

FROM STATE SOVEREIGNTY TO PEOPLE SOVEREIGNTY: A CASE STUDY OF INDONESIA'S CONSTITUTIONAL COURT

Rudy, Lampung University
Utia Meylina, Lampung University
Rifandy Ritonga, University of Bandar Lampung

ABSTRACT

The early 1990s, the past two decades have witnessed crucial developments in the constitutional law and the institution in the world, as frequently and generally called a phenomenon of “constitutionalism”, and Indonesia is among such phenomenon. The Indonesian Constitutional Court (Mahkamah Konstitusi, or MK) has been established since the amendment of the 1945 Constitution in 2001 and practically began its role in 2003. Since then, the Indonesian Constitutional Court has taken an active role while dealing with a total of more than 2000 cases, and passing judgments for more than 1000 cases already.

At this moment, 17 years since its establishment, an academic review is highly anticipated particularly in their role of constitutional rights interpretation. Within the context, this paper attempts to analyze the series of judgments involving constitutional rights decided by Constitutional Court of Indonesia since its establishment in 2003. Special emphasis is placed upon the constitutional rights judgments encompassing civil political rights, economic and social rights.

This study will attempt at answering this question by integrating the reading of Indonesia Constitutional Court judgments, the institutional framework analysis with sociological approach through Indonesian Constitutional Court judges' interviews. The study reveals one possible portrayal of how the constitutional court may serve as a bridge for constitutional transition from state sovereignty to people sovereignty in Indonesia.

Keywords: Constitutional Court, Cases, Interpretation, Indonesia.

INTRODUCTION

The early 1990s, the past two decades have witnessed important developments in the constitutional law and the institution in the word, as frequently and generally called a phenomenon of “constitutionalism”. Indonesia is among such phenomenon, following the fall of authoritarian regime in and of 1990s. The Indonesian Constitutional Court has been established since the amendment of the 1945 Constitution in 2001 and practically began its role in 2003 (Harijanti & Lindsey, 2006). Since then, the Indonesian Constitutional Court has taken an active role while dealing with a total of more than 2000 cases, and passing judgments for more than 1000 cases already (Collins, 2019).

The Indonesian Constitutional Court has been established since the amendment of the 1945 Constitution in 2001 and practically began its role in 2003. Since then, the Indonesian Constitutional Court has taken an active role while dealing with a total of more than 2000 cases, and passing judgments for more than 1000 cases already (Ginsburg, 2014).

This study is aimed at ascertaining the characteristics of the Constitutionalism in Asian context by way of empirical analysis on the adjudication practice of constitutional interpretation at the Indonesian constitutional court through judgment reviews and judge interviews, together with the attempt of comparative analysis with practices in other jurisdictions in order to further identify Indonesian characteristics (Ginsburg, 2003).

The author contends that Constitutionalism in either sense of procedural and substantive can take different forms reflecting local contexts, even if the general consensus was that the constitutionalism takes place in a similar path pattern (Ackerman, 1997; Hirschl, 2012). Within the question, the paper will find an answer on what model best describes Indonesian constitutional adjudication in regard to transplantation of institutional structure and interpretation approach and what standard of interpretation has been used by the court to achieve the constitutionalism. This study will attempt to answer this question in terms of actual function of the constitutional adjudication under the name of constitutionalism, instead of Watson-like positivist studies of a written constitution (Da-Silva, 2014).

Regarding appraising the adjudicative function of the Indonesian constitutional court, this study concentrates on the implementation of the constitutional interpretation; in the meantime, the institutional characteristics including the socio-legal cultural conditions supporting such function will be identified. In order to consider the functional results of the different institutional design of constitutional courts, this paper should observe not only the static structure of the constitutional court as a constitutional organ but its dynamic institutional mechanisms, by looking into the development of living norms of the constitution through the “*interpretation*” of the constitution, as well as relevant laws considering the legal culture and political environment (Sokalska, 2019; Hanadi, 2019; Sukmariningsih, 2019).

It should be noted that this kind of comparative study is still worthy given the fact that the outcome for each country’s constitutional reform shall be different albeit the general consensus on the general spread of constitutionalism around the world with a similar pattern. Those distinctions denote the vast disparities in constitutional legacies and structures, historical inheritances, formative experiences, including non-trivial disparity in the value systems of each nation. This point of view shares somewhat similar ground with Ran Hirsch proposing that constitutions in the entire world vary in models and priorities with respect to organic pattern and state institutions (Hirschl, 2006).

