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The Development of Judicial Review of Legislation by the Indonesian Constitutional Court

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Abstract

This article examines the development of judicial review of legislation by the Constitutional Court of Indonesia. Since its establishment on 13 August 2003, the Constitutional Court has encountered a certain amount of turmoil. Notably, it was highly criticized by the certain public, where some public criticisms can be found in controversy of the Constitutional Court decisions on judicial review cases. Does this article aim to assess to what extent the developments of judicial review mechanisms contribute to guarding the Indonesian Constitution? The study is conducted through an analysis of the problems and challenges faced by the Constitutional Court, such as the problem of the dualism of judicial review systems in Indonesia. It then gives a solution by adopting the idea of the one-roof system of Judicial Review by the Constitutional Court. Nevertheless, this has not prevented the Constitutional Court from further developing its jurisprudence, and, indeed, as in recent years, the Constitutional Court delivered numerous decisions. Concerning the proceedings before the Constitutional Court, some of them the expanded power of judicial review of legislation, such as in the cases of the Judicial Review of the Government Regulation in Lieu of Law (Perpu) and deciding the Local Election disputes.

Keywords

Judicial Review, Legislation, Constitutional Court

Introduction

The establishment of the Constitutional Court cannot be separated from the development of the judicial review mechanism. Historically, the history of judicial review practices dates back to *the Marbury vs Madison case* (1803) handled by the Supreme Court of the United States of America under the leadership of John Marshall. Although at that time, the Constitution of the United States did not have any provision for granting authority to the Supreme Court to conduct a judicial review, based on Marshall's interpretation of the official oath of office requiring him to uphold the Constitution at all times, Marshall considered that the Supreme Court had the authority to declare a law as being contradictory to the Constitution.¹

The concept of judicial review can be seen as the result of the development of a modern idea of a democratic government system based on the concept of the rule of law, the principle of democracy, and the protection of human rights. Since then, all laws under the constitution it shall be subject to the constitution. In the event of a conflict, the lower rule shall be declared invalid.²

The proposal for establishing the first Constitutional Court in the world was introduced in 1919 by Hans Kelsen (1881-1973), a legal expert from Austria. Kelsen stated that the constitutional implementation of legislation could only be guaranteed effectively if an organ other than the legislative body is assigned the task of examining whether a legislative product is constitutional and making it inapplicable if, in its opinion, such legislative product is unconstitutional. For such purpose, it is necessary to establish a particular organ referred to as the Constitutional Court.

Historically, during the enactment of the Federal Constitution of Indonesia of 1949 (Konstitusi RIS), judicial review was one of the powers of the Supreme Court of Indonesia. Still, it was limited only to examining State Laws against the constitution. This is regulated in Article 156, Article 157, and Article 158 of the RIS Constitution. Whereas in The Provisional Constitution of 1950 (UUDS 1950), there was no judicial review mechanism because laws are seen as the implementation of people's sovereignty which is carried out by the government along with the House of Representatives (DPR).³

If we take a closer look at the history of the formulation of the 1945 Constitution, Hans Kelsen's idea regarding judicial review appears to be in line with the proposal conveyed by Muhammad Yamin in the meeting of the Committee for the Preparation of Independence (BPUPK). Yamin proposed that the Balai Agung (or the Supreme Court) be granted the authority to "compare laws", which was no other than the authority to conduct judicial review. However, Muhammad Yamin's

¹ Brun Otto Bryde, 'Constitutional Courts', *International Encyclopedia of the Social & Behavioral Sciences: Second Edition*, 2015, 700-703 <<https://doi.org/10.1016/B978-0-08-097086-8.86012-2>>.

² Stefan Voigt, 'On the Optimal Number of Courts', *International Review of Law and Economics*, 32.1 (2012), 49-62 <<https://doi.org/10.1016/J.IRLE.2011.12.008>>.

³ I.G.A.K. Rachmi Handayani, Lego Karjoko, and Abdul Kadir Jaelani, 'Model Pelaksanaan Putusan Mahkamah Konstitusi Yang Eksekutabilitas Dalam Pengujian Peraturan Perundang-Undangan Di Indonesia', *Bestuur*, 7.1 (2019), 36-46 <<https://jurnal.uns.ac.id/bestuur/article/view/42700>>.

proposal was refuted by Soepomo, who argued that (i) the basic concept adopted in the Constitution being formulated was not the concept of separation of powers but the concept of distribution of powers; in addition to that, (ii) the judges' task was to apply laws, rather than to review laws; and (iii) the judges' authority to review laws was contradictory to the concept of the supremacy of the People's Consultative Assembly (MPR). Consequently, the idea of judicial review of laws against the Constitution proposed by Yamin was not adopted in the 1945 Constitution. Despite the failure to obtain approval, Yamin's ideas indicate that the drafters of our Constitution had very progressive ideas ever at that time.⁴

