

## **Legal Aspects of Function and Institutional Strengthening of the Constitutional Court in Indonesia**

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### **Abstract**

Along with the momentum of changes to the 1945 Constitution of the Republic of Indonesia (UUD 1945) in the reform era, the idea of establishing a Constitutional Court (MK) in Indonesia was accepted as a mechanism to control the implementation of the 1945 Constitution in the form of laws. Based on Article 24C paragraph (1) of the 1945 Constitution which was reaffirmed in Article 10 paragraph (1) letters a to d of Law Number 24 of 2003 concerning the Constitutional Court (UU MK), the authority of the MK is to test laws against the 1945 Constitution; decide on disputes over the authority of state institutions whose authority is granted by the 1945 Constitution; decide on the dissolution of political parties; and decide on disputes over the results of general elections, including regional head elections. In addition, based on Article 7 paragraph (1) to paragraph (5) and Article 24C paragraph (2) of the 1945 Constitution which is reaffirmed by Article 10 paragraph (2) of the Constitutional Court Law, the obligation of the Constitutional Court is to provide a decision on the opinion of the DPR that the President and/or Vice President are suspected of having committed a violation of the law in the form of treason against the state, corruption, bribery, other serious crimes, or disgraceful acts, and/or no longer meet the requirements as President and/or Vice President as referred to in the 1945 Constitution. With a series of these authorities and obligations, over the course of 13 (thirteen) years the presence of the Constitutional Court has been greatly needed by the community, especially in the authority to test laws against the 1945 Constitution which is the majority of the Constitutional Court's work. The authority to test laws against the 1945 Constitution was the initial idea for the establishment of the Constitutional Court. Since the establishment of the Constitutional Court in 2003 until mid-December 2012, the Constitutional Court has received 531 cases of judicial review of laws, 21 cases of disputes over authority between state institutions (SKLN), 116 cases of disputes over general election results, and 489 cases of disputes over regional head election results. The purpose of this study is to examine the strategy for strengthening/authority of the constitutional court institution in Indonesia, so that the role of the Constitutional Court institution can function properly. The research method is normative juridical with qualitative data analysis.

**Keywords: Strengthening, Institution, Constitutional Court**

## **INTRODUCTION**

### **A. Background**

There are two major histories of judicial review in the world. The first is the history of judicial review in legal practice in the United States through the decision of the Supreme Court of the United States in the case of "Marbury vs. Madison" in 1803. Although the provisions of judicial review are not included in the United States Constitution, the Supreme Court of the United States made a decision written by John Marshall when he was Chief Justice of the Supreme Court of the United States which stated that the court has the authority to overturn laws that are contrary to the constitution (Asshiddiqie & Syahrizal, 2006). The second is the existence of the Austrian Constitutional Court. which was introduced by an Austrian legal expert, Hans Kelsen, whose idea was then accepted in the Austrian Constitution of 1919 (Kelsen, 1919). Kelsen's thinking encouraged the establishment of an institution called the Verfassungsgerichtshoft or Constitutional Court. Then the first Constitutional Court was established in 1920 in Austria (Asshiddiqie, 2005). Hans Kelsen's idea regarding the judicial review of the law is in line with the idea once put forward by Prof. Muhammad Yamin in the session of the Investigating Committee for Preparatory Work for Indonesian Independence (BPUPKI). He proposed that the Supreme Court (now called the Supreme Court) should be given the authority to "appeal laws". However, Prof. Muhammad Yamin's proposal was refuted by Prof. Soepomo on the grounds that, among other things, the basic concept of the 1945 Constitution that had been agreed upon until July 18, 1945, determined that what we adhere to is the division of powers, not the separation of powers. Because of that, our nation cannot implement the function of judicial review of the law because it is closely related to the principle of the supremacy of the MPR. In addition, judicial review is also considered "taboo" to be implemented, because judges are not allowed to assess and test legislative product laws. The judge's job is to apply the law, not to assess the law. According to Prof. Jimly Asshiddie, this doctrine was inherited from the Dutch influence, because in the Dutch legal system there is a doctrine that laws cannot be challenged. On that basis, Soepomo did not accept the idea of testing laws by the Supreme Court (Asshiddiqie. 2004).