Then, judgments involving issues of constitutional rights will be studied, in order to ascertain the tendency of standards applied in judicial interpretation of the constitution as well as laws. Findings on the legal interpretation of Indonesian constitutional court will be further compared with the preceding researches on the practice of other jurisdictions. This research is aimed at employing the comparative study of constitutional adjudication in terms of institutional structure and interpretation method of diverse countries to provide the basis for identifying a number of key features shaping the character of the Indonesia Constitutional Court.

RESULTS AND DISCUSSION

Institutionalization of Constitutional Court in Indonesia

The continuous existence and enlargement of a new constitutional court in the world political system having a part of the institutionalization of constitutional structure follow the ascent of constitutionalism (Tate & Vallinder, 1995). This seems a natural phenomenon given the fact that the role of constitutional court has long been attributed to both of the aforementioned two dimensions of the Constitutionalism, namely, procedural and substantive goals. Mauro Cappelletti, for example, explained the role of constitutional court as the method utilized to generate the positivization of higher values hinted by constitutions (Cappelletti, 1970) in which it emerges as another role as an institutional pillar in the separation of powers. A reference is also made to the stream of scholars descending from Montesquieu (Clark & Shapiro, 1983) asserting that constitutional separation of powers is critically predicated on the existence of an independent constitutional adjudication.

The world has observed three waves of the spread of constitutional review. The first wave was the adoption of a Judicial Review into the US constitutional system and the constitutions of its constituent states. The second wave was soon after Hans Kelsen's reconceptualization of constitutional review under special court, particularly after World War II, assuming that the legislature might make mistakes, which constitutional review could rectify (Woozley et al., 1968). Amid the third wave of democratization, a large number of countries, particularly in the post-Communist world, as well as new democracies was adopting the German type of constitutional court (Ginsburg, 2003).

Indonesian constitutional court is one of such typical products amid the third wave of democratization. Until the introduction of Indonesian constitutional court (hereinafter referred to as MK) in 2003, neither sense of rule of law, namely the procedural sense of *rechtstaat* or the substantive sense of democracy, was within reach of the Indonesian people. Indonesia constitutional doctrine asserting that "*Indonesia is rechtstaat but not machstaat*" was merely written in the constitution elucidation and constitutional books but had never been realized. It is sensible to affirm that throughout Indonesian history, at dictatorial rule periods in particular, constitutional law was stipulated as a peripheral role. The salient trigger of the constitutionalism failures was the weaknesses of the 1945 Constitution and the absenteeism of an institution for protecting the Constitution.

Perhaps, as is often the case in the world history on formation of any constitutional institutions, Indonesian constitutional court has its own historical moment involving political and economic crises demanding substantial civic engagement. Therefore, a brief historical review of the formation process of Indonesian constitution and its related institutions will assist in understanding the path led to the constitutional court.

In August 1945, amid the independence struggle, the process of drawing up Indonesia's constitution was undertaken in which it was organized to be a mere interim document. The constitution was an authoritarian one, albeit entailing articles regarding human rights providing for the majority of the thinly conceived rights which are crucial for democratic politics, including social and economic rights (e.g. things alluding education and occupation). Before the

amendment was held, the 1945 Constitution had prevailed as the state constitution of The Republic of Indonesia for three periods¹, namely in the initial years of the independence from 1945 to 1949, and it ultimately supplanted by the RIS Constitution and 1950 Provisional Constitution. The 1950 Constitution was merely implemented for nine years before re-imposing the 1945 Constitution accomplished by President Soekarno having no patience with the tempestuous experiment in democracy. During the Soeharto era up to its first amendment in 1999², the 1945 Constitution was utilized to retain an authoritarian style of government through its obscurity.

During those three periods, distinctive models of state administration were utilized despite being grounded on the text of the 1945 Constitution which was not altered. In the first years of the independence, the country obeyed liberal democracy with the parliamentary governmental system differing from the governmental system envisaged in the 1945 Constitution (Bhakti, 2020). In the following period, recognized as the “*Old Order*” era, the presidential governmental system was implemented grounded in the 1945 Constitution complemented by the establishment of the House of Representatives (DPR) and the People’s Consultative Assembly (MPR). The democracy whose development was built in that era was termed as “*guided democracy*”. The “*guided*” perspective, nonetheless, turned to be completely crucial in which its tendency ultimately led to authoritarianism.

