LESSONS FROM THE KOREAN CONSTITUTIONAL COURT: WHAT CAN INDONESIA LEARN FROM THE KOREAN CONSTITUTIONAL COURT EXPERIENCE?

한국과 인도네시아의 헌법재판소제도 비교

책임자: **Andy Omara** (Professor, Faculty of Law, Gadjah Mada University)

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KOREA LEGISLATION RESEARCH INSTITUTE

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Introduction

The history of an institution which has an authority to conduct constitutional review rapidly developed through the diverse experience from many countries. In some countries, the function of constitutional review is conducted by specific court whereas in other countries, such function embedded in the ordinary court such as the Supreme Court. There are also some countries which use a specific body to conduct constitutional review, this body is not a court rather it is a council. The presence of the constitutional court is often called by some legal scholars as 'The 20th Century phenomenon.' This is because the constitutional court is first established in 1919 or in the 20th Century.[1] The first constitutional court is established in Austria[2] based upon the idea of some legal scholars, including Hans Kelsen. This is probably the reason why some legal scholars often called the Austrian model of Constitutional Law as a '*Kelsenian Model'*.[3]

In recent years, a number of countries in transition to democracy have established constitutional courts or other organs in charge of constitutional jurisdiction. In Asia, for example, countries such as South Korea, Mongolia, Thailand, Cambodia, and the Philippines established such court.[4] In this regards Petra Stockman views that 'a wave of constitutionalism and constitutional jurisdiction has accompanied the much talked about waves of democratization.'[5]

The importance of the establishment of constitutional courts for countries

[1] I D. G. Palguna, *Mahkamah Konstitusi Dalam Transisi Demokrasi di Indonesia in Konstitusi dan Ketatanegaraan Indonesia Kontemporer (Constitutional Court in Transitional democracy in Indonesia*, (2007) p 386
[2] Ibid.
[3] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (2006) p 103.
[4] Petra Stockman, *New Indonesian Constitutional Court: A Study into Its Beginnings and First Year of Work*, (2007) p. 11
[5] Ibid.

undergoing a transformation towards a democratic constitutional state under the rule of law is clearly stated by Justice Yong-Joon Kim, the former President of the South Korean Constitutional Court. Justice Yong Joon Kim, based on his country experiences, stated that 'from a political standpoint, it can be said that the Constitutional Court has accelerated the process of democratization in Korea by doing away with the authoritarian system of past regimes. The legal system, which had been outside the control of the constitution, is now being reformed one step at a time."[6]

Some challenges, however, may be faced by the Constitutional courts in transition countries as said by Petra Stockman: the constitutional courts will, in certain ways, deal with the legacy of the past authoritarian regimes. Transitional justice, therefore, may also touch the constitutional jurisdiction and the principle of upholding the law.[7] The next question is which constitution the court has to uphold. Is the constitution which, unambiguously, enshrines the principles of a democratic constitutional state under the rule of law and human rights protection? Or the amended constitution which the process is dominated by short term interests and political compromises of the day? If the latter is the case, then the constitution in question might be fraught with inconsistencies and provisions which justice-minded judges might find difficult to uphold.[8] This may lead to the question of how creative judges may be in their interpretation of the constitution, which is a question of boundaries.[9]

In the Korean context as well as in the Indonesian context, the establishment of this specific court is considered a significant effort. This is because this court has specific authorities, among the others, guarding the norms of the constitution and protecting the constitutional rights of the citizens, such authorities which are not owned by any other legal institutions.

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[6] Justice Yong-Joon, Kim, "Constitutional Adjudication and the Korean Experience", in: Harvard Asia Quarterly, Vol. 4, No. 1. Winter 2000, http://www.asiaquarterly. com/ content/ view/54/40/ at 4 November 2008
[7] Stockman, above n 4, 11
[8] Ibid
[9] Ibid, 12

The Korean Constitutional Court is often considered as one of good references for the Indonesian Constitutional Court. This can be seen that prior to the establishment of the Constitutional Court, some of the Indonesian constitutional experts conduct comparative study in some Asian countries, including South Korea. From the study, arguably, it can be said that the Korean Constitutional Court model plays significant roles specifically in the features of the then Indonesian Constitutional Court. This is because the features of the Indonesian Constitutional Court, in a certain extent, resemble the Korean Constitutional Court features. The significance of the Korean Constitutional Court can be seen as follow:

The Korean Constitutional Court, for example, owned five different authorities. These include: first, the authority to review the constitutionality of the Law; second, the authority to decide Impeachment; third, the authority to dissolute a political party; fourth, the authority to resolve disputes about the jurisdictions between State agencies, between State agencies and local governments, and between local governments, and last, the authority to decide petitions relating to the Constitution as prescribed by law.

The above features, similarly, exists in the Indonesian Constitutional Court. Such features are: examining the legality of law against the constitution; involving in the impeachment process; dissolution a political party; dispute in general election; and dispute among states institution. Another similarity can be seen in the number of constitutional justices and the institutions that nominate the constitutional justices.

This paper aims to comparatively examine the features of the Korean Constitutional Court and the Indonesian Constitutional Court. It argues that even though there are some common features between the Korean Constitutional Court and the Indonesian Constitutional Court, both constitutional courts have their specific authorities which, in certain ways, are different. Further, there is a need for the Indonesian Constitutional Court to have additional authorities such as constitutional complaint and review all

types of laws towards the Constitution, like in the Korean Constitutional Court.

The comparative study is significant since both countries may learn the experiences of their constitutional court counterpart. And they may benefit each other. The Indonesian Constitutional Court may study the specific authorities that are owned by the Korean Constitutional Court such as Constitutional complaint and review of laws against the constitution. Whereas the Korean Constitutional Court may consider studying the authority to settle dispute in the general election result, such features which owned the Indonesian Constitutional Court. This paper, however, will more focus on two authorities of the Korean Constitutional Court namely constitutional complaint and review of laws against the constitution, two features that will be beneficial for the current Indonesian Constitutional Court in enhancing its performance as well as in protecting the rights of citizens and guarding the constitution.

This paper will be divided into five parts. The paper will begin with a brief description concerning the Korean and the Indonesian legal system in their historical context. This is important to appropriately understand the evolvement of legal system in both countries. This is also significant in understanding the importance of the establishment of the constitutional court in both countries. This part will be followed by a brief description concerning some Constitutional Courts models existing in the world. These models then will be applied into the Korean Constitutional Court and the Indonesian Constitutional Court.

The second part will explain the history of the establishment of an institution which is authorized to conduct judicial review in Korea as well as in Indonesia. This brief description is significant to understand the development of the judicial review system in both countries, specifically in relation to the current situation of the Constitutional Court in both countries.

The third part will examine the constitutional basis of the Constitutional Court in Korea and Indonesia. This is significant to appropriately understand the Constitutional guarantees that are owned by the Korean and The Indonesian

Constitutional Courts. Such constitutional guarantees include the authorities that are held by the Constitutional court, the composition of the constitutional justices and the nomination procedures of constitutional justices.

The fourth part will comparatively examine the authorities that are owned by the Constitutional Courts in both countries. In doing so, the Korean Constitutional Court Act and the Indonesian Constitutional Court Act will be rigorously examined. Some significant experiences will also be presented. The paper will then critically analyze those authorities and make some suggestions about the possibility to apply those authorities in both countries.

The fifth part will specifically explain the needs of the Indonesian Constitutional Court to adopt two features of the Korean Constitutional Court namely: the authority to adjudicate constitutional complaint and the authority to review all types of laws against the Constitution. In doing so, the recent case regarding Joint Decree on Ahmadiyah in Indonesia will be presented. The joint decree case is important to be presented because it potentially creates constitutional problem. The case of Joint Decree may be resolved if the Indonesian Constitutional Court owned the authority to adjudicate constitutional complaint and the authority to review all types of laws against the Constitution. This paper will end with some recommendations for the future of the Indonesian Constitutional Court.

I. A Brief Description Regarding the Korean Legal System and The Indonesian Legal System: Some Significant Similarities

The Korean legal system is a civil law system, and the modern Korean legal system originally followed the European civil law system. During the Japanese rule of Korea from 1910 to 1945, the Japanese legal system was, in

certain way, applied to Korea.[10] In 1948 when the Republic of Korea was inaugurated, some laws from Japan were carried over. In addition, during the U.S. military occupation of 1945-1948, there were also an influence from the American Legal System in the Korean legislation. During the 1950s and 1960s, however, there had been an effort to by the legislative to eliminate and to amend most of the Japanese legislation. Rather than following the Japanese legal system, during this period, the Republic of Korea, arguably, was influenced by the American legal system.[11] This is because of Korea's strong political and economic relations with the United States.

In addition, during the 1970s and the 1980s, many laws were also amended or enacted to reflect administrative changes, economic growth, and social developments. Since the massive anti government protest and the following reform in 1987, Korea has been in the process of gradual democratization. [12] The democratization movement by the Korean public brought significant changes to the Constitution in 1987, and with the first civilian government in 1993, the legislative reform activity continued to adopt a more democratic reform and to improve the legal system. The government's policy toward globalization and economic reform with the advent of the WTO and Korea's accession to the OECD has also led to many revamped acts and statutes. The Asian financial crisis in 1997 led to a systematic deregulation and proliferation of new laws and regulations.[13] Apart from many changes that had been occurred in various fields, the existence of constitutional adjudication is particularly significant from legal point of view. [14] The description of the history of the Korean Constitutional Court will be presented in the next part.

[10] Overview of Korean Legal & Court System http://www.korealaw.com/node/16 at 21 October 2008
[11] Ibid.
[12] Kun Yan, Judicial Review and Social Change in The Korean Democratizing Process, p. 1
[13] Korea Legislation Research Institute, *Economic Laws on Foreign Investment in Korea*. 8-9 (2000).
[14] Yan, above n 12, 1.

Similar to The Korean legal system, The Indonesian legal system is commonly called a civil law system. The Indonesian civil law system is basically rooted from the Netherlands. The Dutch transferred its legal system through its colonization in Indonesia. The Dutch colonized Indonesia for almost three hundred and fifty years. Even though Japan also colonized Indonesia after the Dutch, it did not give many legal impacts. This is because Japan colonized Indonesia only for about three and a half years.

When the republic Indonesia was inaugurated in 1945, many of the Dutch laws were also carried over. These include the Dutch Civil Codes, the Dutch Commercial Codes and the Dutch Criminal Codes. In line with the legal development in Indonesia, the Indonesian legislature produced more Indonesian legislation. The impact of this development is the existence of the Dutch legislation in Indonesia significantly decreased.

The 1997 Asian financial crisis resulted significant changes in Indonesia. This crisis led to massive anti government protest in Indonesia. Public believed that such crisis was not only because of the regional financial crisis or external factors but more than that it is also because of the weak economic fundamentals as a result of corruption, collusion and nepotism. This situation led to the resignation of the President Soeharto in 1998. This situation then followed by significant legal reform. Not only some laws and legislation amended and repealed but more than that the Indonesian Constitution was also amended. Such amendment occurred four times from 1999 to 2002. The establishment of the Indonesian Constitutional Court as a result of the third amendment in 2001 is significant in legal point of view.

1. Some Constitutional Court Models in the World

In general, there are two major models of constitutional court that usually considered as significant model in establishing the Constitutional Court. They

are: the American Model and the European Model.[15] In very general sense, the different between the two lies in which institution such authorities will be held. The other different is the variants of such model. It is usually said that American model consists of one model, whereas in the European model there are some variations.

In the American Model, the functions of constitutional court are carried out by ordinary court namely the Supreme Court. In other words, there is no special court or body such as constitutional court to conduct its functions.[16] The Supreme Court in this sense has an authority to examine the constitutionality of legal norms besides its original authority. In addition, The Supreme Court is also the highest body which has the authority to examine the constitutionality of laws as well as the interpreter of the constitution.[17] Argentine, Mexico, Nigeria, India, Sweden and Israel are example of countries which adopt the American Model.

Unlike the American Model where the functions of constitutional review embedded in The Supreme Court, in the European model there is a specific court to conduct such functions, which is different from the Supreme Court. Within the European model, there are some variations, these include: The Austrian Model; The Germany Model; and The France Model.[18]

The Austria Model is also commonly called the continental model. In this model the functions of constitutional court is carried out by specific court which is different from the ordinary court. The main responsibility of this special court is to control the constitutionality of laws. Despite its main

[15] There are 10 models of constitutional review: American model, Austrian model, France 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, p 43-73.

[16] Violaine Autheman and 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 #4, Constitutional Courts, p. 8.

[17] Ibid.

[18] Asshiddiqie, above n 3, 43-73.

responsibilities, there are some other responsibilities of this court, among the other, the authority to settle the dispute between the state organs and the authority to dismiss political parties. Countries which follow this model, among the others, Spain, Poland, Russia, Chile, Costa Rica, Egypt, South Africa and Lebanon.[19]

In The Germany model, the Constitutional Court is a separate body which has an authority to state that a law or an act contradicts with the constitution. Germany, Brazil and Peru are examples of countries which adopt this model.[20]

Unlike the Austria and the Germany model, in France model there is no constitutional court rather it has *counseil constitutionnel*. This means that within this model the functions of constitutional court is carried out by a specific council not by specific court. This council obliges to review a bill whether or not it contradicts with the constitution. In this model the reviewing process is conducted before a bill is enacted. France and Morocco are two countries which apply this model.[21] Within the above model, it can be said that the Korean Constitutional Court and the Indonesian Constitutional Court are considered applying the European model. This can be seen from the Korean Constitutional Court features as well as the Indonesian constitutional court features which resemble the European Model.

[19] Ibid.
[20] Ibid.
[21] Ibid.

