STRENGTHENING INDEPENDENCE: CONSTITUTIONAL INTERESTS AS A PARADIGM FOR JUDICIAL REVIEW IN INDONESIA

Andriansyah
Sahabat Saksi dan Korban South Sulawesi
Rahmanandriansyah5@gmail.com

Muthi'ah Maizaroh
Kantor Hukum Ali Ichsan
mutamzrh@icloud.com

Abstract

The existence of a constitutional injury requirement since Constitutional Court Decision Number 006/PUU-III/2005 was strengthened by Constitutional Court Regulation Number 2 of 2021. In fact, 34 cases in the last 3 years have been ruled inadmissible due to the issue of not fulfilling the requirements of constitutional injury. Some of them are about the New Criminal Code and the Law on Villages, which are considered urgent to be tested but are hampered by the fulfillment of the constitutional injury requirement. This research will prove that the constitutional injury requirement has distorted the independence of the Indonesian Constitutional Court. On the other hand, constitutional interests is a paradigm for restoring the independence, analyst and comparison have provided answers to the issues raised. The results of normative legal research with literature study show two important things. First, the requirement of constitutional injury undermines independence, so it must be eliminated and accompanied by a supporting paradigm that allows it to be eliminated. Second, applying the paradigm of constitutional interests as a condition for fulfilling legal standing. Systematically, constitutional interests are a manifestation of the independence of the Indonesian Constitutional Court by removing obstacles for the public to achieve access to justice.

Keywords: Constitutional Interests, Constitutional Injury, Independence of The Constitutional Court.

Introduction

During the last three years, there have been 34 cases in which the verdict was unacceptable because the applicant did not meet the legal standing requirements. The following graph describes this situation more specifically.

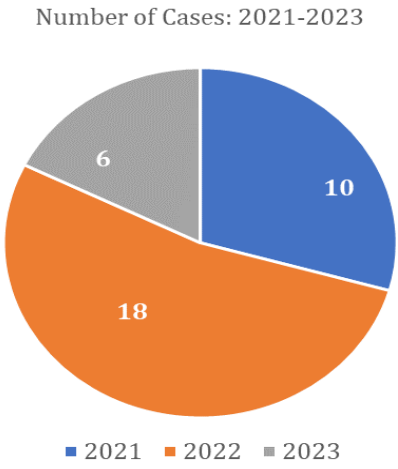

Figure 1. *The Constitutional Court of the Republic of Indonesia, 2023*

The constitutional injury requirement is an anomaly. Because there are fundamental implications for the existence of this constitutional injury requirement. *First*, it increases the chance that a legal product is contrary to the constitution. This is because conflict with the constitution, which is the subject matter of the case, can only be tested if the constitutional injury has been proven first. *Second*, it increases the chances of human rights violations that can distort a fair judicial process. For example, of the six petitions in 2023 that were not accepted because they could not prove the existence of a constitutional injury, four of them were petitions to review the new Criminal Code. The Court held that because the norms had not yet come into force, it could not be said that they had violated constitutional rights. *Third*, this situation shapes the posture of the Constitutional Court of the Republic of Indonesia as the examiner of constitutional norms. All of these things can systematically hamper the Constitutional Court in carrying out its role as an

independent judicial institution, as well as a judicial institution that protects the constitution and human rights.

Looking at the development of existing law in Indonesia, constitutional injury as the legal basis for judicial review of laws was first referred to in Constitutional Court Decision Number 006/PUU-III/2005. The Indonesian Constitutional Court explicitly stated that constitutional injury can be measured by five requirements of constitutional rights or authorities. The regulation of these requirements is then concretized in Constitutional Court Regulation Number 2 of 2021 concerning Procedure in Law Review Cases (*PMK 2/2021*).

This restriction on the requirements for citizens to apply for judicial review was born through the Indonesian Constitutional Court's interpretation of Article 51 of Law Number 24 Year 2003 (MK Law).[1] This also shows that the existing constitutional court procedural law in Indonesia only accommodates factual and potential constitutional injury as the only legal standing. Indonesian law does not accommodate constitutional interests as part of the legal standing of judicial review. This strict regulation of constitutional injury is the source of many judicial reviews that are ruled inadmissible on the grounds that they do not fulfill legal standing. The fundamental question that needs to be answered is whether we must be adversely affected first before we can declare that a legal norm is wrong. On the one hand, there is an expectation that when the norm applies, it will cause injury to the right constitution. The problematic discourse arising from the application of law in Indonesia due to restrictions on the right to challenge laws is limited to constitutional injury.

The subject of discussion in this research is the possibility of applying constitutional interests as part of the applicant's legal standing. This research also looks at the correlation between the independence of judicial power and the limitation of testing authority in the Constitutional Court of the Republic of Indonesia. Previous research that discusses constitutional interests only touches on the level of concepts and comparisons of applicability in other countries. For example, research written by Ulrich Witt and Christian Schubert in the journal Constitutional Political Economy, University of New York The

[1] Bisariyadi Bisariyadi, "Membedah Doktrin Kerugian Konstitusional," *Jurnal Konstitusi* 14, no. 1 (2017).

research discusses the development of constitutional interests in the midst of the development of political economy innovation. The result of the research is that the presence of the constitution should be a social safety net against market interests, so public participation in norm innovation is needed.[2] Interestingly, more specific to the development of law in Indonesia, there has been no research outlining the importance of accommodating constitutional interests as an effort to purify the independence of the constitutional judicial power.

This research meets the urgency value of being enacted immediately because it is related to the fulfillment of citizens' human rights under proper legal norms. To date, there are several laws that will take effect but are feared to cause constitutional problems in the future. Such as the new Criminal Code Law, which will only be effective in 2 years, but many have attempted to test the law because it is considered not in harmony with the constitution. If you look at the current legal conditions, then this is not possible. For this reason, in order to answer crucial legal problems, there are several laws that are important to immediately see the constitutionality of because they are in force but have problems with constitutional requirements. For example, the testing of the term of office of the village head in the Law on Villages requires immediate accommodation, but the Constitutional Court of the Republic of Indonesia cannot accept it. Thus, this research is important to conduct.

