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Submission date: 16-Aug-2023 03:28AM (UTC-0500)
Submission ID: 2146554169
File name: Reconstruction of Testing Legislation by the Supreme Court.pdf (310.11K)
Word count: 4492
Character count: 24375

Remittances Review
June, 2023
Volume: 8, No: 4, pp. 908-916
ISSN: 2059-6588 (Print) | ISSN 2059-6596 (Online)
remittancesreview.com

Received: 11 November 2022 Accepted: 28 March, 2023
DOI: https://doi.org/10.33182/rr.v8i4.63

Reconstruction of Testing Legislation by the Supreme Court

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Abstract

Article 24 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia: The Supreme Court has the authority to adjudicate at the cassation level, examine statutory regulations under laws, and have other powers granted by law. The research objective is to reconstruct the procedural law for testing statutory regulations under the law by the Supreme Court. The research method is this type of normative legal research with the following approaches: laws and regulations, concept approach, historical approach, and comparative approach. In conclusion, the reconstruction of the procedural law for testing statutory regulations under the law was carried out by the Supreme Court, namely by improving Perma No. 01 of 2011 concerning the Right to Judicial Review because it is very concise and simple, so that in the future it can still be developed by accommodating hearings that are open to the public present the relevant parties and hear the testimony of witnesses or experts (if needed), the formality of the application for review of the proposed law must first be examined carefully by the clerk's office to determine whether the application file is complete, if the file has been completed or has been corrected, the permanent clerk must check again to ensure that the required documents have been met. This evidence in the form of electronic or optical devices is something new that is regulated in procedural law, which is a development in the field of law, and the implementation of a government decision can only be canceled (vernietigbaar), not canceled (nietigaabsoluut niet ig-inextence), or null and void (van rechtswege nietig).

Keywords: *Legislation, Reconstruction, Supreme Court, Testing*

Introduction

Montesquieu further put forward thoughts about the rule of law in Continental Europe through his book entitled L'Espirit de Lois, which outlines three types of power. Montesquieu's thought is known as Trias politica (Three branches of power) (Suparman, 2023). Montesquieu's teachings require the separation of the branches of state power into three branches with the scope of authority of each, namely the legislative branch of power which functions to make laws, the executive branch of power which functions to execute laws, and the judicial power which functions to take action against all violators of the law (Isnaeni, 2021).

Montesquieu stated Marbun & Moh.Mahfud (2000): " There is no freedom if the judicial power is

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not separated from the legislative and executive powers; the lives and freedoms of citizens will be faced with arbitrary supervision because judges are the legislators. If the judicial power unites with the executive power, the judges will behave evilly and cruelly. Based on his thoughts, Montesquieu argued that if power is strictly separated into three, namely statutory power, power to carry out government, and judicial power, and each power is held by an independent body, this will eliminate the possibility of arbitrary actions from a ruler, or strictly speaking, does not give the possibility of implementing an absolutist system of government. Indonesia is a state based on law; this is stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated as the 1945 Constitution of the Republic of Indonesia): "The State of Indonesia is a state based on law", The consequence of being a state based on law is that law occupies a supreme position (the main thing), and all actions taken must be based on the law.One of the pillars of power is judicial power (judicial power), which is regulated in Article 24 Paragraph

(2) by religious courts, military courts, and a constitutional court (hereinafter abbreviated as MK). Article 24 A Paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that the Supreme Court has the authority to adjudicate at the cassation level, examine statutory regulations under laws, and have other powers granted by law.MA, in carrying out its authority to examine statutory regulations under the law, experienced many challenges and obstacles. Based on data released by the Supreme Court Registrar's Office, it was recorded that during 2016, the Supreme Court received 18,514 cases, while the Constitutional Court (hereinafter abbreviated as MK) in 2016–2017 received 332 cases.

In other words, the burden for the Supreme Court regarding the review of laws and regulations is greater compared to the Constitutional Court (Al-Fatih, 2018). The procedural law for examining legislation under the law conducted by the Supreme Court is regulated in the Supreme Court Regulation of the Republic of Indonesia (hereinafter abbreviated as Perma RI) No. 01 of 2011 concerning the Right to Judicial Review (Indonesia, 2011). Pasal 5 Perma No.01 Tahun 2011 mengatur tentang Pemeriksaan dalam Persidangan :

(1) The Junior Chairperson for State Administration, on behalf of the Chairman of the Supreme Court, determines the Supreme Council, which will examine and decide on the application for objection regarding the said judicial review right;

(2) The Panel of Supreme Court Judges examines and decides on the objection regarding the right to judicial review by applying the legal provisions applicable to the cases requested in the shortest possible time in accordance with the principle of a simple, fast, low-cost trial.