II. The History of the Korean Constitutional Court and the Indonesian Constitutional Court

1. The History of the Korean Constitutional Court: The Most Frequent Changes in Judicial Review System?

Since its independence in 1948, Korea already had an organ which carried out the judicial review function. Even though the name of such body is probably not the same each period, this body exists up to present. It is probably true that Korea is a country which has experiences in so many changes in its judicial review system within relatively short period of time.[22] Professor Kun Yang emphasized that 'there is probably no other country which has experienced so many changes in its judicial system in a relatively short period of time.'[23] Professor Yang added that 'since its establishment of the first Democratic Constitution in 1948, Korea has had a judicial system in one form or another varying from the European to the American or mixed. With each change of government, and the consequent Constitutional revision, the judicial review system also changed.'[24] Since the Korean independence in 1948 up to present, the changes of the Korean judicial review system may be divided into six different periods.

In the First Republic from 1948 to1960, the name of the body which had judicial review function was the Constitutional Committee. In the Second Republic from 1960 to 1961, however, the name of such institution changed to the Constitutional Court. In the next period namely the Third Republic from 1961 up to 1972 the body which owned judicial review power was the Supreme Court. In the Fourth Republic (1972-1981), such authorities were owned by the Constitutional Committee; whereas in The Fifth Republic (1981-1987) the

[22] Yan, above n 12, 1
[23] Ibid.
[24] Ibid.

Constitutional Committee was the body which has judicial review authority. In the current period namely The Sixth Republic from 1987 up to present, the Constitutional Court is the body which owned such authority.

The First Republic started from the Korean Independence in 1948 up to 1960. In this period, Korea already had a specific body which has the authority to review the constitutionality of legislation. Unlike the current constitutional court, this body is called Constitutional Committee. In practice, this body, can be said, reflects a combination of German and French practices. In its eleven-year history, the Constitutional Committee reviewed only seven cases altogether, among which only two laws were decided unconstitutional.[25]

The Second Republic began from1960 to 1961. Within this period, Korea introduced the new body with similar function. Such a body called the Constitutional Court. This body is influenced by the successful history of the then West German Constitutional Court. [26] This can be seen that The 1960 Constitution, drafted just after the student revolution of April 1960, provided a continental European type of Constitutional Court. This body, however, never had the opportunity to function because of the ensuing May 1961 military coup.[27] It is important to be noted, however, that this system is incorporated in the current Korean Constitution and has produced remarkable outcomes.

Under the Constitution of The Third Republic (1961-1972): The functions of the constitutional court were carried out by the Supreme Court. This means that the authority to decide whether or not a law is constitutional is embedded in the Supreme Court. In other words, The American style of the judicial review system is adopted in this period. In practice, although the lower courts occasionally made daring holdings of unconstitutionality, in fear of politicizing the judiciary, the Supreme Court maintained a principle of self-restraint by

[25] Ibid
[26] Woo-Jung Jon, On The History and The Role of The Korean Constitutional Court &Its Introduction in Vietnam (2006) p.13
[27] International Symposium in Celebration of the20th Anniversary of the Constitutional Court of Korea, the History of Korean Constitutional Court. http://www.ccourt.go.kr/home/ 20symposium/About_01_1.html at 5 November 2008

reversing all except two of the lower courts' holdings of unconstitutionality. Within 10 years periods, the Supreme Court held a law unconstitutional in only one instance.[28]

In The Constitution of The Fourth (1972-1981) and Fifth (1981-1987) Republics, the functions of constitutional court are again carried out by the Constitutional Committee. This Committee, however, never actively discussed the review of the constitutionality of legislation. This is due to the period of authoritarian political power.[29] In other words during its existence, the Committee reviewed no legislation. Between 1972 and 1987, the Supreme Court to take a leading role in defining the content of "constitutionalism" whereas the Constitutional Committee is inactive.

Even though since its independence Korea has such legal body, this body however did not work well as Justice Yong-Joon, Kim viewed that: "Since … [1948], Korea has had a republican form of government and a constitution that protects the basic rights of the citizens based upon the principles of democracy and of the rule of law. Until recently, however, the Korean Constitution had been unable to perform effectively its protective functions. … Starting in 1987, Korea was engulfed by a strong democracy movement. The people … genuinely longed for a society in which human rights, freedom, and democracy would be living realities. Hence, it seemed natural that the aspirations of the people began to focus on establishing a new mechanism for constitutional adjudication."[30] It can be said that between 1948and 1987 the constitution paid lip service in the judicial review.[31]

Under the Constitution of The Sixth Republic (1987-present), the judicial review function is held by the Constitutional Court. With the start of the so called Sixth Republic in 1988, the Constitutional Court was established as a

[28] Yan, above n 12,1
[29] Jon, above n 26, 15
[30] Statement of Justice Yong Joon in Petra Stockman, *New Indonesian Constitutional Court: A Study into Its Beginnings and First Year of Work*, (2007) p 11
[31] John Ferejohn, France Rosenbluth and Charles Shipan, Comparative Judicial Politics (2004) p. 15.

key part of the constitutional system. The constitution has become a living document and constitutional adjudication become daily occurrences.[32] Two majors progress in The 1987 Constitution: first, the limitation of the term of the presidency and second, the establishment of Constitutional Court to conduct judicial review.[33]

At the beginning, there were some debates regarding which organ should be given this responsibility. Should it be given to the Supreme Court or such responsibility should be given to a new separate court. Ultimately, the government decided that a new Constitutional Court should be set up to conduct such responsibility. The government considered that to promote the protection of basic rights, the Constitutional Court should adopt a system of constitutional petition, a system which is similar to that of Germany.[34]

The reasons why the Korean government decided to establish a new constitutional court are numerous. Justices Yon Joon Kim, in a more general sense explained that 'for those countries lacking a tradition of judicial review, and especially those still struggling to cast aside their historical baggage of authoritarianism, the establishment of an independent constitutional court will help to promote specialized adjudication of constitutional issues as well as uniformity and efficiency in the application of constitutional norms.'[35] That is perhaps the reasons why the republic of Korea chose a separate constitutional body. There is, however, another argument that the adoption of the Constitutional Court system in Korea was, actually, not based on theoretical ground but was a result of a compromise between political parties in existence

[32] Kyong Whan Ahn, 'The Constitution Court and Legal Change in Korea: Post 1987 Development,' p 10

[33] Han, Sang Hie, Judicial Mechanism and its Reform for Resolving Conflict in Political Context of Korea, paper for workshop 6 'What Constitutional Mechanisms are Useful for Resolving Conflict Within Site' p. 5.

[34] Justice Yong-Joon, Kim, "Constitutional Adjudication and the Korean Experience", in: Harvard Asia Quarterly, Vol. 4, No. 1. Winter 2000, http://www.asiaquarterly.com/content/view/54/40/ at 4 November 2008

[35] Ibid

at the time the constitution was being drafted.[36]

Apart from the above debate, it seems that the presence of the Korean Constitutional Court has made great progress, through its activities, the Korean Constitutional Court took a very strong, positive stand in reviewing the constitutionality of laws, issuing determined decision nullifying number of existing laws.[37]

2. The History of the Indonesian Constitutional Court: the Old Idea Finally Implemented

Unlike the Korean experience which has already established such institution in 1948 or soon after its independence and continually existed, even though with different name, up to the current Korean Constitutional Court established in 1987, the Indonesian Constitutional Court can be said as a product of the amendment of the Indonesian Constitution or commonly called the 1945 Constitution.

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).[38] Unfortunately, under these three Constitutions, there was no provision concerning the Constitutional Court. The only legal institution which 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

[36] Jon, above n 26, 16.
[37] Joon Hyung Hong, The Rule of Law and Its Acceptance in Asia: A View from Korea. A conference paper presented at ' Rule of Law and Its Acceptance in Asia' a conference co-sponsored by the Mansfield Centre for Pacific Affairs and the Global Forum of Japan.(1999) p. 151.
[38] Denny Indrayana, Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution Making in Transition, *Asia Law Review* (2008) Volume 5 Number 1, p.66.

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.[39] The discussion regarding the importance of the Constitutional Court, generally, can be divided into four periods. The first period is occurred in the Session of the BPUPK -a body which in charge to prepare 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. [40] Yamin's idea, however, did not fit into the integralist concept of state promoted by prominent constitutional law expert Raden Soepomo, who consequently rejected it.[41] The authors of the original 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 Constitution and rejected the judicial authority to verify laws.[42]

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. [43] 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. It was, however, canceled because President Soekarno, through the Presidential Decree dated 5 July 1959, re-

[39] Stockman, above n 4, 14.
[40] Ibid, 11
[41] Ibid.
[42] Benny K Harman, The Role of the Constitutional Court in Indonesian Legal Reform, p 48-49 http://www.ide.go.jp/English/Publish/Asedp/pdf/074_03.pdf at 10 November 2008
[43] Ibid.

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.[44]

The third period occurred at the beginning of the New Order administration 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 namely the Indonesian Supreme Court. Such power, however, only applied to test the constitutionality of regulations beneath law. In other word, there was no legal mechanism to review the constitutionality of a law.

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.[45] 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 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 1945 Constitution.[46] Starting from 1999 The 1945 Constitution underwent amendment until 2002. Within four years, the amendments were conducted four times namely in 1999, 2000, 2001 and 2002. The first amendment focused on the limitation of the presidential authority as well as the empowerment of

[44] Ibid.
[45] Ibid.
[46] Ibid.

the Indonesian House of Representative (the DPR).[47] This is because in the past government, under the 1945 constitution, in practice president gained more power compared to that of the DPR, as a result the government may control the legislature and leads to 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.[48] The third amendment focused on the state institutions including the judiciary. Originally, 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 factor such as the recent establishment of the Constitutional Court in some transitional countries in Asia, internal factor also played significant roles in establishing Constitutional Court. These include the impeachment of President Wahid.[49] Another issue underlining the necessity of constitutional jurisdiction was when there was a tension between president and parliament. 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 - a classic case of conflict between two constitutional organs. [50]

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[47] Articles 5, 7, 13, 14 and 20, 21 the 1945 Constitution as amended.
[48] Ross Clarke, Restropectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials, Asian Law (2003)Volume 5 p. 3
Note: Articles 18,18A, 18 B, 19, 20A, 25E, 26, 27, 28A-J, 30, , 36A-C the 1945 Constitution as amended
[49] Stockman, above n 4, 14.
[50] Ibid.

Another significant issue during the third amendment is concerning the institution which will hold this authority. There were two choices in regard to which institution should hold that power. Should such power be held by the Supreme Court, which means adding one more authority to the Supreme Court; or should such power be held by a new separate legal institution. People's Consultative Assembly, with considering the current situation in the Supreme Court, finally chose the second option, which is establishing a separate court namely constitutional court.

There are two reasons why the People's Consultative Assembly chose the second option. First, there were big pending cases in the Supreme Courts docket. In 2002, there were about 20,000 (twenty thousand) pending cases in the Supreme Courts docket.[51] If the constitutional adjudication is granted to the Supreme Court, the burden of the Supreme Court will be heavier and it may affect the work of the Supreme Court. Second, the level of confidence to the judicial authority, specifically to the Supreme Court was low.[52] This is because performance of Supreme Court is below public expectation. People believe that the judicial system at that time was so corrupt. It would be very difficult to gain public trust if such authority vested to the Supreme Court. In other words, the Supreme Court did not consider it possible to take on additional functions – not with a backlog of more than 20.000 cases and tarnished reputation of the Supreme Court.[53]

Apart from the above issues, in the third amendment, there are two different opinions regarding the importance of the Constitutional Court. First, the representatives of the parties and groups in the MPR who believe that, it was important to control the legislative and executive authority in order to

[51] Rifqi Sjarief Assegaf, A Concept for Reducing Pending Case in the Supreme Court Docket (Seputar Konsep Mengurangi Perkara di MA), workshop, Strategi Pembaharuan di Mahkamah Agung RI (Strategic Reform at the Supreme Court of Republic Indonesia, (2001),p.1

[52] Tim Konstitusi P3I DPR RI, Academic Draft of Constitutional Court Act (*Naskah Akademik RUU tentang Mahkamah Konstitusi*), Jakarta, 23 April 2003, at p.3.

[53] Stockman, above n 4, 15

prevent any violation against the Constitution.[54] Second, the representatives of parties and groups in the MPR, who persistently rejected the control over the legislative product namely law fall within the jurisdiction of a judicial body tasked with determining whether the law is in line with the Constitution.[55] In general, however, the idea to have a constitutional court seems to have met with little opposition - that is notwithstanding the objection of people who did not want any change of the original 1945 Constitution.[56] But then the latter position was no longer a tenable one, since process of constitutional amendment had gotten under way already in 1999.

Based on the above explanation, it can be said that the establishment of the Indonesian Constitutional Court, apart from the pros and cons, is the result of the third amendment of the 1945 Constitution in November 9th, 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.'[57] The last amendment in 2002 made all changes of constitutional provisions completed.

Apart from the success story of the establishment of the Indonesian constitutional court, some criticisms also arose. The judicial review function of constitutional courts has been subject to criticism as it conflicts with the concept of parliamentary sovereignty: From a democratic 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.[58] This "counter majoritarian difficulty" has been the concern of many constitutional law experts on judicial review for

[54] Harman, above n 42, 48-49
[55] Ibid.
[56] Interview by Petra Stockmant with Justice Harjono, Natabaya and Siahaan in Petra Stockman, *New Indonesian Constitutional Court: A Study into Its Beginnings and First Year of Work*, (2007) p 14.
[57] Article III of Transitional Provision of the 1945 Constitution (as amended)
[58] Stockman, above n 12, 15

decades.[59] In addition, there is a fear that the presence of constitutional court with its authorities may turn itself into a "superbody" or "superman".[60]

III. The Constitutional Basis of The Korean Constitutional Court and the Indonesian Constitutional Court

1. The Constitutional Basis of the Korean Constitutional Court: The More Elaborative Provisions Concerning Constitutional Court

During the existence of the Republic of Korea, the Constitution has been revised or rewritten several times, the most recent of which was in 1987 at the beginning of the Sixth Republic.[61] In the Sixth Republic Constitution, The Korean Constitutional Court is explicitly guaranteed by The Constitution. Such guaranteed appears in chapter VI. Besides the competence of the constitutional court, chapter VI regulates the composition of the Constitutional Justices and guarantees the term of office of the Constitutional Justices

In regard to the competence of the constitutional court and the appointment of the constitutional court justices, Article 111 of the Korean

[59] 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. In Petra Stockman, *New Indonesian Constitutional Court: A Study into Its Beginnings and First Year of Work*, (2007) p 12

[60] "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. In Petra Stockman, *New Indonesian Constitutional Court: A Study into Its Beginnings and First Year of Work*, (2007) p 12

[61] History http://en.wikipedia.org/wiki/Law_of_South_Korea at 21 October 2008.

