

THE THEORIZATION OF INSTITUTIONS OF JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF LAWS

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Abstract

This article argues for judicial review of the constitutionality of legislation or laws. This article opines that the judiciary is more favourable in discharging the function as the guardian of the constitution than other government bodies. According to Marbury v. Madison, the judiciary enjoys the jurisdiction of judicial review to declare the unconstitutionality of legislation or laws because “it is emphatically the province and duty of the judicial department to say what the law is”.

Keywords: constitution, judicial review, legislation.

Intisari

Artikel ini membahas tentang pengujian yudisial konstitusionalitas undang-undang. Dalam artikel ini penulis berpendapat bahwa badan yudisial merupakan kandidat utama sebagai penjaga konstitusi ketimbang badan-badan pemerintahan yang lain. Pendapat ini didasarkan pada kasus Marbury v. Madison yang meyakinkan bahwa menentukan makna hukum adalah ranah dan tugas badan yudisial, termasuk dalam melakukan pengujian yudisial untuk menyatakan suatu undang-undang inkonstitusional.

Kata Kunci: konstitusi, pengujian yudisial, undang-undang.

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A. Introduction

This paper discusses institutional issues, especially in the review of the constitutionality of Laws. The focus of this paper is about legal remedy to ascertain that as the dicte of Law, the principle of human rights shall be obeyed by the legislative in forming laws by producing the coheren legislation in accordance to the Constitution which ensures the protection of human rights. That legal remedy is philosophically relative depending on the need of the state.

The legal remedy which will be discussed in this paper is spesific, which is in Judiciary. That process is called as judicial review of the constitutionality of laws or legislations.¹ Finck provides about the pre-condition of institutions of judicial review of the constitutionality of legislation or laws that:

First, it requires the existence of a written constitution which is conceived as a superior and fundamental law with clear supremacy over all other laws. Second, the constitution must be of a rigid character; the amendments or reforms that may be introduced can only be put into practice by means of a particular process. Third, the constitution must establish the judicial means for guaranteeing the supremacy of the constitution over legislative acts.²

Moreover, Michelman according to Tushnet provides criterias of the existence of institutions of judicial review of the constitutionality of legislation or laws in a state, namely:³

- a) Questions of the constitutionality of legislation are regularly brought before courts for resolution;
- b) The courts address these questions afresh, with a substantial degree of independence from the explicit or implicit opinions of other agents in the

- c) system including those who enacted the questioned law;
- c) The resulting judgments of jurisdictionally competent courts are regarded as binding on other departments of government unless and until revised either by judicial decision or by constitutional amendment; and
- d) The result of a judicial declaration of a legislative enactment's unconstitutionality is that the enactment thenceforth is treated as invalid, voided of the force of law.

This paper will discuss the form of practices of the institution of judicial review of the constitutionality of legislations or laws (*American-style judicial review and Kelsen's court*) and the structure of theories to understand its background. To conduct the theorization of the institution of judicial review of the constitutionality of legislation or laws, this paper will be focused on *Marbury v. Madison Case* as the general theory. General substances on the case of *Marbury v. Madison* can be examined to universally understand and explain the institution of judicial review of the constitutionality of legislation or laws, eventhough the practices of that process is different among countries.

B. Discussions

1. *American-style Judicial Review vs Kel-sen's Court*

As explained before, there is no strict guideline about how the judicial review of the constitutionality of legislation or laws shall be conducted. This is a very particular issue depending on tradition or interest among countries adjusting to their constitutions.⁴ Generally, there are two types of the model of review of the constitutionality of legislation or laws, namely judicial review and non-judi-

¹ Comparing with: Titon Slamet Kurnia, "A concept of state based on the right as justified argument of the judicial review of the constitutionality of laws," *Jurnal Konstitusi*, Vol. 9, No. 2, September 2012, p. 563-582. In this article, the author discuss the concept of state based on the right to justify the review of constitutionality of laws in general. This article does not discuss any particular institutions which has authority to review the constitutionality of laws.

