

## Prospect of Judicial Preview by Indonesian Constitutional Court as a Preventive Action to Protect Constitutional Rights (Comparative Study with the Constitutional Court of Chile)



Elisabeth Sihaloho<sup>1</sup>, Fifiana Wisnaeni<sup>2</sup>

<sup>1</sup>Magister of Law, Diponegoro University

<sup>2</sup>Faculty of Law, Diponegoro University

**ABSTRACT:** The existence of the Constitutional Court as stated in the provisions of Article 24C of the 1945 Constitution has established the dignity of the Constitutional Court's position as a Guardian of the Constitution which is understood as a judicial institution that protects the constitutional rights of Indonesia citizens. This research is aimed at solving the problem of the constitutional rights of Indonesia citizens who are often injured through legal products in the form of laws. Therefore, this study focuses on studying, analyzing and comparing how the context of judicial preview or can be understood as a test of a draft law both formally and materially as a form of preventive protection of citizen's constitutional rights. The writing of this journal is a normative juridical research based on a literature study by examining and understanding the basic mechanism regarding the provisions for testing laws in positive law in Indonesia accompanied by the act of analyzing the process of implementing judicial preview (testing of draft laws) carried out by the Chilli Constitutional Court. The final result of writing this journal is in the form of a prospective study of the expansion of the authority of the Constitutional Court of Indonesia in conducting a judicial preview (testing of draft laws) which can later be expected to be adopted in positive legal provisions.

**KEYWORDS:** Constitutional Court of Indonesia, Constitutional Court of Chile, Testing of Laws, Testing of Draft Laws, Protection of Constitutional Rights

### I. INTRODUCTION

In the dynamics of the process of realizing the fulfillment of citizens' constitutional rights as mandated by the constitution, to achieve this goal certainly requires the optimal and maximum role of every state institution, especially the Constitutional Court or what we commonly know as "The Guardian of the Constitution" considering the role of the constitution to be a fundamental thing for the life of the nation and state. This is linear with Article 24 paragraph (2) of the 1945 Constitution which mandates the establishment of the Constitutional Court<sup>1</sup> as part of the state's obligation to seek the protection of the constitutional rights of the Indonesian people in accordance with the supremacy of the constitution outlined in the 1945 Constitution.

The Constitutional Court is considered a major supporter of the Checks and Balances system, and its implementation in Indonesia has been approved. The examination of the idea of "checks and balances", which is considered a constitutional principle that requires that all state institutions, including the legislative, executive, and judicial branches, empowered by the people, have an equal standing and are subject to regulation and control when exercising their respective powers, can be understood as simple<sup>2</sup>. It is clearly stated in Article 24 Letter C paragraph (1) of the 1945 Constitution that only the Constitutional Court is the only state institution that has the authority to adjudicate laws against the Constitution at the first and last levels with a final decision. This means that as a single institution in carrying out its obligations, the Constitutional Court must be quick to respond in testing the law so as not to cause a violation of the constitutional rights of Indonesian citizens.

This legal research departs from the complex problem of testing laws in Indonesia, which can be seen in the records of the Constitutional Court's annual report in 2021, as many as 121 laws whose constitutionality has been tested by the Constitutional Court. However, only 3 laws have been directly improved by the House of Representatives through an open cumulative list. Of course, this will affect the quality of the climate of legislation products in Indonesia and the fulfillment of the creation of legal products that prosper the people.

<sup>1</sup> UUD 1945 Pasal 24 Ayat (2)

<sup>2</sup> Affan Gaffar, *Politik Indonesia : Transisi Menuju Demokrasi*, (Yogyakarta: Pustaka Pelajar, 2006), hlm 89.

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In accordance with the dictum of the law "Gouverner C'est Prévoir," which affirms that the state must prepare itself for the future and anticipate problems in order to manage the government and overcome the needs and difficulties of the people. This is also in line with the idea of legal standards known as Das Sein and Das Sollen. The concept of this norm according to Prof. Arief Sidharta can be interpreted as a law that is expected or aspired to, a law that stands and achieves its main goal or can be considered as a desired state to realize the ideal law enforcement and usefulness, such as what is to be achieved in this legal research, namely the expansion of testing of draft laws which is the authority of the Constitutional Court. However, on the opposite side, the law looks at what is the reality of the application in the field or the norm of Das Sein, namely the presence of the law runs with existing facts and capabilities, although it is still far from the expected situation<sup>3</sup>.

