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# Regulation Arrangement through The Judicial Power: The Challenges of Adding the Authority of The Constitutional Court and The Supreme Court

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## ABSTRACT

Disharmony and regulation arrangement is one of the problems in Indonesia that has not been completely resolved. Efforts have been made by the government and various parties. But in reality, disharmony and regulation arrangement are still a problem in Indonesia. There needs to be

an out of the box solution, one of which involves the judicial power to organize regulations. The researchers in this article have two problem formulations, namely (1) how is the arrangement of regulations through judicial power from the theoretical aspect? and (2) how is the arrangement of regulations through the Constitutional Court and the Supreme Court to realize a synchronized and harmonious simplification of regulations? First, regulatory arrangements can be made by the judiciary through instruments and processes called judicial review. Theoretically, judicial review can be used as an instrument and a process for structuring regulations so that they are synchronous and harmonious. In Indonesia, a judicial review has been applied to the authority of the Constitutional Court and the Supreme Court. This means that theoretically, regulatory arrangements can be made by the judiciary, in this case the Constitutional Court and the Supreme Court. Second, the judicial review carried out in the context of structuring regulations must be comprehensive on all types of laws and regulations and systematically tiered. Judicial review can also be done horizontally and vertically. The question? Which institutions can do? There are two options to choose from. First, it can be done by the Constitutional Court as a whole. Second, it can share the authority of a thorough judicial review between the Constitutional Court and the Supreme Court. The difference in distinguishing the overall judicial review authority by the Constitutional Court and the Supreme Court lies in the type of legislation.

**Keywords:** *Regulation Arrangement, Judicial Power, Judicial Review.*

## INTRODUCTION

Efforts to regulate regulation have been carried out by the government through various policies. One of the popular and actual policies related to regulatory arrangement is by using the omnibus law or the omnibus method. Omnibus law is a method or system for the formation of laws and regulations by combining several different laws and regulations into one

legislation with the result that the old laws do not apply partially or completely<sup>1</sup>. That is, omnibus law is a regulation that comes from a combination of several regulations with the aim of changing, revoking or cutting other regulations<sup>2</sup>. Easier, it can be said that omnibus law is a law that covers many aspects<sup>3</sup>. Indeed, normatively, omnibus law is capable of structuring regulations with many existing regulations, but regulatory structuring in Indonesia through omnibus law has not found a significant impact on simplification and harmonization of regulations.

This can be seen from various things, for example the problem of forming an omnibus law that creates pros and cons in society<sup>4</sup>. In addition, the problem of establishing the omnibus law is related to time, which is relatively long<sup>5</sup>. Not to mention the emergence of many derivative regulations as a consequence of the omnibus law<sup>6</sup>. Indonesia has recently issued a legal product policy in the form of an omnibus law. The omnibus law is Law Number 11 of 2020 concerning Job Creation (UU Ciptaker). UU Ciptaker before it was ratified until after it was ratified reaped many pros

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- <sup>1</sup> Wicipto Setiadi, "Simplifikasi Regulasi Dengan Menggunakan Metode Pendekatan Omnibus Law," *Jurnal RechtsVinding: Media Pembinaan Hukum Nasional* 9, no. 9 (2020): 45; Ayon Diniyanto, Bambang Sri Hartono, and Heris Suhendar, "Strategi Dan Model Omnibus Law Dalam Penataan Regulasi," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 12, no. 2 (2021): 166, <https://doi.org/10.21043/yudisia.v12i2.10162>; Dani Muhtada and Ayon Diniyanto, "Penataan Regulasi Di Indonesia Melalui Lembaga Independen," *Pandecta: Research Law Journal* 16, no. 2 (2021): 279, <https://doi.org/http://dx.doi.org/10.15294/pandecta.v16i2.31866>.
  - <sup>2</sup> Ayon Diniyanto, "Omnibus Law Dan Demokrasi Kita," Artikel RechtsVinding, 2021.
  - <sup>3</sup> Firman Freaddy Busroh, "Konseptualisasi Omnibus Law Dalam Menyelesaikan Permasalahan Regulasi Pertanahan," *Arena Hukum* 10, no. 2 (2017): 242, <https://doi.org/10.21776/ub.arenahukum.2017.01002.4>.
  - <sup>4</sup> I Putu Eka Cakra and Aditya Yuli Sulistyawan, "Kompabilitas Penerapan Konsep Omnibus Law Dalam Sistem Hukum Indonesia," *Jurnal Crepido* 2, no. 2 (2020): 64, <https://doi.org/10.14710/crepido.2.2.59-69>.
  - <sup>5</sup> Dhaniswara K. Harjono, "Konsep Omnibus Law Ditinjau Dari Undang-Undang No. 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan," *Jurnal Hukum: Hukum Untuk Mengatur Dan Melindungi Masyarakat* 6, no. 2 (2020): 99; Lenny Tristia Tambun, "Target Molor, Istana Sebut Penyusunan Omnibus Law Butuh Waktu Sinkronisasi," *Beritasatu.com*, 2020.
  - <sup>6</sup> Tsarina Maharani, "Banyaknya Aturan Turunan UU Cipta Kerja Dinilai Bertentangan Dengan Tujuan Pemerintah," *Kompas.com*, 2020.

and cons in the community. The process of ratifying the UU Ciptaker is also relatively long. Not to mention that the problem is that there are many regulations derived from the existence of the UU Ciptaker, thus making the purpose of the UU Ciptaker, one of which simplifies regulations, in fact creates regulatory obesity under<sup>7</sup>. This condition causes a horizontal regulatory obsession. Obesity horizontal regulation occurs in the hierarchy under the UU Ciptaker. This means that there is a failure to simplify regulations horizontally at the level of regulations implementing laws.