In Indonesia, the idea of establishing a separate Constitutional Court outside and on an equal footing with the Supreme Court is relatively new in Indonesia. However, the idea of testing laws as a constitutional adjudication mechanism to compare, assess, or test the results of the work of political democracy mechanisms has been debated by the "founding leaders" in the BPUPKI sessions since before independence, when the text of the 1945 Constitution was first drafted (Asshiddiqie, 2007). Along with the momentum of changes to the 1945 Constitution of the Republic of Indonesia (UUD 1945) in the reform era, the idea of establishing a Constitutional Court (MK) in Indonesia was accepted as a mechanism to control the implementation of the 1945 Constitution in the form of laws. Based on Article 24C paragraph (1) of the 1945 Constitution which is reaffirmed in Article 10 paragraph (1) letters a to d of Law Number 24 of 2003 concerning the Constitutional Court (UU MK), the authority of the MK is to test laws against the 1945 Constitution; decide on disputes over the authority of state institutions whose authority is granted by the 1945 Constitution; decide on the dissolution of political parties; and decide on disputes regarding the results of general elections, including regional head elections. In

addition, based on Article 7 paragraph (1) to paragraph (5) and Article 24C paragraph (2) of the 1945 Constitution which is reaffirmed by Article 10 paragraph (2) of the Constitutional Court Law, the obligation of the Constitutional Court is to provide a decision on the opinion of the DPR that the President and/or Vice President are suspected of having committed a violation of the law in the form of treason against the state, corruption, bribery, other serious crimes, or disgraceful acts, and/or no longer meet the requirements as President and/or Vice President as referred to in the 1945 Constitution. With a series of these authorities and obligations, over the course of 13 (thirteen) years the presence of the Constitutional Court has been greatly needed by the community, especially in the authority to test laws against the 1945 Constitution which is the majority of the Constitutional Court's work. The authority to test laws against the 1945 Constitution was the initial idea for the establishment of the Constitutional Court. Since the establishment of the Constitutional Court in 2003 until mid-December 2012, the Constitutional Court has received 531 cases of judicial review of laws, 21 cases of disputes over authority between state institutions (SKLN), 116 cases of disputes over general election results, and 489 cases of disputes over regional head election results.

The Constitutional Court is one of the state institutions exercising judicial power in addition to the Supreme Court. The existence of the Constitutional Court as an exerciser of judicial power whose authority is determined in the 1945 Constitution, is very necessary because the amendment to the 1945 Constitution has caused: (1) the 1945 Constitution to be positioned as the highest state law in which the authority of state institutions is regulated, meaning that all state issues must be based on and sourced from the 1945 Constitution; (2) the MPR is no longer the highest state institution and the position of state institutions regulated in the 1945 Constitution is equal, and each state institution has authority in accordance with its function as given by the 1945 Constitution; (3) Recognition of human rights as constitutional rights as regulated in Article 28, Article 28A to Article 28J, as well as citizen rights in Article 27, Article 30, and Article 31 of the 1945 Constitution, for which the state must respect, protect or fulfill these rights, in addition to the rights of citizens that arise due to the obligations of the state as stated in Article 33 paragraph (3) of the 1945 Constitution. In order to ensure that state life legally does not deviate from the provisions stipulated by the 1945 Constitution, a legal procedure is needed if there is a violation of the 1945 Constitution.

## **LITERATURE REVIEW**

### **A. Definition of Institution**

Basically, institutions are more directed at the meaning of organizations, containers, or institutions that function as containers or places. Meanwhile, the definition of an institution also includes rules of the game, ethics, code of ethics, attitudes and behavior of a person in a system. This institution comes from the word "institution" which means rules in a group of people/society to help its members integrate with each other as rules in a social group. So this institution can also be divided into two types, namely formal institutions and non-formal

institutions. Where a formal institution is a group of two or more people who have a rational working relationship and have a common goal for the common interest, such as limited liability companies, schools, government agencies, and others. While for non-formal institutions, it is sometimes difficult for us to determine the real time someone becomes a member of the organization, sometimes even the purpose of the organization is unclear.