If you pay attention to Article 5 above, there is a void in the norms relating to trial and examination processes, namely trial scheduling, summons to the parties, preliminary examination, trial examination, and evidence. Formulation of the problem, reconstruction of procedural law for testing statutory regulations under the law by the Supreme Court.

METHOD

This type of research is normative legal research, also known as doctrinal research (Soemitro, 1983). Normative legal research has the character of finding legal rules, legal principles, and legal doctrines in order to answer legal issues at hand because this is in accordance with the prescriptive character of jurisprudence (Machmud & Marzuki, 2005). Approach methods: statutory approach, conceptual approach, historical approach, and comparative approach (Ariani, 2021). The sources of legal materials used are primary legal materials and secondary legal materials. The collection of legal materials is done through library research. Furthermore, the processing of legal materials is carried out coherently and systematically through classification techniques, analyzed, and a conclusion drawn.

RESULT AND DISCUSSION

The examination of laws and regulations will differ from one country to another (Miniaoui et al., 2019). Comparison of testing the laws and regulations of the Federal Republic of Germany with the United States is as follows:

1. The Federal Republic of Germany, which adheres to the Civil Law System and has five courts: the General Court, Administrative Court, Labor Court, Tax Court, and Social Court. The Federal Constitutional Court and the Lander outside the five judicial systems' powers include reviewing laws, adjudicating disputes over the competence of state agencies, disputes related to the Federal Law and the constitutional validity of the Lander Act, and violations of fundamental rights by public authorities in constitutional complaints. The practice of testing legislation in Germany is directed at various forms of legislation (legislative regulation), including laws, decisions, and statutory regulations stipulated by the Federal or State government and administered by the Constitutional Court.

2. The United States adheres to the Common Law System (Anglo-Saxon). The authority to conduct a judicial review of a regulation or constitution is given by the Supreme Court with very simple considerations because the court does function to interpret laws and apply them in cases. The object that the judge examines can be in the form of legal products applied by legislative bodies (legislative acts) or can also be in the form of executive products (executive acts), which are usually called laws, wet, or law (depending on the language used in each country).

3. Thus, in the Federal Republic of Germany, the authority to review laws, adjudicate disputes over the authority of state institutions, and resolve disputes related to federal laws is the authority of the Constitutional Court, while in the United States, the authority to conduct a judicial review is the authority of the Supreme Court on the grounds that the court has the function of interpreting the law and applying it in cases.

In Indonesia, the review of laws and regulations under the law is regulated in the Supreme Court

June, 2023
Volume: 8, No: 4, pp. 908-916
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Law Article 24A paragraph (5) of the 1945 Republic of Indonesia Constitution, which is spelled out in Law Number 14 of 1985 concerning the Supreme Court as amended twice, most recently by Law Number 3 of 2009. Specifically regarding testing laws and regulations, they are regulated in two articles, namely Article 31 and Article 31A. The two articles briefly contain authority, legal standing, formal and application materials, decision dictums, and the publication of decisions in the State Gazette or Regional Gazette.Furthermore, to follow up on the provisions of this article, a Supreme Court Regulation (Perma) was issued regarding the Right to Judicial Review (HUM), which contains procedures for submitting applications, examinations in court, decisions, notification of the contents of decisions, and implementation of decisions. Observing the articles in the law and in the Perma, it is clear that the procedural law for reviewing statutory regulations under the law is indeed very simple and concise. Consequently, the examination of HUM cases is aligned with the examination of cassations. It is sufficient for the applicant to submit an application accompanied by evidence (especially written evidence). If there is an expert opinion, it is sufficient to put it in written form. Likewise, the respondent was given the opportunity to submit his response accompanied by evidence to strengthen the arguments for his response. There are no trials that are held open to the public by presenting the parties or the application of evidentiary law, such as at the court of first instance or the trial at the Constitutional Court. Whereas in HUM cases, not only legal aspects but also facts are tested, and the decision is final and binding. Initially, the Supreme Court wanted the examination of HUM cases to remain as it is today, with various considerations. An examination of simple HUM cases, like an examination at the cassation level, is a realistic choice considering the number of cases that have been submitted and examined by the Supreme Court. From year to year, the number of cases that go to the Supreme Court tends to increase.The research results from the Indonesian Center for Law and Policy Studies (PSHK) revealed that the implementation of juridical control over regional regulations by the Supreme Court through judicial review still had problems, so it could not run optimally. Some of the problems that have resulted in the ineffectiveness of the judicial control mechanism implemented by the Supreme Court include mechanisms that make it difficult for the public to go through procedures for filing a judicial review, for example, charging a registration fee and requiring transparency in examining applications. (Kebijakan, 2011). The same thing was also expressed by the research results of the Center for Research and Development of Kumdil MA revealed that some of the judicial review rights decisions studied were very brief (jumping to conclusion) as a result of the absence of a judicial review procedural law that could accommodate the needs of proceedings (RI, 2000).

