JILS (JOURNAL *of* INDONESIAN LEGAL STUDIES)
The Interpretation of Justice and Fairness: Theories and Practices in Indonesia and Global Perspective
Published by Faculty of Law, Universitas Negeri Semarang, Indonesia
Volume 7 Issue 2, December 2022 ■ ISSN (Print) 2548-1584 ISSN (Online) 2548-1592

RESEARCH ARTICLE

POST AMENDMENT OF JUDICIAL REVIEW IN INDONESIA: HAS JUDICIAL POWER DISTRIBUTED FAIRLY?

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Submitted: April 25, 2022 **Revised**: Dec 11, 2022 **Accepted**: Dec 19, 2022

ABSTRACT

Distribution of power in Indonesian constitutional system not only occur amongst state organs but also within Indonesian judicial system. The Supreme Court and Constitutional Court share their power to review several regulations. The 1945 Constitution delivers power to review act against constitution for Constitutional Court and to review regulations below an act for the Supreme Court. However,

this distribution of power is vulnerable to contradicting each other, with the possibility of having clash of judgment. There is no guarantee that the Supreme Court will fully obey the Constitutional Court judgment. So, the research question needs to be solved such as judicial Review pre-the Amendment of the 1945 Constitution process, and judicial Review Post the Amendment of the Constitution implement, that will be main points of research purposes. Furthermore, the main problem is the distribution power between Constitutional Court and Supreme Court, whether have distributed fairly or not. Another problem after amendment is about disagreement amongst judges. Before amendment, judges were forbidden to show their disagreement clearly in the verdict, but now allowed. This fact has led to public distrust. They have questioned the legitimacy of the verdict having disagreement, whether should be obeyed or be denied.

Keywords: *Judicial Review, Post Amendment, Supreme Court, Constitutional Court, Distributed Fairly*

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Armia, M. S., Karim, Z. P., Tengku-Armia, H., Fahmi, C., Bin-Armia, M. S., & Musa, A. (2022). Post Amendment of Judicial Review in Indonesia: Has Judicial Power Distributed Fairly?. *JILS (Journal of Indonesian Legal Studies)*, 7(2), 525-556. https://doi.org/10.15294/jils.v7i2.56335

INTRODUCTION

THIS ARTICLE ARGUES that judicial review in Indonesia after the amendment of the 1945 Constitution has inflicted serious problems. It had no judicial review in Indonesia before the amendment, chiefly in the time of authoritarian government. In this era had given no space and mechanism for ordinary persons to express reluctance on acts, decrees, regulations, and other regulations. The mechanism of judicial review can demolish the impression of the 'sacred constitution,' from the time of the authoritarian, then following the democratic era post-amendment of the 1945 Constitution from 1998 to 2002.[1]

However, after amendment of Indonesian's constitution, the judicial review mechanisms have distributed to Supreme Court (SC) and Indonesian Constitutional Court. Unfortunately, both Indonesian Constitutional Court (MK) and the Supreme Court (SC) are still difficult to corporate each other, even in some cases have tended to show off their power to each other. In some cases, SC have disobeyed the MK judgment, activating some annulled articles decided by MK. The amendment has also given MK power to review several acts, which was a result of a prolonged process since 1945. Muhammad Yamin proposed the need for a judiciary institution to review laws against the 1945 Constitution[2], indicating a

[1] H Crouch, *Patrimonialism and Military Rule in Indonesia*, 31 WORLD POLIT. (1979); R Robison, *Authoritarian States, Capital-Owning Classes, and The Politics of Newly Industrializing Countries: The Case of Indonesia*, 41 WORLD POLIT. (1988); E. ASPINALL & G FEALY, LOCAL POWER & POLITICS IN INDONESIA (2003); A BOOTH & P MCCAWLEY, THE INDONESIAN ECONOMY DURING THE SOEHARTO ERA (1981).

[2] DANIEL S LEV, COLONIAL LAW AND THE GENESIS OF THE INDONESIAN STATE (2017); P CHURCH, A SHORT HISTORY OF SOUTH-EAST ASIA (John and Sons Wiley ed., 2017).

change of thinking of all people in Indonesia, especially those Indonesian figures regarding acts, constitution, and government administration.[3]

Reviewing act by the MK is new mechanism in the development of judicial review [4]. Since its establishment, the MK has received reports from people who are their rights and authorities violated by a certain act. The Indonesian people have become aware of this new function of the MK. Many cases have been proposed since 2004 and investigated by the MK with judgment on some [5]. The establishment of the MK has marked a new era of judicial review system in Indonesia. Judicial Review, which was a taboo discussion in authoritarian era, now can be addressed by the MK.[6]

Regarding this fact Jimly has claimed that an act is a product of democracy that is the will of the people. However, the substance of an act has not complied on justice and truth according to constitution[7]. If an act has contradicted directly with Indonesian constitution, in whole or part, will be considered not binding. It is an implication of duties given to the MK as the countervailing power as well as the guardian of democracy. The implementation of judicial review according to the Indonesian is not only conducted by MK, but also by Supreme Court. The judicial review conducted by the Supreme Court is only to review a number of regulations, which is not an act. Thus, the regulations can be outnumbering if compared with acts reviewed by MK.[8]

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[3] B. K HARMAN, MEMPERTIMBANGKAN MAHKAMAH KONSTITUSI: SEJARAH PEMIKIRAN PENGUJIAN UNDANG-UNDANG TERHADAP UUD (2013).

