EVOLUTION OF JUDICIAL REVIEW IN INDONESIA: A COMPREHENSIVE LEGAL ANALYSIS

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Abstract *-. Judicial review is a process whereby governmental decisions or legislative acts can be re-evaluated by judicial or court bodies. The implementation of judicial review signifies the adherence to a fundamental principle within the legal system, namely the rule of law. Indonesia has instituted judicial review within both the Supreme Court and the Constitutional Court. Judicial review within the Supreme Court serves to assess legislative regulations against statutory laws, whereas within the Constitutional Court, it evaluates laws against the Constitution. The evolution of judicial review implementation in Indonesia has traversed debates stemming from the conceptual ideologies of the nation's founding fathers, all of which aim to safeguard or uphold the sovereignty of the people.*

Keywords*: Judicial Review, Constitution, Souverignity*

INTRODUCTION

Judicial review, or the examination of laws against the constitution, is a process in which the validity or constitutionality of a law is evaluated by a judicial body empowered to conduct such reviews.[1] The purpose of law examination is to ensure that the law complies with the provisions of the state constitution.[2] The mechanism of judicial review also provides insight to lawmakers to be more cautious in crafting legislation, thereby emphasizing legal consistency with the existing constitution during the legislative process, minimizing constitutional losses resulting from enacted laws. Law examination is an essential aspect of the rule of law and the separation of powers in the legal system. Judicial review also serves to prevent the imposition of majority tyranny in the legislature, thus protecting minorities in Indonesia.[3]

Although this process is crucial for maintaining legal consistency and justice, law examination can also be a source of controversy and debate, especially in cases involving conflicts between government interests and individual rights.[4] Judicial Review involves the examination of legislative products by the judiciary. Many scholars trace the origins of judicial review back to the 1803 case of Madison versus Marbury. The Madison versus Marbury case became a famous doctrine in judicial review cases, as "Almost every important case that displeases some sizeable group leads to questions about the legitimacy of the famous doctrine proclaimed in Marbury v. Madison."[5]

The case of Madison versus Marbury is a historic case in America and globally, despite the Supreme Court rejecting the substance of Marbury's petition. It originated from the presidential election, where John Adams was defeated by Thomas Jefferson of the Democratic Party.[6] Following his defeat, Adams made several significant decisions by appointing several officials, including William Marbury.[7] However, Marbury's appointment letter was not delivered to him until after Adams' term ended, by which time presidential power had transferred to Jefferson. Consequently, the appointment letter was withheld by James Madison, who was appointed Secretary of State by Thomas Jefferson. It was Madison's withholding of the letter that led to the lawsuit filed in the Supreme Court by Marbury, seeking a "writ of mandamus," which was ultimately rejected. This event is believed to have inspired many countries to adopt the mechanism of judicial review.[8]

The mechanism of judicial review is implemented in various countries with different variations, including granting special space for judicial review by establishing separate institutions to conduct the review process. This can be seen in Austria, where a specialized constitutional court was established in 1920.[9]

Indonesia has a historical connection to the thought process concerning judicial review in the United States through the Madison versus Marbury case and the development of specialized judicial

institutions handling constitutional matters, which began in Austria. It poses a significant question because the development of judicial review in Indonesia is inspired by two legal traditions: common law and civil law, which are distinct systems. Therefore, it is important to explore in this research using an approach that examines the concept of the birth of judicial review in Indonesia through the original ideas of the nation's founders, such as Muhammad Yamin.[10]

This research adopts a historical and comparative approach to explore the evolution of judicial review in Indonesia. The historical approach will involve a detailed analysis of the juridical and institutional developments from the early period of state formation to the present day. This will entail tracing historical documents, court decisions, and other relevant legal documents.[11] Additionally, the comparative approach will be used to compare Indonesia's judicial review system with similar systems in other countries, especially those with similar legal backgrounds or in broader regional contexts, such as Southeast Asia. This will allow for understanding the similarities and differences in approaches, practices, and impacts of judicial review in Indonesia compared to other countries. By combining these two approaches, this research will provide in-depth insights into how judicial review has evolved in Indonesia, as well as the factors influencing its development over time.

1. Legal History of Judicial Review in Indoensia

In Indonesia, judicial review was implemented in 1970 with the issuance of Law Number 14 of 1970, aimed at examining regulations deemed inconsistent with the law. This is stated in Article 26, which stipulates:

(1) The Supreme Court has the authority to declare invalid all regulations from lower levels than the law on the grounds of inconsistency with higher legal regulations.
(2) Decisions regarding the invalidity of such legal regulations can be made in relation to examinations at the cassation level.

