

# Independence of The Constitutional Court In Judicial Review Related To Constitutional Court Laws

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## ABSTRACT

*The independence of the Constitutional Court is a guarantee for the rule of law and justice. The principle which states that judges may not examine cases involving themselves (nemo judex idoneus in propria causa) is one way to protect the dignity of the Constitutional Court. However, this is contrary to the authority of the Constitutional Court which has been confirmed by Article 24C of the 1945 Constitution of the Republic of Indonesia, one of which gives the authority to review the Constitution. The problem is also increasing with the absence of external supervision of constitutional judges which has been in effect after the Constitutional Court's Decision No. 1-2/PUUXII/2014, the date of the review of the Constitutional Court Law to date. This research is a normative/doctrinal legal research, which shows that the authority of the Constitutional Court to review the laws governing the Constitutional Court as a constitutional mandate.*

## ABSTRAK

Asas nemo judex idoneus in propria causa yang memiliki arti hakim tidak boleh menguji perkara yang menyangkut dirinya sendiri merupakan salah satu cara untuk menegakkan keadilan. Namun di sisi lain, Mahkamah Konstitusi diamahkan oleh Pasal 24C UUD NRI 1945 untuk melakukan judicial review Undang-Undang terhadap Undang-Undang Dasar. Pada realitanya, salah satu problematika dapat dilihat dengan tidak adanya pengawasan terhadap hakim konstitusi secara eksternal pasca Putusan MK No 1-2/ PUU-XII/2014 perihal pengujian Undang-Undang Mahkamah Konstitusi hingga saat ini. Oleh karenanya penulis melakukan penelitian ini yang merupakan penelitian hukum normatif/doctrinal. Hasil penelitian menunjukkan bahwa kewenangan judicial review oleh Mahkamah Konstitusi terhadap Undang-Undang yang mengatur Mahkamah Konstitusi sebagai amanah konstitusi.

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## I. INTRODUCTION

The constitution in Indonesia has a role from starting to guide policy directions, describing the life of the state to determining the limits of power of each policy maker. And as a basic law, the Constitution provides limits on authority to state institutions so that they do not absolutely commit acts of arbitrariness and constitutional values in the life of the nation and state are maintained.

Theoretical limitation of power is a combination of the theory of separation of powers by Montesquie and division of power/distribution of power by John Locke, both of which have a correlation because they require the importance of limits on power so that corrupt and

authoritarian hegemony does not occur. . Meanwhile in Indonesia, the Constitutional Court (hereinafter abbreviated as MK) is known as the guardian of the constitution which is obliged to uphold these values. But not only that, the Constitutional Court also serves as the final interpreter of the constitution, the protector of human rights,

The position, duties and powers of the Constitutional Court are strictly regulated in Articles 24 and 24C. However, the authority of the Constitutional Court is also related to the provisions of Articles 7A and 7B which regulate the dismissal of the president. One of the powers and obligations of the Constitutional Court based on Article 24C paragraph (1) of the 1945 Constitution is to adjudicate at the first and final levels a final decision to review the Law (hereinafter shortened to become Law) against the Constitution (hereinafter shortened to UUD). The judicial review conducted by the Constitutional Court is to find out whether a law is constitutionally compatible with the Constitution.

MK Decision No. 49/PUU – IX/2011 concerning the review of Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law) against the 1945 Constitution is one of the judicial reviews conducted by the Constitutional Court. The object of this judicial review has created problems in society because it is considered that the authority given to the Constitutional Court in examining laws that regulate its own existence is in conflict with the principle of *nemo iudex in propria causa*. This was also conveyed by Judge Harjono in a dissenting opinion when deciding on the object of the judicial review. In his opinion it was written that before the judicial review of Law no. 8 of 2011, the Constitutional Court has conducted a review of Article 50 of Law no. 24 of 2003, in which the review caused various conflicts because the Constitutional Court had expanded its authority in examining the Law on the Constitutional Court itself. It is feared that it will lead to injustice and dishonesty in deciding cases that can benefit oneself.

However, according to Indonesia Court Monitoring, in the event that the Constitutional Court examines the Constitutional Court Law, it does not violate its authority, because it is clear that according to Article 24C of the 1945 Constitution it provides for this authority. Thus, the existence of the Constitutional Court decision No 12/PUU – XII/2014 has raised pros and cons. Therefore, this study aims to find out how the position of the Constitutional Court and the independence of constitutional judges in the institution authorized to carry out a judicial review of the laws that regulate their own existence.

