THE DESIGN OF THE IDEA OF JUDICIAL PREVIEW AUTHORITY OF THE CONSTITUTIONAL COURT IN THE INDONESIAN CONSTITUTIONAL SYSTEM

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Abstract

Adopting the authority of judicial review in the context of testing laws against the Constitution carried out by the Constitutional Court should be welcomed as positive progress for institutionalizing the authority of judicial review itself. In its implementation so far, the authority of judicial review has received serious attention, as evidenced by the number of laws submitted for review in the Constitutional Court. To streamline the authority to review regulations by the Constitutional Court, it is necessary to adopt a model of judicial preview authority, namely testing draft laws, so that when they are passed, they are no longer legally problematic. This research is normative juridical research using various literature materials as the main study. The results show that the idea of adopting the authority of judicial preview is urgently needed. It is based on the consideration that so many laws are problematic both in terms of content and formation process. On the other hand, the authority of the Constitutional Court is only limited to the authority of judicial review, making it less appropriate in the context of the efficiency of judicial review of laws. Given the urgency of the application of judicial preview authority by the Constitutional Court, it is necessary to consider efforts to amend the 1945 Constitution by adding the phrase "testing draft laws against the Constitution" in the article governing the authority of the Constitutional Court as practiced in other countries such as France.

Keywords: Constitutional Court, judicial review, judicial preview, laws.

Introduction

The birth of the Constitutional Court (MK) as one of the implementing institutions of judicial power in Indonesia should be welcomed to strengthen the conception of the Indonesian rule of law as mandated by Article 1 paragraph (3) of the 1945 Constitution. The existence of the Constitutional Court as a state institution has recently become a new phenomenon in state administration. The establishment of the Constitutional Court, initiated through the third amendment to the 1945 Constitution and took place in 2001, was one of the efforts to organize judicial power institutionally. Based on the provisions before the amendment of the 1945 Constitution, judicial power was only held by the Supreme Court, but now the Constitutional Court has complemented the judicial function, especially about the resolution of problems of constitutional dimension.[1] According to the history of its establishment, Indonesia is the 78th country to have a Constitutional Court with a separate placement from the Supreme Court.[2]

The concept of judicial review is a judicial effort to uphold the values contained in the constitution against all laws and regulations at the lower level. Judicial review is one of the efforts to force the legislators to comply with the principles[3] and legal norms contained in the upper-level rules to form laws and regulations that align with the provisions of the Constitution. The idea of judicial review itself has long appeared in Indonesia. It has been contained in the RIS Constitution and the 1950 UUDS, even based on historical records. As for the original 1945 Constitution (before the amendment),[4] the provisions on judicial review were not contained at all. The authority was only later found in Law No. 14/1970 on the Basic Provisions of Judicial Power, which confirms that the legal system of the Republic of Indonesia

[1] Syed Raza Shah Gilan, Ilyas Khan, and Shehla Zahoor, 'The Historical Origins of the Proportionality Doctrine as a Tool of Judicial Review: A Critical Analysis', *Research Journal of Social Sciences & Economics Review*, 2.1 (2021).

[2] Abdul Latif, *Buku Ajar Hukum Acara Mahkamah Konstitusi* (Yogyakarta: Total Media, 2009).

[3] Janpatar Simamora, *Mendesain Ulang Model Kewenangan Judicial Review Dalam Sistem Ketatanegaraan Republik Indonesia* (Yogyakarta: Capiya Publishing, 2013).

[4] Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi* (Jakarta: RajaGrafindo Persada), (2010).

contains provisions regarding judicial review of laws against regulations below them.

However, upon further scrutiny, this provision contains theoretical chaos, resulting in its implementation facing severe problems and even almost not functioning. The confusion is caused by the delegation of judicial review authority to the Supreme Court, which is limited to laws and regulations under the law. Article 26(1) of Law No. 14/1970 states that the Supreme Court's judicial review authority is to examine laws and regulations under the law against the law. Thus, the Supreme Court cannot play a further role as the guardian and protector of the 1945 Constitution of the Republic of Indonesia because the authority to examine laws against the Constitution has yet to be found. Along with the Constitutional Court's presence, the issue of judicial preview of laws against the 1945 Constitution is now more problematic.

