THE ISSUES OF JUDICIAL REVIEW IN REALIZING THE HARMONIZATION OF LAW IN INDONESIA

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ABSTRACT

The laws and regulations are stipulated in hierarchies implying that the substance of lower laws shall not contravene the higher laws substance. Contradiction of laws shall be settled by conducting judicial review. The competence to proceed judicial review is the authority of the Constitutional Court and the Supreme Court. The settlement of judicial review in the two Courts may raise the issue of disharmony of regulations. On the other hand, there is particular type legislation that cannot be reviewed by the two Courts. The regulation concerning judicial review process is required to be amended. This research is a normative legal research using secondary data. The results of the study discovers that the judicial review authority on laws and regulation based on the applicable law is subject to the Constitutional Court, meanwhile the authority to amend and revoke the decree of the People's Consultative Assembly is subject to per se. Therefore, the 1945 Constitution of the Republic of Indonesia shall be amended.

Keywords: Authority, Constitutional Court, Harmonization of Law, Judicial Review, Indonesian Law.

INTRODUCTION

The Indonesian laws and regulations are stipulated in hierarchy, implying that higher law is the basis to stipulate the lower law, in order to prevent disharmony of regulations. In the event there is contradiction of law, it shall be settled by the mechanism of regulation review by which known as judicial review. In Indonesia, the authority to conduct judicial review is the competence of two State Institutions namely the Supreme Court and the Constitutional Court. The effort of improving law enforcement by the Supreme Court and the Constitutional Court with other institutions related to the judicial power function requires the following comparison. Equalization: The Supreme Court and the Constitutional Court both provide and uphold the human rights institutions (Ardiansyah & Handoko, 2018).

The Supreme Court has the authority to review regulation under the Law such as Government Regulations; Presidential decree; Provincial Regulations; Regency/City Regional Regulations or other regulations under the Law are subject to judicial review based on the hierarchy of regulations which mandated it to substitute with Law/Government regulation. Whereas, the Constitutional Court has the authority to examine any act against the Constitution, for example the Judicial Review Decision Number 36/PUU-X/2012 decided that Law Number 22 of 2011 concerning Oil and Natural Gas contravenes the 1945 Constitution of the Republic of Indonesia therefore; the binding force of the law has been alienated. In addition, the decision of the Constitutional Court Number 28/PUU-XI/2013 concerning the Review of Law Number 17 of 2012 on Cooperatives contravenes the 1945 Constitution of the Republic of Indonesia by which it is no longer applicable. However, the existence of the Constitutional Court and the Supreme Court as State institutions with the authority to conduct judicial reviews, two contradictions arise as results of judicial review of laws by the two institutions by which are related one another and may lead recur.

The first case relates to the determination of the elected legislative candidates in the 2009 legislative elections. There are 4 (four) decisions of the Supreme Court related to the

judicial review of General Election Commission (KPU) Regulation Number 15 of 2009 concerning Technical Guidelines for Determination and Announcement of General Election Results, Procedures for Determining Seat Acquisitions, Determination of Elected Candidates and Replacement of Elected Candidates in the General Election of DPR, DPD, Provincial DPRD and Regional DPRD in 2009 which were issued on 16 March 2009 against Law Number 10 of 2008 concerning General Election for DPR, DPD and DPRD by which the four decisions were adjudged on 18 June 2009 (Simamora, 2013). Among the four judicial review cases adjudged by the Supreme Court, Article 205, Article 211 and Article 212 of Law Number 10 of 2008 concerning the General Election of DPR, DPD and DPRD members were the basis of the Supreme Court in conducting the judicial review of KPU Regulation Number 15 of 2009. In response to this decision, a number of legislative candidates submitted a judicial review of the provisions the Supreme Court used as the basis in resolving the case to the Constitutional Court due to unfair decision of the Supreme Court.

On Friday 6 August 2009, the Constitutional Court issued the decision of the judicial review case Decision Number 110-111-112-113/PUU-VII/2009. The Constitutional Court declared that Article 205, Article 211 and Article 212 of Law Number 10 of 2008 which have been used by the Supreme Court as the legal basis in adjudging judicial review case of KPU Regulation Number 15 of 2009 are conditional (conditionally constitutional). The conditionally constitutional implies that such decision shall not be deemed contravening the Constitution considering the interpretation is in conformity with the decision issued by the Constitutional Court. Meanwhile, the substance of the Constitutional Court decision affirms the KPU Regulation Number 15 of 2009 and revokes the previous Supreme Court judicial review decision.

Based on the decision of the Constitutional Court, KPU considers disregarding the Supreme Court decision. The decision of KPU is based on quite reasonable since Article 8 of the Supreme Court Regulation Number 1 of 2004 concerning the Right of Judicial Review prescribes that a decision of the Supreme Court shall have no binding force in the event it is being neglected by the concerned State Institutions within 90 (ninety) days.

Meanwhile, the interval between the decisions of the Supreme Court and the Constitutional Court regarding the judicial review in the case for determining seats in the second stage for DPR seats for political parties participating in the election is between 18 June 2009 and 6 August 2009. This implies that the interval of the two decisions is only 52 (fifty-two) days. Therefore, KPU is not bound to the Supreme Court's decision, considering that the Constitutional Court decision has been issued, implying that the basis of Supreme Court decision in adjudging the case does not conceive legal force.

According to the legal and binding power, the decision of the Supreme Court perceived as having lost its legal force due to its conditionally constitutional status as declared by the Constitutional Court.

Thus, KPU finally decided to neglect the Supreme Court decision. This decision of KPU followed by pros and cons. This fact reveals that majority of parties in such case, especially KPU prefers to implement the Constitutional Court decision and neglect the Supreme Court decision. Moreover, the Constitutional Court decision was deemed to provide alternative or legal certainty for the multiple interpretations of the formulation in the legislative election provisions.

