

# STRENGTHENING JUDICIAL REVIEW AUTHORITY OF SUPREME COURT IN REVIEW OF REGIONAL REGULATIONS

**Muh. Risnain**

*Faculty of Law University of Mataram*  
*srikaryati84@gmail.com*

Received 27-07-2019; Revised 03-12-2020; Accepted 29-12-2020  
<https://doi.org/10.25216/jhp.9.3.2020.502-522>

## **Abstract**

The problem of judicial review of regional regulations in the Supreme Court is a serious academic problem and practical problem that needs to be resolved after the issuance of the Constitutional Court Verdict Number 137 / PUU-XIII / 2015. There are two problems in this paper, *first* of all, the legal implications of the Constitutional Court Decision Number 137 / PUU-XIII / 2015 on institutional and legal procedures for judicial review of regional regulations in the Supreme Court, secondly, how is the concept of the Supreme Court judicial review carried out through renewal of procedural law Trial Judicial Review in the Supreme Court?. The legal implications of the Constitutional Court Verdict Number 137 / PUU-XIII / 2015 on the institutional and legal procedures for judicial review of regional regulations in the Supreme Court are the stronger and increasing authority of judicial review in Supreme Court. Secondly, the concept of the implementation of a judicial review by the Supreme Court is carried out through legal renewal of the judicial review proceedings in the Supreme Court by including several important substances, related to hearings that are open to the public, the existence of a preliminary examination, hearing, verdict and decision making that are openly and fairly.

Permasalahan *judicial review* Perda di Mahkamah Agung menjadi persoalan akademik dan praktikal serius yang perlu dipecahkan pasca keluarnya putusan Mahkamah Konstitusi Nomor 137/PUU-XIII/2015. Terdapat dua masalah dalam tulisan ini, *pertama*, implikasi hukum Putusan Mahkamah Konstitusi Nomor 137/PUU-XIII/2015 terhadap kelembagaan dan hukum acara *judicial review* perda di Mahkamah Agung, kedua, bagaimanakah konsep pelaksanaan *judicial review* perda oleh Mahkamah Agung dilakukan melalui pembaharuan hukum acara persidangan *judicial review* di Mahkamah Agung? Berdasarkan

pembahasan di atas maka dapat disimpulkan dua hal, *pertama*, implikasi hukum Putusan Mahkamah Konstitusi Nomor 137/PUU-XIII/2015 terhadap kelembagaan dan hukum acara *judicial review* perda di Mahkamah Agung adalah semakin kuat dan meningkatnya kewenangan *judicial review* di Mahkamah Agung, *kedua*, konsep pelaksanaan *judicial review* perda oleh Mahkamah Agung dilakukan melalui pembaharuan hukum acara persidangan *judicial review* di Mahkamah Agung dengan memasukan beberapa substansi penting, terkait sidang yang terbuka untuk umum, adanya proses pemeriksaan pendahuluan, pemeriksaan persidangan, pembuktian dan pengambilan putusan yang lebih terbuka dan fair.

**Keywords: Regional Regulation, Judicial Review, and Reformation**

## **Introduction**

The problem is the dualism of the cancellation mechanism of regional regulations (*peraturan daerah*) that contradicts the laws and regulations above which have been a polemic and the legal academic debate has ended with the pronouncement of the constitutional court verdict No. 137 / PUU-XIII / 2015 by the Indonesian Constitutional Court on April 4, 2017 ago. Before the decision of the Constitutional Court Number 137 / PUU-XIII / 2015 the cancellation of regional regulations was in a dualism condition between the mechanism of judicial review and the executive review mechanism. The design of the Judicial Review of regional regulations is carried out by the Supreme Court based on the mandate of law number 12 of 2011 concerning the establishment of legislation that gives authority to the Supreme Court, while judicial review is carried out by governors and domestic affairs ministers based on the law regime number 23 years 2014 concerning regional government.

Debates over the cancellation of regional regulations by the executive or judiciary become academically interesting issues and the constitutional political space departs from a different perspective to place regional regulations as part of the implementation of regional government that correlates with the principle of unitary state as a form of state and legal the area is considered as part of the legislation within the framework of the

rule of law<sup>1</sup>. The concept of a unitary state placed the central government as the original owner in relations of relations between the central government and the regional government, because the central government has the authority to oversee the administration of the government in the regions including cancelling regional regulations. In the other side the concept of the rule of law placed law as the only instrument to oversee the administration of the government, including the assessment of whether a regional regulation is contradictory or does not conflict with the supreme laws and regulations. Law as a rule system is then able to correct itself through the mechanism of judicial review material. In the concept of a democratic law state material testing of laws and regulations is carried out by the judiciary.