The formulation of the problem that will be discussed in the analysis of this journal is the ratio legis of constitutional interests as part of the legal standing to judicial review. This research will also examine the relationship between the current legal standing requirements and the reduction of the independence of the Constitutional Court of the Republic of Indonesia in exercising its authority. This research also seeks to provide an implementation plan and an analysis of the direction of the reach of accommodating constitutional interests as legal standing in the future.

[2] Ulrich Witt and Christian Schubert, "Constitutional Interests in the Face of Innovations: How Much Do We Need to Know about Risk Preferences?," *Constitutional Political Economy* 19, no. 3 (2008).

Method

This research is normative legal research that specifically examines positive law[3], namely the requirements of the applicant's legal position in judicial review. The Approach used are statuta approach, conseptual approach and comparasion approach. This research will be elaborated by exploring the legal aspects of the legislation on the topic raised. In addition, the constitutional paradigm regarding human rights and constitutional rights will be the foundation for building coherent arguments related to the essence of constitutional interests. Exploring the concepts of constitutional interests and judicial independence are important arguments in this research. As a complement, the Supreme Court in the United States, which also applies constitutional requirements, can serve as a comparison by looking at the differences in legal systems, the nuances of independence between Indonesia and the United States, and the institutionalization of the constitutional judicial bodies of the two countries. The Bundesverfassungsgericht in Germany is an example of an institution that accommodates constitutional interests.

Results And Discussions

1. The Paradigm of Constitution : Existence of Human Rights and Constitutional Right

The constitution is the supreme law of the state. The constitution does not only refer to the writings or opinions of jurists that are defended. The compromise (*constitutionalism*) to form the state is contained in the constitution, therefore it becomes natural when the constitution can be accepted as the highest law in a country. Supreme law means that constitutional considerations must be higher than other considerations.[4]

James Madison, pointed out the importance of the constitution as the rules of the game in the life of the state, because the people who are governed are not angels, and the government is not an angel.[5] The

[3] Muhaimin, *Metode Penelitian Hukum,* (Mataram: Mataram University Press, 2016), p. 46.

[4] Richard H. Fallon, "Taking the Idea of Constitutional 'Meaning' Seriously," *Harvard Law Review* 129, no. 1 (2015).

[5]The Essential Constitution," Heritage.org. accessed July 10, 2023, https://www.heritage.org/the-essential-constitution.

birth of the constitution clearly shows that the constitution binds different individual interests to norms that are general in nature because they are accepted by all individuals. One of the implications of this binding is the birth of the government. However, again because the government is not an angel, according to Madison, human rights are a form of external control over that government.

Therefore, it can be concluded that human rights are the pillars of the constitution. Human rights, according to Black's Law Dictionary, are described as follows: "*The freedoms, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live.*"[6] Based on this understanding, human rights are universally recognized powers possessed by humans. Richard Rorty argues that "*human rights have become 'a fact of the world' with a reach and influence that would astonish the framers of the international human rights project. Today, if the public discourse of peacetime global society can be said to have a common moral language, it is that of human rights.*"[7] This statement shows that human rights are a manifestation of human civilization. The father of human rights, John Locke, systematically explained the relationship between government, the constitution and human rights. The presence of the government comes from a compromise called the social contract. However, not all rights are handed over to the government; this is what is referred to as human rights (in the negative sense[8]). This construction illustrates that the constitution, human rights and government are three coherent things.

In later developments, the protection of human rights became a feature of the modern rule of law. It is not surprising that human rights are included in the constitution. These rights are human rights embodied in the constitution[9], so they are referred to as constitutional rights. Constitutional rights in the Indonesian context are a group of rights that are expressly regulated verbally in the Constitusion of Indonesia. Constitutional rights are therefore a step towards giving legal

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[6] Bryan A. Garner, ed.*, Black's Law Dictionary,* (Amerika: Thomson Reuters, 2009), p. 809.

[7] Charles R. Beitz, *The Idea of Human Rights*, *The Idea of Human Rights*, vol. 9780199572458, 2012.

[8] Jonathan S. Gould, "Puzzles of Progressive Constitutionalism," *Harvard Law Review,* vol. 135, no. 8, (June, 2022), pp. 2053-2109.

[9] Bagir Manan and Susi Dwi Harijanti, "Konstitusi Dan Hak Asasi Manusia," *Padjajaran Jurnal Ilmu Hukum* 3, no. 3 (2016).

meaning to human rights. The essential meaning of human rights in the constitution is the guarantee of human rights protection as a logical consequence of the rule of law. As legal rights, constitutional rights contain the following three notions:[10]

1. A right created or recognized by law.
2. A right historically recognized by common-law courts.
3. The capacity of asserting a legally recognized claim against one with a correlative duty to act.

The conclusion that can be drawn is that the law becomes a medium for asserting rights, with the court as an institution that plays a role in enforcing these rights, and there inherently arises an obligation to protect each other's rights together. Indonesia, as a state of law (Article 1 paragraph 3 of The 1945 Constitution of the Republic of Indonesia in Article 1 point 1 of Indonesian Law Number 39 of 1999 on Human Rights, has provided the following definition:

> *"Human Rights are a set of rights inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld, and protected by the state, law, government, and every person for the sake of honor and protection of human dignity".*

This definition further emphasizes rights as something inherent, along with the role of various parties to respect and protect these rights. The protection of legal rights then eventually gave birth to the constitutional court.

