 1

Time Limit of Adjudication

Jurisdictions		Time Limit of Adjudication
Constitutional Review		-
Dispute amongst institution		-
Political party dissolution		60 working days
Election disputes	Presidential election dispute	14 working days
	Parliamentary election dispute	30 working days

[177] Art. 84 the Law on the Constitutional Court

[178] Art. 7B (7) of the Indonesian Constitution.

	Local election dispute	40 work days
Impeachment		90 days

Under the Indonesian Constitutional Court Law, Article 71 of the Constitutional Court Law regulates the time limits on political party dissolution, "The decision of the Constitutional Court concerning a petition for the dissolution of a political party must be passed within 60 (sixty) working days from the time at which the petition is recorded in the Registry of Constitutional Cases." Then, for presidential and parliamentary elections disputes regulate under Article 78, The decision of the Constitutional Court concerning a petition on a dispute on the results of the general election shall be rendered within a period of: a) 14 (fourteen) working days from the time at which the petition is recorded in the Registry of Constitutional Cases, in the case of elections for the presidency and vice-presidency; b) 30 (thirty) working days from the time at which the petition is recorded in the Registry of Constitutional Cases, in the case of the election of members to the House of Representative (DPR), the Regional Representatives' Council (DPD), and the Regional People's Legislative Assembly (DPRD). Lastly, for impeachment, Article 84 stipulates "The decision of the Constitutional Court on a petition concerning the opinion of the *DPR* on allegations of violations as intended in Article 80 must be rendered within 90 (ninety) days from the time at which the petition is recorded in the Registry of Constitutional Cases."

However, under the Constitutional Court Law, the constitutional review and dispute among state institutions are not yet available for the time limit. Therefore, it is also very important to set a time limit for constitutional review and dispute among institutions, both of which are important authority possessed by the Constitutional Court in protecting the constitutional rights of citizens.

3.3.3. The Role of Attorney: Is it Mandatory?

The Indonesian Constitutional Court power is not only limited to removing a provision of the Law but also states the conditionally constitutional or unconstitutional, as well as many other types of decisions. This becomes the motivation for the attorney to help the applicant in filing a case before the Constitutional Court.

Under the Constitutional Court Law, to submit an application for judicial review, it does not have to be accompanied or represented by an attorney.[179] However, the applicant who will submit applications for constitutional review may appoint an attorney or advocate based on a Power of Attorney Letter, and this letter must be submitted along with the application documents to the Constitutional Court.[180]

In the Constitutional Court trial, the applicant's attorney does not have to be an advocate and hold a legal license. The applicant may be represented by someone who capable of defending applicant interests. Therefore, although it is not mandatory, advocacy by an attorney can help maximize the constitutional review applications before the Constitutional Court. So the applicants' problem harmed by a Law can be well advocated.

3.4. Decisions and Its Controversy

The Indonesian Constitutional Court decision is final and binding. However, the implementation of Constitutional Court decisions remains one of the main problems in its implementation. In several situations, the Constitutional Court decisions are not adhered to by the state institutions, on the other hand, the Court has no instruments to force other institutions to adhere to the decision.

Besides that, the controversy of Constitutional Court's decisions that influenced and impacted the Indonesian legal order such as *ultra petita* decision on constitutional review and the decision which is a positive legislator. This section will specifically analyze the controversial decision, such as *ultra petita* decision and positive legislator decision. Then this section will also discuss the possibility of judicial descents at the Indonesian Constitutional Court.

---

[179] Art. 51 of the Constitutional Court Law

[180] Art. 5 of the Constitutional Court Regulation No. 06 / PMK / 2005 of 2005 concerning Guidelines for Procedure of constitutional review

3.4.1. Decision Making and Types of Decision

Decision-making process in each case is conducted through the Deliberation Meeting of Justices (*RPH*), which is a closed and confidential meeting. This meeting can only be attended by the Constitutional Court Justices and the Registrar. At this meeting, decision of the Constitutional Court are discussed in depth and in detail and passed. This meeting must be attended by at least seven justices.

Decisions are taken by majority vote. However, if the deliberation meeting fails to reach a majority vote, the chairperson of the meeting shall have the decisive vote.[181] In the case where no decision is reached unanimously, the justices can write dissenting opinions that must be included in the last part of the Court's decision.[182]

Regarding the types of decisions, the Constitutional Court may issue a decision of constitutional nonconformity, conditional unconstitutional, conditional constitutional, or decide the case to be unconstitutional or constitutional, and other. For further information about the types of decisions and case statistic will be explained in table and chart below:

- Unacceptable: Used for petitions the Constitutional Court is of the opinion that the petitioner and/or the petition does not meet the requirements as stipulated in the Act of Constitutional Court.
- Unconstitutional: Used in Constitutionality of Laws cases that Constitutional Court accepted the petition filed and declared a certain law (partially or as a whole) is unconstitutional. This includes the decision of Conditionally Constitutional and Conditionally Unconstitutional.
- Void: The Constitutional Court declares a petition as “Void” after the petitioner does not attend any of the court sessions following the submission of the petition and being called properly to present before the court.

[181] Art. 45(8) of the Constitutional Court Law

[182] Art. 45(10) of the Constitutional Court Law

- Unauthorized: In cases of examining the constitutionality of a law, the Court considers that the petition does not fall under its authority. For example, it should be undergoing a legislative review instead of a judicial review.
- Provisional Decision: Used in the Dispute of General Election Result and/or Regional Election Result cases. Such decision is issued if the error(s) in the ballot count as announced by the General Election Commission is caused by more than just administrative mistakes. Normally, the Court orders the Commission to recalculate or even to conduct a re-election process; the result(s) of which will be submitted to the Court for final decision. This type of decision also applied in the case of competence dispute.

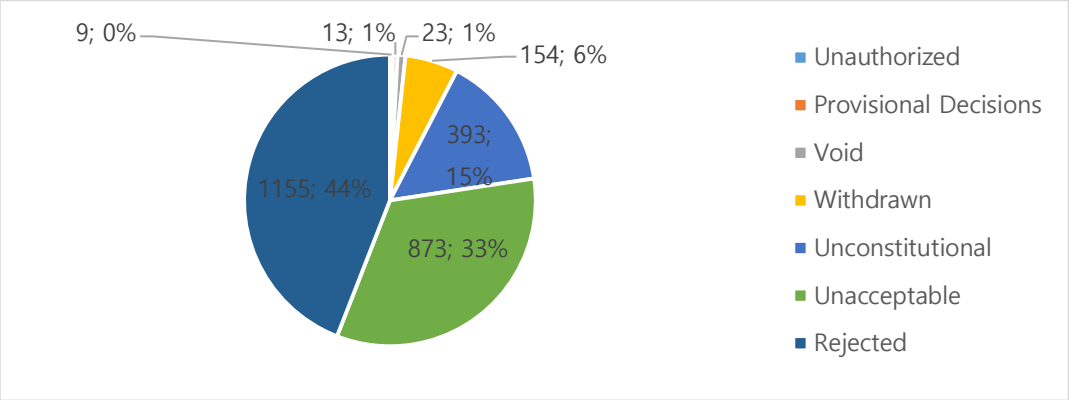
Table 2
Case Statistic of the Indonesian Constitutional Court 2003 – 2018[183]

Type		Total	Constitutional Review	Competence Dispute	Dispute of National Election	Dispute of Regional Election	Dissolution of Political Party	Impeachment
Filed		2,657	1,236	25	414	982		
Settled		2,620	1,199	25	414	982		
Decision	Unconstitutional/Accepted	393	259	1	58	75		
	Rejected	1,155	420	3	259	474		
	Unacceptable	873	375	16	79	403		
	Void	23	21			2		
	Withdrawn	154	115	5	5	28		
	Unauthorized	9	9					
	Provisional Decision	13			13			
Pending		37						

[183] Constitutional Court of Indonesia, 'Case Statistics of the Constitutional Court of Indonesia', accessed 6 December 2019, https://mkri.id/index.php?page=web.RekapPUU&menu=18

Figure 12

Total Number of Decision of the Indonesian Constitutional Court 2003 - 2018



Based on the case statistic, for sixteen years, since its establishment on 13 August 2003 until 2018, the Constitutional Court has registered 2.657 cases and decided 2.620 cases. The Constitutional Court decisions are divided into 1.236 decisions concerning constitutional review, 25 decisions concerning cases on disputes between state institutions, and the decisions on electoral cases can be categorized further into national elections and regional election, 414 decisions on national elections and 982 decisions on regional head elections.

Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made. The concurrence of six or more Justices is required to make a decision of unconstitutionality. Any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies, and local governments.

3.4.2. Dissenting and Concurring: How Justices Express their Opinion?

Decision-making process in each case is conducted through the Deliberation Meeting of Justices (RPH), which is a closed and confidential meeting. This meeting can only be attended by the Constitutional Court Justices and the Registrar. At this meeting, decision of the Constitutional Court are discussed in depth and in detail and passed. This meeting must be attended by at least seven justices. Decisions are taken by majority vote. However, if the deliberation meeting fails to reach a majority vote, the chairperson of the meeting shall have the decisive vote. In the case

where no decision is reached unanimously, the justices can write dissenting and concurring opinions that must be included in the last part of the Constitutional Court's decision.[184]

A decision is considered a dissenting opinion if there is an argument by a member of Justices which is different from the majority of other members Justices. According to the Constitutional Court Law, the Constitutional Court Justice have the freedom and authority to make the dissenting opinion, because the constitutional justices must work independently without any intervention by any other branch of power. Through dissenting opinion is one of the mechanism to create the independence and impartiality of the judiciary, so decisions more transparent and legitimate.

In practice, the judgments of Indonesian Constitutional Court often contain "dissenting opinions". Simon Butt found that, "one of more judges writes reasons indicating why they would have decided the case differently to the way a majority of the Court decided it. However, there is, to my knowledge, no consensus amongst Indonesian judges and academics about the significance and purpose of dissents. In one sense, this is unsurprising: publishing dissenting opinions alongside majority or other opinions in a single judgment document have long been a feature of the common law tradition."[185]

Through judicial dissent, each of the constitutional justices has the authority to consider constitutional decisions based on their opinion on the cases. As Hendrianto pointed out that, "there is always room for voices of dissent in the Court. Therefore, the Chief Justice cannot easily twist the direction of the Court based on his own preference. For example under first Chief Justice Jimly Asshiddiqie (2003–2008), in some cases, Chief Justice Asshiddiqie faced opposition from his associate justices. On the issue of taxpayer standing, two justices filed dissenting opinions and argued against the application of the generalized grievance form of standing. Chief Justice Asshiddiqie was fully aware that he did not have absolute control over the Court's decisions, and therefore he needed to find a strategy to bridge the differences among the justices. He decided to

---

[184] Art. 45 of the Constitutional Court Law.

[185] See Simon Butt, 'The Function of Judicial Dissent in Indonesia's Constitutional Court', *Journal of Constitutional Review,* Volume 4, Number 1 (May 2018): 1.

take on the role of the consensus builder. For example, on the standing issue, he tried to build a consensus among his colleagues that the Court needed to apply a more lenient standing test in its early years of operation. Furthermore, Chief Justice Asshiddiqie successfully convinced his brethren not to express their dissent publicly. On the surface, the justices were conscious of avoiding open opposition to each other."[186]

3.4.3. The Possibility of Inconsistency of Decision

It such difference of the Court decisions can be understood because the constitution is a living document. In the ongoing process, it may be possible to change the decision with the emergence of new conditions, and through forthcoming applications to the Constitutional Court.

Throughout history, several decisions have been found about the same case but different decisions. For example in the Local Election Disputes case (2005), the Court declared that the direct regional head elections is an expansion of definition of the general elections as referred to Article 22E of Constitution, therefore, disputes over the results become a part of the Constitutional Court's jurisdiction.

However, in the recent Local Election Dispute case (2014), the Court declared that the Constitutional Court's jurisdiction in handling regional head electoral disputes was unconstitutional. In a transitional period, however, the Court stated in its decision that they would still exercise the power to examine regional head electoral disputes until a new law is enacted by the Parliament.

3.4.4. The Weak Binding Force of Decision

Based on the Indonesian Constitutional Court Law, the decision of the Court is final and binding since mentioned in a plenary session open to the public. This means that, by the time it has a permanent legal force, there is no need for other legal actions in the forms of appeal and cassation, including any efforts to correct it; the decision is the first and final resort. As a

[186] Stefanus Hendrianto, 'the Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia', *Washington International Law Journal*, Volume 25 No. 3 (2016): 519.

consequence, the decision of the Constitutional Court may not be disallowed or even ignored by other state institution.

However, in reality, there is often a gap between theory and practice, where many Constitutional Court Decisions are not obeyed by other relevant state institutions, and there is no sanctions or legal consequences if the Constitutional Court's decision is not followed up. For the time being, the execution of the Court Ruling only relied on a good cooperative relationship between the Constitutional Court and other state institutions.

Some Indonesian legal scholars express that there are several factors why the final and binding decisions of the Constitutional Court are not implemented consistently: (1) the Constitutional Court only serves as a negative legislature, (2) there are no special enforcement agencies, (3) there is no grace period for the implementation of decisions, (4) there are no consequences of ignoring of the decisions of the Constitutional Court.

The following decisions are an example where the other institutions were not obeyed the Court decisions:

- Decision Number 34/PUU-XI/2013, the Court invalidated Article 268 (3) of the Code of Criminal Procedure. The legal consequence of the decision is that the Reconsideration mechanism can be submitted by the convicted more than once as long as they still meet the conditions specified in Article 268 (2) of the Code of Criminal Procedure. However, the Constitutional Court's Decision was later annulled by the Supreme Court through the Supreme Court Letter Number 07 of 2014 concerning Submission of Requests for Reconsideration in Criminal Cases, and emphasize that Reconsideration mechanism can only be done once.
- Decision Number 5/PUU-X/2012 on the review of Article 50 (3) of Law Number 20/2003 concerning the National Education System. The issue of execution the Court's decision, in this case, is that the government through the Ministry of Education is still pursuing a transitional period policy to erase the policies of the International Standard School or International Standard School Pilot Project. Whereas, the Constitutional Court's Decision does not recognize the transition period to be implemented, but has binding legal force since it was declared, which means that from then on it must be obeyed and implemented.

- Decision Number 011/PUU-III/2005, the Court argued that the explanation of Article 49 (1) of the National Education System Law does not have binding force, and the implementation of the constitution should not be postponed, including the provision of a minimum budget of 20 percent of the state budget for education, so it must not be reduced by the legislation below. However, in the Law on the State Budget (2005), the parliament budget committee only allocated a budget of 8.1 percent of the total available budget.

The solution to the problem of the execution of the Constitutional Court's decision is to revise the Court Law and Law No. 12 of 2011 on Establishment of Law and Regulations, to clearly mention concerning the legal consequence for other state institutions if not obey the Court decisions. Otherwise, the Court decision will continue to be ignored and unconstitutional norms will continue to be applied to citizens.

3.4.5. *Ultra Petita* Decisions on Constitutional Review

Ultra Petita is a Latin term which means beyond that which is sought (unsolicited). It is used to refer to a decision of a court which grants more than what is asked for. The judicial activism of the Constitutional Court, in annulling and making *ultra petita* decisions, has sparked controversy, especially from the House of Representative (DPR) members.[187] Various parties have different views on responding *ultra petita* decision made by the Constitutional Court. Regarding to that condition, some parties considered that the Court has acted as an institution that is authoritarian and violated its authority, but on the other hand, the Court instead declared itself as the guardian of democracy and substantive justice. The author argued that the prohibition to use a doctrine of *ultra petita* for judge was not generally applicable.

In the case Number 005/PUU-IV/2006 of judicial review Act Number 22 of 2004 concerning Judicial Commission (*Komisi Yudisial, KY*) and the Law Number 4 of 2004 on Judicial Power, for example, in its decision had eliminated all of the authority KY in supervising and

[187] Pan Mohamad Faiz Kusuma Wijaya, 'The Role of the Constitutional Court in Securing the Constitutional Government in Indonesia,' PhD Thesis, University of Queensland, Australia (2016), 185.

check the behavior and performance of Supreme Court judges to the lowest ranks. The Court also annulled the authority KY to examine the judges of the Constitutional Court, but the matter was never asked the applicant to be invalidated.

Another *ultra petita* decision is the case Number 102/PUU-VII/2009, the Petitioners argue that the Petitioners could not vote in the 9 April 2009 elections because they are not listed in the Permanent Voter List (DPT). This was due to the provision of Article 20 of Law Number 10 Year 2008 regarding General Election of Members of DPR, DPD, and DPRD which reads, "In order to exercise the right to vote, Indonesian citizens must be registered as voters." Through the Decision Number 102/PUU-VII/2009, the Constitutional Court grants the application partially and states that an unnamed voter in the DPT may still exercise his/her right to vote by using an ID Card (KTP) or passport in accordance with the address stated in his/her identity by registering Local Voting Organizer Group (KPPS) one hour prior to the completion of voting at the Voting Place (TPS) concerned.

According to the Constitutional Court arguments that the Court may decide an *ultra petita* decision if: (1) the Law requested is the "key" of the Law so the other articles cannot be implemented; (2) The constitutional review concerns the public interest and is *erga omnes*; different from civil law; (3) if the public interest requires the judge not to follow to the *petitum*.

In this issue, there are some legal experts who want to be *ultra petita* decision is prohibited to include in the amendment of the Constitutional Court Act. Some considered the need for the amendment of the Constitutional Court ruling stating the permissibility of containing *ultra petita* with strict restrictions. Others argued that it is not necessary amendments, and considers the practice of the Constitutional Court as part of judicial activism.[188]

3.4.6. Transforming from Negative to Positive Legislator

The Indonesian Constitutional Court not only can overturn laws, but also often creates new norms based on the interpretation of the 1945 Constitution. Therefore, the Indonesian Constitutional Court play the role of both negative legislator as well as positive legislator. The

[188] Hery Abduh Sasmito, '*Ultra Petita* Decision of Constitutional Court on Judicial Review (The Perspective of Progressive Law)', *Journal of Indonesian legal Studies,* Volume 1 (01 November 2016): 50.

role of the Constitutional Court as a positive legislator can be justified because it aims to protect the constitutional rights of citizens.

In practice, many of the Constitutional Court Decisions create new norms. For example, when the Indonesian Constitutional Court decided its first case, the *Electricity* case Number 001-021-022/PUU-I/2003, the Court has annulled the Law No. 20 Year 2002 on Electricity as a whole, while at the same time the Constitutional Court also re-enacted the Law Number 15 of 1985 concerning Electricity previously revoked by the House of Representative (DPR).

Another case is *Age of Criminal Responsibility* (2010), the decision number 1/PUU-VIII/2010 regarding Judicial Review on Law Number 3 of 1997 on Children Protection. According to Articles 59 (2) (b) and 64 of the Child Protection Law states that the minimum age of criminal responsibility for children in Indonesia was set at 8 years old. In this case, the Court decided to increase the minimum age of criminal responsibility under the Juvenile Court Law of 1997 from 8 years to 12 years.

CHAPTER 4

THE KOREAN CONSTITUTIONAL ADJUDICATION SYSTEM

The Korean Constitutional Court has just celebrated its thirtieth anniversary, since its establishment thirty years ago in 1988, the Constitutional Court of Korea has been playing a significant role in protecting of fundamental rights and constitutional values through an impartial interpretation of the constitution, and the Court decisions also have strengthened the constitutional system in Korea.

The jurisdictions of the Korean Constitutional Court stipulated in Article 111(1) of the Korean Constitution, the Constitutional Court shall have the jurisdictions of constitutional review, [189] impeachment, dissolution of the political party, competence disputes, and constitutional complaint. Because of all these powers, the Constitutional Court occupies a very strategic and influential position, and the Court is said to be "the guardian of the constitution."

Therefore, many constitutional cases have been handled by the Korean Constitutional Court. The statistics of cases handled by the Korean Constitutional Court since its establishment in 1988 to October 2019 is 37,908 cases and 36,751 cases settled. Which consist of 933 decisions concerning the constitutionality of statutes, 2 decisions concerning impeachment, 2 decisions concerning dissolution of political party, 99 decisions concerning cases on competence disputes, and 35,715 decisions concerning constitutional complaint.[190]

Regardless of the number of cases in each constitutional jurisdictions of the Korean Constitutional Court, the most important thing that should be interpreted wisely is that the existence of the Constitutional Court itself has been demonstrated through the process of handling the cases. Furthermore, the following section will be explained how the Korean Constitutional

[189] The Korean Constitutional Court does not have the competence of abstract review.

[190] Constitutional Court of Korea, 'Case Statistics of the Constitutional Court of Korea', accessed 6 December 2019, http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do

Court dealing with the constitutional cases.

4.1. Organizational Structures

4.1.1. President, Justices, and Council of Justices

According to the Korean Constitution, the Korean Constitutional Court shall be composed of nine Justices.[191] Moreover, the Korean Court organizational structure also consists of the Council of Justices, which shall include of all justices, and the President of the Korean Constitutional Court shall serve as the Chairperson.[192] In case the position of the President is vacant or becomes unable to perform his or her duties due to any unavoidable cause, other Justices shall act the President according to the procedure set forth in the Constitutional Court Act.[193]

The final decision making body regarding the administration of the Korean Constitutional Court is the Council of Justices. Resolution of the Council of Justices shall be adopted with the attendance of seven or more Justices by the affirmative vote a majority of the Justices present.[194] The matters decided by the Council of Justices include matters concerning the enactment and amendment of the Constitutional Court Rules and issues concerning the presentation of opinions on legislation related to the organization, personnel affairs, operation, adjudication procedure and other functions of the Constitutional Court. budget requests, expenditure of reserve funds and settlement of accounts, appointment and dismissal of the Secretary General, Deputy Secretary General, Rapporteur Judges, and public officials of Grade III and higher, and mattes other important matters presented by the President of the Korean Constitutional Court for discussion in the Council of Justices.[195]

---

[191] Art. 111(2) of the Korean Constitution

[192] Art. 16 (1) of the Korean Constitutional Court Act

[193] Art 12(4) of the Korean Constitutional Court Act

[194] Art. 16(2) of the Korean Constitutional Court Act

[195] Art 16(4) of the Korean Constitutional Court Act

4.1.2. Selection, Qualifications, and Term of Justices

The nine Korean Constitutional Court Justices shall be appointed by the President of the Republic of Korea. Among the Justices, three shall be appointed from persons selected by the National Assembly, and three shall be elected from person nominated by the Chief Justice of the Supreme Court.[196] The president of the Court shall be appointed by the President of the Republic of Korea from among the Justices with the approval of the National Assembly, take charge of the affairs of the Constitutional Court, and directs and supervises public employees under his or her authority.[197] This appointment system shows that the Constitutional Court of Korea follows the representation model of appointing Constitutional Court Justices.