In line with the momentum of the amendments to the 1945 Constitution during the reform era (1999-2002), the idea of establishing a Constitutional Court in Indonesia became increasingly more assertive, reaching its peak in 2001, when the idea of establishing a Constitutional Court was adopted in the amendments to the 1945 Constitution by MPR as formulated in the provisions of Article 24 paragraph (2) and Article 24C of the Third Amendment to the 1945 Constitution.⁵

Subsequently, for further elaboration and following up on the mandate mentioned above under the Constitution, the Government, and the House of Representatives (DPR) conducted discussions on the Draft Law regarding the Constitutional Court. After completing discussions for some time, the Draft Law was finally jointly agreed upon by the Government and DPR and was passed in the Plenary Session of DPR on August 13, 2003. On the same day, the Constitutional Court Law was promulgated in the State Gazette, and it was then named Law Number 24 of 2003 regarding the Constitutional Court.

Result and Discussion

Jurisdictions and Procedures of the Indonesian Constitutional Court

The presence of the Constitutional Court of Indonesia is a new paradigm of governance to balance power among several branches of state power. The existence of the Constitutional Court is expected to further strengthen the constitution's function as the land's supreme law. The Constitution has given the role of the Constitutional Court as a protector of the constitutional rights of citizens, protector of democracy, and protector of human rights through the powers and obligations assigned to the Constitutional Court.⁶

The 1945 Constitution in Article 24 affirms that judicial power is an independent power for administering a judiciary to enforce the law and uphold justice. The Constitutional Court is one of the implementers of judicial power as intended in the 1945 Constitution. The Constitutional Court has four jurisdictions

⁴ Jeovan Assis Silva and Tomas Aquino Guimaraes, 'Factors Affecting Judicial Review of Regulatory Appeals', *Utilities Policy*, 72 (2021), 101284 <<https://doi.org/10.1016/J.JUP.2021.101284>>.

⁵ Bernd Hayo and Stefan Voigt, 'Explaining Constitutional Change: The Case of Judicial Independence', *International Review of Law and Economics*, 48 (2016), 1–13 <<https://doi.org/10.1016/J.IRLE.2016.06.003>>.

⁶ Abdul Kadir Jaelani, I Gusti Ayu Ketut Rachmi Handayani, and Lego Karjoko, 'The Political Law of the Constitutional Court In Canceling the Concept of the Four Pillars as an Pancasila as the State Foundation', *Journal of Talent Development and Excellence*, 12.2 (2020), 1314–21.

and one responsibility as outlined in Article 24C, paragraph (1) and paragraph (2) of the 1945 Constitution. The Constitutional Court has the authority to hear cases at the first and final instance, the verdict of which shall be conclusive for the following purposes:

- a. to conduct a judicial review of laws against the 1945 Constitution of the State of the Republic of Indonesia.
- b. to decide upon disputes related to the authorities of state institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia.
- c. to decide upon the dissolution of political parties; and
- d. to decide upon disputes related to the results of general elections, including the general election of the President and Vice President, the general election of members of the House of Representatives (DPR), the Regional House of Representatives (DPRD) at the Provincial and Regency/Municipality levels, general election of members of the House of Regional Representatives (DPD), and general election of head and deputy head of the region.

Moreover, the Constitutional Court has the responsibility of making verdict concerning the opinion of the People's Legislative Assembly (DPR) holding that the President and/or Vice President is/are alleged: (1) to have violated the law in the form of (a) treason against the state, (b) corruption, (c) bribery, (d) other serious criminal acts; (2) or disgraceful acts, and/or (3) no longer being qualified to as President and/or Vice President as intended in the 1945 Constitution of the State of the Republic of Indonesia.

Based on the constitutional authority, the Constitutional Court has a function that is a derivation of its constitutional authority, namely the guardian of the constitution); guardians of democracy; the final interpreter of the constitution; a protector of the constitutional rights of citizens; and a protector of the state ideology.

The procedural law of the Indonesian Constitutional Court is regulated in Law Number 8 of 2011 on Amendment to Law Number 24 of 2003 on the Constitutional Court. The first step is started with a filling of a petition or application, the applicants shall be filed with the Constitutional Court in writing in the Indonesian language, and the application must be made with a clear description of each jurisdiction (Quacoe, Yusheng, & Quacoe, 2022).