When juxtaposed, the situation referred to in this legal study is the limitation of the authority of the Constitutional Court which can only conduct tests only on the law. However, if we examine further, the draft law can be seen as the basic form of law where the test can be carried out by the Constitutional Court.

In contrast to Indonesia, when we observe and study further with the State of Chile, where the Chilli Constitutional Court has the authority to conduct tests not only on laws but also on draft laws as well. This is applied by the Chilean State to maintain a balance between the laws and regulations in the judicial institution and the Chilean executive and of course as an effort to guarantee the law that provides legal protection and certainty for all levels of society in it<sup>4</sup>. The writing of this journal focuses on comparative studies with the Constitutional Court of Chile. Therefore, it is important to first study and see what the State of Indonesia and Chile have in common so that the adoption of the system of testing the draft law by the Constitutional Court in Indonesia can be applied as shown in the following table:

Num.	Equation	Indonesia	Chile
1.	Highest Legal Norms	UUD 1945	<i>Constitution de 1980</i>
2.	Form of State	Unity	Unity
3.	Form of Government	Republic	Republic
4.	System of Government	Presidential	Presidential
5.	State Concept	Pancasila Democracy	Constitutional Democracy

Based on the table, it can be seen that the similarities between the State of Indonesia and the State of Chile can be seen, so when conducting a comparative study with the State of Chile, it can be justified as long as it does not damage the legal system run by Indonesia. Therefore, the expansion of the authority applied by the Chilean Constitutional Court is considered to be the right answer and solution, and later it can be considered by the Indonesian Constitutional Court in answering the rampant number of judicial review cases that must be resolved by the Constitutional Court so that it is feared that it will eventually affect the quality of the Constitutional Court's decision.

Therefore, in writing and researching this law, we will try to analyze and provide a study that contains explanations and how to compare the existence of the Constitutional Court in Indonesia with the Constitutional Court in Chile, by focusing on the authority to test the law and to a draft law. To see more deeply how the similarities and differences between the two are, in order to produce legal research and writing that is able to present reviews and output results that show how the authority of the Constitutional Court is ideal in maintaining its existence as a Guardian of the Constitution". Not only limited to this, but in this legal research, we will also see and analyze how the right proportion in conducting a test of both laws and draft laws is a form of state responsibility for the fulfillment of the constitutional rights of its citizens.

## II. METHODS

The research specification is based on normative juridical which focuses on understanding and assessing positive legal provisions accompanied by a review of certain books or study journals that focus on understanding the object of research. This paper also manages the secondary data and is strengthened through an analysis approach and a comparative approach as well as a legal and regulatory approach in addressing the problems that will be touched upon and become the subject of research.

The writing of this journal has 2 (two) problem formulations, including:

- 1) What is the problem of judicial review by the Constitutional Court so that it is necessary to expand its authority through judicial review?
- 2) What is the mechanism for implementing judicial preview in Indonesia based on comparison with the Chilean Constitutional Court?

<sup>3</sup> Arief Sidharta, *Filsafat Hukum*, (Bandung: Remaja Karya, 1989), hlm 31.

<sup>4</sup> Patawari. "Perbandingan Mahkamah Konstitusi Negara Republik Indonesia dan Negara Republik Chili", *Jurnal Petium Universitas Indonesia Timur*, Vol 13 No.2 (Maret,2020),12

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On the basis of the thoughts outlined above, in this legal research, the author will further study "Judicial Preview by the Constitutional Court as a Preventive Effort to Protect Constitutional Rights (Comparative Study with the Chilean Constitutional Court)".

### III. RESULT AND ANALYSIS

#### A. THE PROBLEM OF JUDICIAL REVIEW BY THE CONSTITUTIONAL COURT SO THAT IT IS NECESSARY TO EXPAND ITS AUTHORITY THROUGH JUDICIAL PREVIEW

The Constitution has mandated the establishment of the Constitutional Court as an institution under judicial jurisdiction with the aim of establishing it as part of the state's obligation to protect and fulfill the constitutional rights of every citizen, in particular in Article 24 paragraph (2) of the 1945 Constitution, which was amended in the third amendment. In accordance with this, the Constitutional Court functions as the interpreter and protector of the constitution. According to Hans Kelsen, quoted by Maruarar Siahaan, the Constitutional Court of the Republic of Indonesia was established to ensure that the idea of the constitution is handled in a superior manner.

