

The Construction of Eclecticism to Constitutional Interpretation in Indonesia

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Abstract: This study is motivated by the inadequate quality of the constitutional interpretation by the Indonesian constitutional court in overcoming the problem of constitutional review. There are contradictory phenomena that have surfaced with an understanding of the essence of meaning in various constitution interpretations and the shift in the results of the interpretation towards weakening the authority of the constitutional court decision. The potential for the constitutional interpretation of the Indonesian constitutional court in each case shows that the quality is not optimal yet. This anomalous condition arises because the process of interpreting the constitution is not yet holistic, integrative, and dynamic, even though it has used an eclectic approach. Although the need for an eclectic interpretation of the constitution is getting stronger, its practice does not automatically bring legal certainty. For this reason, it is still necessary to develop a holistic, integrative, and dynamic interpretation tool which in this article uses Barak's purposive interpretation. The method used a phenomenology rooted in a philosophical perspective, a cross-sectional research design with a qualitative approach to the narrative case study in the category of narrative analysis. The participants were four judges of the Indonesian constitutional court, the determination was made by accidental sampling. The findings of this study are interesting to what extent the predisposition of Barak's purposive interpretation of the constitution in the Indonesian constitutional court. This finding also explains the weakness of the Indonesia constitutional court interpretive approach that is not yet objective, holistic, integrative, and dynamic, and this finding also shows the need to reform the interpretation of Barak's constitution to incorporate the values of the Pancasila ideology.

Key Words: Constitutional Interpretation, Purposive Interpretation, Aharon Barak, Narrative Case Study

1. Introduction

Since the creation of the Constitution provisions no 24C (1) 1945 which reaffirms in no 10 (1) letter a to letter d Law 24/2003, one of which is the authority of the Indonesian Constitutional Court (MK-RI) is to test laws against the 1945 constitution (constitutional review). In the context of the constitutional review, the Indonesian constitutional court cannot be separated from efforts to interpret the constitution against the provisions of the 1945 constitution which are used as a test point in examining laws and government regulations instead of laws in Indonesia.

How does the Constitutional Court use the approach and method of interpreting the constitution at this time? although not yet available sufficient information to trace, some indications are less encouraging. Lately, many legal observers and experts are concerned about the existence of constitutional interpretation. This concern is quite

reasonable because based on historical experience and visible phenomena in Indonesia, legal experts and judges tend to prioritize a legal positivism approach in interpreting the constitutional text so that it is more oriented towards the flow of originalism. Nevertheless, the latest developments in the interpretation of the constitution in the Constitutional Court of Indonesia have also used various methods known in the flow of non-originalism, in addition to originalism. It can be said, the use of approaches and methods of interpreting the constitution by the Constitutional Court of the Republic of Indonesia tends towards eclecticism or a combination of originalism and non-originalism. The use of approaches and methods of interpretation, both psychologically and culturally, has worried about the objectivity of judges in interpreting the constitution so that it feels ambiguous, even the weak authority of the Constitutional Court of the Republic of Indonesia.

On the other hand, based on the results of research by Safaat et al (2017) which examined the pattern of interpretation of the constitution from 2003 to 2013 in the Constitutional Court of the Republic of Indonesia, there is a tendency for the eclecticism of constitutional interpretation by MK-RI judges can be seen from the 21 Constitutional Court Decisions using the approach or a particular method of interpretation, whether it can be categorized in the flow of originalism or flow of non-originalism. It's just that based on the results of this study it is also illustrated that the MK-RI uses a more original approach, rather than non-originalism (Safaat et al., 2017).

If we look closely at some of the decisions of the Constitutional Court of Indonesia that were reviewed by Syaharga et al. above, the Constitutional Court of the Republic of Indonesia has also considered the two approaches known in constitutional interpretation, both originalism, and non-originalism in a combination manner. However, when the Constitutional Court-RI found conflicting meanings in the interpretation of the constitution, it seemed that the Constitutional Court of the Republic of Indonesia put forward the meaning that was in line with the originalism approach. This means that the interpreted subjective objectives of the 1945 Constitution are superior to objective objectives (Safaat et al., 2017). Even so, in general, there is a tendency to use methods of constitutional interpretation that are eclectic or mixed (originalism and non-originalism) in the interpretation of the constitution carried out by the Constitutional Court of the Republic of Indonesia. It's just that the eclecticism of the use of the method of interpreting the constitution by the Constitutional Court of Indonesia does not have a clear direction, and is very dependent on the subjectivity of judges. Of course, this condition can affect the objectivity of judges in interpreting the constitution. If it is not treated carefully, it will certainly affect the authority of the Constitutional Court of the Republic of Indonesia in deciding certain constitutional cases.

Another phenomenon that occurs is the loss of understanding or ambiguity of the Constitutional Court's decision regarding the question of the constitutionality of whether the Constitutional Court of the Republic of Indonesia has the authority to resolve disputes over the results of regional head elections in Indonesia. In the Constitutional Court Decision Number 072-073 / PUU-II / 2004, the MK-RI stated that it has the authority to resolve disputes over the results of regional head elections. On the other hand, in the

Constitutional Court Decision Number 97 / PUU-XI / 2013, the MK-RI stated that it was not authorized to resolve this matter. In the two decisions above, MK-RI uses a combination of originalism and non-originalism approaches. It's just that in the first decision, the Constitutional Court of the Republic of Indonesia prioritizes the non-originalism aspect (the objective of the constitutional text). Meanwhile, in the second decision, the Constitutional Court of the Republic of Indonesia prioritized aspects of originalism (subjective objectives of the constitutional text). Of course, this ambiguity will be able to shake the foundation of legal certainty, if the arguments for the differences cannot be clearly explained. This also strengthens the assumption that the eclecticism of the interpretation of the constitution by the Constitutional Court of the Republic of Indonesia is strongly influenced by the subjectivity of judges and is not yet fully holistic and integrative.

