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Pdf **The Problematics of a Separate Judicial Review through Two Institutions: A Case Study in Indonesia**

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The implementation of a judicial review, which is conducted separately by the Constitutional Court, and the Supreme Court, is considered to be inappropriate with the ideals of building a harmonious, and integrated legal system. In its practice, it has been proven that the authority of the judicial review to the Constitutional Court, and the Supreme Court encourages various issues. The substantive difference between the tests conducted by the Constitutional Court, and those conducted by the Supreme Court, is the process of examining the trial of the legislation under the law, and against the law by the Supreme Court was conducted in private. The cases handled by the Supreme Court were numerous, not just the legislation testing cases, but also the cases of cassation, and other legal matter. The relationship between the two judicial institutions, namely the Supreme Court, and the Constitutional Court, has become out of sync in the Indonesian constitutional system. The enforcement of the constitution integrally in all laws and regulations has become challenging to materialise. It becomes the loss of the power of the Supreme Court decision for a test case. When the norms that are used as the basis by the Supreme Court are declared unconstitutional by the Constitutional Court, there will be conflicting decisions.

Key words: *Judicial review, Constitutional court, Supreme court.*

Introduction

The concept of legal development is a fundamental and comprehensive matter and is not to be separated from the development of the people's rights. Legal development is when a

country creates a law, and it conducts legal development in the aim to guarantee the fundamental rights of the people, and protect the interests of the people (Gaffar, 1992). Legal development in Indonesia must begin through the legal system, which consists of the institutional, instrumental, and the behaviour of the legal subjects, and which holds the rights, and obligations or the subjective, and cultural elements (Asshidiqie, 2005). In line with this, the establishment of the Constitutional Court (MK) as an institution which currently has the authority to examine the Law on the 1945 Constitution of the Republic of Indonesia, is a means of fulfilling the constitutional rights of the community in guaranteeing a legal system that is in line with the Constitution, and the Pancasila values.

The judicial review which is applied in Indonesia, is essentially a concept based on the legislative theory of Hans Kelsen, where the 1945 Constitution of the Republic of Indonesia occupies the highest position in the order of Indonesian laws and regulations. The laws and regulations under the 1945 Constitution of the Republic of Indonesia, and respectively from the highest position, are: the People's Consultative Assembly Decree (MPR), The UU Law and Regulations of Law Replacement (Perppu), Government regulations, the Presidential decree, Provincial Regional Regulations, and the Regency or City Regulations. All of these laws and regulations must not contradict the 1945 Constitution of the Republic of Indonesia. In broader terms, there should not be a conflict between the laws and regulations which are inferior to the laws and regulations of a higher position. At least, this is what is theoretically desired. Therefore, in terms of implementing the state responsibility in law enforcement, the State must be able to maintain the validity of these legal norms, which certainly can lead to a conflict of norms, especially between the basic norms, and the norms below them. For this reason, Hans Kelsen points out the right to test as a mechanism that guarantees the constitution (Kelsen, 2013). Thus, the right to examine the norms of the law becomes an essential element in the concept of the state of law, and as its relation as a mechanism that can guarantee the implementation of law in society.

The testing or examination of the norms of the law is an assessment of the constitutionality value of the law itself, and in both informal, and material terms. Therefore, at the first level, the constitutionality test must be distinguished from the legality test. The Constitutional Court examines constitutionality, while the Supreme Court (MA) conducts the legality test (Asshidiqie, 2006).) In the judicial review case of the law, according to the 1945 Constitution, and the Constitutional Court Law, it was asserted that the Constitutional Court was only authorised to judge or test the constitutionality of law against the 1945 Constitution (Abrianto, Nugraha, Izzaty, 2019). The Constitutional Court cannot break the boundaries of constitutionality competence and roam into legality competence, which is not within its duties (Ali, 2015).

Through this perspective, a judicial review is intended to avoid conflicting laws and regulations, and minimise vertical normative conflicts. The existence of the two institutions of judicial power are given the authority to conduct a judicial review, even though the test object is distinguished, in practice, has led to a dualism of institutional functions. This dualism problem has raised questions related to the position of the Constitutional Court, which has the authority to examine the law against the 1945 Constitution of the Republic of Indonesia. Meanwhile, the Supreme Court only tests the regulations under the law against the law. New problems will arise when the Supreme Court decides that a statutory regulation under the law does not contradict the law. However, at the same time, the Constitutional Court decides that the law, which becomes the benchmark, is contrary to the 1945 Constitution of the Republic of Indonesia.

The placement of authority for a judicial review to the Constitutional Court, and the Supreme Court, and which is based on differences in test objects and touchstones, is inappropriate if it accompanies the ideals of building a harmonious, and integrated legal system. In practice, it has also been proven that the placement of the authority of the judicial review to the Constitutional Court, and the Supreme Court, has increased various problems. This includes the substantive difference between the tests or reviews conducted by the Constitutional Court, and those conducted by the Supreme Court. The process of examining the trial testing the legislation under the law, and against the law by the Supreme Court, which was conducted in private. The cases handled by the Supreme Court were numerous, not just the reviews or tests of the law cases and regulations under the law, but also the cassation cases, and other legal remedies, and reconsideration cases, which require extensive time to be resolved. The relationship between the two judicial institutions, namely the Supreme Court, and the Constitutional Court, has become out of sync in the Indonesian constitutional system. The enforcement of the constitution integrally in all laws and regulations has become challenging to materialise. It has occurred to the point that the Supreme Court's power is waning on the decision for cases, when the norms that became the basis by the Supreme Court were declared unconstitutional by the Constitutional Court, which will lead to conflicting decisions.

Methods

This type of research is a normative legal research (Soekanto, 2001). The research approach includes a legal approach, case approach, historical approach, and conceptual approach. The types of legal materials in this study consist of primary, and secondary legal materials. The main legal material consists of statutory regulations, official records of laws and regulations or court decisions. The secondary legal documents are legal materials that explain the primary legal materials, which help in analysing the problem, and the object of this research.

The analysis technique used in this research is a qualitative juridical analysis, which refers to research material that leads to the study of theoretical concepts, norms or legal norms. Wherein, the legal material or object of the research is not only in the form of a general overview, but there is also a legal analysis that provides arguments regarding how the practice of conducting a judicial review is conducted separately, and the ideal concept in conducting a judicial review, itself, in a country.

