

The Dynamics Implementation of Judicial Review by the Constitutional Court in Indonesia

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Abstract—research issues: **The Constitutional Court as the guardian, interpreter and guard the constitution factually, in the constitutional system of judicial review of the Constitution is a necessity, to create the ideal law. Research Method: legal normative-sociological research. The research location was in the Constitutional Court, at Jakarta. Techniques of collecting data were observation, interviews, and documents. The technique of analyzing data used descriptive qualitative analysis. The research results: Judicial review by the Constitutional Court from 2013 to 2017, view from the frequency of legislation testing against basic laws tends to be high. It can be understood that many laws are still not following the mandate of the constitution, and still do not fulfill the wishes and aspirations of society.**

Keywords— *judicial review, The Constitutional Court*

I. INTRODUCTION

After the fourth amendment of the 1945 Constitution of the Republic of Indonesia, the Indonesian constitutional system changed, including the presence of the Constitutional Court of the Republic of Indonesia in the Indonesian institutional structure in the judicial field. The Constitutional Court has main duties as the guardian, interpreters and constitutional guards[1]It has four authorities and one obligation as stipulated in article 24 C Sections (1) and paragraph (2) of the Constitution of the Republic of Indonesia. That four authority includes; to judge at the first and last level with a final decision to test laws against the Constitution (judicial review), to decide the dispute over the authority of state institutions, to decide the dissolution of political parties and to decide disputed election results. Whereas the Constitutional Court must give a decision about the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the Constitution.

This study focuses on one of the authorities of the Indonesian Constitutional Court that is *judicial review* of law against the constitution of the Republic of Indonesia. There are three main reasons why this study is important to conduct: first, the Constitutional Court has an important role in the constitutional system of Indonesia. According to John N. Hostettler and Thomas W. Washburne, the authority of the judicial review which is owned by the Constitutional Court can realize the principle of check and balance in the constitutional practice, since the Constitutional Court has the right to assert their constitutional or unconstitutional about a law that made by

the House of Representatives and signed by the President. [2] If a law contradicts with the constitution, then the Constitutional Court as an interpreter and guardian of the constitution has authorities to conduct a judicial review of law against the constitution on the first and the last level with a final decision. Therefore, the House of Representatives and the President must pay attention and consider the interpretations issued by the Constitutional Court, then we can say that the theory of *checks and balances* implemented effectively.

Second, the law as a product of the House of Representatives with the President (Article 20 Section (1) the 1945 Constitution of the Republic of Indonesia), need to be controlled by the Constitutional Court through a material test and formal test, whether the law is constitutional or unconstitutional? This is necessary as an efforts to improve the constitutional law and also to prevent the 1945 Constitution of the Republic of Indonesia is not misused.

Third, the decision of the Constitutional Court of the Republic of Indonesia throughout 2003 until the end of 2015 on legal testing towards the 1945 Constitution of the Republic of Indonesia, has decided 858 cases, and the number of cases granted was 203 decision (Kepaniteraan and the General Secretariat of the Constitutional Court). It means that judicial review which has been carried out by the Constitutional Court proved that the quality of law made by the House of Representatives is often contradicting with a legal order. Marzuki called the Constitutional Court as a 'negative legislator' which means that Constitutional review and the House of Representatives as a 'positive legislator' means as the legislators [3], [4]. Other assumptions that may arise is that judicial review is a balance of the establishment law[5], its main purposes are in establishing and maintaining democratic systems of government[6]

II. METHOD

This study was law research by using normative-sociological approach, through the study of dogmatic aspects of law, legal theory in analyzing the dynamics of judicial review in the Constitutional Court in Indonesia. The research location was in the Constitutional Court of the Republic of Indonesia, at Jakarta. The sources of this study consist of three kinds: first, the primary legal materials are legislation, the Constitutional Court decision related to judicial review. Second, the secondary legal materials are from legal expert opinions, principles of law,

legal theories and jurisprudence. Third, tertiary legal materials are from legal journals or articles. As for, the techniques of collecting data in this study were interview and document study. After the sources obtained, the researchers categorized or done *coding data* and analyzed it qualitatively with the normative-sociological approach to interpreting the sources descriptively.

III. RESULT AND DISCUSSION

The Constitutional Court in conducting its authority in the form of judicial review has demonstrated its sincerity in establishing, controlling and maintaining a constitutional legal system in Indonesia.

The results showed that since 2013 until 2017, the number of cases of judicial review of laws the 1945 Constitution of the Republic of Indonesia which have been registered at the Constitutional Court, there were 602 cases. This indicates that the Constitutional Court has a heavy-duty and has a strategic role in guarding, interpreting and maintaining the Constitution (the 1945 Constitution of the Republic of Indonesia)[6]. On the other hand, for the Constitutional Court, the authority of judicial review of the constitution towards the 1945 Constitution of the Republic of Indonesia raises a challenge, which creates decisions that reflect fairness, expediency, and legal certainty.