Examination of the Law, which is generally carried out by the Constitutional Court today, is a form of human rights protection. The Constitutional Court's role as a protector of human rights can be seen from the birth of the Austrian Constitutional Court as the first Court. Initially, constitutional enforcement was carried out by the Imperial Court in 1867–1919. Enforcement of the constitution did not include the authority to review laws, although at that time there was already a Basic Law on the General Rights of Citizens. However, it was narrowly interpreted to mean complaints against violations of citizens' political rights. Then, in 1919, the Constitutional Court of the German-Austrian Republic was established, which took over the authority of the Imperial Court with the additional authority of limited judicial review. This was

[10] A. Garner, *Law Dictionary*....., p. 1437.

because, at that time, judicial review could only be brought by state governments. Nevertheless, there have been efforts to ensure the fulfillment of constitutional rights violated by the enactment of laws, although they are still group-based.

The Austrian Constitutional Court was first introduced by George Jellinek, who wrote about the "*fassung gerichtshof für Österreich* (Austrian Constitutional Court)" in 1885. There are two main points in Jellinek's view of the Constitutional Court. *First*, the Constitutional Court is a form of resistance to parliament violating the constitution.[11] This is quite reasonable because the presence of the Constitutional Court also affects the field of legislation, which is the authority of parliament. In fact, the Constitutional Court's authority is a form of supervision over the parliament.[12] Second, the rejection of the United States model of constitutional enforcement makes the Court not an interpreter of the constitution, but seem to be the creator of the constitution.[13]

Jellinek's ideas were then realized by Hans Kelsen on the orders of Chancellor Karl Renner in December 1918. The idea of the Austrian Constitutional Court version of Hans Kelsen was outlined in a memorandum on "*Entwurf eines Gesetzes ueber die Errichtung eines Verfassungsgerichtshofe* (Draft Law on the Establishment of a Constitutional Court)". The form of the Constitutional Court was only seen in 1920. Although it has gone through many ages, the influence of the Imperial Court, political dynamics, and the thoughts of Jellinek and Hans Kelsen still exist today. The role of the Constitutional Court in testing laws carried out by individuals or groups of people has been regulated in Article 140, paragraph 1, letter c, of the Bundes-Verfassungsgesetz (B-VG) (Federal Constitutional Law). The history of

[11] Sara Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918-1929)," *Co-herencia* 9, no. 16 (2012).

[12] Fajar Laksono et al., "Relation between the Constitutional Court of the Republic of Indonesia and the Legislators According to the 1945 Constitution of the Republic of Indonesia," *Constitutional Review* 3, no. 2 (2017).

[13] Andrzej Dziadzio, "The Academic Portrait of the Creator of the Pure Theory of Law. Several Facts from Thomas Olechowski's Book Entitled Hans Kelsen. Biographie Eines Rechtswissenschaftlers. Tübingen: Mohr Siebeck, 2020 (1027 Pp.)," *Krakowskie Studia z Historii Państwa i Prawa* 14, no. 3 (2021).

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the Constitutional Court illustrates that the main purpose of its birth was to review laws in order to protect constitutional rights.

The Legal Concept of Constitutional Interests as a Right to Law Examination

The definition of constitutional rights in the previous discussion has shown that the presence of judicial review aims to uphold the values of rights. The development of rights that continues to expand makes people's interests in a legal product also expand. The adoption of modern democracy is based on the "constitution of freedom". There are two tendencies in modern society: the first is the fear of the welfare state not being efficient, and the second is the restriction of constitutional freedom.[14] The rise of constitutional democracy calls for fundamental reforms in every democratic country to uphold its constitution. The prerequisite for that is the willingness and agreement of all citizens to behave as political actors. For this reason, every society will have "interests". Interests in a constitutional revolution are different from personal interests. The interest in the constitution is the long-term interest to be gained from the activities of the welfare state.[15] So, it can be concluded that the interests referred to in this case are the interests of society in general, which are protected by the Constitution.

In legal developments, such interests have been referred to as public interests in public interest review cases in the U.S. Supreme Court, including Matilla in 2016 and Lenonn in 2017.[16] In deciding this public interest, it is determined at what level it can be tested through the constitutional framework or the evolving social environment. The choice of this does not depend on interpersonal expediency but on public law conformity.[17] The Constitutional Court of Bosnia and Herzegovina has done the same under Chapter 3 Article IV of the Constitution of Bosnia and Herzegovina, which gives the Constitutional

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[14] Malte Faber, Reiner Manstetten, and Thomas Petersen, "Homo Oeconomicus and Homo Politicus. Political Economy, Constitutional Interest and Ecological Interest," *Kyklos* 50, no. 4 (1997).

[15] Malte Faber, Reiner Manstetten, and Thomas Petersen. "Homo Oeconomicus"......, p. 467.

[16] Stefano Moroni, "Constitutional and Post-Constitutional Problems: Reconsidering the Issues of Public Interest, Agonistic Pluralism and Private Property in Planning," *Planning Theory* 18, no. 1 (2019).

[17] Stefano. "Constitutional and Post".....p. 18.

Court of Bosnia and Herzegovina the legitimacy to rule on violations of vital national interests.[18] Even the constitutional enforcement in South Africa recognizes real rights that are constitutional and receive the same treatment as other private rights.[19] The constitution as a product of political fragmentation becomes the highest basic norm to protect the constitutional interests of citizens, not the institutional interests of the supporting institutions.[20] These things are to be implemented in derivative regulations made by the legislature as the maker of regulatory norms. So, if you want to see the value of constitutionalism in general, the glasses used are those of the public interest.

