

Legal Reconstruction Of Laws Regarding Human Rights Through *Judicial Review* To The Constitutional Court

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ABSTRACT

This research on legal reconstruction of laws that conflict with human rights through judicial review to the Constitutional Court, is a normative legal research study using secondary data in the form of primary legal material in the form of the 1945 Constitution of the Republic of Indonesia, the Constitutional Court Law, Human Rights Law, Constitutional Court decisions, and material Secondary law in the form of research results that have been done by previous researchers. This study aims to analyze the normalization of human rights in the 1945 Constitution of the Republic of Indonesia and the Human Rights Law, and find legal reconstruction of laws that conflict with human rights through a judicial review to the Constitutional Court. Studies show p enormaan Human Rights In 1945 the Constitution NRI loaded in the articles of the 1945 Constitution of the Republic of Indonesia, namely Article 26 paragraph (1), Article 27 paragraph (1) and paragraph (2), Article 28, Article 29, Article 30, Article 31, Article 33 and Article 34, and Article 28A through Article 28J, while in Law no. 26 years 199 9 Human rights are divided into 10 groups, namely: (1) Right to Life, (2) Family Rights and Continuing Progeny, (3) Right to Self-Development, (4) Right to Justice, (5) Right to Personal Freedom, (6) Right to Sense of Security, (7) Right to Welfare, (8), Participation Rights in Government, (9) Women's Rights, and (10) Children's Rights. Each of these human rights groups is further elaborated on what provisions constitute human rights and must be protected. For example, the right to life group consists of: (a) the right to live, maintain life, and improve living standards; (b) the right to peace, security, peace, happiness, physical and spiritual well-being, and (c) the right to a good and healthy environment. Reconstruction of the law against laws that conflict with human rights through a judicial review to the Constitutional Court can be realized by fulfilling the following requirements: (1) Submitted by legal subjects with human rights who meet the legal standing namely Indonesian Citizens / Citizens Groups or customary law communities, (2) Test stones (foothold) konstitus ional is a human rights provisions in the Constitution NRI 1945, and (3) type pu decision- taken is dikabu the fish, constitutional conditionally constitutional, conditionally unconstitutional, limited constitutional and formulation of new norms.

Keywords: Law Reconstruction Law; Human Rights; MK Judicial Review.

A. PRELIMINARY

As stated in the preamble of the Law of Association of the Republic of Indonesia Year 1945 (Constitution NRI 1945), the purpose of the establishment of the Republic of Indonesia is to protect the entire Indonesian nation and the entire homeland of Indonesia, *promote the general welfare*

“, the intellectual life of the nation and participate in the establishment of world order based on independence, lasting peace and social justice. In order to achieve the objectives of the country the position of Indonesian citizens as human entities is very important. This means that there are Indonesian human rights and obligations as Indonesian citizens.

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The objectives of the Indonesian state as mentioned above have consequences including giving mandates to the state to ensure the protection of human rights (HAM). This human rights protection can be in the form of normalization in statutory regulations, and no less important is its implementation in the practice of state and social life .

Human rights are obtained from the creator, namely God Almighty, a right that cannot be ignored as a human being, he is a creature of God who has a high. Human rights exist and are inherent in every human being, because they are universal, meaning that they apply everywhere and to anyone and cannot be taken by anyone. This right is needed by humans in addition to protecting themselves and the dignity of their humanity as well as being used as a moral foundation in associating or dealing with fellow human beings.²

The development of human rights in Indonesia, in fact in the 1945 Constitution has been written, but not yet transparently listed.³ After the amendment I to IV of the 1945 Constitution of the Republic of Indonesia, the provisions concerning human rights are listed as having an origin of 28 A to 28 J. What is interesting is that before or before an amendment to the 1945 Constitution of the Republic of Indonesia, there is a law that regulates the rights human rights, namely Law No. 26 of 1999.

The regulation of human rights in the 1945 Constitution of the Republic of Indonesia is meaningless if it turns out that in the Law (Law) made by the Parliament and the President of Human Rights is not transferred or the Act is contrary to Human Rights. If this happens then for Indonesian citizens or other parties can raise the issue. The way to deal with it constitutionally is through judicial review of the 1945 Constitution of the Republic of Indonesia (*Judicial Review*) to the Constitutional Court. It is provided for in paragraph C of Article 24 (1) Constitution NRI 1945, which stated one of the authorities of the Constitutional Court is to hear at the first and tera khir decision is final to test the law - und ang against the Constitution.

Based on the foregoing , this study aims to analyze the normalization of human rights in the 1945 Constitution of the Republic of Indonesia and the Human Rights Law, and find legal reconstruction of laws that conflict with human rights through a *judicial review* to the Constitutional Court .

B. RESEARCH METHODS

This study uses a normative juridical approach in the form of an approach based on legislation and court decisions in this case the Constitutional Court's decision . Type of analytical descriptive research by describing the results of research conducted. The data used is secondary data in the form of primary legal materials which consist of the Constitution NRI 1945, the Constitutional Court Law, Human Rights Law, the decisions of the Constitutional Court, and secondary legal materials in the form of research that tela h done earlier researchers, books, journals and ha sil seminars , also tertiary legal material in the form of dictionaries and encyclopedias. Data obtained by literature study and document study, and then analyzed qualitatively.

