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## The Problematics Implementation of Law and Regulations Testing in Indonesia

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### Abstract

One of the results of the constitutional change, particularly during the 3rd amendment in 2001 is related to the arrangement of judicial powers exercised by two state institutions; the Supreme Court (MA) and the Constitutional Court (MK). Both as executors of judicial power are given different duties regarding the object of testing a statutory regulation. The Supreme Court is based on Article 24A Paragraph (1) of The Constitution of 1945 relating to the authority to test the legality of statutory regulations under the law against laws, while the Constitutional Court is given the authority to examine constitutionality of laws against the Constitution of 1945 based on Article 24C Paragraph (1) of the Constitution of 1945. Based on the research, it was found that the two state institutions, namely MA and MK, are both given authority in examining the legislation causing problems such as the following : (1). Potentially raises the insynchrony between the Supreme Court's ruling and the Constitutional Court's ruling. (2). The Supreme Court's decision is considered by the Constitutional Court in making the decision. (3). There is a temporary suspension of testing in the Supreme Court (MA). This can affect the institutional relationship between judicial institutions, the image and the authority of the court's rulings, can also cause legal uncertainty so that it will harm the interests of the justice-seeking community.

**Keywords:** Problems; Testing; The Supreme Court; The Constitutional Court.

### Introduction

One of the results carved by the Indonesian nation from the change of the constitution, particularly at the time of the 3rd amendment in 2001 related to the arrangement of judicial powers exercised by the two institutions of the State, namely the Supreme Court (MA) and the Constitutional Court (MK). Based on the provisions prior to the amendment of the 1945 Constitution, the power of the judiciary is only held by the Supreme Court (MA), but now the presence of the Constitutional Court (MK) has complemented the function of the judiciary

especially related to the resolution of the constitutional issues.<sup>1</sup>

The Supreme Court and the Constitutional Court are given the duty to accept, examine and dismiss the people's lawsuit over the legislation. Both as executors of judicial powers are given different duties regarding the object of testing a rule of law.

The Supreme Court based on Article 24A Paragraph (1) the Constitution of 1945 is related to the authority to test the legality of statutory regulations under laws against laws.<sup>2</sup> Meanwhile, the Constitutional Court was given the authority to examine the constitutionality of laws against the Constitution based on Article 24C Paragraph (1) the Constitution of 1945.<sup>3</sup>

In the constitutional practice in Indonesia it is recognized that the term *judicial review* is often defined as the examination of the Constitution. *Judicial review* was first born in the United States in 1803 when the Madison vs. William Marbury case occurred. It was Judge John Marshal who delivered the judicial review verdict. At the time, he was challenged by Madison to test legislation enacted by Congress. But in America judicial review is conducted by the Supreme Court. Americans do not recognize the institution of the Constitutional Court.<sup>4</sup>

*Judicial review* was discussed a long time ago by Indonesian founding fathers Soepomo and Muh.Yamin. Soepomo at the time considered that judicial review was not necessary because it positioned judicial institutions higher than other institutions and contrary to the concept of *triassic politica*. But this was disputed by Muh. Yamin, he said that *judicial review* was necessary.

In judicial review or constitutional review there are two scopes of the main duties which include: First, ensuring the functioning of the democratic system in the balancing relationship of roles between legislative, executive, and judicial

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<sup>1</sup> Abdul Latif, *Textbook of Procedural Law of the Constitutional Court* (Total Media 2009).[9].

<sup>2</sup> The Supreme Court is authorized to adjudicate at the level of cassation, test the rule of law under the law, and have the best other authority by law. See.

<sup>3</sup> The Constitutional Court is authorized to prosecute at the first and last level whose rulings are final to test the law against the Constitution, break disputes over the authority of state institutions whose authority is granted by the Constitution, break.

<sup>4</sup> Jimly Asshiddiqie, *Constitutional Testing Models in Different Countries* (Konstitusi Press 2006).

powers so that there is no centralization of power by one branch of power against another. Second, protecting every individual citizen from abuse of power by state institutions that harm the basic rights guaranteed in the constitution.<sup>5</sup>

The law is a political product. Making the law is a job laden with political interests. When the process of shaping this law is in the political space, there will be the potential for politically charged legislation. As a result, the law has the potential to conflict with the Constitution which violates the basic rights of citizens that have been guaranteed. But the law has a binding force. Therefore, there needs to be a mechanism for the protection of the constitutional rights of citizens, a right stipulated in the Constitution. Testing the law, both forensically and materially, is one of the efforts to protect the constitutional rights of citizens.

