THE LEGISLATIVE TESTING SYSTEM IN INDONESIA

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ABSTRACT

This study aimed to analyze and explore the problems arisen from the implementation of judicial review on a two-stop service in the constitutional system. The results of the study indicate that the implementation of the judicial review conducted in Indonesia has the potential to cause legal conflicts. One reason is the separation of authority over the testing of regulations carried out by two judicial institutions, namely the Constitutional Court and the Supreme Court. Exploring problems arising from the implementation of judicial review in a two-stop service that occurs in the constitutional system. The possibility to unite the authority of judicial review under one-stop service with the potential problems that are likely to emerge is followed by a comparative approach by looking at several practices in countries that conduct a judicial review under one-stop service, with the Austrian Constitutional Court as the main reference. The conclusion is that the preparation of this study is followed by the awareness that this paper will not be sufficient for changes in the existing judicial review system. Nevertheless, the unification of the authority to examine the laws and regulations means to amend the 1945 Constitution which requires strong reasons and careful consideration. Therefore, this study aims to open a preliminary discourse that elaborates issues related to judicial review.

Keywords: Legal Testing Systems, Legislation, Judicial Review, Constitutionality, Indonesia.

INTRODUCTION

Judicial review has an important role as a legitimate tool for the existence of legislation. Judicial review, both in the context of constitutional and administrative review, is the reverse of the reversal of the legitimation chain (Wintgens, 2007; Wintgens & Thion, 2007; Perju, 2009). This means that a judicial decision that rejects an application to cancel a statutory regulation will provide confirmation of the validity of the legislation and regulations. The legit correlation between legisprudence theory and constitutional review perspective has become a concern in the practice of its application in court decisions, one of which is carried out by the German Federal Constitutional Court (Meßerschmidt & Oliver-Lalana, 2016; Ismer & Meßerschmidt, 2016; Oliver-Lalana, & Meßerschmidt, 2016). Judicial review is one of the answers to the problem of many low-quality laws and regulations. The court which has the authority of judicial review can assess the appropriateness of laws and regulations, both in formal and material terms (Deller & Vantaggiato, 2014). The court's decision will have a large influence on the formation of the legislation that will be designed and drafted next in the new term (Kovacic, 2002; Eng, 2002; Wintgens, 2002).

Citation Information: Hakim, L., Negara, P.D., & Kurniawan, N. (2022). The legislative testing system in Indonesia. *Journal of Legal, Ethical and Regulatory Issues, 25*(3), 1-7.

The judicial review model of the statutory regulations, which is differentiated in a limitative realm of testing, has the potential to cause conflicts in interpreting the conflict between the laws and regulations and the norms above. The Supreme Court tests at the level of legality and the Constitutional Court examines at the level of constitutionality. However, in the practice of its implementation in several decisions, the Constitutional Court is considered to have carried out judicial activism, because it has taken the role of Parliament in forming legislation (Bisariyadi, 2016). One of the factors that motivated the Constitutional Court to make a legal breakthrough in the judicial review was the division of authority in the judicial review system by the two institutions. Testing mechanisms like this raise quite complex legal issues. This study examines the issue of the separation of judicial review authority, with the intention to provide several arguments for the possibility of merging its implementation in one institution. In more detail, this study would like to examine the idea of managing regulations by integrating the material testing model of all laws and regulations in one-stop service system in the Constitutional Court of the Republic of Indonesia. The discussion in this study is conceptual and normative . Furthermore, in order to be more implementative, a comparative approach will be used by reviewing the practice of testing legislation carried out under one institution.

LITERATURE REVIEW

Models of Legislatives Testing System

The history and condition of a country influences the arrangement of judicial power and authority in the testing of laws and regulations. This authority varies from country to country. The difference is concerning the judicial authority organs/institutions that are tested, the laws and regulations or governmental actions being tested, the consequences arising from the laws and regulations or governmental actions being tested both regarding the time and regarding similar cases that come later (Aziz, 2016).