Departing from article III of the Transitional Rules of the 1945 Constitution in this third amendment, the establishment of the Constitutional Court began, which states that, "The Constitutional Court shall be established no later than August 17, 2003 and before it is formed, all its powers shall be exercised by the Supreme Court". Through this provision, the House of Representatives and the President drafted Law Number 24 of 2003 concerning the Constitutional Court which was passed by the President on August 13, 1945, so the enactment of the law has proven that legally the institution of the Constitutional Court has been established.

With Presidential Decree No. 147/M of 2003, the President officially transferred the jurisdiction of the Supreme Court to the Constitutional Court on August 15, 2003, marking the appointment of the first Constitutional Judge. The issuance of the Presidential Decree also highlights the fact that the existence of the Constitutional Court depends on the general principle of the application of judicial power that is independent, free, and unaffected by other institutions in upholding law and justice, as the Constitutional Court decisions are made by the President, the House of Representatives, and the Supreme Court. which means that the membership of judges in the Constitutional Court is required to be impartial and neutral<sup>5</sup>.

Therefore, it has been stated in our constitution that the authority of the Constitutional Court is to carry out the principle of checks and balances that place all state institutions in an equal position so that a balance can be found in the administration of the state, then the authority of the Constitutional Court is actually the right step to mutually correct the performance of state institutions in the government, therefore the Constitutional Court has the authority among others<sup>6</sup> :

- a. "Adjudicating at the first and last level of the Testing of the Law against the 1945 Constitution;
- b. Follow up on alleged violations by the President and Vice President by giving a verdict on the opinion of the House of Representatives;
- c. Decide on the dissolution of political parties;
- d. Deciding disputes over the results of general elections and regional head elections; and
- e. Deciding disputes over the authority of state institutions".

There are two (2) types of testing laws and regulations, as detailed below, based on the authority mentioned earlier and the main point of this work, namely the authority to examine the constitution based on article 51 paragraph (3) of Law Number 24 of 2003 concerning the Constitutional Court. A formal legal test, or "formele toesting," is an examination of the process or procedure for the formation of laws that the applicant claims does not follow the scheme of forming a constitutional law. It involves evaluating the form, format, and structure of the law as well as the authorized institutions to make decisions regarding the process of testing the law.

There is also a material test of the law (*materieele toesting*), which is interpreted as a test of the law based on the content material in the verses, articles and/or parts of the law that are considered contrary to the Constitution<sup>7</sup>. It should be emphasized that the position of the Constitutional Court in exercising its authority when testing a law is not to cancel the enactment of a law but only to state that in the law, there are paragraphs, articles and/or parts of the law that no longer have binding legal force (not legally binding)<sup>8</sup>. Some of the problems there is a judicial review so that an expansion of authority through judicial preview is needed will be explained through the following sub-section.

#### 1) Late Follow-up to the Constitutional Court's Decision

The House of Representatives, which has direct access to legislation products, or laws, is an institution that is allowed to carry out the mandate of the Constitutional Court's decision on legal testing of the Constitution. However, the problem is that the

<sup>5</sup> Sekjen dan Kepaniteraan MKRI, *Naskah Komprehensif Perubahan UUD 1945: Buku VI Kekuasaan Kehakiman*, (Jakarta: Setjen dan Kepaniteraan MKRI, 2010), hlm. 492

<sup>6</sup> *Loc cit.*

<sup>7</sup> Pasal 51 ayat 3(tiga) Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi.

<sup>8</sup> Laica Marzuki, "Judicial Review di Mahkamah Konstitusi", 2010, hlm.03.

