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INCONSISTENCY OF INDONESIA SUPREME COURT AND
MAKE DECISION LAWS (RELATED TO ARTICLE
DETERMINATION OF 2019 PRESIDENT ELECTION
CANDIDATES)

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ABSTRACT:

Judicial review is necessary to balance the power of the ruler (government) with citizens' constitutional rights. Ideally, the authority of a court of law (such as testing statutory regulations) and a court of justice (such as criminal and civil disputes) are carried out by two different judicial institutions but not with Indonesia. In Indonesia, the authority of a court of law is equally exercised namely the Supreme Court and the Constitutional Court. However, what distinguishes the two institutions' authority is the form and position of the legislative regulations. In practice, it is not uncommon for decisions to contradict the Constitutional Court's decisions, causing inconsistencies and legal uncertainty regarding the Article on the Determination of Selected President's electoral Candidates.

INTRODUCTION:

In Indonesia, the principle of judicial review as a constitutional mechanism to compare, assess, or test the work results of the political democracy mechanism has existed since before independence, namely in the BPUPKI session when

formulating the 1945 Constitution. Moh. Yamin suggested that there should be a mechanism for examining the validity of the law's contents against the constitution, adat, and sharia by the highest judicial institution. However, this proposal was denied by Soepomo because there had never been a consensus among State Administration experts regarding a judicial review. Besides, legal experts in Indonesia had no experience regarding the judicial review process (Dirhamsyah, 2006).

Moh. Yamin continued to be followed up by the enactment of the 1945 Constitution of the first period (1945-1949), the 1949 RIS Constitution (1949-1950), the 1950 UUDS (1950-1959), to the 1945 Constitution of the old-new order period. After the amendments to the 1945 Constitution, the Constitutional Court was born to examine laws. Since then, Indonesia has had two judicial institutions that handle a judicial review of laws and regulations. Unfortunately, according to experts, the dualism concept of examining statutory regulations is considered less than ideal. If the two-issue different decisions on the substance of the same problem, it is feared that it will cause inconsistency and legal uncertainty in society. The Supreme Court and the Constitutional Court Decision on the Elected Cawapres Presidential Candidates' material review contradicted each other. The decision ended up confusing and confusing between the two cases above (Wever, Glaser, Gorriss, & Ferrol-Schulte, 2012).

Motivation in writing this is to explain that judicial reviews often conflict with everyday life in decision making. This journal explains what the difference is and what policymakers must do to separate the powers of the two institutions so as not to overthrow each other.

DISCUSSION

A. *Position of Judicial Review Rights*

There are two popular terms known as judicial review and *toetsingrecht* (right to test) regarding testing legislation. Judicial review is the judiciary's authority to examine whether a regulation is against a higher level regulation. This authority gives the legislative and executive bodies' regulations following higher regulations and equivalent do not conflict with each other. Meanwhile, *toetsingrecht* is the right to test in a broad sense, namely that it can be carried out by the executive, legislative, and judiciary bodies so that judicial review is part of *toetsingrecht* (Aditya & Al-fatih, 2020).

The *toetsingrecht* (right to test) into two, namely:

- The right to test material (materials *toetsingrecht*)
It is an authority to assess whether a regulation conflicts with a higher level regulation. This material test is related to the possibility of contradicting regulation material with higher regulation and can also involve a rule's specificities compared to generally accepted norms.
- Right to formal examination (formally *toetsingrecht*)

Namely, an authority to assess whether a regulation is a form and how it follows the applicable regulations should be. This formal test is related to procedural problems and the legality of the institution's competence that made it.

(Aditya & Al-fatih, 2020) So from this description, it can be concluded that the consequence of testing when the tested regulation is declared contrary to the test stone used is that in the case of a formal test, the entire contents of a statutory rule become legally binding, whereas in the case of a material test there are only a few provisions such as specific articles, paragraphs or letters which are not legally binding. In Indonesia, state institutions with the right to conduct formal and material examinations of statutory regulations are the Supreme Court and the

Article 24A paragraph (1) and paragraph 24C (1) of 1945.

Article 24A paragraph (1) of 1945

"The Supreme Court has the authority to judge at the cassation level, examine statutory regulations under the law against laws, and have other powers granted by law."

Article 24C paragraph (1) of 1945

"The Constitutional Court has the authority to judge at the first and last levels whose decisions are final to examine the law against the Constitution, decide disputes over the authority of State institutions whose authority is granted by the Constitution, decide the dissolution of political parties, and decide on disputes over election results."

If we look at the two articles above, it can generally take that the two judicial institutions both have the authority of a court of law and the court of justice—the authority to review laws and regulations and adjudicate disputes. In terms of reviewing statutory regulations, the Supreme Court has the authority to examine statutory regulations under laws against laws, while the Constitutional Court has the authority to examine laws against the constitution. Ideally, the division of authority to exercise one power to two different institutions must follow by clearly dividing boundaries where one institution's authority is clearly from another institution's authority. In this regard, the division of authority to exercise judicial power conceptually can be divided into two parts: the court of law and the court of justice. With such a division, it will avoid a clash between the two judicial power actors' institutions. With such a division, it is idealized that the judicial authorities will focus on their respective authority areas. Simultaneously, conflicts in the exercise of authority will not occur or can avoid in such a way (Hardjomuljadi & Asce, 2020).

Unfortunately, this is not implemented in Indonesia, so that between the deciding cases for judicial review of laws and regulations, a conflict can occur. However, this can be a hierarchical system of statutory regulations adopted by law for no. 12 of 2011 concerning the Establishment of statutory regulations.