The Constitutional Court Decision Number 137/PUU-XIII/2015 turned out to not only ending the polemic executive review and judicial review of the local regulations, but more fundamentally was the problem of how to design the Supreme Court institution in maximizing the implementation of the judicial review authority for the future. The disappearance of the executive review mechanism against regional regulations switching to a judicial review at the Supreme Court certainly has little impact on the increase in friendly work for the Supreme Court in resolving cases that have been known to have accumulated cases of cassation and reconsideration.

The impact of decision No. 137 / PUU-XIII / 2015 is the number of cases of judicial review cases will increase submitted to the Supreme Court. With the number of regencies/cities in Indonesia as many as 540 cities and 34 provinces with estimates of regional regulations submitted for judicial review a regional regulation in one year, it is estimated that the Supreme Court will settle judicial review cases as much as 574 in a year. Not to mention that if coupled with other laws and regulations that are under the law such as government regulations, presidential regulations, and ministerial regulations and other institutional regulations, there is also the possibility of judicial review in the Supreme Court, it can be estimated the number of cases handled by the court great will multiply. Not to mention the cassation and reconsideration cases submitted to the Supreme Court which every year

---

<sup>1</sup> Sri sumantri, *Hak Uji Materil* di Indonesia, Bandung, PT Alumni, 1977, p.18

increases and has become a heavy workload for the Supreme Court.

Based on the above conditions, the Supreme Court institution must begin to think about how to design institutions, procedural law and work procedures in carrying out the authority of judicial review. This article aims to reveal the design of the Supreme Court's work in carrying out the authority for judicial review of regional regulations. This paper begins the theoretical design of judicial review by a judicial institution, constitutional judicial review design and institutional concept of implementing a judicial review by the Supreme Court.

Verdict of Constitutional Court Number 137 / PUU-XIII / 2015 has a significant impact on the implementation of the supreme court authority in the field of judicial review of local regulations. Institutional issues, procedural law and human resources are serious problems faced by the Supreme Court in exercising their authority. The problems in this paper are, first of all, what are the legal implications of the Constitutional Court Decision Number 137 / PUU-XIII / 2015 on the institutional and legal procedures for judicial review of regional regulations in the Supreme Court? secondly, how is the concept of the implementation of a judicial review by the Supreme Court?

Type of this of research is juridical-normative research. In line with the type of research, the method used is normative legal research. This research will examine various laws and regulations that regulate judicial review of regional regulations and find a formulation of the institutional concept of implementing a judicial review by the Supreme Court. To get answers of the research questions , the approach used in this study are statute approach, historical approach, and conceptual approach. The statute approach will be reviewed and analyzed the laws concerning judicial review of existing regulations regulated in the 1945 Constitution of the Republic of Indonesia, Law Number 12 of 2011 concerning Establishment of Legislation, Law Number 48 of 2009 concerning Judicial Power, Law Number 23 of 2014 concerning Regional Government and the Decision of the Constitutional Court Number 137 / PUU-XIII / 2015. The historical approach will examine and analyze the development of legislation relating to judicial review. The comparative approach will compare the settlement

model of judicial review cases in the constitutional court and supreme court. The conceptual approach will find out a concept of the implementation of the Supreme Court's judicial review authority on local regulations in the future. The legal material was then analyzed using legal analysis in the form of legal interpretation and legal construction. Drawing conclusions is done using the deductive method.

### **A Theoretical and Constitutional Design Authority of the Judicial Review by the Supreme Court.**

Theoretically, the existence of a regime of judicial review in the field of legal knowledge departs from the nature of legal norms that are self-assessing (self-correction)<sup>2</sup>. Legal norms are able to assess norm errors that are born if the legal norms conflict with justice and common sense or legal logic<sup>3</sup>. Then the law which consists of rules, principles and legal processes is complemented by legal principles such as the principle of *lex superior derogate lex inferiori*, *lex specialis derogate lex generale*, and the principle of no other intended to correct and maintain the nature of consistency and legal consistency. According to that, legal norms can be sued through the court institution as well as the implementation of the law by the court<sup>4</sup>.

According to Jimly Asshidiqie judicial review is the testing of legal norms through the judiciary, which is different from the legislative review and executive review. Legislative review is the testing of legal norms by the legislature. While the executive review is the executive authority to test the laws and regulations. In the repertoire of constitutional law judicial review originated from the Marbury vs. Madison 1803 case which conducted a test

---

<sup>2</sup> Abdul Mukti Fadjar, *Teori Hukum*, (Malang, Intrans,2003),p.40

<sup>3</sup> Mochtar Kusumaatmadja and Arief Sidharta, *Pengantar Ilmu Hukum*, (Alumni, Bandung:2003), p. 34.