All candidates are subject to a confirmation hearing at the National Assembly. In this process, the President shall request a confirmation hearing before he or she appoints the Justices (except the Justices elected by the National Assembly or nominated by the Chief Justice of the Supreme Court) and the Chief Justice of the Supreme Court shall request a confirmation hearing before he or she nominates the Justices.[198]

The qualification of justices, it is clearly mentioned in the Court Act that all nine justices shall be appointed from among those who have held any of the following positions for 15 years or more and who are 40 or older. Moreover, the candidates must be qualified to be ordinary court judges, prosecutor, or attorney.[199] There are also unqualified candidates, such as a person who is disqualified to serve as a public official under pertinent statutes and regulations; a person who has been sentenced to imprisonment without labour or a heavier punishment; or a person for whom five years have not yet passed since he or she was dismissed by impeachment.[200]

The term of Justices is six years and may be renewed. The retirement age of a Justice is 70.[201] No Justice can be removed from his or her office against his or her own will, unless

---

[196] Art. 111(3) of the Korean Constitution

[197] Art. 111(4) of the Korean Constitution and Art. 12 (3) of the Korean Constitutional Court Act

[198] Art. 6(2) of the Korean Constitutional Court Act.

[199] Art. 5(1) of the Korean Constitutional Court Act.

[200] Art. 5(2) of the Korean Constitutional Court Act.

[201] Art. 7 of the Korean Constitutional Court Act.

impeached or criminally sanctioned with a sentence of imprisonment without labor or a heavier punishment.[202]

4.1.3. Supporting System of Justices: Research and Administrative Department

The Supporting system of the Korean Constitutional Court can be divided into two categories, research and administrative department. According to the Court Act, the Korean Constitutional Court's administrative affairs are managed and supervised by the Department of Court Administration, which consist of a Secretary General and a Deputy Secretary General. The Secretary General, under the direction of the President, oversees the work of the Department of Court Administration, directs and supervises its employees and attends National Assembly sessions to make statements on the Court's administrative issues. The Deputy Secretary General assists the Secretary General and shall act on behalf of the Secretary General should he or she be unable to perform his or her duties due to unforeseeable circumstances. Moreover, this department also shall have offices, bureaus and divisions [203]

In addition, to give a substantive support to justices, the Korean Constitutional Court shall have Rapporteur Judges, which shall be State public officials in special service. The Rapporteur Judges main duties shall be engaged in investigation and research concerning the review and adjudication of cases under the order of the President of the Constitutional Court. The appointment mechanism, rapporteur Judges are appointed by the President of the Constitutional Court through a resolution of the Council of Justices, from those falling under any of the following categories: 1) a person who is qualified as a judge, a public prosecutor, or an attorney-at-law; 2) a person who has been in a position equal to or higher than an assistant professor of law in an accredited college or university; 3) a person who has been engaged in legal affairs for five or more years as a public official of Grade IV or higher in the state agencies, such as the National Assembly, the Government, ordinary courts, or the Constitutional Court; 4) a person who has obtained a doctorate in law, and engaged in legal affairs for five or more years in the state

[202] Art. 8 of the Korean Constitutional Court Act.

[203] Art. 17 of the Korean Constitutional Court Act

agencies, such as the National Assembly, the Government, ordinary courts, or the Constitutional Court; and 5) a person who has obtained a doctorate in law, and engaged in legal affairs for five or more years in an accredited research institute, such as a college or university as stipulated by the Constitutional Court Regulations. Depending on prior experience, some appointees are required to first serve as an Assistant Rapporteur Judge for three years, before being appointed to the position of a Rapporteur Judge.[204]

In carrying out the research on the constitutional law and constitutional adjudication and education for Rapporteur Judges, public officials of the Department of Court Administration and others, the Korean Constitutional Court also has Constitutional Research Institute (the CRI). This institute conducts systematic study and research of constitutional law and constitutional adjudication with a long term perspective and seeks ways to develop the Korean Constitution and constitutional adjudication system into one that suits Korea's particular circumstances. The CRI also provides educational programs on constitutional law for public officials, law school and university students, teachers, and others. The organizational structure of the CRI shall consist of 40 persons or fewer, including one president, and the heads of departments and teams, research officers, and researchers shall be appointed under the president's authority.[205]

The number of public officials, as of 2018, the Korean Constitutional Court has around 325 public officials, about 55 of whom are Rapporteur Judges to assist the Justices in delivering judgments, 236 public officials work at the Department of Court Administration of the Constitutional Court, and 34 Constitutional Researchers work at the Constitutional Research Institute.[206]

---

[204] Art. 19 of the Korean Constitutional Court Act

[205] Art. 19-4 of the Korean Constitutional Court Act

[206] Constitutional Court of Korea, 'AACC Member Fact File: Constitutional Court of Korea', in *The Jurisdictions and Organization of AACC members,* ed. AACC SRD, Seoul: AACC SRD, 2018, 109-111.

4.2. Jurisdictions of the Korean Constitutional Court

The jurisdictions of the Korean Constitutional Court mentioned in Article 111(1) of the Korean Constitution, the Constitutional Court shall have the jurisdictions of constitutional review, impeachment, dissolution of the political party, competence disputes, and constitutional complaint. This section will discuss the Korean Constitutional Court jurisdictions in more detail.

4.2.1. Constitutional Review

The constitutional review system in Korea was introduced in 1948, however, full-scale constitutional review actually began when the current Constitutional Court was established in September 1988. Due to the activities of the Constitutional Court, the basic rights of people have been more completely protected. The freedom and rights of people of Korea have been guaranteed with equal status to advanced countries and democratic political system has been stably established. So, it is estimated that Korea is the most successful country in Asia to settle into a constitutional adjudication system. In the process of development of democracy and the rule of law in various parts of society including social, political and economic sectors, many important constitutional issues have been brought to the Constitutional Court.[207]

Adjudication on the constitutionality of a law serves the purpose of securing the system of checks and balances in constitutional government. A request for the review of a law can be made by an ordinary court, either ex officio or by decision upon a motion by the party. The subject of adjudication includes statutes legislated by the National Assembly, and other norms with the equivalent status of such statutes.[208]

In adjudication on constitutionality of the statutes, only the concrete norm control is adopted, as the constitutional review of statutes is exercised upon the request of an ordinary court when the constitutionality of laws is at issue in a pending case. When an ordinary court requests a review on the constitutionality of a statute to the Constitutional Court, the court's written request

---

[207] Jong Ik Chon, 'The Effect of Constitutional Review on the Legislature and the Executive branch for last 25 years in Korea', *Journal of Korean Law*, Vol. 14, (June 2015): 165.

[208] Art. 111 (1) 1 of the Korean Constitution and Art. 41-47 of the Korean Constitutional Court Act

shall include the following matters: 1. Information of the requesting court; 2. Information of the case and the parties; 3. The statute or any provision of the statute which is interpreted as unconstitutional; 4. Bases on which a statute is interpreted as unconstitutional; and 5. Other necessary matters.[209]

Moreover, when the Constitutional Court decides on the constitutionality of a statute, the decision shall be made only for the statute or a provision of the statute for which a review is requested, that if the Court finds that a decision of unconstitutionality on a provision would render the entire statute unenforceable, it may decide the statute unconstitutional as a whole.[210]

4.2.2. Constitutional Complaints

One of the Korean Constitutional Court jurisdictions is a constitutional complaint, which is an essential jurisdiction in the efforts to guarantee the protection of fundamental rights of the citizen as guaranteed by the Korean Constitution. There are two types of constitutional complaints, first, based on Article 68(1) of the Constitutional Court Act, any person who claims that his or her fundamental rights have been violated by an exercise or omission of state power, excluding the judgments of the ordinary courts.[211] Second, another type of constitutional complaint mentioned in Article 68(2) of the Constitutional Court Act, if a motion made under Article 41(1) of the Constitutional Court Act for request of adjudication on constitutionality of laws is denied by the ordinary court, the party may file a constitutional complaint to the Constitutional Court.

---

[209] Art. 43 The Korean Constitutional Court Act

[210] Art. 45 The Korean Constitutional Court Act

[211] Art. 68(1) the Constitutional Court Act**:** 'Any person whose basic rights guaranteed by the Constitution is infringed due to exercise or non-exercise of the governmental power, excluding judgment of the ordinary courts, may file a constitutional complaint with the Constitutional Court: Provided, That if any remedy is provided by other laws, no one may file the constitutional complaint without having exhausted all such processes'.

4.2.2.1. Complaint against Exercise of State Power

The constitutional complaint against an exercise or omission of state power[212] can be used in situations where existing laws do not afford remedies through ordinary court processes for unconstitutional state action. It should be noticed that the decisions of ordinary courts are not eligible for the petition.[213]

The application for constitutional complaint under Article 68(1) requires that the applicant shall include the information of the complainant and his or her counsel, infringed rights, exercise or omission of state power by which the infringement of the right is caused, bases for the request and other necessary matters.[214]

The time limit for filing a constitutional complaint under Article 68(1) shall be filed within 90 days after the occurrence of the cause is known, and within one year after the cause happens. If a constitutional complaint is filed after exhausting remedial processes provided by other laws, it shall be filed within 30 days after the final decision in these processes has been made.[215]

Furthermore, the procedure of examination, according to Article 72 of the Constitutional Court Act which regulates about prior review states that the President of the Court may set the Panels each of which consists of three Justices and have the Panels take a prior review of a constitutional complaint.[216] The Panel shall dismiss a constitutional complaint unanimously as a result of the non-satisfaction of formal requirements for constitutional complaint.[217]

The decision of the constitutional complaint cases shall bind all the state agencies and the local governments.[218] In upholding a constitutional complaint under Article 68(1), the

---

[212] Art. 111 and 113 Korean Constitution and Art. 68 (1) of the Constitutional Court Act

[213] Dae-Kyu Yoon, 'The Constitutional Court System of Korea: The New Road for Constitutional Adjudication,' *Journal of Korean Law*, Vol. 1, No. 2, (2001): 11

[214] Art. 71(1) of the Constitutional Court Act

[215] Art. 69(1) of the Constitutional Court Act

[216] Art. 72(1) of the Constitutional Court Act

[217] Art. 72(2) of the Constitutional Court Act

[218] Art. 75(1) the Constitutional Court Act

violated fundamental rights and the exercise or non-exercise of governmental power by which the infringement has been caused shall be specified in the holding of the decision of upholding.[219]

There are three types of final judgment on the request for adjudication. First, rejection it means the request is irrational and unfounded. Second, dismissal or the request was made unlawfully. Third, upholding which means six or more Justices deem the request to have the reason(s) and is justified.[220]

4.2.2.2. Complaint against Court's Denial of a Constitutional Review

Another type of constitutional complaint is constitutional complaint against a court's denial of a request for constitutional review of a statute in any judicial proceeding,[221] this mechanism prescribes a special form of constitutional complaint, also known as the "norm-control," which is one of the institutional factors that enabled early stabilization of the constitutional adjudication system in Korea and that facilitated public recognition of constitutional review as the last resort in protecting individuals' fundamental rights.[222]

Basically the issues to be stated on the application for complaint under Article 68(2) is actually the same with adjudication on the constitutionality of statutes as regulated in Article 43, when an ordinary court requests a complaint to the Constitutional Court, the court's written request shall include the information of the requesting ordinary court, information of the case and the parties, the statute or any provision which is interpreted as unconstitutional, based on which a statute is interpreted as unconstitutional, and other necessary matters.[223]

In the case under Article 68(2), the Constitutional Court may revoke the exercise of governmental power which infringes fundamental rights or confirms that the non-exercise thereof

---

[219] Art. 75(2) the Constitutional Court Act

[220] Constitutional Court of Korea, 'AACC Member Fact File: Constitutional Court of Korea,' in *The Jurisdictions and Organization of AACC members,* ed. AACC SRD, Seoul: AACC SRD, 2018.

[221] Art. 2, 23, 30, 37, 40, 68-75 of the Constitutional Court Act

[222] Kang-Kook Lee, *The Past, and Future of Constitutional Adjudication in Korea, Current Issues in Korean Law, School of Law*, California: University of California at Berkeley, 2014, 3.

[223] Art. 43 of the Constitutional Court Act

is unconstitutional.[224] The time limit a complaint under Article 68(2) shall be filed within 30 days after a denial of a motion to request for review on the constitutionality of the statute is notified.[225]

4.2.3. Competence Dispute

When conflicts arise between State agencies, between State agencies and local governments, and between local governments, about the duties and authorities of each institution, it not only endangers the principle of checks and balances between public powers, but also risks paralyzing an important government function. A state agency or a local government concerned may request an adjudication on competence dispute to the Constitutional Court.[226]

Article 62 of the Constitutional Court Act stipulates that the adjudication on competence dispute shall be classified as follows:

1. Adjudication on competence dispute between state agencies: Adjudication on competence dispute between the National Assembly, the Executive, ordinary courts and the National Election Commission;
2. Adjudication on competence dispute between a state agency and a local government:
   (a) Adjudication on competence dispute between the Executive and the Special Metropolitan City, Metropolitan Cities, the Special Self-Governing City, Provinces or the Special Self-Governing Province; and
   (b) Adjudication on competence dispute between the Executive and the City/ County or District which is a local government (Self-Governing District).
3. Adjudication on competence dispute between local governments:
   (a) Adjudication on competence dispute between the Special Metropolitan City, Metropolitan Cities, the Special Self-Governing City, Provinces or the Special Self-Governing Province;
   (b) Adjudication on competence dispute between the Cities/Counties or Self Governing

[224] Art. 75(3) the Constitutional Court Act

[225] Art. 69(2) of the Constitutional Court Act

[226] Art. 111 (1) 4 of the Korean Constitution and Art. 61 – 67 of the Constitutional Court Act.

Districts; and

(c) Adjudication on competence dispute between the Special Metropolitan City, Metropolitan Cities, the Special Self-Governing City, Provinces or the Special Self-Governing Province and the Cities, Counties or Self-Governing Districts.

In the case of adjudication on competence disputes, the Korean Constitutional Court is vested with more comprehensive powers to adjudicate on constitutional or legal competence disputes between all government institutions established on the basis of the Constitution, as well as disputes between the state agencies.[227]

Concerning the decision, the Constitutional Court shall decide as to whether/or to what extent, a state agency or a local government has the competence, which is subject to adjudication. The Constitutional Court may revoke or invalidate the respondent's action that infringed the competence at issue, and when the Constitutional Court approves the request against an omission, the respondent shall take an action pursuant to the purport of decision.[228]

4.2.4. Dissolution of Political Party

The dissolution of a Political Party is also part of the Korean Constitutional Court jurisdiction, which to protect the Constitution from the destruction of the basic order of democracy by a political party. If the objectives or activities of a political party are contrary to the basic order of democracy, the Executive, upon a deliberation of the State Council, may request an adjudication on dissolution of the political party to the Constitutional Court.[229]

In exercising this jurisdiction, the Government may file for adjudication of political party dissolution. The written request for adjudication on dissolution of a political party shall include an indication of the political party requested to be dissolved, and the grounds of the request. When

---

[227] Min Hyeong-Ki, 'The Role of the Constitutional Court in Strengthening the Principles of Democracy', *The International Symposium on Constitutional Democratic State The 8th Anniversary of The Constitutional Court of The Republic of Indonesia*, Jakarta, Indonesia, 10-14 July 2011, 67.

[228] Art. 66 of the Constitutional Court Act

[229] Art. 111 (1) 3 of the Korean Constitution and Art. 55 – 60 of the Constitutional Court Act

it receives a request for adjudication on dissolution of a political party, the Constitutional Court, on its own motion or upon a motion of the requesting party, may make a decision to suspend the activities of the respondent until the pronouncement of the final decision.[230]

When a decision ordering dissolution of a political party is pronounced, the political party shall be dissolved. The decision of the Constitutional Court ordering dissolution of a political party shall be executed by the National Election Commission in accordance with the Political Parties Act.[231]

The Korean Constitutional Court has exercised this jurisdiction, where the case on the dissolution of a political party (2013Hun-Da1) was filed against the Unified Progressive Party on November 5, 2013.[232] It was upheld by eight justices in favor and one justice in dissent on December 19, 2014, a year and a month after it was filed. As a result, the Unified Progressive party was dissolved, and its lawmakers lost their membership of the National Assembly.[233]

4.2.5. Impeachment

Impeachment is also part of the Korean Constitutional Court jurisdiction, this power plays an important role in providing accountability for unconstitutional actions by high ranking public officials, especially in a presidential system.[234] Article 48 of the Constitutional Court Act stipulates that if a public official who falls under any of the following violates the Constitution or laws in the course of execution of his or her duties, the National Assembly may pass a resolution on the institution of impeachment as prescribed in the Constitution and the National Assembly Act:

1) President of the Republic, Prime Minister, Members of the State Council or Ministers;

---

[230] Art. 56 and 57 of the Korean Constitutional Court Act

[231] Art. 59 and 60 of the Korean Constitutional Court Act

[232] The case on dissolution of the Unified Progressive Party (2013Hun-Da1)

[233] Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea,* Seoul: The Constitutional Court, 2018, 119.

[234] Art. 111 (1) 2 of the Korean Constitution and Art. 48 – 54 of the Constitutional Court Act

2) Justices of the Constitutional Court, judges or Commissioners of the National Election Commission;
3) Chairman and Commissioners of the Board of Audit and Inspection; or
4) Other public officials as prescribed by relevant laws

For the adjudication on impeachment, the National Assembly may pass a motion for impeachment, and the impeachment prosecutor shall request adjudication by presenting to the Constitutional Court an authentic copy of the written resolution of initiating impeachment proceedings.

The decision of impeachment shall not exempt the accused person from his or her civil and criminal liabilities. Any person who is removed from the public office by the decision of impeachment shall not be a public official until five years have passed from the date on which the decision is pronounced.[235]

The Korean Constitutional Court has decided two cases on presidential impeachment. In the 2004 impeachment case against President Roh Moo-hyun (16-1 KCCR 609, 2004Hun-Na1, May 14, 2004), the petition was rejected, while, in the 2016 impeachment case against President Park Geun-hye (29-1 KCCR 1, 2016Hun-Na1, March 10, 2017), the petition was upheld and the President was removed from office.

4.3. General Procedural Law and Decision

The general procedure of the Korean Constitutional Court is stipulated in the Court Act. According to Article 22 paragraph (1) and (2) of the Korean Constitutional Court Act, the adjudication of the Korean Constitutional Court shall be assigned to the Full Bench composed of all the Justices. The presiding Justice of the Full Bench shall be the President of the Constitutional Court. The Full Bench shall review a case by and with the attendance of seven or more Justices, and shall make a decision on a case by the majority vote of Justices participating in the final

[235] Art. 54 of the Korean Constitutional Court Act

discussion. The following section will explain the procedure of the Court, which will be divided into three steps, request for adjudication, the review process, and final decision.

4.3.1. Request for Adjudication

Article 26 of the Korean Constitutional Court Act explains about forms of adjudication request, the request for an adjudication of the Constitutional Court shall be made by submitting to the Constitutional Court a written request as prescribed for each type of proceedings, that in an adjudication on the constitutionality of statutes, it shall be substituted by a written request of the ordinary court, and in an adjudication on impeachment, by an authentic copy of the impeachment resolution of the National Assembly. Moreover, evidentiary documents or reference materials may be appended to the written request.[236]

Once a request is filed, it is assigned a case number. The case number consists of a case code ("Hun-Ka" for request for constitutionality review of statutes; "Hun-Na" for impeachment proceedings; "Hun-Da" for political party dissolution cases; "Hun-Ra" for competence disputes; "Hun-Ma" for constitutional complaints according to Article 68 Section 1 of the Constitutional Court Act; "Hun-Ba" for constitutional complaints according to Article 68 Section 2 of the Constitutional Court Act; "Hun-Sa" for various motions; and "Hun-A" for various special motions [retrial]) preceded by the four-digit filing year (last two digits of the year for requests filed until December 31, 1999) and followed by a serial number given in the order of filing in that year. (Before an internal bylaw on the case code was adopted, Article 68 Section 2 constitutional complaints were also classified as Hun-Ma [16 cases including 88Hun-Ma4] before classified as Hun-Ba from 1990.)[237]

---

[236] Art. 26 (1) and (2) of the Korean Constitutional Court Act

[237] Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea* (Seoul: The Constitutional Court, 2018), 120.

4.3.2. The Review Process

The review process of constitutional adjudication includes document-based review and oral arguments. Adjudication on impeachment, dissolution of a political party or competence disputes shall be conducted through oral arguments.[238] The adjudication on the constitutionality of statutes or constitutional complaints shall be conducted with written arguments in principle. If it is deemed necessary, however, the full bench may hold oral arguments and hear the statements of the parties, interested persons and other reference witnesses.[239]

In the process of examination of evidence, when the Full Bench deems it necessary for the review of a case, it may, on its own motion or motion of a party, examine evidence as follows: 1. To examine the party or witness; 2. To demand presentation of documents, books, articles and other evidentiary materials which are possessed by the parties or relevant persons, and to place them in custody; 3. To order a person of special knowledge and experience to give an expert opinion; and 4. To verify the nature or condition of relevant goods, persons, places and other things.[240]

4.3.3. Final Decision

When the Full Bench finishes the review, it shall make a final decision. Upon making a final decision, a written decision stating the following matters shall be prepared, signed and sealed by all the Justices participating in the adjudication: 1. Number and title of the case; 2. Information on the parties and persons who pursue the proceeding for them or their counsels; 3. Holding; 4. Reasoning; and 5. Date of decision.[241]

Any Justice who participates in adjudication shall express his or her opinion on the written decision. When a final decision is pronounced, the clerk shall prepare without delay an authentic copy of the written decision and serve it on the parties. The final decision shall be made public through publication in the Official Gazette or other means stipulated in the Constitutional Court Rules.

---

[238] Art. 30 Section 1 of the Korean Constitutional Court Act

[239] Art. 30 Section 2 of the Korean Constitutional Court Act

[240] Art. 31 of the Korean Constitutional Court Act

[241] Art. 36 of the Korean Constitutional Court Act

CHAPTER 5

THE GERMAN CONSTITUTIONAL ADJUDICATION SYSTEM

Germany as a reference was due to the fact that Germany is one of the countries who have the most advanced and established the Constitutional Court system, even though it is not the oldest. The Basic Law entered into effect on 23 May 1949. For the first time in German history, it provided for a constitutional court to be established. The Federal Constitutional Court began its work in the year 1951. Today, the Federal Constitutional Court can look back upon more than 70 years of history.

Article 93 of the Basic Law regulates of the German Federal Constitutional Court jurisdictions, which consist of constitutional complaint, constitutional review (abstract and concrete review), competence dispute, party dissolution, election dispute, and impeachment. In exercising these jurisdictions, the Federal Constitutional Court has a high-level workload, since its establishment from 7 September 1951 to 31 December 2018, a total of 238.048 proceedings were brought before the Federal Constitutional Court, 229.899 (96.57%) concerning constitutional complaint cases, where the Court receives some 6.000 constitutional complaints per year; 3.861 (1.62%) concerning abstract and specific judicial review cases; 9 (0.01%) concerning the prohibition of political parties; 4.254 (1.79%) concerning other types of proceedings, e.g. disputes between the Federation and the *Laender* (states), disputes between highest federal organs and other constitutional disputes at the federal and *Laender* level; 25 (0.01%) former types of proceedings conducted until 1960.[242]

[242] The German Federal Constitutional Court, 'Annual Statistic 2018', (February 2019), accessed on 16 April 2019, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2018.pdf?__blob=publicationFile&v=4

5.1. Organizational Structures: Justices and Rapporteur System

5.1.1. Justices and Two Senates

As part of a political compromise entered into when the German Federal Constitutional Court was established in 1951, the Parliament decided that the Court should be divided into two senates. The number of justices serving on the two senates has also changed over the years. The Federal Constitutional Court Act originally provided for twelve members per senate. In 1956, the number was reduced to ten. In 1962, it was further reduced to eight.[243] Currently, the German Federal Constitutional Court consists of sixteen judges divided into two senates.[244]

Each Senate has its own, precisely defined competences, but always decides as "the Federal Constitutional Court". Which of the two Senates is competent to decide follows from the Federal Constitutional Court Act and a decision taken by the Plenary – that is, a decision taken jointly by the sixteen Justices. In rare cases, the Plenary decides a case itself; this is mandated if one Senate intends to deviate from the other Senate's interpretation of a specific legal matter.

