Convergence or Borrowing: Standing in The Indonesian Constitutional Court

Stefanus Hendrianto
Santa Clara University School Of Law,
Santa Clara Jesuit Communtiy, 500 El Camino Real,
Santa Clara, California, 95053
hendrh2@gmail.com

Abstract

This Article addresses the constitutional convergence theory by examining the standing rule in the Indonesian Constitutional Court. The central investigation of this paper is whether the application of standing doctrine in the Indonesian Constitutional Court is evidence of constitutional convergence or of borrowing? This paper argues that the Constitutional Court jurisprudence on standing indicates that constitutional convergence has never taken place but rather the Court has engaged in constitutional borrowing. Legal borrowing on standing is limited to the carbon copy of the five-prong standing tests of the U.S. model, but in reality standing doctrine in the Indonesian Constitutional Court is not based on the private rights model of adjudication. Although the Court allows individuals to bring cases before the Court, it is rather a quasi-public model of standing, in which claimants no longer have standing only to vindicate their own private rights but can also sue to vindicate public interests. Standing requirements also allow the judges to review many highly sensitive political cases, and to some extent it enables the Court to second guess the decisions of the different branches of government.

Key words: Constitutional Convergence, Constitutional Borrowing, Doctrine of Standing, Constitutional Court.

I. INTRODUCTION

This Article addresses the constitutional convergence theory by examining the standing rule in the Indonesian Constitutional Court. In a nutshell, the theory of constitutional convergence claims that the content of constitutional law is becoming increasingly similar across the globe. But, having realized the complexities of constitutional convergence, a few caveats and clarifications are in order. First, this article focuses on rights based convergence instead of structural based convergence. David Law, with his theory of a global race to the top, focuses on constitutional convergence in terms of the protection of individual rights.[1] Rights based convergence must be distinguished from structural constitutional convergence, which focuses on the structural form of government, such as separation of powers and democratic elections for the legislature and the head of executive. Mark Tushnet suggests convergence among national constitutional systems can take place in their protection of fundamental rights and their structures, such as the creation of an independent court.[2] As important as the constitutional structure is, this paper will not focus on whether structural convergence occurs in Indonesia, but rather on rights based convergence.

Second, much of the scholarship on rights based convergence focuses on the adoption of rights in the written constitution. Elkins, Ginsburg and Simmons posit that there has been substantial convergence with regard to human rights in national constitutions across the globe.[3] Their studies focus on the incorporation of the Universal Declaration of Human Rights (UDHR) and its complementary treaty, the International Covenant on Civil and Political Rights (ICCPR) in various national constitutions.[4] David Law and Mila Versteeg collected data on rights provision from 188 different constitutions that were adopted from 1946 to 2006, and they conclude that national constitutions, on average, grow similar over time with the inclusion of a relatively high number of rights in the first place.[5] It is beyond the scope of this article to examine the content of the Indonesian

[1] David Law, *Globalization and the Future of Constitutional Rights*, 102 Nw. U.L. Rev, 2008, p. 1277.
[2] Mark Tushent, *The Inevitable Globalization of Constitutional Law*, 49 Va. J. Int'l L., 2009, 985.
[3] Zachary Elkins, Tom Ginsburg, and Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 Harv. Int'l L.J., 2013, p. 61.
[4] Id.
[5] David Law, *The Evolution and Ideology of Global Constitutionalism*, 99 Calif. L. Rev. 2011, p. 1163.

Constitution and see whether it is characterized by imitation or convergence of rights. The object of investigation of this article is on judicial opinions instead of written constitutions. Thus, in order to analyze rights based convergence in Indonesia, I will consult the Constitutional Court cases of the last decade.

Third, some scholars posit the judges as driving forces behind constitutional convergence. Anne Marie Slaughter postulates the concept of a "global community of judges," arguing that high court judges frequently talk across jurisdiction.[6] The global community of judges then tries to influence domestic courts to take particular approaches.[7] Mark Tushnet also argues for judge-led-convergence, noting the spread of proportionality review, judicial balancing and the language of margins of appreciation as examples of judge-led-convergence towards adopting common constitutional formula.[8] On some level, this article is about judge-led-convergence; nonetheless, it will not focus on the participation of Indonesian judges in a global community of judges. This article will not examine to what extent Indonesian Constitutional Court Justices are influenced by their fellow international judges, but rather, how the judges are influenced by ideas from different jurisdictions.

Fourth, in his critical analysis to Law's "race to the top" theory, Mark Tushnet argues that it is difficult to define what the "top" of constitutional rights protection might be.[9] Tushnet believes that there is no general reason to think that U.S. constitutional law is at the "top" with respect to every specific constitutional guarantee.[10] Shall this paper compare the Indonesian Constitution and the U.S. Constitution? This paper does not aim to compare the Indonesian Constitution with the U.S. constitution. David Law and Mila Verstegg, in their study of the influence of the U.S. Constitution abroad, placed the Indonesian Constitution in the top five constitutions least similar to the U.S. Constitution.[11] Nonetheless, some constitutional practices in the United States will be taken

[6] Anne Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L. J., 2003, p. 191.
[7] For a recent scholarship on the court on court encounters as the basis of convergence, please see Paul B. Stephan, *Courts on Courts: Contracting For Engagement and Indifference in International Judicial Encounters*, 100 Va. L. Rev, 2014, p. 17.
[8] Mark Tushnet,*The Inevitable Globalization of Constitutional Law*, 49 Va. J. Int'l L., 2009, p. 985.
[9] Tushnet, id, at 1003.
[10] Id.
[11] David Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U.L. Rev. 762, 781.

into consideration, especially on the rule of standing.

