

Type: **Research Article**

Judicial Review in Indonesia: A Simplification Model

Ahmad Siboy¹✉^{ID}, Sholahuddin Al-Fatih²^{ID}, Asrul Ibrahim Nur³^{ID}, Nur Putri Hidayah⁴^{ID}

¹ Faculty of Law, Universitas Islam Malang, Indonesia

^{2,4} Faculty of Law, University of Muhammadiyah Malang, Indonesia

³ Géza-Marton Doctoral School of Legal Studies
University of Debrecen, Hungary

✉Corresponding email: siboyalman@unisma.ac.id

Abstract *Judicial review ensures that no regulations are contrary to higher laws, and none is unfair to people. The review of Indonesia's laws and regulations is conducted based on a hierarchy of laws and regulations. However, many laws and regulations are not within the hierarchy that raises uncertainty about the institutions that are authorized to review them. This research aims to offer an alternative review authority against all types of laws and regulations applicable in Indonesia. This research employed normative legal research with statutory, conceptual, case, and historical approaches. This study stated that the alternative design of regulatory, judicial review is the unification of all judicial reviews' authority into one judicial institution. Second, separation into judicial institutions is different from the model of separation based on the order of hierarchy of legislation, based on the scope of*

usable power (local and national), based on legislation and non-legislation, based on the forming and separation institutions with cross-subsidy models.

Keywords Judicial Review, Simplification Model, Indonesian Legal System, Justice, Judicial Institution

1. Introduction

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (henceforth referred to as the 1945 NRI Constitution), which states that Indonesia is a state of Law, automatically requires all legal matters in the Republic of Indonesia's Unitary State to be based on the Law.¹ The Law must ensure that it can describe or explain what citizens should and should not do, where the government is heading, the relationship between citizens, and the relationship between citizens and the government. In realizing the state of Law, a legal order has been drafted and enacted in the legislation² which serves a guide in the life of the nation and state.³ All Indonesians must abide by all provisions in the laws and regulations. Under no circumstances should people deny legislation because the Indonesian

¹ Muhammad Hanafi, "Kedudukan Musyawarah dan Demokrasi di Indonesia," *Jurnal Cita Hukum* 1, No. 2 (2016), <https://doi.org/10.15408/jch.v1i2.2657>.

² Ahmad Fadlil Sumadi, "Hukum Dan Keadilan Sosial Dalam Perspektif Hukum Keadilan Negara Law and Social Justice in Constitutional Law Perspective," *Jurnal Konstitusi* 12, No. 4 (2015): 853–54, <https://doi.org/https://doi.org/10.31078/jk1249>.

³ Sholahuddin Al-Fatih and Felinda Istighfararisna Aulia, "Tanggung Jawab Negara Dalam Kasus Covid-19 Sebagai Perwujudan Perlindungan HAM (The State's Responsibility in the Case of COVID-19 As a Realization of the Protection of Human Rights)," *Jurnal HAM* 12, No. 3 (2021): 349–66, <https://doi.org/10.30641/ham.2021.12.349-366>.

legal system adheres to a law fictie theory.⁴ As mentioned in a law fictie theory (*presumptio jures de jure*), everyone is considered to know the law.

Normatively, legislation is often interpreted as a hierarchically arranged legal norm with different content materials and functions.⁵ The legislation is formed by various institutions authorized to form the legislation following the authority of each forming institution. The 1945 NRI Constitution was drafted by the People's Consultative Assembly (henceforth referred to as MPR); The Law (*Undang-Undang/UU*) was made by the House of Representatives (DPR) together with the President, while the Government Regulation in Lieu of Law (henceforth referred to as Perppu) was made by the President. The government makes Government regulation (*Peraturan Pemerintah/PP*), while Presidential Decree (*Peraturan Presiden/Perpres*) was made by the President. The Provincial Parliament and the Governor make the Provincial Regulation (*Perda*), and the District/Municipal Regulation (*Perda*) is made by the DPRD District/City and the Regent/Mayor.

The legal products of each forming institution of legislation type are then compiled in hierarchy as follows: *a*) The Constitution of the Republic of Indonesia; *b*) The Decree of the People's Consultative Council; *c*) The Law/Government Regulation in Lieu of Law; *d*) The Government Regulation; *e*) The Presidential Regulation; *f*) The Provincial Regulations; and *g*) The District/Municipal Regulations.

The hierarchical arrangement of such legislation is prepared in terms of value and position. The hierarchical arrangement shows that the value of a

⁴ Fajar Nurhardianto, "Sistem Hukum dan Posisi Hukum Indonesia," *Jurnal TAPIS* 11, No. 1 (2015): 34–45, <http://www.ejournal.radenintan.ac.id/index.php/TAPIS/article/view/840/723>.

⁵ Agnes Fitryantica, "Harmonisasi Peraturan Perundang-Undangan Indonesia Melalui Konsep Omnibus Law," *Gema Keadilan* 6, No. 3 (2019): 300–316, <https://doi.org/10.14710/gk.6.3.300-316>.

provision in each legislation is based on its position in the hierarchy of laws and regulations. The highest legislation is a type of regulation that contains the highest value and should be used as the basis in the formation of legislation under it. For example, the content of Government Regulation must be based on the content of the law considering the Government Regulation position is under the Law.

The hierarchical composition of legislation also indicates the position or degree of a type of legislation. Higher legislation can override lower legislation, or lower legislation should not be contrary to higher one. However, although Indonesia's legal system has been rigidly regulated by the forming institutions, the type, content of materials, and their position between one legislation and another legislation, conflicts, and overlaps between laws and regulations are still often found. From the frequent review of legislation, both are submitted to the Constitutional Court and the Supreme Court.

Territorially, in case of an overlap or conflict of norms, the solution is based on the following several principles:⁶

- 1) The principle of *lex superiori derogate lex inferiori*. This principle implies that the provisions of higher legislation may override or invalidate the provisions of the laws and regulations under it.
- 2) The principle of *lex priori derogate lex postpriori* is based on the provisions of the law review legislation where the new laws and regulations can override the previously enacted laws and regulations.
- 3) The principle of *lex specialist derogate lex generalis* explains that special legislation can override general legislation.