However, in Indonesia, the development of eclectic interpretation still needs to be developed continuously. Efforts to obtain a holistic and integrative interpretation can use Aharon Barak's purposive approach as one of the approaches to interpreting the constitution which should be considered in its development in Indonesia. An urgent problem that becomes a real challenge that must be faced is how relevant Barak's purposive approach is to be developed in the context of the prevailing legal system in Indonesia so that it can improve the quality of the interpretation of the Constitutional Court of the Republic of Indonesia and have a competitive advantage. As one of the efforts in that direction, the results of this research explain the findings regarding Barak's purposive interpretation of the constitution, the eclecticism of the interpretation of the constitution practiced by the Constitutional Court of the Republic of Indonesia along with its weaknesses and strengths, and the need to reformulate the interpretation of Aharon Barak's constitution which is in line with the Indonesian legal system by including the values the value of the Pancasila ideology to improve the weaknesses of the eclectic approach in interpreting the constitution in the Constitutional Court of the Republic of Indonesia.

2. Literature Review

In constitutional interpretation study, there are two major approaches, i.e. originalism and non-originalism. These two approaches have contradicting assumptions. Originalism departs from the view that the constitutional text must be interpreted with the same meaning as when it was

written and determined with the original intention of the framers of the constitution. Meanwhile, non-originalism departs from the view that the constitutional text must be interpreted with the currently developing meaning so that the original intention of its framers is not the most defining aspect in interpreting the constitution (Goldsworthy, 2011).

In other words, originalism is oriented toward subjective interpretation as it emphasizes the aspect of the constitution framers' intention. Meanwhile, non-originalism is oriented toward the objective interpretation as it emphasizes the outside of the intention of the makers of the constitution (MacCormick & Summers, 2016). The differences in the two interpretation approaches, in the end, causes partialism problem in interpreting the constitution. If one holds on to the originalism tightly, the interpretation would be stiff and strict as it is difficult to be adjusted to the development of current society. In contrast, if one holds on to the non-originalism which always favors the current development of the society in interpreting the constitution, then the interpretation would be too broad. As a result, a judge can take the role of a legislative, which is obviously against the principle of the separation of power.

Thus, in the development of the current constitutional interpretation study, there are a few scholars that find a middle ground to bridge the debate between the two main constitutional interpretations. One of those scholars is Aharon Barak. As one of the most important legal figures in Israel, Barak developed a purposive approach, especially in the interpretation of the constitution. He claimed that his approach is eclectic and holistic by integrating various approaches of constitutional approaches, originalism or subjectivism as well as non-originalism or objectivism (Barak, 2005b). In this case, Shalev reiterates that the approach developed by Barak is unique because it integrates various hermeneutic, philosophical, constitutional approaches and holds the legal practice in interpreting the constitution text (Shalev, 2002).

The purposive interpretation can be analyzed from Barak's explanation. According to him, legal interpretation is a rational activity that gives meaning to a legal text to settle a contradiction in the text which is closely related to a certain legal system tradition to fill the void or to fill the gap in it. (Barak, 2005b). The purpose of legal interpretation according to Barak is generally to achieve a legal purpose, and specifically to achieve the purpose of a certain legal text as part of the law itself (Khan, 2006). In general, every law

has its specific purpose, and legal interpretation strives to achieve that purpose (Barak, 1992b). From Barak's explanation, it can be understood why Barak mentioned his approach with a purposive approach, namely the interpretation of law based on the objectives contained in a legal text.

Barak also confirms that his purposive interpretation is normative, now that the legal meaning of a legal text, including the constitutional text, in itself is normative. In general, legal interpretation is used by the court to produce precise legal rulings in settling legal cases, making each one of the rulings binding (Barak, 2005b). Barak's view is in conjunction with the characteristics of legal interpretation. Legal interpretation must be able to overcome the ambiguity in a legal text, both in deciding the applicable rule of law and in creating a new law that articulates the rights and responsibilities of the people (Antonius Cahyadi & Manullang, 2011).

The characteristics of Barak's purposive interpretation include a comprehensive concept of interpretation, a holistic interpretation perspective, a legal interpretation structure that settles a conflict between the real intentions of framers and the legal system values; and recognition of the importance of court discretion with certain limits. This is the reason why Barak proposed three major components of purposive interpretation: language; purpose; and judicial discretion (Barak, 2005b). The three components must be holistically and integrally taken into account when one needs to interpret the constitution.

According to Barak, the language or semantics component has a clear function which is to determine the limits of interpretation by limiting the interpreter when finding the meaning of a law written in a text. The purpose component is a normative concept, which is a legal construction related to the function in which a text is written to achieve the purpose of the law itself. The purpose component is a synthesis between the objective and subjective norms. Lastly, the judicial discretion component plays a major role in determining the ultimate purpose, after determining the appropriate significance for every presumption from the objective or subjective purpose, including the settlement of a possible contradiction between the two purposes (Barak, 2005b). Judicial discretion according to Barak is not a psychological concept, it is rather a reflection of its normative position that requires judges' objectivity in interpreting the constitutional text (Bendor, 2011).

Barak states that the constitution contains an exact balance regarding the rights of individuals, needs of society, legislative democracy, limits of executive power, judicative autonomy, and mechanism of constitutional enforcement (Barak, 2005a). Barak also underlines that the constitution itself contains philosophical, political, social, and legal aspects all together in one. As a result, a judge interpreting the constitution should comprehend the nature of the constitution itself and place himself/herself as the protector of the constitution and democracy as Barak said: "I see the role as a judge on the Supreme Court or a Constitutional Court of a democracy as the protection of the constitution and democracy" (Barak, 2008).

In many countries, the constitution must be interpreted solely based on the predetermined purpose in the constitution itself. Therefore, the purposive interpretation of the constitution departs from the efforts to understand the purpose of the constitutional text from the language available in the text as well as from external sources. Besides that, consideration of the combination of the subjective and objective purpose written in the aforementioned constitutional text must be well performed (Barak, 2005b). To Barak, this purposive interpretation of the constitution focuses on the purpose of the constitutional text by taking the language, historical, cultural, and fundamental principle aspects contained in the text into account (Shalev, 2002).

Barak further explains that the purpose of this kind of constitution is not just to achieve the purposes desired by the framers of the constitution. Furthermore, the purpose of the constitution is to provide a foundation for the social structure and fundamental values that will be reinforced in a democratic country. As Barak states that "The state is democratic, by recognizing institutions and organs built upon majority rule, by providing full equality among all its citizens and by its recognition of basic human and civil rights" (Barak, 1992a).

