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CHARACTERISTICS OF THE RESTRICTIONS OF JUDICIAL REVIEW IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

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Abstract: *Article 60 Paragraph (1) Mahkamah Konstitusi (Constitutional Court, CC) Act prohibits double jeopardy in judicial review, meanwhile, the regulation of Paragraph (2) provides an exception if there is a difference in constitutional norms from the previous review. Similar norms are also found in Article 42 Peraturan Mahkamah Konstitusi (Constitutional Court Regulation, CCR) Number 06/PMK/2005. However, the two regulations provide different exceptions regarding the limitation of cases, causing problems: whether the parameters of restriction of judicial review at CC? This study uses normative judicial research methods, with literature data collection techniques. From the research using this deconstruction theory, it is found that the parameters of the petition that cannot be re-reviewed are determined by the reasons for the Petitioner's petition. Because the exemption provisions in the form of "reasons for a petition" in Article 42 Paragraph (2) CCR Number 06/PMK/2005 are more abstract than the "basic petition" element in Article 60 Paragraph (2) of the CC Act which is limited based on the articles in the 1945 Constitution of the Republic of Indonesia.*

Key Words: *Characteristics, Restriction of Judicial Review, Constitutional Court of The Republic of Indonesia.*

1. INTRODUCTION:

The Constitutional Court of the Republic of Indonesia (CC) is the first and last constitutional court whose decisions are binding, so that Article 60 Paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court as Amended by Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court, and Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court (CC Act) regulates restrictions on judicial review. Whereas a provision of a law that has been reviewed cannot be re-filed for review, however Article 60 Paragraph (2) provides an exception if the articles in the 1945 Constitution of the Republic of Indonesia which are used as a measure of constitutionality differ from the previous review. The same is also regulated in Article 42 Paragraph (1) of the Constitutional Court Regulation (CCR) Number 6/PMK/2005 concerning Guidelines for Procedures in Judicial Review Cases. However, the exception to Article 42 Paragraph (2) PMK Number 6/PMK/2005 stipulates that a law that has been submitted for review can be re-reviewed if there are differences in the reasons for the application from the previous case.

If we observe again, there are exceptions to the two sources of the CC procedural law. If the elements of Article 60 Paragraph (2) of the CC Act stipulate an exception in the form of *"basic petition"* which means normative based on the articles of the 1945 Constitution of the Republic of Indonesia, while Article 42 Paragraph (2) CCR adheres to the element of *"reasons for a petition"* which are not only based on articles of the 1945 Constitution of the Republic of Indonesia. As a result, the parameters of limiting judicial review in the midst of a landscape of petition that cannot be re-reviewed have become very relative. This is because the reasons for the Petitioners' petition against the same legal provisions are very likely to be different and similarities may only be found after being compared with one another.

This situation occurred in the CC decision Number 78/PUU-X/2012. The Petitioners petitioned for the review of Article 197 Paragraph (2) of Law Number 8 of 1981 Concerning Criminal Procedure Law which was reviewed by Article 1 Paragraph (3) and Article 28D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. In essence, the Petitioner questioned that almost all of the appeal decisions and cassation was read out in a mock open session to the public.[1] Because, the trial was only attended by judges and clerks, while the general public could not attend the verdict because the court was not open in providing a schedule of decisions to the public. The Court in this decision argued that the petition for review of Article 197 Paragraph (2) of Law Number 8 Year 1981 was *ne bis in idem*.[2] In the opinion of the Court, this is because the object of reviewed had previously been decided in CC decision Number 69/PUU-X/2012 which was reviewed by Article 1 Paragraph (3), Article 28D Paragraph (1), and Article 28G Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Both decisions the Court rejected the petition in its entirety, however in its opinion the Court explicitly argued that the main petition was the same. Furthermore, Article 197 is

petitioned again to be reviewed in case Number 53/PUU-XI/2013 with the of Article 1 Paragraph (3) and Article 28D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The Court again argued the *ne bis in idem* case and stated that the petition cannot be accepted.[3]

2. CONCEPTUAL FRAMEWORK:

a. Judicial Review

Judicial review in Indonesia was born after the constitutional reformation as a form of manifestation of constitutional supremacy. The judicial review mechanism is carried out by the CC as an actor of judicial power that is equal to the Supreme Court, and also parallel to other state institutions from different branches of power as a consequence of the principle of constitutional supremacy and separation of powers.[4]

b. Constitutional Court of the Republic of Indonesia

The CC of Indonesia is a state institution that is equal and has the same position as the Supreme Court. Both of them are executors of a branch of judicial power that are independent and separate from other branches of power, namely the executive and legislative branches. Among the several powers of the CC which are directly attributable to the constitution, are examining and annulling laws that are contrary to the Constitution.

