Comparing Practice of Judicial Review in Indonesia and Japan: Learning from Their Diversity and Commonalities

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Abstract

Indonesia and Japan are example of countries where judicial body owned the authority to conduct judicial review. Article 81 of the Japanese Constitution (1947) grants the Japanese Supreme Court an authority to review the constitutionality of any laws, order, regulation, or official act. With slightly different model, The Indonesian Constitution (The 1945 Constitution post amendment 1999-2002) grants the authority to review law against the Constitution in the hand of The Indonesian Constitutional Court. Even though the existence of judicial review mechanism in Japan is much longer than that of Indonesia, it does not mean that the Japanese judiciary handles more judicial review cases. This paper aims to comparatively study why there are significant different between Indonesia and Japan concerning the attitude of the judiciary toward judicial review cases. The Indonesian judiciary specifically the Mahkamah Konstitusi to a certain extent is more 'progressive' in conducting judicial review compared to that of the Japanese Supreme Court. What factors contributing to this very different attitude. What lessons can be learnt from both countries in regard to judicial review? To answer the above questions, the paper will analyze the practice of the judiciary specifically on judicial review in both countries. Such analysis includes the work of judicial review system in both countries, factors contributing to 'the difference' of the work of the judiciary on judicial review and what lessons can be learnt from other countries experience to improve the work of judicial review system. It is expected that through this comparative study the concerned countries may obtain some essential lessons from their country counterpart experience.

Key words: Judicial Review, Indonesia, Japan

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I. Introduction

In the field of constitutional law, judicial review (The US system) or constitutional review (European system) primarily means a review conducted by the judiciary toward the constitutionality of laws and regulations such as acts, ordinances, rules and regulations, and of administrative actions. This term is significant to differentiate such review with other types of review such as legislative review[1] or executive review.[2]

In modern democracy, many countries adopt the mechanism of judicial review with the aims to protect the rights of the people as well as to uphold the norms of the constitution. Indonesia and Japan are example of countries where the judicial body own the authority to conduct judicial review. Article 81 of the Japanese Constitution (1947) grants the Japanese Supreme Court authority to review the constitutionality of any laws, order, regulation, or official act. With a slightly different model, the Indonesian Constitution (The 1945 Constitution post amendment) grants the authority to review law against the Constitution in the hand of The Indonesian Constitutional Court.[3]

The primary aim of this research is to observe the practice of the judiciary specifically on judicial review in Japan as well as in Indonesia. The observation will cover understanding the work of judicial review system; obstacles that may exist and how to overcome such situations; efforts to improve the work of the judicial review system and modify the judicial review system. It is expected that through this comparative study the concerned countries may take some essential lessons from their country counterpart experience.

The paper will be structured as follows: to begin with, the paper will briefly discuss some fundamental issues on constitutional law in both countries. This includes the discussion on how the judiciary is structured in both countries. This will be followed by the discussion of the characteristics of judicial review systems in Japan and Indonesia. In doing so, the paper will critically analyze the character of judicial review in both countries. Such analysis will include the works of the judiciary in dealing with judicial review cases, the

1. Reviews conducted by the legislature commonly in the form of amending a legislative statute.
2. In the case of Indonesia, such review is conducted by the Executive toward certain regional regulations.
3. Article 24C of the 1945 Constitution of the Republic of Indonesia.

attitude of the judiciary toward judicial review cases, and obstacles that is faced by the judiciary. The paper then will look at some possibilities to overcome the problems by learning from other countries' experience and finally find some possible solutions to overcome such difficulties.

II. Some Fundamental Issues on the Judiciary in Japan and Indonesia

This part will briefly compare some significant features of the Japanese and Indonesian constitutional arrangements. Such comparison includes the structures of the government, types of governmental system, the legislature, and the judiciary. This comparison is significant to understand how the constitution in both countries distributes the power of governance; particularly the judiciary, as the judicial review system is part of the judicial system.

Historically, the very first modern constitution enacted in Japan is the old Constitution of The Empire of Japan ("The Meiji Constitution"). It was promulgated on February 11, 1889, and in force from November 29, 1890 to May 2, 1947. It consists of seven chapters and 76 articles in total. Its organization was as follows: Chapter I, The Emperor; Chapter II, Rights and Duties of Subjects; Chapter III, The Imperial Diet; Chapter IV, The Ministers of State and the Privy Council; Chapter V, The Judicature; Chapter VI, Finance; Chapter VII, Supplementary Rules.[4]

In the Meiji Constitution, judicial review was not clearly expressed in the sense that it is possible to question the propriety of procedure in establishing law, but it is still questionable whether it is possible to review the substance of law.[5] The unclear expression regarding judicial review in the Meiji Constitution reflects the idea that the final interpreter of the constitution is the legislature, not the judiciary. This was based on an assumption that under the Meiji Constitution the people would agree to have their rights limited by

4. *Japan's Present Crisis and Her Constitution: The Mikado's Ministers Will Be Held Responsible by the People for the Peace Treaty -- Marquis Ito May Be Able to Save Baron Komura*, N.Y. Times, Sept. 3, 1905, http://query.nytimes.com/gst/abstract.html?res=9C01E5D8103AE733A25750C0A96F9C946497D6CF&scp=5&sq=order+of+meiji&st=p.

5. Norikazu Kawaguchi, *The Birth of Judicial Review in Japan*, 5 I•CON, no. 2, 314 (2007), *available at* http://icon.oxfordjournals.org/ at Nagoya University on Jan. 26, 2012.

the emperor as far as it is supported by the legislature (the Imperial Diet).[6] This leads to the insufficient protection of the rights of the people in the Constitution. The failure to compromise between the autocracy nature of the Constitution and the protection of the people rights resulted in the amendment of the Meiji Constitution.[7]

The amendment[8] of the Meiji Constitution was held in 1946. In general, the structure of the New Constitution, *Nihonkoku Kenpo* ("The Constitution of Japan") enacted on November 3, 1946, and effective as of May 3, 1947, is not significantly different compared to the old Constitution. The new Constitution consists of eleven chapters and 103 articles in total. Its structure is as follows: Chapter I, The Emperor; Chapter II, Renunciation of War; Chapter III, Rights and Duties of the People; Chapter IV, The Diet; Chapter V, The Cabinet; Chapter VI, Judiciary; Chapter VII, Finance; Chapter VIII, Local Self-Government; Chapter IX, Amendments; Chapter X, Supreme Law; Chapter XI, Supplementary Provisions.[9]

What becomes the significant difference in the new Constitution, is the status and powers of the Emperor. Although the Emperor still remains as an important institution, the Emperor is no longer the head of state with significant authority to govern. The Emperor has become "The symbol of the State and of the unity of the people, deriving his position from the will of the people, with who resides sovereign power."[10] In other words, there has been a fundamental change in the holder of sovereign power from the Emperor to the people.

Further, some new fundamental principles also establish in the new Constitution. These include the change of *kukotai* concept[11] into the sovereignty of the people. It is mentioned in the preamble of the Constitution that "Government is a sacred trust of the people, the authority for which is derived from

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6. *Id.*
7. *Id*. at 315.
8. The 1947 Constitution considers as an amendment of the 1898 Constitution of the Empire of Japan (the Meiji Constitution), even though in reality it was a new constitution particularly in the history of the process of amendment and promulgation.
9. Nihonkoku Kenpō [Kenpō] [Constitution] (Japan) *available at* http://www.solon.org/Constitutions/Japan/English/english-Constitution.html.
10. *Id*. art. 1.
11. *Kokutai* concept means the Emperor should govern Japan forever by following the will of the imperial founder and his ancestors.

the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people."[12]

The Japanese Constitution holds a popular sovereignty principle.[13] The Constitution is considered as the supreme law of the land. The draft of the Japanese Constitution is prepared by the Supreme Commander of Allied Powers (SCAP), General Douglas MacArthur.[14] Thus to a certain extent, it resembles the US Constitution. Japan is a constitutional monarchy[15] with the Emperor as the symbol of the state.[16] The governmental system is a parliamentary democracy where the Executive is responsible to the Japanese parliament (The Diet).[17] The Diet consists of a House of Representatives and a House of Councilors.

Executive power is vested in a cabinet composed of a prime minister and ministers of state,[18] all of whom must be civilians. The prime minister must be a member of the Diet and is designated by his colleagues. The prime minister has the power to appoint and remove ministers, a majority of whom must be Diet members.

The Judiciary is in the hand of the Supreme Court and other lower courts, which are established by the Diet and their independence is guaranteed by the Constitution.[19] Besides settling disputes, the Japanese Supreme Court has the authority to conduct judicial review.[20]

Unlike Japan, Indonesia is a presidential government where the president acts as head of state and head of government.[21] The very first Indonesian Constitution established in 1945. This is why it is called the 1945 Constitution (*Undang-Undang Dasar Tahun* 1945). This Constitution is established by the Committee on Preparation of Indonesian Independence or BPUPKI which consists of 62 members. This Constitution is very brief as it only

12. Nihonkoku Kenpō [Kenpō] [Constitution], pmbl. (Japan).
13. *Id*. art. 1.
14. Norikazu Kawaguchi, *supra* note 5, at 317.
15. Nihonkoku Kenpō [Kenpō] [Constitution], art. 1, 4 (Japan).
16. *Id*. art. 1.
17. *Id*. art. 66.
18. *Id*. art. 65.
19. *Id*. art. 76.
20. *Id*. art. 81.
21. Article 4-15 of the 1945 Indonesian Constitution.

consists of Preamble, Body (37 articles, two transitional articles, and two additional rules) and Elucidation. This Constitution is often called "lightning" Constitution as it was created in a very short period of time, approximately two months. Thus, it is not surprising that this Constitution regulates aspects of governance in a very general way.

With such a Constitution, the structure of governance was established as the Constitution rules; the structure is as follows: Executive (the President, Vice President and Ministers), the Legislature (The DPR), and the Judiciary (the MA). The President is elected by the MPR (consists of the DPR, regional delegates, and group delegates), the highest institution in the Indonesian governance structure. In this Constitution, the authority of the President can be said significantly powerful.[22] Besides executive power, the President also holds the legislative power, as the president may propose a bill and be involved in the discussion of bill. The DPR authority, however, is not as powerful as the President. Even though the DPR has the authority to propose a bill, the function of the DPR, such as budgeting and controlling, is not specifically mentioned in the Constitution. The Judiciary is in the hand of the Supreme Court (the MA), which gained its independence through the provision in the Constitution. However, such provision does not specifically elaborate and mention the authority of the Judiciary.

