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JURIDICAL ANALYSIS OF DUALISM IN THE IMPLEMENTATION OF JUDICIARY AUTHORITY REVIEW IN INDONESIA

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Abstract:
After the third amendment to the 1945 Constitution, Indonesia officially adopted a dualistic judicial review system. With this dualistic system, the authority for judicial review is spread/divided between two judicial organs by separating the scope of their respective tests: the Supreme Court reviews regulations under the law against the law (legal review) while the Constitutional Court reviews the law against the Constitution (constitutional review). Viewed from the perspective of theory and practice adopted by countries that adopted the formation of the Constitutional Court (a centralized judicial review model), the system adopted by Indonesia turns out to be very unusual and even a mistake in designing the judicial review system. Because in countries that have a Constitutional Court, the authority for judicial review will definitely be concentrated/centered on the Constitutional Court. This division of authority into two review regimes (legal review and constitutional review) as practiced in Indonesia is never known (except in South Korea) both in countries that use a centralized judicial review model and a distributed judicial review model. Because such a division would disrupt the implementation of the judicial review itself because the authority would be exercised by two different institutions using different testing standards. For this reason, at the end of this research, a proposition is put forward to centralize the authority of judicial review to the Constitutional Court so that the practice of dualistic judicial review which has proven to be problematic can be ended and the judicial review system in Indonesia can be reconstructed and placed on an appropriate theoretical and practical basis..

Keywords*:* *Dualism – Judicial - Review*

I. Introduction

The state is a power organization whose function is to advance and prosper society, regulate and order society's life, and educate society. For this reason, the state is attached to what is called power. Because power is the basis of the state in carrying out its functions. To exercise power in order to carry out its functions, the state must have an instrument

called law. "Law, or more specifically, legislation is a political product.[1]

Law is used as a tool by the government of a country to implement public policies in the context of running the country, through law the state can also force people to obey what it orders so that the government can carry out social engineering on society. In connection with this, Hans Kelsen said "the existence of the state, every action, can only appear as a legal action, as an act of creating or implementing legal norms". Therefore, law has a very important position in a country.[2]

After the third amendment to the 1945 Constitution, Indonesia officially adopted a dualistic judicial review system. With this dualistic system, the authority for judicial review is spread/divided between two judicial organs by separating the scope of their respective tests: the Supreme Court reviews regulations under the law against the law (legal review) while the Constitutional Court reviews the law against the Constitution (constitutional review). Viewed from the perspective of theory and practice adopted by countries that adopted the formation of the Constitutional Court (a centralized judicial review model), the system adopted by Indonesia turns out to be very unusual and even a mistake in designing the judicial review system. Because in countries that have a Constitutional Court, the authority for judicial review will definitely be concentrated/centered on the Constitutional Court. This division of authority into two review regimes (legal review and constitutional review) as practiced in Indonesia is never known (except in South Korea) both in countries that use a centralized judicial review model and a distributed judicial review model. Because such a division would disrupt the implementation of the judicial review itself because the authority would be exercised by two different institutions using different testing standards.

Based on Article 24C Paragraph (1) of the 1945 Republic of Indonesia Constitution, one of the authorities possessed by the Constitutional Court is the authority to adjudicate at the first and last level whose decision is final and binding to review laws (UU) against the 1945 Constitution of the Republic of Indonesia. Meanwhile, regarding regulatory review legislation under the Law against the Law, the authority is given to the Supreme Court.

Consistency of implementation is also an important issue to achieve tiered norm justice. Norm disputes do not seem to be problematic in judicial practice, both at the Constitutional Court and the Supreme Court. However, the case is different if the legal norms provided by the court decision are contradictory. Problems will arise if the review of statutory regulations against laws is taking place at the Supreme Court, while the law that is the touchstone is also being tested at the Constitutional Court and is declared to be in conflict with the 1945 Constitution of the Republic of Indonesia, then the request for judicial review at the Supreme Court will be irrelevant. This is still being implemented, because the law used as the touchstone has been declared no longer valid.

Then the judicial review at the Supreme Court can also be considered ineffective. Apart from the problems above, the burden of cases handled by the Supreme Court each

[1] Moh. Mahfud M. D. (2009). Politik Hukum di Indonesia. Jakarta Utara: PT. Rajagrafindu Persada, h.4

[2] Kelsen, H. (2009). Pengantar Teori Hukum" diterjemahkan oleh Siwi Purwandari". Bandung: Nusa Media, h. 151.

year can be said to exceed its capacity. This can certainly hamper the ongoing judicial review process at the Supreme Court, considering that the Supreme Court is the pinnacle of the judiciary which is concerned with demands for the struggle for justice for individuals or other legal subjects. Under the Supreme Court there are four judicial environments, namely general court, religious court, state administrative court and military court.[3]

Such problems could certainly be avoided if the Judicial review was carried out under one roof at the Constitutional Court. Because judicial review is a way to protect the public from government arbitrariness regarding the various legal products it creates.