3. THEORITICAL FRAMEWORK:

Deconstruction Theory: Deconstruction provides a reversal of the ideal meaning achieved through the interpretation of legal texts that have been carried out in the past. As a result, the meaning of law as a text, which was originally a universe, became a form of a multiverse. Deconstruction becomes an alternative to reject all limitations of interpretation or standard form of conclusions.[5]

4. LITERATURE REVIEW:

a. Judicial Review in Indonesia

Judicial review is a function of the judicial legislation, focuses on strengthening representative politics by overcoming barriers to political change, and facilitating representation of minorities.[6] This basic character is related to a situation in which the political process cannot be restrained as an authority that is limited by legislators. Especially in democratic political processes, parliaments more often only place majority votes as the main form of law formation.

b. Restrictions on Constitutional Cases

According to Faiz, the judicial review conducted more than once by the CC is not *ne bis in idem*. He gave three reasons, *first, ne bis in idem* can only be applied to cases with the same demands, the same parties, the same place, and the same time. *Second*, the provisions in the CC Act provide room, and even have to open space for exceptions from the inability to submit a petition for judicial review of the same material. *Third*, the application of *ne bis in idem* is more prioritized to provide protection for the fundamental rights of a certain person or party from losses that will occur, when prosecution of the same case is carried out more than once. Meanwhile, the process of judicial review is not adversarial or contentious by confronting parties with conflicting interests.[7]

Faiz's explanation can be met with the exception provisions based on Article 42 Paragraph (2) CCR Number 06/PMK/2005. The existence of an element of *"reasons for a petition"* in the said paragraph, which requires the Petitioner to argue to later prove the constitutional loss it has borne on the validity of the norms of the object of review. This is where the concrete form of norm abstraction occurs, that the Petitioner as a legal subject can bear constitutional losses that are different from the other Petitioners' legal subjects. Even legal subjects in a broad sense, citizens in general, may not bear any constitutional harm to the object of the review. At this stage the case does appear to be in a subjective form based on the actuality of norms by the Petitioner, however, the Court's legal considerations on the subject matter of the case constitute a form of objectification of the subjective appearance. Even if traced back to the bottom, laws are nothing more than a form of regulation that is subjectively formulated to be applied objectively. This is where the nature of *Erga Omnes* was born.

5. METHOD:

This study uses normative judicial research methods conducted by examining library materials as secondary data,[8] normative legal research is also called library research or doctrinal legal research which is classified as a positive legal inventory, discovering legal principles and doctrines.[9]

6. DISCUSSION:

The search for philosophical roots regarding the restrictions of the judicial review collided with the existence of supporting documents. The documents referred to are the Academic Paper and the Minutes of the Session for the Discussion of the Constitutional Court Bill by the People's Representative Council (DPR-RI). Regarding the inclusion of Academic Manuscripts in the form of research results on the subject matter discussed in the draft law, "new" is

required after Law Number 12 of 2011 concerning the Formation of Laws and Regulations was passed in 2011. Meanwhile, the Minutes of the Discussion Session document on the Constitutional Court Bill which contains the discussion and laden with debates detail by article can not be traced.

Meanwhile, the 259-page document entitled The Process of Discussing the Draft Law of the Republic of Indonesia on the Constitutional Court released by the DPR-RI Trial Bureau in 2003, does not contain discussion, debate, and exchange of ideas related to articles that will later be ratified as the CC Act . The document contains only the Proposer's Statement signed by 41 DPR-RI members as proposers for the DPR-RI Initiative Bill on the Constitutional Court, in addition to responses from nine factions on the draft formed by fifty members of the DPR-RI as a Special Committee, plus a Letter from the President of the Republic. Indonesia regarding its views regarding the draft law.

In the course of the CC Act, the limitations of the constitutionality review contained in Article 60 have undergone one change. In the first CC Act, namely Law Number 24 of 2003, Article 60 only consists of one formula which states *"Regarding the content of paragraphs, articles, and/or parts of an act that has been reviewed, it cannot be re-reviewed".* Amendments occurred in Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 which added material content to Article 60, where the initial material became Paragraph (1) and additional material became Paragraph (2):

> (2)The provisions as intended in paragraph (1) may be waived if the material contained in the 1945 Constitution of the Republic of Indonesia which is used as the basis for review is different.

The same situation with regards to Article 60 when the CC Act was first established and also occurs in the 511-page document containing the Minutes of the DPR-RI Meeting on the discussion of the Bill on amendments to the CC Act. The minutes compiled from the presentation of the Experts and the formation of the Working Committee on 15 April 2010, to the Plenary Meeting of the Legislation Body for decision making on 14 June 2011 also do not discuss the additional content of Article 60.

