

Considering Centralization Of Judicial Review Authority In Indonesia Constitutional System

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Abstract : *The objective of this research is to figure out and understand the way on how to centralize the judicial review authority of the both of judicial institutions. The research model is a literature study with a purpose to get the secondary data. Then the data was analyzed qualitatively accord with the main problem and relevant theories after classifying the secondary data in accordance with the problem. The classification then was systematized in order to be the basis in making final conclusions and suggestions. The results of this research, first, theoretically, the role of Supreme Court and Constitutional Court on implementing the judicial review is not interrelated. But practically, the division of judicial review authority in two different judicial institutions engenders serious legal problems and corrupts the principles of laws in advance. Second, without putting aside the role and existence of the Supreme Court, it can be assumed that the best way to centralize the judicial review process is to delegate the whole judicial review authority to Constitutional Court, centrally.*

Keywords: *centralization of authority, constitutional court, judicial review.*

I. Introduction

According to Article 1 paragraph (3) of constitution 1945 stated that "Indonesia is a state of law". Conception the state of law always refers to two different streams, namely state of law in meaning *rechtsstaat* and state of law within the meaning of the rule of law. (Janpatar Simamora, 2014: 547) Fundamentally, the principle of rule of law in Indonesia implied in The 1945 Constitution of the state of the Republic of Indonesia (UUD 1945) would be realized only if the entire governmental process is exercised according to the constitutional principles. In order to improve a set of guidances and principles of the governmental process to be more democratic and modern (MPR RI, 2006: 9), a lot of changes had been implanted into the original UUD 1945 by changing some of its original clauses and provisions, then injecting it with a bundle of fundamental principles in a new perspective, such as the assertion of separation of powers, tight and transparent check and balances systems, and the establishment of a variety of new institutions in order to accommodating public needs and responding any new constitutional values in the future (Maruarar Siahaan, 2010: 9).

There were two crucial reasons used in amending the original UUD 1945, i.e. irresolute provisions and clauses on separation of powers and multi-interpreted clauses. One of the most important constitutional changes in the third amendment process is the separation of judicial power into two judicial branches, the Indonesian Supreme Court (Mahkamah Agung/MA) and Indonesian Constitutional Court (Mahkamah Konstitusi/MK).

Based on the original constitution, judicial process was only held by a single judicial institution which was MA. But since MK had been constitutionally and explicitly stated in the new constitution, it means that all of the constitutional disputes emerging in the future is only decided by MK which is meant to be the sole constitutional court in Indonesia. It is worth noting that Indonesia is the 78th country in the world using a specific judicial branch in dealing with all kind of constitutional problems (Abdul Latif, et.al, 2009: 9).

Judicial power is regulated in article 24, 24A, 24B and 24C. Article 24 (2) explicitly mentions that "judicial power shall be exercised by a Supreme Court and its inferior courts, in the jurisdictions of general courts, the religious affair courts, the military tribunal, the state administration courts, and by a Constitutional Court". The essential meaning of the clause is that judicial process is exercised by two different institutions i.e. MK and MA.

The basic point in arranging the judicial power after the third amendment is how to share the judicial review authority between two judicial institutions, MK and MA. Article 24A (1) UUD 1945 states that MA is an institution for a final appeal or cassation level for every legal or civil disputes and MA is only intended to be an executor of judicial review on any kind of regulations made under law which means that the constitutionality of law becomes the object of judicial review exercised by MK (article 24C).

Judicial review can be defined as the examination by a country's court of the action of the legislative, executive, and administrative branches of government to ensure that those actions conform to the provision of the constitution (Vivian C. Madu (Mrs), 2012: 165). Judicial review is a valid evidence to implement the rule of law principles by placing the constitution to be the highest and most prominent legal source. Hierarchical legal

order is the basic principle of judicial review and a constitution is the highest fundament to any other regulations in below. The system is based on the theory which was initiated by Hans Kelsen called *stufenbau theorie*. The theory explained that legal order is a hierarchical system of norms. Furthermore, Hans Kelsen wrote that at the top of the constitution (as the basic norms), there is a higher, more fundamental and hypothetical norm which is called as *Grundnorm* (Sudikno Mertokusumo, 2009: 12).