Of course, Barak does not refute the subjective approach in interpreting the constitution. It is just for him the constitutional interpretation ought to be just that. The interpretation should combine the subjective purpose which is generally traced to the real intention of the framers of the constitution with the objective purpose that becomes the foundation of the existence of the constitution. All of the purposes of the constitutional text cannot be separated from the component of the language of the constitutional text (Barak, 2005b). So, the purposive

interpretation of the constitution covers all the components of language and purpose (subjective, objective, and ultimate purpose), and all of which are mixed by a judge through his discretive authority (discretion component).

The understanding of the language or semantics component of the constitution is determined by the characteristics of the constitutional language. One of the typicalities of the language of the constitution compared to other legal languages is that it uses more general and open-textured (Barak, 2005b). The language of a constitutional text also covers explicit and implicit stuff. The two distinctions of the constitutional text language must be understood from the constitutional text structure as a whole. This means that provisions or articles in the constitution must be comprehended as a whole, explicitly or implicitly. Barak further shows that the understanding of separation of power and court independence conception should be connected to the constitutional provisions governing the three branches of power (executive, legislative, judicial) and protection of human rights (Barak, 2005b).

Therefore, the constitutional language has two distinct positions. On one hand, it sets boundaries in interpreting the constitution. On the other hand, it is the source of knowing the purpose of the constitution (Barak, 2005b). This is what underlies the purposive interpretation model developed by Barak, including the interpretation of the constitutional text. Thus, the purposive interpretation of the constitution focuses on the efforts to achieve constitutional purpose within the boundaries of the constitutional text itself. As an implication, this type of interpretation is not free in the free meaning and cannot deviate from the literal boundaries of the text.

The three components of the purposes are the subjective, objective, and ultimate purposes. The subjective purposes are interests, goals, values, aims, policies, and functions that need to be achieved by the framers of the constitution. Meanwhile, the objective purposes are interests, goals, values, aims, policies, and functions in which the constitutional text is designed to achieve democratic life (Barak, 2005b). If the subjective purposes focus on the efforts to find the purposes desired by the framers of the constitution, the objective purposes are closely related to the efforts to achieve the values or principles of the democratic state of law. Both purposes must be harmoniously and integrally taken into account by the judges to decide the ultimate purposes of the constitutional text that needs to be interpreted.

According to Barak, the subjective purpose is the real, not hypothetical, intent of the text's author. The source of the subjective purposes includes the constitutional text as a whole and constitutional history. Regarding this matter, Barak confirms that the framers of the constitution stated their intention through the constitutional language. Making the text the most credible source of the subjective purpose. Meanwhile, the constitutional history covers the social and legal background of how the constitution was created as well as in various written authoritative documents before and after the constitution was set (Barak, 2005b).

Regarding the objective purpose, the purposive interpretation takes into account various levels of objective purpose abstraction. The lowest level is the imaginative reconstruction of the specific purpose to be achieved by the framers of the constitution. The next level is related to the makers' purpose that can be logically accepted. In a higher abstraction level, the objective purpose is connected to basic values to be achieved through the constitutional text. The source of this objective purpose includes internal sources as well as external. The internal source is the constitution as a whole and the search for constitutional consistency, while the external one consists of other constitutional provisions, post-enactment history, judicial constitutional case law, fundamental values, and comparative law (Barak, 2005b).

Eventually, the purposive interpretation of the constitution demands every concerned judge to be able to formulate the ultimate purpose in interpreting the constitution as part of the judicial discretion. He or she will not find any meaningful difficulty in interpreting the constitutional text if the various constitutional purposes (subjective-objective) in the text are all in harmonious positions. This is in conjunction with the major foundation of the purposive interpretation, which is to come up with a synthetic and coordination effort among various information parts related to the text that needs to be translated; to settle any coordination weakness among various abstraction levels of the subjective purposes by carefully selecting the abstraction level that suits the objective purpose; as well as to choose the abstraction level for the objective purpose which is consistent with the subjective purpose (Barak, 2005b).

A problem will arise if the various purposes found in the text contradict each other, both between subjective purposes or subjective purposes or between objective and subjective purposes. In regards to the matter mentioned above,

Barak confirms that the interpreter has to build a system that can help him determine which purpose he needs to favor over the other purposes. In the purposive interpretation, the determination of the best purpose is not related to the justification of whether the interpretation is right or wrong. However, this is more on the justification of whether the interpretation made by a judge is accurate or not (Barak, 2005b). It means that the purposive interpretation tries to help produce the proper or the best interpretation, not true interpretation.

Through this interpretation method, Barak offers a formula of how to settle contradictions among various purposes of the constitutional text based on the characteristics of a legal text. In regards to constitutional interpretation, all data related to purposes in the constitutional text must be tested for validity by a judge. If the contradiction among purposes of the text is found, Barak firmly states that this purposive interpretation gives more weight on the objective purposes than the subjective ones in interpreting the constitution. The reason is that only with such a view the constitution can fulfill its basic purpose to guide human behavior for generations as society develops, fulfill the needs of modern society, and balance up the past, present, and future interests (Collings, 2018).

In terms of balancing and determining the weight of various purposes of the constitutional text, Barak also proposes the use of the proportionality analysis, especially in solving contradiction problems of purposes regarding human rights. To him, even though human rights is the most crucial to protect, it still can be limited. Two main reasons support this argumentation. First, it covers the limits needed to make other people able to exercise their rights. The principle of democracy makes it possible to limit the rights of one person to protect the rights of others. Second, it includes the limits needed by society to achieve its goals. Strictly speaking, democracy is based on the right relationship between the interest of society and the protection of human rights (Barak, 2010).

Proportionality in a broad sense is based on two principle components, namely legality and legitimacy. There are also two conditions of justification for limiting the constitutional rights, namely the appropriate purpose and proportional means. The appropriate purposes are the threshold requirements that are determined when legal regulations are not available to achieve those purposes. Whereas proportional means must meet these three secondary criteria: a rational connection

between appropriate purposes and means used by the law to achieve them; unachievable goals, except by less limiting constitutional rights; and there must be a proportional balance between social benefits to achieve the proper purpose, and losses incurred on rights. According to Barak, balancing can be done by putting forward "the importance of the benefit" and "the importance of preventing the limitation" (Barak, 2005b).