The Constitutional Court in deciding on a petition for Constitutional review against the 1945 Constitution of the Republic of Indonesia is based on the following main points as follows:

First, the principle of Act '*lex superior de rogat legi inferiori*', where the laws are sourced and based on the 1945 Constitution of the Republic of Indonesia. The implication, if those principles are implemented well, it is expected to create legal order in the national legal system in Indonesia. However, if the law contradicts to the Constitution, then it will be canceled for the legal[7]. Those principles cannot be separated from the hierarchy theory of legal norms which popularized by Hans Kelsen and Hans Nawiasky, stated that legal norms are gradual and layered in one hierarchical system of rules, where a legal norm that has a lower degree, is sourced and based on the legal norm which is a higher degree, it will continue until it reaches the basic norm (*grundnorm*) or constitution.

Second, in deciding petition for judicial review of law against the 1945 Constitution of the Republic of Indonesia, the Constitutional Court also pay attention to the formal principle and the material principle of the legislation. As for the formal principle in this study means the establishment of good legislation which includes clarity of purpose, institutional or proper officials, correspondence between the types, hierarchy and material content, can be implemented, usability and benefit, clarity of formulation and openness. Meanwhile, the principle of the material is the content of the legislation that must reflect the principle of protection, humanity, nationality, family, concern other people's interests, cultural diversity, justice, equality in law and governance, order and legal certainty and or balance, harmony and alignment[8]

The two benchmarks will influence the mindset of the judges in testing the constitutional of law, that it is not only based on the law manuscript but also considers living

values and habits that assume ideal in constitutional practice, such as ethical, moral and humanitarian values[9]

In 2013 until 2017, the recapitulation data of a judicial review of law with the 1945 Constitution of the Republic of Indonesia noted that there were 342 cases, and one of it was 117 cases decided by the Constitutional Court with the verdict "granted". The implication is that the Constitutional Court in its verdict state firmly that material, substance, paragraphs, articles, and/or parts of laws which in contrast with the 1945 Constitution of the Republic of Indonesia, and it is not legally binding[4]

It is arrange in the Law of the Republic of Indonesia Number 8 Year 2011 regarding the Constitutional Court, Article 57 Sections (1) and (2), and Section 60 set that, " about if the decision of the Constitutional Court with its verdict stated that the substance of articles, paragraphs and / or parts of laws opposing to the 1945 Constitution of the Republic of Indonesia, then the substance of the article, paragraph and / or parts of laws that is opposite with it does not have binding legal force. Similarly, regarding the decision of the Constitutional Court with its verdict stated that the establishment of law means does not meet the provisions of the establishment of law based on the 1945 Constitution of the Republic of Indonesia, because these laws do not have binding legal force.

The number of filing judicial review about the law on the 1956 Constitution of the Republic of Indonesia and many filings are granted, showed that the authority of the judicial review which owned by the Constitutional Court can be said as a normative-control indirectly to the House of Representatives and the President as state institution who create the law, in order to make them be careful in making the real legal into the articles that interpret transformation of transactional democracy, because it is obvious not prioritize the interests of society in general. On the other hand, constitutional awareness becomes an integral part and we must obey the instructions. Laica Marzuki stated how important to create a life that upholds the spirit of constitutional values[3]

In this research, we found an interesting thing about recapitulation of frequency law which proposed in judicial review or in this case, it called re-judicial review, it can be seen in the table 1 below:

TABLE 1. RECAPITULATION OF FREQUENCY LAWS EXAMINED IN JUDICIAL REVIEW BY THE CONSTITUTIONAL COURT IN INDONESIA

The frequency of judicial review	Year					Total
	2013	2014	2015	2016	2017	
1 time	62	56	46	51	52	267
2 to 6 times	20	22	27	25	29	123
7 to 11 times	2	7	0	3	6	18
12 to 16 times	1	1	1	0	0	3
17 to 21 times	0	0	0	0	3	3
22 to 31 times	0	0	1	0	0	1
Total	85	86	75	79	90	415

Source: Results of the research data, 2018

The data presented in table 1 shows quantitatively, the frequency of judicial review by the Constitutional Court in Indonesia tended to be high. The unique is that, there is a law that which is tested by the Constitutional Court of the Republic of Indonesia for 31 times, one of it is the Law of the Republic of Indonesia Number 8 Year 2015 about the changes of the law of the Republic of Indonesia Number 1 Year 2015 concerning the Determination of Government Regulation, replaced with the Law Number 1 Year 2014 on the Election of the Governor, the Regent and the Mayor become the Law. Of course, that laws contain political content which is concerned about the constitutional rights' of citizens in the political field, such as the right to become the head region (selected by the people).