<sup>4</sup> Center for Constitutional Studies, Faculty of Law, Andalas University and the Constitutional Court of the Republic of Indonesia, *Development of Legislative Examination in the Constitutional Court, (from thinking about textual law to progressive law)*, (Pusako and general secretary, constitutional court, 2010), p. 49.

of the laws made by Congress<sup>5</sup>.

The authority of the court institution to conduct a judicial review according to Jimly Asshidiqie has two variants which are judicial review and judicial preview. Judicial review is the testing of statutory regulations after the law is passed. Whereas a judicial preview is a test of legislation before it is ratified. Jimly Asshidiqie further elaborated on the constitutionality testing of the law examining statutory norms on the constitution in both the formal and material aspects. Formal constitutional judicial review examines the constitutionality of the formation of laws relating to the validity of the law making process. Material constitutionality testing examines the constitution of material contained in the norms of law<sup>6</sup>.

The Indonesian constitution, it has regulated a regime of judicial review as part of the power possessed by judicial authority institutions. Article 24 A paragraph (1) of the 1945 Constitution of the Republic of Indonesia determines "The Supreme Court has the authority to adjudicate at the level of cassation, test the laws and regulations under the law against the law, and have other authorities governed by law". Article 24 C paragraph (1) stipulates that".<sup>7</sup>The Constitutional Court has the authority to try at the first and last levels whose final verdict is to test the law against the Constitution, decide upon the dispute over the authority of state institutions whose authority is granted by the Constitution, decide the dissolution of the party politics, and decide on disputes about the results of the general election ". Regarding the two authorities to test legislation above Jimly Ashiddiqie stated that there are fundamental differences in judicial review held by the Supreme Court and judicial review held by the constitutional court<sup>8</sup>. The

---

<sup>5</sup> [David Feldman](#), *Democracy, The Rule of Law and Judicial Review*, Federal Law Review (FLR) , Vol.19 ,March 1990, p.1-39

<sup>6</sup> Jimly Asshidiqie, *Hukum Acara Pengujian Undang-Undang*, (Konstitusi Press: Jakarta, 2006), p.2-3

<sup>7</sup> Kartono, *Politik Hukum Judicial Review Di Indonesia*, Journal of Dinamika Hukum, Vol.11 edisi khusus februari 2011,p.16

<sup>8</sup> Ralph Ruebner, *Democracy, Judicial Review And The Rule Of law In The Age Of Terrorism: The Experience Of Israel-A Comparative Perspective*, Georgia Journal Of International And Comparative Law, Volume 31 2003 Number 3, p.503

power of testing legislation under the law by the Supreme Court is the testing of legality (the legality of regulation), while the power of law testing against the Constitution is the constitutionality of legislative law<sup>9</sup>.

The authority of the judicial review of the Supreme Court is the new authority possessed by the Supreme Court stipulated in the 1945 Constitution, before the 1945 Constitution of the Republic of Indonesia was amended judicial review authority not regulated in the constitution, but regulated at the level of law. Article 26 paragraph (1) of Law Number 14 of 1970 concerning Basic Provisions for Judicial Power stipulates "The Supreme Court Authorizes to Declare Invalid All Statutory Regulations that are Lower than the Law for reasons contrary to higher laws and regulations". Law number 14 of 1985 acknowledges the authority of the Supreme Court judicial review, namely materially testing only the laws and regulations below the Law. The Judicial Review of the Supreme Court is authorized to declare illegitimate all statutory regulations from a lower level than the Law for reasons contrary to higher laws and regulations<sup>10</sup>. The decision regarding the invalid statement of the laws and regulations can be taken in connection with the examination at the cassation level. Revocation of statutory regulations that are declared invalid is carried out immediately by the relevant agency<sup>11</sup>. The judicial review of the Supreme Court stipulated in the 1945 Constitution of the Republic of Indonesia was the adoption of the norms contained in Law No. 14 of 1985 concerning the Supreme Court.

The implementation of the Supreme Court's authority to conduct judicial review is then regulated in Law Number 48 of 2009 concerning Judicial Power and Law Number 3 of 2009 concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court. The arrangement in Article 20 paragraph (2) is very short basically governing almost the same as Article 24 A paragraph (1) 1945 Constitution of the Republic of Indonesia the Supreme Court has the authority of judicial review to examine the legislation under the law against the law. Law number 3 of 2009 regulates in more detail the Supreme Court judicial review. Article 31 A regulates the mechanism for the application of judicial review, the parties that have the

---

<sup>9</sup> *ibid*, p.4-5.