The second case occurred in 2018 was related to KPU Regulation Number 26 of 2018 concerning the Individual Nomination of General Election Participants for Members of the Regional Representative Council. The judicial review of KPU Regulation Number 26 of 2018 was submitted by the Chairman of the Hanura Party Oesman Sapta Odang (hereinafter referred to as OSO) to the Supreme Court. The material of the submission was the request to annul the norm that obliges candidates for the Regional Representative Council (DPD) to resign any active post in political parties (https://tirto.id/gugatan-oso-dan-dualisme-judicial-review-yang-bikin-bingung-c87; Rahadian, 2018)

The material of OSO’s submission to the Supreme Court has actually been adjudged by the Constitutional Court. On 23 July 2018, the Constitutional Court issued a judicial

review decision Number 30/PUU-XVI/2018 which declared that legislative candidates and DPD members shall not hold any active posts in political parties.
However, the Supreme Court granted the Judicial Review of KPU Regulation Number 26 of 2018 regarding individual candidates for the DPD who currently hold active post in political parties. The decision of Supreme Court was clearly contravening the decision of Constitutional Court Number 30/PUU-XVI/2018.

In this case, a conflict of law between two judicial review decisions of the Supreme Court and the Constitutional Court arises which indicates legal issues as follows:

1) Legal uncertainty of State administration in Indonesia. The previous explanation reveals that the Constitutional Court decision has impacted the registration process for DPD candidates for the 2019 Election, especially for the candidates who hold active posts in political parties such as Oesman Sapta Odang as General Chair of the Hanura Party;
2) The legal consequences of the Supreme Court decision did not bind since the panel of judge of the Supreme Court neglected the interpretation that had been made by the Constitutional Court on the previous Constitutional Court Decision. Moreover, the Supreme Court Decision could not be enforced due to the lack of the basis of Law Number 12 of 2011). The Supreme Court and the Constitutional Court are granted the authority to examine laws and regulations, however types and hierarchies of laws and regulations are distinguished, the examination of laws and regulations by the two institutions shall comply the hierarchical system of laws.

The third case is related to the Supreme Court decision Number 44P/HUM/2019 which granted the lawsuit of Rachmawati et al who submitted a request for a judicial review (filed on 13 May 2019) of General Election Commission (KPU) Regulation Number 5 of 2019 concerning the Determination of Selected Candidate Pairs, Determination of Seat Acquisitions, and Assignment. The material of the judicial review was Article 3 paragraph (7) which prescribes the determination of the elected President and Vice President Pair. This Supreme Court decision issued on 28 October 2019 and was published on 3 July 2020. The request of Rachmati et al for a judicial review was granted by the Supreme Court.

In its decision, the Supreme Court declared that the request for judicial review was fully accepted and granted. Supreme Court declared that the provisions of Article 3 paragraph (7) of the KPU Regulation contained no binding force. In its consideration, the Supreme Court states that Article 3 paragraph (7) of KPU Regulation contravened Article 416 paragraph (1) of Law Number 7 of 2017 concerning General Elections.

Article 3 paragraph (7) of KPU Regulation Number 5 of 2019 prescribed that "In the event there are only 2 (two) Pairs of Candidate in the Presidential and Vice-Presidential Election, the KPU shall determine the pair with highest number of votes as the elected."

Meanwhile Article 416 paragraph (1) of Law Number 7 of 2017 states that “The elected presidential candidate ticket (which shall be the president-elect and vice-president-elect) shall win more than 50% (fifty percent) the total national valid votes with the distribution of at least 20% (twenty percent) in more than half the total number of provinces in Indonesia.”

The analysis will be focused on the aspect of legislation. The laws and regulations have stipulated the mechanism of President and Vice President Election, from the 1945 Constitution of the Republic of Indonesia, the laws, and regulations of the KPU. Before conducting the analysis, below are the laws and regulations of the President and Vice President election: Table 1

Table 1
COMPARISON OF LAWS AND REGULATIONS OF PRESIDENT AND VICE PRESIDENT ELECTION, FROM THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA, THE LAWS, AND REGULATIONS OF THE KPU IN INDONESIA

Article 6A of the 1945	Article 416 of Law Number 7 of	Article 3 of KPU Regulation Number 15 of 2009 concerning Technical Guidelines for Determination and

Constitution of the Republic of Indonesia	2017 concerning General Elections	Announcement of General Election Results, Procedures for Determining Seat Acquisitions, Determination of Elected Candidates and Replacement of Elected Candidates
(1) The President and Vice-President shall be elected as a single ticket directly by the people	(1) The elected presidential candidate ticket (which shall be the president-elect and vice-president-elect) shall win more than 50% (fifty percent) the total national valid votes with the distribution of at least 20% (twenty percent) in more than half the total number of provinces in Indonesia	(1) The KPU shall determine the Candidate Pairs who obtain more than 50% (fifty percent) of the number of valid votes in the Presidential and Vice-Presidential Election as the elected Candidate Pair, provided that:
(2) Each ticket of candidates for President and Vice-President shall be proposed prior to the holding of general elections by political parties or coalitions of political parties which are participants in the general elections.	(2) In the case where there are no presidential candidate tickets that fulfill the requirements stated in paragraph (1), 2 (two) presidential candidate tickets who collected the most number of votes shall enter a second round of the presidential election to collect direct votes from eligible Indonesian voters.	a. obtain at least 20% (twenty percent) of the votes in each province; and
(3) Any ticket of candidates for President and Vice-President which polls a vote of more than fifty percent of the total number of votes during the general election and in addition polls at least twenty percent of the votes in more than half of the total number of provinces in Indonesia shall be declared elected as the President and Vice-President.	(3) In the case where 2 (two) presidential candidate tickets collect exactly the same number of votes in the second round of the presidential election, those presidential candidate tickets shall enter another round of the presidential election to collect direct votes from eligible Indonesian voters.	b. the acquisition of valid votes as referred to in letter a is spread over more than 50% (fifty percent) of the total provinces in Indonesia
(4)) In the event that there is no ticket of candidates for President and Vice-President elected, the two tickets which have received the first and second highest total of votes in the general election shall be submitted directly to election by the people, and the ticket which receives the highest total of votes shall be sworn in as the President and Vice-President.	(4) In the case where there are 3 (three) or more presidential candidate tickets that collect exactly the same, highest number of votes among others, the top two candidates shall be determined by the tickets who won the votes in a wider geographical spread.	(2) In the case no Candidate Pair meets the provisions referred to in paragraph (1), the KPU shall determine 2 (two) Candidate Pairs that obtain the first and second most votes to be directly re-elected by the people in the second round of the Presidential and Vice-Presidential Elections. .
(5) The procedure for the holding of the election of the President and Vice-President shall be further regulated by law.	(5) In the case where there are more than 1 (one) presidential candidate tickets that collect exactly the same, second-highest number of votes, the second entrant for the second round of the presidential election shall be determined by the ticket who won the votes in a wider geographical spread.	(3) In the case in the highest number of votes acquired there are 2 (two) Candidate Pairs with the same number of votes, the Candidate Pairs are directly re-elected by the people in the second round of the Presidential and Vice-Presidential Election.
		(4) In the case in the votes acquired there are 2 (two) Candidate Pairs with the same highest number of votes, the determination of the first and second