However, after the authority of judicial review by the Constitutional Court was realized, a new problem arose related to the proliferation of laws being tested in the Constitutional Court. Based on the reality of the implementation of the authority owned by the Constitutional Court, of all the constitutional authority owned, the authority to test laws against the Constitution or the authority of judicial review is the authority that has received the most positive responses from various groups and has always experienced the dynamics of increasing cases from year to year. This can be proven by the number of judicial review cases submitted to the Constitutional Court. Since the Constitutional Court was established in 2003 until the end of 2024, there were at least 1830 cases of judicial preview of laws against the Constitution received by the Constitutional Court. Of all these cases, 1799 decisions have been issued by the Constitutional Court. From the perspective of the number of laws tested, hundreds of laws have been tested by the Constitutional Court.[5]

It is understood that in the process of judicial review,[6] the authority to test a law against the Constitution is only limited to a law that has been passed. The judicial preview process can only be carried

[5] Mahkamah Konstitusi, 'REKAPITULASI PERKARA PENGUJIAN UNDANG-UNDANG' (2024).

[6] Mirlinda Batalli and Islam Pepaj, 'Citizens' Right To Seek Judicial Review of Administrative Acts and Its Impact on Governance Reforms', *Corporate Governance and Organizational Behavior Review*, 6.2 (2022).

out if a law has been passed by the institution that formed it. This concept has been known in Indonesia's system of judicial preview. On the other hand, in legal science, there is still another concept, namely the examination of a draft law. This concept is known as judicial preview. The concept of judicial review is intended as a judicial effort to test a draft law before it is passed into law.

Based on the concept of judicial preview, a draft law can be judicially canceled if it is deemed to be contrary to the Constitution. In line with that, through the authority of judicial preview, the Constitutional Court can play a further role in maintaining the creation of a draft law that is in line with and in harmony with the rules of the Constitution as the fundamental law of the state. Such authority can be interpreted as a form of preventive effort to anticipate the enactment of a draft law that is considered not in line with constitutional norms. In principle, such a mechanism will significantly contribute to building a legislative process that adheres to the principles, standards, and rules of the Constitution in order to maintain and uphold the Constitution itself. This authority should be adopted as one of the constitutional authorities of the Constitutional Court.

In line with that, this research is intended to present a concept or idea regarding the urgency of expanding the authority of the Constitutional Court through the authority of judicial preview. Through the expansion of the authority, there will be ample room for the Constitutional Court to maximize the exercise of its jurisdiction to ensure the upholding of constitutional norms in every draft law that will be passed into law. This research is normative juridical research conducted by conducting a literature study based on the availability of legal materials obtained. Through this research, it is expected to get a concept in the form of ideas regarding the authority of judicial preview by the Constitutional Court as an effort to streamline regulatory testing by the judiciary.

Rationale for The Idea of Judicial Preview

The rationale for the idea of judicial review is almost the same as the rationale for the concept of judicial preview. The only differentiator between the two ideas is the object of the preview; in judicial preview, the object of the preview is the draft law, whereas in judicial preview, the object of the preview is the enacted law. Therefore, the initial idea

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that became the rationale for adopting the authority of judicial review will have a lot in common with the idea of embracing the authority of judicial review, as it has been made one of the current authorities of the Constitutional Court.

The idea of adopting the power of judicial preview is inseparable from the theory of stufenbau,[7] or the theory of tiered norms introduced by Hans Kelsen. The Stufenbau theory was first proposed by Hans Kelsen, who then received further development from his student Hans Nawiasky.[8] The theory, which in full language is referred to as "Stufenbau das Recht" or "The hierarchy of law," explains that legal norms are a tiered arrangement in which each lower legal norm derives legal force from a higher-level legal norm.

Norms that determine the formation of other norms are higher, and vice versa; norms that are formed based on higher norms have a lower degree. Based on this conception, the relationship between the higher norms and the norms at the lower level is a hierarchical relationship of norms. As a consequence, the lower-level norm is not allowed to contradict the higher-level norm.[9]

Furthermore, Hans Kelsen explains that law is a hierarchy of normative relationships, not a causal relationship whose essence contains normative reality or what should be done *(das sollen)* and not natural reality or concrete events *(das sein)*. In law, the most crucial part is not located on the issue of what happened but instead leads to what should happen. Mertokusumo explains that legal rules are passive, so the legal regulations then turn active and alive; it takes "stimulation," and what is meant by "stimulation," in this case, is a concrete event. The existence of a concrete event will have an impact on the activeness of the legal method. Thus, it becomes clear how concrete events play a role in forming an active and truly living legal method.