The First Senate is concerned predominantly with conflicts between the state and citizens, which the first Senate has authority to examine judicial review cases in which the main issue is the alleged incompatibility of a legal provision with fundamental rights or rights under Articles 33, 101, 103 and 104 of the Basic Law, and constitutional complaint cases with the exception of constitutional complaints pursuant to Article 91,[245] as well as constitutional complaints concerning electoral law.[246]

---

[243] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 2nd ed., rev. and expanded ed. Durham: Duke University Press, 1997.

[244] Art. 2 of the Federal Constitutional Court Act

[245] Art. 91 of the Act on the Federal Constitutional Court regulates about municipalities may submit a constitutional complaint claiming that federal or Land law violates the provisions of Article 28 of the Basic Law.

[246] Art. 14(1) of the Act on the Federal Constitutional Court

Meanwhile, the Second Senate decides on conflicts between state organs,[247] which the second Senate is authorized to examine the forfeiture of constitutional rights,[248] the dissolution of the political party,[249] complaints in proceedings involving the scrutiny of elections,[250] impeachment of the Federal President,[251] constitutional disputes between federal organs,[252] review of statutes upon application by a constitutional organ,[253] constitutional disputes between the Federation and the Laender,[254] impeachment of federal and *Land* judges,[255] Status of a provision of public international law as part of federal law,[256] and disagreements on whether law continues to be valid as federal law,[257] as well as for review proceedings and constitutional complaints not assigned to the First Senate.

5.1.2. Selection, Qualifications, and Non-renewable Term of Justices

Regarding the selection mechanism of justices, half of the 16 justices are elected by the *Bundestag* (Federal Parliament), and the other half by the *Bundesrat* (Council of Constituent States).[258] The President and Vice-President are also elected by the Bundestag and the Bundesrat. They are at the same time the chairpersons of the First and Second Senate.[259]

---

[247] Art.14(2) of the Act on the Federal Constitutional Court

[248] Art. 18 of the Basic Law for the Federal Republic of Germany

[249] Art. 21(2) of the Basic Law for the Federal Republic of Germany

[250] Art. 41(2) of the Basic Law for the Federal Republic of Germany

[251] Art. 61 of the Basic Law for the Federal Republic of Germany

[252] Art. 93(1) number 1 of the Basic Law of Germany

[253] Art. 93(1) number 2, the Basic Law for the Federal Republic of Germany

[254] Art. 93(1) number 3 and Art. 84(4) second sentence, the Basic Law of Germany

[255] Art. 98(2) and (5) of the Basic Law for the Federal Republic of Germany

[256] Art. 100(2) of the Basic Law of Germany

[257] Art. 126 of the Basic Law for the Federal Republic of Germany

[258] Art. 94(1) of the Basic Law and Art. 5 (1) of the Federal Constitutional Court Act

[259] Art. 9 of the Federal Constitutional Court Act

To be selected as a justice of the Federal Constitutional Court, the candidate should meet certain condition. First, anyone who is at least 40 years of age, be eligible for election to the Bundestag and must have declared in writing that they are willing to become a member of the Federal Constitutional Court. Second, they must qualified to hold judicial office pursuant to the German Judiciary Act may be elected. Third, they may be members neither of the Bundestag, the Bundesrat, they Federal Government nor of any of the corresponding organs of a *Land*. Upon their appointment they shall cease to be members of such organs. Forth, the qualifications are granted to law professors at a German higher education institution and persons who graduated from college of law and passed the national exam.[260]

The term of office is 12 years, though it shall not extend beyond retirement age, and retirement age is 68. To ensure their independence, Justices may not be re-elected.[261] This choice represents an alternative method of achieving judicial independence: even though the Constitutional Court judges have limited terms, they cannot be reappointed and therefore the theory goes they would be unlikely to trim their decisions to achieve any sort of political favor with executive or legislative officials. The result of these shorter judicial terms is that there is a reduced chance for the exercise of influence by the Constitutional Court President over a very long period of time.[262]

5.1.3. Rapporteur System of Justices

The Federal Constitutional Court's administration consists of the Judicial Administration, the General Administration, the IT/Documentation department, the Protocol department, and the Library. It is headed by the Director of the Federal Constitutional Court on behalf of the President

[260] Art 3 (1), (2), (3), and (4) of the German Federal Constitutional Court Act

[261] Art. 4 of the German Federal Constitutional Court Act

[262] Peter E. Quint, 'Leading a constitutional court: Perspectives from the Federal Republic of Germany,' *U. Pa. L. Rev.* 154 (2005): 1857.

of the Federal Constitutional Court. The Federal Constitutional Court has approximately 260 employees, about 65 of whom are research assistants or "clerks".[263]

The justice who receives the assignment of a case usually because the case falls within his or her area of expertise is known as the "Reporter" (*Berichterstatter*). The main task of the Reporter is to write a long memorandum on the case, called a "votum," which ordinarily becomes the basis for the Court's opinion in that case.[264] Where rapporteur prepares what amounts to a major research report and describes the background and facts of the dispute, surveys the court's own precedents and the legal literature, presents fully documented arguments advanced on both sides of the question, and concludes with the personal view of how the case should be decided.[265]

When the case is debated in conference, however, a majority of the justices may make any changes they choose in the opinion derived from the votum, and neither the author of the votum nor the President has any formal influence over these changes. Of course, a particular justice may exert significant influence on the conference by virtue of personal powers and abilities, and that may well include the special expertise possessed by the Reporter. Indeed, this special expertise may often give the Reporter extraordinary authority over the opinion and result particularly in complex cases in which a deep knowledge of the subject matter by the Reporter gives him or her a decided advantage.[266]

The rapporteur also has the task of writing the opinions, even when his or her view of the outcome of the case has not prevailed. A rapporteur who strongly disagrees with the outcome of the case can ask that another justice take responsibility for writing the opinion, but this is a rare occurrence. In the Federal Constitutional Court, majority opinions are unsigned and signed

---

[263] The German Federal Constitutional Court, 'Profile of the German Federal Constitutional Court,' (2017), accessed 16 April 2019, www.bundesverfassungsgericht.de

[264] Peter E. Quint, 'Leading a constitutional court: Perspectives from the Federal Republic of Germany,' 1860-1861

[265] Damle Sarang Vijay, 'Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court,' *Virginia Law Review* 91 (2005): 1267-2023.

[266] Peter E. Quint, 'Leading a constitutional court: Perspectives from the Federal Republic of Germany,' 1860-1861.

dissenting opinions are extremely rare. According to one estimate, over ninety percent of the Court's reported cases are unanimous. The Court places a high premium on minimizing discord on the bench and coming to broad consensus even on prickly constitutional issues.[267]

5.2. Jurisdictions, Procedures, and Decisions of the German Federal Constitutional Court

The jurisdiction of the German Federal Constitutional Court is enumerated in Article 93 the Basic Law and, with more detail, in the Federal Constitutional Court Act, which provide for various possibilities of recourse to the Court. Each Senate has its own authorities but always decides as "the Federal Constitutional Court." This part will discuss in more detail regarding the German federal Constitutional Court jurisdictions, procedures, and decisions.

5.2.1. Constitutional Complaint

In practice, most of the cases dealt with by the Federal Constitutional Court arose from constitutional complaints, and most of such complaints were against decisions of other courts. It has been pointed out that the institution of constitutional complaints has contributed to the high standing of the constitutional court in the eyes of members of the public and to the 'rising constitutional consciousness among Germans generally'.

In Federal Constitutional Court of Germany refer to the constitutional complaint mechanism known as *verfassungsbeschwerde*.[268] Since, contrary to all other jurisdictions, everybody (not just specific public authorities) has access to this jurisdiction the number of those

---

[267] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 25-26. See also Damle Sarang Vijay, 'Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court.'

[268] The Federal Constitutional Court's authority to decide constitutional complaints cases stated in Article 93 (1) number 4a and 4b of the Basic Law for the Federal Republic of Germany and Article 90 to Article 95 of the Act on the Federal Constitutional Court

who make use of this opportunity is much more significant than in other jurisdictions.[269] In 2018, the Court has completed 5.678 cases of constitutional complaint.[270]

As underlined in article 93(1) of the Basic Law for the Federal Republic of Germany stated that a constitutional complaint might be lodged by an individual citizen claiming that one of his or her rights has been violated by the public authority (law, administrative act, or court decision).

The reason submitted in the constitutional complaint must explain the constitutional right which has been violated, and the act or omission of the organ or authority by which the complainant claims his or her rights have been violated.[271] In detail as stipulated in the Federal Constitution, it is stated that a constitutional complaint can be made if any of the following rights are violated by the public authority, particularly the fundamental right contained in Article 20 (Basic principles of state order, Right of resistance), Article 33 (Equal citizenship – Public service), Article 38 (election), Article 101 (Ban on extraordinary courts), Article 103 (Fair trial), and Article 104 (Deprivation of liberty).[272]

a. Admission Procedure

The application for constitutional complaint shall be submitted to the Federal Constitutional Court in writing, it must state reasons, and the necessary evidence must be listed.[273] As determined by Article 93(1) No. 4a of the Basic Law, the constitutional complaint, which may be filed “by any person” alleging that one of his fundamental rights has been infringed "by public authority.[274]

---

[269] Caroline Elisabeth Wittig, ‘Ideological Values and their Impact on the Voting Behavior of Justices of the Federal Constitutional Court of Germany’, (Thesis Master of Public Administration Bowling Green State University, August 2009): 27.

[270] The Federal Constitutional Court, ‘Annual Statistic 2018’, (February 2019), 19.

[271] Art. 92 of the Act on the Federal Constitutional Court

[272] Art. 93(1) No. 4a of the Basic Law of Germany

[273] Art. 23 of the Act on the Federal Constitutional Court

[274] Art. 93(1) no. 4a of the Basic Law of Germany

The article above means several things. First, the phrase of “any person” means every physical person or legal person, including foreigners. Second, the phrase "public authority" means all acts which are committed by a Federal or State authority which violates to the fundamental rights, such as the constitutional complaint against the law, administrative act, or court decision.

The time limit of constitutional complaints application regulated in Article 93 of the Act on the Federal Constitutional Court. The constitutional complaint against the court and administrative decisions must be lodged within one month to be admissible, and the complete reasoning of the complaint must also be submitted within this period.[275] If applicants were unable to apply with this time limit through no mistake of their own, they shall, upon application, be granted reinstatement into their previous procedural position. The application shall be submitted within two weeks of the removal of the cause for their non-compliance. Reasons for the request shall be stated either in the application itself or during the proceedings and their factual basis substantiated *by prima facie* evidence. Fault on the part of the applicant's authorized representative shall be deemed equal to fault on the part of the complainant.[276] The constitutional complaint examines a law or another sovereign act against which legal recourse is not possible, the complaint may only be lodged within one year of the law entering into force or of the sovereign act being issued.[277]

b. Decision

The Federal Constitutional Court makes its decisions through two benches (Senate), each consisting of eight Constitutional Court Judges. The allocation of cases between the two senates depends on the type and subject matter of proceedings. In case of diverging interpretations

---

[275] Art. 93(1) first sentence of the Act on the Federal Constitutional Court, see also the Federal Constitutional Court, ‘How to Lodge the Constitutional Complaint,’ accessed March 2018, https://www.bundesverfassungsgericht.de/EN/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt.html

[276] Art. 93(2) of the Act on the Federal Constitutional Court, see also the Federal Constitutional Court, ‘How to Lodge the Constitutional Complaint’.

[277] Art. 93(3) of the Act on the Federal Constitutional Court

of law, decisions are made by the judges of both senates together in the so-called plenum. Not all decisions require the involvement of all eight judges of a bench. Each senate forms three chambers that deal with a large number of constitutional complaints conclusively as long as the central legal questions in the cases have already been decided by a senate.[278] They have the power to reject by unanimous vote or admit the complaint or norm control to a full hearing. They even can decide on the merits in case of a prior decision of the Court on the issue.[279]

The pronouncements of decisions shall be public.[280] The Federal Constitutional Court decision shall be issued "in the name of the people.[281] The Constitutional Court shall decide in secret deliberations at its discretion and based on the opinion resulting from the hearing and the evidence obtained. The decision shall be set in writing, shall provide reasons and shall be signed by the participating Justices.[282] If a Justice expressed a different view on the decision or its argumentation during the deliberations, he or she might set forth this viewpoint in a separate opinion; the separate opinion shall be attached to the decision. The Senates may publish the distribution of votes in their decisions.[283] The Federal Constitutional Court Decision is final and binding upon the constitutional organs of the Federation and the *Laender*, as well as on all courts and those with public authority.[284]

---

[278] Jürgen Bröhmer, Clauspeter Hill & Marc Spitzkatz (Eds.), "60 Years German Basic Law: The German Constitution and its Court," Landmark Decision of the Federal Constitutional Court of Germany in the Area of Human Rights, ed. Suhainah Wahiduddin, 2nd edition, *The Malaysian Current Law Journal* (2012): viii.

[279] Ralf Rogowski, *Constitutional Courts in Comparison the U.S. Supreme Court and the German Federal Constitutional Court, New and Revised Second Edition.* Edited by Thomas author Gawron. S.l.: Berghahn Books, 2016.

[280] Art. 17a of the Act on the Federal Constitutional Court

[281]" Art. 25(4) the Act on the Federal Constitutional Court

[282] Art. 30 (1) of the Act on the Federal Constitutional Court

[283] Art. 30(2) of the Act on the Federal Constitutional Court

[284] Art. 31(1) of the Act on the Federal Constitutional Court

5.2.2. Judicial Review

The judicial review fall under the jurisdiction of the First Senate of the German federal Constitutional Court. In proceedings on the judicial, the Federal Constitutional Court reviews whether federal or *Land* legislation is compatible with the Basic Law. The judicial review in Germany is divided into two types of judicial review, abstract judicial review and concrete judicial review. The sections below will explain these two types of judicial review.

5.2.2.1. Abstract Review

The proceedings of abstract judicial review are regulated in Article 93 (1) no. 2 and no. 2a of the Basic Law and in Article 76 of the Federal Constitutional Court Act. The subject of abstract judicial review consist of all statutes against the Basic Law, concerning the formal or substantive compatibility of federal law or Land law with this Basic Law or the compatibility of Land law with other federal law on application of the Federal Government, of a Land government or of one fourth of the Members of the Bundestag.[285]

All statutes under federal and *Land* law may be reviewed for their compatibility with the Basic Law in proceedings for the abstract review of statutes; moreover, *Land* law may be reviewed for its compatibility with other federal law. The Federal Constitutional Court reviews the challenged statute comprehensively; it is not restricted to the challenges made by the applicant. In most cases, applicants regard the statute as being unconstitutional and request the Federal Constitutional Court to declare it to be void. However, it is also possible that the applicant considers a statute to be valid and would like the Federal Constitutional Court to declare it as such after another state authority did not apply the statute considering it unconstitutional or incompatible with other federal law (known as proceedings for the confirmation of statutes).[286]

---

[285] Art. 93 (1) no. 2 of the Basic Law

[286] The German Federal Constitutional Court, 'Abstract Judicial Review of Statutes', accessed 30 May 2019. https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Abstrakte-Normenkontrolle/abstrakte-normenkontrolle_node.html

a. Admission Procedure

The application may only be filed by the Federal Government, a *Land* government, or one quarter of the Members of the *Bundestag.*[287] In the abstract judicial review case, individuals are not entitled to file applications for this type of proceedings. The application is not subject to a time limit. Applicants are also not required to be violated in their own rights in order to be able to file an application.

According to Jibong Lim, in practice, the party that makes request for abstract judicial review is, many times, either the political opposition in the bundestag or a state government governed by the opposition party.[288] Wolfgang Zeidler, a former Chief Justices of Federal Constitutional Court explained that the abstract judicial review has ran into criticism because it "forces the Federal Constitutional Court to decide the constitutionality of a legal norm without access to sufficient information regarding the implementation of the norm or its implication."[289]

The application shall only be admissible if the applicant considers federal or *Land* law to be: (1) void due to being formally or substantively incompatible with the Basic Law or other federal law; or (2) valid after a court, an administrative authority, or a federal or *Land* organ did not apply a legal provision because it deemed it to be incompatible with the Basic Law or other federal law.[290] The Federal Constitutional Court also reviews whether the delimitation of competences regarding concurrent legislative powers as mentioned in Article 72 (2) Article 74 of the Basic Law was respected. The *Bundesrat*, a *Land* government or a *Land* parliament are entitled to file applications. Only formal federal laws may be the subject of such a review. There is no time limit for such an application.[291]

---

[287] Art. 76 (1) of the Act on the Federal Constitutional Court

[288] Jibong Lim, 'A Comparative Study of the Constitutional Adjudication System of the U.S., Germany and Korea', *Tulsa Journal of Comparative and International Law* 6, Issue 2 (3 January 1999): 149.

[289] Wolfgang Zeidler, 'The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms,' *Notre Dame Law Review* 62 (1987): 501.

[290] Art. 76 (1) of the Act on the Federal Constitutional Court

[291] Art. 76 (2) of the Act on the Federal Constitutional Court

b. Decision

In deciding the abstract review case, the Federal Constitutional Court will consider several reasons, if the application is unfounded, the statute is declared to be compatible with the Basic Law (or, as the case may be, with other federal law). If the application is well-founded, the Federal Constitutional Court declares the statute concerned to be void or incompatible with the Basic Law.

5.2.2.2. Concrete Review

Concrete judicial review arises from an ordinary lawsuit. If a regular court is convinced that a relevant federal or state law under which a case has arisen violates the basic law, it must refer the constitutional question to the federal Constitutional Court before the case can be decided.[292] If a regular court considers a law the validity of which is material to its decision to be unconstitutional, it suspends the proceedings and refers the matter to the Federal Constitutional Court for decision. This type of proceedings is therefore also called referral from a court. It is regulated in Article 100 (1) of the Basic Law and in Article 80 of the Federal Constitutional Court Act. Every year, the Federal Constitutional Court receives about 100 cases of this type.[293]

According to Article 100 (1) of the Basic Law stipulates that the Federal Constitutional Court with the exclusive right to declare an Act of Parliament to be void. Regular courts must submit federal or *Land* laws on the validity of which their decision depends, and which they consider to be unconstitutional, to the Federal Constitutional Court for review. Apart from that, the Federal Constitutional Court has jurisdiction if a court considers a *Land* law to be incompatible with a federal law or other law. The regular courts, however, are competent to review non-parliamentary statutes (e.g. regulations) without referring them to the Federal Constitutional Court.

---

[292] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 13

[293] The German federal Constitutional Court, 'Specific Judicial Review of Statutes', accessed 30 May 2019. https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Konkrete-Normenkontrolle/konkrete-normenkontrolle_node.html

a. Admission Procedure

Concrete judicial review can be requested at the Federal Constitutional Court by any regular court that denies the constitutionality of any applicable legislation. If the requirements of Article 100 (1) of the Basic Law as mentioned in previous section are met, the regular courts shall directly request a decision by the Federal Constitutional Court.[294] In the reasons the court shall indicate in which respect its decision depends on the validity of the legal provision in question and which higher-ranking legal provision that provision is incompatible with. It shall also attach the files.[295] The request of the court shall be independent of any claim on the part of a party to the proceedings that the legal provision is void.[296]

According to Kommers, the application must be signed by the judges who vote in favor of referral and accompanied by a statement of the legal provision at issue, the provision of the basic law allegedly violated, and the extent to which a constitutional ruling is necessary to decide the dispute. The Federal Constitutional Court will dismiss the case if the judges below it manifest less than a genuine conviction that a law or provision of law is unconstitutional or if the case can be decided without settling the constitutional question. As a procedural matter, the court must permit the highest federal organs or a state government to enter the case and must also afford the parties involved in the earlier proceeding an opportunity to be heard.[297]

b. Decision

In deciding the case of concrete review, the Federal Constitutional Court shall decide solely on the relevant point of law.[298] The Chamber may, by unanimous order, declare a request to be inadmissible. The decision shall be reserved to the Senate if the request is made by a *Land*

---

[294] Art. 80 (1) of the Federal Constitutional Court Act

[295] Art. 80 (2) of the Federal Constitutional Court Act

[296] Art. 80 (3) of the Federal Constitutional Court Act

[297] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 13.

[298] Art. 81 of the Federal Constitutional Court Act

constitutional court or by one of the supreme federal courts.[299] If the referral is well-founded, the legal provision in question is declared to be incompatible with the Basic Law. On the contrary, if a referral is admissible and the legal provision is compatible with the Basic Law, this is explicitly declared as well.

According to Jibong Lim, there are two different types of nullity that are declared by the Court in a judicial review, including abstract judicial review. The first is "nullity" (incompatibility), which is the typical type discussed so far. This legal effect is based on the traditional German doctrine that states that a norm, which violates a higher norm, is void *ex ipso and ex tunc.* The law also provides the Federal Constitutional Court with the opportunity to nullify other particular provisions of the same law as long as these are incompatible with the Constitution for the same reasons. The second type is partial nullity. There scarcely is a need for the complete nullification of a law or other legal norm. Even an individual legal provision need not always be wholly proclaimed unconstitutional and void. Restrictions on judicial review may result from particular constitutional procedures. In the context of concrete judicial review, the limited range of the introduced issues may restrict the Court's ability to invalidate an entire law.[300]

5.2.3. Disputes between Constitutional Organs

The proceedings concerning disputes between constitutional organs are regulated in Article 93 (1) no.1 of the Basic Law and Article 63 of the Federal Constitutional Court Act, which the Court decides disputes between constitutional organs concerning the extent of the rights and duties of a supreme federal body (*Bundestag, Bundesrat*, Federal Government, Federal President) and those parts of such organs as are vested with own rights pursuant to the Basic Law or the rules of procedure of the Bundestag and of the Bundesrat.[301]

---

[299] Art. 81a of the Federal Constitutional Court Act

[300] Jibong Lim, 'A Comparative Study of the Constitutional Adjudication System of the U.S., Germany and Korea', *Tulsa Journal of Comparative and International Law* 6, Issue 2 (3 January 1999).

[301] Art. 63 of the Federal Constitutional Court Act

In addition, the Federal Convention the Federal Chancellor, the federal ministers and individual Members of the *Bundestag* are entitled to bring an action. Political parties exercise the function of a constitutional organ when they participate in political decision-making. They can therefore defend the rights accorded to them by Article 21 of the Basic Law in the proceeding of disputes between constitutional organs.