Although the additional content of Article 60 has occurred since the enactment of amendments CC Act of 2011, the characteristics of the CC decision stating that a petition cannot be accepted because it has been tried before has not experienced any significant changes in the range before and after the birth of Paragraph (2). Because before the content of Article 60 was added, the CC was bound to a similar provision in CCR Number 06/PMK/2005 concerning Guidelines for Proceedings in Case Reviewing Laws which have been established since 2005. It is likely that the additional content of Article 60 was inspired by PMK Number 06/PMK/2005:

> (1)Regarding the material containing paragraphs, articles, and / or parts of the Act which have been tested, cannot be applied for re-examination;
> (2)Apart from the provisions of paragraph (1) above, a petition for judicial review of the contents of the same paragraph, article and / or part as the case which has been decided by the Court may be petitioned for re-examination with the constitutional requirements which become the reason for the petition in question different.

In plain view, Article 60 of the CC Act and Article 42 CCR above look similar, but when examined there are principal differences in Paragraph (2). If Article 60 Paragraph (2) of the CC Act states an exception if the constitutionality parameter must be a different material based on the *"1945 Constitution of the Republic of Indonesia"* which is used as the *"basic petition"*. Meanwhile, Article 42 Paragraph (2) PMK emphasizes that the difference parameter must occur in the *"constitutional requirements"* which are built into *"reasons for a petition"*.

7. ANALYSIS:

Deconstructively, the constitutional paradigm which is limited to written basic legal norms can no longer be used to adjust the contents of legal arrangements to the needs of the growing society. This is because the constitution is basically a legal arrangement in an abstract form that must be continuously elaborated in order to conform to the times.[10] For example, Bolingbroke's idea states that the constitution is not a document, but a combination of laws, institutions and customs:

> *"By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed."*[11]

Thus, the constitution sets limits both for the exercisable power and the means by which it can be exercised. So that the constitution defines the legality of power.[12] That is why Paine interpreted the constitution as an antecedent of forming the state:

> *"A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right...*[13] *A*

> *constitution is a thing antecedent to a government; and a government is only the creature of a constitution."*[14]

Strong also interpreted the constitution broadly as a collection of principles governing government power, people's rights, and the relationship between the two.[15] In terms of the relationship between the government and the people, by means of deconstruction, the *"basic petition"* element in Article 60 Paragraph (2) of the CC Act and the *"reasons for a petition"* in Article 42 Paragraph (2) CCR Number 06/PMK/2005 differ in principle. Whereas the exception arrangement in Article 42 Paragraph (2) PMK Number 06/PMK/2005 is more abstract than the exception in Article 60 Paragraph (2) of the CC Act. This is because the relationship between the government and the people through statutory norms produces reasons for petition that are not in the form of constitutionality review instruments based on the articles of the 1945 Constitution of the Republic of Indonesia.

As a result, the CC is more tied to institutional legal products than the CC Act. So that the Court cannot merely adhere to the articles in the 1945 Constitution of the Republic of Indonesia, but the Court will rather adhere to the reasons put forward by the Petitioner as a form of actualization of legal norms. In other words, the exclusion rule for restriction of judicial review in the CC is a form of deviation from the principle of *lex superior derogat legi inferior*. So, the correct terminology to classify reasons with the same meaning is *ad idem* which means *"to the same point or matter"* or *"of the same mind"*.[16] This idea is closely related to the principle of interpretation of the law *expressio unius est exclusio alterius*, which literally means that the expression of one thing is an exception to another.[17]

8. CONCLUSION:

The characteristics of the restriction of judicial review in the CC are determined by the actualization of the Petitioner's constitutionality, it is these factual expressions that build the reasons for the petition. Meanwhile, the reviews of the same norms can be repeated if the Petitioner submits a different constitutional reason from the previous Petitioner. This exemption is not determined by Article 60 Paragraph (2) of the CC Act which only requires differences in the basis of testing based on the articles of the 1945 Constitution, but Article 42 Paragraph (2) PMK Number 06/PMK/2005 Concerning Procedural Guidelines in Case of Judicial Review which requires a different reason for application. This exemption is not determined by Article 60 Paragraph (2) of the CC Act, but rather Article 42 Paragraph (2) CCR Number 06/PMK/2005 which requires differences in the reasons for petition.

9. SUGGESTIONS:

To overcome the problem of deviation from the principle of *lex superior derogat legi inferior* between CC Act and CCR Number 06/PMK/2005, it can only be done by amending the CC Act, especially those related to the procedural law for judicial review.

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