The implementation of judicial review in Indonesia is evidence of Indonesia's commitment to the principle of separation of powers, where the Supreme Court is granted authority to assess all regulations below the law. Praise has also been given by Daniel S. Lev, stating "The principles of judicial independence and separation of powers - the trias politica….".[12] Law Number 14 of 1970, according to Daniel, is a development from Law Number 19 of 1964. Both laws are referred to by Daniel as guardians of democracy in Indonesia.

Indirectly, the implementation of judicial review in the Supreme Court at that time also influenced the application of judicial review implemented in the Constitutional Court, particularly during the third amendment to the 1945 Constitution of the Republic of Indonesia, which led to the establishment of the Constitutional Court on August 13, 2003.[13] Thus, in the present era, judicial review is applied in two places: the Constitutional Court and the Supreme Court.[14] In the Constitutional Court, its task is to examine laws against the Constitution, while in the Supreme Court, it is to examine regulations below the law against the law. This is important because it relates to the form of the Unitary State of the Republic of Indonesia and the existence of regional regulations, as provided in the 1945 Constitution of the Republic of Indonesia.

Judicial review serves as a mechanism to protect society from government arbitrariness over various legal products created by legislative or other institutions empowered to enact regulations below the law.[15] In the context of judicial review in the Constitutional Court (MK), Mohammad Fajrul Falaakh asserts that judicial review is an effort to uphold and enforce the constitution, meaning that legal products and actions must comply with and not contradict the constitution.[16] For Fajrul, the MK aims to liberate law and justice from the potential tyranny of the majority of representatives in legislative bodies. At this point, there is a shared perspective between Yamin and Fajrul regarding the protection of individual human rights within a state.

Judicial review is a consequence of the concept of the rule of law, as within this concept, there are three elements: First, governance is conducted for the public interest; Second, governance is conducted according to laws based on general provisions, not arbitrary laws that disregard conventions and constitutions; Third, constitutional governance means governance carried out at the will of the people, not through coercion or pressure exerted by despotic government (government with one ruler/oligarchy).[6] According to Fredrich Julius Stahl, the elements of the rule of law (rechtsstaat) are as follows:

1) Human rights

2) Separation or division of powers to safeguard these rights (in continental European countries, this is often referred to as the trias politica)
3) Governance based on regulations (wetmatigheid van bestuur)
4) Administrative justice in disputes.

In various literature, judicial review is said to originate from legal thought in America and Europe, where both concepts share similar thinkers, but their implementation techniques differ. In America and Europe, judicial review is based on the principle of constitutional supremacy, which considers the constitution as the supreme law of the land. Whereas in Europe, judicial review requires lawmakers to adhere to the constitution, thereby not creating laws that contradict it. This principle is called constitutionalism, which is a fundamental requirement of the rule of law and constitutional democracy. Hence, a legal mechanism is needed to ensure that laws and regulations do not conflict with those above them.[14]
The development of practice related to judicial review in the world is divided into two models, namely the American and European models, the explanation of both models can be seen in the table below.

JR Modal	Explanation	
American (Anglo-Saxon) Model	Decentralized testing of laws, where each level of court in America has the authority to conduct judicial review. The final authority to assess the constitutionality of actions or activities and interpretations of the constitution lies with the Supreme Court. Thus, there is no separate Constitutional Court established to fulfill the need for constitutional review. This American model is followed, for example, by Argentina, Mexico, Nigeria, India, Nepal, Sweden, Israel.	
European Model	Testing of laws in the European model is characterized by two main features: first, the testing authority is carried out in a centralized manner, by a specifically established institution to meet these needs, namely a constitutional court (or by another name); second, testing of laws can be done without requiring a specific concrete case beforehand, but rather abstractly or based on theoretical argumentation (in the abstract). Although termed the European model of constitutional review, this model actually contains several variations, such as the Austrian, German, and French variants.	
	Austia	Often referred to as the Continental Model. This model also implements a centralized system, where a constitutional court is established with exclusive authority to control the constitutionality of legislation. This model is followed by most European countries (for example, the Czech Republic, Poland, Russia, Spain), several countries in South America (for example, Costa Rica, Chile), countries in the Middle East and Africa (for example, Egypt, Lebanon, South Africa), as well as Asian countries (for example, South Korea).
	Germany	This model also applies a centralized system where a constitutional court is established with exclusive authority to control the constitutionality of laws as well as actions or activities that contradict the constitution, but all courts (others) are also given

		the authority to set aside laws deemed to be inconsistent with the constitution. This model is followed, among others, by Brazil, Peru, Indonesia.
	France	The French model also applies a centralized system, but the institution empowered for this purpose is not a court (thus not a court), but rather a council, namely the Constitutional Council. The council's authority is to conduct preventive oversight to examine the constitutionality of laws that have been adopted but not yet enacted. Therefore, it is more appropriate to call it constitutional preview rather than constitutional review. This model is followed by Morocco and Cambodia.