² Danielle E. Finck, "Judicial Review: The United States Supreme Court versus the German Constitutional Court", *Boston College International and Comparative Law Review*, Vol. 20, No. 1, December 1997, p. 125.

³ Frank I. Michelman, "Justice as Fairness, Legitimacy and the Question of Judicial Review: A Comment", *Fordham Law Review*, Vol. 72, No. 5, April 2004, pp. 1407-1408. Reference above is Mark Tushnet's opinion on strong-form judicial review cited by Michelman. see Mark Tushnet, 2008, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, New Jersey, p. ix-xi.

⁴ Cf. Gustavo Fernandes de Andrade, "Comparative Constitutional Law: Judicial Review," *University of Pennsylvania Journal of Constitutional Law*, Vol. 3, No. 3, May 2001, p. 977-989 specifically discuss the difference between judicial review in USA and Continental Europe Countries.

cial review.⁵ Recently, judicial review is the best common mechanism employed by many countries. Non-judicial review is not as famous as the judicial review where only few countries have that mechanism, such as Dutch, France, and Ethiopia.

The institutionalization of the judicial institution to conduct the review of the constitutionality of laws is a universal contemporary state phenomenon. This phenomenon is common to be conceptualized with the term of juristocracy (which literally means the government by the judges) to describe the movement of state power in formulating policies from the bodies of the house of representatives into the judiciary. Ran Hirschl explains this phenomenon that:

Over the past few years the world has witnessed an astonishingly rapid transition to what may be called juristocracy. Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries [...] National high courts and supranational tribunals have become increasingly important, even crucial, political decision-making bodies.⁶

The institution of judicial review of the constitutionality of laws is believed and hoped to be capable to ascertain the protection of human rights of minority and the authority of majority. Judges are believed to be capable to be impartial because they are free from any political pressure (judicial independence principle). Hirschl states that:

Democracy is not the same thing as majority rule; that in a real democracy (namely a

constitutional democracy rather than a democracy governed predominantly by the principle of parliamentary sovereignty), minorities possess legal protections in the form of a written constitution, which even a democratically assembly cannot change. Under this vision of democracy, a bill of rights is part of fundamental law, and judges who are removed from the pressures of partisan politics are responsible for enforcing those rights.

Based on that, so this paper suggests that functionally, institutions of judicial review of the constitutionality of laws are required in ascertaining the protection and enforcement of human rights.⁸

Institutionally, there are two approaches in applying the system of judicial review of the constitutionality of laws, namely concentrated or monopolized constitutional jurisdiction and diffuse judicial review. Concentrated constitutional jurisdiction means that an institution is established for particular duty which is to conduct judicial review of the constitutionality of laws, such as the Federal Constitutional Court in Germany and the Constitutional Court in Indonesia). While, diffuse judicial review is employed by USA judicial institutions. This authority is well organized by the Federal and State Court.⁹ In literatures, these two different designs are conceived as American-style Judicial Review and Kelsen's Court Represented by Countries which employ the concentrated judicial review. Sweet formulates four core elements from Kelsen's court as the contrary of the American-style judicial review, namely:¹⁰

First, constitutional courts enjoy exclusive and final constitutional jurisdiction. For-

⁵ See Jimly Asshiddiqie, 2006, *Model-model Pengujian Konstitusional di Berbagai Negara*, Konstitusi Press, Jakarta.

⁶ Ran Hirschl, 2004, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cambridge-Massachusetts, p. 1.

⁷ *Ibid.*, pp. 1-2.

⁸ See and compare these several articles. John Hart Ely, 1980, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge-Massachusetts, pp. 135-179 discusses on the function of judicial review in the protection of minority. Andrew S. Buttlar, "Judicial Review, Human Rights and Democracy", in Huscroft, Grant, & Paul Rishworth (Ed.), 2002, *Litigating Rights: Perspectives from Domestic and International Law*, Hart Publishing, Oxford-Oregon, pp. 47-72, discusses the importance of the judicial review institution for New Zealand in relation to the protection of Human Rights based on the New Zealand Bill of Rights Act 1990 dan international law. Tom Ginsburg, 2003, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, Cambridge, pp. 21-33, develop the theory of judicial review institution which is formulated in the concept of judicial review as insurance. This theory focuses on the protection of minority in political process of the formulation of democratic laws (Majoritarian). Michael J. Perry, 2009, *Constitutional Rights, Moral Controversy and the Supreme Court*, Cambridge University Press, Cambridge, pp. 1-7 discusses the role of the Supreme Court of the United States in enforcing constitutionally entrenched human rights.