The testing of laws in the state system in Indonesia is one of the forms of authority of the Constitutional Court. This authority is regulated in the Constitution of 1945 and the Constitutional Court Law. The Constitution of 1945 gives the public the right to apply for legal testing both material and formal on a law to the Court of Justice. Meanwhile, the testing of legislation under the law, such as Government Regulations, Presidential Regulations, and Local Regulations both materially and formally against the law is in the Supreme Court.

The emergence of two institutions that conduct statutory testing in Indonesia resulted in the emergence of problems, especially in terms of legal certainty, institutional dignity, and legal vacuum. In terms of legal certainty, it refers to which decision should be followed, the Supreme Court decision or the Constitutional Court decision. When the Constitutional Court examines the law, while the Supreme Court examines the statutory regulations under the law whose touchstone is the object of the Court's examination, it does not mean that the Court's position is higher than the Supreme Court. In terms of dignity, ignoring the Supreme Court's decision, as has been done by the General Election Commission (KPU), disturbs the Supreme Court's authority. How can the decision of an institution as large as the Supreme

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<sup>5</sup> Jimly Asshiddiqi, *Constitutional Law and The Pillars of Democracy* (Constitution Press 2006).

Court not be carried out by the KPU? The problem is due to the Constitutional Court's decision which provides a different interpretation of the law which is used as a touchstone by the Supreme Court, and that's another matter. In terms of legal vacuum, for example, there is no judicial institution that has the authority to examine the Decree of the People's Consultative Assembly.<sup>6</sup>

Theoretically, there is no relationship between the two agencies implementing the judicial power. The absence of a relationship between the two agencies implementing the judicial power in terms of the authority of the judicial review is because the objects under the authority of the judicial review between the Supreme Court and the Constitutional Court are not the same. So, at a glance, this condition indicates that there is no relationship between the two institutions holding the authority for the judicial review. However, it must be understood that all the objects of judicial review which are the domain of the authorities of the two institutions are in one hierarchical level of statutory regulations, specifically: a) The Constitution of 1945, b) MPR Decree, c) Law/PERPU, d) Government Regulation, d) Presidential Regulation, e) Provincial regulations, f) District/city regional regulations. Thus, all statutory regulations must comply with the laws and regulations above it. The hierarchical level is meant to oblige all laws and regulations of a lower level to comply with the laws and regulations above it.<sup>7</sup>

The dualism of authority for *judicial review* by two institutions, the Supreme Court and the Constitutional Court, empirically will sooner or later lead to institutional conflicts between the Supreme Court and the Constitutional Court. Although, conceptually, the potential for conflict between institutions has been minimized by the provision of Article 55 of Law No. 24 of 2003 as amended by Law No. 8 of 2011 concerning the Constitutional Court, that testing of statutory regulations under the law that is being tested in the Supreme Court must be stopped if the law which is the

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<sup>6</sup> Wira Atma Hajri and others, 'Testing Legislation in Indonesia: Issues and Solutions' (2018) 2 UIR Law Review [235].

<sup>7</sup> Muhammad Ishar Helmi, 'One-Stop Settlement of Judicial Review Case In Constitutional Court' (2019) 6 Salam.

basis for the review of these regulations is in the process of being reviewed in the Constitutional Court until there is a Constitutional Court decision.<sup>8</sup>

In order to enforce the state of law, then all legal products of both the center and the region should not be contrary to the constitution, then efforts to correct if there are legal products that conflict with the constitution can be resolved through the mechanism of testing the legislation. However, the dualism of judicial review in the Supreme Court and the Constitutional Court is not an ideal arrangement, because it has the potential to cause differences in conflicting decisions and other problems.

### **Implementation of Law and Regulations Testing In Indonesia**

Judicial review is an authority to assess whether a statutory regulation is in accordance with or contradicts regulations of a higher degree, as well as whether a particular power has the right to issue a certain regulation. Normatively, the Constitutional Court has an equal position and is equally high with the Supreme Court. The Constitutional Court and the Supreme Court are both executors of the branch of judicial power (*Judiciary*) that are autonomous from other organs of power, namely the Government (*Executive*), and the Consultative Body and Council of Representatives (*Legislative*). One of the powers of the two institutions as actors of judicial power is to carry out a judicial review, namely examining statutory regulations with a statutory test of a higher degree. The difference is, the Supreme Court tests the legal products under the law against the law, while the Constitutional Court tests the law against the Constitution of 1945.