[4] Muchamad Ali Syafa'at, *Pengujian Ketentuan Penghapusan Norma dalam Undang-Undang*, 7 J. KONSTITUSI (2010). *See also* H M Sahat Radot Siburian, *Constitution Formulation and Amendment in Indonesian and American Legal System: A Comparative Study*, 3 JOURNAL OF LAW AND LEGAL REFORM (2022): 39-66.

[5] Bambang Sutiyoso, *Pembentukan Mahkamah Konstitusi Sebagai Pelaku Kekuasaan Kehakiman di Indonesia*, 7 J. KONSTITUSI (2010).

[6] *Id.*

[7] J ASSHIDDIQIE, PENGANTAR HUKUM TATA NEGARA (2006).

[8] Butt, S. & N Parsons, *Reining in Regional Governments? Local Taxes and Investment in Decentralised Indonesia*, 34 SYD. LAW REV. (2012); S BUTT, THE CONSTITUTIONAL

Although, the MK has equal position to the Supreme Court, Indonesian constitution has established a supervisory commission for SC, rather than for MK. The commission has named *Komisi Yudisial-KY* (Judicial Commission). This commission has duty to surveillance all activities done by SC's judges, regarding justices' ethical performance. The commission has significant role in upgrading the judiciary system in Indonesia. Because the amendment has emphasized goals of reform in reinforcing legal supremacy, and making institutions more clean, free, and authoritative. However, this fact has created jealousy between MK and SC. The question has appeared on why MK not supervised by *KY*? This question has still no answer and still creating public debate amongst constitutional law scholars.[9]

Thus, this article investigates on how judicial review in pre and post amendment of Indonesian constitution, the cases process if judges disagreeing, and how fair judicial power have distributed?

The method used in this article is black-letter law. It refers to the basic standard elements or principles of law, which are generally known and free from doubt or dispute. It describes the basic principles of law that are accepted by a majority of judges in most states. For example, it can be the standard elements for a contract or the technical definition of assault. This article method is characterized by the study of legal texts, including constitutional court and supreme court judgments in Indonesia. When people use this term, generally

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COURT AND DEMOCRACY IN INDONESIA (2015); Rosser, A. & J Curnow, *Legal Mobilisation and Justice: Insights From the Constitutional Court Case on International Standard Schools in Indonesia*, 15 ASIA PACIFIC J. ANTHROPOL. (2014).

9 KOMISI YUDISIAL REPUBLIK INDONESIA, STUDI PERBANDINGAN KOMISI YUDISIAL DI BEBERAPA NEGARA (2014); Mohd Yuhdi, *Analisis Yuridis Penyelesaian Sengketa Kelembagaan antara Komisi Yudisial dan Mahkamah Agung*, 24 J. ILM. PENDIDIK. PANCASILA DAN KEWARGANEGARAAN (2016). *See also* Ahmad Fauzan, Ayon Diniyanto, and Abdul Hamid, *Regulation Arrangement through The Judicial Power: The Challenges of Adding the Authority of The Constitutional Court and The Supreme Court*, 3 JOURNAL OF LAW AND LEGAL REFORM 3 (2022): 403-430.

the implication is that the law in question is accepted and not open to argument. On the other hand, with other types of laws, it may be widely open to interpretation.

JUDICIAL REVIEW BEFORE AMENDMENT OF THE 1945 CONSTITUTION

THE AUTHORITY TO REVIEW regulation was previously proposed by the founding fathers of Indonesia, since the earlier stage of Indonesia independence in 1945. Judicial review was the compulsory idea of the state-law. This idea had been emerged by Mohammad Yamin, who was a member of *Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia-BPUPKI* (Investigative Committee for the Preparation of Independence Indonesia). Mohammad Yamin had proposed a state organ, having authority to resolve disputes regarding the implementation of the constitution, and a supreme court had given authority to compare laws.[10]

Unfortunately, Mohammad Yamin's view was not widely accepted. One of his colleagues, Soepomo, disapproved of the idea, for four reasons. Firstly, was the basic concept of the constitution being established at that time, which did not emphasize on separation of power, but on distribution of power. Secondly, was that a judge was to implement the law instead of reviewing it. Next, was that the authority given to a judge to review the law contradicted with the supremacy concept of the *Majelis Permusyawaratan Rakyat- MPR*

[10] A.B KUSUMA, RISALAH SIDANG BADAN PENYELIDIK USAHA-USAHA PERSIAPAN KEMERDEKAAN INDONESIA (BPUPKI): PANITIA PERSIAPAN KEMERDEKAAN INDONESIA (PPKI): 29 MEI 1945-19 AGUSTUS 1945 (1992); MAHFUDH M.D., MEMBANGUN POLITIK HUKUM, MENEGAKKAN KONSTITUSI (2006).

(People's Consultative Assembly).[11] Lastly, was because the Republic of Indonesia was a new state, which just gained independent, and did not have experienced experts on judicial review. For those reasons, the idea was not adopted by the 1945 Constitution at that time.[12]

In that time, Soepomo also disagreed with Mohammad Yamin, claiming the term of 'judicial review' was a characteristic of the law of the United States [13]. It investigated every government action violating the constitution. He similarly added that the concept was unknown in the Netherlands, in which, in this regard, authority to review was the only concept known.[14] Soepomo's argument was influenced by Netherlands legal system. In that era, most of legal scholars from Indonesia chose Netherlands as the prime destination for studying law, including Soepomo who did his doctoral degree in Leiden, Netherland. He was involved directly in the legislation of the 1945 Constitution [15]. However, if Soepomo had shifted slightly to German or Austria at that time, instead of concentrating only in Netherlands, he would have found that the judicial review mechanism, through judicial process, was implemented in those countries[16].

