

## Measuring The Law On The Formation Of Laws And Regulations As A Touchstone Constitutional Review

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**Abstract:** *This study examines the constitutional supremacy in shaping statutory regulations, positioning it both as a guiding framework and a binding compliance standard for the public particularly state authorities and their institutions. It argues that the Law on the Formation of Laws and Regulations serves as a definitive and legitimate benchmark in constitutional review. Nonetheless, practical realities reveal instances where the principle of utility can override arguments concerning formal defects in legislation and Government Regulations in Lieu of Law (Perppu). Employing a normative legal research method that integrates statutory and conceptual approaches, this paper provides a descriptive analysis of the issue. The findings indicate that constitutional review functions as an embodiment of constitutional supremacy through the judicial examination of laws, with the Law on the Formation of Laws and Regulations serving as a key parameter in determining constitutionality a parameter whose application continues to evolve.*

**Keywords:** *Constitutional Supremacy; Constitutional Review; Constitutional Touchstone*

## INTRODUCTION

The 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) is the supreme legal foundation that governs the country's legislative framework. As stipulated in Article 7 paragraph (1) of Law No. 12 of 2011 on the Formation of Laws and Regulations—last amended by Law No. 13 of 2022—the Constitution occupies the highest position in the national hierarchy of legal norms, serving as the ultimate reference point for the creation of all subordinate regulations (Kurnia, 2023).

This constitutional supremacy is grounded in Article 1 paragraph (2), which affirms that sovereignty resides in the people and is exercised according to the Constitution, and Article 1 paragraph (3), which establishes Indonesia as a state based on the rule of law. These provisions mandate that all legislative and governmental



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processes must be aligned with the Constitution, ensuring the protection of democratic principles and the rule of law (Rahman & Maizaroh, 2024).

The supremacy principle not only requires statutory laws to comply with the Constitution but also binds the conduct of state institutions and officials to constitutional mandates. Awareness of this obligation is critical since these actors simultaneously serve as both the creators and executors of legislation. In this context, the Constitutional Court plays a pivotal role through the mechanism of constitutional review, empowered to assess whether laws conform to constitutional norms (Fikriya et al., 2024).

Since its inception in 2003, the Constitutional Court has adjudicated over two thousand constitutional review cases, with a significant proportion of petitions granted. This trend reflects persistent shortcomings in legislative compliance with constitutional principles. Such decisions reaffirm that the exercise of legislative and governmental authority must aim to serve justice and public welfare, rather than entrench particular political or economic interests (Buana, 2024).

Furthermore, recent developments in legislative practice, including the adoption of digital platforms in the law-making process, highlight the evolving nature of constitutional compliance. While such innovations enhance public participation, they also raise concerns about procedural transparency and substantive alignment with constitutional standards (Gusman, 2024).

Against this background, this article examines the interplay between constitutional supremacy, constitutional review, and the statutory framework governing the formation of laws, drawing upon contemporary legal theory, jurisprudence, and relevant statutory provisions from both national and comparative perspectives (Nggilu et al., 2024).

## METHOD

This research employs a normative legal methodology that focuses on the formulation of problems as determined by statutory provisions. The study applies both statutory and conceptual approaches, followed by a qualitative analysis of legal materials collected primarily through library research (Putra, 2021).

Normative legal research seeks to determine *das sollen*—how the law ought to operate—rather than *das sein*, which concerns its empirical implementation in practice. Accordingly, this study relies on primary and secondary legal sources, interpreting and constructing legal norms to address specific constitutional issues (Kurnia, 2023).

As articulated by Peter Mahmud Marzuki and reaffirmed in recent scholarly discussions, normative legal research is prescriptive in nature, aiming not only to describe the current state of the law but also to justify the validity of certain legal actions within an established legal framework (Fikriya et al., 2024). Soerjono Soekanto and Sri Mamudji classify normative legal studies as encompassing research on legal principles, systematics, harmonization, history, and comparative law.



The data sources for this research consist of: (1) primary legal materials, such as statutory regulations and Constitutional Court decisions; (2) secondary legal materials, including peer-reviewed journals and authoritative scholarly works; and (3) tertiary sources, such as legal dictionaries and encyclopedias. All materials are examined using a qualitative interpretative method to construct a coherent normative framework (Nggilu et al., 2024).

The novelty of this study lies in integrating constitutional law, legislative studies, and judicial review jurisprudence to analyze the role of the Law on the Formation of Laws and Regulations as a constitutional benchmark. By drawing on recent cases, including those involving *formal review*, the research contributes to contemporary debates on legislative compliance with constitutional mandates (Rahman & Maizaroh, 2024).

