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History of Judicial Review in Indonesia

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Abstract

The granting of judicial review powers to various state institutions has raised problems in practice. The Constitutional Court is granted the power of judicial review based on the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that the Constitutional Court has the power to hear cases in the first and last instance and its decision is final to review legislation against the Constitution. Meanwhile, based on the provisions of Article 24A paragraph (1) of the 1945 Constitution of the Republic of Indonesia, in the event that there is legislation under the Constitution contrary to the law, the authority is in the hands of the Supreme Court. This research examines issues relating to the history and rationale of judicial review and the separation of judicial review powers in Indonesia. This research is a normative legal research. The research uses primary legal materials and secondary legal materials presented using a descriptive method. The history of the existence of judicial review is inseparable from the settlement of the Madison versus Marbury case. The history and rationale of judicial review is also inseparable from the thinking of Hans Kelsen. The idea of judicial review in Indonesia had appeared in 1945 in the Great Meeting of the Investigation Board for Preparatory Efforts for Independence delivered by Yamin. The history of judicial review in Indonesia can be seen from the period of 1945-1949, the constitutional period of the Republic of Indonesia, the enactment of the Provisional Constitution of 1950, the Post-Presidential Decree Period of 5 July 1959 and according to the Post-Reform 1945 Constitution. The debate on the Constitutional Court and the Supreme Court emerged in the minutes of the 1945 Constitutional amendment debated by the Ad Hoc Committee I of the MPR Working Committee in 2000 and 2001, particularly regarding the position of the Constitutional Court and the scope of authority of the Constitutional Court.

Keywords: *Constitutional Court; Supreme Court; Judicial Review*

Introduction

The Constitutional Court and the Supreme Court of Indonesia are part of a separate judiciary and each has the power to conduct judicial review for the state. Judicial review is a review not only of the legal product of the law, but also of legislation under the law, the subject of which is only judges or judicial institutions (Asshiddiqie, Jimly, 2010). Judicial review is a court's review of a legislative or executive act for compliance with the constitution (Delaney, Erin F, 2018). In Indonesia, the Constitutional Court is granted the power of judicial review under the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that the Constitutional

Court has the power to hear cases in the first and last instance and its decision is final to review laws against the Constitution. Meanwhile, if there are laws and regulations under the law that conflict with the law, the authority lies with the Supreme Court. This is regulated by the provisions of Article 24A (1) of the 1945 Constitution of the Republic of Indonesia.

The granting of judicial review authority to different state institutions has caused problems in practice. This was also confirmed by Tim Lindsey who stated that although the jurisdiction for the judicial review of laws is split between the Constitutional Court and the Supreme Court, neither can review the constitutionality of subordinate regulations (Lindsey, Tim 2018). This research seeks to uncover and examine the historical background of the split of judicial review authority in two different institutions – the Supreme Court and the Constitutional Court in Indonesia. Based on the matter, the present researchers are interested in examining the issue and packaging it in a paper entitled "The History of Judicial Review in Indonesia".

Method

This research is a normative legal research. The research employs primary and secondary legal materials. The approaches used are conceptual approach and statute approach. All primary and secondary legal materials were analysed and presented using a descriptive method.

Discussion

History and Rationale for Judicial Review

The history of judicial review cannot be dissociated from the emergence of the case of Madison vs. Marbury. In fact, Marbury vs. Madison case is regarded as a landmark case and a major innovation, particularly with regard to judicial review (Mountjoy, Shane, 2007). Although not the world's first case of judicial review, the case appears to have been an unprecedented monumental event in the hands of the United States Supreme Court, which makes the Constitution the supreme law of the land (Pan Mohamad Faiz & Lutfi Chakim, 2020). The United States Constitution does not provide for judicial review. Article VI Section 2 of the United States Constitution states that judges in each state are bound by the Constitution of the United States and its laws (Soemantri, Sri, 1986).