<sup>10</sup> Yuswanto dan M. Yasin al-arif, *Diskursus Pembatalan Peraturan Daerah Pasca Putusan Mahkamah Konstitusi Nomor 137/PUU-XIII/2015 dan Putusan Nomor 56/PUU-XIV/2016*, Jurnal Konstitusi Vol. 15 No.4 Desember 2018,P. 715.

<sup>11</sup> article 31 law number 14 /1985 concerning supreme court.

legal standing to file a judicial review, the application material, the time of the petition, and the supreme judgment regarding judicial review. Article 31 A also regulates the delegated legislation judicial review through Supreme Court Regulation<sup>12</sup>. In the Indonesian constitution, it has regulated a regime of judicial review as part of the power possessed by judicial authority institutions. Article 24 A paragraph (1) of the 1945 Constitution of the Republic of Indonesia determines "The Supreme Court has the authority to adjudicate at the level of cassation, test the laws and regulations under the law against the law, and have other authorities governed by law". Article 24 C paragraph (1) stipulates that "the Constitutional Court has the authority to examine at the first and last levels whose final verdict is to test the law against the Constitution, decide upon the dispute over the authority of state institutions whose authority is granted by the Constitution, decide the dissolution of the party politics, and decide on disputes about the results of the general election". Regarding the two authorities to test legislation above, Jimly Asshiddiqie stated that there are fundamental differences in judicial review held by the Supreme Court and judicial review held by the constitutional court. The power of testing legislation under the law by the Supreme Court is the testing of legality (the legality of regulation), while the power of law testing against the Constitution is the constitutionality of legislative law.

### **Judicial Review of Regional Regulations by the Supreme Court in the System Framework for Legislation and the Decision of the Constitutional Court**

As described above the system of judicial review in Indonesia is carried out by the judicial authority. The Constitution gives authority to two institutions, namely the Supreme Court and the Constitutional Court. The Supreme Court is given the authority to conduct judicial review of laws and regulations under the Constitution. The Constitutional Court is given the authority to review the constitutional of law against the constitution. Article 9 paragraph (1) of Law Number 12 of 2011 concerning the establishment of laws and regulations described that in the case of a Law allegedly

---

<sup>12</sup> Maria Farida Indrati S., *Ilmu Perundang-Undangan: Jenis, Fungsi Dan Materi Muatan*, Revise edition) (Jakarta: Penerbit Kanisius, 2007) p.57

contradicting the 1945 Constitution of the Republic of Indonesia, the review shall be conducted by the Constitutional Court. Article 9 paragraph (2) regulates a statutory regulation under the law allegedly in contravention of the law, the review was carried out by the Supreme Court.

Article 7 of Law Number 12 of 2011 concerning the establishment of laws and regulations adheres to a hierarchical system of legislation starting from:

1. The 1945 Constitution of the Republic of Indonesia;
2. Decree of the People's Consultative Assembly;
3. The laws/Government Substitution Laws;
4. Government regulations;
5. Presidential decree;
6. Provincial Regulation; and
7. Regency / City Regulation.

The hierarchy of legislation above also gives authority to the Supreme Court to conduct judicial review of Government Regulations, Presidential Regulations, Provincial Regional Regulations and Regency / City Regulations. The provisions of Article 8 paragraph (1) of the types of legislation that can be carried out by the Supreme Court for judicial review are the rules set by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Agency, the Judicial Commission, Bank of Indonesia, Ministers, agencies, institutions or commissions established by the Act or Government at the behest of the Law, Provincial Regional Representatives, Governors, Regency / City Regional Representatives, Regents / Mayors, Village Heads or the same level.

Compared to the authority of the Constitutional Court which only has the authority to examine the constitutionality of the law against the constitution, the judicial review authority of the Supreme Court is far complex both in terms of substance and quantity and the laws and regulations that will be judged by a review. It can be estimated that if one of the types of legislation under the law above is carried out a judicial review is one of the laws in a year, the greater the burden of the Supreme Court which has accumulated.

Interesting to be discuss in this article is the consideration of the judge (*ratio decidendi*) decisions of the Constitutional Court of the Republic of Indonesia No 137 / PUU / 2015 which invalidates Article 251 paragraph (2), paragraph (3), paragraph (4) and paragraph (8) of the Law Number 23 of 2014 concerning regional government. First of all, the principle of a unitary state. In a unitary state with decentralization model such as Indonesia with the principle of regional autonomy and co-administration where local regulations as instruments of legislation in the regions are democratically made by regional heads and regional peoples representative council (DPRD) must therefore also be regarded as legislative products (local law) the same as the law. Secondly, the principle of judicial power and the rule of law. The mechanism of judicial review is one of the conditions for upholding a state of law, in a democratic state of law judicial review is held in the framework of realizing a check and balances mechanism for legislative and executive powers to make laws and regional regulations. According to the doctrine of separation of powers, legislation is only worthy of being reviewed by the judiciary. Regional regulations whose content material is the follow-up of legislation on it and regulating regional specialities must be judicial review by the Supreme Court, while the executive only has the authority to preview (executive preview)<sup>13</sup>.