Results and Discussion

The review or testing of laws and regulations is closely related to the hierarchy of laws and regulations. The hierarchy theory of laws and regulations applied in Indonesia is a hierarchical theory delivered by Hans Kelsen, which is commonly known as '*stufenbau das recht*'. The theory stands where the rule of law is made in stages, and where the first legal norms become a reference for the other legal norms below. Moreover, the lowest legal norms must not conflict with the higher legal norms. In the case of the arrangement of the system or hierarchy of the highest norms (basic norms), it becomes a place of the dependence for the lower norms, where if the basic norms change, it will become damaged to the norms system underneath it.

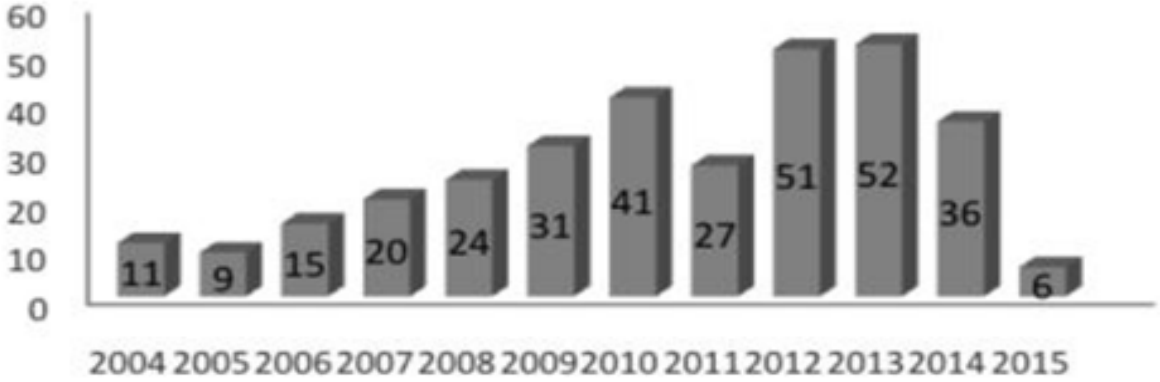
In Indonesia, this highest norm is contextualised in the form of a constitution. Therefore, this norm is the highest reason for the validity of norms or one norm created by another, and thus a legal order is formed in a hierarchical structure (Kelsen, 2008). The application of this theory in Indonesia can be seen in Article 7 of Law Number 12 of 2011 concerning Formation of Legislation, which states the highest hierarchy of laws is the 1945 Constitution of the Republic of Indonesia, is as follows: the statute of the people's consultative assembly (TAP MPR), laws or Government regulations, Presidential regulations, Provincial regional regulations, and Regency or City regional regulations. The regulations issued by State institutions, such as the DPR, the Legislative Assembly, the Supreme Court, the Constitutional Court, the Financial Audit Board, and others, are under the authority of the Supreme Court in the matter of testing, as long as the regulations are issued by the higher laws (Munawaroh, 2015). As a consequence of this hierarchy of laws and regulations, it is necessary to have a mechanism to maintain and ensure that these regulations are not to be abused. The mechanism is that there is a judicial review system for each statutory regulation or policy, as well as other government actions against laws that are of a higher level or the highest level, namely the Constitution. Without these consequences, the order will not be meaningful. Lower level legislation can still apply, even if it is contrary to higher-level legislation (Huda, 2011). There are currently two judicial institutions that have the authority to conduct a review of the laws and regulations, namely the Supreme Court, and the Constitutional Court, where there are different models regarding the testing or review of conditions.

In Article 24A, paragraph 1 of the Second Amendment to the 1945 Constitution, the Supreme Court is given the function of adjudicating at the cassation level, reviewing the statutory regulations under the law, and having other authorities granted by the law. Since before the Amendment to the 1945 Constitution, the authority has been stated in Law Number 14 of 1985 concerning the Supreme Court (Junaenah, 2016). Meanwhile, Article 24C, paragraph 1 of the 1945 Constitution authorises the Constitutional Court at the first, and last level of its final decision to review the law against the Constitution.

The practice of the Material Testing Rights (HUM) at the Supreme court includes formal testing (*formele toetsingsrecht*), and material testing (*materieele toetsingsrecht*). In addition to community groups and individuals who can become petitioners over the cases, the parties who consider their rights to be impaired by the enactment of statutory provisions under the law can also submit objections to the Supreme Court over the enforcement of a statutory regulation under the law. These parties are the indigenous community unit, as long as it is still alive, and by the development of the society, and the principles of the Republic of Indonesia, as stipulated in the law; or a public legal entity or a private legal entity.

To compare the state of the material testing right case decisions in the Supreme Court with the case decisions in the judicial review in the Constitutional Court, the inventory of decisions from the 2004–2014 period, which are based on data obtained from 6 July 2015, were assessed. The chart below provides a list of the case decisions in the Supreme Court, accompanied by the substance of the application, and within the period of 2004–2014.

Figure 1. Number of Decisions on Case for Material Testing Rights in the Supreme Court



Source: The Supreme Court

The bar diagram above shows the number of material testing right decisions in the Supreme Court from 2004 to 2015. The development of material testing right case reviews in the Supreme Court is fluctuating, but it can be reported to have an upward trend between the year to year. It can be seen that in 2004 there were 11 decisions, in 2005 there were nine decisions, in 2006 there were 15 decisions, in 2007 there were 20 decisions, in 2008 there were 24

decisions, in 2009 there were 31 decisions, in 2009 there were 31 decisions, in 2010 there were 41 decisions, in 2011 there were 27 decisions, in 2012 there were 51 decisions, in 2013 there were 52 decisions, in 2014 there were 36 decisions, and until 2015, there were six decisions. Thus, the total number of decisions of the Supreme Court's Law in 2004–2015 was 323 decisions. This data is sorted by case number, and in the amount of its verdict or decisions (Junaenah, 2016).

