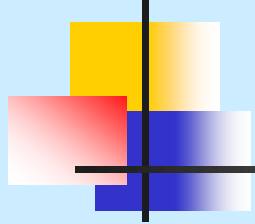


Model-model *Constitutional Adjudication*

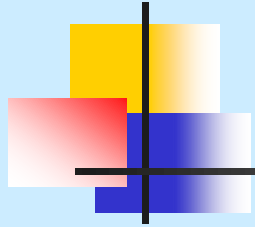
Oleh Mohammad Fajrul Falaakh
Fakultas Hukum UGM
Jogjakarta, Oktober 2013

Prinsip-prinsip konstitusi untuk pengujian peraturan perundang-undangan

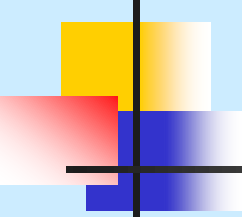


1. UUD 1945 Pasal 1 ayat (2) dan (3) menegaskan bahwa “Kedaulatan berada di tangan rakyat dan dilaksanakan menurut UUD” (*constitutional democracy*) dan bahwa “Negara Indonesia adalah negara hukum” → Supremasi konstitusi.
2. UUD 1945 Pasal 20 ayat (2): Setiap RUU dibahas oleh Presiden dan DPR untuk mendapat persetujuan bersama. Pembentuk UU juga menafsirkan konstitusi menurut aneka sudut pandang, kepentingan dan cara yang mungkin melanggar hak-hak konstitusional.
3. UUD 1945 Pasal 5 ayat (2): Presiden menetapkan Peraturan Pemerintah untuk menjalankan UU sebagaimana mestinya.
4. Harus ada akses dan kontrol masyarakat terhadap legislasi (luas): preventif (partisipasi dalam legislasi) maupun represif (*judicial review*).

Prinsip-prinsip konstitusi untuk pengujian peraturan perundang-undangan



1. Pasal 24C (1): "Mahkamah Konstitusi berwenang mengadili pada tingkat pertama dan terakhir yang putusannya bersifat final untuk menguji UU terhadap UUD." → MK "mengubah legislasi" melalui putusan final (tak ada upaya hukum lain). Hans Kelsen: *negative legislation*.
2. MK hanya tunduk kepada konstitusi sebagai formulasi kedaulatan rakyat. MK sebagai "penafsir dan pelindung konstitusi" (*interpreter and the guardian of the constitution*) untuk diterapkan dan ditegakkan dalam menilai UU.
3. UUD 1945 Pasal 24A ayat (1): MA berwenang menguji peraturan perundang-undangan di bawah UU. MA memiliki wewenang lain menurut UU: mis. Peratun, memutus sengketa hasil Pilkada.



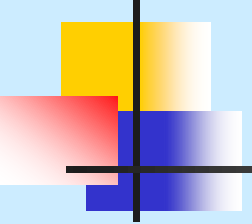
Classifications of Constitutional Review

Based on the Structure of the Court :

1. Centralized model → Originated in Europe.
2. Decentralized model → Originated in USA.
3. Mixture: Swiss (centralized, decentralized), Germany (abstract, concrete).
4. Indonesian model → Combining two models by way of labor division and applied on two types of legislation: parliamentary acts (MK) and secondary legislations (MA).

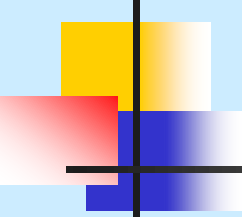
Based on subject matter:

1. Abstract review (Indonesia, Germany).
2. Concrete review (US, Germany, South Korea).
3. Individual constitutional complaint (Germany, SK).



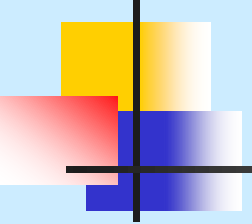
Centralized & Decentralized Models

- The two most identifiable systems of judicial review: Decentralized/American and Centralized/Austrian models;
- Centralized model: Confines the power of review to one single judicial organ.
- Decentralized model: Gives the power of review to all judicial organs of a given legal system.
- They have become less and less popular over time in their unaltered forms.



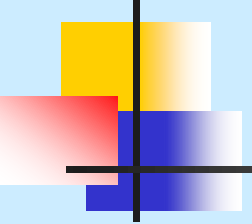
Centralized or Concentrated Model

- The power of review in the classic Austrian or centralized model is vested either in a country's supreme court or in a special court. Review under the Austrian model can be initiated through an independent action raising an abstract issue of constitutionality.
- Austria (1920), Germany (1951), Italy (1956), France (1958), Cyprus (1960), Turkey (1961), Yugoslavia (1963), Portugal (1976 and 1983), Spain (1980), Belgium (1984), Poland (1985).
- A modified version of the Austrian model was incorporated into the Spanish (1931) and Italian (1948) constitutions. In more recent years, countries with legal systems emerging from common law roots (e.g. New Guinea and Uganda) have experimented with the effectiveness of the concentrated system of review.