There are two models of judicial review materials. The models are known as judicial reviews, namely:

1. First, the United States model through the decision of the Supreme Court or Supreme Court in the case of "*Marbury vs. Madison*" in 1803. Although the provisions of judicial review are not listed in the United States Constitution. In its history the Supreme Court in the United States made a decision written by John Marshall when he was Chief Justice of the Supreme Court stating that the court was authorized to overturn a law that was contrary to the Constitution (Asshiddiqie, 2005).
2. Second, the European model of the Constitutional Court in Austria introduced by Hans Kelsen, Austrian Constitution of 1919. Austria was the first country in the world to introduce the term Verfassungsgerichtshoft or the Constitutional Court established in 1920 (Asshiddiqie & Syahrizal, 2006).

In Indonesia, the constitutional design after the amendment of the 1945 Constitution has distinguished two separate judicial systems and has authority that is clearly differentiated in the Constitution, so this shows that the Indonesian judicial system adheres to a bifurcation system. The justice system places a judicial authority that is completely different from one another. In practice, the two are not really different (pseudo). Both of these judicial institutions still have the same authority, namely conducting a material test of the laws and regulations. The Supreme

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Court examines the laws and regulations under the Law against the Act, while the Constitutional Court examines the Law against the 1945 Constitution.

The Supreme Court should be a justice court in a place where everyone can get justice in general (court of justice). The constitutional court is a court of constitutional nature and a state of law (court of law) where every person or legal entity can question legislation that violates their rights and contradicts and principles of the Constitution in each country.

This artificial bifurcation justice system is ineffective from the time aspect of conducting a material test for justice seekers (justiabelen) to seek legal justice, because it has to move between the Supreme Court and the Constitutional Court. From the technical aspects of the judicial system of the pseudo bifurcation justice system, the Supreme Court is a judicial institution that is severely disadvantaged, because the Supreme Court is demanded to resolve legal cases at the cassation level. The accumulation of cases continues to grow every year. The burden of handling the cases of the Supreme Court in the period January-August 2017 amounted to 13,203 cases, consisting of cases received as many as 10,846 cases and the remaining cases by the end of 2016 totaling 2,357 cases. The number of Supreme Court Justices in this period was 44 people, so that the Supreme Court case handling load ratio was 1: 300. Because each case was tried by a panel of judges consisting of 3 justices, then from this data it can be concluded that each justices received an average allocation 900 files average.

However, the Supreme Court must also be prosecuted in order to receive requests for judicial review of statutory provisions under the law. The choice of a legal bifurcation court's legal policy will certainly make the task of the Supreme Court increasingly heavy. The establishment of the Constitutional Court can be used as a tool that can help reduce the burden of the Supreme Court. Reform and improvement of the performance of the Supreme Court as a house of justice for every citizen can be realized immediately. If the authority to examine the legal matters is delegated to the Constitutional Court, then the Supreme Court can settle cases from time to time without increasing clear resolution mechanism (Ma'shum, 2008).

In addition, if observed, it turns out that the workload in the Supreme Court is very large. The Supreme Court supervises 800 court units. As a result, within a year the Supreme Court and the lower court units handled cases of around 5 million cases (in 2010) with 3 million cases being included as traffic violations. The Constitutional Court only handled 300 cases in 2010. The Supreme Court in a year examines 12 thousand cases handled by 50 Supreme Judges. The Constitutional Court only handles 300 cases handled by 9 Constitutional Justices. From this comparison of data, researchers do not intend to justify one institution as being better than another. The intent and focus of the researcher is in line with the opinion of Jimly Asshiddiqie that it is time for each institution to then focus more on the core of their duties and authority. The Supreme Court as the cort of justice adjudicates legal subjects while the Constitutional Court as the cort of law hears the legal system or norm court.

RESULT

Evaluation of Legislatives Testing under the Act

The idea to unite the authority to examine the laws and regulations in one roof is not an exaggeration, when looking at the burden of handling cases received by the Constitutional Court

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and the Supreme Court. The total number of cases received by the two state institutions which have the authority of judicial review is still possible, if the authority of judicial review of laws and regulations is carried out under one roof. The authority of judicial review in the Constitutional Court is only limited to judicial review, while the Supreme Court's material review includes all statutory provisions under the Act. Even the Supreme Court also includes data on the receipt of material test cases of regulations which are not classified in the hierarchy of statutory regulations such as the Election Commission Regulation, Regulation of the Head of the National Land Agency, Ministerial Circular, Circular of the Supreme Court to Directors' Decrees. If the selection of cases for judicial review rights in the Supreme Court is stricter, the total number of cases in the Supreme Court is also lower.