⁹ L.A. Weber, "Judicial Review in the Federal Republic of Germany", in Zhang, Yong (Ed.), 1997, *Comparative Studies on the Judicial Review System in East and Southeast Asia*, Kluwer Law International, The Hague-London-Boston, pp. 237-238.

¹⁰ Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy", *West European Politics*, Vol. 25, No. 1, January 2002, pp. 79-80.

mally, constitutional judges possess a monopoly on the exercise of constitutional review, while the judiciary remains prohibited from engaging in review. Second, terms of jurisdiction restrict constitutional courts to the settling of constitutional disputes. Constitutional judges do not preside over judicial disputes or litigation, which remain the function of judges sitting on the ordinary courts. Instead, specifically designated authorities or individuals ask questions of constitutional courts, challenging the constitutionality of specific legal acts; constitutional judges are then required to answer these questions, and to give reasons for their answers. Their decisions are final. Third, constitutional courts have links with, but are formally detached from, the judiciary and legislature. They occupy their own 'constitutional' space, which is neither clearly 'judicial' nor 'political'. Fourth, unlike the situation in the US, constitutional courts may review legislation before it has been enforced, as a means of eliminating unconstitutionality prior to harm being done. Thus, in the European model, the ordinary judges remain bound by the supremacy of statute in the legal order, while constitutional judges are charged with preserving the supremacy of the constitution.

The character of concentrated judicial review in Kelsen's Court is explicitly shown in the first and second criteria. These criterias are significantly different with American-style Judicial Review which is conducted by the Supreme Court of the United States. Constitutionally, the Supreme Court of the United States does not have particular jurisdiction to conduct the review of the constitutionality of laws. That jurisdiction is established by the particular interpretation of the Supreme Court terhadap the Constitution of the United States about the basic function of adjudication which the Court has. Alexander M. Bickel explains that:¹¹

The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known. The power which distinguishes the Supreme

Court of the United States is that of constitutional review of actions of the other branches of government, federal and state. Curiously enough, this power of judicial review, as it is called, does not derive from any explicit constitutional command. The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself. This is not to say that the power of judicial review cannot be placed in the Constitution; merely that it cannot be found there.

The Indonesian Constitutional Court follows the Kelsen's Court Model, but those four criterias are not fully implemented, such as the jurisdiction and preview competence. The differences between the concentrated judicial review of American-style Judicial Review and diffuse judicial review consist of several ratios. In countries which do not have the stare decisis principle, diffuse judicial review will not really influence in constitutional sectors because decisions cannot be enforced *erga omnes*, but in contrary where decisions are enforced inter parties. As a result, to answer that condition, Countries which do not have stare decisis principle prefer to choose concentrated judicial review. The absence of stare decisis principle will result in problems in predictability and uniformity.¹²

When there are substantial similarities between diffuse judicial review and concentrated judicial review, these similarities are more crucial than the differences which are merely technical. In this context, it is also according to the Andrade's opinion which states that "Notwithstanding its distinctive features, however, both the United States and Continental Europe adopted judicial review as a constitutional device to protect the fundamental laws."¹³ Moreover, Andrade concludes that:¹⁴

Both in the United States and Europe, courts have been playing a very important role in the preservation of individual liberties. The need for an effective check on legislative majorities, thus, seems to be the main force

¹¹ Alexander M. Bickel, 1986, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, New Haven, p. 1.

¹² Gustavo Fernandes de Andrade, *Op.cit.*, pp. 983-984.

¹³ *Ibid.*, p. 977.

