

# REVIEWING AND MONITORING OF THE LEGISLATION ON INDONESIAN CONSTITUTIONAL SYSTEM

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# The Course

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- Understanding the terminology of reviewing and monitoring of legislation
- Understanding the initial ideas of judicial review
- The relation of judicial review and democracy and comparative perspective in several countries
- The legal basis of judicial review under Indonesian constitutional law system

# References

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- Christie, George C (1975) "A Model of Judicial Review of Legislation", *Southern California Law Review* Vol. 48: 1308.
- Beale, Andrew (1997) *Constitutional Law*. London: Cavendish Publishing Essential Series.
- Levy, Leonard W (ed) (2005) *Judicial Review: Sejarah Kelahiran, Wewenang, dan Fungsinya dalam Negara Demokrasi*. Bandung: Nusamedia.
- Wignyosoebroto, Soetandyo (2003) "Konstitusi, Konstitusionalisme dan HAM", dalam *Toleransi dalam Keragaman: Visi untuk Abad 21*. Surabaya: PUSHAM UBAYA-The Asia Foundation

# Laws

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- UUD 1945
- Law Number 4/2004 About Judicial Power
- Law Number 24/2003 About Constitutional Court
- Law Number 5/2004 About Supreme Court (revised Law Number 14/1985)
- Supreme Court Regulation (Perma) Number 1/2004 About Judicial Review

# What is judicial review?

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- Judicial review (UK) relates to the granting of the prerogative orders of certiorari, mandamus, and prohibition (Beale 1997: 55).
- Judicial review (UK) sometimes called the supervisory jurisdiction, is the High Court's power to police the legality of decisions made by public bodies (Alder 2005: 357).

# What is judicial review?

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**Judicial review** is *the power of a court to review a statute, or an official action or inaction, for constitutionality. In many jurisdictions, the court has power to strike down a statute, overturn an official action, or compel an official action, if the court believes the constitution so requires. In some countries, courts also have authority to strike down statutes even though they are constitutional, for violation of basic principles of justice, or for contrariness to principles of a free and democratic society.*

# The term of '*Hak Uji*'

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## ■ TOETSINGRECHT



*Menguji*

Review



*Hukum/Hak*

Law/Rights

➔ Rights or authority to review laws (*hak uji*)

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Based on those terms (judicial review, *toetsingrecht*, and *hak uji*), are they similar or adversely, different?

# Comparison

Aspects	<i>Hak Menguji</i>	Judicial Review
Review authority	Not always judge or judicial bodies	Judge or judicial bodies ( <i>toetsingsrecht van de rechter</i> )
Object	Legislations	Legislations and Administrative Decision (KTUN)
Trigger	Not necessary based on specific sue/application/objection	Based on sue/petition/objection
Reviewing Bodies	Active and passive	Passive, requires the trigger

# Critical Perspectives on Judicial Review

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- *Kewenangan judicial yang dianggap hendak mengintervensi kewenangan badan legislatif sebagai aspirasi kolektif rakyat (Wignjosoebroto 2003: 24; Commager 1967, in Levy 2005)*
- *Kewenangan yang tergelincir untuk masuk ke ranah perpolitikan, dimana hakim akan gampang bermain-main dengan selera etika atau ideologi politiknya sendiri secara subyektif (Wignjosoebroto 2003: 24)*

# Proponen perspective on Judicial Review

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- *Kewenangan yang memungkinkan terkontrolnya pendayagunaan produk perundang-undangan di ranah judicial dari berbagi infiltrasi praktik-praktik perpolitikan para politisi, baik yang berada di legislatif maupun eksekutif, yang berpotensi mengganggu tegaknya hak-hak asasi warganegaranya (Wignjosoebroto 2003: 25).*

# Is judicial review democratic?

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- Is the judicial democratic when the legislation authority (elected representative) is partly taken by judicial authority which is non-elected by citizen?
- Nevertheless, how if the tyranny of majority in parliament marginalized the minority rights, how to control or review these laws?

# Practices (1)

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- UK

Unwritten Constitution → judge is not given authority to review legislations

- France

Counseil Constitutionel (*Dewan Konstitusi*) → has authority to review legislation draft which is passed by parliament, but it is not legalized officially by President (called by Judicial Preview)

# Practices (2)

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- USA, Austria, and Italy

Supreme Court has authority to review, and there is no Constitutional Court.

- South Korea and Indonesia

Constitutional Court as *the Sole Interpreter of the Constitution*, and Supreme Court has authority to review legislations against Law/Act.

# What are institutions having authority to review?

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Theoretically, there are two models:

- Single Model -- Supreme Court
- Double Model (*dualis*) -- Supreme Court and Constitutional Court

Could you reflect in Indonesia practice?

# *Hak Menguji* under Indonesian Constitutional Law System

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- *What are legal authority to mention Hak Menguji in Indonesia?*
- Pasal 24A (1) UUD 1945: Mahkamah Agung berwenang mengadili pada tingkat kasasi, **menguji peraturan perundang-undangan di bawah undang-undang terhadap undang-undang**, dan mempunyai wewenang lainnya yang diberikan oleh undang-undang. (\*\*\*)
- Pasal 24C (1) UUD 1945: Mahkamah Konstitusi berwenang mengadili pada tingkat pertama dan terakhir yang putusannya **bersifat final untuk menguji undang-undang terhadap Undang-Undang Dasar**,..... (\*\*\*)

# Hak Menguji under Indonesian Supreme Court

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- Pasal 11 ayat (2) UU No 4/2004 tentang Kekuasaan Kehakiman: MA mempunyai kewenangan menguji peraturan perundang-undangan di bawah undang-undang.
- Pasal 31 UU No.5 /2004 (perub. UU 14/1985 tentang MA):
  - (1) MA mempunyai wewenang menguji peraturan perundang-undangan terhadap undang-undang.
  - (2) MA menyatakan tidak sah peraturan perundang-undangan di bawah undang-undang atas alasan bertentangan dengan peraturan perundang-undangan yang lebih tinggi atau pembentukannya tidak memenuhi ketentuan yang berlaku.
- PERMA No. 1 Tahun 2004: Hak Uji Materiil

# *Hak Menguji* under Indonesian Constitutional Court

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- Pasal 12 ayat (1) UU No. 4/2004 dan Pasal 10 ayat (1) UU No. 24/2003: Mahkamah Konstitusi berwenang mengadili pada tingkat pertama dan terakhir yang putusannya bersifat final untuk: (a) menguji undang-undang terhadap UUD Negara RI 1945.
- Obyek yang bisa direview: Pasal 50 UU No. 23/2004, namun dengan Putusan MK No. No. 066/ PUU-II/2004 yang mencabut pasal tersebut.

# Grounds of Review

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UK (Alder 2005: 362)

- Illegality (*Ultra Vires Doctrine*)
- Irrationality
- Procedural Impropriety

Jimly Asshidiqie (2007: 589-590):

- Materiële toetsing → Pemeriksaan pengujian UU yang dilakukan secara materi
- Formele toetsing → secara formil

# *Formele toetsing*

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- Apakah bentuk atau format UU yang dibentuk sudah tepat menurut UUD
- Sejauh mana prosedur yang ditempuh dalam proses pembentukan UU memang ditaati?
- Apakah lembaga yang terlibat memang berwenang?
- Apakah prosedur pengundangan dan pemberlakuannya sesuai dengan ketentuan UUD atau peraturan perundang-undangan berdasarkan UUD.