The Constitutional Court shall examine, adjudicate, and render a decision in a plenary hearing of the Constitutional Court with 9 (nine) justices, except for extraordinary circumstances with 7 (seven) judges, which shall be presided over by the Chief Justice of the Constitutional Court.⁷

As a judicial body, the Constitutional Court carries out hearing processes in adjudicating cases filed by petitioners. There are three types of hearings at the

⁷ Hendrasta Pijar Ramadhan and others, 'Ratio Decidendi of the Judges in Deciding a Case of Certificate Submission after the Expiration of 5 (Five) Years Pursuant to Article 32 Paragraph 2 Government Regulations Number 24 of 1997 Concerning Land Registration', *European Journal of Molecular and Clinical Medicine*, 7.3 (2020), 2820–29.

Constitutional Court, namely panel hearings, consultative meetings of justices (RPH), and plenary sessions. A panel hearing is a hearing which consists of 3 (three) Constitutional Court Justices assigned to carry out the task of conducting the preliminary examination. This hearing is conducted to examine the petitioners' legal standing and the substance of the petitions. Constitutional Court Justices may advise on revisions of the petitions (Rahman, 2022).⁸

A consultative meeting of justices (RPH) is a closed and confidential meeting. This meeting can only be attended by the Constitutional Court Justices and the Registrar. At this meeting, verdicts of the Constitutional Court are discussed in depth and in detail and passed. This meeting must be attended by at least seven justices. During a Consultative Meeting of Justices (RPH), the Registrar takes notes and records every discussed item and the conclusions.

A Plenary Session is a hearing conducted by a panel of Constitutional Court Justices attended by at least 7 (seven) Constitutional Court Justices. The hearing is open to the public with the agenda of hearing examination or decision pronouncement. The hearing examination includes listening to the petitioner, the statements of witnesses, experts, and the related parties, as well as examining instruments of evidence.

Problems of Dualism of Judicial Review Systems in Indonesia

Regarding the judicial review system, Indonesia applies two separate mechanisms. The first mechanism is that the Constitutional Court can only review the constitutionality of laws enacted by the President and the House of Representatives. The second mechanism is that only the Supreme Court can review the legality of regulations below the level of the law. It includes Government Regulation, Presidential Regulation, Provincial Regulation, and Regency/City Regulation.

To resolve the dualism of the judicial review system in Indonesia, the judicial review of all laws and regulations under the Constitution should be integrated into one judicial institution. All reviews should be under the Indonesian Constitutional Court.

The expanded power of judicial review

Elections in Indonesia can be categorized into two types: national and local. National polls can also be categorized into the legislative elections (DPR, DPD, and DPRD) and the presidential election. At the same time, the local election is to elect a regional head (governor and head of city/mayors).⁹

By enacting the Election Act 2007, local election dispute settlement authority was moved from the Supreme Court to the Constitutional Court.

⁸ Zora A. Sukabdi, 'Bridging the Gap: Contributions of Academics and National Security Practitioners to Counterterrorism in Indonesia', *International Journal of Law, Crime and Justice*, 65 (2021), 100467 <<https://doi.org/10.1016/J.IJLCJ.2021.100467>>.

⁹ Kuswanto Kuswanto, 'Consistency of the Presidential System in Indonesia', *Sriwijaya Law Review*, 2.2 (2018), 170 <<https://doi.org/10.28946/slrev.vol2.iss2.67.pp170-182>>.

According to Article 1, paragraph 4 of the Election Act 2007, it is stated that local election for the head of regions is part of the direct general election for electing the head of the regions in the unitary state of Indonesia, which is based on Pancasila and 1945 Constitution.

Although the Constitutional Court is generally considered successful in exercising its jurisdiction to settle regional head electoral disputes, a constitutional review decision surprised many. However, on 19 May 2014, the Court declared that the Constitutional Court's jurisdiction in handling regional head electoral disputes was unconstitutional. The Court reasoned that giving the regional head election disputes to be governed by the Constitutional Court was not following the meaning of the Constitution's original intent.¹⁰

The history of the development of the increased authority of the Constitutional Court was actually preceded by the interpretation of the Constitutional Court of PUU regarding regional governance, namely Law Number 32 of 2004 in cases 72 and 73 of 2004. Whereas the consideration of the decision in the case states that the direct election is not included in the category of general elections as referred to in Article 22E of the Law -The 1945 Constitution and its implementation may be different from the Election as referred to in Article 22E of the 1945 Constitution.¹¹

However, in line with the Constitutional Court's efforts to carry out transparency and accountability in adjudicating the cases of the three constitutional judges, namely H.M. Laica Marzuki, A. Mukhtie Fadjar, and Maruar Siahaan expressed a dissenting opinion by stating that PemiluKada is part of the legal regime for elections.