Even with the mapping of the number of requests, it is considered by several parties to remain small compared to the public interest to submit applications for a judicial review to the Constitutional Court. In questioning the openness of the hearing in the Supreme Court, several parties who made the petition assumed that this was due to the lack of publication by the Supreme Court. The public's awareness to submit a request for a judicial review of the regulations under the Act was still considered very low. The publication referred to by the petitioner is not merely a notification on how to proceed with the procedure, and how to access the verdict or decision, but is also the public transparency to know the proceedings sequences. This is the impact of the closed session, with no possibility to present expert witnesses, except only on reading the verdict (Junaenah, 2016). In addition, the verdict of the case review that enters the Supreme Court can be said to reduce the performance of the Supreme Court itself, because currently the Supreme Court has been burdened by four judicial powers. In contrast to this, in the implementation of the judicial review (PUU) at the Constitutional Court, there are provisions which mandate the disclosure of information by the Constitutional Court, namely: 1) that the Constitutional Court's decision is announced in a hearing which is open to the public; 2) the Constitutional Court session is open to the public, except for the deliberation of the judges; and 3) the Constitutional Court's decision to obtain permanent legal force since its finalisation in a plenary session is open to the public.

The Constitutional Court, since its establishment, is intended to protect the Constitution, and democracy. Referring to the track record of the Constitutional Court in its performance, the Constitutional Court is an institution that can maintain the Constitution and contribute to the development of law in Indonesia. As of 2003, and until 31 December 2017, as many as 1,134 cases were entered; 1,007 decisions were issued; 3,480 norms were tested; a total of 574 norms were amended, both in their article and paragraph revoked; and with a total of 234 Laws petitioned for review (Constitutional Court of the Republic of Indonesia, 2018).

With an excellent track record, as well as being trusted by the public in testing or reviewing the laws and regulations, especially the Law against the Constitution, it is hoped that the Constitutional Court should be able to test the constitutionality of statutory regulation.

According to Jimly Asshiddiqie himself, the implementation of constitutional rules on legislation can be effectively guaranteed, but only if a party other than the legislative body is

given the task of testing whether a legal product is constitutional or not. The law will not be able to be implemented, if according to this party, the legal product is unconstitutional (Asshidiqie, 2009). Therefore, it is necessary to establish a particular institution within the judicial authority to conduct a judicial review. This is intended to avoid potential losses that can occur in the enforcement of justice.

The potential loss of testing upon these two parties can be seen in several cases. First, in the testing or review of the Commission of General Election / KPU Regulation No. 15 of 2009 as amended by Regulation No. 26 of 2009 concerning the Technical Guidelines for Determination and Announcement of General Election Results, Procedures for Determination of the position Obtained, Determination of Selected Candidates and Replacement of Elected Candidates in the Election of Members of the People's Legislative Assembly, Regional Representative Council, Provincial Regional Representative Council, and Regency / Regional Representative Council of 2009 and Commission of the general election/KPU Regulation No. 259 of 2009 concerning Determination of the Obtaining of Political Party Position to Law No. 10 of 2008 concerning General Elections for Members of the House of Representatives, The Regional Representative Council, and the Regional People's Representative Council, the Supreme Court have decided the establishment of the Commission of The General Election/KPU Regulation is contrary to Law No. 10 of 2008, while the Constitutional Court in the review of Article 205 paragraph (4) of Law no. 10 of 2008 issued the verdict of conditional constitutional (Huda, 2012). Then, concerning Sharia Regional Regulations which began to spread in Indonesia. As reported by the Ministry of Law and Human Rights, there are at least 92 Sharia Regional Regulations that have been applied to be reviewed. Of the several Sharia Regulations in question according to the Ministry of Law and Human Rights, one example is the Tangerang City Regulation No. 8 of 2005 concerning the Prohibition of Prostitution. Tangerang City Regional Regulation No. 8 of 2005 concerning Prohibition of Prostitution which has been judicially reviewed by the Supreme Court is discriminatory and violates the constitutional rights of citizens. For example, Lilis Mahmudah, who is a victim of wrongful arrest, and later died due to depression, the Supreme Court decided the regulation under the Criminal Code (KUHP) (Hasani, 2013). This is due to the Supreme Court not having the authority to test these regulations with the human rights article in the Constitution. Similarly, this also occurs when a local regulation is tested through an executive review. As a result, when a review is not integrated into one place, it will lead to legal uncertainty. Thus, efforts to develop the law in Indonesia will not be applied optimally (Munawaroh, 2015).

Secondly, there will be complexity in conducting material tests against the regulations that indirectly conflict with the regulations of the right above its level, but also contrary to the higher regulations (Simamora, 2013). This occurs because the test is inadequate. Observing from several of these problems, it is necessary to have a renewal in the judicial power, which

specifically carries out its authority in reviewing the legislation, to guarantee the constitutional rights of each citizen.

The testing of the law or statutory regulations or a judicial review is a means to assess a higher regulation hierarchically. According to Brewer Carrias, a judicial review is essential as an effort from the judiciary to guarantee legislative, and executive actions by the highest law, namely the Constitution, and the values of Pancasila (Huda, 2011). The testing of law or statutory regulations is a logical consequence of Hans Kelsen's theory of the hierarchy of legal norms in the legal system, and which uses written legal regulations as the dominant source. This is a way to maintain consistency between the existing regulations (Asshidiqie, 2011).

The debate on the authority to examine the laws and regulations also emerged in the amendment to the 1945 Constitution during the 1999–2002 period. The discussions in the *Ad Hoc* Committee on the chapter on judicial power, as well as the debate over the testing of the laws and regulations also regard whether the authority of the Constitutional Court are only specific to review the Law against the Constitution, while the regulations under the Law are tested in the Supreme Court. The party that agreed to the review of the legislation was centred in the Constitutional Court. One of the reasons, as revealed by Sutjipto from F-UG, was that the right of the trial is centralised in one court, not two courts (Constitutional Court of the Republic of Indonesia, 2008). This statement reinforces the statement of Frans F.H. Matrutty, that the right to examine this material must be on the authority of the Constitutional Court, with the aim that the rule of law is tested for constitutionalism or as a form of guarding the constitutionality of law (the Constitutional Court of the Republic of Indonesia, 2008).

The concept of uniting a judicial review of all laws and regulations under the Constitutional Court is a form of legal progress. In essence, it may improve the legal system through instruments or substances, and institutions. Firstly, this idea can undoubtedly improve legal institutions to match their proportions, where later the Supreme Court can be focussed and consistent in its role as a court of justice, overshadowing the latest decisions in four judicial environments, so that the implementation of the Constitutional Court's authority as a court of the Constitution can be guaranteed in the event of reviewing the constitutional laws and regulations.