The failure to simplify regulations indicates that the UU Ciptaker has not been able to regulate regulations through horizontal simplification of regulations. This condition also provides a lesson that the executive (Government) and legislative institutions (Dewan Perwakilan Rakyat/DPR) have not been able to simplify regulations effectively and comprehensively. As a result, regulation arrangement has not run perfectly, because there is still regulatory obesity. An effective and comprehensive regulatory arrangement is needed. This effort can be done by providing decentralization of authority for regulatory arrangements to the judiciary (the Constitutional Court/MK and the Supreme Court/MA). Moreover, the two institutions, namely the Constitutional Court and the Supreme Court, have the authority to conduct judicial reviews or examinations of statutory regulations. The judicial review authority is actually in line with structuring regulations through simplification by synchronizing and harmonizing regulations. The Constitutional Court and the Supreme Court must be given the authority to cancel regulations that are out of sync and are not horizontally harmonized. Based on the background of the problem, the formulation of the problem in this article is (1) How is regulation structuring through judicial power from a theoretical aspect? and (2) how is the regulation arrangement through the Constitutional Court and the Supreme Court to realize a synchronized and harmonious simplification of regulations?

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<sup>7</sup> Haris Prabowo, "Omnibus Cipta Kerja Justru Bikin Regulasi Makin Gemuk," *Tirto.id*, 2020.

## METHOD

This research method uses a statutory approach. This means that the study of this research cannot be separated from the study of the legislation. This type of research uses doctrinal research, namely normative juridical. The types of data in this study are primary legal materials and secondary legal materials. The source of data in this study is primary legal material. The primary legal materials in this research are statutory regulations and other legal documents. The next source of legal material is a secondary source of legal material, namely sources that come from articles, books, and others. Data analysis in this study was carried out using interactive models<sup>8</sup>.

## RESULT & DISCUSSION

Structuring regulations through judicial power is not a new thing. If we look at the history and concept of judicial review, it cannot be separated from the arrangement of regulations. Not to mention we have seen the development of judicial power, especially in relation to judicial review. State institutions in the judiciary have developed to have quite strong powers. It is not only adjudicating disputes between citizens or state bodies. The judiciary also has the power to challenge or examine applicable

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<sup>8</sup> Zaka Firma Aditya and Rizkisyabana Yulistiyaputri, "Romantisme Sistem Hukum Di Indonesia: Kajian Atas Kontribusi Hukum Adat Dan Hukum Islam Terhadap Pembangunan Hukum Di Indonesia," *Jurnal RechtsVinding: Media Pembinaan Hukum Nasional* 8, no. 1 (2019): 37–54, <https://doi.org/http://dx.doi.org/10.33331/rechtsvinding.v8i1.305>; Ayon Diniyanto, "Reformasi Hukum Tanah Desa: Redefinisi Dan Penguatan Kedudukan," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 8, no. 3 (2019): 351–65, <https://doi.org/10.33331/rechtsvinding.v8i3.331>; Matthew B. Miles and A. Michael Huberman, *An Expanded Sourcebook Qualitative Data Analysis*, SAGE Publications, Inc., 2nd ed., vol. 1304 (California: SAGE Publications, Inc., 1994); Ayon Diniyanto and Dani Muhtada, "The Dynamics and Future of Qanun in the Welfare of the People of Aceh," *Bestuurskunde: Journal of Governmental Studies* 2, no. 1 (2022): 34, <https://doi.org/10.53013/bestuurskunde.2.1.31-42>.

laws and regulations. This study examines in depth related to the arrangement of regulations through judicial power. First, the researcher examines the arrangement of regulations through judicial power based on a theoretical review of the various literatures collected by the researcher. Second, researchers examine regulatory arrangements through two judicial institutions, namely the Constitutional Court and the Supreme Court.

## I. REGULATORY STRUCTURING THROUGH JUDICIAL POWER (THEORETICAL REVIEW)

Regulatory arrangements through judicial power may be a foreign matter. But for some people who are concerned about the knowledge of judicial review. Structuring regulations through judicial power is possible. Judicial power in its development has various powers, including one of them is the power to conduct judicial review. It is not surprising that up to now, many judicial reviews have been found in various judicial powers from various countries. Seeing the form of judicial review that is growing up to now, it is very possible for regulation to occur through judicial power. This research in the initial part of the discussion will take pictures related to the arrangement of regulations through judicial power based on a theoretical review. Researchers in finding this will divide into two categories, namely (1) regulatory arrangement through judicial review; and (2) regulation arrangement in Indonesia through judicial review.

### *A. Regulatory Arrangement through Judicial Review*

Regulatory arrangements through judicial power cannot be separated from the theory of judicial review which has developed rapidly to date. We all know that judicial review first appeared when the case between Marbury versus Madison in 1803 AD John Marshall, who was then a Judge of the United States Supreme Court (Supreme Court) of the United States

canceled the policy of the Judiciary Act of 1789 because the content of the Judiciary Act was contrary to the constitution. In fact, there had never been such a thing before. Previously, judges only ruled out if there were regulations that contradicted the constitution. Long story short, this case became the forerunner of the judicial review we know today<sup>9</sup>. Although there are other studies that judicial review actually existed before the case of *Marbury versus Madison*. William Michael Treanor (2005) in his research entitled *Judicial Review Before Marbury* states that there have been similar cases related to judicial review before the *Marbury versus Madison* case. Treanor at the end of his writing also stated that the public in the past had considered the *Marbury versus Madison* case as the originator of the emergence of a judicial review<sup>10</sup>.