The Constitutional Court also considers that the existence of article 251 paragraph (2), paragraph (3), paragraph (4) and paragraph (8) of Law Number 23 of 2014 concerning regional government negates article 24 of the 1945 Constitution which gives judicial review authority only to the Court Great. The verdict of the constitutional court actually confirmed the existence of the authority for judicial review of laws and regulations under the law is the sole authority of the Supreme Court. Other interesting legal considerations conveyed by the constitutional court are the form of legal instruments to cancel regional regulations. Article 251 Paragraph (2), Paragraph (3), Paragraph (4) and Paragraph (8) which provide “clothes” for cancellation of regional regulations through a governor's decision and the Minister of Home Affairs' decision to make the two *beschikking* lawsuit by the

---

<sup>13</sup> John McGinnis and Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, (Northwestern University School of Law Public Law and Legal Theory Papers, 2003) p. 39-41

region to the Administrative Court so that it can disrupt the system of current law. The constitutional court ruling has ended the dualism of the cancellation of regional regulations that have been adopted so far, namely the executive review by the Minister of Home Affairs and the governor and judicial review, to be purely a judicial review by the Supreme Court.

### **Redesigned of the Law of Procedure for the Supreme Court Judicial Review of Regional Regulations after the Decision of the Constitutional Court.**

The decision of the Constitutional Court which confirmed a judicial review of the regulation to the Supreme Court was not only a consistency in carrying out the principles of the rule of law<sup>14</sup>, but also led to a new homework for the Supreme Court which had to be resolved. In that context, it is necessary to have a mature Supreme Court procedural law design to carry out the authority for judicial review of maximum regional regulations in the Supreme Court<sup>15</sup>. There are several problems that need to be corrected and refined in the judicial review of regional regulations in the Supreme Court.

#### a. Open trial for the public

The law on judicial review at the Supreme Court of the Republic of Indonesia after the constitutional amendments that gave Supreme Court authority to conduct judicial review of legislation under the law on the law have been enacted by two rules of the Supreme Court (Peraturan Mahkamah Agung/perma), namely Perma No 1 of 2004 concerning Judicial review and Perma No 1 of 2011 concerning Judicial review. Perma Number 1 of 2004 concerning Judicial review<sup>16</sup>. In the midst of the amendment of Perma No. 1 of 2011 concerning judicial review is based on the results of a Supreme

---

<sup>14</sup> Amy Street, *Judicial Review And The Rule Of Law who Is In Control?* (London, The Constitution Society : 2013) p.40.

<sup>15</sup> Hamid Chalid, *Dualism of Judicial Review In Indonesia: Problems And Solutions*, *Indonesia Law Review* (2017) 3: 366-393

<sup>16</sup> Spigelman, James, *The Principle of Open Justice: A Comparative Perspective*, *University of New South Wales Law Journal*, Vol. 29, No. 1, pp. 147-166, 2006.

Court Research & Development study which concluded that: First of all, the regulation of time limits in Perma No. 1 of 2004 is not accompanied by adequate consideration as to why the deadline is limited, so it does not have a rational and scientific basis. secondly, judges' judgments about legal standing in most judicial rights decisions do not show adequate consideration. Third, the scope of the Supreme Court's authority to examine and decide on material judicial rights is limited to the testing of laws and regulations under the law rather than policy regulations<sup>17</sup>.

After the enactment of Perma No. 1 of 2011 concerning the judicial review it actually still has substantial weaknesses. One such weakness is the absence of procedural law that specifically regulates the process of judicial review proceedings. The absence of regulatory proceedings raises public perceptions that the process of proceedings in the Supreme Court is closed-system procedure<sup>18</sup>, so it does not allow applicants and defendants to submit their arguments and the absence of a verification process such as presenting expert witnesses at the trial. It is therefore important to think about improving the procedural law for testing the law in the Supreme Court in accordance with the principles of the procedural law of modern judicial review which emphasizes the principle of transparency and accountability of the judiciary. Then it becomes important in the future to make changes to the Judicial Review Rights procedure in the Supreme Court by including the principles of trials that are open to the public which can be attended by the applicant and related parties to submit arguments and provide information on the regional regulations being tested. Thus the principle of a transparent and fair legal procedure is fulfilled<sup>19</sup>.