The central investigation of this paper is whether the application of standing doctrine in the Indonesian Constitutional Court is evidence of constitutional convergence or evidence of constitutional borrowing. Rosalind Dixon and Eric Posner argue that many scholars make very general claims about constitutional convergence and thus neglect the complexities of the convergence theory.[12] Dixon and Posner alleged that there are various pathways of convergence and that sometimes the actual convergence is limited or even does not take place at all.[13] For example, the adoption of a bill of rights might only be constitutional borrowing instead of constitutional convergence. Constitutional borrowing does not always result in convergence and sometimes divergence occurs instead.

This paper argues that the Constitutional Court jurisprudence on standing indicates that constitutional convergence has never taken place but rather the Court has engaged in constitutional borrowing. Legal borrowing on standing is limited to the carbon copy of the five-prong standing test of the U.S. model, but in reality standing doctrine in the Indonesian Constitutional Court is not based on a private rights model of adjudication. Although the Court allows individuals to bring cases before the Court, it is rather a quasi-public model of standing, in which claimants no longer have standing only to vindicate their own private rights but also to vindicate public interests.

II. DISCUSSION

The Strange Birth of Standing

Standing is an important issue to review because it helps us to understand the nature of constitutional litigation in Indonesia. Steven Winter says that the question of standing is a question of the nature of our relationship in society and our ability to sustain community.[14] For Winter, standing divides members of the community from one another by reinforcing our individual and conflicting

[12] Rosalind Dixon and Eric Posner, The Limits of Constitutional Convergence, 11 Chi. J. Int'l L, 2011, p. 399.
[13] Id. at p. 405.
[14] Steven Winter, *The Metaphor of Standing and the Problem of Self Governance*, 40 Stan. L. Rev, 1393, p. 1371.

self-interests and by submerging our common stake in the fate of the community. Former Chief Justice Aharon Barak of the Israel Supreme Court shares the view that the way a judge applies the rules of standing is determined by his approach to his judicial role.[15]

In the last ten years, especially under the leadership of the first Chief Justice Jimly Asshiddiqie, the Court has crafted a peculiar doctrine of standing that expanded the access of people to bring cases before the Court. On the surface, the Indonesian Constitutional Court has employed a similar doctrine of standing to the United States, which requires a three-prong standing test.[16] The Court requires the petitioner to demonstrate injury in order to establish standing. The Court defined this injury-based standing in the *Biem Benjamin* case.[17] The petitioner was a politician who intended to run for Governor of the Special Capital Territory of Jakarta. He wanted to run as an independent candidate, but the Law only permitted candidates that were nominated by a political party.[18] He asked the Court to declare the law unconstitutional, thus allowing him to run for Governor as an independent candidate.

The Court ruled that in order to establish constitutional injury (*kerugian konstitusional*), the claimant must fulfill five requirements: 1) the claimant has a constitutional right that is guaranteed by the Constitution; 2) the claimant considers that his or her constitutional rights have been violated by the challenged statute; 3) the constitutional injury should be specific and actual or at least potential in character, that is, according to normal logic, the injury is likely to occur; 4) there should be a causal relationship (*causal verband*) between the

[15] According to Justice Ahron Barak, a judge who regards his role as deciding a dispute between persons with rights will tend to emphasize the need for strict standing. By contrast, a judge who regards his judicial role as bridging the gap between law and society and protecting (formal and substantive) democracy will tend to expand the rules of standing, because liberal rules of standing enable courts to hear matters that ordinarily would not find their way before a court. If the Court restricts its standing rule, then many potentially impactful cases would not be reviewed. See Aharon Barak, "A Judge on Judging: *The Role of A Supreme Court In A Democracy*," 116 Harv. L. Rev. 16 (November, 2002), 107 – 108; See also AharonBarak, The Judge In A Democracy, Princeton, New Jersey: Princeton University Press, 2006, p. 190.

[16] The U.S. law of standing has its roots in Article III's case and controversy requirement The U.S. Supreme Court has established a three-part test for standing. The constitutional minimum of standing" requires the plaintiff to establish: first, an injury in fact. Second, there must be a causal connection between the injury and the complained, in which the injury has to be traceable to the challenged action of the defendant. Third, the injury will be "redressed by a favorable decision.

[5ee] Erwin Chemerinksy, Constitutional Law: Principles and Policies (2006).

[17] The Constitutional Court decision no. 006/PUU-III/2005, reviewing the Law No. 32 of 2004 on the Regional Government [*Pemerintahan Daerah – Pemda*) (hereinafter the *Pemda Law III* case).

[18] Law Number 32 of 2004 on the Regional Governance, article 59 (2).

enactment of the challenged statute and the injury; and 5) there should be the possibility that with the issuance of a favorable decision, the constitutional injury would not occur or would not be repeated.[19]

Although these requirements are relatively similar to the five-prong standing test in the U.S. Constitutional system, the Indonesian Constitutional Court, has provided a completely different interpretation on standing requirements. In the *Biem Benjamin* case, the Court held, "although the claimant could not show injury in fact (because he never ran for the position of Governor), it can be predicted that the claimant's candidacy would be turned down by the General Election Commission, and therefore the claimant has fulfilled the standing requirement." In other words, the Court held that potential injury is sufficient to establish standing before the Court.