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[7] Muhammad Winata and Zaka Aditya, 'Characteristic and Legality of Non-Litigation Regulatory Dispute Resolution Based on Constitutional Interpretation', *Brawijaya Law Journal*, 6.2 (2019).

[8] Abdul Rasyid Thalib, *Wewenang Mahkamah Konstitusi Dan Implikasinya Dalam Sistem Ketatanegaraan Republik Indonesia* (Bandung: Citra Aditya Bakti, 2006).

[9] Zainal Arifin Hoesein, *Judicial Review Di Mahkamah Agung Republik Indonesia: Tiga Dekade Pengujian Peraturan Perundang-Undangan* (Jakarta: RajaGrafindo Persada, 2009).

From Hans Kelsen's[10] view and the development carried out by the jurists, there are at least three essential points that can be explored. *First,* the *Stufenbau* theory shows that the legal method closely relates to all the lower-level regulations. The hierarchical level described in Hans Kelsen's theory becomes a binder and requires all legal norms from the higher level to the lower level to be in a hierarchical arrangement. Between one legal norm and other legal norms, there is not only one hierarchical level but also a harmony of norms ranging from the highest level of legal norms to the lowest level of legal norms.

Secondly, Hans Kelsen's theory also mandates that every formation of laws and regulations must be based on higher rules, where the peak of this theoretical pyramid ends at the basic norm or ground norm. The basic norm acts as the primary source for forming legal standards and other regulations at a lower level. So, the hierarchical level is not only limited to the arrangement but also related to the entire substance to be regulated; each level of regulation must refer to higher provisions. Third, legal rules need concrete events that can spur and activate legal regulations. Because if the legal method is left in a passive condition, it will undoubtedly impact the law's difficulty in reaching and providing natural justice.

If there is a case of violation of a legal norm in which the organ authorized to do so is unable to impose sanctions, then such a legal norm can be classified as an ineffective legal norm. This is where the effectiveness of legal norms is tested, especially in the context of norm implementation. The idea of Hans Kelsen, through his Stufenbau theory[11] has more or less given a deep meaning related to legal order in various countries. As stated by Hans Kelsen, the legal order is a hierarchical or multilevel system of norms. Hans Kelsen further explained that above the constitution as a fundamental law, there is a higher hypothetical basic rule that is not a positive rule known as the *Groundnorm.*

[10] Jörg Kammerhofer, 'Beyond the Res Judicata Doctrine: The Nomomechanics of ICJ Interpretation Judgments', *Leiden Journal of International Law*, 37.1 (2024).

[11] Stanley Paulson, 'Empowerment: Hans Kelsen and the Radical Theory of Legal Norms', *Analisi e Diritto*, 19.1 (2019).

In the hierarchical legal order, the lower-level legal rules gain strength from the higher-level legal rules.[12] Hans Kelsen's view suggests the need to institutionalize the concept of judicial preview to resolve any conflicts between higher and lower legal norms.[13] Through the institutionalization of judicial preview, the teachings of Hans Kelsen can be preserved from time to time.[14] The concept of judicial preview itself will be able to become a tool to fortify the enforcement of the Constitution in constitutional life. The birth of a state organ authorized to conduct a material preview of any draft legislation and the availability of efforts to conduct judicial preview are the double meanings of the birth of the authority of judicial preview itself.

Based on the dynamics of its later development, although the term judicial preview is already a familiar language or is already popular in the field of law, there has yet to be a standardized understanding related to the term judicial preview. In Indonesia, the term judicial preview is also often referred to as the right to test or material test of draft legislation. However, the authority of judicial preview has yet to be adopted as one of the forms of authority of judicial institutions in the country.

As stated earlier, judicial preview is the authority given to the judiciary to test whether or not a draft regulation conflicts with "higher law" regulations. The granting of this authority is intended so that rules that are formed and will be ratified by the legislative and executive institutions are in accordance with and in line with higher-level rules and regulations of the same level so as not to contradict each other.

By referring to Munir Fuady's opinion on judicial preview, judicial review can also be interpreted as an institution in law that gives authority to general court bodies, special court bodies, or special institutions to conduct a preview of a draft regulation by applying or interpreting the provisions and spirit of the constitution, so that the results of the

[12] Thomas Olechowski, 'Legal Hierarchies in the Works of Hans Kelsen and Adolf Julius Merkl', *Studies in the History of Law and Justice*, 12 (2018).