During the New Order (1966 to 1998) under former President Soeharto³, the 1945 constitution generated an executive heavy governmental system giving the president vigorous power without mechanism of checks and balances. Besides, it enabled the president to own an additional and bestowed power in regulating constitutional and fundamental affairs with the mere laws or governmental decree since a large number of provisions in the constitution give the instructional to be regulated by law and subsequently regulated more detail in subsequent governmental decree⁴. One obvious example is the membership of the MPR, which was the highest organ within Constitutional Order, and was arranged for the president’s benefit through the Law on MPR and DPR Membership⁵. By this Law, 440 MPR memberships were appointed by the president, consisting of 100 members from Army and individuals, and 340 from delegates of groups; 160 members came from regional representatives selected by the Regional House of Representatives (DPRD); and 400 members were elected through general election. It marks the president’s domination over the MPR. In addition, the law making was controlled by the president since its predominant power was owned by the president. Furthermore, DPR occupied the domination of the parties that supported the president.

A large number of laws in that era were substantially illegitimate, yet it was able to be altered by employing a legislative review carried out by DPR itself. Additionally, some provisions or articles in the 1945 constitution have norm obscurity which was merely possible to be depicted in assorted ways grounded on the president's policies. Further, the abuse of power frequently led to human rights and constitutional rights violations without any measure for constitutional appeal.

A result of this lack of effective channels for the realization of constitutional provisions was the general neglect of the constitution as a normative source. A dominant tendency in Indonesian academy was the European customs of the first half of the 20th century viewing the

constitution as merely an assortment of the policy programs that could never materialize without addressing the actions of the legislation or administrative actions (Asshiddiqie, 2004).

In addition, the New Order's hot pursuit of economic development and stability had led the government to consider that human rights and the rules of law are expendable in pursuit of economic development, thus putting aside the constitutionalism after the economic development and stability. Hence, amid the New Order period, the existence of the written constitution did not make the Indonesian people feel either a procedural or substantive sense of Constitutionalism.

All those experiences and the weaknesses of the 1945 Constitution signified the deliberations leading to the existence of the Constitutional Court as one of judicial power executors, in addition to the Supreme Court. Establishing the constitutional court was regarded as one of the largest constitutional reforms in Indonesia after the fall of former President Soeharto in 1998 (Subekti, 2008). Former President Habibie, the successor of Soeharto, apparently already thought of the need for constitution amendment and direct election for presidency. Habibie conveyed that the future of Indonesian democracy lies in the constitution amendment so that Indonesia can stand firmly together with other democratic nations without losing its own identity⁶.

Finally, the provisions regarding Constitutional Court, together with those on the Judicial Commission, were included into the Constitution during the third amendment in 2001. The amendments to the 1945 Constitution⁷, proposed to realize a democratic constitutional state grounded in the principle of constitutional supremacy, will probably encounter the similar reality as the 1945 Constitution, unless a constitutional control mechanism exists, in which implementing the constitution in the life of people, nation, and state will be guaranteed.

Judgments Review

This section is devoted to answering the second hypothesis on whether the interpretation methods applied at the Indonesian Constitutional Court have a hybrid nature in a comparative view with world leading practices.

To distinguish the characteristics of constitutional interpretive methods according to the difference of constitutional issues at stake in major constitutional cases, a distinction was observed at least between the two categories of issues, namely the issue related to civil political rights including indigenous people case (Warman et al., 2018), and the issues associated with social economic rights.

Civil and Political Rights

As summarized in Table 1, the Constitutional Court in its legal considerations interpret the provisions of the Constitution, the interpretation methods used Textualism, Systematic, and Historical. The cases related to civil political rights, such as freedom of thought, freedom from retroactive trial, equality before the law involving rights to vote and be voted, rights to autonomy, and freedom of association, have been discussed with special importance in the Indonesia's new era of reformation and democratization, since they directly relate to the

constitutional basis for democratic consolidation. These cases must shed light upon how Indonesian Constitutional Court interpreting the new brand of civil and political rights newly integrated in the amendment in 1999 through 2001 of the 1945 Constitution. In these studied cases, Indonesian Constitutional Court exhibits an interesting tendency of ultimately referring to the notion of “*democracy*” as the normative basis of constraint to the legislative power, coupled with its grammatical and systematic method of interpretation, particularly reflecting the civil law tradition of interpretation developed in the normal judicial process.