Constitution stated that

(1) The Constitutional Court is competent to adjudicate the following matters:
   1) The unconstitutionality of law upon the request of the courts;
   2) Impeachment;
   3) Dissolution of a political party;
   4) Disputes about the jurisdictions between State agencies, between State agencies and local governments, and between local governments, and
   5) Petitions relating to the Constitution as prescribed by law.

(2) The Constitutional Court is composed of nine adjudicators qualified to be court judges, and they are appointed by the President.

(3) Among the adjudicators referred to in Paragraph (2), three are appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice.

(4) The head of the Constitutional Court is appointed by the President from among the adjudicators with the consent of the National Assembly.

The above article clearly indicates that the competence of the constitutional court is five matters which are different from that of the Korean Supreme Court. Under the Korean Constitution, three legal entities are eligible to file a constitutional case before the Constitutional Court. First, a state agency may request the Constitutional Court to adjudicate a dispute with other state agencies regarding competence. [62] Second, an ordinary court may request the Constitutional Court to determine the constitutionality of a specific Act.[63] The Korean Constitutional Court is authorized to determine whether any legislation is compatible with the Constitution. It is the district court, not the plaintiff in

[62] Article 61 of Korean Constitutional Court Act.
[63] Article 41 of Korean Constitutional Court Act.

the pending civil suit, which is entitled to submit such a request to the Constitutional Court. Third, an individual may file a constitutional complaint on the ground that his or her fundamental rights were violated by the government's action.[64]

In a more elaborative sense, parties who may file a petition for constitutional adjudication are numerous. These include an ordinary Court, the National Assembly, The Government, the branch of Central Government, the branch of Local Government and an individual. An ordinary court may file a petition for constitutional review of statutes. The National Assembly has the power to initiate the impeachment. The Government may bring an action for dissolution of political parties. A branch of central and local government may file a petition for competence.[65] An individual may file a petition for constitutional complaint when his or her fundamental right guaranteed by the Constitution was violated by the exercise or non-exercise of governmental power.

Accordingly, article 112 determines the term and the incompatibility the justices of constitutional court. It stated that:

Article 112

(1) The term of office of the adjudicators of the Constitutional Court is six years, and they may be reappointed under the conditions as prescribed by law.

(2) The adjudicators of the Constitutional Court may not join any political party nor participate in political activities.

(3) No adjudicator of the Constitutional Court can be expelled from office except by impeachment or a sentence of imprisonment or heavier punishment.

The above article implies the security of the justices of constitutional court,

[64] Article 68 of Korean Constitutional Court Act.

[65] Can any body file a petition for constitutional adjudication? http://english.ccourt.go.kr at 5 Nov 2008/

not only in terms of the term of office but also the possibility to be expelled from office. In addition, the restriction for justices of constitutional court to join or participate in political activities is also important to maintain its independence.

Article 113 regulates the procedures in deciding a case and also the authority of the court to establish internal regulation.

Article 113

(1) When the Constitutional Court makes a decision on the unconstitutionality of a law, impeachment, dissolution of a political party, or a petition relating to the Constitution, the concurrence of at least six adjudicators is required.
(2) The Constitutional Court may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of law.
(3) The organization, function, and other necessary matters of the Constitutional Court are determined by law.

The above article affirms that to hand down a verdict, there should be at least six Constitutional justices concurring. This requirement aims to ensure that there should be a majority in deciding cases. Even though there is no article in the Constitution regarding the minimum number of judges in deciding cases, article 113 implies that there should be at least 6 concurring justices. Further regulation concerning the minimum number of Constitutional Justices in rendering decision is regulated in the Korean Constitutional Court where there should be attended by seven Justices.

2. The Constitutional Basis of The Indonesian Constitutional Court: The Less Provision on Constitutional Court

Similar to that of Korea, the Indonesian Constitutional Court is also

guaranteed by the 1945 Indonesian Constitution. The constitutional guarantees of the Indonesian constitutional court can be seen, particularly, in article 24C. It stated that:

(1) The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding over disputes on the result of a general election.
(2) The Constitutional Court shall possess the authority to issue a decision over an opinion of the DPR concerning alleged violations by the President and /or Vice-President of this Constitution.
(3) The Constitutional Court shall be composed of nine persons who shall be constitutional justices and who shall be confirmed in office by the President, of whom three shall be nominated by the Supreme Court, three nominated by the DPR, and three nominated by the President.
(4) The Chair and Vice-Chair of the Constitutional Court are elected by and from the constitutional justices.
(5) Each constitutional justice must possess integrity and a personality that is not dishonorable, and shall be fair, shall be a statesperson who has a command of the Constitution and the public institutions, and shall not hold any position as a state official.
(6) The appointment and dismissal of constitutional justices, the judicial procedure, and other provisions concerning the Constitutional Court shall be regulated by law.

Based on the above article, it can be said that the Indonesian Constitutional court gains five different authorities. Article 24 C also clearly states the composition of constitutional justices and the requirement to be constitutional justices. However, it does not explicitly arrange the appointment

and dismissal of constitutional justices.

In comparative perspective, the number of article concerning the Constitutional Court is fewer than the Korean Constitution. The Indonesian constitution, for example, does not regulate the impossibility of the constitutional justices to be expelled from the office. In the case of Indonesia most of the rules concerning the Constitutional Court will be further regulated in the form of law.

There are some similarities as well as some differences between the Korean Constitutional Court and the Indonesian Constitutional Court in regard to their Constitutional guarantees. The composition of judges in Indonesian Constitutional Court as well as in Korea Constitutional Court consist of 9 (nine) justices. In the case of Indonesia the Justices come from three different institutions namely: 3 (three) are appointed by President, 3 (three) are appointed by Supreme Court, and 3 (three) are appointed by House of Representative. [66] This situation is similar to that of Korea where the Constitutional Court Justices also come from three different institutions namely the National Assembly, The President and Chief of Justice.

In regard to the requirements to hold Constitutional Court Justices, the Indonesian Constitutional Court is more details in regulating such matter compared to that in Korea. Such requirements are: someone should be (a) possess a strong integrity and good personality, (b) just; and (c) state' man who have sufficient knowledge of the Constitution and state administration. [67] Further requirements regarding the qualification to be Constitutional Justices in the form of law[68]

In addition, during hold the office, judges of both the Indonesian

[66] Article 24 C (3) The 1945 Constitution (as amended).
[67] Article 24 C (5) The 1945 Constitution (as amended).
[68] Article 16 Law number 24 year 2003 adds such requirements: (a) hold an Indonesian citizenship, (b) hold law degree, (c) aged at least 40 (forty) years old at the time of appointment, (d) have never been imprisoned based on enforceable court decision for committing a crime punishable by at least 5 (five) years of imprisonment, (e) not declared bankrupt by court decision, and (f) have the experience in the field of law for at least 10 (ten) years.

Constitutional Court and the Korean Constitutional Court are prohibited to hold political positions and political activities. The Indonesian Constitutional court justice, however, is also prohibited doing business, legal advocates and public servants.[69]

Generally speaking, the Indonesian Constitutional Court has only one panel which consist of 9 (nine) judges for hearing of each case, trials, and renders a decision. Under an extraordinary circumstances the session should be at least attended by 7 (seven) judges.[70] This is similar to the Korean Constitutional Court even though there is no such limitation stated in the Constitution, the Constitutional Court Act stated that in reviewing cases there should be at least seven Justices and six concurring justice in rendering decision.[71]

Some differences, however, are apparent in regard to the term of office, authorities and appointment of the chief of Constitutional Justice. The Korean constitutional court justices enjoy more term of office compared to that of the Indonesian Constitutional Court. The Korean Constitutional Justices enjoy six years term of office whereas the Indonesian Constitutional Justices enjoy five years term of office. In both Countries the Constitutional Justices may be re elected for another term of office.

The above figure is different from the German Constitutional Court: The German Constitutional Courts is organized into two separate panels (Senates), each consisting of eight judges. The judges should have to qualify for admission to the bar and judicial office and are not allowed to engage in any other professional activities except the teaching of law at a German University.[72]

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[69] Article 17 Law number 24 year 2003
[70] Article 28 Law number 24 year 2003.
[71] Article 23 The Korean Constitutional Court Act
[72] Hans G. Rupp , *The Federal Constitutional Court and The Constitution of The Federal Republic of Germany*, Saint Louis University Law Journal , Vol. 16 ; 359 , p. 360 in Harjono, The Indonesian Constitutional Court, p 3. http://www.ccourt.go.kr/home/english/introduction /pdf/05.pdf at 18 November 2008

They are elected by the federal legislative bodies (Bundestag and Bundesrat), each body electing one half. They are elected for a single term of twelve years. In other words, the re election is not permitted. Each judge is elected to one panel for his term; he cannot serve on the other panel. The judges must retire at sixty-eight which leads to the consequence that as a rule, no one would be elected who is over fifty-six years of age. A further requirement is that three judges in each panel have to be chosen from among the judges of the five federal courts.[73]

In terms of the authorities, the Indonesian constitutional court possesses an authority which is not owned by the Korean constitutional court. Such authorities include deciding over dispute on the result of a general election. The Korean Constitutional Court, on the other hand, also has an authority which is not owned by the Indonesian Constitutional Court, namely adjudicating petitions relating to the Constitution. In addition, the Chief/Chair of the Indonesian Constitutional Justice is elected by the member of Constitutional Justices. The role of President only confirms the nine constitutional Justice. In Korea, however, the role of President is significant in this regards, this is because the Chief of Constitutional Justice is appointed by President with consent of National Assembly.

IV. Law Concerning the Constitutional Court: Some Significant Features of The Korean Constitutional Court and the Indonesian Constitutional Court

The more elaborative rules concerning the Constitutional Court, both in Indonesia and in Korea, are in the form of legislation or act. In order to gain more comprehensive picture concerning the authorities that are owned by the

[73] Ibid

Korean Constitutional Court as well as the Indonesian Constitutional Court, the following part will examine these authorities based on the relevant legislation. In the case of Indonesia the relevant legislation is the Act Number 24 of 2003 on the Constitutional Court of the Republic of Indonesia whereas in Korea the relevant legislation is the Constitutional Court Act 1988, which was amended nine times up to the recent amendment in 2007.[74] Six features of Constitutional Court in both countries will be discussed, they are: first, the authority to examine the constitutionality of Laws against the Constitution; second, the authority to settle the dispute among state institutions; third, the authority to dissolute political parties; fourth, the authority to resolve the dispute on the result of general election; fifth, the authority to involve in the impeachment process and lastly, the authority to settle constitutional complaint.

1. Adjudicate the Constitutionality of Law toward Constitution

Even though both the Indonesian Constitutional Court and the Korean Constitutional Courts gain the authority to adjudicate the constitutionality of law toward the constitution, there are some differences between the two. The differences include: the beginning of this function, the parties which are eligible to file the case, the type of review and the procedures.

In Indonesia, the authority to conduct judicial review of a law started in 2000, specifically after the issuance of the People Consultative Assembly Decree Number III/MPR/2000 regarding the Legal Source and Hierarchy of Laws. Article 5 section (1), determined that the People Consultative Assembly (the PCA) was authorized to review a statute toward the 1945 Constitution

Nowadays, the hierarchy of laws is determined by the Law Number 10 of 2004 regarding The Procedure to Formulate the Laws and Regulations. The hierarchy of laws is determined in Article 7 section (1), as follows:

[74] The nine times amendments occurred in: 1991, 1994, 1995, 1997, January 19th 2002, January 26th 2002,March 12th 2003, March 31st 2005, July 29th 2005. The Constitutional Court Act http://english.ccourt.go.kr/ at 7 November 2008

1. The 1945 Constitution,
2. Statute/ Government Regulation in Lieu of Statute,
3. Government Regulation,
4. Presidential Regulation,
5. Regional Regulation:
   a. Provincial Regional Regulation,
   b. Regency/City Regional Regulation,
   c. Village Regulation.

This hierarchy means that the lower rank regulation should be in line with the higher regulations. In other words, the lower rank regulation cannot contradict with the higher rank regulation. In case the lower rank of regulations contradicts with the higher regulations, the lower regulations shall be void and null. In addition, the higher regulations shall be the foundation in forming the lower regulations.

In regard to the authority to conduct constitutional adjudication, these authorities are distributed into two different courts. The authority to review a statute toward the constitution is in the hand of the Indonesian Constitutional Court whereas the authority to review regulations and ordinances beneath a statute toward a statute is in the hand of the Supreme Court.

Based on the above explanation, it can be said that the authority to adjudicate the legality of law toward the Constitution started in 2000. Such authority is owned by the People Consultative Assembly. This authority, however, had never been used by the People Consultative Assembly until this decree was revoked by the People Consultative Assembly Decree Number I/MPR/2003 regarding the Substantive Review of the Provisional People Consultative Assembly Decrees and the People Consultative Assembly Decree since 1966 until 2002.

The revocation of the Decree did not create a legal vacuum. This is because in the same year the Indonesian Constitutional Court gained this

authority through the enactment of the Law Concerning the Indonesian Constitutional Court in 2003. Unlike the Indonesian Constitutional Court, the Korean Constitutional Court operated after the enactment of the Korean Constitutional Court Act in 1988 approximately one year after the amendment of sixth Republic of the Korean Constitution. In other words, the operation of the Korean Constitutional Court was fifteen year earlier than the Indonesian Constitutional Court.