[13] Paolo Carrozza, 'Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes', *Estudios de Deusto*, 67.1 (2019).

[14] Stanley L. Paulson, 'Hans Kelsen on Legal Interpretation, Legal Cognition, and Legal Science', *Jurisprudence*, 10.2 (2019).

preview can strengthen, declare void, or cancel a draft regulation that will be passed into rules.[15]

Referring to the definition of judicial preview, it can be concluded that what is meant by judicial preview is the right to test the draft legislation (*regeling*) owned by the judiciary whether or not it conflicts with higher-level regulations or the constitution. From this understanding, it can be understood that the authority of judicial preview is only in the hands of the judiciary, excluding the jurisdiction to test regulations owned by other institutions and only for legal products included in the *regeling* category.

A judicial preview is intended as judicial advice to correct or preview a draft law that aligns with the rules and regulations at the upper level. Through the authority of judicial preview, a legal system will be built that is in line with the regulations at the upper level, especially the Constitution. It is where the importance of adopting the authority of judicial preview lies. Although the judicial preview model is only adopted by countries such as France, considering that the main principle is how to create harmony and harmony of legal norms in a hierarchy of laws and regulations by examining the draft of a law before it is passed into law, it is very reasonable to adopt the authority of judicial preview in the Indonesian constitutional system.

Several Reasons for the Urgency of the Application of the Authority of Judicial Preview by the Constitutional Court

As stated in the previous section, the authority of judicial preview urgently needs to be adopted to ensure the draft law's constitutionality and improve the quality of national legislation. Both are part of the positive side of the effort to embrace the authority of judicial preview. If further examination is conducted, several vital reasons can be used as the basis for adopting the rule of judicial preview by the Constitutional Court in Indonesia. Firstly, many laws need to be revised regarding content and the formation process. This can be proven by the rise of judicial review cases submitted to the Constitutional Court. Therefore, it becomes very urgent to find a solution in order to unravel the problem.

[15] Munir Fuady, *Teori Negara Hukum Modern (Rechtstaat)* (Bandung: Refika Aditama, (2009).

Secondly, there is a limiting sign in the exercise of judicial review authority by the Constitutional Court. Based on the concept of the authority of judicial review, the tests carried out are limited to laws passed against the Constitution. On the other hand, it is common for a condition to occur where a law that has yet to be passed, i.e., is still in the form of a draft law, can already be found to have indications of incompatibility with constitutional norms. However, the Constitutional Court must go further to make judicial review due to the limitation of the authority of judicial preview, which only applies to laws passed against the Constitution.

Third, the low quality and productivity of national legislation so far.[16] The first and second issues are closely related. If the quality of national legislation is poor, this will be one of the causes of judicial review cases before the Constitutional Court. Based on these two facts, the DPR, as the holder of the legislative function to form laws, is clearly unable to keep up with the high number of judicial review submissions at the Constitutional Court.

Such conditions can ultimately create stagnation in the national legislative process. The House of Representatives cannot complete the formation of laws under the mandate of the national legislative program as a reference for the formation of laws. This is especially true when coupled with the many judicial review decisions that require the DPR to amend several laws under preview. There is a potential accumulation of legislative burdens for the DPR, both from the DPR itself through the national legislative program and from the Constitutional Court through judicial review decisions.

Based on these considerations, it is reasonable to expand the authority of the Constitutional Court through judicial preview. So far, the authority of the Constitutional Court regarding judicial preview is limited to judicial review, which is the examination of a law against the Constitution. Based on the concept of judicial review, the Constitutional Court can and is only allowed to preview a law passed and declared in force. Along with this, it can be understood that in exercising the authority of judicial preview, the Constitutional Court is bound by the existence of a limiting sign, which is only authorized to

[16] Saru Arifin, 'Illiberal Tendencies in Indonesian Legislation: The Case of the Omnibus Law on Job Creation', *The Theory and Practice of Legislation*, 9.3 (2021).

conduct judicial review of laws passed against the Constitution. Beyond that, the Constitutional Court cannot further ensure the adoption of constitutional values and norms in every law.