¹⁴ *Ibid.*, p. 988.

compelling different legal systems to confer upon their courts—constitutional or not—the power to review legislation repugnant to the constitution.

On the other hand, the non judicial review has rationality to be a solution to *counter-majoritarian difficulty*.¹⁵ Supporting argument as justification on this approach is the purity of the implementation of *trias politica* principle. Judicial review of the constitutionality of laws is presumed incompatible with the pure *trias politica* principle so that the solution is that the authority of review of the constitutionality of laws is given to non-judiciary institutions (Non-judicial review). Incompatibility between *trias politica* principle and judicial review of the constitutionality of laws is created because that practice results in difficulties to differ between the legislation functions and adjudication functions which are the traditional concepts of *trias politica* principle. Even, Kelsen explicitly states that “The judicial review of legislation is an obvious encroachment upon the principle of separation of powers.”¹⁶

As stated by Kelsen, in such authority, Judges have the political function to conduct rule-making. As a result, this function shall not be conducted by the ordinary judiciary, but by judges and the special judiciary.¹⁷ Then, this matter results in the idea to establish Constitutional Courts which are different with ordinary judiciary. Since the inventor of constitutional court is Kelsen, the constitutional court is well-known as Kelsen’s Court. Constitutional court is different with other ordinary courts because constitutional court is a legislator which is *negative legislator*. Sweet describes, negative legislator theory introduced by Kelsen, that:¹⁸

Kelsen understood the constitutional review of statutes to be an inherently political activity – however judicial in form – since the reviewing authority would inevitably participate in the legislative function. Nonetheless, he distinguished how parliaments and constitutional courts make law. Parliaments, he argued, are “positive legislators,” since they make law freely, according to their own policy preferences, subject only to the constraints of the constitution (for example, rules of procedure). Constitutional judges, on the other hand, are “negative legislators,” whose legislative authority is restricted to the annulment of statutes when they conflict with the law of the constitution.

According to reference above, the function of negative legislator is limited to reject legislations which contradict to the Constitution. In non-judicial review approach, a legislative has inherent authority in conduction review of the constitutionality of laws (legislative review). This authority is self-control or self-correction in a legislation process conducted by a legislative which is based on general assumption that who forms a legislation shall correct the legislation in the first time. This approach is based on supremacy parliament principle which means: “Every statute that Parliament enacts is legally valid, and therefore that all citizens and officials, including the courts, are legally obligated to obey it. The courts’ legal obligation is therefore to interpret and apply every statute in a way that is consistent with Parliament’s legal authority to enact it, and their corresponding obligation to obey it.”¹⁹

However, that approach can be questioned on its effectivity based on the *nemo iudex in causa sua* principle which means “no one can be a judge for his/her case” because that person can never be objective. This argument is agreed by Arend Lijphart,

¹⁵ Yonatan Tesfaye Fisseha, 2004, *Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review*, Dissertation, Faculty of Law, University of Pretoria, South Africa, pp. 22-31.

¹⁶ Hans Kelsen, 1960, *General Theory of Law and State*, Russell & Russell, New York, p. 269.

¹⁷ This argument was kept by Soepomo in the meeting of Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) 11 July 1945 in the schedule of discussion on citizenship and the bill of constitution. Soepomo states to reject the institutionalization of judicial review like what is established in the USA: “Constitution does only discuss main and general aspects, so it can be interpreted that A’s opinion and B’s opinion is suitable with the constitution. So, if there is a conflict whether a law is constitutional or not, it is not about law, that is a political issue. Therefore, it will raise a conflict between the power of laws and constitution. Thus, in my opinion, that system is not good for Indonesia”. Muhammad Yamin, 1959, *Naskah Persiapan Undang-Undang Dasar 1945*, Jajasan Prapantja, Jakarta, pp. 341-342.

¹⁸ Alec Stone Sweet, “The Politics of Constitutional Review in France and Europe,” *International Journal of Constitutional Law*, Vol. 5, No. 1, January 2007, p. 83.

