



## The Original Intent of Settings Judicial Review of Local Regulations in Indonesia

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### **Abstract**

There are differences in the characteristics of judicial review in the Supreme Court and in the Constitutional Court in terms of the object being tested and the use of test stones that are indeed by the authority granted by the 1945 Constitution. The principle of *audi et alteram partem* is a general principle in the study of law, so the judicial review process in the Supreme Court which is only one-way and closed should not be carried out. This article analyzes and explores the original intent of granting judicial review authority to regional regulations at the Supreme Court. This article is normative legal research conducted by examining legal materials (library studies) or secondary data. The original intent the granting of judicial review authority to the Supreme Court is intended to foster checks and balances between various high state institutions. In addition, the granting of the right of judicial review is intended to enforce checks and balances between the three branches of power.

**Keywords:** *Original Intent; Judicial Review; Local Regulations; Supreme Court; Indonesia*

### **Introduction**

The 1945 Constitution of the Republic of Indonesia has provided an understanding that there is a close relationship between the form of the Unitary State of the Republic of Indonesia and the existence of regional regulation. This can be seen from the amendment process to the 1945 Constitution. The amendment process carried out in 1999-2002 gave many changes to the Indonesian state administration, but some were maintained until the fourth amendment, namely the form of the Unitary State (Soehino, 2007) (Majelis Permusyawaratan Rakyat Indonesia, 2014).

Systematically the provisions contained in Article 18 Paragraph (1), paragraph (2), and paragraph (6) of the 1945 Constitution which states:

"The Unitary State of the Republic of Indonesia is divided into provincial regions and the province is divided into districts and cities, which each province, district, and the city has a regional government, which is regulated by law".

Article 18 Paragraph (2) of the 1945 Constitution states the provincial, district, and city governments shall regulate and manage their government affairs according to the principles of autonomy and co-administration. Furthermore, Article 18 paragraph (6) of the 1945 Constitution states local governments have the right to stipulate regional regulations and other regulations to carry out autonomy and assistance tasks. Thus, regional regulations as part of legislation occupy an important position in the legal system in Indonesia because they are a form of embodiment of a unitary state for the implementation of regional autonomy.

Given the importance of the position of Regional Regulations, as one type of legislation, Regional Regulations (Perda) need to get legal certainty to be tested. This is because the testing of statutory regulation is a form of control mechanism over a legal norm (legal norm control mechanism).

According to Aan Eko Widiarto, the entire legal product must be a harmonious whole (because it is synchronous or consistent vertically and horizontally) both from the material aspect which includes legal principles/because it fulfills the principles of establishing good laws and regulations, and the principle of material content) and by the legal principle which is the legal background/reason/ratio from the formation of the law, the meaning (both explicit and implied meaning), to the use of terminology; as well as from a formal aspect where the method of preparation must be by the applicable provisions (Widiarto, A. E., 2019).

As a system, the law has many links with various aspects and even other systems in society. Law as a product must be able to create legal certainty for the community. Often the laws and regulations that are formed fail to provide legal certainty for the community, which in the end fails to create legal order in society (Widiarto, A. E., 2019).

The mechanism for controlling legal norms can be implemented through political supervision, administrative control, or legal (judicial) control (Asshiddiqie, J., 2006). There are three known legal norms in testing legal norms, namely normative decisions that regulate (*regeling*) and are general and abstract, normative decisions containing administrative determinations (*beschikking*) are individual and concrete norms, normative decisions that are judgmental are general and the abstract norm is called a verdict.

In this context, Jimly Asshidiqqie emphasized that general and abstract norms can only be monitored through court law with a judicial review mechanism (Asshiddiqie, J., 2006). In Indonesia, the authority to conduct a judicial review belongs to the Supreme Court (MA) and the Constitutional Court (MK).

There are differences in the characteristics of judicial review in the Supreme Court and in the Constitutional Court in terms of the object being tested and the use of test stones that are indeed by the authority granted by the 1945 Constitution. However, there are differences in practice, especially the application of formal and material types of testing, as well as trial technicalities with the use of the principle of *audi et alteram partem* of course raises questions.

This is because the two-state institutions are the holders of judicial power and have direct authority from the 1945 Constitution. Article 24 paragraph (1) and paragraph (2) of the 1945 Constitution states that:

- (1) Judicial power is an independent power to administer justice to enforce law and justice.
- (2) Judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, the religious court environment, the military court environment, the state administrative court environment, and by a Constitutional Court.

Judicial review in the Supreme Court and the Constitutional Court is at least the same as some adjustments or applies *mutatis mutandis*, because, in the doctrine of constitutional law, the right to examine

is distinguished from the right to examine formally and the right to examine materially. In addition, the principle of *audi et alteram partem* is a general principle in the study of law, so the judicial review process in the Supreme Court which is only one-way and closed should not be carried out. This article analyzes and explores the original intent of granting judicial review authority to regional regulations at the Supreme Court.