In this regard, it is reasonable to initiate the authority of judicial preview in Indonesia. As an institution with the authority to preview laws against the Constitution, MK needs to expand its authority by adopting the concept of judicial review. If, in the idea of judicial preview, the judiciary can only test a law passed against the Constitution, then the judiciary can test a draft law against the Constitution.

In essence, the Constitutional Court is authorized to preview a draft law to the extent deemed contrary to the Constitution. Suppose such authority can be adopted as one of the powers of the Constitutional Court. In that case, it is strongly believed that the quality of national legislation will improve. The reason is that a draft law that will be passed has been judicially tested through the judicial preview authority of the Constitutional Court, so the possibility of inconsistencies in the draft law in question against the Constitution has been answered early on before the draft law is passed into law.

This kind of authority model is known in several countries. One of them can be seen through the duties and authorities of the French Constitutional Council. The model of authority the French Constitutional Council possesses is one of the most effective forms of authority. The French Constitutional Council not only has judicial review authority but also has judicial preview authority simultaneously.[17] Therefore, the French Constitutional Council does not only have the authority to preview laws against the constitution, but more than that, it also includes preventive forms of preview, such as previewing laws that have not been enacted or previewing international treaties that have not been ratified. A draft law can be subject to judicial correction in France before it is passed by promulgating it in a state institution.

This is based on the provisions of Article 61 of the 1958 Constitution, which stipulates that before a law is enacted, it must first be submitted to the Constitutional Council for examination or testing to determine whether or not it conflicts with the Constitution. After the draft law has been previewed and declared not to conflict with the Constitution, it can be promulgated accordingly. Such judicial authority

[17] Malgorzata Gersdorf and Mateusz Pilich, 'Judges and Representatives of the People: A Polish Perspective', *European Constitutional Law Review*, 16.3 (2020).

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is a positive thing because, with preventive action, it will at least be able to cut off the risks that may arise from the ratification of a law. This means that before a law has binding force, a means has been established to conduct judicial testing, whether or not it conflicts with higher regulations or the Constitution.

The decisions of the Constitutional Council in France are neither political nor based on political considerations but rather on legal principles as outlined in the constitution. Therefore, it is almost certain that the decisions issued are legal, not decisions that contain political nuances. In the Indonesian constitutional context, the judicial review and preview authority models can be applied simultaneously, as in France.

In addition to these reasons, other reasons for adopting the authority of judicial preview can be based on several positive impacts. In this context, several positive effects will be felt in constitutional life by applying the rule of judicial preview. Firstly, through the authority of judicial preview, the Constitutional Court will contribute positively to building more qualified national legislation.[18] Although the Constitutional Court is not attached to the function of legislation, through the mechanism of judicial preview, the Constitutional Court can play an active role in creating a climate of legislation that complies with the Constitution. In addition, through this authority, the legislature, as an institution that plays a significant role in the legislative process, will automatically be required to improve the quality of its legislation. Without an improvement in the quality of national legislation, the Constitutional Court will certainly make corrections even though they are passive, either through the authority of judicial preview or judicial review.

Secondly, through judicial preview, the Constitutional Court will be more accessible to enforce constitutional norms in every law. After all, the Constitutional Court has the primary mission of upholding and safeguarding the Constitution.[19] The main task is manifested in the form of decisions made by handling all cases under its authority. Therefore,

[18] Indah Permatasari and I Made Subawa, 'History of Judicial Review in Indonesia', *International Journal of Multicultural and Multireligious Understanding*, 11.2 (2017).

[19] Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?', *SSRN Electronic Journal*, (2017).

as long as the authority can be intended to maintain the upholding of constitutional norms, it is not unreasonable to reject the expansion of the authority of the Constitutional Court. The nature of the existence of the Constitutional Court has been understood as an institution that plays an active role in guarding and upholding the Constitution. If the Constitutional Court cannot enforce the Constitution properly, this can be interpreted as a form of failure by the Constitutional Court to carry out its primary task.