As also explained by Barak that the interpretation of the constitutional text must give decisive weight to the objective goal aspect which he calls as "understanding of the enlightened public" or "fundamental values that reflect the deeply held beliefs of modern society, not passing trends... fundamental beliefs that have passed the test of time, changing their form but not their substance" (Barak, 2002). The construction of Barak's constitutional interpretation, according to Shalev is his effort to include Israel's ideology as a democratic Jewish State into the interpretation of the constitution, in harmony and conformity. Barak sought to combine Israel's constitutional history with the foundations of modern theories of fundamental constitutional principles, as widely recognized, reflected, and carried out in court practice, especially in Israel. The emphasis is on the protection of two main principles of the basic law, namely human dignity and liberty (Barak, 2015).

To Barak, the past guides the present, but it doesn't mean that the past enslaves humans (Barak, 2005b). Humans cannot be separated from history, but it doesn't mean that humans are slaves of history. Exactly as confirmed by Sukarno (Indonesia's First President) with his slogan "*Jas Merah*" (*Jangan Sekali-kali Melupakan Sejarah*) "Do not Ever Forget Your History," but history is not the end of human life. Eventually, Barak's purposive interpretation is very relevant to be used as a model of constitutional interpretation which can be developed in Indonesia, that obviously must be harmonized with the ideology of Pancasila.

In the end, Barak is not the only judge or legal expert who developed an eclectic constitutional interpretation construction. Besides Barak, there are many other judges or legal experts who developed this eclectic approach, with their various terms. For example, Feldman explicitly called it the interpretation of eclecticism (Feldman, 2014), Garvey et al. call it a "balancing method" (Garvey et al., 2004), Barber and Fleming call it "A Fusion of Approaches to Constitutional Interpretation" (Barber & Fleming, 2007), and Griffin came up with his theory of pluralistic

interpretation. Even according to Griffin, several other experts developed pluralistic theories in the interpretation of the constitution, such as Philip Bobbitt, Robert Post, Richard Fallon, Cass Sunstein, and Daniel Farber (Griffin, 194 C.E.).

Therefore, it can be concluded that the eclectic purposive approach developed by Barak can be justified theoretically. However, Barak's purposive interpretation cannot be equated simply with some of the eclectic interpretation approaches described above. This argument also confirms that Barak cannot be 'convicted' as inconsistent in using the hermeneutic approach or the constitutional interpretation approach. Barak's choice to use various hermeneutic approaches and eclectic interpretation of the constitution shows his consistency in developing an eclectic, purposive approach of his purposive interpretations which is typically him. The choice of eclecticism in the development of Barak's purposive interpretation is in line with his ambitions in initiating a theory of legal interpretation that is holistic, integrative, and dynamic. Such ambitions will not be realized while still holding fast to find a single approach or method in legal interpretation.

3. Methodology

This research uses qualitative research, with a method using phenomenological roots in the philosophical perspectives of Husserl, Heidegger, Sartre, and Merleau-Ponty. According to Moustakas (1994: 13), phenomenologies are aimed at "... to determine which experiences are meaningful for someone who has had experience and can provide a comprehensive description of that experience. The research design was cross-sectional with a qualitative approach to narrative case study category analysis of narratives (Polkinghorne in Syrjlainen, et al., 2015, p. 61). The research participants were four MK-RI judges in 2019, the determination was made by accidental sampling. The details of the participants are as follows.

Table 1: Participants

Classification	Male	Female	Age	Length of Work	Amount
Judge/Chairman of The Indonesian Constitutional Court	1	-	63	5 years	1
Judge/Members of The Indonesian Constitutional Court	1	-	63	8 years	1
Judge/Members of The Indonesian Constitutional Court	1	-	58	9 years	1

Judge/Members of The Indonesian Constitutional Court	1	-	51	2 years	1
Total	4	-	4	-	4

Data collection techniques to obtain more comprehensive information are first to conduct focused discussions and interviews, then observation and document collection. The collected data is then recorded based on a review of two dimensions, namely accuracy, and structure. Data were analyzed using four data analysis techniques, namely (1) dominant analysis, (2) taxonomic analysis, (3) component analysis, and (4) theme analysis. The first three data analyzes were carried out simultaneously during the data collection in the field (dominant analysis was used in the comprehensive exploration stage, while taxonomic and compound analyzes were used at the focused exploration stage). The last-mentioned data analysis (theme analysis) was carried out after the data collection and analysis activities in the field. Data validity checks are based on four criteria, namely: credibility, information, dependability, and certainty. To check credibility, seven techniques were used, namely: participation extension, observation persistence, triangulation, peer checking, referential adequacy, negative case studies, and member checking. The descriptive criteria are checked by the detailed description technique, the dependency is checked by the dependency audit technique and the certainty is checked by the assurance audit technique.

4. Results And Discussion

4.1. The eclecticism of Constitutional Interpretation in the Indonesia Constitutional Court

The findings show how the conception of constitutional interpretation practiced by the Constitutional Court of the Republic of Indonesia. This study is following the results conducted by Bisariyadi, et al., Which explained that only a few of the total decisions of the Constitutional Court of the Republic of Indonesia explicitly use constitutional interpretation. There are more than 850 decisions that have been decided by the Constitutional Court of the Republic of Indonesia in the 2003-2015 period, however, there are only 32 interpretations of the constitution. Conclusion Bisariyadi, et al. This stems from the reality of testing the law against the 1945 Constitution in the Constitutional Court of the Republic of Indonesia which often interprets the provisions of the law being tested rather than the provisions of the 1945

Constitution which are used as the basis for testing (Bisariyadi et al., 2016)

The nature of the constitutional interpretation is closely related to the interpretation of the provisions contained in the constitutional text itself, not the interpretation of the provisions of the law (Albert H.Y. Chen, 2000). Even though it cannot be denied that when a judge reviews a law against the 1945 Constitution, he or she interprets not only the Constitution but also the law being reviewed. The two activities are conceptually different. In constitutional review, constitutional interpretation should be prioritized. This shows that the Constitutional Court of Indonesia possesses its own specific constitutional interpretation conception to review a law against the 1945 Constitution.

