



OPEN COURT PRINCIPLE FOR THE PUBLIC IN MATERIAL JUDICIAL REVIEW RIGHT IN THE SUPREME COURT Analysis of Constitutional Court Decision No. 85/PUU-XVI/2018

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ABSTRACT

The Supreme Court (MA) has the authority legality review on regulations under the law against the law as stated in Article 34A paragraph (1) of the 1945 Constitution. Unlike the Constitutional Court (MK) in the examination process until the ruling applies Open Court Principle the Supreme Court does not implement it because apply the legal provisions that apply to the application case in the shortest possible time. This research uses normative legal research methods with conceptual approaches, philosophical approaches, and statute approaches. There are two research questions of this study namely why is the principle of the trial open to the public in the right of judicial review in the MA in the concept of modern legal states and what is the constitutional basis for a trial open to the public based on the principle of *Audi et Alteram Partem*? Based on principles of law country, Indonesia should emphasize on transparency to make a public decision in court so that justice will prevail. The Supreme Court can make a rule that accommodate the spirit of a trial that is open to the public as in the principle of *Audi et Alteram Partem*.

Keywords: Judicial Review; The Supreme Court; Trials

INTRODUCTION

The rule of law is called *rechstaats* or the rule of law. State establishment Indonesia has been aspired by its founder father as a state of law. For the third amendment to the 1945 Constitution Article 1 Paragraph (3), it is emphasized that “the State of Indonesia is a State law”.¹ The 1945 Constitution has expressly the authority of the Supreme Court as in the provisions of Article 24A paragraph (1) of the 1945 Constitution affirmed, “*The Supreme Court has the authority to adjudicate at the cassation level, to test laws and regulations under the law against laws, and to have other powers granted by law.*”

Judicial review is the right to test that judicial power exercises as a form of application of the principles of the state of the law with transparency and social control. The right to test can be in the form of formal test rights relating to testing procedures and ways of forming laws

and regulations, and in the form of the right to test materials related to testing the substance of laws and regulations. And that test can be based on the principle of *lex specialis*, whereby a judge can declare the validity of a particular rule even if the article violates a more general article of regulation. Similarly, a rule can also be considered void if it conflicts with a higher regulation according to the principle of higher regulation not limiting the lower law.²

The term examination of legal norms (legislation) can be divided according to the subject and object of its regulation. Depending on the exam material, the exam can be conducted by a judge (*Totsengricht van de Richter* or judicial review), an examination by the legislature (legislative review), and an examination by an executive body (executive review). Another definition states that there are three broad categories in the testing of laws and regulations and constitutional affairs, namely: testing with judicial review, testing by political bodies (political review), and testing by officials or state administrative bodies

¹ Andryan Andryan Farid Wajdi, “Sifat Putusan Impeachment Mahkamah Konstitusi Terhadap Status Hukum Presiden Dan/Atau Wakil Presiden,” *Jurnal Penelitian Hukum De Jure* 20, no. 2 (2020): 304.

² Imam Soebechi, *Judicial Review Perda* (Jakarta: Sinar Grafika, 2012).15

(administrative review).³

In the study of *Tweetsengricht* (test rights) reviewed from Dutch literature, the test rights are divided into official test rights (*Formel Tweetsvsvfsrecht*) and judicial review rights (*MatrilToetsengricht*). The right of formal testing is the authority to assess whether the product of the law has been established with procedures by the law, while the right to test materials is the authority to investigate and then evaluate whether the content of the legal product is appropriate or not. contrary to higher regulations⁴. The concept of⁵ judicial review comes from countries that adhere to the principle of constitutional supremacy.⁶

Judicial review first arose in the practice of law in the United States which was not explicitly provided for in the country's constitution. The birth of judicial review into the legal order of the United States through the decision of the Supreme Court of the United States in the case of "Marbury vs. Madison" in 1803, which was then John Marshal as Chief Justice of the United States Supreme Court. Although judicial review and *toetsingsrecht* have different developmental histories.⁷

In its development, Indonesia, after the Amendment of the 1945 Constitution, has established a Constitutional Court, which has the authority to conduct judicial review of the Law against the Basic Law. Thus, the Supreme Court is given the authority to conduct a judicial review of the regulations under the Act against the Act. In Perma No. 1 of 2011, it is stated that the Right of Judicial review is the right of the Supreme Court to assess the material content of laws and regulations under the Law on higher-level laws

and regulations. However, there are differences in the process of testing norms between the Constitutional Court and the Supreme Court.