This premise then influences the meaning of the desire for constitutionalism, which prioritizes the public interest as a constitutional interests. Cases developed in the Austrian Constitutional Court show this. For example, in the case of the review of the Aviation Law, Decision E 875/2017, the Austrian Constitutional Court assessed the constitutional interests through the right to a healthy environment and expanded the meaning of this interest to mean sustainable interests.[21] Thus, to test the constitutional rights of the community, the first and foremost step is to look at the constitutional interests attached to them. This modern constitutional revolution shows the development of the meaning of constitutional interests as a protector of constitutional rights.

Constitutional interests is a paradigm of constitutional review based on the recognition of the rights of the applicant in the constitution. This paradigm emphasizes testing on the basis that no law can contradict the constitution. This has become a legal identity. Since the time of Ancient Greece in the Kingdom of Athens, there has been a clear distinction between *nomoi* (constitution) and *psephisma*

[18] Konstantin A. Polovchenko, "Influence of the Constitutional Court on the Transformation of Vital National Interests of Bosnia and Herzegovina," *European Politics and Society* 24, no. 3 (2023).

[19] S Viljoen, "The Constitutional Protection of Tenants' Interests: A Comparative Analysis," *The Comparative and International Law Journal of Southern Africa* 47, no. 3 (November 2014): 460–489.

[20] Anna Fruhstorfer and Michael Hein, "Institutional Interests and the Politics of Constitutional Amendment," *International Political Science Review* 42, no. 2 (2021).

[21] Birgit Hollaus, "Austrian Constitutional Court: Considering Climate Change as a Public Interest Is Arbitrary - Refusal of Third Runway Permit Annulled Judgment of 29 June 2017, e 875/2017," *ICL Journal* 11, no. 3 (2017).

(legislation), with the *psephisma* system not contradicting the *nomoi*.[22] In addition, human rights must be upheld as an inherent part of every human being universally. This means that the rights stipulated in the constitution are attached to every legal subject mentioned in the constitution, whether in the form of individuals, groups, or institutions in general. Therefore, these rights are automatically violated when there is a law that, by legal reasoning, contradicts the constitution, whether or not there is a particular case occurring. Another fact proves that the rights stipulated in the constitution are the result of compromise (*constitutionalism*) from many conflicts of interest or individual rights. Therefore, these rights are general and not partial to certain people. Systematically, the process of the formation of constitutional rights is as follows:

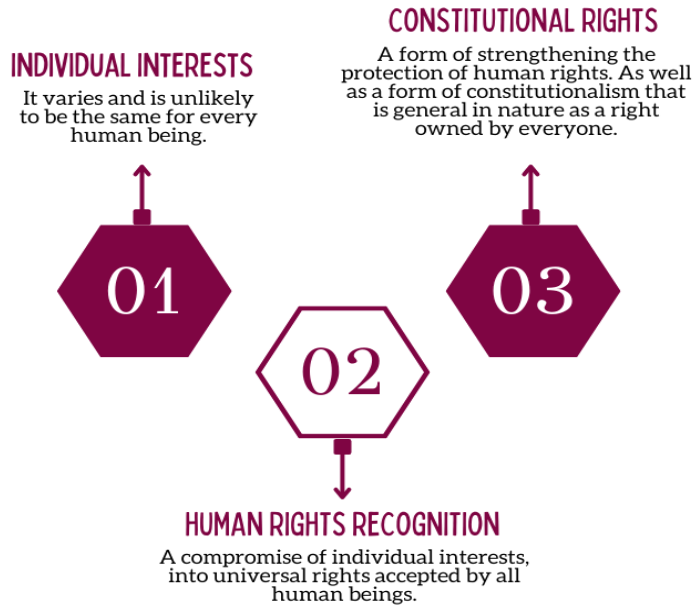

Figure 2. *The Process of The Formation of Constitutional Rights, 2023*

Constitutional rights that are general and inherent to all people must of course be underlined. To quote one of the norms in the

[22]Andriansyah, et.al., *Academic Constitutional Drafting: Rancangan Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Terkait dengan Pokok-Pokok Haluan Negara,* (Jakarta: Badan Pengkajian MPR RI, 2021), p. 27.

Constitution of the Republic of Indonesia, "*Every person has the right to form a family and continue their descendants through legal marriage*" (Article 28B, paragraph 1). If the right is inherent, even if I am not old enough to get married, the right is still attached to me. Therefore, if there is a law that deviates from this provision, then I automatically have the right to challenge the law (*constitutional interests*). In another situation, if someone else suffers a loss, because the protection of human rights is a collective duty, I automatically have a constitutional interests in protecting the person from loss. Accommodating constitutional interests means purifying the essence of the rule of law, the manifestation of the constitution, and the essence of constitutional rights as inherent and general rights. Because, it is not said that human rights protection is only regulated in the Constitution of the Republic of Indonesia. This protection must also be implemented in the administration of the state and felt by the community. Fukuyama had alluded to this by stating that the state is seen from three angles, including the ability to plan, implement policies, and also enforce laws.[23]

Several other aspects rationalize accommodating constitutional interests. *First,* it is an embodiment of the principle of kinship in human rights. If we look back at the debate between Soepomo-Soekarno and Hatta-Yamin regarding human rights. The real debate did not lie in the existence of human rights. However, the relevance of human rights to the family principle of the Indonesian nation.[24] Therefore, mutual assistance in the protection of human rights is a manifestation of that kinship. Such protection should not only be carried out between communities. The government must also play an active role in carrying out this protection. Article 28I, paragraph 4, of the Constitution of the Republic of Indonesia also confirms this, "*The protection, promotion, enforcement, and fulfillment of human rights are the responsibility of the state, especially the government.*" *Secondly*, not all aggrieved people have the ability to conduct their own testing. This is certainly influenced by various factors, ranging from the economy to ignorance that it is detrimental. This situation is the face of law in the community (*the law in the street*).

The values of constitutional supremacy and human rights contained in constitutional interests can also be extracted from the

[23] Zezen Zaenal Mutaqin, "The Strong State And Pancasila: Reflecting Human Rights in the Indonesian Democracy," *Constitutional Review* 2, no. 2 (2016).