¹⁹ Jeffrey Goldsworthy, 2010, *Parliamentary Sovereignty: Contemporary Debates*, Cambridge University Press, Cambridge, p. 225.

a bachelor of politicians, who states that “If parliament itself is the judge of the constitutionality of its own laws, it can easily be tempted to resolve any doubts in its own favor.”²⁰ In countries which have non-judicial review approach, it does not mean that judicial institutions in those country cannot conduct judicial review of the constitutionality of laws. That judicial review is conducted indirectly and it is not meant to reject unconstitutional laws, but it is conducted by avoiding and interpreting laws so laws can be consistent to constitution (weak-form judicial review). Tushnet explains the weak-form judicial review concept as that:²¹

Courts assess legislation against constitutional norms, but do not have the final word on whether statutes comply with those norms. In some versions the courts are directed to interpret legislation to make it consistent with constitutional norms if doing so is fairly possible according to (previously) accepted standards of statutory interpretation. In other versions the courts gain the additional power to declare statutes inconsistent with constitutional norms, but not to enforce such judgments coercively against a losing party. In still others, the courts can enforce the judgment coercively, but the legislature may respond by reinstating the original legislation by some means other than a cumbersome amendment process.

That shows the flexibility of judiciary to avoid complexity in the form of conflict between state institutions in functional aspects.

In Dutch case, article 120 the Netherlands Constitution states explicitly that the judiciary does not have the authority to decide the unconstitutionality of laws and then, those laws are not binding. Polak and Polak strictly formulates judicial absent principle as the basis of Art. 120 of the Netherlands Constitution, “the judiciary has no authority to refuse to apply a statute. The judiciary should consume the legislature’s products even if they possess

an unconstitutional or otherwise illegal flavour.”²² That basis assumed by scholars as anomaly from constitutional system implemented by Dutch Constitutional System.

Perhaps, that system is the most satisfying system as a model of the establishment of constitutional jurists who are adherents of popular constitutionalism which gives emphasis on limit of judiciary power to be consistent to democracy principles. However, in terms of judicial independence principle, actually judges are possible to interpret laws so that those laws are in accordance to the Constitution. In this context, judges have done the review which is not apparent because it is the duty of legislatures to review laws as legislative products.

2. Marbury Case in The United States of America

As mentioned above, the historical event referred for institutionalization of judiciary in conducting judicial review of the constitutionality of laws is the case of *Marbury v. Madison* (1803).²³ Therefore, understanding this case decided by the Supreme Court of the United States is unavoidably required. Before specifically discussing the *Marbury v. Madison* case, understanding the context of American constitutional system is required as the basis of the organization of institutions of judicial review of the constitutionality of laws.

U.S. Constitutional system with an institution of judicial review of the constitutionality of laws is commonly known as *trias politica* principle plus which means that *trias politica* principle with checks and balances principle are implemented in main government institutions (legislative, executive, and judiciary). If *trias politica* principle purely implemented, so as the theory, judiciary cannot proceed the constitutional issues of laws. U.S. Constitutional system embracing *trias politica* plus principle can be seen from Gerber’s opinion that “without judicial review the Supreme Court would have no

²⁰ Arend Lijphart, 1999, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, Yale University Press, New Haven, p. 223.

²¹ Mark Tushnet, *Op.cit.*, p. ix.

²² Carla M. Zoethout, “Reflections on Constitutionalism in the Netherlands,” in Zoethout, Carla M., et al., (Ed.), 1993, *Control in Constitutional Law*, Martinus Nijhoff Publishers, Dordrecht, p. 157.

²³ Robert J. Reinstein & Marc C. Rahdert, “Reconstructing *Marbury*”, *Arkansas Law Review*, Vol. 57, No. 4, 2005, pp. 730-731.