I. THE DOMINATION OF SUPREME COURT

[11] D. K EMMERSON, INDONESIA BEYOND SUHARTO (2015); KARTASASMITA, G. & J. J STERN, *Reinventing Indonesia*, (2016).

[12] LAICA MARZUKI, MERAMBAH PEMBENTUKAN MAHKAMAH KONSTITUSI DI INDONESIA (2003).

[13] K. L HALL, JUDICIAL REVIEW AND JUDICIAL POWER IN THE SUPREME COURT: THE SUPREME COURT IN AMERICAN SOCIETY (2014); E. S CORWIN, THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS (2017).

[14] M.D., *supra* note 10.

[15] A.W BEDNER ET AL., KAJIAN SOSIO-LEGAL (2012).

[16] Gábor Halmai, *Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective*, 50 WAKE FOREST LAW REV. (2015); A. S Sweet, *Constitutions, Rights, and Judicial Power*, COMP. POLIT. (2017).

Indonesian Supreme Court has been established in Indonesian legal system since the Dutch and Japan colonialization. Thus, the development of justice in Indonesia was influenced by that period of time. In 1807, Mr. Herman Willem Deandels was appointed Governor General by Lodewijk Napoleon to defend Dutch colonialization in Indonesia.[17] Deandels made many changes in the area of judiciary established earlier by the Dutch, amongst others was changing *Raad van Justitie* into *Hooge Raad* in 1798.[18] In spite of the Indonesian constitution was legislated, Supreme Court as judiciary organ was not legislated in Indonesian constitutional organ. The Supreme Court have later established after amendment of Indonesian constitution. Then, the place of Supreme Court enacted in *Peraturan Pemerintah-PP* (Government Decree) Number 9 of 1946, insisted the capital city of Jakarta as place of the Supreme Court. Therefore, the Act on the Supreme Court gave staff positions in the Supreme Court and Attorney General.[19] This Act was amended in 1948 and assigned the Supreme Court as the highest federal court more than forty-six years [20]. Supreme Court have hosted four judiciary institutions, including the General Court, the Military Court, the Religious Court, and the State Administrative Court.

In this time, Supreme Court had authorities to reviewed: regulatory decision, administrative decision, and judicial decision.[21] The three norms can be reviewed in court or by other mechanisms. The Supreme Court has the following jurisdictions; *firstly*, conducting judicial review towards legislations under laws; *Secondly*, declaring invalid all legislations under laws if it violates the higher legislations;

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[17] C. A GROENEWOLD, *Herman Willem Daendels, katalysator van de Eenheidsstaat. F. Pereboom en HA Stalknecht ed., Herman Willem Daendels (1762-1818)*, (1989).

[18] RM. A.B KUSUMA, LAHIRNYA UNDANG-UNDANG DASAR 1945 (2004).

[19] SUPREME COURT, ACT NUMBER 7, (1947).

[20] KUSUMA, *supra* note 18.

[21] ASSHIDDIQIE, *supra* note 7.

lastly, decision on the invalidity of a regulation is made and based on a review at the level of cassation.[22] Those Supreme Court authorities in judicial review had not made sense, because regulation in Indonesia was too many, out of Supreme Court capacities. Thus, the cases of judicial review in Supreme Court almost not finished.[23]

However, after establishment of MK, Supreme Court's authorities has been significantly reduced. That consists of, *firstly* the Supreme Court is authorized to review legislations below acts towards the 1945 Constitution; *secondly* the Supreme Court declares invalid legislation under the 1945 Constitution if violating higher level legislations, or if not established in accordance with prevailing laws and regulations; *thirdly* the judgement on the invalidity of a legislation must be based on a review at the level of cassation, or based on direct request from the Supreme Court; *fourthly* the legislation declared invalid does not have any binding legal force; *lastly* the judgment must register in the State Gazette of the Republic of Indonesia within the maximum period of 30 (thirty) days since the judgment is declared [24]. The Supreme Court plays a key role in determining the validity of a legislation result, whilst the MK's authority is restricted to only review legislations under the Indonesian constitution.

II. THE LIMITLESSNESS OF PRESIDENTIAL POWER IN LAW REVIEW

[22] SUPREME COURT, ACT NUMBER 14, (1985).

[23] J ASSHIDDIQIE, *Creating a Constitutional Court for A New Democracy*, (2009); D. L HOROWITZ, CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA (2013).

[24] ASTAWA, G.P & S NA'A, DINAMIKA HUKUM DAN ILMU PERUNDANG-UNDANGAN DI INDONESIA (2008).

The authorities for reviewing several provisions are not restricted to judicial authorities only. The President, as executive institutions, had also authorities to review regulations, called executive review. The objects for executive review can divide into legislative products, and regulative ones. The legislative products are products of regulation involving parliament as legislators or co-legislators. The *Dewan Perwakilan Rakyat-DPR* (House of Representatives) have acted as the legislator or lawmaker, whilst the government as co-legislator because any bills which will be made into acts, need discussion as well as approval by the DPR and the President [25]. The president had unlimited authorities to carry out executive review to bylaws. These authorities have targeted autonomous provinces that controlled by the central government [26].