[24] Manan dan Harijanti, "*Konstitusi,*"......, p. 448-467.

historical values of judicial review. The existence of judicial review cannot be separated from the history of the United States Supreme Court's invalidation of federal laws. John Marshall laid the foundation for judicial review, now commonly referred to as judicial review. According to Bagir Manan, he interpreted the actions of the United States Supreme Court, because there was a legal case, therefore it was resolved by a judge.[25] Based on this description, it can be seen that the Constitutional Court is present as a legal problem solver related to conflicts of laws against the constitution. The fundamental essence of the review leads to upholding the supremacy of the constitution. Therefore, federal laws that, according to the Court, are contrary to the constitution must be canceled. This nuance clearly illustrates that, in addition to the essence of upholding human rights, judicial review is also a form of constitutional supremacy. Therefore, some of the world's constitutional courts provide various spaces for testing laws against the constitution, not only concerning applications due to constitutional injury. Bagir Manan stated that this test is intended to maintain constitutional norms.[26]

The conviction to change the paradigm of law review towards constitutional interests is further strengthened by the failure of the constitutional injury requirement to be maintained. *First*, the constitutional injury requirement weakens the supremacy of the constitution. Conflict with the constitution can only be proven by the subject matter of the case. However, so far it is not uncommon for the Constitutional Court not to see the contradiction because the issue does not meet legal standing because the constitutional injury is not fulfilled. This is also the reason for the four unacceptable decisions related to the new Criminal Code. *Second*, the requirement of constitutional injury does not reflect the interpretation of the constitution, but rather the creation of legal norms. This is because, if you look at the Constitution of the Republic of Indonesia and Indonesian Laws Number 24 of 2003 on the Constitutional Court and its amendments, they never include the

[25]Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VI Kekuasaan Kehakiman* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2012), p. 344.

[26] Ni'matul Huda and R Nazriyah, *Teori dan Pengujian Peraturan Perundang-Undangan,* (Bandung: Penerbit Nusa Media, 2020), p. 124.

requirement of constitutional injury. In fact, the Court did not even include the reasons that became the basis for determining the requirements for constitutional injury listed in Decision Number 006/PUU-III/2005. The establishment of conditions without clear legal reasons can certainly be a trap that harms the judiciary itself. This has been alluded to previously by Holmes, who emphasized that sometimes judges are reluctant to look at the interests of society, so judges are trapped in unfounded judicial logic. Holmes further stated as follows:[27]

> "*I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious…*"

Third, that there are several Constitutional Court decisions that continue to assess the subject matter of the petition even though, in the end, the constitutional injury requirement is not met. This can be seen in Decision Numbers 98/PUU-XVI/2018, 105/PUU-XVI/2016, and 57/PUU-XV/2017.[28] In addition, there are many conditions in which the Constitutional Court of the Republic of Indonesia passes Legal Standing to test laws even though they do not meet the five requirements of constitutional injury. Among them in Decision No. 5/PUU/IX/2011, Constitutional Judge Mahfud MD passed the qualification of the applicant as an active taxpayer with an interest in testing the term of office of the corruption eradication commission.[29] Decision 32/PUU-XIV/2015 did not consider the requirement of constitutional injury on the grounds that the right to obtain clemency is a right explicitly mentioned in the Constitution.[30] Thus, there is an apparent unconstitutionality in the application of the constitutional injury requirement within the constitutional judges. *Five*, realizing that

[27] Chester James Antieau, "The Jurisprudence of Interests as a Method of Constitutional Adjudication," *Case Western Reserve Law Review,* vol. 27, no 4, (1977), pp. 823.

[28] Intan Permata Putri and Mohammad Mahrus Ali, "Karakteristik Judicial Order Dalam Putusan Mahkamah Konstitusi Dengan Amar Tidak Dapat Diterima," *Jurnal Konstitusi* 16, no. 4 (2020).

[29] Bisariyadi,. "Membedah Doktrin"....., p. 30.

[30] Bisariyadi,. "Membedah Doktrin"....., p. 39.

constitutional testing, although requested by certain individuals or groups, has broad implications and is in the public interest. This can be seen from the fact that the terminology used in judicial review is petition," not suit," because of the strong nuances of public interest in it.[31] This is also consistent with one of the principles in the Constitutional Court's decision, which is *erga omnes*, or generally applicable, and must be obeyed. The essential question from this idea is, if a norm that is tested based on the constitutional injury of a particular person or group causes the norm not to apply, why should the implications of the decision affect everyone, even if the person does not experience a injury? Of course, the question must be answered because constitutional rights apply generally, and judicial review is an instrument of constitutional supremacy.

In the end, the paradigm of constitutional interests must be applied. Constitutional interests are not only conceptual, but can be applied with several indicators that can be used as references. Former United States Supreme Court Justice Benyamin Cardoso emphasized that constitutional interests can be assessed by looking at several aspects, such as custom, history, logic, and legal utility.[32] Jimly Asshiddiqie also explained the same thing, that there are four approaches to assessing the constitutionality of a law. *First*, assess according to the text of the constitution. *Second*, documents that are closely related to the constitution, such as minutes, decisions and decrees of the MPR, certain laws and rules of order. *Third*, constitutional values are inseparable from state administration in the practice of state administration. *Fourth*, there are cognitive values that exist in society.[33] The indicators have causal verband as the basis for the fulfillment of the legal standing of the applicant for judicial review of the law.

2. Judicial Independence Under the Paradigm of Constitutional Interests

The independence of constitutional courts is narrowly defined by only looking at the influence of other institutions. In fact, internal

[31] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, 2015.

[32] Chester James Antieau, "The Jurisprudence of Interests as a Method of Constitutional Adjudication," *Case Western Reserve Law Review,* vol. 27, no 4, (1977), pp. 827.