In the application for a judicial review of Law Number 48 of 2009 concerning Judicial Power in the Constitutional Court, assessing the reason for not being able to open an open session to the public because it was limited to a maximum of 14 days was unwarranted. With the principle of court openness, the court is open to be accessed by the public, both the right to attend and participate in the trial and access all information related to the court. The Supreme Court cannot open the hearing open to the public because it is reasoned that it is limited to a maximum time of 14 as stipulated in the provisions of Article 31 paragraph (1) and paragraph (4) of Law Number 48 of 2009 concerning Judicial Power. The Supreme Court could have made an MA regulation that accommodates the spirit of an open trial and can be seen transparently by the public.

So far, the examination of the issue of the right to a judicial review in the Supreme Court is in line with the examination of the cassation.⁸ Nonetheless, the large number of cases does not have to close public access as part of judicial transparency in the modern legal state.

Regarding the research problem of this study, there are two research questions. First, why is there any principle of the open court to the public in the right of judicial review in The Supreme Court based on the concept of modern legal states? Second, what is the constitutional basis for an open court to the public based on *Audi et Alteram Partem* principle?

RESEARCH METHOD

This research uses normative legal research methods. Marzuki said that legal research is a process to find the rule of law, legal principles, and legal doctrines to answer the legal issues faced. This study aims to find and describe the conceptual framework of positive law (written law).⁹ The

³ Andryan Ida Hanifah, "The Rights to Review Policy Rules in the Perspective of Rule of Law," *De Jure* 21, no. 3 (2021): 324.

⁴ Maria Farida, *Masalah Hak Uji Terhadap Peraturan Perundang-Undangan Dalam Teori Peraturan Perundang-Undangan: Seri Buku Ajar* (Jakarta: FH. UI, 2000).25

⁵ Ibid.

⁶ Andryan, "Implikasi Putusan Hak Uji Materil Mahkamah Agung Terhadap Legalitas Pimpinan Dewan Perwakilan Daerah," *Jurnal Penelitian Hukum De Jure* 18, no. 3 (2018): 367–380.

⁷ Tim Penyusun Hukum Acara MK, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2010).17

⁸ Maftuh Effendi, "Usulan Rumusan Hukum Acara (Ius Constituendum) Pengujian Peraturan Perundang-Undangan Di Bawag Undang-Undang Oleh Mahkamah Agung," *Jurnal Media Hukum* 25, no. 1 (2018).

⁹ Sunny Ummul Firdaus; Putri Anjelina Nataly Panjaitan; Rizky Kurniyanto Widyasmito, "Peran Dissenting Opinion Hakim Konstitusi dalam

approach used in this study is a ¹⁰conceptual approach that is used to examine the principle of trials open to the public in modern legal countries. The philosophical approach, is used to analyze the principle of the trial being open to the public in the right of judicial review; statute approach to finding a constitutional basis in the principle of open trial to the public the right of judicial review in the Supreme Court. the approach used by researchers in analyzing to answer the problems in this study.¹¹ legal materials used in research this is primary, and secondary sources of legal material, and tertiary.¹²

Research tools used in the types of this research are: Literature/ Normative Studies, namely studying various literature related to the object research, including normative research on relevant laws and regulations with research. Document Study of primary and secondary materials.¹³

DISCUSSION AND ANALYSIS

A. Open Court Principle

According to Beverly McLachin, there are two core values to the principle of open court. ¹⁴ First, the Open Court guarantees the achievement of individual freedom of opinion and expression of his ideas and stances. His right to speak and express these ideas and attitudes will be reduced in substance if he does not allow the individual to access the information he expresses. Freedom of expression protects everyone's right to express opinions, criticize and debate the substance of court decisions as well as the operational and

Pembaharuan Hukum Nasional," *Jurnal Penelitian Hukum De Jure* 20, no. 1 (2020): 4.

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2015). 43

¹¹ Endra Wijaya, "Praktik Pengelolaan Keuangan Desa dan Faktor-Faktor yang Memengaruhinya," *Jurnal Ilmiah Kebijakan Hukum* 13, no. 2 (2019): 170.

¹² M. Nur Syafiuddin, "Aksentuasi Kepentingan Terbaik Anak dalam Putusan Nafkah sebagai Upaya Penjaminan Hak Asasi Anak," *Jurnal HAM* 13, no. 2 (2022): 239.

