

COMPARISON OF AUTHORITY OF THE CONSTITUTIONAL COURT IN INDONESIA AND THAILAND IN JUDICIAL REVIEW

Indah Satria

Law Faculty Of Bandar Lampung University, Indonesia

Corresponding author e-mail: indah.satria@ubl.ac.id

ABSTRACT - All countries which transformed into democracies at the end of the 20th century established constitutional courts. Thailand and Indonesia established constitutional courts following their transformation into new democracies. For Thailand and Indonesia, the presence of the Court is already long overdue. The main target of the establishment of this institution cannot be separated from the ideals of the legal state. As is known, generally countries that have looked at the written law constitutional text as a collection of the highest legal doctrines. This raises the legal consequences if a product is contrary to the constitution, the supreme doctrine requires cancellation action on the legal product. As for the problem in this paper is how it compares to the authority of the Constitutional Court in Indonesia and Thailand in judicial review. The method used in this research is normative juridical. Constitutional Court of Thailand can review and decide upon the constitutionality draft of laws or draft organic law approved by the National Assembly. However, based on the provisions that have been enacted, the constitutional court of Thailand carry out reviewing of the object of legal norms that have been established or disconnected constitutionality after the Bill is enacted. While in Indonesia, judicial review benchmarks performed with the Constitution. In contrast to the Constitutional Court of Thailand, Constitutional Court of Indonesia cannot examine the Draft of Laws. However, the existence of the Constitutional Court in Indonesia and Thailand has actually functioned optimally. It is effort to maintain the basic rights of the people. Through the way people's preferences in questioning the actions that are considered controversial state apparatus can be organized fairly and accurately. It can be said as the media is able to bridge the community in finding constitutional justice.

keywords: comparison, court , constitution , judicial review

1. INTRODUCTION

In 1978 Hene Van Maarseven in his studies estimating, from the whole constitution contained in the world at that time, only 26 percent of the entering provisions of the formation of the Constitutional Court. When examined applicable provisions in constitutions, said Maarseven this organ mandated to hold power of judicial review.¹ Constitutional history shows that the practical utility of the Constitutional Court related to the need to hold a top constitutional laws set by parliament. The debate on the issue originally appeared in France when Abbe Sieyès put forward the establishment of a special organ guarantor of the constitution. However, when it rejected the idea Sieyes and as the successor regime of Napoleon Bona-Parte formed Senate.²

However, the debate on constitutional review, it develops in the United States as a judicial review, exactly when Marshall deciding the case Marbury vs Madison in 1803. The core of debate in this case is that the Supreme Court of the United States under the leadership of John Marshall challenged to perform testing (review or toetsing) over the constitutionality laws set by the congress, while the United States Constitution did not give authority to the Supreme Court to make the effort that is fundamentally question the laws are made by congress, which is the

legislative branch. All countries roomates transformed into Democracies at the end of the 20th century established constitutional courts. For example, the Eastern European former communist states, Thailand and Indonesia established constitutional courts Following Reviews their transformation into new Democracies.

For the system of the Monarchy of Thailand, reviewing the constitutional power can be seen in the provisions of the constitution that never applies. The presence of the Court is already long overdue. The main target of the establishment of this institution cannot be separated from the ideals of the Rule of Law. Historically, it can be said to be more than sixty-five years (1932-1997) that are institutional organ officially called the Constitutional Court did not previously exist. The role and functions of the Constitutional Court are currently carried maturing process embryonic organ constitutional guarantor there ever before. The maturation takes place in evolutionary and within a certain time often faced with constraints.

While in Indonesia, the reform movement led by youth and students in Indonesia has brought a huge impact in the life of the state. No exception in the state system in Indonesia, the reform movement has brought a big change in the constitutional system in Indonesia. This can be seen by the amendment of the 1945 Constitution as many as four times, which is when the new order regime in power for nearly 32 years, the 1945 Constitution is only used as a tool of coercive power by the rulers of the country at that time. By the amendment of the 1945 Constitution as

¹. As quoted by Tom Ginsburg in his book entitled Judicial Review in New Democracies, op.cit., p.9.

². Alec Stone, Birth of Judicial Politics: The Constitutional Council in Comparative Perspective, Oxford University Press, New York, 1992, p.30.

much as four times lead to fundamental changes in the constitutional system in Indonesia. One of the results are clearly visible with the changes to the 1945 Constitution is the creation of a new state agency in charge of guarding the constitution in Indonesia, and the state agency known as the Constitutional Court.