In regard to the parties who are eligible to file application before the constitutional court, there are some differences between the Indonesian Constitutional Court and the Korean Constitutional Court. In the Indonesian Constitutional Court there are four parties or groups who are eligible to file an application before the constitutional court specifically in the matter of the constitutionality of laws against the Constitution. They are: first, any individuals, citizens of Indonesia. Second, union of customary law community, provided that it is still alive and in line with the community development and the principles of the Unitary of the Republic of Indonesia as regulated by law (*kesatuan masyarakat adat*). Third, public or private legal entities. And fourth, state institutions.[75]

Within the above category there are some issues that are significant to be addressed, these include the vague definition regarding the union of customary law community and the state institutions. Even though there has been an effort to limit the definition of the union of customary law community as stated in article 51 of the Law Number 24 Year 2003 concerning the Indonesian Constitutional Court, in practice it is not easy to determine whether union of customary law community is still alive. This is because society continuously changes. The evolvement of the society leads to the difficulties in determining whether or not certain society still conduct its customary law. In deciding the legality of the parties within this category, the Indonesian Constitutional Court examines the evidence that brought by the parties before court. Such evidence

[75] Article 51 of The Indonesian Constitutional Court Act

includes for, example, the person who file the case is the traditional leader who still play significant role in the community.

Apart from the difficulty in determining the definition of the union of customary law community, there is also a difficulty in determining the definition of state institutions. This is because the Indonesian Constitution as well as the Constitutional Court Act does not clearly explain what considered state agencies. This leads to the difficulties in determining which state agencies can file application to Constitutional Court. Does it only apply to state agencies or it also applies for local government agencies.

In Korea, however, the parties which are eligible to file a case concerning the constitutionality of laws against the Constitution is more limited they are the ordinary courts and the parties in court proceeding. In this sense the Indonesian Constitutional Court Act give opportunity to more parties to file a constitutional adjudication compared to that in Korean Constitutional Court Act. Apart from that, the Korean Constitutional Court Act is clearer in defining state institutions.[76] As stated in article 41, 61 and 68 of the Act of the Constitutional Court state institutions include an ordinary court, the National Assembly, The Government, the branch of Central Government, and the branch of Local Government.[77] It can be said that the Korean Constitutional Court is better in defining the term state agencies compared to that in Indonesian.[78]

Some differences are also apparent in regard to the type of review. For example in Indonesia, in case there is an allegation that an article, sub article, or a part of a statute contravenes with the 1945 Constitution and potentially breach or already breach citizen's constitutional rights as determined by the 1945 Constitution, they can submit directly to the Indonesian Constitutional Court without any proceeding case in the ordinary court that has been

[76] Article 61, 41 and 68 of the Korean Constitutional Court Act
[77] Article 68 paragraph 1 of the Korean Constitutional Court Act.
[78] Article 61 of the Korean Constitutional Court Act. The term state agencies are not only state agencies themselves but also local government.

examined.[79]

Unlike the Indonesian Constitutional Court, the Korean Constitutional court is authorized to review a statute based upon the request from ordinary court as determined in Article 2 and Article 41 paragraph (1) of the Constitutional Court Act.[80] This means that the request shall come from the ordinary court that examines that case. The request itself could be based upon the ordinary court judge request or by the motion of party that involve in that proceeding case, which means there should be a real case.

Theoretically, The Indonesian Constitutional Court uses method of review that could be categorized as an abstract review.[81] This is because the request or application can be filled to the court without any real case in the ordinary court and the decision should also bind to any person, local governments, state institutions, and even to the Supreme Court. The Korean Constitutional Court , however, can be considered using a concrete review.[82] This is because there is a real case in the court proceeding that needs to be decided by the ordinary court. The statute or part of a statute, that will be enforced, however, raises a question of constitutionality. So, the judges or the party could request the decision of the Korean Constitutional Court before continue to decide that case.

The other difference is the procedural law regarding the suspension of

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[79] Article 51 the Indonesian Constitutional Court Act

[80] **Article 41 (Request for Adjudication on the Constitutionality of Statutes)**

(1) When the issue of whether or not statutes are constitutional is relevant to the judgment of the original case, the ordinary court (including the military court; hereinafter the same shall apply) shall request to the Constitutional Court, ex officio or by decision upon a motion by the party, an adjudication on the constitutionality of statutes.

(2) The motion of the party as referred to in paragraph (1) shall be in writing, stating matters as referred to in sub- paragraphs 2 to 4 of Article 43.

(3) The provisions of Article 254 of the Civil Procedure Act shall apply mutatis mutandis to the examination of the writ- ten motion referred to in paragraph (2).

(4) No appeal shall be made against the decision of the ordinary court on the request for adjudication on the constitutionality of statutes.

(5) When an ordinary court other than the Supreme Court makes a request referred to in paragraph (1), it shall do so through the Supreme Court.

[81] Norman Dorsen, et all, Comparative Constitutionalism: Cases and Materials, at P.114, (West Group), 2003.

[82] Ibid

proceeding case if the applied statute is being in question of its constitutionality. In conducting the suspension procedure, the Indonesian Constitutional Court follows the rules in article 53 and 55 of The Indonesian Constitutional Court Act. [83] Meanwhile, the Korean Constitutional Court Act, such matter is determined in Article 42. In the case of Korean constitutional Court, even though only one article pertaining this matter, the suspension is "makes sense" and can be applied. Whereas in the Indonesian Constitutional Court Act, even though two articles are authorized the Indonesian Constitutional Court to conduct the suspension case procedure, the procedure is not easy to be applied. This is because of the different method of review regarding the constitutionality of a statute between the Korea Constitutional Court and the Indonesian Constitutional Court.

In the Korean Constitutional Court, the suspension is easier to be applied because the Korean Constitutional Court applies concrete review meaning that there is a real case in the court proceeding. While in the Indonesian Constitutional Court, since the review method is considered abstract review, there is no obligation that there should be a real case in the court proceeding.

The difficulties to apply suspension procedures in the Indonesian Constitutional Court can be explained using the First Bali Bombing case as an example. The First Bali Bombing defendant believed that the statute charged[84]

[83] Article 53 and Article 55 of The Indonesian Constitutional Court Act:
Article 53.
The Constitutional Court shall notify the Supreme Court of appeals which involve the review of laws within a period of 7 (seven) working days from when such petitions are recorded in the Register of Constitutional Cases.
Article 55.
Review of legislation under the law, which is being undertaken by the Supreme Court, must be discontinued, if the law which constitutes the basis for review of such legislation is being reviewed by the Constitutional Court, until such time as may be determined by the Constitutional Court.

[84] The Government Regulation in Lieu of Law Number 2 of 2002 regarding the Enforcement of Government Regulation in Lieu of Law Number 1 of 2002 regarding the Abolishment of Terrorist Act on Bali Bombing Attach on October 12th, 2002.*Note*: The Government Regulation in Lieu of Law is a regulation that have the same rank with the statute in the Indonesian hierarchy of laws. The President who is authorized to promulgate this regulation in conjunction to a compelling emergency based upon Article 22 subsection (1) of The 1945

to him was a retroactive statute. And, therefore, it contradicts with Article 28 H section (1) of the 1945 Constitution.[85] He asked the Constitutional Court judges to ignore the charge of the general attorney and let him be freed. The Constitutional Court judges did not accept the defense at that time. When the verdict already being taken by the ordinary court and the defendant was charged with severe sentence, the First Bali Bombing defendant then filed a new case to the Indonesian Constitutional Court in order to obtain the legality of charged statute. The Indonesian Constitutional Court, then, decided that the charged statute was contradicted to Article 28 H of the 1945 Constitution.[86] Therefore, the charged statute then being nullified and void by a decision of the Indonesian Constitutional Court.

Based on the verdict of the Indonesian Constitutional Court, the First Bali Bombing defendant filed a Special Review (*Peninjauan Kembali*)[87] to the Supreme Court. The Supreme Court, however, rejected the application. The Supreme Court considered that the Indonesian Constitutional Court decision[88] was not a *novum* (new evidence).

Constitution. However, this kind of regulation is only a temporary regulation or an emergency regulation, so it needs the approval from the House of Representative on its next session. After being approved by the House of Representative, then the Government Regulation in Lieu of Law become a statute. The Government Regulation in Lieu of Law Number 2 of 2002 was promulgated on October 18th,2002, but it was enforced since Bali Bombing happened which was October 12th, 2002. It means that this regulation was enforced retroactively. This Government Regulation in Lieu of Law was approved by the House of Representative on April 4th, 2003 and then became Law Number 16 of 2003. See Andi Sandi Antonius: The Constitutional Adjudication in Indonesia: An Introduction (2007) p.7.

[85] Article 28H Section (1) of The 1945 Constitution determines" The right for living, the right for not being tortured, the right for freedom of thought and conscience, religious rights, the right for not being enslaved, the right for being recognized as an individual before the law, and the right for not being prosecuted based on retroactive laws shall be the rights as human that may not be diminished in any situation whatsoever".

[86] Based upon this article, the Indonesian Constitutional Court then nullified and void the Law Number 16 of 2003 through its decision Case Number 013/PUU-I/2003. also see. Andi Sandi Antonius, 'Constitutional Adjudication in Indonesia: An Introduction' (2007) p.7

[87] It means that the defendant asks the Supreme Court to review a case although the case already binding. It is usually being use when there is a *novum* or a new fact that was not presented to the court when the case was examined. See Andi Sandi Antonius, 'Constitutional Adjudication in Indonesia: An Introduction' (2007) p.7

[88] The Indonesian Constitutional Court Decision Case Number 013/PUU-I/2003

The above case shows that the suspension procedures are not easy to be applied. There is insufficient regulation regarding the relation between the Supreme Court and the Indonesian Constitutional Court, although they have correlated powers. The Indonesian Constitutional Court is authorized to review a statute toward the 1945 Constitution and the Supreme Court is authorized to review a law and regulation contributed to the statutes toward a statute.

This situation, on the one hand, is conducive for the constitutional system since the judicial institutions may work independently, in the sense that they do not depend on other institutions. On the other hand, this may lead the judicial system works in opposite way and resulted in legal uncertainty in Indonesia Legal System. Therefore, the correlated procedure between the Supreme Court and the ICC should be introduced in the near future so the Supreme Court and the Indonesian Constitutional Court could work hand in hand to achieve legal certainty and justice in Indonesia.

In the case of Indonesia, it can be said that among other authorities, the adjudication function to examine the constitutionality of law is the most often resorted to question the legality of law. From all of the cases that have been accepted and registered till December 31, 2007, the Indonesian Constitutional Court has decided 174 cases or around 93.55% of the cases. Specifically on constitutional review cases, the Court has reviewed 63 Acts wherein four Acts have been declared void entirely and 19 Acts void partially. The result placed that every one out of four constitutional review cases have been declared unconstitutional.[89] This figure also raises the question on the work of the house of Representative and the President when the enacted law. Do they sufficiently consider the 1945 Constitution when they enacted a law?

[89] Statistic of Constitutional Review cases in Indonesia 2003-2007 Total Cases: 133; Total Acts: 67.Constitutional: 100 Cases (75%) 44 Acts (70%) Unconstitutional 33 Cases (25%) and 23 Acts (30%): 4 Acts Void Entirely; 19 Acts Void Partially http://faizlawjournal.blogspot.com/ at 19 November 2008

1.1 Adjudication Function : Some Similarities

Apart from the differences mentioned above, both the Indonesian Constitutional Court and the Korean Constitutional Court share some similarities such as on the eligible of statute that could be reviewed and the centralized character of the Constitutional Court. Both countries considered that the statute that can be reviewed is the statute that has already taken effect and already promulgated. This can be seen from the Indonesian Constitutional Court and the Korean Constitutional Court Acts.

Article 50 of Law No.24 of 2003 states that the statute which could be reviewed by the Indonesian Constitutional Court is the statute that already promulgated after the first amendment, which was took place in 1999. This means that all statutes that promulgated after 1999 can be reviewed. This limitation, however, is nullified by the Indonesian Constitutional Court by issuing the Decision Number 066/PUU-II/2004 regarding constitutional review of the Law No.24 of 2003 and the Law Number 1 of 1987.

The main reason why the Indonesian Constitutional Court nullified Article 50 Law No.24 of 2002 was because this article limited the Indonesian Constitutional Court in conducting its constitutional power specifically in reviewing a statute. And such limitation does not exist in the 1945 Constitution. In other words, such limitation contravened to the 1945 Constitution. After the decision of the Indonesian Constitutional regarding this matter, all statutes can be reviewed by the Indonesian Constitutional Court.

Similar to its Indonesian Constitutional Court counterpart, the statute that could be reviewed by the Korean Constitutional Court is also a statute which already took effect and promulgated[90], as concluded in article 41 of the Constitutional Court Act. It stated that "When the issue of whether or not statutes are constitutional is relevant to the judgment of the original case…"[91] This means the statute is already in effect and is already applied.

[90] Article 41 of Korean Constitutional Court Act.
[91] Article 41 of the Korean Constitutional Court Act

The above method of review is different from review that is conducted by the Federal Constitutional Court of Germany and the *Conseil Constitutionnel* of France. Both of these institutions can only review a statute that has been passed by the parliament but not yet applied or promulgated. This method of review is commonly called a constitutional preview, not constitutional review[92].

Another similarity is that both of the Indonesian Constitutional Court and the Korean Constitutional Court are the sole institution which is authorized to adjudicate the constitutionality of a statute. This can be categorized as a centralized review. This is based on the fact that in both countries, there is only one legal institution which is authorized to review the legality of a statute. In other words, this authority shall not be conducted by a lower court, ordinary court, or even by the Supreme Court. This is different from the United States of America which applied a decentralized review, where the other courts, such as Federal Court, State ordinary court or even a lower court, can also conduct a review of statute.

1.2 The Role of International Law and the Practice of Other Countries in Reviewing the Constitutionality of Law Toward the Constitution: An Experience from the Indonesian Constitutional Court

The following part will show how the Indonesian Constitutional Court, in deciding certain case refers the practice of Korean Constitutional Court as well as the International Law, though not as the main law source. Such case is concerning the Truth and Reconciliation Commission.