⁶ Otong Rosadi, "Hukum Kodrat, Pancasila dan Asas Hukum dalam Pembentukan Hukum di Indonesia." *Jurnal Dinamika Hukum* 10, No.3 (2010): 277-284.

The mechanism of applying the three principles above in resolving conflicts between laws and regulations can be done through three processes: legislative review, executive review, and Judicial review. Legislative review is the process of reviewing or evaluating the provisions of legislation conducted by the legislature. In contrast, the executive review is conducted by executive institutions, such as the minister of home affairs' cancellation of provincial regulations, while the mechanism of judicial review is performed by the judiciary. Judicial review mechanisms are required to:⁷

- 1) Maintain the hierarchy of laws and regulations based on the principle of *lex superior derogat lex inferiori*. This judicial review of legislation that is considered contrary to higher regulations can be directly requested for judicial review cancellation.
- 2) Safeguard the sovereignty of the people, which is performed based on the Constitution. Automatically, the Constitution and the laws and regulations under it must be requested a review by Indonesian citizens, especially regarding the appropriateness of its contents following the people's will.
- 3) Manifest *trias politica*. The legislation's judicial review mechanism will serve as a parameter to see the division and implementation of the three branches of power because the judiciary's judicial review mechanism will be implemented. What is formed by other branches of power is based on what the judiciary has performed.
- 4) Ensure that the formation of legislation serves appropriately. It is obvious that legislators in Indonesia are facing issues in terms of the competence or capacity in making laws and doing transactional political practices that often keep them

⁷ Jimly Asshiddiqie, *Putusan Monumental Menjawab Problematika Kenegaraan* (Malang: Setara Press, 2016).

as if they were hostages. The competence and political issues spoil the course of the legislators not congruent with sound law formation principles. Judicial review mechanism is expected to encourage legislators to carefully make regulations because if the rules are made only to accommodate specific interests, they will undoubtedly be canceled at judicial review.

Review through judicial review mechanisms is conducted by the Constitutional Court and the Supreme Court, reviewing the Law against the Basic Law and reviewing the legislation under the law that contravenes the state law respectively.⁸ In practice, the review of legislation by both judicial institutions is not by the authority given, and it is *ultra vires*, overriding the judicial process's principles in general.⁹ For example, the Constitutional Court reviewed Perppu, and it does not represent the explicit authority of the Court. Similarly, the Supreme Court reviewed the Ministerial Regulation (Permen), which is not within the explicit authority of Supreme Court. Supreme Court can even adjudicate its own regulation known as Perma while in the judiciary, the principle of *nemo iudex idenous propria causa* applies. The *ultra vires* review process conducted by the Constitutional Court and Supreme Court can lead to problematic verdicts in the perspective of legal certainty, considering the verdicts issued by an unauthorized institution should be considered null and void.

⁸ Sholahuddin Al-Fatih, "Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi," *Jurnal Ilmiah Hukum LEGALITY* 25, No. 2 (2018): 247, <https://doi.org/10.22219/jihl.v25i2.6005>.

⁹ Muhammad Addi Fauzani and Fandi Nu Rohman, "Urgensi Rekonstruksi Mahkamah Konstitusi Dalam Memberikan Pertimbangan Kebijakan Hukum Terbuka (Open Legal Policy)," *Justitia Et Pax: Jurnal Hukum* 35, No. 5 (2019): 127–52, <https://doi.org/https://doi.org/10.24002/jep.v35i2.2501>.

2. Method

This is normative law research or doctrinal research,¹⁰ employing the statutory approach, conceptual approach, case approach, and historical approach.¹¹ The legal materials consisted of primary, secondary, and tertiary legal materials, all analyzed in descriptive and prescriptive methods. The primary legal materials used in this research, such as UUD NRI 1945, Law No. 12 of 2011 concerning Formation of Law and Regulation, and some of Perma, SEMA, and PMK. Descriptive analysis is used in this research to describe the term and conditions of judicial review. In contrast, prescriptive analysis is used to find a new judicial review model that is simpler than before.

3. Result & Discussion

A. Rules and Principles of Review of Legislation

The rules of the review of legislation in Indonesia are the obligations of two judicial institutions: the Supreme Court and the Constitutional Court, both of which have their fundamental competencies. The Constitutional Court is only authorized to review the law against the Constitution.¹² That is, the Constitutional Court is only authorized to review one type of legislation, while the Supreme Court can review government regulations, presidential regulations, provincial regulations, and district/municipal regulations.

¹⁰ Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*, ed. Ahsan Yunus (Yogyakarta: Mirra Buana Media, 2020).

¹¹ Jonaedi Efendi and Johnny Ibrahim, *Metode Penelitian Hukum: Normatif dan Empiris* (Depok: Kencana Prenada Media Group, 2018).

¹² Oly Viana Agustine, "Keberlakuan Yurisprudensi Pada Kewenangan Pengujian Undang-Undang Dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 15, No. 3 (2018): 642, <https://doi.org/10.31078/jk1539>.

Both judicial institutions cannot review a type of legislation that is not within its authority. For example, the Constitutional Court should not review the Regional Regulations simply because this is within the Supreme Court's authority. If the Constitutional Court reviews the Regional Regulations, the Constitutional Court's review process is considered to never exist, or the decision issued by the Constitutional Court is declared null and void. Every state institution must not act ultra vires considering each State institution's authority has been distributed attributively through the NRI Constitution of 1945 and the Law. Distribution of authority in each state institution, including judicial institutions such as the Constitutional Court follows the norm of authority that seems to restrict the space for each state institution so that there are no conflicts or disputes between state institutions.

However, restrictions on absolute contingency given to the Constitutional Court and Supreme Court are not effective in exercising the authority of review against the laws and regulations. The Constitutional Court and the Supreme Court review a type of legislation that is not part of their authorities. The practice of review legislation conducted ultra vires by the Constitutional Court and Supreme Court can be mapped as follows: First, the The Constitutional Court is a judicial institution that is only authorized to review the Law regarding the review of legislation.¹³ The Court's authority to review this Law is explicitly mentioned in Article 24C of the NRI Constitution of 1945. That is, the absolute competence of the Court is limited to reviewing the law. In practice, the Court also reviewed the

¹³ Maria Farida Indrati, *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan* (Jakarta: Kanisius, 2016).