## **B. Scope of the Constitutional Court**

The Constitutional Court is one of the state institutions that exercise judicial power besides the Supreme Court. The existence of the Constitutional Court as an exerciser of judicial power whose authority is determined in the 1945 Constitution, is very necessary because the changes to the 1945 Constitution have caused: (1) the 1945 Constitution to be the highest law of the state in which the authority of state institutions is regulated, meaning that all state issues must be based on and sourced from the 1945 Constitution; (2) The MPR is no longer the highest state institution and the status of state institutions regulated in the 1945 Constitution is equal, and each state institution has authority in accordance with its functions as assigned by the 1945 Constitution; (3) Recognition of human rights as constitutional rights as regulated in Article 28, Article 28A to Article 28J, as well as citizen rights in Article 27, Article 30, and Article 31 of the 1945 Constitution, regarding which rights the state must respect, protect or fulfill, in addition to the rights of citizens which arise due to the obligations of the state as stated in Article 33 paragraph (3) of the 1945 Constitution. In order to ensure that state life legally does not deviate from the provisions stipulated by the 1945 Constitution, a legal procedure is required if a violation of the 1945 Constitution occurs. Therefore, the authority of the Constitutional Court to test laws against the 1945 Constitution, the authority granted by the 1945 Constitution, is intended to enforce the provisions contained in the 1945 Constitution because it is from this that constitutionality issues can arise. At the beginning of the establishment of the Constitutional Court (MK), the scope of the authority of the MK was understood to only include disputes over the results of the vote count determined by the election organizers that affected the acquisition of the questionnaire or whether or not the candidate was elected (Mahfud, 2009).

## **RESEARCH METHOD**

The type of research data is secondary data, where the secondary data in this study comes from primary legal materials, namely binding legal materials in the form of laws and regulations and secondary legal materials in the form of literature. The technique in collecting research data uses the library research method. With this, the author reads several literatures in the form of scientific books, laws and regulations and other documentation such as magazines, newspapers and other theoretical sources related to strengthening the symbolism of the Constitutional Court. Data analysis in this writing uses qualitative data, namely a clear data analysis and is described in the form of sentences.

## **RESEARCH FINDINGS**

## A. Strengthening Strategy for the Institution of the Constitutional Court in Indonesia

### Testing of Legislation.

One of the powers of the Constitutional Court granted by the 1945 Constitution and the Constitutional Court Law is to test laws against the 1945 Constitution. The large number of cases of testing laws against the 1945 Constitution received by the Constitutional Court is one proof of public awareness in constitutionalism. The Constitutional Court Law emphasizes that those who can submit a request to test a law are individual Indonesian citizens. The Constitutional Court has also made a qualification of constitutional losses caused by the enactment of the law requested to be tested must meet five cumulative conditions, namely: a. the existence of constitutional rights granted by the 1945 Constitution of the Republic of Indonesia; b. the constitutional rights of the applicant are considered by the applicant to have been harmed by the enactment of the law being tested; c. the constitutional loss is specific (special) and actual or at least potential which according to reasonable reasoning can be ascertained to occur; d. there is a causal relationship (*causal verband*) between the Applicant's constitutional loss and the law requested to be tested; and e. there is a possibility that with the granting of the application, the constitutional loss as argued will not or will no longer occur.