The judicial review that emerged from the case of *Marbury versus Madison* in 1803 AD, indicates that the judicial review has been going on for more than two centuries until now. Although judicial review has existed for more than two centuries. The existence of judicial review remains strong and continues to develop. The question is what causes judicial review to still exist in various countries and even continue to develop? The answer can be found by knowing and discovering the theory/postulates and the purpose of the judicial review. There are various arguments about judicial review which if accumulated will become a theory about judicial review. This argument, for example, relates to the theory and principles of a written constitution which states that judicial review is attached to every written constitution. This is if it follows the theory and principles in the written constitution which states that any regulation that is contrary to the constitution is considered null and void. The theory has concluded that judicial review is attached to every written constitution. Judicial review can be said to be an instrument and process to

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<sup>9</sup> Martitah, *Sistem Pengujian Konstitusional (Constitutional Review) Di Indonesia* (Jakarta: Konstitusi Press, 2015), 32–33, <https://doi.org/10.1093/oxfordhb/9780190469771.013.7>; Jimly Asshiddiqie, "Sejarah Constitutional Review Dan Gagasan Pembentukan Mahkamah Konstitusi," in *The Three "E" Lecture Series*, 2012, 2–5.

<sup>10</sup> William Michael Treanor, "Judicial Review Before *Marbury*," *Stanford Law Review* 58 (2005): 459–555.

check the suitability and validity between the laws and regulations with the regulations above them (the constitution). These instruments and processes should be automatically embedded in the constitution as the highest law in a country<sup>11</sup>.

One of the theories of judicial review states that judicial review aims to protect the judicial power from the influence or involvement of the legislative power. The existence of a judicial review gives independence to the judicial power to test legislative products so that it can provide limits on power to the legislature if legislators exceed their authority in forming regulations<sup>12</sup>. This is indeed very appropriate because there is no guarantee that the legislative power will not abuse its power through the legal products that are formed. The existence of a judicial review provides control over every legal product formed by the legislative power.

The independence of judicial power will be created if there is judicial power (strong judicial power). Judicial review cannot be separated from judicial power. Without judicial power, it is difficult to carry out a judicial review, let alone enforce the constitution through a judicial review mechanism. Judicial power is also important so that every decision or result of a judicial review can be obeyed and implemented. It's hard to imagine if there is no judicial power, the results of the judicial review will be easy to ignore<sup>13</sup>.

Judicial review aims to protect the judicial power from the influence of other powers. Judicial review is also a tool for judicial or judicial powers to enforce the constitution. The enforcement of the constitution is meant to uphold the constitution of the laws and regulations below which are not in line with or not in accordance with the content of the constitution<sup>14</sup>. This is actually in accordance with the two main principles of judges in deciding

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<sup>11</sup> William W. Van Alstyne, "A Critical Guide to *Marbury v. Madison*," *Duke Law Journal* 1, no. 1 (1969): 17, <https://doi.org/10.4324/9781315053561-16>.

<sup>12</sup> Treanor, "Judicial Review Before *Marbury*."

<sup>13</sup> David S. Law, "A Theory of Judicial Power and Judicial Review," *Georgetown Law Journal* 97 (2009): 796.

<sup>14</sup> Mauro Cappelletti, "Judicial Review in Comparative Perspective," *California Law Review* 58, no. 5 (1970): 1032, <https://doi.org/10.4324/9781315246024-13>.



two cases. Roscoe Pound (1923) stated that judges decide cases based on two things. First, the judge's decision must aim to create justice. Second, the judge's decision must be based on and to enforce the law<sup>15</sup>.

The theory/postulates and the purpose of the judicial review as described previously provide an accumulation or conclusion about the theory of judicial review. This means that judicial review is an instrument and process of validating regulations in order to uphold the constitution and to control the power of forming regulations from arbitrariness. The validation is meant to check the suitability of the regulatory content material formed by the regulatory body with the material in the constitution. That is the essence or conclusion of the theory and postulate related to judicial review. However, judicial review in addition to requiring judicial power also requires media or containers to run optimally.

The media or forum is an institution or agency tasked with conducting a judicial review. In the world there are bodies that function to conduct judicial reviews. The body is generally part of the judicial power. There is a body that handles judicial review and it is combined with handling other types of case resolution. For example, the Supreme Court in the United States which handles judicial review and also other matters. This means that the judicial review here is accommodated by one body with other types of case resolution. Then there is a body specially formed to handle judicial review or commonly referred to as a constitutional court institution. The constitutional judiciary was specifically formed to handle and conduct judicial reviews.

The constitutional judiciary cannot be separated from the emergence of judicial review. The constitutional judiciary appeared practically after the practice of judicial review. The history of the emergence of the constitutional court cannot be separated from the role of Hans Kelsen. Hans Kelsen was the first founder of the Constitutional Court. Hans Kelsen at that time established a constitutional court called *Verfassungsgerichtshof*

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<sup>15</sup> Roscoe Pound, "The Theory of Judicial Decision," *Harvard Law Review* 36, no. 8 (1923): 940.