Theoretically, in the beginning, it can be assumed that there is no any potential problem when judicial power was bestowed upon MK and MA, separately, because the objects of judicial review of these two institutions are very different. In one side, the constitutionality of laws is examined by MK but in another side, the legality or validity of the regulations made under law is tested by MA. But, if this combination were analyzed comprehensively and critically then we will find out that there are at least two potential problems on judicial review process could arise.

First, MK's judicial review decision would potentially overrule the MA's judicial review decision concerning the related regulations. The inexpediency between MK's and MA's judicial review process will not emerge only when MK's judicial review on law against the constitution is to be implemented first before judicial review on regulation made under such law is executed by MA. Because there is a legal obligation for MA to halt its judicial review process on inferior regulations against law when such law is in the middle of judicial review process by MK, until a final constitutional review decision is taken.

Such condition could bring so many complexities to Indonesian legal system, especially between MK and MA on how to synchronize the judicial review process. One of the difficult questions which needs to be answered is what if MK annulled a law which had been used by MA as the legal basis to examine an inferior regulation. What would be the legal grounds to resolve this complexity.

One of the examples on this problem had already happened in 2009 related to the determination of the national legislative member names of general election in 2009 according to the Law number 10 year 2008 on general election of DPR, DPD, and DPRD. At that moment, MK had decided that some provisions of the law were unconstitutional. But unfortunately, just before the decision was stated, the Regulation of KPU (General Election Commission) No. 15 year 2009 which was made based on that law was annulled by MA through judicial review process. In this case, the crucial point is the previous MA's judicial review decision on the annulment of Regulation of KPU was invalid and had no any legal bases (Janpatar Simamora, 2013: 390).

Second problem of a separated judicial review system is instead of being contrary to any law, inferior regulations are assumed to be contrary to the constitutional norms directly. For example, what if a local government's regulation or an executive regulation is not actually contrary to any superior laws but the constitution, then which institution would has a power to examine such regulation. These two problems mentioned before would be the potential obstacles in managing a separated judicial review system and it might bring negative effects to the implementation of rule of law principles in advance.

Term, Definition And A Brief History Of Judicial Review In Indonesia

Until the present time, there is no exact meaning of judicial review terminology in Indonesian language. In Indonesian legal system the "judicial review" means "hak uji material" or "hak menguji" whilst in the Dutch legal system it's called "toetsingrecht" (Siti Fatimah, 2005: 18) which is combined by two words "toetsing" means "to review" and "recht" means "right". But. There is still a few other different terminologies which can be regarded as close as to the meaning of judicial review namely, constitutional review and constitutional adjudication. These different terms are bringing up the difficulties to find out the exact or appropriate meaning of judicial review term itself. However, in conclusion, those different terms imply one similar understanding or key point that a power to review regulation is clearly executed by a judicial branch. Judicial review is the means by which a court determines the acceptability of a given law or other official action on grounds of compatibility with constitutional forms (Danielle E. Finck, 1997: 123).

Abdul Rasyid Thalib (2006: 227) explains that judicial review is an authority conferred upon a court or judicial branch to examine inferior regulation against superior one. The judicial review power was attributed in order to controlling and avoiding any contradictions among legislative and executive regulations or any other law against higher norm and also no contradiction among the equal regulations. Judicial review is a legal instrument for an ordinary or a specialized court or body to check or examine the validity and legality of inferior norms against higher norms by using the judicial or constitutional interpretation. It will give judges right reasons to nullify (or not) the executive's action, and another institution including the legislative branch.