¹³ Marulak Pardede, "Legitimasi Pemilihan Kepala/Wakil Kepala Daerah dalam Sistem Pemerintahan Otonomi Daerah," *Jurnal Penelitian Hukum De Jure* 18, no. 2 (2018): 132.

¹⁴ Beverly McLachin, "Court, Transparency and Public Confidence to the Better Administration of Justice," *Deakin Law Review* 1 (2003):36

administrative aspects of the course of justice in courts. Second, the principle of openness supports court accountability. With the guarantee of the public's right to access trials and court decisions, the public can supervise the decision-making process.¹⁵

In the context of Criminal Law, the hearing is open to the public as stipulated in Article 153 paragraph (3) of the Criminal Procedure Code. It is said, "*For the purposes of examination, the presiding judge of the trial opens the hearing and declares it open to the public except in cases concerning decency or the accused children.*" Non-fulfillment of this provision will result in the null and voidness of the judgment.

As a country based on legal sovereignty as stated in Article 1 paragraph (3) of the 1945 Constitution, Indonesia adheres to the principles of the state of law. Jimly Asshiddiqie, emphasized that the principle of the Indonesian legal state can be divided into twelve types, namely ¹⁶the rule of law, equality before the law, the principle of legality, restriction of power, independent executive organs, free and impartial justice, state administrative courts, constitutional courts, protection of human rights, democracy serves as a means to achieve state goals (Social Welfare), transparency and social control.

One of the principles of the state of the law is the presence of transparency and social control.

Transparency means that it can be seen thoroughly in the sense of the word, openness. Thus, transparency can be interpreted as openness in carrying out a process of the activity. With transparency in every decision that becomes the public domain, such as the judiciary, fairness can be grown. Thus transparency means openness in providing information related to public activities to parties who need information. In the sense that the court is certainly obliged to provide the information needed for interested parties in particular and the public in general.

The application of judicial openness will certainly have implications for public participation

¹⁵ Alvaro Herrero and Gesper Lopez, "Access to Information and Transparency in the Judiciary," Word Bank Institute Working Paper, 2010.

¹⁶ Jimly Asshiddiqie, *Konstitusi Dan Konstitusionalisme Indonesia*, Edisi Revi. (Jakarta: Konstitusi Press, 2005).

in terms of conducting judicial review applications. As affirmed by the party conducting the judicial review process in the Supreme Court, in questioning the disclosure of the hearing in the HUM MA Case, Muhammad Hafidz, Wahidin, and Solihin, as the petitioner party assumed that since the Supreme Court has not yet been issued, there is no public awareness to apply for a judicial review against the laws and regulations.¹⁷

The publication indicated by the applicant is not only a notice of how to proceed and how to arrive at the decision but also openness to the knowledge of the process of action to the public. According to the Petitioner, this was due to the closing of the hearing and the absence of the possibility of presenting expert witnesses, unless the verdict was read out only.¹⁸

B. Exceptions to Open to The Public Hearing

Here are the following provisions of the norms governing trials which are open to the public:

Table of Legal Basis for Open Court

| LAW | ARTICLE | NORM PROVISIONS |
|---|---------------------------|---|
| Law Number 48 of 2009 concerning Judicial Power | Article 13 paragraph (1) | All court hearings are open to the public unless the law specifies otherwise. |
| Law Number 8 of 1981 concerning the Criminal Procedure Law (KUHP) | Article 153 paragraph (3) | “For the purposes of examination, the presiding judge of the hearing opened the hearing and declared it open to the public except in cases concerning decency or the accused children.” |
| Law Number 5 of 1986 concerning The State Administrative Court as last amended by Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning The State Administrative Court | Article 70 paragraph (2) | “If the Panel of Judges is of the view that the dispute being heard concerns public order or the safety of the state, the proceedings may be declared closed to the public”. |
| Law Number 7 of 1989 concerning Religious Courts as last amended by Law Number 50 of 2009 concerning the Second Amendment to Law Number 7 of 1989 concerning Religious Courts | Article 80 paragraph (2) | “The examination of the divorce suit is carried out in a closed-door hearing”. |

¹⁷ During 2015, the Court tried 220 judicial review cases, 140 of which were new cases. If counted backwards since 2012 the trend of testing the Law to the Constitutional Court tends to increase, namely in 2012 as many as 118 cases, in 2013 as many as 109 cases, in 2014 as many as 140 cases. This is different from the case of testing the legislation under the Law in the Supreme Court which for 2015 was 72 cases.