Several constitutional changes occurred[23] before the very last Amendment held in 1999-2002. As the financial crisis hit Indonesia in 1998, there was a demand from the people that there should be a change of government as well as amendment to the Constitution. This is because people believed that such crisis happened because of the weakness of the government, since the Constitution did not sufficiently regulate how governance should be carried out. The President finally stepped down and the Indonesian Constitution was amended in 1999, 2000, 2001, and 2002.

Unlike in the first Constitution, the current Constitution states that, the President is directly elected by the popular.[24] The President has fix term

22. President can be elected consecutively more than twice, is the Chief Commander of an armed force, has the authority to grant clemency, pardon, rehabilitation, has the authority to declare war etc. mostly without necessarily obtaining the consent from the legislature.
23. Besides the 1945 Constitution, there are the 1949 Federal Constitution and the 1950 Provisional Constitution, which also existed in Indonesia during 1949 and 1950.
24. Article 6A of the Indonesian Constitution.

of office (five years)[25] and can be reelected for another term of office. The President is not responsible to the parliament and normally, she may not be dismissed by the parliament. The parliament of Indonesia consists of House of Representatives (The DPR) and Regional Representative Council (The DPD),[26] which owned three different functions, namely: supervisory, budgetary, and legislative functions.[27] Apart from the DPR and the DPD, there is also a body called People Consultative Assembly (the MPR) whose members consist of members of DPR and members of DPD. The responsibilities of the MPR are to establish and to amend the Constitution, to inaugurate and elect President and Vice President, and to decide the impeachment of the President and Vice President.

In regards to the Judiciary, previously the Indonesian Judiciary was in the hand of the Supreme Court and lower courts. After the constitutional amendment in 1999-2002, however, the Indonesian Judiciary consists of two judicial bodies; namely the Supreme Court (the *MA-Mahkamah Agung*) and the Constitutional Court (the *MK-Mahkamah Konstitusi*). The Supreme Court is authorized to settle dispute in cassation, as well as review regulations and ordinances against the laws. Whereas the Constitutional Court is authorized to: settle disputes on the result of general election, dissolve political party, settle dispute on competence among state institution, and review the law against the Constitution. The Constitutional Court also involves in providing legal opinion regarding the impeachment of the President and/or Vice President. Unlike the Supreme Court which has lower courts, the Constitutional Court of Indonesia is a single centralized court to deal with constitutional review. The independence of the Judiciary is guaranteed in the Constitution. The birth of the MK during the constitutional amendment is primarily significant because during the New Order era the norms of the Constitution, often, could not sufficiently be enforced. This is because there is no mechanism as well as institution in charge to enforce the norm of the Constitution. As a result, many laws and regulations allegedly were not in conformity with the Constitution.

In terms of legal system, both Japan and Indonesia are civil law countries, and the precedent of the Supreme Court is not binding on either the Supreme

25. Article 7 of the Indonesian Constitution.

26. Article 19, 22C of the Indonesian Constitution.

27. Article 20A of the Indonesian Constitution.

Court itself or on lower courts. Judges are supposed to return to the text of the statute for each legal dispute and apply the rules to specific cases. Judicial decisions are not a law to be applied by the courts.

In practice, however, judges often follow the precedent of the Supreme Court. The Supreme Court will follow its precedent in normal situations, and the lower courts will usually follow the precedent of the Supreme Court as well. Thus, although the precedents are not legally binding, they have a *de facto* binding power.

A. Judicial Recruitment Mechanism Compared

The 1947 Japanese Constitution provides for a Supreme Court *(saikōsaibansho)* and such inferior courts may be established by statute.[28] Based on this provision, the 1947 Court Organization Law establishes four categories of courts below the Supreme Court: eight high courts *(kōtōsaibansho)* as the primary courts of first appeal, 50 district courts *(chihō saibansho),* and 50 family courts *(katei saibansho),* each with 203 branches as the primary courts of first instance, and 438 summary courts *(kan'i saibansho)* for relatively small claims and minor offenses.[29]

The Japanese Supreme Court Justices consist of the Chief Justice, who is to be designated by the Cabinet and appointed by the Emperor[30] and the Associate Justices to be appointed by the Cabinet.[31] The number of Associate Justices shall be further regulated by Law and currently is 14.[32] A Supreme Court Justice has to be at least 40 years of age and have an intellectual grasp of the law, but not necessarily a lawyer.[33]

In addition, at least 10 out of 15 Supreme Court Justices must have either a combined 10 years of experience as chief judges of the High Court or judges, or a combined 20 years of experience as chief judges of the High Court,

28. Nihonkoku Kenpō [Kenpō] [Constitution], art. 76 (1) (Japan).
29. John O. Healy & Veronica L. Taylor, Rule of Law in Japan, in Discourses on Rule of law in Asia: Theory and Implementation of Rule of Law in Twelve Asian Countries, France and the US 447 (Randall Peerenboom ed., 2004).
30. Nihonkoku Kenpō [Kenpō] [Constitution], art. 6, para. 2 (Japan).
31. *Id*. art. 79, para. 1. *See also* Yosiyuki Noda, Introduction to Japanese Law 133 (Anthony H. Angelo trans. & ed., 1976).
32. Saibanshōhō [Judiciary Act], Law No. 59 of 1947, art. 5, para. 3 (Japan).
33. *Id*. art. 41, para. 1.

judges, Summary Court judges, prosecutors, attorneys, or university law professors.[34]

The appointment of Supreme Court Justices is not life long; Justices are supposed to retire at the age set by statute,[35] which is currently 70.[36] It is also important to be noted that there is a mechanism of public review for the appointment of the Supreme Court Justices.[37]

Unlike Japan, in the case of Indonesia, the judiciary consists of the Supreme Court and the lower courts, and a Constitutional Court. In regard to the composition, the Constitutional Court Justices consist of nine justices who three of each are coming from President, Parliament (the DPR) and the Supreme Court.[38] The Chief of Justice is elected by and among the Justices of the Constitutional Court.[39] The term of office is five years and renewable for another term of office.[40] Requirements to be Constitutional Justices, among others, are: must hold doctoral degree with bachelor degree in Law, 47 years of age or above, healthy physically and mentally.[41]

The Indonesian Supreme Court Justices consist of career Justices and non-career Justices. For career justices, the requirements to be a Supreme Court Justice are candidates who should be above 50 years of age, and should experience 20 years as judges including three years as judges at high court.[42] For the non-career Supreme Court Justices, the requirements for candidacy are: be over 50 years of age, have 20 years experiences as law professor or

34. *Id*.

35. Nihonkoku Kenpō [Kenpō] [Constitution], art. 79, para. 5 (Japan).

36. Saibanshōhō [Judiciary Act], Law No. 59 of 1947, art. 50 (Japan).

37. David S. Law, *Anatomy of a Conservative Court: Judicial Review in Japan*, 87 Tex. L. Rev. 1545 (2009) (Public Law in Asia p.7). *See also* Nihonkoku Kenpō [Kenpō] [Constitution], art. 79, para. 2-3: The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter… [W]hen the majority of the voters favors the dismissal of a judge, he shall be dismissed.

38. Article 24C (3) of the Indonesian Constitution.

39. Article 24C (4) of the Indonesian Constitution.

40. Law No. 24 of 2003 as amended by Law No. 8 of 2011 on the Constitutional Court (Indon.).

41. *Id*.

42. Law on the Supreme Court (Indon.).

lawyer, and have legal educational background.[43]

Unlike the recruitment of the Constitutional Court Justice, the Justices of the Supreme Court are nominated by special commission namely Judicial Commission (the KY Komisi Judicial),[44] then approved by the Parliament (the DPR), and finally inaugurated by the President. The number of Supreme Court Justices is determined by Law and currently there are a maximum of 60 Justices. The Supreme Court Justices are supposed to retire at the age set by statute, which currently is 67.

B. The Constitutional Basis of the Japanese Judicial Review

In Meiji Constitution, provision concerning judicial review was not clearly expressed. Such situation is different particularly when the Meiji Constitution was amended by the 1946 Constitution. Even though judicial review did not become the main focus of the debate,[45] the Constitution explicitly expressed the authority of the Judiciary to conduct judicial review.

During the amendment of the Constitution, the focus of the amendment was more on emphasizing issues on popular sovereignty, the symbolic Emperor institution, and the renunciation of war.[46] It is probably because the new Constitution was established in a post World War II situation.

It is, however, also possible that the new Constitution emphasizes a parliamentary sovereignty. Thus, the existence of judicial review would raise the question whether the Supreme Court will be more powerful than the Diet (Japanese Parliament), which was declared in the Constitution to be "the highest organ of state power."

Normatively, the foundations of judicial review in Japan are stated in Article 81 of the Japanese Constitution. It clearly defines "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."[47] The literal interpretation of this provision is that the Court has jurisdiction over all government action. As such, the Court has the power to strike down any official act on constitutional

43. *Id*.

44. Article 24B of the 1945 Constitution post amendment (Indon.).

45. Norikazu Kawaguchi, *supra* note 5.

46. *Id.*

47. Nihonkoku Kenpō [Kenpō] [Constitution], art. 81 (Japan).

grounds. The words "last resort" in article 81 means that determining the constitutionality of laws etc. can be conducted by lower (ordinary) courts.

C. Japanese Judicial Review: American or European Model? Abstract or Concrete Review?

In general, there are two major models of judicial review, namely the American Model and the European Model.[48] The basic difference between the two lies in the institution which has the authority to conduct judicial review. In the American Model, the functions of a constitutional court are carried out by an ordinary court, namely the Supreme Court. In this case, there is no special court or body such as a constitutional court to conduct such functions.[49] The Supreme Court in this sense has the authority to examine the constitutionality of legal norms besides its original authority. In addition, the Supreme Court is also the highest body that has authority to examine the constitutionality of laws as well as being the interpreter of the constitution.[50]

The other model is the European model. In the European model, there is a specific court, which is different from the Supreme Court. The function of this court is different to that of ordinary courts. The main responsibility of this special court is to test the constitutionality of laws. Despite its main responsibilities, often there are some other responsibilities of this court, among others, the authority to settle disputes between state organs and authority to dissolve political parties. This court is generally called the Constitutional Court.