The case began when John Adams, known as a Federalist, served as the second president of the United States for the term 1797-1801 (Yaqin, Arief Ainun, 2018). In 1800, Jefferson and Adams faced off again in the presidential election. This time, Jefferson and the Republicans won a resounding victory. As well as winning the presidency, the Republicans gained control of both houses of Congress (Mountjoy, Shane, 2007). During the transition period before the change of presidency, John Adam made many policies and decisions that placed his close friends and relatives in certain positions before he was replaced by President-elect Thomas Jefferson, including Secretary of State John Marshall, who was appointed to the Supreme Court (Yaqin, Arief Ainun, 2018). In fact, before midnight on 3 March 1801, the transition period to the new president, President John Adams, assisted by John Marshall, who at that time had officially become Chief Justice while continuing to serve as Secretary of State, was still preparing and signing the letters of appointment (Asshiddiqie, Jimly, 2010). In fact, the act of signing the appointment decree (commission) can be said to be only administrative (an appointment), as procedurally, the provisions of the appointment requirements were taken earlier (Yaqin, Arief Ainun, 2018).

William Marbury, Dennis Ramsay, Robert Townsend Hooe and William Harper are individuals whose names were listed in the letter of appointment of justices of the peace (Asshiddiqie, Jimly, 2010). A copy of the letter of appointment was not given to the person concerned as it should have been because the next day, 4 March 1801, the change from President John Adam to Thomas Jefferson took place (Yaqin, Arief Ainun, 2018). Therefore, when Thomas Jefferson started serving his office as the new

president on the first day, the letters were held by James Madison, who was appointed by President Thomas Jefferson as Secretary of State to replace John Marshall (Asshiddiqie, Jimly, 2010).

Marbury's attorney reminded the Court that the Judiciary Act of 1789 authorized the Supreme Court to issue writs of mandamus to government officials, including those in the Executive Branch (Mountjoy, Shane, 2007). The argument used by the Supreme Court under Chief Justice John Marshall was that the action taken was to review the case of Marbury v Madison, and not through the Judiciary Act of 1970 but through the authority it interpreted from the Constitution (Asshiddiqie, Jimly, 2010). Based on John Marshall's decision in Marbury vs. Madison case, it can be seen that:

> The logical justification for judicial interpretation of a Constitution finds its most concise expression in the words which Chief Justice Marshall used when, in 1803, the Supreme Court of the United States, in the case of Marbury vs Madison (I Cranch 137), first declared an act of Congress void. It is emphatically the province and duty of the department to say what the law is, he said. "Those who apply the rule to particular case, must of necessity expound and interpret that rule. If two laws conflict with each other, the Court must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decided that case conformably the law, disregarding the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. (Wheare, K.C., 1966).

Based on the above statement, it can be understood that all laws enacted by Congress must be declared null and void if they conflict with the Constitution as the supreme law of the land. This power is then known as judicial review (Asshiddiqie, Jimly, 2010). Marbury vs. Madison was not the first case to require judicial review. The first judicial review case brought before the United States Supreme Court occurred in 1796 in the case of Hylton vs. United States (Nasir, Cholidin, 2020). Hylton vs. United States concerned the constitutionality of a federal tax on carriages (Alicea, Joel & Donald L. Drakeman, 2013). The history and rationale of judicial review is also inextricably linked to the thought of Hans Kelsen. Hans Kelsen also played an important role in the drafting of the Austrian constitution and the establishment of the Constitutional Court as a centralised court dealing exclusively with constitutional issues (Jakab, András, et.al., 2017).

A Glimpse into the History of the Separation of Judicial Review Authority in Indonesia

The 1945-1949 Period

The idea of judicial review in Indonesia emerged in 1945 at the Great Meeting of the Investigating Body for Preparatory Efforts for Indonesian Independence. Specifically, on 15 July 1945, it was presented by Moh. Yamin (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010). According to Yamin, the Great Hall not only carried out the judicial part, but also became a body that compared whether the laws made by the House of Representatives did not violate the Constitution of the Republic, did not conflict with the recognised customary law, or did not conflict with the Islamic Religious Sharia (Hoesein, Zainal Arifin, 2013).

The powers of the judiciary, in particular the powers of the Supreme Court during this period, are governed by the provisions of Article 24 of the 1945 Constitution in Chapter IX on the Judiciary, prior to the amendment. The provisions of the said article and the law before the amendment are as follows:

(1) Judicial power shall be exercised by a Supreme Court and other judicial bodies according to law.
(2) The composition and powers of the judicial bodies shall be regulated by law.

During this period, the Supreme Court had no power of judicial review.

Constitutional Period of the United Republic of Indonesia (RIS)

In the 1949 Constitution of the United Republic of Indonesia (referred to as RIS), the Supreme Court is regulated in Chapter IV of the constitution with the subtitle Supreme Court in Articles 113–116, while the types of courts include the Supreme Court as a federal court regulated in Part III (courts) in Articles 144–Article 163 (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010). The authority of the Supreme Court is further regulated in Article 156 paragraph (2) of the RIS constitution, which stipulates as follows.