Law Number 32 of 2004 concerning Regional Government in Article 106 paragraph (1.) and paragraph (2) regulates objections regarding the handling of disputes over vote count results that affect the election of a Candidate Pair submitted to the Supreme Court, but as the law changes as referred to in Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 following the provisions of Article 236C of Law Number 12 of 2008 stipulates that, "The handling of disputes over the results of regional head election votes by the Supreme Court is transferred to the Constitutional Court no later than 18 (eight). twelve) months since this Law was promulgated".

Such a transfer began to be implemented with the signing of the Minutes of Transfer of Judicial Authority by the Chief Justice of the Supreme Court and the Chair of the Constitutional Court on October 29, 2008. The course of the regional head elections subsequently changed to an election regime following the amendment of Law Number 22 of 2007 concerning General Election Administrators as already amended by Law Number 15 of 2011 concerning General Election Administrators, including regional head elections as part of the general election

¹⁰ Silva and Guimaraes.

¹¹ Zaka Firma Aditya and Sholahuddin Al-Fatih, 'Indonesian Constitutional Rights: Expressing and Purposing Opinions on the Internet', *International Journal of Human Rights*, 0.0 (2020), 1–25 <<https://doi.org/10.1080/13642987.2020.1826450>>.

regime.¹²

The Constitutional Court, in its further development, made a new historical record by passing decision Number 97/PUU-XI/2013, dated 19 May 2014, stating in its consideration that the Pilkada was not regulated under Article 22E of the 1945 Constitution but was regulated based on Article 18 paragraph (4) of the Constitution 1945 so that the Constitutional Court stated that regional head elections were not an election regime so that the settlement of disputes over the results of regional head elections was not the authority of the Constitutional Court. This decision is really a big sign for the wider community, considering that the decision was born after several significant cases that occurred in the Constitutional Court.¹³

Article 1 point 4 of Law 12 of 2011 states that Government Regulations instead of Laws (Perppu) are Legislative Regulations stipulated by the President in a compelling emergency. Bagir Manan explained that the element of "compelling emergency" must show two general characteristics, namely: there is a crisis and an emergency. A crisis occurs when there is a disturbance that causes a sudden and critical nature (a grave and sudden trouble). Emergency, in the event of various circumstances that have not been considered beforehand and require immediate action without waiting for prior consultation. Or there have been signs of real beginnings and according to reasonableness, if not regulated, it will immediately cause disturbances to the community and the running of the government.

According to Jimly Asshiddiqie, there are three material requirements for the stipulation of the Perppu, namely: a. There is an urgent need to act or a reasonable necessity, b. The time available is limited (limited time), or there is a time crunch, and c. There are no other alternatives available, or according to reasonable reasoning (beyond reasonable doubt), other options are not expected to be able to overcome the situation, so the stipulation of the Perppu is the only way to overcome the situation. If the three conditions have been fulfilled, automatically, the President, as with the constitutional authority, must regulate the things that are needed to carry out the functions of state administration and the wheels of government he leads. What material can and should be included in the Perppu, of course, depends on the needs faced in practice (the actual legal necessity).¹⁴

The Constitutional Court has received many requests for examination of the Perppu and has also decided on the cases concerned. However, in decision Number 138/PUU-XV/2013, the Constitutional Court stated that the Court had the authority to examine the Perppu.

¹² Hayo and Voigt.

¹³ Ni'matul Huda, Dodik Setiawan Nur Heriyanto, and Allan Fatchan Gani Wardhana, 'The Urgency of the Constitutional Preview of Law on the Ratification of International Treaty by the Constitutional Court in Indonesia', *Heliyon*, 7.9 (2021), e07886 <<https://doi.org/10.1016/J.HELIYON.2021.E07886>>.

¹⁴ Ni'matul Huda, *Rekonstruksi Kedudukan Dan Kewenangan Dewan Etik Hakim Konstitusi Sebagai Upaya Memperkuat Integritas Hakim Konstitusi* (Jakarta: Pusat Penelitian dan Pengkajian Perkara dan Pengelolaan Perpustakaan Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi, 2018).