(Constitutional Court) Austria in 1920 AD. Constitutional court institutions like this in its development are increasingly mushrooming in existence. Many countries in the world have established constitutional courts according to their respective names<sup>16</sup>. The number of constitutional courts is due to the very important function of the constitutional court. The constitutional court does not only review the content of the regulations. The constitutional judiciary can also function to maintain and guarantee the constitutional rights of citizens<sup>17</sup>. This urgency has caused many countries to establish a constitutional court. After the reformation and when the constitution was amended, a constitutional court was established, which was named the Constitutional Court of the Republic of Indonesia (MKRI) or commonly known as the Constitutional Court (MK)<sup>18</sup>. However, in terms of authority and practice, the Constitutional Court does not only handle judicial review cases. There are many types of case settlement handled by the Constitutional Court other than judicial review, such as deciding on disputes over the authority of state institutions; decide on the dissolution of a political party; decide disputes over general election results<sup>19</sup>; give a decision related to the opinion of the House of Representatives (DPR) regarding alleged violations of the President and/or

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<sup>16</sup> Martitah, *Sistem Pengujian Konstitusional (Constitutional Review) Di Indonesia*; Asshiddiqie, "Sejarah Constitutional Review Dan Gagasan Pembentukan Mahkamah Konstitusi."

<sup>17</sup> I Dewa Gede Palguna, "Constitutional Complaint and the Protection of Citizens the Constitutional Rights," *Constitutional Review* 3, no. 1 (2017): 16, <https://doi.org/10.31078/consrev311>; I Dewa Gede Palguna, "Constitutional Question: Latar Belakang Dan Praktik Di Negara Lain Serta Kemungkinan Penerapannya Di Indonesia," *Jurnal Hukum Ius Quia Iustum* 17, no. 1 (2010): 3, <https://doi.org/10.20885/iustum.vol17.iss1.art1>.

<sup>18</sup> Martitah, "Why Legitimacy Matters in Times of Uncertainty: A Critical Study of the Success Story of the Constitutional Court of Indonesia," *Asia-Pacific Social Science Review* 19, no. 1 (2019): 233.

<sup>19</sup> See the 1945 Constitution Article 24C paragraph (1)

Vice President according to the Constitution<sup>20</sup>; and decide disputes over the results of regional head elections<sup>21</sup>.

### *B. Regulatory Structuring in Indonesia through Judicial Review*

The history of the birth of judicial review and constitutional judicial institutions cannot be separated from the arrangement of regulations by the judiciary. Indeed, the form of regulatory arrangement through judicial review is not concrete. In Indonesia, which has two judicial institutions with the authority to conduct judicial reviews, namely the Constitutional Court and the Supreme Court<sup>22</sup>. We can see the regulatory arrangements of the two institutions through the judicial review mechanism. The Constitutional Court has the authority to conduct a judicial review of the types of laws against the 1945 Constitution<sup>23</sup>. The Supreme Court has the authority to conduct a judicial review of the types of regulations under the law against the law<sup>24</sup>.

<sup>20</sup> See the 1945 Constitution Article 24C paragraph (2)

<sup>21</sup> Article 157 paragraph (3) of Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning Election of Governors, Regents, and Mayors to Become Laws.

<sup>22</sup> Simon Butt, "Judicial Reasoning and Review in the Indonesian Supreme Court," *Asian Journal of Law and Society* 6, no. August 2018 (2019): 89, <https://doi.org/10.1017/als.2018.26>; Pan Mohamad Faiz, "Legal Problems of Dualism of Judicial Review System in Indonesia," *Jurnal Dinamika Hukum* 16, no. 2 (2016): 189–90, <https://doi.org/10.20884/1.jdh.2016.16.2.535>; Hamid Chalid, "Dualism of Judicial Review in Indonesia: Problems and Solutions," *Indonesia Law Review* 7, no. 3 (2017): 376–77.

<sup>23</sup> See at the authority of the Constitutional Court in the 1945 Constitution Article 24C paragraph (1) which basically states that one of the powers of the Constitutional Court is to adjudicate at the first and last level whose decisions are final in order to examine the Law against the Constitution.

<sup>24</sup> Simon Butt, "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?," *Asian Journal of Comparative Law* 14, no. 1 (2019): 156, <https://doi.org/10.1017/asjcl.2018.19>. See also Article 9 paragraph (2) of Law Number 12 of 2011 concerning the Establishment of Legislation which basically states that the Supreme Court has the authority to examine statutory regulations under the law against the law.

The form of regulatory arrangement through judicial review can be seen in the process and output. The judicial review process is to examine the content material or the formation of regulations against the content material in a higher regulation. We can see the process of structuring regulations from the judicial review. First, let's look at the arrangement of regulations through a material judicial review. We see how a charge material is tested against a charged material in a higher order. Here there is a process of structuring the regulation between the charge material (regulation) below and the charge material (regulation) above. The content material (regulation) below will follow and not conflict with the content material (regulation) above. This means that there is a vertical synchronization and harmonization of regulatory content material. This process is known as regulatory structuring through judicial review in a material manner. Likewise with the judicial review in a formal test

Judicial review on a formal basis can also arrange regulations. This can be seen from the formal test process for the formation of regulations. The formation of regulations that are not carried out in accordance with the provisions can be canceled through a formal test. This means that regulations can be canceled not only if there is material that contradicts the above rules, but also if the process of forming regulations is found that is not in accordance with the provisions. The judicial review process through a formal test can regulate regulations, especially those related to regulations that are formed that are not in accordance with applicable regulations.

That is the judicial review process with a material test and a formal test in structuring regulations. Then if you look at the output (results) of the material test and formal test, it is very clear. That the content material or regulations that are tested materially and formally if it is declared contrary to the provisions of the above regulations or the provisions of the formation of regulations, then automatically the material or regulations being tested are declared invalid. Content or regulation material that is declared invalid will automatically negate any conflicting content or regulation material.