[33] Andriansyah, et.al., *Academic Constitutional Drafting.....,* p. 32.

factors such as organizational regulations, quality, effectiveness and efficiency of managerial and procedural matters also affect independence. This will of course affect the fair decision-making process as the spirit of independence.[34] In practical terms, a constitutional court that wants to be considered independent must meet certain standards. Starting from the regulation in the constitution with the discretion to amend it, the appointment of judges by academics not practitioners, the appointment of judges for life without term extension, salaries that are rigidly regulated in law, no domination of judicial power by the chief judge, publication of dissenting opinions and concurring opinions, the existence of the right to test, accessibility to the judiciary for every citizen whose rights have been violated.[35]

Accessibility is interpreted as a free space for citizens to test legal products that violate the constitution. The existence of a constitutional injury requirement certainly deviates from this. Therefore, the creation of a constitutional injury requirement has systematically undermined the principle of independence of judicial power. Referring to the origin of the constitutional injury requirement in Constitutional Court Decision Number 006/PUU-III/2005 does not provide reasons for the requirement. The absence of such considerations can invite suspicion of the Constitutional Court. This is reasonable because the public needs reasoned and reflective laws that are filled with adequate legal principles.[36] This symptom also undermines judicial independence. This is because independence is not only understood in exercising authority, but is also considered independent in every action taken.

Accessibility also reflects the spirit of the judiciary's right to review. Reducing accessibility undermines the essence of judicial review. One of the functions of judicial review is to ensure the realization of the functions and objectives of the constitution, which is inherent to the protection of human rights. The constitutional harm requirement practiced in the Indonesian Constitutional Court has resulted in many applications being inadmissible. This certainly degrades the principle of

[34] Zoltán Fleck, "A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts," in *Ius Gentium*, vol. 27, 2014.

[35] Lars P. Feld and Stefan Voigt, "Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators," *European Journal of Political Economy* 19, no. 3 (2003).

[36] Christopher Forsyth, ed., *Judicial Review and The Constitution,* (North America: Hart Publishing, 2000), p. 175.

independence, which is reflected in adequate access to judicial review. Therefore, efforts to accommodate constitutional interests are steps to restore public accessibility to conducting judicial review. Constitutional interests do not view the fulfillment of legal standing in terms of losses or potential losses. However, it is based on the legal arguments that become the applicant's reasons associated with constitutional norms. Indirectly, constitutional interests are also related to the supremacy of the constitution, which is clearly an integral part of the independence of judicial power.

Comparative Legal Systems of Constitutional Interest: U.S. vs Germany

The development of the law of judicial review can be analyzed through the judicial system according to a country's legal system. To find the reason why a law is used and how it affects society, it can be done by comparing the state of the law in the legal system. Comparison is known as one of the research methods used in the branches of empiricism. Legal comparison can be done by comparing two systems with different characteristics but the same purpose.[37] A legal comparison can also be done between two legal institutions with different legal systems.[38]

In this research, comparative law will be used to find the logical ratio of accommodating constitutional interests as a condition of legal standing in judicial review. More specifically, it will refer to the U.S. as the first country to test laws based on constitutional injury. America is a country that applies civil law. And the comparison country is Germany, which is a continental European country and one of the proponents of a special institution for judicial review, namely through the Constitutional Court. For this reason, the following will describe the differences between the two systems of judicial review in the two countries.

[37] Usmak Ul Hosnah, et. al. . *Karakteristik Ilmu Hukum dan Metode Penelitian Hukum Normatif,* (Depok: PT Raja Grafindo 2021), p.105.

[38] Usmak Ul Hosnah, et. al. *Karakteristik Ilmu Hukum*....., p. 106.

Table 1. Comparative Judicial Review between the U.S. and Germany

Contents	U.S. Supreme Courts	The Bundesverfassungsgericht in Germany
Specialized institutions guarding the constitution	It does not have a special institution and is mixed with ordinary courts.	Having a special institution to handle constitutional cases.
Authority to guard the constitution	Tests federal laws against the constitution and provides answers to constitutional questions.	Conducting judicial review of laws, constitutional complaints against government actions, election disputes, constitutional interests, and other disputes involving public law.
Legal Standing Requirements	The U.S. has a strict requirement for legal standing, namely that there must be a sufficient and factual constitutional injury.	Based on citizenship and human rights protection. Provides a linkage of rights and policies to be invoked in court.
Ideology Concentration	Since 1937, it has concentrated on developing the ideology of liberalism-capitalism[39] which focuses on protecting civil rights.	The constitutional court is intended to focus on democratization efforts.

[39] Ralf Rogowski and Thomas Gawron, *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court*, (U.S.: 1st ed. Berghahn Books 2016), P. 16.

The U.S. does not have a specific institution to review its constitution. The jurisdiction of the U.S. Supreme Court's function in testing laws will focus on the legal standing of the people. Any person who feels aggrieved by the enactment of policies or laws can make a test. Subsequently, courts under the U.S. Supreme Court or federal courts will demand the government's compliance with the U.S. Supreme Court's decision.[40] The emphasis on judicial review in the U.S. Supreme Court is on the "enforceability of the law," and thus judicial review can only be conducted if there is factual harm. The doctrine developed in the U.S. is that a petition in court (Standing to Sue) is required to have a sufficient interest and be directly related to the impact provided by the law.[41] But what is interesting about the U.S. is that it accommodates constitutional questions. So, when there is a norm established by the government, citizens can conduct constitutional questions to give meaning to the norm. This is intended to keep the meaning of the law in line with the constitution. Such cases have been practiced since 1909.[42]

Whereas in Germany, there is a special institution that handles constitutional issues, namely the Federal Constitutional Court, hereinafter referred to as The Bundesverfassungsgericht in Germany. Germany's characteristics as a democratic country lead to the practice that the court must ensure that state administration is in line with the constitution. The authority of The Bundesverfassungsgericht in Germany is much broader based on Article 93 of the Grundgesetz, Generally Abbreviated (GG), which classifies the authority of The Bundesverfassungsgericht in Germany to include constitutional interpretation, conformity of laws, constitutional complaints, and other public law policy disputes.[43] Interestingly, every authority of the Bundesverfassungsgericht in Germany is always linked to human rights

[40] Ralf Rogowski and Thomas Gawron, *Constitutional Courts in.....*, p. 199.