Table 1
CONSTITUTIONAL INTERPRETATION: CIVIL POLITICAL RIGHTS CASES

DECISION	ISSUE	METHOD OF INTERPRETATION
MK Decision No 013/PUU-I/2003	Freedom from Retrospective Trials (Art. 28I (1))	Textualism Systematic
MK Decision No. 011-017/PUU-I/2003	Equality on Voting Rights (Art. 27 (1), 28D (1), 28J)	Systematic Rational Basis Test
MK decision No. Number 5/PUU-V/2007	Equality and Unity of Legal Order (Art. 18 (4))	Systematic
MK Decision Number 102/PUU-VII/2009	Procedural Democracy versus Substantive Democracy (Art. 27 (1) Art. 28, Art. 28D)	Balancing
MK Decision No. 31/PUU.V/2007.	Civil Political Right versus Autonomy (Art. 27 (1), Art. 18B)	Balancing
MK Decision No. 35/ PUU-X/2012	Right on Water Resources Indonesia (Art. 28H (1), Art. 33 (1))	Textualism-Systematic-Historical
MK Decision No. 85/PUU-XI/2013	Indigenous People Right (18B (2), Art. 28H (1))	Textualism-Systematic- Historical
MK Decision No. 14/PUU-XI/2013	Civil Political Right versus elections	Textualism Systematic
MK Decision No. 95/PUU-XII/2014	Constitutional rights of indigenous forest peoples (Art. 18B (2), Art. 28C (1), Art. 28D (1))	Textualism-Systematic- Historical
MK Decision No. 24/PUU-XVII/2019	Civil Political Right versus Election Survey (Art. 28F)	Textualism Systematic

Although these cases of civil political rights, particularly the last two cases, imply that Indonesian Constitutional Court is increasingly accustomed to the technical influence from the American style tests, the “*democracy*” seems to be kept at the top of the hierarchy of constitutional values in the balancing methods among different constitutional rights (Fahmi et al., 2019).

The Decision (Table 1) issued by the Constitutional Court brought many changes in the field of Civil and Political Rights, specifically in the MK Decision No. 85/PUU-XI/2013 and

MK Decision No. 95/PUU-XII/2014, MK uses Textualism, Systematic, Historical. The Decision provides legal force and recognizes that customary forests are separate from state forests as a form of people sovereignty. Besides the decision is utilized to guarantee the fulfillment of the constitutional rights of indigenous forest peoples. The decision also illustrates a process of transition of state sovereignty to people's sovereignty.

Nevertheless, Indonesian Constitutional Court occasionally has a tendency to go beyond the traditional adjudicative constraints going more for free-style philosophical approach for defining this democracy. The use of rational basis test in the case of equality in voting rights (MK decision No.011-017/PUU-I/2003) without any reference is one example of the aforementioned free style of interpretation mode.

Socio-Economic Rights

<p>Table 2 CONSTITUTIONAL INTERPRETATION UPON SOCIAL ECONOMIC RIGHTS CASES</p>			
Decision	Issue	Method of Interpretation	Hierarchy of Values
MK decision No. 001-021-022/PUU-I/2003	Social Rights versus Property	Systematic-Historical	1. Public Welfare 2. Freedom of Economy
MK Decision Number 002/PUU-I/2003	Social Rights versus Property	Systematic-Historical	1. State Goal 2. Public Welfare 3. Freedom of Economy
MK Decision No. 008/PUU-III/2005	Right to Life versus State Monopoly	Systematic	1. Right to Life 2. Public Welfare 3. Freedom of Economy
MK Decision No. 21-22/PUU-V/2007	Social Rights versus Investment Promotion	Systematic-Historical	1. Public Welfare 2. Freedom of Economy
MK Decision No. 54/PUU-VI/2008	Right to Life versus State Monopoly	Systematic -Structural	1. Public Welfare 2. Freedom of Economy
MK Decision No. 32/PUU-VII/2010	Right to Life versus State Monopoly	Systematic	1. Right to Life 2. Public Welfare 3. Freedom of Economy
MK Decision No. 36/PUU-X/2012	Right to Life versus State Monopoly	Systematic -Structural	1. Public Welfare 2. Freedom of Economy
MK Decision No. 85/PUU-XI/2013	Right to Life versus private Monopoly	Textualism-Systematic	1. State Goal 2. Public Welfare 3. Private Welfare 4. Freedom of Economy
MK Decision No. 18/2019	Social Rights versus Property	Textualism -Systematic-Grammatical	1. Public Welfare 2. Freedom of Economy