## II. REGULATIONS ARRANGEMENT THROUGH THE CONSTITUTIONAL COURT AND THE SUPREME COURT TO REALIZE SYNCHRONOUS AND HARMONIOUS REGULATORY SIMPLIFICATION

It has been explained previously that regulatory arrangements can be carried out by the judiciary, namely through judicial review. Unfortunately, the judicial review is only limited to examining content material that is contrary to the above regulations for material review and testing the process of forming regulations that are contrary to the provisions that apply to formal tests. This means that the process of structuring regulations through judicial review is only limited to a vertical arrangement (from top to bottom). It is also still limited, namely between the law against the Constitution and the regulations under the law against the law. For example, regional regulations that conflict with government regulations or presidential regulations. There is no material testing mechanism yet. This is because the Supreme Court only examines the legislation under the law against the law. Not local regulations against government regulations or presidential regulations. This is actually a problem of structuring regulations vertically which is difficult to solve. It is not surprising that the impact is not only disharmony in regulations between the central government and the regions, but also disharmony in the relationship between the central government and the regions. This reality also indicates that regulatory structuring through judicial review can only be carried out vertically, but not comprehensively.

Synchronization and harmonization of regulations through judicial review that is currently taking place in Indonesia can only be carried out in a limited vertical manner. In fact, the main problem in structuring regulations is not only the synchronization and harmonization of regulations vertically. Another major problem of regulatory arrangement is also related to horizontal synchronization and harmonization of

regulations (parallel regulations). For example, the problem of many overlapping laws. Not to mention the problem of the many laws and regulations under the law that overlap horizontally or vertically<sup>25</sup>. Extraordinary solutions are needed for regulatory arrangements. The researcher in principle proposes that regulatory arrangements are not only carried out by the executive power (Government) and legislative power (Parliament) only. The researcher proposes that regulatory arrangements also need to be carried out by the judiciary (Judgment). There needs to be involvement of the role of the judiciary in structuring regulations. Regulatory arrangements through judicial power can be carried out using a judicial review model. As mentioned earlier, that judicial review functions in addition to controlling the power of forming regulations. Judicial review can also arrange regulations through content material. Conflicting or overlapping content can be resolved by judicial review. There are two options for regulatory structuring solutions through judicial power. First, the arrangement of regulations is carried out in its entirety through a judicial review by the Constitutional Court. Second, regulation arrangement is carried out through judicial review with division between the Constitutional Court and the Supreme Court.

### *A. Comprehensive Regulatory Arrangement through the Constitutional Court*

The overall arrangement of regulations by the Constitutional Court means that the Constitutional Court has the authority to conduct a judicial review of all materials of legislation in a comprehensive vertical and horizontal manner. This is because the function of the Constitutional Court is to

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<sup>25</sup> Dani Muhtada and Ayon Diniyanto, "Harmonisasi Peraturan Daerah: Tantangan Dan Strategi Di Era Otonomi Daerah," in *Konferensi Nasional Hukum Tata Negara (KNHTN) Ke - 4 "Penataan Regulasi Di Indonesia"* (Jember: UPT Penerbitan Universitas Jember, 2017); Ayon Diniyanto, "Peraturan Daerah Dana Cadangan," *Jurnal Legislasi Indonesia* 18, no. 4 (2021): 478–91, <https://doi.org/https://doi.org/10.54629/jli.v18i4.803>; Dani Muhtada and Ayon Diniyanto, "Penguatan Peran BPIP Dan Strategi Membumikan Pancasila Untuk Melindungi Kelompok Minoritas," *Pancasila: Jurnal Keindonesiaan* 01, no. 01 (2021): 111–21.

enforce and protect the constitution through judicial review. It is really ideal if the arrangement of regulations vertically and horizontally is carried out by the Constitutional Court. All types of laws and regulations can be judicially reviewed by the Constitutional Court horizontally and or vertically. Horizontal judicial review means a judicial review between types of laws and regulations of the same or equal position. For example: (1) Law X against Law Y; (2) Government Regulation X against Government Regulation Y; (3) Regional Regulation X in Region A against Regional Regulation Y in Region A. If you look at the types and hierarchy of laws and regulations<sup>26</sup> the horizontal judicial review can be seen in Table 1.

**TABLE 1.** Horizontal For example, the types of laws and regulations that can be done by judicial review horizontally

No	Type	With	Type
1	Decree of the People's Consultative Assembly (Ketetapan MPR)	With	Decree of the People's Consultative Assembly (Ketetapan MPR)
2	Law (Undang-Undang)	With	Law (Undang-Undang)
3	Government Regulations (Peraturan Pemerintah)	With	Government Regulations (Peraturan Pemerintah)
4	Presidential Decree (Peraturan Presiden)	With	Presidential Decree (Peraturan Presiden)
5	Provincial Regulations (Peraturan Daerah Provinsi)	With	Provincial Regulations (Peraturan Daerah Provinsi) (the same province)
6	Regency/City Regional Regulations (Peraturan Daerah Kabupaten/Kota)	With	Regency/City Regional Regulations (Peraturan Daerah Kabupaten/Kota) (the same regency/city)
7	Other laws and regulations	With	Other laws and regulations (equal position)

As for the judicial review vertically, it is a thorough examination of the laws and regulations with the laws and regulations above them. Vertical

<sup>26</sup> See Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation.