Citizens' rights guaranteed by the 1945 Constitution if violated by the provisions in the Law can be submitted to the Constitutional Court for a judicial review of the Law against the 1945 Constitution. The testing carried out by the Constitutional Court is limited to testing the Law against the 1945 Constitution. Testing of statutory regulations under the Law is carried out by the Supreme Court. The separation of the testing of statutory regulations was originally intended to prevent overlapping in the resolution of norm testing. However, along with the development of law in Indonesia, it is necessary to consider testing statutory regulations under one roof. The idea of unifying the testing of laws and regulations in one judicial state institution, namely the Constitutional Court, had already emerged during the discussion of the third amendment to the 1945 Constitution. That in the discussion the Constitutional Court was proposed to be able to test conflicts between laws and the 1945 Constitution. In Law Number 12 of 2011 concerning the Formation of Legislation, legislation is a written regulation that contains generally binding legal norms and is formed or stipulated by a state institution or authorized official through procedures stipulated in Legislation. Law in a broad sense includes all regulations made by certain institutions according to the level and scope of their authority which are usually called statutory regulations. Thus, statutory regulations are various types of written regulations formed by various institutions according to their respective levels and scopes. All binding regulations are arranged hierarchically to determine their respective degrees with the consequence that if there are two conflicting regulations, the one that is declared valid is the one with the higher degree. Legal studies almost always associate the problem of this hierarchical structure with the "Hierarchical Theory" (*stufenbouw* theory) developed by Hans Kelsen and Nawiasky (Indrati, 2007). If a regulation is considered to be in conflict with a higher regulation,

then to ensure its validity, it can be tested by a judicial institution, this test is usually called a judicial review. One of the objectives of the one-stop judicial review forum is to ensure the consistency and synchronization of regulations with the constitution.

### **Legal Basis**

- The 1945 Constitution of the Republic of Indonesia, specifically (Article 24);
- Law Number 24 of 2003 concerning the Constitutional Court, specifically Article 28, Article 85;
- Regulation of the Constitutional Court of the Republic of Indonesia (PMK No. 4/PMK/2004 concerning Guidelines for Proceedings in PHPU, Number 05/PMK/2004 concerning Procedures for Filing Objections to the Determination of the Results of the 2004 Presidential Election, Number 6/PMK/2005 concerning Guidelines for Proceedings in Cases of Judicial Review of Laws, Number 08/PMK/2006 concerning Guidelines for Proceedings in Disputes over the Constitutional Authority of State Institutions); Constitutional Complaints.

Indonesia, based on the 1945 Constitution, is a State of Law that adheres to the supremacy of the constitution which cannot be separated from three things, namely the constitution, constitutionality and constitutionalism. The constitution is the highest law, constitutionality is actions and actions in accordance with the constitution and constitutionalism is the constitutional understanding of citizens. One element of the State of Law is the fulfillment of the basic rights of citizens and the understanding of constitutionalism. The constitutional complaint mechanism or what is commonly known as constitutional complaint is a form of embodiment of the State of Law itself. Constitutional complaint is the authority held by the Constitutional Court in general in several countries, including the Constitutional Court of the Federal Republic of Germany, but in Indonesia this authority is not included as the authority of the Constitutional Court.

The constitution aims to regulate, protect and fulfill the basic rights of citizens, in order to create the welfare and prosperity of the people. In the development of the state administration in Indonesia, the Constitutional Court was born as one of the pillars of democracy that plays a strategic role in realizing the protection of the constitutional rights of citizens. The birth of the Constitutional Court after the third amendment to the 1945 Constitution which was then regulated in Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court, where the Constitutional Court has four authorities and one obligation. The Constitutional Court is a state institution that guards and interprets the constitution (the guardian and the interpreter of the constitution). Along with its development, the Constitutional Court has held many hearings related to violations of the constitution that fall within the authority of the Constitutional Court as stated in Article 24C of the 1945 Constitution. However, the authority



possessed by the Constitutional Court, there is still one fundamental thing that is still bothering the minds of justice seekers, namely the lack of openness of the function of the Constitutional Court as an institution that can accommodate and channel complaints (personal grievance) or constitutional complaints as an extraordinary legal effort in defending constitutional rights for every citizen, or better known as constitutional complaint. Based on the journey of the Constitutional Court in the last 13 (thirteen) years, the Author has notes that need to be considered in thinking about increasing the authority of the Constitutional Court. Despite the various criticisms that cannot be avoided, it must be acknowledged that at this time it can be said that the Constitutional Court has become the mecca for enforcing constitutional supremacy; meaning that almost every time there is a constitutional problem, the community always turns to the Constitutional Court. This situation is caused by the Constitutional Court's courage to carry out *ijtihad* in resolving cases received, including testing laws against the 1945 Constitution and other authorities. Based on this, it is necessary to consider the possibility of the Constitutional Court being given authority over constitutional complaints.