A bylaw legislated by *Dewan Perwakilan Rakyat Daerah-DPRD* (Regional House of Representatives) and Governor must submit to President within seven days after enacted. This mechanism has referred to the Act Number 32 of 2004 on the Legislating Law. Unfortunately, in this period of time, President can choose some bylaw to be annulled by President. Most of annulled bylaw have been indicated politically to contradict and not coherence with President political view.

The authorities of executive review have controlled bylaws using the preventive mechanism and repressive mechanism [27]. The

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[25] ASSHIDDIQIE, *supra* note 7.

[26] J. H. MCGLYNN & H SULISTYO, INDONESIA IN THE SOEHARTO YEARS: ISSUES, INCIDENTS AND IMAGES (2007); Martinez-Bravo, M., Mukherjee, P. & Stegmann. A, *The Non-Democratic Roots of Elite Capture: Evidence From Soeharto Mayors in Indonesia*, 85 ECONOMETRICA (2017).

[27] Butt, S. & N Parsons, *Judicial Review and the Supreme Court in Indonesia: A New Space for Law?*, 97 INDONES. SOUTHEAST ASIA PROGR. PUBL. CORNELL 55–85 (2014); A. F Fanani, *Shari'ah Bylaws in Indonesia and Their Implications for Religious Minorities*, 5 J. INDONES. ISLAM (2011).

control has covered all of bylaws from provinces and district in Indonesia.

Preventive mechanism has reviewed bylaw related to provincial budgeting, taxes, and spatial planning. Furthermore, preventive controlling has targeted any draft of bylaw related to provincial annual budget, tax and retribution, and spatial planning. Those bylaws are also part of responsibility of central government [28].

Repressive mechanism has only focused on larger type of bylaws, which have been not reviewed by preventive mechanism, including governor decree, mayor decree, and district bylaws. Repressive control applies all regulation passed by a local government, including local regulation to which preventive controlling has been conducted. Therefore, it is possible that one local regulation undergoes both types of controls [29]. The cancellation of local regulation is imposed by President through presidential decree, no more than sixty days since submission to central government. However, the evaluation process conducted by the regional government usually takes longer, delaying legal certainty ("The Act No. 32" 2004).

The executive review mechanism practiced by President has different mechanism with Supreme Court. The Supreme Court reviews bylaw to unsure a certain bylaw not violating the higher law, or the procedure of making bylaw is in accordance with the existing acts and regulations [30]. The government reviews a bylaw against a wider standard, higher level regulation, as well as public interest. Public interest review depends on a variety of social laws and norms

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[28] T HUXLEY, DISINTEGRATING INDONESIA?: IMPLICATIONS FOR REGIONAL SECURITY (2013).

[29] IMAM SOEBECHI, JUDICIAL REVIEW PERDA PAJAK DAN RETRIBUSI DAERAH (2012).

[30] W CASE, EXECUTIVE ACCOUNTABILITY IN SOUTHEAST ASIA: THE ROLE OF LEGISLATURES IN NEW DEMOCRACIES AND UNDER ELECTORAL AUTHORITARIANISM (2011); Butt, S. and Parsons, *supra* note 8.

such as lives of society, public services, and public orders (Article 136 "The Act No. 32" 2004). Cancellation of a bylaw done by presidential regulation or by Decree of the Ministry of Home Affairs, who acting on behalf the President. Cancellation of bylaws by Decree of the Ministry of Home Affairs should firstly confirm by the Presidential Regulation, if not, the bylaw is still valid (Article 145 "The Act No. 32" 2004).

III. JUDICIAL REVIEW POST THE AMENDMENT OF THE CONSTITUTION

A. The Role of Supreme Court

The amended constitution has created a new role for Supreme Court. Because judicial authorities have to be independent from other authorities, according to state based on the rule of law. The Supreme Court has been authorized to conduct judicial review, in addition to performing court in the level of appealing, and other authorities based on the prevailed acts and regulations [31]. The Supreme Court moreover may invalidate a number of regulations, including *Peraturan Pemerintah-PP* (Government Decree), *Peraturan Presiden-Perpres* (President Decree), *Keputusan Presiden- Keppres* (President Decision), *Peraturan Menteri-Permen* (Ministerial Decrees), and *Peraturan Daerah-Perda* (Provincial Bylaw).[32]

In implementing its function, the Supreme Court has acted passively, and only waiting for any objections submitted by local governments. However, the authorities of the Supreme Court in conducting judicial review of legislations under acts have been

[31] Al-Rasid, 2011; Husein, 2009; Sezgin, & Künkler, 2014

[32] Article 7 Forming of The Legislation, Act Number 12, 2011

restricted by the Indonesian Constitutional Court (hereinafter refered as MK, *Mahkamah Konstitusi*). The provisions being reviewed by the Supreme Court must be postponed, if the provision relates to act which is being reviewed by the MK until MK decides final judgement. The restriction is made because the MK has the authority to conduct judicial review as well (Article 55 "The Act No. 24" 2003).

The Supreme Court has also had authority to review only the substance of the provisions, not how the provisions have been made. The mechanisms contrast with the MK, which can also be reviewing a process of making an act assumed against the constitution. The standard used by the Supreme Court in conducting judicial review is whether the following statement, namely, *firstly* the local regulation contradicts higher level legislations; and/or *lastly* the local regulation is not made by complying with the prevailed acts and regulations [33].