In general, the Supreme Court can be described as the pinnacle of the judiciary which deals with demands for the struggle for justice for individuals or other legal subjects, while the Court does not deal with individuals, but with broader public interests. Broadly, the normative duty of the Court is contained in Constitution 45 Article 24C Paragraph (1) and (2), which is to prosecute matters that generally concern matters of state institutional or political institutions concerning the broad

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<sup>8</sup> Ahmad Mulyanto, 'The Problems of Testing Legislation (Judicial Review) at the Supreme Court and the Constitutional Court' (2013) 2 Yustisia.

public interest or with regard to testing the norms of the law that are *dauerhaftig*.<sup>9</sup> The Supreme Court is essentially the *Court of Justice*, while the Constitutional Court is the *Court of Law*, the one adjudicating injustice to realize justice, while the second adjudicates the legal system and the justice system itself. In addition, the Constitutional Court as the first and last level judicial institution does not have an organizational structure as complex as the Supreme Court which is the top of the judicial system whose structure is authorized vertically and horizontally and which includes five judicial environments, namely the general court environment, the state administrative court environment, the religious court environment, and the military court environment.

The relationship between the Constitutional Court and the Supreme Court in terms of material judicial review cases is that every case that has been registered by the Constitutional Court must be notified to the Supreme Court so that the examination of regulatory review cases under the law in question by the Supreme Court is temporarily suspended until a verdict is made on a judicial review case. The law concerned by the Constitutional Court is intended to prevent conflict between a judicial review conducted by the Constitutional Court and judicial review of regulations conducted by the Supreme Court.

If there is a *judicial review* in the Supreme Court, but the law that is the test point is also being tested in the Constitutional Court, the Supreme Court in conducting a *judicial review* must first wait for the *judicial review* process to be completed at the Court. This certainly does not indicate that the Supreme Court has the same position as the Constitutional Court in the Indonesian constitutional system. That means granting full *judicial review* authority to the Constitutional Court will not only facilitate the case settlement process, but will also provide an illustration that the Supreme Court and the Constitutional Court have the same position in the Indonesian constitutional system. The Supreme Court is the highest court in matters of individual conflict, while the Court is the highest court in ensuring

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<sup>9</sup> Maria Farida Indrati, *Legislative Science* (Kanisius 1998).[14].

the consistency of all statutory regulations so that they do not conflict with higher regulations. Then, if the *judicial review* authority is fully in the Constitutional Court, it will also positively support the settlement of the case in the Supreme Court. The burden of the case handled by the Supreme Court will certainly be lighter, thus, the Supreme Court can certainly better guarantee individual and concrete justices for the coals seeking justice.<sup>10</sup>

The above description shows the working relationship between the Constitutional Court and the Supreme Court in conducting the testing of the legislation. The integrity of the legal system in a country is important in order to ensure fair legal certainty as the constitutional rights of citizens. Therefore, the termination of statutory testing under the law by the Supreme Court pending the decision of the Constitutional Court is aimed at maintaining the integrity of the legal system and is an attempt to achieve legal certainty.<sup>11</sup>

The Constitution of 1945 has actually limited the authority of the Constitutional Court in testing the legislation. The authority states the Constitutional Court only tests the Law against the Constitution of 1945, then the testing of legislation under the Law that conflicts with the Law becomes the authority of the Supreme Court. The test conducted by the above two institutions is not without reason, that is the Constitutional Court for the law against the Constitution of 1945, and the Supreme Court for the regulation under the law against the law. The reasons for testing the legislation through the two agencies are: *first*, provide flexibility and acceleration of the litigation process in the judiciary; *second*, the testing submitted entirely to the Constitutional Court will cause the trial process to be longer so that it can interfere with a fast and simple trial; *third*, there are difficulties in practice if the judicial review rights under the law are separated from the Supreme Court.

However, the dualism of the testing of legislation by the MK and MA caused problems. Sri Soemantri emphasized that there is a link between laws and regulations

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<sup>10</sup> Antoni Putra, 'Dualism of Testing Legislation, Indonesian Legislation Journal' (2016) 15 Indonesian legislation.

