

Testing of Laws and Regulations in Creating Legal Certainty.pdf

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Testing of Laws and Regulations in Creating Legal Certainty

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Abstract- Indonesia is a state of law. This is expressly stated in the 1945 Constitution. As a state of law, Indonesia established laws and regulations as the basis for the implementation of government. The legislation should be formed and run harmoniously and not contrary to other laws and regulations, but in reality, there is often a conflict between laws and regulations. The problem studied is the model of testing legislation in the future in creating legal certainty in Indonesia. This type of research is normative legal research with a statutory approach, concept approach, and comparative approach. The source of legal materials used is; primary legal materials, secondary legal materials, and tertiary legal materials. The legal material is discussed, criticized, and analyzed using prescriptive analysis. Concluded, the model of testing legislation in the future in creating legal certainty in Indonesia is with a single testing system by one institution that specifically carries out testing of all legal products from the regional level to the 1945 NRI Constitution to create robustness and legal certainty.

Index Terms- Testing of laws and regulations, Legal Certainty

I. INTRODUCTION

The State of Indonesia is a state of law. This is expressly stated in the Constitution of the Republic of Indonesia of 1945 (hereinafter written the 1945 NRI Constitution). As a country based on law, Indonesia establishes hierarchical laws and regulations as the basis for government administration. As for the type and hierarchy of laws and regulations as stipulated in Article 7 paragraph (1) of Law No. 12 of 2011 concerning the Establishment of Laws and Regulations (hereinafter written Law No.12 of 2011) consists of:

- A. The Constitution of the Republic of Indonesia of 1945;
- B. Decree of the People's Consultative Assembly (Tap MPR);
- C. Government Laws/Regulations In lieu of the Act (Perpu);
- D. Government Regulations (PP);
- E. Presidential Regulations (Perpres);
- F. Provincial Regulations (Perda Provinsi); and
- G. District/City Regulations (Perda Kabupaten/Kota).

The legislation should be formed and run harmoniously and not contrary to other laws and regulations, but in reality, there is often a conflict between laws and regulations. If the conflict that occurs between the laws against the Basic Law then tested to the Constitutional Court (hereinafter abbreviated as MK), This is as stipulated in Article 24 C paragraph (1) of the 1945 Constitution which states that the Constitutional Court is authorized to adjudicate at the first and last level whose decision is final to test the law against the 1945 NRI Constitution, but if a conflict occurs between the laws and regulations under the law

then it is tested to the Supreme Court (hereinafter written MA), This is stipulated in Article 24 A paragraph (1) of the 1945 Constitution where the Supreme Court is authorized to prosecute at the level of cassation, test the laws and regulations against the law, but in Article 7 paragraph (1) of Law No.12 of 2011 mentioned Tap MPR as one type of legislation, but in the authority of the MA and MK testing the laws and regulations do not mention Tap MPR as part of the object tested. Then who tested Tap MPR, when in the future there was found an alleged conflict between Tap MPR and the 1945 Constitution or the laws and regulations under Tap MPR against Tap MPR? The absence of institutions authorized to test the MPR Tap is evidence that legal certainty has not been realized in the Judicial Review system in Indonesia.

In addition to the absence of institutions authorized to test tap MPR, the same question is also addressed to the Joint Decree (hereinafter written SKB) 3 Ministers on Ahmadiyyat? The Ahmadiyya Jama'at feels that the existence of Decree 3 Of Ministers violates the constitutional right to freedom of religion. Therefore the Ahmadiyya Jama'at tries to apply for testing to the Constitutional Court. Related to this, Mahfud MD argued that the decree of the three Ministers on the prohibition of the Ahmadiyya Jama'at could not be sued to the Constitutional Court, MA, or the State Administrative Court (hereinafter written PTUN).

MK is not authorized to assess the Ahmadiyya Decree based on the provisions of Article 24C of the 1945 Constitution. The Constitutional Court is only authorized to conduct legal testing against the 1945 NRI Constitution. Being brought to the MA is also not appropriate because the SKB is not a law, as stipulated in Law No.12 of 2011. If it is referred to PTUN, it is also less appropriate because the DECREE can be judged as a non-determination regulation because there is a general content.¹

In the absence of institutions authorized to test SKB 3, the Minister further makes it clear that legal certainty against the testing of laws and regulations has not been realized in the judicial system in Indonesia. Thus, the problem studied is the model of testing legislation in the future in creating legal certainty in Indonesia.