### **Research Methods**

Legal research is a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced (Mazuki, P.M., 2008). Substantially, the writing of this article includes normative legal research, namely legal research conducted by examining legal materials (library studies) or secondary data. According to Soerjono Soekanto and Sri Mamudji, normative legal research includes research on legal principles, research on legal systematics, research on levels of vertical and horizontal synchronization, legal comparisons and legal history (Soekanto, S. & Mamudji, S., 1995).

### **Research Result and Discussion**

Original intent is a pattern of interpretation of a constitution or law. Original intent is a method of interpretation by using the intent or intention of forming the legal norm itself in formulating it into the legal norm. Therefore, the perspective used in the original intent method is historical, so it can be called a variant of the historical interpretation approach.

This historical interpretation is also referred to as original interpretation, namely the form or method of interpreting the constitution based on the history of the constitution or the law that was discussed, formed, adopted, or ratified by its makers or signed by an authorized institution (Safa'at, M. A., 2011). According to Anthony Mason, the original interpretation or interpretation is an interpretation that is by the original meaning of the text or terms contained in the constitution, where this interpretation is usually used to explain the text, context, purpose, and structure of the constitution (Safa'at, M. A., 2011).

The search for the original intent in this paper is intended to find out more about what the drafters of the 1945 Constitution wanted in the amendment process regarding the granting of judicial review authority to the Supreme Court and whether the judicial review of Perda carried out by the Supreme Court was carried out materially or materially and formally. The search will be carried out by looking at the opinions expressed in discussion meetings, especially regarding the discussion of judicial power.

The discussion during the first amendment. The proposal for changes to the authority, institutions, and role of the Supreme Court as the executor of judicial power in Indonesia at the People's Consultative Assembly (MPR) session surfaced since the second meeting of the 1999 MPR Working Body (Badan Pekerja MPR) during the first amendment period on October 6, 1999, which scheduled the general views of the factions regarding trial material. Regarding the discussion of judicial review, at the meeting chaired by the Chairman of the MPR M. Amien Rais, Valina Singka Subekti from the Utusan Golongan Fraction (F-UG) proposed an autonomous judicial body granting judicial review rights to the Supreme Court, with the following statement:

“... The autonomy of the judiciary or judiciary and the granting of the right of judicial review to the Supreme Court.” (Wasito, B. W., et.al.,2010).

Table 1. Compilation of Proposed Result of All Fractions related to Judicial Review by the Supreme Court

The PDIP faction	The Supreme Court has the authority to conduct a judicial review of the legislation under the Constitution
The Reform Faction	The Supreme Court has judicial review authority
The Golongan Karya Party faction	The Supreme Court has the authority to actively conduct judicial review of the laws and regulations below it.
The Utusan Golongan Fraction	The Supreme Court holds the power to conduct judicial reviews of laws and regulations under the law whose mechanism is regulated by law.
The PPP Fraction	The Supreme Court has the authority to examine laws and regulations under the provisions of the People's Consultative Assembly

Source: the primary data source is processed by the author from the court minutes data (2020)

The results of the above formulation are the result of the compilation team's work or also known as the Five Team. The results of the formulation from the Team Five, by PAH III BP MPR 1999 had also been discussed. However, due to time constraints, PAH III BP MPR 1999 agreed that further discussions be carried out after the 1999 MPR General Session. Views and proposals related to changes to the Supreme Court in the 1945 Constitution were also conveyed by experts.

The experts/experts are specially invited and asked for their opinion by the Ad Hoc Committee I of the Working Body of the MPR RI. This is done to obtain input and information on important matters related to efforts to amend the 1945 Constitution. The suggestions and views presented by the experts/experts relate to the authority, function, and position of the Supreme Court as the executor of judicial power in Indonesia.

The discussion during the second amendment. The 1999 MPR General Session resulted in amendment I to the 1945 Constitution. In addition to the formulation of amendment I, the 1999 MPR general assembly also recommended the BP MPR to continue and prepare the Draft Amendment to the 1945 Constitution. During the second amendment period, the BP MPR formed PAH I BP MPR in 2000 which was assigned by The 1999 General Assembly of the People's Consultative Assembly to prepare the Draft Amendment to the 1945 Constitution, in its meetings from November 25, 1999, to August 2, 2000, produced proposals for the formulation of amendments to the Supreme Court in the 1945 Constitution.