<sup>11</sup> Maria Farida Indrati, *Op.Cit.*[164].



under it. Based on existing provisions of the Government Regulation, Presidential Regulation, Local Regulation is contrary to the law, it will be tested by the Supreme Court. The problem that arises is if the law used for testing is being tested in the Constitutional Court and it is decided that the law in question is contrary to the Constitution of 1945. This will be different if the testing of the legislation is done under one roof, because the above conditions can be immediately addressed and dealt with directly; the Constitutional Court can prioritise testing the law against the 1945 Constitution and if the law is declared contrary to the 1945 Constitution, then it becomes irrelevant to apply to test the Government Regulation, because the law that is made into the law of the making of government regulations can no longer apply.<sup>12</sup> Although the real concern of the emergence of testing problems has been anticipated with the regulation in Article 55 of Law No. 24 of 2003 on the Constitutional Court.

The division of duties in the field of judicial review of the legislation between MA and MK is not ideal at all, because it is likely to cause a difference of verdict between MK and MA. In the future, it should be considered the possibility of integrating the entire regulatory review system under the authority of the Constitutional Court. In *Judicial review* conducted by two institutions, namely MA and MK, there is the possibility of the emergence of potential problems in practice, which will be counter productive to the legal objectives and in fact intent of the accommodated *judicial review* mechanism. At least three potential problems can arise.

### **Insynchronous Supreme Court Rulings and Constitutional Court Rulings**

The impact of *judicial review* mechanisms is carried out by two different agencies, while in vertically normative legislation it is highly likely that the two agencies use different legal benchmarks. Consequently, it is highly likely that the verdicts of the two agencies, especially when the legislation being tested are

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<sup>12</sup> Jimly Asshiddiqi, *Op. Cit.*[189].



related, will be out of sync. In a sense, the spirit and argument struck by the verdicts differs diametrically. Such insynchronicity affects not only institutional relations between fellow judicial institutions, but also the image and authority of court rulings, and can also cause legal chaos which will certainly harm the interests of the justice-seeking community. In addition, there will be an interpretation that, in *judicial review*, the ruling of the Constitutional Court is higher than the Supreme Court's ruling.

For example, in 2009, through Decision Number 15 P/HUM/2009 dated June 18, 2009, the Supreme Court stated that Article 22 letter c and Article 23 Paragraph (1) and (3) General Election Commission (KPU) Regulation Number 15 Year 2009 concerning Technical Guidelines for Determination and Collection of General Election Results, Procedures for Determination of Seat Acquisitions, Determination of Elected Candidates and Replacement of Elected Candidates in the General Election of Members of the People's Representative Council (DPR), Regional Representative Council (DPD), Provincial Regional People's Representative Council (DPRD), and the Regency/City Regional People's Representative Council (DPRD) 2009 do not have legal force because it contradicts Article 205 Paragraph (4) and Article 212 Paragraph (3) of Law Number 10 of 2008.<sup>13</sup>

In a short period of time, the Constitutional Court, through Decision Number 110-113/PUU-VII/2009 dated 7 August, 2009, stated that Article 205 Paragraph (4) and Article 212 Paragraph (3) of Law 10 of 2008 are conditional constitutional. Both chapters relate to the legal mechanism in the calculation of seats in phase II. Thus, the Constitutional Court confirms the article as long as it complies with the provision stipulated by the Constitutional Court while simultaneously overturning the Supreme Court's decision regarding the annulment of the count of stage II seats. Of course, then the constitutional court ruling was enacted. In its consideration the Constitutional Court's panel of judges held that:

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<sup>13</sup> Supreme Court Decision Number 15 P/HUM/2009 Concerning Material Review Rights of KPU Regulation Number 15 Year 2009 Regarding Technical Guidelines for Determination and Collection of General Election Results, Procedures for Determining Chair Acquisiti.

“Therefore, although the Constitutional Court law determines the decision of the Court is prospective but for the case *a quo* due to its special nature, then the ruling *a quo* must be implemented retroactively for the division of seats of the House of Representatives, the Provincial Representative Council and the District/City Representative Council legislative elections in 2009 without any compensation or damages for the consequences that existed from the previous regulations”.