Basically the parties concerned who have been vested with rights of their own by the Basic Law or by rules of procedure of a supreme federal body that are entitled to institute this proceedings may join ongoing proceedings and file own applications if the Federal Constitutional Court's decision in the case at hand is also relevant for the delimitation of their own competences.

In practice, the proceedings of disputes between constitutional organs are not among the most frequent types of proceedings at the Federal Constitutional Court, but they often raise fundamental issues that are highly relevant for the political system. The subject of this proceeding may be an act or an omission by the respondent. Cases often concern issues from the law on political parties, electoral law or parliamentary law.

a. Admission Procedure

An application of the disputes between constitutional organs may be filed if highest federal organs, or actors that are equivalent to such organs, disagree on their respective rights and obligations under the Basic Law. This type of proceedings is necessary because the organs have no authority over each other. This proceeding make it possible for constitutional organs to judicially scrutinise each other's actions; thus, *this* proceedings protect political decision-making by enforcing the separation of powers.

Applicants must claim that the applicant asserts that an act or omission on the part of the respondent violated or directly threatened to violate the rights and obligations conferred on the applicant or on the applicant's organ by the Basic Law.[302] Regarding the time limit, the application must be filed within six months after the applicant has gained knowledge of the

[302] Art. 64 (1) and (2) of the Federal Constitutional Court Act

respondent's contested conduct. If the time limit expired before this Act entered into force, the application may be filed within three months of its entry into force.[303] This time limit is preclusive. In the interest of legal certainty, there is no remedy for not meeting the deadline.

b. Decision

The decision concerning the disputes between constitutional organs stipulates in Article 67 of the Constitutional Court Act, "The Federal Constitutional Court shall declare in its decision whether the respondent's contested act or omission violates a provision of the Basic Law. The provision is to be specified. In the operative part of the decision the Federal Constitutional Court may at the same time decide on a point of law which is relevant for interpreting the provision of the Basic Law on which the declaration pursuant to the first sentence depends."

The Federal Constitutional Court rejects applications as unfounded if constitutional law has not been infringed. In case of successful applications, the Federal Constitutional Court finds that the respondent's contested act or omission violates a provision of the Basic Law. The Federal Constitutional Court does not annul acts or declare them to be void, nor does it oblige the respondent to perform specific acts. However, the constitutional organs are obliged to consider the Federal Constitutional Court's decision and to implement it if necessary (Article 20 (3) of the Basic Law).[304]

5.2.4. Dissolution of Political Parties

The proceedings of the dissolution of political parties puts the Federal Constitutional Court technically into the role of a guardian of the political authorities currently in power. According to Article 21 (2) of the Basic Law, "Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the

[303] Art. 64 (3) and (4) of the Federal Constitutional Court Act

[304] The German Federal Constitutional Court, '*Organstreit* Proceedings', accessed 30 May 2019. https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Organstreitverfahren/organstreitverfahren_node.html

existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality."

Historically, the Federal Constitutional Court has twice prohibited a party, first, the Socialist Reich Party (SRP) was prohibited in 1952.[305] In May 1951 the German federal executive branch found that the SRP "sought to impair the liberal democratic order," where the Federal Constitutional Court received abundant evidence that SRP was an unabashed Nazi-front organisation.[306] The Court decided that the SRP as a party threatening the existing constitutional order. Second, the Communist Party of Germany (KPD) was prohibited in 1956.[307] The federal government challenged the party's constitutionality in 1951, and the Federal Constitutional Court banned the KPD, the ban was essentially based on the incompatibility of the KPD's aims and activities with the democratic principles of freedom and equality, because KPD allegedly conceives of its political opponent as the enemy to be stripped of his rights as soon as is opportune. The Court presumed the KPD, once in power, to be insufficiently committed to a fair pluralism of political parties, and therefore as incompatible with the free democratic basic order.[308]

Furthermore, the proceedings for the prohibition of the National Democratic Party of Germany (NPD) initiated in 2001 were discontinued in 2003 for procedural reasons. On 17 January 2017, the Federal Constitutional Court again decided on the prohibition of the NPD. The Second Senate found that the NPD advocates a political concept aimed at abolishing the existing free democratic basic order. However, the NPD was not prohibited as there were no indications that it would succeed in achieving its anti-constitutional aims.[309]

---

[305] The Decision of the German federal Constitutional Court concerning *Socialist Reich Party (SRP) Case*, BVerfGE 2,1 (1952).

[306] Paul Franz, 'Unconstitutional and Outlawed Political Parties: A German-American Comparison,' *BC Int'l Comp. & L. Rev.* 5 (1982): 56.

[307] The Decision of the German Federal Constitutional Court Concerning *Communist Party Case*, BVerfGE 5,85 (1956).

[308] Peter Niesen, 'Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties - Part I,' *German Law Journal* 3, no. 7 (2002).

[309] The German Federal Constitutional Court Decision concerning *the prohibition of the National*

a. Admission Procedure

The applicants who have legal ability to file an application of the dissolution of political parties are the *Bundestag*, the *Bundesrat* and the Federal Government. In addition, a *Land* government may file an application only against political parties whose organizational extent is limited to the territory of its *Land*.[310]

In dealing with this proceeding, the Federal Constitutional Court shall give the person entitled to represent the party which determined in accordance with relevant legal provision or, in their absence, in accordance with the party's statute. Then, the Court shall assesses in preliminary proceedings whether to open principal proceedings or whether to reject the application as inadmissible or as insufficiently substantiated.[311] For this purpose, a preliminary assessment of the application's prospects of success is carried out based on the information on record.

b. Decision

In deciding the proceeding of dissolution of political parties, the Federal Constitutional Court shall consider several aspect. According to Article 46 of the Federal Constitutional Court Act, if the application proves to be well-founded in the principal proceedings, the Federal Constitutional Court declares that the political party is unconstitutional, orders the dissolution of the party and the prohibition to establish substitute organizations. The declaration may be limited to a legally or organizationally independent section of a political party. Moreover, the declaration shall be accompanied by the dissolution of the political party or of its independent section and by the prohibition of establishing a substitute organization. The Federal Constitutional Court may, in such cases, also declare that the property of the political party or of its independent section be

Democratic Party of Germany case, 2 BvB 1/13 (17 January 2017).

[310] Art. 43 (1) and (2) of the Federal Constitutional Court Act.

[311] Art. 44 and 45 of the of the Federal Constitutional Court Act.

confiscated in favour of the Federation or of the *Land* to be used for charitable purposes which are for the public benefit.[312]

5.2.5. Elections Disputes

According to the Basic Law, the members of the *Bundestag* are elected in general, direct, free, equal, and secret elections for four years terms. While the Federal Council (*Bundesrat*) is the body through which the *Lander* participate in the legislation at the federal level. The *Bundesrat* composed of representatives of the governments of the *Lander* and has authority to review and grant consent on some legislative proposals.[313]

In connection with the *Bundestag* elections, there are two type of proceedings before the German Federal Constitutional Court, first, complaints against decisions of the *Bundestag* regarding the validity of an election or against decisions concerning the loss of a seat in the *Bundestag* as stipulated in Article 41 (2) of the Basic Law and Article 48 of the Federal Constitutional Court Act. Second, complaints by associations regarding their non-recognition as a political party for an election to the *Bundestag* as stipulated in Article 93 (1) no. 4c of the Basic Law and Article 96a of the Federal Constitutional Court Act.

a. Admission Procedure

Both types of elections disputes mentioned in the previous section are under the Federal Constitutional Court proceedings. Article 41 of the Basic Law stipulates that the *Bundestag* is responsible for "scrutiny of elections", and it shall also decide a member has lost his seat. Complaints against such decisions of the *Bundestag* may be lodged with the Federal Constitutional Court. Then, Article 93 (1) no. 4c of the Basic Law stipulates that the Federal

---

[312] Art. 46 of the Federal Constitutional Court Act

[313] Office for Democratic Institutions and Human Rights, 'Elections to the Federal Parliament (Bundestag),' *Election Assessment Mission Report*, (Warsaw, 14 December 2009): 3, accessed 30 May 2019, https://www.osce.org/odihr/elections/germany/40879?download=true

Constitutional Court shall rule on constitutional complaints filed by associations concerning their non-recognition as political parties for an election to the *Bundestag*.

For the application under Article 41 of the Basic Law, the applications may be lodged with the Federal Constitutional Court within two months of the *Bundestag's* decision by the Member of the Bundestag whose seat is disputed, by an individual or group of individuals who are entitled to vote and whose objections were rejected by the Bundestag, by a parliamentary group or by a minority in the Bundestag comprising at least one tenth of the statutory number of Members; reasons for the complaint shall be given within this period of time.[314] In the hearing process, the Federal Constitutional Court may refrain from conducting an oral hearing if it is unlikely to advance the proceedings.[315]

While for the application under Article 93 (1) no. 4c of the Basic Law, the complaints may be lodged by associations and political parties which were refused recognition as political parties authorized to nominate candidates,[316] and the applications are to be lodged and reasons stated within four days of the decision being announced in the session of the Federal Electoral Committee.[317]

b. Decision

The decision concerning scrutiny of elections under Article 41 of Basic Law, stipulates in Article 48 (3) of the Constitutional Court Act, "If the examination of a complaint lodged by an individual or a group of individuals who are entitled to vote proves that their rights have been violated, the Federal Constitutional Court shall declare that this violation has taken place, unless it declares the election invalid."

---

[314] Art. 48 (1) of the Constitutional Court Act

[315] Art. 48 (2) of the Constitutional Court Act

[316] Art. 96a (1) of the Constitutional Court Act

[317] Art. 96a (2) of the Constitutional Court Act

Whereas, the decision concerning complaints by the associations under Article 93 (1) no. 4c of the Basic Law, the Federal Constitutional Court may decide without an oral hearing,[318] and may communicate its decision without reasons. If this is the case, the reasons shall be communicated separately to the complainant and to the Federal Electoral Committee.[319]

5.2.6. Impeachment

5.2.6.1. Impeachment of Federal President

The German Federal Constitutional Court has exclusive power over impeachment proceeding brought Federal President, but until now there have not been any proceedings for impeachment of the Federal President. This proceeding is regulated in Article 61 of the Basic Law and Article 49-57 of the Federal Constitutional Court Act.

The Federal President can be impeached by the *Bundestag* or the *Bundesrat* before the Federal Constitutional Court for wilful violation of this Basic Law or of any other federal law in the performance of official duties. The motion of impeachment must be supported by at least one quarter of the Members of the *Bundestag* or one quarter of the votes of the *Bundesrat*. The decision to impeach shall require a majority of two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body.[320]

Furthermore, if the Federal Constitutional Court finds the Federal President guilty of a wilful violation of this Basic Law or of any other federal law, it may declare that he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions.[321]

---

[318] Art. 96c of the Constitutional Court Act

[319] Art. 96d of the Constitutional Court Act

[320] Art. 61 (1) of the Basic Law

[321] Art. 61 (2) of Basic Law

a. Admission Procedure

The procedure of the proceeding of impeachment of the Federal President, Article 49 (2) of the Federal Constitutional Court Act stipulated that, "On the basis of a decision by one of the two legislative bodies, the president of the entity in question shall prepare the motion for impeachment and send it to the Federal Constitutional Court within one month." Then, followed by paragraph (3), "The motion for impeachment shall specify the act or omission for which impeachment proceedings are being initiated, the evidence and the provision of the Constitution or law which has allegedly been violated. It must state that the decision to initiate impeachment proceedings was taken by a two-thirds majority of the statutory number of Members of the *Bundestag* or by two thirds of the votes in the *Bundesrat*."

The impeachment proceedings may only be initiated within three months, and the initiation of the proceedings shall not be affected by the resignation of the Federal President, by his or her ceasing to hold office, or by the dissolution of the Bundestag or by the end of its electoral term.[322] During the process of impeachment proceeding and until the pronouncement of the judgement, the motion for impeachment against Federal President may be withdrawn on the basis of a decision by the entity which filed the application. The requirement in withdrawing the motion, it shall be approved by the majority of the statutory number of Members of the *Bundestag* or of the majority of the votes in the *Bundesrat*.[323]

When the Federal Constitutional Court starts to conduct the impeachment proceeding, the Court may issue a preliminary injunction stating that the Federal President is precluded from exercising his or her duties.[324] In dealing with the impeachment proceeding, the Court may order an investigation to prepare the oral hearing if the representative of the entity initiating the impeachment proceedings or the Federal President files such an application.[325]

---

[322] Art. 50 and 51 of the Federal Constitutional Court Act

[323] Art. 52 (1) of the Federal Constitutional Court Act

[324] Art. 53 of the Federal Constitutional Court Act

[325] Art. 54 (1) of the Federal Constitutional Court Act

In dealing and deciding the impeachment proceeding, the Federal Constitutional Court shall decide on the basis of an oral hearing. In the oral hearing, there are several steps, first, the Federal President shall be summoned. Second, the representative of the entity which filed the application shall first present the motion for impeachment. Third, the Federal President shall then be given the opportunity to submit a statement on the impeachment. Fourth, evidence shall be taken. Fifth, this is the last steps which the representative of the entity which initiated the impeachment proceedings shall present that entity's motion and the Federal President shall present his or her defence. The Federal President shall have the last word.[326]

b. Decision

After all the impeachment hearings have been carried out, the Federal Constitutional Court shall declare in its judgment whether the Federal President is guilty of intentionally violating the Basic Law or a federal law, which must be clearly specified. Furthermore, in the event of a conviction, the Federal Constitutional Court may declare that the Federal President has forfeited his or her office. The forfeiture shall take effect on pronouncement of the judgment.[327] Finally, a copy of the judgment, including the reasons, shall be sent to the Bundestag, the Bundesrat and to the Federal Government.[328]

5.2.6.2. Impeachment of Judges

The impeachment proceeding against judges must be seen in conjunction with the constitutional guarantee of the judicial independence as stipulated in Article 97 of the Basic Law which requires that judges shall be independent and subject only to the law. This article shows the important position of a judge, especially when deciding the case.

The consequences when a federal judge infringes the principles of the Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional

[326] Art. 55 of the Federal Constitutional Court Act.

[327] Art. 56 of the Federal Constitutional Court Act.

[328] Art. 57 of the Federal Constitutional Court Act.

Court, upon application of the *Bundestag*, may by a two-thirds majority order that the judge be transferred or retired, only in the case of an intentional infringement it may order the judge dismissed.[329]

a. Admission Procedure

A federal judge may be impeached only by the *Bundestag*,[330] while a *Land* judge only by the parliament of the *Land* in question.[331] The procedure if the federal judge is accused of having violated a law in his or her official capacity, the *Bundestag* shall not decide before a final decision has been taken in the judicial proceedings or, if formal disciplinary proceedings have previously been initiated for the same violation, until these proceedings have been opened. Regarding the time limit, According Article 58 (2) of the German Federal Constitutional Court, the motion for impeachment of federal judge shall only be admissible within six months of the final conclusion of the judicial proceedings in which the federal judge was claimed to have committed the violation.[332] The other situation or except for the cases referred to Article 58 (2) as mentioned before, a motion for impeachment shall only be admissible within two years of the violation.[333]

In the hearing process, when the impeachment of judges proceedings are pending before the Federal Constitutional Court, disciplinary proceedings pending before a disciplinary court which are based on the same facts shall be suspended. Furthermore, if the Federal Constitutional Court orders removal from the office, transfer to another office or retirement, the disciplinary proceedings shall be discontinued, otherwise, they shall be continued.[334]

---

[329] Art. 98 (2) and (5) of the Basic Law

[330] Art. 58 of the Federal Constitutional Court Act

[331] Art. 62 of the Federal Constitutional Court Act

[332] Art. 58 (2) of the Federal Constitutional Court

[333] Art. 58 (3) of the Federal Constitutional Court Act

[334] Art. 60 of the Federal Constitutional Court Act

b. Decision

The decision of the impeachment of judges, the Federal Constitutional Court shall decide on the admissibility of the application without an oral hearing.[335] If the Federal Constitutional Court concludes that judges infringes the principles of the Basic Law or the constitutional order, the Court may order the judge to be given a different function or retired or (in a case of intentional infringement) dismissed.

[335] Art. 61 (2) of the Federal Constitutional Court Act

CHAPTER 6

IMPROVING THE INDONESIAN CONSTITUTIONAL COURT SYSTEM: A COMPARATIVE SUDY

Since its establishment on 13 August 2003, the Constitutional Court of Indonesia (the CCI) has been playing an important role in promoting constitutionalism. However, the Constitutional Court's performance has also sparked controversy, some problems can be found in the system of organization, jurisdictions, procedural law, and decisions which influenced and impacted the Indonesian legal order. For further development of the Indonesian constitutional adjudication system, these problems must be corrected not only by constitutional and statutory interpretation, but also by revision of the relevant provisions in the Constitution, the Constitutional Court Law, and the Constitutional Court Regulation. This chapter will examine the problems of constitutional adjudication and provides alternative proposals to improve the Indonesian Constitutional Court performance by learning from the Korean and German systems.

6.1. Improving the Organization

Most of constitutional adjudication system allows for the organizational autonomy of the empowered body on the basis of the Constitution or on the basis of the Constitutional Court Act. This means they authorize the Constitutional Court to follow their own rules regarding their internal organization. Special services of the Constitutional Courts in many countries are organized similarly, where they consist of clerks and researcher, whereby the head of special services generally, holds the status of a secretary-general.[336] More specifically, the Constitutional Courts in Indonesia, Korea, and Germany have adopted a varied system of organizational

[336] Constitutional Court of Armenia. 'The Independence and the Autonomy of the Organization of the Constitutional Court,' accessed 18 August 2019, http://www.concourt.am/Books/harutunyan/monogr3/ch3p2.htm

structure, the following table will shows a comparison of number of justices, appointment procedure, and term of office.

Table 3

Comparison of Justices, Appointment Procedure, Term of Office, and Employees

Constitutional Court	**Year Established**	**Number of Justices**	**Appointment Procedure**	**Term of Office**	**Number of Employees**
Indonesia	2003	9 Justices	3 proposed by the Supreme Court, 3 by the House of Representative, and 3 by President	5 Years and may be renewed	Approximately 291 staff, about 19 of whom are researchers, and there are also 7 researcher candidates.
Korea	1988	9 Justices	9 Justices are appointed by the President, but among them 3 are selected by the National Assembly, and 3 are nominated by the Supreme Court	6 years and may be reelected	Approximately 325 public officials, about 55 of whom are Rapporteur Judges
Germany	1951	16 Justices	Half of the 16 justices are elected by the *Bundestag*, and the other half by the *Bundesrat*	12 years and non-renewable	Approximately 260 employees, about 65 of whom are researchers

To describe the organization in more detail that the Federal Constitutional Court has sixteen judges divided into two senates and approximately 260 employees, about 65 of whom are

research assistants or "clerks/rapporteur judges" work at the Judicial Administration, the General Administration, the IT/Documentation department, the Protocol department, and the Library.[337]

The Korean Constitutional Court has 9 Justices and as of 2018, it has around 325 public officials, about 55 of whom are Rapporteur Judges to assist the Justices in delivering judgments, 236 public officials work at the Department of Court Administration of the Constitutional Court, and 34 Constitutional Researchers work at the Constitutional Research Institute.[338]

Like the Korean Constitutional Court, the Indonesian Constitutional Court also has 9 Justices. However, it has differences in the number of public officials, at the time of writing this paper (May 2019), the Indonesian Constitutional Court consists of 291 staff. Staff who have a law background are 106 (34%) and those with a non-law background are 185 (64%). Even though the number of public officials is just a little different with Germany and Korea, but the Indonesian Constitutional Court has only 19 researchers and there are also 7 newly recruited researcher candidates.

In the context of the Indonesian Constitutional Court organization, some problems occur especially related to the justice selection mechanism, term of office, the small number of supporting system of justices (researcher), and the weak supervision of justices. Therefore, the following sections will give a proposal to improve the organization.

6.1.1. Revising the Justice Appointment System and Term of Office

One of the most important institutional elements of the Indonesian Constitutional Court's autonomy has been its multitrack appointment system. The Indonesian Constitution and the Constitutional Court Act introduce a mixed system for the selection of nine justices, which includes a combination of an election and appointment system with the proportionate participation and influence of all three branches of power, where the nine justices to be stipulated by a

[337]The German Federal Constitutional Court, 'Profile of the German Federal Constitutional Court,' (2017) accessed 16 April 2019, www.bundesverfassungsgericht.de

[338] Constitutional Court of Korea, 'AACC Member Fact File: Constitutional Court of Korea,' in *The Jurisdictions and Organization of AACC members,* ed. AACC SRD (Seoul: AACC SRD, 2018), 109-111.

Presidential Decree, three of them are nominated by the President, the other three are nominated by the House of Representative and the remaining three are nominated by the Supreme Court.[339] For the selection of the Chief Justice and the Deputy Chief Justice, they shall be elected from and by Member of Justices.[340] These three branches of power have produced not only a very diverse bench but also loosened the ties between justices and their nominating institutions. With justices able to explore several opportunities to seek reappointment, they are not bound to the interests of a single political actor.[341]

Basically, this justice's recruitment model can be assumed as a proportional system, where it represents three essential state institutions, as well as to generate justices from different backgrounds, deemed advantageous in deciding various constitutional cases. However, political influence is inevitable in the selection process, and it can be seen throughout history, two justices were involved in criminal cases such as corruption and bribery.[342]

Some Indonesian legal scholars argued that one of the reasons for judicial corruption is because there is a problem with the justice's selection process.[343] This argument can be justified because the CCI Act only regulates some general provisions relating to the nomination and selection procedure of justices: Article 19, "the nomination of constitutional justices is conducted in transparent and participatory manners." Article 20 "(1) The procedure for selection, election and submission of constitutional justices are regulated by the respective authorized institutions as referred in Article 18(1)", and "(2) Selection of constitutional justices referred in paragraph (1) shall be conducted objectively and accountably."

---

[339] Art. 18 of the Constitutional Court Law

[340] Art. 4 of the Constitutional Court Law

[341] Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court', *Journal of East Asian Studies* 10, no. 3 (2010): 415.

[342] At the end of 2013, the former chief justice (Akil Mochtar) was arrested by the Indonesian Commission Eradication Corruption (the KPK) because of corruption issue, and in 2017, again the KPK arrested the CCI Justice (Patrialis Akbar) because of accepting a bribe.

[343] Simon Butt and Sofie Arjon Schütte, 'Assessing Judicial Performance in Indonesia: The Court for Corruption Crimes', Crime, Law and Social Change 62, no. 5 (2014): 603-19.