¹⁸ Ibid.

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|--|--|--|
| Law Number 11 of 2012 concerning the Juvenile Justice System | Article 54 | “The judge examines the case of the child in a hearing that is declared closed to the public, except for the reading of the judgment”. |
| Law Number 31 of 1997 concerning Military Justice | Article 141 paragraph (2) Article 141 paragraph (3) | (2) For the purposes of examination, the Presiding Judge opens the hearing and declares the hearing open to the public, unless in a case of decency the hearing is declared closed to the public”. (3) In cases concerning military secrets and/or state secrets, the Presiding Judge may declare the hearing closed to the public. |

Source: Processed by the author, 2022

All parties applying for judicial reviewing are not allowed to obtain the right to testify and provide witnesses and experts to strengthen the proposed application to convince the panel of judges who examined, tried, and decided on the application for judicial reviewing. As referred to in Article 13 paragraph (1) of the Judiciary, the process of examining cases in court is carried out by the parties and is open to the public, unless otherwise provided by law. This certainly creates uncertainty about the law of the parties to be fair and violates the principle of an independent judiciary to administer the judiciary to uphold law and justice, which is an important component of the principle of the state of law.

C. Application of the Principle of *Audi et Alteram Partem*

Communities need to be given space to participate directly or indirectly directly in the process of forming the law because society is one sub-system in the legal system as Lawrence M. Friedman stated that a good law must always contain three legal elements consisting structure law, legal substance, and legal culture.¹⁹

¹⁹ Asri Lasatu, “Urgensi Peraturan Daerah tentang Program Pembentukan Peraturan Daerah terhadap Kinerja DPRD,” *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 215.

Audi et Alteram Partem is a general principle that applies universally to the proceedings, so since the created and enforced by the Dutch government also applies to colonial countries including Indonesia, one of which is HIR/RBG. After Indonesia’s independence and along with the development of society, there is a legal development in Indonesia so that the rules have begun to be made by Indonesia. Among them, there are the rules in the field of Judicial Power, while those relating to legal principles in the field of civil procedures still use the HIR/RBG rules.²⁰

According to Hendry Cambell Black, the word *Audi* means to hear. The judge before deciding the case at hand needs to listen carefully and carefully to the information submitted by the litigants in the court. In order to be able to listen well, it requires facilities (technical term audio) which can be in the form of tools but can also be non-technical, namely with the intention of the party providing information in accordance with concrete events that are conveyed properly and clearly.²¹

The philosophy of hearing (audio) is a principle to dig deeply / into the essence of the

²⁰ Dwi Handayani, “Kajian Filosofis Prinsip Audi Et Alteram Partem Dalam Perkara Perdata,” *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 288.

²¹ Ibid.

basic word itself. The root of the word audi means to hear (hear). When listening, good means are needed so that the results can be captured clearly and can be understood as material / information to pour something / decide on regulatory policies.²²

Philosophy of principles / principles is the basis of a legal school, if we dig deeper, we will find the essence of the basic rules. The principle of *audi et alteram partem*, if explored, will find the essence of the meaning of hearing in the sense of hearing as widely as possible from various aspects.²³

One of the reasons why judicial review is open is to meet the principles of Ultram Back and Bartom. In judicial review, it is clear that the defendant is legally a lawmaker. Therefore, they and the relevant parties who will be affected by the decision must be involved. In current practice, the *Audi Et Alteram Partem* Principle is used to some extent by a written statement. Of course, this principle has a meaning other than just hearing the testimony of the parties. By providing equal opportunities, justice is expected.

The mechanism of the trial in court gives the parties the same space because the evidence can be carried out initially and after the testimony of the accused after the arguments developed in the trial are developed. In addition, the judge may provide a question and answer or clarification to both parties.

The Supreme Court held, in its view, that after exercising jurisdiction as a court, it did not violate the principle of *audi et altera partem*, which provided equal opportunity for the parties to be tried in court, including presenting witnesses and experts, as the opportunity could be given at an open hearing held in the Court of First Instance under the power of the Supreme Court. Against the decision of the Constitutional Court, there is a dissenting opinion of the Constitutional Judge, namely Saldi Isra who has the argument that in adjudicating and deciding the application for norm testing submitted by the Petitioners, the Constitutional Court should adhere, to one of which is to the Constitutional Court Decision No. 93/PUU-XV/2017, dated March 20, 2018. Of all the legal considerations in the judgment a quo, the following considerations are closely related