‘constitutional control’ over the President and Congress. As a consequence, judicial review is an inevitable component of the Constitution’s commitment to checks and balances.”²⁴

The Gerber’s opinion is representative as *opinion doctorum* statement regarding to the meaning of features of the U.S. Constitutional System in allowing the judiciary to review the constitutionality of laws as a form of ‘check’ on the legislative. Moreover, the meaning of check can be related to Treanor’s opinion that “judicial review, by keeping legislative power from overstepping its bounds with respect to other and competing institutional actors, had the goal of protecting against arbitrary government.”²⁵

The theorization on practices of judicial review of the constitutionality of laws gives objective basis on that practices. In terms of the theorization, the *Marbury v. Madison* is so proper to be discussed, including its relation to Indonesian Constitutional Court although constitutional systems of both countries are different. This case is very monumental, landmark, and proper to be the justification to support the idea of judicial review of the constitutionality of laws although it is rejected as the justification. Tushnet in the book “Taking the Constitution Away from the Courts” suggests that “a constitutional amendment overruling *Marbury v. Madison*.”²⁶

The main focus of the author is what important principle of this case to address the issue of judicial justification of testing the constitutionality of laws. At the next level is what makes the justification of morally and politically acceptable and can be generalized. This last point relates to the external implications of the case that inspired many countries to replicate similar practices (although the institutional and functional format that is not always the same).

Marbury v. Madison case started from the politic intrigue in United States of America that

appeared because of the power transition from the Federalist Party to the Republican Party. The incumbent president candidate from Federalist Party; John Adams was defeated by candidate from Republican Party which was Thomas Jefferson. In the end of his power, John Adams made the important decision by putting his man from his party to be federal judges. The base law of this decision was *the Judiciary Act of 1801*. In the last two months of Adam’s power, John Marshall had double position as *Secretary of State* and at the same time as *Chief Justice of the Supreme Court*. President Adams assigned Marshall on his capacity as a *Secretary of State* to prepare, signed (together with President Adams), and also gave the assigned letter to the people who will be stationed as judges. However, this process was not finished yet (the assigned letter was not fully sent to the pointed people) until President Adams give his throne to Jefferson. President Jefferson then withdraws the decision made by Adams. The one who got the effect of that withdraws was William Marbury who was failed to become *justice of peace*. Marbury then sue James Madison; *Secretary of State* in Jefferson period to show the assigned letter that was signed by President Adams and *Secretary of State* Marshall through the law effort *writ of mandamus*.²⁷ Reinstein & Rahdert said that there were three main issues in this case, namely: (1) the right of individuals to claim the protection of the laws; (2) the ideal that government is constrained by and subject to the laws; (3) the role of courts in constitutional government.²⁸

The essential of this case was in administration laws area, which is government obligation to give the personal document to the person who had the right. In this case, the law effort *mandamus* taken by Marbury (asked Madison to give the assign letter to be *Justice of peace*) does not take too much attention. Precisely the *landmark* of this case was the action of *the Supreme Court of the United States* which did the constitutional judicial review

²⁴ Scott D. Gerber, “The Court, the Constitution and the History of Ideas”, *Vanderbilt Law Review*, Vol. 61, No. 4, May 2008, p. 1116.

²⁵ William Michael Treanor, “Judicial Review Before Marbury”, *Stanford Law Review*, Vol. 58, No. 2, November 2005, p. 560.

²⁶ Scott D. Gerber, *Op.cit.*, p. 1072.

²⁷ Robert J. Reinstein & Mark C. Rahdert, *Op.cit.*, p. 739-743.

²⁸ *Ibid.*, p. 736.

of the Judiciary Act of 1801. This case become so important because Art. III of the *Constitution of the United States* does not explicitly give the authority to the supreme court of the USA to do judicial review.

Chief justice Marshall was the intellectual actor behind the case *Marbury v. Madison*. The principle that become the guideline for Marshall in this case to give the authority for the implementation of judicial review of constitutionality of laws was the rule of law which is defined as “government must operate by, and be subject to, the ideals of the rule of law.”²⁹ Thus, it is a fortiori, in the judicial commission authority to apply and interpret the law as well as the inherent authority to declare illegitimate government action exceeded its authority and invalidate legislation or regulation that is not illegal (against the law) to be consistent with the principle of *the rule of law*.³⁰