		ranks to be re-elected in the second round of the Presidential and Vice-Presidential Election, shall be carried out based on the wider distribution of the voting area.
		(5) In the case the vote acquired there are more than 1 (one) Candidate Pairs who obtain the second highest number of votes, the determination of the Candidate Pairs with the highest number of votes carried out based on the wider distribution of the votes acquired by the area hierarchically.
		(6) The tiered broader vote acquisition as referred to in paragraph (4) and paragraph (5) constitutes a superior Candidate Pair in a province and regency/municipality with a greater number of provinces and regencies/cities.
		(7) In the case that there are only 2 (two) Candidate Pairs in the Presidential and Vice-Presidential Election, the KPU shall determine the Candidate Pair that receives the most votes as the elected Candidate Pair.

The comparison of the three laws and regulations reveal that Article 416 of Law Number 7 of 2017 does not completely elaborate the provisions of Article 6A of the 1945 Constitution of the Republic of Indonesia and may be categorized as incomplete.

There are an absent of clause on Article 416 concerning a case where the candidates only consist of two pairs. The determination of the elected remains uncertain.

Article 416 of Law Number 7 of 2017 only enables two pairs of candidates to take part in the second phase of the presidential election in the case the presidential election has more than two pairs of candidates. Meanwhile Article 6A paragraph (4) of the 1945 Constitution of the Republic of Indonesia clearly stipulates that if the Presidential Election consists of two pairs of candidates, then the pair receives the highest total of votes shall be appointed as the elected President and Vice President.

In the case the presidential election consist of two pairs of candidates the provisions of Article 6A paragraph (4) directly applies instead of Article 6A paragraph (3) of the 1945 Constitution of the Republic of Indonesia which require more than fifty percent of the total number of votes during the general election and in addition polls at least twenty percent of the votes in more than half of the total number of provinces. Meanwhile, Article 3 paragraph (7) of KPU Regulation Number 5 of 2019 has already conformed to the provisions of Article 6A paragraph (4) of the 1945 Constitution of the Republic of Indonesia.

Therefore, considering that Article 6A of the 1945 Constitution of the Republic of Indonesia has not been amended, the first step to do is refining the provisions of Article 416 of Law Number 7 of 2017 to be adjusted to the provisions of Article 6A of the Constitution of the Republic of Indonesia. 1945. In order to complete the absence of clause, the determination of the elected candidate in the case the election only consists of two pairs of candidate shall be mentioned explicitly.

Secondly, the judicial review also contained an absent of law. The authorities to condict judicial review lies in two State institutions as mentioned are the Constitutional Court and the Supreme Court. The Constitutional Court is granted the authority to examine laws against the Constitution as referred to in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

On the other hand, the Supreme Court is granted the authority to hear a trial at the highest (cassation) level, to review ordinances and regulations made under any law against

such law. The absence of law implies to the provision of examining regulations under the Law against the Basic Law.

As for the request for judicial review of the KPU Regulation, according to the Constitution, Article 3 paragraph (7) KPU Regulation Number 5 of 2019 has been in accordance with Article 6A paragraph (4) of the 1945 Constitution of the Republic of Indonesia.

Based on these cases, there is disharmony between the judicial review decisions of the Supreme Court and the judicial review decisions of the Constitutional Court, even though there are limits on the authority to test regulations or laws as regulated in the 1945 Constitution of the Republic of Indonesia including the laws stipulating the powers of the Supreme Court and the Constitutional Court, in fact those remain containing no guarantee of legal certainty and justice.

In the hierarchy of Laws, the Constitution is in the highest position, which implies that the material content of all the legislation under it shall not contravene the Constitution. Thus, the authority to review shall not be granted by two State institutions which exercise different judicial powers, the authority to conduct judicial review which has granted to be conducted by two different State institutions (the Constitutional Court and the Supreme Court) seemingly implies that only Laws that shall conform the Constitution, while regulation seemingly separated to the Constitution, therefore the Supreme Court is authorized to conduct judicial review. Moreover, such authorities may emerge disharmony between Laws and facilitate the review process. In the event, a law is being reviewed by the Constitutional Court, while the law is currently being reviewed as the basis for regulation under it and also being tested by the Supreme Court, subsequently the judicial review in the Supreme Court shall be continued in advance until there is a decision of the Constitutional Court.