Therefore, adopting the authority of judicial preview by the Constitutional Court can also be interpreted as an effort to strengthen the existence of the Constitutional Court to maintain and guard the Constitution. Since there is a draft law, the Constitutional Court will be able to play a direct role in ensuring constitutional norms in every draft law by conducting a judicial preview. Therefore, it is expected that the quality of legislation will improve.[20]

Thirdly, the existence of judicial preview authority, including judicial review authority, will simultaneously show that a legislative process is inseparable from constitutional supervision by the Constitutional Court. Constitutional supervision includes supervision in the form of testing regarding the content material and related to the procedure for forming the legislative product itself. The authority of judicial review is one of the ways to ascertain whether or not lawmakers have followed and adopted constitutional principles in forming and passing the law itself.[21]

Fourth, with the Constitutional Court's judicial preview authority, the existence of a newly enacted law is unlikely to be immediately subject to judicial preview. If a draft law is deemed to contain constitutional contradictions, it will undoubtedly be submitted for judicial review by those who feel there is a potential contradiction. Therefore, when a draft law is passed, it is unlikely that it will be followed by a judicial review, at least shortly after the date of its passing.

Based on the conditions, the wider community often needs clarification when a newly enacted law has been submitted to the

[20] Samuel Issacharoff, 'Judicial Review in Troubled Times: Stabilizing Democracy in a Second Best World', *SSRN Electronic Journal*, 98.1 (2018).

[21] Ahmad Syahrizal, *Peradilan Konstitusi: Suatu Studi Tentang Adjudikasi Konstitusional Sebagai Mekanisme Penyelesaian Sengketa Normatif* (Jakarta: Pradnya Paramita, 2006).

Constitutional Court for judicial review.[22] Such conditions can confuse the public's understanding of a newly enacted law. This means that if only the concept of judicial review is adhered to, the public and all parties are required to always actively follow the development of judicial preview at the Constitutional Court because, at any time, a law can constantly be subjected to judicial review, including shortly after its enactment.

In addition, it should be realized that not all people can always be active in following the court's decision in every judicial review case. In the end, such conditions often lead to public ignorance about the existence of a law related to its validity, namely whether it is still valid or has been declared not to have binding legal force by the Constitutional Court. Based on these conditions, it is not uncommon for some people to accuse the Constitutional Court's judicial review authority of being very vulnerable to disrupting public understanding in terms of whether a law is still valid.

If only the power of judicial review is retained, there should be a database that can be used as a reference regarding the status of a law, whether it is still valid or not. Thus, the wider community can refer to the database when they want to refer to the existence of a law. For example, even in the most complicated context, a law may have been referred to in various regions to form regional legal products. Still, when a legal product is about to be implemented, it turns out the Constitutional Court has canceled the law used as one of the references.

This could lead to juridical chaos related to legalizing the legal products formed. On the other hand, forming the legal product in question has taken a long time and cost a lot of money. However, because the status of the law being referred to has been canceled, the legal products at the lower level will automatically become challenging to implement.

Concept Design of Judicial Preview Authority by the Constitutional Court

Based on the thought of how important it is to expand the authority of the Constitutional Court in the form of judicial preview

[22] Oleksandr Amelin, 'Modernisation of The Constitutional and Legal Status of Judges in Ukraine', *Law Journal of the National Academy of Internal Affairs*, 14.1 (2024).

authority, a design is needed as a follow-up regarding the mechanism for exercising the authority in question comprehensively. Related to the concept or design of the mechanism for exercising the authority of judicial preview, it must be confirmed that those who can act as petitioners are parties who consider their constitutional rights and authorities to be potentially harmed as a result of the existence of a draft law that will be passed into law.

In connection with that, one of the conceptual offers related to the parties that can become petitioners in the context of the idea of judicial preview is all parties, both individuals, legal entities, and state institutions, that feel their constitutional rights and authorities will be disturbed along with the formulation of a draft law that will be passed. The applicant must prove such provisions by describing the potential disruption of their constitutional rights and authorities due to a draft law that will be passed into law.

Another alternative regarding the parties that can become petitioners in a judicial preview case can be designed by limiting it to the Parliament. That is, only the DPR can be the petitioner in a judicial preview case, with the caveat that the DPR must submit a draft law preview to the Constitutional Court before it is passed into law. However, if this concept is adopted, it would indirectly make the judicial preview process part of the legislative process. This kind of design certainly has the potential for several weaknesses. Given the existence of draft laws that are the work of the DPR, the DPR will find it challenging to demonstrate legal arguments that can be used to request judicial preview before the Constitutional Court unless the nature of the request is limited to requesting consideration.