Government Regulation in Lieu of Law (Perppu), while the Law and Perppu are two different things.¹⁴

Second, the Supreme Court is an institution explicitly declared authorized by Article 24 A to review the legislation that contravenes the state law, namely, Government Regulation (PP), Presidential Regulation (Perpres), Provincial Regulation, and Regency/Municipal Regulation. However, in practice, the Supreme Court also reviewed the Ministerial Regulation (Permen), Regulation of the Electoral Commission (PKPU). The review conducted by the Supreme Court and the Constitutional Court on legislation that is not within the authority is undoubtedly a portrait of legislative review that will always ignite debate since it represents "abuse of power".¹⁵ On the other hand, the review of legislation conducted by the Supreme Court and the Constitutional Court against legislation outside their authorities is a legal breakthrough to provide room for justice and legal certainty to people who feel disadvantaged by the regulation that no institution is authorized to review.

Explicitly, the occurrence of review outside the authority occurs because various state agencies make many regulations, but the regulation is not included in the type of legislation mentioned in Articles 7 and 8 of Law No. 12 of 2011, resulting in review performed by the institution. It will be reviewed through the Supreme Court or the Constitutional Court or simply through the cancellation mechanism by officials or state institutions. Second, there are many obscure laws

¹⁴ Richard Kennedy and Bonaventura Pradana Suhendarto, "Diskursus Hukum: Alternatif Pola Pengisian Jabatan Kepala Daerah Di Masa Pandemi Covid-19," *Jurnal Pembangunan Hukum Indonesia* 2, No. 2 (2020): 188–204, <https://doi.org/10.14710/jphi.v2i2.188-205>.

¹⁵ Zainal Arifin Hoesein, *Judicial Review di Mahkamah Agung RI Tiga Dekade Pengujian Peraturan Perundangundangan* (Jakarta: Rajawali Press, 2009).

and regulations which institutions can review.¹⁶ The Decree of People's Consultative Assembly (henceforth referred to as TAP MPR) and The Supreme Court Regulation are the two examples. TAP MPR is a type of legislation mentioned in Law Number 12 of 2011 as part of the type of legislation that applies in Indonesia. TAP MPR even ranks second or above the Law in Indonesia's hierarchical structure of norms.

Another example is the judiciary regulation, such as Perma and the Constitutional Court Regulation (henceforth referred to as PMK). Both types of rules have binding power and apply both outwards and inwards. However, if some people or citizens feel disadvantaged by the existence of Perma or PMK, then there is no judicial institution that is explicitly authorized to review both regulations issued by the branch of judicial power. From the above exposure, the review of regulations and authority for each legislation in Indonesia is still not performed accordingly and not based on legislative review that is simple, fast, affordable, and legal. Therefore, the regulation of review authority over the legislation in Indonesia must be redesigned so that the legislation review process can cover all types of applicable regulations and reviewing institutions following their competence.¹⁷ The regulation's design relates to the institution's position and authority that will carry out the review process of the legislation. The design of authority and institutions to review Indonesia's laws and regulations should meet several principles for more proper reviewing practices. There are several principles guiding the judiciary's choice or design that conducts a review of the

¹⁶ Fritz W. Scharpf, "Judicial Review and the Political Question: A Functional Analysis," *The Yale Law Journal* 75, No. 4 (1966): 517–97, <https://doi.org/10.2307/794865>.

¹⁷ Hambali Thalib, Sufirman Rahman, and Abdul Haris Semendawai, "The Role of Justice Collaborator in Uncovering Criminal Cases in Indonesia," *Diponegoro Law Review* 2, No. 1 (April 2017): 27, <https://doi.org/10.14710/dilrev.2.1.2017.27-39>.

laws and regulations in Indonesia so that the same problems will not be repeated like in the case of the Supreme Court and Constitutional Court.

First, the principle of *nemo iudex in causa sua*¹⁸ states that a person or judge must not judge himself. This principle implies that if a person becomes a judge on his own, then the judicial process will not come to the value of justice, considering there will be a conflict of interest if the judge reviews his own regulations. In the case of the authority to review Perma by the Supreme Court or given to the Supreme Court, for example, a conflict of interest may arise. If the authority of the Supreme Court to review the laws and regulations under the Law also applies to Perma, a conflict of interest will occur in the material review. If the Supreme Court cancels a Perma through a material review mechanism, it appears that the Supreme Court is incompetent because the cancellation indicates that the Supreme Court made a mistake in forming a Perma that contravenes the Law.

The event is evidence of the Supreme Court's inability to form an excellent Perma to defame the Supreme Court as a judicial institution that obviously has the better knowledge about the Law than other state organs. The phenomenon is certainly not intended to occur; the Circular Letter of the Supreme Court (henceforth referred to as SEMA) is impossible to cancel Perma made by the judging judge in the judicial review process. Supreme Court's unilateral assessment in reviewing his own rules (Perma) will appear to avoid and prevent negative judgments and criticism and public condemnation of the Supreme Court. A well-known adage "*no judge can act fairly in his case*" seems to fit this conflict of interest of Supreme Court if Perma is materially reviewed this way. The judge must not be a prosecutor of his case because this act will justify and benefit him.

¹⁸ Y. Maladi, "Benturan Asas Nemo Iudex In Propria Causa Dan Asas Ius Curia Novit' (Telaah Yuridis Putusan Mahkamah Konstitusi Nomor 005/ Puu-Iv/2006)," *Jurnal Konstitusi* 7, No. 2 (2010): 1–18, <https://doi.org/https://doi.org/10.31078/jk%25x>.

In the logic of sound legal thinking, a state institution should not be authorized to materially review its legal products.