> The Supreme Court also has the power to declare unequivocally that a provision in a constitutional regulation or in a state law does not comply with the Constitution, if a reasoned petition is filed for the Government of the Republic of Indonesia of the Union by or on behalf of the Attorney General at the Supreme Court, or for another state government by the Attorney General at the highest court of the state concerned at that time (Hoesein, Zainal Arifin, 2013).

Based on the provisions of Article 156(2) of the RIS Constitution, the Supreme Court has the power to conduct judicial review. The provisions contained in the RIS Constitution were heavily influenced by the United States, including the adoption of the American model of judicial review (Faiz, Pan Mohamad, 2016). This is reflected in the provisions of Article 156(2), Article 157 and Article 158 of the Constitution. Article 156 paragraph (2), Article 157 and Article 158 of the constitution strictly prescribe that judicial review is considered important in relation to the relationship between the federal state and its states, so that the formation of law does not contradict each other, especially their vertical relationship (Hoesein, Zainal Arifin, 2013).

Validity of the Provisional Constitution of 1950

The Provisional Constitution of 1950 brought about a change in the form of the state from united states to a unitary state. Section 1 paragraph (1) of the Provisional Constitution of 1950 expressly stipulates that the independent and sovereign Republic of Indonesia is a democratic and unitary State of law. In the perspective of judicial review, a review of legislation or in the sense of judicial review is unknown in the Provisional Constitution of 1950 (Hoesein, Zainal Arifin, 2013).

Post-Presidential Decree Period 5 July 1959

In its development, the Republic of Indonesia decided to return to the 1945 Constitution. The birth of the Presidential Decree of 5 July 1959 is inseparable from the failure of the Constituent Assembly to form a new constitution to replace the Provisional Constitution of 1950 (Risdiarto, Danang, 2018). Historically, from 1966 to 1970, there were laws and regulations that regulated judicial review through two (2) alternatives, namely *legislative review* and *judicial review* (Hoesein, Zainal Arifin, 2013). This power is regulated in MPRS Decree No. XIX/MPRS/1966 on the Review of State Legislative Products Outside the MPRS Products that are not in accordance with the 1945 Constitution, and Law No. 14/1970 on the Basic Provisions of Judicial Power. Article 26 paragraph (1) and (2) of Law No. 14/1970 stipulates that the Supreme Court has the power to declare invalid all regulations of a lower level than the law on the grounds that they contradict higher laws and regulations (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010). The authority of the Supreme Court to judicially review lower-level regulations against laws on the grounds that they contradict higher-level laws and regulations is further regulated in Article 11 (4) of MPR Decree No. III/MPR/1978 on the Position and Working Relationship of the Highest State Institution with and/or among Highest State Institutions.

Judicial Review under the Post-Reform 1945 Constitution

The People's Consultative Assembly, the result of the 1999 general election at the beginning of the reform era, had made changes to the 1945 Constitution as one of the reform agendas that was rolled out in 1998 (Majelis Permusyawaratan Rakyat Republik Indonesia, 2008). In the midst of the process of discussing the amendment of the 1945 Constitution, the Ad Hoc Committee I drafted a Basic Agreement on the Amendment of the 1945 Constitution. The Basic Agreement consisted of five agreements as described below.

1. not to amend the Preamble of the 1945 Constitution;
2. maintain the Unitary State of the Republic of Indonesia;
3. emphasise the presidential system of government;
4. The Elucidation of the 1945 Constitution of the Republic of Indonesia which contains normative matters will be incorporated into the articles (body);
5. make amendments by way of addendum (Majelis Permusyawaratan Rakyat, 2017).

The history of the birth of the Constitutional Court is inextricably linked to the opinions of the factions in the Ad Hoc Committee I for the Indonesian Working Committee of the People's Consultative Assembly. According to I Dewa Gede Palguna, the idea of the Constitutional Court underwent a long and intensive process of debate to arrive at the final formulation as it is today (Palguna, I Dewa Gede, 2013). Even in the minutes of the constitutional amendment, there were different opinions on the granting of judicial review powers. Based on the debates that took place in the Ad Hoc Committee I of the Working Committee of the People's Consultative Assembly 2000 and 2001, there were three clusters of thoughts that emerged in placing the position of the Constitutional Court, namely the Constitutional Court is part of the People's Consultative Assembly, the Constitutional Court is attached to or becomes part of the Supreme Court, and the Constitutional Court is independently seated as an independent state institution (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010).