There are several variables to consider as well when performing the evaluation of legislation. The variables are explained briefly below:

1. Transparancy and accountability. The hearing on the case of material judicial rights in the Supreme Court did not meet the aspects of transparency and accountability. Examination of applications carried out "*closed and limited*" does not involve parties who are litigants, impacting on the level of reluctance of the community to file a matter of material test rights. Therefore, suggestions for improving the procedural law of material judicial rights are always focused on matters that open up transparency and public accountability for the examination of cases (Jackson & Tate, 1992; Tate, 1993). As the trial is open to the public, the procedure for summoning the parties to the litigation is completed with information on the trial agenda, as well as the time limit for the examination and administration process (Sholikin, 2014). The problem of the procedure for examining the case of the material judicial right has been tested for constitutionality in the Constitutional Court. In its decision, the Constitutional Court is of the opinion that this trial mechanism is the domain of authority of the legislators and is not included as a case of norm of the constitutionality (Garoupa, 2017; Menéndez, 2017; Thierse & Badanjak, 2021).
2. Division of Central and Regional Power. This is highlighted by some scholars (e.g Kyritsis, 2017; Klatt, 2019; Jenart & Leloup, 2019; Henckels, 2017). Besides procedural factors, there is also a consideration of the problem of sharing power between the center and the regions. In overseeing the issuance of laws and regulations, especially Regional Regulations that cause low acceptance of cases of material testing rights in the Supreme Court. Regional regulations can be tested through two mechanisms, namely judicial review and executive review. Testing Regional Regulations at the Supreme Court is a form of judicial review. The government represented by the Ministry of the Interior is also authorized to carry out testing of Regional Regulations, as a form of central government oversight function of the region or autonomy.

In exercising its authority, the Ministry of Home Affairs is inseparable from problems. One of them is the issue of limitation of authority possessed by the Ministry of Home Affairs, namely supervision only in Regional Regulations that govern the Regional Budget, Regional Taxes, Regional Levies and Regional Spatial Planning. Therefore, the cancellation of Regional Regulations by the Government is more related to Regional Regulations in the field of taxation and retribution. Based on research conducted by the Center for Law and Policy Studies (PSHK), of the 1691 Local Regulations that were canceled during the 2004-2009 period, as many as 1066 were Regional Regulations. The second highest position is Regional Regulation on regional tax with 224 Regional Regulations (Sholikin et al., 2013). In 2016, the Ministry of Home Affairs made a list of Regional Regulations, both at the Provincial and Regency/City levels, which were revoked or revised by the Minister of Home Affairs as many as 1765. In addition, in the same list the Ministry of Home Affairs also compiled district/city Regional Regulations 1266 has been revoked or revised by the Governor as the representative of the central government. The preparation of the list of canceled or revised Regional Regulations is based on Regional

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Regulations that do not support the investment climate or overlapping rules in this field. Therefore, in the list there are a lot of local regulations on taxes, user fees, asset management and procedures for applying for business licenses in the regions. The Ministry of Home Affairs argues that Law No. 23 of 2004 concerning Regional Government stipulates that there are 6 types of Regional Regulations which before being enacted and enforced in the regions must have the approval of the central government. Matters relating to the regulation regarding the draft Regional Regulation on Regional Budget Revenue, spatial planning, regional taxation, regional levies, Regional Medium and Long Term Development Plans. Therefore, it is these Regional Regulations which are within the scope of the local government's supervision. In its development, after canceling the Regional Regulation to create a good investment climate. The Ministry of Home Affairs also conducts an inventory of Regional Regulations that are considered to contain elements of discrimination and intolerance.