These provisions do not specifically regulate the detail procedures of the justice's selection process, which only emphasize that the selection shall be conducted objectively and accountably without giving any clear mechanisms and procedures to each institution (President, House of Representative, and Supreme Court). Consequently, so far there is no consistency where the change of President also has a different selection mechanism.[344]

It is, therefore, necessary to improve the CCI Justices selection system, in this regard, the Constitutional Court of Korea (the CCK) model of selection system can be a reference for Indonesia. Even though the constitutional justice selection systems in Indonesia and Korea are normatively similar, but in Korea, each branch applies high standards and qualifications, and the other important mechanism is that justice candidate from the President and the chief justice of the Supreme Court will be assessed by the National Assembly of Korea through the confirmation hearing.[345] In this mechanism, the Legislation and Judiciary Committee of the National Assembly is to hold confirmation hearings for the candidates before their official appointment and nomination.[346]

The confirmation hearing for the candidate shall be conducted in public for a period not exceeding three days, and in general in the order of the chair's declaration of commencement, the candidate's oath and opening statement, answers to queries and closing statement followed by witness interviews. The Legislation and Judiciary Committee must adopt a report of findings within three days after completing the hearing and submit it to the Speaker of the National Assembly of Korea. The chair of the Committee makes a report to the plenary session of the National Assembly of Korea. The Speaker must send to the president or chief justice the report of findings without delay after it is reported at the plenary session.[347]

---

[344] Indramayu, Jayus, and Rosita Indrayati, 'Rekonseptualisasi Seleksi Hakim Konstitusi Sebagai Upaya Mewujudkan Hakim Konstitusi Yang Berkualifikasi [Reconceptualization of the Selection of Constitutional Justices as an Effort to Create Qualified Constitutional Justices]', *Lentera Hukum* 4, no. 1 (2017): 1-18.

[345] Art. 65-2 of the National Assembly of Korea Act

[346] Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea*, Seoul: the Constitutional Court of Korea, 2018, 111.

[347] Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea*, 112-113.

The confirmation hearing held by the parliament is very important mechanism to assess the profile and knowledge of justices' candidate. Therefore, this mechanism is necessary to be adopted in Indonesia in order to find qualified constitutional justices, even though nine justices are selected by three different branches of power, justices must work independently in order to remain free from the influence or intervention by any branch of power. The CCI will only be progressive when its justices have the ability to render the Constitution.[348]

Another important institutional elements of the CCI Justices is the term of office. Justices are appointed for five years term of office, with the possibility of being re-elected or re-appointed only once. [349] For the Chief Justice and the Deputy Chief Justice, they have two years six months term of office as from the date on which they are appointed.[350]

This becomes an important challenge, particularly when the incumbent justice express to apply for the second term, and it is required to apply and follow all selection processes along with the new candidates.[351] Instead of focusing the CCI duty, this will make the incumbent justice focus and busy with the next selection process, and in order to get him re-elected, it cannot be denied that the incumbent justice will make communication with the appointing institution. Consequently, there are potential internal conflicts of interest, and it is vulnerable to intervention from the political issue.

To solve the term of office problem, the author recommends revising the term of office from five years and renewable changes to be six years and cannot be re-elected, a six-year period is good enough or suitable time period for a new constitutional justice to deal with the complex

---

[348] Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review,* Kansas: University Press of Kansas, 1999, 218. See also Adnan Buyung Nasution, Towards Constitutional Democracy in Indonesia*, Inaugural Professor Lecture, Papers on Southeast Asian Constitutionalism*, Asian Law Centre, University of Melbourne, 2011, 25.

[349] Art. 22 of the Constitutional Court Law

[350] Art. 4 of the Constitutional Court Law

[351] In 2008, President Yudhoyono formed an independent Selection Committee to appoint the justices. Nevertheless, in 2013, when selecting Patrialis Akbar as a justice, President Yudhoyono did not form an independent Selection Committee.

constitutional cases. This option will make justices more independence because justices will focus on their functions without thinking of the selection for the second term.

When comparing with the other institutions, such as the Indonesian President and Supreme Court Judges, and Parliament Members, it shows that there are similarities and differences. The term of office of the President for five years strictly limited to only two periods,[352] the term of office of Supreme Court Judges is based on retirement age 70 years,[353] and the term of office of the Parliament members is five years.[354]

Discussing on the non-renewable term office of constitutional justice can be found in the German Federal Constitutional Court, where the term of office is 12 years, though it shall not extend beyond retirement age, and retirement age is 68 years. To ensure their independence, justices may not be re-elected.[355] This choice represents an alternative method of achieving judicial independence: even though the Constitutional Court judges have limited terms, they cannot be reappointed and therefore the theory goes they would be unlikely to trim their decisions to achieve any sort of political favor with executive or legislative officials. The result of these shorter judicial terms is that there is a reduced chance for the exercise of influence by the Constitutional Court President over a very long period of time.[356]

6.1.2. Strengthening Supervision of Justices: Does it Harm their Independence?

The idea of the Indonesian Constitutional Court establishment was to uphold constitutional values, strengthen checks and balances mechanism, create the clean and good government and protect the fundamental rights of citizens. Because of this vital position, in deciding the case, the constitutional justices shall be independent and impartial.

---

[352] Art. 7 of the Indonesian Constitution

[353] The Law No 3/2009 on the Supreme Court

[354] Art. 2 of the Indonesian Constitution

[355] Art. 4 of the Federal Constitutional Court Act

[356] Peter E. Quint, 'Leading a constitutional court: Perspectives from the Federal Republic of Germany', *U. Pa. L. Rev.* 154 (2005): 1857.

However, judicial corruption has destroyed the image of the judiciary and undermines the honour and integrity of justices. This happened two times, at the end of 2013, the former chief justice (Akil Mochtar) was arrested by the Indonesian Commission of Eradication Corruption (the KPK) because of corruption issue, and the Supreme Court sentenced him to a life sentence.[357] When Akil Mochtar arrested by the KPK, this case urged the President to issue the Emergency Law that regulated the justice selection mechanisms and the supervision of justices. Nevertheless, the CCI declared that the Emergency Law was unconstitutional, and ordered to re-apply the previous Constitutional Court Law.[358]

It didn't stop there, in 2017, again the KPK arrested the CCI Justice (Patrialis Akbar) because of accepting a bribe in dealing with the constitutional review case. Then, the Supreme Court sentenced him to seven years in prison.[359] The corruption cases that ensnared the two justices show the weak supervision of the constitutional justice. It is, therefore, necessary to take concrete measures to restore the image of the judiciary and maintaining the honour and integrity of justices as the main pillars of the judiciary in enforcing law and justice.

One of the concrete steps is the need for strengthening the ethic supervisory system of constitutional justices, the results of which will provide input to the CCI, whether the monitoring system of ethics against justices applied so far has been able to maintain the honour and integrity of justices, and whether the current ethic supervisory system has provided legal certainty in its enforcement against violations of the Code of Ethics and Conduct of Constitutional Justice. [360]

Under the CCI Law, it is regulated that for the purpose of maintaining and enforcing integrity and an impeccable personality, justice, and statesmanship; justices shall be required to adhere to

---

[357] The Supreme Court Decision No: 336 K/Pid.Sus/2015 (23 February 2015) concerning Aklil Mochtar case.

[358] Constitutional Court Decision No.1-2/PUU-XII/2014 concerning constitutional review of regulations in Lieu of Law on the Constitutional Court.

[359] The Supreme Court Decision No: 156 PK/Pid.Sus/2019 concerning Patrialis Akbar case.

[360] The Indonesian Constitutional Court has the Code of Ethics of Constitutional Justices which regulated in the Constitutional Court Regulation no. 09/PMK/2006 on the Declaration of the Enactment of the Code of Ethics and Conduct of Constitutional Justice (*Sapta Karsa Hutama*).

the Code of Ethics,[361] The Code of Ethics is basically adopted the Bangalore Principles, which are intended to establish standards for ethical conduct of justices. They are designed to provide guidance to justices and to offer the judiciary a framework for regulating judicial conduct. Seven core values are recognized: Independence, impartiality, integrity, propriety, equality and finally competence and diligence. The Principles define their meaning and elaborate in detail on what kind of conduct is to be expected in concrete terms of the persons concerned in order to put the respective value into practice.[362]

To enforce the Code of Ethics, the Honorary Council of the Constitutional Court (*Majelis Kehormatan Mahkamah Konstitusi, MKMK*) is established, which has function to monitor, examine and recommend measures to be taken against Constitutional Court Justices, alleged of having violated the Code of Ethics for Justices.[363] The MKMK members consists of: a. one person of a Constitutional Court Justice; b. one person of a Judicial Commission member; c. one person from the House of Representative element; d. one person from the Government element exercising government affairs in law; and e. one person of a Supreme Court Justice."[364]

However, the MKMK is a temporary institution, it will only be established when there is constitutional justice found violating the Code of Ethics. The role of the MKMK contained in the CCI Law is considered insufficient to maintain the honour and integrity of justices, so that in 2013, the CCI also established the Board of Ethics of Constitutional Justice (*Dewan Etik Hakim Konstitusi, DEHK*) as a permanent institution, which cannot be separated from the effort to uphold a code of ethics and maintain of the dignity of the constitutional justices.[365] Nevertheless, this institution doesn't have a strong power to give dismissal punishment when a justice commits a

[361] Art. 27B of the Constitutional Court Law.

[362] The Bangalore Principles of Judicial Conduct, accessed 30 October 2019, https://www.judicialintegritygroup.org/jig-principles

[363] Art. 1 point 4 of the Constitutional Court Law

[364] Art. 27A(2) of the Constitutional Court Law

[365] The Constitutional Court Regulation no. 2/2013 on the Board of Ethics of Constitutional Justice

severe violation of the Code of Ethics, or it can only provide recommendations to the Chief Justice of the CCI.[366]

Therefore, the strengthening role of the Board of Ethics as guardians of constitutional justices should be continuously improved, and this can be done by repositioning the organizational structure of the Board of Ethics, which is no longer under and responsible for the Chief Justice of the CCI, but becomes an independent institution outside the organizational structure of the CCI. To improve its power, the Board of Ethics can receive complaints from the public against allegations of ethical violations committed by constitutional justices and giving a punishment when it's found the Code of Ethics violation.

However, there is a controversy whereby strengthening the supervision of constitutional justices can harm their independence, where justices cannot freely decide cases based on their views. In principle, supervision does not harm the independence values of justices. Monitoring is a consequence that the justices' position as the representative of God on earth could affect the applicant's status or even changes the system. Moreover, the supervision of the justices is applied as a guide for justices to decide cases. With good supervision, consistency of decision will be achieved and avoid controversial decisions, which in turn will guarantee legal certainty and public trust to the judiciary and law enforcement, both at national and international levels.

6.1.3. Increasing the Supporting System of Justices

To provide assistance in the implementation of the CCI's tasks and authorities, the CCI Justices require general and judicial administrative support from government apparatuses, a registrar's office and general secretariat shall be established.[367] The CCI would not be able to function properly without their support, it is because the substance, methods, and the direction of the CCI's work are determined by nine justices along with the support of the CCI's Secretariat and Registrar's Office.

---

[366] Art. 12 of the Constitutional Court Regulation no. 2/2013 on the Board of Ethics

[367] Art. 7 of the Constitutional Court Law

The Registrar's Office has the main task of providing support in the field of judicial administration. The organizational structure of the Registrar's Office consists of a number of functional positions of the Registrar, which is led by 1 registrar, assisted by 3 deputy registrars, 9 senior substitute registrars, and 27 substitute registrars. [368] The Registrar's Office in charge of handling various affairs, such as the registration of petitions filed by Petitioners, examination of the completeness of petitions, the recording of complete petitions in Book of Constitutional Cases Registration, as well as preparing and assisting with the implementation of the Court's hearings.[369]

Whereas, the Secretary General is carrying out technical administrative tasks: (1) coordination of administrative implementation within the general secretariat and the registrars' office; (2) formulation of the plan and program for administrative technical support; (3) implementation of cooperation with the community and inter-institutional relations; (4) implementation of supporting facilities for court hearing activities; and (5) the implementation of other tasks assigned by the Chief Justice of the Constitutional Court in accordance with its field of tasks.[370]

One of the important supporting system of justices under Secretary General is the Center for Research and Case Analysis and Library Management (the Research Center). The Research Center is headed by a Head of Research Center and is divided into two divisions which are Division of Research and Case Analysis and Library Management Division. The Research Center is also supported by an Administrative Subdivision.[371]

When comparing between the high-level of competence of the CCI and the number of staff, it is found that the number of staff especially constitutional researchers is still very small, and it is difficult to give maximum support to the justices. At the time of writing this paper (2019), the

---

[368] Constitutional Court of Indonesia, 'AACC Member Fact File: Constitutional Court of Indonesia', in *The Jurisdictions and Organization of AACC members,* ed. AACC SRD, Seoul: AACC SRD, 2018, 54-87.

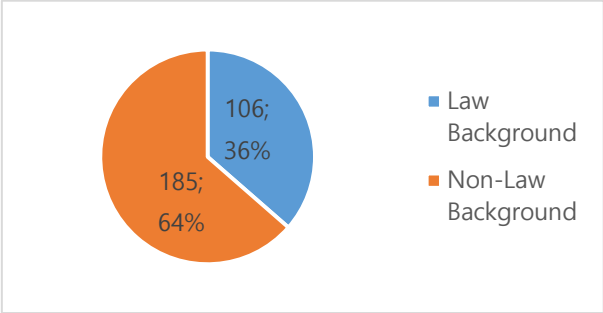
[369] Art. 7A of the Constitutional Court Law

[370] Art. 7B the Law on the Constitutional Court

[371] The President Regulation no. 65/2017 concerning Registrar's Office and General Secretariat of the Constitutional Court

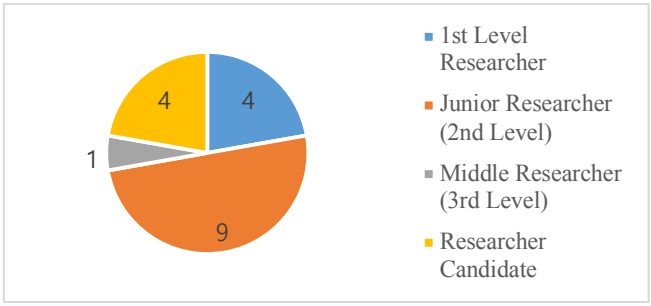
CCI consists of 291 staff. Staff who have a law degree are 106 (34%) and those with a non-law degree are 185 (64%).[372]

Figure 13
Education Background of the Indonesian Constitutional Court Staff



It can be seen from the data mentioned above that the number of staff who have the law background is very small only 106 staff. One of the important supporting system of justices is the Research Center, and the number of researchers are only 18 researchers and there are also 7 newly recruited researcher candidates. Of the 19 researchers, there is only 1 researcher who is ranked as 3rd level researcher (middle researcher). Most of the researchers are classified as 2nd level (junior researcher). The other 8 researchers are equally divided between first level researchers and researcher candidates. The 19 abovementioned researchers at all levels are respectively assigned to the nine justices. Each Constitutional Court Justice is supported by 2 researchers.

Figure 14
Researcher of the Indonesian Constitutional Court



The number of researchers at the Indonesian Constitutional Court as mentioned in the chart above is still very small when compared to the Korean or German Constitutional Court. This is one of the organizational problem faced by the Indonesian Constitutional Court, and it's difficult

[372] Constitutional Court of Indonesia, 'AACC Member Fact File: Constitutional Court of Indonesia,' 54-87.

to run the effective function if the Court doesn't have enough supporting system from the staff, especially researchers. Therefore, increasing the supporting system to the Justices is one of the solutions in dealing with the effects of the potential introduction of constitutional complaint and concrete constitutional review mechanisms.

6.2. Improving the Jurisdictions: Better Protection of Fundamental Rights

Comparative study on the jurisdictions of constitutional courts in Indonesia, Korea and Germany, showing similarities and differences that can be seen from their jurisdictions, procedures, including objects, standing, time limit, and decision. The following table will explain the jurisdictions among these three courts.

Table 4

Comparison of Jurisdictions

Constitutional Court	Jurisdictions						
	Constitutional Complaint	Abstract Review	Concrete Review	Competence Dispute	Party Dissolution	Election Dispute	Impeachment
Indonesia	-	√	-	√	√	√	√
South Korea	√	-	√	√	√	-	√
Germany	√	√	√	√	√	√	√

The table shows that the German Federal Constitutional Court jurisdictions covers a large variety of legal fields and has functioned as the ultimate guarantor of fundamental rights and the supremacy of the constitution. The Federal Constitutional Court jurisdictions is comparatively broad and its covers the whole German legal issues. It can be said that Germany is one of the countries who have the most advanced and established the Constitutional Court system.

The Korean Constitutional Court owned five different jurisdictions. These include: first, the authority to review the constitutionality of the Law; second, the authority to decide Impeachment; third, the authority to dissolute a political party; fourth, the authority to resolve disputes about the jurisdictions between State agencies, between State agencies and local

governments, and between local governments, and last, the authority to decide petitions relating to the Constitution as prescribed by law.

The above features, similarly, exists in the Indonesian Constitutional Court. Such features are: constitutional review of law against the constitution; involving in the impeachment process; dissolution a political party; dispute in general election; and dispute among states institution. However, some Indonesian legal scholars argued that these jurisdictions still couldn't give maximum protection of democracy and the fundamental rights of the citizens, it is because the Indonesian Constitutional Court jurisdictions mentioned above is still very limited, the important mechanism such as constitutional complaint and concrete constitutional review are not part of the Constitutional Court jurisdictions. This sections will analyze the Constitutional Court jurisdictional limit and then provide recommendations to improve the Constitutional Court jurisdictions.

6.2.1. Constitutional Review

Since the third amendment of the 1945 Constitution in 2001, the judicial review system in Indonesia rises some problems, such as the absence of the concrete review in the Constitutional Court jurisdiction, which makes the Court couldn't effectively protect the citizens' fundamental rights. In addition, the dualism of the judicial review system might lead to different interpretations in handling cases. Therefore, this section will analyze judicial review problems and offer recommendations to improve the system.

6.2.1.1. Adopting Concrete Review

In Indonesia, there are many constitutional review cases,[373] everything is petitioned, appealed, or brought for constitutional review whenever something is disliked. Of course in time, certain limitations will be applied so that only cases that are truly contrary to the Constitution are brought to the CCI. However, in the adjudication on constitutionality of statutes, the concrete

[373] The constitutional review case statistics can be found in the Constitutional Court website, https://mkri.id/index.php?page=web.RekapPUU&menu=18

review has not been recognized in the Indonesian constitutional adjudication system. The CCI only has power to decide the abstract review of law against the constitution, and any individual alleging that one of the fundamental rights has been infringed by laws can bring abstract constitutional review case to the CCI.

Many of the Indonesian legal scholars argued that the abstract constitutional review jurisdiction is not enough to protect citizens' constitutional rights. Because the protection of fundamental rights is a significant issue, complicated, and continues to pose challenges in Indonesia which has the 4th largest population. Therefore, the absence of a concrete constitutional review makes the CCI unable to fully protect the fundamental rights of citizens.

However, in Germany and Korea, concrete constitutional review mechanism has been implemented. The German and Korean Constitutional Courts have been applying this important mechanisms in their jurisdictions. The following table will discuss concerning the judicial review system and procedure, including abstract and concrete review in Germany, Korea, and Indonesia (only for abstract review).

Table 5

Comparison of Judicial Review Systems

Constitutional Court	**Judicial Review**		
	Types	**Cause for Request**	**Standing of Applicants**
Germany	Abstract Review	All statutes against the Basic Law	The Federal Government, a *Land* government, or one quarter of the Members of the *Bundestag*
	Concrete Review	The federal or state law under which a case has arisen violates the Basic Law	Regular Court
South Korea	Abstract Review	-	-
	Concrete Review	Statutes legislated by the National Assembly, and other norms with the equivalent status of such statutes	Ordinary Court
Indonesia	Abstract Review	Laws against constitution	Any individual alleging that one of his fundamental rights has been infringed by laws
	Concrete Review	-	-

According to the table, in adjudication on constitutionality of the statutes, the Indonesian Constitutional Court only has power to decide the abstract review of law against the constitution, and any individual alleging that one of his fundamental rights has been infringed by laws can bring constitutional review case to the Indonesian Constitutional Court.

Unlike in Indonesia, the Korean Constitutional Court only deal with the concrete norm control, and the subject of adjudication includes statutes legislated by the National Assembly, and other norms with the equivalent status of such statutes. A request for the review of a law can be made by an ordinary court, either ex officio or by decision upon a motion by the party.

In Germany, both abstract and concrete review are handled by the German Federal Constitutional Court. For the abstract review, the Federal Constitutional Court will review all statutes against the Basic Law which can be requested by the Federal Government, a Land government, or one quarter of the Members of the *Bundestag*. While for the concrete review, its concerning the federal or state law under which a case has arisen violates the Basic Law, and the applicant is the Regular Court.

It is, therefore, necessity that the CCI should adopt concrete constitutional review as new jurisdiction. It is a mechanism that allows ordinary judges to review the constitutionality of laws or regulations being used to decide cases in ordinary courts. If the Ordinary Court Judges are unsure or doubtful about the constitutionality of laws or regulations being used for examining their cases, they may delay the examination and question the Constitutional Court. In this matter, the Constitutional Court will only decide the constitutionality of the law or regulation in question. The ordinary judges will then determine the case based on the Constitutional Court's decision.

This because the concrete constitutional review mechanism offers several advantages for the constitutional adjudication system. First, the concrete constitutional review can strengthen the protection, respect of and fulfilment of constitutional rights of citizens. Thus, when citizens lack awareness or ability to defend constitutional rights, minimum constitutional rights protection is guaranteed even without the need for to active application for constitutional reviews by the Constitutional Court. Nonetheless, the submission of the concrete review to the Constitutional Court remains highly dependent on the initiative and willingness of ordinary judges. Second, ordinary judges will no longer be forced to apply applicable laws or regulations in examining a

case when there is doubt of potential conflict with the Constitution. Third, the presence of the concrete constitutional review will help to achieve a common understanding among ordinary judges of the importance in upholding the principles of the constitutionality of laws and regulations. If the mechanism of the concrete constitutional review is adopted in Indonesia, the ordinary judges could be more critical of the constitutionality of laws and regulations.[374]

There are three options exist for the adoption of the concrete constitutional review in Indonesia. First, through a constitutional amendment. Second, the Constitutional Court Law could be revised by adding provisions providing flexibility for ordinary judges to submit a constitutional review to the Constitutional Court. Third, the Constitutional Court can decide on a constitutional interpretation defining state institutions in constitutional review system to include general courts.

6.2.1.2. Integrating the Judicial Review System

In the Indonesian constitutional system, there exists a hierarchical structure of laws adopted from the pyramid of law theory by Hans Kelsen, known as *Stufenbau des Rechts*.[375] Presently, the types and hierarchy of laws in Indonesia consist of the 1945 Constitution, People's Consultative Assembly (MPR) Decision, Law or Government Regulation in Lieu of Law (Interim Emergency Law), Government Regulation, Presidential Regulation, Provincial Regulation and Regency/City Regulation.[376] The legal power of those laws is in accordance with the hierarchical structure ranging from the highest to the lowest level.

Regarding the judicial review system, Indonesia applies two separate mechanisms. The first mechanism is that the Constitutional Court can only review the constitutionality of laws enacted by the President and the House of Representative.[377] The second mechanism is that only

---

[374] I Dewa Gede Palguna, 'Constitutional Question: Latar Belakang dan Praktik di Negara Lain serta Kemungkinan Penerapannya di Indonesia' [Constitutional Question: Background and Practice in Other Countries and the Possibility of Its Implementation in Indonesia] *Jurnal Hukum* 1 (2010): 16-7.

[375] See Hans Kelsen, *Pure Theory of Law*, Berkeley: Univ of California Press, 1967.