here must be guided by the type and hierarchy of laws and regulations that have been established<sup>27</sup>. Example, (1) Ketetapan Majelis Permusyawaratan Rakyat with Undang-Undang Dasar 1945; (2) Undang-Undang with Undang-Undang Dasar 1945; (3) Undang-Undang with Ketetapan Majelis Permusyawaratan Rakyat; (4) Other laws and regulations under law with Undang-Undang; (5) Peraturan Presiden with Peraturan Pemerintah; (6) Peraturan Daerah Provinsi with Peraturan Pemerintah; (7) Peraturan Daerah Provinsi with Peraturan Presiden; (8) Peraturan Daerah Kabupaten/Kota with Peraturan Pemerintah; (9) Peraturan Daerah Kabupaten/Kota with Peraturan Daerah Presiden; (10) Peraturan Daerah Kabupaten/Kota with Peraturan Daerah Provinsi and others. For more details, please see Table 2.

**TABLE 2.** Examples of Types of Legislation that can be Conducted Vertical Judicial Review

No	Type (Bottom)	With	Type (Top)
1	Ketetapan Majelis Permusyawaratan Rakyat	With	Constitution (Undang-Undang Dasar 1945)
2	Undang-Undang	With	Undang-Undang Dasar 1945
3	Undang-Undang	With	Ketetapan Majelis Permusyawaratan Rakyat
4	Other laws and regulations under law with Undang-Undang	With	Undang-Undang
5	Peraturan Presiden	With	Peraturan Pemerintah
6	Peraturan Daerah Provinsi	With	Peraturan Pemerintah
7	Peraturan Daerah Provinsi	With	Peraturan Presiden
8	Peraturan Daerah Kabupaten/Kota	With	Peraturan Pemerintah
9	Peraturan Daerah Kabupaten/Kota	With	Peraturan Presiden
10	Peraturan Daerah Kabupaten/Kota	With	Peraturan Daerah Provinsi
11	Other laws and regulations	With	The laws and regulations above

<sup>27</sup> Refer to Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation which regulates related to the types and hierarchy of laws and regulations.



This example is a strategy for structuring regulations through a vertical judicial review. So far, judicial review vertically is only limited to two, namely: (1) Undang-Undang with Undang-Undang Dasar 1945; and (2) Other laws and regulations under law with Undang-Undang with Undang-Undang.

There is no systematic judicial review mechanism between the regulations below and the above regulations. Ideally, every statutory regulation can be subject to a judicial review with the legislation above it. It is not limited to statutory regulations. If there are restrictions like the current situation. The fundamental question is why is there a hierarchy of laws and regulations? The hierarchy of laws and regulations is a level that indicates a different position in each type of legislation. It is in line with the theory of hierarchy of norms from Hans Kelsen and *Stufentheorie* (Stufen theory) from Hans Nawiasky. The two theories in principle state that the norms or statutory regulations below are derivatives of the norms or statutory regulations above. Therefore, the norms or laws and regulations below must not conflict with the norms or laws and regulations above<sup>28</sup>.

Based on this theory, why is there a hierarchy of norms or a hierarchy of laws and regulations? If there is no mechanism or instrument to check and ensure that the norms or laws and regulations below do not conflict with the laws and regulations above? At present, Indonesia clearly has not implemented a regulatory review mechanism based on these two theories. For example, Provincial Regulations which cannot yet be subject to a judicial review of Presidential Regulations. Whereas in the hierarchy of laws and regulations in Indonesia. Regional Regulations are under the Presidential Regulation. If you look at the two theories that have been

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<sup>28</sup> Hans Kelsen, *General Theory of Law and State* (Cambridge, Massachusetts: Harvard University Press, 1949); Hans Kelsen, *Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, 1967); Jimly Asshiddiqie and M. Ali Safa'at, *Teori Hans Kelsen Tentang Hukum, Pertama* (Jakarta: Sekretariat Jenderal & Kepaniteraan Mahkamah Konstitusi RI, 2006), 170–71; Ayon Diniyanto, *Perlindungan Dan Penguatan Komunitas Minoritas: Kajian Terhadap Eksistensi Komunitas Islam Aboge* (Pekalongan: Scientist Publishing, 2021).

mentioned previously, then the Provincial Regulations should be subject to a judicial review of the Presidential Regulations. Likewise with Regency/City Regional Regulations which may be subject to judicial review of Provincial Regional Regulations. More clearly see again in Table 2.

In the future, every statutory regulation should be subject to a judicial review with the above statutory regulations systematically, not limited as it is now. This is to ensure that there is a comprehensive vertical synchronization and harmonization between laws and regulations. Therefore, there needs to be an alternative solution in structuring regulations through judicial review and there is also a need for reform of the judicial review system in Indonesia. The researcher proposes that judicial review be carried out both horizontally and thoroughly vertically in the Constitutional Court. This is part of structuring regulations through a judicial review that is systemized under one roof. It is indeed quite difficult for the Constitutional Court to handle judicial reviews horizontally and vertically on all existing laws and regulations. Moreover, in the Constitutional Court there are only 9 (nine) constitutional judges. This condition is certainly difficult if all judicial reviews must be completed by the Constitutional Court. Unless there is a breakthrough to increase the human resources (judges) of the constitution. The shortage of judges in the Constitutional Court is not easily resolved by suddenly increasing the number of judges. This is because they must first adjust the trial system at the Constitutional Court.

These deficiencies or weaknesses can actually be covered by taking advantage of existing conditions. As previously mentioned by the researcher. That there are two solutions in structuring regulations through judicial power. The first can be done by the Constitutional Court itself. Second, there is a division of roles in structuring regulations between the Constitutional Court and the Supreme Court as is currently happening. The only difference is that there are additional roles for the two institutions in conducting judicial reviews, namely horizontal judicial review and vertical judicial review.