Regarding abstract and concrete review, the main difference between the two lays on whether or not there is a requirement to present real cases in order to conduct judicial review. Abstract review generally means that the

48. There are 10 models of constitutional review: American model, Austrian model, French model, Mixed (America and Continental) Model, Review by Special Chamber, Belgium model, no Judicial Review model, Legislative Review, Executive Review and International Judicial Review. *See* Jimly Asshiddiqie, Model-Model Pengujian Konstitusional di Berbagai Negara 43-73 (2005).

49. Violaine Autheman & Keith Henderson, *Constitutional Court: The Contribution of Constitutional Review to Judicial Independence and Democratic Process from Global and Regional Comparative Perspective*, IFES Rule of Law White Paper Series, White Paper No. 4, Constitutional Courts, 8 (2004), http://www.ifes.org/~/media/Files/Publications/White%20PaperReport/2004/23/WhitePaper_4_FINAL.pdf.

50. *Id*.

Judiciary can conduct judicial review toward provisions of law and regulation without necessarily having a real case submitted by the petitioners to the court. Thus, the court may review a provision that potentially contradicts with the Constitution.

In this model a real case is not a requirement for the court to conduct judicial review. So the court examines norms of legislation toward norms of Constitution. Conversely, concrete review requires a real case submitted by petitioners to the court to conduct judicial review. Without such real case, there is no authority for the Court to conduct judicial review.

Using the above model, the following part will discuss the characteristics of the Japanese judicial review. The discussion will include the academic and practical debates. It will address issues whether the Japanese judicial review adopts an American or European model. Issues on abstract and concrete review will also be addressed.

III. Characteristics of the Judicial Review System in Japan and Indonesia: Performance and Obstacles Faced by the Judiciary toward Judicial Review Cases

A. Characteristics of the Judicial Review System in Japan: Academic Debate

Even though constitutionally the Japanese Supreme Court owned the authority to conduct judicial review, academically there is a debate regarding the type of judicial review that can be conducted by the Supreme Court. The main issue is whether the Japanese Supreme Court conducts concrete judicial review or abstract review. Or in other words, is it possible that the Supreme Court deals with abstract cases (not necessarily concrete, specific cases) or should there be a concrete case brought to the Court.

Regarding this matter, there is no conclusive agreement among Japanese Constitutional Law scholars. Professor Kaneko, as mentioned in the article on judicial review, believes that statutes that have been declared unconstitutional

by the Supreme Court shall be considered invalid.[51] Professor Kaneko further argues that the Supreme Court decision on judicial review has general binding effect.[52] Another scholar, Professor Kazuyuki Takahashi, believes that the judicial function is defined in the Constitution as settling disputes of interpretation and application of law under due process. Professor Takahashi further argues that the essence of judicial power is not necessarily in the form of cases and controversies.[53]

Still others believe that the Supreme Court must decide only practical and specific cases.[54] Professor Kouji Sato, for instance, believes that judicial power requires courts to adjudicate cases and controversies.[55] It requires disputes peripheral to cases and controversies to be determined by law. In other words, there should be concrete and specific cases brought to the Supreme Court. Thus within this view, the Supreme Court only reviews the constitutionality of law for specific cases.

There is also opinion that the Japanese Supreme Court has the authority to conduct constitutional review like the authority owned by a Constitutional Court.[56] This means that the authority to test the constitutionality of the statutes is only in the hand of the Supreme Court, not in lower courts. This is based on the fact that Article 81 explicitly authorized the Supreme Court to test the constitutionality of law and regulation against the Constitution, or in other words conducting constitutional review. Further, Article 81 does not clearly mention the authority of lower courts to conduct constitutional review. Thus, it can be interpreted that the Japanese Supreme Court is the sole institution that owns the authority to conduct constitutional review.

Based on three different views mention above, the wording of Article 81 of

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51. Kaneko, *Judicial System*, 60 Kokka gakkai zasshi 2 (1946).

52. *Id*. *See also* Souichi Sasaki, Kokka Koui No Junsuigoukensei Ni Kansuru Ketteiken [Authority of the Supreme Court on the Pure Constitutionality of National Action] (Yuhikaku 1990); Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law And An Examination of Trend in the Japanese Supreme Court's Constitutional Oversight*, 41 Loy. L.A. L. Rev. 606 (2008).

53. Kazuyuki Takahashi, Kenpō Handan No Houhou [Judgment Method of Constitutionality] 359-61 (Yuhikaku 1995). Jun-ichi Satoh, *supra* note 52, at 608.

54. Kouji Sato, Kenpō [Constitution] 291 (Seirin Shoin 3d ed. 1995).

55. Article 3 of the Court Organization Law (Japan).

56. Wu Xinping, *Japanese System of Judicial Review and Its Significance to China*, 6 Kokusai kyōryoku ronshū 57, 66 (1998).

the Constitution can be interpreted differently. One says that judicial review can be conducted by both the Supreme Court and lower courts; another says that it should be the authority of the court since there is no explicit delegation stated in the Constitution. Each argument has its own merit. It seems that such debates will not be easy to resolve. And academically it will raise more critical thinking in interpreting the meaning of Article 81. Today, such debate still continues among Constitutional Law scholars in Japan.

B. Practical Debate: The Approaches of the Japanese Supreme Court in Dealing with Constitutional Cases

In practice, the debate on whether the Supreme Court deals with concrete review or abstract review is not over yet. Two cases below illustrate how the Court determines its position regarding the judicial review model through its decision. In *Komatsu v. Japan*,[57] the Supreme Court declines the abstract review and the Court adopts concrete judicial review. The Court interprets article 81 as concrete review and adopts the American judicial review. The Court declared that "Article 81 of our Constitution should be characterized as an explicit provision adopting the type of judicial review which has been established by the United States by way of mere interpretation of the Constitution."[58]

In *Suzuki v. Japan*,[59] there was an attempt from the petitioner to challenge the use of concrete review. The petitioner argues that provisions on the Japanese Constitution authorize the Supreme Court to conduct abstract judicial review.[60] In addition, the petitioner believes that the Supreme Court Justices

57. Saikō Saibansho [Sup. Ct.] July 8, 1948, 2 Keishū 80, 86 (Japan).

58. *Id.*

59. Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, 6 Minshū 783 (Japan). In this case, Diet member Mosaburou Suzuki from the Japan Socialist Party (JSP), filed a suit to the Supreme Court. Suzuki sought a declaration of unconstitutionality and an injunction against the establishment and maintenance of the National Police Reserve since it against Article 9 of Nihonkoku Kenpō [Kenpō] [Constitution]. He argued that Article 81 authorizes the Supreme Court two functions: as judicial and a constitutional court. According to Suzuki, the Supreme Court could accept a suit without any case or controversy and review the constitutionality of the law as a constitutional court. The Supreme Court, however, had already held in a previous decision that Article 81 merely affirmed the power of a judicial court to review the constitutionality of a statute in adjudicating a case or controversy.

60. Article 81 and Article 79 of the Japanese Constitution equipped the Supreme Court to conduct judicial review.

qualify to conduct abstract judicial review.[61] The Supreme Court, however, declares that if the court conducts abstract judicial review, it is possible that there will be many Acts challenged. As a result the Court may be more dominant than two other branches of government which in such case, it will violate the equality principle among government branches.

Based on the cases presented above, it appears that the Supreme Court adopts the view that the Court only deal with concrete cases. The Court applies concrete review in the sense that if the Court finds a law to be unconstitutional, the Court will refuse to apply such law in particular cases.

The Supreme Court believes that such approach will avoid the encroachment of the authority of the legislature, which in the Constitution is considered as the highest organ in the state as well as the sole law-making organ.

C. The "Dynamic" Works of the Japanese Supreme Court in Conducting Judicial Review

In the history of the Japanese Judiciary, the works of the Japanese Supreme Court in dealing with judicial review can be described into two different attitudes, namely the "conservative" nature and more "active" roles. Prior to 1973 the Supreme Court was more "conservative." The "active" roles of The Supreme Court primarily occurred after 1973. It is important to be noted that during 1966-1973 there were "ups and downs" on the performance of the Court.

During 1947-1966, the decision of the Supreme Court is more negative in nature and more in favor of public interest rather than the rights of the plaintiff. Such attitude can be seen that during this period, the Court declared only two statutes unconstitutional. First is the case of *Sakagami v. Japan*[62] in 1953. In this case, the Supreme Court declared an act of the Diet uncon-

61. Article 41 of the Court Organization Law requires "Justices of the Supreme Court shall be appointed from leaned persons with extensive knowledge of law, who are not less than forty years old. At least ten of them shall be persons who have held one or two of the positions set forth in item 1 or 2 for not less than ten years, or one or more of the positions set forth in the following items for the total period of twenty years or more. (i) President of the High Court (ii) Judges (iii) Judges of the Summary Court (iv) Public Prosecutors (v) Attorneys (vi) Professors or associate professors of law of universities."

62. Saikō Saibansho [Sup. Ct.] July 22, 1953, 7 Keishū 1562 (Japan). This decision, however, had little practical significance because the law was no longer in effect at the time it was declared unconstitutional.

stitutional. Second is the case of *Nakamura v. Japan*[63] in 1962, which was a result of Nakamura and his group that tried to smuggle textiles from Japan to Korea. They were captured based on article 118(1) of the Customs Law. Nakamura claimed that article 18 is unconstitutional since such article does not provide notice and a hearing as stipulated in the Constitution. The Supreme Court finally declared that article 118(1) violated articles 29 and 31 of the Constitution.

Between 1966-1973, the Court turned from negative to a more positive attitude in protecting human rights, even though some scholars believe that such change was insignificant. In addition, the Court also conducted concrete judicial review. In the *Naganuma Nike* case,[64] for instance, the Court declared that article 9 of the 1947 Constitution prohibited the establishment of the Japanese Self Defense Force because by doing so, it potentially encourages war, which contradicts with article 9 of the Constitution.