Although the *Biem Benjamin* case signifies that the standing requirements arise from individual claims of private rights, it opens the way for constitutional claims invoked by third parties or large groups of people. In the U.S. constitutional realm, this type of standing is known as generalized grievance.[20] The U.S. Supreme Court has adopted a principle preventing individuals from suing if their only injury is as taxpayer[21] or citizen[22] concerned with having the government follow the Constitution. Unlike the U.S Supreme Court, the Indonesian Constitutional Court allows individuals to have standing as taxpayer or citizen.

Most of the Indonesian Constitutional Court decisions related to social economic issues were framed within the context of generalized grievance standing. The first Court decision that established generalized grievance standing was the *Electricity Law* case, which dealt with the privatization of the electricity industry.[23] The claimants were human rights NGOs who argued that as non-profit organizations, they had standing to represent the public.[24] The Court

[19] The Constitutional Court decision no. 006/PUU-III/2005, reviewing the Law No. 32 of 2004 on the Regional Government [Pemerintahan Daerah – Pemda) (hereinafter the Pemda Law III case), at 16.
[20] See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
[21] See *Frothingham v. Mellon*, 262 U.S. 447 (1923); *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservist Committee to Stop the War*, 418 U.S. 208 (1974); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).
[22] *Ex Parte Levitt*, 302 U.S. 633 (1937); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
[23] The Constitutional Court decision no. 001-021-022/PUU-I/2003, reviewing Law No. 20 of 2000 on the Electricity (hereinafter the *Electricity Law* case).
[24] Id, at 13 -14.

held, "considering the claimants are electricity consumers, and taxpayers, they have the right to question any statute on economic policy that involved public welfare."[25] Thus, the Court allowed individuals and organizations to file petitions for judicial review as consumers and taxpayers.

Later, in the *Oil & Gas Law I* case,[26] the Court reinforced the generalized grievance standing approach. The claimants were four human rights NGOs who argued that as non-profit organizations they had standing to represent the public in challenging the privatization of the state owned oil company, PERTAMINA.[27] The Court held, "the objective of those NGOs is to fight for public interest advocacy...therefore the Court is of the opinion that the petitioners have standing to raise constitutional issues."[28] In other words, the Court permitted public interest NGOs to come before the Court as defenders of the people at large.

In the *Water Resources Law* case,[29] the Court moved even further, issuing a ruling that every citizen has standing to challenge the Water Resources Law. The claimants were two prominent NGOs in Indonesia, the Indonesian Legal Aid Institute and Friends of the Earth Indonesia (*Wahana Lingkungan Hidup Indonesia* – WALHI) and some individuals. They challenged the Water Resources Law that grants control over Indonesia's water resources to private entities.[30] The Court held that every citizen may act on his or her own as a defender of the people, and the Court does not require that the claimants assert an injury that is shared by a large number of people.[31]

This article posits that the generalized grievance standing is basically the Court's doctrinal invention. The period from 2003 to 2008 was characterized by the rise of generalized grievance standing in the Constitutional Court. [32] The invention was actually a strategy that was employed by the then Chief Justice,

[25] Id. at 327.
[26] The Constitutional Court decision no. 002/PUU-I/2003, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas Law I* case).
[27] Id., at 10.
[28] Id. at 200.
[29] The *Water Resources Law* case, the Constitutional Court decision no. 058-059-060-063/PUU-II/2004.
[30] Law Number 7 of 2004 on Water Resources.
[31] The *Water Resources Law* case, supra note 29, at 78.
[32] My data reveal there were at least fifteen cases that were initiated by NGOs during the period 2003 – 2008.

Jimmly Asshiddiqie to enhance the Court's authority.[33] On the one hand, Chief Justice Asshiddiqie knew that the Court would not be able to review governmental policies if nobody challenged the governmental policies before the Court. On the other hand, there were many NGOs whose agenda was to challenge governmental policies. Asshiddiqie saw the potential for collaboration between the Court and NGOs because both shared a similar vision for political and economic reform.[34] Therefore, he led the Court to apply generalized grievance standing, which permits NGOs to challenge governmental policies with minimal barriers in terms of standing.

Although generalized grievance standing has become one of the benchmarks of the Constitutional Court doctrine, it does not mean that the Court is always unanimous on the subject. An apt example is the Court's decision with regards to taxpayer standing; two justices filed dissenting opinions and argued against the application of generalized grievance standing.[35] Chief Justice Asshiddiqie himself was fully aware that he did not have absolute control over the Court's decision, and, thus, he tried to build consensus among his colleagues that the Court needed to apply a more lenient standing test in the early years of the Court's operation. One of the associate justices confirmed that the Chief Justice managed to convince his brethren to apply a lenient standing test lest no one come before the Court.[36]

The departure of Chief Justice Jimly Asshiddiqie from the Court in 2008, however, did not lead to the abandonment of standing doctrine. Under the leadership of his successor Chief Justice Mohammad Mahfud, the Court continued to employ generalized grievance standing. For instance, the Mahfud Court allowed an NGO to challenge the authority of the Ministry of Forestry to grant large concessions to private mining companies for mining exploration