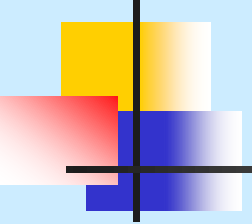
Decentralized Model

- The American model of decentralized or defused and concrete review allows all courts the right to review the constitutionality of laws. Constitutional issues may only arise, however, as incidental to other litigious issues.
- The decentralized model was adopted by several South American countries, such as Argentina and Mexico, by former British colonies such as Australia and India, by the Scandinavian states, and by Japan and Greece.



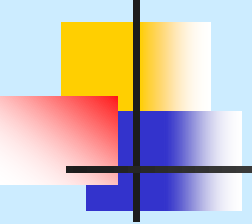
Why Rejecting the US Model?

- Differences in legal system (continental law tradition vs. common law tradition).
- Differences on judges recruitment process.



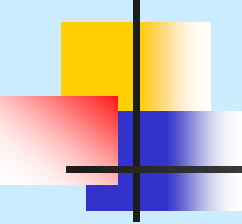
Similarity of US Model and European Model

- Both protect the fundamental-constitutional rights against infringement by governmental authority, especially the parliament or legislature.
- Both model try to maintain a balance between the state and its entities (i.e. citizens, organs of the state) of which it is composed.
- US SC and European CC perform the same tasks, as contemplated by their respective constitutions, when they protect the separation of powers → Checks and balances.



Hybrid or mixed model

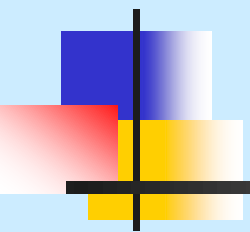
- The number of countries experimenting with mixed systems of judicial review is growing.
- The German model is a combination of abstract and concrete review.
- The components of the concentrated and diffuse models can be found in Portugal, Venezuela, Brazil, Guatemala, Colombia, Peru.
- Switzerland has a mixture of decentralized and concentrated systems.

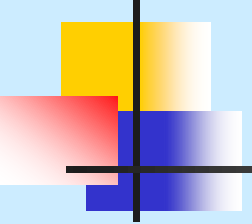


RI: Centripetal, Divergent, Federative

- Gives the power of review of different types of legislation to separate judicial organs, i.e. MK and MA, due to the dual structure of RI judiciary.
- The basis for JR is also different: MK based on the Constitution; MA based on parliamentary act and even public interest.
- Different legal efficacy: MK decision takes immediate effect; MA decision awaits subordinate legislator to repeal legislation, but judicial ruling is eventually binding.

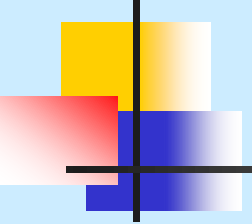
Abstract & Concrete Reviews and Constitutional Complaint





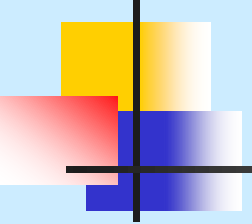
Abstract Review (AR)

- AR: the review takes place in the absence of litigation → e.g.: French judicial preview.
- AR in the US: in the absence of a concrete case or controversy.
- Ground for constitutional review in Indonesia: Constitutional damage resulted from the 'promulgation' of law → Not necessarily an actual damage.



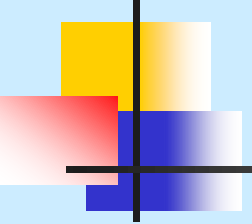
Concrete Review (CR)

- CR: The review of legislation, or public act, constitutes a separate stage of, but related to, an ongoing judicial process (litigation in the ordinary courts): JR-MA.
- JR-MK: Concrete review from American perspective; but it may not be a real litigation, depending on the claim of constitutional damage.



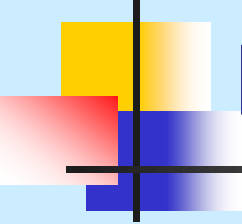
Individual constitutional complaint

- A private individual alleges the violation of a constitutional right by a public act or governmental official, and request redress from court for this violation.
- *Actio popularis in concreto?*
- In South Korea, Germany: if other legal means or procedures have been exhausted.