## II. RESEARCH METHODS

The research used in this paper is a normative research type that is in line with its purpose which intends to carry out the analysis. Based on this research, the data used in this research is secondary data or data obtained through library research. In addition, the authors use a qualitative method, namely research that produces descriptive analysis data. The research was conducted by analyzing the independence and objectivity of the Constitutional Court in a judicial review related to the Law on the Constitutional Court.

## III. RESULTS AND DISCUSSION

The Constitutional Court is part of the judiciary which has one of the duties and authorities, namely conducting a judicial review or re-examination by means of interpreting the law and/or interpreting the constitution for a juridical settlement. In the field of constitution, judicial review is a review and/or review by a judicial power body to be able to cancel the decision of the legislature or legislative body and/or executive body. Judicial review of laws against the Constitution is the competency of the Constitutional Court both in terms of formal and material or called constitutionalism, this is in accordance with Article 24C of the 1945 Constitution which states that

the Constitutional Court has the authority to try at the first and final level whose decision is final to test the law against the Constitution.

According to Jimly Asshiddiqie, the effective implementation of constitutional legislation can be guaranteed if an organ other than the legislature is given the task of examining whether a legal product is constitutional or not, and does not enforce it if according to this organ the legal product is unconstitutional. The Constitutional Court, which is the special organ, can control or completely abolish laws that are unconstitutional, so that they cannot be applied by other organs or bodies. In addition to the constitutional basis of Article 24C paragraph (1), the operational juridical basis is Law Number 4 of 2014 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2013 concerning the Second Amendment to Law Number 24 of 2003 concerning the Constitutional Court.

Article 10 paragraph (1) letter a of the Constitutional Court Law states that one of the powers of the Constitutional Court is to review laws against the 1945 Constitution. reviewing the law governing the authority of the Constitutional Court itself. However, this raises many pros and cons because it contradicts the principle of *nemo iudex in propria causa* which states that no one can be a judge in his own case and is one of the principles of the Constitutional Court's procedural law which is an embodiment of impartiality or impartiality. The problems that arise in general relate to how the independence of Constitutional Justices in carrying out a judicial review of the laws governing the Constitutional Court, where independence in an independent institution is certainly very important.

The International Commission of Jurists states that independence is one of the characteristics of a rule of law country, while these characteristics include a state that is subject to the law, its government respects individual rights and a judiciary that is free and impartial (independence and impartiality of judiciary). Likewise, Jimly Asshiddiqie stated that an independent and impartial judiciary is one of the main principles of a rule of law nation. According to Bagir Manan, the guarantee of the impartiality of judges in court with independent and free powers is what is meant by the independence of judicial power ( Bagir Manan, 2005). Literally, Independence means independence. The adjective of independence is independent which in KBBI is defined as being independent, free-spirited; unbound, independent, free. This is also in line with the definition of independence in the Black's Law Dictionary which mentions two words, namely independence and independent. Independence is defined as "The state or quality of being independent". Being independent is: Not subject to the control or influence of another, not associated with another (often larger) entity and not dependent or contingent on something else.

Independence within the scope of constitutional justice is reflected in the process of examination and decision making. Decisions issued by constitutional judges objectively become guardians of the Constitutional Court's dignity as the guardian of the constitution; the final interpreter of the constitution; protector of human rights (the protector of the human rights); the protector of the citizen's constitutional rights; as well as the protector of democracy. 19 Therefore, in a number of cases he tried, several explanations were found regarding the independence exercised by constitutional judges, especially in cases which gave birth to dynamics in society, such as in MK Decision No. 1-2/PUU-XII /2014 concerning testing of Law no. 4 of 2014 concerning Stipulation of Government Regulation in lieu of Law Number 1 of 2013 concerning the Second Amendment to Law no.

One of the contents of the material in the law is regarding the submission of constitutional judges by a panel of experts formed by the Judicial Commission (KY). In relation to this petition, the court is of the opinion that the nomination of candidates for Constitutional Justices through a Panel of Experts formed by the Judicial Commission reduces the constitutional authority of the Supreme Court, the DPR, and the President, who have clearly been given their authority by the constitution in Article 24C paragraph (3) of the 1945 Constitution which states that the MK has nine members of the constitutional justice appointed by the President, each of which is proposed

three persons by the Supreme Court, three persons by the House of Representatives, and three persons by the President.”

