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Law Politics of Authority Separation of Judicial Review by Judiciary in Indonesia

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Abstract
Remarkable shift occurred after the amendment of the Constitution 1945, of the supremacy of the parliament to the supremacy of the constitution. Consequently, all legislation products starting from legislation until the lowest level whose constitutionality and legality can be reviewed toward the higher constitution and law and regulation. However, the arrangement of Article 24A paragraph (1) and Article 24C paragraph (1) that separates the authority in the field of judicial review of the Supreme Court and the Constitutional Court is only based on the technical and practical purposes in the perspective of the politics of law that is not ideal, so it is necessary to be amended and improved.
Keywords: judicial review, legal politic, and the constitution.

A. BACKGROUND

Before four amendment of the Constitution 1945, from 1999 to 2002, except in the Constitution of RIS 1949, the Constitution that is ever applied in Indonesia, both the beginning of Constitution 1945, the Provisional Constitution (UUDS) 1950, the Constitution 1945 that was reapplied by decree of president July 5 1959, it had not regulate the authority of the judiciary in the field of judicial review. Nevertheless, began in 1970, precisely through Law Number 14 of 1970 on Principles of Judicial Power has set up the Supreme Court's authority to conduct judicial review under the legislation done coinciding with handling concrete event on cassation level.[1] This provision is also further regulated in Law Number 14 of 1985, and Decree Number III / MPR / 2000.

After the Third Amendment of the Constitution 1945, on 19th of November 2001, the authority to do judicial review is given to the two judiciaries; the Supreme Court review the law and regulation under the laws in accordance with the provision of Article 24A paragraph (1) Constitution of Indonesia 1945, and the Constitutional Court review the law against the Constitution of Indonesia 1945, as stipulated in Article 24C point (1) Constitution of Indonesia 1945. So with these three changes, the authority of the judicial authorities to conduct review of law and regulation, the juridical legitimacy is strengthened and reinforced, if previously it was only regulated by law, namely Law Number 14 of 1970 on Judicial Power and its amendment, this time it is directly regulated in the Constitution/ Constitution of Indonesia 1945. In the previous time only the legislation under law that can be reviewed, but now the constitutionality of law can be reviewed by the Constitutional Court.

However, the advance in regulating judicial review is not running smoothly without problems. The main issues that will be the focus of this research is solving the authority of judicial review between the Supreme Court and the Constitutional Court as provided for in Article 24A paragraph (1) and Article 24C paragraph (1) Constitution 1945 of Indonesia. Because actually the kind and hierarchy of law and regulation of Indonesia, are in the same system that is integral in accordance with the legal norm theory, which is the theory *Stufenbau De Recht* or the *Hirarchi of law theory* by Hans Kelsen. This means that between one kind and hierarchy of law and regulation are related each other because of a unity of underlying value, until a highest value called *grundnorm* (Kelsen) or *staat fundamental norm* (Nawiaski) that then is regulated in Law Number 12 Year 2011 on the Establishment of law and regulation.[2]

Thus, according to the Indonesian legal system, legislation or any written law was organized in a one level that is called hierarchy of law and regulation. Sequence order shows the levels of each form that is concerned, which is called first has a higher position than the form that is called later (below it). In addition, the sequence order contains the consequences of the legal form of rules or provisions that has lower level must not contain material that is contrary to the material contained in a rule whose form is higher, instead of the matter of who is authorized to give a review of the material of rule and how the consequences are if a rule whose material is considered contrary to the material of higher rule.[3] This is in line with the legal principle of *lex superiori derogate legi inferiori* (higher law beats lower law). This is all aimed to create legal certainty in the system of law and regulation.

[1]Look at Article 26 UU Number 14 Year 1970 about the essence of Judicial Power.
[2]Look at Article 7 UU Number 12 Year 2011 aboutThe Establishment of Law and Regulation.
[3] Ni'matul Huda, *Negara Hukum, Demokrasi dan Yudicial Review,* (Yogyakarta: UII Press, 2005), page 50.

Therefore, the separation of powers in the field of judicial review of the Supreme Court and the Constitutional Court has caused philosophical, theoretical, and juridical problems. Philosophically, separation of these powers affect to the objective of the law that is not achieved and disrupt the unity of the value system of legislation, the theoretical separation of powers is contrary to the theory of state law, theory of legal politic, legal norms theory, and theory of review of legal norm. While legally can lead to conflict between the decision of the Supreme Court and the Constitutional Court (conflict of norm) and can create the impression that the Constitutional Court has a higher position than the Supreme Court.

From the discussion above, the problem that can be formulated is: what is legal politic of authority separation of judicial review conducted by one judiciary in Indonesia?