Secondly, to unite the testing of legislation, the improvement of instruments should be conducted through efforts to harmonise between laws and regulations. The structuring process between the laws and regulations can be carried out when the Constitutional Court conducts tests or reviews which are based on the Constitution (Huda, 2014), so that every review conducted by the Constitutional Court will naturally be automatically tested for its constitutionality. This idea is expected to be able to maintain the constitutional rights of the

society in testing regulations under the Law, so that later it will be indirectly in line with the 1945 Constitution of the Republic of Indonesia, where the review power over the 1945 Constitution of the Republic of Indonesia has become the principal authority by the Constitutional Court, as the court of law. This is in line with the role of the Constitutional Court as the protector of the citizens' constitutional rights. This means that the Constitutional Court, in its spirit, is a protector of citizens' constitutional rights, and the Court itself is a protector of human rights.

Thirdly, with the concept of proceedings at the Constitutional Court, which are currently carried out transparently and openly, as regulated in the Regulation of the Constitutional Court Number: 06 / PMK / 2005 regarding Guidelines for Law Practice in Case of Judicial Review, it is clear that almost all the provisions of proceedings at the Constitutional Court are carried out openly to the public. Thus, when the authority of the judicial review of regulations under the Law against the Constitution will later be transferred from the Supreme Court to the Constitutional Court, the judicial review of regulations under the law will be increasingly trusted by the public, as an accountable legal instrument. Moreover, it is even predicted that there will be an increase in the enthusiasm of the community in submitting their votes to test regulations under the Law that are deemed not by the Law, and/or the Constitution.

The consequence of transferring the authority to examine the regulations under the Law which were previously under the authority of the Supreme Court to the Constitutional Court would have to be considered in detail, as there would be several problems that needed to be anticipated. Whereas, in the concept of the Constitutional Court as the guardian of the Constitution, it does not necessarily mean that all laws and regulations will be directly confronted with the 1945 Constitution of the Republic of Indonesia, but the touchstones in the review must be adjusted to the material in stages, as it considers the substance of the norms used, and the touchstones will be various.

Therefore, as explained previously, to maintain the integrity of the legal system that is integrated with the Constitution, and the values of the Pancasila, every request for judicial review against the Law or what is referred to as a legality test that goes to the Constitutional Court, then the law which becomes the touchstone must be automatically tested for its constitutionality. If the petition for the judicial review is declared unconstitutional, then the review must be stopped, and the Constitutional Court must issue a verdict or decision on the Law which is considered unconstitutional (Sugiarto, 2020). However, if the latter, which is that the touchstone of the judicial review is declared by the Constitutional Court to be constitutional, then the review requested can be continued. This is explained in greater detail in the following diagram.

Figure 2. Concept Diagram of Judicial Review Integration in the Constitutional Court

Source: Hasil olahan Penulis.

The concept of this test does not necessarily make the Constitutional Court an active institution in conducting testing. However, regarding the legality review request, it needs to be considered as a request for a particular constitutionality review, so that the request for legality review is used as a basis for the Constitutional Court to conduct a particular constitutionality review for the law that becomes the touchstone.

Based on the above elaboration, it is not only the norms at the operational level that need to be updated, but also the norms at the level of the 1945 Constitution of the Republic of Indonesia, as a *staatverfassung* for a State. Through this, the opportunities for developing the operational norms that have the potential to harm the ideals of the founding fathers, and the Indonesian constitutional values, can be closed. Therefore, it is necessary to have a form of reconstructed judicial power at the level of the Constitution, as a form of legal consistency for the enforcement of the Court of Justice, and the Court of the Constitution.

Conclusion

Based on the explanation that has been stated by the author, several conclusions can be formulated. Firstly, the mechanism of a judicial review in Indonesia is currently carried out through two judicial powers, namely by the Supreme Court, and the Constitutional Court. Both institutions are authorised to conduct judicial reviews in different corridors, and objects. The form of the separation of the object of the implementation of a judicial review for the two judicial powers tends to cause problems in law enforcement, which to this date, remain unavoidable. This is evidenced by the relationship between the two judicial institutions becoming unsynchronised with the Indonesian constitutional system. Wherein, the enforcement of the Constitution, which occurs integrally within all laws and regulations, has become difficult to realise. This has occurred to the effect of a loss of power by the Supreme Court in case reviews, when the norms used as the basis for the Supreme Court in handing

down a decision are declared unconstitutional by the Constitutional Court. Moreover, this carries the possibility that it will lead to conflicting decisions. The process of hearing the trial of testing the statutory provisions under the law are conducted in private in the Supreme Court. Furthermore, the cases handled by the Supreme Court are numerous, that is, not only cases of a judicial review of the statutory law under laws, but also cases of cassation, and other legal remedies, and reconsideration cases, which incidentally require time for settlement. Thus, the model of conducting a two-roof judicial review has imposed an obstacle to the legal development process in Indonesia.

Secondly, a judicial review is a means to protect the public from the arbitrariness of the State, and over the various legal products that it creates. Besides, the judicial review is a form of guarantee of the Constitution, and to ensure that all laws and regulations are integrated with the values of Pancasila, as a *staatfundamentalnorm*.

To guarantee it all, it requires the application of an integral judicial review in a particular institution, namely the Constitutional Court. Thus, later, all laws and regulations can be structured effectively (Winarsi, Abrianto, Nugraha, Danmadiyyah, 2020). Moreover, with this idea, the enforcement of the Constitution, and the resolution of a series of problems that currently continue to hang within the Indonesian judiciary, will be able to be resolved. As we know, upholding the supremacy of the Constitution, and legal certainty is the basis for the absolute obligations of a State that adheres to the concept of the rule of law. Therefore, it is imperative to implement the uniting of the authority of judicial review under the Constitutional Court, as a form of the country's consistency in maintaining the values of the Pancasila, and the Constitution.

As mentioned earlier, legal development in Indonesia must begin through the legal system, which includes more equitable institutional reconstruction. Therefore, there is a need for a fifth amendment to the 1945 Constitution of the Republic of Indonesia, which would move the provisions of the judicial review power in the Supreme Court to the Constitutional Court, and in the context of reconstructing the Constitutional Court as the sole institution which implements the judicial review of all laws and regulations.

For this reason, when an amendment is made, it should be carried out with consideration of greater supervision by the Constitutional Court, as a result of the possibility of an overload of cases in the Constitutional Court. This serves in addition to the potential for an increasingly authoritarian Constitutional Court, as well as other comprehensive, and fundamental considerations under the requirements of the objective from the implementation of the amendment. It should also be noted that the Constitution must be concise, general, and fundamental. Even if changes are made to the Constitution, the Constitution must be treated with respect.