In explaining the concept of judicial review, Fuady says that in constitutional perspective, judicial review means a power given upon a judicial branch like supreme court or constitutional court to nullify every action (do or not to do) committed by executive or legislative organs including to nullify a regulation or law on the ground of being contradictory to the constitution (Abdul Rasyid Thalib, 2006: 81-82). Judicial review defines constitutional climate and plays a key role in ensuring that the executive acts only according to law. Without it, we are closer to an authoritarian or even totalitarian state (Amy Street, 2013: 12).

From every perspective and definition mentioned by the scholars before, it can be concluded that judicial review is a judicial power to examine inferior norm against superior norm or the constitution. Judicial review, as we know, can involve judicial review of executive action and judicial review of legislation (Jeremy Waldron, 2014:6).

A bunch of theories support this perspective, specifically for Indonesian judicial review system. The principle of rule of law is one of the most fundamental base and it has been explicitly stated in Article 1 (3) of UUD 1945 that the state of Indonesia shall be a state based on law. Another thing which is used to support the perspective is the theory of separation of power. This theory says that judicial power shall be separated from the other two branches of power (executive and legislative). Its role shall be done impartially or independently. The last theory used in this research is the *stufenbau theorie* initiated by Hans Kelsen who said that legal order is hierarchical. In this theory, inferior norms shall not be contradictory to superior norms because the validity and legality of inferior norms come from the higher norms (superior norms).

In Indonesian constitutional history, the idea of judicial review had been discussed back then. Especially, when the founding fathers was convining to make the first constitution (UUD 1945) in BPUPKI's meeting held in 15 July 1945. Even so, the idea was none to be realized because of the incisive disagreement among them. Although the idea was not legally regulated, practically the judicial review process was applied especially when the new order regime was still prevailing. But the concept was not fully-implemented yet because the idea of judicial review was only executed on regulation made under law. Initially, this power was only held by MA but it did not include the constitutional review. The previous constitutional review was applied by MPR according to its power stated in UUD 1945 before the amendments.

Anticipatory judicial review was one of the judicial powers given to MA which was written in Article 25 of Law Number 14 Year 1970. This article stated that supreme court and inferior courts could decide and give responds or recommendations on every legal problems and questions submitted by any other governmental institutions when it is demanded. But unfortunately, the judicial power was not actively exercised (Mohammad Fajrul Falaakh, 2001).

This condition went on untill the third amendment of UUD 1945 was done in 2001 and since then, it becomes a milestone to the development of Indonesian judicial system. A number of crucial changes and ideas was put into UUD 1945 as new clauses especially related to the application of judicial review power. Among other things are the article 24 (2), 24A (1), and 24C (1).

Article 24 (2) :

Judicial power shall be exercised by a Supreme Court and its inferior courts, in the jurisdictions of general courts, the religious affair courts, the military tribunal, the state administration courts, and by a Constitutional Court.

Article 24A (1) :

The Supreme Court shall have the authority to hear a trial at the cassation level, to conduct judicial review of regulations made under any law against such law, and shall have other authorities as provided by law.

Article 24C (1) :

The Constitutional Court shall have the authority to hear cases at the first and final level the decisions of which shall be final, in conducting judicial review on laws against the Constitution, to decide disputes concerning to the authorities of state institutions whose authorities provided by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the results of general elections.

In this combination, constitutional review shall be exercised by MK and the judicial review on regulations made under law shall be exercised by MA. This judicial review model is rather similar to South Korean judicial review system. As once mentioned in a book written by Jimly Asshiddiqie (2010: 196), The first Ad-hoc Committee of MPR's Directing Board on constitutional review issues was inspired by South Korean judicial review system. In this model, judicial review on law against the constitution (constitutional review) is exercised by constitutional court (MK) and the judicial review on regulation made under any law against such law shall be exercised by supreme court (MA).