The next development is that the Supreme Court has begun to discuss drafting procedural law for testing statutory regulations under the law through trials that are open to the public (Fauzia et al., 2021; Steinberg et al., 2020). Examination of trials that are open to the public is very important to do in order to ensure the fairness of the trial in order to increase public trust.

As a judicial institution, the Supreme Court must comply with the general principles of good justice which apply universally to the exercise of judicial power. These principles must be the soul and

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basis for the regulation of judicial review under the law by the Supreme Court.

The general principles of good justice include the following (Ali & Heryani, 2012):

a. Supremacy of Constitution

The principle of the rule of law basically requires that the law should hold the highest authority in administering the state. The highest law that binds all parties and becomes the main guideline in running the government is the constitution (Effendi & Permana, 2018). At a normative level, this principle is reflected in the provisions of Article 53 of the Constitutional Court Law, which stipulates that the Constitutional Court notifies the Supreme Court of the existence of a request for review of the Law against the Constitution. These provisions are intended to avoid differences in decisions issued by the Supreme Court and the Constitutional Court.

b . Principles of Free and Impartial

The principle of an independent and impartial judiciary absolutely must exist in a rule of law to ensure a fair judicial process. This principle has been accepted and adhered to by countries in the world that claim to be a democratic rule of law (Wajdi, 2018). In the 1945 Constitution this principle is emphasized in the provisions of Article 24 paragraph (1), which stipulates that the judicial power is an independent power to administer justice to uphold law and justice, while the principle of impartiality means that judges may not side with anyone except for the truth. and justice. Judges are prohibited from discriminating against parties to a dispute, prohibited from being sympathetic or antipathy towards them. Therefore, the judge must be free from conflicts of interest in adjudicating. In the event of a conflict of interest, the judge is obliged to resign as stipulated in the provisions of Article 17 paragraph (3) of Law Number 48 of 2009 concerning Judicial Power.

c. Principles of Transparency and Accountability

Transparency and accountability are two important principles to encourage public trust in an institution. Transparency is a prerequisite for achieving accountability (Hermansyah et al., 2018). In the era of globalization and information, these two principles are a necessity. The principle of transparency itself is a mandate of Article 2 paragraph (1) of Law Number 14 of 2008 concerning Public Information Disclosure, it is clearly stated that all information relating to the public interest is open and can be accessed by every information user..

d . The Principle of Public Participation and Control

Public participation and control are essential in the life of a democratic country. This principle is the embodiment of citizens' rights to successful expression and participation in the administration of the state and government which have been guaranteed by the Constitution. The existence of public participation can make the law function optimally, because it gets strong legitimacy (Melina & others, 2018). Without strong legitimacy from society, the law will be easily perverted for the sake of partial and momentary interests, while public control that can arise from the press,

June, 2023
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campuses and community organizations can prevent and minimize deviations that occur, while at the same time can lead to improvements that are expected together in achieving justice (Sari, 2020).

e. Simple Principle, Fast and Low Cost

Simple literally means not much intricacies (difficulties etc); not many knick-knacks; straightforward. Simple refers to "complicated" or not the settlement of cases. The principle of simplicity means that the method is clear, easy to understand and not convoluted. Fast literally means in a short time; quick; quick. Fast or appropriate refers to the "tempo" of sooner or later settling the case (Harviyani, 2021). The application of this principle must not reduce the accuracy of examinations and assessments according to law and justice. Cost literally means money spent to establish (establish, do, and so on) something; fare; shopping; expenses, while light refers to the amount or the minimum costs that must be incurred by justice seekers in resolving disputes before the court. The low cost in this case means that no other costs are needed unless it is really needed in real terms for the settlement of cases. Fees must have clear rates and be as light as possible. All payments in court must be clear about their use and be given a receipt of money.

The general principles described above have mostly been adopted in our statutory regulations, both in the Constitution and laws. The general principles themselves are universal principles that are expected to be directions or guidelines for the preparation of content material for reviewing statutory regulations under laws by the Supreme Court.

Procedural law is a formal law which is essentially included in the scope of public law. In public law, formal law functions as a publiekrechtelijk instrumentarium to enforce material law. Procedural law as formal law is a normative guide in orderly and utilizing justice.

