

INFLUENCING OR INTERVENTION? IMPACT OF CONSTITUTIONAL COURT DECISIONS ON THE SUPREME COURT IN INDONESIA

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Abstract

The third amendment of Indonesia's 1945 Constitution, conducted in 2001, had significant implications for the nation's judiciary. It transformed the judiciary from a single to a dual structure. Consequently, there are two apexes of the judiciary: the Supreme Court and the Constitutional Court. Furthermore, the establishment of the Constitutional Court divided judicial review authority between the two apex courts. The Constitutional Court can review laws against the Constitution, while the Supreme Court has the power to review whether regulations, made under laws, contradict such laws. Although the Indonesian Constitution provides explicit delineations over the absolute competence of judicial review, the division of judicial review has often triggered tension between the two courts. The Constitution allows the Supreme Court to have additional authorities granted by laws. On the other hand, the Constitutional Court has the power to review any law against the Constitution, including laws related to the Supreme Court. This article seeks to answer the important question of whether the Constitutional Court could influence or intervene in the Supreme Court through judicial review. The authors argue that the duality of judicial review authority

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unintentionally causes an imbalance in the functional relationship between the two apexes of the judiciary. The main reason is that the Constitutional Court can influence or intervene in the Supreme Court through constitutional review authority. The authors examine two essential aspects of this: (1) the functional implications of duality of judicial review authority; and (2) the implementation of the Constitutional Court's authority in reviewing laws, especially those closely related to the Supreme Court's authorities. Various cases are examined to illustrate how the Constitutional Court could directly or indirectly influence the Supreme Courts' authorities. The Constitutional Court, however, often seems to 'play safe' to maintain the judiciary's imbalanced relationship caused by the dualism of judicial review authority.

Keywords: Constitutional Review, Constitutional Court Decision, Influencing, Intervening, Supreme Court.

I. INTRODUCTION

The existence of an independent judiciary is an essential element of a state based on the rule of law. Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (the Indonesian Constitution) explicitly states that the judiciary is an independent authority in organizing the judicature for the sake of law enforcement and justice. The Indonesian judiciary consists of two branches, the Supreme Court and its subordinate judicial bodies, and the Constitutional Court. The Supreme Court and the Constitutional Court are the highest courts in the judiciary; both are independent, have respective authorities and equal positions. The Supreme Court has existed since the foundation of Indonesia in 1945, while the Constitutional Court was established based on the third amendment of the 1945 Constitution in 2001 although it did not begin to carry out its duties until 2003. The establishment of the Constitutional Court was intended to resolve problematic issues of administrative practice that had lacked a mechanism for resolution.¹

Furthermore, the amendment of the 1945 Constitution not only established the Constitutional Court but also gave judicial review authority to both the

¹ Constitutional Court of the Republic of Indonesia, *Blueprint: Establishing a Constitutional Court as a Modern and Trusted Constitutional Court Institution* (Jakarta: Secretary General and Registrar of the Indonesian Constitutional Court, 2004), 4.

Supreme Court and the Constitutional Court. First, the Constitutional Court has the authority to review laws against the Constitution. Second, the Supreme Court can review regulations below law against the law. The judicial review of laws against the Constitution is deemed essential to protect citizens from any violation of their constitutional rights through the enactment of unconstitutional laws.² Thus, the task of nullifying unconstitutional laws must be entrusted to a separate organ that is independent of any state authority.³

In practice, the Constitutional Court's authority to review laws against the Constitution has accounted for most of its cases, compared to cases related to its other authorities.⁴ Therefore, various legal developments have occurred in the last 18 years as a result of the Constitutional Court's decisions. This can be seen from the Court's decisions that have contained the formulation of new norms,⁵ the absence of an external supervisory mechanism for constitutional justice, and multiple decisions annulling the provisions in laws deemed to weaken the Constitutional Court's authorities.⁶ This development has prompted praise of the Court's independence but also triggered accusations the Court is 'untouchable'.

The Constitutional Court has not only maintained its authority through the implementation of judicial review, but has influenced other state institutions, such as in the *Judicial Commission* case in 2006,⁷ the *Regional Representative Council* case in 2012,⁸ and the *Supreme Court* case in 2013.⁹ Although this seems

² The existence of a constitutional review mechanism toward laws is also one of the essential means to ensure the effectiveness of human rights provisions in constitution. See Adam S. Chilton and Mila Versteeg, "Do Constitutional Rights Make a Difference?" *American Journal of Political Science* 60, no. 3 (2016): 575-76.

³ Sara Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918-1929)," *Revista Co-Herencia* 9, no. 16 (2012): 286.

⁴ Constitutional Court of the Republic of Indonesia, "Rekapitulasi Perkara Pengujian Undang-Undang [Recapitulation of Constitutional Review Cases]," Indonesian Constitutional Court, 2022, <https://www.mkri.id/index.php?page=web.RekapPUU>.

⁵ The 'new norms' are formulated in a 'conditional decision', mostly in 'conditionally unconstitutional' decisions, where the Constitutional Court formulates a 'constitutional version' of an unconstitutional norm in the reviewed laws.

⁶ For instance, Constitutional Court Decision No. 48/PUU-IX/2011 on the Review of Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court. Through this decision, the Court, for instance, allows itself to formulate new norms in its decisions and decide beyond what is requested in a petition.

⁷ Constitutional Court Decision No. 005/PUU-IV/2006 on the Review of Law No. 22 of 2004 on the Judicial Commission and Law No. 4 of 2004 on Judicial Power against the 1945 Constitution of the Republic of Indonesia.

⁸ Constitutional Court Decision No. 92/PUU-X/2012 on the Review of Law No. 27 of 2009 on the People's Consultative Assembly, the House of Representatives, and the Regional Representative Council, and Law No. 12 of 2011 on the Formulation of Laws and Regulations against the 1945 Constitution of the Republic of Indonesia.

⁹ Constitutional Court Decision No. 34/PUU-XI/2013 on the Review of Law No. 8 of 1981 on the Criminal Procedure Code.

predictable and not particularly surprising as the Constitutional Court ‘only’ interprets the Constitution, the way it decides cases related to state institutions is inconsistent.¹⁰ In some instances, the Constitutional Court seems to ‘play safe’ by stating that it lacks the authority to formulate regulations and order the legislature to revise laws. On the other hand, there are cases when the Constitutional Court explicitly develops new norms through its decisions. Such cases have occurred when the Constitutional Court deals with laws regulating the Supreme Court’s authorities.

For instance, in Constitutional Court Decision No. 34/PUU-XI/2013, the Constitutional Court revoked Article 263(1) of Law No. 8 of 1981 on the Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana*). The Constitutional Court held that a reconsideration of a final and binding court decision (Reconsideration) could be done more than once.¹¹ The Supreme Court responded to the decision by issuing a Circular Letter stating that a Reconsideration could only be done once.¹² The Supreme Court added that a petition for Reconsideration could be made more than once only in a case involving two or more contradictory court decisions in civil or criminal cases.¹³

The Supreme Court also affirmed that if a Reconsideration does not follow the Circular Letter, then the chief of the lower-level court is instructed to reject the submission and not deliver it to the Supreme Court. Therefore, it seems the Supreme Court considers that its Circular Letter has more binding power than the Constitutional Court’s decision. The Supreme Court also instructed the lower-level courts to “disregard” the Constitutional Court’s decision on Reconsideration. Consequently, there was a conflict between the Constitutional Court’s decision and the Supreme Court’s response. The review of laws related to the Supreme Court by the Constitutional Court often results in disagreements between the two apex courts of the Indonesian judiciary.