The constitution signifies the formation, specifically the establishment of a state.[7] Thus, it serves as the fundamental law that binds and holds the highest authority, positioned as the principle of sovereignty within a country, particularly in a state that adheres to the rule of law ideology.[17] The position of the constitution is crucial in maintaining state order because it functions to regulate the limitation of power within the state, as articulated by Bagir Manan, "the constitution is a set of provisions that regulate the organization of the state and the structure of government".[18]

In principle, C.F. Strong provides a consistent theme regarding the purpose of the constitution, namely to limit government actions, to ensure the rights of the governed, and to formulate the implementation of sovereign power. Therefore, every constitution always has two main objectives:[19]

1) To provide restrictions and oversight on political power.
2) To liberate power from the absolute control of rulers and establish boundaries for their authority.

The constitution sets limits to prevent rulers from acting arbitrarily in their actions, allowing society to monitor if rulers deviate from the provisions outlined in the constitution. This is because the constitution is created from the agreement of citizens to achieve common goals. *As Rousseau stated in "Du Contrat Social," meaning law arises from agreement*.[20] From this, the constitution is born as the basis for the establishment of a state, aligning with the purpose of founding a state to serve as a vessel for achieving common goals.[21]

To achieve these common goals, society needs to bind itself to the state's constitution because the constitution symbolizes a collective agreement.[22] Therefore, with this sequence, the existence of the constitution is viewed as the foundation of law, seen as the embodiment of a social contract. Thus, the constitution is the culmination of society's agreement to construct the state and the government that will govern them.[23]

"There is hardly any state without a constitutional basis because the constitution is the embryo of a state's birth, so the existence of the constitution as the basis of state law." In the concept of the rule of law, the constitution is considered a sacred area because its position is as fundamental laws".

Laica Marzuki expresses his opinion on the constitution in a constitutional state, positioning it as "the constitution is de hoogste wet," meaning the highest legal regulation in the country. Furthermore, Laica explains that the constitution holds the highest proclamation, which establishes the highest sovereignty holder, the state structure, form of state, form of government, legislative power, judicial power, various state institutions, and the rights of the people.[24]

As fundamental laws, the constitution holds a sacred position, and its existence is highly revered. Therefore, its creation process cannot be arbitrary; instead, it must undergo intricate and detailed mechanisms because it must be sourced from the values and philosophies of the nation itself. Thus, society also embodies the contents of the constitution.

The process of constitution-making in Indonesia cannot be separated from the thoughts and legal figures of Indonesia, such as Muhammad Yamin. As a constitutional law expert at that time, graduating from Recht Hoog School (now Universitas Indonesia), he certainly played a role in the constitution-making process in Indonesia.

In interpreting the constitution, Yamin agreed with J.J. Rousseau that the constitution is a social contract. Therefore, it is only natural that the content of the constitution should be intertwined with its society's life and soul. In his opinion, Yamin expressed that the Indonesian constitution must always be connected to the content and spirit of the proclamation itself because the proclamation and the constitution are the foundation and political basis of Indonesia. "...where a Constitution is, and in it is written a set of rules that organize political power and society, guaranteeing and strengthening the independence of the state and its citizens. The notion of a constitution originated from the 17th century, and in the literary works of the French Revolution by J.J. Rousseau called Contrat Social, the constitution is also referred to as lois fondamentales or lois politiques, which can be translated into our language as the Basic Law and State Law."

The constitution is a product of revolution because the proclamation was declared based on the spirit of national revolution, so the constitution is not just a mere collection of words but a living poem (the living constitution).[25] With the existence of the constitution, the proclamation embodies the spirit of struggle to achieve the aspirations of the Indonesian people collectively, not just a mere political call proclaimed by the Great Commander of the Revolution, Soekarno, and Muhammad Hatta, because with the constitution, the Indonesian nation can already "knock" on the door towards legal modernity.[26] Because the constitution is the highest law and serves as the basis for limiting power so that rulers do not act dictatorially.

The existence of a constitution also provides a clear picture of the nation's ideology because its position is the highest law. Additionally, the constitution also has a pragmatic purpose as a compromising medium for Indonesia's unitary state, which has many differences but can become united under common agreements enshrined in the constitution, as expressed by Rousseau.