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House of Representatives, as a legislative body, often fails to implement the decisions of the Constitutional Court. In an ideal world, the House of Representatives would be able to monitor every decision made by the Constitutional Court and include those findings in an open cumulative list to amend laws that have been deemed unconstitutional, as required by Law Number 12 of 2011 on the Establishment of Legal Regulations. However, based on the publication data of the Constitutional Court's annual record, it is stated that as the following table:

Type of Conference Cases	Amount of Conference Cases
Judicial Review	954 Conference Cases
Granted Conference Cases	222 Conference Cases
Rejected Conference Cases	281 Conference Cases
Unacceptable Conference Cases	120 Conference Cases
Continued Cases	78 Conference Cases

Based on the table, of the 222 Constitutional Court Decisions that were declared unconstitutional (granted by the Constitutional Court), only 1 legal product was included in the open cumulative list in 2024. It can be understood that there is no supervision and follow-up efforts to the Constitutional Court's decision which is immediately corrected by the legislature. In fact, every decision issued by the Constitutional Court is closely intertwined with the creation of legal protection and certainty for the constitutional rights of its citizens, therefore it is necessary to supervise every follow-up of the Constitutional Court's decision and sanctions as a binding force for the legislature to better accommodate every decision of the Constitutional Court.

Based on Article 95 Letter B, Law Noor 15 of 2019 concerning Amendments to the Law on the Formation of Laws and Regulations mandates that there is a stage of monitoring and review of legal products that have been issued by the House of Representatives<sup>9</sup>, which will later be the authority of the Institution/Ministry of Government Affairs in the field of Law and/or in the field of Formation of Laws and Regulations, which until now has not been formed by the Government. Therefore, it can be concluded that there has been no concrete supervision of the results of the Constitutional Court's decision that states that a law is contrary to the constitution.

Conditional constitutional decisions, conditional unconstitutional decisions, and rulings that establish new standards are all considered content material in legislative and regulatory processes because there is no follow-up plan for these decisions or their variants. In accordance with the direction of the Constitutional Court through its ruling, laws must be formed through the legislative process, and regulations must be made based on the law through the regulatory process. The legislation process carried out by the House of Representatives together with the President can materially take over the decision of the Constitutional Court to be adopted in the revision or formation of a new law and regulation.

Ideally, a legislator would change the law in response to a decision made by the Constitutional Court through law. However, in certain cases, the Court applies its decision through a regulatory process, eliminating the need for lawmakers to wait for changes in the law. Court decisions can also be included in the revision or making of new laws and regulations. Similarly, monitoring through a regulatory framework whose stance must be based on a law or ruling given by the Constitutional Court.

According to the 1945 Constitution, the House of Representatives and the government are the law-making bodies, therefore they are undoubtedly active in the legislative process. It is logical that the president, the House of Representatives, and the administration must maintain their objectivity as legislators and refrain from allowing their political agendas to influence how laws that have been decided by the Constitutional Court are to be interpreted. The basic idea must be understood correctly by reading and analyzing the interpretation in order to fully understand the intent or meaning of the legal standard that has been decided by the Constitutional Court conditionally. Furthermore, it needs to be seen in the context of people's expectations for the future and the socio-economic reality they face. In this regard, it is very important for the House of Representatives and the Government to comply with every decision made by the Constitutional Court regarding the draft law. This is because the court's decision must be followed up by the government<sup>10</sup>

According to several legal analyses and studies conducted so far, every decision given by the Constitutional Court has helped improve the quality of the legislative process. The Constitutional Court's material test can improve the process of making prudent laws and the concept of prudence. Since this requirement has a significant impact on the adoption of the Constitutional Court's decision and its follow-up in its implementation, the House of Representatives and the government, in its capacity as positive legislators, must take advantage of this opportunity. The problem lies in the fact that the procedure for making laws after

<sup>9</sup> Pasal 99 Huruf A UUD 2945

<sup>10</sup> Proses Legislasi Jangan Abaikan Putusan Mahkamah Konstitusi", <http://jakarta.kemerkumham.go.id/berita-hukum-dan-ham/799-proses-legislasi-jangan-abaikan-putusan-mk> , diakses 27 Februari 2023.

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the Constitutional Court's decision continues to be a topic of discussion. This can be a problem in itself, and the challenges raised above undoubtedly have an impact on the coordination and harmonization process of laws and regulations. Since harmonization is the process of harmonization of laws and regulations as an important component or sub-system of the legal system to achieve legal goals, efforts to achieve harmonization are unquestionable or difficult.

The Constitutional Court with its authority in testing laws is required to position the law as a harmonious system, so the same responsibility should be imposed on the lawmakers, in this case the House of Representatives as the legislator and the government as the co-legislator.