DISCUSSION

Regulation Strategy of One-Stop Service Testing in Constitutional Court

That the separation of authority to carry out the testing of laws and regulations, which is currently carried out by the Constitutional Court and the Supreme Court, indeed creates complexity, problems and causes conflict. Both need to be separated because in essence they are indeed different. The Supreme Court is more a court of justice, whereas the Constitutional Court is more concerned with a court of law institution. It cannot be distinguished 100 percent and absolutely as court of justice versus court of law. The Constitutional Court is still given duties whose functions are related to the court of justice in addition to its main function as a court of law, and vice versa for the Supreme Court. Although the two cannot be one hundred percent distinguished between court of law and court of justice, in essence the emphasis on the intrinsic functions of the two is indeed different from one another (Huda, 2008).

With the institutional change, the institution authorized to conduct the testing of laws and regulations is only the Constitutional Court. Then this confirms that the Constitutional Court is the court of law, and the Supreme Court is the court of justice. The Supreme Court as the court of justice adjudicates the injustice of legal subjects to bring about justice. The Constitutional Court as the court of law adjudicates the legal system to achieve justice itself. Testing of laws and regulations is included in the realm of court of law because the testing of laws and regulations does not prosecute individuals, institutions, organizations, and subjects of law but to try the legal system or legislation pursuit in order to achieve justice. Furthermore, with the authority to examine one-stop laws and regulations at the Constitutional Court, it will be easier to evaluate, revise, revoke in terms of synchronize and harmonize the laws and regulations from the top level to the most applicable level of regulations. The Constitutional Court's assessment will be complete, including: is it against the Constitution; whether this regulation is unnecessary; ineffective and efficient; or even out of date. Thus, the structuring and simplification of regulations still have clear goals, directions and corridors in accordance with the 1945 Constitution. The findings confirm the results of previous studies in legislation and legislative testing (De Andrade, 2001; Ferejohn, 2002; Eng, 2002; Ginsburg & Versteeg, 2014). The

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findings also confirm the previous findings (Oliver-Lalana, 2016; Marcilla, 2019; Bar-Siman-Tov, 2019) on the judicial method to legislative review.

CONCLUSION

This study confirms that regulatory structuring as a way out of hyper-regulation conditions can be done through synchronization and harmonization of laws and regulations which are carried out through testing of laws and regulations. It is necessary to synchronize and harmonize by way of changes or revisions to the Law on Judicial Power, the Law of the Supreme Court and the Law of the Constitutional Court. The findings recommend the evaluation of testing the laws and regulations can be a perfect solution to fix the hyper-regulation situation. So that the authority to examine the existing laws and regulations in the Supreme Court are removed. Furthermore, the authority to examine all laws and regulations is given or done under one roof at the Constitutional Court. It is necessary to make a rule for the transfer of authority. So that when there is a shift in the authority to examine the one-stop laws and regulations at the Constitutional Court there is clarity and legal certainty related to the case of testing the laws and regulations that are still handled by the Supreme Court at the time of the shift in authority. The rules for the transfer of authority are contained in revision/amendment of the Law on Judicial Power, the Constitutional Court Law and the Supreme Court Law. Furthermore, transitional rule will be binding and adhered to by both institutions. The purpose of this transitional rule is to provide legal certainty as well as a bridging rule if a case status occurs in the event of a change in legislation. That with the authority to examine one-stop laws and regulations in the Constitutional Court, it will be easier to conduct an evaluation, revision, revocation through synchronization and harmonization of the legislation. Both from the top level to the lowest level of regulation. Directly applicable, meaning that the laws and regulations assessed by the Constitutional Court are in conflict with the Constitution or the regulation, then the legal status can be determined that it is unnecessary, ineffective and efficient or even out of date. Thus, the structuring and simplification of regulations still have clear goals, directions and corridors in accordance with the 1945 Constitution.

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Received: 07-May -2021, Manuscript No. JLERI-21-3802; **Editor assigned:** 08-May-2021, PreQC No. JLERI-21-3802(PQ); **Reviewed:** 22-May-2021, QC No. JLERI-21-3802; **Revised:** 27-Jan-2022, Manuscript No. JLERI-21-3802(R); **Published:** 03-Feb-2022

Citation Information: Hakim, L., Negara, P.D., & Kurniawan, N. (2022). The legislative testing system in Indonesia. *Journal of Legal, Ethical and Regulatory Issues, 25*(3), 1-7.