Furthermore, the decree of the People's Consultative Assembly remains immutable since there is no provision which explicitly prescribe authority to review the decree of The People's Consultative assembly in the event it contravenes the 1945 Constitution of The Republic of Indonesia, in addition no institution is granted the authority to review Laws which contravene the decree of the People's Consultative Assembly. The next issue is related to formal review. State institutions are entitled to formally submit judicial review of any laws or regulations and its legal basis.

Based on the explanation above, this article will discuss the development of judicial review in the history of Indonesian constitutional and examine the result in order to propose solution to be implemented as a means to harmonize the laws and regulations.

METHOD

The method of this research approach is normative juridical, which examines the rules of law as a building system related to a legal event (Fajar & Achmad, 2010). The data used are secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Data collection is done by a literature study to be analyzed and presented descriptively.

The analysis is carried out using a juridical doctrinal approach which considers the law as a doctrine or a set of normative rules to be addressed with case studies of disharmony problems that occur in Indonesia. The result is analyzed based on legal principles, legal norms, and the opinions of scholars or experts. The result of the research will conclude a solution to find the ideal model for future judicial reviews in Indonesia. In addition, comparison of law on judicial review model in several countries is conducted. The additional step is conducted with the expectation to find and determine the ideal role model for judicial review in Indonesia.

RESEARCH RESULT AND DISCUSSION

Legislation

According to Bahasa Indonesia dictionary, the word "legislation" means "that is related to law or the ins and outs of law". Whereas the "statute" means "the provisions and regulations of the State made by the Government (the minister, the Executive Body, and so on) are passed by the Parliament (House of Representatives, legislative bodies, and so on), signed by the head of State (the President, the head of government, the King) and have binding force (Department of Education and Culture, 1990). According to Black's Law Dictionary, legislation and regulation is distinguished. Legislation means the establishment of law through legislation, while regulation means rules or order imposed by the provisions of the law stipulated by the Government (Henry Campbell Black, 1991) through executive authority (rule or order having the force of law issued by the executive authority of government). Jimly Asshiddiqie distinguished legislative and regulatory products, administrative determination as an executive institution product, and the judiciary's verdict in the form of a court decision (Assiddiqie, 2006). All three legal products have their own structure and hierarchy.

The regulations are compiled from the highest, namely the Constitution, to the lowest, namely the District regulation/city or even the village regulation. Assurance of consistency, considering that in Indonesia there is a hierarchical system of legal regulations from the highest to the lowest level. In the event it is not consistent, it will cause disorder in the application of the legal system and lead to uncertainty and legal injustice in society which can lead to the absence of guarantee for human rights. Therefore, it is possible in judicial review mechanisms (Assiddiqie, 2006). Hans Kelsen asserted that the legal order is not a coordinated system of the same domiciled norm, but rather a hierarchy of legal norms of varying tiers with the basic norm (Constitution) occupying the highest level (Kelsen, 2008). A. Hamid S. Attamimi as Yuliandri, argues that the legislation (Legal regulation), when associated with the establishment of State regulation, according to Burkhardt Krems, using the term (State legislation), is to determine "... Regulatory Contents (Content of the scheme); form and arrangement (Yuliandri, 2011) of regulations (Form of regulation); Regulation method of forming (Method of drafting the scheme); Procedures and rules for the formation of regulations (Procedure for drafting the scheme).

According to PJP Tak, the definition of legislation, with the term "wet in Materiele Zin" is (Huda & Nazriyah, 2011):

"...if a decision of a body with legislative power contains general rules that are binding on citizens. The term general in this definition does not mean that material laws are only those laws which bind all citizens, but only material laws that do not apply to a particular gift, but apply in an indefinite number of cases and for an indefinite number of persons."

Maria Farida Indrati Soeprapto asserted that the term legislation (legislation, legislation or Gezetzgedude) has two understandings: as the process of establishing State regulations (Soeprapto, 1998); and as a product of any State regulations. According to Moh Mahfud MD, legislation is all laws in the broad sense that is formed in a certain way, by authorized officials and bestowed in written form (Mahfud, 2005). Statutory regulations are written rules that contain generally binding legal norms and are established by State institutions or competent authorities through the procedures specified in the Law (Article 1 section (2) of Law Number 12 Concerning Making Rules)

Hierarchy of Rules

The hierarchy of Rules requires the lower regulations to not contravening the higher regulations. As emphasized by Friedman, the Rules may be rated in a type of pyramid, forming a shape which portrays the lowest to the highest level. When the rules conflict, higher rules control lower rules (Friedman, 2009). Consequently, there has to be a judicial review of every rule bearing in mind that the basis for the idea of a judicial review mechanism is how to force the legislators to comply with the legal norms contained in the

higher rules and to form laws and regulations according to the provisions in the constitution. The establishment of the Constitutional Court is intended to improve the system, mechanism and model of authority for judicial review in Indonesia in order to guarantee the enforcement and implementation of the human rights of the citizens in the fields of social, political, cultural and religious law as stated in the Indonesian constitution, therefore the lower law will not contravene the higher law and reduces the potential of the absence of law, guarantees and certainty for human rights.

The hierarchy of legislation is associated with the theory of Hans Kelsen on "Stufenbau des Recht" or "The Hierarchy of Law", which asserted that the rule of law is a level arrangement and each rule of the lower rule is based on the higher rule (Manan, 2003). At the peak of "Stufenbau", there is the basic rule of a national law that is abstract, generalized, or hypothesized, which is a fundamental rule called "Grundnorm" or "Ursprungnorm" (Kelsen, 1973). Grundnorm resembles the assumption of the 'order' which shall be manifested in life together (in this case the State), and is a transcendental-logical condition for the validity of the entire law. The entire positive ordinance must be hierarchically guided in Grundnorm (Tanya, 2010).