## DISCUSSION

Article 1 paragraph (3) of the 1945 Constitution establishes Indonesia as a state governed by law (*rechtsstaat*), a concept rooted in the legal traditions of both Continental Europe and the Anglo-American system. The *rechtsstaat* tradition, shaped by thinkers such as Immanuel Kant, Paul Laband, Julius Stahl, and Fichte, emerged as a philosophical and institutional response to absolutism within civil law jurisdictions. Conversely, the *rule of law* tradition, popularized by A.V. Dicey, developed within common law systems, emphasizing the supremacy of law, equality before the law, and due process (Kurnia, 2023). While originating from different traditions, these frameworks converge in recognizing the Constitution as the ultimate guarantor of legal order and fundamental rights (Rahman & Maizaroh, 2024).

In the Indonesian context, the principles of *rechtsstaat* and *rule of law* are operationalized in the Law on the Formation of Laws and Regulations, particularly in Articles 5 to 8, which articulate the core principles of legislative drafting. The legislative hierarchy theory (*Stufenbau des Recht*) proposed by Hans Kelsen provides a theoretical foundation for this structure. Kelsen posited that each legal norm derives its validity from a higher norm, ultimately tracing back to a supreme basic norm (*Grundnorm*). This concept finds expression in Article 3 paragraph (1) of the Law on the Formation of Laws and Regulations, which positions the 1945 Constitution as the primary legal source, and in Article 2, which recognizes Pancasila as the source of all state law (Fikriya et al., 2024).

Maria Farida Indrati Soprapto's elaboration on the hierarchical relationship of legal norms underscores that every lower legal provision must be consistent with the norms above it. Recent scholarship supports this view, particularly in the context of ensuring legislative compliance through judicial review mechanisms (Nggilu et al., 2024).

The notion of constitutional supremacy, as articulated by Jutta Limbach, entails three key elements: distinguishing constitutional norms from other legal norms, binding all state authority to the Constitution, and establishing institutions to assess constitutional conformity. This view aligns with Richards Ekins' assertion—cited by Benny K. Harman—that legislative power is inherently limited by constitutional rules, subject to review, and invalid if inconsistent with the Constitution (Buana, 2024).



Constitutional review in Indonesia encompasses judicial, legislative, and executive reviews, each differing in terms of the reviewing authority, object of review, and procedural timelines. While judicial review by the Constitutional Court has no strict submission deadlines for *material review*, *formal review* must be submitted within 45 days of promulgation, as mandated by Article 51A(3) of Law No. 8 of 2011 (Putra, 2021). This procedural requirement ensures adherence to the legislative formation process as regulated by statute.

Notably, Constitutional Court decisions in cases such as No. 27/PUU-VII/2009, No. 91/PUU-XVIII/2020, and No. 130/PUU-XXI/2023 illustrate the nuanced application of these principles. In some instances, the Court has upheld legislation despite technical defects, prioritizing substantive constitutionality over procedural compliance. In others, it has invalidated legislation on the basis of procedural irregularities, reaffirming the necessity of procedural safeguards to maintain legislative legitimacy (Djarmiko et al., 2024).

The growing adoption of digital legislative processes further complicates the balance between efficiency and adherence to constitutional principles. While electronic platforms have increased public access to legislative proceedings, they also raise concerns about transparency and the authenticity of public participation (Gusman, 2024). This evolution underscores the need for adaptive yet constitutionally sound legislative practices in the digital era.

Ultimately, *formal review* serves as a constitutional safeguard against procedural abuses in lawmaking. By ensuring that laws are enacted by competent authorities, in proper form, and through lawful procedures, it strengthens the legitimacy of legislative outputs and reinforces public trust in the rule of law (Nggilu et al., 2024).

## CONCLUSIONS

The principle of constitutional supremacy in Indonesia's legislative system is firmly rooted in the legal state theory (*rechtsstaat*) and the hierarchical theory of norms (*Stufenbau des Recht*). These foundations are reflected in the Law on the Formation of Laws and Regulations, which operationalizes constitutional mandates through principles such as *lex specialis derogat legi generali* and *lex superior derogat legi inferiori* (Kurnia, 2023; Fikriya et al., 2024).

The Constitutional Court has consistently used the Law on the Formation of Laws and Regulations as a key benchmark in *formal review* cases, underscoring its significance in safeguarding procedural integrity. Nonetheless, recent decisions demonstrate that the principle of utility is sometimes invoked to prioritize substantive constitutionality over procedural defects, a practice that has sparked debate among scholars and practitioners (Djarmiko et al., 2024; Rahman & Maizaroh, 2024).

Given that the procedural requirements in the Law on the Formation of Laws and Regulations are derived directly from Article 22A of the 1945 Constitution, adherence to these provisions should be prioritized to preserve legislative legitimacy. In an era where digital legislative processes are expanding, the challenge is



to ensure that efficiency and technological innovation do not undermine constitutional safeguards (Gusman, 2024; Nggilu et al., 2024).

Strengthening procedural compliance in legislative formation will not only reinforce constitutional supremacy but also promote public trust in the law-making process. This approach ensures that the legislative function remains an instrument for realizing justice and advancing public welfare, rather than serving narrow political or economic interests (Buana, 2024).

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