Since then, the Supreme Court of Japan has been more conservative in handling judicial review cases. The Supreme Court tends to avoid dealing with constitutional cases and reluctant to have cases decided by the Grand Bench in which constitutional cases are decided.[65] The 'active' roles of the judiciary in dealing with judicial review started around 1973. The question is why prior to 1973 the Japanese Supreme Court tended to be conservative? The following part will address this question.

D. Contributing Factors to the "Conservative" Attitudes of the Japanese Supreme Court

It is believed that the attitude of the Japanese Supreme Court is often considered as conservative or as taking "a very careful and cautious approach" toward constitutional review.[66] The Supreme Court has been careful and cautious, especially toward political decisions of the Diet and the Cabinet, and toward legislative discretion by the Diet, which is the highest organ of the State.[67]

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63. Saikō Saibansho [Sup. Ct.] Nov. 28, 1962, 16 KEISHŪ 1593 (Japan).
64. Chihō Saibansho [Dist. Ct.] 1973, 298 HANREI TAIMUZU [HANTA] 40 (Japan).
65. Koba, *Judicature and Judicial Review in 50 years*, CASS J.Foreign L., no. 1 (1997).
66. Itsuo Sonobe, *Standard of Review in Constitutional Jurisdiction in Japan*, 4, *available at* http://www.ccourt.go.kr/home/history/world/pdf/04.pdf.
67. *Id*.

It is not easy to point out a single reason for the conservatism of the Supreme Court of Japan. This is because the reluctance of the Court to deal with constitutional issues is influenced by many contributing factors, among others are: Historical background, cultural aspect, the short tenure of the Supreme Court Justices, procedural issues, issues of competence, legal and political questions.

Historical Background

The "passivity" of the Japanese Supreme Court in dealing with judicial review cases is heavily influenced by its history. In the past, Supreme Court Justices did not sufficiently understand the authority owned by them, namely judicial review.[68] This is because judges were accustomed to adopt traditional German constitutional philosophy where judges are authorized to apply statutes[69] and not to examine them. In other words, the positivist paradigm prevailed during this period. There was no tradition that judges strike down a statute in the name of the Constitution. The practice of America in conducting judicial review was also unknown in the beginning. This resulted in many cases brought to the Supreme Court and ending with rejection. The conservative constitutional jurisprudence was, therefore, established.[70]

Cultural Aspect: Respecting the Harmony and Reconciliation

The modern Japanese legal system remains rooted in traditional values in which conciliation, rather than adjudication, is the preferred method of dispute resolution.[71] The Japanese people have the spiritual tradition of "reconciliation." They prefer to settle their dispute through reconciliation. Even though there was significant Western influenced in the 1850s and peaking during the post-World War II occupation, the Japanese legal system em-

68. Shigenori Matsui, *Why is the Japanese Supreme Court so Conservative?*, 88 Wash. U. L. Rev. 1401 (2011).

69. *Id*.

70. In the 1960s, the Supreme Court showed some indication of change as shown in the *All Postal Workers, Tokyo Central Post Office Case*. Even though the Supreme Court upheld the ban on strikes by public corporation workers, it gave a landmark decision that showed its willingness to narrow the permissible scope of the ban on strikes and criminal punishment. See Shigenori Matsui, *supra* note 68, at 1401.

71. Lyn Berat, *The Role of Reconciliation in the Japanese Legal System*, 8 Am. U. Int'l L. Rev. 125 (1992).

phasizes harmony rather than conflict.[72] Involving court in settling disputes is avoided as much as possible because it is a kind of shame. Further, they are used to respecting political institution rather than being in conflict with them.[73]

Another significant cultural aspect that influences the "passivity" of the Japanese Supreme Court is the philosophy of respect for harmony. Culturally, harmony of a group is much respected in Japanese society. This perhaps links to the tendency of the Supreme Court to respect the judgment of the Diet and administrative agencies. Even the Japanese Supreme Court, the *Saikosaibansho,* is reluctant to cause discord and rarely uses its constitutionally authorized power of judicial review.[74] Thus harmony can be maintained. It is probably fair to say that because of the emphasis on harmony, it might be difficult for the minority members on the bench to strongly disagree with the majority.

The Short Tenure of the Supreme Court Justices

Historically, the tenure of Supreme Court Justices is short and they areconsidered as judicial bureaucrats. Even though the formal requirement for the appointment of Supreme Court judges is 40 years of age, in practice the appointment of judges occurs generally at the age of 64 or 65.[75] It seems that the appointment to the Supreme Court is a final honor for successful lower court judges. Unfortunately, Supreme Court Justices shall retire at the age of 65.

In addition, Supreme Court Justices coming from attorney backgrounds are generally appointed at a higher age.[76] This leads to the fact that they will not stay long on the bench. With such situation where each justice will stay in the office for four or five years, will certainly influence in developing a more activist constitutional jurisprudence. In other words, the appointment process of Supreme Court Justices is not designed to appoint Justices who are willing

72. *Id*. *See also* Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, U.Ill. C. L. & Econ. Working Paper No. 3 (2004).

73. *Id*.

74. *Id*.

75. Shigenori Matsui, *supra* note 68, at 1408.

76. *Id.*

to actively exercise the power of judicial review.[77] This is not only because of its short tenure but also its status as judicial bureaucrats, so that they tend to hold laws and enactments to be constitutional.[78]

However, there is an exception in regard to Chief Justice Kotaro Tanaka who serves almost 10 years. Chief Justice Tanaka was able to be considerably more progressive with respect to judicial review because of his comparatively long tenure.

The reluctance of the Court to deal with constitutional issues also can be explained that the Court will not decide based upon a constitutional question also if there is present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction, the Court will decide only the question of statutory construction.[79] As Professor Hidenori Tomatu has written, "[N]o one can say that Japan's Supreme Court has ever made active judgments on constitutional issues."[80]

Procedural Issues: Legal Interests, Case and Controversy Requirement

In order to be successful in filing a judicial review case in the Court, an individual must understand and fulfill the following situation. When filing a case in the Supreme Court, an individual must show their legal interest has standing to file such a suit.[81] In addition, the individual also should have a legal right or legal interest protected by a statute passed by the Diet.[82] In this case, when the government regulates a certain thing for the protection of the public, the Supreme Court tends to deny standing to individual citizens because such statute is not intended to vest rights or legal interests to individual citizens, rather it is for the interest of the public in general.[83]

There is also a requirement to prove the infringement of rights or individu-

77. *Id.*
78. Wu Xinping, *supra* note 56, at 66.
79. Jun-ichi Satoh, *supra* note 52, at 622.
80. *Id*. at 623.
81. Shigenori Matsui, *supra* note 68, at 1383.
82. *Id.* at 1384.
83. *Id.*

al legal interests.[84] A citizen who suffers from an injury cannot challenge the administrative action unless he or she can determine which statutes explicitly mention about protection of the citizen interest, individual right, or legal interest.[85] Unfortunately, many statutes enacted by the Diet have no explicit clauses allowing the citizen to file a suit on the basis of judicial review. As a result, often the citizen has difficulty in convincing the courts that provisions stated is a part of the protection of the interests of the citizen as a legal right or legal interest.

Even when a citizen has clear interest in certain constitutional issues, the Court tends to deny standing. The action of government to send troops to the Gulf War[86] and to Iraq[87] is an example where even though such action potentially violates article 9 of the Constitution, The Court denied standing. In the case of sending troops to Iraq, however, the Court declared that sending the troop to Iraq was unconstitutional.

Issues of Competence: Legal and Political Questions

There is also a tendency that the Court is reluctant to deal with political question. It is clearly seen in *Sunagawa Case*[88] where the Court was reluctant to declare that stationing the US Army in Japan is a violation of article 9 of the Constitution. The Court declared that such issue is a highly political issue so that it is not suitable for judicial decision unless such action is clearly unconstitutional. Further, the Court further believed that stationing the US army in Japan does not clearly violate the Constitution. As a result the Court did not deal with the issue.

Apart from the explanation mentioned above, Professor Koba determines

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84. *Id.* at 1386.

85. Saikō Saibansho [Sup. Ct.] Apr. 8, 1982, 36 Minshū 594 (1st petty bench, the Textbook Censorship Case) (Japan); Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, 36 Minshū 1679 (1st petty bench, the Naganum Case) (Japan); Saikō Saibansho [Sup. Ct.] Dec.17, 1985, 1179 Hanreijiho 56 (3rd petty bench, the Date Power Plant Case) (Japan).

86. Ōsaka Kōtō Saibansho [Ōsaka High Ct.] Oct. 29, 1991, 38 Shōmu Geppō [Shōmu Geppō] 761 (Japan). Shigenori Matsui, *supra* note 68, at 1385.

87. *Id.;* Nagoya Kōtō Saibansho [Nagoya High Ct.] Apr. 17, 2008, 2056 Hanrei Jihō [Hanji] 74 (Japan).

88. Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 13 Saikō Saibansho Keiji Hanreishū [Keishū] 3225 (Grand Bench) (Japan). Although the existence of the Self Defense Force in Japan potentially violate article 9 of the Constitution, a number of lower courts have refused to decide upon its constitutionality by appealing to this doctrine.

additional factors that influence such trend. Such factors include: first, in the history of judicial review in Japan, the Japanese Supreme Court handled few constitutional cases so that there are only six cases in which the law was considered unconstitutional. Second, the decisions of the Supreme Court tend to affirm the actions of the authorities. Third, the Court is reluctant to deal directly with constitutional issues.[89]

It is true that there have only been a few cases where the Supreme Court has ruled in favor of plaintiffs asserting individual rights infringements and taken the further step of invalidating statutes.[90] However, it is important to note that the Japanese judicial self-restraint is basically because the Judiciary lacks direct democratic grounds as opposed to the legislation that is passed by the legislature (Diet), which is directly elected by the people.[91] As a result, the Judiciary is reluctant to deal with judicial activism.