The Petitioners in this case file a petition to conduct reviewed on Article 27, Article 1 Sub article 9, and Article 44 of Law No. 27 Year 2004 regarding the Truth and Reconciliation Commission (KKR) [93] which is considered

[92] Jimly asshiddiqie, above n 3, 43

[93] Decision number 006/PUU-IV/2006 regarding the substantiation of the Law on Truth and Reconciliation Commission (KKR Law)

contradictory to Article 28D paragraph (1) and Article 28I paragraph (4) of the 1945 Constitution.[94] The decision grants the petition of the Petitioners and states that Law No. 27 Year 2004 regarding KKR is contradictory to the 1945 Constitution and has no binding legal force. In this decision, only Article 27 of the KKR Law[95] is declared contradictory to the 1945 Constitution. However, because the provisions of the aforementioned article determine the implementation of the entire KKR Law, therefore, the entire KKR Law is declared as not having binding legal force. This is because the existence of Article 27 is closely related to Article 1 Sub article 9, Article 6 Sub article c, Article 7 paragraph (1) Sub article g, Article 25 paragraph (1) sub paragraph b, Article 25 paragraph (4), paragraph (5), paragraph (6), Article 26, Article 28 paragraph (1), and Article 29 of the KKR Law. The existence of Article 27 and articles related to the Article 27 of the KKR Law is essential for the implementation of the entire provisions in the KKR Law.

Therefore, if it is stated that the Article 27 of the KKR Law is not legally binding, the legal implications will make all articles related to amnesty lose their binding legal force. This is because procedural law related to the substantiation of laws against the 1945 Constitution involves public interest and the legal consequences.

In deciding this case, besides considering the International Law the Constitutional Justices also consider other relevant laws in other countries, in this case is South Korea. Justice Harjono added that this decision is somehow in line with the Korean Constitutional Court Act particularly Article 45 stated that 'The Constitutional Court shall decide only whether or not the requested

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[94] Article 28D paragraph (1) article 28 I paragraph (4) of the 1945 Indonesian Constitution
Article 28 D paragraph (1)
Every person shall have the rights of recognition, guarantees, protection and certainty before just law, and of equal treatment before the law.
Article 28 I paragraph (4)
The protection, advancement, upholding and protecting human rights are the responsibility of the state especially the government.

[95] Article 27 of the KKR Law sets forth that "The compensation and rehabilitation as intended in Article 19 may be granted if the amnesty application is granted."

statute or any provision of the statute is unconstitutional: Provided, that if it is deemed that the whole provisions of the statute are unable to enforce due to a decision of unconstitutionality of the requested provision, a decision of unconstitutionality may be made on the whole statute"[96]

The consideration to use International law as well as law in other countries said Justice Harjono is only 'in the event of absence of regulation in the legislation on a certain issue, if so wished by the public interest concerned, the Constitutional Court Justice shall not rely only on the petition or the claims (*petitum*) being filed. Such matters also constitute customary practices of Constitutional Courts in other countries.'[97]

2. The Authority to Resolve Dispute among State Institutions/Competence Dispute

In Indonesian context, it is probably true that the importance of the constitutional court to have an authority to resolve dispute among state institutions was triggered by the situation at that time, the situation where President Wahid has been removed by Parliament under political reason. It was felt that the decision whether a president had committed acts that justified dismissal in accordance with the constitution should not be solely based on political considerations.

According to the Former Chief of Constitutional Court Justices Jimly Asshiddiqie, it was Wahid's impeachment that really brought home the importance of a constitutional court: "… in my opinion, without this incident, surely the awareness of the importance of the Constitutional Court would not have turned into an awareness to realize the existence of the Constitutional Court.'[98]

The following part will briefly describe such situation. After the 1999

[96] Article 45 of The Korean Constitutional Court Act
[97] Justice Harjono, The Indonesian Constitutional Court, p 12.
[98] Stockman, above n 4, 14

General Election, President Abdurrahman Wahid was accused for committing corruption. At that time, the process to impeach President should be initiated by the House of Representatives by issuing a letter of Warning Memoranda namely the first memorandum and the second memorandum. These memoranda were a warning letters to the president that he/she was alleged a wrong full act.

Unfortunately, the definition of a wrong full act was not clearly determined in the 1945 Constitution (before the amendment). Such definition was vaguely determined in the People Consultative Assembly Decree.[99] The wrong full act was determined as an act that contradicts to the 1945 Constitution and/or contrary to the State Broad lines Development Programs.[100] This vague and broad definition may be used by the House of Representatives to openly interpret any presidential acts or programs to be considered a wrong full act. This also opens possibilities that the basis to impeach President may be purely on political reasons since the House of Representative is a political body.

In case the president ignored the first and second memorandum, the House of Representatives, based on the Constitution, will hold a plenary session to invite the Additional Appointed Members of the People Consultative Assembly[101] And then holding a special session of the People Consultative Assembly with single agenda that was the presidential impeachment. Before judging the president as committing a wrong doing, the accused president and/or vice president should be given a chance to defend his/her self before the session.

Even though has been warning twice, President Wahid never showed up

[99] People Consultative Assembly Number III/MPRS/1978 regarding the Legal Status and Authorities-Management between Highest State Institution and/or with the Higher State Institutions.

[100] State Broad Lines Development Program was a five years development program promulgated by the People Consultative Assembly. This development program should be implemented or achieved by the higher state institution, including the president, because they all were under supervision and control of the People Consultative Assembly.

[101] The Additional Members of The People Consultative Assembly were appointed by the President in order to represent the military, minority groups, and local government. See also Andi Sandi Antonious, 'Constitutional Adjudication in Indonesia: An Introduction' (2007), p.8.

before the House of Representatives. This resulted in the People Consultative Assembly, in its special session, agreed to impeach him, President Wahid, however, did not agree with the judgment. He believed that the decision was not based upon the law, but merely based on political reason.

Based on Wahid Impeachment mentioned above, the need to hold an authority to resolve dispute among state agencies becomes significant to be granted to the Constitutional Court.

The other reason is that, as a consequence of the Amendment of the 1945 Constitution, all state institutions has equal constitutional status and they operate under check and balances system. Since there is connection among state institutions, a conflict among state institutions may occur. Therefore, it is necessary to have a state institution that can resolve the dispute between state institutions.

The next question in relation to the authority of the constitutional court to settle dispute among state institutions would be, what is considered as state institutions which are eligible to file application before Constitutional Court? Constitutionally, the 1945 Indonesian Constitution does not clearly define what include states agencies. The 2003 Indonesian Constitutional Court Act, however, defines clearer definition regarding states agencies 'All of the states institutions that were vested their powers from the 1945 Constitution shall have a legal standing to file a constitutional dispute settlement through the Indonesian Constitutional Court.'[102] Both the 1945 Constitution and the 2003 Constitutional Law Act, however, do not sufficiently elaborate and mention in details which institutions are considered as state institutions.

The above situation becomes problem since in the 1945 Constitution mention two types state institutions namely: first, state institution that its status and its authorities are clearly defined in the constitution; Second, state institution that its status clearly mentioned in the Constitution, however, its

[102] Article 61 Section (1) of Law No.24 of 2003. "Applicant is any state institutions whose authorities are mandated by the 1945 Constitution of the Republic of Indonesia and has direct interest against the disputed authority".

authorities should be further regulated by Statute.[103]

This situation becomes the concerned of many Indonesian constitutional experts. To overcome this problem, the constitutional court enacted a regulation number 08/PMK/2006. Article 2 section (1) of the Constitutional Court Regulation Number 08/PMK/2006 concerning the Procedures of Dispute Authorities between States Institutions determines that the following state institutions could file a constitutional dispute authority, they are:

a. The House of Representatives
b. The Regional Representatives Council
c. The People Consultative Assembly
d. The President
e. The Supreme Auditory Board
f. The Regional Authority,
g. Other state institutions whose powers are vested by the 1945 Constitution.

State Institutions stated in letter (a) up to (f) seems limit the definition of state institution into six different institutions. The sentence in letter g, however, does not really limit the definition since it is an open ended statement. This resulted in the possibility for the Indonesian Constitutional Court to make a narrow interpretation as well as a broad interpretation. The consequence is, then, it might cause flooding cases regarding the state institutions and their authorities to the Indonesian Constitutional Court docket- if judges made a broad interpretation. And it could limit the power of the Indonesian Constitutional Court- if judges apply a narrow interpretation.

In addition, The Indonesian Constitutional Court Act does not clearly

[103] Jimly Asshiddiqie, Competence Dispute among State Institutions, (*Sengketa Kewenangan antar Lembaga Negara*), Konpress, 2005, Jakarta, at p.22. 25 *See* Article 63 Section (1) of The Constitutional Court Act.

define the scope of the dispute which can be filed to the Constitutional Court.[104] The Act only vaguely stated the appellant which can file the dispute the constitutional court and the need for the appellant to hold direct interest in the disputed competency.[105] In other words, it is very depend on the Constitutional Judges to determine the scope.

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[104] **Part Nine (Dispute about Jurisdiction of State Institutions Whose Competencies are Conferred by the Constitution).**

Article 61

(1) The appellant is a state institution whose jurisdiction is conferred by the 1945 Constitution of the Republic of Indonesia and which holds direct interest in the disputed competency.

(2) The appellant shall clearly describe in its appeal the direct interest it holds and set out the competency in contention and name exactly the state institution which constitutes the respondent.

Article 62

The Constitutional Court shall forward the appeal which has been recorded in the Register of Constitutional Cases to the respondent within a period of 7 (seven) working days from when the petition is recorded in the Register of Constitutional Cases.

Article 63

The Constitutional Court may issue an injunction which orders the appellant and/or the respondent to temporarily suspend the exercise of the competency which is the subject of dispute until a decision of the Constitutional Court is available.

Article 64

(1) In the event the Constitutional Court believes that the appellant and/or the appeal does not meet the requirements as stipulated in Article 61, the decision shall declare the appeal rejected.

(2) In the event the Constitutional Court believes that the appeal is justified, the appeal shall be granted favor.

(3) In the event the appeal is granted favor as referred to in paragraph (2), the Constitutional Court shall expressly declare that the respondent holds no authority to exercise the competency which is the subject of the dispute.

(4) In the event the appeal is found to be unjustified, the decision declares the appeal rejected.

Article 65

The Supreme Court shall not be a party in a dispute over the competencies of state institutions, the competency for which is conferred by the 1945 Constitution of the Republic of Indonesia to the Constitutional Court.

Article 66

(1) With regard to the decision of the Constitutional Court where the ruling declares that the respondent holds no authority to exercise the competency which is the subject of the dispute, the respondent is under the obligation to comply with this decision within 7 (seven) working days from when the decision is received.

(2) If the decision is not duly executed within the timeframe as referred to in paragraph (1), the respondent's exercise of the competency shall become null and void.

Article 67

Decisions of the Constitutional Court concerning disputes over competencies shall be conveyed to the *DPR*, the Regional Representative Council (*DPD*) and the President.

[105] Article 61 of the Indonesian Constitutional Court Act.

The Korean Constitutional Court has clearer jurisdiction over competence on Jurisdictional Disputes between governmental entities. The governmental entities include the state organs and the local government organs.[106] If any controversy regarding the existence of jurisdiction occurs between organs of the State, between an organ of the State and a local government, or between local governments, an organ of the State or local government may request in writing a judgment of the Constitutional Court as to respective competence.[107] In addition, it also classifies the adjudication on competence dispute that can be filed to Constitutional Court.[108] Article 62 paragraph (1) of Constitutional Court Act clearly and systematically classifies that matter

The competence dispute is classified as follows:

1. Adjudication on competence dispute between state agencies: Adjudication on competence dispute between the National Assembly, the Executive, ordinary courts and the National Election Commission.
2. Adjudication on competence dispute between a state agency and a local government:

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[106] Article 61 of the Korean Constitutional Court Act

[107] Judgment on Competence Dispute <http://english.ccourt.go.kr/> at 5 November 2008

[108] **Article 62 (Classification of Adjudication on Competence Dispute)**

(1) The adjudication on competence dispute shall be classi- fied as follows:

1. Adjudication on competence dispute between state agencies: Adjudication on competence dispute between the National Assembly, the Executive, ordinary courts and the National Election Commission;
2. Adjudication on competence dispute between a state agency and a local government: (a)Adjudication on competence dispute between the Executive and the Special Metropolitan City, Metro- politan City or Province; and (b)Adjudication on competence dispute between the Executive and the City/County or District which is a local government (hereinafter referred to as a "Self-governing District").
3. Adjudication on competence dispute between local governments: (a)Adjudication on competence dispute between the Special Metropolitan City, Metropolitan City or Province; (b)Adjudication on competence dispute between the City/County or Self-governing District; and (c)Adjudication on competence dispute between the Special Metropolitan City, Metropolitan City or Province and the City, County or Self-governing District.

(2) When a competence dispute relates to the affairs of a local government concerning education, science or art under Article 2 of the Local Educational Self-Governance Act, the Superintendent of the Board of Education shall be the party referred to in paragraph (1) 2 and 3.

(a) Adjudication on competence dispute between the Executive and the Special Metropolitan City, Metropolitan City or Province; and
(b) Adjudication on competence dispute between the Executive and the City/County or District which is a local government (hereinafter referred to as a“Self-governing District”).

3. Adjudication on competence dispute between local governments:
(a) Adjudication on competence dispute between the Special Metropolitan City, Metropolitan City or Province;
(b) Adjudication on competence dispute between the City/County or Self-governing District; and
(c) Adjudication on competence dispute between the Special Metropolitan City, Metropolitan City or Province and the City, County or Self-governing District.

Furthermore, the request for adjudication may be allowed only when an action or omission by the defendant infringes or is in obvious danger of infringing upon the plaintiff's competence granted by the Constitution or laws.[109] This clear classification leads to the more certainty of the Korea Constitutional Justices in determining whether of not a dispute can be filed to the Constitutional Court. Constitutional Justices do not need to interpret the scope of the dispute, as it is clearly mention in the relevant act. It is also important to avoid the complaint of the applicant, regarding the scope of dispute, in case their application is rejected by the Court. The possibility of flooding of cases in the Court may also be avoided.

