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Questioning the legal standing conception in the formal review at Indonesian constitutional court

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Abstract

Not everyone can apply to the Constitutional Court and become a petitioner. The existence of legal interests alone cannot be used as a basis for granting the request. The Court once conveyed the importance of legal standing in formal review in decision 27/PUU-VII/2009 in a 'direct linkage relationship'. However, in its development, the Court, in many formal review decisions, still considers the existence of this direct linkage. Even in several decisions, the Court gave a judicial order that in the future it must be separated between formal and material review as in the legal considerations of Decision 70/PUU-XVII/2019 and 91/PUU-XVIII/2020. Therefore, further assessment is needed to determine whether all parties, as regulated in Article 51 of the Constitutional Court Law, can directly become applicants in the formal examination at the Constitutional Court. This article will discuss the development of legal standing in the formal review and the opportunity of an individual to become a petitioner in the formal review.

Keywords: Petitioner, legal standing, formal review, direct linkage relationship, decision

Introduction

In Indonesia, formal review is not as popular as material review. Even, the Indonesian Constitutional Court (hereinafter: The Court) tends to be perceived more as a material judicial review institution because of the low probability of granting formal review^[1]. If it is understood further, the legal consequences of the law's cancellation for formal reasons are far more significant than for material reasons. It is because granting a formal review of the law will impact the law's cancellation as a whole^[2]. Meanwhile, in material review, the Court tends not to cancel a law entirely because the Court only states or cancels a part of an article, paragraph, or phrase contrary to the 1945 Constitution. Except in certain cases, the Court by cancelling an article which is a the heart of the law, then the law can be cancelled in its entirety.

Currently, there are very few studies that seriously discuss formal review. Moreover, it has also been realized that these two types of reviews are based on different judgments and have various legal consequences. The most extreme difference can be seen in the cancellation of law in its entirety if the formal examination is declared granted. While material review will not invalidate a law in its entirety. The granting of a material review only has implications for the non-binding of parts, articles, paragraphs, or phrases of the law that are considered contrary to the 1945 Constitution^[3].

A serious issue that cannot rule out is assessing the legal standing in the formal review. Article 51 of the Constitutional Court Law mentions who can directly become an applicant in a formal review at the Court. Legal standing is a concept used to determine whether the applicant is sufficiently affected to bring a dispute before the Court^[4]. The legal standing requirements have met the requirements if the applicant has a genuine interest and is legally protected^[5].

The Court once conveyed the importance of legal standing in formal review in the legal considerations of decision number 27/PUU-VII/2009 concerning Formal Review of Law Number 3 of 2009 on Amendments to Law Number 5 of 2004 related to Amendments to Law Number 14 of 2009 1985 concerning the Supreme Court by adding the criteria for constitutional losses in the form of a 'direct linkage relationship'^[6]. Legal considerations require that the legal standing in the formal review is distinguished from the legal standing of the applicant in the material examination. The critical point of the above legal considerations is 'direct linkage relationship' and 'not to the extent that there is an interest in material review'. The sentence 'direct linkage' indicates that in the formal review, the petitioner is not

only sufficient to postulate his constitutional harm based on the Decision Number 006/PUU-III/2005 dated May 31, 2005, and the Decision Number 11/PUU-V/2007 dated September 20, 2007. More than that, the petitioner must prove that they directly relate to the legal consequences or losses experienced, both specifically and potentially, from the enactment of the law which is being formally tested. Meanwhile, the sentence '*not to the extent that there is an interest in the judicial review*' indicates that the Court does not want to restrict the applicant from submitting a formal application. Although it must prove the existence of a direct linkage relationship, this is not an absolute requirement for the applicant.

However, in its development, the Court, in many formal judicial review decisions, still considers the existence of this direct linkage. Even in several decisions, the Constitutional Court has given a judicial order that in the future, it must be separated between formal and material review, as mentioned in the legal considerations of the Decision Number 70/PUU-XVII/2019 and the Decision Number 91/PUU-XVIII/2020. This separation can be in the form of the procedural law, which the applicant is, the touchstones, and the terms of the constitutional loss.

Legal Standing of Judicial Review in General

The Procedural Law of the Constitutional Court recognizes that there are requirements for legal standing, namely the requirements that must be fulfilled by the Petitioner based on the law to file a constitutional case petition. Legal status is defined as a condition in which a person or a party is determined to meet the requirements and therefore has the right to apply for the settlement of a dispute or dispute or case before the Court^[7]. It means that the Petitioner who does not have legal standing will receive the Court's decision stating that his application cannot be accepted (*niet ontvankelijk verklaard*)^[8]. Legal standing is also a concept used to determine whether the applicant is sufficiently affected so that a dispute is brought before the court^[9].