It is also important that the cautious of the Japanese Judiciary is not because of the Judiciary's deference to the political ideology of the ruling party.[92] Rather, "even if the legislature (Diet) becomes progressive and produces more statutes, we would still not expect the number of rulings of unconstitutionality to significantly increase."[93]

E. The Change in Attitudes of the Japanese Supreme Court in Dealing with Judicial Review

The Japanese Supreme Court has been criticized for its reluctance to exercise judicial review. Within 30 years since its establishment, The Japanese Court invalidated only five statutes. This attitude slightly changes in the 1970s, in which the Supreme Court is more "active" in conducting judicial review.[94] Such activity can be seen that during this period, the Supreme Court "overruled" the previous decision toward similar cases. The following cases will show how the Supreme Court changes its "conservativeness" into more

89. Koba, *supra* note 65.

90. Tokiyasu Fujita, *The Supreme Court of Japan: Commentary on the Recent Work of Scholars in the United States*, 88 Wash. U. L. Rev. 1519 (2011).

91. *Id*.

92. *Id*.

93. *Id.*

94. Lyn Berat, *supra* note 71, at 147.

"active" attitudes toward judicial review. In explaining such changes, Lyn Berat's article on "The Role of Reconciliation in the Japanese Legal System" is significant to be referred.[95]

In 1973, The Supreme Court in *Aizawa v. Japan*[96] decided unconstitutional regarding the question of the constitutionality of article 200 of the Japanese Penal Code, which stipulates a more severe penalty for murder of a family member rather than homicide. This decision is important because it is different from the Supreme Court decision toward similar statutes in 1952 where in *Japan v. Yamato*[97] the Supreme Court upheld such statutes. It can be said that the Supreme Court decision in *Aizawa v Japan* "overruled" its 1952 decision in *Japan v. Yamato*.

In 1975, The Supreme Court in *K.K. Sumiyoshi v. Governor of Hiroshima Prefecture*,[98] the 1975 Pharmacies License Case, declared unconstitutional a provision that prohibit new pharmacies from opening within one hundred meters of the existing pharmacies. This decision can be said to have "overruled" the 1955 decision in *Shimizu v Japan*[99] where the Supreme Court upheld a law requiring people to obtain license before operating a public bath.

In 1972, The Supreme Court, in the case *Kurokawa v. Chiba Prefecture Election Commission,*[100] declared unconstitutional a statute involving an apportionment plan for the Diet's lower house. This is based on the argument that there is a shift of population from rural to urban areas so that such apportionment creates inequality in the sense that the rural districts possessed more relative voting power than that the urban districts. Again, this decision "overruled" the 1964 case of *Ishiyama v. Tokyo Prefecture Election*

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95. Lyn Berat, *supra* note 71, at 147-149. However, there is different opinion regarding the "active" role of the Supreme Court as described by Lyn. For further information, *see* John O. Healey, *Constitutional Adjudication in Japan: Context, Structure and Values*, 88 Wash. U. L. Rev. 1486 (2011).

96. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Showa 48 [Keishū], 27 Saikō Saibansho Keiji Hanreishū [Keishū] 265 (one of three cases decided together, holding unconstitutional the provision of article 200 of the Criminal Code for aggravated penalties for the crime of the murder of a lineal ascendant) (Japan).

97. Saikō Saibansho [Sup. Ct.] Oct. 11, 1952, 4 Saikō Saibansho Minji Hanreishū [Minshū] 1520 (Japan). In *Japan v. Yamato*, the Supreme Court upheld a similar provision for enhanced penalties for the crime of inflicting bodily injury resulting in death.

98. Saikō Saibansho [Sup. Ct.] 1975, 665 Saibansho 1 (Japan).

99. Saikō Saibansho [Sup. Ct.] 1955, 9 Keishū 89 (Japan).

100. Saikō Saibansho [Sup. Ct.] 30 Minshū 223 (Japan).

Commission,[101] where the Supreme Court rejected a claim of unconstitutionality of a particular apportionment scheme on the basis that such disparity did not reach the point where it was a constitutional problem.

From three cases mentioned above, it can be said during this period the Japanese Supreme Court has more "active" roles in dealing with judicial review. The Supreme Court takes necessary action to "overrule" the principles that were upheld by the Supreme Court toward similar cases in the past. Thus, it is fair to say that the Supreme Court has moved from conservative to more "active" attitudes.

F. Factors Contributing to the "Active" Roles of the Supreme Court

The change in attitudes of the Supreme Court from conservative to more "active" in dealing with judicial review is influenced by several significant factors, among others: first, there is a significant change of the Judiciary composition; secondly, the Judiciary gains its recognition as an institution; lastly, training of the judges which produce well-trained judges.

As time goes by, the old judges who are in charge under the old Constitution (Meiji Constitution) retired. They were replaced by a younger generation who, to a certain extent, were trained in different circumstances as there are some changes including the change of the Constitution. As described by David J. Danelski, "In the mid-1960's, a younger and more progressive group of judges began to emerge in the lower judiciary. About 200 of these younger judges belonged to the liberal Young Jurists Association."[102]

Unlike the old judges, the young generation grew and was educated in a more liberal ideology and institution.[103] As a result, the "conservative" nature of the Supreme Court is significantly influenced by the young generation with a more liberal ideology who are relatively more active in dealing with

101. Saiko Saibansho [Sup. Ct.] 1964, 18 Minshū 270 (Japan).

102. David J. Danelski, *The Political Impact of the Japanese Supreme Court*, 49 Notre Dame. L. Rev. 955, 963-965 (1974). *See also* Tom Ginsburg & Glenn Hoetker, *supra* note 72, at 1. Japan demonstrates that in the 1990s there is an increase in litigation. This is based on two main factors: the expansion in institutional capacity for litigation traced to procedural reforms and an expansion in the formerly miniscule bar; and further, structural changes in the Japanese economy related to the post bubble slowdown in growth.

103. Tokiyasu Fujita, *supra* note 90, at 1515.

judicial review.

There are also some significant efforts to improve the selection method of justices both the Supreme Court Justices and the lower court justices.[104] Constitutionally, the lower judges are appointed by the Cabinet from the list provided by the Supreme Court and subject to the Prime Minister's veto.[105] In the 1970s, however, some individuals mentioned in the list proposed by the Supreme Court prevailed over the objection of the Prime Minister.[106]

It can be said that the Supreme Court has gained its recognition as an institution. As can be seen, the Supreme Court is not only gaining the constitutional guarantee as stated in the constitution but also playing significant roles in nominating lower judges. The presence of more professional and well-trained judges in the Court is also considered a significant factor attributing to the activity of the Supreme Court.

G. More Efforts to Create a More "Active" Japanese Supreme Court in Dealing with Judicial Review Cases

Even though from time to time there are some changes toward the attitudes of the Supreme Court in dealing with judicial review, generally, the Japanese Supreme Court is seen by some scholars as relatively conservative.[107] This perception is based on, among others, the Japanese cultural preference in resolving dispute. These include a view that settling dispute through court is often considered shameful in Japanese society.[108] An individual should consider a wider community interest rather than his own interests.

In addition, the differences in social status difference also play an important role. Generally, in the Japanese society the so-called "inferior" society tends to avoid settling disputes through the court against "superior" society.[109]

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104. Takayuki Ii, *Japanese Way of Judicial Appointment and Its Impact on Judicial Review*, 5 Nat'l Taiwan U. L. Rev. 105 (2010). These include the involvement of the Justice Appointment Consultation Commission. The involvement of this commission is used after the World War II but such method is not applicable anymore.

105. Nihonkoku Kenpō [Kenpō] [Constitution] art. 8 (Japan).

106. Lyn Berat, *supra* note 71, at 150.

107. *Id*. at 150.

108. *Id.;* Rene David & John E.C. Brierley, Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law 458 (3rd ed. 1985).

109. *Id.*

Further, ideologically, the western concept of individual rights to a certain extend conflicts with Confucian ideals of a natural human hierarchy, a powerful part of Japanese life which emphasizes more on wider community interests and harmony.[110]

The issuance of The 2004 Amendment of the Japanese Administrative Case Litigation Act is also a significant endeavor to improve the judicial review system. This law is designed to move toward more expansive judicial review. Several significant provisions include the abolition of the requirement "priority rule of nullification suit."[111] This means a plaintiff can file a judicial review soon after the enactment of a statute. There is no need to wait until the disposition occurs of the plaintiff's case as applied to the previous law.

The 2004 Act also revised the standing to sue. It contains new statutory interpretation principles such as the court shall "consider all the relevant statutes," "do not limit the consideration to the texts of the statutes," and "consider the purpose of relevant statutes along with the nature of interest to be considered by the agency."[112] These new provisions have significant impact as in the past the courts often constructed the administrative statutes restrictively.

Commonly, scholars view that the "conservativeness" of the Supreme Court is measured based on quantity such as how many judicial review cases have been handled by the Supreme Court. And from that number of cases, how many cases have been declared unconstitutional.

It is true that quantitatively the number of judicial review cases declared by the Supreme Court is not many, less than 10 cases perhaps. However, such figure probably does not necessarily mean that the Supreme Court is conservative. It is possible that the Supreme Court is conservative, but it is equally possible that there is a significant improvement from the legislature or the executive in drafting the statute so that the statutes are in conformity with the Constitution; as a result, the case of judicial review is small in number.

The following paragraph will explain the role of CLB in reviewing draft of bills from the cabinet, which likely play significant roles in the improvement of the statutes. In regard to the legislative drafting, it is important to examine the law making process in Japan particularly observing the roles of Japan's

110. *Id*. at 151.

111. Ronald M. Levin, *Reform of Judicial Review in Japan: An American Perspective*, CDAMS Discussion Paper, 04/26E, 1 (Nov. 2004).

112. *Id*. at 3.

Cabinet Legislation Bureau -CLB- (*Naikaku-Hosei-Kyoku*). Even though formally a bill is prepared by the Cabinet or the Diet, in practice a bill proposed by the Cabinet is "reviewed" by The CLB prior to its enactment.[113]

Member of CLB are senior government officials with expertise in specific legal areas who are seconded from various government ministries and agencies. The CLB tasks are to provide legal opinions to the Prime Minister and other legislative officials and to review drafts of bills, regulations, and orders to determine if they are consistent with the constitution and legal precedent.[114]

As such, the CLB's purpose is to avoid this type of legal confusion. Due to the significant influence of the CLB's opinions, the Japanese Supreme Court has almost always upheld government acts. This is because when the Japanese Supreme Court undertakes judicial review, the reviewed laws and orders have already been reviewed by the CLB prior to their enactment.