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The Problematics of a Separate Judicial Review through Two Institutions: A Case Study in Indonesia

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The implementation of a judicial review, which is conducted separately by the Constitutional Court, and the Supreme Court, is considered to be inappropriate with the ideals of building a harmonious, and integrated legal system. In its practice, it has been proven that the authority of the judicial review to the Constitutional Court, and the Supreme Court encourages various issues. The substantive difference between the tests conducted by the Constitutional Court, and those conducted by the Supreme Court, is the process of examining the trial of the legislation under the law, and against the law by the Supreme Court was conducted in private. The cases handled by the Supreme Court were numerous, not just the legislation testing cases, but also the cases of cassation, and other legal matter. The relationship between the two judicial institutions, namely the Supreme Court, and the Constitutional Court, has become out of sync in the Indonesian constitutional system. The enforcement of the constitution integrally in all laws and regulations has become challenging to materialise. It becomes the loss of the power of the Supreme Court decision for a test case. When the norms that are used as the basis by the Supreme Court are declared unconstitutional by the Constitutional Court, there will be conflicting decisions.

Key words: *Judicial review, Constitutional court, Supreme court.*

Introduction

The concept of legal development is a fundamental and comprehensive matter and is not to be separated from the development of the people's rights. Legal development is when a

country creates a law, and it conducts legal development in the aim to guarantee the fundamental rights of the people, and protect the interests of the people (Gaffar, 1992). Legal development in Indonesia must begin through the legal system, which consists of the institutional, instrumental, and the behaviour of the legal subjects, and which holds the rights, and obligations or the subjective, and cultural elements (Asshidiqie, 2005). In line with this, the establishment of the Constitutional Court (MK) as an institution which currently has the authority to examine the Law on the 1945 Constitution of the Republic of Indonesia, is a means of fulfilling the constitutional rights of the community in guaranteeing a legal system that is in line with the Constitution, and the Pancasila values.

The judicial review which is applied in Indonesia, is essentially a concept based on the legislative theory of Hans Kelsen, where the 1945 Constitution of the Republic of Indonesia occupies the highest position in the order of Indonesian laws and regulations. The laws and regulations under the 1945 Constitution of the Republic of Indonesia, and respectively from the highest position, are: the People's Consultative Assembly Decree (MPR), The UU Law and Regulations of Law Replacement (Perppu), Government regulations, the Presidential decree, Provincial Regional Regulations, and the Regency or City Regulations. All of these laws and regulations must not contradict the 1945 Constitution of the Republic of Indonesia. In broader terms, there should not be a conflict between the laws and regulations which are inferior to the laws and regulations of a higher position. At least, this is what is theoretically desired. Therefore, in terms of implementing the state responsibility in law enforcement, the State must be able to maintain the validity of these legal norms, which certainly can lead to a conflict of norms, especially between the basic norms, and the norms below them. For this reason, Hans Kelsen points out the right to test as a mechanism that guarantees the constitution (Kelsen, 2013). Thus, the right to examine the norms of the law becomes an essential element in the concept of the state of law, and as its relation as a mechanism that can guarantee the implementation of law in society.

The testing or examination of the norms of the law is an assessment of the constitutionality value of the law itself, and in both informal, and material terms. Therefore, at the first level, the constitutionality test must be distinguished from the legality test. The Constitutional Court examines constitutionality, while the Supreme Court (MA) conducts the legality test (Asshidiqie, 2006).) In the judicial review case of the law, according to the 1945 Constitution, and the Constitutional Court Law, it was asserted that the Constitutional Court was only authorised to judge or test the constitutionality of law against the 1945 Constitution (Abrianto, Nugraha, Izzaty, 2019). The Constitutional Court cannot break the boundaries of constitutionality competence and roam into legality competence, which is not within its duties (Ali, 2015).

Through this perspective, a judicial review is intended to avoid conflicting laws and regulations, and minimise vertical normative conflicts. The existence of the two institutions of judicial power are given the authority to conduct a judicial review, even though the test object is distinguished, in practice, has led to a dualism of institutional functions. This dualism problem has raised questions related to the position of the Constitutional Court, which has the authority to examine the law against the 1945 Constitution of the Republic of Indonesia. Meanwhile, the Supreme Court only tests the regulations under the law against the law. New problems will arise when the Supreme Court decides that a statutory regulation under the law does not contradict the law. However, at the same time, the Constitutional Court decides that the law, which becomes the benchmark, is contrary to the 1945 Constitution of the Republic of Indonesia.

The placement of authority for a judicial review to the Constitutional Court, and the Supreme Court, and which is based on differences in test objects and touchstones, is inappropriate if it accompanies the ideals of building a harmonious, and integrated legal system. In practice, it has also been proven that the placement of the authority of the judicial review to the Constitutional Court, and the Supreme Court, has increased various problems. This includes the substantive difference between the tests or reviews conducted by the Constitutional Court, and those conducted by the Supreme Court. The process of examining the trial testing the legislation under the law, and against the law by the Supreme Court, which was conducted in private. The cases handled by the Supreme Court were numerous, not just the reviews or tests of the law cases and regulations under the law, but also the cassation cases, and other legal remedies, and reconsideration cases, which require extensive time to be resolved. The relationship between the two judicial institutions, namely the Supreme Court, and the Constitutional Court, has become out of sync in the Indonesian constitutional system. The enforcement of the constitution integrally in all laws and regulations has become challenging to materialise. It has occurred to the point that the Supreme Court's power is waning on the decision for cases, when the norms that became the basis by the Supreme Court were declared unconstitutional by the Constitutional Court, which will lead to conflicting decisions.

Methods

This type of research is a normative legal research (Soekanto, 2001). The research approach includes a legal approach, case approach, historical approach, and conceptual approach. The types of legal materials in this study consist of primary, and secondary legal materials. The main legal material consists of statutory regulations, official records of laws and regulations or court decisions. The secondary legal documents are legal materials that explain the primary legal materials, which help in analysing the problem, and the object of this research.

The analysis technique used in this research is a qualitative juridical analysis, which refers to research material that leads to the study of theoretical concepts, norms or legal norms. Wherein, the legal material or object of the research is not only in the form of a general overview, but there is also a legal analysis that provides arguments regarding how the practice of conducting a judicial review is conducted separately, and the ideal concept in conducting a judicial review, itself, in a country.