II. Legal Materials and Methods

This research is normative legal research which uses the method of collecting legal materials, namely literature study or document study. The legal materials used are primary legal materials, including a collection of laws and regulations starting from the 1945 Constitution of the Republic of Indonesia, Laws, Constitutional Court Decisions, Government Regulations and other laws and regulations. Meanwhile, secondary legal materials include handbooks, legal magazines, legal journals, newspapers and scientific works.[4]

III. Result and Discussion

The authority of the Constitutional Court (MK) which is absolute (absolute competence) is to carry out a judicial review of laws which contain the nature of violating and violating the constitutional rights of the people as regulated in Article 24C of the 1945 Constitution of the Republic of Indonesia. The rights affirmed by the constitution, both because of their fundamental nature and because they are inherent in the identity of the Indonesian nation, are recognized as general and universal values. So because of the nature of recognition by the constitution, the various laws and regulations under the 1945 Constitution of the Republic of Indonesia, with the nature of constitutional recognition, must wisely consider constitutional humanitarian aspects in the formulation of legal products, so that constitutional rights does not become scratched and lost. The nature of the law, which not only regulates institutional aspects and general interests, but also contains aspects of humanitarian considerations as a legal subject, then humanitarian considerations as underlined by the constitution must be respected by legal products in under the 1945 Constitution of the Republic of Indonesia.

In Article 24A paragraph 1 of the 1945 Constitution it is explicitly stated that "the Supreme Court has the authority to adjudicate at the cassation level, examine statutory regulations under the law against the law, and other authorities granted by law". Furthermore, Article 24 paragraph 2 of the 1945 Constitution stipulates that "judicial power is exercised by a Supreme Court and subordinate judicial bodies in the general court environment, religious court environment, military court environment, state administrative court environment, and by a Constitutional Court" . Regarding the authority of the Supreme Court, this is regulated again in Article 31 paragraph 1 of

[3]Jimly Asshiddiqie, Http://Www.Jimlyschool.Com/Read/Analisis/238/Kedudukan-Mahkamah-Konstitusi-DalamStruktur-Ketatanegaraan-Indonesia/, Diakses Pada Hari Kamis 09 Mei 2024 Jam 02:00 WIB

[4] Soerjono Soekanto dan Sri Mamudji, 2003, Penelitian Hukum Normatif (Suatu Tinjauan Singkat), Rajawali Press,Jakarta, hlm. 29.

Law no. 5 of 2004 concerning Amendments to Law no. 14 of 1985 concerning the Supreme Court, namely "The Supreme Court has the authority to review statutory regulations under the law against the law".

There are four important reasons for the development of judicial review that has taken place so far; First, substantially, there is a confirmation and at the same time a separation between constitutional testing which places the Basic Law (Constitution) as the basis for testing and juridical testing which uses the law as the basis for testing. Second, technically juridically, with the birth of the Constitutional Court, cases related to "defects" in the law can be tested and straightened out so that they are in accordance with the constitutional spirit. Third, with the birth of the Constitutional Court, even if a law is drafted by the DPR, which therefore has very obvious political interests, it can still be tested on the material it contains, if it is known that the material of the law is contrary to the principles of human rights, the principles of rule of law and democracy as well as the constitutionality of the 1945 Constitution of the Republic of Indonesia, then the violating articles can be tested. And fourth, with efforts to coherence all types of legal products in a series of legal lines with the 1945 Constitution of the Republic of Indonesia, strict and constitutional control can be exercised over legislative products, both those made by legislative institutions down to the regions and by the government (executive).

Giving authority to the same substance, namely the review of statutory regulations, but differentiating the object from different organizations but within the same state institution, namely judicial power, will in the future give rise to various normative and technical confusions. The separation of authority to review legislative regulations between the Supreme Court and the Constitutional Court as regulated in Article 24A paragraph (1) and Article 24C paragraph (1) of the 1945 Constitution is not ideal because it can give rise to complex legal problems. Sri Soemantri emphasized that there is a connection between the law and the regulations under it. Based on existing provisions, if a Government Regulation, Presidential Decree, or Regional Regulation conflicts with the Law, it will be tested by the Supreme Court. The problem that arises is, if the Law used for testing is being tested at the Constitutional Court and it turns out that it is decided that the Law in question is in conflict with the 1945 Constitution of the Republic of Indonesia. This will be different, because the Law that is used as law for making Government Regulations can no longer applies if the review of statutory regulations is carried out under one roof, because the above conditions can be immediately resolved and dealt with directly, the Constitutional Court can prioritize the review of the law against the 1945 Constitution of the Republic of Indonesia and if the law is declared to be in conflict with the 1945 Constitution of the Republic of Indonesia, then the application becomes irrelevant to review Government Regulations, because the law that was used as law to make Government Regulations can no longer be valid.