C. DISCUSSION

1. The extent of human rights in the 1945 Constitution of the Republic of Indonesia and the Law on Human Rights

Incorporating human rights norms into the 1945 Constitution is a long struggle. At the beginning of this country, there was a conflict between the founders of the state and the drafters of the constitution about whether or not human rights should be included in the NRI Constitution. The contradiction was suggested between M. Yamin's camp, on the one hand, with Soepomo and Soekarno's camp on the other. In Soepomo's view, human rights are synonymous with liberal-individual ideology. Soepomo never imagined that a state based on kinship would result in conflict or oppression of the state to its people because the state or government was a unity, between the government and the people was the same body.⁴

2 Susani Triwahyuningsih, 2018, *Protection and enforcement of Human Rights in Indonesia*, *Journal of Legal Standing Law*, Vol. 2 No. September 2, 2018, published by the Faculty of Law, University of Muhammadiyah Ponorogo , page 113.

3 Slamet Marta Wardaya, 2005, *Nature, Conception and National Action Plan for Human Rights (HAM)*, in Muladi (Editor), *Human Rights, Nature, Concepts and Implications in the Perspective of Law and Society* , Refika Aditama, Jakarta, Hlm . 3

4 Firdaus, 2005, *Implications of Human Rights Regulations in the Constitution Against Ius Constituendum*, in Muladi (Editor), *Human Rights, Nature, Concepts and Implications in the Law and Society Perspective* , Refika Aditama, Jakarta, p. 10

Yamin rejects this view, according to him there is no basis whatsoever that can be used as an excuse to refuse to include human rights in the constitution they drafted. As a result of this conflict reached a compromise to include some human rights principles in the constitution that they are designing. The form of the compromise is what is regulated in the article in Law D 1945.⁵ Regarding whether the 1945 Constitution of the Republic of Indonesia (before the amendment) had formulated the principles of human rights, Mahfud MD stated that the 1945 Constitution only spoke about a particular human rights (HAW) or particularistic human rights. according to him both, HAM and HAW are clearly different. The first is based on the understanding that human nature, wherever the innate rights can not be transferred, taken, or destroyed. As for the second, it is only possible to obtain it because someone has a status as a citizen⁶.

Regardless whether it is HAW or HAM, using the observation of Dahlan Taib⁷ by clicking examine both the Pembukaan, Body and Penjelasan 1945, will be found at least fifteen (15) principles of human rights, namely: (1) the right to download entukan self [Paragraph 1 Preamble], (2) the right to citizenship [Article 26 paragraph (1)], (3) equality rights in law & government [Article 27 paragraph (1)], (4) right to work [Article 27 paragraph (2)], (5) the right to a decent life [Article 27 paragraph (2)], (6) the right to associate [Article 28], (7) the right to express an opinion [Article 28], (8) the right to religion [Article 29], (9) the right to defend the State [Article 30], (10) the right to receive instruction [Article 31], (11) the right to welfare social (Article 33), (12) the right to guarantee social [Article 34], (13) the right to freedom and independence [explanation of Article 24-25], (14) the right to maintain cultural traditions [explanation of Article 32], and (15) right to the maintenance of regional language [explanation of Article 36]. According to him, the provisions of the above is enough to make that very guarantee 1945 HAM.

While the 1949 RIS Constitution in force in the Republic of Indonesia which has its capital in Yogyakarta as a substitute for the 1945 Constitution provides for regulations and significant legal protections regarding human rights. Human rights provisions stipulated in a separate section (Chapter I, Section 5 with the title of Rights and

Freedoms-K ebebasa n Basic Human) contained in 27 chapters. In addition to the constitution RIS also set the basic obligation of the state in conjunction with efforts to penega right of human rights (Chapter I, Section 6 Fundamental Principles) are loaded nature 8 chapters. Thus i, then the overall issue of human rights in the 1949 RIS Constitution is regulated in 2 parts, namely Section 5 and Section 6 in Chapter I with a total of 35 articles.

In the Provisional Constitution of 1950 (UUDS 1950) in lieu of the 1949 RIS Constitution, a total of 36 articles of human rights principles are published under the umbrella of «Basic Human Rights», which stretches from Article 7 to Article 43. Because UUDS the origin of K ounces titusi RIS, then generally no substantial changes are striking in it, except in the form of state and several articles that adapts to changes in the structure of the state, from a unitary state to a union neraga. In terms of human rights protection, the 1945 Constitution is also not too different from what is regulated in the Republic of Indonesia Constitution.

As for the human rights provisions in the Constitution NRI 1945 the current is, in addition to those already set in articles resentful umnya (Constitution NRI 1945 original, namely Article 26 paragraph(1), Article 27 paragraph(1) and paragraph (2), Article 28, Article 29, Article 30, Article 31, Article 33 and Article 34), especially is that a result of Amendment K Secondly Constitution NRI 1945 in 2000. As we know after the re-formation occurs 4 times NRI Constitution Amendment 1945, namely the First Amendment in 1999 (in the General Session of [the People's Consultative Assembly](#) on 14-21 October 1999), the Second Amendment in 2000 (in the Annual Session of [the People's Consultative Assembly](#) on 7-18 August 2000), the Third Amendment in 2001 (in the Session Annual [People's Consultative Assembly](#) on 1-9 November 2001), and the Fourth Amendment of 2002 (in the Annual Session of [the People's Consultative Assembly](#) on 1-11 August 2002).