## *B. Regulatory Arrangement through the Constitutional Court and the Supreme Court*

The second solution to structuring regulations through judicial power is by decentralizing regulatory arrangements to existing institutions. In Indonesia, there are two institutions in the judiciary that are capable of structuring regulations. The two institutions previously mentioned are the Constitutional Court. Then the institution that also has judicial review authority is the Supreme Court. The two institutions both have the authority to conduct a judicial review as previously reviewed. This means that these two institutions have the potential to carry out regulatory arrangements through judicial review. The only question is what is the model for structuring regulations at the Constitutional Court and the Supreme Court through judicial review? (1) is it done with the current model with limited judicial review? or (2) whether to adopt the first solution, namely a thorough judicial review? or (3) does it create a limited decentralization of regulatory arrangements for each institution?

The first question is, of course, less effective in structuring regulations like the current one. As mentioned earlier, the first question will stop at horizontally disharmony regulations. The second question is also difficult to realize because the overall arrangement of regulations means whether it will be submitted to the Constitutional Court or to the Supreme Court. This condition will certainly be less effective considering the shortcomings previously mentioned, if the arrangement of regulations through judicial review is submitted to one institution. The third question may be the answer to the second solution in structuring regulations by the judiciary through judicial review. If the Constitutional Court is still experiencing shortages if the arrangement of regulations through judicial review is submitted to the Constitutional Court. The solution that can be developed is to decentralize the judicial review authority to the Supreme Court. Decentralization is certainly limited, not all, so that the Constitutional Court and the Supreme Court also have the power to regulate regulations

through limited judicial review. The question is what is the difference with the regulation arrangement through limited judicial review currently or which has been running? Currently, judicial review is limited to vertically limited judicial review. The solution offered by the researcher is limited, namely dividing the first solution to be carried out by two institutions, namely the Constitutional Court and the Supreme Court. In the first solution, regulation arrangement through a thorough judicial review is carried out by the Constitutional Court. The second solution is to arrange regulations through a thorough judicial review carried out by the Supreme Court and the Constitutional Court. In short, it is not a limitation related to judicial review, but a limitation on institutions conducting judicial reviews.

**a. Limited Regulatory Arrangement through the Constitutional Court**

Limited regulatory arrangements through the Constitutional Court, namely limiting the authority of the Constitutional Court in conducting judicial reviews of the types of laws and regulations. If in the previous solution, the Constitutional Court has the authority to conduct a judicial review of all types of laws and regulations vertically and horizontally. In this second solution, the Constitutional Court only has the authority to carry out a limited judicial review on the types of legislation, namely Decrees of the People's Consultative Assembly and Laws. The Constitutional Court has limited authority to conduct a judicial review of the two types of laws and regulations horizontally and vertically. This means that the Constitutional Court has the authority to examine (1) *Ketetapan Majelis Permusyawaratan Rakyat* with *Ketetapan Majelis Permusyawaratan Rakyat*; (2) *Undang-Undang* with *Undang-Undang*. (3) *Ketetapan Majelis Permusyawaratan Rakyat* with *Undang-Undang Dasar 1945*; (4) *Undang-Undang* with *Undang-Undang Dasar 1945*; dan (5) *Undang-Undang* with *Ketetapan Majelis Permusyawaratan Rakyat*. More clearly see in Table 3.

**TABLE 3.** Examples of Types of Legislations that can be Conducted Horizontally and Vertically by Limited Judicial Review by the Constitutional Court

No	Type	With	Type
<b>Horizontal</b>			
1	Ketetapan Majelis Permusyawaratan Rakyat	With	Ketetapan Majelis Permusyawaratan Rakyat
2	Undang-Undang	With	Undang-Undang
<b>Vertical</b>			
3	Ketetapan Majelis Permusyawaratan Rakyat	With	Undang-Undang Dasar 1945
4	Undang-Undang	With	Undang-Undang Dasar 1945
5	Undang-Undang	With	Ketetapan Majelis Permusyawaratan Rakyat

The authority of the Constitutional Court to conduct limited judicial review as shown in Table 3 is expected to be able to make regulatory arrangements through judicial review more effective. The model also does not burden the Constitutional Court compared to the burden in the first solution. The Constitutional Court is expected to be able to conduct a judicial review to harmonize regulations horizontally and vertically.

**b. Limited Regulatory Arrangements through the Supreme Court**

The Supreme Court also did the same. So far, the Supreme Court has had the authority to conduct a judicial review. The authority of the Supreme Court is to conduct a judicial review of the legislation under the law against the law. This authority is of course limited to vertical judicial review. The limitation referred to is a judicial review of all types of statutory regulations under the law against the law. There has been no systematic tiered judicial review between the regulations below and the regulations above. That is what is called a vertically limited judicial review. Then there is also no horizontal judicial review authority. Therefore, the researcher proposes to increase the authority of the Supreme Court to conduct judicial review of laws and regulations horizontally and vertically. But the authority is limited to the type of legislation under the law. This means that the Supreme Court can only conduct a judicial review for: (1)

Peraturan Pemerintah with Peraturan Pemerintah; (2) Peraturan Presiden with Peraturan Presiden; (3) Peraturan Daerah Provinsi with Peraturan Daerah Provinsi (the same province); (4) Peraturan Daerah Kabupaten terhadap Peraturan Daerah Kabupaten/Kota (the same regency/city); (5) Other statutory regulations with other statutory regulations that are equal in position; (6) Regulation under the Undang-Undang with Undang-Undang; (7) Peraturan Presiden with Peraturan Pemerintah; (8) Peraturan Daerah Provinsi with Peraturan Pemerintah; (9) Peraturan Daerah Provinsi with Peraturan Presiden; (10) Peraturan Daerah Kabupaten/Kota with Peraturan Pemerintah; (11) Peraturan Daerah Kabupaten/Kota with Peraturan Presiden; (12) Peraturan Daerah Kabupaten/Kota with Peraturan Daerah Provinsi; dan (13) Other statutory regulations with the above statutory regulations. More clearly see in Table 4.