Based on the principle of *nemo iudex in causa sua*, it is necessary to establish an autonomous organ to review Perma. The establishment of this autonomous institution is worth considering so that the problem of the review of Perma and other similar regulations such as DPR regulation, DPD regulation, Bank Indonesia regulation, Constitutional Court regulation, and others that are prone to be materially sued do not give rise to problems. Thus, the institution that will be authorized to review legislation must be ensured to be an institution that has no connection with the process of forming a norm to be reviewed. Second, in terms of the hierarchy/unity of values,¹⁹ the principle of hierarchical legislation must be used as a basis in determining the institution to be authorized to conduct a review of legislation. The principle of hierarchy in granting the examiner institution's authority means that all laws and regulations represent a unity of values. That is, one norm and another are in one value, the value of Pancasila serving as the highest source of state law. With this principle, the judiciary that will review the legislation is a judicial institution assessing a norm. A quo makes legislative provisions in one type of norm, while another related norm is not requested a judicial review.

Third, authority²⁰ is legitimate power that should serve as the basis for determining the form or model of the institution of legislative review. The

¹⁹ Zaka Firma Aditya and Muhammad Reza Winata, "Rekonstruksi Hierarki Peraturan Perundang-Undangan Di Indonesia (Reconstruction of The Hierarchy of Legislation in Indonesia)," *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 9, No. 1 (2018): 79–100, <https://doi.org/10.22212/jnh.v9i1.976>.

²⁰ Abdul Ghoffar, "Mewujudkan Mahkamah Konstitusi Sebagai Peradilan Yang Akuntabel Dan Terpercaya," *Pandecta: Research Law Journal* 13, No. 2 (2018): 76–88, <https://doi.org/10.15294/pandecta.v13i2.16727>.

principle of authority serves as the basis for laying down and ensuring that the authority of an institution that will review a legislation has obtained attribution/order from the law so that the reviewing institution's decision is valid before the Law. Simultaneously, the principle of authority will also guarantee and ensure that a statutory review institution's authority will not overlap with the authority of other institutions. Fourth, the principle of check and balances²¹ ensures that all state institutions can control and compensate each other so that no State institution can abuse authorities. The principle of check and balance in the context of review legislation is intended to ensure that the institution to be authorized is a separate institution and equivalent to or higher than the institution that forms the legislation to be reviewed. For example, if the legal norm to review is a provincial regulation, a higher institution of the State domiciled as a high institution of the State of a national nature is authorized to review.

Fifth, legal certainty obeyed by the forming body,²² in this case, means that the results of the process of review legislation by the judiciary can be implemented. They are implemented in the sense of being able to revoke the binding power of a norm while also being adhered to the forming body. Sixth, the principle of legal protection here is that the review institute that will conduct the review of legislation must be based on the nature of legal protection, namely a judicial institution that will run the review process accessible to the public in general, especially people who feel disadvantaged by the enactment of the rule of law.

²¹ Subiharta, "Moralitas Hukum dalam Hukum Praksis Sebagai Suatu Keutamaan (Legal Morality in Practical Law as a Virtue)," *Jurnal Hukum dan Peradilan* 4, No. 3 (2015): 385–98.

²² Mario Julyano and Aditya Yuli Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum," *Jurnal Crepido* 1, No. 1 (2019): 13–22, <https://doi.org/https://ejournal2.undip.ac.id/index.php/crepido/article/download/6325/3197>.

Seventh, the principle of simple, low-cost, and fast judiciary²³ should serve as one of the main pillars in giving authority to a judicial institution. The judiciary that will review the laws and regulations must be a judicial institution that can translate the judicial process that can be understood by the people seeking justice and does not charge fees for the applicant/plaintiff, and the process is not convoluted.

B. Design of Authority of Judicial Review

Based on the consideration of the above seven principles, several alternative design to review legislation can be chosen:

1) Review by One Judicial Institution

The process of review of the laws and regulations in Indonesia can be integrated with one judicial institution. There is only one institution that will adjudicate all types of legal norms that apply in Indonesia. The judiciary can be handed over to existing judicial institutions, or new judicial institutions can be established specifically to review Indonesia's laws and regulations. If it is handed over to the existing judiciary, it can be chosen between the Supreme Court (MA) or the Constitutional Court (MK). This is because the Supreme Court and Constitutional Court are judicial institutions based on *ius contituendum*, and these two judicial institutions have the authority to review the laws and regulations. The Supreme Court reviews the Laws and regulations, while the Court can review the

²³ Maya Hildawati Ilham, "Kajian Atas Asas Peradilan Cepat, Sederhana, dan Biaya Ringan Terhadap Pemenuhan Hak Pencari Keadilan (Studi Putusan Mahkamah Agung Nomor 246 K/Pid/2017)," *Verstek* 7, No. 3 (2019): 13–14, <https://jurnal.uns.ac.id/verstek/article/view/38286/25314>.

Law against the Constitution. If the authority to review the laws and regulations is handed over to one judicial institution, it can transfer the independent authority in the Supreme Court's authority, and the Court merges into one institution only. For example, the authority to review all laws and regulations is requested to the Court so that the the Supreme Court will no longer have the authority to review the laws and regulations and make the legislation's review process centralized in the Court. Alternatively, the authority to review the laws and regulations is given to the Supreme Court in order to transfer the Court's authority to the Supreme Court.

On one hand, if the authority to review the laws and regulations is given to the Court, the principle where all types of laws and regulations are in one entity of values will ensue because the Court is an institution formed with the primary function to review the constitutionality of the Law. When the Court reviews the laws and regulations, it can ensure that legislation requested to review the material will be reviewed based on the Constitution's values. If the requested material reviewed is a Ministerial Regulation (Permen) or a regional regulation (Perda), the Court uses the law as the basis or reviewing instrument and the Constitution.

However, handing over the authority to adjudicate all laws and regulations to the Constitutional Court is not without problems. The Constitutional Court is a judicial institution that also publishes the Regulation of the Constitutional Court (PMK) as a means of regulation on implementing the Court's authority, such as Supreme Court Regulation (Perma) No. 1 of 2016 concerning dispute resolution resulting from regional head elections. As an institution that issues regulations, the Constitutional Court can be an institution that can review an object of dispute formed by itself, namely the Regulation of the Constitutional Court. This is undoubtedly contrary to the principle of the independence of the Court, and the principle of the judge should not allow a judge to judge his/her own legal product.