Apart from the research by Bisariyadi et al. above, Constitutional Court Justice I Dewa Gede Palguna confirmed that a Constitutional Court Judges is bound to the constitutional interpretation method, though it is not always explicitly stated in the decisions. Yet, in terms of legal consideration, it is possible to identify what kind of interpretation that a judge makes in his rulings is before arriving at his verdict, especially in the petition for constitutional review (Interview on 22 April 2019).

A similar statement was made by Justice Arief Hidayat that the method of constitutional interpretation is taken into account by all the Constitutional Court judges when interpreting the constitution. However, the method of interpreting the constitution should not be rigid. This means that a judge can use various methods of interpreting the constitution, both originalism and non-originalism in an integrated (eclectic) manner. This depends on the specifications of the case that will be resolved by the Constitutional Court through constitutional interpretation (Interview on 30 August 2019).

In line with the opinions of the two Constitutional Court Justices above, Justice Saldi Isra also underlines the importance of the method of constitutional interpretation used by judges when interpreting the constitution. The use of the constitution interpreting method does not need to be explicitly mentioned in the decisions of the Court. Even when deciding a case, Constitutional Court Judges never debate what constitutional interpretation method should be used in making decisions. Strictly speaking, the method of interpreting the constitution, in general, can be explicitly found in the Decisions of the

Constitutional Court (Interview on 10 October 2019).

One of the former Constitutional Court, Justice Jimly Asshiddiqie also stressed the importance of interpreting the constitution to clarify the provisions of the 1945 Constitution. According to him, the 1945 Constitution must be seen as an integrated whole consisting of the Preamble and the Body Text of the constitution. The Body Text contains principles described in the articles of the 1945 Constitution. The textual description of a particular article may be unclear, vague, or even incomprehensible. Therefore, judges need interpretation methods known in Legal Studies or Constitutional Law, to clarify the provisions of the 1945 Constitution (Asshiddiqie, 2010).

The statements from several Constitutional Justices above are also strengthened in decisions made by the Constitutional Court, especially in reviewing the law against the 1945 Constitution which contains the constitutional interpretation problem. In Paragraph [3.16] of Constitutional Court Ruling, Number 25/PUU-XIII/2015 in conjunction with Constitutional Court Ruling Number 40/PUU-XIII/2015, the Court confirms that "The most common legal reasoning method used in law is a legal interpretation and legal construction". This means that the Court in interpreting the constitution used the legal reasoning method include legal interpretation and legal construction.

Also, the Constitutional Court confirms in the Court Ruling Number 109/PUU-XII/2014 in Paragraph [3.17]: "In his consideration to find law in making his decision a judge besides interpreting and constructing the law also needs to create the law so that in certain cases he through his decision performs the role of a law-making institution, therefore his ruling is the law that applies to all citizens."

Based on the statements and rulings above, it can be concluded that the Constitutional Court of the Republic of Indonesia always takes into account and holds in high regard the use of constitutional interpretation, especially in reviewing law against the 1945 Constitution of the Republic of Indonesia. In a broader sense, the Constitutional Court of the Republic of Indonesia recognizes the role of the Court in finding law through legal interpretation and legal construction as a method of (legal) discovery widely known in Legal studies.

The next question is "what is the Court's tendency in its practice to use various approaches

and methods of constitutional interpretation?" It is known that Indonesia's legal system is much influenced by the legal tradition of Continental Europe because the country was colonized for more than three centuries by Dutch East Indies whose legal tradition was oriented towards that of Continental Europe. Nevertheless, in its practice, Court through its judges has been simultaneously using one type of approach and method of constitutional interpretation combined with another of the originalism or non-originalism approach. Even the constitutional interpretation methods are often likened to the legal interpretation method in general, such as grammatical, authentic, teleological, historical, futuristic, systematic, restrictive, and extensive interpretation (Manan, 2012). All of which have been used by the Constitutional Court to interpret the constitution, especially in reviewing law against the 1945 Constitution.

Judges of the Constitutional Court of the Republic of Indonesia have not always been oriented towards the originalism approaches, even though Indonesia's legal system is much more influenced by the legal tradition of Civil Law. Sometimes judges use various non-originalism approaches, which are mainly practiced in the countries with the Common Law legal tradition. This is deemed natural since the development of laws in several countries has been showing a combination of the legal tradition of the Civil Law and Common Law as two approaches (originalism and non-originalism) are closely related and influence each other like their development in the legal system in Indonesia. Therefore, it can also be concluded that the approaches and methods of constitutional interpretation that have been developing in the constitutional court practice in Indonesia are heavily influenced by the development of the approaches and methods of constitutional interpretation in countries with Civil Law and Common Law legal tradition. They are more broadly influenced by the Customary Law and Islamic law as part of sources of law in Indonesia.

Through a series of descriptions that have been explained above, it shows that the Constitutional Court uses various methods and approaches to interpreting the constitution, both those that can be categorized as originalism and non-originalism, especially in judicial review of the 1945 Constitution. interpretation of the constitution with an interpretation of the law. Both MK-RI judges can use them in interpreting the constitution. This fact is reinforced by the findings of Haryono's

research which concluded that of the 252 Constitutional Court Decisions of 2015-2018 whose verdicts either granted or rejected requests for constitutional review, there were as many as 71 decisions (28.17%) with original characteristics. As many as 181 decisions (71.83%) have an eclectic character (Haryono, 2020). All of this shows that the use of various styles and methods of interpreting the constitution by the Constitutional Court of the Republic of Indonesia tends to be eclectic (eclecticism approach).

That conclusion is also strengthened by views as well as interviews with several judges who are still active and who have retired. As stated by Justice Palguna that "A judge may once appear an originalist, while another time a non-originalist, depending on the problem context that is dealt with. This also applies to the interpretation of the 1945 Constitution", especially in reviewing the law against the 1945 Constitution (Interview on 22 April 2019).