[33] See Hendrianto, From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003 – 2008 (Unpublished PhD Dissertation, University of Washington, 2008) (on file with author).
[34] Private conversation with JimlyAsshiddiqie, Chief Justice of the Indonesian Constitutional Court, in Jakarta, Indonesia (July 31, 2006).
[35] The Constitutional Court decision no. 003/PUU-I/2003, reviewing Law No. 24 of 2002 on the Government Securities Law (hereinafter the *Government Securities Law* case).
[36] Private conversation with MaruararSiahaan, Associate Justice of the Constitutional Court, in Jakarta, Indonesia (July 4, 2006).

in "State Forest Areas".[37] The case was significant because Indonesia's central government has control over the country's vast forest area and thus the Ministry of Forestry had the right to grant large concessions to private companies for logging, plantations, and mining exploration even if the area has been managed for generations by indigenous people. The case was initiated by an NGO, The Alliance of Indigenous People's Organization (*Aliansi Masyarakat Adat Nusantara* - AMAN), which claimed to represent 2,240 indigenous communities and a total of 15 million people across the archipelago.[38] The Court ruled that the petitioner had standing to challenge the Forestry Law because the petitioner is an NGO who has concern over indigenous issues.[39]

Another apt example of the doctrine of generalized grievance standing under the Mahfud Court is the Court decision in the *Deputy Minister* case.[40] The State Ministry Law allows the President to appoint a deputy minister to assist with the minister's responsibilities. In his second administration, President Yudhoyono appointed 20 Deputy Ministers. An NGO called the National Movement to Eradicate Corruption (GNPK) challenged the appointment of those deputy minister and argued that the position was unnecessary and a waste of state funds.[41]The Court ruled that the GNPK had standing because its members were taxpayers whose interest had been harmed by the government's decision to appoint deputy ministers.

Standing and Abstract Review

While it is easy to conclude that the Indonesian Constitutional Court has invented its own standing doctrine, I would like also to consider a structural design that facilitated the rise of generalized grievance standing. By design, the Indonesian Constitutional Court only has authority to pronounce consistency of statute. In other words, the Court only has authority to review a constitutional

[37] The Constitutional Court decision no. 35/PUU-X/2012, reviewing Law No. 41 of 1999 (hereinafter the *Alliance of Indigenous People* case).
[38] See Mina Susana Setra, *Indigenous Peoples in Indonesia: The Struggle for "Legal" Recognition*, presentation at International Conference on Scaling-Up Strategies to Secure Community Land and Resource, Interlaken, Switzerland, September 19-20, 2013.
[39] See *The Alliance of Indigenous People* case, supra note 37 at 161.
[40] The Constitutional Court decision no. 79/PUU-IX/2011, reviewing Law No. 39 of 2008 on the Cabinet Minister (hereinafter the Deputy Minister case).
[41] Id. at 80.

question in an abstract manner and not to solve a concrete constitutional case. Abstract review is basically compatible with inquiry standing instead of injury standing.[42] The Court's decision in an abstract review does not aim to resolve the injury suffered by the claimant but rather, to simply pronounce the constitutionality of the challenged statute. Consequently, the Court will only provide some type of advisory remedy.

A telling example of such advisory remedy is the Court's decision in the *Electricity Law* case, in which the Court invalidated the entire statute because it was proven to be inconsistent with economic clauses in the Constitution.[43] The Court held that all agreements or contracts and business permits in the electricity industry that had been signed and issued based on the nullified Law should remain valid until the expiration date of the contracts or agreements and business permits in question.[44] Obviously, the Court's decision only pronounces the consistency of the statute with the Constitution, and it has no effect to create any remedy. In the very recent decision of the Constitutional Court on *General Election schedule*, the Court ruled that the current election mechanism contradicted the Constitution.[45] It held that the presidential election and legislation election should be held concurrently; however, the Court's decision will not apply until the 2019 General Election instead of the recent General Election in 2014.[46]

Basically, the Court's decision is merely a declaratory judgment, in which the Court has authority to issue interpretation on the constitutionality of law but, it is simply an advisory opinion. Therefore, the type of remedy that the Court can render is merely declaratory relief. The effect of the Court's decision rests on its moral authority and the willingness of the other political branches to follow that decision. The *Oil and Gas Law I* case is an obvious example of this kind of declaratory relief. In this case, the Court held that fuel prices should be regulated

[42] See Richard S. Kay, "Standing to Raise Constitutional Issues: A Comparative Analysis," in Richard S. Kay (ed.), *Standing to Raise Constitutional Issues: Comparative Perspectives* (2005).
[43] See the *Electricity Law* case, supra note 23.
[44] Id at 350.
[45] The Constitutional Court decision no 14/PUU-XI/2013 reviewing Law No. 42 of 2008 on the Presidential Election (hereinafter the *Presidential Election Law* case).
[46] Id. at 88. See also The Jakarta Post, "Court rules one voting day in 2019," January 24, 2014.

by the Government, and consequently, it invalidated the provision that ruled that fuel prices should be regulated by the market mechanism.[47] Not long after the Court issued its decision, the Government issued a Presidential Regulation which set up fuel prices based on the market mechanism.[48] In response to the Presidential Decree, the Court wrote a letter and reminded the President that the market price clause in the Oil and Gas Law had been invalidated and the Government should not consider it a source of law any longer.[49] The President, in his formal reply to the Constitutional Court, stated that that the government's decision corresponded with the Court's holding[50] and that The Government was in fact regulating the fuel price as mandated by the Court through the Presidential Regulation.[51] Then, the President reminded the Court not to trespass beyond its jurisdiction and authority.