Unlike the Indonesian Constitutional Court which limit the dispute of competence only the competence of the state agencies that vested by the Constitution, the Korean Constitutional Court the dispute of competence is not only limited to the competence that vested by the Constitution but also the

[109] Article 61 (causes for request) paragraph 1 The Korean Constitutional Court.

competence that is vested by the statute.[110] The Korean Constitutional Court, therefore, may take more cases compared to that of the Indonesian Constitutional Court, since the competence that is authorized to be exercised by the Court is more compared to that of the Indonesian Constitutional Court.

Another interesting feature is that there is a limitation for the applicant to file a case in Korean Constitutional Court. The case should be filed to the Court in sixty days after the existence of the caused known, and within one hundred and eighty days after the cause occurs. [111] This means even though there is a case but such case is filed to the constitutional court after the above period, the court is not competence to examine the case. Similar provision, however, does not exist in the Indonesian Constitutional Court Act. The time limitation is, on the one hand, useful to avoid the flooding case in the court as well as to enhance the legal certainty since there is a certain period of time where the eligible parties can file the case. On the other hand, the limitation will potentially restrict the parties when they want to file a case because they are constrained by certain period of time.

2.1 Some Significant Experiences regarding Dispute among state Institutions / Competence Dispute

Since its establishment, at least three 'significant' cases concerning dispute among state institutions were filed to the Indonesian Constitutional Court. [112] They are: first, the dispute among the Regional Representatives Council versus the House of Representatives and the President. Second, the dispute among the Candidates that won the Mayor Election of City of Depok, West Java versus the Regional Election Commission of City of Depok, West Java. And third, the dispute among the Regent and the vice of Regent of the Bekasi Regency, West Java versus the President, The Minister of Home Affairs,

[110] Article 61 (causes for request) paragraph 2 The Korean Constitutional Court.
[111] Article 63 of Korean Constitutional Court Act
[112] Andi Sandi Antonius, 'Constitutional Adjudication in Indonesia: An Introduction' (2007) p. 10-11.

and The Regional House of Representatives of Bekasi Regency.

The first case was the dispute among the Regional Representatives Council versus the House of Representatives and the President.[113] The case was caused by the action of the President and the House of Representatives when they appointed the members of the Supreme Auditory Board in 2004. The Regional Representatives Council alleged that this action was infringed its constitutional power as determined in Article 23F section (1) of the 1945 Constitution stated that "the members of the Supreme Auditory Board shall be chosen by the House of Representatives, which shall have regard to any considerations of the Regional Representative Council, and will be formally appointed by the President".

When appointed the new members of the Supreme Auditory Board, the Regional Representative Council was never been asked for their considerations. As a result the Regional Representatives filed the dispute competence to the Indonesian Constitutional Court. the Indonesian Constitutional Court decides that the action of the President and the House of Representatives was not infringed the Regional Representatives Council constitutional competence. This is because when the process was begun-between June until July 2004, when the member of the Regional Representative Council was not yet inaugurated. It is also supported by the Article II of the Transitional Provisions of the 1945 Constitution which determined that "all existing laws and regulations shall remain in effect as long as new laws and regulations have not yet taken effect under this constitution".

The second case is concerning the dispute among the Candidates that won the Mayor Election of City of Depok, West Java versus the Regional Election Commission of City of Depok, West Java.[114] The case was initiated by the result dispute among the candidates of the regional election for the mayor and

[113] Case Number 068/SKLN-II/2004, See Andi Sandi Antonius, 'Constitutional Adjudication in Indonesia: An Introduction' (2007) p. 10.
[114] Case Number 002/SKLN-IV/2006 See Andi Sandi Antonius, 'Constitutional Adjudication in Indonesia: An Introduction (2007) p. 11

vice mayor in the City of Depok. The case was filed to the Constitutional Court before the candidates was officially declared as the winner. Therefore, the Indonesian Constitutional Court said that they are not eligible to represent themselves as the Mayor and the Vice Mayor of the City of Depok. As a result, the Court rejected the application, on the basis that they are not yet Mayor and Vice Mayor of Depok Distrik. Even though rejected, this case proofed that local government is considered as a state institution that vested its power from the 1945 Constitution. In other words, the local government is eligible to file a dispute competence to the Indonesian Constitutional Court.

The last case is the Case concerning the dispute among the Regent and the vice of Regent of the Bekasi Regency, West Java versus the President, The Minister of Home Affairs, and The Regional House of Representatives of Bekasi Regency.[115] The case was concerning the impeachment of Regent and the Vice Regent of Bekasi Regency based upon the Decree of the Minister of Internal Affairs Number 131/2006 and Number 132/2006.

The applicants in this case were the Regent and the Vice Regent of Bekasi Regency. The accusation in this case is that the Regent and the Vice Regent of Bekasi could not execute their constitutional obligation as vested by the Article 18 section (2)[116], (5)[117], and (6)[118] of the 1945 Constitution. The Court, however, stated that the procedures of the impeachment were somewhat illegal. Based upon this allegation, then, the Minister of Internal Affairs replied that his action

[115] Case Number 004/SKLN-IV/2006 regarding the dispute among the Regent and the vice of Regent of the Bekasi Regency, West Java versus the President, The Minister of Internal Affairs, and The Regional House of Representatives of Bekasi Regency. See Andi Sandi Antonius, 'Constitutional Adjudication in Indonesia: An Introduction (2007) p. 11

[116] Article 18 section (2) determines "The Regional Authorities of Provinces, Regencies, and municipalities shall administer and manage their own affairs according to the principles of regional autonomy and the duty of assistance (*medebewind*)".

[117] Article 18 section (5) determines "The regional authorities shall exercise wide-ranging autonomy, except in matters specified by law to be the affairs of the central government". Meanwhile, based upon the Article 10 of the Law Number 32 of 2004 regarding the Regional Government, the central government shall have the authority on the Foreign Affairs, Defense, Security, Judicial, National Economy and Fiscal, and Religious Affair.

[118] Article 18 Section (6) determines "the regional authorities shall have the authority to adopt regional regulations and other regulations to implement autonomy and the duty of assistance (*medebewind*)".

was not an illegal impeachment because it was based upon the Supreme Court Decision Number 436 K/TUN/2004 on June 6th, 2006 regarding the Annulment of the Minister of Home Affairs‟ Decree Number 131.32-36 of 2004, Date January 8th, 2004 concerning the appointment of the Bekasi Regency's Regent and the Annulment of the Minister of Home Affairs‟ Decree Number 132.32-37 of 2004, Date January 8th, 2004 concerning the appointment of the Bekasi Regency's Vice Regent.

Based upon these facts, the Indonesian Constitutional Court rejected the case on the basis that there was no relation between the impeachment and the constitutional obligations of the Regent as determined in Article 18 section (2), (5), and (6). The constitutional court stated that it was merely dispute among the impeachment procedures. The 1945 Constitution, however, did not regulate the impeachment procedures of a regent. Such procedures were regulated by Law No.32 of 2004. Therefore, the competence dispute among the parties was a competence dispute determined in statute/law, so the Indonesian Constitutional Court could not examine this case.

Based on the three cases mentioned above, it can be said that the Indonesian Constitutional Court is still in the process of building the precedent regarding the competence dispute. It seems that the Justice of Constitutional Court tends to apply a broad interpretation in resolving competence dispute among state institutions that vested their power from the 1945 Constitution.

Unlike the Indonesian Constitutional Court experience, the Korean Constitutional Court since its establishment in 1988 up to 2008 has approximately received 51 Competence dispute cases.[119] The Recent case is the dispute over the Local Election Administration Costs.[120] This case is mainly about the amendment Law concerning Public Employee Election and its Corruption Prohibition Act that has been enacted by the National Assembly.

[119] Cases statistics of the Constitutional Court of Korea http://english.ccourt.go.kr/ at 10 November 2008

[120] Competence Over Local Election Administration Costs (2005Hun-Ra7) http://english.ccourt.go.kr/ at 10 November 2008

The main issue in this case is that the cost of the election is changed from the national government to the local government. The Local governments claim that the action of National Government to amend The Law 2005 with regard to 122-2 whereby make the local governments to bear the costs spent by candidate of the local election, infringes upon their authorities.

In short, the Korean constitutional Court decided that the action of the National Assembly did not infringe the self government authority of the local government. In deciding this case, there are six concurring justices and 2 dissenting justices.

The Korean Constitutional Court experience in handling the competence disputes particularly on dispute between the national assembly and the local government as mentioned above may become a good lesson for the Indonesian Constitutional Court if such a case occurs in the future. The Korean Constitutional Court may also take the lesson from the Indonesian Constitutional Court experiences.

3. The Dissolution of Political Party: An Authority which never been Used?

This authority is one of the two Indonesian Constitutional Court authorities which has not been used since it establishment. Similar to its Indonesian Constitutional Court counterpart, there has been no dissolution of political party case brought before the Korean Constitutional Court.[121] It seems that this authority contradicts with the value of democracy and the protection of human rights, such as freedom and liberty for all citizens to associate, to gather, to form and to become the member of political parties. The reasons to dissolute political parties, therefore, should be carefully regulated. The Korean Constitutional Court Act, for example, specifies that a political party may be dissolved in case the objective and activities performed by the political party

[121] Judgment on Dissolution of a Political Parties http://english.ccourt.go.kr/ at 5 November 2008

contradict with the basic order of democracy.[122] The Indonesian Constitutional Court Act, however, more general in regulating such matter. In Indonesia, the process of dissolution of political party can be found in Articles 68 up to 73 of Law No.24 of 2003.[123] Whereas in Korea such matter is regulated in Article 55 up to 60 of the Constitutional Court Act.[124]

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[122] Article 55 of the Korean Constitutional Court Act.

[123] **Part Ten (Dissolution of Political Parties) of The Indonesia Constitutional Court Act**

Article 68

(1) The Government is the appellant.

(2) The appellant shall describe clearly in its appeal, the ideology, the principles, the objects, the program and the activities of the political party concerned, which are alleged to be contrary to the 1945 Constitution of the Republic of Indonesia.

Article 69

The Constitutional Court shall forward the appeal which has been recorded in the Register of Constitutional Cases to the political party concerned within a period of 7 (seven) working days from when the appeal is recorded in the Register of Constitutional Cases.

Article 70

(1) In the event the Constitutional Court believes that the appeal does not meet the requirements as stipulated in Article 68, the decision shall declare the appeal rejected.

(2) In the event the Constitutional Court believes that the appeal is justified, the appeal shall be granted favor.

(3) In the event the Constitutional Court believes the appeal to be unjustified, the decision declares the appeal rejected.

Article 71

The decision of the Constitutional Court concerning an appeal for the dissolution of a political party shall be rendered within a period of 60 (sixty) working days from when the appeal is recorded in the Register of Constitutional Cases.

Article 72

The decision of the Constitutional Court on the dissolution of a political party shall be forwarded to the political party concerned.

Article 73

(1) Implementation of the decision on the dissolution of a political party as referred to in Article 71 shall be effected by way of annulment of its registration by the Government.

(2) The decision of the Constitutional Court as referred to in paragraph (1) shall be announced by the Government in the State Gazette of the Republic of Indonesia within a period of 14 (fourteen) days from when the decision is received.

[124] **Korean Constitutional Court Act.**

Article 55 (Request for Adjudication on Dissolution of a Political Party)

If the objectives or activities of a political party are contrary to the basic order of democracy, the Executive may request to the Constitutional Court, upon a deliberation of the State Council, an adjudication on dissolution of the political party.

Article 56 (Matters to be Stated on Written Request)

The written request for adjudication on dissolution of a political party shall include the following matters:

1. Indication of the political party requested to be dissolved; and
2. Bases of the request.

In Indonesia as well as in Korea, Government is the only eligible applicant which can dissolute a political party. In the case of Indonesia, elucidation of Article 68 section (1) of Law No.24 of 2003 limits the meaning of the government by defining that the government is the central government. Other state institutions, the regional governments, or even an Indonesian citizen is not eligible to file an application before Court to dissolute a political party. The other similarity is concerning the cause of dissolution of political party which is the objective and activity of the political party which may endanger the basic order of the democracy.

In executing process, there is a different between the Indonesian Constitutional Court and the Korean Constitutional Court. The Decision of the Korean Constitutional Court regarding dissolution of political parties is executed by the General Election Commission, as an institution which responsible in conducting General Election. In Indonesia, however, the decision of the Constitutional Court regarding this matter is executed by the government. One of the reasons is because in Indonesian political system, not all political parties can participate in the general election. Only political parties that fulfill the general election requirements may joint general election. It is

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Article57 (Provisional Remedies)
The Constitutional Court may, upon receiving a request for adjudication on dissolution of a political party, make ex officio or upon a motion of the plaintiff or a decision to suspend the activities of the defendant until the pronouncement of the final decision.

Article58 (Notification of Request, etc.)
(1) When an adjudication on dissolution of a political party is requested, a decision on the provisional remedies is rendered, or the adjudication is brought to an end, the President of the Constitutional Court shall notify the facts to the National Assembly and the National Election Commission.
(2) The written decision ordering dissolution of a political party shall also be served, in addition to the defendant, on the National Assembly, the Executive and the National Election Commission.

Article 59 (Effect of Decision)
When a decision ordering dissolution of a political party is pronounced, the political party shall be dissolved.

Article 60 (Execution of Decision)
The decision of the Constitutional Court ordering dissolution of a political party shall be executed by the National Election Commission in accordance with the Political Parties Act.
SECTION 4 Adjudication on Competence Dispute

possible that a political party cannot participate in general election. If the authority to dissolve a political party is executed by the Indonesian General Election Commission, The Commission cannot reach all of the political parties. This is because the general election commission can only reach political parties which are eligible to take a part in general election, not the one that cannot joint in the election.

4. The Dispute on the General Election Result

As many Constitutional law experts predicted, the authority of the Indonesian Constitutional Court to resolve dispute on general election result was so popular especially after the 2004 General Election. This is not only because this authority was first implemented but also because of the number of political parties which joint in the election was many. Based on the Indonesian General Election Committee, there were 24 Political Parties participated in the 2004 General Election. This opened possibilities that there would be many disputes among the candidates. In 2004, approximately 273 cases[125] were filed to the Constitutional Court when the legislative election took place. Most of the cases were concerning the allegations of miscounting votes by the election officers.