The emergence of the proclamation, followed by the emergence of the constitution, can also be a sign that the state has sovereignty. If Indonesia has a constitution, then Indonesia can be said to be a fully sovereign state. Full sovereignty is the desire of Yamin because he was a follower of the 100% independent ideology championed by Tan Malaka.[27]

Yamin's thinking concept cannot be separated from Tan Malaka's ideas because Yamin openly expressed that the formation of the Republic of Indonesia is a synthesis of the long politics born by the Indonesian action masses.[28] The concept of action masses was taken from Tan Malaka's book titled "Massa Aksi," which was published in the early 1926s. In it, Tan Malaka wrote that revolution cannot be created by anyone, including society and political elites. It means that a revolution is caused by the interaction of life, a certain consequence of societal actions, and class conflicts influenced by economic, social, political, and psychological factors. The more wealth taken by others, the greater the misery and slavery. In short, the greater the gap between the ruling class and the ruled class, the greater the chance of revolution.[15], [29]

Furthermore, Yamin stated that the proclamation and constitution imply the sovereignty of the government, regions, and its people.[12] Thus, there is no more colonial government that dominates and belittles the natives in the bureaucratic arena and public space. Therefore, Yamin rejected the existence of a puppet state. Indonesia should not be positioned as a puppet state; hence, Indonesia must be sovereign. The formation of the constitution marks Indonesia's sovereignty. The unity emphasized in the 1928 Youth Pledge must also be reflected in Indonesia's constitutional system. Therefore, federalism is not an ideal system for Indonesia; rather, unitarism, reflecting national, regional, and cultural unity, is more suitable, Through unity, the automatic eradication of the deeply rooted feudal system within Indonesian society can be achieved.

The abolition of the feudal system is one of the means to foster unity in Indonesia. Thus, Yamin referred to this mission as the "social revolution," one of the two components of the national revolution. Yamin stipulated that to achieve the national revolution, one must first undertake both political and social revolutions.

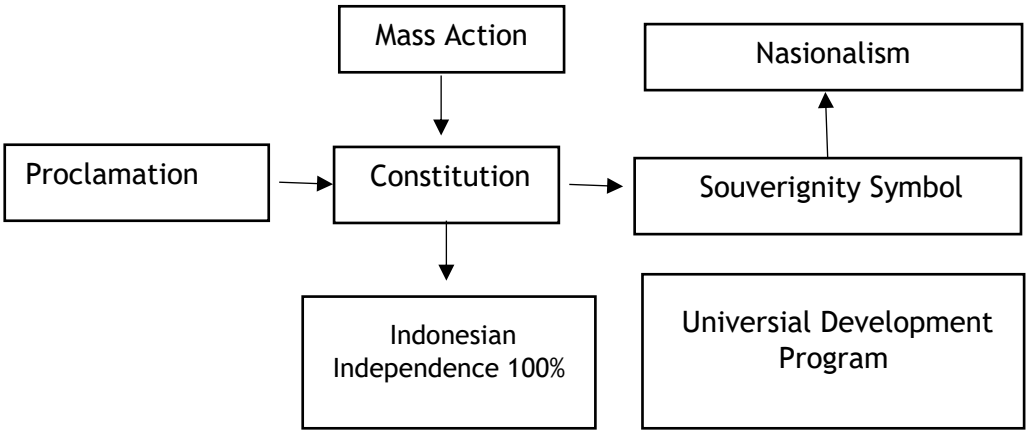
The social and political revolutions are interrelated; they cannot stand alone.[30] The political revolution leads to the social revolution. The successful implementation of the political revolution necessitates the emergence of central, regional, and subordinate governance in the Republic of Indonesia. If the political revolution succeeds, the social revolution will follow suit.[31] For instance, special regions like Surakarta will be abolished, removing obstacles to the political revolution, enabling the Murba people to attain power. Consequently, the locus of change will shift from the top down.

Yamin illustrated how the political revolution could have international ramifications. This implies that the discourse production regarding societal changes in Indonesia could impact foreign nations, preventing Indonesia from becoming a mimic or a puppet state of more established countries. The political revolution ideology articulated by Yamin is an application of the ideas of the Murba Party, founded by Tan Malaka, which advocated for 100% independence. "The organizational spirit of Murba, by Murba, and for Murba".[32]

The political revolution, followed by the social revolution, aims to provide space for the Murba people to hold power. With the social revolution's abolition of feudalism in the Republic of Indonesia, Murba can enter all spheres. Their entry into policymaking territories will undoubtedly produce policies originating from Murba's ideology, not foreign ideas, directed toward Murba's interests rather than foreign interests.