II. Research Method

The research method used in this research is a normative-analytical method. Soekanto and Mamudji (2007:14) explained that normative juridical analysis at least consists of five elements i.e. (i) research on the principles of law; (ii) research on the legal system; (iii) research on vertical – horizontal synchronization of law; (iv) the comparison of law, and; (v) the history of law. In line with the research method, this research aims to investigating a few regulations and laws which were so much related to judicial review system in Indonesia. It is

used to figure out an explanation about the appropriate model of judicial review system fits the role of MK and MA based on Indonesian constitutional system.

A Normative-analytical research model uses law materials as the secondary data (literature study). According to Sukanto (1986: 23), secondary data which can be used as the research objects in a normative analytical method are

Primary Law Materials

Primary law material is a set of main and binding legal source which must be related to the research problems. Regarding to this research, the following regulations and laws are considered to be the primary sources.

- a) The 1945 Constitution of the State of the Republic of Indonesia (UUD 1945) and the Amendments;
- b) Law No. 08 Year 2011 on Constitutional Court of the Republic of Indonesia;
- c) Law No. 48 Year 2009 on Judicial Power;
- d) Law No. 14 Year 1970 on Fundamental Guidelines of Judicial Power;
- e) Law No. 3 Year 2009 on Second Amendment to Law No. 14 Year 1985 on Supreme Court of the Republic of Indonesia;
- f) Law No. 12 Year 2011 on Regulations Making Procedure;
- g) Regulation of General Election Commission (KPU) No. 15 Year 2009 on Technical Guidances of Determination and Notification of General Election Result, Legislative Seats Allocation Procedure, Determination and Replacement of Elect Legislative Members of DPR, DPD, Provincial DPRD, and Regional/Municipal DPRD in General Election Year 2009.

Secondary Law Materials

It is a set of data used to help us to explain and describe further about the primary law materials. Among other things are references, judicial session proceedings, law journals, internet sources, and any other references.

Other Supporting Law Materials

It is a sorts of data used to provide supporting and useful informations to explain and describe more about the primary and secondary law materials as mentioned above. The sources are Indonesian Language Dictionary, Thesaurus, and Law Dictionary.

The main instrument of the analysis used in this paper is a library or documentary research. In this regard, the next process is to systematize the whole documentary data. The data is to be analyzed qualitatively according to the main problems and relevant theories. Then, to the related provisions of the primary legal documents, we make some inventories of these parts in line with the history of creation of judicial review process and those provisions are also to be compared to any relevant and compatible theories.

From the whole analytical process, we can make some conclusions and recommendations which can be used as the propositions to answer the research problems in this research. At this point, Mukti Fajar and Yulianto Achmad (2010: 41) said that one of the benefits of using normative analysis is to rephrase and preserve the system of norms in order to be consistent to the fundamental norms, the principles of law, the doctrines of law, contracts, the prevailing regulations, and to every upcoming law.

Effort Centralization of Judicial Review Authority in Indonesia Constitutional System

After the judicial review power on regulation made under law was transferred to MA and the constitutional review to MK, the synchronization of judicial review process of these two branches was automatically expected to happen, because the process of judicial review was executed separately. But in practice, we figure out that there is a potential institutional paradox or complexity in this model. This condition could possibly happen because Indonesian legal order was hierarchical and there is a principle of law which determines the validity and efficacy of inferior regulation. In the hierarchical legal order, inferior regulation shall submit to higher regulation. In this point, there should be a synchronized relationship between inferior regulation with superior one vertically.

According to the article 7 (1) of Law Number 12 Year 2011 on Regulations Making Procedure, the type and the order of Indonesian regulations system are as follows:

Article 7 (1)

- a. The 1945 Constitution of the State of the Republic of Indonesia (UUD 1945);
- b. TAP MPR
- c. Law/Executive Regulation in lieu of law on Emergency Affairs;
- d. Executive Regulation;
- e. Presidential Regulation;
- f. Provincial Government's Regulation; and
- g. Regional/Municipal Government's Regulation.