The debate and opinion that the power of judicial review is more appropriately vested in the Constitutional Court began to emerge during the 2000 session, but there are also opinions that the power of judicial review is vested in the Supreme Court. The idea of separating the power of judicial review into two different institutions, the Supreme Court and the Constitutional Court, emerged during the 41st session of the Ad Hoc Committee I for the Working Committee of the People's Consultative Assembly on 8 June 2000. Another debate that arose at that time was that it was irrelevant to place the Constitutional Court under the People's Consultative Assembly or the Supreme Court because more problems would arise. This consideration emerged at the plenary session of the 41st Ad Hoc Committee for the Working Committee of the People's Consultative Assembly on 8 June 2000, that is, if the Constitutional Court became part of the Supreme Court, the level of public trust in judicial institutions, including the Supreme Court, would be at a very worrying level because this institution would be seen as failing to deliver justice (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010).

The Constitutional Court should be independent because there have been so many laws in the past that contradict the Constitution. The concern about rivalry between the Supreme Court and the Constitutional Court over the granting of judicial review powers to these two institutions was also expressed by Affandi of the Indonesian National Army/Police of the Republic of Indonesia faction (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010). The debate on the scope of the Constitutional Court's review also emerged during this session. The debate was about which provisions would be reviewed by the Constitutional Court and what the mechanism would be. The debate arose because legally, the Supreme Court already had the power to review legislation under the law (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar

Negara Republik Indonesia Tahun 1945,2010). The factions had different opinions during the amendment of the 1945 Constitution. I Dewa Gede Palguna of the Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia*, abbreviated as PDI-P) faction, in submitting his faction's final opinion, proposed that the Constitutional Court should be given the full power of judicial review, including judicial review of laws and judicial review of laws against the Constitution (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010).

In addition to listening to the opinions of the factions of the Ad Hoc Committee I for the Working Committee of the People's Consultative Assembly, the opinions of the Team of Experts of the Working Committee of the People's Consultative Assembly, input from the campus community, and input from non-governmental organisations were also used as input regarding the granting of judicial review authority. Several opinions between the Working Committee and the Team of Experts had much in common, both regarding the formulation of the Judicial Power and others. The only difference was on the issue of the Constitutional Court, where the Working Committee of the People's Consultative Assembly proposed that the authority of judicial review be vested in the Constitutional Court and the Supreme Court, while the Team of Experts proposed that the overall authority of judicial review be given to the Constitutional Court (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010). To narrow down the different opinions, the 5th meeting of Commission A was held with the agenda of Preparing a Report on the Results of the Activities of Commission A (Tim Penyusun Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010). Jakob Tobing as Chairman of Commission A submitted a draft of the third amendment to the 1945 Constitution, that is, the formulation of Article 24C paragraph (1) of the 1945 Constitution, which states that the Constitutional Court has the authority to hear cases at the first and final levels, whose decisions are final to test laws against the Constitution, decide disputes over the authority of state institutions with authority granted by the Constitution, decide on the dissolution of political parties, and decide disputes about the results of general elections (Tim Penyusunaskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010). This formulation then became the final formulation which was then outlined in the third Amendment to the 1945 Constitution. The draft was then presented at the 7th Plenary Meeting of the People's Consultative Assembly on 8 November 2001 to obtain the final opinion of the factions before being ratified as part of the Third Amendment to the 1945 Constitution led by the Chairman of the People's Consultative Assembly,Amien Rais(Tim Penyusunaskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, 2010).

Conclusion

The history of judicial review is closely linked to the resolution of the Madison versus Marbury case and the ideas of Hans Kelsen. In 1945, Moh Yamin introduced the concept of judicial review in Indonesia during the Great Meeting of the Investigative Body for Preparatory Efforts for Indonesian Independence. The history of judicial review in Indonesia can be traced back to the constitutional period of the Republic of Indonesia from 1945-1949. It continued with the enactment of the Provisional Constitution of 1950, the Post-Presidential Decree Period of 5 July 1959, and the Post-Reform 1945 Constitution. During the treatise on the amendment of the Constitution, a debate arose on the position of the Constitutional Court and the Supreme Court, as well as the scope of authority of these two institutions.

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