The principles underlying procedural law include: (Blegur, 2022):

1) Ius curia novit means "the court knows the law". Freely it can be interpreted that ius curia novit is a principle which fictions that the court (in this case the judge) knows the law in every case he examines. Consequently, the parties to the dispute do not need to put forward legal rules in the lawsuit or response, because the legal issues are the responsibility of the judge to know and apply. .

2) Audi et alteram partem

Audi et alteram partem comes from the Latin which means: "listen to the other side". This sentence is an expression in the field of law in order to maintain justice (Aulia, 2019). In order for a trial to run in balance, it is known that there is the principle of audi et alteram partem which means "listening to both parties" or listening to the opinions or arguments of the other party before making a decision so that the trial can run in balance. This principle is applied to the procedural process at trial, namely during the trial, the judge must pay attention and listen to both parties together.

3) Vrij bewijs

According to van Wijk and Willem Konijnenbelt, the principle of vrij bewijs or free proof contains the meaning de rechter heeft grote vrijheid in het verdelen van de bewijslast en het aanvaarden en waarderen van bewijsmiddelen - judges have enormous freedom in dividing the burden of proof and accepting and evaluating evidence tools. A similar meaning has also been put forward by van Galen and van Maarseveen, namely the principle of independent proof: in relation to the question of who has to submit certain evidence, the administrative judge is the most powerful. He is free in dividing the burden of proof as well as in evaluating evidence (Dotulong, 2019).

4) Dominus Litis

The principle of dominus litis or actieve rechter or active judge, van Wijk and Willem Konijnenbelt wrote that act ieve rechter, als het beoep eenmaal is ingesteld en onvantkelijk word geoordeeld, neemt de rechter deleiding: hij beepalt de gang van de procedure, roep getuigen op, wint inlicht igen ('ambtsberichten') in, e.d. - the judge is active, if the claim has been prepared and accepted, the judge takes the lead: he arranges the agenda, summons witnesses, collects data, and so on. The consequences of this dominus litis principle are: (1) being active during the dispute examination process lies entirely with the judge. The autonomy of the parties to the dispute does not apply; (2) the judge has the authority to conduct a preparatory examination to find out the completeness of the lawsuit; (3) ultra petita is not banned. Judges can decide more than what is requested, so that it is possible to have reformatio inpeius; and (4) in carrying out the test it is not bound by the reasons for filing a lawsuit - beroepsgronden - put forward by the plaintiff (Didik, 2023).

Thus the reconstruction of the procedural law for reviewing statutory regulations under the law by the Supreme Court must pay attention to the use of the terminology of Judicial Review Rights in a normative juridical manner which is not quite right, because the term "judicial review" has a narrower meaning than reviewing statutory regulations as referred to in the regulations that became the basis for the issuance of Perma No. 1 of 2011, in reviewing laws and regulations with hearings open to the public presenting the parties or related parties and hearing witness or expert testimony (if needed) as an examination at the Constitutional Court, it should be considered, the formality of the application Each application cases for reviewing the proposed law must first be examined carefully by the clerk's office to determine whether the application file is complete. Regarding evidence, evidence in the form of electronic or optical devices is something new that is regulated in procedural law which is a development in the field of law, as the development of technology and information, needs to be accommodated as evidence, and the implementation of a decision of a government decision becomes only can be canceled (vernietigbaar), not canceled (nietigaabsoluut niet ig-inexixtence) or null and void (van rechtswege nietig).

CONCLUSION

Reconstruction of the legal procedure for testing statutory regulations under the law by the

Supreme Court, namely by amending Perma No. 01 of 2011 concerning the Right to Judicial Review because it is very concise and simple, so that in the future it can still be developed by accommodating hearings that are open to the public presenting the related parties and hear the testimony of witnesses or experts (if needed) as the examination at the Constitutional Court, should be considered, the formality of the application for review of the law submitted must first be examined carefully by the clerk's office to determine whether the application file is complete, if the file has been completed or has been repaired, the clerk still has to check again to ensure that the completeness requested has been fulfilled. This evidence in the form of electronic or optical devices is something new that is regulated in procedural law which is a development in the field of law, and the implementation of a decision of a government decision can only be canceled (vernietigbaar), not canceled (nietigaabsoluut niet ig-inextence) or null and void (van rechtswege nietig).Supreme Court needs to carry out a reconstruction of the legal procedure for testing statutory regulations under the law, by making improvements to Perma No. 01 of 2011 concerning the Right to Judicial Review by accommodating: a trial that is open to the public presenting related parties and hearing statements from witnesses or experts, requests for cases for review of laws and regulations must be examined carefully by clerks, and evidence in the form of electronic or optical devices.

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