As a result, the Constitutional Court itself needs to consider several factors in terms of the follow-up of its decision. First, there is currently no law that specifies how quickly after a decision must be followed up. Second, it is not clear which institution should be involved precisely to implement the Constitutional Court's decision<sup>11</sup>.

A judicial order, which is one of the powers of the Constitutional Court to forcibly order the recipient to implement the decision, is one of the legal instruments needed to overcome the fact that in some decisions made by the Constitutional Court, the follow-up of the decision does not follow the interpretation of the constitutional judge<sup>12</sup>.

### **2) *Repeated Mistakes Committed by the House of Representatives and the President and the Government in the Making of Legal Products***

In line with the Constitutional Court's annual record which explains that the formal test is due to the action of the House of Representatives in forming a law does not involve direct participation by the public such as the Job Creation Law, the State Capital Law, the Regional Head Law and the Corruption Eradication Commission Law. The concept of repeated mistakes by not emphasizing the role of the community should be overcome by emphasizing the role of the Constitutional Court in conducting tests on the draft law to see whether during the making process it is in line with the mandate of the constitution or not.

In fact, not only in the formal realm but also in the expansion of testing on draft laws with material objects, shown to avoid constitutional losses in the future due to errors in the content of verses, articles and substance of a law that will later harm the people of Indonesia. Not only in the formal order, have repeated errors also often occurred in the material order in substantial articles of a law.

This is because in the process of making laws, the House of Representatives and the Government do not understand the concept of the article used and the essence of the position of the article and certainly do not pay attention to the records from the Constitutional Court in testing the previous law.

The existence of this repeated error will actually damage and weaken the fulfillment of the constitutional rights of citizens which on the one hand is being improved and sought to fulfill by the Constitutional Court, therefore, the expansion of the Constitutional Court's authority in the examination of the draft law (judicial preview) is expected to be able to provide a positive climate for the fulfillment of citizens' constitutional rights and bring the position of the Constitutional Court to be unlimited as a passive institution that must first wait for an application for loss of constitutional rights from citizens.

### ***B. THE MECHANISM FOR THE IMPLEMENTATION OF JUDICIAL PREVIEW IN INDONESIA BASED ON COMPARISON WITH THE CHILEAN CONSTITUTIONAL COURT***

According to the main objective of this essay, it is necessary to first understand the background and status of the Chilean Constitutional Court which was established in 1980 on the basis of the Constitution de 1980. It similar to the judicial authority of the Indonesian Constitutional Court in terms of organizing the judiciary to uphold law and justice in order to build legal certainty for all levels of society in accordance with the three (three) basic legal values stated by Gustav Radbruch and quoted by Prof. Satjipto Rahardjo: justice, usefulness, and legal certainty<sup>13</sup>.

Reflecting back to the Chilean State, where a more developed check and balance between the legislative and judicial branches exists thanks to the power of the Constitutional Court to evaluate proposed laws. If the Judicial Preview is a legal test of a draft law that has not yet been passed, then the Judicial Preview is an idea investigated by the author and can be considered a legal test of the Constitution. The idea of judicial preview can also be used to observe and evaluate bills to determine whether or not they would violate the constitution if passed into law<sup>14</sup>. Therefore, the concept of implementing the Judicial Preview can be carried out by the Constitutional Court as a direct breakthrough effort to reform the law in Indonesia.

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<sup>11</sup> M. Nur Solihin dalam Lexy Armanjaya, Dekonstruksi Kewenangan Legislasi dari DPR ke Mahkamah Konstitusi (MK) Analisis Sosio Legal, *Jurnal Konstitusi Vol.5 No. 2( Setjen MK : Jakarta, 2019) hal .66*

<sup>12</sup> Di Amerika Serikat dikenal dengan istilah instrument injunction yaitu memerintah kepada perseorangan atau institusi untuk mentaati putusan Supreme Court. Adapun di Jerman dikenal dengan Judicial Order. Federal Constitutional Court (FCC) dapat menerbitkan judicial order yang mewajibkan adressat untuk mematuhi interpretasi konstitusional FCC.

<sup>13</sup> Satjipto Rahardjo, Ilmu Hukum, Citra Aditya Bakti: Bandung, 2012, hlm. 19.

<sup>14</sup> Alec Stone Sweet, *Governing With Judges: Constitutional Politics in Europe*, New York: Oxford University Pers, 2000, hlm.24. Dikutip oleh Jimly Asshiddiqie, Op.cit.