The consultative function of the CLB bears a striking resemblance to the role of France's Council of the State (*Conseil d'Ét́at*), which also assists the executive branch with legal advice.[115] The Japanese Constitution, however, mentions nothing about the CLB's advisory role.

H. How About the Development of Judicial Review in Indonesia

The part mentioned above has shown to us how the Japanese Judicial Review system develops. Such development includes how the system works from time to time, what are its limits, challenges, what aspects need to be improved and efforts that have been made to improve the work of the judicial review mechanism.

After analyzing and understanding the Japanese judicial review system, it is important to examine how the Indonesian judicial review (precisely constitutional review) system works. By understanding the work of the constitutional review system in Indonesia, the author believes that both countries, Japan and

113. David S. Law, *Why Has Judicial Review Failed in Japan?*, Legal Stud. Res. Paper Series Paper No. 11-04-03, at 1454. *See also* About the Cabinet Legislation Bureau, http://www.clb.go.jp/english/about.html (last visited Feb. 8, 2012).

114. *Id.*

115. *Id.*

Indonesian, may learn from each country's counterpart experiences. Thus, for this purpose, the following part will discuss the development of constitutional review in Indonesia. To appropriately understand the recent situation, this part will begin with a brief description of the establishment of the Indonesian Constitutional Court (*Mahkamah Konstitusi*).

I. The Birth of Constitutional Review in Indonesia

In Indonesia, constitutional review is formally recognized after the Constitutional amendment (1999-2002). This especially occurred when the provision on the Judiciary is amended. The new provision on the Judiciary recognizes two separate judicial bodies, namely the Supreme Court (*Mahkamah Agung*) and Constitutional Court (*Mahkamah Konstitusi*). Previously, there was only one judicial body, namely the Supreme Court and its lower courts.

The establishment of the Constitutional Court in 2003 is based on the experience that in the past there were insufficient mechanisms to enforce the norm of the Constitution as well as to protect the human rights. As a result, violation of the norms of the Constitution cannot be adequately settled.

Normatively, there are five authorities owned by the Indonesian Constitutional Court namely: testing the constitutionality of law against the Constitution, settling competence disputes among state institutions, settling disputes on the result of general election, dissolving political party, and providing legal opinion in the impeachment process of the President and/or the Vice President.

In terms of its establishment, it can be said that the Indonesian Constitutional Court is relatively new compared to the existence of the Japanese Supreme Court. However, the Indonesian Constitutional Court is often considered more progressive in many ways compared to the Japanese Supreme Court particularly in dealing with judicial review. The following part will show the historical background of the establishment of the Indonesian Constitutional Court and will be followed by the "progressive" nature of the work of the Indonesian Constitutional Court.

J. The Indonesian Constitutional Court: The Old Idea is Finally Implemented

Unlike the Japanese Supreme Court experience, which was already estab-

lished in 1947, the Indonesian Constitutional Court can be said as a product of the third amendment of the Indonesian Constitution or, commonly called the 1945 Constitution in 2001.

Historically, since its independence in 1945, Indonesia had been under three different Constitutions, namely the 1945 Constitution (1945-1949), the 1949 Federal Republic of Indonesia Constitution (1949-1950), and the 1950 Constitution (1950-1959).[116] Unfortunately, under these three Constitutions, there was no provision concerning the Constitutional Court. The only legal institution that is explicitly mentioned in the Constitution is the Supreme Court. In 1959 by Presidential Decree, Constitution 1945 was effective again replacing the 1950 Constitution.

The idea to have an institution in charge of constitutional jurisdiction is by no means a new one in Indonesia. In fact, it had already been debated as early as 1945 when the founding fathers of the new republic were drafting the 1945 Constitution.[117]

The discussion regarding the importance of the Constitutional Court, generally, can be divided into four periods. The first period occurred in the Session of the BPUPK - a body in charge of preparing the Indonesian Independence - in 1945 when this institution arranged a draft of the Constitution for the state. The concept of a Supreme Court vested with powers of judicial review was proposed by Muhammad Yamin, a strong advocate of democracy, rule of law, and human rights protection. According to Yamin, judicial review authority for the Supreme Court would clearly have strengthened the principle of separation of powers.[118] Yamin's idea, however, did not fit into the integral concept of state promoted by prominent constitutional law expert Raden Soepomo, who consequently rejected it.[119]

The framers of the (old) 1945 Constitution finally decided that the authority to conduct judicial review was excluded from the Constitution. The legislators of the 1949 Federal Constitution and the 1950 Provisional Constitution seemed to follow the idea of the founders and drafters of the 1945 Constitu-

116. Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution Making in Transition*, 5 Asia L. Rev. 66 (2008).

117. Petra Stockmann, The New Indonesian Constitutional Court: A Study into Its Beginnings and First Year of Work 14 (2007).

118. *Id*. at 11.

119. *Id.*

tion and rejected the judicial authority to verify laws.[120]

The second period occurred when the Constituent Assembly elected at the 1955 General Election held their sessions during the period from 1957 to 1958 in order to arrange and draft a new Constitution as the replacement for the 1950 Provisional Constitution.[121] The session held by the Constituent Assembly approved a Constitutional Court to hold the authority for verifying laws and governmental actions by employing the 1945 Constitution as the benchmark for determining validity of laws and actions.[122]

It was, however, canceled because President Soekarno, through the Presidential Decree dated 5 July 1959, re-enacted the 1945 Constitution and dissolved the Constituent Assembly. This decree was deemed to have re-enacted the 1945 Constitution, which obviously did not allow for a Constitutional Court to verify laws and governmental regulations or actions.[123]

The third period occurred at the beginning of the New Order era that started from 1965 and reached its culmination in 1970 when the House of Representatives (the DPR-GR), together with the Government discussed Law No. 14 of 1970 regarding the Principles of Judicial Authority as the replacement for Law No. 19 of 1964.

In the New Order era, the idea of judicial review is somewhat alive. There is one legal institution, which owned judicial review authority namely the Indonesian Supreme Court. Such power, however, only applied to test the constitutionality of regulations beneath law against the Law itself. In other words, there was no legal mechanism to review the constitutionality of a Law against the Constitution.

Since 1970 until the collapse of the authoritarian regime of Soeharto in 1998, the debate regarding the importance of a Constitutional Court did not become significant issues in the Indonesian parliament.[124] The People's Consultative Assembly elected at General Elections in the New Order era did not change its stance on this issue in spite of the growing aspirations of the community demanding the existence of judicial institutions to measure and verify

120. Benny K. Harman, *The Role of the Constitutional Court in Indonesian Legal Reform* 48-49 (Nov. 10, 2008), http://www.ide.go.jp/English/Publish/Asedp/pdf/074_03.pdf.

121. *Id*.

122. *Id.*

123. *Id*.

124. *Id*.

laws that were potentially in breach of the provisions of the Constitution.

The fourth period occurred when the MPR (People's Consultative Assembly) elected at the 1999 General Election, the first democratically held election in the post-Soeharto era, discussed the amendment of the 1945 Constitution.[125] Starting from 1999, the 1945 Constitution underwent amendment until 2002. Within four years, the amendments were conducted four times in 1999, 2000, 2001 and 2002.

The first amendment focused on the limitation of presidential authority as well as the empowerment of the Indonesian House of Representative (the DPR).[126] This is because in the past government, under the 1945 Constitution, in practice, the President gained more power compared to that of the DPR. As a result, the government could control the legislature and led to an authoritarian government.

The second amendment focused on some democratic features such as the establishment of human rights articles, citizen's rights, and the general election.[127] The third amendment focused on the state institutions including the Judiciary. Originally, the chapter concerning the Judiciary only consisted of one article. After the amendment, however, there are four articles concerning the Judiciary, namely article 24, article 24A, article 24B, and article 24C. Article 24 regulates the main structure of judicial power in Indonesia; article 24A deals with the Supreme Court; article 24B deals with the Judicial Commission; and article 24C regulates the Indonesian Constitutional Court.

In the process of the third amendment of the 1945 Constitution, some issues triggered the establishment of the Constitutional Court in Indonesia. Besides external factors, such as the recent establishment of the Constitutional Court in some transitional countries in Asia, internal factors also played significant roles in establishing the Constitutional Court. These included the impeachment of President Wahid[128] and tension between President and par-

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125. *Id*.

126. Articles 5, 7, 13, 14 and 20, 21 the 1945 Constitution as amended.

127. Ross Clarke, *Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials*, 5 Asian L. 3 (2003). Note: Articles 18, 18A, 18B, 19, 20A, 25E, 26, 27, 28A-J, 30, 36A-C the 1945 Constitution as amended.

128. Petra Stockmann, *supra* note 117, at 14. President Wahid single-handedly sacked the police chief and appointed a loyal general. Member of Parliament protested: No longer did the President have the authority to appoint and dismiss the police chief, parliament had a say in it as well.

liament in regard to their competence - conflict between two constitutional organs.[129]

In order to establish a constitutional review mechanism, there were two different models that could be adopted. First, such power is held by the Supreme Court or second, such power be held by a new separate legal institution. People's Consultative Assembly, with considering the current situation in the Supreme Court, chose the second option, which is establishing a separate court, namely the Constitutional Court.

There are two reasons why the People's Consultative Assembly chose the second option. First, the Supreme Courts still struggle with many cases pending in its docket.[130] There is a worry that if such authority is granted to the Supreme Court, the Supreme Court will be possibly overburdened. Second, the public perception regarding the performance of the Supreme Court in the past was relatively low.[131] As a result it was a possibility that granting an additional function to the Supreme Court would have likely made it difficult to obtain public confidence.