to the petitioners' pleadings especially the norms of Article 31A subsection (1) of the Supreme Court Act, namely In the power to test laws with unlawful laws, not acting as a court but exercising the powers directly granted by the Constitution, where the Supreme Court does not play the role of adjudicating facts under the law, but instead 'adjudicate' the rules of legislation. In this context, the power of the Supreme Court is not much different from the power of the Constitutional Court to test laws against the Constitution. For this reason, there must be a similarity of opinion between the Supreme Court and the Constitutional Court in this context, since in this case both state institutions equally perform the "arbitrary" function of the rule of law (written). The difference is that the Constitutional Court regulates rules that are contrary to the Basic Law, while the Supreme Court regulates the conflict of statutory rules against laws.

The authority granted by the 1945 Constitution, the way of thinking of the law should be to align the testing process in the Supreme Court with the testing process in the Constitutional Court. Such a necessity is not only caused by legal considerations of the Constitutional Court Decision Number 93 / PUU- XV / 2017 but there is also a mandate of Article 13 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power.

Constitutionally, as stated by the legal opinion of the Constitutional Court, the authority of the Supreme Court to test laws and regulations under the law is the original jurisdiction derived from the provisions of Article 24A paragraph (1) of the 1945 Constitution. The acquisition of this authority is the same as the authority of the Constitutional Court in examining the constitutionality of the law against the 1945 Constitution. Therefore, the fundamental question arises, why for an authority equally obtained from the constitution, even if granted to different institutions, in its implementation must be distinguished? Philosophically both are aimed at upholding law and justice. In addition, historically (*historical approach*), the authority of the Supreme Court and the Constitutional Court to test legal norms (written) even though there are different types and hierarchies of laws and regulations that can be tested, the norms that give the authority of such testing were formulated in the same period and were equally passed in the Third Amendment to the 1945 Constitution.

²² Ibid.

²³ Ibid.

Sudikno Mertokusumo explained that the principle of trials open to the public is intended for two things, namely: first, protecting human rights in the judicial field; and the second, to further ensure the objectivity of the judiciary by accounting for fair, impartial examinations and imposing fair judgments on society.

To listen to the arguments, reasons, rebuttals, explanations, or statements of the parties, Therefore, the substance of the Petitioner's Posita against Article 31A paragraph (1) of the Supreme Court Law regarding "The Examination Process in the Proceedings of the Application for Objection of the Right of Judicial review is carried out in the presence of the parties to the case in a hearing declared open to the public" is reasonable according to law.

The implementation of the principle of openness, it will create excellent public agency services and transparent public participation, and high accountability as one of the prerequisites for realizing true democracy.²⁴ The principle of openness in court proceedings is also a reflection of the space for public information disclosure. We know that public information is a fundamental right of a person.

The United Nations Universal Declaration of Human Rights Chapter 19 regulates the most basic human rights stating that: "Everyone has the right to freedom of expression and ideas; this right includes the right to hold opinions without interference, and to seek, receive and disseminate information and ideas through any media regardless of national boundaries."

In order to provide guarantees for everyone in obtaining Information, a law governing the Disclosure of Public Information is enacted. Public information is information that is generated, stored, managed, and/or sent/received by a public agency related to the organizers and administration of the state and/or the organizers and operations of other public bodies in accordance with this law as well as other information related to the public interest.²⁵

²⁴ Eko Noer Kristiyanto, "Urgensi Keterbukaan Informasi Dalam Penyelenggaraan Pelayanan Publik," *Jurnal Penelitian Hukum De Jure* 16, no. 2 (2016): 232.

²⁵ Ibid.

CONCLUSION

Based on the foregoing, several things conclude, as follows: What is very aware of this but the practice of conducting open hearings is unquestionable. According to the former Chief Justice, "When the consultative meeting of the judges is held in a closed room. But to say it is open, there is a special officer who opens the door. This is the so-called open." This is ironic considering that the decision of the Chief Justice of the Supreme Court preceded Law Number 14 of 2008 concerning Public Information Disclosure. The decision of the court, in this case, is included in the parameters of information that must be provided at all times. Moreover, judicial review whose rulings are binding on the public is not only the parties. Although it is clear that the provision sets the deadline for judgment in a public relations case from the receipt of the application file or from the time of submission of the respondent's response, the room for putting forward the arguments of the parties should be considered to create a dialogue between the parties, especially the public and the institutions that formed the Rules.

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