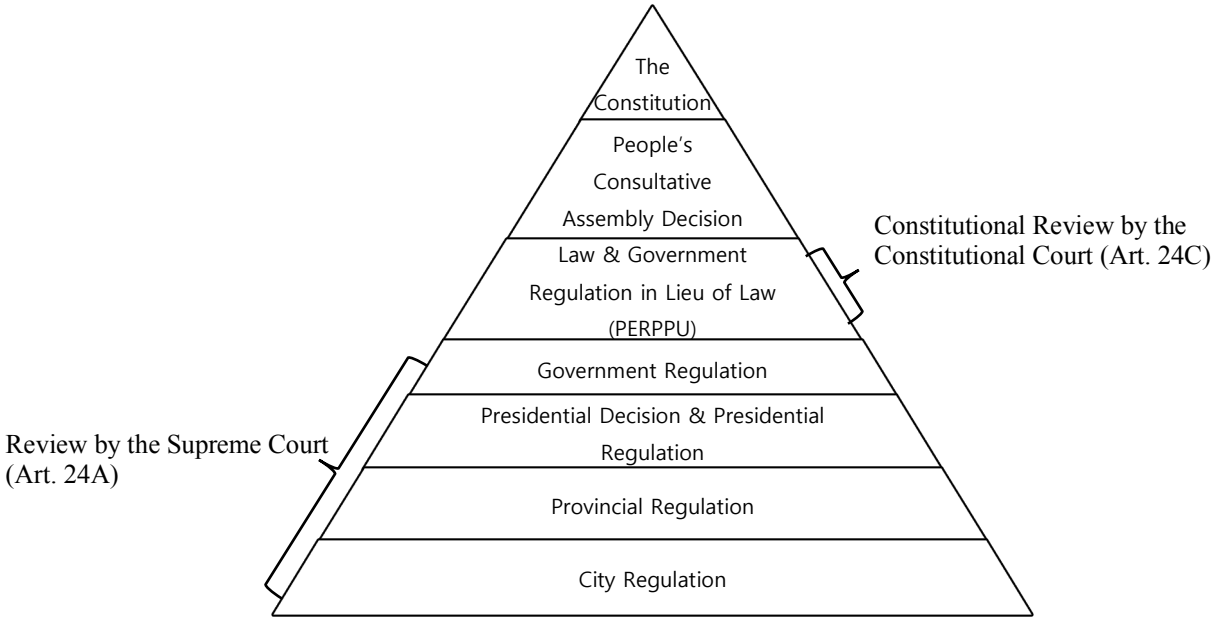
[376] The Law No 12/2011 on the Hierarchical Structure of the Indonesian Laws

[377] Art. 24C of the Indonesian Constitution

the Supreme Court can review the legality of regulations below the level of law, this includes Government Regulation, Presidential Regulation, Provincial Regulation and Regency/City Regulation.[378] The following figure provides explanation on the hierarchy of the Indonesian law and regulation as well as dualism of judicial review systems.

Figure 15

Hierarchy of the Indonesian Law and Regulation



This dualism of review systems have created several problems in the constitutional review system in Indonesia. First, there might be an inconsistency and different interpretation in dealing with review cases, where the Supreme Court give a different interpretation to the Constitutional Court's previous interpretation for the same case.[379]

In the future, to resolve the dualism of the judicial review system in Indonesia, the judicial review of all laws and regulations under the Constitution should be integrated into one judicial institution, which all reviews should be under the Indonesian Constitutional Court. Establishing a constitutional review mechanism under a one-roof system can cover the vacuum

[378] Art. 24 A of the Indonesian Constitution

[379] Pan Mohamad Faiz, 'Legal Problems of Dualism of Judicial Review System in Indonesia', *Jurnal Dinamika Hukum* 16, no. 2 (2016): 187-95.

of legal remedy. In addition, it can prevent inconsistency of interpretations in a judicial review case decided by the Constitutional Court and the Supreme Court.

This dualism of judicial review system similarly apply in South Korea. On one side, the Korean Constitutional Court has jurisdiction over a constitutional review of legislation enacted by the National Assembly,[380] and on the other hand, the Supreme Court of Korea has jurisdiction to make a definitive review on the constitutionality or legality of orders, rules, regulations, and actions taken by administrative entities.[381]

6.2.2. Dispute of State Organs: Necessity to Expand the Object

In the Indonesian constitutional system, the relationship between one institution and another is bound by the principle of checks and balances. In that principle, the state institutions are known as equal. The implication of the mechanism of checks and balances on such equal relations, it is possible in the exercise of the authority of each state institution to arise differences or disputes in interpreting the Constitution. Under the 1945 Constitution, the mechanism to solve the dispute will be handled by the Indonesian Constitutional Court.

In the case of adjudication on competence disputes, the CCI has authority to handle the disputes related to the authorities of state institutions whose authorities are granted under the constitution, as well as the applicant shall be a state institution whose authorities are granted under the Constitution. Therefore, the state institutions that can be applicants or respondents in a dispute are limited, namely the House of Representative (DPR), the Regional Representative Council (DPD), the People Consultative Assembly (MPR), the President, the Supreme Audit, the Regional Government or other state institutions whose authorities are granted by the Constitution.

Based on this situation, the problems occur when there is a dispute between institutions are not regulated in the Constitution, such us institutions that established by Law and Presidential Decree, and the CCI does not have the authority to handle this disputes. Whereas, many institutions are mandated only by Law and Presidential Decree.

---

[380] Art. 111 (1) 1 of the Korean Constitution

[381] Art. 107 of the Korean Constitution

The German and Korean Constitutional Courts can a good examples where both countries adopt the jurisdiction of dispute between state organs in more comprehensive. The following table will describe the comparison of dispute between state organ in Germany, Korea, and Indonesia.

Table 6

Comparison of Dispute between State Organs

Constitutional Court	**Disputes between State Organs**		
	Cause for Request	**Standing of Applicants**	**Time Limit for Request**
Germany	Constitutional organs concerning the extent of the rights and duties of a supreme federal body (*Bundestag, Bundesrat*, Federal Government, Federal President) and those parts of such organs as are vested with own rights pursuant to the Basic Law	Constitutional organs or actors that are equivalent to such organs disagree on their respective rights and obligations under the Basic Law	Six months
South Korea	When conflicts arise: • between State agencies • between a State agency and a Local government, and • between Local governments	State agencies or Local governments	Sixty day
Indonesia	When conflicts arise between state institution whose authorities are granted under the constitution	Constitutional organs	-

Unlike Indonesia, the Korean Constitutional Court is vested with more comprehensive powers to adjudicate on constitutional or legal competence disputes between all government

institutions established on the basis of the Constitution, as well as disputes between the state agencies. Concerning the applicants, a state agency or a local government concerned may request an adjudication on competence dispute to the Constitutional Court.[382]

In Germany, the Federal Constitutional Court decides disputes between constitutional organs concerning the extent of the rights and duties of a supreme federal body (*Bundestag, Bundesrat*, Federal Government, Federal President) and those parts of such organs as are vested with own rights pursuant to the Basic Law or the rules of procedure of the Bundestag and of the Bundesrat. An application of the disputes between constitutional organs may be filed if highest federal organs, or actors that are equivalent to such organs, disagree on their respective rights and obligations under the Basic Law.[383]

By learning from the Korean and German Constitutional Courts systems in dealing with the disputes of state organs. In the future, the CCI should expand the object over the dispute amongst state organs, where the CCI can deal with the case which not only for institutions are granted under Constitution, but also institutions are mandated under the Law and Presidential Decree. This can be done by constitutional amendment and Constitutional Court Law revision.

6.2.3. Election Dispute: Strengthening the Constitutional Court's Jurisdiction in Deciding the Local Election Dispute

Not only national elections (presidential and parliamentary elections), but local elections are also regulated in the Indonesian Constitution. Article 18 (4) stipulates "Governors, Regents and Mayors, respectively as head of regional government of the provinces, regencies and municipalities, shall be elected democratically." This provision does not explicitly require the head of local government (Governors, Regents, Mayors) to be directly elected by the people, but rather to be elected democratically. The phrase of "elected democratically" has two meanings, the head of local government can be directly elected by the people and can be elected through the

[382] Art. 111 (1) 4 of the Korean Constitution and Art. 61 – 67 of the Korean Constitutional Court Act

[383] Art. 63 of the German Federal Constitutional Court Act

House of Local Representative (DPRD) as a representative body of the people in the region.[384]

Based on this interpretation, the current Local Election Law applies the direct local election system, where the head of local government is elected directly by the people.[385] This direct election system was chosen because it is the best way to interpret the phrase "elected democratically". However, since the implementation of the direct local election in 2005, several issues occur and need to be solved, first, related to the regulations (Local Election Law and Local Government Law), which are still ambiguous and multi-interpreted. Second, the problem of the quality of the local election organizers, such as the Local Election Commission (KPUD) and the Local Election Supervisory Board, where found many of the KPUD members who are not independent or take sides with one of the candidates. Third, the problem concerning mechanism in dealing with the local election disputes, including election administration disputes, election crimes, and election results.[386]

One of the issues mentioned above and that will be discussed in this section is related to election disputes. Historically, the Regional Government Law regulates that local election disputes handled by the Supreme Court.[387] However, during its implementation, lots of problems arose in the organization of the election either concerning regulation, organization or law enforcement. Therefore, a number of non-governmental organizations filed a constitutional review to the Constitutional Court and requested that the authority over local election disputes changed to the Constitutional Court jurisdiction.

Through its decision on 22 March 2006, the Constitutional Court argued that local elections could be categorized as general elections, as covered by Article 22E of the 1945

---

[384] M Lutfi Chakim, 'Perubahan Sistem Pemilihan Kepala Daerah Dalam Dinamika Pelaksanaan Demokrasi [Changes of the Local Election System in the Dynamics of Democracy]', *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 3, no. 1 (2014): 113-27.

[385] The Law Number 10/2016 concerning the Election of Governors, Regents and Mayors

[386] The People Consultative Assembly, 'Rekomendasi MPR tentang Penataan Kekuasaan Kehakiman [the MPR Recommendation concerning the Improvement of the Judicial Power],' Badan Pengkajian MPR-RI, Jakarta 2018, 93.

[387] Art. 106 of the Regional Government Law

Constitution.[388] Consequently, because the local election is also a general election, the institution that has the authority to handle local election disputes is the Constitutional Court. In the course of its development, the Constitutional Court jurisdiction to decide local election dispute does not lie on textual interpretation only which merely rules on the dispute concerning the result of the election but also on the violations which happened during the election process. It is the constitutional obligation of the Court which basically has the purpose to ensure that fair and just election can be held.[389]

Although the Constitutional Court is generally considered successful in exercising its jurisdiction to decide local election disputes; there was a constitutional review decision that surprised many. However, On 19 May 2014, the Court declared that the Constitutional Court's jurisdiction in handling regional head electoral disputes was unconstitutional. The Court reasoned that giving the regional head election disputes to be handled by the Constitutional Court was not in accordance with the meaning of the original intent of the Constitution.[390]

The Constitutional Court jurisdiction in handling election dispute has been developed in terms of the object of the dispute, where currently the Constitutional Court does not only handle disputes over the results of local elections but also encompasses variously structured, systematic and massive violations (TSM). Even though, lots of challenges and obstacles are also faced in settling election dispute. However, that situation does not deter the Court from making legal breakthrough to mend and improve local election system.[391]

Many Indonesian legal scholars argue that so far the local election dispute handling by

---

[388] The Constitutional Court decision no. 072073/PUU-II/2005 concerning constitutional review of the Regional Government Law against the Constitution

[389] Hamdan Zoelva, 'Problematika Penyelesaian Sengketa Hasil Pemilukada Oleh Mahkamah Konstitusi [Problems of Settlement of Local Election Disputes by the Constitutional Court]', *Jurnal Konstitusi* 10, no. 3 (2013).

[390] The Constitutional Court Decision no. 97/PUU-XI/2013 concerning constitutional review of the Regional Government Law and Judicial Power Law against the Constitution

[391] Hamdan Zoelva, 'Problematika Penyelesaian Sengketa Hasil Pemilukada Oleh Mahkamah Konstitusi [Problems of Settlement of Local Election Disputes by the Constitutional Court]'.

the Constitutional Court is quite effective, and has a positive impact. Through this Constitutional Court jurisdiction, the citizens' right to vote and be elected can be protected. So it needs to be reconsidered if there is a desire to revoke this authority from the Constitutional Court. Even if there are deficiencies and problems, the thing to do is to improve the system, not delete it.

Therefore, in the future, the provisions on the Constitutional Court jurisdiction in handling local election disputes needs to be regulated clearly in the Constitutional Court Law. The position of the Constitutional Court as the guardian of the constitution and fundamental rights must continue to be upheld because basically the only judicial institution that is very suitable for handling election dispute is only the Constitutional Court.

6.2.4. Dissolution of Political Party: Necessity to Expand the Applicant

Political party dissolution is closely tied to the implementation of people sovereignty. Therefore, the issue of dissolution of political parties is also considered to be related to the constitutional matter so that it becomes the authority of the CCI. However, this jurisdiction has never been done by the CCI, where there has not been a single application submitted by the Central Government to the Constitutional Court to decide a political party dissolution.

The procedure to file an application shall be the government, and as an applicant the government shall be obligated to describe clearly in its petition the ideology, the principles, the objectives, the program and the activities of the political party concerned, deemed to be contradictory to the Constitution.[392] However, it's difficult to control the political party activities when the applicant is only for government, because it might happen where a political party that violates the constitution is one of the government coalitions. In this situation, it is very difficult for the government to be objective.

It is, therefore, in addition to the government, the House of Representatives (DPR) as a representative institution is very important to have a legal standing as an applicant in the case of dissolution of political parties. In this context, the German Federal Constitutional Court can be a good example where the applicants is not only for Federal Government but also for parliament.

---

[392] Art. 68 of the Indonesian Constitutional Court Law

To provide a detailed information on the dissolution of political party in Germany, South Korea, and Indonesia, the following table shows a comparison of the political party dissolution:

Table 7

Comparison of Political Party Dissolution

Constitutional Court	**Dissolution of Political Party**	
	Cause for Request	**Standing**
Germany	Political Party's aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order	*Bundestag*, *Bundesrat* and Federal Government
South Korea	The Political Party purpose or activities are contrary to basic democratic order	Government
Indonesia	The Political Party ideology, principles, objectives, program and the activities are contrary to the Constitution	Government

Like in Indonesia, the Korean Constitutional Court receives a request for adjudication on dissolution of a political party from the Government. The Government may file for adjudication of political party dissolution. The written request for adjudication on dissolution of a political party shall include an indication of the political party requested to be dissolved, and the grounds of the request.

Whereas, in Germany, the applicants who have legal ability to file an application of the dissolution of political parties are the *Bundestag*, the *Bundesrat* and the Federal Government. The political party can be declared unconstitutional when a party take an actively belligerent, aggressive stance vis-a-vis the free democratic basic order.

6.2.5. Impeachment: Necessity to Expand the Object

The Indonesian Constitutional Court can only dealt the impeachment case against the

President and/or the Vice President,[393] and since the CCI was established there has been no impeachment case decided by the CCI. The procedure for the impeachment of the President and/or the Vice President is to be proposed by the House of Representative by first submitting a petition to the Constitutional Court. The applicant shall be obligated to clearly describe in its petition any allegation of violation of the law in the form of treason against the state, corruption, bribery, other serious criminal act, or act of misconduct, and/or no longer fulfilling the requirements as the President and/or Vice President as intended in the Constitution.[394]

The impeachment case that can be handled by the Constitutional Court is very limited, where the only impeachment of the president and vice president. This makes the CCI does not have the authority to decide the case of impeachment against other high ranking officials that violates the constitution or any other law in the performance of official duties. To provide a detailed information about the impeachment procedure, the following table shows a comparison of the impeachment procedure.

Table 8

Comparison of Impeachment

Constitutional Court	**Impeachment**		
	Types	**Cause for Request**	**Standing of Applicants**
Germany	Impeachment of the Federal President	Federal President violates the Basic Law or of any other federal law	*Bundestag* or *Bundesrat*
	Impeachment of Judges		Federal judge impeached by the *Bundestag*, and a *Land* judge impeached by the parliament of the *Land*
South Korea	Impeachment of the high ranking public officials: • President, Prime Minister, Members of State Council or Ministers	When these high ranking public officials violates the Constitution or other laws	National Assembly

[393] Art. 24C of the Indonesian Constitution

[394] Art. 30e of the Constitutional Court Law

	• Justices of the Constitutional Court, judges or Commissioners of the National Election Commission • Chairman and Commissioners of the Board of Audit and Inspection		
Indonesia	Impeachment of President and/or Vice President	President and/or Vice President violate the law in the form of treason against the state, corruption, bribery, other serious criminal act, or act of misconduct, and/or no longer fulfilling the requirements	House of Representative

Unlike in Indonesia, the adjudication on impeachment in Korea is not only against President, but also Prime Minister, Members of State Council or Ministers, Constitutional Court Justices and others high ranking official mentioned in the Law. If one of this public official who falls under any of the following violates the Constitution or laws in the course of execution of his or her duties, the National Assembly may pass a motion for impeachment, and the impeachment prosecutor shall request adjudication by presenting to the Constitutional Court an authentic copy of the written resolution of initiating impeachment proceedings.[395]

In addition, in Germany, the Federal Constitutional Court has exclusive power over impeachment proceeding against Federal President and Judges. The Federal President can be impeached by the *Bundestag* or the *Bundesrat* before the Federal Constitutional Court for wilful violation of this Basic Law or of any other federal law in the performance of official duties. [396]

In order to improve the Indonesian Constitutional Court jurisdiction in dealing with impeachment case, it is necessary to expand the type of impeachment, which is not only for President and Vice President but also for other high ranking officials, such as minister and the parliament members as applied in Korea and Germany.

[395] Art. 111 (1) 2 of the Korean Constitution and Art. 48 – 54 of the Korean Constitutional Court Act

[396] Art. 61 of the German Basic Law and Art. 49-57 of the Federal Constitutional Court Act.

6.2.6. Recommendation to Adopt Constitutional Complaint

6.2.6.1. Overview of Constitutional Complaint: the Korean and German Models

The idea of constitutionalism and the guarantee of the protection of fundamental rights are one manifestation in modern democracies. This assurance has been supported by the establishment of various legal instruments in order to ensure the protection of the constitutional rights as a responsibility of the state. In this context, the constitutional complaint is one of the legal mechanisms designed to reinforce the guarantee of the protection of citizens' rights against any state action, in all branches of power that violates the constitutional rights of citizens. The authority to hear and decide cases of constitutional complaint has become one of the constitutional authorities of the constitutional court and similar institutions in a number of different countries.

The history of constitutional complaints begins and is directly related to and even a logical consequence of the requirements of the constitutional state. In brief, the theoretical construction is explained as follows. The first characteristic of a modern constitutional state is constitutionalism, which means that state administration is based on and (therefore) may not contradict with the constitution. Thus, the constitution must be actually applied or complied with in practice, instead of merely playing an aspirational role. In order to secure strict compliance and performance of the constitution in practice, the idea to establish a constitutional court emerges.[397]

The term "constitutional complaint" applied in this paper refers to an individual citizen claiming that one of his or her constitutional rights has been violated by an act or omission of the public authority. Gerhard Dannemann characterized constitutional complaint by four factors. First, they provide a judicial remedy against violations of constitutional rights; second, they lead to separate proceedings which are concerned only with the constitutionality of the act in question and not with any other legal issues connected with the same case; third, they can be lodged by the person adversely affected by the act in question; and, fourth, the court which decides the

[397] I Dewa Gede Palguna, "Constitutional Complaint and the Protection of Citizens the Constitutional Rights," *Constitutional Review* 3, no. 1, (May 2017): 2-3.

constitutional complaint has the power to restore to the victim his or her rights.[398]

The first application of the constitutional complaint jurisdiction came from Europe. Austria, with Hans Kelsen playing a major role, established the first constitutional court as we understand constitutional courts today. The Constitutional Court of Austria (*Verfassungsgerichtshof*) was established in 1920, and rejected the American model. The Austrian Constitutional Court's model became known as the European model of constitutional review. Today, the Austrian Constitutional Court has the authority to decide complaints against laws, regulations, international treaties, and against administrative actions, but there is no constitutional complaint against acts of the judiciary.[399]

In Germany, as one of the most advanced mechanisms among countries in dealing with this issue, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) has the authority to handle constitutional complaint cases related to an act of a public authority. This therefore includes complaints concerning the constitutionality of a law, an administrative act, and even a court decision.[400]

Another interesting model of the protection of fundamental rights can be found in Spain. The Spanish Constitutional Court (*Tribunal Constitucional de España)* also has the power to examine constitutional complaint cases known as the *recurso de amparo,* which is an appeal for constitutional protection of fundamental rights against parliamentary decisions, governmental and administrative decisions, and judicial decisions.[401]

Korea and Germany have a constitutional complaint mechanism handled by their constitutional courts, whereas the Indonesian Constitutional Court doesn't have this power. However, this variety of systems for constitutional complaint, particularly in Korean and

---

[398] Gerhard Dannemann, "Constitutional Complaints: The European Perspective," *the International and Comparative Law Quarterly* 43, no. 1 (January 1994): 142.

[399] Art. 139, Article 140 and Art. 144 of the Austria Constitution.

[400] The authority of the German Constitutional Court to decide constitutional complaint cases is described in Art. 93 paragraph (1) number 4a and 4b of the German Constitution (*Grundgesetz).*

[401] Art. 53(2) the Constitution and Article 41, 42, 43, and 44 the Spanish Constitutional Court Law.

Germany shows on the effectiveness of the protection of fundamental rights. The details of the differences of constitutional complaints will be explained in the following table:

Table 9

Comparison of Constitutional Complaint

Constitutional Court	**Constitutional Complaint**		
	Cause for Request	**Standing of Applicants**	**Time Limit for Request**
Germany	A complaint against an act of public authority: • constitutionality of the law; • administrative act; and • court decision	Any individual (including foreigner) alleging that one of his fundamental rights has been infringed by public authority	One month
South Korea	• The complaint against an exercise or omission of state power (Art. 68(1)) • The complaint against a court's denial of a request for constitutional review of a statute in any judicial proceeding (Art. 68(2)).	• Any person who claims that his/her rights have been violated (68(1)) • The party whose its request on constitutionality of statutes is rejected (68(2))	• 90 days (Art. 68(1)) • 30 days (Art. 68(2))
Indonesia	-	-	-

According to the models of constitutional complaint as mentioned in the table above, Germany permit constitutional complaints against any act of public authority, including statutes and court decisions. Unlike at the Federal Constitutional Court of Germany, the constitutional complaint handled by the Korean Constitutional Court does not allow to challenge a court decision although the court's decision is alleged to violate fundamental rights.

Standing provisions for constitutional complaint are the same in two jurisdictions under

consideration Germany and Korea, claiming suffering a personal and direct violation of constitutional rights by the public authority as a requirement for resorting to the Constitutional Court. Taking into account the substantive scope of constitutional rights, in Korea a complainant may be a natural person. Whereas, in Germany the applicants may be an individual or private corporate body, as well as citizen foreigner or stateless person.[402]

With constitutional complaint, the issue of fundamental rights, and the rights of citizens can be accommodated and carried out to a high level of competence by the constitutional court. In many countries, the authority to deal with the constitutional complaint is in the hands of a constitutional court. But, of course, there must be limitations first of what can be deliberated or tried in the constitutional court. What matters can be considered under a constitutional complaint mechanism? These questions are discussed in detail based on the experience and practice in several countries through a comparative perspective.