Justice Isra further added that the use of constitutional interpretation methods does not need to favor one of the methods particularly, originalism or non-originalism. Various methods from both constitutional interpretation approaches can be used combinative by the judges depending on the context of the constitutional problem to be solved (Interview on 10 October 2019). In finding solutions to a certain case, a judge may refer to a textual, historical, as well as a similar approach in line with the development of legal studies. This is confirmed by Justice Hidayat that judges of the Constitutional Court of the Republic of Indonesia do not use any methods of constitutional interpretation separately, originalism or non-originalism. Both kinds of methods may be used simultaneously in solving certain cases, especially cases related to reviewing the law against the 1945 Constitution (Interview on 30 August 2019).

Also, the Constitutional Court of the Republic of Indonesia tends to liken the methods of legal interpretation to those of constitutional interpretation, as that is commonly carried out in countries with Civil Law legal tradition (Manan, 2012). Various methods of constitutional interpretation that have developed in the Common Law legal tradition are even used by the Court in many of its rulings. Interestingly, the debate between originalism and non-originalism is not as sharp as in some other countries. As a result, judges of the Constitutional Court of the Republic of Indonesia tend to use various approaches or methods eclectically based on the interest of the

case to be resolved, especially in reviewing the law against the 1945 Constitution.

This condition is also motivated by legislation in Indonesia that does not specify the number of approaches or methods of interpreting the constitution available or developing in the court practice at the Constitutional Court of the Republic of Indonesia. There is no strict guideline that only certain approaches or methods of constitutional interpretation can be selected and used by judges. In court practice, one approach or method of constitutional interpreting may be used by judges together with another approach or method. As a result, the use of methods of constitutional interpretation at the Constitutional Court of the Republic of Indonesia does not distinguish originalism and non-originalism diametrically and making it more eclectic.

4.2. Advantage and Disadvantage

The problem is, "can such practice of eclecticism at the Constitutional Court be theoretically justified?". In modern literature on constitutional interpretation, there is no strong argumentation found in regards to the obligation of judges to choose a certain method or approach in interpreting the constitution. Clark states that there is no list of absolute constitutional interpretation methods in reviewing the constitution. Various models and methods of interpreting the constitution with their respective justifications (Clark, 2002). Rubinfeld also confirms this in his explanation of the practice of the use of constitutional interpretation methods in the US. According to him, there not a single consensus in America that determines whether a certain constitutional interpretation method is precise (Rubinfeld, 1998). Therefore, the eclectic or combinative use of two approaches or methods or more in interpreting the constitution as practiced by the Constitutional Court of the Republic of Indonesia can be theoretically justified.

The use of the eclecticism approaches by The Constitutional Court of the Republic of Indonesia is shown in the legal considerations of its various rulings. In the Constitutional Court Ruling Number 1-2/PUU-XII/2014, the Court affirms the importance of its holding onto the meaning of originalism in interpreting the constitution. In a different circumstance, in the Constitutional Court Ruling Number 005/PUU-IV/2006, the Court also recognizes the importance of the use of non-originalism approaches to complement the weaknesses of originalism approaches. While in the Constitutional Court Ruling Number 25/PUU-

XIII/2015 conjunction with the Constitutional Court Ruling Number 40/PUU-XIII/2015, the Court realizes the importance of interpreting the constitution holistically, integrally, and dynamically, not just eclectically itself. On one hand, a judge still owns his independence and freedom to interpret the constitution, but on the other hand, he must be held accountable for his constitutional interpretation in his ruling in conjunction with the general rules that apply in the interpretation of the constitution (canons of constitutional interpretation), making it possess strong legitimacy and justification.

Even so, the eclecticism approach or method of constitutional interpretation as applied by the Constitutional Court of the Republic of Indonesia can be criticized in terms of its advantage and disadvantage. Its advantage is that the use of it makes it possible to achieve a constitutional interpretation activity that is dynamic and non-rigid for the achievement of holistic and non-partial interpretation that can be adjusted to the development of the society. The complexity of the current constitutional problem nowadays demands each judge to be creative in integrating various approaches or methods of constitutional interpretation. This requires the open-mindedness

of each judge to various approaches or methods of constitutional interpretation, instead of being rigid.

On the other hand, the eclecticism approach can rise certain disadvantages, especially if it is done carelessly and resulting in the inconsistency of judges' attitude towards the solution of constitutional problems. In the end, it may result in an ambiguous ruling and too wide court discretion that contradicts the majority democracy principles which adopt the concept of separation of power. This condition will also imply the decrease of the aspect of legal certainty fulfillment of court rulings and may lower people's trust in the Court's rulings. For that, the judge needs to be prudent and cautious in utilizing various developing approaches or methods of constitutional interpretation including using the eclecticism approach.

4.3. Development of Barak's Purposive Constitutional Interpretation in Indonesia

This article offers Barak's purposive approach to correct the weaknesses of the eclectic approach in interpreting the Constitution in the Constitutional Court-RI. In summary, the advantages of Barak's purposive interpretation can be seen in table 2.

Table 2: Advantages of Aharon Barak's Purposive Approach in the Interpretation of the Constitution

Characteristic	General Principles of Interpretation of the Constitution of Aharon Barak
Holistic	<ul style="list-style-type: none"> • Considering the dialogical relationship between the text of the constitution and its interpreter (past and present / backward-forward looking). • Understand the text of the constitution as a whole as part of a legal system by taking into account the various contexts surrounding it as well as the interpreter's pre-understanding which is bound by space and time. • Considering the circulation process of three important aspects in interpreting the constitutional text, namely semantics, objectives, and judicial discretion in normative and objective-relative terms (spiral/hermeneutic circles). • Formulating, balancing, and giving certain weights (weighing) to the objectives of the text of the constitution based on comprehensive understanding. • Finding the clarity of the meaning of the constitutional text after a thorough interpretation process is carried out before it is applied to certain legal cases (whether the text is clear or not determined at the beginning of the interpretation).
Integrative	<ul style="list-style-type: none"> • Reflecting and combining the relationship between the historical horizon/horizon of the constitutional text with the interpreter's horizon/horizon of the current constitutional text. • Using a variety of approaches: interpretation of the constitution (subjective-objective / originalism-non-originalism); constitutional; social; jurisprudential/legal science; and hermeneutics in an integrative and eclectic way. • Harmonizing, integrating, and synthesizing the semantic aspects, subjective goals, and objective objectives of the constitutional text through judicial discretion within procedural and substantial normative boundaries. • Combining formal democracy with substantial democracy.
Dynamic	<ul style="list-style-type: none"> • Viewing the interpretation of the constitution as an ongoing process from the time the constitution text was created until the time the constitutional text was

implemented and oriented towards solving the constitutional problems of society at this time.