The second category is the constitutional cases entailing social economic rights, in which Indonesian Constitutional Court is observed taking a more active role in utilizing typical methods of civil law style legal reasoning of systematic and historical method of interpretation,

when compared to the cases on civil political rights. This difference of activeness of the Indonesian Constitutional Court is a unique aspect found in comparative approach, which must stem from, on one hand, the special importance of having long been vested to the socio-economic rights since the formulation of the 1945 Constitution from the very beginning, and on the other, the fact that this constitutional stress on the socio-economic rights has been long neglected during the authoritarian regime.

Truly, the Constitutional Court as summarized in Table 2, the interpretation methods used such Textualism, Systematic, Historical and Grammatical. The explanation of socio-economic rights whose development was undertaken by the Indonesian Constitutional Court in the series of the cases having a relevance as summarized in Table 2 owns a definitive significance for Indonesians after decades of authoritarian regime. The provision of Article 33 of 1945 Constitution defining that the State possesses a restraint towards the lands including natural resources served as a weapon by the authoritarian government to quieted the local inhabitants' objections in which they were forced to leave their lands, and their traditional rights were infringed. The Constitutional Court of Indonesia has interpreted and provided a clarification explaining that there are definite constitutional restraints on state control grounded on the objective hierarchy of constitutional values. It served as an epoch-making judgment of the Indonesia Constitutional Court declaring that in light of the people's sovereignty over all natural resources and public proprietorship of these natural resources (Hosein, 2016), the people, through the Constitution, had "*provided a mandate to the state to make policy, organize, regulate, manage and supervise to achieve maximum welfare for the people*" (case reference no. No. 001-021-022/PUU-I/2003 page 106). In the MK decision No. 001-021-022/PUU-I/2003 on electricity law case, the principle of "*controlled by state*" has been implemented by Indonesia Constitutional Court and it provides an opportunity for investors to take part in dealing with salient sectors so long as the sectors are controlled by the state. The elemental principle is associated with protecting welfare rights of Indonesians over the jeopardy of oppressive proprietorship by the private sectors. The succeeding series of judgments encompassing MK Decision Number 002/PUU-I/2003 on Oil and Gas Law, MK Decision No. 008/PUU-III/2005 on Water Law, and MK Decision No. 21-22/PUU-V/2007 on Investment Law have generated the principle of state control in MK decision No. 001-021-022/PUU-I/2003 on Electricity Law as the interpretation basis.

It is exhibited that in this explanation series concerning on the social economic rights, Indonesian Constitutional Court has attained advancement of the series of hierarchical objective values of constitutional rights in economic activities, as follows: the first rank refers to the right to life; the second rank is linked with the state and nation aspirations, and the last rank is the right to public welfare.

By a series of social economic related cases, the Indonesian Constitutional Court has maintained its consistency in terms of interpreting the Article 33 of Indonesia's 1945 Constitution, in which it owns an expectation to utilize the equal ground to indistinguishable cases in accordance with the existence of the hierarchy of objectives values in the 1945 Constitution. The hierarchical value integrity whose development exists in the judgment series implicitly and seemingly denotes a conventional effect of civil law style of adjudication; meanwhile, it also affirms Ronald Dworkin's philosophical theory on the "*law as integrity*"

which is frequently recognized to elaborate the case law development in the conventional law traditions. As mentioned in his concept of the law as integrity (Dworkin, 2014), Indonesian Constitutional Court in socio-economic cases denotes a noticeable propensity by perceiving the past institutional decisions indicating a morally orderly scheme of principles, and these principles are followed to resolve the present and future disputes.

Mixed Process of Bricolage and Expressionism

Above reviews on judgments from Indonesian Constitutional Court would imply a certain relationship between the institutional choice of constitutional adjudication and the reach of constitutional interpretation. In addition to the fact that Indonesia has a characteristic of hybrid European model of institutional structure emphasizing the independent political role, the influence of civil law tradition of judicial interpretation to the Indonesian Constitutional Court has been evident in Indonesian cases. Such an attribute to civil law style interpretation seems evident specifically in the series of judgments involving the social economic rights as discussed above, such as the extended interpretation on the constitutional normative order through the traditional judicial interpretive approaches such as the systematic method of interpretation on pertaining provisions of the Constitution (see e.g. the case No.008/PUU-III/2005), finding and reasoning from the legislative intent (see e.g. the case No. 001-021-022/PUU-I/2003), and lastly is the deduction from the normative hierarchy of a welfare state (see e.g. the case No. 002/PUU-I/2003).