The concept and arrangement of human rights in the Constitution NRI 1945 was passed in the Plenary Session Annual Session August 18th 2000. Before ratified, the material on human rights has begun to be discussed since 1999. This material was first discussed in the Ad-Hoc Committee (PAH) III

5 Ibid

6 Mahfud MD, 2000, "Democracy and the Constitution in Indonesia: Study of the Interaction of Politics and Life of the State Administration", Jakarta: Rineka Cipta, p. 161

7 Dahlan Thaib, 1998, "Constitutional Law Reform: Finding An Alternative Model of the Constitutional Amendment" dala m Journal of Law Ius Quia Iustum (Yogyakarta: UII Press, No. 10 Vol. 5. 1998). P. 12

Working Committee (BP) MPR. Next, the results of the discussion of PAH III continued by PAH I in the 1999-2000 time frame. The discussion by PAH I produced a draft amendment to the articles concerning human rights. The draft was then taken to the Commission A forum in the 2000 MPR ST and then passed through the MPR Plenary Meeting⁸.

The normalization of age human rights is contained in Chapter XA entitled Human Rights which consists of ten articles, namely Article 28A through Article 28J. The ten articles consist of 26 verses. Of the 26 verses referred to, 21 paragraphs among which regulate rights, 2 paragraphs regulate obligations, 2 paragraphs concerning rights limitation, one paragraph further regulation related to guaranteeing the implementation of human rights.

21 paragraphs or provisions relating to rights can be subdivided on the provisions governing individual rights in general, special rights possessed by citizens and the rights of vulnerable groups. Of that number, there are 18 provisions related to individual rights, 1 special provision for citizens and 2 provisions relating to special groups, namely children and traditional communities.

Individual rights are the rights of every human individual. This right in the constitution is defined by the phrase «everyone». Everyone means anyone. Follow-up whether Indonesian citizens or not. As long as he is human and lives in Indonesia, the 1945 Constitution recognizes and guarantees the existence and continuity of his human rights. Similar formulations are also found in the *Universal Declaration of Human Rights* and various major conventions in the field of human rights.⁹

Rights of human air- categories of individual rights stipulated in the Constitution NRI 1945 were as follows :

1. the right to life and the right to defend their lives and lives [Article 28A];
2. the right to form a family and continue the security through legal marriage [Article 28B paragraph (1)];
3. the right to develop oneself through the fulfillment of basic needs, the right to receive education and obtain benefits from science

8 Saldi Isra, 2014, *The Role of the Constitutional Court in Strengthening Human Rights in Indonesia*, in the *Constitutional Journal*, Vol 11, No. 3 (2014), Jakarta, Indonesian Constitutional Court, p. 27

9 *Ibid*

and technology, arts and culture, for the sake of improving the quality of life and for the welfare of humanity [Article 28C paragraph (1)];

4. the right to advance themselves in fighting for their rights collectively to build a community, nation and state [Article 28C paragraph (2)];
5. the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law. [Article 28D paragraph (1)];
6. the right to work and to receive fair and appropriate remedies and treats in an employment relationship [Article 28D paragraph (2)];
7. the right to citizenship status [Article 28D paragraph (4)];
8. the right to freely embrace religion and worship according to their religion, to have education and teaching, to choose a job, to have citizenship, to choose a place to live in the territory of the country and to leave it, and to be entitled to return [Article 28E paragraph (1)];
9. the right to freedom of belief, trust, mind and attitude, in accordance with his conscience [Article 28E paragraph (2)];
10. The right to freedom of association, *Berkumpul*, and issued an opinion [Article 28E (3)];
11. The right to communicate and memperoleh information for personal development and environment sosialn yes s erta right to seek, obtain, possess, store, process, and communicate information with menggunakan will all

available channels. [Article 28F paragraph (1)];

12. the right to personal, family, respect, dignity, and property under his authority, as well as the right to a sense of security and protection from the threat of fear of making or not doing something that is a human right [Article 28G paragraph (1)];
13. the right to be free from torture or treatment which demeans human dignity and has the right to obtain political asylum from other countries [Article 28G paragraph (2)];
14. the right to live in physical and spiritual well-being, have a place to live, and get a good and healthy living environment and have the right to obtain health services [Article 28H paragraph (1)];
15. The right to access and special privileges to obtain equal opportunities and benefits in order to achieve equality and justice. [Article 28H paragraph (2)];
16. the right to social security which enables the development of himself as a whole with dignity [Article 28H paragraph (3)];
17. The right to have private property rights and property rights should not be taken over Se-wen ang arbitrarily by anyone [Article 28H paragraph (4)];
18. The right to be free from treatment that is diskrim inatif on da sar any and entitled mendapatk early protection against treatment is diskrimin Atif it [Article 28 paragraph (2)];

Provisions for special rights for citizens are contained in Article 28D paragraph (3), namely the right to obtain equal opportunities in government. According to Saldi Isra¹⁰ this right is a right that does not apply to anyone

such as an individual right, but is only recognized as an individual right with citizenship. This right does not apply generally. This right is only owned by individuals who fulfill certain qualifications, namely as citizens of Indonesia.