Juridically, the conditions and which parties have legal standing have been determined in Article 51 paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court (and its amendments), as follows:

Article 51

- (1) Petitioner is a party who considers his constitutional rights and/or authority to be impaired by the enactment of the law, namely:
- a. Indonesian citizen;
 - b. Customary law community units as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law;
 - c. Public or private legal entity; or
 - d. State institution.

The above provisions are further regulated in Article 4 paragraph (1) of the Constitutional Court Regulation Number 2 of 2021 concerning Proceedings in Judicial Review Cases.

The Petitioner's legal position is closely related to the constitutional loss, because without a constitutional loss, the Petitioner cannot have a legal position in submitting a petition for judicial review. This means that the existence of a constitutional loss causes not everyone to submit an

application to the Court. The existence of a legal interest alone cannot be used as a basis for the acceptance of the application. This is of course different from civil procedural law which recognizes the existence of point d'interet point d'action, namely if there is a legal interest, you may file a lawsuit.

If it is formulated in a simple way, the Petitioners in examining the law against the 1945 Constitution must first explain:

- a. His position as the Petitioner as referred to in Article 51 paragraph (1) of the Constitutional Court Law;
- b. Whether or not there is a loss of constitutional rights and/or authority granted by the 1945 Constitution as a result of the enactment of the law for which judicial review is requested in its position as referred to in letter a;

Furthermore, the Court has also provided conditions for the existence of constitutional losses in judicial review. Since the Decision Number 006/PUU-III/2005 dated May 31, 2005 and the Decision Number 11/PUU-V/2007 dated September 20, 2007, as well as subsequent decisions, the Court is of the opinion that the loss of constitutional rights and/or authority as referred to in the provisions of Article 51 paragraph (1) of the Constitutional Court Law must meet five conditions, namely:

- a. The existence of the constitutional rights and/or authorities of the Petitioner granted by the 1945 Constitution;
- b. the said constitutional rights and/or authorities by the Petitioner are deemed to have been impaired by the enactment of the law petitioned for review;
- c. The constitutional loss must be specific (special) and actual or at least potential which according to reasonable reasoning can be ascertained to occur;
- d. There is a cause-and-effect relationship between the loss in question and the enactment of the law requested for review;
- e. There is a possibility that with the granting of the petition, the constitutional loss as argued will not or will no longer occur;

The Conditions for Constitutional Disadvantages in Formal Review

Article 51 of the Constitutional Court Law does not distinguish legal standing between material and formal review. The legal standing requirements for material review also apply to formal review. However, some literature states that different standards should test the constitutional disadvantages of formal review. In a formal review, the tested object does not involve the validity of a particular paragraph or article. The formal review emphasizes more examinations related to the issue of the formation of laws that do not meet the provisions stipulated in the 1945 Constitution.

Formal review is related to institutional competence to determine the legal standing of the Petitioner so that the legal standing to apply for a formal review of the Law against the 1945 Constitution should only be granted on a limited basis to state institutions at the central and regional levels. It is closely related to the procedural requirements of the Court, which states that the Petitioner, in his application, is obliged to mention their constitutional rights or authorities that the enactment of the act thus impaired.

Suppose it is related to the constitutional point of view in the 1945 Constitution ^[10]. In this case, those who have constitutional authority are State Institutions, House of Representatives, the President, and he/she related to the legislation's process and authority. It means, in the formal review, the individual Petitioners' constitutional losses have a fragile basis.

The individual constitutional disadvantages above can be ignored because the petitioner is not essential or in an obiter-dictatory position. It is due to the constitutional rights owned by individuals do not necessarily suffer losses even though the law-forming organs mistakenly apply the formal procedures for the formation of laws as regulated in the 1945 Constitution ^[11]. At the practical level, it will be challenging for an individual Petitioner to have a legal interest as a Petitioner in a formal examination case ^[12]. It is because the individual Petitioners do not have a legal interest guaranteed by the 1945 Constitution to obtain legal standing in the Court ^[13].

Legal interest originates from the principles, standards, and rules developed by law or by the courts. In other words, legal interest is an interest recognized by law. There are several variants of legal interest in law doctrines, such as absolute legal interest, contingent legal interest, defeasible legal interest, direct legal interest, and vested legal interest. Contingent legal interest is defined as an interest that can only be owned by the Petitioner only if certain conditions are met, such as an element of constitutional loss. From the variant of the legal interest a quo associated with the Constitutional Court Law and the jurisprudence that the Court has developed, it can be said that to grant or accept legal standing can be explained as follows:

1. Not all legal subjects, by law, may become Applicants;
2. To become a legal subject in the Court, one must have one of 4 (four) legal qualifications [vide Article 51 paragraph (1) of the Constitutional Court Law]; and
3. It is not enough for the Petitioner to only have legal rights and interests. Still, the Petitioner must also prove a loss of constitutional rights or authority over the enactment of the law being petitioned for review.