“Considering that in a ruling *a quo* the Court does not assess or test neither the Supreme Court’s ruling nor the General Election Commission’s regulations. The Supreme Court, which has examined the General Election Commission’s regulation Number 15 of 2009, has taken action according to its authority, as well as the General Election Commission has carried out regulations according to its authority. However, because of Article 205 paragraph (4), Article 211 paragraph (3), and Article 212 paragraph (3) Law No. 10 of 2008 has been assessed by the Court as conditional constitutional, so automatically all contents of court regulations or decisions that are not in accordance with this decision become invalid because they have lost their basis of foundation”.<sup>14</sup>

Regarding this reality, there are conditions where the Constitutional Court’s decision is not in sync with the Supreme Court decision. In the *judicial review* conducted by the two institutions, Article 205 Paragraph (4) of Law 10 of 2008 was interpreted differently. The Supreme Court interpreted this provision in its position as the basis for examining KPU Regulation Number 15 of 2009. However, the Constitutional Court interpreted these provisions differently when conducting a *judicial review* of Law 10 of 2008 against the Constitution of 1945. Due to the fact that the Constitutional Court’s decision was enforced, the Supreme Court’s decision seemed to be ‘countered’, so that there was an opinion that there was a practice where the Court’s decision seemed to ‘annul’ the Supreme Court’s decision, even though in fact the rationality was not that, because what happened was the provisions in the Law 10 of 2008, which is the basis for the examination of KPU Regulation Number 15 of 2009 in the Supreme Court *judicial review*, have a different meaning by the Constitutional Court, so the Supreme Court decision loses its legality and is no longer relevant to be applied. If the Constitutional Court’s decision can override

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<sup>14</sup> Constitutional Court Decision Number 110-113 / PUU-X / 2009 Regarding Judicial Review of Law No. 10 of 2008 concerning the General Election of Members of the MPR, DPR, DPD and DPRD.

the Supreme Court's decision, it means that the position of the Constitutional Court seems to be higher than the MA, even though, in the constitutional structure based on the Constitution of 1945, the Supreme Court and the Constitutional Court are determined to be actors of judicial power who have an equal position. That is why, legally, the Supreme Court decision and the Constitutional Court decision are in an equal position so that they cannot annul each other.

### **Supreme Court Decisions Are Considered By Constitutional Judges in Making Decisions**

In the case of Berhala Island ownership, there was a dispute between the government of Riau Islands Province and Jambi Province. So that both parties mutually conducted legal testing in the Constitutional Court. In this case, one of the court's rulings is No. 32/PUU-X/2012 in which the Court rejected the applicant's application. In Decision No. 32/PUU-X/2012, the application was submitted by Hasan Basri Agus as Governor of Jambi. The applicant submitted a *judicial review* application against Law No. 31 of 2003 on the Establishment of Lingga Regency in Riau Islands Province by which, under the law, Berhala Island enters the administrative area of Lingga district of Riau Islands province.

The interesting thing about this decision is the consideration of the Constitutional Court in making a decision based on the Supreme Court decision Number 49P / HUM / 2011 concerning the Material Test Rights of the Minister of Home Affairs Regulation Number 44 of 2011 concerning the Berhala Island Administrative Region.<sup>15</sup>

In the judgment, the Constitutional Judge conveys the following;

“...Because the legal issue has been decided by the Supreme Court in Decision Number 49 P / HUM / 2011, dated February 9, 2012 regarding the review of the Minister of Home Affairs Regulation Number 44 of 2011, dated September 29, 2011 concerning the Administrative Region of Berhala Island as mentioned above is the implementation of the Law, according to the Court, in the framework

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<sup>15</sup> Supreme Court Decision No. 49 P/HUM/2011 On Material Test Rights regulation of the Minister of Home Affairs No. 44 of 2011 on The Administrative Territory of Pulau Berhala.

of a rule of law and for the sake of maintaining legal certainty, without intending to evaluate the Supreme Court Decision, such decisions are synchronized with the Court's opinion as mentioned above. The decision of the Supreme Court must be respected because it is still in its competence. Therefore, on the basis of appreciating the correct legal product, the territorial boundaries that have been canceled by the Supreme Court in Decision Number 49 P / HUM / 2011, dated 9 February 2012 are legal products and must therefore be respected. In addition, according to the Court of Division of Territories by the legislator does not conflict with Article 18 paragraph (1) and paragraph (2), as well as Article 18A of the Constitution of 1945".<sup>16</sup>

The Supreme Court's decision as a consideration by constitutional court judges is interesting. Is this just a coincidence that the Supreme Court decision and the Constitutional Court decision have the same result (the Court's decision strengthens the Supreme Court decision)? If it does not mean that the Supreme Court's ruling is indeed used as a basis, rejected or granted an application, then this will later set a bad precedent. The public can already guess that if there is a judicial review of the law in the Constitutional Court, it can be ascertained that the result will be the same as the test result of the related statutory regulations that have been tested in the Supreme Court. In fact, the law that was used as a test stone by the Supreme Court is contrary to the Constitution 1945.