The addition of the Constitutional Court's authority is considered if there are further changes to the 1945 Constitution. As explained above, a constitutional complaint is a case submitted to the Constitutional Court for a violation of constitutional rights for which there is no legal instrument to prosecute it or there is no longer a legal resolution path available, namely the courts. One example of a constitutional complaint problem is the existence of laws and regulations under the Law that violates the contents of the Basic Law (Constitution), but do not clearly violate higher laws and regulations under the 1945 Constitution. Likewise, it can also be used as an object of constitutional complaint for court decisions that violate constitutional rights even though they already have permanent legal force and cannot be challenged by legal action to a higher court; for example, there is a cassation decision or judicial review from the Supreme Court which turns out to be detrimental to a person's constitutional rights. However, because until now the Constitutional Court does not have the authority to handle constitutional complaints, these problems still cannot be submitted to the Constitutional Court or to other legal resolution channels. That is why it is important to consider the possibility of increasing the authority of the Constitutional Court to decide on constitutional complaints so that violations of constitutional rights that have no legal resolution channels can be handled by the Constitutional Court. According to the Author, the protection of constitutional rights is the responsibility of the Constitutional Court and it is time for the Constitutional Court to have the authority to handle constitutional complaint cases.

## **B. Authority and Function of the Constitutional Court**

The Constitutional Court is one of the independent judicial institutions to administer justice in order to uphold law and justice. In detail, there are 4 (four) authorities of the Constitutional Court in Law No. 24 of 2003 concerning the Constitutional Court, which states that the authority of the Constitutional Court is:

- 1) To try at the first and final level whose decisions are final to test laws against the 1945 Constitution of the Republic of Indonesia, to decide on disputes over the authority of state institutions whose authority is granted by the 1945 Constitution of the Republic of Indonesia, to decide on the dissolution of political parties, to decide on disputes regarding election results;
- 2) The Constitutional Court is also required to provide a decision on the opinion of the DPR that the President and/or Vice President are suspected of having committed a violation of the law in the form of treason against the state, corruption, bribery, other serious crimes, or disgraceful acts, and/or no longer meet the requirements as president and/or vice president as referred to in the 1945 Constitution of the Republic of Indonesia;
- 3) And others in general

**Table: Authorities of the Supreme Court and the Constitutional Court**

No	Authority of the Supreme Court	Constitutional Court
1	Examining and deciding, including: <ul style="list-style-type: none"> <li>• Cassation Applications</li> <li>• Disputes regarding the authority to judge</li> <li>• Applications for PK of Court decisions that have obtained permanent legal force;</li> <li>• Testing of laws and regulations below the law against the law               <ul style="list-style-type: none"> <li>• See Article 28 paragraph (1) of the Supreme Court Law and Article 31 paragraph (1) of Law No. 3/2009</li> </ul> </li> </ul>	To adjudicate at the first and last level which is final in nature to: <ul style="list-style-type: none"> <li>• Test laws against the 1945 Constitution</li> <li>• Decide on disputes over the authority of state institutions whose authority is granted by the 1945 Constitution</li> <li>• Decide on the dissolution of political parties</li> <li>• Decide on disputes over election results.</li> <li>• See Article 24C paragraph (1) of the 1945 Constitution;</li> <li>• See Article 24C paragraph (2) of the 1945 Constitution.</li> </ul>
2	See Article 28 paragraph (1) of the Supreme Court Law and Article 31 paragraph (1) of Law No. 3/2009	See Article 24C paragraph (1) of the 1945 Constitution, and Article 24C paragraph (2) of the 1945 Constitution.