After the successful social revolution, the culmination of the movement, namely the National Revolution, will emerge. The National Revolution is not merely a power rotation (as feudalism has been eradicated) but a continuous revolution. The National Revolution movement will ignite the passion of foreign societies to support Indonesia's independence. It is only fitting for the National Revolution to become the reference point for the Republic of Indonesia, in line with the law of revolution: Revolution gives birth to the State, the State carries out the revolution, and the people seek refuge under the State. And the mandate of the revolution is complete independence.

The explanation above provides Muhammad Yamin's systematic framework of thought, as it implies that the constitution exists for proclamation, while the constitution reflects the political actions of the masses. Without a constitution in place, there is no symbol of the nation's sovereignty that can be used as a source of nationalism in building the Indonesian nation. Only after Indonesia's instruments of sovereignty are fulfilled can the comprehensive development program formulated by him be implemented. Below is Yamin's conceptual framework regarding the position of the Constitution in his view.



The diagram above elucidates that Yamin's train of thought does not merely stop at one point but always correlates with the values of past societal struggles, which also have implications for future state programs. Therefore, the urgency of this research lies in uncovering Muhammad Yamin's thoughts on the Indonesian constitution, which serves as a reference point for Indonesia's development, considering that the constitution embodies the nation's spirit for the common good. Through this investigation, Yamin's stance on the constitution can be understood in terms of whether it aligns more with Western legal traditions or incorporates local values, particularly those of the Minangkabau society, given Yamin's origins from the Minangkabau land.

Upon comprehending Yamin's train of thought regarding the Indonesian constitution, it becomes evident that the constitution mirrors the sovereignty of the people, where the people are the pivotal element ("tuan") of the state. From this perspective, the idea of judicial review, as advocated by Muhammad Yamin, emerged.

"In Balai Agung, it should not merely serve as a judicial body, but also as a comparative institution. Is the legislation enacted by the People's Representative Council in violation of the Republic's Constitution or contrary to recognized customary law or Islamic Sharia? Therefore, within the High

Court, there should be established not only civil and criminal courts but also customary courts and Islamic High Courts whose task is not only to administer justice but also to compare and provide reports to the President of the Republic regarding any matters that contravene constitutional law, customary law, and Sharia regulations."

The excerpt above necessitates clarification regarding the nomenclature of Balai Agung and Mahkamah Tinggi. What Yamin meant by these two names is essentially the same, as both names originated from Yamin's speech at the grand meeting on July 11, 1945. In this assembly, Yamin formulated the division of powers within the Republic of Indonesia into six powers, namely:

1) Head of State and Vice President;
2) People's Representative Council;
3) People's Consultative Assembly;
4) Ministries;
5) Advisory Councils;
6) High Court or Balai Agung.

Muhammad Yamin's ideas, though rejected during the BPUPK meeting, were indeed futuristic considering that his concepts are now implemented in the present era. For instance, there exists an institution known as the Constitutional Court (Mahkamah Konstitusi or MK), which has the authority to conduct judicial reviews of laws against the Constitution. This is based on Article 24C of the 1945 Constitution of the Republic of Indonesia, further reinforced by Law Number 24 of 2003 concerning the Constitutional Court. Meanwhile, the Supreme Court (Mahkamah Agung or MA) has the authority to review legislation under the Constitution, as stipulated in Article 24A of the 1945 Constitution.

Both the MK and MA are judicial bodies empowered to conduct judicial reviews, albeit at different levels. However, during the BPUPK session, Muhammad Yamin only mentioned one institution capable of handling judicial reviews, namely the Balai Agung. This discrepancy raises issues, considering that these two institutions are parallel but possess distinct authorities. Therefore, this research aims to unveil the originality of Muhammad Yamin's thoughts regarding judicial review itself.

CONCLUSION

The evolution of judicial review in Indonesia is deeply rooted in its legal history. From its inception, the nation's legal framework has undergone significant development, guided by historical precedents and the vision of its founding fathers. The establishment of institutions such as the Supreme Court and the Constitutional Court marks pivotal milestones in this journey, reflecting Indonesia's commitment to upholding the rule of law and safeguarding the sovereignty of its people. Over time, judicial review mechanisms have evolved in response to changing socio-political dynamics, with continuous refinements and adaptations shaping the landscape of Indonesian jurisprudence. By delving into the historical trajectory of judicial review, Indonesia gains valuable insights into the factors that have influenced its development, paving the way for a more robust and effective legal system that aligns with global standards of justice and accountability. Thus, a thorough examination of Indonesia's legal history underscores the significance of judicial review as a cornerstone of its legal framework, shaping its trajectory towards a more equitable and democratic society.

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