One-roof system of Judicial Review by the Constitutional Court

The authority of the Constitutional Court and Supreme Court in examining statutory regulations (judicial review) is regulated in the Constitution. Thus, the practice of judicial review in the Constitution was carried out by two different institutions. Various views on the dualism of testing have received multiple opinions. Many experts argue that such separation of powers is ineffective and not ideal because, as a result of the separation of management, there are numerous problems both regarding the relationship between the Constitutional Court and Supreme Court institutions as well as substantive issues regarding the protection of citizens' constitutional rights and hierarchical synchronization between statutory regulations.¹⁵

Violation of the constitutional rights of citizens does not only occur due to a law that is contrary to the Constitution so that the Constitutional Court declares it unconstitutional, but it can also occur that the constitutionality of legislation is because the regulations under the law are directly contrary to the Constitution (unconstitutional). Thus, the development of ideas that want the role of the Constitutional Court as guardian of the Constitution is not only due to the unconstitutionality of law but also legislation under law. So that emerged the idea that the authority for judicial review to be cantered in the Constitutional Court. The arguments regarding the one-roof system in the judicial review mechanism can be seen from various other statements, among others, as stressed by Jimly Ashiddiqie:

- a. The formulation with the separation of powers to differentiate judicial review seems as if it is not based on a conceptual deepening regarding the conception of the judicial review itself in a comprehensive manner.
- b. Separation of powers makes sense if the power system adopted is still based on the principle of power-sharing adopted by the 1945 Constitution before experiencing the first and second amendments. The 1945 Constitution of the Republic of Indonesia, after the changes, has officially and firmly adhered to the principle of horizontal separation of powers, prioritizing the principle of checks and balances. Therefore, the separation between the material of the law and the material of the regulation under the law should no longer be done.
- c. In practice, hypothetically there may be substantive contradictions between the Supreme Court decision and the Constitutional Court decision. Therefore, it is better if the system of reviewing laws and regulations under the constitution is only integrated under the Constitutional Court. In this way, each Court can focus its attention on different issues. The Supreme Court handles issues of justice and injustice for citizens, while the Constitutional Court guarantees the constitutionality of all laws and

¹⁵ Iwan Satriawan and Tanto Lailam, 'Open Legal Policy Dalam Putusan Mahkamah Konstitusi Dan Pembentukan Undang-Undang', *Jurnal Konstitusi*, 16.3 (2019), 559–84.

regulations.

- d. If the authority to review the regulatory materials under the 1945 Constitution of the Republic of Indonesia is entirely given to the Constitutional Court, of course, the burden on the Supreme Court can be reduced.

Some other considerations related to the unifying judicial review issue are that the Constitutional Court will focus more on review authority with the object of statutory and abstract cases and constitutional cases) so that such instances as PH Pilkada become the affairs of other judicial bodies (specifically) because they are concrete. The design of the Constitutional Court is not very suitable for handling cases of PH Pilkada, especially when it is related to the supporting system, which is designed so that the court's secretariat is poor in structure with rich functions. Through the specificity that the Constitutional Court is a constitutional court, it is hoped that it can produce decisions that guarantee the upholding of Pancasila and the constitution.¹⁶

Apart from several attempts, thoughts, and concepts to increase the role of the judiciary to safeguard the upholding of the constitution, the efforts of the Constitutional Court to organize the system and review mechanism carried out in particular on regional regulations, which for some times have been carried out through an executive review have been declared constitutional. The decision of the Constitutional Court 137 / PUU-XIII / 2015 stating that the provisions of article 251 paragraph (2), paragraph (3), and paragraph (8) along the phrase "cancellation of district/city regional regulations and regent and mayor regulations are stipulated by the decision of the governor as the representative of the central government. "Stated that it has no binding legal force.

Another idea is the authority of the Constitutional Court to adjudicate constitutional complaints and questions that have not been resolved. Constitutional violations occur not only because of the law's unconstitutionality. Still, they can be directed at the actions of public officials and the final decision of a general court that has violated the constitutional rights concerned.

Conclusion

Since its establishment on 13 August 2003, the Constitutional Court has encountered a certain amount of turmoil. Notably, it was highly criticized by the certain public, where some public criticisms can be found in controversy of the Constitutional Court decisions on judicial review cases. Nevertheless, this has not prevented the Constitutional Court from further developing its jurisprudence, and, indeed, as in recent years, the Constitutional Court delivered numerous decisions. Concerning the proceedings before the Constitutional Court, some of them the expanded power of judicial review of legislation, such as in the cases of the Judicial Review of the Government Regulation in Lieu of Law (Perppu) and deciding the Local Election disputes.

¹⁶ Mas Pungky, Hendra Wijaya, and Mohammad Zulfikar Ali, 'Legislation Impediments in Reorganising Government Bodies in Indonesia', *Jurnal Bestuur*, 9.1 (2021), 1–12.

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