There are several instances where the Executive decided to comply with the Court's decision. One telling example is the *Attorney General* case.[52] The central dispute in this case was whether an Attorney General is a cabinet official, and, whether he serves in accordance with the length of term of a cabinet. The Court majority ruled that the Attorney General should be subjected to term limits as a Cabinet Minister.[53] Following the Court's decision, Chief Justice Muhammad Mahfud urged the President to dismiss the Attorney General Hendarman Supandji, who had previously not been subjected to the term limit.[54] President Yudhoyono decided to uphold the Court ruling by removing Hendarman Supandji from his post. Despite the President's compliance, the Court basically has no command over its decision and depends entirely on the willingness of the Executive to comply with the Court decision.

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[47] See The Constitutional Court decision no. 002/PUU-I/2003, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas Law I* case).
[48] The Presidential Regulation No. 55 of 2005.
[49] Letter from Chief Justice of the Indonesian Constitutional Court to the President of Republic of Indonesia, October 6, 2005 (copy on file with the author).
[50] The President of Republic of Indonesia to the Chief Justice of Constitutional Court, October 14, 2005 (copy on file with the author).
[51] Id.
[52] The Constitutional Court decision no. 49/PUU-VIII/2010, reviewing Law No. 16/2004 on the Attorney General Office (hereinafter the *Attorney General* case).
[53] Id. at 133.
[54] *Court says Hendarman no longer attorney general,* The Jakarta Post (Jakarta), September 22, 2010.

Standing and Private Rights

Before I move to evaluate whether the Court's standing doctrine is evidence of constitutional convergence or just of constitutional borrowing, it is necessary to explain the standing doctrine within the context of liberal constitution. In this article, I will use the standing doctrine in the U.S. constitutional system as the point of comparison. Although, the Indonesian Constitution has little resemblance to the U.S. Constitution, the five-prong standing test in the Indonesian Constitutional Court is reminiscent of the five-prong test in the U.S. constitutional system. For that reason, it is important to briefly review the standing doctrine as it is found in the U.S. constitutional system.

Arthur Ripstein has provided a subtle analysis of the Kantian understanding of private rights and standing.[55] In Kant's understanding of rights, one might have a right also to enforce his or her rights. The right to enforce is remedial because it addresses private wrongs. Ripstein gives an illustration whereby if I carelessly bump you and injure your body or damage your property, and then I have interfered with your right to be the one who determines how your body and property will be used. A remedy then is supposed to give you back what you were entitled. The right of enforcement is your right to make me restore you to the position you would have held had I never wronged you. Nevertheless, you have no standing as a matter of private right to complaint if a hailstone injures you or damages your property, because there is nobody against whom you can direct your complaint.

Kant's insight on private rights can form a basis to understand the origin of standing doctrine in the U.S. constitutional realm. The modern U.S. standing doctrine invokes two important arguments about the judicial role. First, standing requirements ensure that adjudication addresses concrete issues brought by people who have interest.[56] This argument has roots in the common law notion of private rights, and it contends that litigants should have a stake in a genuine dispute

[55] Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 Va. L. Rev. 1391 (2006), 1416.

[56] See John F. Muller, *The Constitutional Incompleteness Theorem*, 15 U. Pa. J. Const. L. 1373 (May 2013) Muller uses the notion of justiciability in his analysis on the relationship on the judicial role. Nevertheless, standing is part of the justiciability doctrine, so I will simply use standing in my reference to Muller's argument.

capable of judicial redress. Second, standing requirements ensure that the courts do not overstep their boundaries against the other branches of government.[57]

The modern U.S. principles of standing grew out of the distinction between public and private rights. In its original form, standing enforced the rule that the judiciary had the power only to vindicate private rights in suits by private litigants. Law was the body of rules that defined the rights of citizens and provided a remedy to the injured party. Based upon these principles, Chief Justice Marshall in *Marbury v. Madison* drew the conclusion that, "the very essence of civil liberty certainly consists in the light of every individual to claim the protection of the laws, whenever he receives an injury."[58]Under the 18th century common law, rights were synonymous with remedies, remedies were synonymous with the forms of action and the forms of action were synonymous with the concept of redressable injuries.[59] One might infer from this line of reasoning that in its original form, standing was based on the private rights model of litigation.

Standing flourished as an independent doctrine in the early of the 20th century. Standing was developed principally at the hands of Justice Brandeis and later Justice Frankfurter to achieve the goal of protecting legislation from judicial attack.[60]Justice Frankfurter began to develop a new doctrine, that the violation of public right is insufficient to establish standing. If no private right was involved then the litigant's only recourse was through the elected branches of government. In other words, standing required the invasion of a "legal right".

During the mid-twentieth century, however, the Court expanded standing by abandoning the private rights requirement. One option for the Court to expand standing was to adopt a public rights model, permitting a private individual to bring suits against any violation of the public interest. Thus, the Court created a quasi-public model of standing, in which litigants no longer had standing only to vindicate their own private rights but also to vindicate public interests. The only requirement for standing was that the challenged actions affect the litigant.

[57] See Antonin Scalia, *A matter of interpretation: federal courts and the law : an essay* (1997).
[58] Marbury v. Madison, 5 U.S. (1 Crach) 87, 102 (1803).
[59] Steven L. Winter, *The metaphor of standing and the problem of self-governance*, Stanford Law Review (1988): 1371-1516.
[60] Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* (2000), 218.