2. MATERIALS AND METHOD

Based on the above, the issues to be discussed is how the comparison authority of the Constitutional Court in Indonesia to Thailand in judicial review. The method used in this research is normative juridical. Normative juridical approach is done through the study of literature by studying the principles of act that exist in the theory and the legislation in force. Furthermore, the data was analyzed qualitatively juridical.

3. RESULTS AND DISCUSSION

In general, the Constitutional Court of Thailand has some authorities. Firstly, this organ has the authorities to determine the constitutionality of laws and the draft organic law. Secondly, the Constitutional Court of Thailand has the authorities to approve or not the Anti-Corruption Commission recommendation that a candidate for public office was not appointed to a particular post office. The reasons for rejection of candidates caused by it cannot report the amount of wealth or provide information which was considered false. Thirdly, the Constitutional Court of Thailand is very detailed and extensive, the authority of this organ further regulated in the organic law.³

From various authorities possessed by the Constitutional Court of Thailand, the court determines the constitutionality of power laws and the draft organic law is considered the most important authority. Therefore, at this stage review and decide the constitutionality of laws or draft organic law. The constitutional court must consider some important things as follows:

1. In determining public policy must be not violate the rights and fundamental freedoms as has been set by the constitution.
2. In order to achieve the democratic regime of government should pay attention to the balance between the powers and duties of the constitutional organization as defined in the constitution.
3. In order to maintain the constitution, the basic law should be crowned as the highest law in the country.⁴

Constitutional Court of Thailand by a petition can only determine the constitutionality of products

³.The Constitutional Court of Thailand The Provision and The Working of the Court, Edited by Amara Raksasataya and James R.Klein, Constitution for the People Society Supported by The Asia Foundation, Bangkok, 2003, p.6.

⁴. Furthermore it is said : " In fact, there are two primary steps in Determining the constitutionality of such statue and organic law bill, that is to be determined before or after enacting the law". See The Constitutional Court of Thailand The Provision and The Working of the Court, op. Cit., P.6 .

legislation although deliberation against it being held (a priori abstract review). The Court also has other powers, namely the Emergency Regulations stipulate constitutionality (emergency decree) before the emergency rule was imposed by the Council of Ministers (government). In carrying out this kind of reviewing, at an early stage the Court will conduct a thorough examination of the underlying paradigm of a draft of laws or emergency rule in question. In the review series, the constitutional judges review the consistency of the laws with the Constitution of 1997. In addition, Constitutional Court of Thailand is also empowered to verify the legality regarding the establishment of a law based on the constitution.⁵

Constitutional Court of Thailand can examine a number of draft laws. Tests include :

1. Determine the constitutional of an organic law;
2. Determine the constitutional of the issuance of the Emergency Decree by the Council of Minister;
3. Determine the constitutionality of the statue or organic law bill reintroduced by the Concil of Minister or members of the House of Representative having the same or similar principle as that of the statue or the organic law being withheld.⁶

Constitutional Court of can review and decide upon the constitutionality draft law or draft organic law approved by the National Assembly under the provisions of Article 93. In addition, the organ translators basic rules also have the power to examine draft laws Organic ever proposed by a national assembly as stipulated in Article 94. However, petition constitutionality review on draft laws or draft organic law to the constitutional court, it must be done before the prime minister submit two types of the bill to the king for signed. Submission or the application can be done institutionally each president in the parliament and prime minister. If the constitutional court considered that the draft law or draft organic laws contrary to the constitution, the two drafts of legislation that cannot be enforced. The constitutional court may also cancel the law when a predetermined deviate from the determination procedure of a law as determined by the constitution. This issue is clearly regulated under Article 262 the Constitution of 1997. That said:

After any bill or organic law bill has been approved by the National Assembly under section 93 or has been reaffirmed by the National Assembly under section 94, before the Prime Minister present it to the King for signature:

1. If members of the House of representatives, senator or members of both House of not less than one-tenth of the total number of the existing members of both House are of the opinion that provision of the said bill are contrary to or inconsistent with this Constitution or such bill is enected contrary to the provision of this

⁵. See, The Constitutional Court of Thailand The Provision and The Working of the Court, op. Cit., p.6.

⁶. Ibid., p. 6-7.