¹⁰ The inconsistency is apparent, even when dealing with provisions concerning authorities of the same institution, including the Supreme Court’s authorities. The authors will elaborate on this issue on the next part of this article.

¹¹ Constitutional Court Decision No. 34/PUU-XI/2013 on the Review of Law No. 8 of 1981 on the Criminal Procedure Code (2013), 88.

¹² Supreme Court of the Republic of Indonesia, *Circular Letter of the Supreme Court of the Republic of Indonesia No. 7 of 2014 on Submission for Reconsideration*, 2014.

¹³ Supreme Court of the Republic of Indonesia, *Circular Letter of the Supreme Court*, 2.

However, there are also several instances where the Constitutional Court seems to 'play safe' by 'not intervening' in the Supreme Court's authorities, such as in Constitutional Court Decision No. 30/PUU-XIII/2015. In that decision, even though the Constitutional Court stated the examination of a judicial review case and the reading of the verdict should be conducted in an open trial, the Court held that the arrangements of the mechanism of a judicial review examination trial are an open legal policy and not a problem of constitutionality of the norm.¹⁴ A similar stance was seen in some decisions related to the restriction on cassation under certain circumstances stipulated in the Supreme Court Law, which will be discussed later in this article.

Several means to successfully implement judicial review have been put into practice. For example, a review by the Supreme Court of regulations under a law (regulatory review) shall be suspended if the law used as the legal basis in the regulatory review is under judicial review by the Constitutional Court.¹⁵ This illustrates the implication of the hierarchy of legislation, which requires that lower-level norms should not contradict higher-level norms. Although there is an arrangement concerning the suspension of a regulatory review process, no provision requires the Supreme Court to follow the Constitutional Court's decision. In some instances, the Supreme Court may have different interpretations from the Constitutional Court concerning the law that becomes the legal basis in a regulatory review.

The above explanation shows how the Constitutional Court on the one hand can influence the Supreme Court, whereas the Supreme Court cannot similarly influence the Constitutional Court. Although the Constitutional Court seems only to conduct its authority to perform a constitutional review, there may be functional implications for the implementation of the Supreme Court's authorities. Moreover, as mentioned earlier, the Supreme Court may be given other authorities by law. Therefore, it is essential to examine the implication

¹⁴ Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court (2016), 42-43.

¹⁵ Law No. 24 of 2003 on the Constitutional Court, Article 55, 2003.

of constitutional review performed by the Constitutional Court on the laws regulating the Supreme Court's authorities.

This article is structured into two parts. The first briefly explains the division of judicial review authority and how it affects the Supreme Court and the Constitutional Court in exercising their respective authorities. The second examines various constitutional review decisions on laws regulating the Supreme Court's authorities. It is essential to understand the Constitutional Court's standing when it must indirectly face the Supreme Court, which has an equal position in the Indonesian judiciary. This article illustrates that the duality of judicial review in Indonesia unwittingly allows the Constitutional Court to intervene in the Supreme Court through its constitutional review authority, which may affect the independence of the Supreme Court granted by the Constitution. The situation is exacerbated by the absence of provisions on the institutional relationship between the Constitutional Court and the Supreme Court.¹⁶

II. DISCUSSION

2.1. Judicial Review in the Dual Structure of the Indonesian Judiciary

Implementation of the rule of law concept requires that all constitutional norms must be followed without exception. Consistency in applying constitutional provisions is known as the principle of constitutionalism. Tom Ginsburg depicts constitutionalism as an attempt to limit government under law, with an emphasis on limiting certain government bodies.¹⁷ This principle is essentially a logical consequence of the implementation of the theory of the rule of law.¹⁸ Gerhard Casper explains two implications of a comprehensive implementation of constitutionalism: (a) political restrictions and moral obligations are sacred as constitutional law; and (b) every social problem becomes a constitutional

¹⁶ Ibnu Sina Chandranegara, "Defining Judicial Independence and Accountability Post Political Transition," *Constitutional Review* 5, no. 2 (2019): 295.

¹⁷ Tom Ginsburg, "Constitutionalism: East Asian Antecedents," *Chicago-Kent Law Review* 88, no. 1 (2012): 12; See Rogers M. Smith, "Constitutionalism and the Rule of Law: Considering the Case for Antecedents," *Chicago-Kent Law Review* 88, no. 1 (2012): 37-40.

¹⁸ T.R.S. Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism," *Law Quarterly Review* 115 (1999): 232; Furthermore, McIlwain explains the essential element of constitutionalism is a legal limitation on government. See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (New York: Cornell University Press, 1947), 21.

problem (in the judicial review regime particularly), and thus, the law becomes heavily burdened.¹⁹ Casper's explanation indicates that judicial review becomes one of the indicators in implementing constitutionalism, considering the shifting of socio-political issues into the constitutional law realm. Edward McWhinney noted that constitutional review is one of the striking trends in the development of constitutionalism and constitution-making in the post-World War II era.²⁰

The expansion of judicial review is seen as an essential step toward greater protection of citizens' rights, thereby encouraging the creation of democracy around the world. Moreover, according to Ginsburg, judicial review is a central and essential feature of the principle of constitutionalism. The consistency in applying constitutional provisions is known as the principle of constitutionalism.²¹ The expansion of judicial review encouraged the birth of a new political order called juristocracy, in which the power of the parliament in protecting the fundamental rights of citizens shifted to the judiciary. Ran Hirschl calls this condition new constitutionalism.²²

In Indonesia, the establishment of the Constitutional Court through the third amendment of the 1945 Constitution was inseparable from the discussion of judicial review. The idea of an institution with judicial review authority had been discussed in the weeks ahead of Indonesia's independence. Mohammad Yamin put forward the idea during a meeting of the Investigating Committee for Preparatory Work for Independence (BPUPK) on 11 July 1945 but it was not accepted.²³ The discussion of judicial review resurfaced during the amendments

¹⁹ Gerhard Casper, "Changing Concepts of Constitutionalism: 18th to 20th Century," *The Supreme Court Review* 10 (1989): 311.

²⁰ See Edward McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Dordrecht: Martinus Nijhoff, 1986), 1; See also Geoffrey R. Watson, "Constitutionalism, Judicial Review, and the World Court," *Harvard International Law Journal* 34, no. 1 (1993): 6.

²¹ Margit Cohn, "Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural-Institutional Context," *The International and Comparative Law Quarterly* 64, no. 1 (2015): 102; See Lisa Hilbink, "Assessing the New Constitutionalism," *Comparative Politics* 40, no. 2 (2008): 227; Bruce Ackerman, "The Rise of World Constitutionalism," *Virginia Law Review* 83, no. 4 (1997): 775.

²² Ran Hirschl, "The Political Origins of the New Constitutionalism," *Indiana Journal of Global Legal Studies* 11, no. 1 (2004): 71.