On the other hand, if the authority to review all laws and regulations to the Supreme Court, then the potential problems faced are the same as those that occur in the Constitutional Court. The Supreme Court is a state institution that also issues legislation that can be the object of review, and it also serves as an institution that often issues Supreme Court Regulations (Perma), in which Perma can be the object of review so that if the Supreme Court is given the authority to adjudicate all laws and regulations, then it adjudicates Perma as well. When the Supreme Court and Constitutional Court do not expect to be authorized to adjudicate all types of legislation, then the best option can be reached by establishing a new institution to internalize the process of reviewing legislation in one judicial institution. A new judicial body that specializes in reviewing all kinds of laws and regulations should be established. The new institution can be formed and has the position equivalent to the Supreme Court and Constitutional Court to be an institution that performs judicial power functions.²⁴

2) Review by Different Institutions

Review of laws and regulations can also be separated into different institutions. That is, two institutions will review the laws and regulations in Indonesia. The review of legislation by more than one institution is a review legislation model as it applies now but with some changes, including changes in institutions and objects to be reviewed. Some models that can be applied when review legislation is separated into two different institutions as given in the following.

²⁴ Robert Schütze, "‘Delegated’ Legislation in the (New) European Union: A Constitutional Analysis," *Modern Law Review* 74, No. 5 (2011): 661–93, <https://doi.org/10.1111/j.1468-2230.2011.00866.x>.

a) Separation by Hierarchy

If two different institutions carry out the authority to review the laws and regulations, then the regulation on authority in each institution can be divided based on legislation set hierarchically. For example, the U.S. judiciary adjudicates TAP MPR, UU/Perpu towards the Constitution. Judicial institution B adjudicates PP, Perpres, and Perda. Review of legislation from PP into institutions is different from the law review up to the NRI Constitution of 1945 because the government regulation such as PP-Perda serves as a delegated regulation. That is, this regulation is made only to perform what is set forth in the law above it. That is, a government regulation cannot change or add to the provisions governed by the rule above it.

The division into the two new judicial institutions is undoubtedly different from the pattern of the division of review legislation that applies now where the review is given to the Constitutional Court and the Supreme Court.²⁵ This difference lies in the benchmark level of the hierarchy of legislation. The pattern of division of authority to the judiciary with this hierarchical level does not look at the form and forming institutions of a type of legislation but instead based on its level. For example, all laws and regulations are positioned under the Constitution until they are tried by institution A. With this provision, TAP MPR, UU/Perppu can automatically become the judiciary A's absolute competence. This is different from the authority of the Court in force now. The Court has the authority to review the Law (UU) against the Constitution (UUD) only. As a result,

²⁵ Muhammad Sabil Ryandika and Jatmiko Wirawan, "Penerapan Peran Hakim Agung Sebagai Judex Juris Dalam Perkara Pidana Studi Kasus Putusan MA No. 2239 K/PID.SUS/2012," *Jurnal Penelitian Hukum* 2, No. 2239 (2015): 90-104, <https://journal.ugm.ac.id/jph/article/view/19117/12368>.

no institution is authorized to review TAP MPR even though TAP MPR is under the NRI Constitution of 1945 and above the Law.²⁶

On the same side, the legislation that is not included as part of institution A's authority will be reviewed by institution B. This institution will review all types of legislation ranging from government regulations to district/municipal regulations. Institution B can also adjudicate legislation not included in the hierarchical legislation or regulations mentioned in Article 7 paragraph (1) of Law Number 12 of 2011.

TABLE 1. Design of Review Based on Hierarchical Principles

No	Type of Regulation Reviewed	Reviewing Institution	Source of Authority
1	NRI Constitution of 1945		
2	TAP MPR	U.S. Judiciary	Primary regulation
3	UU/Perppu		
4	PP		
5	Perpres		
6	Provincial Regulation		
7	Municipal/District Regulation	Judicial Institution B	Secondary regulation or delegated legislation
8	Non-hierarchical legislation/Article 7 paragraph (2) law 12/2011 and Law 15/2019 (Ex. Perma and PMK)		

²⁶ Brilliant Gustama, Sarita, and Sholahuddin Al-fatih, "The Influence of TAP MPR ' s Position on The Hierarchy System of Indonesian Laws and Regulations," *Indonesia Law Reform Journal* 2, No. 1 (2022): 67–80, <https://doi.org/10.22219/ilrej.v2i1.19442>.

The separation based on the hierarchy level and the legislation that is not included in the hierarchical structure will provide legal certainty to the process of reviewing legislation in Indonesia. Whatever the type of legislation is, there is already room for anyone who wishes to file a *judicial review*, both material and formal.

b) Separation Based on Scope of Applicable Power

The separation of statutory review institutions can also be separated based on the scope of the enactment of legislation In the Indonesian context. The enactment of legislation can be divided into three levels, namely nationally applicable legislation such as UU/Perppu, laws and regulations applying to the province, such as Provincial Regulations and Governor's Regulations, and laws and regulations applying to districts/cities, such as district regulations and regent regulations or mayoral regulations. If the review mechanism is based on the territory's principle in force, then the submission of the reviewing authority can be handed over to the existing judicial institutions at each territorial level. For the national level, it can be tried by the Constitutional Court or the Supreme Court, both of which can review TAP MPR, UU/Perppu, and Government Regulations. The review can be submitted to the High Court (PT) or the State Administrative High Court (PT TUN) for the regional level or the type of Provincial Regulation and Governor Regulation. Meanwhile, district/municipal regulations and regent regulations or mayoral regulations can be submitted to the District Court (PN) or the State Administrative Court (PTUN).