B. RESEARCH METHODS

This type of research is a normative legal research, which is research that reviews the law and regulation in a coherent legal system and the unwritten legal values that exist in the community. With the specific characteristic of jurisprudence, this kind of research / legal review*(rechtsbeoefening)* moves from the positive legal review whose study includes three layers of jurisprudence, that are dogmatic law, legal theory, and the philosophy of law. Specific characteristic *(sui generis)*of normative legal science by D.H.M. Meuwissen is characterized by: a) the empirical-analytical characteristic that provides exposition and analyzes the content and structure of the law, b) systematization of symptoms of law, c) interpretation of the enforced law, d) review the enforced law, and e) the practical significance of jurisprudence that is closely related to normative dimension.[1]

C. DISCUSSION

1. Definition of Legal Politic

The term of legal politic comes from Dutch is *"rechts-politiek"* that is formed by two words *"rechts"* (the law) and *"politiek"* (politics). Between these two words there is a close relationship, although each word has a different meaning. To better understand the relationship between the two words, firstly it is important to know the meaning of politics and law.

Moreover, for the definition of legal politic there are many opinions of experts as described in the theoretical basis in chapter 2 above, which basically states that the operational definition of the politics of law is the basic policy of state officials in the field of law that will, is and has been applied, which is based on the values that exist in society to achieve the aspired purposes of state.[2] In other words, national legal politic contains two main meanings that are running in dialectic way: first, as a legal policy and secondly, as an instrument to review and criticize (controller instrument) whether the law that is created is appropriate or not with the framework of that legal policy. As legal policy, legal politic is served as a blueprint to determine the achievement direction ofcountry's objectives contained in various products of law and regulation, jurisprudence and constitutional convention. In contrast, the law as an instrument of controller instrument means that in applying the law, the state through its organs is functioned to keep the legal policy running in accordance with the function.[3]

2. Legal Politic of Regulating Judicial Review Conducted by Judiciary in Indonesia before The Amendment of Constitution 1945.

A discussion of the legal politic of regulating authority of judicial review conducted by the judiciary before the amendment of the Constitution 1945 is divided by its periodization that is :, first, before 1970 the Constitution 1945 starts to be applied, the Constitution of RIS, Provisional Constitution (UUDS 1950), back to the Constitution 1945 by presidential decree; second, the period 1970-2000; and third, the period 2001 / after third amendment of Constitution of Indonesia 1945 (for the third period, it will be discussed in the next sub-sections of legal politic of regulating authority separation of judicial review between the Supreme Court and the Constitutional Court).

a. Period Before 1970

1) Time Period 1945-1949

Normatively Constitution 1945 does not set out clearly about judicial review, so that in the first period of implementation of the 1945 Constitution, there is no provision that regulates judicial review, due to forming of the 1945 Constitution did not intend it.

If it is traced, the developed debate during the arrangement of the Constitution, then the matter is a judicial review. The question that arises is what if the parameter is a legal product under the

[1] D.H.M. Meuwissen, *In Apeldoom's Inleiding Tot de Studie van het Nederlandse Recht,* W.E.J. Tjeenk Zwolle, 1985, page 446-447.

[2] Imam Syaukani, A. Ahsin Tohari, *Dasar Dasar Politik Hukum,* (Jakarta: Raja Grafindo Persada, 2006), hlm. 58.

[3] Seminar Arah Pembangunan Hukum Menurut UUD 1945, Hasil Amandemen, Departemen Hukum dan HAM RI, Badan Pembinaan Hukum Nasional, hlm. 62.

Constitution, such as MPR decree? if it is based on the opinion of Sri Soemantri.[1] By underlying on the condition that the MPR according to Constitution 1945 is a holder of society's sovereignty.[2]

This principle would lead to the consequence that MPR has a position or as the highest institution, so that the position of other state institutions are under MPR degree, as President, Parliament, DPA, the CPC and the Supreme Court.

Based on this consideration, the legal product that will be issued by state institutions under MPR may not be contrary to the legal product issued by MPR. Thus, the legal product that is in the state institutions under MPR can be reviewed against laws issued by MPR. The problem is, to which institutions the authority of judicial review is given? If you follow that logic, then the proper institution has a function to do judicial review is MPR, because this institution is a representation of the society's sovereignty, so that MPR has the highest authority, or a particular state institution designated by MPR.

However, throughout the history of the state administration in 1945-1949, it has never been done because there are no norms that regulate it, so the judicial review is not regulated explicitly in the basic regulations and other laws and regulations, nor there is any institution appointed to carry out thatreview function. Thus, based on the theory of legal politicin this period, the position of Assembly/ Parliament as the highest state institutions (supremacy) which embodies the sovereignty of the people, so that the legal products which are made cannot be judged and reviewed by other state institutions, including the institution of judicial power. This was confirmed by the provision of Article 1 (2) of the Constitution 1945 (before the amendment) which states that sovereignty is on people's hand, and performed entirely by the Assembly. Thus, in Chapter IX Article 24 and Article 25, which regulates the judicial power do not regulate the authority of the judiciary in the field of judicial review.