²³ Yamin put forward his idea of an institution that could review laws against *adat* law, sharia, and the Constitution. However, the idea was rejected by Soepomo. See State Secretariat of the Republic of Indonesia, *Compilation of Minutes of Sessions of the Investigating Committee for Preparatory Work for Independence (BPUPKI) and the Preparatory Committee for Indonesian Independence (PPKI) in Connection with the Preparation of the 1945 Constitution* (State Secretariat of the Republic of Indonesia, n.d.), 168.

of the 1945 Constitution following the end of President Soeharto's New Order administration because of a legal vacuum in reviewing laws against the Constitution. After long and heated debates, the drafters of the constitutional amendments agreed to establish a new judicial institution to perform the judicial review of laws against the Constitution. The Constitutional Court is also equipped with constitutional authorities, as outlined in Article 24C paragraph (1) and paragraph (2) of the Constitution.

However, as mentioned earlier, the implementation of judicial review in Indonesia is conducted by both the Supreme Court and the Constitutional Court. The Supreme Court has the authority to perform a judicial review of regulations and ordinances to ensure their consistency with higher-level laws (regulatory review), while the Constitutional Court conducts a judicial review of laws against the Constitution (constitutional review). The Supreme Court retains its authority to perform regulatory review, previously regulated in the 1970 Judiciary Law.²⁴ Although the Constitution makes an apparent distinction between the judicial review authorities of the Supreme Court and the Constitutional Court, there are no explicit provisions on the relationship between the two courts when performing their respective judicial review authority.

Only one article in the 2003 Constitutional Court Law regulates the relationship between the two courts concerning judicial review. Article 55 of the 2003 Constitutional Court Law stipulates that a regulatory review by the Supreme Court must be stopped (*dihentikan*) if the law that is the basis for the regulatory review is itself being reviewed by the Constitutional Court, until there is a decision concerning the constitutionality of the law.²⁵

However, Article 55 can be broadly interpreted. For instance, in Case No. 93/PUU-XV/2017, the petitioner filed for a review of Article 55 of the Constitutional Court Law. The petitioner claimed the Supreme Court had rejected its regulatory review petitions because the law that was the legal basis for the review was

²⁴ Law No. 14 of 1970 on Basic Provisions of the Judiciary, Article 26, 1970. The provision on regulatory review is also regulated in several decrees of the People's Consultative Assembly (MPR), such as MPR Decree No. VII/MPR/1973 and No. III/MPR/1978.

²⁵ Law No. 24 of 2003 on the Constitutional Court, Article 55.

being reviewed by the Constitutional Court.²⁶ The Constitutional Court decided the norm was conditionally unconstitutional and interpreted that the word “*dihentikan*” in Article 55 does not mean ‘stopped’ but ‘suspended’. Thus, the regulatory review should be resumed after the Constitutional Court decides the constitutional review case.²⁷ Considering that the Constitutional Court’s decisions should be executed, good faith from the Supreme Court to comply with its decisions is highly expected.

There was also a situation when the Supreme Court and the Constitutional Court held different stances on the same issue. The discrepancy was between the Constitutional Court’s Decision No. 30/PUU-XVI/2018²⁸ and the Supreme Court’s Decision No. 65 P/HUM/2018.²⁹ Both decisions concerned whether members of political parties could stand for election for the Regional Representative Council (DPD). The Constitutional Court held that political party functionaries could not stand for the DPD. In contrast, the Supreme Court decided that political party members could run for the DPD. In this case, the petitioners followed the decision that was most favorable to their interests.

The aforementioned cases show how the absence of an institutional relationship between the Constitutional Court and the Supreme Court leads to different interpretations, both in the context of “suspension of the regulatory review” and the “constitutional interpretation of a reviewed law”. Therefore, a constitutional review decision that by law should be adhered to by a regulatory review decision can be “ignored” if the Supreme Court has a different stance in interpreting the case.

This condition raises the question of whether differing stances between the Supreme Court and the Constitutional Court can be justified based on an

²⁶ Constitutional Court Decision No. 93/PUU-XV/2017 on the Review of Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court (2018), 6-7.

²⁷ Constitutional Court Decision No. 93/PUU-XV/2017 on the Review of Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court.

²⁸ Constitutional Court Decision No. 30/PUU-XVI/2018 on the Review of Law No. 7 of 2017 on General Elections (2018).

²⁹ Supreme Court Decision No. 65 P/HUM/2018 on the Review of General Elections Commission (KPU) Regulation No. 26 of 2018 on the Second Amendment of KPU Regulation No. 14 of 2018 on the Individual Nomination for Regional Representative Assembly Elections (2018).

independent approach. P.N. Bhagwati emphasized that in theory, the concept of independence of the judiciary is not limited to independence from the legislative or the executive but is a much broader concept that encompasses independence from many other pressures and prejudices.³⁰ A further question arises as to whether it also applies to the relationship between judicial institutions, considering the disconnected functional relationship between the Supreme Court and the Constitutional Court. The next part of this discussion will elaborate on these dynamics, primarily on how the Constitutional Court handles the constitutional review of laws regulating the Supreme Court's authorities.

2.2. Duality of Judicial Power and Imbalanced Relationship between the Constitutional Court and the Supreme Court

As explained above, the division of judicial review authority between the Constitutional Court and Supreme Court affects the independence, impartiality and uniformity of the Indonesian judiciary. Furthermore, examining the implementation of constitutional review authority, especially in cases related to the Supreme Court's authorities, can help to understand how the Constitutional Court responds in circumstances by 'intervening in' or 'influencing' the Supreme Court's authorities.

Saldi Isra notes the potential for overlapping authorities between the two institutions could result in conflict and ineffective implementation of their judicial authorities.³¹ Ideally, the distribution of authority between the two institutions should be followed by a clear demarcation between their respective authorities.³² The Constitution does not place the two functions of the judiciary into the two institutions separately, as the Supreme Court and the Constitutional Court could each act as both a court of law and a court of justice.³³

³⁰ Yash Vyas, "The Independence of the Judiciary: A Third World Perspective," *Third World Legal Studies* 11, no. 1 (1992): 134–35. See also Bhagwati J. in *S.P. Gupta v President of India*, A.I.R. 1982 S.C. 149.

³¹ Saldi Isra, "Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi [Authority Connectivity of the Supreme Court and Constitutional Court]," *Jurnal Hukum Dan Peradilan* 4, no. 1 (2015): 18.

³² *Ibid.*

³³ According to Isra, the Constitutional Court acts as a court of justice when adjudicating disputed general election results, while the Supreme Court acts as a court of law when it performs the authority of regulatory review.

The implementation of constitutional review may affect the exercise of the Supreme Court's authorities in two circumstances. The first circumstance concerns the Supreme Court's power to conduct regulatory review. As described earlier, Article 55 provides a minimum connection between the Supreme Court and the Constitutional Court in their respective judicial review authorities. Therefore, the Constitutional Court shall notify the Supreme Court if there is a constitutional review submission.³⁴ If a law reviewed by the Constitutional Court is also the basis of a regulatory review by the Supreme Court, then the Supreme Court's review process should be suspended until the Constitutional Court hands down a decision.³⁵ Thus, the outcome of the regulatory review process in the Supreme Court will depend highly on the Constitutional Court's decision.