The hierarchy of Rules in Indonesia according to Article 7 section (1) of Law Number 12 of 2011 Concerning Making Rules as follows:

a) 1945 constitution of the Republic of Indonesia;
b) Decree of the People's Consultative assembly
c) Law/Government regulation for Substitute Law
d) Government Regulation
e) Presidential Regulation
f) Province Regulation
g) Regency/Municipality Regulation

The Development of Rules in the History of the Indonesian Constitutional

Judicial Review in the history of Indonesia's constitutional government began when discussing the constitution draft. In the hearing of BPUPKI Muh Yamin proposed: "This court is highest, therefore in the case of the law, the Balai Agung will decide whether it is in accordance with customary law, sharia, and the Constitution (National Secretariat of the Republic of Indonesia, 1998). The proposal by Muhamad Yamin about judicial review was not being included in the draft text of the Constitution, by which Muh. Yamin responded: "The Great Hall (referring to the Supreme Court) shall not carry out the judiciary; however it should be a tough institution, whether the law made by the legislative institution does not contravene the Constitution or contravene the recognized customary law, or not contravene the sharia". Despite Muh. Yamin did not use the term judicial review, but the "tough" implied judicial review (Ranggawidjaja & Perwira, 1996). The idea of Muh. Yamin was rejected by Soepomo based on the situation of Indonesia at that time which the experts of such topic were less. In addition, Soepomo added that the material of review is a consequence of the Trias Politica (Soemantri, 1979).

The debate between Muh. Yamin & Soepomo was discontinued due to the urgency of addressing the draft of Constitution which later successfully established as for the proclamation of Indonesian independence enabled to be declared. The idea of Muh Yamin concerning the right to review was not included in the 1945 Constitution, therefore the provision on the right of judicial review remained unregulated in the 1945 Constitution. However, during the era which the applicable Constitution of the 1949 Constitution of the United States of Indonesia (RIS), the provisions of Article 156 (Article 156 Section (1) of the 1949 RIS Constitution) stipulated the right of judicial review, by which granted the Supreme Court and other judicial institution to adjudge judicial review. The 1949 RIS Constitution enabled regional regulation and other regulations including federal regulations except federal

rules and the federal emergency law as stipulated in Article 130 paragraph (2) of the 1949 Constitution of RIS.

The judicial review authority stipulated in the 1949 RIS Constitution had not been practiced since it was changed or amended with the 1950 Temporary Constitution (UUDS). Article 95 paragraph (2) of the 1950 Temporary Constitution stipulated that the Law cannot be reviewed, which implied that the judicial review was not possible to be carried out. The 1950 Temporary Constitution remained enforced until the Presidential Decree on 5 July 1959 was commenced which reintroduced the 1945 Constitution as the applicable constitution which did not regulate the provision of judicial review.

The provision of judicial review was established in the Law Number 14 of 1970 concerning Primary Provisions of Judicial Power. Article 26 stipulated that the Supreme Court is granted the authority to declare regulations under the law are invalid based on its contradiction to the higher regulations. Judicial review may only be carried out to the regulations under the law, and the authority remained hold by the Supreme Court.

Judicial review began to be conducted when the decree of the People's Consultative Assembly Number III/MPR/2000 which in Article 5 paragraph (1) stipulated an authority for the People's Consultative Assembly to conduct judicial review for regulations against the Constitution. Such authority was given to the People's Consultative Assembly due to its mandate as the representatives of people's sovereignty. However, the People's Consultative Assembly never conducted the authority to review any laws or regulation under the Constitution (Syahuri, 2014).

The provision of judicial review in the new constitution began to be exercised after the third amendment of the 1945 Constitution. Article 24A paragraph (1) 1945 Constitution of the Republic of Indonesia stipulates that the Supreme Court shall have the authority to hear a trial at the highest (cassation) level, to review ordinances and regulations made under any law against such law, and shall possess other authorities as provided by law. Meanwhile, Article 24C paragraph (1) of the 1945 Constitution stipulates that the Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections.

Therefore, it may be concluded that the provisions of Article 24A paragraph (1) and Article 24C paragraph (1) of the 1945 Constitution stipulate that there are two State institutions which granted the authority to conduct judicial review, namely the Supreme Court and the Constitutional Court.

Judicial Review by the Supreme Court of the Republic of Indonesia

The authority to conduct judicial review by the Supreme Court is hereafter regulated in Law Number 48 of 2009 concerning Judicial Power. Article 20 paragraph (2) letters (b) stipulates Supreme Court is authorized to conduct judicial review of regulations such as Government Regulations, Presidential Regulations, Provincial Regulations, and Regency/Municipality Regulations against the Law stipulated by Legislative institution or Government Regulations for substitute law. Review of the invalidity of the regulations may be conducted based on appeal or petition directly to the Supreme Court. The right to review may be exercised on the material content of paragraph, article, and/or part of the regulation which contravene the higher regulation and its establishment.

Provision of judicial review is additionally stipulated in Law Number 5 of 2004 concerning the Amendments to the Law Number 14 of 1985 concerning the Supreme Court in which Article 31 stipulated that the Supreme Court has the authority to examine the regulations under the Law of Law which is conducted on appeal or petition directly to the Supreme Court.

The lack of judicial review process in the Supreme Court is the examination process which conducted in less transparent process since there is no involvement of the applicant,

the respondent, or expert. The applicant may only convey petition in writing form and shall wait for the Decision. Such process implies no conformity with the principle of transparency and accountability of trials (Hussain, Quddus, Pham, Rafiq & Pavelková, 2020).