[41] Ajie Ramdan, "Problematika Legal Standing Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 11, no. 4 (2016).

[42] Emlin McClain. "Decisions of the Supreme Court of the United States on Constitutional Questions, 1911–1914." *The American Political Science Review,* vol. 9, no. 1 (1915), pp. 36-49.

[43] I Dewa Gede Palguna. "Constitutional Complaint and the Protection of Citizens the Constitutional Rights." *Const. Rev,* vol. 3, no. 1. (2017), pp. 1-23.

as the origin of the constitution. Germany accommodates constitutional complaints based on basic rights.

> *"Any person who claims that one of his basic rights or one of his rights under Articles 20 (4), 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court."*[44]

More attention to human rights protected by the constitution makes Germany also accommodate constitutional interests as legal standing to review laws.

> *"On the interpretation of this Constitution in the event of disputes concerning the extent of the rights and duties of a highest federal body or other parties concerned who have been vested with rights of their own by this Constitution or by rules of procedure of a highest federal body."*[45]

Thus, the fulfillment of the right to test or legal standing to test laws in Germany is not only limited to factual losses but also to constitutional interests that see a tendency to make laws that are contrary to the constitution. In terms of judicial independence between the US and Germany, it can be seen that the German Constitutional Court is much more independent. Germany has the Bundesverfassungsgericht as an independent state institution. The Bundesverfassungsgericht in Germany has absolute freedom to resolve constitutional issues through its decisions.[46] Although, to maintain checks and balances, judges will be elected by parliament, the Bundesverfassungsgericht in Germany is free to exercise its authority. Actually, the same applies to the U.S. Supreme Court's freedom to decide cases. However, comparing the authority of the Bundesverfassungsgericht in Germany, which is much larger and more complex in guarding the constitution, makes the freedom to exercise its authority much greater. For this reason, Germany accommodates all forms of "complaints" against the constitution, including testing norms that are abstract in nature. This is in line with the previous discussion that in Germany, the right to review laws is only based on the validity

[44]Article 95 paragraph (1) Grundgesetz, Generally Abbreviated in Germany.
[45] Article 93 paragraph (1) Grundgesetz, Generally Abbreviated in Germany.
[46] Ralf Rogowski, Thomas Gawron, *"Constitutional Courts in"*....., p. 18.

of human rights, so constitutional interests are recognized as having legal standing.

Both legal systems in the country certainly have their own advantages and disadvantages. But if we look at the formulation that is trying to be explored in this discussion, which system is more in line with the needs of legal protection and human rights? Looking at the existing constitutional court model in Indonesia, the closest to the same system is The Bundesverfassungsgericht in Germany. Indonesia has a special judicial institution to oversee the constitution, namely the Constitutional Court of the Republic of Indonesia. There is also a system of additional authority for the constitutional court, namely disputes over election results and disputes between state institutions. The interpretation of constitutional law by the Constitutional Court of the Republic of Indonesia also continues to develop.

The Constitutional Court of the Republic of Indonesia actively cooperates to find the ideal formula for testing laws. Judging from the website of the Constitutional Court of the Republic of Indonesia, which continues to develop the testing system, the Constitutional Court of the Republic of Indonesia has even begun to study judicial review based on constitutional questions and constitutional complaints.[47] Thus, the development of Indonesian law requires reform, which is in line with the concept of constitutional interests in Germany. The ideology developed is also democratic. So if you look at the comparison, the system of constitutional interests as legal standing as practiced by Germany is actually in line with the principles of the rule of law and the protection of human rights in Indonesia. This will also strengthen the independence of Indonesia's constitutional court system.

3. Prospects for Law Examination in the Constitutional Court

a. Legal Implications of Constitutional Interest as a Condition for Fulfillment of Legal Standing

By accommodating constitutional interests as legal standing to review laws in Indonesia, there are two legal implications, namely implications for the paradigm of the decision of the Constitutional

[47] "MKRI dengan MK Austria Sepakat Kerja Sama Untuk Menguatkan Kelembagaan", Mahkamah Konstitusi Republik Indonesia, accessed July 3, 2023, https://www.mkri.id/index.php?page=web.Berita&id

Court of the Republic of Indonesia and implications for the law of judicial review.

First, the implications for the paradigm of the decision of the Constitutional Court of the Republic of Indonesia will change. The application of the constitutional injury requirement stems from Decision 006/PUU-III/2005. In its legal considerations, the Constitutional Court of the Republic of Indonesia did not mention the concrete reasons for the birth of these requirements. The interesting thing is whether the legal considerations of the decision must be interpreted as having binding force and being final and binding. If you look at the context of testing existing laws, then the verdict is accepted, unacceptable, granted, rejected, or not authorized. This verdict is the final end to the establishment of a norm. Practically, the interpretation of the constitutional injury requirement is often overruled even by the judges of the Constitutional Court of the Republic of Indonesia itself. For this reason, the Constitutional Court of the Republic of Indonesia accommodates the requirement of constitutional injury in PMK 2/2021. However, the requirements in the PMK *ad quo* still come from legal considerations in the decision. The paradigm that makes the legal considerations of Decision 006/PUU-III/2005 the basis for assessing legal standing must change by considering the legal considerations as not part of the legal basis. Thus, a rearrangement of the legal standing of a petition for judicial review can be made. This arrangement is to include constitutional interests as part of the legal standing to review the law. So that law enforcement of the law and the constitution will run optimally.