TABLE 2. Design of Review Based on The Scope of The Applicable Region

No	Type of Regulation Reviewed	Applicable or Territorial Power Level	Reviewing Institution
1	Tap MPR	National	MA/MK
2	UU/Perppu		
3	PP		
4	Perpres		
5	Permen		
6	PMK/Perma/and similar		
7	Provincial Regulation/Governor Regulation	Province	PT/PT TUN
8	District/City Regulations and Regent/Mayor Regulations	Regency/City	PN/PT TUN

The process of reviewing the legislation based on the division of territory is also faced with some challenges related to the reviewing instrument. If the judicial review of laws and regulations is conducted at the regional level, the issue lies in the judiciary's reviewing instrument. If referring to the review legislation theory, legislation must be reviewed based on higher laws and regulations. Law (UU), for example, serves as a reviewing instrument for the review of Government Regulation (PP). If it is the Provincial Regulation, the reviewing instrument is the Presidential Regulation. The problem is that if the Provincial Regulation is reviewed, the reviewing instrument is the Presidential Regulation as a national level regulation.

c) Separation by Form

Statutory review can also be based on the object reviewed. In this case, it may refer to the provisions of the prevailing laws and regulations in Indonesia. In Law No. 12 of 2011 concerning the Establishment of Legislation, legislation is classified

in either hierarchically arranged or not hierarchically arranged structure. The hierarchically drafted laws and regulations are the NRI Constitution of 1945, TAP MPR, UU/Perppu, PP, Perpres and Perda, while the laws and regulations not hierarchically structured are PMK, Perma and others. The classification can be used as a basis for determining the institution of review. One judicial institution reviews hierarchically drafted laws and regulations, and another judicial institution reviews legislation that is not hierarchically drafted.

TABLE 3. Design of Review by Form

No	Type of Regulation Reviewed	Review Institution	Divided by
1	NRI Constitution of 1945	National Judiciary	Hierarchically
2	TAP MPR RI		
3	UU/Perppu		
4	PP		
5	Perpres		
6	Provincial Regulation		
7	City/District Regulation		
8	Non-hierarchical legislation/Article 7 paragraph (2) law 12/2011 and Law 15/2019 (Ex. Perma and PMK)	Judicial Institution B	Not-Hierarchically

d) Separation Based on Forming Institutions

The judiciary regulation that will review the laws and regulations can also be separated based on the forming institutions of each type of legislation. For example, for the legislature's legislation, the authority to review it is handed over to the U.S. judiciary. In contrast, the authority to review legislation is handed over

to judiciary B. The model of separation of authority submission based on the type of legislation established by the executive body tends to be a type of legislation that is only to carry out the legislation, such as the Regional Head Regulation (Perkada). Perkada serves as a local regulation (Perda). Government Regulation (PP) was formed to perform the legislation made by the House of Representatives (DPR) together with the President.

Meanwhile, the choice of judicial institutions that will adjudicate can be submitted to the State Administrative Court (PTUN) or the State Administrative High Court (PT TUN) for the type of legislation made by the executive body. The choice of authorization to the PTUN is caused by the condition in which PTUN is a judicial institution specializing in adjudicating state administrative disputes; one of the main objects is the legal product of executive institutions in the form of *beschikking* or decisions. During this time, PTUN often adjudicates executive institutions' decisions such as Presidential Decree, Governor's Decree, Regent's Decision, and Mayor's Decree. The institution that will review the legislation established by the legislature can be submitted to the Constitutional Court as a judicial institution with authority to review the legislation to review the Law towards the Constitution. The Constitutional Court's authority may be expanded to add or include the review of legal products of legislative institutions and executives outside the Law, such as the authority to review provincial and district/municipal regulations, which serve as legal products of executive institutions and regional legislatures.

TABLE 4. Design of Review Based on Forming Institutions

No	Type of Regulation Reviewed	Forming Institution	Selection of Review Institution
1	UU		
2	Provincial Regulation	Joint Legislative Executive	Supreme Court (MK)
3	Regency/City Regulation		
4	PP		
5	Perpres	Executive	
6	The legislation stipulated in Article 7 paragraph (2) of Law 12/2011 (ex: PMK, Perma)	Judiciary/Legislature	PTUN

e) Separation Based on Cross-Subsidy System

The cross-subsidy system is the last alternative to the judiciary's choice that will review the legislation. The choice of cross-subsidies here is to stick with the review legislative system as it is in force to date but with some changes. First, the judiciary that publishes legal products cannot review their own regulations. The authority over the legal products it publishes must be handed over to other judicial institutions. For example, the Supreme Court is an institution that has the authority to issue a Regulation of the Supreme Court (Perma) and The Supreme Court should not try this Perma, but it should be handed over to other institutions such as the Constitutional Court. The choice is left to the Constitutional Court for Perma because this is a legal product of the State's high institution in the judicial power branch, and the position of the Constitutional Court is equivalent to the Supreme Court.

On the contrary, for the legislation issued by the Supreme Court of the Constitution, such as the Regulation of the Constitutional Court (PMK), the review

authority is given to the Supreme Court. The Supreme Court's legal products reviewed by the Constitutional Court and the Constitutional Court's legal products that are under review of the Supreme Court represent a cross-subsidy system to avoid possible conflict of interest or so as not to contradict the principle suggesting that judges should not judge themselves for a more objective reviewing process. To realize the cross-subsidy system in the legislation review, this must be referred to declaratively in the law. Without any explicit mention of the mechanism of review with a cross-subsidy system, the process of legislative review will still be based on the principle of *lex superior derogate lex in prior* so that cross-subsidy review efforts will not materialize because if based on the principle of *lex superiori derogate lex inferior*, the regulation of the Supreme Court (Perma) will be reviewed by the Supreme Court itself. With the mention of the scope of each type of legislation in each institution, including the implementation of a cross-subsidy system, the principle of *lex superior derogate lex inferior* will not apply absolutely.

4. Conclusion

Reviewing laws and regulations aims to ensure an orderly legal system in Indonesia. The review system that applies in Indonesia is based on the principle of *lex superiori derogate lex inferior* and *stufenbau theory* (hierarchical theory) so that the process of reviewing the Law (UU) against the Constitution (UUD) is given to the Constitutional Court (MK) and for legislation under the Law is given to the Supreme Court (MA). However, not all types of legislation are included in the hierarchy of legislation that causes normative obscurity about which institutions are authorized to review regulations that are not included in the hierarchy of legislation. In contrast, every legislation must still be given review room to ensure

that the regulation does not violate people's rights. It is in this context that the regulatory authority to review legislation must be redesigned. The new form of the design can be achieved using the review process integrated into one judicial institution only for all types of legislation both included in the hierarchy, and it does not include the design of separation of the review process into different judicial institutions through a review model based on a hierarchy of laws and regulations, based on the scope of applicable power (Local and National), based on legislation and non-legislation, and based on the forming institutions or using a system of cross-subsidy review.