The interpretation of the Constitutional Court in resolving the dispute over the ownership of Berhala Island is by making the Supreme Court decision, which has already decided the same case as a consideration for making a decision, for reasons of recognition and respect for the existence of the Supreme Court. The Constitutional Court did not build its ruling argument on exploring the constitutionality of the law against the 1945 Constitution but on the Supreme Court decision.<sup>17</sup> This way, the Constitutional Court should test the constitutionality of the law by interpreting the constitution as mandated by the constitution instead of relying on previous judicial rulings.<sup>18</sup>

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<sup>16</sup> Constitutional Court Decision Number 32 / PUU-X / 2012 Regarding Judicial Review of Law No. 31 of 2003 concerning the Establishment of Lingga Regency.

<sup>17</sup> M Risnain, 'Interpretation of the Constitutional Court's Decision on Pulau Berhala Ownership Dispute' (2014) 11 Constitution.

<sup>18</sup> Suparto, 'Differences in Interpretation of the Constitutional Court in Breaking Concurrent Election Cases' (2017) 10 Judicial Journals.

### **Termination of Judicial Review Process in the Supreme Court**

As previously explained, a judicial review case being processed in the Supreme Court allows it to be dismissed due to the existence of the provisions of Article 55 of the Constitutional Court Act which states: 'The testing of legislation under the current law of the Supreme Court shall be halted if the law on which the law is testing is in the process of testing the Constitutional Court until there is a ruling of the Constitutional Court'.

The temporary suspension of the statutory testing process is detrimental to justice seekers. Therefore, under the provisions of Article 55 of the Constitutional Court Act itself there is a proposal to be tested in the Constitutional Court. The proposal to test Article 55 in the Constitutional Court came from the applicants who applied for the right to test material at the Supreme Court on the Regulation of the Minister of Health Number 1871/Menkes/Per/IX/2011 concerning the revocation of Ministerial Regulation Number 339/Menkes/Per/V/1989 concerning dental work regarding Article 59 Paragraph (1), Paragraph (2), and Paragraph (3), as well as Article 61 Paragraph (1) and Paragraph (2), Law Number 36 Year 2009 regarding health registered with the Supreme Court at dated 7 June, 2012, with register Number 24P/HUM/2012.<sup>19</sup> Furthermore, the petitioners received a letter from the Supreme Court Number MA/PANMUD-TUN/VI/82/2012, dated June 11, 2012, which stated that Law Number 36 Year 2009 regarding health is currently being tested in the Constitutional Court. Referring to Article 55 of the Constitutional Court Law, the Supreme Court in the letter stated that it was obliged to stop the testing process until the Court's decision was made. With the termination of the process of reviewing the petition for judicial review rights, the petitioners felt aggrieved by the enactment of this article.<sup>20</sup>

The existence of this provision in Article 55 of the Constitutional Court can be considered as at least obstructing the judicial process. So, if anyone wants to block

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<sup>19</sup> Supreme Court Decision No. 24 P/HUM/2012 On Material Test Rights regulation of the Minister of Health No. 1871/Menkes/Per/IX/2011 on The Repeal of Ministerial Regulation No. 339/Menkes/Per/V/1989 on The Work of Dentists.

<sup>20</sup> Imam Soebechi, *Rights of Materiil Test* (Sinar Grafika 2016).[162-163].

or temporarily stop the judicial review in the Constitutional Court, it is sufficient to submit a request for judicial review of the law, which is the basis for the judicial review to the Constitutional Court. On that basis, the judicial review process at the Supreme Court cannot be continued, at least until the Court's decision on the judicial review of the Act is issued.<sup>21</sup>

Therefore, there are many proposals for Article 55 of the Constitutional Court Law to be subject to a judicial review so as not to hamper access to justice for justice seekers in the Supreme Court related to judicial review cases of laws and regulations under the Act. But, if not careful, these proposals will actually be contradictory to the will to achieve harmonization of the Supreme Court decision and the decision of the Court. If the judicial review under the law that is being carried out by the Supreme Court continues or is not stopped, even though the law that is the basis for the review of the regulation is currently in the process of examining the Constitutional Court, it is very possible that the decisions of the two institutions will not synchronize. Based on the Constitutional Court decision No. 93/PUU-XV/2017, the Constitutional Court stated that what is meant by the phrase 'terminated' in Article 55 of the Constitutional Court Law must be interpreted as 'postponed the examination' meaning that, if there is a Constitutional Court decision, the examination process at the Supreme Court will be resumed.<sup>22</sup>