However, Indonesia Constitutional Court occasionally tends to go beyond the traditional adjudicative constraints, going more for a free-style philosophical approach particularly for such fundamental terms as democracy, as shown in the series of civil political rights. The use of rational basis test in the case of equality in voting rights vide MK decision No. 011-017/PUU-I/2003 without any reference is the example of the aforementioned free style of interpretation mode. As a result, Indonesian constitutional adjudication is not free from an overly political role beyond systemic constraints that should not be allowed under the present constitutional structure. In order to best accomplish its constitutional role as a player within the constraints of constitutional principle of legislative-led democracy, it would be beneficial for Indonesian constitutional court judges to pay more attention to technical interpretive constraints in civil law tradition, instead of being overly influenced by the dynamic style of political and philosophical opinions frequently accompanied by the image of activist US judges.

This exercise of constitutional power necessarily entails creative activities by enabling the judges to supply the content of the constitutional values in accordance with the social and political necessities of the time, while perpetually based on and being constrained by the stability of the same objective values they develop. In this context of the development within the constraint, the Indonesian Constitutional Court will be able to keep taking their active role of interpreting the constitution within their institutional position given under the present constitutional structure, which is in itself in the process of development from an authoritarian model to the constitutional democracy.

This section will be devoted to answering the third hypothesis of whether the characteristic of Indonesian Constitutional Court can be considered a dynamic process both in

terms of institutional structure and adjudication practice is an example of “*bricolage*” instead of “*functionalism*” and “*expressionism*” in the constitutional scholarly terminology differentiating the world’s constitutional phenomena. When applying the model of dynamic process of constitutional function in which he described a view as a learning process of constitutional institution, institutionalization of Indonesian Constitutional Court cannot be explained within the single framework of functionalism, expressionism, or of bricolage. Probably, with an historical review of the process, it is evident that bricolage and expressionism is what occurred in the gradual process of constitutional adjudication in Indonesia.

In the specific details of institutional design, the expressivity learning process occurred in Indonesia constitutional Adjudication. Expressivism's strength lies in its ability to allow us to engage in a discussion of what is our constitutional characteristic, rather than leaving us to take it for granted. This process can be seen from jurisdiction and legal standing of Indonesian Constitutional Court that accommodates the indigenous community involvement in constitutional adjudication. This is totally unique of Indonesia, as the indigenous community has been given the chance to enter into the realm of constitutional debate. The inclusion of indigenous community as legal standing is the result of the Indonesia constitutional commitment to protect the long establishment of the indigenous community even with its constraint and challenges.

Bricolage is an unconscious process, and picking up a piece from somewhere just seems like a natural thing to do; this process in the constitutional interpretation seems harder to justify. The bricolage process in Indonesian Constitutional Court can be explained by seeing the judgment in the series of civil and political rights. As discussed above, Indonesian Constitutional Court, in the series of civil and political rights, has inconsistencies with the constitutional interpretation. The Indonesian Constitutional Court tends to be affected by the free style of interpreting the democracy notion unconsciously, taking some random standard of review from US constitutional interpretation without any reference as shown clearly in equality of voting rights cases.

The other series of judgments involving the social and economic rights is considered as expressionism approach of constitutional interpretation reflecting Indonesia local context and historical legacy. The series of judgments in this regard is defining the long debate upon state control definition in the Indonesia 1945 Constitution. 1945 Constitution Article 33 is the reflection of economic policy framed by the founding fathers in 1945 in order to achieve the state goal stated in the constitution preamble.

Accordingly, the phenomenon of Indonesian Constitutional Court is considered as a mixed process of “*bricolage*” and “*expressionism*”. Given the random and unconscious nature of “*bricolage*”, particularly observed in civil and political cases, there is a high risk of having the constitutional interpretation evolve in illegitimate way. An implication is that this “*bricolage*” of constitutional evolution in Indonesia must need a constraint to be pursued in a legitimate way, within the game rules given by the constitution itself as the supreme source of legitimacy reflecting the whole nations' consent. It is suggested that the “*expressionism*” pursued in the series of socio-economic cases in forms of intentional and willful struggles for the clarification of constitutional normative order gives light to the cases in other categories so that the free style

nature of “*bricolage*” should be well termed in the sought for democracy and constitutionalism in the Indonesian context of constitutional evolution.