Another weakness of this kind of design is that it has the potential to overwhelm the Constitutional Court in exercising its authority. Suppose every draft law must be tested first at the Constitutional Court. In that case, this will be very time-consuming and potentially disrupt the performance of the Constitutional Court. After all, it is not necessarily the case that a formulation in a draft law always contains contradictions to constitutional norms. Another area for improvement and the fundamental weakness of such a concept is the attempt to involve the judiciary in the legislative process. The Constitutional Court, as a judicial institution, does not have a legislative function, especially if the function is given. It means that if such a concept is to be adopted, it will lead to

a shift in the power of the Constitutional Court, namely a shift from the judicial function to the actual legislative function.[23]

Therefore, it would be more effective and efficient if the parties who could become petitioners were not restricted. As long as they can show that there is a potential conflict between the norms in a draft law and the Constitution or that their constitutional rights are potentially violated due to a draft law, such parties can become petitioners in filing a judicial preview at the Constitutional Court.[24]

To complete the thinking about the urgency of expanding the authority of the Constitutional Court through the authority of judicial preview, then related to the design of the verdict in a judicial review case, it can be done by following the verdict model as applied in judicial preview cases with the addition of several phrases so that the words of the verdict become as follows:

a. Judgment "declaring the petition inadmissible."
   This ruling is handed down if the petition fails to fulfill the requirements of a judicial preview petition, where the requirements have been determined in advance. Such a verdict may be rendered if, for example, the applicant cannot clearly describe the potential loss of constitutional rights and authorities due to a draft law that is to be enacted into law.
b. Decision "granting the petition."
   This verdict can be rendered in two cases. First, suppose the content material of a paragraph, article, or part of a draft law is declared contrary to the Constitution. In that case, the verdict reads "declaring that the content material of the paragraph, article, or part of the draft law in question has no binding legal force." Secondly, if the formation of the draft law in question does not fulfill the provisions for the formation of laws based on the Constitution, the verdict reads "declaring that the draft law does not have binding legal force."
c. The verdict "declaring that the petition is rejected."

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[23] Doreen Lustig and J. H.H. Weiler, 'Judicial Review in the Contemporary World- Retrospective and Prospective', *International Journal of Constitutional Law*, 16.2 (2018).

[24] Tarunabh Khaitan, 'The Indian Supreme Court's Identity Crisis: A Constitutional Court or a Court of Appeals?', *Indian Law Review*, 4.1 (2020).

> This verdict is issued if the draft law petitioned for preview is not contrary to the Constitution regarding its formation or content (partially or wholly).

Although there is an urgency to expand the authority of the Constitutional Court through judicial review, it must be recognized that such an idea only sometimes runs smoothly and can be accepted by all parties. Since this idea began to emerge in the country, not a few people have expressed their rejection of it. Various arguments have been put forward as justifications for refusing to adopt the idea of judicial review. One of the reasons put forward is that if the authority of judicial review and judicial preview is adopted simultaneously in Indonesia, it is considered that it will potentially make the Constitutional Court hostage in exercising its jurisdiction. In addition, expanding the Court's authority through judicial preview is also considered to drag the Court into the political realm, namely the realm of lawmaking.[25]

This view is partially correct. MK will not be held hostage if the judicial review and preview authorities are adopted simultaneously. In fact, with the simultaneous adoption of the two authorities, the Constitutional Court will be tested for consistency in applying its decisions, both in judicial preview and judicial review cases. If there is a judicial review case on a draft law, parties file a judicial review after the draft law is passed. The consistency of the Constitutional Court will be tested in making a decision, whether it is consistent with the previous decision or just the opposite.[26]

In addition, the reason for saying that the Constitutional Court will enter the political realm if given the authority to conduct judicial review is also partially correct. The reason is that, in deciding every case under its jurisdiction, the Constitutional Court must always make the Constitution the basis of footing and consideration. The Court is not allowed to make a decision based on political considerations. Therefore, it is unreasonable to state that the Constitutional Court has entered the political realm if it is given the authority to conduct judicial proceedings.

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[25] Nukeu Adriani, 'Doctrine Of Judicial Review: A Tool to Examine the Constitutional Validity of Legislative, Executive and Judicial Actions', *Dissertation Submitted in Partial Fulfilment of the Requirements for the Award of Degree Of* (Karnavati University, (2018).

[26] George Tsebelis, 'Constitutional Rigidity Matters: A Veto Players Approach', *British Journal of Political Science*, 52.1 (2022).