Results and Discussion

The review or testing of laws and regulations is closely related to the hierarchy of laws and regulations. The hierarchy theory of laws and regulations applied in Indonesia is a hierarchical theory delivered by Hans Kelsen, which is commonly known as '*stufenbau das recht*'. The theory stands where the rule of law is made in stages, and where the first legal norms become a reference for the other legal norms below. Moreover, the lowest legal norms must not conflict with the higher legal norms. In the case of the arrangement of the system or hierarchy of the highest norms (basic norms), it becomes a place of the dependence for the lower norms, where if the basic norms change, it will become damaged to the norms system underneath it.

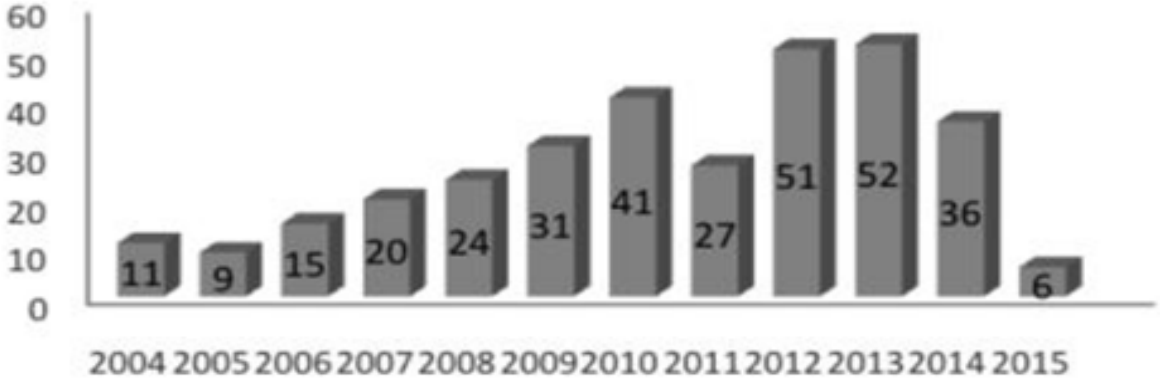
In Indonesia, this highest norm is contextualised in the form of a constitution. Therefore, this norm is the highest reason for the validity of norms or one norm created by another, and thus a legal order is formed in a hierarchical structure (Kelsen, 2008). The application of this theory in Indonesia can be seen in Article 7 of Law Number 12 of 2011 concerning Formation of Legislation, which states the highest hierarchy of laws is the 1945 Constitution of the Republic of Indonesia, is as follows: the statute of the people's consultative assembly (TAP MPR), laws or Government regulations, Presidential regulations, Provincial regional regulations, and Regency or City regional regulations. The regulations issued by State institutions, such as the DPR, the Legislative Assembly, the Supreme Court, the Constitutional Court, the Financial Audit Board, and others, are under the authority of the Supreme Court in the matter of testing, as long as the regulations are issued by the higher laws (Munawaroh, 2015). As a consequence of this hierarchy of laws and regulations, it is necessary to have a mechanism to maintain and ensure that these regulations are not to be abused. The mechanism is that there is a judicial review system for each statutory regulation or policy, as well as other government actions against laws that are of a higher level or the highest level, namely the Constitution. Without these consequences, the order will not be meaningful. Lower level legislation can still apply, even if it is contrary to higher-level legislation (Huda, 2011). There are currently two judicial institutions that have the authority to conduct a review of the laws and regulations, namely the Supreme Court, and the Constitutional Court, where there are different models regarding the testing or review of conditions.

In Article 24A, paragraph 1 of the Second Amendment to the 1945 Constitution, the Supreme Court is given the function of adjudicating at the cassation level, reviewing the statutory regulations under the law, and having other authorities granted by the law. Since before the Amendment to the 1945 Constitution, the authority has been stated in Law Number 14 of 1985 concerning the Supreme Court (Junaenah, 2016). Meanwhile, Article 24C, paragraph 1 of the 1945 Constitution authorises the Constitutional Court at the first, and last level of its final decision to review the law against the Constitution.

The practice of the Material Testing Rights (HUM) at the Supreme court includes formal testing (*formele toetsingsrecht*), and material testing (*materieele toetsingsrecht*). In addition to community groups and individuals who can become petitioners over the cases, the parties who consider their rights to be impaired by the enactment of statutory provisions under the law can also submit objections to the Supreme Court over the enforcement of a statutory regulation under the law. These parties are the indigenous community unit, as long as it is still alive, and by the development of the society, and the principles of the Republic of Indonesia, as stipulated in the law; or a public legal entity or a private legal entity.

To compare the state of the material testing right case decisions in the Supreme Court with the case decisions in the judicial review in the Constitutional Court, the inventory of decisions from the 2004–2014 period, which are based on data obtained from 6 July 2015, were assessed. The chart below provides a list of the case decisions in the Supreme Court, accompanied by the substance of the application, and within the period of 2004–2014.

Figure 1. Number of Decisions on Case for Material Testing Rights in the Supreme Court



Source: The Supreme Court

The bar diagram above shows the number of material testing right decisions in the Supreme Court from 2004 to 2015. The development of material testing right case reviews in the Supreme Court is fluctuating, but it can be reported to have an upward trend between the year to year. It can be seen that in 2004 there were 11 decisions, in 2005 there were nine decisions, in 2006 there were 15 decisions, in 2007 there were 20 decisions, in 2008 there were 24

decisions, in 2009 there were 31 decisions, in 2009 there were 31 decisions, in 2010 there were 41 decisions, in 2011 there were 27 decisions, in 2012 there were 51 decisions, in 2013 there were 52 decisions, in 2014 there were 36 decisions, and until 2015, there were six decisions. Thus, the total number of decisions of the Supreme Court's Law in 2004–2015 was 323 decisions. This data is sorted by case number, and in the amount of its verdict or decisions (Junaenah, 2016).