For the rights related to special groups are rights for groups that are «devoted» by the 1945 Constitution. It is called a special group, because the 1945 Constitution regulates it separately with its own terms as well. Even though there are already provisions relating to similar rights, the 1945 Constitution still regulates them separately. For example the child's right to survival. This right is specifically regulated in Article 28B Paragraph (2) of the 1945 Constitution. Whereas in Article 28A of the 1945 Constitution, it regulates the right of everyone to live (each person also means a child, because the child is also a person). This indicates that the 1945 Constitution gives special attention to children. Because, children are one group that is very vulnerable to become victims of human rights violations. Besides children, the group that also received special attention in the 1945 Constitution was the traditional community of customary law communities. Recognition of the rights of indigenous peoples or *indigenous people* is a consequence of that Indonesia is a multi-ethnic, multi-cultural, multi-religious and multi-lingual country. Guarantees respect for the rights of traditional communities are regulated in Article 28I Paragraph (3) of the 1945 Constitution which states that *cultural identity and traditional community rights are respected in accordance with the development of time and civilization.* ¹¹

The 1945 Constitution of the Republic of Indonesia in addition to regulating the recognition and protection of human rights, also regulates the limitation of rights. There are two verses related to rights restrictions, namely:

- 1) The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as persons before the law, and the right not to be prosecuted on the basis of a retroactive law are human rights that are retroactive cannot be reduced under any circumstances [Article 28I paragraph (1)],

¹⁰ *Ibid.* Pg. 29-30

¹¹ *Ibid*

- 2) In exercising their rights and freedoms, each person is obliged to submit to the restrictions set forth by the law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill fair demands in accordance with the consideration moral, religious values, security and public order in a democratic society. [Article 28J paragraph (2)].

In addition to the protection of human rights, the 1945 Constitution of the Republic of Indonesia also contains provisions concerning obligations related to human rights. There are two verses that govern it, namely: 1). Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government [Article 28I paragraph (4)], and 2). Se each person is obliged to respect the human rights of others da lam orderly society, nation, and air n egara [Article 28J paragraph (1)].

The 1945 Constitution of the Republic of Indonesia also determines the need for further regulatory provisions relating to guarantees in the implementation of human rights. In Article 28I paragraph (5), the 1945 Constitution of the Republic of Indonesia gives the mandate to form legislators to regulate the implementation of human rights. Article 28I paragraph (5) reads: to uphold and protect human rights with the principles of a democratic rule of law, human rights implementation is guaranteed, regulated, and set forth in legislation.

Related to the further regulation of human rights, the interesting law on human rights already existed before the promulgation of the Second Amendment to the 1945 Constitution of the Republic of Indonesia , which as described in the amendment concerns human rights provisions. A year before the Second Amendment to the 1945 Constitution of the Republic of Indonesia, namely in 1999 Law No. 26 of 1999 concerning Human Rights (Human Rights Law) . In this Law of Human Rights is defined as a set of rights attached to nature and human existence as a creature of God Almighty and is a gift - His must be respected, upheld and protected by the state, law, government, and everyone for the respect and protection of the dignity and human dignity. He also emphasized that the Republic of Indonesia recognizes and upholds

human rights and basic human freedoms as rights that are inherently inherent to and inseparable from humans, which must be protected, respected and upheld for the sake of increasing human dignity, welfare, happiness, and intelligence and justice .

Human rights law broadly divides human rights into 10 groups, namely: (1) the right to life , (2) the right to family and continuing heredity , (3) the right to self-development , (4) the right to obtain justice , (5) the right to Personal freedom , (6) Right to security , (7) Right to welfare , (8), Participation rights in government , (9) Women›s rights , and (10) Children›s rights . Each of these human rights groups is further elaborated on what provisions constitute human rights and must be protected. For example, the right to life group consists of: (a) the right to live, maintain life, and improve living standards; (b) the right to peace, security, peace, happiness, physical and spiritual well-being, and (c) the right to a good and healthy environment.

In the Human Rights Law also determined the existence of rights that can not be reduced under any circumstances and by anyone (non derogable) . Human rights included in this criterion are: Right to life, right not to be tortured, right to personal freedom, mind and conscience, right to religion, right not to be enslaved, right to be recognized as a person and equality before the law, and right not to be prosecuted based on retroactive laws.

In addition to providing protection and recognition of human rights, the human rights law also determines basic human obligations. These basic human obligations include:

- (1) Every person in the territory of the Republic of Indonesia is obliged to obey the laws and regulations, unwritten laws and international law concerning human rights that have been accepted by the Republic of Indonesia. ¹²
- (2) Every citizen is obliged to participate in the effort of state defense in accordance with the provisions of the law - law.¹³
- (3) Everyone must respect the human rights of others, morals, ethics, and the order of life

¹² Article 67 of Law 29/1999

¹³ Article 68 of Law 29/1999

in a society, nation and state.¹⁴

(4) Every human rights of a person creates a basic obligation and responsibility to respect the rights of others in a reciprocal way and becomes the duty of the Government to respect, protect, uphold and promote it.¹⁵

(5) In carrying out the rights and freedoms, everyone shall be subject to the restrictions set by the Act - undang with ma KSud to ensure recognition and respect for the rights and freedoms of others and to meet the demands that are appropriate to the moral considerations, security, and public order in a democratic society.¹⁶

If the above is an obligation for everyone (both Indonesian citizens and non- Indonesian citizens) related to human rights, then the government also has obligations that are obligatory and responsible for respecting, protecting, enforcing, and advancing human rights as regulated in the Human Rights Law , legislation a n g - another invitation, and huku m of international human rights ratified by the Republic of Indonesia. Obligations and responsibilities of the Government include effective implementation steps in the fields of law, politics, economy, social, culture, national defense and security, and other fields.