According to Jimly, there were four reasons that caused the separation of judicial review to be not ideal; *first*, the granting of judicial review of statutory material to the constitution to the newly formed Constitutional Court gave the impression that only a part of the formulation of the constitutional material was added. It is easy and patchy, as if the conception of legal judicial review rights that are in the hands of the Supreme Court has no effect on the right to test granted to the Court. Such formulation seems less based on conceptual deepening with regard to the comprehensive conception of the test itself. *Second*, the separation of powers makes sense if the system of power

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<sup>21</sup> *ibid.*

<sup>22</sup> Constitutional Court Decision Number 93 / PUU-XV / 2017 concerning Judicial Review of Law No. 24 of 2003 concerning the Constitutional Court.

is still based on the principle of power sharing and not the principle of power that prioritizes check and balances as was embraced by the Constitution of 1945 before undergoing the first and second amendments; the Constitution of 1945 has officially and firmly adhered to the principle of horizontal separation of powers. Therefore, the separation between legal materials should no longer be done. *Third*, in practice, its implementation could potentially be a substantive difference between the Supreme Court's ruling and the Constitutional Court's ruling. Therefore, it is recommended that the system of testing legislation under the constitution be integrated only under the Constitutional Court. Thus, each Court can focus attention on different issues. The Supreme Court deals with the issue of justice and injustice for citizens, while the Constitutional Court guarantees the constitutionality of the entire rule of law. *Fourth*, if the authority of testing statutory material under the Constitution is fully granted to the Constitutional Court, surely the burden of the Supreme Court can be reduced.<sup>23</sup>

The same thing was also conveyed by Moh. Mahfud MD; the competence of the two judicial power institutions (MA and MK) should be as follows:

- (1) Ideally, the Constitutional Court will handle 'conflict of laws and regulations' in order to ensure the consistency of all laws and regulations. This institution should only examine conflicts of legislation starting from the highest to the lowest degree. Therefore, the authority for judicial review of the statutory regulations under the laws against higher levels of statutory regulations should be given to the Constitutional Court.
- (2) Ideally, the Supreme Court handles 'conflicts between people and/or legal entities and/or institutions', including conflicts regarding election results, conflicts over state institutions, cases of political party dissolution, and the DPR's statement that the President/Vice President is no longer eligible as President either, because of a violation of certain things stipulated in the Constitution or because of something that caused it to no longer meet the requirements.<sup>24</sup>

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<sup>23</sup> Sirajuddin, 'Design Of Testing Legislation Integratively Under the Constitutional Court' (2018) 11 Legal Arena.[137].

<sup>24</sup> Moh Mahfud MD, *Building Legal Politics, Upholding the Constitution* (LP3ES 2006).



Academically, it may be necessary to think that the testing of all statutory regulations starting from the law to the lowest hierarchy is united under the Constitutional Court linearly, no longer crossing. This is important so that there is a guarantee of consistency in the pouring of constitutional thoughts into all levels of legislation from one constitutional interpreting institution. Meanwhile, part of the Constitutional Court's powers concerning conflicts between persons and / or institutions can be transferred to the Supreme Court. The authority of the Court that can be transferred to the Supreme Court, for example, is the authority to dissolve political parties and the authority to adjudicate disputes over authority between state institutions.<sup>25</sup> Apart from the United States and Austria, countries that have implemented the one-stop judicial review concept are France (constituency preview and review), Germany and even Malaysia. Countries that implement the concept of one-stop judicial review majority think that the concept of one-stop judicial review is more effective and efficient. In addition, in the context of Indonesia, the concept of one-stop judicial review can strengthen the position, role and function of the Constitutional Court. An integral and holistic interpretation of the constitution can be realized by the Constitutional Court through the concept of a one-stop judicial review.<sup>26</sup>

## **Conclusion**

Based on the results of the discussion that has been outlined, it can be concluded that the two state institutions, namely the Constitutional Court (MK) and the Supreme Court (MA), in the testing of the Laws and Regulations in Indonesia raise problems, among others: (1). There is the potential to create a disagreement between the Supreme Court's ruling and the Constitutional Court's ruling. (2). There is a Supreme Court ruling that is considered by the Judge of the Constitutional Court in making the decision. (3). Termination of Judicial Review process in the Supreme

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<sup>25</sup> Moh Mahfud MD, 'Point of Tangent Authority Between Supreme Court And Constitutional Court' (2015) 4 Law and Judiciary.