From the perspective of the theory of constitutional state, such a situation has not been ideal yet, because it has not fulfilled the elements of constitutional state as presented by A.V. Dicey, that the constitutional state known as "The Rule of Law", there are three important characteristics in any constitutional state, which are[3]: 1). Supremacy of Law. 2). Equality before the law. And 3). Due to the Process of Law. On the other hand,the institution which has supremacy is the parliament / assembly, not the supremacy of law. In addition, the element of human rights protection as required by Julius Stahl in his *rechtsstaat*[4] concept is not guaranteed, because if there is a legal product that is issued by the parliament (MPR / DPR) which breaks or potentially breaks human rights, no other state institutions including the institution of judicial power that can judge or review.

2) Time Period 1949-1950

In this period the basic law that was applied is the Constitution of the Republic of United Indonesia (RIS). The form of state is a federation,[5] in which the sovereignty is conducted by governments together with the House of Representatives and the Senate.[6]It means that sovereignty was carried out entirely by the government together with House of Representatives and the Senate, and the form is existed in the form of federal laws.

Therefore, all legal products issued by the holder of people' sovereignty, which are the Government, Parliament, and the Senate that is in the form of a federal law is not possible or not allowed to be reviewed by institutions beyond the three institutions that make it.[7] Provision that states 'Federal law that is inviolable', also including or cannot be reviewed judicially, because the urgent law that is made by the government has the same position with federal laws. Thus, the law that can be judged or reviewed judicially is federal laws and urgent laws (federal).[8]

However, local law can be reviewed by the parameter of federal law.[9]The institution that is given the authority to conduct judicial review on local law and regulation whose part is contrary to RIS Constitution and federal law is the Supreme Court either simultaneously with the handling of civil cases are handled or at the request of the Attorney General, or by the highest District Attorney.[10]Thus,

[1] Sri Soemantri Matosoewignjo, *Hak Uji Materiil di Indonesia,* Bandung: Alumni, 1997, edisi ke-2, cet. Ke-1., page 51-57.
[2]Look at Article 1 point (2) UUD 1945 (before the amendment)
[3]Jimly Asshidiqie. *Cita Negara Hukum Indonesia Kontemporer.*(Palembang : Orasi Ilmiah pada Wisuda Sarjana Fakultas Hukum Universitas Sriwijaya, 23 Maret 2006).
[4]*Ibid.*
[5]*Ibid.*
[6]Look at Article 1 point (2) RIS Constitution.
[7]Look at Article 127, 128 point (1), and point (2), Article 130 point (2) RIS Constitution.
[8]Look at Article 139 point (1) RIS Constitution.
[9]Look at Article 156 point (1), and (2), Article 157 point (1), and (2), Article 158 point (1) – point (5) RIS Constitution.
[10]Look at Article 156 point (1) and (2) RIS Constitution.

the Supreme Court as a 'subject' that is given the authority by the Constitution RIS to do judicial review, because it is based on the provisions of Article 147 paragraph (1) of the Constitution RIS, the Supreme Court is a institution that hold and do highest federal judicial power.

Because this constitution is applied in a short period, which isregulated since December 27, 1949 until August 17, 1950 and regulated in the turbulent political atmosphere, then that provision it self cannot be implemented properly. However, during the implementation of the Constitution RIS it has established Law Number 1 Year 1950 on the Supreme Court. In the perspective of theory of legal norm review, the Supreme Court isgiven the authority and function to dojudicial review.[1]

From the perspective of theory of legal politic and theory of constitutional state, in the period of Constitution RIS is in the field of judicial reviewis relatively the same as at the time under the Constitution 1945 (the first period), it sets Parliament (House of Representatives / Senate) assupreme institutions, so the legal product namely the Federal Law and Law cannot be judged or reviewed by the institution of judicial power (the Supreme Court), but under the constitution RIS it had regulated the authority of the institution of judicial power (the Supreme Court) in the field of judicial review even though the object is still limited to law and regulation under Federal Laws and the Urgent Laws.

3) Time Period 1950-1959

The Provisional Constitution 1950 or abbreviated as UUDS 1950 was born in 1950 as a statement of the return of the Unitary Republic of Indonesia.[2] Although the substance of the Provisional Constitution 1950 is largely derived from the Constitution RIS, but the principle of the Unitary State differed it toward the principles of the Constitution RIS. As in the Constitution RIS, the Provisional Constitution 1950 also adopts that 'law is inviolable'.[3]

In addition, legislation is inviolable also include urgent laws. It is based on Article 96 point (1) and (2) which are completely explained as follows.

Article 96 paragraph (1):

"The government has right for powers and responsibilities to decide urgent laws to regulate matters of government implementation due to urgent conditions need to be regulated immediately";

Article 96 paragraph (2):

"Urgent law has the power and the degree of Law, this provision does not decrease specified things in the following Article."

In the perspective of judicial review, then judicial review itself judicially or in terms of judicial review is not recognized in the Provisional Constitution 1950. As well as the Constitution 1945, then the judicial review that is not intended and regulated is based on an understanding of people's sovereignty. In Provisional Constitution 1950, the holders and implementers of people's sovereignty are in the hands of the government and the House of Representatives, so the legal product of both institutions of holders of people's sovereignty cannot be violated by other state institutions.[4]

Thus, it is clear from the perspective of theory of legal politic and theory of constitutional state, in the period of the Provisional Constitution in the field of judicial review is relatively the same as at the time under the Constitution 1945 (the first period), sets Parliament as a supreme institution, even the government is set as executor of the sovereignty of the people, so all products of law and regulation that are issued cannot be judged or reviewed by the institution of judicial power (the Supreme Court).