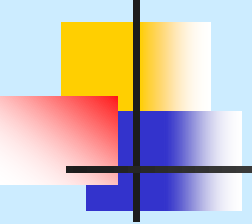
Impacts of JR

- Negative legislation (Hans Kelsen): annulling public act or legislation.
- JR means judicial preview (the French model)
- Positive legislation: mandating new act or legislation
→ Is this a judicial review? *Ultra petita, ultra vires?*



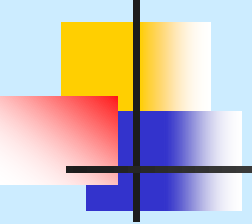
Model Perekrutan MK

- *Monocratic* (Perancis): lembaga yang berwenang mengangkat hakim tidak perlu berkonsultasi dengan lembaga lain.
- *Majority* (Amerika Serikat): Presiden mengangkat hakim agung dengan persetujuan Senat AS.
- *Supermajority* (Jerman, Italia): kesepakatan kolegal di antara lembaga-lembaga negara.



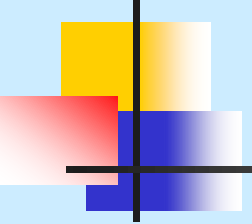
Mahkamah Konstitusi Afrika Selatan

- Komposisi MK Afsel: 11 anggota, menjabat sekali untuk 9 tahun.
- Perekrutan MK Afsel: Ketua & Wakil Ketua MK diangkat oleh Presiden setelah berkonsultasi dengan Komisi Yudisial (*Judicial Service Commission*); 9 anggota diangkat oleh Presiden setelah berkonsultasi dengan Ketua MK dan pimpinan partai politik di Majelis Nasional.



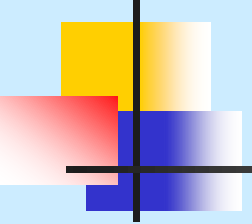
Mahkamah Konstitusi Korea Selatan

- Komposisi MK Korsel: 9 anggota, hakim karir, menjabat sekali untuk 9 tahun.
- Perekrutan MK Korsel: 3 hakim dimajukan oleh Presiden, 3 hakim oleh Majelis Nasional, 3 hakim oleh MA.



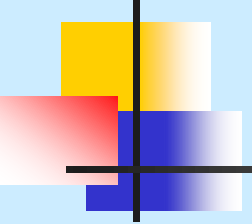
Conceil constitutionnelle di Perancis

- Komposisi *Conceil constitutionnelle* di Perancis: 9 anggota, menjabat sekali untuk 9 tahun.
- Perekrutan: 3 hakim ditetapkan oleh Presiden, 3 oleh Majelis Nasional, 3 oleh Senat; dan mantan presiden Perancis jadi anggota seumur hidup.
- Perekrutan 9 anggota dilakukan dengan *staggard system*, yaitu setiap tiga hakim dipilih setelah tiga tahun masa jabatan *Conceil constitutionnelle*.



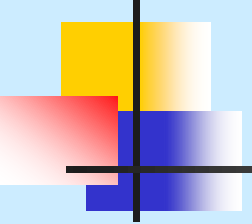
Verfassungsgericht di Austria

- *Verfassungsgericht* di Austria: Presiden, Wapres, 12 hakim tetap; 7 hakim pengganti.
- Perekrutan: Presiden, Wapres, 7 hakim tetap, 3 hakim pengganti diangkat berdasarkan rekomendasi pemerintah federal.
- Perekrutan: 3 hakim tetap, 2 hakim pengganti diangkat oleh Majelis Nasional.
- Perekrutan: 2 hakim tetap, 1 hakim pengganti diangkat oleh Majelis Federal.



Bundesverfassungsgericht di Jerman

- *Bundesverfassungsgericht* di Jerman terdiri dari 2 Panel, masing-masing 8 hakim, menjabat sekali untuk 12 tahun.
- Panel-I: *basic rights*. Panel-II: *constitutional review, abstract judicial review from lower courts, constitutional complaint*.
- Perekrutan: masing-masing Panel ditetapkan oleh *Bundestag* (DPR) dan *Bundesrat* (Senat); 3 hakim pada setiap Panel berasal dari Hakim Agung, 5 hakim pada setiap Panel dipilih oleh *Bundestag* dan *Bundesrat*; yang dipilih bukan anggota *Bundestag*, *Bundesrat*, kabinet atau lembaga serupa di negara bagian (*Laender*).



Mahkamah Konstitusi di Eropa Timur

- Masa jabatan: menjabat sekali (*limited tenure*) untuk 9 tahun; Estonia 68 tahun, Bosnia-Herzegovina 70 tahun.
- Masa jabatan terkait dengan independensi: seumur hidup dinilai “paling independen” dan dapat dipilih kembali dinilai kurang independen, sedangkan menjabat sekali untuk waktu cukup lama berada di antara keduanya.
- Larangan untuk dipilih kembali termasuk cara memajukan independensi hakim.
- Masa jabatan juga terkait dengan status MK sebagai “*second or third chamber*”.