---

<sup>17</sup> <http://bldk.mahkamahagung.go.id/puslitbang-hukum-dan-peradilan/dok-kegiatan-litbangkumdil/764-kewenangan-uji-materiil-peraturan-perundang-undangan-di-bawah-undang-undang.html>

<sup>18</sup> Asfinawati, *Menguatkan Mekanisme Pemenuhan Hak Konstitusional Perempuan Melalui Peradilan Terbuka judicial review di mahkamah agung*, kertas kerja Komnas perempuan, 2013,p.14.

<sup>19</sup> Anoeska Buizje, *The Principle Of Transparency In Eu Law* (Uitgeverij Boexpress, 'S-Hertogenbosch, Nederlands : 2013), 27-34

## 2. Preliminary sessions

The preliminary sessions (dismissal process) is an important part that needs to be held in the judicial review procedure in the Supreme Court<sup>20</sup>. The preliminary hearing is the entrance and the initial part of the trial process for judicial review in Supreme court and is open to the public. Preliminary examination is a mechanism for the judge to examine the completeness and clarity of the application material which includes the authority of the Court, the legal standing of the Applicant, and the subject matter of the petition<sup>21</sup>. At the preliminary hearing the judge has not examined the substance of the case (principal case) but only the administrative completeness, standing and principal of the petition. In the preliminary session the Judge advises the Applicant and / or his proxy to complete and / or correct the application. Judge's advice can be an explanation of the orderly conduct of the trial<sup>22</sup>.

The results of the preliminary examination are the advise of the judge that the applicant's request is complete and clear, and / or has been corrected in accordance with the advice in the panel session. The Registrar then submits a copy of the request to the chief of Regional government , Local parliament and the Ministry of Home Affairs (integration) as a related party in order to submit information on regional regulations that are currently under judicial review<sup>23</sup>.

## 3. Trial Examination Process

Examination of the trial is also an important part of the trial of judicial review of regional regulations in the Supreme Court. At the hearing, the applicant and related parties will provide arguments and explanations of the norms of a norm in the regional regulations that are in conflict or not in

---

<sup>20</sup> Supreme Court of UK, *Judiciary For england And Wales, The Administrative Court Judicial Review Guide 2020* (England , Supreme Court : 2020) P.3

<sup>21</sup> The Public Law Project *An introduction to Judicial Review* (The Public Law Project, 2015 ) p.23

<sup>22</sup> Compared with article 10 constitutional courts rules No : 06/pmk/2005 concerning procedural of judicial review.

<sup>23</sup> Jimly Asshidiqie, *Hukum Acara Pengujian Undang-undang*, (Sinar Grafika, Jakarta : 2015) p.56

conflict with the laws and regulations under the law in a balanced and transparent manner<sup>24</sup>. So it becomes important to lay down the basic principles of hearing a judicial review by conducting hearings in a plenary session that is open to the public. Technically, a hearing can be conducted by the Panel of Judges in certain circumstances decided by the Judge Consultative Meeting<sup>25</sup>.

Examination of the trial is carried out to examine a) examination of the principal request, b. examination of written evidence, c. listen to the statement of the regional head, d. listen to the DPRD's statement, e. listen to the statement of the interior minister / governor, f. hear witnesses testimony, g. listen to the expert's testimony, listen to the information of the Related Party i. examination of data series, information, actions, circumstances, and / or events that correspond to other evidence that can be used as guidance, j. examination of other evidence in the form of information that is said, sent, received, or stored electronically with optical instruments or similar<sup>26</sup>.

#### 4. Burden of Proof process

Burden of Proof process is the “heart” of the process of holding judicial review<sup>27</sup>. It is in this process of verification that the relevant party applicant submits evidence that supports the application and the related party submits the contrary evidence. The proof of law principle in a judicial review case is proof that is charged to the applicant<sup>28</sup>. However, in certain cases and deemed necessary, the Judge may also minister of internal Affairs

---

<sup>24</sup> Mark Symes & David Jones, *The Fundamentals Of Judicial Review In The Upper Tribunal – Including Drafting Grounds*, (Hjt Training : 2008) P.16

<sup>25</sup> Inosentius Samsul, et,al, *Pengkajian Hukum Tentang Putusan Mahkamah Konstitusi*, (Badan Pembinaan Hukum Nasional Kementerian Hukum Dan Ham RI :2009), p.58-62

<sup>26</sup> Compared with article 11 constitutional courts rules No : 06/pmk/2005 concerning procedural of judicial review.