Toward People Sovereignty

The notion of “*constitutionalism*”, either restated as *rechtstaat* or the rule of law, has evolved from the true need to limit the powers of government and safeguard against arbitrary or despotic rule. Indonesia, before the constitutional amendments taking place in 1999 through 2001, had been a typical case of this, long-dominated under decades of arbitrary or despotic rule by the authoritarian regime, where the emergence of “*constitutionalism*” was truly awaited. The introduction of the Constitutional Court by the constitutional amendment in 2001 must be remembered as the initiation of Indonesian “*constitutionalism*”. However, it must also be emphasized that the introduction of constitutional institution is a necessity, yet it is an inadequate situation for achieving the goal of deepening of constitutional values. Constitutionalism in Indonesia should be distinguished from a mere majoritarianism, and it has to be identified by the commitment to nothing other than the clarification and deepening of Indonesia’s own constitutional normative order. The Indonesian Constitutional Court has to be continuously studied for its actual dynamic process of fulfilling the requirement of a clear hierarchy of laws, supported by a legal culture in the local society (Warman et al., 2018).

It is clear that the constitutional adjudication could not exercise this power beyond the constitutional structural constraints. Indonesian constitutional structure is in itself in the unique process of formation, while empathizing with supremacy of the legislature as the primary source of national representation, and while recognizing the balance of power-style tension between this legislature and the administration head by the president having its own democratic legitimacy vested by the national council. In this particular picture of mixed constitutional system, the role of Constitutional Court adds more complexity while primarily being mandated to watch over the legislative, while the constitutionality of administrative regulations is considered to be under the jurisdiction of Supreme Court as the head of judicial system. Accordingly, the constitutional role of the Constitutional Court itself has to be identified through the continued endeavors by itself. The challenge for “*constitutionalism*” in Indonesian context is yet continuing.

CONCLUSION

Indonesian Constitutional Court (MK) decision in the field of Social-Political Rights and Socio-Economic Rights in general employs the method of interpretation such as Textualism and Systematic and some of them use historical and grammatical method of interpretation. The method of interpretation by MK has brought many changes in the Indonesian constitutional system, one of which is the recognition and guarantee of the constitutional rights of indigenous and tribal peoples and other guarantees in the economic field. The decision illustrates the process of transition from state sovereignty to people's sovereignty. Nevertheless, until now, MK does not have its own standards in the use of methods of interpretation. The standard is completely needed considering that the MK decisions occasionally tend to go beyond the traditional

adjudicative constraints going more for free-style philosophical approach for defining something, one of which is democracy.

ENDNOTE

1. Indonesia's constitutional history started in 1945. Before the declaration of independence on August 17, 1945, the preparation committee for the independence had started the drafting process of the constitution. The 1945 Constitution was ultimately enacted on August 18, 1945. In 1949 due to negotiation with the Allied Forces, Indonesian territory was divided into small states under the 1949 Constitution of the United States of Indonesia. Afterwards, in 1950 Indonesia attained its total freedom and the Contemporary Constitution of 1950 was enacted mandating the making of a more comprehensive permanent constitution to a Constitutional Assembly. However, the Constitutional Assembly was considered failed in 1959 so that President Sukarno declared to go back to the 1945 Constitution. From July 1959 to August 1999, the 1945 Constitution remained in place. In 1999 to 2002 amendments were made. Although major changes have been made in the four amendments, the current constitution is officially called "*the 1945 Constitution*".
2. Soeharto relinquished his presidency in 1998, and after 32 years in power, the New Order eventually disintegrated. B.J. Habibie was Soeharto's successor. Afterwards, a new democratic constitution with accountability and transparency became what the people (students in particular) expected. Moreover, they were extremely eager to ameliorate the justice system which did not entail 'KKN' (Corruption, Collusion and Nepotism). Furthermore, the Indonesian Armed Forces was not allowed to get involved in politics. This 'early stage of political transformations' from Suharto to Habibie emerged as the beginning of the succeeding stages of political liberalization from authoritarianism.
3. Article 2 (1) of 1945 Constitution before amendment mentioned that The General Assembly shall consisted of the members of the House of Representative augmented by the delegates from the regional territories and groups as provided for by statutory regulations.
4. Law No. 16/1969; Law No. 5/1975; Law No. 2/1985; and Law No. 5/1995 on MPR and DPR Membership.
5. Article 5 of 1945 Constitution before amendment stated as follow: (1) The President shall hold the power to make statutes in agreement with the DPR. (2) The President shall determine the government regulations to expedite the enforcement of laws. See Article 7 stating that the President including Vice-President shall hold office for a term of five years and shall be eligible for re-election. This provision enabled the president to hold the presidency without term limitation.
6. The political point of view, the amendment of 1945 Constitution was not "*by design*" but more to the accident to save the "*reformasi*" and to prevent chaos of politic. It was completely different from Thailand and the Philippines' experience on constitutional reform.

