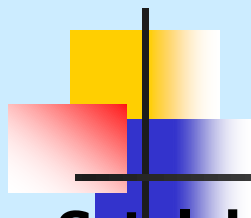


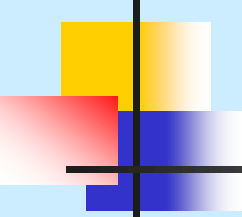
Pengujian Peraturan Perundang-undangan (*Judicial Review*)

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Jogjakarta, Februari 2009**

Mengapa dan Untuk Apa JR (*raison d'être* JR)?



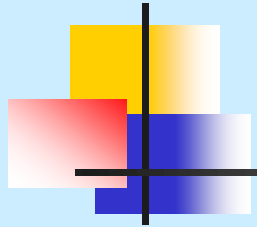
- Setelah parlemen muncul sebagai satu-satunya lembaga utama dalam negara. Jean Bodin: "Di mana tidak ada kekuasaan legislatif, di situ tidak ada *republica*, tidak ada pemerintahan yang sah, dan dengan demikian, tidak ada negara" (CJ Friedrich, *The philosophy of Law in Historical Perspective*, 1969, hal. 72). Kekuasaan dan produk yang dihasilkannya tidak dapat diganggu-gugat.
- Muncul asas "undang-undang tidak dapat diganggu gugat". Hakim bertindak sebagai mulut UU, tugas hakim hanya menuruti UU secara harfiah.
- Muncul konsep pengganti: teori *trias politica* (abad ke-18). Asumsi: wewenang yang dimiliki pemerintah selalu berpeluang disalahgunakan → tidak boleh sentralisasi dan monopoli kekuasaan negara pada seorang penguasa atau lembaga politik tertentu, perlu di bagi-bagi, agar kebebasan politik rakyat tidak dicerai.



Mengapa dan Untuk Apa JR (*raison d'être* JR)?

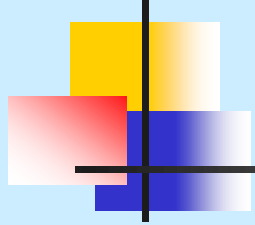
- Montesquieu (*Spirit of Law*, tr. Thomas Nugent, New York: Hafner Press, 1949, hal. 151): pemisahan kekuasaan (*separation of powers*) mengandung pengertian bahwa tiap cabang kekuasaan harus dipegang oleh pejabat yang berbeda dan tidak boleh merangkap jabatan cabang kekuasaan lain. Kekuasaan negara dikelola melalui *checks and balances*.
- Yudikatif menjadi suatu unsur esensial negara hukum modern. Semua teori negara (hukum) moderen menempatkan yudikatif sebagai kekuasaan yang vital dalam negara. Negara di Eropa Kontinental pascaabad ke-18 mendudukkan yudikatif seimbang dengan legislatif dan eksekutif. Muncul gagasan *judicial review of legislation* oleh yudikatif. Pergeseran tersebut muncul politik hukum yang non-represif.

Prinsip-prinsip konstitusi untuk pengujian peraturan perundang-undangan



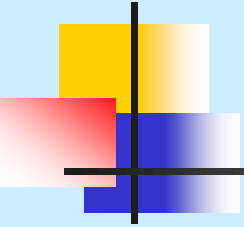
- 1. UUD 1945 Pasal 1 ayat (2) dan (3) menegaskan bahwa “Kedaulatan berada di tangan rakyat dan dilaksanakan menurut UUD” (*constitutional democracy*) dan bahwa “Negara Indonesia adalah negara hukum” → Supremasi konstitusi.**
- 2. UUD 1945 Pasal 20 ayat (2): Setiap RUU dibahas oleh Presiden dan DPR untuk 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 Judicial Review



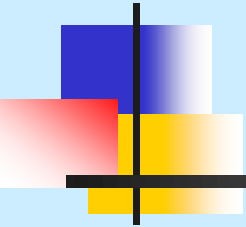
Based on the Structure of the Court :

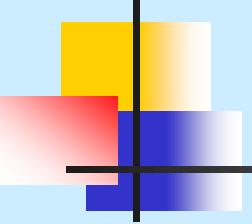
- 1. Centralized model → Originated in Europe.**
- 2. Decentralized model → Originated in USA.**
- 3. Mixture: Swiss (centralized, decentralized), Germany (abstract, concrete).**
- 4. Indonesian model → Combining two models by way of labor division and applied on two types of legislation: parliamentary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

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 of Judicial Review

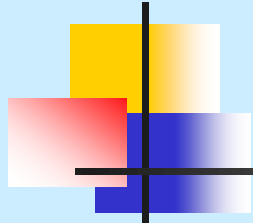




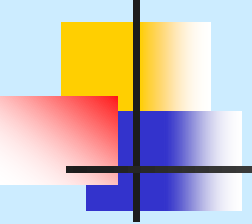
Centralized & Decentralized Models

- **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

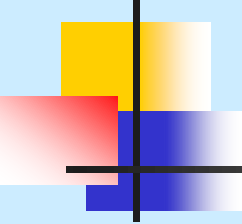


- **The power of review in the classic Austrian or centralized model is vested either in a country's supreme court or in a special court. Review under the Austrian model can be initiated through an independent action raising an abstract issue of constitutionality.**
- **Austria (1920), the Republic of 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, such as New Guinea and Uganda, have experimented with the effectiveness of the concentrated system of review.**



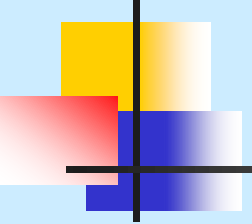
Decentralized Model

- **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.**



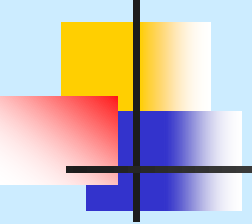
Why Rejecting the US Model?

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



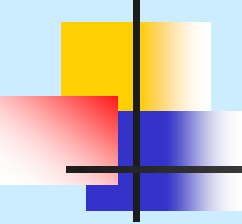
Similarity of US Model and European Model

- **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

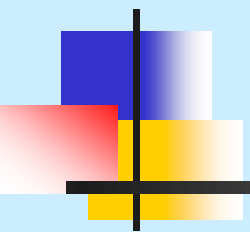
- **The number of countries experimenting with mixed systems of judicial review is growing.**
- **The German model is a combination of abstract and concrete review.**
- **The components of the concentrated and diffuse models can be found in Portugal, Venezuela, Brazil, Guatemala, Columbia, Peru.**
-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

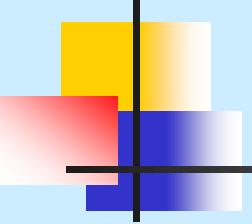


RI: Centripetal, Divergent, Federative

- 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.

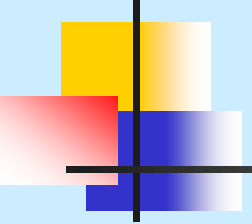
Abstract & Concrete Reviews and Constitutional Complaint





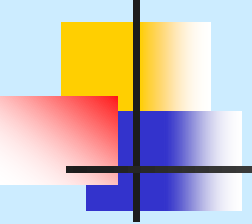
Abstract Review

- **AR: 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.**



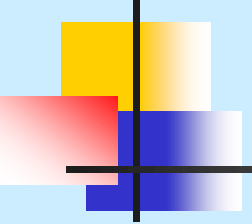
Concrete Review

- **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/legislation → already this far? Is JR simply means judicial preview (the French model)?**
- **Positive legislation: mandating new act or legislation → Is this a judicial review? *Ultra petita, ultra vires?***