- Prioritizing the objective aspect (dynamic) rather than the subjective-objective aspect (static) of a constitutional text within the range of possible normative semantic meanings, especially when there is a conflict between the two that cannot be reconciled.
 - Oriented in efforts to bridge the gap between the law (constitution) and the changing interests/needs of the developing community.
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From the description of the table above, Barak's purposive interpretation is holistic, integrative, and dynamic so that it has its advantages and is relevant to be developed in Indonesia, especially in interpreting the constitution. There are three main reasons for this specific selection. The first reason is related to the nature of the 1945 Constitution (Written Constitution) which is broad and abstract. The second one is related to the characteristics of Pancasila as the ideology of the Republic of Indonesia which is open. The third one is based on the tendency of the contemporary practice of the Constitutional Court of the Republic of Indonesia which frequently uses an eclectic approach in interpreting the constitution. This last reason has been explained at length in the previous sub-discussion. I would like to elaborate on the other two reasons related to the characteristics of the 1945 Constitution of the Republic of Indonesia and the ideology of Pancasila.

First, the 1945 Constitution is the basic law or the highest legal norms in the hierarchical system of legislation in Indonesia. As the highest legal norms in the Republic of Indonesia, the 1945 Constitution possesses rigid as well as flexible characteristics. It is rigid in that the 1945 Constitution can only be revised in certain strict procedures. It is also flexible in as much as the Constitution contains abstract and general provisions, making it interpretable following the times (Asshiddiqie, 2006). Even so, it has to be admitted that several provisions of the constitutional text have been explicitly in the articles of the 1945 Constitution by its framers, as well as the manifestation of the People's Consultative Assembly (Majelis Permusyawaratan Rakyat) consensus that must be respected in interpreting the constitution.

Second, Pancasila is the basis of the Indonesian state as stated in the Preamble of the 1945 Constitution. It is also referred to as the source of all sources of written law as well as the state ideology. Pancasila to the Indonesian nation is its open ideology. In various works of literature according to Pancasila, the conception of Pancasila

is interpreted in various ways. Nevertheless, it can be historically and juridically concluded that Pancasila is the basis of the Indonesian state, precisely the basis of the state in the sense of philosophy or also is also called the basis the state philosophy (*filosofische grondslag*), as stated in the fourth paragraph of the 1945 Constitution.

Pancasila contains five of the most basic values or principles in Indonesia's legal system. The five Pancasila values or principles are Belief in One Supreme God, Just and Civilized Humanity, The Unity of Indonesia, Democracy Guided by the Inner Wisdom derived by Deliberations-Representation, and Social Justice for all the People of Indonesia. These five Pancasila values or principles became the basis for the preparation of the 1945 Constitution as well as other legislation and regulations in Indonesia. This means that the legislation and regulations must not conflict with Pancasila's values or principles.

As an open ideology Pancasila has certain characteristics. First, it contains basic orientation, while its interpretation into social-political goals and norms can always be questioned and adjusted to the moral values and principles that develop in society. Second, operational ideals to be achieved with is that Pancasila cannot be determined a priori, but rather it must be democratically agreed upon. Third, it is inclusive, non-totalitarian, and it cannot be used to legitimate the power of a certain group of people. Fourth, it can exist only in a democratic system (Magnis-Suseno, 1992).

Based on the above review, it can be concluded that the characteristics of Pancasila as the ideology of Indonesia is open and dynamic, so the interpretation of Pancasila values must also be done dynamically. In other words, interpretation of Pancasila values must combine its text elements, context, and contextualization harmoniously. In consequence, Pancasila values should be interpreted holistically, integrally, and dynamically rather than partially, non-integrally, and statically.

Referring to the characteristics of Pancasila as an open ideology and the characteristics of the 1945 Constitution which are

rigid in its amendments as well as flexible/flexible in its interpretation, in the context of the interpretation of the constitution, Indonesia needs an interpretive model that can accommodate the characteristics of the Pancasila ideology and the characteristics of the 1945 Constitution as explained above. . Therefore, the interpretation of the constitution which is static and partial by dichotomizing in a diametric way between the interpretive approach of originalism which has the character of "text-based theories" and non-originalism which has the character of "practice-based theories" becomes irrelevant to be developed in Indonesia. The two should be integrated with interpreting the constitution.

In this context, the purposive approach developed by Barak is very worthy of consideration for its development in Indonesia. As already explained, Barak's purposive approach in interpreting the constitution is holistic, integrative, and dynamic which combines language / semantic components, objective components (subjective and objective), and discretionary components. The advantage of Barak's purposive interpretation model is that it combines various hermeneutic approaches and constitutional interpretation in general. By using purposive interpretation, various hermeneutic approaches can be used combatively with certain limitations. Likewise, various approaches to constitutional interpretation, both originalism and non-originalism can be proportionally combined. This is in line with the wishes of the Constitutional Court of the Republic of Indonesia to create a holistic and integrative interpretation as reflected in its various decisions.

Through the purposive approach, the constitutional text (the 1945 Constitution) as a result of consensus, must be respected as a form of fidelity towards constitutionalism in Indonesia. Even so, fidelity should not be rigidly interpreted. As confirmed by Dworkin, fidelity to the constitution as a whole, not to its text (Ronald Dworkin, 2006). As an implication, textual interpretation of the constitution is just one of the important parts of every effort to interpret the constitution more broadly. Interpreting the constitution will be impossible if it is not based on the constitutional text itself. Nevertheless,

constitutional interpretation is also contextual which should be able to adjust to the development of time and society.