<sup>26</sup> M Sholahuddin Al-Fatih, 'One-Stop Statutory Testing Model Through the Constitutional Court' (2017) 25 Legality.

Court. This can not only affect the institutional relationship between the judicial institutions, the image and authority of the court's rulings, but it can also cause a legal uncertainty that will harm the interests of the justice-seeking community. In addition, there will be a view that, in judicial review, the ruling of the Constitutional Court is higher than the Supreme Court's ruling as a result of the provision that the judicial review process in the Supreme Court be suspended temporarily if the law which is the basis for examining the regulation is in the process of being reviewed in the Constitutional Court. Therefore, in order to test the legislation more effectively and legally, it should be done by one state institution or one-stop, that is through the Constitutional Court. As a consequence, it is necessary to have an amendment to the 1945 Constitution, namely Article 24 A and Article 24 C.

### **Bibliography**

Abdul Latif, *Textbook of Procedural Law of the Constitutional Court* (Total Media 2009).

Ahmad Mulyanto, 'The Problems of Testing Legislation (Judicial Review) at the Supreme Court and the Constitutional Court' (2013) 2 Yustisia.

Antoni Putra, 'Dualism of Testing Legislation, Indonesian Legislation Journal' (2016) 15 Indonesian legislation.

Imam Soebechi, *Rights of Materii Test* (Sinar Grafika 2016).

Jimly Asshiddiqi, *Constitutional Law and The Pillars of Democracy* (Constitution Press 2006).

Jimly Asshiddiqie, *Constitutional Testing Models in Different Countries* (Konstitusi Press 2006).

M. Sholahuddin Al-Fatih, 'One-Stop Statutory Testing Model Through the Constitutional Court' (2017) 25 Legality.

M. Risnain, 'Interpretation of the Constitutional Court's Decision on Pulau Berhala Ownership Dispute' (2014) 11 Constitution.

Maria Farida Indrati, *Legislative Science* (Kanisius 1998).

Moh. Mahfud MD, 'Point of Tangent Authority Between Supreme Court And

Constitutional Court' (2015) 4 Law and Judiciary.

Moh.Mahfud MD, *Building Legal Politics, Upholding the Constitution* (LP3ES 2006).

Muhammad Ishar Helmi, 'One-Stop Settlement of Judicial Review Case In Constitutional Court' (2019) 6 Salam.

Sirajuddin, 'Design Of Testing Legislation Integratively Under the Constitutional Court' (2018) 11 Legal Arena.

Suparto, 'Differences in Interpretation of the Constitutional Court in Breaking Concurrent Election Cases' (2017) 10 Judicial Journals.

Wira Atma Hajri [et.al.], 'Testing Legislation in Indonesia: Issues and Solutions' (2018) 2 UIR Law Review.

Constitutional Court Decision Number 110-113/PUU-X/2009 Regarding Judicial Review of Law No. 10 of 2008 concerning the General Election of Members of the MPR, DPR, DPD and DPRD.

Constitutional Court Decision Number 32/PUU-X/2012 Regarding Judicial Review of Law No. 31 of 2003 concerning the Establishment of Lingga Regency.

Constitutional Court Decision Number 93/PUU-XV/2017 concerning Judicial Review of Law No. 24 of 2003 concerning the Constitutional Court.

Supreme Court Decision No. 24 P/HUM/2012 On Material Test Rights regulation of the Minister of Health No. 1871/Menkes/Per/IX/2011 on The Repeal of Ministerial Regulation No. 339/Menkes/Per/V/1989 on The Work of Dentists.

Supreme Court Decision No. 49 P/HUM/2011 On Material Test Rights regulation of the Minister of Home Affairs No. 44 of 2011 on The Administrative Territory of Pulau Berhala.

Supreme Court Decision Number 15 P/HUM/2009 Concerning Material Review Rights of KPU Regulation Number 15 Year 2009 Regarding Technical Guidelines for Determination and Collection of General Election Results, Procedures for Determining Chair Acquisiti.

The Constitutional Court is authorized to prosecute at the first and last level whose rulings are final to test the law against the Constitution, break disputes over the authority of state institutions whose authority is granted by the Constitution.

The Supreme Court is authorized to adjudicate at the level of cassation, test the rule of law under the law, and have the best other authority by law".