4) Time Period 1959-1970

This period is the period when the Constitution 1945 is reapplied after the Provisional Constitution 1950, which is based on Presidential Decree of July 5, 1959, due to the Constituent as an institution that is authorized to arrange the Constitution is considered fail to prepare and establish the Constitution.

RI Presidential Decree July 5, 1959 has politically denied the results of the 1955 elections, although initially it is only aimed at three things; The first, the dissolution of the constituent; second, the determination of the re-implementation of the Constitution 1945 and the Constitution 1950 is no longer applied; Third, the establishment of the Provisional Assembly and the Provisional Supreme

[1] UU Number 1 Year 1950 about Supreme Court starts to be applied on May, 9 1950.

[2] Endang Saifuddin Anshari, *Piagam Jakarta 22 Juni 1945 dan Sejarah Konsensus Nasional antara Nasionalis Islami dan Nasional "Sekuler" tentang Dasar Negara Republik Indonesia 1945 – 1959,* (Bandung: Pustaka-Perpustakaan Salman, 1981), page 181-182.

[3] Look at Article 95 point (2) UUDS 1950.

[4] Look at Article 1 point (1) and (2) UUDS 1950. The complete content of Article 1 point (1) : *"Republik Indonesia yang mereka dan berdaulat adalah suatu Negara hukum yang demokratis yang berbentuk kesatuan.* While the content of Article 1 point (2) is: *"Kedaulatan Republik Indonesia adalah di tangan rakyatdan dilakukan oleh pemerintah bersama-sama dengan Dewan Perwakilan Rakyat."*

Advisory Council.[1]

Thirdly, the substance of the Presidential Decree provides an indication of the temporariness of various state equipment tools.[2]That temporariness can also be seen from the basic of consideration of Presidential Decree of 5th July 1959.[3] Therefore, in thistemporary condition, so the determination of guided democracy appears where power center is on one hand, the president.[4]

In the perspective of judicial power, in this period two laws were born, which are Law Number 19 Year 1964 on Basic Provisions on Judicial Power and Law Number 13 Year 1965 concerns onthe Courts of the General Court area and the Supreme Court. Both of these laws, the controller tool in this case is the president in supporting the revolution thatis conducted by the government in the judicial field, so that institutionally the judicial power is under pressure and government monitoring.[5]

The second birth of this law is animplementationof decision of MPRS Number II / MPRS / 1960, so that the institutional power of the judiciary (the Supreme Court and judicial institution underneath it) has foundation in accordance with the spirit embodied in Presidential Decree of 5th of July 1959. Several articles in both laws confirms that the court is a tool of revolution,[6] and even the president is allowed to stop the process of examination in court by reason of the constitutional interest and the revolution.[7]

In the perspective of theory of judicial review, it was originally introduced by the Constitution RIS, then in this period (1959-1970) in which the judicial authority in a position that is neither free nor independent and even under government supervision, self-review laws law in the sense of judicial review by the Supreme Court is not known. Substance of normative judicial review is not regulated in the basic regulations such as the 1945 Constitution and MPRS and legislation such as Law Number 19 of 1964 and Law Number 13 1965. Because the substance of judicial review is not regulated or introduced by the basic rules and other regulations, then the 'institution' itself is given legal authority to review the product in the form of laws against the Constitution and the regulations under Law does not exist.

Thus, from the perspective of legal politictheory in this period under the system of guided democracy and the transition from the old order to the new order, made all state institutions including the judiciary / judicial power institution under the control of the President and used as a tool of revolution, so that the judiciary cannot/ do not have the authority to judge and review law and regulation.

Meanwhile, from the perspective of the theory of constitutional state, this period is not ideal, because instead ofit is not law that has supremacy, also did not meet the elements of *due process of law*, because the judicial power may be intervened by the President.

b. The period 1970-2000.

The fierce debate that happens among the judges who are involved in IKAHI with the government which at that time the judge is under government's monitoring, is an interesting phenomenon and made hope to hold the democracy. It shows that in the early growth of the New Order,its political configuration leads to the democracy, so the society's political participation can be channeled properly.

It has an impact on the flow of support from all sides toward the new authority. However, this condition has not been able to provide political support to create legal politic in the field of judicial authority as required by the Constitution 1945. It is clearly seen that the reason of the government's rejection to the demands of the independence / separation of the judiciary from the Ministry of justice or the power is by reviewing the product of law that is contrary to legislation on it.[8]

Hence, the implementation of Law Number 14 Year 1970 is not the result of a compromise of a long debate between the two groups above, but it is the coercion of government's intention. Although DPR (GR) has great access in deciding the product of laws, but in terms of the arrangement of the Law Number 14 1970 sides more with the government.