**TABLE 4.** Examples of Types of Legislation that can be Conducted by the Supreme Court Limited Judicial Review Horizontally and Vertically

No	Type	With	Type
<b>Horizontal</b>			
1	Peraturan Pemerintah	With	Peraturan Pemerintah
2	Peraturan Presiden	With	Peraturan Presiden
3	Peraturan Daerah Provinsi	With	Peraturan Daerah Provinsi ((the same province)
4	Peraturan Daerah Kabupaten/Kota	With	Peraturan Daerah Kabupaten/Kota (the same regency/city)
5	Other laws and regulations	With	Other laws and regulations (at the same level)
<b>Vertical</b>			
6	Regulation under the Undang-Undang	With	Undang-Undang
7	Peraturan Presiden	With	Peraturan Pemerintah
8	Peraturan Daerah Provinsi	With	Peraturan Pemerintah
9	Peraturan Daerah Provinsi	With	Peraturan Presiden
10	Peraturan Daerah Kabupaten/Kota	With	Peraturan Pemerintah
11	Peraturan Daerah Kabupaten/Kota	With	Peraturan Presiden

12	Peraturan Kabupaten/Kota	Daerah	With	Peraturan Daerah Provinsi
13	Other statutory regulations		With	The above statutory regulations

The addition of authority to the Supreme Court as shown in Table 4 is a breakthrough in the context of structuring regulations through judicial power. The Supreme Court, of course, together with the Constitutional Court are expected to be able to play a role in solving the nation's problems, one of which is the problem of disharmony and regulation arrangement. This problem is a serious problem if it has to be solved by the regulatory institutions in Indonesia, namely the Government and the House of Representatives (DPR). It requires cooperation and roles from all branches of power, including the judicial branch. It also takes the role of all elements of the institution including the Constitutional Court and the Supreme Court in order to organize regulations in Indonesia so that they are synchronized and harmonious. Solving the problem of disharmony and structuring regulations will certainly have an impact on synchronous and harmonious regulations. The broad impact will be the creation of quality, streamlined laws and regulations that are able to realize justice and the welfare of the community. It is hoped that with the solutions that have been formulated and described by the researchers, they will be able to contribute in solving the problems of disharmony and regulation, so as to be able to make Indonesia a state of law with quality rules, democracy, and to realize justice and the welfare of the Indonesian people<sup>29</sup>.

## CONCLUSION

<sup>29</sup> Dani Muhtada and Ayon Diniyanto, *Dasar-Dasar Ilmu Negara* (Semarang: BPFH Unnes, 2018); Ayon Diniyanto, "Indonesian's Pillars Democracy: How This Country Survives," *Journal of Indonesian ILegal Studies* 1, no. 01 (2016): 105–14, <https://doi.org/https://doi.org/10.15294/jils.v1i01.16572>; Ayon Diniyanto, "Tindak Pidana Pemilu Dalam Perspektif Negara Demokrasi Indonesia," in *Seminar Nasional Hukum Universitas Negeri Semarang*, vol. 4, 2018, 422–29.

The problem of disharmony and regulation arrangement is one of the big and acute problems faced by Indonesia. There needs to be a solution that breaks down and out of the box in solving the problem. The researcher proposes to involve the judiciary in solving the problem of disharmony and regulatory arrangement in Indonesia. Is it possible? The researcher answered this question perhaps by looking at the model of regulatory arrangement through judicial power based on a theoretical review. There are two things that the researchers managed to find related to the arrangement of regulations through judicial power based on a theoretical review. First, regulation arrangement through judicial review. Based on the academic literature that the researcher has studied, the researcher concludes that judicial review is an instrument and a process for structuring regulations. Second, regulation arrangement through judicial review in Indonesia. That is, it turns out that Indonesia has adopted and implemented judicial review through two judicial institutions, namely the Constitutional Court and the Supreme Court. This means that a judicial review is very likely to be carried out for structuring regulations in Indonesia. The next question is how does a judicial review organize regulations through judicial powers, in this case the Constitutional Court and the Supreme Court? The researcher also succeeded in finding the answer to this question. First, the arrangement of regulations through the Constitutional Court as a whole. Give authority to the Constitutional Court to carry out a comprehensive regulatory arrangement. This authority is to give the Constitutional Court the authority to conduct a horizontal and vertical judicial review of all types of laws and regulations in Indonesia. Second, if the arrangement of regulations through the Constitutional Court as a whole is considered burdensome to the Constitutional Court, then there needs to be decentralization to the Supreme Court. This means that the Supreme Court is involved in structuring regulations through horizontal and vertical judicial review. It's just that there must be a clear division regarding the types of laws and regulations that can be judicially reviewed by the Constitutional Court or the Supreme Court. If these



solutions are implemented, there is great potential to resolve the problem of disharmony and regulatory structuring in Indonesia.

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