Subsequent examination of this decision is related to the authority of the Judicial Commission in compiling a code of ethics and establishing the Constitutional Honorary Council. Then the next constitutionality test is related to the provisions governing the requirements for Constitutional Justices mentioned in Article 15 paragraph (2) letter i Law No. 4 of 2014 where prospective judges do not become members of political parties for a minimum period of 7 (seven) years before being proposed as candidate for constitutional justice. Furthermore, the Constitutional Court Law was declared contrary to the 1945 Constitution and did not have binding legal force so that Law no. 24 of 2003 concerning MK as amended by Law no. 8 of 2011 concerning Amendments to Law no. 24 of 2003 concerning MK. The independence of constitutional judges in decision No. 1-2/PUU – XII/2014 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2013 Concerning the Second Amendment to Law No. 24 of 2003 concerning the Constitutional Court can be seen in every consideration that refers to the constitution. Decisions that are final and binding have a major influence considering that apart from being the guardian of the constitution, the Constitutional Court also acts as the sole interpreter of the constitution so that the Constitutional Court becomes the sole interpreter in interpreting the constitution. However, apart from that, the Court realized that the public's trust in the level of independence of the Constitutional Court had begun to decline when trying this case.

Apart from testing Law no. 4 of 2014, previously the MK had also reviewed laws related to the Constitutional Court, namely in the Constitutional Court Decision No. 49/PUU – IX/2011 concerning the review of Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court whose request was partially granted. In addition, there are differences of opinion among the constitutional judges. In this case, the judge adjudicates the election of the chairman and deputy chairman of the Constitutional Court, the addition of the requirements to become a constitutional judge, the term of office for a substitute judge, not using other laws as a basis for legal considerations, the follow-up of the DPR/President on changes to laws that have been reviewed and adjudicates related Honorary Council of MK Judges consisting of the DPR, the Government and the Supreme Court.

The constitutionality test related to the election of the chairman and the presiding judge in Article 4 paragraph (4f), paragraph (4g), and paragraph (4h) of the a quo Law against Article 28D paragraph (1) and paragraph (3) was declared to have legal grounds. The basic considerations of the a quo article if implemented have the potential to cause a legal deadlock (dead lock), namely the vacancy of one of the heads of the Constitutional Court. Therefore, the a quo article has the potential to impede the rights of one of the chairpersons or deputy chairpersons of the Constitutional Court who are elected as well non-fulfillment of the principle of a simple majority in elections.

Testing Article 15 paragraph (2) letter d of Law No. 8 of 2011 contradicts Article 28D paragraph (1), Article 28D paragraph (3), and Article 24C paragraph (5) of the 1945 Constitution, the Court stated that the petitioner's argument was groundless according to law. The basis for the consideration of the court in its decision is that the 1945 Constitution does not stipulate a certain minimum age limit for occupying all government positions and activities. This is an open legal policy, which can be changed at any time by the legislators. Furthermore, the Petitioners' argument that Article 26 paragraph (5) of the UU quo is contradictory to Article 28D paragraph (1) of the 1945 Constitution, the Court stated that the Petitioner's argument was based on law. What the court considers is the guarantee of consistency and continuity in the process and decisions of the court which are greatly affected by the length of term of office of constitutional judges, related to legal opinions and the independence of judges.

In the case of the Honorary Panel of MK Judges consisting of the DPR, the Government and the Supreme Court, the Petitioners argued that Article 27A paragraph (2) letter c, letter d, and letter

e of Law No. 8 of 2011 contradicts Article 1 paragraph (3), Article 24 paragraph (1) and paragraph (2) of the 1945 Constitution, was declared contrary to the 1945 Constitution. The Court considers that the involvement of the institutions mentioned in the quo Law provides an opportunity for the independence of the Constitutional Court to be enforced. The request for further review of Article 50A is related to using another law as a basis for legal considerations where the applicant argues that the regulation contradicts Article 22A and Article 28D paragraph (1) of the 1945 Constitution.