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The mechanism agreed by the State of Chile regarding the examination of the draft law is enshrined in Chapter VIII Article 93 of the Constitutional Tribunal of Chile which states that<sup>15</sup>: "Supervise the constitutionality of law that interprets each rule from the constitution, from organic constitutional law and the norms of the Covenant International before enactment, including being able to review the bill before it is passed if deemed deviating from the constitution." which gives absolute authority to the Constitutional Court to be able to test the draft law. Not only is it limited to draft laws, but the Chilean Constitutional Court also has the authority to test an international treaty that has not yet been ratified.

It is the same with Indonesia, which places the constitution as the highest hierarchy of norms, so that all laws and regulations must not contradict the constitution. This legal product in the form of a law is made by the legislative power called congress, namely by the Senator and the Lower House, because Chile adheres to the bicameral system, namely there are 2 (two) chambers in the legislature. And as a legislative body that makes laws, the following are the phases of the process of forming laws and regulations in Chile<sup>16</sup> :

### **1) *Planning and Discussion Stage on Lawmaking***

The Chilean state adheres to a strong bicameral legal system which clearly emphasizes the division of roles of the legislature in the process of drafting a law, namely both the Senator and the Lower House can propose a bill that will later be discussed and considered by the party who did not give the proposal, for example, if a law is drafted by the Lower House, the Senator who will make efforts to discuss and will give consideration. If the regulation is proposed by the President, the discussion will be carried out by Congress, which involves the role of both Senators and the House of Representatives<sup>17</sup>.

Similar to the process of forming laws applied in Indonesia, at this stage of restriction is also carried out with 2 (two) periods, as the first stage of restriction is carried out with the main agenda, namely the discussion of the list of inveterization of problems, goals and human rights that are fought for as well as the submission of opinions in an open forum with Congress, the President and the government as well as community representatives, Then continued to the final stage of discussion, namely how each political party views in approving or rejecting the draft law and ending with a vote on the approval or rejection of the draft law before it becomes the main academic draft that will be tested by the Chilean Constitutional Court.

### **2) *Judicial Preview***

The Chilean Constitutional Court at this stage conducts a Judicial Preview of the Bill that has been made by Congress. The main thing that is the object of testing by the Chilean Constitutional Court is whether or not during the process of its formation the formal and material requirements of the formation of the law are paid attention to. Within the formal scope of the Chilean Constitutional Court considers related<sup>18</sup> :

- a. The entire process and stages of making laws are carried out as mandated by the constitution;
- b. Community involvement and participation;
- c. The decision-making process during the manufacturing process.

Meanwhile, at the stage of material testing, it contains about whether a norm, article, verse and substance of the draft law will have the tendency to negate the constitutional rights of its people or not with several parameters that have been set by the Chilean Constitutional Court. Not only stopping at this step, the Chilean Constitutional Court can question the legislature about the analysis of the impact of the law's enactment. Therefore, the Constitutional Court can cancel the draft law, if it is found that the existence of the draft law is formally and materially defective and automatically the draft law must return to the first stage of the process if it wants to be re-promulgated.

### **3) *Stages of Ratification and Invitation***

If after going through the Judicial Preview by the Constitutional Court, the Law is passed by the President and immediately promulgated and immediately published to all levels of society, through TV channels, radio and also websites as well as all social media roles. However, if the draft law is clearly contrary to the constitution, it will be repeated at the stage of discussion at level I.

### **4) *Ex-Post Evaluation Stages***

At the ex post evaluation stage, maintaining the quality of a law, therefore the Chilean State has an Evaluation Department that is independent and contains members of the public as its members, with the main task of supervising the legal norms made by the legislature, how the impact of the rules that have been issued and whether there is a political impact derived from the law that will only meet the political interests of a person, groups to certain institutions.

Those are some of the differences in the process of forming laws and regulations by. The Chilean state, which we can say is far superior in answering the needs and legal certainty of its citizens and in applying the concept of Check and Balances. As an effort to observe, assess whether a draft law will be contrary to the constitution or not when the product of the law is

<sup>15</sup> Konstitusi Negara Chili Bab VIII Pasal 93

<sup>16</sup> Chili Constitutional Tribunal Act 1987.