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[1] Zainal Arifin Hoesein, *Judicial Review di Mahkamah Agung RI, Tiga Dekade Pengujian Peraturan Perundang-undangan,* Jakarta: Raja Grafindo Grafika, 2009, page 184.

[2] Ending Saifuddin Anshari, *Op.Cit.,* page 143.

[3] Look at"Konsideran dektrit Presiden 5 Juli 1959", which is decided through President's Decree Number 150 year 1959 which is announced through "Lembaran Negara RI Year 1959, Number 75."

[4] Look at Chapter II MPRS's provision Number: VIII/MPRS/1965.

[5] Look atprovision of Article 19 UU Number 19 Year 1964.

[6] Look at Article 6 point (1) and (2) UU Number 13 Year 1965 jo. Article 3 UU Number 19 Year 1964.

[7] Look at Article 19 UU Number 19 Year 1964.

[8] Oemar Seno Adji, *Peradilan Bebas Negara Hukum,* (Jakarta: Erlangga, 1980).

In connection with the IKAHI's proposal and political intention of government that are not in line, Daniel S. Lev gives review:

"... That the judges of Indonesia with few exceptions, does not tends to have a stock of functional independence spirit when they feel that they are civil servants, officials, or when have another feelings like it, which became part of the layers of bureaucracy which became a place of attachment ofhigh status."

The provision that regulates the authority of the Supreme Court in the field of judicial review in the period 1970-2000 stated in Article 26 of Law Number 14 Year 1970; Article 11 of MPR Decree Number III / MPR / 1978, and Article 31 of Law Number 14 Year1985, as well as Article 5, paragraph (2) MPR Decree Number III /MPR /2000.

Article 26 of Law Number 14 Year 1970 explains that;

(1) The Supreme Court has the authority to declare invalid for all legislation from the lower level of the legislation because it iscontrary to the higher law and regulation;

(2) A decision on the statement of invalid legislation is taken in connection with the examination in the cassation level.

Article 11 of Decree Number III / MPR / 1978 regulates:

(1) The Supreme Court is the institution that conducts judicial power which is in the implementation of his duty got off the influence of government's power and other influences;

(2) The Supreme Court gives considerations in the field of law, whether requested or not, to the high institutions;

(3) The Supreme Court provides legal advice to the President / Head of State for granting / rejection of clemency;

(4) The Supreme Court has the authority to reviewmaterially only to the law and regulation of law under the Law.

Article 31 of Law Number 14 Year 1985 about the Supreme Court:

(1) The Supreme Court has the authority to review materially only to the law and regulation under the Law;

(2) The Supreme Court declared invalid for all law and regulation of a lower level than the law, because it is contrary to higherlaw and regulation;

(3) The decision on the validity of that law and regulation can be taken in connection with the examination of the cassation level.

Article 5 (1) and (2) MPR Decree Number III / MPR / 2000 states that:

(1) The People's Consultative Assembly has the authority to review the law toward the Constitution of Indonesia 1945, and the determination of The Assembly;

(2) The Supreme Court has the authority to review the law and regulation under the legislation.

Based on the provisions above, then in the period 1970-2000 the judiciary that is authorized by law and Decree of The Assembly to conductjudicial review is the Supreme Court, with its object that is the law and regulation under the law against legislation. In contrast, for the legislation, *'legislative review'* can be done by the Assembly against the Constitution 1945 and Decree of The Assembly.[1]

However, from the perspective of theory of legal norm review, the authority of judicial review by the Supreme Court to review the law and regulation under the law cannot run effectively, that because: 1) the normative reason is the authority of the judicial review that only can be done on cassation leveltogether with its case investigation,[2] and 2) political reason, because the strength of the executive power to intervene branches of other powers, including the power in the field of judiciary/ court.

In the perspective of legal politic theory, regulatory of authority of judicial review in this period, in terms of object that has led to the enforcement of the supremacy of law, which is by making all product of law and legislation ranging from the Law until the low level as an object in reviewingthe legal norm, but if you look the subjects who were given the authority, it has not fully lead to the enforcement of the supremacy of law, because the Supreme Court as an institution that implement the judicial powerwas only given authority to do judicial review under the legislation, while for subject who has the authority to review Constitution is MPR (political institution). Thus, in this period the parliament is still put as an institution that is supreme of other state institutions.

3. Legal Politic of Authority Separation of Judicial Review in Indonesia after Amendment of the Constitution 1945.

In the perspective of the Constitution of the Republic of Indonesia Year 19 945 after the third

[1]Look at the provision of Article 5 point (1) MPR's Decree Number III/MPR/2000.

[2] Look at Article 26 point(2) UU Number 14 Year 1970 about provisions of main judicial power.

amendment Year 2001, the judicial review is substantive (object) and institutional (subject) is also changing as stipulated in Article 24 point (2), Article 24A point (1), and Article 24C point (1). The content of those Articles areexplained as follows:

Article 24 point (2):

"Judicial power is done by a Supreme Court and judiciary underneath it in the public court area, religious court area, military court area, administrative courtarea, and by a Constitutional Court."