But the litigants were not required to demonstrate the violation of private rights in order to prevail on the merits.

In the last forty years—starting with the Burger Court—the Court has again restricted standing. The belief that liberal access to the courts by private litigants seeking to enforce public rights endangers the separation of powers has driven the Court again to revert to what is essentially a private rights model for standing. But in returning to the private rights model, the Court did not abandon the injury in fact test; instead the Court stated that injury must be "actual", "distinct," "palpable," and "concrete." Abstract injuries such as the injury caused by the government's failure to obey the law were insufficient. In general, the Court has denied standing to taxpayers and held that generalized grievance regarding government misconduct could not support standing, stating that standing required the plaintiff to allege that he was in danger of suffering any particular concrete injury as a result of the government misconduct.[61]

Evaluating Standing

Having explained the development of standing doctrine in the United States, this paper will move to evaluate the evolution of standing doctrine in the Indonesian Constitutional Court. First and foremost, this paper argues that the standing doctrine in the Indonesian Constitutional Court is the product of constitutional borrowing rather than constitutional convergence; i.e., when the Court crafted the five prong standing test in the *Biem Benjamin* case, some Justices consciously copied what they saw in the United States.

One plausible driving force behind the borrowing of the U.S. standing doctrine is former associate Justice Achmad Natabaya, who is the proponent of strict standing doctrine. While he was in the Court, Justice Achmad Natabaya preferred the Court to have a limited role and limited access for citizens. Justice Natabaya believed that the Constitutional Court had a limited role in reviewing statutes. Based on his view of the limited role of the Court, Natabaya believed that the Court should apply a strict standing rule because only through strict would the

[61] In the *EPA v. Massachusetts*, however, the Court held as a state, Massachusetts had standing to sue the EPA over potential damage caused to its territory by global warming.

Court avoid trespassing on the jurisdictions of the other governmental branches. Natabaya believed that standing rules should require the claimant to assert a personalized and factual injury.[62] According to Natabaya, there was a fundamental flaw within the standing mechanism in the Indonesian Constitutional Court because it allowed individual citizens to challenge a statute.[63] Natabaya believed that the ideal standing mechanism was like that of the France Constitutional Council, in which only a designated institution—President, Prime Minister, Upper House, Lower House and Parliamentary minority —can challenge consistency of the statute with the Constitution.[64]

Nevertheless, Natabaya argued that if the Law allowed individual citizens to challenge a statute, then claimants must fulfil certain requirements in order to establish standing. Natabaya said that the U.S. five-prong standing test became a reference for him in believing that there should be personalized and factual injury.[65] As a scholar who studied in a U.S. Law School (Natabaya earned his LL.M degree from Indiana University School of Law, Bloomington) Natabaya was familiar with the U.S. style of standing and decided to copy the U.S. principle of injury standing. Moreover, Natabaya himself claimed that he was the only Justice who was educated in the American law school and with real knowledge of the US constitutional system.[66]

Dixon and Posner warn that constitutional borrowing will often go in only one direction, that is from more successful or older countries to less successful or newer countries, or else from countries with a great deal of experience with an issue to countries that must address that issue for the first time.[67] In the case of the Indonesian Constitutional Court, the constitutional borrowing on standing, indeed, has gone into a different direction. Clearly the standing doctrine in the Indonesian Constitutional Court is not based on a private rights model of adjudication. Although the Court allows individuals to bring cases before

[62] Private conversation with Achmad Natabaya, May 28, 2008.
[63] Id.
[64] Id.
[65] Id.
[66] Id.
[67] Dixon and Posner, supra note12.

the Court, it is rather a quasi-public model of standing, in which claimants no longer have standing only to vindicate their own private rights but also to vindicate public interests.

One of the obvious examples of the quasi-public rights model is the recent Court decision in the *General Election schedule* case. The claimant, Effendi Ghazali, was a political activist who challenged the Presidential Election Law no. 42 of 2008, which prescribed two separate election schedules for legislative and presidential elections. First, Ghazali argued that the current election mechanism has subverted the presidential system. His concern was that a coalition of political parties that nominates a president will have too much leverage over the president elect. In other words, Ghazali argued that a president elect could be held hostage by the interest of a coalition of political parties that support his nomination.

Obviously, Ghazali invoked the public interest argument in his petition. Nonetheless, he also argued that the Law had infringed upon his voting rights. Ghazali referred to his personal experience in the 2004 General Election. At that time, he was doing his doctoral research in the city of Nijmegen, Netherlands. Ghazali returned to Indonesia to cast his vote for the legislative election on April 5, 2004. Ghazali, however, could not cast his vote for the Presidential Election on July 5, 2004 because he had to travel back to Netherlands before that date. Ghazali posited that his voting rights had been deprived by the Law that set two separate election schedules.[68]

Apart from the application of quasi-public right model, the Court has consistently applied generalized grievance standing, which arises out of a public rights model of adjudication. The Court's application of the public rights model obviously deviates from the private rights model in the U.S. Constitutional doctrine. There have been many examples of the public rights model of adjudications in the last ten years, but I would like to cite one more

[68] If one reviews the case closely, there is a mismatch between the challenged statute and the injury claimed. On the one hand, Ghazali invoked an injury that was caused by the 2004 presidential election process, which was based on Law no. 23 of 2003 on the Presidential Election. On the other hand, he challenged the Law no. 42 of 2008 on the Presidential Election, which was enacted by the House in 2008. Thus, the challenged statute did not cause any immediate harm to Ghazali's voting rights.