Against human rights violations in the Human Rights Act, human rights violations (*ordinary*) and gross human rights violations are distinguished . What is meant by violations of human rights (*ordinary*) in the General Provisions Number 6 of the Human Rights Act is stated as any act of a person or group of people including state officials either intentionally or unintentionally or negligence, limiting, and or revoking the human rights of a person or group of people guaranteed by law - human rights laws , and did not get, or worry about not getting a fair legal settlement and correct, based mechanism applicable law. While what is a grave violation of human rights is the mass killings (*genocide*), the killing of ill - treatment or outside the court decision (*arbitrary / extra judicial killing*), torture, enforced disappearances, enslavement, or discrimination are carried

out systematically (*systematic discrimination*)¹⁷.

To deal with these gross human rights violations in 2000 Law No. 26 of 2000 concerning Human Rights Courts. The Human Rights Court is a special court within the General Courts. The Human Rights Court is located in a regency or city area whose jurisdiction covers the jurisdiction of the relevant District Court. For the Special Capital Region of Jakarta, Human Rights Courts are located in each region of the relevant District Courts.

Penyelidikan human rights violations carried out by the weight of the National Human Rights Commission. The National Commission on Human Rights in conducting an investigation can form an ad hoc team consisting of the National Commission on Human Rights and elements of society. Meanwhile, the investigation and prosecution is under the authority of the Attorney General . The Attorney General as an investigator has the authority to make an arrest for the purpose of investigating a person suspected of committing gross human rights violations based on sufficient preliminary evidence.

2. Forms of Legal Reconstruction of Laws That Are Contrary to Human Rights through *Judicial Review* to the Constitutional Court

Article 28I paragraph (5) of the 1945 Constitution of the Republic of Indonesia states that *to uphold and protect human rights with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated, and set forth in legislation* . What is meant by the implementation of human rights in these laws and regulations, according to the opinion of the writer is not just the existence of laws and regulations (Laws, PPs, or regulations below) that specifically regulate human rights, but also how all the laws and regulations invitation under the 1945 Constitution reflects human rights protection or does not conflict with human rights.

What if there is an issue of legislation, in this case an act contrary to human rights ? , NRI Related to this Constitution in 1945 already

14 Article 69 paragraph (1) of Law 29/1999

15 Article 69 paragraph (2) of Law 29/1999

16 Article 70 of Law 29/1999

17 Elucidation of Article 104 of the Human Rights Law

provides a solution, namely the space do *judicial review* or judicial review of the law against the Constitution NRI 1945. Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia states: “ *The Constitutional Court has the authority to adjudicate at the first and last level, the decision of which is final to examine the law against the Constitution, to decide on disputes over the authority of state institutions whose authority is granted by the Constitution, to decide upon the dissolution of political parties. , and decide upon disputes over the results of general elections .* “

Before the formation of the Constitutional Court as part of the Third Amendment to the 1945 Constitution, the authority to examine the Law on the 1945 Constitution was held by the People’s Consultative Assembly (MPR). This was regulated in MPR Decree Number III / MPR / 1998 concerning Legal Sources and Ordering of the Regulation on Legislation-Invitation. Article 5 paragraph (1) of the decree states that “the People’s Consultative Assembly has the authority to examine the law against the 1945 Constitution, and the Decree of the People’s Consultative Assembly. However, this test cannot be called a judicial review, because it was carried out by the MPR which is not a judicial institution. ¹⁸

Initially there were three alternative institutions that were initiated to be given the authority to conduct a review of the Law on the Constitution, namely the MPR or MA or MK. The idea of granting such authority to the MPR was finally sidelined because in addition to being no longer the highest institution, the MPR was not a collection of legal experts and constitutional experts, but representatives of political organizations and interest groups. The idea of granting authority to test the law to the Supreme Court also cannot be accepted because the Supreme Court itself has too much work burden in dealing with cases that have become its competence. That is why the authority to examine the Law on the Constitution was finally given to a separate institution, namely the Constitutional Court as one of the perpetrators of judicial power¹⁹.

In testing the Law on the 1945 Constitution of the Republic of Indonesia, there are at least 5 functions attached to the existence of the Constitutional Court and implemented through its authority. The fifth of these functions are: Constitutional Court as guardian of the constitution (*the guard-*

ian of the constitution), the interpreter final constitution (*the the final interpreter of the constitution*) , protector of democracy (*the protector of democracy*), protector of the constitutional rights of citizens (*the protector of the citizen’s constitutional rights*), and *the protector of human rights* .

FUNCTION Court as a protector of human rights (*the protector of human rights*) , tangible to give a decision on the petition for *judicial review* with the touchstone of human rights provisions in the Constitution NRI 1945. That is when giving a decision granting or rejecting the petition for *judicial review* filed by citizens Indonesia and / or the customary law community based on consideration is the human rights provisions contained in Articles 28A to 28J of the 1945 Constitution of the Republic of Indonesia.