Even with the mapping of the number of requests, it is considered by several parties to remain small compared to the public interest to submit applications for a judicial review to the Constitutional Court. In questioning the openness of the hearing in the Supreme Court, several parties who made the petition assumed that this was due to the lack of publication by the Supreme Court. The public's awareness to submit a request for a judicial review of the regulations under the Act was still considered very low. The publication referred to by the petitioner is not merely a notification on how to proceed with the procedure, and how to access the verdict or decision, but is also the public transparency to know the proceedings sequences. This is the impact of the closed session, with no possibility to present expert witnesses, except only on reading the verdict (Junaenah, 2016). In addition, the verdict of the case review that enters the Supreme Court can be said to reduce the performance of the Supreme Court itself, because currently the Supreme Court has been burdened by four judicial powers. In contrast to this, in the implementation of the judicial review (PUU) at the Constitutional Court, there are provisions which mandate the disclosure of information by the Constitutional Court, namely: 1) that the Constitutional Court's decision is announced in a hearing which is open to the public; 2) the Constitutional Court session is open to the public, except for the deliberation of the judges; and 3) the Constitutional Court's decision to obtain permanent legal force since its finalisation in a plenary session is open to the public.

The Constitutional Court, since its establishment, is intended to protect the Constitution, and democracy. Referring to the track record of the Constitutional Court in its performance, the Constitutional Court is an institution that can maintain the Constitution and contribute to the development of law in Indonesia. As of 2003, and until 31 December 2017, as many as 1,134 cases were entered; 1,007 decisions were issued; 3,480 norms were tested; a total of 574 norms were amended, both in their article and paragraph revoked; and with a total of 234 Laws petitioned for review (Constitutional Court of the Republic of Indonesia, 2018).

With an excellent track record, as well as being trusted by the public in testing or reviewing the laws and regulations, especially the Law against the Constitution, it is hoped that the Constitutional Court should be able to test the constitutionality of statutory regulation.

According to Jimly Asshiddiqie himself, the implementation of constitutional rules on legislation can be effectively guaranteed, but only if a party other than the legislative body is

given the task of testing whether a legal product is constitutional or not. The law will not be able to be implemented, if according to this party, the legal product is unconstitutional (Asshidiqie, 2009). Therefore, it is necessary to establish a particular institution within the judicial authority to conduct a judicial review. This is intended to avoid potential losses that can occur in the enforcement of justice.

The potential loss of testing upon these two parties can be seen in several cases. First, in the testing or review of the Commission of General Election / KPU Regulation No. 15 of 2009 as amended by Regulation No. 26 of 2009 concerning the Technical Guidelines for Determination and Announcement of General Election Results, Procedures for Determination of the position Obtained, Determination of Selected Candidates and Replacement of Elected Candidates in the Election of Members of the People's Legislative Assembly, Regional Representative Council, Provincial Regional Representative Council, and Regency / Regional Representative Council of 2009 and Commission of the general election/KPU Regulation No. 259 of 2009 concerning Determination of the Obtaining of Political Party Position to Law No. 10 of 2008 concerning General Elections for Members of the House of Representatives, The Regional Representative Council, and the Regional People's Representative Council, the Supreme Court have decided the establishment of the Commission of The General Election/KPU Regulation is contrary to Law No. 10 of 2008, while the Constitutional Court in the review of Article 205 paragraph (4) of Law no. 10 of 2008 issued the verdict of conditional constitutional (Huda, 2012). Then, concerning Sharia Regional Regulations which began to spread in Indonesia. As reported by the Ministry of Law and Human Rights, there are at least 92 Sharia Regional Regulations that have been applied to be reviewed. Of the several Sharia Regulations in question according to the Ministry of Law and Human Rights, one example is the Tangerang City Regulation No. 8 of 2005 concerning the Prohibition of Prostitution. Tangerang City Regional Regulation No. 8 of 2005 concerning Prohibition of Prostitution which has been judicially reviewed by the Supreme Court is discriminatory and violates the constitutional rights of citizens. For example, Lilis Mahmudah, who is a victim of wrongful arrest, and later died due to depression, the Supreme Court decided the regulation under the Criminal Code (KUHP) (Hasani, 2013). This is due to the Supreme Court not having the authority to test these regulations with the human rights article in the Constitution. Similarly, this also occurs when a local regulation is tested through an executive review. As a result, when a review is not integrated into one place, it will lead to legal uncertainty. Thus, efforts to develop the law in Indonesia will not be applied optimally (Munawaroh, 2015).

Secondly, there will be complexity in conducting material tests against the regulations that indirectly conflict with the regulations of the right above its level, but also contrary to the higher regulations (Simamora, 2013). This occurs because the test is inadequate. Observing from several of these problems, it is necessary to have a renewal in the judicial power, which

specifically carries out its authority in reviewing the legislation, to guarantee the constitutional rights of each citizen.

The testing of the law or statutory regulations or a judicial review is a means to assess a higher regulation hierarchically. According to Brewer Carrias, a judicial review is essential as an effort from the judiciary to guarantee legislative, and executive actions by the highest law, namely the Constitution, and the values of Pancasila (Huda, 2011). The testing of law or statutory regulations is a logical consequence of Hans Kelsen's theory of the hierarchy of legal norms in the legal system, and which uses written legal regulations as the dominant source. This is a way to maintain consistency between the existing regulations (Asshidiqie, 2011).

The debate on the authority to examine the laws and regulations also emerged in the amendment to the 1945 Constitution during the 1999–2002 period. The discussions in the *Ad Hoc* Committee on the chapter on judicial power, as well as the debate over the testing of the laws and regulations also regard whether the authority of the Constitutional Court are only specific to review the Law against the Constitution, while the regulations under the Law are tested in the Supreme Court. The party that agreed to the review of the legislation was centred in the Constitutional Court. One of the reasons, as revealed by Sutjipto from F-UG, was that the right of the trial is centralised in one court, not two courts (Constitutional Court of the Republic of Indonesia, 2008). This statement reinforces the statement of Frans F.H. Matrutty, that the right to examine this material must be on the authority of the Constitutional Court, with the aim that the rule of law is tested for constitutionalism or as a form of guarding the constitutionality of law (the Constitutional Court of the Republic of Indonesia, 2008).

The concept of uniting a judicial review of all laws and regulations under the Constitutional Court is a form of legal progress. In essence, it may improve the legal system through instruments or substances, and institutions. Firstly, this idea can undoubtedly improve legal institutions to match their proportions, where later the Supreme Court can be focussed and consistent in its role as a court of justice, overshadowing the latest decisions in four judicial environments, so that the implementation of the Constitutional Court's authority as a court of the Constitution can be guaranteed in the event of reviewing the constitutional laws and regulations.