Constitution, they shall submit their opinion to the President of the House of Representatives, the President of the senate or the President of the National Assembly, as the case may be, and the President of the House receiving such opinion shall refer it to the Constitutional Court for decision and, without delay, inform the Prime Minister thereof;

2. If not less than twenty members of the House of Representatives, senators or members of both House are of the opinion that the provision of the said organic law bill are contrary to or inconsistent with this Constitution or such organic law bill is enacted contrary to this constitution, they shall submit their opinion to the President of the House of Representatives, the President of the Senate or the President of the National Assembly, as the case may be, and the President of the House receiving such opinion shall then refer it to the Constitutional Court for decision and, without delay, inform the Prime Minister thereof;
3. If the Prime Minister is opinion that the provisions of the said bill or organic law bill are contrary to or inconsistent with this Constitution or it is enacted contrary to the provision of this Constitution, the Prime Minister shall refer such opinion to the Constitutional Court for decision and, without delay, inform the President of the House of representatives and the President of the Senate thereof;
4. During the consideration of the Constitutional Court, the Prime Minister shall suspend the proceeding in respect of the promulgation of the bill or organic law bill until the Constitutional Court gives a decision thereon.⁷

Based on the provisions that have been enacted, the constitutional court of Thailand to carry out reviewing of the object of legal norms that have been established. This review model is actually falls into the category of concrete review, as already discussed at length in the previous section. For Thailand, the right to apply for standing is given to the general court judge. However, the initiative to submit the request, commonly driven by the parties were litigating in public court proceedings or on the initiative of general court judges itself. Therefore, if a bill already approved by the legislature and enacted, then through a petition to the Constitutional Court can determine the constitutional after the bill was legitimately become law. Request for review to the Constitutional Court can be made to the parties and the general court judges or institutions Ombudsman. If the applicable law was considered contrary to the constitution, the constitution interpreter organ can cancel the law. This issue in detail under Article 264 and 198.

While in Indonesia, one of the authorities possessed by the Constitutional Court 1945 Constitution is the authority of the constitutionality of laws. Judicial review benchmarks performed with the Constitution. Reviewing can be done in the material or formal.

⁷. Ibid., p. 7.

Material reviewing involves reviewing on material laws, so the question must be clear which parts of the legislation in question is contrary to any provision of the Constitution. While formal reviewing is the reviewing of the process of establishing the law into law if it has to follow the procedure applicable or not. The term reviewing of the legislation can be divided by subject reviewing, regulation, reviewed, and reviewing time. In terms of subject reviewing, reviewing can be done by the judge (toetsingsrecht van de rechter or judicial review), reviewing by the legislature (legislative review), as well as reviewing by the executive (executive review).⁸

In practice, Indonesia set three reviews. Reviewing by the judge (toetsingsrecht van de rechter or judicial) set both before and after the change of the 1945 Constitution concerning judicial setting legislation at the time of entry into force of the 1945 Constitution, was first regulated in Act Number 14 Year of 1970 on Basic Provisions on Judicial Power, which regulates the reviewing of regulations under the Act against the authority of the Supreme Court Act. After the 1945 changes, the reviewing authority regulations under the Act to the Act remains the authority of the Supreme Court, while judicial review against the Constitution is the authority of the Constitutional Court.

Judicial review by the legislature (legislative review) performed in the capacity of institutions that shape and discuss and approve the Act (together with the President). Before the 1945 changes, reviewing laws against the Constitution are in the MPR by MPR Decree Number III/MPR/2000 on Law Resources and Sequence of Statutory Regulations. The reason why the Supreme Court has the authority to review only to legislation under the Act against the law in the period before the 1945 changes, according Padmo Wahjono, based on the premise that the Act as the maximum juridical construction to reflect the ultimate power to the people, should be reviewed by the Assembly.⁹ Constitutional practice there ever was MPRS Number XIX/MPRS/1966 on Reconsideration Products State Legislature outside the Provisional People's Consultative Assembly Products is not in accordance with the 1945 Constitution.¹⁰

Depth analysis is required if reviewing is examined in terms of its object, because they have to pay attention to the legal system is used, the system of government, and the constitutional history of a country that is very likely there are peculiarities in certain countries. Judging from the object being reviewed, then the legislation that was reviewed consists of:

⁸. The term legislative review equated with the political review in HAS Natabaya, System Legislation Indonesia, (Jakarta: The Secretariat-General and Registrar of the Constitutional Court, 2006), p. 187 .

⁹. Padmo Wahjono, *Indonesia Negara Berdasarkan atas Hukum*, Cet. 2, (Jakarta: Ghalia Indonesia, 1986), p.15.