Even though the presence of the Constitutional Court is considered new, with the scope of its authority not being exercised by state institutions such as the Supreme Court, the presence of the Constitutional Court is quite significant in shaping and at the same time coloring the conceptual order of the Indonesian legal state to become a "true legal state". With the authority of the

Constitutional Court to carry out reviews of laws, the absolute correctness of the laws that have existed so far (under the old order and new order regimes), besides showing the existence of limitations on prerogative rights. The DPR and the President are related to the "single interpretation of legal truth" as has so far crystallized in the development of law in Indonesia. It is certainly hoped that this effort can enforce the "defect free" law. In this way, there can be restrictions on power, abuse of power as well as strong and firm control by the constitutional judiciary on the use of legal products as a form of unlawful acts and crimes against humanity.

The Supreme Court can only assess or test regional regulations with normative standards that conflict with higher statutory regulations (materially) and procedures for forming regional regulations (formally). What if certain regional regulations do not conflict with higher laws and regulations, but only conflict with the public interest, can the Supreme Court carry out a review of, for example, regional regulations? Thus, it can be said that the scope of normative standards for testing regional regulations carried out by the Supreme Court is very limited.

According to Jimly, there are four reasons why the dualism of regulatory testing is not ideal, namely as follows:[5]

1. The granting of the authority to review (Judicial Review) legal material on the Constitution to the newly formed Constitutional Court gives the impression that it is only a partial addition to the formulation of the material of the 1945 Constitution of the Republic of Indonesia in an easy and patchy manner, as if the conception of the right to judicial review of existing regulations in the hands of the Supreme Court does not affect the test rights granted to the Constitutional Court. Such a formulation seems as if it is not based on a comprehensive conceptual deepening regarding the conception of the material test itself.
2. Separation of authority makes sense if the power system adopted is still based on the principle of division of powers as adopted by the 1945 UUD NKRI before undergoing the first and second amendments, the 1945 UUD NKRI after the amendment has officially and firmly adhered to the principle of horizontal separation of powers prioritizing the principle checks and balances. Therefore, the separation between statutory material and regulatory material under the law should no longer be made.
3. In future implementation practice, hypothetically a substantive conflict could arise between the Supreme Court's decision and the Constitutional Court's decision. Therefore, it would be better if the system for reviewing legal regulations under the constitution is integrated under the Constitutional Court. In this way, each Court can focus attention on different issues. The Supreme Court handles issues of justice and injustice for citizens, while the MK guarantees the constitutionality of all laws and regulations.
4. If the authority to review regulatory material under the 1945 Constitution of the Republic of Indonesia is fully given to the Constitutional Court, of course the Supreme Court's burden can be reduced.

[5] Doni Silalahi, 2016, Kewenangan Yudisial Review Mahkamah Agung Terhadap Peraturan Perundang-Undangan di Bawah Undang-Undang, Jurnal Untan Vol 3 Nomor 3 Tahun 2016.

This opinion is in line with that expressed by Mahfud MD [6] who said that "legislative regulations are structured hierarchically and have certain proportions of material content". Mahfud MD also said "ideally, two judicial institutions have clear groups or lines of competence, namely that one handles conflicts or cases between people/institutions, while the other handles conflicts between laws and regulations." On another occasion Mahfud MD [7] said there were two notes regarding this intersection of authority:

1. Ideally the Constitutional Court functions to ensure the consistency of all statutory regulations so that this institution only examines conflicts of statutory regulations from the highest to the lowest level. Therefore, the authority for judicial review of statutory regulations under the law against the law would be more ideal if given to the Constitutional Court with this idea so that the consistency and synchronization of all statutory regulations in a linear manner is in one institution, namely the Constitutional Court.
2. Ideally, the Supreme Court has the authority to handle all conflict incidents between individuals and/or between rechtpersons so that issues regarding election results or the dissolution of political parties and so on become the authority of the Supreme Court, and the Supreme Court is freed from the authority to review legal regulations.

One of the principles derived from the legal hierarchy related to this test is that higher regulations are a measure of validity for regulations "This means that statutory regulations are a single unit that is integrated with each other. Therefore, it must also be tested by one institution to maintain consistency.

The existence of two different regulatory review institutions will give rise to conceptual problems in its implementation. This is because there is no supreme institution to monitor and enforce the constitution. The theory of the hierarchy of norms and the principles of forming legal regulations cannot be fully implemented in an integral manner. "The mechanism for reviewing legislative regulations under the law against the Constitution does not yet have a legal basis, thus creating a legal vacuum." Furthermore, Ahmad and Mulyanto also said "the existence of dualism in the authority of judicial review by the two institutions, the Supreme Court and the Constitutional Court, can empirically sooner or later lead to institutional conflict between the Supreme Court and the Constitutional Court.