Regarding the form of legal reconstruction of laws that conflict with human rights through a *judicial review* to the Constitutional Court, it must first be understood what is meant by legal reconstruction. By borrowing the meaning of reconstruction from BN Marbun²⁰ as returning something to its original place, rearranging or re-drawing from existing materials and rearranging as is or returning to the original event, the legal reconstruction is intended as the rearrangement of a law (rules / norms) of the materials existing and reorganized as good rules / norms. So that the legal reconstruction of laws that are contrary to human rights is intended as the preparation of a law (regulations / norms) contained in the law rearranged into good rules / norms that are in accordance with human rights. This legal reconstruction was carried out through a *judicial review* to the Constitutional Court.

Based on the provisions of Article 51 of Law Number 24 of 2003 concerning the Con-

¹⁸ Constitutional Court Procedural Drafting Team, 2010, *Constitutional Court Procedure Law*, Jakarta, Publisher: General Secretariat and Registrar of the Indonesian Constitutional Court , p. 25

¹⁹ Ibid

²⁰ BN Marbun, 1996, *Political Dictionary*, Pustaka Sinar Harapan, Jakarta,, p. 469

stitutional Court as amended by Law Number 8 of 2011 concerning Amendments to the Law of the Constitutional Court (MK Law) it is said that the petitioner (*subjectum litis*) of *judicial review* is the party who considers the rights and / or its constitutional authority is impaired by the coming into effect of the law, namely:

- a. perorangan Indonesian citizens, defined as “individual” includes a group of people who have the same interest .
- b. customary law community unit as long as it is alive and in accordance with the development of the community and the principles of the Unitary State of the Republic of Indonesia stipulated in the law;
- c. public or private legal entity; or
- d. state institutions.

The subject matter can be accepted for submitting a judicial review application if it has a legal position (*legal standing*). The *legal standing* required is:

- a. legal subjects have constitutional rights or authorities as regulated by the Constitution;
- b. the right has been impaired or violated by the coming into effect of the law or part of the law in question;
- c. the constitutional impairment must be specific (specific) and actual or at least potential which according to logical reasoning will certainly occur;
- d. the existence or emergence of a loss is proven to have a relationship as a result or causal relationship (*causalverband*) with the enactment of the Law;
- e. if the petition is granted later, the constitu-

tional impairment concerned can indeed be recovered with the cancellation of the said Act.

While for types of judicial review decisions based on the provisions of Article 56 of the Constitutional Court Law are: (1) the application cannot be accepted, in case the applicant and / or the application does not meet the requirements, (2) the request is granted, in the case the application is grounded, or (3) the request is rejected, in the event that the aforementioned law does not conflict with the 1945 Constitution of the Republic of Indonesia, both in its formation and in part or in whole. For the decision of the petition to be granted, the Constitutional Court must state explicitly the content of the paragraph, article, and / or part of the law that is contrary to the 1945 Constitution of the Republic of Indonesia.

Referring to the 3 types of MK decisions above, of course the legal reconstruction through the MK *judicial review* , is not in the form of a decision stating that the application cannot be accepted or the request is rejected. This is because both types of decisions have no effect whatsoever on the normalization provisions in the Act being tested. This means that the norms of the law are constructed as before.

For decisions granted in Article 57 paragraph (1) of the Constitutional Court Law, it is stated that the Constitutional Court’s decision whose decision states that the material contained in paragraphs, articles, and / or parts of the law is contrary to the 1945 Constitution of the Republic of Indonesia, , article and / or parts of the law do not have binding legal force. This means that a decision in the form of an application is granted resulting in the norms contained in a law that are declared to be in conflict with the 1945 Constitution of the Republic of Indonesia so that the norms do not have binding legal force. Thus this type of decision shows the legal reconstruction.

According to the research results of Syukri Asy’ari, Rahmawaty Hilipito, and Mohammad Mahrus Ali ²¹There are other models of the Constitutional Court is a constitutional decision conditional (*conditionally constitutional*), unconstitutional conditional (*conditionally unconstitutional*), the decision to postpone implementation of the decision (*limited constitutional*) and formulate new norms. Decision constitutional conditional (*conditionally constitu-*

21 Syukri Asy’ari, Rahmawaty Hilipito, and Mohammad Mahrus Ali, 2013, *Model and Impementation of Constitutional Court Decisions in Judicial Review (Study of Decisions of 2003-2012)*, *Constitutional Journal*, Volume 10 No. December 4, 2013. P. 675.

tional) and not constitutional conditional (*conditionally unconstitutional*) is basically a model of decision that is not legally cancel and declare void a norm, but both models of the decision contains or contain their interpretation (*interpretative decisions*) to a material the contents of paragraphs, articles, and / or parts of the law or the law as a whole which are basically declared contrary or not contrary to the constitution and still have legal force or do not have binding legal force. The decision model that delayed the implementation of its decision (*limited constitutional*) basically aimed at giving space to transition rules that were contrary to the constitution to remain in force and have legal force for a certain time. The decision model for formulating new norms is intended to overcome the unconstitutionality of the application of norms. The formulation of the new norm is basically temporary, the new norm will later be taken over in the formation or revision of relevant laws.