Meanwhile, the function of the constitutional court can be detailed that the Constitutional Court (abbreviated as MK) functions to maintain the constitution in order to uphold the principle of constitutional law. This is also the basis for countries that accommodate the formation of the



MK in their constitutional system. In order to maintain the constitution, the function of testing laws can no longer be avoided in the Indonesian constitutional system because the 1945 Constitution emphasizes that the system is no longer based on parliamentary supremacy but rather constitutional supremacy. In fact, this also happens in other countries that previously adopted a parliamentary supremacy system and then changed to a democratic country. The MK was formed with the function of ensuring that there will be no more legal products that deviate from the constitutional corridor so that the constitutional rights of citizens are maintained and the constitution itself is protected by its constitutionality. To test whether a law is in conflict with the constitution or not, the agreed mechanism is judicial review which is the authority of the MK. If a law or one part of it is proven to be inconsistent with the constitution, then the legal product will be revoked by the MK. Hence, all legal products must refer to and must not conflict with the constitution. Through this judicial review authority, the Constitutional Court carries out its function of overseeing so that there are no more legal provisions that deviate from the constitutional corridor.

Additional functions besides judicial review are namely (1) deciding disputes between state institutions, (2) deciding the dissolution of political parties, and (3) deciding disputes over election results. Such additional functions allow for the availability of mechanisms to decide various disputes (between state institutions) that cannot be resolved through the regular judicial process, such as disputes over election results, and demands for the dissolution of a political party. Such matters are closely related to the rights and freedoms of citizens in the dynamics of a democratic political system guaranteed by the Constitution. Therefore, the functions of resolving general election results and the dissolution of political parties are linked to the authority of the Constitutional Court. The function and role of the Constitutional Court in Indonesia have been institutionalized in Article 24C paragraph (1) of the 1945 Constitution which stipulates that the Constitutional Court has four constitutionally entrusted powers and one constitutional obligation. The provision is emphasized in Article 10 paragraph (1) letters a to d of Law Number 24 of 2003 concerning the Constitutional Court. The four authorities of the Constitutional Court are:

- Testing laws against the 1945 Constitution.
- Deciding on disputes of authority between state institutions whose authority is granted by the 1945 Constitution.
- Deciding on the dissolution of political parties.
- Deciding on disputes regarding election results.

## CONCLUSION

Based on the descriptions above, this article can conclude that the legal basis for this constitutional court is:

- The 1945 Constitution of the Republic of Indonesia, specifically (Article 24);
- Law Number 24 of 2003 concerning the Constitutional Court, specifically Article 28, Article 85;
- Regulation of the Constitutional Court of the Republic of Indonesia (PMK No. 4/PMK/2004 concerning Guidelines for Proceedings in PHPU, Number 05/PMK/2004 concerning Procedures for Filing Objections to the Determination of the Results of the 2004 Presidential Election, Number 6/PMK/2005 concerning Guidelines for Proceedings in Cases of Testing Laws, Number 08/PMK/2006 concerning Guidelines for Proceedings in Disputes over the Constitutional Authority of State Institutions);

That the authority of the Supreme Court is different from the authority of the Constitutional Court, including the authority of the Supreme Court is:

a. Examining and deciding;

- Cassation Application;
- Disputes regarding the authority to try;
- Application for PK of Court decisions that have obtained permanent legal force;
- Testing laws and regulations below the law against the law;
- See Article 28 paragraph (1) of the Supreme Court Law and Article 31 paragraph (1) of Law No. 3/2009

b. The authority of the Constitutional Court, including;

- To adjudicate at the first and last level which is final in nature to:
- Test laws against the 1945 Constitution;
- Decide on disputes over the authority of state institutions whose authority is granted by the 1945 Constitution;
- Decide on the dissolution of political parties;
- Decide on disputes over election results.

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