This principle according to Reinstein & Rahdert can be traced into the source of the rule of law principles inherited from English common law through its main exponent of William Blackstone. Reinstein & Rahdert then explain some aspects of the argument which seems counter-intuitive and paradoxical because the UK as a reference source of the principle of the rule of law that the justification of the institution of judicial review is practiced by Marshall does not have a constitution, adheres to the principle of parliamentary supremacy and does not recognize the separation of governmental powers.³¹

The principle of the rule of law relied upon by both Britain and the United States is that ‘the government is subject to the law and that individuals may seek recourse in the courts for illegal actions by executive Officials’³² that ‘break the rules acts’ of any nature committed by government can be submitted to the court by the injured party as a

result of such actions. In terms of that, the Chief Justice Marshall stated, “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the law, whenever he receives an injury.”³³ Connectedness between the United States with Britain concerning the subjection to this principle Marshall is apparent from the following statement: “in Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.”³⁴ To strengthen the argument quoting Marshall Blackstone in Commentaries on the Laws of England 23: “it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”³⁵

Marshall then concluded his argument very well known that: “the government of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”³⁶ Marshall’s argument to justify the authority of judicial review of constitutionality of laws according Reinstein & Rahdert does not quote *English rule of law principle but ‘derive from them’*. Marshall’s argument is divided into five proportion:³⁷

1. In a case properly before it, the court is bound by an oath to decide according to the law;
2. If two laws are in conflict in that case, the court must choose which law to apply;
3. If one of the laws is superior to the other in importance and authority, that law must be held by the court to nullify the lesser law;
4. The Constitution is a superior law to an ordinary statute and therefore must be held by the court to nullify a statute whose terms conflict with the Constitution; and

²⁹ *Ibid.*, p. 828.

³⁰ *Ibid.*, p. 829.

³¹ *Ibid.*, p. 797-798.

³² *Ibid.*, p. 799.

³³ *Marbury v. Madison*, 163 in *Ibid.*, p. 800.

³⁴ *Marbury v. Madison*, 163 in *Ibid.*

³⁵ *Marbury v. Madison*, 163 in *Ibid.*

³⁶ *Marbury v. Madison*, 163 in *Ibid.*

³⁷ *Ibid.*, p. 801.

5. It is the special province of the judiciary to determine the meaning of all laws, including the Constitution.

These principles are familiar in England, except the fourth principle, which shows the revolutionary nature of the doctrine of judicial review which is being developed by Marshall. Reinstein & Rahdert provided annotation as follows:³⁸

Marshall's fourth principle—that the Constitution is superior to an act of Congress—of course finds no counterpart in English law. Nor is stated unambiguously in the Constitution. Although the Supremacy Clause establishes the hierarchy of federal over state law, it does not explicitly make the Constitution superior to acts of Congress or federal treaties. The revolutionary doctrine in *Marbury* is that the Constitution is a law that is superior to all other laws, including statutes enacted by Congress. This explains why Marshall went to such lengths to prove the doctrinal supremacy of the Constitution, which is now considered obvious. By establishing that the Constitution is itself a law, and supreme to all other federal laws, Marshall could then place the Constitution at the apex of the hierarchy of laws and apply accepted English rule of law principles to establish judicial review.

Based on the four principles of the Marshall then it went a step further with the fifth principle being the ultimate justification for the institution of judicial review of the constitutionality of the law practiced that: “it is emphatically the province and duty of the judicial department to say what the law is.”³⁹

This statement by Reinstein & Rahdert had wider implications than simply deciding conflicts that occurred between the constitutions with the law: “His opinion in *Marbury* asserts more than simply the authority of the courts to interpret the Constitution and laws and decide conflicts between them. Importantly, it further asserts the authority of

the courts to bind the other commissions of government by its decisions.”⁴⁰ But in the final analysis Reinstein & Rahdert argues that the judicial authority of review of the constitutionality of the law of judicial commission is not necessarily the final arbiter of constitutional interpretation of each product.