II. RESEARCH METHODS

Research methods, this type of research is normative legal research with a statutory approach, concept approach, and

¹ Mahfud MD: SKB Ahmadiyya Cannot Be Sued to MK, MA and PTUN. Source: <https://ressay.wordpress.com/2008/06/12/mahfud-md-skb-ahmadiyah-tak-bisa-digugat-ke-mk-ma-dan-ptun/> accessed September 22, 2021

comparative approach. The source of legal materials used is; primary legal materials, secondary legal materials, and tertiary legal materials. The legal material is discussed, criticized, and analyzed using prescriptive analysis.

III. DISCUSSION

According to Hayyanul Haq, that the establishment of laws and regulations is to make clear a norm and run consistently, starting from the 1945 Constitution and derivatives and implementation regulations, but factually many derivatives of the 1945 Constitution are inconsistent so that testing is carried out by both the SUPREME Court and MK.²

According to I Dewa Gede Palguna, there are two functions of statutory testing owned by mk. First, to maintain the functioning of the democratic process in mutually influencing relations between legislative, executive, and judicial institutions. The authority to test the law owned by the Constitutional Court serves to maintain the mechanism of checks and balances. Second, the testing of the law serves to protect citizens' rights or private lives from violations by branches of state power.³

From the explanation, it is known that the purpose of testing the laws and regulations is solely to maintain the Constitution. If there is a conflict between the Constitution and the laws and regulations under it, it can be ascertained there will be legal uncertainty. The uncertainty of the law is unconstitutional as the constitution guarantees.

Some of the practices of testing laws and regulations in Indonesia do not even reflect a certainty even though the nature of the testing of the legislation is to realize a legal certainty, such as the case of Oesman Sapta Odang alias Oso Chairman of the Hanura Party where in The Decree Of MK Number: 30 / PUU-XVI / 2018, MK stated the phrase "other work" in Article 182 letter l of Law No. 7 of 2017 on General Elections contrary to the 1945 NRI Constitution and does not have i the power of conditional binding law as long as it does not mean includes the management (functionary) of political parties.⁴

Taking into account the decision of the Constitutional Court, the General Election Commission (hereinafter written KPU) of the KPU amended KPU Regulation No. 14 of 2018 concerning the Individual Candidacy of Participants in the General Election of Members of the Regional Representative Council with KPU Regulation No. 26 of 2018. KPU Regulation No. 26 of 2018 regulates the mandate of the Constitutional Court's Decision in Article 60A. Based on Article a quo, the KPU removed Dr. Oesman Sapta as a Candidate for DPD Because it is known as the administrator (functionary) of a political party. It is contrary to Article a quo.

Against this, Dr. Oesman Sapta felt aggrieved and filed a material test rights lawsuit against Article 60A of KPU Regulation No. 26 of 2018 to the MA. Against dr. Oesman Sapta's application, the Supreme Court through Decree No. 65

P/HUM/2018 stated that it accepted and granted part of Dr. Oesman Sapta's application and stated that the provisions of Article 60A of KPU Regulation No. 26 of 2018 on the Second Amendment to KPU Regulation No. 14 of 2018 concerning the Candidacy of Individual Participants of DPD Member Elections are contrary to higher laws and regulations namely Article 5 letter d and Article 6 paragraph (1) letter i of Law No. 12 of 2018. 2011.⁵ From the MA Verdict can be seen the conflict between the MA verdict and the MK verdict. With the conflict between the verdicts, there is legal uncertainty in a judicial decision.

According to Hayyan Ul Haq, legal uncertainty occurs due to incoherence between legal norms. "Coherence is a measurement of the validity of a norm."⁶ Based on this explanation, a norm can be seen as legal certainty if the norm is created with consistency so that there is a consistent relationship between norms.

Therefore, to be able to realize a legal certainty in the system of testing laws and regulations, a new formulation is needed or different from that already in Indonesia today, to be able to formulate it can compare the implementation of testing to laws and regulations in various countries, including:

a. Testing of Laws and Regulations in the United States

The United States is a historical state in the world judicial review mechanism known in the madison vs Marbury case. Actually, the United States Constitution does not explain Judicial Review, but John Marshall, chairman of the Supreme Court/MA, argues that the Constitution is the supreme law of the land that must be maintained so that all forms of laws that are contrary to the Constitution must be overturned and considered invalid.⁷ Since then, the concept of Judicial Review has been established in the United States. Judicial Review in the United States is conducted by one institution, the Supreme Court / MA America. The United States did not form MK. According to Constitutional Judge Daniel Yusmic P. Foekh, although the United States does not have a constitutional court, the function of the Constitutional Court is in the Supreme Court.⁸