The applicant of a dispute on the election result, should be a candidate for the Regional Representatives Council member, or a political party that propose its member become member of the House of Representatives or member of the Regional House of Representatives, or the Pairs of President and Vice President (in Presidential election) as determined by Article 74 section (1) of Law No.24 of 2003.[126]

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[125] Refly Harun, Antisipasi Sengketa Hasil Pemilihan Presiden (the Anticipation for the Dispute regarding the Presidential Election Result), Kompas, June 28th, 2004, available at http://www.reformasihukum.org/konten.php?nama=Pemilu&op=detail_politik_pemilu&id=14.

[126] **Article 74**
(1) The appellant is:

The applicants can only submit the case if they believe that the action against the election result may influence their victories on the legislative or the presidential election. In other words, they are entitled to file a case only if the result of miscounting will change the winner of the election.

Therefore, in their applications, they should also submit the proofs of the alleged miscounting tabulation of votes and the right voting tabulation results according to them. It seems that the Indonesian Constitutional Court becomes "an election correction result institution." This is because the Constitutional court plays as an institution that declares the right voting tabulation.

In the legislative election, there are some of the Regional Representatives Council members and the House of Representative members that finally become a member on these institutions because of the miscounting. In the presidential election, however, the Indonesian Constitutional Court did not find any miscounting tabulation the presidential election result.

Recently there is a debate regarding this authority. The main issue is whether the election for governors, regents and mayors fall in the definition of General Election as stated in the 945 Constitution. Article 22E sub article (2) Chapter VIIB on General Election, stated that: 'General Election shall be conducted to elect the members of the House representatives, the Regional Representatives Council, the President and the Vice President and the Regional House of Representatives.' In addition, Article 18 sub article (4) Chapter VI on

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a. An Indonesian citizen competing in the general elections as candidate member to the Regional Representative Council (*DPD*);
b. A President and Vice president candidate pair competing in the general elections for the presidency and vice-presidency; and
c. A political party competing in the general elections.

(2) An appeal may be filed only to contest the determination of the results of the general elections conducted on a national scale by the National Elections Commission (*KPU*) which affects:
a. A candidate elected to the Regional Representative Council (*DPD*);
b. The determination of the pair of candidates competing in the second round of the election for presidency and vice-presidency and the pair of candidates elected to the presidency and vice-presidency;
c. The seats won in an electoral district by a competing political party.

(3) An appeal may be filed within a period of 3 times 24 hours from the announcement by the *KPU* of the determination of the results of the general election nationally.

Regional Authorities stated that 'Governors, regents and Mayors respectively as head of regional government of the provinces, regencies and municipalities, shall be elected democratically.'

Based on two articles mentioned above, the election of governors, regents and mayors, arguably, does not fall in the definition of general election. This is because the election for governors, regents and mayors is not included in Chapter VIIB concerning General Election. It includes in Chapter VI concerning Regional Authorities.

In addition, the Law concerning Local Government is silent regarding this matter. This situation leads to the legal uncertainty specifically on which institutions should be in charge if there is a dispute in governors, regents or mayors election. This unease situation is finally resolved by the amendment of Law concerning Local Government. The amended Law concerning Local government clearly stated that in case there is a dispute on the Governors, Regents and Mayors election, the dispute should be submitted in the Constitutional Court. The amendment of Law on Local Government can be said broaden the authority of the Indonesian constitutional Court. This is quite unique since the Indonesian Constitutional court gains its additional authorities without amending of the constitution.

Apart from the above discussion, this authority is only owned by the Indonesian Constitutional Court, the Korean Constitutional Court does not have such authority.

5. The Impeachment Process

The Korean Constitutional Court as well as the Indonesian Constitutional Court has the authority to involve in the impeachment process. However, there are some differences in the impeachment procedures between the Indonesian and the Korean Constitutional Court. The differences include: first, the parties which are eligible to file a case; second, the officials who may be impeached;

third, the legal basis of impeachment; fourth, the suspension of exercise power for the allegedly public officials and last, the impact of the court decision.

In Korea, parties which are eligible to act as impeachment prosecutors are two namely, the Chairman of the Legislation and Justice Committee of National Assembly.[127] In Indonesia, however, only one party which is the House of Representative (the DPR) that is eligible to file the impeachment case in the Court.

In regard to the officials who may be impeached by the Constitutional Court, in Korea, there are many public officials who may be impeached by the Constitutional Court. These include: President, Prime Ministers, Member of the State Council and Ministry, Justice of the Constitutional Court and Commissioner of the National Election Commission, Chairman and Commissioners of the Board Audit and Inspection and other Public officials as prescribed by law.[128] This figure is absolutely different with that in Indonesia, since only the President and/or the Vice President can be impeached by the Indonesian Constitutional Court.[129]

Another difference is the basis of impeachment. In Korea the basis of impeachment is broaden compared to that in Indonesia. Not only violation of the constitution, the violation of laws can also be the basis of impeachment of public officials. In Indonesia, however, the basis of impeachment is limitedly regulated in Article 7A of the Indonesian Constitution. Actions which can be the basis of impeachment are act of treason, corruption, bribery, serious offences or moral turpitude.

In addition, the Indonesian Constitutional Court act is silent in regard to the suspension of exercise of power in case the president and the vice president allegedly violate the constitution. That situation is different with the Korean Constitutional Court Act which regulate that the parties, which allegedly violate the Constitution or law in conducting their responsibilities, should be

[127] Article 49 of the Korean Constitutional Court Act
[128] Article 48 of the Korean Constitutional Court Act
[129] Article 80 of the Indonesian Constitutional Court Act (Law 24/2003)

suspended to exercise its power until the constitutional court decide the case. In this sense, the Korean Constitutional Court is better in regulating such matter. The suspension will lead to more independent and fair of the constitutional court in deciding the case. By suspension, the public officials cannot use their power to influence the legal process.

In regard to the impact of the court decision, the decision of the Korean Constitutional Court concerning impeachment has a significant impact since the court decision will automatically removed the concerned public officials from their office. This figure is different from the Indonesian Constitutional Court where the court decision does not have direct impact to the concerned public officals.

The case of impeachment is often considered as a landmark decision in The Korean Constitutional Court. It is probably because the person who will be impeached is high rank public officials, such as the President and the Prime Minister. In 2004, the Korean Constitutional Court used this authority. The Chair of the Legislation and the Judiciary Committee of the National Assembly of Korea filed a petition to the Korean Constitutional Court. The respondent in this case is President Roh Moo hyun.[130] Some issues arise in this case, among the others, whether or not the President is a Public official within the meaning of Article 9 of the Public Official Election Act; whether or not the statement of President expressing support for a particular political party at press conference is violating the provision that prohibits electoral campaign by public officials set forth in article 60 Public Official Election.[131]

In short, the President is not considered violating the constitution. As stated in the sub conclusion of the decision 'since the act of violation of law by the president does not have a significant meaning in terms of the protection of the constitution and such violation of law by the President cannot be deemed to evidence the betrayal of public trust, there is no valid ground justifying

[130] (16-1 KCCR 609, 2004Hun-Na1, May 14, 2004)
[131] Hahm Chaihark and Sung Ho Kim, Challenges and Change in Asia: Constitutionalism on Trial in South Korea, Journal of Democracy Volume 16, Number 2, April 2005 p. 36

removal of the president from office.'[132] This phenomenal decision reflected that even though high rank officials like president is possible to be removed from office for violating the Constitution and Statutes.

Unlike the Korean Constitutional Court, the Indonesian Constitutional Court never used this authority. For that reason, the experience of the Korean Constitutional Court in conducting impeachment may become a good reference for the Indonesian Constitutional Court in case similar case occurs in the future.

It is, however, important to be noted that the impeachment procedures between Korea and Indonesia is quite different. In Indonesia, the impeachment authority owned by the Constitutional Court does not have direct impact to the removal of the President and/or the Vice President from their office. Even though the Indonesian Constitutional Court decides that the President and/or the Vice President violate the Constitution, it does not mean that the President or the Vice President should be removed from their office. This is because the final decision of whether the President and/or the Vice President should be removed from their office is in the hand of People Consultative Assembly.

Considering the above circumstances, in the case of Indonesia it can be said impeachment is not merely a legal process. The possibility of the People Consultative Assembly, which is a political body, to take different position from the decision of the Indonesian Constitutional Court; and the ultimate decision regarding the removal of the President and/or the Vice President is in the hand of the People Consultative Assembly, is the reason why it may not be considered as a pure legal process.

In order to continue the impeachment process, after receiving the decision of the Indonesian Constitutional Court regarding the impeachment of the President and/or Vice President, the House of Representatives then hold a plenary session to submit the proposal to remove the president and/or Vice President to the People Consultative Assembly. To form the People Consultative

[132] Impeachment of the President Roh Moo Hyun case (16-1 KCCR 609, 2004Hun-Na1, May 14, 2004) http://www.ccourt.go.kr/english/ 12 November 2008

Assembly, the House of Representatives should invite the Regional Representative Council.[133] This is because the People Consultative Assembly consists of the member of the House of Representatives and the member of the Regional Representative Council.

Within thirty days after receiving the proposal, the People Consultative Assembly should convene a sitting to decide on the proposal of the House of Representatives.[134] The decision of the People Consultative Assembly over the proposal to remove the President and/or the vice president shall be taken during plenary session ad attended by at least ¾ of the total member and shall require the approval of at least 2/3 of the total member who are present.

In other words, if ¾ (three forth) of the total number of the People Consultative Assembly are present on the plenary session, and 2/3 of the present members convince that the president and/or vice president is/are guilty or no longer qualify as president and/or vice president, the president and/or vice president shall be removed from the office.

Within this process, it is possible that the decision of the People Consultative Assembly is different with the Indonesian Constitutional Court. If the above circumstances occurred, the decision of the People Consultative Assembly prevails. Therefore, it is possible that the president and/or vice president that are legally proofed committed a crime or he/she has been found no longer meet the requirements as president and/or vice president based on the decision of the Indonesian Constitutional Court may remain in their office if the People Consultative Assembly intents to do so.

Based on the above fact this authority is often considered as an obligation of the Indonesian Constitutional Court rather than its authority. This is because the Indonesian Constitutional Court is only authorized to examine the motion from the House of Representatives on removing the president and/or vice president from the office. The Court is not authorized to remove the president

[133] Article 7B The Indonesian Constitution.
[134] Article 7B sub article (6) of The Indonesian Constitution

and/or vice president from the office.

As can be predicted, the eligible applicant to file impeachment case is the House of Representatives. This is because the Indonesian Constitutional Court only has an obligation to examine the motion from the House of Representatives. In order to file this case, the House of Representatives should allege that the president alone or together with the vice president commit or allege that they are not longer meet the qualifications as the president and/or vice president.

Based on the above explanation, the causes of the impeachment can be grouped into two. First, the president and/or vice president allegedly commit an act of treasons, corruption, bribery, serious criminal offences, or trough moral turpitude; and second, the president and/or vice president allegedly no longer meet the qualifications for their jobs.

The 1945 Indonesian Constitution does not sufficiently elaborate the causes of impeachment. The more elaborative terms regarding the causes of impeachment, specifically the first cause, can be found in Article 10 sub article (3) Law No.24 of 2003 they are:

a. Treachery against the state is a crime against national security as regulated in the prevailing laws,
b. Corruption and bribery are corruption or bribery defined in the prevailing laws,
c. Other serious criminal offences are crimes with penalties of 5 (five) years Imprisonment of more,
d. Moral turpitude is behavior which may disgrace the credibility of President and/or Vice President.

The second cause of action which is the president and/or the vice president is/are no longer meets the qualifications are prescribed in Article 6 of the 1945 Constitution. This article determines that the president and/or the vice president should be a citizen of Indonesia since his/her birth, should never have acquired

another citizenship by his/her own will, should never have committed and act of treason, and should be mentally and physically capable of performing the tasks and duties of President of vice president.

In addition to the above qualifications, there are other qualifications as determined by Article 6 of the Law Number 23 of 2003 regarding the Presidential Election. This article determines that the candidate of president or vice president should also:

a. Believing in the All Mighty God,
b. Has domiciled in Indonesia territory,
c. Already report his/her wealth to the institution that authorized to do so,
d. Is never being declared bankrupt by the court,
e. Is never being revoked his/her rights to vote that based upon a final decision of the court,
f. Is never being committed an act of misdemeanor,
g. Is registered as a voter,
h. Has Tax Payer Registration Number,
i. Has a Curriculum Vitae,
j. Is never being a president or the vice president for two times of the president or vice president tenure,
k. Is loyally to the *Pancasila*, the 1945 Constitution, and Indonesia‟s Freedom Declaration,
l. Has minimum of 35 years of age,
m. Has minimum senior high school level of education,
n. Has never being involved in the forbidden organization: communist party, and its under bow organizations,
o. Has never been imprisoning for 5 years or more because of committing a crime.

All of these requirements are also binding for the President or Vice President, this is because the Law No.23 of 2003 is the enabling act of Article 6

section (2) of 1945 Constitution. From the above explanation, it can be said that the authority of the Indonesian Constitutional Court in regard to the impeachment process is a legal examination which may to support a political decision.

6. Constitutional Complaint

In Korea this authority is often regarded as an authority which may directly protect the constitutional rights of the Korean Citizens. It may also be regarded as guarding the norms of the constitution. This is because every Korean citizens who allegedly being violated their constitutional right. They may file their cases into Korean Constitutional Court.