<sup>27</sup> Ulrike Hahn And Mike Oaksford, *The Burden Of Proof And Its Role In Argumentation*,( Argumentation (2007) 21:39–61

<sup>28</sup> Compared with article 18 constitutional courts rules No : 06/pmk/2005 concerning procedural of judicial review.

and / or the Related Party. As a consequence of the fair procedure of chief of local government , the DPRD, the Minister of Domestic Affairs and / or the Related Party can submit evidence to the contrary (tegen-bewijs)<sup>29</sup>

The thing that needs to be regulated also in the process of proving a judicial review case in the Supreme Court is the types of evidence that are regulated. There are several evidences that can be submitted for examination at the trial; a. letters or writings that must be accountable for the legal way of obtaining them, b. testimony of witnesses under oath concerning facts that are seen, heard and experienced by themselves, c. statement of experts under oath according to their expertise, d. statement of the Applicant, chief of local government , the DPRD, the Minister of Home Affairs and / or the Related Party as well as information from the parties directly related, e. instructions obtained from a series of data, information, actions, circumstances, and / or events that correspond to other evidence; and / or f. other evidence in the form of information that is said, sent, received or stored electronically with an optical instrument or similar to that<sup>30</sup>.

Proof of writing or writing in the form of quotations, copies, or photocopies of laws and regulations, state administrative decisions, and / or court decisions, the original manuscript must be obtained from the official institution that issued it.

## 5. Decision

The final part of the judicial review system in the Supreme Court is a verdict. But before arriving at the verdict the judge goes through a process, namely the Judge Consultation Meeting (Rapat Permusyawaratan Hakim)<sup>31</sup>. Judges Consultation Meeting is a forum of judges to hear, discuss and / or make decisions regarding a. panel report on preliminary examination, b. panel report on hearing hearings, c. Panel recommendations regarding

---

<sup>29</sup> Maftuh Effendi, Tri Cahya Indra Permana, *Usulan Rum usan Hukum Acara (Ius Const it uendum) Pengujian Perat uranPerundang-Undangan di Bawah Undang-Undang oleh Mahkamah Agung*, Jurnal Mimbar Hukum, Vol. 25 No. 1juni 201. p.37

<sup>30</sup> Compared with article 29 constitutional courts rules No : 06/pmk/2005 concerning procedural of judicial review

<sup>31</sup> Compared with article 30 constitutional courts rules No : 06/pmk/2005 concerning procedural of judicial review

follow-up of results of examination of requests, d. legal opinion of the Supreme Judges, e. the results of the plenary hearing and the legal opinions of the Chief Judges, f. The Chief Judge who drafted the decision, g. final draft decision, h. appointment of the Chief Judge who served as the last reader of the draft decision and. division of assignments for reading decisions in plenary sessions.

The decision was taken in the RPH which was attended by a panel of judges who tried the case and read / pronounced in a plenary session open to the public attended by a panel of Supreme Judges. In making decisions, every Chief Justice must submit a written consideration or opinion on the application. The principle of decision making is as far as possible taken by deliberation to reach consensus. If consensus is not reached, the meeting is postponed until the next consultation meeting. But if a condition after being cultivated in earnest turns out to be unable to reach a consensus, the decision is taken with the most votes. Even if the condition cannot take the decision with the most votes then the final vote of the RPH Chairperson determines. The opinion of a different Chief Judge on the decision is contained in a decision, unless the judge concerned does not want it.

## **CONCLUSION**

Based on the discussion above, we can conclude two things, first, the legal implications of the Constitutional Court Decision Number 137 / PUU-XIII / 2015 on the institutional and legal procedures for judicial review of regional regulations in the Supreme Court are the stronger and increasing authority of judicial review in Supreme Court. This decision ended the dualism of review of local regulations from judicial review by the Supreme Court and executive review of regional regulations by the Ministry of Home Affairs to only a judicial review by the Supreme Court, also potentially increasing the number of cases of judicial review in the Supreme Court. Second, the concept of the implementation of a judicial review by the Supreme Court is carried out through legal renewal of the judicial review proceedings in the Supreme Court by including several important substances, related to hearings that are open to the public, the existence of a preliminary examination, hearing, verdict and decision making that more open and fair.

To realize the idea of strengthening the Supreme Court's judicial review authority in testing regional regulations, the author recommends to the Supreme Court to revise the Regulation No. 1 of 2011 concerning judicial review by including several material, namely public hearings, preliminary examinations, hearing hearings, verification and decision making that is more open and fair. The Supreme Court should make a comparative assessment with the constitutional court regulation Number: 06 / PMK / 2005 concerning the guiding procedure in the case of Judicial review.