On the other hand, the authority of Supreme Court to conduct judicial review remains uncertain due to different expression of power in different legal instruments. Moreover, the Constitution, the Supreme Court Law, and the 2009 Judicial Power Law appear to restrict the Supreme Court in reviewing regulations 'under a law of law'. This situation shall be considered dominant, given that it is established by the Constitution. However, the Supreme Court Law and the 2009 Judicial Power Law imply, in other provisions, that the Supreme Court may review any regulation below a law of law which higher than it on the hierarchy and not necessarily a law (Hussain & Hassan, 2020). Importantly, Article 1 paragraph 1 of the Supreme Court Regulation Number 1 of 2011 specifies that judicial review is the 'right of the Supreme Court to examine the substance of a law below a law of law against a higher-level law'. While this Regulation has legal force by virtue of Article 8 of the 2011 Law Making Rules, it only implies an internal set of guidelines for judges when deciding cases, and legally is clearly inferior to law, much less the Constitution. Nevertheless, many Supreme Court judges defer to the Regulation when adjudging judicial review cases. The result has been inconsistent with the Supreme Court decisions: in some cases, the Supreme Court has held that its jurisdiction is confined to reviewing lower-level laws against the Constitution; and the Court has taken a broader view, for example adjudging review of Regional Regulations against Presidential Decree (Butt, 2019).

Judicial Review by the Constitutional Court of the Republic of Indonesia

Judicial review by the Constitutional Court is stipulated in the Law Number 24 of 2003 concerning the Constitutional Court. Article 51 paragraph (3) stipulates that there are two kinds of appeal in the Constitutional Court. First, the Formal Appeal (Formula Review) is the appeal to the formulation of a law is inconsistent with the provisions as laid down by the 1945 Constitution of the Republic of Indonesia. In the event that the establishment of a law does not meet the provisions of the law based on the Constitution, the law in its entirety contains no binding power. Second, the Material Appeal (Formula Review) is the appeal to the material substance of the law as set out in the paragraphs, articles, and/or a section of the law contravenes the 1945 Constitution of the Republic of Indonesia. In the case that a material of paragraph, article and/or part of the law is declared contravening the Constitution by the Constitutional Court contrary to, it subsequently has no binding power (Hussain & Nguyen, 2021).

The Constitutional Court does not void the applicability of law, it is only granted the authority to declare that regulation, or its material or paragraph, article and/or part of the law is no longer. The Constitutional Court is not granted the authority to change the formulation of paragraph, article and/or part of the law (Marzuki, 2006).

The distribution of duty between the Supreme Court and the Constitutional Court according to Jimly Assiddiqie is not ideal, as it may pose a difference of conflicting decision between the Supreme Court and the Constitutional Court. Such discrepancies occurred because the Supreme Court was initially authorized to review regulations under law. Therefore, when the agreement of the establishment of the Constitutional Court in the amendment of the Constitution 1945, the Supreme Court remains given the authority to conduct judicial review (Hussain, Ahmad, Quddus, Rafiq, Pham & Popesko, 2021). Furthermore, the role model for the distribution of duty is the Republic of South Korea. The Constitution of South Korea authorizes judicial review (Constitutional review) of regulations to the Constitutional Court, and judicial review of the regulations under the law is granted to the Supreme Court (Assiddiqie, 2006).

Issues and Solutions of Making Rules in Realizing the Harmonization of Law in Indonesia

In Indonesia, the material of different regulations frequently contravening one another, either between laws with a higher position and a lower one, or between equivalent laws and regulations. In the Indonesian constitutional system, harmonization and synchronization of the regulation draft are conducted by the Ministry of Law and Human rights. Once it has been enacted as laws, harmonization and synchronization are the duties of judicial institutions.

The 1945 Constitution of the Republic of Indonesia grants the authority of reviewing regulations against the Constitution to the Constitutional Court and on the other hand the Supreme Court is granted the authority to review regulations under Law against Law. Practically, there are laws and regulations under law that conflict with rules, however rather not in accordance with the Constitution. This is a particular problem in the Indonesian constitutional system, as the basis of the Supreme Court in conducting judicial review is Law, not the Constitution. Therefore, the judicial review conducted by the two institutions turns into flaw since it may result to the absence of harmonization and synchronization of regulations. There may even be a conflicting decision between the Constitutional Court and the Supreme Court (Mulyanto, 2013).

An attempt to address the dispute is Article 55 of Law Number 24 of 2003 on the Constitutional Court Review of legislation under the law, which is being undertaken by the Supreme Court, must be discontinued, if the law which constitutes the basis for review of such legislation is being reviewed by the Constitutional Court, until such time as may be determined by the Constitutional Court.

Another issue is that there is no State institution that addresses judicial review under the law if it contravenes the Constitution. No institution is granted the authority to review the law against the People's Consultative Assembly decree, and no institution can review the People's Consultative assembly decree if it contravenes with the Constitution. However, such institutions may conduct amendment or revocation. However, in addition to the People's Consultative Assembly decree, other than no institution to review, the People's Consultative assembly was not authorized to change nor revoke its decree since the 1945 Constitution of the Republic of Indonesia grants no authority to People's Consultative Assembly decree, therefore the current People's Consultative Assembly decree will remain in force permanently. In fact one of the characteristics of regulation according to Satjipto Rahardjo is the power of regulation to correct and repair itself (Rahardjo, 1991). The absence of an authorized institution of such review and the absence of a review mechanism led to the void of law, also known as Tetraa Incognita (Agustian, 2016).

Harmonization and synchronization of regulation is necessary to facilitate the implementation and enforcement of the law. The overlapping of law and invitation materials will be obstacles for implementing institutions and law enforcement institutions. Harmonization and synchronization of regulations shall be carried out during the establishment of regulation. However, due to the process of formation is influenced by various factors, such as political and economic interest which may lead to disharmony. Therefore, the review of regulation of making law is indispensable.