<sup>17</sup> Fatmawati, Struktur dan Fungsi Legislasi Parlemen dengan Sistem Multikameral; Studi Perbandingan Antara Indonesia dan Berbagai Negara, UI Press, Jakarta, 2010, Hlm 237

<sup>18</sup> Jimly Asshiddiqie, Model-Model Pengujian Konstitusional di Berbagai Negara, (Jakarta: Konpress, 2005), hal. 6 – 9.

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passed<sup>19</sup>. Therefore, the concept of implementing the Judicial Preview can be carried out by the Constitutional Court as a direct breakthrough effort to reform the law in Indonesia.

Considering the research that has been carried out by the author, the author is of the view that the expansion of the financial object of the Indonesian Constitutional Court to conduct a test on the draft law (Judicial Preview) can be implemented in Indonesia, but with the following considerations:

- a. Changing the grace period of the Constitutional Court's authority in deciding disputes over the results of disputes between regional heads, which was originally only 45 days, now to 60 working days since the case was recorded in the constitutional case registration book, to reduce the workload
- b. There is a time frame for testing the draft law (Judicial Preview) by the Indonesian Constitutional Court, which is limited to a maximum of 45 working days, considering that a law is made and formed, of course, based on the demands of the needs of life that exist in the community.

The establishment of a supervisory institution under the Ministry of Law and Human Rights to supervise the implementation of every Constitutional Court decision on the results of Judicial Review and Judicial Preview decisions. So that there is accountability from the follow-up to the Constitutional Court's decision

In fact, the idea of the prospect of testing draft laws has always been a topic raised by the Constitutional Court since 2014, but until now there has been no further discussion about the expansion of the authority because the workload of the Constitutional Court is considered too much and heavy every year. However, the author considers that a legal breakthrough needs to be made as quoting the opinion of H.L.A. Hart in his book *The Concept of Law* explains that <sup>20</sup> "The law should not focus on the concept of mere formality, the law must dare to look ahead, make various breakthrough efforts and answer various problems".

Das Sollen and Das Sein as the concepts that have been mentioned and discussed in the introduction. Prof. Arief Sidharta interpreted Das Sollen as a law that is expected or aspired to, a law that stands and achieves its main goal, or a law that can be seen as a desirable state to realize ideal and useful law enforcement. This legal research aims to achieve an expansion of the testing of draft laws that are under the jurisdiction of the Constitutional Court. However, on the opposite side, the law looks at what is the reality of the application in the field or the norm of Das Sein, namely the presence of the law runs with existing facts and capabilities, although it is still far from the expected situation<sup>21</sup>.

It can be said that Bills and Laws are integral to each other because Bills are the first product, basic idea, and an important component in the making of Laws. The President, the Regional House of Representatives, and the House of Representatives are the main parties that have the authority to write laws. Each proposed Bill is formulated in accordance with the national legislative program, which is characterized as a document consisting of planning units for the initial stages of lawmaking, specifically the stages of drafting, discussing, approving and lawmaking<sup>22</sup>.

The judicial preview stage can be carried out after the discussion stage by the House of Representatives and before the ratification stage by the President. There is a Judicial Preview stage on the process of forming laws and regulations in Indonesia, as an expansion of the authority of the Constitutional Court as an effort to make a legal breakthrough, strengthening checks and balances between institutions and concrete evidence of the dignity of the Indonesian Constitutional Court as The Guardian of the Constitution.

The concept of judicial preview is carried out by the Constitutional Court both formally and materially on the draft law. The Constitutional Court will see in the formal order whether the series of processes or procedures for the formation of laws are appropriate or not as stated in the provisions of the Law on the Establishment of Laws and Regulations, it can also test the provisions of the form, format and structure of the law. Later the constitutional judge will look at several related points as follows:

- a. The entire manufacturing process is carried out in accordance with the mandate of the constitution;
- b. Involvement and participation in the community; and
- c. The process of returning decisions during the process of making the law.

In the judicial preview order in the material realm, then, the examination of the law is carried out and analyzes the substantial provisions of articles that are considered contrary to the provisions of the Constitution and have the potential to harm the constitutional rights of citizens, whether a norm, article, paragraph and substance of the draft law will have the tendency to negate the constitutional rights of its people or not with several parameters that will later be further compiled in the procedural law regulations of the Indonesian Constitutional Court.