5. Declaration of Conflicting Interests

The authors state that there is no conflict of interest in the publication of this article.

6. Funding Information

None.

7. Acknowledgment

None.

8. References

Aditya, Zaka Firma, and Muhammad Reza Winata. "Rekonstruksi Hierarki Peraturan Perundang-Undangan di Indonesia (Reconstruction of The Hierarchy of Legislation In Indonesia)." *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 9, No. 1 (2018): 79–100. <https://doi.org/10.22212/jnh.v9i1.976>.

- Agustine, Oly Viana. "Keberlakuan Yurisprudensi Pada Kewenangan Pengujian Undang-Undang Dalam Putusan Mahkamah Konstitusi." *Jurnal Konstitusi* 15, No. 3 (2018): 642. <https://doi.org/10.31078/jk1539>.
- Al-Fatih, Sholahuddin. "Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi." *Jurnal Ilmiah Hukum LEGALITY* 25, No. 2 (2018): 247. <https://doi.org/10.22219/jihl.v25i2.6005>.
- Al-Fatih, Sholahuddin, Fachry Ahsany, and Ahmad Faiz Alamsyah. "Legal Protection of Labor Rights During the Coronavirus Disease 2019 (Covid-19) Pandemic." *Jurnal Pembaharuan Hukum* 7, No. 2 (2020): 100–115. <https://doi.org/10.26532/jph.v7i2.10975>.
- Al-Fatih, Sholahuddin, and Felinda Istighfararisna Aulia. "Tanggung Jawab Negara Dalam Kasus Covid-19 Sebagai Perwujudan Perlindungan HAM (The State's Responsibility in the Case of COVID-19 As a Realization of the Protection of Human Rights)." *Jurnal HAM* 12, No. 3 (2021): 349–66. <https://doi.org/10.30641/ham.2021.12.349-366>.
- Asshiddiqie, Jimly. *Putusan Monumental Menjawab Problematika Kenegaraan*. (Malang: Setara Press, 2016).
- Efendi, Jonaedi, and Johnny Ibrahim. *Metode Penelitian Hukum: Normatif dan Empiris*. (Jakarta: Kencana Prenada Media Group, 2018).
- Fauzani, Muhammad Addi, and Fandi Nu Rohman. "Urgensi Rekonstruksi Mahkamah Konstitusi Dalam Memberikan Pertimbangan Kebijakan Hukum Terbuka (Open Legal Policy)." *Justitia Et Pax: Jurnal Hukum* 35, no. 5 (2019): 127–52. <https://doi.org/https://doi.org/10.24002/jep.v35i2.2501>.
- Fitryantica, Agnes. "Harmonisasi Peraturan Perundang-Undangan Indonesia Melalui Konsep Omnibus Law." *Gema Keadilan* 6, No. 3 (2019): 300–316. <https://doi.org/10.14710/gk.6.3.300-316>.
- Ghoffer, Abdul. "Mewujudkan Mahkamah Konstitusi Sebagai Peradilan Yang Akuntabel Dan Terpercaya." *Pandecta: Research Law Journal* 13, No. 2 (2018): 76–88. <https://doi.org/10.15294/pandecta.v13i2.16727>.
- Gustama, Brilliant, Sarita, and Sholahuddin Al-fatih. "The Influence of TAP MPR 's Position on The Hierarchy System of Indonesian Laws and Regulations."

- Indonesia Law Reform Journal* 2, No. 1 (2022): 67–80.
<https://doi.org/10.22219/ilrej.v2i1.19442>.
- Hanafi, Muhammad. "Kedudukan Musyawarah dan Demokrasi di Indonesia." *Jurnal Cita Hukum* 1, No. 2 (2016). <https://doi.org/10.15408/jch.v1i2.2657>.
- Hoesein, Zainal Arifin. *Judicial Review di Mahkamah Agung RI Tiga Dekade Pengujian Peraturan Perundangundangan*. (Jakarta: Rajawali Press, 2009).
- Ilham, Maya Hildawati. "Kajian Atas Asas Peradilan Cepat, Sederhana, Dan Biaya Ringan Terhadap Pemenuhan Hak Pencari Keadilan (Studi Putusan Mahkamah Agung Nomor 246 K/Pid/2017)." *Verstek* 7, no. 3 (2019): 13–14.
<https://jurnal.uns.ac.id/verstek/article/view/38286/25314>.
- Indrati, Maria Farida. *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan*. (Jakarta: Kanisius, 2016).
- Irwansyah. *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*. Edited by Ahsan Yunus. (Yogyakarta: Mirra Buana Media, 2020).
- Julyano, Mario, and Aditya Yuli Sulistyawan. "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum." *Jurnal Crepido* 1, No. 01 (2019): 13–22.
<https://doi.org/https://ejournal2.undip.ac.id/index.php/crepido/article/download/6325/3197>.
- Kennedy, Richard, and Bonaventura Pradana Suhendarto. "Diskursus Hukum: Alternatif Pola Pengisian Jabatan Kepala Daerah di Masa Pandemi Covid-19." *Jurnal Pembangunan Hukum Indonesia* 2, No. 2 (2020): 188–204.
<https://doi.org/10.14710/jphi.v2i2.188-205>.
- Maladi, Y. "'Benturan Asas Nemo Judex Idoneus In Propria Causa Dan Asas Ius Curia Novit' (Telaah Yuridis Putusan Mahkamah Konstitusi Nomor 005/Puu-Iv/2006)." *Jurnal Konstitusi* 7, No. 2 (2010): 1–18.
<https://doi.org/https://doi.org/10.31078/jk%25x>.
- Nurhardianto, Fajar. "Sistem Hukum dan Posisi Hukum Indonesia." *Jurnal TAPIS* 11, no. 1 (2015): 34–45.
<http://www.ejournal.radenintan.ac.id/index.php/TAPIS/article/view/840/723>