Therefore, the 1945 Constitution contains general provisions that should be dynamically interpreted while still departing from its literal meaning. This does not mean that a judge may act "freely" in interpreting the text of the 1945 Constitution (absolute discretion), he or she remains bound to the text of the 1945 Constitution (restrictive discretion). In the view of the purposive interpretation, a judge may not deviate from the scope of the text of the 1945 Constitution. The meaning and interpretation of the text of the 1945 Constitution must be understood dynamically by integrating the subjective goals of the text of the constitution that are historical or static with its objective goals that are dynamic. Specifically, the purposive interpretation that needs to be developed here possesses eclectic characteristics between static and dynamic approach, originalism and non-originalism, text-based theories and practice-based theories, as well as formal theories and substantive theories (Richard H. Fallon Jr., 1999).

Based on the above review, it can be concluded that Barak's purposive approach in interpreting the constitution is following the characteristics of the Pancasila ideology which is open, and the characteristics of the 1945 Constitution which are rigid in its amendments as well as flexible/flexible in its interpretation. Moreover, the eclecticism approach as developed by Barak is also being developed in Indonesia by the Constitutional Court-RI. Therefore, the purposive interpretation proposed by Barak deserves to be developed as an alternative constitutional interpretation model, particularly in the practice of judicial review of the 1945 Constitution by the Indonesian Constitutional Court in Indonesia. Even so, the purposive interpretation developed by Barak must be adapted to the Indonesian context which characterizes Pancasila as the ideology of the Indonesian state.

In detail, the following model for developing Aharon Barak's purposive approach in interpreting the constitution in Indonesia can be seen in Table 3.

Table 3: Aharon Barak's Model of Developing a Purposive Approach in the Interpretation of the Constitution in Indonesia

Aspect	Principles of Pancasila-Based Purposive Interpretation
Semantics	<ul style="list-style-type: none"> • Semantic-syntactic as the definition of the meaning of the constitutional text (UUD 1945) and Pancasila • Semantics-pragmatics as the development of the meaning of the constitutional text and Pancasila. • Focuses on methods of grammatical and systematic interpretation (originalism approach).
Subjective Goals	<ul style="list-style-type: none"> • In the form of interests, specific goals, values, aims, policies, and functions that constitution-formers wish to realize through the text of the constitution. • Focusing on historical and restrictive methods of interpretation (originalism approach).
Objective Goals	<ul style="list-style-type: none"> • In the form of the author's intention of a constitutional text that is acceptable to human common sense (intent of the reasonable author) or the intention of the Indonesian legal system (intent of the system). • Focusing on teleological/sociological, comparative, futurist, and extensive methods of interpretation (non-originalist approach).
Pancasila Goals	<ul style="list-style-type: none"> • In the form of interests, specific goals, values, aims, policies, and functions that the Pancasila formers want to achieve through their five principles which have static and dynamic elements. • Integrated or incorporated into subjective goals and objective goals. • Become the main basis for purposive interpretation in Indonesia.
Final Destination	<ul style="list-style-type: none"> • Integrate the use of various methods of interpretation of originalism (grammatical, systematic, historical, and restrictive interpretation) and non-originalism (teleological/sociological interpretation, comparative, futurist, and extensive). • Formulating (formulating), balancing, and giving certain weight (weighing) to all objectives of the text of the constitution within semantic limits.
Court Discretion	<ul style="list-style-type: none"> • Interpretive complementary instruments to incorporate semantic components and objectives. • Substantially and procedurally limited, especially based on the Law of Procedure of the Constitutional Court of the Republic of Indonesia. • Ensure that the interpretation of the constitution does not go beyond the semantics of the constitution and Pancasila.

In the Indonesian context, the interpretation of the constitution based on Pancasila with a purposive approach can also be called a purposive approach based on Pancasila. This approach uses and develops Barak's purposive interpretation in interpreting the constitution. The reason behind the use of this model is because it is holistic, integrative, and dynamic combining various hermeneutic approaches and legal interpretation, and can bridge the general debate between originalism and non-originalism over constitutional interpretation. Also, Barak's purposive interpretation is suitable with the characteristics of the 1945 Constitution and Pancasila as Indonesia's ideology that demands a dynamic constitutional interpretation model as well as gives important attention to the historical-static aspect of the 1945 Constitution as desired by its makers. In its developmental practice, this eclectic

approach has been widely used in interpreting the constitution.

In contrast to the purposive interpretation developed by Barak, the conception, methodology, as well as approach of the purposive constitutional interpretation based on Pancasila adds ideological purposes as one of the components of interpretation purposes. Pancasila consists of five values or principles which function as the balancing aspect. It is also a determinant aspect to solve a conflict between one purpose with another that was found by the judges of the Constitutional Court of Indonesia upon interpreting the constitution. Therefore, the development of purposive interpretation in Indonesia includes the components of language or semantics, goals (subjective, objective, ideological, and ultimate goals), and judicial discretion.

5. Conclusion

Barak's purposive approach is relevant to be developed in the context of constitutional interpretation in Indonesia. This approach is in line with the characteristics of the Indonesian constitution which is rigid in its amendments and flexible in its interpretation. Likewise, it is in line with the characteristics of Pancasila as the Indonesian state ideology which is open and dynamic. The advantages of this approach are that although it is eclectic, it also has a holistic, integrative, and dynamic character that relies on three main components: semantic; purposive; and judicial discretion. Thus, the combination of originalism and non-originalism approaches applied by the Constitutional Court of the Republic of Indonesia so far can still be considered proportionally through this approach. This approach rejects approaches that are partial, nonintegrative, static, or wild in the interpretation of the constitution. Also, this approach requires that the interpretation of the constitution be carried out objectively-relatively within the normative corridor, so that interpretive ambiguity can be avoided.

If this purposive approach is to be developed in the interpretation of the constitution in Indonesia, it is necessary to add a component of Pancasila values in the objective component of the purposive interpretation. These values of Pancasila function as a balancing and determining aspect in resolving contradictions between values / principles that can be found by judges of the Constitutional Court of the Republic of Indonesia when interpreting the constitution, especially in judging laws against the 1945 Constitution.

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