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<sup>19</sup> Alec Stone Sweet, *Governing With Judges: Constitutional Politics in Europe*, New York: Oxford University Press, 2000, hlm.24. Dikutip oleh Jimly Asshiddiqie, Op.cit.

<sup>20</sup> H.L.A. Hart, *The concept of Law*, Oxford :Oxford University Press. 1958. P. 225.

<sup>21</sup> Arief Sidharta, *Filsafat Hukum*, (Bandung: Remaja Karya, 1989), hlm 31.

<sup>22</sup> Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan.

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The results of the decisions issued by the Constitutional Court are clearly different in the testing of draft laws and testing of laws in general, therefore there are only 2 (two) types of decisions that will be issued by the Indonesian Constitutional Court on the expansion of the Constitutional Court's authority in testing draft laws, namely:

- a. Constitutional, through judicial preview, the Constitutional Court considers that the draft law does not contradict the 1945 Constitution both formally and materially.
- b. Conditional unconstitutionality, can be understood as the result of a judicial preview that states that the Constitutional Court has a conflict with a norm or value and the content of the article in the 1945 Constitution, therefore the Constitutional Court provides a record of improvement so that the draft law does not harm the constitutional rights of citizens.

When the judicial preview stage by the Constitutional Court has been completed, the Law is passed by the President and immediately promulgated and immediately published to all levels of society. However, if the bill is clearly contrary to the constitution, it will be repeated at the stage of discussion at level I or not re-entered into the discussion of the plenary session, depending on the verdict later.

In the last step to maintain the quality of a law, an institution under the Ministry of Law and Human Rights will be formed to supervise the legal norms made by the legislature, how the impact of the rules that have been issued will be carried out and whether there will be political impacts derived from the law that will only meet the political interests of a person, group or certain institution. as mandated by Law Number 15 of 2019 concerning the Establishment of Laws and Regulations.

Several decisive steps, which need to be taken to be able to immediately implement the expansion of the Constitutional Court's authority in conducting a judicial preview of the draft law, are needed several concrete and direct actions as follows, including:

- a. Make a limited amendment to the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia by including the provisions of the authority of the Constitutional Court in testing the draft law. So that the phrase in Pasa; 24C paragraph (1) reads as follows "The Constitutional Court has the authority to adjudicate at the first and last level whose decision is final in order to test the Law and/or the Draft Law against the 1945 Constitution";  
If the amendment action feels heavy or difficult to do, then a revision or change can be made to the organic law, namely in Law Number 7 of 2020 concerning the Second Amendment to Law Number 24 of 2003 concerning the Constitutional Court;
- b. Revising Law Number 12 of 2011 concerning the Establishment of Laws and Regulations by inserting provisions for Testing the Draft Law (judicial preview) conducted by the Constitutional Court;
- c. Establish new procedural law guidelines that will regulate more rigidly and in detail the subjects, objects, and results of decisions from the results of the testing of the draft law against the 1945 Constitution of the Republic of Indonesia both by the House of Representatives and the Constitutional Court; and
- d. Socialize to the public with the role of academics, students and content creators to promote basic knowledge about the expansion of the authority of the Constitutional Court, which was previously only limited to testing laws against the 1945 Constitution, now added as authority in testing draft laws against the 1945 Constitution.

## IV. CONCLUSIONS

There are obstacles and problems in the testing of the law or judicial review carried out by the Constitutional Court, such as there is no direct follow-up by the House of Representatives and the Government on laws declared unconstitutional by the Constitutional Court. In addition, there are often repeated mistakes made by the House of Representatives and the Government in forming and drafting laws so that this further strengthens the tendency to lose constitutional rights for every citizen. Because of these problems, the expansion of authority through judicial preview or testing of draft laws is necessary as a preventive effort against the loss of constitutional rights of all citizens.

The mechanism regarding judicial review can be studied and adopted through the authority of the Constitutional Court of Chile by including the stages of judicial preview before approving the law to be passed. Therefore, the Indonesian Constitutional Court can adopt the system by first revising the provisions of the a quo law in order to be able to include the judicial preview stage after the drafting and discussion of the draft law is carried out and before the draft is ratified by the President. The expansion of authority is expected to be able to answer existing problems and accommodate what are the interests and needs of the community.

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