With the four variants of the decision as mentioned above, the Constitutional Court was often considered to have changed its role from *negative legislature* to *positive legislature* . That is, the Constitutional Court made itself a third chamber in the legislative process, because it cannot be denied that the variants of the decision could affect the legislative process in the legislative body. Apart from the polemic, this is the external control tool owned by Mk to purify the legal products produced by the institution. legislative.²²

Based on the description above , the legal reconstruction of laws that conflict with human rights through a *judicial review* to the Constitutional Court can be realized with the provisions of:

- 1) Submitted by legal subjects (*subjectum litis*) who meet the *legal standing* . Because what is being tested is a law that is contrary to human rights, the petitioner is a legal subject of human rights as determined in the 1945 Constitution of the Republic of Indonesia, in this case Indonesian citizens / groups of Indonesian citizens or customary law communities;
- 2) Stone test (footing) constitutional or not laws that are tested are the constitutional rights

of the applicant in the form of human rights as human rights provisions already set in the articles of the Constitution NRI 1945 original, namely Article 26 paragraph (1), Article 27 paragraph (1) and paragraph (2), Article 28, Article 29, Article 30, Article 31, Article 33 and Article 34, and in the articles of the Second Amendment to the 1945 Constitution, namely Articles 28A through 28I;

- 3) Type decisions made by the judges of the Constitutional Court is granted, the constitutional conditional (*conditionally constitutional*) , unconstitutional conditional (*conditionally unconstitutional*) , delaying the implementation of the decision (*limited constitutional*) and the formulation of new norms.

Examples of MK decisions that reconstruct laws against laws that conflict with human rights are as follows:

- 1) For the decision of the petition granted : Decision on case No. 68 / PUU-XV / 2017 concerning testing Law No. 11 of 2012 concerning the Child Criminal Justice System . Applicant: D r. Nor Rochmad, SH., MH., Setia Untung Arimuladi, SH., MH., Febri Ardiyansah, SH., MH., Narendra Jatna, SH, LLM, Dr. Redha Manthovani, SH, MH.LLM, S.Kom., And Dr. Yudi Kristiana, SH. MH . Test Stone Human Rights Provisions in the NRI Constitution: Article 28D paragraph (1) and Article 28I paragraph (2). Article tested: Article 99 of Law No. 11 of 2012 concerning the Child Criminal Justice System , the norm of which reads: “ The public prosecutor who deliberately did not carry out the obligations referred to in Article 34 paragraph (3) is sentenced to a maximum imprisonment of 2 (two) years “. In

²² Mohammad Mahrus Ali, Rahmawaty Hilipito, and Syukri Asy'ari, 2015, *Follow Up on Constitutional Court Decisions which are Constitutionally Conditional and Contains New Norms*, *Constitutional Journal*, Volume 12 No. 3, September 2015. Jakarta, page 633

the Court's decision: “ *Article 99 of Law No. 11 Year 2012 on the Criminal Justice System Children contradictory d ith Act of foundation of the Republic of Indonesia Year 1945, and does not have binding legal force* “

- 2) For the decision of the constitutional conditional (*conditionally constitutional*): Decision on case number 10 / PUU-VI / 2008 testing c Law 10 of 2008 concerning General Elections for Members of the People's Representative Council, the Regional Representative Council and the Regional People's Representative Council. Applicants: DPD RI, Individual Members of the DPD RI (33 people), Individual Indonesian citizens who have concerns in elections, regional parliaments, and the distribution of regional aspirations (4 people), and Individuals living in certain provinces (13 people) . Test Stone Human Rights Provisions in the NRI Constitution: Article 28D paragraph (1) and Article 28I paragraph (3). Article tested: Article 12 letter c of Law No. 10 of 2008 concerning General Elections for Members of the People's Representative Council, Regional Representative Council and Regional People's Representative Council whose norm reads: “ residing in the territory of the Unitary Republic of Indonesia “. In the Court's decision: “ *Article 12 letter c of Law No. 10 of 2008 concerning General Elections for Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Representative Council remain constitutional based on the 1945 Constitution of the Republic of Indonesia, as long as they contain the terms of domicile in the province represented* ”
- 3) For a decision to be unconstitutional conditional (*conditionally unconstitutional*

al) : Decision on case number 35 / PUU-X / 2012 testing Law 41 of 1999 concerning Forestry. Applicant: Jakarta Customary Law Community Alliance (AMAN), Kenergian Kuntu Customary Law Community Unit, Kampar Regency, Riau Province, Kasepuhan Csitu Customary Law Community Unit, Lebak Regency, Banten . Human Rights Provisions in the NRI Constitution: Article 28C paragraph (2) Article 28D paragraph (1), Article 28I paragraph (2), (4), and (5) . Article tested : Article 4 paragraph (3) of Law no. 41 of 1999 concerning Forestry, the norm of which reads: “ Forest control by the State continues to consider the rights of indigenous and tribal peoples, as long as in reality it still exists and its existence is recognized, and it does not conflict with national interests “. In the Court's decision: “ *Article 4 paragraph (3) of Law no. 41 of 1999 on Forestry contrary to the Constitution NRI in 1945 and does not have binding legal force throughout the camp does not mean “to control the forest by the state remains memberhat fish right mobi tion of customary law, as long as they live, and in accordance with the development of society and the principle of the unitary state of Indonesia which is regulated by the Law -Chief* “