REFERENCES

- Ackerman, B. (1997). The rise of world constitutionalism. *Virginia Law Review*.
- Asshiddiqie, J. (2004). *State organ and power shift in 1945 constitution*. Yogyakarta, FH UII Press.
- Bhakti, I. (2020). The transition to democracy in Indonesia: Some outstanding problems. Hotel Santika, Jakarta.
- Cappelletti, M. (1970). Judicial review in comparative perspective. *California Law Review*, 58(5), 10-17.
- Clark, D.S., & Shapiro, M. (1983). Courts: A comparative and political analysis. *The American Journal of Comparative Law*, 31(1), 143.
- Collins, J.S. (2019). Addition of the constitutional question authority in the constitutional court as an effort to protect the constitutional rights of citizens. *Jurnal Konstitusi*, 15(4), 688-697.
- Da-Silva, V.A. (2014). How global is global constitutionalism? A comment on Kai Moller's the global model of constitutional rights. *Jerusalem Review of Legal Studies*, 10(1), 175-186.
- Dworkin, R. (2014). A matter of principle. In *Essays and Reviews: 1959-2002*, Princeton University Press.
- Fahmi, K., Isra, S., Muchtar, Z.A., & Hilaire, T. (2019). The role of the law in safeguarding electoral democracy in Indonesia. *Journal of Legal, Ethical and Regulatory Issues*, 22(2), 1-6.

- Ginsburg, T. (2003). *Judicial review in new democracies: Constitutional courts in Asian cases*. Cambridge University Press, 1-295.
- Ginsburg, T. (2014). Constitutional courts in East Asia. In *Comparative Constitutional Law in Asia*. Edward Elgar Publishing Ltd.
- Hanadi, S. (2019). The authority of the constitutional court in interpreting the 1945 constitution of the republic of Indonesia. *Expose: Journal of Legal Research and Education*, 16(1), 349-359.
- Harijanti, S.D., & Lindsey, T. (2006). Indonesia: General elections test the amended Constitution and the new Constitutional Court. *International Journal of Constitutional Law*, 4(1), 138–150.
- Hirschl, R. (2006). The new constitutionalism and the judicialization of pure politics worldwide. *Fordham Law Review*, 75(1), 721–753.
- Hirschl, R. (2012). The origins of the new constitutionalism: Lessons from the old constitutionalism. In *New Constitutionalism and World Order*. Cambridge University Press.
- Hosein, Z.A. (2016). The role of the state in the development of a people's economic system according to the 1945 constitution. *Jurnal Hukum IUS QUIA IUSTUM*, 23(3), 503–528.
- Sokalska, E. (2019). Interpretations of the living constitution in the American legal and political discourse. *Zbornik Pravnog Fakulteta u Zagrebu*, 69(3), 433–453.
- Subekti, V.S. (2008). *Drafting transition constitution*. Rajawali Press, Jakarta.
- Sukmariningsih, R.M. (2019). Some key issues in the cancellation of local regulations in Indonesia. *Journal of Legal, Ethical and Regulatory Issues*, 22(1), 1-6.
- Tate, C.N., & Vallinder, T. (1995). The global expansion of judicial power: The judicialization of politics. In *The Global Expansion of Judicial Power*. New York University Press, New York, London.
- Warman, K., Isra, S., & Tegnan, H. (2018). Enhancing legal pluralism: The role of adat and Islamic laws within the Indonesian legal system. *Journal of Legal, Ethical and Regulatory Issues*, 21(3), 1-9.
- Woozley, A.D., Kelsen, H., & Knight, M. (1968). The pure theory of law. *The Philosophical Quarterly*, 18(73), 377-387.