Ideally, the Supreme Court will follow the Constitutional Court decisions. According to Isra, there are two reasons why this is the case. First, the division of judicial review follows the hierarchy of legislation approach. This means the Supreme Court should comply with the Constitutional Court's interpretation of the reviewed law that becomes the legal basis for a regulatory review. Second, according to the theory of the validation of norms, lower-level regulations should be consistent with higher-level regulations.³⁶ However, as has been explained, there are some cases in which the Supreme Court has its own interpretation of a case.

The second circumstance in which the implementation of constitutional review may affect the exercise of the Supreme Court's authorities is related to laws that regulate such authorities. As mentioned previously, the Supreme Court can have "other authorities given by law".³⁷ Furthermore, it is highly possible that the Constitutional Court's constitutional review authority could influence and even intervene in the Supreme Court. The Constitutional Court could, through

³⁴ Undang-Undang tentang Mahkamah Konstitusi [Law on the Constitutional Court], UU No. 24 Tahun 2003, LN. No. 98 Tahun 2003 [Law No. 24 of 2003, SG. No. 98 of 2003], Article 53.

³⁵ Undang-Undang tentang Mahkamah Konstitusi (Law on the Constitutional Court), UU No. 24 Tahun 2003, LN. No. 98 Tahun 2003 [Law No. 24 of 2003, SG. No. 98 of 2003], Article 55.

³⁶ Isra, "Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi [Authority Connectivity of Supreme Court and Constitutional Court]," 29.

³⁷ The Indonesian Constitution, Article 24A (1).

a constitutional review decision, invalidate provisions on the Supreme Court's authorities stipulated in the law on the Supreme Court's authorities.

As of 2019, the Constitutional Court had made at least 38 constitutional review decisions related to the Supreme Court's authorities. The following table lists those 38 decisions from 2003 to 2019.

Table 1. Constitutional Court's Judicial Review Decisions Related to Supreme Court (2003-2019)

No.	Decision Number	Case	Verdict	Judgment Date
1	95/PUU-XVI/2018	Review of Law No. 14 of 1985 on the Supreme Court	Rejected	30 January 2019
2	85/PUU-XVI/2018	Review of Law No. 3 of 2009 on Second Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	24 January 2019
3	62/PUU-XVI/2018	Review of Law No. 14 of 1985 on the Supreme Court and Law No. 48 of 2009 on Judicial Power	Dismissed	30 October 2018
4	66/PUU-XIV/2016	Review of Law No. 23 of 2014 <i>jo.</i> Law No. 9 of 2015 on Regional Government, Law No. 14 of 1985 <i>jo.</i> Law No. 3 of 2009 on the Supreme Court.	Rejected	14 December 2017
5	69/PUU-XV/2017	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Dismissed	26 October 2017
6	23/PUU-XV/2017	Review of Law No. 48 of 2009 on Judicial Power and Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Dismissed	19 October 2017
7	108/PUU-XIV/2016	Review of Law No. 14 of 1985 on the Supreme Court and Review of Law No. 48 of 2009 on Judicial Power	Rejected	26 July 2017

No.	Decision Number	Case	Verdict	Judgment Date
8	53/PUU-XIV/2016	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court and Law No. 8 of 2011 <i>jo.</i> Law No. 24 of 2003 on the Constitutional Court	Partially Granted (Conditionally Unconstitutional)	19 July 2017
9	133/PUU-XIII/2015	Review of Law No. 14 of 2002 on the Tax Court, Law No. 28 of 2007 <i>jo.</i> Law No. 6 of 1983 on General Provisions and Tax Procedures, Review of Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, and Law No. 48 of 2009 on Judicial Power	Rejected	11 January 2017
10	125/PUU-XIII/2015	Review of Law No. 22 of 2004 <i>jo.</i> Law No. 18 of 2011 on Judicial Commission and Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Dismissed	09 November 2016
11	92/PUU-XIII/2015	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Dismissed	28 July 2016
12	30/PUU-XIII/2015	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Rejected	31 May 2016
13	39/PUU-XIII/2015	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court and Law No. 48 of 2009 on Judicial Power	Dismissed	22 March 2016
14	45/PUU-XIII/2015	Review of Law No. 14 of 1985 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 3 of 2009 on the Supreme Court and Law No. 48 of 2009 on Judicial Power	Dismissed	10 December 2015
15	66/PUU-XIII/2015	Review of Law No. 14 of 1985 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 3 of 2009 on the Supreme Court and Law No. 5 of 1960 on Basic Regulations of Agrarian Principles	Dismissed	07 December 2015

No.	Decision Number	Case	Verdict	Judgment Date
16	94/PUU-XIII/2015	Review of Law No. 22 of 2004 on the Judicial Commission, Law No. 27 of 2004 on the Truth and Reconciliation Commission, Law No. 14 of 1985 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 3 of 2009 on the Supreme Court, Law No. 48 of 2009 on Judicial Power, and Law No. 24 of 2003 <i>jo.</i> Law No. 8 of 2011 on the Constitutional Court	Dismissed	11 November 2015
17	91/PUU-XII/2014	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Rejected	19 March 2015
18	81/PUU-XII/2014	Review of Law No. 14 of 1985 on the Supreme Court	Rejected	11 March 2015
19	45/PUU-XII/2014	Review of Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Rejected	23 December 2014
20	36/PUU-XI/2013	Review of Law No. 8 of 1981 on the Criminal Procedure Code, Law No. 48 of 2009 on Judicial Power, and Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Dismissed	06 March 2014
21	25/PUU-XI/2013	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Partially Rejected and Dismissed	09 January 2014
22	27/PUU-XI/2013	Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2011 <i>jo.</i> Law No. 22 of 2004 on the Judicial Commission	Granted	09 January 2014

No.	Decision Number	Case	Verdict	Judgment Date
23	42/PUU-XI/2013	Review of Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, Law No. 39 of 2008 on State Ministries, Law No. 16 of 2004 on the Attorney General's Office, and Law No. 2 of 2002 on the Police of the Republic of Indonesia	Dismissed	10 September 2013
24	34/PUU-XI/2013	Review of Law No. 8 of 1981 on the Criminal Procedure Code	Granted	22 July 2013
25	28/PUU-X/2012	Review of Law No. 5 of 2004 on the Supreme Court and Law No. 16 of 2004 on the Attorney General's Office of the Republic of Indonesia	Rejected	19 September 2012
26	44/PUU-X/2012	Review of Law No. 8 of 1981 on the Criminal Procedure Code, Law No. 48 of 2009 on Judicial Power, and Law No. 14 of 1985 on the Supreme Court	Dismissed	26 June 2012
27	56/PUU-VIII/2010	Review of Law No. 14 of 1985 on the Supreme Court	Rejected	15 April 2011
28	10/PUU-IX/2011	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Dismissed	15 April 2011
29	64/PUU-VIII/2010	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Dismissed	28 February 2011