Based on the above explanation, it can be said that the establishment of the Indonesian Constitutional Court is the result of the third amendment of the 1945 Constitution in 9 November 2001. It was then followed by the establishment of the Transitional Provisions on Article III of Amended Constitution stating that "The Constitutional Court shall be established at the latest by 17 August 2003 and the Supreme Court shall undertake its functions before it is established."[132]

Apart from the success story of the establishment of the Indonesian Constitutional Court in the new Constitution, some criticisms also arose. The judicial review function of Constitutional Courts had been subject to criticism as it conflicts with the concept of parliamentary sovereignty; from a democratic

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129. *Id*.

130. Rifqi Sjarief Assegaf, Seputar Konsep Mengurangi Perkara di MA [A Concept for Reducing Pending Case in the Supreme Court Docket], workshop, Strategi Pembaharuan di Mahkamah Agung RI [Strategic Reform at the Supreme Court of Republic Indonesia], 1 (2001). In 2002, there were about 20,000 (twenty thousand) pending cases in the Supreme Courts docket. Currently there are still around 8,000 cases in the Supreme Court docket.

131. Tim Konstitusi P3I DPR RI, Academic Draft of Constitutional Court Act (*Naskah Akademik RUU tentang Mahkamah Konstitusi*), Jakarta, 23 April 2003, at 3. This is because performance of Supreme Court is below public expectation. People believe that the judicial system at that time was so corrupt.

132. Article III of Transitional Provision of the 1945 Constitution (as amended) (Indon.).

theory point of view it has been considered as problematic that a small group of people with no popular mandate wields the power to abrogate legislation enacted by democratically legitimized legislators.[133] This "counter majoritarian difficulty" has been the concern of many constitutional law experts on judicial review for decades.[134] In addition, there is a fear that the presence of a Constitutional Court with its authorities may turn itself into a "super body" or "superman."[135]

K. The Dynamic Work of the Indonesian Constitutional Court

Quantitatively, the work of the Constitutional Court can be seen from its statistical data provided in Table 1.

Table 1. Recapitulation of Judicial Review Cases in The Indonesian Constitutional Court (2003-February 2012) [136]

No	Year	Pending Cases From Previous Year	Newly Registered Cases	Decision				Total Decisions	Pending Cases	Total of Laws
				Granted	Rejected	Not Accepted	With-drawn			
1	2003	0	24	0	0	3	1	4	20	16
2	2004	20	27	11	8	12	4	35	12	14
3	2005	12	25	10	14	4	0	28	9	12
4	2006	9	27	8	8	11	2	29	7	9

133. Petra Stockmann, *supra* note 117, at 15.

134. Constitutional courts have been described as "protecting democracy from its own excesses" in that they could be "countermajoritarian", able to protect the substantive values of democracy against possible attempts to subvert them by procedurally legitimate elected bodies. Petra Stockmann*, supra* note 117.

135. "Superbody" is the term often used in the Indonesian debate, but also the term "superman" can be heard. Among others, Vice President Yusuf Kalla is reported as having used the latter; interview with Christian Hegemer, Director of the Hanns Seidel Foundation in Jakarta, 24/4/2006. Against fears that the court may become such a "superbody,", it has been argued that a limitation of the constitutional court's authority can be achieved by way of clear regulations on competence, function, composition, and procedure. One important element is that the court may not act on its own initiative but only upon application. Petra Stockmann, *supra* note 117, at 12.

136. Mahkamah Konstitusi Republik Indonesia, http://www.mahkamahkonstitusi.go.id/index.php?page=website_eng.RekapitulasiPUU (last visited Feb. 3, 2012).

No	Year	Pending Cases From Previous Year	Newly Registered Cases	Decision				Total Decisions	Pending Cases	Total of Laws
				Granted	Rejected	Not Accepted	With-drawn			
5	2007	7	30	4	11	7	5	27	10	12
6	2008	10	36	10	12	7	5	34	12	18
7	2009	12	78	15	17	12	7	51	39	27
8	2010	39	81	17	23	16	5	61	59	58
9	2011	59	86	21	29	35	9	94	51	0
10	2012	51	11	3	1	1	0	5	57	0
Total		219	425	99	123	108	38	368	276	166

It shows that from its establishment in 2003 up to the beginning of 2012 the Court has decided the constitutionality of approximately 166 Laws with various verdicts (Granted, Rejected, Not accepted, and Withdrawn).[137] Such figure describes how progressive the Court in dealing with the constitutional review cases as compared to the Japanese Supreme Court. Apart from the statistical data, the "progressive" work of the Court can be examined from the attitude of the Court in dealing with constitutional review cases, particularly cases that are more political in nature.

The work of the Court can be divided into two different periods: the 2003-2008 and the 2008-2013 periods, in line with to the term of office of the Constitutional Court Justices.

Basically, there are many cases that can be considered as crucial in the sense that such highly political cases are brought to the Indonesian Constitutional Court. These include judicial review on the Constitutionality of article 50 of the Law on Constitutional Court; cases on the rights of the former communists to involve in general election, e.g right to vote;[138] the problem with retroactive effect of law;[139] determining the limits of state control in the economy;[140] 20 percent of the state budget for education.[141] For the purpose

137. *Id*.

138. In this case the Court declare that the former communist party members who during the New Order era was banned using the right to vote, are now eligible to have right to vote because such prohibition contradicts with human rights provisions stated in the Constitution.

139. Petra Stockmann, *supra* note 117, at 45-46.

140. *Id*. at 54.

141. *Id*. at 58.

of this paper, two significant cases will be presented to show the performance of the Indonesian Constitutional Court.

L. Invalidating Article 50 of the 2003 Constitutional Court Law[142]

Article 50 of Law 24/2003 on Constitutional Court limits the laws that can be reviewed by the Constitutional Court, namely law that was enacted after the constitutional amendment, or since 1999.[143] This provision is viewed, directly or indirectly, closely related to the work of the Constitutional Court. On this case, the Court, with split decision, decided that Article 50 is unconstitutional. One Constitutional Court justice believes that such limitation will create a double standard. On the one hand, certain laws (prior to the 1999) cannot be reviewed. On the other hand, other laws can be reviewed by the Court. Thus it may create legal uncertainty. Further, the relevant provision in the amended Constitution does not limit the work of Constitutional Court.

The dissenting Justice questions how laws, which were enacted during the old Constitution can be reviewed using the amended Constitution. The dissenting Justice also argues that it is true the Constitution does not determine such limitation. However, the Constitution clearly stated, "Other regulation can be further regulated by law." So the existence of article 50 was not unconstitutional because it is the implementation of the Constitution.[144]

From this case it can be seen even though the case is "sensitive" in the sense that the case is closely related to the work of the Court, the Court finally decided the case and delivered the verdict. In the verdict, the legal arguments of each judge can be read, analyzed, and accessed by the public.

M. Reviewing Perpu (Government Regulation in Lieu of Law)

Constitutionally, one of the authorities owned by the Constitutional Court is to test the constitutionality of law (statutes) against the Constitution. Thus the

142. The Mahkamah Konstitusi Decision No 66/PUU-11/2004 (Indon.).

143. Article 50 Law 24/2003 (Indon.) ("Laws which can be petitioned to be reviewed are laws enacted after the amendment of the 1945 Constitution of the Republic of Indonesia.").

144. The Mahkamah Konstitusi Decision No 66/PUU-11/2004.

authority of the Court is limited to test the constitutionality of law (not other type of legislation) against the Constitution.[145] The hierarchy of laws and regulations in Indonesia is as follows: (1) Constitution, (2) People Consultative Assembly Stipulation (MPR Decree), (3) Law/Perpu (Government Regulation in Lieu of Law), (4) Government Regulation, (5) Presidential Regulation, and (6) Regional Regulation. Other types of legislation, specifically regulation beneath law, is reviewed by the Supreme Court.[146]

Thus, constitutionally, the work of the Constitutional Court is to review the laws against the Constitution. In practice, however, when a Perpu is submitted to the Court for review, the Court conducts constitutional review towards such Perpu.[147] The Chief Justice of the Constitutional Court believes that even though a Perpu is not law/statute, both Perpu and law are in the same rank of hierarchy. In addition, the review of Perpu also aims to avoid abuse of power.[148] This is because the issuance of Perpu, which has legal binding effect for the public, has not yet obtained the approval from the parliament as Perpu is issued in emergency situation. Perpu is issued solely by the government.

Even though the existence of Perpu is crucial, Perpu potentially leads to abuse of power by the government. Thus, the Court viewed that Perpu shall be the object of constitutional review. The Court views the decision on Perpu as progressive to prevent inconsistence in law and regulation toward the Constitution. The Court also declares that such review is a way to avoid political trick, which may lead to abuse of power.

N. Why the Indonesian Constitutional Court is so "Active" in Dealing With Constitutional Review

The establishment of Indonesian Constitutional Court, which is relatively new, is relatively easier to build a "track record" thereof. This is because the

145. Article 24C of the 1945 Constitution (Indon.).

146. Article 24A of the 1945 Constitution (Indon.). Law 12/2011: The hierarchy of legislation in Indonesia: (1) Constitution, (2) People Consultative Assembly Stipulation (MPR Decree), (3) Law/Perpu (4) Government Regulation, (5) Presidential Regulation, and (6) Regional Regulation.

147. Review of Perpu No. 4 of 1999 on Corruption Eradication Commission (Indon.).

148. The possibility of abuse of power is because Perpu is created solely by the President and its content may derogate the provision of the existing law.

Court does not have history, which can be good or bad. Thus, it is significant to create good image for the Court. If the Court is managed by good, highly professional and integral individuals, it will be respected. At this point, the requirements and recruitment mechanism of the judges and Court staff play significant roles. This will determine the Court's performance and more importantly public confidence. In the case of the Indonesian Constitutional Court, the above requirements has been set up and elaborated in the 2003 Law on the Constitutional Court as amended in 2011. This includes the intellectual capacity that requires a doctoral degree to be eligible as Constitutional Court Justices.[149]

In addition, the centralized nature of the Indonesian Constitutional Court also plays significant roles in managing the integrity and the administration of the Court. The number of Constitutional Courts, which is only one for the whole Indonesia, and the number of staff, which is relatively small and concentrated in the Court, make it easier to conduct intensive supervision. Leadership in this regard is also significant to persuade the Court staff to do their best. Even though a single centralized Court, there are problem raised regarding access to justice for the Indonesians who live far from the capital city. This can be minimized as the Court also provides teleconference in conducting proceedings.