¹⁰. Ibid

- 1) The entire legislation (legislative acts and executive acts) and administrative actions of the Constitution reviewed by judges at all levels of the judiciary. Reviewing with the object as it is done in the case of concrete, and is generally performed in countries using the common law system.¹¹ In general, the term used is a judicial review, but it should be noted again that the use of the term in countries that use the system of civil law system, as set forth in point b below.
- 2) Laws against the Constitution reviewed by the judges at the Constitutional Court, while regulations under the Act against the law reviewed by the judges in the Supreme Court. Reviewing with the distribution of such objects is generally not done in the case of concrete, and is generally performed in countries that use civil law system. Asshiddiqie distinguish if the reviewing was carried out on legal norms that are abstract and general norms as "a posteriori", then reviewing can be referred to as "judicial review", but if the size of the reviewing was done using the constitution as a tool measuring it, then such reviewing activities can be referred to as a "constitutional" or the constitutional review, namely the review concerning the constitutionality of the legal norm that is being reviewed (judicial review on the constitutionality of law).¹²

As previously, that the definition of a term is highly dependent on the legal system adopted by the country concerned, the system of government, and the constitutional history of a country. The term is also used in the judicial review of countries that use the common law system is also used in discussing about reviewing in countries that follow civil law system,¹³

as proposed by Asshiddiqie, namely: 'Judicial Review' is an attempt reviewing by the judicial institutions of the legal products set by the legislative branch, the executive, or judicial branches in order to apply the principle of 'checks and balances' system based on the separation of state powers (separation of power).¹⁴ Although using the same term, namely judicial review, but because the legal system into a different runway, the definition would be different, because in countries with common law system has not recognized the existence of a special court to judge the state as an administrative officer in the civil law system,¹⁵ then to act of state administration also tried in public courts. It causes in the countries that follow the common law system judges authorities assess not only the legislation, but also state administration action against 1945 Constitution.

4.CONCLUSION

Constitutional Court of Thailand can review and decide upon the constitutionality draft law or draft organic law approved by the National Assembly. However, based on the provisions that have been enacted, the constitutional court of Thailand carry out reviewing of the object of legal norms that have been established or disconnected constitutionality after the bill is enacted. While in Indonesia, judicial review benchmarks performed with the Constitution. In contrast to the Constitutional Court of Thailand, Constitutional Court of Indonesia cannot review the Draft Law. However, the existence of the Constitutional Court in Indonesia and Thailand has actually functioned optimally. It is effort to maintain the basic rights of the people. Through the way people's preferences in questioning the actions that are considered controversial state apparatus can be organized fairly and accurately. It can be said as the

¹¹. Some definitions judicial review of countries that use the common law system. In Black's Law, judicial review is defined as: the power of courts to review decisions of another department or level of government. "Henry Campbell Black, Black's Law Dictionary with pronunciations. 6th ed. (United States of America: West Publishing Co., 1990), p. 849. Encyclopedia Americana express the notion of judicial review as follows: "Judicial review is the power of the courts of the country to determine if the acts of the Legislature and the executive are constitutional. Acts that the courts declare to be Contrary to the constitution are Considered null and void and therefore unenforceable." The Encyclopedia Americana Vol. 16, Cet. 7, (Canada: Grolier Limited, 1977), p. 236. While Erick Barendt express the sense of judicial review as follows: "Judicial review is a feature of a most modern liberal Constitutions. It refers to the power of the courts to control the compatibility of legislation and executive acts of the term of the Constitutions." Erick Barendt, An Introduction to Constitutional Law, (Great Britain: Biddles Ltd, Guildford and King's Lynn, 1998), p. 17.

¹². *Ibid.*, p. 6-7.

¹³. "The Common law, ... was formed primarily by judges who had to resolve specific disputes. The Common law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future." Rene David dan John E.C. Brierley, *Major*

Legal Systems in the World Today: Introduction to the Comparative Study of the Law, ed. 3rd, (London: Stevens and Sons Ltd., 1996), p. 24.

¹⁴. Jimly Asshiddiqie, "Menelaah Putusan Mahkamah Agung tentang 'Judicial Review' atas Peraturan Pemerintah Nomor 19 Tahun 2000 yang bertentangan dengan Undang-Undang 31 Tahun 1999, loc cit., p. 1.

¹⁵. In literature, the term Civil Law is also known as the Romano-Germanic Family. "A first family may be called the Romano-Germanic family. "This group includes legal roomates Reviews those countries in science has developed on the basis of Roman *ius civile*." *Ibid.*, p. 22. In the book explained further that: "In the countries of the Romano-Germanic family, the starting point for all legal reasoning is found in various forms of" written law ". *Ibid.*, p. 125. In addition, there are also statutory law term. "Statutory law: Formulated primarily by a Legislature, but Also includes treaties and executive orders; law that come from authoritative and specific law-making sources." James Mac Gregor Burns, JW Peltason, and Thomas E. Cronin, *Government by the People*, alternate 13th ed., (New Jersey: Prentice Hall, 1989), p. 364. For further explanation of the system of centralized and decentralized systems in testing legislation, see Fatmawati, review right (Toetsingsrecht) Owned by the judge in the Reviewing Laws, (Jakarta: PT RadjaGrafindo, 2005).

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