If a bylaw has contradicted with the higher-level regulations or was not established in accordance with the prevailed acts, laws, and regulations, the Supreme Court will approve the review. Then, Supreme Court will propose and instruct the provincial government along with the provincial parliament to cancel such bylaw. The bylaw must annul in period of no more than 90 days from the time of the decision [34].

B. The Role of MK

Post amendment of Indonesian constitution have created several new state organs, including Indonesian Constitutional Court (MK). This Court have indicated as a law transplantation, which have not previously occurred in Indonesian legal system. The MK has

[33] M Mietzner, *Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of The Constitutional Court*, 10 J. EAST ASIAN STUD. (2010).

[34] Butt & Parsons, 2014

transplanted as Indonesian state organ referred to success story of Austrian Constitutional Court as well as Germany Constitutional Court [35]. Thus, the procedural mechanism has a close similarity with those constitutional court.

The MK has the authority to examine the law against the constitution, whilst the Supreme Court examines the existing regulations under the law, in order to not conflict with the act and other regulations. The problem faced by the MK is that the DPR often ignored even for years, particularly acts which needed amending. Therefore, the Supreme Court also still uses invalidated acts, which have been cancelled by the MK [36].

The future challenges faced by the MK are the problem of the credibility and dignity of the judiciary. To overcome this situation, firstly, are forceful measures to enforce MK's judgments. Another effort is the dissemination of information acts cancelled by the MK to all state institutions, especially the ordinary court under the auspices of the Supreme Court. For the moment, the MK judgments are only published on the website without a thorough dissemination. The MK needs additional authority to consolidate the supremacy and safeguarding of the constitution.

Gaffar stated that safeguarding the constitution means to reinforce the constitution, suggesting reinforcing laws and justice. The MK is given the position, authority, and constitutional obligation to

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[35] S Lagi, *Hans Kelsen and The Austrian Constitutional Court (1918-1929)*, 9 CO-HERENCIA (2012); P Kiiver, *The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of The National Legislature in The EU*, 16 EUR. LAW J. (2010); Klaushofer, R. & R Palmstorfer, *Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law*, 19 EUR. PUBLIK LAW (2013).

[36] GENERAL PRACTITIONER, ICC JUDGEMENT NUMBER 4/PUU-V, (2007).

guard and guarantee the implementation of the constitution [37]. Thus, an act is a political product which the political interest of law makers is centred in the act. As a political product, the substance of an act can contradict with the constitution's norms [38].

The additional authority is doing the testing on all legislation. So, there is consistency of all legislation from the constitution to the local regulations. Therefore, the Supreme Court, who had been holding the authority of judicial review of legislation under the law, can only concentrate with ordinary cases which are not reviewing regulations.

Soemantri have proposed that the judicial review is an authority to investigate and assess whether the substance of legislation is inline or contrary to the higher-level laws, and whether a certain power is authorized to establish certain legislation [39]. Therefore, the objects of judicial review are divided into two categories. There are namely, the substance of a provision, and procedure in establishing legislation. If a request is submitted to review a provision for both objects, what the judge has to review first is the procedure, because if a provision is established not based on the procedure regulated by the prevailed acts and regulations, the legislation shall be declared invalid, including its substance.

A judge has defined a provision by using two interpretations, including the original intent or non-original intent—commonly known as textual meaning and contextual meaning. The two interpretations have created endless argument between legal

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[37] JANEDJRI M GAFFAR, KEDUDUKAN, FUNGSI DAN PERAN MAHKAMAH KONSTITUSI DALAM SISTEM KETATANEGARAAN REPUBLIK INDONESIA (2009).

[38] HEANEY & M. T, LINKING POLITICAL PARTIES AND INTEREST GROUPS (2010); T HOBBES, ELEMENTS OF LAW, NATURAL AND POLITICAL (2013); CHOI NANKYUNG, LOCAL POLITICS IN INDONESIA: PATHWAYS TO POWER (2012).

[39] SRI SOEMANTRI, HAK MENGUJI MATERIAL DI INDONESIA (1986).

positivism and progressive law [40]. Another known theory in constitutional law is the living constitution theory, considered as a principle for progressive law [41].

According to the law hierarchy, the substance of a lower-level law must not violate or refer to that of higher-level law. To test whether an act contradicts with the constitution, the mechanism used is judicial review [42]. If an act, or any part in it, is declared to violate the constitution, then the act shall be cancelled by the MK. Through a judicial review authority, the MK becomes a state institution ensuring that there are no such acts or any provisions violating the constitution.

Above all, in the future MK have been expected to be the only Indonesian's state organ, owning authority to carry out the judicial review for all regulations. With single state organ having authority to review law and regulation, MK does need other states organ to share the authority of judicial, including with President who has executive power. Thus, the government will no longer be justified to use its power to review legislative product in the provincial level. Because the government is in the domain of executive, notwithstanding, the provincial parliament is in the domain of legislative, even in provincial or district level [43].

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[40] H. P GRAVER, JUDGES AGAINST JUSTICE ON JUDGE WHEN THE RULE OF LAW IS UNDER ATTACK (2015); W. J WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994).

[41] M. E Parrish, *The Evangelical Origins of the Living Constitution by John W. Compton (Review)*, 45 J. INTERDISCIP. HIST. (2015); SEKRETARIS JENDERAL MAHKAMAH KONSTITUSI, PERKEMBANGAN PENGUJIAN PERATURAN PERUNDANG-UNDANGAN DI MAHKAMAH KONSTITUSI-DARI BERPIKIR HUKUM TEKSTUAL KE HUKUM PROGRESIF (2010).