According to the article 24C (1) of UUD 1945, we can read that MK shall have the authority to hear cases at the first and final level the decisions of which shall be final, in conducting judicial review on laws against the constitution, to decide disputes concerning to the authorities of state institutions whose authorities provided by the constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the results of general elections. Then, the article 24A (1) states that the Supreme Court (MA) shall have the authority to hear a trial at the cassation level, to conduct judicial review of regulations made under any law against such law, and shall have other authorities as provided by law. In conclusion, it's obvious that the objects of judicial review to MA and MK are so different. Although, theoretically, it can be concluded that there is no problem with the separation of judicial review power between MK and MA, but in fact, there are at least two crucial and urgent issues by running this model. These problems could also disrupt the implementation of law principles.

First, MK's judicial review decision could possibly overrule MA's judicial review decision concerning the regulation examined by MA. The inexpediency of the two judicial process will not happen if the judicial review on law against the constitution is executed by MK prior to the judicial review on inferior regulation against such law is executed by MA. Then, what if the procedure runs in an opposite way?

In a simple description, when a regulation made under law is reviewed by MA and a final decision is taken based on such law, and after that, MK exercises the judicial review on such law against the constitution and nullifies the law, in which case, That law was the legal ground to MA's judicial review decision made before, then, what will happen with the MA's judicial review decision? Such a case did happen in Indonesia when MK's judicial review decision nullified MA's review decision. One of them happened in 2009 about the determination process of elect legislative member in a general election year 2009. In the beginning, on June 18th in 2009, MA had nullified the Regulation of KPU number 15 year 2009 according to the article 205, 211, and 212 of Law number 10 year 2008 on General Election of DPR, DPD, and DPRD.

But after the judicial review process was executed, on August 6th in 2009, MK did exercise a constitutional review on article 205, 211, and 212 of Law number 10 year 2008 (which was used before by MA as the legal grounds to examine and nullify the Regulation of KPU number 15 year 2009). MK decided that those articles were "conditionally constitutional". The meaning of "constitutionally constitutional" is that those articles shall be considered constitutional as long as they're being executed according to the MK's decision. As the consequence, The Regulation of KPU number 15 year 2009 is still valid and effective because MA's judicial review decision nullifying the KPU's regulation shall submit to MK's decision.

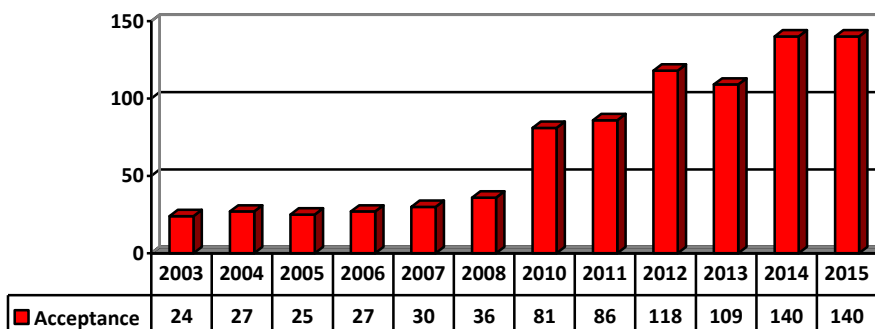
Second problem is when inferior regulations are not actually contradictory to higher regulation but to more higher regulation. For example, when a local government's regulation or executive regulation is not contradictory to law, but actually in a contradiction to the constitution, which institution does have a power to exercise the judicial review on those regulations?

If those regulations were submitted to MA to judicial review, then the question is, does MA have a power to do so, by considering the fact that MA has no power at all to exercise judicial review on regulation against the constitution? It could be quickly assumed that MA will deny the legal request and this could possibly happen to MK too. Because MK has no authority to execute the constitutional review on regulation made under the law against the constitution. (Janpatar Simamora, 2013: 397).