At the third PAH I meeting of the MPR on December 6, 1999, chaired by Jakob Tobing, there were several things about the Supreme Court that were highlighted by several factions who delivered an introduction to the deliberation regarding the weaknesses of the 1945 Constitution, including the unclear arrangement of the tasks and authorities of the Supreme Court, the weak supervision of the Supreme Court as the executor of judicial power, and irregularities that occurred in the Supreme Court. implementation of judicial power in Indonesia.

The twelve factions in the MPR RI, not all factions in the delivery of the introduction to the deliberation gave their views on the Supreme Court. For more details, the following is presented the views of a number of these factions. The PDI-P faction through its spokesman Hobbes Sinaga reaffirmed the empowerment of the Supreme Court as one of the priorities for discussion during the second amendment period. In addition, several things were agreed upon by all factions to set the main priorities in limiting the discussion to the priorities set, namely limiting the power of the President, empowering the MPR, empowering the DPR, empowering the Supreme Court, empowering the Supreme Audit Agency, affirming the duties of the Supreme Advisory Council.

From F-PG, delivered by Agun Gunandjar Sudarsa. Agun Gunandjar Sudarsa conveyed the need for stricter regulations regarding the authority of the Supreme Court in exercising the right to judicial

review. In addition, according to him, it is necessary to consider how the supervision and accountability of the Supreme Court's power are, with the statement:

“Through this forum of the Ad Hoc Committee I of the MPR Working Body, the Golkar Party faction is ready to discuss various materials on the draft amendments to the 1945 Constitution together with other factions. The design materials include the following:

Duties and powers of the judiciary. Regarding this matter, it is necessary to have stricter regulations regarding the authority of the Supreme Court, especially in exercising the right to judicial review. In addition, there is also a need for clearer and firmer regulations on how the mechanism for supervision and accountability of the power of the Supreme Court is intended.”

The PBB faction represented by Hamdan Zoelva also highlighted the Supreme Court in the introductory meeting for the deliberation. Hamdan Zoelva asked to propose the right of material and formal review of legal products downwards regarding the right of material and formal review of legal products downwards by the Supreme Court.

The results of the synchronization of the Small Team in the discussion during the second amendment, decided that the second draft amendment to the 1945 Constitution would be ratified by PAH I BP MPR. To then be discussed and ratified at the 2000 plenary session of the BP MPR. The second draft amendment to the 1945 Constitution which was ratified at the BP MPR, was then submitted to the 2000 MPR Annual Session.

In addition to ratifying the second amendment to the 1945 Constitution, MPR Decree No. IX of 2000 concerning the assignment of BP MPR to prepare a draft amendment to the 1945 Constitution. From the results of the first and second amendments to the 1945 Constitution, the material for the chapter on judicial power has not been discussed, although proposals for amendments have been submitted since the PAH III BP MPR meetings in 1999, later scheduled to be discussed in the third amendment to the 1945 Constitution.

In the period from the 1999 MPR General Session to the 2000 MPR Annual Session, the amendments that have been ratified, are regarding the limitation of the President's power, empowerment of legislative institutions, Regional Government, state territory, and human rights. Human. Meanwhile, regarding the matter of the Supreme Court as the perpetrator of judicial power, a more in-depth discussion will be continued during the third amendment to the 1945 Constitution.

The discussion during the third amendment. Regarding the material formulation of the Supreme Court as the actor of judicial power, during the discussion in the PAH I trial, as has been stated at the beginning of this chapter, there has been a strong desire from the MPR faction to change the Supreme Court in the Judicial Powers Chapter.

This desire is based on considerations related to irregularities that have occurred in the implementation and practice of the Indonesian state administration. These deviations include, among others, the executive who very often intervenes in the judicial power body as the perpetrator of judicial power.

Other considerations relate to the guarantee of the independence of the judiciary and the affirmation of the authority to conduct judicial reviews, not only of lower government regulations but also of laws. After the submission of the proposal and the initial discussion of the faction's opinion in the MPR, the Formulating Team/Small Team formed by PAH I BP MPR then made adjustments to the formulation or synchronization of the proposals of the faction members.

During the discussion in the factions, with the agenda of discussing the amendments to the 1945 Constitution, especially regarding the Supreme Court as an actor of judicial power, the opinions of PAH I members. At the 35th PAH I meeting of the BP MPR on September 25, 2010, Soewarno from the F-PDI-P, presented a description of the formulation that the Supreme Court has the authority to conduct a material review of the regulations under the law, with the following statement:

“... The Supreme Court has the authority to hear cases at the level of cassation, conduct a material review of regulations under the law, and has other powers regulated by law.”

After going through a long process, discussions carried out by members of PAH I BP MPR in-depth, critically, transparently and by upholding democratic principles, finally resulted in the third amendment to the 1945 Constitution.