No.	Decision Number	Case	Verdict	Judgment Date
30	10/PUU-VIII/2010	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Dismissed	15 December 2010
31	16/PUU-VIII/2010	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Partially Rejected and Dismissed	15 December 2010
32	27/PUU-VII/2009	Formal Review of Law No. 3 of 2009 on Second Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	16 June 2010
33	23/ PUU-V/2007	Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	14 January 2008
34	14-17/ PUU-V/2007	Review of Law No. 23 of 2003 on General Election of the President and Vice President, Law No. 24 of 2003 on the Constitutional Court, Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, Law No. 32 of 2004 on Regional Government, and Law No. 15 of 2006 on the Financial Audit Board	Rejected	11 December 2007
35	007/PUU-IV/2006	Review of Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court and Law No. 22 of 2004 on the Judicial Commission	Dismissed	20 June 2006
36	017/PUU-III/2005	Review of Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Dismissed	04 January 2006

No.	Decision Number	Case	Verdict	Judgment Date
37	67/PUU-II/2004	Review of Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates	Granted	15 February 2005
38	04/PUU-I/2003	Review of Law No. 14 of 1985 on the Supreme Court	Dismissed	30 December 2003

Source: Processed by Author, 2019

The above table shows 4 petitions granted,³⁸ 6 rejected³⁹ and 18 dismissed.⁴⁰ However, there are only 13 decisions closely related to the exercise of the Supreme Court's authorities. Some other decisions, such as Decision No. 92/PUU-XIII/2015 and Decision No. 39/PUU-XIII/2015, are also related to the exercise of the Supreme Court's authorities. In the first of those two cases, the applicants submitted that regulatory review trials in the Supreme Court should be conducted publicly, while the second case concerned internal supervision conducted by the Supreme Court. Both cases were dismissed because the applicants did not have legal standing, and therefore the decisions did not affect the implementation of the related provisions.

The 13 decisions closely associated with the exercise of the Supreme Court's authorities are detailed in the table below:

Table 2. Constitutional Court's Decisions Related to the Supreme Court's Authorities Stipulated in the Supreme Court Law (2003-2017)

No.	Decision Number	Case	Verdict	Explanation
1	85/PUU-XVI/2018	Review of Law No. 3 of 2009 on the Second Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	Asserting Constitutional Court Decision No. 30/PUU-XIII/2015.

³⁸ The Court declared the reviewed norms to be unconstitutional and revoked them.

³⁹ The Court held that the norm is constitutional.

⁴⁰ The Court held that the applicant does not have a legal standing, or the case submitted is not the Court's competence.

No.	Decision Number	Case	Verdict	Explanation
2	66/PUU-XIV/2016	Review of Law No. 23 of 2014 <i>jo.</i> Law No. 9 of 2015 on Regional Government, Law No. 14 of 1985 <i>jo.</i> Law No. 3 of 2009 on the Supreme Court.	Rejected	Confirming the authority of the Supreme Court to conduct regulatory review (to review lower-level regulations against higher laws and regulations under the laws in the Indonesian hierarchy of laws and regulations) is constitutional.
3	108/PUU-XIV/2016	Review of Law No. 14 of 1985 on the Supreme Court and Review of Law No. 48 of 2009 on Judicial Power	Rejected	Asserting that Reconsideration of a judgment that has become final and binding in a case, other than a criminal case, can only be done once.
4	133/PUU-XIII/2015	Review of Law No. 14 of 2002 on the Tax Court, Law No. 28 of 2007 <i>jo.</i> Law No. 6 of 1983 on General Provisions and Tax Procedures, Review of Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, and Law No. 48 of 2009 on Judicial Power	Rejected	Asserting that Reconsideration of a judgment that has become final and binding in a case, other than a criminal case, can only be done once.
5	30/PUU-XIII/2015	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Rejected	Confirming that the Supreme Court does not need to conduct a public hearing in regulatory review cases. However, the reading of the decision should be open to the public.
6	91/PUU-XII/2014	Review of Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Rejected	Confirming that restriction of cassation remedies in certain circumstances is constitutional.

No.	Decision Number	Case	Verdict	Explanation
7	45/PUU-XII/2014	Review of Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court	Rejected	Confirming that restriction of cassation remedies in certain circumstances is constitutional.
8	34/PUU-XI/2013	Review of Law No. 8 of 1981 on the Criminal Procedure Code	Granted	Held that Reconsideration of a judgment that has become final and binding in a criminal case can be done more than once.
9	28/PUU-X/2012	Review of Law No. 5 of 2004 on the Supreme Court and Law No. 16 of 2004 on the Attorney General's Office of the Republic of Indonesia	Rejected	Confirming that restriction of cassation remedies in certain circumstances is constitutional.
10	56/PUU-VIII/2010	Review of Law No. 14 of 1985 on the Supreme Court	Rejected	Held that the time limitation for the submission for Reconsideration of a judgment that has become final and binding is constitutional.
11	16/PUU-VIII/2010	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 <i>jo.</i> Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Partially Rejected and Dismissed	Held that limitation for the submission for Reconsideration of a judgment that has become final and binding is constitutional.
12	23/PUU-V/2007	Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	Confirming that restriction of cassation remedies in certain circumstances is constitutional.
13	67/PUU-II/2004	Review of Law No. 5 of 2004 <i>jo.</i> Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates	Granted	Held that the Supreme Court cannot supervise Advocates and Notaries.

Source: Processed by Authors, 2019

Table II above, shows that 11 decisions rejected the petitions, and 2 granted the petitions. Mostly, the disputed provisions are related to the judicial function of the Supreme Court. One of those is related to the supervision function. Also, there are five decisions concerning the authority to conduct a reconsideration, four decisions concerning cassation remedies, three decisions on regulatory review, and one decision on the supervision function of the Supreme Court.

2.2.1. The Case related to the Supervision Function of the Supreme Court

Constitutional Court Decision No. 67/PUU-II/2004 is the first decision affecting the Supreme Court's authority, especially regarding supervision. The Applicant stated in the submission that Article 36 of the Supreme Court Law, which regulates that the Supreme Court and the Government conduct oversight for Advocates and Notaries, is inconsistent with Article 24(1) and (3) of the Indonesian Constitution. Article 24(1) regulates the independence of the judiciary, while Article 24(3) states that other bodies whose functions are related to judicial power are regulated by law. Furthermore, the elucidation of Article 36 of the Supreme Court Law mentions that in carrying out their duties concerning the judiciary, Advocates and Notaries are under the supervision of the Supreme Court, which can impose sanctions in the form of temporary suspension and permanent suspension.

The Applicant argued that if Article 36 remained in force because it was not amended in Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court, it might result in legal uncertainty because of the dualism of supervision, primarily for Advocates, as according to Law No. 18 of 2003 on Advocates (Advocates Law), the supervision of the Advocate profession is conducted by an Advocates Organization.⁴¹ The Applicant added that Article 36 also limits the rights and independence of Advocates to perform their duties because their appointment and dismissal – which under the Advocates Law is conducted by an Advocates Organization – is still conducted by the Supreme

⁴¹ Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates (2003), 3-4.