Thus, judicial review is significant to achieve harmonization and synchronization of laws and regulations. To find the ideal judicial review model in order to achieve harmonization and synchronization of laws, it is necessary to conduct a comparative study of judicial review model of Constitutional Courts in several States in the world. The States that grant the authority to conduct judicial review on the Constitution to the Constitutional Court are Germany, Poland, Cyprus, Russia, Belarus and South Korea, Austria. In several other States such as the United States, Japan, Venezuela and Singapore, the Supreme Court is granted the authorized institution to conduct judicial review. Meanwhile, there are also several States that grant the authority to conduct judicial review to the Constitutional Council, such as France, Cambodia and Kazakhstan. In Estonia, the authorized institution to conduct judicial review is the National Court, while in the People's Republic of China this authority is granted to the Standing Committee of the National People Congress. However, there are also

some States that disable judicial review, such as the Netherlands, Mexico and Peru. Thus, it may be categorized that there are 2 (two) models of judicial review in the world, as asserted by Mauro Cappelletti which mentioned that the world's constitutional law experts have agreed that there are at least two major models of judicial review developed and adopted by various countries, namely: (i) decentralized judicial review; and (ii) centralized judicial review (Cappelletti, 1970). Therefore, the comprehensive comparative study will be conducted between Indonesia, Austria and Germany due to the similarity of character, as follows:

1) Influenced by the theory of Hans Kelsen "The application of the constitutional law concerning regulations can be effectively guaranteed only if an organ other than legislative institution is granted the authority to review whether a law is constitutional, and annulling it if it's declared 'unconstitutional.' There may be a specific institution established for this purpose, for instance a special court, also known as the 'Constitutional Court."
2) Such character implies that the legal system between Indonesia dan Austria adopted the theory of Hans Kelsen "Stufentheorie" also known as the hierarchy of legal norm theory.
3) On the other hand, Germany established centralized particular institution to conduct constitutional judicial review which known as the Federal Constitutional Court or in German known as Bundesversfassungsgericht (hereinafter referred to the Constitutional Court of federal Germany which adopted the Europe Model (Article 92 of the Basic Law Germany, 1949).
4) The Austrian Constitutional Court (Verfassungsgerichtshof) is one of the two main historic prototypes of institutionalized constitutional review worldwide. Not only Europe, the same rationale of constitutional jurisdiction concentrated in a single and centralized court that, inter alia, is vested with the power to review and strike down laws as well as administrative laws (Gamper & Palermo, 2009).

The comparison of judicial review authority of Constitutional Court between Indonesia, Austria and Germany is described as follows:

Table 2
COMPARISON OF JUDICIAL REVIEW SCOPE ON LAWS IN INDONESIA, AUSTRIA AND GERMANY

Constitutional Court of Indonesia (The 1945 Constitution of the Republic of Indonesia, the Constitutional Court is stipulated in Article 24C)	Constitutional Court of Austria (Federal Constitutional Law of 1920)	Constitutional Court of Germany Basic Law 1949 (*Grundgesetz*)
The 1945 Constitution separates or rather divides the judicial review system into two reviewing systems, as follows: • Examination of the Law against the Constitution (constitutional review) with the authority of review being the jurisdiction of the Constitutional Court (based on the highest hierarchy level) examples of legal products that can be subject to a judicial review in the constitutional court are: 1) 1945 Constitution of the Republic of Indonesia; 2) Provisions of the People's Consultative assembly; 3) Law/Government regulation for substitute legislation • Reviewing the legislation under	Chapter VI of the Federal Constitutional Law of 1920 concerning "Constitutional and Administrative Guarantees" on Section D on "Constitutional Court" Article 137 until Article 148. Constitution is granted the authority to conduct constitutional review including: a) Judicial Review, including Federal Law and Federal Law against the Federal Constitution; b) Preventive review based on the petition from the Federal Government to the Bill of Federal Law and vice versa; c) Judicial review of Laws under Law; d) Judicial review of International Treaties (in general); e) Formal review of the Constitution (to the amendment);	Article 93 paragraph 1 of the Basic Law 1949 stipulates that the Federal Constitutional Court shall rule in abstract review (posteriori abstract review) on such matters as shall be assigned to it by federal law, the government of States or ¼ of *Bundestag* (House of Representatives), which include: a) Judicial review of laws in federal level or in the States level to the Federal Constitution; b) Judicial review on the States level to the federal level. Article 100 paragraph (1) of the Basic Law 1949 reviews laws in concrete according to the petition submitted by judge (concrete

the law (*legal review*) with the authority to review is given to the Supreme Court products that can be subject to a judicial review in the Supreme of Court are: 1) Law/Government Regulation for Substitute Law; 2) Government Regulation; 3) Presidential Regulation 4) Province Regulations; 5) Regency/Municipality regulation	f) Review of the States Constitution against the Federal Constitution. Article 144 of the Federal Constitutional Law 1920 stipulates that the Constitutional Court is granted the authority to decide *Constitutional complaint* (individual complaint) since 1975	judicial review/constitutional question) in the event doubt exist whether a rule is constitutional or the legitimacy of a rule that is going to be used in a concrete case he adjudges including: a) Judicial review in the federal level and in the States level against the federal level. b) Judicial review of the State's law against the federal law Article 100 paragraph (2) of the Basic Law 1949 stipulates that judge who adjudges concrete cases which contains a rule of international law is including the question related to: a) Whether a rule of international law has become the integral party of federal law? b) Whether such rule directly creates rights and duties for individual? Article 100 paragraph (3) of the Basic Law 1949 stipulates that the Constitutional Court of States in interpreting the Basic Law proposes to derogate from a decision of the Federal Constitutional Court or of the Constitutional Court

Based on the comparison of the judicial review model of the Constitutional Courts in Indonesia and Austria and Germany, there are several differences. If analyzing based on the characteristics and objects of Constitutional Review in various countries according to G Harutyunyan & Mavcic, there are 2 (two) characteristics of the judicial review. First, in the Preventative (A Prior) Review model is conducted in terms of legal norms before being passed. Second, the Repressive (A Posteriori) Review model, in terms of legal norms after promulgation (Harutyunyan & Mavcic, 1999).