case as evidence of the prevailing of the public rights model of litigation in the Indonesian Constitutional Court. In 2012, the Court issued a decision in the *BP Migas* case.[69] The petitioners challenged some of the key statutory provisions which mandated the Government to establish a Regulatory Agency to supervise the oil and gas upstream sector.[70] The petition was initiated by twelve Islamic based organizations and 30 individuals, chiefly led by Muhammadiyah, one of the largest Islamic non-governmental organizations in Indonesia. Muhammadiyah as the chief petitioner asserted that it came before the Court as an organization with the objective of establishing an Islamic civil society, and, thus, it had standing to represent public interest.[71]

The Court majority did not provide any specific ruling on standing; it simply held that the plaintiffs had standing to bring the case. Nevertheless, there was a dissenting opinion, in which Justice Harjono argued that the plaintiffs have no standing to bring the case.[72] Justice HarJono did not write a lengthy dissent; he simply criticized the Court majority for their lack of consideration with regard to the issue of standing. He believed that the Court did not provide sufficient legal reasoning in reaching the conclusion that the plaintiffs had standing to file the case before the Court.[73]

The *BP Migas* case is not only an exemplar of the public rights model of litigation but also evidence that the public rights model of litigation in Indonesia is not remedial because it does not aim to address private wrongs and any remedy provided by the Court will not give you back that to which you were entitled. In the *BP Migas* case, the Court held that the establishment of the Regulatory Agency of Oil and Gas Upstream Sector had reduced state control over petroleum resources. After the Court announced its decision, The Minister of Energy then established a Special Task Force for Upstream Oil and Gas Activities, which had the responsibility to take over all duties, functions, and employees of the

[69] The Constitutional Court decision no. 36/PUU-X/2012, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas III case / BP Migas* case). The Court finished the deliberation meeting on November 5th 2012 and it announced the decision on November 13, 2012

[70] Article 1 section 23 & article 4 section 3.

[71] Indonesian Constitution, article 28C (2).

[72] See the *BP Migas* case, supra note 69, at 118.

[73] Id.

Regulatory Agency of Oil and Gas Upstream Sector, actually carrying out similar tasks to the disbanded Regulatory Agency.[74]

A few days after the Court issued the decision, Muhammadiyah celebrated its 100th anniversary. The Chairman of Muhammadiyah, Din Syamsuddin expressed his gratitude and praised the Court's decision as the finest anniversary gift for Muhammadiyah.[75] Nonetheless, he raised a concern that "there is no difference before and after the decision issued by the Court. It only changes name and address." [76] Mr. Syamsuddin clearly did not have deep knowledge of the workings of the Court, otherwise, he would not have been surprised to find that the Executive might simply ignore the Court's decision. Obviously, the Court has no judicial command to enforce its decision. Simon Butt, a professor at the University of Sydney in his analysis of the Court decision on the *Electricity Law* case,[77] has criticized the Court for its lack of judicial command. Butt explained that around two months after the Court invalidated the Electricity Law, the Government issued a regulation which appears to have countered the Court's decision.[78] This regulation was described as being very similar to the Law that was invalidated by the Court in the first place. Butt lamented the fact that the Court can do nothing to remedy the unconstitutionality of the new regulation.[79]*The BP Migas* case is basically another chapter in the history of the Indonesian Constitutional Court, in which it is made clear that their decision is merely a declaration judgment and the Court can do nothing to enforce its decision.

Private claimants who bring cases under the quasi-public right models are also not immune to the problem of the lack of remedy to give back that to which they were entitled. A telling example is the *Mohammad Sholeh* case.[80] Mohammad Sholeh was a legislative candidate from the Indonesian Democratic

[74] See the Regulation of Ministry of Energy and Mineral Resources no. 9 of 2013.
[75] *Muhammadiyah celebrates 100 years*, The Jakarta Post (Jakarta), November 19, 2012.
[76] *PerpresPengganti BP Migas 'Sami Mawon'* (The Presidential Decree in lieu of the Regulatory Agency is Same Old Same Old), Republika (Jakarta), November 15, 2012.
[77] The *Electricity Law* case, supra note 23.
[78] See Simon Butt & Tim Lindsey, *Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33 of the Constitution* (The University of Sydney, Sydney Law School, Legal Studies Research Paper No. 09/29), May 2009.
[79] Id. at 21.
[80] The Constitutional Court Decision No. 22-24/PUU-VI/2008, reviewing the Law No. 10 of 2008 on the Election of National and Regional Parliament (hereinafter *Mohammad Sholeh* case).

Party of Struggle (PDI-P). He challenged the constitutionality of the Legislative Election Law, which ruled that the candidate with the highest-ranking position in the candidate list shall be elected as legislator.[81] Sholeh was ranked seventh in the candidate list, and he was unlikely to win the legislative seat based on that ranking. He asked the Court to nullify these statutory rules. The Court accepted his argument and declared the rules unconstitutional. But Sholeh's petition never aimed to address any private wrong against him because his petition was based on speculative injury. He filed the petition long before the legislative election and he never won any legislative seats.[82]

III. CONCLUSION

The Indonesian Constitutional Court has engaged in constitutional borrowing with regards to the doctrine of standing. But clearly constitutional convergence has not occurred. Indeed, divergence has in fact occurred. The Indonesian standing doctrine never arises out of the vindication of private rights. Standing requirements never intend to set the bar for the Court to address concrete issues, but rather they are an instrument for the Court to gain access to review many abstract cases. Standing requirements also allow the judges to review many highly sensitive political cases, and, to some extent, they enable the Court to second guess the decisions of the different branches of government. Moreover, the standing doctrine in Indonesia signifies that the Court's treatment of standing has the potential to be governed by the political preference or the pragmatic choices of its members rather than by the doctrinal authority.