Unifying the authority of Judicial Review under one roof at the Constitutional Court also needs to be done for several reasons. First, to reduce the enormous burden/backlog of case handling work at the Supreme Court. So by integrating the authority to review statutory regulations in the Constitutional Court, it is hoped that the Supreme Court will focus more on handling concrete cases at the cassation level and judicial review for justice seekers.

From the perspective of authority theory and legal political theory, the purpose of the formation and the main duties and functions of the Constitutional Court are as explained

[6] Mahfud, M. D. (2010). *Perdebatan Hukum Tata Negara Pasca amandemen Konstitusi, cetakan kedu*a. Jakarta: Kencana, hal. 57.

[7] Mahfud MD,(2010), MengawalArah Politik Hukum Dari Prolegnas Sampai Judicial Review, http://www.mahfudmd.com/public/makalah/makalah_pdf, h. 262.

in the General Explanation of Law no. 24 of 2003 concerning the Constitutional Court is to handle certain constitutional or constitutional cases within the framework of the constitution so that they are implemented responsibly in accordance with the will of the people and the ideals of democracy. The existence of the Constitutional Court is at the same time to maintain the implementation of a stable state government, and is also a correction to the experience of constitutional life in the past which was caused by multiple interpretations of the constitution. Therefore, apart from being the guardian of the constitution, the Constitutional Court is also the sole interpreter of the constitution.[8]

Apart from that, according to the results of Zainal Arifin Hoesein's[9] dissertation research, from a practical perspective, efficiency and effectiveness, the Supreme Court's testing of statutory regulations is very ineffective, because the average number of cases resolved per year is between 1-2 (lawsuits) and 3 cases. (request). On the contrary, the Constitutional Court is actually more productive, because in just 1 (one) year and 1 (one) month it can resolve 22 (two twenty) cases.

In the state context, the Constitutional Court is constructed as a guardian of the constitution whose function is to uphold constitutional justice in public life. Thus, the examination of statutory regulations which differentiate between object and subject needs to be reformulated, namely integrating the authority for reviewing statutory regulations under one roof of the Constitutional Court.

To make all this happen, the 1945 Constitution of the Republic of Indonesia must be amended, the competence between individual conflicts/rechtsspersons of each institution is completely handed over to different judicial authorities. Conflicts over laws and regulations, starting from the 1945 Constitution of the Republic of Indonesia to the bottom of the hierarchy, must be submitted completely to the constitutional court so that the consistency of each level of regulation is fully monitored by the Constitutional Court in accordance with the 1945 Constitution of the Republic of Indonesia or the Constitution. For this reason, the articles that must be amended are Article 24A Paragraph (1) and Article 24C Paragraph (1) of the 1945 Republic of Indonesia Constitution which regulates the authority of the Constitutional Court and Supreme Court in conducting judicial reviews.

By granting full judicial review authority to the Constitutional Court, not only will it facilitate the process of resolving cases, but it will also provide an illustration that the Supreme Court and the Constitutional Court have the same position in the Indonesian constitutional system. The Supreme Court is the highest court in matters of individual conflict, while the MK is the highest court in ensuring the consistency of all laws and regulations so that they do not conflict with higher regulations. Then, if the authority for judicial review rests entirely with the Constitutional Court, of course it will also have positive implications for resolving cases at the Supreme Court. The burden of cases handled by the Supreme Court will certainly be lighter, in this way, the Supreme Court

[8] Jimly Asshiddiqie, 2002, Konsolidasi Naskah UUD 1945 Setelah Perubahan Keempat, PSHTN FH UI, Jakarta, hlm. 40-41

[9] Zainal Ariffin Hoesein, 2009, Judicial Teview di MA, Rajawali Pers, Jakarta, hlm. 111-112.

will certainly be able to guarantee more individual and concrete justice for those seeking justice.

IV. Conclusion and Suggestion

The implementation of a two-stop review will hinder the enforcement of the constitution against statutory regulations, especially statutory regulations under the law, so in this case it is important to unify the authority of judicial review so that integral enforcement of the constitution in statutory regulations will be achieved, including statutory regulations under the law. Material testing (judicial review) by the judiciary for all levels of the hierarchy of statutory regulations is carried out by just one institution so that the consistency of thought and content of all statutory regulations is more guaranteed and synchronization and harmonization between statutory regulations starting at the highest level can be realized. to the lowest, so it is recommended that further amendments be made to the 1945 Constitution regarding the provisions regarding the authority of the Supreme Court and the Authority of the Constitutional Court, especially regarding the right to judicial review of statutory regulations to overcome the problem of dualism in judicial review of legal regulations in Indonesia.

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