In addition, the existence of the Constitutional Court is sufficiently guaranteed by the Constitution. With full constitutional guarantee including its authorities, independence, both personal and institutional, the Court is more confident in conducting its authorities.

Further, the public trust toward the court works. This can be built by the excellent performance of the Court not only in handling cases but also in dealing with administration of the Court.[150] Integrity and professionalism of the judges are the keywords. Justices of the Constitutional Court are not only professional and have high integrity but also are more willing to scrutinize legislation and governmental actions, and are more willing to strike them down. This includes the possibility of the judges to be criticized when delivering "sensitive" verdicts. As long as the verdicts are legally reasonable and no bad practice is involved, judges must go on with their authorities.

149. Law 8/2011 on the Amendment of Law 24/2003 on Constitutional Court (Indon.).

150. The Secretariat General of The Indonesian Constitutional Court often obtain awards because of its excellent administrative management.

IV. What Lessons can be Learned from the Experience of Japan and Indonesia in Dealing with Judicial Review

It is quite interesting that Japan and Indonesia share different features in many aspects of their judicial review system. These include, among others, institutional design, model of review, and attitudes of the Court in dealing with judicial review cases. It is natural since there are many different contributing factors that influence the establishment of the judicial mechanism in both countries, such as history and culture. However, it does not mean that it is inappropriate for both countries to learn the practice of each country's counterpart, specifically in the case of Japan and Indonesia.

For Japan, one possible lesson that can be learned from the judicial review practice in Indonesia is the establishment of a Constitutional Court. This is a rather dramatic change since to implement this idea constitutional amendment is needed. However this is not an impossible idea as some Japanese legal practitioners[151] and media[152] also support this idea.

If such idea is implemented, the composition of the Justices would be nine: one Chief Justice and eight Associate Justices. The proposed Court would have specific responsibilities, among others, to review the constitutionality of legislation and to review specific constitutional questions from the Supreme Court and lower courts. The decision of the Court will have legal binding effect to unconstitutional legislation and judgment for all agencies and departments of the national government. Since the Court has specific responsibilities, which closely deals with law (particularly constitutional law), it is necessary to determine the qualification of the Justices, such as to Law Professors.

Even though there is doubt regarding this proposal particularly whether such change can give significant impact to the performance of the Court, such change will provide a better alternative. This is because the introduction

151. Masami Itoh, Saibankan To GakushaNo Aida [Between a Justice and a Scholar] 134-137 (1993). Shigenori Matsui, *supra* note 68, at 1416.

152. *Some Important Points on Constitutional Amendment*, Liberal Democratic Party, http://www.jimin.jp/jimin/jimin/2004_seisaku/kenpou/index.html (last visited Apr. 9, 2011); *see* Yomiuri Simbun, Kenpokaisei Yomuri Shian 2004 [Constitutional Amendment – Yomiuri Proposal in 2004] (2004). Shigenori Matsui, *supra* note 68, at 1416.

of a Constitutional Court will grant more specific responsibilities, such as dealing with the Constitution and Human Rights issues so that the Court will be more focused in carrying out its responsibilities.[153]

Indeed, such changes should be accompanied by a viable recruitment, as a good mechanism in the end of the day will depend on the quality of "the man behind the gun." Thus, it is important to appoint judges to the Constitutional Court who are not only professional and have high integrity but also are more willing to scrutinize legislation and governmental actions and are more willing to strike them down.

The introduction of a Constitutional Court will also open more possibilities for the citizens to defend their constitutional rights. As a result, the protection of human rights as well as the norms of the Constitution will be sufficiently upheld.

The next possible solution is that the existing Court, namely the Supreme Court, which is often viewed as "very cautious and careful" in dealing with judicial review cases, can observe the "activism" of the Indonesian Constitutional Court in dealing with constitutional cases, even highly political cases.

The practice of the Indonesian Constitutional Court, which often establishes legal principles in dealing with novel cases possibly can be considered and adopted by the Japanese Supreme Court. It is, of course, with all the consequences such as the possibility of criticisms, comments, and discussion by public regarding the Court decision. Public discussion or comments regarding the Court decision should be viewed as social control to the Court so that the Court will maintain its fairness and integrity in carrying out its responsibility.

Argument on whether the "active" performance of the Court will encroach the authority of the legislature is still questionable. It is true that in terms of the democratic legitimacy, the legislature is more democratic rather than the Court in the sense that members of the legislature are elected by the people. It is also true that making statute is the competence of the legislature.

However, it is important to note that constitutionally one of the Supreme Court functions (and lower court functions) is to conduct judicial review. So it is the Supreme Court's (and lower courts') responsibility to conduct judi-

153. In the case of Indonesia, one of the reasons why a constitutional court is needed is because the existing court, namely the Supreme Court, still has many cases that should be settled. Another reason is because the substance that will be dealt by the Constitutional Court is substantially different compared to cases that are commonly handled by the Supreme Court.

cial review as it is mandated by the Constitution. It means that there is clear division regarding the authority of the legislature and the Supreme Court. In other words, there is no encroachment issue in this process. This is because the legislature has the authority to conduct positive legislation, such as establishing statute, whereas the Supreme Court acts as a negative legislator, which is authorized to scrutinize and invalidate (contradictory) statutes.

In contrast, Indonesia may learn the practice of the Japanese Supreme Court particularly on how the authority to test the constitutionality of all law and regulations is in the hand of one institution, namely the Supreme Court (and its lower court). This practice may avoid the potentiality of inconsistent verdicts issued by the Court.

In the case of Indonesia, since there are two different entities - the Constitutional Court and the Supreme Court - in charge to conduct judicial review, it is possible that verdict from the Constitutional Court differs or even contradicts with the verdict of Supreme Court. This is because both Courts have authority to conduct judicial review. The Constitutional Court is authorized to test the constitutionality of the Statute against the Constitution whereas the Supreme Court is authorized to review ordinances and regulations beneath statutes against statutes itself.

Therefore, it is perhaps viable if the practice of Japan is adopted by the Indonesian Judiciary with certain adjustment. The authority to conduct judicial review will be better if it is authorized in one institution: the Constitutional Court or the Supreme Court. The author suggests that the Constitutional Court of Indonesia should own the authority to review all types of legislation, including ordinances and regulations. Why not the Supreme Court? This is based on the fact that the Supreme Court at the moment still has many pending cases that should be settled. Thus, it is not wise to place more responsibility on the Supreme Court. The Supreme Court should focus on the settlement of the pending cases.

In addition, the role of Japanese CLB to review the bill prior to its enactment may be good practice that can be adopted by Indonesia. This "preliminary review" may have significant impact on the substances of the bill so that there is likely no contradiction toward the Constitution. Thus, after the enactment of law, the possibility of such law to be judicially reviewed is somewhat less. Actually, a similar mechanism exists in Indonesia, but it needs to be improved so that in the future there is less law to be reviewed by the Court. Probably, the composition and the responsibility of the Japanese CLB can be a reference for Indonesia to improve the performance of such body.

V. Conclusion and Recommendations

Formally, the characteristics of the judicial review system in Japan and in Indonesia are different in some aspects. These include the *decentralized v. centralized* institution of judicial review, *concrete v. abstract* type of review and the *European v. American* model of judicial review. Such differences affect how the Court conducts judicial review, such as cases that can be submitted to the court and the number of judicial bodies that have the authority to conduct judicial review.

In practice, the performance of judicial review of the Courts in both countries shares some interesting figures. They share different strength and limits such as the "very cautious and careful" nature of Japanese judicial review and the "progressive" nature of Indonesian judicial review; the "comprehensive" authority of the Japanese Supreme Court to review all types of legislation and "the limited" authority of the Indonesian Constitutional Court to conduct such review.

Another related aspect that is important to be considered is the law making process in Japan. This is particularly focused on the significant contribution of the Japanese CLB in "reviewing" the bill prior to its enactment. The involvement of CLB is probably one of the reasons why there are few cases on judicial review before the Court.

In other words, both countries experience very different attitudes of judicial review. The Japanese Supreme Court tends to be more "conservative" rather than the Indonesian Constitutional Court. The Japanese Supreme Court is reluctant to deal with constitutional issues. This can be seen from its establishment around 60 years ago, the Japanese Supreme Court has decided very few constitutional issues. This is very different compared to the Indonesian Constitutional Court, which was established in 2003, but has decided many constitutional cases.

These very different attitudes of the Court may become significant lessons for both countries. For Japan, establishing a specific court, namely Constitutional Court is possibly an alternative solution that needs to be considered. Next, by observing the work of Constitutional Court of the Republic of Indonesia and examining the "active" role of the Court, it is certainly significant to overcome the "conservative" nature of the Japanese Supreme Court in dealing with Constitutional issues.

For Indonesia, authorizing a single court to conduct the judicial review of

all types of laws and regulations like the Japanese Supreme Court is a good practice that is very important to be implemented in Indonesia.

Currently, with dual authorities, the Supreme Court and the Constitutional Court, to conduct judicial/constitutional review, there is a potentiality of inconsistent decisions between the two bodies. Moreover, there is a constitutional problem if, for example, a regulation beneath law formally does not contradict with the law but may potentially be inconsistent with the Constitution. In such cases, there is no Court, which has the authority to conduct judicial review; neither the Supreme Court nor the Constitutional Court. Thus it is important that the Constitutional Court of Indonesia own the authorities to review all types of legislation including regulations and ordinances

In addition, the active role of the Japanese CLB (Cabinet Legislative Bureau) in reviewing the draft of a statute prior to its enactment is very significant to be implemented in Indonesia. So that in the future there will be less statutes that are considered as unconstitutional by the Constitutional Court. This is important to ensure the legal certainty of the statutes after its enactment.

Above all, however, it is important to note that the application of other countries' experience needs adjustment. Such adjustment includes taking into account other related aspects such as culture and history of the concerned country. It is also important to grasp the actual conditions of the countries we deal with, and find out how a sound development can be achieved in a way that suits the people living there. Thus, it is significant to listen to the voices of the peoples and to understand their societies and cultures.

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