24A point (1):

"The Supreme Court has authority to hear in the cassation level, do judicial review under law against the law, and have other authorities provided by law."

Article 24C point (1):

"The Constitutional Court has the authority to hear at the first and last level, whose decision is final to review law against Constitution, decide lawsuit of authority of state institutions whose authority is granted by the Constitution, decide the dissolution of political parties, and to decide disputes on results of the elections."

Thus, the Constitution of the Republic of Indonesia 1945decides that 'subject' or a state institution that is given authority to conductjudicial review is 'Constitutional Court' and 'Supreme Court'.

Elaboration of provisions on the duties and functions of the institution of judicial power is further regulated in Article 10 paragraph (1), (2) and (3) of Law Number 23 Year 2003 about the Constitutional Court, as amended by Law Number 8 of 2011; Article 11 (2) and (3) of Law Number 4 Year 2004 about Judicial Power,[1] and Article 31 paragraph (1) through (5) and Article 31A paragraph (1) through (7) of Law Number 5 of 2004 on the Amendment of Law Number 14 Year 1985 about the Supreme Court.

The provisions of the various laws and regulations as a elaboration of Article 24A paragraph (1) and Article 24C paragraph (1) Constitution of the Republic of Indonesia Year 1945, in the perspective of the theory of authority and theory of judicial review basically states that the Supreme Court is given authority to conduct judicial review under law against the law, while the Constitutional Court has the authority to conduct review of lawtoward theConstitution.

The question that arises is why does the Constitution 1945 (after amendment) regulate the institutional function of judicial review thatis attached to the two institutions of judicial power? Does not it lead to institutional function dualism of judicial review, even if the object is distinguished? From the perspective of legal politic, what is the actual purpose of thatauthority separation?

When examiningcarefully, the arrangement of Article 24A and Article 24C of the Constitution of the Republic of Indonesia Year 1945 shows their willingness to provide the opportunity of developing normative control towardany legal products as political decision in order to keep the consistency and harmonization of the normative legal products hierarchically in a democratic constitutional state. However, when discussing organization/ institutionalization ofthe function of judicial review, thereisfairly long debate, that is the institution of the Supreme Court just by adding the function and structure of the organ or making other state institution separated from the Supreme Court with the duties and authority of judicialreviewthat is attached to that institution.

In this connection, there are various opinions that are developed before the arrangement of Article 24A and 24C are finally agreed. But generally, the debate can be categorized into two groups: first, do organizingof judicial review is sufficient to be conducted in the Supreme Court; and second, the organization must be done by a separate institution such as the Constitutional Court which is separated from the Supreme Court.

Adnan Buyung Nasution has an opinion that the judicial power according to the principles of a democratic constitutional state must be completely free, independent and impartial. Therefore, it should be explicitly defined in the Constitution that the judicial power should be on the Supreme Court as the culmination of the entire judiciaries. To maintain the independence, the Supreme Court manages his own household, either organization, administrative, personnel, and budget.[2]

In the perspective of judicial review, the Supreme Court should be given the right to review

[1]At this moment the provision of Article 11 point (2) and (3) have been changed with the provisionof Article 18 UU Number 48 Year 2009 about Judicial Power.

[2] Adnan Buyung Nasution, *Konsep Pokok penyelenggara Negara dan Metode Perubahan UUD – Reformasi Konstitusi di Indonesia,* the paper is delivered in Semiloka 'Rancangan Perubahan UUD 1945', held by The Habibie Center, Jakarta 1-4th of October 2001, page 10.

the Law materially, and the legislation under it. Even the Supreme Court is authorized to decide a dispute that happens between the House of Representatives, Senate and president.[1]

Similarly, the result of the Research Centre for Research and Development of Society and Culture - Indonesian Institute of Sciences (LIPI) in 1999, concluded that the Supreme Court should be given the authority to conduct judicial review, not only law and regulation under the lawtoward the legislation, but also lawtoward theConstitution.[2] The conclusion of this study indicate that the Supreme Court is the only institution that has the competence to conductjudicial review and it should be explicitly stated in the constitution.

In 2001Research and Development Center for Social and Culture-LIPI developed research result of Amendment ofConstitution 1945 and Issues in 1999. The study was carried out in cooperation of LIPI with the Hans Seidel Foundation titled 'Repositioning the State Agency - An Effort to Reach New Indonesia. One of the conclusions of the study stated that judicial reviewwas still in the below the Supreme Court, but its organization is put on a Constitutional Court or in other words, putting judicial review in a separate room in the institution of the Supreme Court. One of conclusions of the study can be stated as follows:

> "Considering the burden which is owned by the Supreme Court is currently quite heavy, some expressed the view that the 'judicial review' should not be done by MA, but it needs to establish new institution to implement them, which is the Constitutional Court (MK). But about the position, whether it is standing alone or under MA, in this case there are different views. Some of the views expressed that it should stand on its own because the authority is different from the Supreme Court. However, considering the need for efficiency, MK should enough to be under the MA. In order thatthe MA's burden did not increase, the strongervision is that MK is served as a special part of the MA. Thus, supreme judges in the Supreme Court did not deal with other problems, unless the specific duties of the Constitutional Court. In addition, the Constitutional Court should not only have the power of judicial review, but also authority related to the constitution, which includes the authority to give a final interpretation of the constitution and other products of law and regulation, decide dissolution of political parties, and the court of cassation for gross human rights violation."[3]

Organizing judicial reviewas described above, is also a discussion of the third amendment of the Constitution1945 of Committee A - annual session in 2001.[4] In the discussion about the amendmentofConstitution 1945 on Chapter IV of the Supreme Court of the session 1-3 October 1999, Factions in MPR convey his opinions on the authority of MA, one of them is to review the law and regulation under the legislation.[5] However, after the third amendment of the Constitution 1945 stipulated on November 9, 2001, on the final arrangement of article 24A it is asserted that the Supreme Court had authority to review the law and regulation under law toward the law.[6]

The design of the authority of the Constitutional Court in a judicial review, all factions within the Committee agreed that the Constitutional Court that will be madehas the authority to review the law against the Constitution. The debate in PAH I is dealing withany rules that will be reviewed by the Constitutional Court and how the mechanism is. Some proposed that the Constitutional Court doesnot only to review the law against the Constitution, but alsoreview law and regulation under the law against the Constitution and others wanted the Constitutional Court to only reviewlaw against the Constitution while the regulations under the legislation still becomes the authority of the Supreme Court.[7]

This debate, instead of discussing the principles of judicial power, it also discusses the arrangement of judicial reviewwhose entire material has been prepared by the Ad Hoc Committee (PAH) I The Executive Institution of the MPR. A debate in the Commission is narrowed to two alternatives, which are firstly, the objectof judicial review is separated,which is the law and regulation under the law against law and law against the constitution. Secondly, the subject of the executor is also adjusted, the regulation under constitution is attached to the Supreme Court and the

[1] *Ibid,* page 11.
[2] The Research Institution of Indonesia (LIPI), Amendment ofConstitution 1945 and its problem, Research and Development Center of Society and Culture – LIPI and Hans Seidel Foundation, Jakarta Year 2001.
[3] *Ibid,* page 121.
[4] Look atLetter of Meeting of 3th-5th of Committee A (continuation) 6th – 8th of November 2001 on annual session MPR RI year 2001, Secretary of General MPR RI, *Buku Ke Empat Jilid 2A,* year 2001.
[5] Loo at Factionsin, *Naskah Komprehensif Perubahan UUD NRI Tahun 1945, Buku IV Kekuasaan Kehakiman,* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008), page 133-140.
[6] *Ibid,* page 279-281.
[7] *Ibid,* page 338-342.

law against the constitution is attached to the Constitutional Court.[1]

Thoughts that are developed in the session of the Commission A of the Annual Session of the MPR of 2001, in contrast with the debate and arrangement of PAH 1 MPR Worker Institution conducts intensive discussions with anexpert team.[2] When discussing about the judicial power, a an expert team points Prof. Dr. Asshiddiqie, SH to deliver some of arrangement of proposal of material related to the judicial review proposed by the Expert Team, that the objects associated with the judicial review do not need to be detached, but in accordance with the hierarchy of law and regulation, which is the implementation to the low level and subject or its organization put on the Constitutional Court and released from the authority of the Supreme Court.[3]

Then, the Expert Team explains that proposal that is related to judicial review as follows:

> "... Then we propose to specify this Article 24, a new Article 24A, the Constitutional Court has the authority to hear cases at the first and the last, to review the material of law and regulation and regulation under the law, to give a decision on the opposition or disputes between state institutions, between the central and regional government, and among regional government in implementing their law and regulation as well as running other authorities provided by law.
> .....so in other words Constitution Court, we propose to have three powers: 1. Its authority is the Right of the Material Review. Starting from the law to the low level. This right of material reviewis passive, what we are proposing is passive, which means do not look for actively, depending on if there is the case then there's the suit to be resolved. Because, if he is looking for, instead of becoming heavy for the Constitutional Court itself and that later it could be a dispute between itself and the legislature and regulatory institutions, as if he conducts executive functions included in developing the harmonization of rules. Therefore, it is maintained because it is passive....."[4]

The proposal of Constitutional Court's authority in judicial review is also done integrally by I Dewa Gede Palguna of F-PDIP. Palguna proposes that the Constitutional Court has the authority to:[5]

Review the law and regulation under the law (judicial function);

- Give consideration to the House of Representatives that House of Representatives want to ask the court of the Assembly dealing with the report on the behavior of the President who betrayed the country and / or degrading prestige of the presidency;
- Give a final decision on the dissolution of a political party;
- Give a decision if there is a dispute between the central government and the autonomous local government;
- Give a decision on the lawsuit that is based on the Constitution.