6.2.6.2. The Possible Way to Adopt Constitutional Complaint

The main reasons for creating constitutional courts are to uphold the constitution and principles of the rule of law, to give maximum protection to democracy and the fundamental rights of the citizens. However, having no power or competence to decide cases on constitutional complaint can be detrimental to the mission of protecting fundamental rights. So the question should be, is there any possible way or alternative to adopt constitutional complaint at the Constitutional Court of Indonesia?

A number of academics, researchers, and even Justices of the Constitutional Court have expressed their opinions about the importance of constitutional complaint mechanisms. For example, Faiz, a researcher of the Indonesian Constitutional Court, reviewed several alternative ways on how to adopt the constitutional complaint, including via constitutional amendments, legislative interpretation, and also through a Constitutional Court interpretation to the effect that

[402] Nino Tsereteli, 'Mechanism of Individual Complaints – Germany, Spanish and Hungarian Constitutional Court – Comparative Analysis,' LL.M. Short Thesis, Central European University, Hungary, (2 April 2007), 11.

constitutional complaint becomes part of the constitutional review system.[403] Justice Palguna, one of the Constitutional Court's Justices, also wrote a dissertation for his Ph.D. on this subject, and eventually published the dissertation as a book, analyzing constitutional complaint and proposing several alternative ways to adopt it as an authority of the Constitutional Court.[404]

Each of the alternative methods to adopt constitutional complaint certainly has its own deficiencies and advantages. The first alternative is amending again the constitution which is requires a complicated process, besides requiring a long time.[405] At the time of writing, there is no plan from the People's Consultative Assembly (MPR) to amend the Constitution. Second, via legislative action, the legislative amends the existing law or even establishes a new law concerning the Constitutional Court. The legislature itself can also give a formal interpretation on the terms of judicial review, and all review of laws against the Constitution, because such definition is not clearly or even not mentioned in the Article 24 of the Constitution. So, the legislature may have the power to make an "extended interpretation" to the meaning of judicial review itself, to cover the case of constitutional complaint. However, such legislative

---

[403] Pan Mohamad Faiz, 'A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court,' *Constitutional Review* 2, no 1, (May 2016): 115.

[404] I Dewa Gede Palguna, *Pengaduan Constitutional (Constitutional Complaint): Upaya Hukum terhadap Pelanggaran Hak-hak Warga Negara [Legal remedy against Violation of Citizen's Rights]*, Jakarta: Sinar Grafika, 2013.

[405] The procedure of the constitutional amendment stipulates in Article 37 of the Indonesian Constitution, "(1) Proposals to amend articles of the Constitution can be put on the agenda of the session of the People's Consultative Assembly if submitted by at least 1/3 of the total number of members in the People's Consultative Assembly. (2) Each proposal to amend articles of the Constitution has to be submitted in writing and to mention clearly which part should to be amended and for what reason. (3) To amend articles of the Constitution the People's Consultative Assembly session has to be attended by at least 2/3 of all members of the People's Consultative Assembly. (4) A decision to amend articles of the Constitution requires the agreement of at least fifty percent plus one vote of all the members of the People's Consultative Assembly. (5) Especially those provisions regarding the form of the Unitary State of the Republic of Indonesia may not be amended."

interpretation could be challenged again by the people, so this approach may not provide an easily settled course of action. Third, the introduction of constitutional complaint via constitutional interpretation by the Constitutional Court may also be possible, but such an approach can only be used as long as there is a concrete case that involves the connection with some norm of law.[406]

However, each alternative has its imperfections, but while waiting for the MPR to amend the Constitution, the Constitutional Court needs to make an interpretation that the constitutional court can handle the constitutional complaint cases. According to case statistics, the number of applications, which can substantially be categorized as constitutional complaints, is significant. So in this context, the Indonesian Constitutional Court can make a constitutional interpretation where constitutional complaint becomes part of a constitutional review system.

If it is related to Article 24C (1) of the 1945 Constitution which explain the Constitutional Court jurisdiction, including constitutional review. In this context, the constitutional complaint mechanism, on a limited basis, can be incorporated into the constitutional review system, where the constitutional complaint application is still construed as a constitutional review application. However, in the substance, such application does not question the constitutionality of norms, but it questions the constitutionality of the act or omission of public officials due to a misinterpretation of the legal norms. As a consequence, the citizens' constitutional rights are violated. Therefore, a demand for relief by the applicant should be a demand for statement from the Constitutional Court that the acts or omissions of public officials are contrary to the constitution.[407]

---

[406] I Dewa Gede Palguna, 'Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizen.' In *Proceeding International Symposium on Constitutional Complaint*, ed. the Constitutional Court of Indonesia, Jakarta: The Constitutional Court of Indonesia, 2015, 32-33.

[407] I Dewa Gede Palguna, 'Constitutional Complaint and the Protection of Citizens the Constitutional Rights', *Constitutional Review* 3, no. 1, (May 2017): 18.

6.2.6.3. Challenges in Adopting Constitutional Complaint

One of the challenges that will be faced by the Constitutional Court in dealing with the constitutional complaint jurisdiction is the potentially very heavy workload. For example, the current duration for handling and deciding constitutional review cases takes about 6 months. This is due to the large number of constitutional review cases, which are around 1,000 cases every year, and the overall caseload is even higher if one takes into account other cases such as those on general election disputes and competence disputes. Therefore, it is conceivable that after adopting constitutional complaint, the Constitutional Court would receive an even larger number of cases.

The Korean Constitutional Court has around 2,500 constitutional complaint cases per year. At the German Federal Constitutional Court there are around 5,000 constitutional complaint cases per year. However, even though the two countries have a large number of cases, the two countries have good supporting systems for the Justices. For example, the Korean Constitutional Court has around 60 rapporteur judges.

Therefore in the future, if the Indonesian Constitutional Court introduces constitutional complaint, the Constitutional Court must strengthen the supporting system for the Justices, such as increasing the number of researchers and substitute registrars. In addition, the Indonesian Constitutional Court also must make an effective and efficient procedural law as well as provide suitable information technology (IT) support, so that a large increase in the number of constitutional complaint cases will not become problematic.

6.3. Improving the Rules of Procedure

On the basis of the Indonesian Constitutional Court Act, that further provisions concerning the rule of procedure shall be provided for in the Regulation of the Constitutional Court. However, currently, some problems related of the rule of procedure occur, such as there is no time limit for some jurisdictions, unclear standard qualification of expert, and the consequences of the absence of a statement from government and legislature in the Court hearing. This section will discuss on the current problem of the Court procedural law and offer recommendations to solve this issues.

6.3.1. Regulating Time Limit for Constitutional Review and Competence Disputes

One of the important issues on the rule of procedure that requires certainty is the time limit in every jurisdictions of the Constitutional Court. With the time limit provisions, the parties can plan steps and prepare the requirements needed to be able to follow the entire court process. The absence of a time limit can lead to injustice because the parties may skip a stage that must be passed so that the court's decision harms the party concerned.

However, out of the five jurisdictions, there are two important authorities that have no time limit, where the CCI does not have a time limit to decide the constitutional review and dispute amongst institution. Though both jurisdictions are important mechanisms in protecting the fundamental rights of citizens, and the problems occur where the absence of a time limit can violate the applicant rights to obtain legal certainty.

In this context, the Korean Constitutional Court can be a good example where under Article 38 of the Korean Constitutional Court Act, it clearly mentions that "the Constitutional Court shall pronounce the final decision within 180 days after it receives the case for adjudication: Provided, That if the attendance of seven Justices is impossible due to vacancies of Justices, the period of vacancy shall not be counted in the period of adjudication."

The length of time in deciding a constitutional case by the Constitutional Court becomes an important concern. Therefore, the time limit for the Constitutional Court in deciding a constitutional review and competence disputes should be regulated, either in the Constitutional Court Law or the Constitutional Court Regulation. This is important to prevent lengthy delays affecting ordinary courts in making final decisions.

6.3.2. Necessity to Regulate Expert Qualifications

The existence of experts in the Constitutional Court trials are very significant, especially in cases of constitutional review, competence disputes, and general election disputes. The role of expert is to strengthen the arguments of the application and to convince the constitutional justice to accept the arguments in question.

However, the Constitutional Court Law does not clearly mention the criteria regarding expert qualifications. The CCI Law only mentions that expert statement categorized as one of

evidence.[408] Therefore, expert statements must be accountable under the law. If not, the expert's statement cannot be used as evidence. Moreover, Article 38 (1), "The parties, witnesses and experts shall be obligated to appear before the Constitutional Court in compliance with the summons" and Article 42A (1), "Witnesses and experts can be presented by the disputing parties, related parties, or they can be presented by the Constitutional Court." These provisions only stipulate the general procedures for the expert in the Court hearing, without giving clear qualifications who can be an expert.

Unclear criteria of the expert can make it difficult for the Constitutional Court to assess the quality of its arguments. Even problems occur where someone who has a conflict of interest with the case being examined is asked his argument as an expert. Therefore, the procedure for selecting experts must truly reflect independence.

Some legal scholars emphasize several things: First, the expertise must be proven in advance by attaching the necessarily written curriculum vitae and academic certification. From the evidence of the documents, justices can decide whether someone presented at the trial can be said to be an expert or not. Second, expert statements are only based on their expertise and knowledge. Third, experts are not witnesses, where expert statements are more emphasized in the area of the case being examined.

Based on these criteria, the Constitutional Court should provide qualification to be an expert in the Court hearing, this can be done by revising the Court rule of procedure. More than that, expert competence must be respected as a professional who has dedicated the time, energy and contributed his expertise.

6.3.3. Mandatory Statement of Government and Legislature in the Hearing

In dealing with constitutional review cases, Article 54 of the Constitutional Court Law stipulates that the Constitutional Court may request the People's Consultative Assembly (MPR), the House of Representative (DPR), the Regional Representatives' Council (DPD), and/or the President for information and/or minutes of meetings pertaining to the petitions being examined.

---

[408] Art. 36 (1) of the Constitutional Court Law

Consequently, the Parliaments and the President are the two institutions that must always present in constitutional review case hearing. Therefore, these institutions are given the term as party giving information, not as a defendant or respondent.

Basically, the presence of the Parliaments and the Government in the constitutional review case hearing are intended to provide information and facts to the Court regarding the considerations and reasons during the process of drafting the law being reviewed. In addition, the Constitutional Court also needs to know how the current position and views of the Parliament and the Government towards the Law being reviewed.

However, in practice, the Parliament as the legislature often absent in the Court hearing, even though the Constitutional Court has invited it legally and properly. Consequently, there is no information and views from the Parliament that can be taken into consideration for the Justices to decide the case. The reasons that generally underlie the absence of the parliament in the Court hearing are the tightness of the sessions in the Parliament or the busy activities of the Parliament members.

Considering the importance of the statement of the Government and Parliament in the case of constitutional review, it is a necessity that the Constitutional Court should regulate the mandatory statement of Government and Legislature in the Court hearing, this can be done by revising the Court rule of procedure.

6.4. Enforcement of the Binding Decisions

The 1945 Constitution emphasizes that the Indonesian Constitutional Court decision is final and binding. However, in some cases, the Constitutional Court decisions remains one of the main problems in its implementation. This section will give recommendations to expand the type of the decision and solve the relationship matter between the Court and the House of Representative.

6.4.1. Necessity to Expand the Provisional Decision

According to the Indonesian Constitutional Court procedural law, the provisional decision is actually only recognized in cases of disputes state institutions and general election. Article 63 of the Constitutional Court Law stipulates, “The Constitutional Court may issue a stipulation

ordering the petitioner and/or the respondent to temporarily suspend the exercise of the authorities which is/are the subject of dispute until a decision of the Constitutional Court is available."

However, in constitutional review practice, the Indonesian Constitutional Court has also applied the provisional decision several times, which can be found in decision number 133/PUU-VII /2009 on review of Law Number 30/2002 concerning the Corruption Eradication Commission, in its judgment, the Court argued that "if necessary to protect the constitutional rights of citizens, Article 86 of the Constitutional Court and its Elucidation gives the Court the authority to further regulate matters that are needed in the event of a lack in procedural law. In practice so far, the Court has used Article 86 to decide on disputes over general election results through several provisional decisions."

In addition, based on Article 16 of the Constitutional Court Rule of procedure Number 06/PMK/2005 also opened the possibility for the Court to issue decisions in the request for provision. Therefore, even though the Constitutional Court Law does not recognize the provisional decision in cases of constitutional review, along with the development of legal awareness, practical needs and demands for a sense of community justice and in order to provide legal certainty, the Court deems it necessary to issue the provisional decision. By considering aspects of justice, balance, prudence, clarity of purpose, and interpretations that are adopted and have been applicable regarding the authority of the Court in giving provisional decisions.

Based on these reasons, it can be concluded that although the Constitutional Court Law does not specifically regulate provisional decisions, yet the Law does not prohibit the Constitutional Court to introduce this type of decision in the case of constitutional review. This needs to be done to prevent fundamental rights violations if a legal norm is applied while the examination of the principal application is still ongoing even though the impaired constitutional rights cannot be restored in the final decision.

6.4.2. The Use of International Law in the Decision

The Indonesian Constitutional Court has referred to international human rights law particularly the principle of equality and non-discrimination in many of its constitutional review decisions. In the following discussion, I seek to demonstrate that the Constitutional Court has

used international human rights law primarily to help it interpret the Indonesian Constitution and Indonesian laws.

International human rights law have several functions in the constitutional review decisions of the Constitutional Court. The judges use international human rights law as an additional reference to support his arguments of reasoning. In addition, international human rights law is also referred to in several decisions where the Constitutional Court upholds a basic right as a guaranteed and constitutionally protected right. The international human rights law instruments that serve as reference more frequently are the International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Constitutional Court has used international human rights law as a reference point in several equality and discrimination cases. The ICCPR is widely used as a reference especially in relation to the interpretation on the definition of "discrimination". Discrimination became a central issue in a number of cases before the Constitutional Court of Indonesia. Those, mainly, on the plaintiff argument that a certain requirement to hold public office as stipulated in the law has a different treatment. The differences, according to the plaintiff, is a form of prohibited discrimination.

In the determination of number of seats for members of parliament (Decision No. 130/PUU-VII/2009) and policies that differentiate the requirement of incumbent to run for second terms with the incumbent to run for public office in the different region (Decision No. 55/PUU-XIV/2016). Those policies are challenged on the ground that they injured the plaintiff's constitutional rights, especially the right to equal treatment and prohibition of discriminatory acts. The Court explained that discrimination must be interpreted in accordance with Article 2 of the ICCPR whereby the protection and recognition of the rights of every person shall be conducted "... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In the Indonesian Overseas Workers Case (Decision 028-029/PUU-IV 2006), the applicants argued that the statute under review was discriminatory because it only provided various protections to Indonesian workers abroad who were at least 21 years old. The majority of the

Court ultimately rejected this application. However, when determining what constituted discrimination under the Constitution, the majority set out Article 1(3) of the 1999 Human Rights Law which, the Court noted, contained a definition of discrimination similarly to that contained in Article 2 of the ICCPR. The Court then referred to a European Community Council Directive, which sets out examples of differential treatment on the basis of age that do not constitute discrimination.[409]

The issue of discrimination is not limited only to definitions. It is also relevant for the application of law, as demonstrated by the cases concerning equal treatment in the right to vote. The protection to the right to vote is one the most fundamental in the democratic society. Nonetheless, the Indonesian Constitution does not express the right to vote in the bill of rights catalogue. In the examination of the government policy on the restriction requirements to be candidates of Member of Parliament (Decision 011-017/PUU-I/2003), the Constitutional Court relates the discrimination policy to the Article 2 of UDHR and Article 25 of the ICCPR. Both provisions emphasize the importance of the protection of rights to vote rights without any discrimination.

Therefore, a small number of reference of international human rights law related with the principle of equality and non-discrimination in the Constitutional Court decision is to protect the rights of citizens. Decisions referring to international human rights law are not used as the main arguments in the constitutional reasoning as constructed by the Constitutional Court. This study identifies that the use of international human rights law arguments in the Constitutional Court decision serves to (1) provide additional arguments as a support to protect the citizen constitutional rights, and (2) to include basic rights not yet contained in the Constitution.[410]

---

[409] Simon Butt, 'The Position of International Law within the Indonesian Legal System', *Emory International Law Review*, Vol. 28 (2014): 19.

[410] Bisariyadi, 'Referencing International Human Rights Law in Indonesian Constitutional Adjudication', *Constitutional Review* 4 (2018), 249.

6.4.3. The Constitutional Court's Relationship to the Government and the Parliament

One of the most important role facing the Constitutional Court is to secure the effectiveness of its decisions. As constitutional adjudication is aimed at ensuring the constitutionality of state power, other public institutions must respect the Court decisions. Any disagreement and non-conformance by other state agencies would undermine the consistency of the state's legal order centered upon the Constitution, as well as cause confusion and suffering on the part of the people. To prevent this from happening, a system should be built to assure the effectiveness and enforceability of the decisions, while other state agencies should endeavor to respect mutual authority and to cooperate.[411]

This section aims to analyze and describe the relation between the Constitutional Court with the House of Representative and the President as legislators by looking on implementation of Constitutional Court decision. Tensions between the Constitutional Court and the Legislature are increasingly sharpening, because in a practice, the Court often gives constitutional orders to the legislator for legislative drafting.

Normatively, the Court decisions are final and binding to all state authorities. But in reality, there are problems in the implementation of it. The implementation of the decision is not the task of the Constitutional Court, but the domain of other state institutions. In addition, the presence of the Court is generally not politically desirable. Therefore, it is possible that the Court's decision is not implemented because of the relation of the two institutions. If that happens, it will be difficult to realize the constitutional legislation.

In practice, the Constitutional Court has also several times provided recommendations to the legislature, the following decisions are the example of the Court the recommendations to the Legislature.[412]

---

[411] Constitutional Court of Korea, *Thirty Anniversary*, 106

[412] Fajar Laksono, 'Relation between the Constitutional Court of the Republic of Indonesia and the Legislators According to the 1945 Constitution of the Republic of Indonesia', *Constitutional Review* 3, no. 2 (2017): 141-70.

a. Recommendations to Amendment or Establishment of New Act

- Decision Number 001-021-022/PUU-I/2003, it is recommended that the legislators prepare a new Electricity Bill in accordance with Article 33 of the 1945 Constitution
- Decision Number 005/ PUU-IV/2006, the Constitutional Court also recommends to the People's Representative Council (DPR) and the President to take immediate steps to perfect the Judicial Commission Law. In fact, DPR and the President also recommended to make improvements that are integral.
- Decision Number 4/PUU-VII/2009, the Court encourages the Legislators to be more earnest to review all legislation so long as it relates to the right of former convicted Tailored to this Decision.

b. Giving a Time Limit in Revising Law

- Decision Number 54/PUU-VI/2008, in order to obtain tobacco excise duty, it is necessary to amend the provisions of Article 66A paragraph (1) of Law Number 39/2007, that the allocation of tobacco excise taxes for tobacco-producing provinces in the APBN shall be fulfilled no later than the 2010 Fiscal Year**.**
- Decision Number 32/PUU-XI/2013, two years and six months after the Court's decision is pronounced is sufficient time to complete the Act.

c. Providing Time Constraints with Consequences

- Decision Number 012-016- 019/PUU-IV/2006, legislator must immediately conduct alignment of the Corruption Eradication Commission Act with the Constitution 1945 and establish a law on the Corruption Court. If within three years cannot be fulfilled by the legislator, the provision of Article 53 of the Corruption Eradication Commission Law by itself, by law (*van rechtswege*), has no binding legal force anymore.
- Decision Number 13/PUU-VI/2008, the Constitutional Court then needs to once again remind legislator to no later than in the State Budget (APBN) Law Fiscal Year 2009 must have fulfilled its constitutional obligation to provide a budget of at least 20% for education.

d. Providing the Requirement to the Legislature in Drafting New Law

- Decision Number 115/PUU-VII/2009, with this decision the legislators need to take the initiative to conduct legislative review.
- Decision Number 8/PUU-VIII/2010, In order to improve the Right to Inquiry Act as a result of the unconstitutionality of Law No. 6/1954, Legislators need to anticipate to form Law as intended in Article 20A Paragraph (4) of the 1945 Constitution with due regard to Law Number 27/2009 which related to the rights of Parliament and members of Parliament.
- Decision Number 15/PUU-IX/2011, Legislators should distinguish between the procedures for forming or establishing a political party with rules on the conditions imposed on a political party in order for a political party to be eligible, as well as the provisions governing the legislature.
- Decision Number 34/PUU-X/2012, in the future, Legislators need to set the same requirements for candidates of the Registrar of the Supreme Court and the Constitutional Court.
- Decision Number 25/PUU-XII/2014, the use of the Government Budget for operational costs of Financial Services Authority shall contain the time constraints which become the authority of the Actors to assess them.
- Decision Number 5/PUU-V/2007, requires that the Local Government Law adjust to the new developments that have been made by legislators themselves that is by giving the right to individuals to be able to run as regional head and deputy head of the region without having to go through a political party or a coalition of political parties.
- Decision Number 133/PUU-VII/2009, the Law Number 30/2002 should regulate the procedure of filling temporary vacancy of the Corruption Eradication Commission leadership.

Such essential Constitutional Court recommendations must be followed up by the legislature, and the problem is that although the Constitutional Court's decision is final and binding, the Constitutional Court does not have the instruments to oversee the implementation of the decision. In this context, Woo-Young Rhee provides recommendations that need to be applied

by the legislature, such as giving separation of legislative calendar for those statutory legislation based upon the Constitutional Court decision, expedited process for legislation on such calendar, and automatic opening of process at a certain interval.[413] These mechanisms provide space for the Constitutional Court and the public in general to monitor the legislation process regarding the follow-up of the Constitutional Court's decision in the parliament.

When referring to the experience and practice of the Korean Constitutional Court, where one of the biggest influence of the Korean Constitutional Court on the order of authority is that it has put every state action within the scope of constitutional order prior to any constitutional review by the Korean Constitutional Court.[414]

In this context, the steps to realize the cooperative relations of the Constitutional Court and legislators is to create rules on the implementation of the Court decision, in the Indonesian Constitution, in the act, and the Court's decision. The legal rules regarding the implementation of the Court decision is important to realize a lasting cooperative relationships. Therefore, the Court and legislator must be aware of the nature and meaning that the ultimate goal of the exercise of their respective powers is the same, namely enforcing the Indonesian Constitution.

[413] These ideas proposed by Prof Woo-Young Rhee during thesis discussion.

[414] Jong Ik Chon, 'The Effect of Constitutional Review on the Legislature and the Executive Branch for Last 25 Years in Korea', *Journal of Korean Law*, Vol. 14 (June 2015): 164.