The sole authority of the Supreme Court in America is worthy of reference because with the testing of laws and regulations carried out by one institution, it will be clear the legal certainty created.

b. Testing of Laws and Regulations in Germany

Germany is one of the countries whose development of Constitutional Law is very developed. Germany is one of the countries that formed the Constitutional Court earlier. The German Constitutional Court or Bundesverfassungsgericht was established in 1949. The establishment of the Federal Constitutional Court or Bundesverfassungsgericht is the result of unification in the Grundgesetz (GG) or German Constitution.

⁵ Supreme Court Decision No. 65 P/HUM/2018

⁶ Hayyan Ul Haq: Sustainability in Maintaining Strategic Resources. Source: <https://prasetya.ub.ac.id/hayyan-ul-haq-sustainability-dalam-menjaga-sumberdaya-strategis/> accessed on September 22, 2021

⁷ Jimly Asshiddiqie, Models of Constitutional Testing in Various Countries, (Jakarta: Constitution Press, 2005), Pp. 31-35.

⁸ Daniel Yusmic reveals the history of judicial review. Source: <https://www.mkri.id/index.php?page=web.Berita&id=16851&menu=2> accessed on September 22, 2021

² Interview with L.M.Hayyanul Haq, SH, LL.M, Ph.D. on September 14, 2021

³ I Dewa Gede Palguna in Asmaeny Azis and Izlindawati, Prenadamedia Group: Jakarta, 2018. Hlm. 103

⁴ Quoted from the Constitutional Court of the Republic of Indonesia No. 30/PUU-XVI/2018.

According to I Dewa Gede Palguna, that based on Article 93 and Article 100 GG, the German Constitutional Court has broad authority, covering all issues regarding the implementation and interpretation of GG. The German Constitutional Court has exclusive authority over all judicial proceedings that are directly covered by the issue of obedience to the Constitution (GG). There are three ways of submitting a case to the German Court, namely:⁹

1. *abstract Judicial Review (abstrakte Normenkontrolle)*, It is a trial process that concerns the abstract testing of a law;
2. *concrete Judicial Review (konkrete Normenkontrolle)*, or constitutional question, which is a trial process that is about testing a law relevant to a particular legal case (Article 100 Paragraph (1) GG).
3. through a complaint procedure submitted by an individual called constitutional complaint (*Verfassungsbeschwerde*) (Article 93 Paragraph (1) 4a GG). Through this procedure, any person (including private legal entities, as long as the provisions of the Bill of Rights also apply to him) can apply to the German Court of Justice to declare a federal law or state law invalid. (*void*);⁹

According to the authors, the concept of the Federal Constitutional Court or *Bundesverfassungsgericht* in Germany is very good because the *Bundesverfassungsgericht* is given exclusive authority over all judicial processes that are directly covered by the issue of adherence to the Constitution (GG), so there is no need to worry about the absence of institutions that are authorized to test laws and regulations that are allegedly contrary to the Constitution.

c. Testing of Laws and Regulations in Turkey

The Turkish Constitution, called *Türkiye Cumhuriyeti Anayasası* in Article 148, regulates the Constitutional Court of Turkey or in Turkish. *Anayasa Mahkemesi*.¹⁰ In Turkey, the judiciary is held by *Anayasa Mahkemesi*. *Anayasa Mahkemesi* is the highest legal body for constitutional review in Turkey. The Court "examines the constitutionality, in the sense of its form and substance, of all laws, decrees that have the force of law, and the Rules of Procedure of the Supreme National Council of Turkey".¹¹

If necessary, this body also serves as an MA to hear any case raised concerning the President of the Republic, members of the Council of Ministers, or the President and members of the High Court.¹² According to the author, *Anayasa Mahkemesi* is similar to the Supreme Court in America where there is one judicial institution that specializes in various cases including testing of laws and regulations

IV. CONCLUSION

The model of testing legislation in the future in creating legal certainty in Indonesia is with a single testing system by one institution that specifically carries out testing of all legal products

⁹ *Ibid.* Hlm. 9

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Turkish political system. Source: <http://repository.umy.ac.id/bitstream/handle/123456789/290/bab%20ii.pdf?sequence=2&isAllowed=y> accessed September 22, 2021

from the regional level to the 1945 NRI Constitution so as to create equality and legal certainty

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