- 4) For decisions that delay the implementation of their decisions (*limited constitutional*): Decision case number 22 / PUU-XV / 2017 testing Law No. 1 of 1974 concerning Marriage. Applicants: Endang Wasrinah, Maryanti, and Rasminah. Test Stone Human Rights Provisions in the NRI Constitution: Article 27 paragraph (1) and Article 28B paragraph (2) . Article tested: Article 7 paragraph (1) of Law no. 1 of 1974 concerning Marriage, which normally reads: “Marriage is only permitted if the male has

reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years “. In a *limited constitutional ruling* : “ *State Article 7 paragraph (1) along the phrase*” reaches the age of 16 (sixteen) years “*Law No. 1 of 1974 concerning Marriage, contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force* “ , *Stating Article 7 paragraph (1) of Law No. 1 of 1974 concerning Marriage still applies until the amendments are made with a grace period as determined in this decision* “ , and” *Ordering the legislators to within a maximum of 3 (three) years make changes to Law No. 1 of 1974 concerning Marriage, specifically with regard to the minimum age of marriage for women.* “

- 5) For the decision on the formulation of new norms : Case Decision number 46 / PUU-VIII / 2010 testing Law No. 1 of 1974 concerning Marriage. The applicant: Hajjah Aisyah Mochtar alias Machica Mochtar Binti H. Mochtar Ibrahim and Mochammad Iqbal ramadhan bin Moerdiono . Test Stone Human Rights Provisions in the NRI Constitution: Article 28B paragraph (1) and paragraph (2) Article 28 D paragraph (1). Article tested: Article 43 paragraph (1) of Law no. 1 of 1974 concerning Marriage, which normally reads: “ Children born outside of marriage only have civil relations with their mothers and their families .” Decision on the formulation of the Constitutional Court’s new norm : “ Children born outside of marriage only have civil relations with their mother and mother’s family and with men as fathers who can be proven based on science and technology and / or other evidence according to the law to have blood relations, including civil relationship with his father’s family “

Based on what is explained above along with the example of the case, the legal reconstruction of laws that conflict with human rights through a *judicial review* to the Constitutional Court can occur if there is a request for a review of the constitutionality of the law submitted by legal subjects namely Indonesian citizens / groups of Indonesian citizens and / or customary law community. With the touchstone of constitutional rights as defined in the existing human rights provisions in the Constitution in 1945. Further NRI decided by the judge to the decision is granted, the constitutional conditional (*conditionally constitutional*, unconstitutional conditional (*conditionally unconstitutional*) , delaying the implementation of the decision (*limited constitutional*) and the formulation of norms new.

D. CONCLUSION

Based on the results of the study it can be concluded:

1. The normalization of human rights in the 1945 Constitution of the Republic of Indonesia is contained in articles of the 1945 Constitution, namely Article 26 paragraph (1), Article 27 paragraph (1) and paragraph (2), Article 28, Article 29, Article 30, Article 31, Article 33 and Article 34, and in the articles of the Second Amendment to the 1945 Constitution Chapter XA entitled Human Rights consisting of ten articles, namely Article 28A to Article 28J. The ten articles consist of 26 verses. Of the 26 verses referred, 21 of them regulate rights (consisting of 18 provisions relating to individual rights, 1 special provision for citizens and 2 provisions relating to special groups, namely children and traditional society), 2 paragraphs governing obligations, 2 paragraphs concerning restriction of rights, one paragraph further regulation related to guarantee the implementation of human rights. While in Law No. 26 of 1999 concerning human rights broadly divides human rights into 10 groups, namely: (1) Right to Life, (2) Family Rights and Con-

tinuing Inheritance, (3) Right to Self-Development, (4) Right to Get Justice, (5)) Right to Personal Freedom, (6) Right to Sense of Security, (7) Right to Welfare, (8), Participation Rights in Government, (9) Rights of Women, and (10) Rights of Children. Each of these human rights groups is further elaborated on what provisions constitute human rights and must be protected. For example, the right to life group consists of: (a) the right to live, maintain life, and improve living standards; (b) the right to peace, security, peace, happiness, physical and spiritual well-being, and (c) the right to a good and healthy environment.

2. Legal reconstruction of laws that conflict with human rights through a *judicial review* to the Constitutional Court can be realized by fulfilling the following requirements:
 - a. Submitted by legal subjects (*subjectum litis*) who meet the *legal standing* . Because what is being tested is a law that is contrary to human rights, the petitioner is a legal subject of human rights as determined in the 1945 Constitution of the Republic of Indonesia, in this case Indonesian citizens / groups of Indonesian citizens or customary law communities;
 - b. The constitutional test (stepping stone) whether or not the Act being tested is the applicant's constitutional rights in the form of human rights as stipulated in human rights in Article 26 paragraph (1), Article 27 paragraph (1) and paragraph (2), Article 28, Article 28A to 28I , Article 29, Article 30, Article 31, Article 33 and Article 34 of the 1945 Constitution;
 - c. Types of decisions made by the judges of the Constitutional Court is granted, the constitutional conditional (*condi-*

tionally constitutional), unconstititutional conditional (*conditionally unconstitutional*) , delaying the implementation of the decision (*limited constitutional*) and the formulation of new norms.

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