### **Bibliography**

- Amy Street “Judicial Review And The Rule Of Law who Is In Control?”  
London, The Constitution Society : 2013
- Anoeska Buizje, “The Principle Of Transparency In Eu Law” Uitgeverij  
Boxpress, 'S-Hertogenbosch, Nederlands : 2013
- Asfinawati, “Menguatkan Mekanisme Pemenuhan Hak Konstitusional  
Perempuan Melalui Peradilan Terbuka *judicial review* di Mahkamah Agung,  
Kertas Kerja Komnas Perempuan, 2013.
- Hamid Chalid, “Dualism Of Judicial Review In Indonesia: Problems And  
Solutions, Indonesia Law Review” *Jurnal Hukum dan Pembangunan*. vol.  
3 2017 .
- Inosentius Samsul, et,al, “Pengkajian Hukum Tentang Putusan Mahkamah  
Konstitusi”, Badan Pembinaan Hukum Nasional Kementerian Hukum  
Dan Ham RI 2009.
- Jimly Asshidiqie, “Hukum Acara Pengujian Undang-undang”, Sinar Grafika,  
Jakarta 2015
- John McGinnis and Ilya Somin, “Federalism vs. States’ Rights: A Defense of  
Judicial Review in a Federal System” ,Northwestern University School of  
Law Public Law and Legal Theory Papers, 2003.
- Maftuh Effendi, Tri Cahya Indra Permana, Usulan “Rumusan Hukum Acara  
(Ius Const it uendum) Pengujian Perat uran Perundang-Undangan di  
Bawah Undang-Undang oleh Mahkamah Agung”, *Jurnal Media Hukum*,  
Vol. 25 No. 1juni 2018.
- Maria Farida Indrati S., “Ilmu Perundang-Undangan: Jenis, Fungsi Dan Materi  
Muatan”, Revised edition Jakarta: Penerbit Kanisius, 2007)
- Mark Symes & David Jones, “The Fundamentals Of Judicial Review In The  
Upper Tribunal – Including Drafting Grounds”, Hjt Training : 2008.

Muh. Risnain

*Strengthening Judicial Review Authority Of Supreme Court In Review Of Regional Regulations*

Ralph Ruebner, Democracy, "Judicial Review And The Rule Of law In The Age Of Terrorism: The Experience Of Israel-A Comparative Perspective", *Georgia Journal Of International And Comparative Law*, Volume 31 2003 Number 3

Spigelman, James, "The Principle of Open Justice: A Comparative Perspective", *University of New South Wales Law Journal*, Vol. 29, No. 1.

Supreme Court of UK, "Judiciary For england And Wales,The Administrative Court Judicial Review Guide 2020" England , Supreme Court : 2020.

The Public Law Project , "An introduction to Judicial Review" The Public Law Project, 2015

Ulrike Hahn And Mike Oaksford, "The Burden Of Proof And Its Role In Argumentation", *Argumentation* (2007)

Yuswanto dan M. Yasin al-arif, "Diskursus Pembatalan Peraturan Daerah Pasca Putusan Mahkamah Konstitusi Nomor 137/PUU-XIII/2015 dan Putusan Nomor 56 /PUU-XIV/2016", *Jurnal Konstitusi* Vol. 15 No.4 Desember 2018.

Abdul Mukti Fadjar, "Teori Hukum", ( Malang, Intrans,2003),p.40

Center for Constitutional Studies, Faculty of Law, "Andalas University and the Constitutional Court of the Republic of Indonesia, Development of Legislative Examination in the Constitutional Court, (from thinking about textual law to progressive law)", Pusako and general secretary, constitutional court, 2010.

David Feldman, "Democracy, the Rule of Law and Judicial Review", *Federal Law Review (FLR)* , Vol.19 ,March 1990,

Jimly Asshidiqie, "Hukum Acara Pengujian Undang-Undang" Konstitusi Press: Jakarta, 2006.

Kartono, "Politik Hukum Judicial Review Di Indonesia", *Journal of Dinamika Hukum*, *Vol.11 edisi khusus februari 2011*,

Mochtar Kusumaatmadja and Arief Sidharta, "Pengantar Ilmu Hukum", Alumni, Bandung:2003.

Sri Sumantri, *Hak Uji Materil di Indonesia*, Bandung, PT Alumni, 1977.

<http://bldk.mahkamahagung.go.id/puslitbang-hukum-dan-peradilan/dok-kegiatan-litbangkumdil/764-kewenangan-uji-materiil-peraturan-perundang-undangan-di-bawah-undang-undang.html>