That submission is valid, because, in that context, the Constitutional Court implies the test can still be submitted again, the petitioner can test the laws with substance, article, section, or the same cases that have been decided, their request can be granted by testing the laws again in condition, constitutionality has become the reason for the petitioner which is different. The interesting thing in this research is that the frequency of constitutional review is already submitted for 33 times has been submitted in judicial review, which of course it will affect the public paradigm.

We have been examined the existence of re-judicial review which is indicating a positive side as a normative control performed by the community through the material test, so that it can be balanced and also as a correction to the legal norm as in the Articles in order to make it not contradict with another higher norms gradually, it means that this seen as the part of the community's rights, either individual or group to control policymakers through material rights test. According to Salzberger, independence of rights test was very useful for the government because it reflects the policies made by the Government and the House of Representatives and this policy was sued in court, Matthew C. Step-Hanson called it "blame deflection"[10]

On the other hand, the existence of re-judicial review may indicate that the law is not populist and it does not maintain constitutionalism[11]. In that conditions, it can be assumed that the House of Representatives and the President used their authority by making policies that are the law, but unfortunately, it does not orient to the people interest

To avoid that authority, it is necessary comprehensive understanding about the principles of good legislation based on to the Law of the Republic of Indonesia Number 12 the Year 2011 concerning good legislation namely the clarity of purpose; institutional or proper officials; correspondence between the types and material content; can be implemented; usability and benefit; clarity of formulation and openness. The presence of judicial review also intended as an effort to reduce or to correct the principle of majority in making laws, because they do not necessarily speak the truth and justice.

Although in the view of Menachem Mautner, in fact, there is no right formula that can be used to balance between the need to realize the authority and the effectiveness of a legal norm, he asserted that there is a special mixture between them widely, even though there is

never an effective law", but the process of law formation in the form of legislation must be done carefully, conceptually with notice to the principle and purpose of that rule.

The position of legislator actually is not to act as judged party by the Constitutional Court, but at least for the President and the House of Representatives whose products legislation is being tested by the Constitutional Court, because the petitioner request has fulfil the requirements of Article 51 Section (1) the Law of the Republic of Indonesia Number 8 the Year 2011 will become a history in making the next legislation, to keep pay attention to constitutional rights, because the request of judicial review towards the law is one of the accumulation impacts from people interest' is not provided and inconsistency against the constitution.

Constitutional Court decision will bring legal consequences not only on the person or the petitioner but also including other state institutions. This will have an impact when judicial review against the constitution. The public interest will become differentiator with other matters such as civil law, criminal law, state administration matters which is related to personal interest' with other individuals. Even though with the government merely. This becomes the characteristic of a matter that proposed to the Constitutional Court and also as a differentiator between the procedure of criminal and other matters.

Nurrahman Aji Utomo thinks that the dynamics of the development of the test and the legislator has changed which is influenced and determined by the prevailing laws and regulations [4]. As for, the prevailing laws and regulations are sourced and based on the Constitution, therefore the Constitution occupies a central position in terms of testing and law formation. Furthermore, he recommends that it needs to be further action about the Constitutional Court's decision, primarily in the case of judicial review and optimizing the law formation with more participatory model, to achieve transparent law formation, strengthening in monitoring process with benchmarks of benefits and costs to realize a better law formation process[5]

IV. CONCLUSION

The existence of the Constitutional Court can make strengthens the mechanism of *checks and balances* in the system and constitutional practice in Indonesia. Either judicial review or formal test on the constitution is very beneficial for the government. Therefore, it will reflect the policy made by the House of Representatives and the President, namely whether legal products are populist or not? Is it constitutional or unconstitutional? In other words, the authority of the Constitutional Court's judicial review aims to create law and order, in this case, the law is appropriate and in line with the 1945 Constitution of the Republic of Indonesia.

So far, the decisions of the Constitutional Court is should be praised. However, we need to learn from the experiences related with the emergence of legal problems, namely the number of request/petitioner on judicial review is increased, and it is very difficult for the Constitutional Court of the Republic of Indonesia to ensure that the decision needs to be followed up by the

legislator. Therefore, the Constitutional Court needs to be strengthened as the judiciary power in deciding the case of judicial review, through coordination with the Constitutional Court with the executive and legislative institutions.

ACKNOWLEDGMENT

The writers would like to express their thankfulness to all parties, especially for the reviewer team who have provided valuable suggestion and guidance in writing this article.

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