Court and the Government, which sometimes have undertaken the supervision function arbitrarily.⁴²

The Constitutional Court stated in its legal consideration that the independence of a profession cannot be interpreted as being free from supervision. However, supervision cannot be construed in such a way that it makes it difficult to distinguish between 'supervision' and 'intervention', which might hamper Advocates in conducting their duties independently.⁴³ Moreover, the Constitutional Court stated that lawmakers were not sufficiently careful in amending the Supreme Court Law, as Article 36 was one of the substances of discussion in the amendment of the 1985 Supreme Court Law process in the Legislative branch.⁴⁴

Although the Constitutional Court disagreed with the constitutional basis of the petition (as the Applicant said, Advocates have constitutional rights based on Article 24(1) and (3) of the Constitution), the Court held that Article 36 of the Supreme Court Law is unconstitutional. The reason is that its implementation creates legal uncertainty, which is inconsistent with Article 28D(1) of the Constitution, which states that every person has the right of fair legal certainty. Therefore, the petition was granted, and the Court stated that relevant professional organizations should exercise the authority to supervise Advocates and Notaries.⁴⁵ However, even though the Court stated that Article 36 is unconstitutional, it does not mean that Advocates are free from the supervision of external parties. The Court added that the government and the judiciary still have inherent power to supervise Advocates outside their professional duties regulated in the Advocates Law. This was the first Constitutional Court decision that annulled the Supreme Court's authority.

⁴² Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates, 4.

⁴³ Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates, 26-27.

⁴⁴ Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates, 27.

⁴⁵ Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates, 32-33.

2.2.2. Cases related to the Judicial Function of the Supreme Court

As mentioned above, 12 of the Constitutional Court's 13 constitutional review decisions directly related to the Supreme Court's authority concern the Supreme Court's judicial function. Three of the matters reviewed concern the judicial function of the Supreme Court, namely: (1) the authority to examine and decide upon cassation request; (2) the authority to conduct regulatory review; and (3) reconsideration of a decision that has become final and binding.

First, the authority to examine and decide upon a cassation request regulated in Chapter IV Part 2 of the Supreme Court Law. Article 45(2) of the Supreme Court Law restricts the cassation request in three circumstances: a pretrial decision; a criminal case that is punishable by a maximum imprisonment of one year and/or a fine; and state administrative cases in which the object of the lawsuit is a decision of a regional official whose coverage applies to the concerned region.⁴⁶ Therefore, the Applicant cannot submit a cassation request for these three matters.

As mentioned, the Constitutional Court has made four decisions regarding this authority. On those decisions, the Court held that the restriction in the cassation request is constitutional. The Court argued that for administrative cases, the limitation is not violating citizens' rights to justice as there are other avenues, such as appeal and Reconsideration.⁴⁷ Furthermore, for pre-trial decisions and criminal cases punishable by a maximum imprisonment of one year, the Court held that the restriction is reasonable as it is in line with the simple, fast, and low-cost principles, as well as the limitation of rights mentioned in Article 28J(2) of the Constitution.⁴⁸

⁴⁶ Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court (2011), Article 45(2).

⁴⁷ Constitutional Court Decision No. 23/PUU-V/2007 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court (2008), 53. Constitutional Court Decision No. 28/PUU-X/2012 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court and Law No. 16 of 2004 on the Attorney General's Office (2012), 25.

⁴⁸ Constitutional Court Decision No. 45/PUU-XII/2014 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court (2014), 38. Constitutional Court Decision No. 91/PUU-XII/2014 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court Amended by Law No. 3 of 2009 (2015), 29-30.

Second, the decision on regulatory review authority. The Applicant's petition stated that the trial for regulatory review in the Supreme Court should be open to the public.⁴⁹ Law No. 3 of 2009 (Supreme Court Law) does not regulate the specific procedural measures for regulatory review in the Supreme Court. It only states that the examination of the regulatory review petition is conducted by the Supreme Court no later than 14 working days after the receipt of the petition.⁵⁰ In practice, there is no public trial in a regulatory review process. It also can be seen from the Applicant's expert opinion, which provided a table showing the time differences between regulatory review processes, one of which took up to two years.⁵¹ Moreover, the verdict reading is not conducted in a public trial. The regulatory review decisions are delivered to the parties by sending a copy of the decision with a letter.⁵²

The Applicant added that principally, the Supreme Court's examination should be open to the public to ensure the objectivity of the Supreme Court by being accountable for a fair hearing and giving a reasonable opportunity to the parties to deliver their arguments or objections, as well as presenting experts or witnesses (*audi et alteram partem*).⁵³ Furthermore, as the object of regulatory review is regulations below law that apply to the public (either regionally or nationally), the Applicant argued that regulatory review also has a public interest, and thus, a public trial in a regulatory review will encourage accountability and objectivity of the Supreme Court in its examination.

In its legal consideration, the Constitutional Court stated that based on Article 13(1) and (2) of Law No. 48 of 2009 on Judicial Power (Judicial Power Law) and Article 40 of the Supreme Court Law, all examination and reading of the verdict should be conducted in a public trial unless the law specifies otherwise. The Constitutional Court said the Supreme Court's decisions are legally binding

⁴⁹ Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 12.

⁵⁰ Law No. 3 of 2009 on the Second Amendment of Law No. 14 of 1985 on the Supreme Court (2009), Article 31(4).

⁵¹ Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 25-26.

⁵² Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court, Article 6.

⁵³ Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 10.

only if read in a public trial. Therefore, the regulatory review process should follow these provisions.⁵⁴

As the Constitutional Court affirmed that Article 31A(4) of the Supreme Court Law does not implicitly and explicitly regulate that regulatory review should be conducted in a public trial, the principles adopted in Article 13(1) and (2) of the Judicial Power Law and Article 40(2) of the Supreme Court Law should become the basis for examination and reading a regulatory review verdict in the Supreme Court.⁵⁵ Therefore, the Constitutional Court held that Article 31A(4) of the Supreme Court Law would be unconstitutional if not interpreted to mean that the examination and the reading of the verdict of regulatory review are conducted in a public trial.

However, even though the Constitutional Court seemed to agree with the Applicant, the Court held there is no constitutionality contradiction between Article 31A(4) of the Supreme Court Law and the Indonesian Constitution. Furthermore, the Constitutional Court added that the time limit regulated in the Supreme Court Law becomes an obstacle for the Supreme Court to conduct the examination and the reading of the verdict for the regulatory review in a public trial. The Constitutional Court also mentioned that the time limit, the mechanism for the examination, and the reading of the verdict for the regulatory review is the authority of legislators (open legal policy) and is not a norm of constitutionality.⁵⁶

The argument above is corroborated in Constitutional Court Decision No. 85/PUU-XVI/2018, which stated that the legal consideration in Decision No. 30/PUU-XIII/2015 *mutatis mutandis* (having changed what needs to be changed) applies to legal consideration in the Decision under consideration.⁵⁷ Moreover, one of the Constitutional Court justices, Saldi Isra, presented a dissenting opinion that the

⁵⁴ Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 39-40.

⁵⁵ Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 41.

⁵⁶ Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 42-43.