- Rosadi, Otong. "Hukum Kodrat, Pancasila dan asas hukum dalam pembentukan hukum di Indonesia." *Jurnal Dinamika Hukum* 10, No. 3 (2010): 277-284.
- Ryandika, Muhammad Sabil, and Jatmiko Wirawan. "Penerapan Peran Hakim Agung Sebagai Judex Juris Dalam Perkara Pidana Studi Kasus Putusan MA No. 2239 K/PID.SUS/2012." *Jurnal Penelitian Hukum* 2, No. 2239 (2015): 90-104. <https://journal.ugm.ac.id/jph/article/view/19117/12368>.
- Scharpf, Fritz W. "Judicial Review and the Political Question: A Functional Analysis." *The Yale Law Journal* 75, No. 4 (1966): 517-97. <https://doi.org/10.2307/794865>.
- Schütze, Robert. "'Delegated' Legislation in the (New) European Union: A Constitutional Analysis." *Modern Law Review* 74, No. 5 (2011): 661-93. <https://doi.org/10.1111/j.1468-2230.2011.00866.x>.
- Subiharta. "Moralitas Hukum dalam Hukum Praksis Sebagai Suatu Keutamaan (Legal Morality in Practical Law as a Virtue)." *Jurnal Hukum dan Peradilan* 4, No. 3 (2015): 385-98.
- Sumadi, Ahmad Fadlil. "Hukum Dan Keadilan Sosial Dalam Perspektif Hukum Ketatanegaraan Law and Social Justice in Constitutional Law Perspective." *Jurnal Konstitusi* 12, No. 4 (2015): 853-54. <https://doi.org/https://doi.org/10.31078/jk1249>.
- Thalib, Hambali, Sufirman Rahman, and Abdul Haris Semendawai. "The Role of Justice Collaborator in Uncovering Criminal Cases in Indonesia." *Diponegoro Law Review* 2, No. 1 (April 2017): 27. <https://doi.org/10.14710/dilrev.2.1.2017.27-39>.

Author(s) Biography

Dr. Ahmad Siboy, SH., M.H. is a lecturer at the Faculty of Law, Islamic University of Malang, Indonesia. His area of expertise includes Constitutional Law, State Administration Law, Regional Government Law. Several of his works have been published in several journals, including *The Effectiveness of Administrative Efforts in Reducing State Administration Disputes* (Journal of Human Rights, Culture and Legal System, 2022), *Limitation of the Authority of the Supreme Court in Examining the Constitutional Court Regulation concerning the Election of Regional Heads* (Baltic Journal of Law & Politics, 2022), *The Relationship between DKPP and PTUN Decisions regarding Ethical Violation by General Election Administrators* (Jurnal Konstitusi, 2022), and *Design to Resolve Case of Disqualification of Winning Candidates in Local Government Head Elections in Indonesia* (Central Asia and The Caucasus, 2022).

 <https://orcid.org/0000-0003-3879-5323>

Sholahuddin Al Fatih, S.H., M.H. is a lecturer at the Faculty of Law, University of Muhammadiyah Malang, Indonesia. His area of expertise includes Legislation Electoral Law Human Rights Constitutional Law Comparative Law. Some of his published works such as *Legal Implications of Using Ministerial Instructions as a Legal Basis for the Implementation of Restriction on Community Activities During the Covid-19 Pandemic* (KnE Social Sciences, 2022), *Implementation of the Money Laundering Law as a Predicate Crime during the Covid-19 Outbreak* (Hang Tuah Law Journal, 2022), and *Juridical Analysis of Simultaneous Election Postpones during the COVID-19 Pandemic: Legal Certainty Perspective* (Indonesia Law Reform Journal, 2022).

 <https://orcid.org/0000-0003-1166-5182>

 [57216500585](https://scopus.com/authorid/57216500585)

Asrul Ibrahim Nur is a PhD Student at Géza-Martón Doctoral School of Legal Studies, University of Debrecen, Hungary. He also working as a Legal Analyst at Ministry of Energy and Mineral Resources Republic of Indonesia (Kementerian ESDM). His area of expertise concerning Legislation, Energy Law, Renewable Energy Law. Some of his recent publications such as *The Limits of Indonesia's Legal Framework for Electromobility: Regulatory and Sustainable Issues* (Lentera Hukum, 2022), *Proyeksi Masa Depan Kendaraan Listrik di Indonesia: Analisis Perspektif Regulasi dan Pengendalian Dampak Perubahan Iklim yang Berkelanjutan* (Jurnal Hukum Lingkungan Indonesia, 2021), and *Proyeksi Transformasi Hukum Energi Terbarukan di Indonesia* (Rechtsvinding Online, 2020).

 <https://orcid.org/0000-0002-7799-2111>

Nur Putri Hidayah, S.H., M.H. is a lecturer at the Faculty of Law, University of Muhammadiyah Malang, Indonesia. His area of expertise includes Private Law, Labor Law, Customary Law, Agrarian Law. Some of her works have been presented and published on several conferencens and journals, such as *The Urgency of Strengthening Creditor Legal Protection in Fiduciary Guarantee Agreements* (KnE Social Sciences, 2022), *Protection of Traditional Cultural Expressions as Intellectual Property in Indonesia: A Juridical-Sociological Review* (Proceedings of the 2nd International Conference on Law Reform INCLAR 2022), and *The Implementation of Labor Development Principles According to Job Creation Law as a Reason to Protect Wages Rights* (BESTUUR, 2021).

 <https://orcid.org/0000-0003-0789-3596>

Scopus[®] 57203360828



*Justice will not be served until
those who are unaffected are as
outraged as those who are.*

Benjamin Franklin

How to cite (Chicago style)

Siboy, Ahmad, Sholahuddin Al-Fatih, Asrul Ibrahim Nur & Nur Putri Hidayah. "Judicial Review in Indonesia: A Simplification Model". *Lex Scientia Law Review* 6, No. 2 (2022): 359-390. <https://doi.org/10.15294/lesrev.v6i2.54848>

Copyrights & License



This work is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License (CC BY-NC-SA 4.0). All writings published in this journal are personal views of the authors and do not represent the view of this journal and the author's affiliated institutions. **Authors retain the copyrights under this license, see [our copyrights notice](#).**

History of Article

Submitted: February 14, 2022

Revised: August 11, 2022

Accepted: October 13, 2022

Available online at: December 20, 2022