CHAPTER 7

CONCLUSION

The idea of the Indonesian Constitutional Court establishment is intended to resolve some cases that are related to the constitutional issues in Indonesia. Since its establishment on 13 August 2003, many landmark decisions have been issued, and it shows that the Constitutional Court has been playing an important role in the fundamental rights protection in Indonesia. Despite its achievements, however, the Constitutional Court's performance has also sparked controversy that influenced and impacted the Indonesian legal order. A comparative analysis with the Korean and German Constitutional Court systems can yield lessons to improve the Indonesian constitutional adjudication system.

First, the Constitutional Court organization, the problems occur related to the justice selection system, where there are no clear standards set by each institution in the selection system, and there is no consistency where the change of President also has a different selection mechanism. In this regard, the Korean model of justices selection can be a reference for Indonesia, even though the justices selection systems in Indonesian and Korea are normatively similar, but there are high standards apply in Korea, each branch has their standards and qualifications, then the best candidates will be assessed by the National Assembly through the hearing process. Another important organizational issue is the term of office, the author recommends revising the term of office from five years and might be re-appointed changes to be six years and cannot be re-elected. This option can make justices more independence that will make justices focus on their functions without any worry with the next selection period.

Moreover, the supporting system of justices is also important, where the number of researchers at the Indonesian Constitutional Court is still very small when compared to the Korean or German Constitutional Court. Therefore, increasing the supporting system to the Justices is one of the solutions in dealing with the effects of the potential introduction of constitutional complaint and concrete review.

Second, the Constitutional Court jurisdictions, as mentioned in the Constitution and the

Court Law that the Indonesian Constitutional Court jurisdictions consist of constitutional review, disputes amongst state institutions, dissolution of a political party, disputes on the results of a general election, and impeachment. However, these jurisdictions are still very limited, it is because the important mechanism such as constitutional complaint and concrete constitutional review are not part of the Court jurisdictions. Therefore, the Indonesian Constitutional Court should expand its jurisdictions as owned by the Korean and German Constitutional Courts.

There are three options exist for the adoption of the constitutional complaint and concrete constitutional review. Yet each of the alternative methods certainly has its own deficiencies and advantages. The first alternative is amending again the constitution which is requires a complicated process, besides requiring a long time. Second, via legislative action, the legislative amends the existing law or even establishes a new law concerning the Constitutional Court. However, such legislative interpretation could be challenged again by the people, so this approach may not provide an easily settled course of action. Third, the introduction of constitutional complaint and concrete review via constitutional interpretation by the Constitutional Court may also be possible, but such an approach can only be used as long as there is a concrete case that involves the connection with some norm of law.

Third, the Constitutional Court procedural law, basically each jurisdictions have their own rule of procedure that regulate the applicant and its requirements, hearing process, and time limit. Regarding the time limit in deciding the case, that the Court doesn't have time limit to decide the case of constitutional review and dispute amongst institution. To prevent lengthy delays affecting ordinary courts in making final decisions, the time limit for these two jurisdictions should be regulated, either in the Constitutional Court Law or the Constitutional Court Regulation. In addition, there is no clear standards of the expert, the Constitutional Court should provide standards to an expert in the Court hearing, this can be done by revising the Court rule of procedure.

Another important procedural issue is related the absent of legislature and government in the Court hearing. The Parliament as the main legislator often does not present in the Court hearing to provide information, even though the Constitutional Court has called it legally and properly. As a result, there is no information and views from the Parliament that can be taken into

consideration for the Justices to decide the case. Therefore, the Constitutional Court should regulate the mandatory statement of Government and Legislature in the Court hearing, this can be done by revising the Court rule of procedure.

Forth, the Constitutional Court decision, the Constitution clearly stipulates that the Indonesian Constitutional Court decision is final and binding. However, the implementation of Constitutional Court decisions remains one of the main problems in its implementation. To solve this issue, the Court and legislators should create rules on the implementation of the Court decision. In other situations, the type of decisions are not fully covered by the Court Law, for example the provisional decision is actually only known in cases of disputes state institutions and general elections dispute. Lastly, to secure the effectiveness of the Constitutional Court decisions, a system should be built to assure the effectiveness and enforceability of the decisions, such as giving separation of legislative calendar for those statutory legislation based upon the Constitutional Court decision, expedited process for legislation on such calendar, and automatic opening of process at a certain interval.

BIBLIOGRAPHY

A. Books

Asshiddiqie, Jimly. *Pokok-Pokok Hukum Tata Negara Indonesia* [The Principles of Constitutional Law]. Jakarta: PT. Bhuana Ilmu Populer, 2007.

Asshidiqie, Jimly. *Model-model Pengujian Konstitusional di Berbagai Negara* [Models of Constitutional Review in Various Countries]. Jakarta: Konstitusi Press, 2005.

Asshiddiqie, Jimly. *Kemerdekaan Berserikat, Pembubaran Partai Politik dan Mahkamah Konstitusi* [Independence of Association, Dissolution of Political Parties and Constitutional Court]. Jakarta: Konstitusi Press, 2005.

AACC SRD. *Jurisdictions and Organization of AACC Members*. Edited by AACC SRD. Seoul: AACC SRD, 2018.

Butt, Simon. *The Constitutional Court and Democracy in Indonesia.* Leiden/Boston: Brill - Nijhoff, 2015.

Chen, A., & Harding, A. (Eds.). *Constitutional Courts in Asia: A Comparative Perspective* (Comparative Constitutional Law and Policy). Cambridge: Cambridge University Press, 2018.

Constitutional Court of Korea. *Thirty Years of the Constitutional Court of Korea*, Seoul: the Constitutional Court of Korea, 2018.

Constitutional Court of Korea. 'AACC Member Fact File: Constitutional Court of Korea,' in *the Jurisdictions and Organization of AACC Members,* ed. AACC SRD. Seoul: AACC SRD, 2018.

Constitutional Court of Korea. *The First Ten years of the Korean Constitutional Court*. Seoul: The Constitutional Court of Korea, 2001.

Constitutional Court of Indonesia. 'AACC Member Fact File: Constitutional Court of Indonesia,' in *the Jurisdictions and Organization of AACC Members,* ed. AACC SRD. Seoul: AACC SRD, 2018.

Constitutional Court of Indonesia. *Profile of the Indonesian Constitutional Court*. Jakarta: Registrar's Office and Secretariat General of the Constitutional Court, 2015.

Huq, Aziz Z., and Tom Ginsburg. *How to Save a Constitutional Democracy*. Chicago: The

University of Chicago Press, 2018.

Indrayana, Denny. *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition,* Jakarta: Kompas Book Publishing, December 2008.

International IDEA. *Rule of Law and Constitution Building: The Role of Regional Organizations*, edited by Raul Cordenillo and Kristen Sample, Sweden: International Idea, 2014.

Kommers, Donald P. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2nd ed., rev. Durham: Duke University Press, 1997.

Kelsen, Hans. *Pure theory of law*. Berkeley: University of California Press, 1967.

Lee, Kang-Kook. 'The Past and Future of Constitutional Adjudication in Korea.' In *Current Issues in Korean Law,* edited by Laurent Mayali and John Yoo, 1-13. California: Robbins Collection Publication School of Law University of California at Berkeley, 2014.

McConville, Michael and Wing Hong Chui. *Research Methods for Law*. Edited by Mike Mcconville and Wing Hong Chui. Edinburgh: Edinburgh University Press, 2007.

Palguna, I Dewa Gede. *Pengaduan Constitutional: Upaya Hukum terhadap Pelanggaran Hak-hak Warga Negara* [Constitutional Complaint: Legal Remedy against Violation of Citizens' Rights]. Jakarta: Sinar Grafika, 2013.

Rogowski, Ralf, and Thomas Gawron, eds. *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court*. New and Revised Second Edition. New York: Berghahn Books, 2016.

Smith, Nicholas Mark. *Basic Equality and Discrimination: Reconciling Theory and Law*. England: Ashgate Publishing Limited, 2011.

Whittington, Keith E. *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review.* Kansas: University Press of Kansas, 1999.

B. Journal Articles

Andreescu, Marius and Claudia Andreescu. 'The supremacy of the Constitution, Challenges of the Knowledge Society,' *Nicolae Titulescu University Publishing House*, Volume 12, (01 May 2018).

Butt, Simon. 'The Constitutional Court and Indonesian Electoral Law.' *Australian Journal of Asian Law*, Volume 16 Number 2 (2016).

Butt, Simon. ‘The Function of Judicial Dissent in Indonesia’s Constitutional Court.’ *Journal of Constitutional Review*, Volume 4, Number 1 (May 2018).

Butt, Simon. ‘The Position of International Law within the Indonesian Legal System’, *Emory International Law Review*, Vol. 28 (2014).

Bisariyadi. 'Referencing International Human Rights Law in Indonesian Constitutional Adjudication', *Constitutional Review* 4 (2018).

Bröhmer, Jürgen., Clauspeter Hill & Marc Spitzkatz (Eds.). ‘60 Years German Basic Law: The German Constitution and its Court,’ Landmark Decision of the Federal Constitutional Court of Germany in the Area of Human Rights, ed. Suhainah Wahiduddin, 2nd edition, *The Malaysian Current Law Journal* (2012).

Chon, Jong Ik. ‘The Effect of Constitutional Review on the Legislature and the Executive Branch for Last 25 Years in Korea.’ *Journal of Korean Law*, Vol. 14 (June 2015).

Chakim, M Lutfi. 'Perubahan Sistem Pemilihan Kepala Daerah Dalam Dinamika Pelaksanaan Demokrasi [Changes of the Local Election System in the Dynamics of Democracy]', *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 3, no. 1 (2014).

Dannemann, Gerhard. ‘Constitutional Complaints: The European Perspective.’ *the International and Comparative Law Quarterly* 43, no. 1 (January 1994).

Damle, Sarang Vijay. ‘Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court.’ *Virginia Law Review* 91 (2005).

Edyono, Luthfi Widagdo. ‘The First Ten Years of the Constitutional Court of Indonesia: The Establishment of the Principle of Equality and the Prohibition of Discrimination.’ *Constitutional Review Journal*, Volume 1, Number 2 (December 2015).

Flethcer, William. ‘The Structure of Standing,’ *The Yale Law Journal* 98, no. 221 (1988).

Franz, Paul. ‘Unconstitutional and Outlawed Political Parties: A German-American Comparison.’ *BC Int'l Comp. & L. Rev.* 5 (1982).

Hendrianto, Stefanus. ‘The Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia.’ *Washington International Law Journal*, Volume 25 No. 3 (2016).

Horowitz, Donald L. 'Constitutional Courts: A Primer for Decision Makers', *Journal of Democracy* 17, no. 4 (2006).

Howard, Erica. ‘Equality: A Fundamental Right in the European Union?’ *International Journal of Discrimination and the Law*, Vol. 10 (2009).

Howie, Emily. 'Protecting the Human Right to Freedom of Expression in International Law', *International Journal of Speech-Language Pathology* 20, no. 1 (2018).

Huq, Aziz Z., and Tom Ginsburg. 'How to Lose a Constitutional Democracy', *UCLA Law Review* 65, no. 1 (2018).

Haggard, Stephan and Jong-Sung You. 'Freedom of Expression in South Korea', *Journal of Contemporary Asia* 45, no. 1 (2014).

Indramayu, Jayus, and Rosita Indrayati. 'Rekonseptualisasi Seleksi Hakim Konstitusi Sebagai Upaya Mewujudkan Hakim Konstitusi Yang Berkualifikasi [Reconceptualization of the Selection of Constitutional Justices as an Effort to Create Qualified Constitutional Justices]', *Lentera Hukum* 4, no. 1 (2017).

Kang, Jangseok, ‘The Survivability of Divided Government in the Korean Presidentialism,’ *Korean Political Research* Vol. 17 No. 1 (2008).

Lim, Jibong. ‘A Comparative Study of the Constitutional Adjudication System of the U.S., Germany and Korea.’ *Tulsa Journal of Comparative and International Law* 6, Issue 2 (3 January 1999).

Limbach, Jutta. ‘The Concept of the Supremacy of the Constitution,’ *The Modern Law Review*, Volume 64, No. 1 (January 2001).

Leitner, John M. ‘Anonymity, Privacy, and Expressive Equality: Name Verification and Korean Constitutional Rights in Cyberspace’, *Journal of Korean Law* 14 (June 2015).

Laksono, Fajar. 'Relation between the Constitutional Court of the Republic of Indonesia and the Legislators According to the 1945 Constitution of the Republic of Indonesia', *Constitutional Review* 3, no. 2 (2017).

Mietzner, Marcus. ‘Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court.’ *Journal of East Asian Studies* 10, no. 3 (2010).

Niesen, Peter. ‘Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties - Part I.’ *German Law Journal* 3, no. 7 (2002).

Palguna, I Dewa Gede. ‘Constitutional Complaint and the Protection of Citizens the Constitutional Rights’, *Constitutional Review Journal*. Volume 3, Number 1 (May 2017).

Palguna, I Dewa Gede. ‘Constitutional Question: Latar Belakang dan Praktik di Negara Lain serta Kemungkinan Penerapannya di Indonesia [Constitutional Question: Background and Practice in Other Countries and the Possibility of Its Implementation in Indonesia]’, *Jurnal Hukum* 1 (2010).

Quint, Peter E. ‘Leading a constitutional court: Perspectives from the Federal Republic of Germany.’ *U. Pa. L. Rev.* 154 (2005).

Rhee, Woo-young. ‘Democratic Legitimacy of Law and the Legislative Function of the Constitutional Adjudication in the Republic of Korea.’ *Journal of Korean Law*, Vol. 6, No. 1 (2006).

Satriawan, Iwan. ‘The Constitutional Court’s Role in Consolidating Democracy and Reforming Local Election.’ *Constitutional Review Journal*, Volume 1, Number 1 (May 2015).

Sasmito, Hery Abduh. ‘*Ultra Petita* Decision of Constitutional Court on Judicial Review (The Perspective of Progressive Law).’ *Journal of Indonesian legal Studies,* Volume 1 Issue 01 (November 2016).

Satrio, Abdurrachman. 'Constitutional Retrogression in Indonesia under President Joko Widodo's Government: What Can the Constitutional Court Do?', *Constitutional Review* 4, no 2 (December 2018).

Staples, Clara. 'Freedom of Speech in Indonesian Press: International Human Rights Perspective', *Brawijaya Law Journal* 3, no. 1 (2016).

Tebbe, Nelson and Robert L. Tsai. ‘Constitutional Borrowing.’ *Michigan Law Review* 108, no. 4 (2010).

Thomsen, Frej Klem. ‘Concept, Principle, and Norm-Equally Before the Law Reconsidered,’ *Legal Theory* 24 (2018).

Wijaya, Pan Mohamad Faiz Kusuma. 'Legal Problems of Dualism of Judicial Review System in Indonesia', *Jurnal Dinamika Hukum* 16, no. 2 (2016).

Wijaya, Pan Mohamad Faiz Kusuma. ‘A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court.’ *Constitutional Review* 2, no 1 (May 2016).

Yoon, Dae-Kyu. ‘The Constitutional Court System of Korea: The New Road for Constitutional Adjudication.’ *Journal of Korean Law*, Vol. 1, No. 2 (2001).

Youm, Kyu Ho. 'The Constitutional Court and Freedom of Expression.' *Journal of Korean Law* 1 (2001).

Youm, Kyu Ho. 'Freedom of Expression and the Law: Rights and Responsibilities in South Korea (Expressive Rights in the Information Age).' *Stanford Journal of International Law* 38, no. 1 (2002).

Zoelva, Hamdan. 'Problematika Penyelesaian Sengketa Hasil Pemilukada Oleh Mahkamah Konstitusi [Problems of Settlement of Local Election Disputes by the Constitutional Court]', *Jurnal Konstitusi* 10, no. 3 (2013).

C. Reports, Proceedings, and Presentation Materials

Constitutional Court of Indonesia, 'Proceeding International Symposium on Constitutional Complaint'. *The Registry and Secretariat General of the Constitutional Court of the Republic of Indonesia,* Jakarta, 2015.

Constitutional Court of Indonesia. 'The Jurisdictions and Organization of the Indonesian Constitutional Court.' *Presentation Material of the Indonesian Constitutional Court at the 1st Research Conference of the AACC SRD*, the AACC SRD, Seoul, 2018.

Hyeong-Ki, Min. 'The Role of the Constitutional Court in Strengthening the Principles of Democracy.' *The International Symposium on Constitutional Democratic State*. The 8th Anniversary of the Constitutional Court of the Republic of Indonesia, Jakarta, Indonesia, 10-14 July 2011.

McCrudden, Christopher and Sacha Prechal. 'The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach, European Network of Legal Expert in the Field of Gender Equality.' *The European Commission, Directorate-General for Employment, Social Affairs and equal Opportunities*, 2006.

Nasution, Adnan Buyung. **'**Towards Constitutional Democracy in Indonesia'*, Inaugural Professor Lecture, Papers on Southeast Asian Constitutionalism*, Asian Law Centre, University of Melbourne, 2011.

Omara, Andi. 'Lessons from the Korean Constitutional Court: What can Indonesia Learn from the Korean Constitutional Court Experience?' *Korean Legislation Research Institute* 11, 2008.

Palguna, I Dewa Gede. 'Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizen.' In *Proceeding International Symposium on Constitutional Complaint*, ed. the Constitutional Court of Indonesia, Jakarta: The Constitutional Court of Indonesia, 2015.

The People Consultative Assembly. 'Rekomendasi MPR tentang Penataan Kekuasaan Kehakiman [the MPR Recommendation concerning the Improvement of the Judicial Power].' *Badan Pengkajian MPR-RI*, Jakarta, 2018.

D. Thesis or Dissertations

Hapsari, Luna. 'Film Censorship in Indonesia: Contestation Between Indonesia Censorship Board (LSF) and The Public in Defining Pornography'. Thesis of University of Indonesia, July 2017.

Tsereteli, Nino. 'Mechanism of Individual Complaints – Germany, Spanish and Hungarian Constitutional Court – Comparative Analysis.' LL.M. Short Thesis, Central European University, Hungary, 2 April 2007.

Wijaya, Pan Mohamad Faiz Kusuma. 'The Role of the Constitutional Court in Securing the Constitutional Government in Indonesia.' Ph.D. thesis submitted for the degree of Doctor of Philosophy at the University of Queensland, Australia, 2016.

Wittig, Caroline Elisabeth. 'Ideological Values and their Impact on the Voting Behavior of Justices of the Federal Constitutional Court of Germany.' Thesis Master of Public Administration Bowling Green State University, August 2009.

E. Online Resources

Constitutional Court of Indonesia. 'Case Statistics of the Constitutional Court of Indonesia,' accessed 6 December 2019. https://mkri.id/index.php?page=web.RekapPUU&menu=18

Constitutional Court of Korea. 'Case Statistics of the Constitutional Court of Korea,' accessed 6 December 2019. http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do

Constitutional Court of Armenia. 'The Independence and the Autonomy of the Organization of the Constitutional Court,' accessed 18 August 2019. http://www.concourt.am/Books/harutunyan/monogr3/ch3p2.htm

Human Rights Watch. ‘Turning Critics into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia’, accessed 9 September 2019. https://www.hrw.org/report/2010/05/03/turning-critics-criminals/human-rights-consequences-criminal-defamation-law

Nurbaningsih, Enny. ‘Rule of Law and Its Development in Indonesia’, accessed 05 December 2019. https://worldjusticeproject.org/sites/default/files/documents/remarks_english_drenny.pdf

Office for Democratic Institutions and Human Rights. ‘Elections to the Federal Parliament (Bundestag),’ *Election Assessment Mission Report*, (Warsaw, 14 December 2009), accessed 30 May 2019. https://www.osce.org/odihr/elections/germany/40879?download=true

Soesetyo, Wasis. ‘Guarding Constitution through the Court.’ University of Indonusa Esa Unggul, Jakarta, accessed 22 August 2018. http://www.ialsnet.org/meetings/constit/papers/SusetioWasis(Indonesia).pdf

The German Federal Constitutional Court. ‘How to Lodge the Constitutional Complaint,’ accessed March 2018. https://www.bundesverfassungsgericht.de/EN/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt.html

The German Federal Constitutional Court. ‘Annual Statistic 2018,’ (February 2019), accessed 16 April 2018. https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2018.pdf?__blob=publicationFile&v=4

The German Federal Constitutional Court. ‘*Organstreit* Proceedings’, accessed 30 May 2019. https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Organstreitverfahren/organstreitverfahren_node.html

The German federal Constitutional Court. ‘Specific Judicial Review of Statutes’, accessed 30 May 2019. https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Konkrete-Normenkontrolle/konkrete-normenkontrolle_node.html

The German Federal Constitutional Court. ‘Abstract Judicial Review of Statutes’, accessed 30 May 2019. https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Abstrakte-Normenkontrolle/abstrakte-normenkontrolle_node.html

The German Federal Constitutional Court. ‘Profile of the German Federal Constitutional Court,’ (2017), accessed 16 April 2019, www.bundesverfassungsgericht.de

The Bangalore Principles of Judicial Conduct, accessed 30 October 2019. https://www.judicialintegritygroup.org/jig-principles

초 록

인도네시아 헌법재판의 제도적 개선방안:

한국 및 독일과의 비교법적 고찰을 바탕으로

차킴 러트피

헌법

법과대학

서울대학교

인도네시아 헌법재판소는 인도네시아에서의 헌법적 쟁점에 관한 일정한 사건들을 해결하기 위하여 설립되었다. 2003년 8월 13일 설립 이래 많은 획기적인 결정들이 내려졌고, 인도네시아 헌법재판소는 민주적 기본질서와 법치주의, 그리고 기본권을 수호하는 데 중요한 역할을 수행하고 있다. 그러나 재판소의 획기적 결정들을 통한 성과들에도 불구하고 인도네시아의 헌법재판제도는 대중들의 지적과 비판 또한 불러일으켰고, 조직 체계와 재판권의 한계, 재판절차의 문제들, 그리고 결정들에 대한 논쟁에서 몇몇 문제들도 드러내었다. 이 논문은 인도네시아 헌법재판제도의 전반적인 모습을 그려봄과 동시에, 재판소가 직면한 문제들과 도전들을 살펴봄으로써 그 역할과 성과를 평가하여 보려는 것이다. 연구는 이론적 고찰, 그리고 대한민국이나 독일과 같은 다른 나라의 헌법재판소들과의 비교 연구를 통하여

수행되었다. 기본권을 보호하는 과정에서 도전들에 직면할 것이기에 인도네시아 헌법재판소로서는 그 역할과 성과를 계속하여 향상시키는 것이 반드시 필요하다. 사건에 관해 결정을 내리는 과정에서 법을 집행하고 정의를 실현하기 위하여 헌법재판관들은 독립적이고 공정하여야 한다. 기본권을 최대한 보호하기 위하여 헌법소원과 구체적 규범통제 제도를 도입함으로써 헌법재판권한은 넓어져야 한다. 마지막으로, 재판소 결정들의 효력을 보장하기 위하여, 다른 국가기관들이 재판소 결정들을 존중하고 그에 따라야 하는 것과 별개로, 결정들의 효력과 집행을 확보하는 제도가 마련되어야 한다.

키워드: 비교 헌법; 헌정; 헌법 적 판결; 헌법 재판소; 인도네시아; 대한민국; 독일.

학번: 2018-25519