⁵⁷ Constitutional Court Decision No. 85/PUU-XVI/2018 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court (2019), 41-42.

petition should be granted, considering the principle of trials being open to the public, and therefore, the Legislative branch should adjust the law in accordance with that principle.⁵⁸ The Constitutional Court's argument concerning the time limit seems to contradict the data presented by the Applicant's expert, which showed that the process can take from two months up to two years – which is more than the 14 days stipulated in the Supreme Court Law.⁵⁹

Based on the above considerations, the Constitutional Court seems to 'play safe' by trying to avoid intervening in the authority of other institutions, specifically the Legislative branch and the Supreme Court. Regarding the Legislative branch, it is related to the stipulation of the time limit and the regulatory review mechanism. Even though the Constitutional Court can make a 'conditional decision', it did not exercise it in the above case. Through the 'conditional decision', the Court can present a condition for an article or law's enforceability or invalidity. As the case related to the Supreme Court, if the Constitutional Court had granted the petition, potentially, it might cause tension in the relationship between the Supreme Court and Constitutional Court – which has happened before because of Constitutional Court Decision No. 34/PUU-XI/2013, as it gives the Supreme Court 'more work'. After all, the examination and the reading of the verdict for regulatory review in the Supreme Court should be conducted in a public trial. It is also the same in the constitutional review decisions related to the restriction of the cassation for certain circumstances stipulated in the Supreme Court Law, which also shows how the Constitutional Court seems to 'play safe'.

Third, constitutional review on the Supreme Court's authority to conduct Reconsideration. The conflict between the two apex branches of the Indonesian judiciary can be seen from the implementation of Constitutional Court Decision No. 34/PUU-XI/2013 mentioned above. Through this decision, the Constitutional Court invalidated Article 263(3) of Law No. 8 of 1981 on the Criminal Procedure Code (Criminal Procedure Code Law), which regulates that Reconsideration

⁵⁸ Constitutional Court Decision No. 85/PUU-XVI/2018 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 45-46.

⁵⁹ Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 25-56.

of a decision that has become final and binding can only be done once. This provision is not only regulated in the Criminal Procedure Code Law but also in the Supreme Court Law and Judicial Power Law – which previously had been tested in the Constitutional Court, although the Court rejected the petition.⁶⁰

The Constitutional Court stated there is a difference between Reconsideration in criminal cases and other legal spheres, such as civil or administrative ones. In the criminal case, what matters is material truth. This is different from civil cases, which emphasize formal truth. Furthermore, as Reconsideration is an extraordinary legal remedy – which is historically and philosophically intended to protect the convicted person's interests, it is required to obtain justice and material truth.⁶¹

Furthermore, the Constitutional Court argued that justice cannot be limited by a time limit stipulated in related laws. It is possible that, after the Supreme Court hands down a decision for a Reconsideration submission, the convicted person might have found another essential new fact (*novum*) that will change the final and binding criminal decision. However, it cannot be used because a submission for Reconsideration can only be made once, and therefore, justice for the convicted person cannot be achieved. Based on the argument above, the Constitutional Court held that the limitation for a Reconsideration submission in criminal cases is contrary to the principle of justice upheld by the judicial power in Indonesia to enforce law, justice and the state of law principle.⁶² Therefore, the Constitutional Court held that Article 268(3) of the Criminal Procedure Code Law is unconstitutional.

After the Constitutional Court handed down that decision in July 2013, the Supreme Court in December 2014 issued Supreme Court Circular Letter No. 7 of

⁶⁰ Constitutional Court Decision No. 56/PUU-VIII/2010 on the Review of Law No. 14 of 1985 on the Supreme Court (2011); Constitutional Court Decision No. 16/PUU-VIII/2010 on the Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code (2010).

⁶¹ Constitutional Court Decision No. 16/PUU-VIII/2010 on the Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code, 85-86.

⁶² Constitutional Court Decision No. 16/PUU-VIII/2010 on the Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code, 88.

2014 on Submission for Reconsideration of a Judgment which has Become Final and Binding in a Criminal Case (SEMA No. 7 of 2014). Paragraph 3 of SEMA No. 7 of 2014 states that submission for Reconsideration of criminal justice, which has become final and binding, is limited to one time only.⁶³ This SEMA is inconsistent with the Constitutional Court's above decision, which said that Reconsideration of a final and binding criminal justice decision could be done more than once.

The Supreme Court argued that other provisions also regulate the submission for Reconsideration of a judgment (in a more general sense), such as Article 66 of the Supreme Court Law and Article 24(2) of the Judicial Power Law, which the Constitutional Court did not invalidate.⁶⁴ These provisions have similar wording to Article 263 (3) of the Criminal Procedure Code Law, limiting the submission for Reconsideration of a judgment that has become final and binding. Thus, like the other provisions that restrict the request for Reconsideration still in force, the Supreme Court chooses to follow the provisions in these two laws and order the heads of District Courts to dismiss any submission for Reconsideration of a criminal judgment that was submitted more than once.⁶⁵

After Constitutional Court handed down Decision No. 34/PUU-XI/2013, there were two more decisions on Reconsideration for a final and binding judgment, namely Constitutional Court Decision No. 66/PUU-XIII/2015⁶⁶ and Constitutional Court Decision No. 45/PUU-XIII/2015⁶⁷. In these two decisions, the Court dismissed the petition because the petition's substance was the same as Case No. 34/PUU-XI/2013, even though the reviewed Article(s) were different. Furthermore, through Constitutional Court Decision No. 108/PUU-XIV/2016,⁶⁸

⁶³ Supreme Court of the Republic of Indonesia, *Circular Letter of the Supreme Court of the Republic of Indonesia No. 7 of 2014 on Submission for the Reconsideration*. Para 3.

⁶⁴ Supreme Court of the Republic of Indonesia, *Circular Letter of the Supreme Court of the Republic of Indonesia*. Paras 1-2.

⁶⁵ Supreme Court of the Republic of Indonesia, *Circular Letter of the Supreme Court of the Republic of Indonesia*. Para 5.

⁶⁶ Review of Law No. 14 of 1985 *jo.* Law No. 5 of 2004 *jo.* Law No. 3 of 2009 on the Supreme Court and Law No. 5 of 1960 on the Basic Regulations of Agrarian Principles, 7 Dec. 2015.

⁶⁷ Review of Law No. 14 of 1985 *jo.* Law No. 5 of 2004 *jo.* Law No. 3 of 2009 on the Supreme Court and Law No. 48 of 2009 on the Judicial Power, 10 Dec. 2015.

⁶⁸ Review of Law No. 14 of 1985 on the Supreme Court and Review of Law No. 48 of 2009 on Judicial Power, 18 July 2017.

which reviewed Article 66(1) of the Supreme Court Law and Article 24(2) of the Judicial Power Law, the Constitutional Court, in its legal consideration, affirms that because Article 268(3) of Criminal Procedure Code Law is unconstitutional and does not have legally binding power, Constitutional Court Decision No. 34/PUU-XI/2013 should also apply to the reviewed Articles above, especially in criminal cases.⁶⁹ Therefore, these provisions do not apply in criminal cases because their substance is the same as Article 263(3) of the Criminal Procedure Code Law, which the Constitutional Court invalidated.

However, even though the Constitutional Court affirmed that the limit for Reconsideration of a criminal judgment is unconstitutional, in this decision, the Court held that Article 66(1) of the Supreme Court Law and Article 24(2) of the Judicial Power Law is constitutional, except for Reconsideration in criminal cases. The reason is the difference between criminal cases and other cases, such as civil cases. In a criminal case, the goal is to find material truth and protect human rights from the arbitrariness of the state, especially regarding the right to life and other fundamental rights.⁷⁰ Therefore, there should be different treatment between criminal and other cases for Reconsideration.