[42] KONSTITUSI, *supra* note 41.

[43] W. Krafchik & J Wehner, *The Role of Parliament in the Budgetary Process*, 66 SOUTH AFRICAN J. ECON. (1998); Himonga, C. & A Pope, *Mayelane v Ngwenyama and Minister for Home Affairs: A Reflection on Wider Implications*, 1 ACTA JURIDICA (2013); J Monar, *The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs*, 39 JCMS J. COMMON MARK. STUD. (2001).

In fact, the revocation of regulation by the government is in the form of ministry, because the government has delegated the power to the Minister of Home Affairs. There are two tools which are commonly used by the ministry to test the bylaw regulation: namely, preventive and repressive. The preventive process uses for regulation relating to financial regulations such as taxes, levies, layout, and budget. The repressive process uses for regulation which is indicated as a contradicting regulation during the legislation process. If the regulation has contradiction, it will not be passed to be a bylaw, and will be removed in earlier. The tested regulation by government is a means of control to avoid future problems in society.

C. The Boundaries of Presidential Authority in Law Review

In Indonesia constitutional system[44], there are several states organ having authorities to review bylaws. Thus, rights to review are not only owned by the Supreme Court but are also owned by the President and his ministries [45]. These authorities have purposed to fully control the local governments, whether they have a special autonomy, or only ordinary autonomy. Therefore, the mechanism of supervising and controlling, for the implementation of the local government, have been conducted by the President. This mechanism

[44] HOROWITZ, *supra* note 23; H FEITH, THE DECLINE OF CONSTITUTIONAL DEMOCRACY IN INDONESIA (2006); DENNY INDRAYANA, INDONESIAN CONSTITUTIONAL REFORM, 1999-2002: AN EVALUATION OF CONSTITUTION-MAKING IN TRANSITION (2008); Cammack, M. E. & R. M Feener, *The Islamic Legal System in Indonesia*, 21 PACIFIC RIM LAW POLICY J. (2012).

[45] W. R. TJANDRA & K. B DARSONO, LEGISLATIVE DRAFTING TEORI DAN TEKNIK PEMBUATAN PERATURAN DAERAH (2009).

has included supervising and controlling bylaws as well as governor decree.

The purposes of this supervision and controlling are to clearly implement the goal of local autonomy implementation. Thus, this implementation can steer provincial government to behave based on the highest norms in constitution. For those purposes, several regulations have been regularly established, including the government regulations as well as the ministry regulations.

The President, as the holder executive power, will not review a bylaw by his own hand. He delegates his executive review power through the Ministry of Home Affairs, who will review those regulations within two months (Article 145 "The Act No. 32 on the Local Government" 2004). The delegation of authority in this context is very reasonable, considering the number of provinces and districts in Indonesia are too many, and the President can concentrate on other tasks [46].

The former MK judge, Asshiddiqie has not fully agreed with those mechanisms. He asserted that local regulations cannot be cancelled unilaterally by the central government through the executive review mechanisms [47]. The central government is supposed not be given power to invalid the regulations by the Act of Local Government.[48] His opinion make sense, because as a Kelsen's follower, he wants to protect the local norms existing in the local regulations from being invalidated by the political process but must be through the judicial process in the Supreme Court instead.

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[46] Kemendagri, *Profil Daerah*, (2017), http://www.kemendagri.go.id/pages/profil-daerah (last visited Jul 31, 2017).

[47] J ASSHIDDIQIE, *The Constitutional Law of Indonesia*, (2009).

[48] ASSHIDDIQIE, *supra* note 7.