If simplified, the construction of the terms of the constitutional impairment of the formal examination must be based on the following points:

The existence of Legal Constitutional Rights

Article 20 of the 1945 Constitution states that "(1) the House of Representatives has the power to make laws, (2) Every law draft is discussed by the House of Representatives and the President for mutual approval." Through the 1945 Constitution, the legal subjects who have the right and authority to form a law are the House of Representative and the President. These legal subjects constitutionally have legal constitutional rights guaranteed by the 1945 Constitution to be involved in developing laws. In addition, in line with the emergence of constitutional legal rights to create laws, the House of Representatives and the President are the most appropriate legal subjects to prove the existence of constitutional losses or the presence of wrong procedures in the formation of laws. As constitutional subjects involved, the House of Representatives and the President are actors who have legal constitutional rights to be harmed by one party in forming a law, so they have a constitutional right to be the aggrieved

parties in creating the rule, because only them have a constitutional relationship with the process of forming a law ^[14].

The existence of the Petitioner's Legal Constitutional Interest

In addition to the House of Representatives and the President, it is also possible for public legal entities or other public officials to have the authority to become applicants for formal examinations in the Constitutional Court. However, it must be limited by the existence of a clear legal constitutional interest in the substance of the Petitioner's petition. For example, a public legal entity such as the Regional People's Representative Assembly can become an applicant for a formal review in the Constitutional Court. For example, the Regional People's Representative Assembly can submit a formal review due to the legislation should be regulated by a regional regulation and not in the formulation of law ^[15].

In addition, formal reviews can also be requested by public officials. For example, one of the state ministries feels disadvantaged by passing a law that does not involve the state ministry and incorrectly applies the formulation of the law. Formal examination based solely on abstract and absurd individual interests becomes very difficult to measure as a constitutional loss as in the petition of the Petitioners, so the proof of the constitutional impairment of the Petitioners' petition in the formal examination must indeed be based on institutions or positions that have had relation to the formation of a law.

Justice Muhammad Alim also conveyed the same thing in the dissenting opinion of Decision Number 27/PUU-VII/2009. According to him, although the people have sovereignty, the people have no right to form laws due to based on Article 20 paragraph (1) of the 1945 Constitution, "House of Representatives holds power to make laws" ^[16]. A draft law is discussed by the House of Representatives and the President for mutual approval [vide Article 20 paragraph (2) of the 1945 Constitution].

Based on the above provisions, only members of the House of Representatives and the President are given attribution by the 1945 Constitution to form laws. It is different from a material review, as stated in the Constitutional Court Decision Number 20/PUU-V/2007 dated 17 December 2007, which does not give legal standing to members of the House of Representatives to file a petition for judicial review with the consideration that the law requested for review has been discussed in advance together with other members of the House of Representatives. In the formal review, I think that it is precisely the members of the House of Representatives, as well as the President who has legal standing to file for a formal review, if in the formation of law on rights they are hindered, or sidelined.

Muhammad Alim also emphasized that the legal standing to request a formal review of the formation of law if they feel that their constitutional rights have been harmed are members of the House of Representatives or the President. Therefore, the Petitioners, advocates and individual Indonesian citizens do not have legal standing, so the Petitioners' petition must be declared unacceptable ^[17]. A certain number of people does not represent the people's sovereignty because the mechanism for channelling aspirations must be under the provisions of the 1945 Constitution and other valid laws and regulations ^[18]. It

means that the individual people do not exercise the people's sovereignty in the formation of laws. The 1945 Constitution stipulates that this becomes the authority of the House of Representatives with mutual agreement with the President. So, only Members of the House of Representatives and the President have legal standing to apply for a formal review of a Law if they feel that their rights have been impaired in forming a Law.

The Individual Opportunity to Have Legal Standing in the formal Review

The Constitutional Court has opened an opportunity for the applicant to have legal standing in the formal review as long as they have '*the right to vote*' and have been registered as a voter in the General Election [Vide Decision Number 27/PUU-VII/2009, p. 60]. That is, to prove whether the applicant in their case has legal standing or not, the applicant must be able to prove first that he has been registered as a voter in the general election and must have direct links.