Nevertheless, as the verdict in the decision above “rejected the petition”, the concerned parties in the constitutional review sometimes did not follow up the Constitutional Court’s decision that rejected the petition because they thought that constitutional obligations arise from a decision that grants a petition, that is, stating that an article(s) or a law(s) is unconstitutional.⁷¹ Thus, there might be a tendency that the Constitutional Court’s decision above might not be followed up, and the Supreme Court will still enforce SEMA No. 7 of 2014.

Through this decision, it seems that the Constitutional Court tried to respond to the action taken by the Supreme Court. Nevertheless, this condition also

⁶⁹ Constitutional Court Decision No. 45/PUU-XII/2014 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court, 56.

⁷⁰ Constitutional Court Decision No. 45/PUU-XII/2014 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court, 58.

⁷¹ Syukri Asy’ari, Meyrinda Rahmawaty Hilipito, and Mohammad Mahrus Ali, “Model Dan Implementasi Putusan Mahkamah Konstitusi Dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003–2012) [Model and Implementation of Constitutional Court’s Decisions in Reviews of Law (Case Study of Constitutional Court Decisions of 2003–2012)],” *Jurnal Konstitusi* 10, no. 4 (2013): 685.

raises the question of whether the Supreme Court Circular Letter (SEMA) can ‘invalidate’ the Constitutional Court’s decision and whether the Constitutional Court’s arguments in the legal consideration of the decision above can ‘invalidate’ SEMA No. 7 of 2014, as the legally binding force of the legal consideration in the Constitutional Court’s decision is still debatable. It is interesting to see how the Supreme Court would react to the Constitutional Court’s decision above, as the Constitutional Court has countered the Supreme Court’s argument that said the limitation for Reconsideration of a criminal judgment which has become final and binding, still applies based on Article 66(1) of the Supreme Court Law and Article 24(2) of Judicial Power Law.

Some case laws above show that Constitutional Court decisions can directly and significantly affect the Supreme Court. The Constitutional Court’s decisions can contribute to the addition or reduction of the Supreme Court’s authorities, stipulated in some laws. However, the condition above demonstrates one of the weaknesses of the Constitutional Court’s decisions.

As explained above, according to the Constitution, the Constitutional Court Law, and the Judicial Power Law, the Constitutional Court’s decisions are final and binding. However, its decisions do not have executorial power like a criminal decision, which the Prosecutor executes after it has become final and binding. Therefore, the implementation of Constitutional Court decisions, especially constitutional review decisions, highly depends on the obedience of other state institutions such as the House of Representatives, the Government, and the Supreme Court. Therefore, there are no consequences for other state institutions if they do not follow up on Constitutional Court decision, except for decisions that state an article(s) is unconstitutional because it no longer has a legally binding force.

The discussion above illustrates that the duality of judicial power in the Indonesian judiciary unconsciously raises the potential for the Constitutional Court’s intervention in the Supreme Court. The constitutional design of the duality of judicial review authority unintentionally triggered tension between

the Constitutional Court and the Supreme Court, especially regarding the constitutional review of the Supreme Court's authorities regulated in law. Furthermore, as the Indonesian Constitution states that the Supreme Court may have other authorities given by law, in addition to those mentioned in Article 24A paragraph (1) of the Constitution, the Constitutional Court also has the potential to invalidate the Supreme Court's authorities regulated in a law if it is submitted for a constitutional review. This has been shown, for instance, in the case on the authority of Reconsideration by the Supreme Court, as explained above. This condition conceptually affects the rule of law enforced by an independent judiciary.⁷²

III. CONCLUSION

To conclude, Article 24 paragraph (1) of the Indonesian Constitution guarantees the independence of the judiciary. However, the division of judicial review authority based on a hierarchical approach indirectly created an 'imbalanced relationship', resulting from the imbalanced functional arrangement between the Constitutional Court and the Supreme Court. On the one hand, the Constitutional Court could directly affect the implementation of the Supreme Court's authorities, especially those regulated in laws. However, it does not apply the other way around. It is unlikely that the Supreme Court's regulatory review decisions can affect the implementation of the Constitutional Court's authorities. The reason is that the object of regulatory review by the Supreme Court is regulations under the law, which does not have a significant consequence on the exercise of the Constitutional Court's authorities.

Moreover, the case laws above show that, although some decisions seem to 'intervene' in the Supreme Court and trigger tension between these two courts, other decisions illustrate how the Constitutional Court seems to 'play safe' by not intervening in the Supreme Court. This demonstrates how the Constitutional Court tries to maintain the 'imbalanced relationship' in the judiciary caused by

⁷² David Boies, "Judicial Independence and the Rule of Law," *Washington University Journal of Law & Policy* 22 (2006): 57; Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science* 12 (2009): 347.

the division of judicial review authority through the third amendment to the Constitution.

Further questions arise on whether the Indonesian Constitution allows a judicial institution to ‘influence’ or ‘intervene in’ another judicial institution with the same position and independence at the apex of the Indonesian judiciary, even though Article 24 paragraph (1) guarantees its independence. Additionally, is the Supreme Court’s non-compliance toward the Constitutional Court’s decisions constitutionally allowed in order to balance the imbalanced relationship?

The authors argue that the ‘imbalanced relationship’ between the two apex courts of the Indonesian judiciary can be resolved through a clear and connected functional differentiation, especially in judicial review authority. Ideally, as mentioned by Isra, the authority to perform a judicial review should be given only to the Constitutional Court.⁷³ However, this change can only be accommodated through the amendment of the Constitution.

Another radical change that can be adopted is the mechanism of constitutional question, in which a judge from an ordinary court adjudicating a case can ask the Constitutional Court about the constitutionality of the law on which the case is based.⁷⁴ Ideally, the constitutional question should be adopted through the amendment of the Constitution, although there can be a soft adoption through the revision of Article 55 of the Constitutional Court Law. The Legislative branch could make a more apparent connection between the Constitutional Court and the Supreme Court in performing judicial review authority, primarily when law reviewed by the Constitutional Court is being used as a legal basis for a regulatory review.

In a more practical sense, the way to achieve a balanced relationship between the Supreme Court and the Constitutional Court relies on to what extent the Constitutional Court could restrain itself when handling cases related to the

⁷³ See Isra, “Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi [Authority Connectivity of Supreme Court and Constitutional Court],” *Jurnal Hukum dan Peradilan* 4, no. 1 (2015): 18–19.

⁷⁴ I Dewa Gede Palguna, “Constitutional Question: Latar Belakang Dan Praktik Di Negara Lain Serta Kemungkinan Penerapannya Di Indonesia (Constitutional Question: Background and Its Practices in Other Countries and the Opportunity to Adopt in Indonesia),” *Jurnal Hukum Ius Quia Iustum* 17, no. 1 (2010): 2.

Supreme Court. The Constitutional Court has used this approach in many instances explained above. In a country that uses a dual structure of the judiciary, the concept of judicial restraint should be adjusted not only in the interplay between the executive, legislative and judiciary but also between the judicial institutions. The awareness of the Constitutional Court to implement judicial restraint will lead to judicial deference to the Constitutional Court's decisions.

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