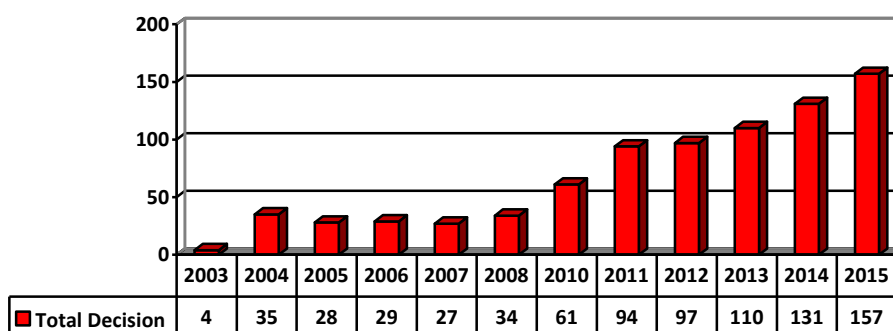
At least, we can assume that the idea of separation of judicial review power to the separated branches like MA and MK is frankly incompatible to be implemented. To resolve the problem, the centralization of judicial review power between MA and MK is one of the appropriate propositions. So we can still handle the development and the implementation of law principles. And it needs to be considered immediately to support the judicial branches to establish the laws, legal certainty, bring justice and benefits for all of the people.

The idea of judicial review synchronization doesn't mean that the answer to resolve the judicial problems is only by accepting a centralized model of judicial review as the preposition. There might be another way to take. But by considering the facts mentioned above, it is so reasonable accepting that a centralized model of judicial review would be so much effective to be applied. Then, by considering the performance records on judicial review between MA and MK, it can be sensibly assumed that MK is a way better to execute the whole process of judicial review than MA, not to mention MK's achievements, institutional supports, the quality of the employees, and its institutional integrity as the guardian of constitution and justice. It can be seen in a number of the following tables.

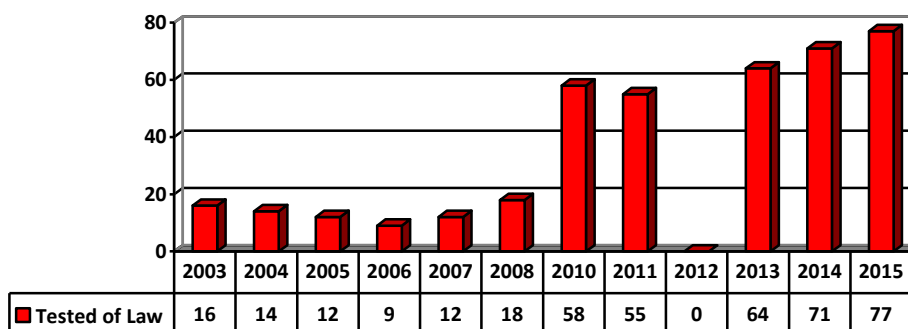
Recapitulation of Judicial Review Case Based on Case The Received Period of time 2003-2015



Recapitulation of Judicial Review Case Based on Total Decision Period of time 2003-2015



Recapitulation of Judicial Review Case Based on Tested Number of Law Period of time 2003-2015



Based on the tables, it appears that, so far, very active MK run judicial authority. The community it also provides hope and great confidence for MK. Therefore, authority of judicial review should be fully centralized under the authority of MK.

III. Conclusion And Suggestion

According to the findings and explanations above, the division of judicial review authority into two different judicial branches could engender a serious legal problem and corrupts the principles of rule of law in advance. Therefore, by considering the record of the judicial review process exercised by MK and MA, it's worth saying that it would be better to delegate the judicial review power to one central judicial branch rather than splitting it into two different and fully-separated bodies. According to its judicial records, achievements, and institutional supports, MK is a way better to handle the authority entirely.

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