The question then is what is meant by '*...direct linkage...*' and '*...direct-linkage relationship in the formal review is not as strong as with the condition that there is an interest in the material review...*' as there are considerations of case law no. 27/PUU-VII/2009? '*direct linkage relationship*' means that there is a norm/stipulation in the enacted law directly related to the interests of the Petitioner. While the meaning of '*not to the extent that there is an interest in the material review*' is that the Court does not need to arrive at a *causal verband* assessment and the possibility of recovering the applicant's losses because this will be a measure in the material examination. It was only after obtaining the belief that the Petitioner did have a direct linkage did the Petitioner prove himself as a citizen who had exercised his voting rights which had been harmed because the holder of a mandate elected by the people had made a decision that was not under the order he received on a fiduciary basis. Both the above considerations are carried out systematically or considered individually and it is not a problem.

Moreover, it is not enough to prove a direct linkage by stating that the profession of the Petitioner is closely related to the Law that is being tested. However, the applicant must indicate which norms/stipulations of the Law are directly related to the profession of the Petitioner. Thus, there is a sufficient need for the Court to reinterpret granting legal standing in this formal review. If in the previous decision, every Indonesian citizen can fulfil the standing to apply for a formal examination as long as he can prove that he has exercised his right to vote and has a direct relationship with the Law that was formed. However, with the considerations, there has been a paradigm shift; namely, every Indonesian citizen does not have the standing to apply for a formal examination unless they can prove that they have exercised their right to vote and has a direct relationship with the Law that was formed. In this case, in terms of legal status, both the first and the last considerations are the same, but there are differences in the starting point for taking their considerations.

When looking at the considerations of decision 27/PUU-VII/2009, I assume that the Court only requires a direct link and a causal relationship between the Petitioners and the law being tested. Therefore, the Petitioners do not need to prove the five conditions for constitutional impairment as

determined by the Court. Likewise, the Constitutional Court Decision Number 91/PUU-XVIII/2020 partially granted the petitioners' petition. In this case, the Court considers that Petitioner I and Petitioners II do not have legal standing, while Petitioners III to VI has legal standing^[19]. The Court rejected the legal position of Petitioners I and II because they could not explain the direct link with the process of forming Law 11/2020, which questioned its constitutionality^[20].

In the future, the terms of constitutional loss in the formal review need to be re-detailed not only for Petitioners who have "direct linkage" requirements as stated in Court Decisions number 79/PUU-XVII/2019 and 91/PUU-XVIII/2020. Suppose it is related to the previous discussion. In that case, I view that the court must ignore the five conditions for constitutional impairment as long as the Petitioner can prove one of the four criteria of the Petitioner, i.e.: '*Individual Indonesian Citizens who have exercised their right to vote who have a direct relationship with the material of the law being tested, members of the House of Representatives/Senates, the Legislator, and State Institutions related to the material of the law.*' They can have a legal position to submit a formal application for legislation.

Interestingly, the Court is in legal considerations [3.16] page 373 of Decision Number 79/PUU-XVII/2019, indicating that the Court can issue an interim decision as a form of priority action and split the examination process between formal and material testing if the applicant combines the two^[21]. The review in one application is included in this case if the Court deems it necessary to postpone the enforcement of the law for which a formal review is requested^[22]. In this regard, the Court may first need to determine the legal position of the Petitioner and the substance of the formal review, and then the Court may examine the legal standing of the Petitioner and the substance of the judicial review based on the five conditions for constitutional impairment^[23].

Conclusion

Determining the size of the constitutional loss has a strategic position as a gateway to testing the norms to be tested. In the context of the formal review, the Court has laid a foothold where the Petitioner can have a legal position based on Decision Number 27/PUU-VI/2009, namely that there must be a direct linkage or causality relationship between the Petitioner and the law. If referring to the construction of this '*direct link*', then after Decision Number 27/PUU-VII/2009, the determination construction of constitutional damages in the formal review is hefty. Apart from they must prove his constitutional loss based on the five conditions of constitutional loss as determined, the Court also has to confirm the '*direct link*'.

This construction shifted slightly when the Court decided on Case Number 79/PUU-XVII/2019. In the decision, the Constitutional Court implicitly simplified the structure of determining the Petitioner's constitutional impairment in the formal review. It can be seen in the legal considerations of Decision Number 79/PUU-XVII/2019, page 355, as follows:

The Court believes that the Petitioners have clearly explained their position and activities, which are closely related to the corruption eradication plan, so there is a direct causal relationship/linkage between the Petitioners and the

law requested for formal review. Thus, the Petitioners have the legal standing to file an application.

Based on the considerations above, it can conclude that the Court only requires a direct link and a causal relationship between the Petitioner and the law being tested. Therefore, the Petitioner does not need to prove the five conditions for constitutional impairment as determined by the Court.

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