Constitutional complaint is the most frequent authority which is used by individuals to defense their constitutional rights. For that reason, the Korean Constitutional Court Act authorized the President of Korean constitutional court to establish a small bench which aims to examine the eligibility of the compliant.[135] This small bench contains three Constitutional Justices. The duty of this bench is to decide whether the complaint is accepted or rejected. The reasons whether such complaints are accepted or not accepted is clearly regulated in Article 72 sub article (3) of Korean Constitutional Court. [136] This small bench shall dismiss a constitutional complaint with a decision of an unanimity if: first, a constitutional complaint is filed, without having exhausted all the relief processes provided by other laws, or against a judgment of the ordinary court; Second, a constitutional complaint is filed after expiration of

[135] Article 72 of The Korean Constitutional Court Act

[136] Article 72 sub article (3) of Korean Constitutional Court

(3) In case of any of the followings, the Panel shall dismiss a constitutional complaint with a decision of an unanimity:

1. When a constitutional complaint is filed, without having exhausted all the relief processes provided by other laws, or against a judgment of the ordinary court;
2. When a constitutional complaint is filed after expiration of the time limit prescribed in Article 69;
3. When a constitutional complaint is filed without a counsel under Article 25; or 4. When a constitutional complaint is inadmissible and the inadmissibility can not be corrected.

the time limit prescribed in Article 69 which means within ninety days after the existence of the cause is known, and within one year after the cause occurs; third, if a constitutional complaint is filed without a counsel or an attorney and lastly,when a constitutional complaint is inadmissible, the inadmissibility can not be corrected.

The frequency of the Constitutional Complaint case can be seen in the statistic case of the Constitutional Court of Korea. It appears that from approximately 16563 cases filed into the Korean Constitutional Court almost 16000 of them are related to the Constitutional Complaint cases.[137]

Unlike the Korean Constitutional Court, the Indonesian Constitutional Court does not own this authority. In fact, it is important for the Indonesian Constitutional court to have such authority. Not only because such authority can sufficiently protect the constitutional rights of the Indonesian citizens, but more than that it may also uphold the norms of the Constitution.

V. Two Significant Lessons from the Korean Constitutional Court for the Indonesian Constitutional Court: Broaden the Scope of Examining the constitutionality of Laws toward the Constitution and Constitutional Complaint Mechanism.

The following part will examine two authorities of the Korean Constitutional Court namely constitutional complaint and reviewing all type of legislation against the Constitution. These two features are significant to be adopted by the Indonesian Constitutional Court in order to enhance its performance in protecting citizens' constitutional rights and to guard the norms

[137] Case statistics of the Constitutional Court of Korea http://english.ccourt.go.kr at 10 November 2006/

of the constitution.

The constitutional complaint system has been recognized in Korea since the establishment of the Korean Constitutional Court in 1988. Korean Constitutional Court has adopted constitutional complaint mechanism as enacted in Article 111 of Korean Constitution. Article 68 Section 1 of the Korean Constitutional Court Act stated that a person who has had his constitutional rights infringed by any act or omission of public authority, "except for a court's decision," can lodge a constitutional complaint to the Korean Constitutional Court. The complaint should have exhausted other available judicial remedies. The period of claim, when the complainant can apply for the complaint, is restricted to a short period in the interest of legal stability. The period is sixty days.

In the case of Indonesia, it is also important for the Indonesian constitutional court to have the constitutional complaint mechanism. This is because it is possible that the government, through its policies which are not in the form laws or regulation, violates the constitutional rights of the citizens. If such violation occurs, the citizens of Indonesia, whose constitutional rights have been violated by the government, may file a case to the Indonesian Constitutional Court. Further, the Indonesian Constitutional Justice Maruarar Siahaan stated that 'constitutional complaint is a form of public complaint with regard to the objection to the treatment of the government performance to the public, laws, and regulations and court decisions, deemed contradictory to the Human Rights regulated in the Constitution.'[138]

In addition to the need to adopt the constitutional complaint authority, it is also necessary for the Indonesian Constitutional Court to broaden the authority to test the constitutionality of all type of laws and regulations, not only laws. This is because not only law that probably violates the norms in the constitution, other regulations may also do so. We may agree that constitutional

[138] Constitutional Complaint in a Limited Discussion, April 16, 2007 http://www.mahkamahkonstitusi.go.id/eng/berita.php?newscode=331 at 17 November 2008

review in Indonesia is important for the protection of the citizens' constitutional rights. However, it can be said that there is a 'constitutional gap' in the constitutional review mechanism.[139] Both the 1945 Constitution and Constitutional Court Act are silent on the constitutional review apart from the Acts. The constitutional review system merely allows the review of Act against the Constitution not the review of other types of regulations beneath laws.[140] In addition, the Indonesian Supreme Court only has the authority to review the legality of regulations beneath law against the law itself.[141] As a consequence, regulations that allegedly violate the provisions contained in the Constitution cannot be comprehensively reviewed either by the Constitutional Court or the Supreme Court. This situation may lead to the constitutional problems.

To overcome this unease situation, the Indonesian Constitutional Court should consider the adoption of the Korean constitutional adjudication function, where the Constitutional Court is authorized to review not only laws or legislation but also other types of regulations and ordinances beneath law toward the constitution. If the Indonesian Constitutional Court is granted this authority, the Supreme Court should give this authority to the Constitutional Court, as a consequence.

The recent case of Joint-Decree regarding Ahmadiyah[142] may become one of the examples to show the importance of adopting such authorities into the Indonesian Constitutional Court. As a decree, it might be brought before the Constitutional Court.[143] However, considering the character as a rule and not in

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[139] Pan Mohammad Faiz, 'Human Rights Protection and Constitutional Review in Indonesia: A Basic Foundation of Sustainable Development in Indonesia,' http://faizlawjournal.blogspot.com/ at 10 November 2008.

[140] Article 24 C of the Indonesian Constitution

[141] Article 24 A of The Indonesian Constitution

[142] Joint Decree of the Minister of Religious Affair, the Attorney General and the Minister of the Interior of the Republic of Indonesia Number 3Year 2008 Number Kep033/A/JA/6/2008 Number 199Yera 2008 in the matter of A Warning and Order to the followers, members, and/or leading members of the Indonesian Ahmadiyya Jama'at (JAI) and to the General Public http://www.thepersecution.org/world/indonesia/docs/skb.html at 19 November 2008

[143] Constitutional Court Should be Authorized in Dealing with the Constitutional Complaint. http://www.mahkamahkonstitusi.go.id/eng/berita.php?newscode=1792 at 10 November 2008

the form of law/act then the Constitutional Court refused due to the reason that the decree had to be brought before the Supreme Court. It is possible that The Supreme Court will also not accept the application. This is because the Supreme Court is only authorized to review regulations and ordinances beneath law against law. In the case of Joint Decree, the applicant asks the Supreme Court to review this decree against the norms in the Constitution. The above case shows that it is possible that the Indonesian Constitutional Court as well as the Supreme Court cannot review this decree. In other words, it is possible that this Joint Decree cannot be reviewed. This situation may lead to constitutional problem. This problem may be resolved if the Indonesian Constitutional Court owned the authority to review all type of laws and regulation toward the constitution like the authority that is owned by the Korean Constitutional Court. The above case also may be resolved if the Indonesian constitutional Court owned constitutional complaint mechanism.

The importance to include a mechanism of constitutional complaint as one of the human rights protection mechanism in the jurisdiction of the Indonesian Constitutional Court became more apparent in 2007, since there was a discussion regarding this matter held by the Indonesian Constitutional Court.[144] The speakers on the discussion are: the first Chief of Justice of the Indonesian Constitutional Court and the former Chief of Justice of the Germany Constitutional Court.[145] The need for the Indonesian Constitutional Complaint to have a constitutional complaint is also acknowledged by the current Chief of Constitutional Justice Mahfud MD. The Chief Justice Mahfud MD stated “If we were given that authority (constitutional complaint), then we could settle that problem (joint decree on Ahmadiyah).”[146]

In addition, the Chief Justice Mahfud MD stated that ‘there were many cases where people having no passage of judicial settlement, meanwhile human

[144] Constitutional Complaint in a Limited Discussion, above n 140.
[145] Ibid.
[146] Constitutional Court Should be Authorized in Dealing with the Constitutional Complaint, above n 144.

rights had been trusted and people were helpless in the name of legal certainty because it had been settled by the Supreme Court."[147] Therefore, the current features of the Indonesian constitutional court should be extended. The Indonesian Constitutional Court should be given more authorities such as Constitutional Complaint and examine the constitutionality of all type of law and regulations toward the constitution.

Chief Justice Mahfud MD further suggests that the Indonesian Constitutional Court should also be authorized to receive constitutional question from judges.[148] This means Judges may ask the Indonesian Constitutional Court regarding the constitutionality of certain acts or legislation that they use as a basis to settle a dispute. This is important for the judges in to avoid the judgment based on the unconstitutional acts or legislation.

These authorities are significant to improve the performance of the Indonesian Constitutional Court. It is also useful for the public in order to defense their constitutional rights. As a result, the protection of human rights as well as the peoples' constitutional rights will be well protected.

Conclusions

It is widely believed that the presence of the Indonesian Constitutional Court is often considered as a significant effort in promoting and protecting the constitutional rights of the people as well as guarding the norms of the constitution. Prior to the establishment of the Constitutional Court, the norms of the Indonesian Constitution are often said as norms of a documentary constitution, meaning that the Constitution is only a text or written constitution without any sufficient legal mechanisms to enforce it. Even though, there was a

[147] Ibid.
[148] Chief Justice of the Indonesian Constitutional Court Mahfud MD, Reformasi Peradilan Harus di Tuntaskan (Court Reform should be completed), Newsletter KHN Vol 8 No 4 July-August 2008 p. 12.

legal body namely the Indonesian Supreme Court which owned a judicial review function, its authorities only limited to review the ordinances and the regulations beneath law against law itself. In other words, there was no legal mechanism to review the constitutionality of law against the Constitution. This may lead to the situation where law or legislation which constitutionally contradict with the norms of the Constitution cannot be reviewed.

Since the establishment of the Indonesian Constitutional Court in 2003, the Indonesian Constitution can be said as a living constitution. This is because the norm of the constitution can be sufficiently enforced. Public, through the legal mechanism in the constitutional court, can defense their constitutional rights if they believed that their constitutional rights have been violated by the government through its laws. Other entities such as state institutions and union customary law community may also file a case in the Indonesian Constitutional Court.

In the case of Indonesia, despite its good performance since its establishment in 2003[149] , where so many constitutional problems have been resolved by the Indonesian Constitutional Court [150] , The Indonesian Constitutional Court should also acknowledge that, based on its experience, there are some limitation in conducting its authorities. The case of Join Decree on Ahmadiyah may be one of the examples that, in conducting its authorities the Indonesian Constitutional Court experienced some difficulties. In this case, the join decree could not be filed to the Indonesian Constitutional Court, even though the applicant believed that the joint decree violated the norms of the Constitution. This is because Joint Decree is not considered as a law or legislation so that the Constitutional Court does not have authority to review

[149] The establishment of the Indonesian Constitutional Court was 15 October 2003 History of The Constitutional Court http://www.mahkamahkonstitusi.go.id/eng/profilemk.php?mk=2 at 10 November 2008

[150] Until December 31, 2007 the Indonesian Constitutional Court From all of the cases that have been accepted and registered, the Indonesian Constitutional Court has decided 174 cases or around 93.55% of the cases. Specifically on Constitutional Review cases, the Court has reviewed 63 Acts wherein four Acts have been declared void entirely and 19 Acts void partially

the Joint Decree. This limited authority resulted in the joint decree cannot be reviewed by the Constitutional Court even though it is considered contradicted with the Constitution. Other legal institution namely the Supreme Court cannot review this Joint Decree. Even though the Supreme Court is authorized to review the legality of ordinances and regulations beneath law, its authority is limited only if the ordinances and regulations, allegedly, contradict with law or legislation, not with the Constitution. This limitation may lead to the constitutional problems since the joint decree can not be reviewed by both legal institutions.

It is, therefore, important to the Indonesian Constitutional Court to take some lessons from its experiences. More importantly, especially for the future of the Indonesian Constitutional Court, the Indonesian Constitutional Court should take some lessons from other countries experience which has similar legal institution, such as the Korean Constitutional Court.

Despite its long establishment[151] and its long experiences, the Korean Constitutional Court, in certain ways, reflects some similar features to the Indonesian Constitutional Court. These include the authority of the Constitutional Court to review the legality of law and to dissolute political parties. Therefore, the Korean Constitutional Court may become a good lesson for the Indonesian Constitutional Court.

Apart from some similar features that are owned by both of the Constitutional Courts, the Korean Constitutional Court, arguably, gains more authorities. These include the authority to settle a constitutional complaint from individuals and the authority to review the legality of not only laws or legislation but also other regulations and ordinances beneath laws against the Constitution.

The unease situation, as described in the case of joint decree on Ahmadiyah may not be occurred if the Indonesian Constitutional Court gains

[151] The Korean Constitutional Court Established September 1988 and considered as the first Constitutional Court in Asia, About the Court, http://english.ccourt.go.kr/ at 11 November 2008

similar authorities that the Korean Constitutional Court has, specifically the authority to review the legality of all type of law against the constitution and the authority to settle the constitutional complaint. If the Indonesian constitutional court gains these authorities, the Indonesian Constitutional Court can sufficiently address the problems. As a result, there will be less constitutional problems. This situation will also improve the protection of the constitutional rights of citizens as well as the protection of the norms of the Indonesian Constitution.

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Case Number 002/SKLN-IV/2006

Case Number 004/SKLN-IV/2006 regarding the dispute among the Regent and the vice of Regent of the Bekasi Regency, West Java versus the President, The Minister of Internal Affairs, and The Regional House of Representatives of Bekasi Regency.

Impeachment of the President Roh Moo Hyun case (16-1 KCCR 609, 2004Hun-Na1, May 14, 2004) http://www.ccourt.go.kr/english/

People Consultative Assembly Decree Number III/MPRS/1978 regarding the Legal Status and Authorities-Management between Highest State Institution and/or with the Higher State Institutions.

Joint Decree of the Minister of Religious Affair, the Attorney General and the Minister of the Interior of the Republic of Indonesia Number 3Year 2008 Number Kep033/A/JA/6/2008 Number 199 of 2008 in the matter of A Warning and Order to the followers, members, and/or leading members of the Indonesian Ahmadiyya Jama'at (JAI) and to the General Public http://www. The persecution .org/ world/ indonesia/docs/skb.html at 19 November 2008