Secondly, to unite the testing of legislation, the improvement of instruments should be conducted through efforts to harmonise between laws and regulations. The structuring process between the laws and regulations can be carried out when the Constitutional Court conducts tests or reviews which are based on the Constitution (Huda, 2014), so that every review conducted by the Constitutional Court will naturally be automatically tested for its constitutionality. This idea is expected to be able to maintain the constitutional rights of the

society in testing regulations under the Law, so that later it will be indirectly in line with the 1945 Constitution of the Republic of Indonesia, where the review power over the 1945 Constitution of the Republic of Indonesia has become the principal authority by the Constitutional Court, as the court of law. This is in line with the role of the Constitutional Court as the protector of the citizens' constitutional rights. This means that the Constitutional Court, in its spirit, is a protector of citizens' constitutional rights, and the Court itself is a protector of human rights.

Thirdly, with the concept of proceedings at the Constitutional Court, which are currently carried out transparently and openly, as regulated in the Regulation of the Constitutional Court Number: 06 / PMK / 2005 regarding Guidelines for Law Practice in Case of Judicial Review, it is clear that almost all the provisions of proceedings at the Constitutional Court are carried out openly to the public. Thus, when the authority of the judicial review of regulations under the Law against the Constitution will later be transferred from the Supreme Court to the Constitutional Court, the judicial review of regulations under the law will be increasingly trusted by the public, as an accountable legal instrument. Moreover, it is even predicted that there will be an increase in the enthusiasm of the community in submitting their votes to test regulations under the Law that are deemed not by the Law, and/or the Constitution.

The consequence of transferring the authority to examine the regulations under the Law which were previously under the authority of the Supreme Court to the Constitutional Court would have to be considered in detail, as there would be several problems that needed to be anticipated. Whereas, in the concept of the Constitutional Court as the guardian of the Constitution, it does not necessarily mean that all laws and regulations will be directly confronted with the 1945 Constitution of the Republic of Indonesia, but the touchstones in the review must be adjusted to the material in stages, as it considers the substance of the norms used, and the touchstones will be various.

Therefore, as explained previously, to maintain the integrity of the legal system that is integrated with the Constitution, and the values of the Pancasila, every request for judicial review against the Law or what is referred to as a legality test that goes to the Constitutional Court, then the law which becomes the touchstone must be automatically tested for its constitutionality. If the petition for the judicial review is declared unconstitutional, then the review must be stopped, and the Constitutional Court must issue a verdict or decision on the Law which is considered unconstitutional (Sugiarto, 2020). However, if the latter, which is that the touchstone of the judicial review is declared by the Constitutional Court to be constitutional, then the review requested can be continued. This is explained in greater detail in the following diagram.

Figure 2. Concept Diagram of Judicial Review Integration in the Constitutional Court

Source: Hasil olahan Penulis.

The concept of this test does not necessarily make the Constitutional Court an active institution in conducting testing. However, regarding the legality review request, it needs to be considered as a request for a particular constitutionality review, so that the request for legality review is used as a basis for the Constitutional Court to conduct a particular constitutionality review for the law that becomes the touchstone.

Based on the above elaboration, it is not only the norms at the operational level that need to be updated, but also the norms at the level of the 1945 Constitution of the Republic of Indonesia, as a *staatverfassung* for a State. Through this, the opportunities for developing the operational norms that have the potential to harm the ideals of the founding fathers, and the Indonesian constitutional values, can be closed. Therefore, it is necessary to have a form of reconstructed judicial power at the level of the Constitution, as a form of legal consistency for the enforcement of the Court of Justice, and the Court of the Constitution.

Conclusion

Based on the explanation that has been stated by the author, several conclusions can be formulated. Firstly, the mechanism of a judicial review in Indonesia is currently carried out through two judicial powers, namely by the Supreme Court, and the Constitutional Court. Both institutions are authorised to conduct judicial reviews in different corridors, and objects. The form of the separation of the object of the implementation of a judicial review for the two judicial powers tends to cause problems in law enforcement, which to this date, remain unavoidable. This is evidenced by the relationship between the two judicial institutions becoming unsynchronised with the Indonesian constitutional system. Wherein, the enforcement of the Constitution, which occurs integrally within all laws and regulations, has become difficult to realise. This has occurred to the effect of a loss of power by the Supreme Court in case reviews, when the norms used as the basis for the Supreme Court in handing

down a decision are declared unconstitutional by the Constitutional Court. Moreover, this carries the possibility that it will lead to conflicting decisions. The process of hearing the trial of testing the statutory provisions under the law are conducted in private in the Supreme Court. Furthermore, the cases handled by the Supreme Court are numerous, that is, not only cases of a judicial review of the statutory law under laws, but also cases of cassation, and other legal remedies, and reconsideration cases, which incidentally require time for settlement. Thus, the model of conducting a two-roof judicial review has imposed an obstacle to the legal development process in Indonesia.

Secondly, a judicial review is a means to protect the public from the arbitrariness of the State, and over the various legal products that it creates. Besides, the judicial review is a form of guarantee of the Constitution, and to ensure that all laws and regulations are integrated with the values of Pancasila, as a *staatfundamentalnorm*.

To guarantee it all, it requires the application of an integral judicial review in a particular institution, namely the Constitutional Court. Thus, later, all laws and regulations can be structured effectively (Winarsi, Abrianto, Nugraha, Danmadiyyah, 2020). Moreover, with this idea, the enforcement of the Constitution, and the resolution of a series of problems that currently continue to hang within the Indonesian judiciary, will be able to be resolved. As we know, upholding the supremacy of the Constitution, and legal certainty is the basis for the absolute obligations of a State that adheres to the concept of the rule of law. Therefore, it is imperative to implement the uniting of the authority of judicial review under the Constitutional Court, as a form of the country's consistency in maintaining the values of the Pancasila, and the Constitution.

As mentioned earlier, legal development in Indonesia must begin through the legal system, which includes more equitable institutional reconstruction. Therefore, there is a need for a fifth amendment to the 1945 Constitution of the Republic of Indonesia, which would move the provisions of the judicial review power in the Supreme Court to the Constitutional Court, and in the context of reconstructing the Constitutional Court as the sole institution which implements the judicial review of all laws and regulations.

For this reason, when an amendment is made, it should be carried out with consideration of greater supervision by the Constitutional Court, as a result of the possibility of an overload of cases in the Constitutional Court. This serves in addition to the potential for an increasingly authoritarian Constitutional Court, as well as other comprehensive, and fundamental considerations under the requirements of the objective from the implementation of the amendment. It should also be noted that the Constitution must be concise, general, and fundamental. Even if changes are made to the Constitution, the Constitution must be treated with respect.

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