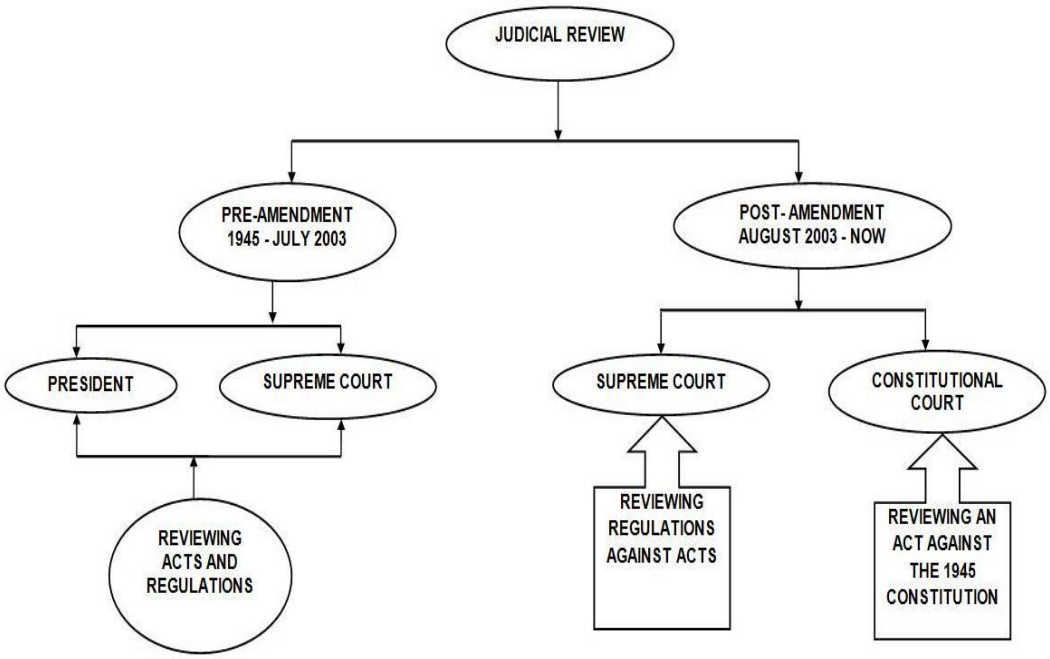

FIGURE 1. Judicial Review Pre and Post Amendment

The Figure 1 showed that judicial review mechanism in Indonesia have change dramatically. In 1945 until 2003, the law review mechanism enforced through the executive power done by President, and judicial power done by Supreme Court. However, in fact the domination of executive power was too strong, even overruled the Supreme Court. It is hard in that time to review a single regulation without the permission of President. Post amendment the 1945 Constitution, judicial review mechanism in Indonesia have showed a significant change. The executive power enforced by President have been clearly removed. President does not have authorities to review and to annul regulations come from parliamentary process, such as acts, provincial/ district regulations. So, the regulations review has shifted from executive power to judicative power. However, the shifting power has created another problem. Both Constitutional Court and Supreme Court seem reluctant to each other judgments. In fact, not all of Constitutional

Court judgement obeyed by Supreme Court. This fact has potential problem for law uncertainty.[49]

D. When Judges Disagreeing

One of the results from legal reform in Indonesia, post the constitutional amendment is the freedom of expression for judges, including in deciding case. Judges can disagree with the majority of the members of the assembly, and the opinion is included as an integral part of the court judgment. A different opinion is now commonly called a dissenting opinion.[50] Dissenting opinion have required as a part of democratic state. This mechanism is obligatory part of democratic judiciary process. Therefore, judge can show their expression of disagreement in the judgment and feeling comfortable to being out of majority.

In defining the term of dissenting opinion, Hussain have stated that the dissenting opinion is the opinion of a judge who disagrees with the decision or recommended opinion. But a distinct opinion is one in which a judge supports the view of the majorities. The dissenting is also when the judge finds case, which is hard to agree with the effective part of the judgment or opinion. Whereas in separate view the judge agrees with operative part but disagrees with the majority on the grounds of decision [51].

Furthermore, between dissenting opinion and concurring opinion has different meaning. Those terms, dissenting and

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[49] BUTT, S. & T LINDSEY, THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS (1981).

[50] M ZILIS, THE LIMITS OF LEGITIMACY: DISSENTING OPINIONS, MEDIA COVERAGE, AND PUBLIC RESPONSES TO SUPREME COURT DECISIONS (2015).

[51] IJAZ HUSSAIN, DISSENTING AND SEPARATE OPINIONS AT THE WORLD COURT (1984); R. B Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. LAW REV. (2010); ZILIS, *supra* note 50.

concurring, have established in Indonesian justice system. The dissenting opinion is the point of view of a judge who disagree with other judges since the beginning. The disagreeing can start from consideration, legal fact, legal consideration, and in verdict [52]. In contrast, the concurring opinion is that the legal fact and legal consideration are the same, but the verdicts are relatively different. The base statement, chiefly in the Indonesian criminal justice system, is indictment. If indictment has been different, it means a difference since the beginning. Although the guilty in a case is fairly clear, in responding an indictment could be different. It entered a dissenting opinion because of different indictment.[53]

Although there are three judges having the dissenting opinions, the panel can still take a decision. The court cannot let the dissenting opinion hinder decision making. For instance, in the existing mechanisms established in the Supreme Court, justices can be added if the case cannot be disconnected because there was a dissenting opinion.[54]

For comparative constitutional approach, Germany is an overview of the tradition of a dissenting opinion. This country has become the first European country to recognize dissenting opinion in the legislative drafting process. The dissenting opinion had legislated in the drafting of the Judicature Act *(Gerichtsverfassungsgesetz)* in 1877 [55]. The Germany's experience has been followed by Spain and

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[52] Djoko Sarwoko, *Dissenting Opinion di Mata Hakim Agung [Dissenting Opinion on the Eye of Supreme Court Judge]*, HUKUM ONLINE (2013), http://www.hukumonline.com/berita/baca/lt51f1005f68a4c/idissenting-opinion-i-di-mata-mantan-hakim-agung (last visited Dec 23, 2014).

[53] *Id.*

[54] *Id.*

[55] O. R. KISSEL & H MAYER, GERICHTSVERFASSUNGSGESETZ (1994); G Wendisch, *Die Strafprozessordnung Und das Gerichtsverfassungsgesetz: Grosskommentar*, 2 WALTER DE GRUYTER (1989); HANS-JOACHIM MUSIELAK, MIT GERICHTSVERFASSUNGSGESETZ (2012).

Portugal. These countries have permitted the use of dissenting opinions in their constitutional courts, started from the time of establishment of constitutional court.