The Third Amendment, which was agreed upon in the 2001 Annual Session, was a continuation of the amendment first and second of the 1945 Constitution. At the 2001 MPR Annual Session, which took place from 1 to 9 November 2001, the MPR Decree No. IX/MPR/2001 concerning the assignment of BP MPR to prepare the Draft Amendment to the 1945 Constitution, namely the fourth draft amendment to the 1945 Constitution.

Before the Third Amendment of the 1945 Constitution in 2001, the formulation of the provisions of the Articles concerning the Supreme Court, especially in Chapter IX of judicial power in the 1945 Constitution was only regulated in 1 (one) Article, namely in 24 Paragraph (1). At the 7th Plenary Session of the 2001 ST MPR, 8 November 2001 chaired by the Chairperson of the MPR, M. Amien Rais, the factions expressed their final opinion on the Third Amendment Draft of the 1945 Constitution as the result of Commission A's work. Article 24A concerning the Supreme Court, all MPR factions in the plenary meeting agreed by acclamation on the formulation of the work of the A Commission.

However, following the third amendment to the 1945 Constitution which was stipulated on November 9, 2001, the provisions regarding the Supreme Court were increasingly detailed, which were not only related to the position of the Supreme Court as the perpetrator of judicial power. However, it is also regulated in more detail regarding the authority, composition, position, recruitment, and election of the Chairman and Deputy Chairperson of the Supreme Court. Amendments to the provisions regarding the formulation of articles on the Supreme Court, in more detail, were made based on considerations to provide stronger constitutional guarantees for the authority and performance of the Supreme Court.

By the formulation of the results of the Third Amendment, the provisions regarding the Supreme Court as the perpetrator of judicial power, along with the authority, requirements, recruitment, the election of the Chair and Deputy Chair, as well as the composition, position, membership and procedural law are regulated in Article 24 Paragraph (2), and in Article 24A Paragraph (1), Paragraph (2), Paragraph (3), Paragraph (4), and Paragraph (5). In the formulation of the results of the changes, the judicial power is no longer only carried out by the Supreme Court which oversees the judicial bodies under it in the general court environment, the religious court environment, the military court environment, the state administrative court environment and is also carried out by a Constitutional Court. In addition to 2 (two) actors of judicial power.

The Supreme Court and the Constitutional Court also formulated the Judicial Commission which has the authority to maintain the nobility and dignity of judges, maintain the behavior of Supreme Court justices, and recruit Supreme Court justices. The other executives of judicial power, namely the Constitutional Court and the Judicial Commission as the Supreme Court recruitment executor, will be discussed in the next chapter. In general, the presence of two new institutions, namely the Constitutional Court and the Judicial Commission in the 1945 Constitution, is intended to strengthen judicial power in the

Indonesian state administration system. This, as a manifestation of the formulation in the 1945 Constitution, which states that Indonesia is a state of law.

Based on this understanding, the author has the view that in the process of discussing the formulation of articles that regulate the judicial review authority by the Supreme Court, there is no clear statement that the judicial review authority by the Supreme Court only covers material trials and does not include formal tests.

This is supported by the final result of the final formulation of Article 24A paragraph (1) which uses the phrase "... examines the legislation under the law against the law." Meanwhile, the reason why the Supreme Court is given the authority to conduct a judicial review of laws and regulations under the law is to foster checks and balances between various high state institutions, enforce checks and balances and all statutory products, including the formation of regional regulations, cannot be released. from the products of political decisions that affect the content of the law.

### **Conclusion**

Based on the process of discussing the amendments to the 1945 Constitution, it can be concluded that at first there was a desire from the formulators of the 1945 Constitution that the Supreme Court has the right of judicial review, not only of the regulations under the law but also of the laws and regulations under the law, as an effort to increase the empowerment of the Supreme Court.

However, the formulation continues to be discussed. In this case, a judicial review by the Supreme Court is carried out on the regulations under the law because all statutory products are not separated from the products of political decisions, where the situation and conditions in making a statutory product greatly affect one existing laws so that the Supreme Court needs to be given the right to test materially under the laws and regulations. In addition, the mention of the authority of the right to test is often referred to as a judicial review.

However, some mention complete material and formal tests. On the other hand, from the explanations of the experts invited in the discussion process, it can be seen that there is an explanation regarding the judicial review which also includes material and formal tests. In this case, the PBB faction represented by Hamdan Zoelva stated that "including the authority given to him regarding the right to material and formal examination of the legal products of the law down.

The regulation of this authority is felt to be very necessary to foster checks and balances between various high state institutions". Then, the granting of judicial review authority to the Supreme Court is intended to foster checks and balances between various high state institutions. In addition, the granting of the right of judicial review is intended to enforce checks and balances between the three branches of power.

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