The scope of the judicial review authority of the Austrian Constitutional Court is quite broad apart from examining enacted regulations; it is also authorized to examine a Bill (hereinafter referred to as RUU) which categorized as Preventative (A Prior) Review and also a Repressive (A Posteriori) Review. Meanwhile, Indonesia and Germany only grant authority to examine regulations that have been enacted (post-promulgation, the examination) which categorized as Repressive (A Posteriori) Review, which classified into abstract reviews and concrete reviews. Therefore, the judicial review model of Austrian Constitutional Court may lead to create harmonization and synchronization of law. Moreover, a guarantee of obedient to the decision of the Court is stipulated in the Austrian Law, the implementation of current and future law products, starting from the highest level of the constitution to the legal

regulations below it will be harmonious and synchronous. The establishment of regulations requires review of substances, in this case is the Bill to identify potential contradiction with the highest law or even the constitution. Therefore, the possibility of disharmony remains less. This model may guarantee the enforcement of human rights as stated in the Constitution.

In Germany, judicial review may only be conducted towards enacted regulation (Repressive (A Posteriori) review) with centralized characteristic model by which is conducted by the Constitutional Court, encompassing the highest to the lowest level of regulation thereby lead to harmonization and synchronization of law. Considering that there is no particular distribution of authority for judicial review in terms of regulation level between the Constitutional Court and the Supreme Court.

On the pther hand, in the Indonesian legal system as affirmed in the Fourth Amendment of the 1945 Constitution stipulates that the examination of Law against the Constitution with the authority for review is granted to the Constitutional Court and the authority of reviewing regulation under the law is granted to the Supreme Court. Based on this, the authority for judicial review in Indonesia implies a philosophy of power distribution in a hierarchical system and also the institution of authority between the Constitutional Court and the Supreme Court. Hence, the authority distribution in conducting judicial review may lead to disharmonization of law since the authority is granted to two different institution. Compared to the system adopted by Austria and Germany which exercised the system of authority separation, the Constitutional Court is the 'court of law' specifically adjudged judicial review cases of general rules. Meanwhile, the Supreme Court is the 'court of justice.

The issue of authority distribution refers to the judicial review of Law agains the Constitution to the Constitutional Court, which only implies as additional formulation of the Constitution which may easily be amended so as the conception of the judicial review in the Supreme Court does not impacted the authority of the Constitutional Court which majorly has the right to conduct judicial review. Such system implies that the formulation is lack of conceptual basis with regard to the conception of the material that is being reviewed comprehensively. Therefore, the possibility of contradiction between Supreme Court decision and Constitutional Court decision may recur. Therefore, the system of reviewing laws and regulations under the Constitution shall only be granted to the Constitutional Court in order to enable each Court to exercise its main authority. The Supreme Court adjudges the cases of justice and injustice for the people, while the Constitutional Court guarantees the constitutionality of all laws and regulations. Moreover, this option may also reduce the line of duty of the Supreme Court.

In the perspective of authority theory, politic of law theory and judicial review theory, the option to integrate the authority to conduct examination of regulations to the Constitutional Court is grounded on several legal reasons as follows:

1) To reduce the huge amount of work line in the Supreme Court. The authority of judicial review being only granted to the Constitutional Court will allow the Supreme Court to exercise its main duty adjudge concrete cases at the cassation level and reviewing cases of justice seekers;
2) To provide certainty and justice to the public due to discrepancy of interpretation or conflicting decisions between the Supreme Court and the Constitutional Court (political of law theory);
3) To realize efficient and effective process in terms of the time;
4) To achieve the main duty and functions of the Constitutional Court including State administration cases or certain constitutional cases within the framework of the constitution responsibly according to the will of the people and the purpose of democrachy.
5) The procedure of judicial review in the Constitutional Court is more transparent compared to the Supreme Court. The procedure in the Constitutional Court involves the applicant, respondent, and related parties in every stage of the hearing.

To address the various problems of judicial review, the proposing solution is amending related regulation, including the Constitution. In this case, the authority to conduct judicial review shall only be granted to the Constitutional Court, including the review agains

the Constitution and the law under law in order to achieve synchronization and harmonization of the material.

Table 3
COMPARISON OF THE DESIGN OF THE AUTHORITY OF THE CONSTITUTIONAL COURT WITH THE SUPREME COURT

Scope	Pre Amendment in Current Amandement IV (*Ius constitutum*)	Post Amendment (*Ius constituendum*)	Roles and Functions after Amendment
The exercise of judicial power in the Supreme Court	Article 24A section (1) The Supreme Court is authorized to adjudicate at the rate of cassation, to review the regulation under laws and regulations, and to have other authorities provided by the law	Article 24A section (1) The Supreme Court is authorized to adjudicate at the level of cassation and has another authority given by the law	The Supreme Court is the culmination of justice relating to demands for justice for individuals or other legal subjects facing criminal, civil, or military cases, therefore the main function of the Supreme Court is 'court of justice'.
The exercise of judicial power in the Constitutional Court	Article 24C section (1) The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections.	Article 24C section (1) The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections.	• The role and function of the Constitutional Court is mainly court of law; • The cases of State institutions or political institutions in the mean of public interest or relating to the examination of legal norms shall be conducted from the highest hierarchical level of the Constitution to the norms of the lowest hierarchical level in the hierarchical position.

The provision of judicial review in the Indonesian constitutional system is developing in line with the constitutional amendment. However, there is one issue on the duality of authorization to conduct judicial review which granted to the Constitutional Court and the Supreme Court. This authorization may lead to disharmony of law and resulting to the absence of harmonization and synchronization of law. Moreover, the absence of provision on authorization of judicial review of People's Consultative Council decree may lead to absolute power.

CONCLUSION

To achieve harmonization and synchronizing regulations, the authority to review the law and regulation under the Rule shall be granted to the Constitutional Court; meanwhile the People's Consultative Council decree may review its decree. Therefore, the amendment of Article 24A paragraph (1) and 24C paragraph (1) of The 1945 Constitution of The Republic of Indonesia followed by related law under it is required to be conducted.

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