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Indeed, suppose such considerations are used to reject the idea of judicial preview. In that case, the authority of the Constitutional Court in conducting judicial preview will also indicate that the Constitutional Court has entered the realm of politics.[27] In contrast, in a decision of the Constitutional Court that declares a paragraph, article, section, or even a law to be contrary to the Constitution, it is far more likely to be interpreted that the Constitutional Court has indirectly played a dual role, on the one hand as an institution holding judicial power and on the other hand also holding legislative power, albeit pseudo in nature. Therefore, rejecting the idea of judicial preview being implemented in the Indonesian judicial system is unreasonable.

In line with the urgency of applying the authority of judicial preview in the country, the thing that should be considered is how to adopt or provide the proper legal platform to accommodate the authority of judicial preview by the Constitutional Court. Given that the basis for the placement of the authority of the Constitutional Court is placed in the Constitution, ideally, the expansion of the authority of the Constitutional Court in the form of judicial review authority is done through amendments to the 1945 Constitution of the Republic of Indonesia. As stated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia as the article that regulates the authority of the Constitutional Court, the Constitutional Court has the authority to hear cases at the first and final level, whose decisions are final, to test laws against the Constitution, decide disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties, and decide disputes over the results of general elections.[28]

This provision could be amended by adding the phrase "the authority to review draft laws against the Constitution." Through this form of amendment, the Constitutional Court will have the authority of judicial preview and the authority of judicial review, which are also directly derived from the Constitution. This regulation will strengthen

[27] Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court', *Yale Law Journal*, 129.1 (2019).

[28] Abdul Kadir Jaelani, I. Gusti Ayu Ketut Rachmi Handayani, and Lego Karjoko, 'Executability of the Constitutional Court Decision Regarding Grace Period in the Formulation of Legislation', *International Journal of Advanced Science and Technology*, 28.15 (2019).

the judicial preview authority as well as other constitutional authorities owned by the Constitutional Court.

Realizing the idea of expanding the authority of the Constitutional Court through the authority of judicial preview requires a qualified political will from the institution that holds the authority to make changes to the regulation that will become the legal basis for its regulation. If the effort to adopt the judicial preview authority of the Constitutional Court is intended to be regulated in the constitution, then in this context, it requires the political will of the MPR to make changes to the provisions in the 1945 Constitution of the Republic of Indonesia. However, the adoption is targeted to be regulated at the level of the law. In that case, the political will of the DPR and the government to amend the relevant law becomes the absolute answer to realize it.

In addition, the encouragement of various parties, especially legal practitioners and legal academics, is also needed to realize the adoption of judicial preview in Indonesia. Given the urgency of expanding the authority of the Constitutional Court through the authority of judicial preview, as stated in the previous description, the encouragement of various parties is very relevant to be rolled out so that the appropriate institutions that have the authority to regulate the idea of judicial preview authority can immediately realize it.

Conclusion

It is urgent to expand the Constitutional Court's authority through judicial preview authority based on a number of essential considerations. A large number of problematic laws, both in terms of content material and related to the process of their formation, the existence of limiting signs in the implementation of the judicial review authority possessed by the Constitutional Court, which is only limited to judicial review authority and the low quality and productivity of national legislation so far are several fundamental reasons for said how urgent it was to adopt judicial preview authority. Apart from that, it is very urgent to adopt the judicial preview authority to guarantee the constitutionality of draft laws, improve the quality of national legislation, and strengthen the existence of the Constitutional Court as the guardian and guardian of the Constitution. Through its judicial preview authority, the Constitutional Court can further guarantee and ensure that constitutional rules are accommodated in every draft law.

Considering the urgency of expanding the Constitutional Court's authority through judicial preview authority, it seems necessary to consider legal steps to provide an adequate legal basis to accommodate the authority in question. This legal step can be taken through amendments to the 1945 Constitution of the Republic of Indonesia by adding the phrase "testing draft laws against the Constitution" in the article that regulates the authority of the Constitutional Court. Apart from that, another alternative that can be used as a reference for regulating judicial preview authority is Article 24C paragraph (6) of the 1945 Constitution of the Republic of Indonesia, which, in principle, provides space to regulate the Constitutional Court in the form of a law. In this context, efforts to adopt an expansion of the Constitutional Court's authority through judicial preview authority can be carried out through changes to the law regarding the Constitutional Court. Efforts to test draft laws can be applied in Indonesia by adopting models implemented in other countries, such as testing practices implemented in France.

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