Second, the implications for the procedural law of judicial review will also change. By accommodating constitutional interests as part of legal standing, the PMK 2/2021 concerning the Procedure for Law Testing will change. The requirement of constitutional injury will be removed and replaced with the meaning of constitutional rights that are harmed based on Article 51 paragraphs (1) and (2) MK. The law is a constitutional interest. This interest contains at least two indicators, namely the qualifications of the applicant for judicial review and the existence of constitutional rights regulated in the constitution. With the loss of this constitutional injury requirement, the Constitutional Court

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of the Republic of Indonesia has directly accommodated constitutional interests as legal standing. This will affect the procedural law of judicial review, especially the legal standing requirements that will be easier to fulfill.

b. Direction of Law Examination Arrangements in the Constitutional Court

Accommodating constitutional interests as a condition of legal standing will expand the space for judicial review to the Indonesian Constitutional Court. The law should not only fulfill the truths of coherence and correspondence, but also fulfill the pragmatic truths that allow the law to be used effectively. Supporting this certainly requires adjustments regarding the institutional posture of the Constitutional Court. Some things that can be done include the following:

1. *Increase the quota of constitutional judges*. Germany, which also does not set a constitutional injury requirement, can be used as a reference. Germany has 16 judges in total, with an average of 8 judges per courtroom. In the future, Indonesia can increase the number of judges to 18, with nine judges per courtroom. Of course, this solution can not only overcome the number of cases that come to the Court, but also provide space for the Court to have additional powers such as constitutional questions and constitutional complaints. However, to be able to accommodate the politics of national legal development, it requires political will from the People's Consultative Assembly to amend the constitution. Specifically, an amendment to Article 24C, paragraph (3), which states, "The Constitutional Court shall have nine constitutional judges appointed by the president, three of whom shall be nominated by the Supreme Court, three by the House of Representatives, and three by the President." In addition to changing the number of judges, this change can also change the mechanism for selecting constitutional judges, with the formation of an ad hoc committee of academics. This is to strengthen the independence of the Constitutional Court from the influence of other institutions.
2. *Application of a Single Judge in the Preliminary Hearing of a Judicial Review Case at the Constitutional Court*. The application of a single

judge is a legal custom that is commonly used both globally and nationally. Some countries in the world that apply a single judge to the judicial process are Bosnia, Finland, France, Georgia, Germany, Ireland, Hungary, Italy, Latvia, Malta, Scotland, Slovakia, Switzerland, Spain, and Ukraine.[48] Indonesia itself has implemented single judges in pre-trial and speedy trial cases in the State Administrative Court (general court). The same applies to the special courts, the Juvenile Court and the Tax Court. The function of the Preliminary hearing, which focuses on the completeness of the petition and the direction of the petition but has not touched on the subject matter, is another reason for the application of a single judge. This is also practiced by the Austrian Constitutional Court, which leaves it to the permanent rapporteur to conduct an examination of the petition regarding the authority of the Constitutional Court to deal with the case, the timeliness of the filing, and the applicant's right to bring the case to the Court, as well as the fulfillment of formal legal requirements.[49] However, the application of a single judge must also be accompanied by the application of the principle of impartiality. This means that cases specifically concerning the individual interests of a particular judge cannot be heard by that judge. This arrangement will later add to the provisions in Article 28 of Law No. 24 of 2003 concerning the Constitutional Court by accommodating the application of a single judge at the preliminary hearing in judicial review cases.

In addition, in order to ensure legal certainty, it is necessary to emphasize that the Constitutional Court uses the paradigm of constitutional interests in fulfilling legal standing. This is a form of amendment to Article 51 paragraph (2) of MK Law concerning the Constitutional Court, emphasizing that the

[48] Konstantinos Kalliris and Theodore Alysandratos, "One Judge to Rule Them All: Single-Member Courts as an Answer to Delays in Criminal Trials," *Journal of Empirical Legal Studies* 20, no. 1 (2023).

[49] "Proceedings before the Constitutional Court – The Decision Process," Verfasunggerichtshof, accessed 7 July, 2023, https://www.vfgh.gv.at/verfassungsgerichtshof/organisation/the_courts_bench.en.html.

applicant must prove the constitutional interests that are harmed by the enactment of a law.

Conclusion

The application of constitutional interests as legal standing for judicial review of laws has a logical ratio. Supported by the essence of human rights and the right to constitutional testing as part of the history of the birth of the concept of judicial review to maintain constitutional harmonization. Accommodating this constitutional interests will restore the independence of the constitutional judicial body in exercising the authority to review the law. In the analysis conducted, it was found that the model of accommodating constitutional interests was by amending PMK 2/2021 and Article 51 Paragraph (2) of MK Law by removing the requirement of constitutional injury and changing it to constitutional interests. The implications given will have an impact on changing the paradigm of decisions that provide loss requirements to be non-binding and changes in the procedure for judicial review of laws. This will run optimally by increasing the number of constitutional judges and implementing a single judge system at the preliminary hearing of judicial review. The regulatory direction created by this solution is an amendment to the legal product governing the trial procedure of the Constitutional Court of the Republic of Indonesia. Recommendations that can be provided:

1. The People's Consultative Assembly of the Republic of Indonesia, based on input from the Constitutional Court of the Republic of Indonesia, amending the Constitution of the Republic of Indonesia, especially Article 24C paragraph (3).
2. The House of Representatives of the Republic of Indonesia, together with the President of the Republic of Indonesia, revised Article 28 and Article 51 of MK Law.
3. The Constitutional Court of the Republic of Indonesia made changes to PMK 2/2021.

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