In principle, other government agencies, as a judicial commission, are bound by constitutional obligation within the framework of the rule of law to make decisions that are the constitutional integrity of the constitution as the apex of the hierarchy of laws remains intact: “We do not mean to contend that judicial review was regarded as the exclusive mode of constitutional interpretation. The rules of law principles also require the President and members of Congress to make constitutional decisions.”⁴¹ However, as stated by Alexander Hamilton in *The Federalist* No. 78, a judicial commission has a special position in the sense of: “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative commission.”⁴²

Discussion about the legitimacy of judicial review the constitutionality of laws for the U.S. case is very important because the Constitution of the United States did not authorize judicial review of the constitutionality of the law to the Supreme Court of the United States. In contrast with its counterparts in the foregoing discussion, it is labeled Kelsen's Court, which explicitly obtain the constitutional guarantee to review the constitutionality of judicial legislation. Through the case of the United States, other judicial commission in other countries can learn to do the same even though the constitution does not provide explicit authorization for judicial review of the constitutionality of the law (for example practiced in the *Mizrahi Case* in Israel).⁴³

³⁸ *Ibid.*, p. 802.

³⁹ *Marbury v. Madison*, 177 in *Op.cit.*, p. 803.

⁴⁰ *Ibid.*, pp. 802-803.

⁴¹ *Ibid.*, p. 808.

⁴² *Ibid.*, p. 809.

⁴³ Guy E. Carmi, “A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the Only Tribunal for Judicial Review”, *Connecticut Journal of International Law*, Vol. 21, No. 1, December 2005, pp. 67-91.

Lesson learned from the case of the United States was the pivot of the argument for judicial review of the constitutionality of laws on the nature of the roles of judges and judicial commission that can be generalized.

Principles as described above are a universal principle and very clear in justifying judicial review of the constitutionality of laws.⁴⁴ These principles are universally acceptable because it does not contain a contradiction understanding which can result in serious disagreement on the validity. However, the issue is whether these principles are sufficient (adequate) as justification for judicial review of the constitutionality of laws? As for the principle of judicial power commission, the principle of justify. However, as system compatibility in relation to the principles of power, other principles are not fully adequate (counter-majoritarian issue until the intervention of the legislative power is political power that led to the idea of a concept which is commonly known as Kelsen's Court).

In the final analysis, as a judicial function of the guardian of constitution through the judicial process of review of the constitutionality of the legislation requires a prerequisite as a necessity, which is the guarantee of judicial independence. Guarantee of judicial independence only occurs in countries based on the rule of law in accordance with the following Foster's opinion: "An essential feature of the rule of law is that those who bring a case before the courts must be confident that the presiding judge is not Undue under any pressure to decide it in a particular way."⁴⁵ Therefore, on the basis

of the guarantee of judicial independence, Gerber claimed: "judicial review is the ultimate expression of judicial independence, because without judicial independence no court could safely void an act of a coordinate political branch."⁴⁶

C. Conclusion

The constitutionality of the law implicitly provides protection against the constitution or basic law. In order for the constitution or the constitution to be meaningful as a juridical document (legal document), it is necessary to have a guard or protection against the basic law. Meaning of substantial protection is to ensure compliance with legislators in the legislation to exercise power products (i.e the law) which is consistent with the constitution.

Most potential candidates as a guardian of the constitution, to review the constitutionality of the law, are a judicial commission. Declaring a law as unconstitutional because it conflicts with the Constitution is a part of the natural duty of the judicial bodies in legal states. Options for this judicial commission are determined by two pre-conditions. **Firstly**, judicial commission, in the state based on the rule of law, has guarantees of independence. **Secondly**, traditionally, the judges believe to have interpretation skills. Review of the constitutionality of judicial legislation is a vehicle for the judges to apply the interpretation skills as believed by Alexander Hamilton. Interpretation expertise is a legitimate comparative advantage of the judicial commission of other government agencies.

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⁴⁴ Robert J. Reinstein & Marc C. Rahdert, *Op.cit.*, pp. 828-833.

⁴⁵ Steven Foster, 2006, *The Judiciary, Civil Liberties and Human Rights*, Edinburgh University Press, Edinburgh, p. 45.

⁴⁶ Scott D. Gerber, *Op.cit.*, p. 1117.

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