In the 36th Plenary Meeting of PAH I BP MPR, Asnawi Latief of F-PDU states:[6]

> Therefore the proposal of the existence of Constitutional Court is sympathetic and also supported by the Expert Team, which functions we've affirmed yesterday.
>
> Firstly, the Constitutional Court is subject that makesthe decision on the disagreement or dispute between the institutions in conducting the law and regulation.
>
> Secondly, we give the Constitutional Court right to conduct judicial material review. Thus, from the legislation to bottom.
>
> Third, the resolution of election dispute and others which is related to the election.
>
> The fourth, it deals with the matter of impeachment.
>
> Fifth, the proposal of dissolution of political parties

In contrast, Agun Gunandjar of F-PG proposed a different, which is:[7]

> Then it comes to the function matter, the authority problem, the first thing he did in this case is conducting judicial review against the law, against the Constitution. Only that matter that is restricted. The function to do material review toward the law and regulation under it is not

[1] *Ibid,* page 2-57.
[2] The expert team consists ofPolitical, Legal, Economic, Education, Religionand Social Culture. The expert teamis lead by Prof. Dr. Ismail Sunny, S.H.
[3] *Ibid*page224-231.
[4] *Ibid,* page 231-232.
[5] Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002 Buku VI Kekuasaan Kehakiman*, (Jakarta: Sekretarian Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2010),page 459.
[6] *Ibid.,*page 547-548.
[7] *Ibid.,*page 548-549.

conducted by the Constitutional Court.

Based on some thoughts that are developed dealing with the organizing judicial review that is mentioned above, it can be concluded that the essential difference lies inthe practical / technical substance. The first group prefers in terms of practical / technical matter and effectiveness and efficiency, while the second group preferssubstantive point first. Substantively, there is no relevance to separate the object of judicial review especially separating its organization at two different institutions. This is because the position and function of judicial review is a normative control to maintain the normative consistency and harmonization vertically, so that the democratic constitutional state can be maintained and realized in various forms of responsive law and regulation.

Differentiation on authority of judicial review between the Supreme Court and the Constitutional Court cannot actually be removed from reality that is since in the previous time Supreme Court has authority to review the legislation under the law as stipulated in Law Number 14 of 1970, Law Number 14 of 1985 and Decree Number III / MPR / 2000. Therefore when the idea of the adoptionis agreed to the establishment of the Constitutional Court in the third amendment of Constitution 1945 in 2001, the old provision regarding the authority of the Supreme Court stated in the formulation of Article 24A paragraph (1) Constitution 1945. Moreover, there are other countries that are considered as source of inspiration by the members of the Ad Hoc Committee I Working Committee of the Assembly when formulating the provisions on this Court, the Constitutional Court of South Korea. In the South Korean constitution, judicial review authority (Constitutional Review) of the constitution that was given to the Court but the authority of a judicial review of law and regulation under the law is given to the Supreme Court.[1]

In the perspective of the theory of authority of judicial power, separation of judicial reviewauthority between the Supreme Court and the Constitutional Court is not actually a problem, because it is directly attributable authority of the constitution. However, when it is viewed from the aims and objectives of the establishment of the Constitutional Court and its principal function, which is as the guardian and interpreter of the Constitution, then the institution that is surely more appropriate to be authorized judicial review is a Constitutional Court.

Meanwhile, in the perspective of theory of legal politic of the debate in the Proceedings of the Constitution 1945 amendment by the Assembly, it is known that in fact it had the idea to unify review under one roof of Constitutional Court but depth elaboration did not appear either philosophically or theoretically as well as the juridical consequence, so that it was finally approved by the MPR which separates the judicial review to the authority of the Supreme Court and the Constitutional Court as it can now be read in Article 24A paragraph (1) and Article 24C paragraph (1) of the Constitution 1945 for practical reasons and technically because the Supreme Court already has such authority before. However, by inserting the legislation as an object of judicial review by the judiciary, it has put the law and regulation (constitution) over the power of state institution including the parliament.

From the perspective of the theory of the constitutional state, separation of authorityof judicial reviewbecomes not ideal, because it potentially createsthe legal certainty that is not a result of a decision that has the potential to be different, and potentially violates human rights.

D. CONCLUSION

From the description in the discussion above, it can be concluded as follows: first, the politic of law ofjudicial review before the amendment of the Constitution 1945 puts the parliament as an institution that sovereignty (supremacy of parliament) so that the laws are born not to be reviewed by the judiciary, Second, the legal politic of setting of judicial reviewafter the amendment of the Constitution 1945 has put the supremacy of the constitution, so that the laws can be petitioned for judicial review by the judiciary. And third, the legal politic of separation of authority in the field of judicial review of the Supreme Court and Constitutional Court is only based on technical and practical reasons, because the Supreme Court already has such authority before, so it is maintained.

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[1] Jimly Assiddiqie, *Kontitusi dan Konstitusionalisme Indonesia,* (Jakarta, Mahkamah Konstitusi RI dan Pusat Studi Hukum Tata Negara Fakultas Hukum UI, 2004), page 190.

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