In the quo decision there is also dissenting proposed by Constitutional Justice Harjono who is of the opinion that Law No. 8 of 2011 implied the intention of lawmakers to improve the institution of the Court through the arrangement of judges. Furthermore, he is of the opinion that the requirement for candidates for constitutional judges who are doctors/masters as stated in Article 15 of the a quo Law is to have basic legal education as stated in Article 15 paragraph (2) b of the a quo Law. Regarding the age limit for constitutional judges in Article 87 letter b, the legislators implicitly intend to impose a 70-year retirement age for new judges whose conditions have been made tougher by law because it requires at least 15 years of work experience in the legal field, from only 10 years previously and changes This has an impact on changing the retirement age limit for constitutional justices from 67 years to 70 years. Harjono also believes that it is necessary to consider the position of the applicants in examining Article 87 letter b of Law no. 8 of 2011 this. This is because the article relates to the dismissal of constitutional judges, while the applicants, in this case, have a relationship with the Constitutional Court, not with MK judges, so that the basis for a constitutional loss has no basis. In closing, he reiterated that the said article did not cause any actual or potential constitutional harm to the Petitioners and could even potentially benefit the Petitioners because of the existence of that Article.

Thus the judicial review authority of the Constitutional Court over the Constitutional Court is something that cannot be disputed as long as the constitution expressly states this mandate. However, the fact that Constitutional Justices have the same position as human beings requires caution in every decision. Independence in the Constitutional Court Decision No. 49/PUU – IX/2011 can at least be found in the considerations of judges to make their decisions by making the constitution the basic construction both in interpreting the constitution and protecting citizens' constitutional rights. The Court, in maintaining its independence, declared that the article discriminated against or imposed a limitation without any basic reference stated that the article did not have binding legal force. In addition to regulating the involvement of elements of other institutions whose proportion comes from the legislature and also the judicial power itself, the Constitutional Court uses independence as a basis for declaring that the article in question does not have binding legal force. However, apart from that, the Court's carelessness was evident in the same decision. This can be seen in the dissenting opinion considered by Judge Harjono in the a quo decision. It is a matter that needs to be considered by the Constitutional Court in the future regarding legal standing which is the basic determinant of the objectivity of Constitutional Justices and the independence of the Constitutional Court in their decisions.

Likewise in another review of the Constitutional Court Law, namely in decision No. 12/PUU – XII/2014, the Court granted the petitioner's request in its entirety. One of the implications of this decision is that supervision of the Constitutional Court from elements of institutions outside the Constitutional Court is again abolished. Thus the independence of the Court can be seen in its considerations where the Court considers it to be contrary to the will of Article 24 paragraph (1) of the 1945 Constitution which states that the judicial power is an independent power to administer justice in order to uphold law and justice. Even so, the judge, if necessary, can form a new law for the sake of juridical interests, as stated by Bagir Manan.

As for basically the principle of *nemo iudex in propria causa*, it is not a single legal principle that can be chosen by a judge, because there is another legal principle, namely the court may not reject a case submitted to him on the pretext that the legal rules are incomplete or incomplete. there is, but he is obliged to examine, decide and adjudicate the case. These two

principles certainly contain contradictions. Therefore the judge has the authority to consider which legal basis he will choose and which will be ruled out. Therefore if the judge refuses to try this case, then there will be citizens' constitutional rights which should be protected by the state through the Constitutional Court, but will be usurped by the application of the judicial principles that apply to them.

#### IV. CONCLUSION

Based on the discussion above, it can be concluded that the position of the constitutional court as an institution that conducts judicial reviews related to Law no. 4 of 2014 is a constitutional mandate that must be implemented, this is in accordance with Article 24C paragraph (1) of the 1945 Constitution. The Constitutional Court may not reject a case, because only the Constitutional Court has this authority, no other institution is given the authority to review a case. Law against the 1945 Constitution. And related to independence within the scope of constitutional justice is reflected in the process of examination and decision making. In the case of a judicial review related to Law Number 4 of 2014, the independence of the MK judges can be seen in their considerations which refer to the constitution. The affirmation of the independence of the Constitutional Court was also stated in its decision where the Constitutional Court stated that the actions of those who exert pressure through the formation of public opinion against the judicial power fall into the category of violating the principle of freedom of judicial power or contempt of court. Thus, in its decision, the Court tried to restore public trust in the independence of the Constitutional Court in carrying out its authority.

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