Reference

Aharon Barak, "A Judge on Judging: *The Role of A Supreme Court In A Democracy*," 116 Harv. L. Rev. 16 (November, 2002), 107 – 108; See also Aharon Barak, The Judge In A Democracy, Princeton, New Jersey: Princeton University Press, 2006.

[81] Law no. 10 of 2008 on the Election of National and Regional Parliament.

[82] Moreover, his own party later removed his name from the list and so he never enjoys the benefit from the winning in the Constitutional Court.

Antonin Scalia, *A matter of interpretation: federal courts and the law : an essay* (1997).

Anne Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L. J., 2003.

Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 Va. L. Rev. 1391 (2006), 1416.

David Law, *Globalization and the Future of Constitutional Rights*, 102 Nw. U.L. Rev, 2008.

----------, *The Evolution and Ideology of Global Constitutionalism*, 99 Calif. L. Rev. 2011.

David Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U.L. Rev. 762, 781.

Erwin Chemerinksy, Constitutional Law: Principles and Policies (2006).

Hendrianto, From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003 – 2008 (Unpublished PhD Dissertation, University of Washington, 2008) (on file with author).

John F. Muller, *The Constitutional Incompleteness Theorem*, 15 U. Pa. J. Const. L. 1373 (May 2013).

Mark Tushent, *The Inevitable Globalization of Constitutional Law*, 49 Va. J. Int'l L., 2009, 985.

Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* (2000), 218.

Mina Susana Setra, *Indigenous Peoples in Indonesia: The Struggle for "Legal" Recognition*, presentation at International Conference on Scaling-Up Strategies to Secure Community Land and Resource, Interlaken, Switzerland, September 19-20, 2013.

Paul B. Stephan, *Courts on Courts: Contracting For Engagement and Indifference in International Judicial Encounters*, 100 Va. L. Rev, 2014.

Richard S. Kay, "Standing to Raise Constitutional Issues: A Comparative Analysis," in Richard S. Kay (ed.), *Standing to Raise Constitutional Issues: Comparative Perspectives* (2005).

Rosalind Dixon and Eric Posner, The Limits of Constitutional Convergence, 11 Chi. J. Int'l L, 2011.

Simon Butt & Tim Lindsey, *Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33 of the Constitution* (The University of Sydney, Sydney Law School, Legal Studies Research Paper No. 09/29), May 2009.

Steven Winter, *The Metaphor of Standing and the Problem of Self Governance*, 40 Stan. L. Rev, 1393.

Zachary Elkins, Tom Ginsburg, and Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 Harv. Int'l L.J., 2013.

Law Number 32 of 2004 on the Regional Governance, article 59 (2).

Law Number 7 of 2004 on Water Resources.

The Constitutional Court decision no. 006/PUU-III/2005, reviewing the Law No. 32 of 2004 on the Regional Government [*Pemerintahan Daerah – Pemda*) (hereinafter the *Pemda Law III* case).

The Constitutional Court decision no. 006/PUU-III/2005, reviewing the Law No. 32 of 2004 on the Regional Government [Pemerintahan Daerah – Pemda) (hereinafter the Pemda Law III case), at 16.

The Constitutional Court decision no. 001-021-022/PUU-I/2003, reviewing Law No. 20 of 2000 on the Electricity (hereinafter the *Electricity Law* case).

The Constitutional Court decision no. 002/PUU-I/2003, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas Law I* case).

The Constitutional Court decision no. 003/PUU-I/2003, reviewing Law No. 24 of 2002 on the Government Securities Law (hereinafter the *Government Securities Law* case).

The Constitutional Court decision no. 35/PUU-X/2012, reviewing Law No. 41 of 1999 (hereinafter the *Alliance of Indigenous People* case).

The Constitutional Court decision no. 79/PUU-IX/2011, reviewing Law No. 39 of 2008 on the Cabinet Minister (hereinafter the Deputy Minister case).

The Constitutional Court decision no 14/PUU-XI/2013 reviewing Law No. 42 of 2008 on the Presidential Election (hereinafter the *Presidential Election Law* case).

The Constitutional Court decision no. 002/PUU-I/2003, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas Law I* case).

The Constitutional Court decision no. 49/PUU-VIII/2010, reviewing Law No. 16/2004 on the Attorney General Office (hereinafter the *Attorney General* case).

The Constitutional Court decision no. 36/PUU-X/2012, reviewing Law No. 22 of 2001 on the Oil and Gas (hereinafter the *Oil and Gas III case* / *BP Migas* case). The Court finished the deliberation meeting on November 5th 2012 and it announced the decision on November 13, 2012.

The Constitutional Court Decision No. 22-24/PUU-VI/2008, reviewing the Law No. 10 of 2008 on the Election of National and Regional Parliament (hereinafter *Mohammad Sholeh* case).

The *Water Resources Law* case, the Constitutional Court decision no. 058-059-060-063/PUU-II/2004.