Therefore, the dissenting opinions has been historically considered as German's model at that time, chiefly the end of the 1970s. But Indonesia has seemed like an infant state in the implementation of dissenting opinion system. This idea was first introduced in 1998 in the Act of Judicial Power and in the Act of the MK[56], furthermore a judgment taken by a judge could not necessarily be the same. The factors of interpretation in the trial, the legal knowledge of the judge, and their faith beliefs have significantly influenced the attitude of the judge whilst making decisions. The judgment of the judges' assembly has been taken during the deliberations process.[57]

The discussions and debates during the consultative meeting can influence judge decision, opinion, and the way of thinking. For instance, a junior judge for example may have a reluctant sense to oppose the opinion of senior judges. They are still reluctant and not brave enough to dissent with others, not only because of the seniority, but also from concern over other judges excluding them from other parties [58]. Before reaching a final judgment, a judge should be questioning to his heart, whether a judgment will be giving a fairness

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[56] BANKRUPTCY, ACT NUMBER 4, (1998); Sunarmi, *Dissenting Opinion Sebagai Wujud Transparansi Dalam Putusan Peradilan (Dissenting Opinion As Being Transparency In Court Ruling)*, 12 J. EQUAL. (2011).

[57] P DARBYSHIRE, SITTING IN JUDGMENT: THE WORKING LIVES OF JUDGES (2011); R. A POSNER, HOW JUDGES THINK (2010); HASTIE, R. & R.M DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING (2010).

[58] Wijayanta, Tata & Hery Firmansyah, *Perbedaan Pendapat dalam Putusan Pengadilan [Dissenting Opinion in the Court Judgment]*, PUSTAKA YUST. (2011).

judgment, or not. The judge must consider, assess, and choose the final judgment—which influences people's lives.

Dissenting opinion in some cases is important. The dissenting is a realization of the democratization and justice. In the process of dissenting opinion have appeared judicial transparency and independent opinion, requiring free speech. The dissenting has also prevented collusion, corruption and nepotism, as well as preventing the judicial mafia in court system.

The main debate concerning dissenting opinion, however, is whether the judgment should be attached within a judgment, or in the separate note. because attached within judgment does not show a tangible benefit, most importantly for those who were defeated in court.[59] For instance, the dissenting opinion in the MK have not had a strict correlation between constitutional justice and the publication of dissenting opinions.

Nowadays, MK's judges have published their disagreement in the MK verdict. This model has influenced Indonesian judiciary system, which seemed forbidden to apply before the amendment. Showing disagreement in the verdict can create academic discussion amongst law scholar, and also creating law transparency in judicial system. So, this phenomenon can develop legal thought in year to come, such as happening in European public law.[60]

However, looking to European experiences, even if today the majority of European constitutional courts are permitted to publish dissenting opinions, there is much heterogeneity as to how they make

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[59] SOEDARSONO, PUTUSAN MAHKAMAH KONSTITUSI TANPA MUFAKAT BULAT: CATATAN HAKIM KONSTITUSI SOEDARSONO [CONSTITUTIONAL COURT JUDGMENT WITHOUT CONSENSUS ROUND; A NOTE OF JUDGE SOEDARSONO] (2008).

[60] M Rasmussen, *Rewriting the History of European Public Law: The New Contribution of Historians*, 28 AM. UNIV. INT. LAW REV. (2012); CHALMERS, D., DAVIES, G. & G MONTI, EUROPEAN UNION LAW: CASES AND MATERIALS (2010); R SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW (2012).

use of the possibility. The non-MK- judges are still not tolerated in stating their dissent publicly. The MK's judges, who attach a higher value to institutional loyalty than common law judges, are still quite reluctant to dissent. In this respect, even in constitutional justice, the classic division between civil law and common law carries some weight, as the mentality of the jurist tends to differ.

The repetition of dissenting opinions discloses that there is still much difference in the mind-set of judges between common law and civil law systems. Therefore, an examination of dissenting opinions in constitutional courts can offer a very instructive and opened-eyed picture on continental European constitutional adjudication.

CONCLUSION

The distribution of power in judiciary system after amendment of constitution have not distributed fairly. This fact caused by the Constitution itself. Recently, the legal drafter of constitution has not drawn a clear line between MK and Supreme Court, chiefly in arranging authorities, so creating the clash of authorities between MK and Supreme Court. An invalidated act by MK can be easily validated by Supreme Court. Thus, the Constitution must state clearly in Constitution how far MK and Supreme Court can implement their authorities, on which verdict both MK and Supreme Court should obey each other's.

To fix this situation, the parliament needs to amendment the 1945 Constitution stating exactly the boundary amongst judiciary organs, chiefly in the authority of reviewing regulations, if not, a long-lasting conflict amongst judiciary system will be unable to stop. For instance, between Constitutional Court and Supreme Court will

always have clash of opinions, because both institutional organs strongly supported by interpretation of constitution.

In executive power, the President with his authority can easily cherry-pick local regulations, which he does not like to be effortlessly annulled. Thus, the review of local regulation, produced by the local parliament, is supposed to be reviewed through judiciary process, instead of political process done by the President. He is supposed to be given the authority only to review the product of the state government officer under his domain, particularly ministries and governors/mayors. If the President objects to fully accepting the local parliament product, he can be given a chance to carry out judicial review through judicial process, instead of political process.

The main problem of judicial review in Indonesia is the sharing power between Indonesian Constitutional Court and the Supreme Court. Kelsen has many times critiqued the role of Supreme Court to do judicial review. The Supreme Court has fully loaded with ordinary cases, including criminal case, private case, and so forth. The Supreme Court judges also not regularly handle the conflict of norms in a regulation, because their regularly task are to enforce a norm not to review or annul a norm. So, the 1945 Constitution should deliver the authority of judicial review only to constitutional court. Systematically and institutionally the constitutional court is well-prepared to review a norm through judicial review process.

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