Based on the law, the Constitutional Court's test stones are higher than the test stones used by the Supreme Court and also in line with the theory of *Stufenbau de Recht* or The Hierarchy of Law proposed by Hans Kelsen, which states that the law is stratified and layered to the enactment of lower norms is based on more norms. Even the enactment of higher, namely the basic norm (ground norm). Based on this, in deciding a case for judicial review, submit to the Constitutional Court's interpretation.

The authority as the interpreter of the constitution allows the Constitutional Court to overturn the law used as a touchstone by the Supreme Court. In this regard, Bishop Hoadly, as quoted by Hans Kelsen, once said:

"Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoken them; a fortiori, however, hath an absolute authority not only to interpret the law but to say what the law is, truly the law-giver ". In fact, against all the aims and objectives of the law, it is not the person who first wrote it or pronounced it; more strictly, whoever has absolute authority not only to interpret the law but also to define the law, then he is the one who gives the real meaning of the law."

It is emphasized in Law no. 24 of 2003 jo. UU no. 8 of 2011, to be precise in Article 53 which states that, "The Constitutional Court notifies the Supreme Court of a request for judicial review within 7 (seven) working days from the time the application is recorded in the Constitutional Case Registration Book", and Article 55 which states that, "The examination of statutory regulations under a law that is being carried out by the Supreme Court must be terminated if the law which is the basis for the review of said regulation is in the process of reviewing the Constitutional Court until there is a Constitutional Court decision"(Butt, 2018).

Also, which is final and binding as described in the explanation of Article 10 paragraph (1) of Law no. 24 of 2003 jo. UU no. 8 of 2011 states, "The Constitutional Court's decision is final, namely the Constitutional Court's decision immediately obtains permanent legal force since it was pronounced and no legal remedy can be taken. The final nature of the Constitutional Court's decision in this law also includes the legality of binding (final and binding)". The binding strength of the Constitutional Court decisions, in contrast to ordinary court decisions, which is not only binding parties in a case such as a petitioner, government, DPR / DPD, or related parties who are allowed to enter the case, but the decision is also binding for all persons, State institutions and agencies. It acts as law as created by lawmakers. Constitutional Court judges are said to be hostile legislators whose decisions are *erga omnes* in nature, addressed to all people(Butt, 2018).

B. Inconsistency of Supreme Court and Constitutional Court Decisions regarding the Article Material Test of Elected Cawapres Candidates

As a democratic country, elections manifest the Indonesian people's sovereignty in realizing national aspirations as stated in the Preamble to the 1945 Constitution. The implementation of elections guides by direct, general, free, secret, honest, and fair as the manifestation of a democratic country. And integrity. Therefore, to achieve the realization of a democratic country with integrity, it is necessary to have legal certainty, namely through the formation of laws and regulations representing the interests of the Indonesian people in general. As far as possible, no party will feel disadvantaged. The existence of election laws and various implementing regulations such as KPU regulations must guarantee the rights of citizens and not violate the constitutional rights of citizens. If these regulations indicate to have violated citizens' constitutional rights, the citizens who feel that they have been disadvantaged can file a judicial review to the competent judiciary (Hardjomuljadi & Asce, 2020).

In this context, on May 14, 2019, Rachmawati Soekarno Putri et al. apply for a judicial review of Article 3 paragraph (7) of KPU Regulation No. 5 of 2019 the Supreme Court. The Petitioner argued that a quo article contradicts the existing regulations, namely Article 416 of Law no. 7 of 2017 concerning Elections. Based on the previous description, it should have been that when the Constitutional Court was testing the regulations that were the test points for the Supreme Court, the Supreme Court had to temporarily stop the meter test examinations that were taking place at the Supreme Court until the MK decision regarding the judicial review was issued. As is known by the Constitutional Court Decision No. 39 / PUU-XVII / 2019 was issued by the Constitutional Court on September 30, 2019, while the Supreme Court's decision, in this case, was only issued on October 28, 2019.

Supreme Court Decision No. 44 P / HUM / 2019 states that Article 3 paragraph (7) PKPU No. 5 of 2019 which reads, "If there are only two Candidate Pairs in the Presidential and Vice-Presidential Election, the KPU shall determine the Candidate Pairs who receive the most votes as the elected candidates" is contrary to Law No. 7 of 2017 concerning Elections. Although only two pairs run for office, the elected President and Vice President must meet the requirements as stipulated in Article 416 paragraph (1) of the Election Law, namely obtaining more than 50% of the total votes for the Presidential Election with at least 20% of the votes in the Election Law. Each province spread over more than ½ the number of provinces in Indonesia. Contradicts a quo Constitutional Court Decision, which states that Article 416 paragraph (1) of the Election Law is contrary to the 1945 Constitution if applied to the Presidential Election, only followed by two candidate pairs. The Constitutional Court does not require distribution of votes, but it is enough that more than 50% of the vote acquisition becomes the elected Vice president Candidate if two candidate pairs only follow the Presidential Election. Meanwhile, it has no implications for the mechanism for determining the results of the Presidential Election, and it can say that the decision is

invalid because it contradicts the principle of *lex superior derogat legi inferior* and Hans Kelsen's theory. It was adopted by Indonesia so that it does not have binding legal force. So what must follow is the Constitutional Court decision (Tyson, 2020).

It is different when the two decisions are a *quo* seen from the two institutions' position. Referring to Article 24 paragraph (2) of the 1945 Constitution, which states that, "A Supreme Court and judicial institutions exercise judicial power under it in the environment of general courts, religious courts, military courts, state administrative courts, and by a Constitutional Court." What then becomes a problem in testing the legislation. Namely, if the Supreme Court decision and the Constitutional Court decision contradict each other, it will cause inconsistency in rules and legal uncertainty.

If examined more deeply, these problems arise due to the weak executorial power. Base on the following factors:

- Constitutional Court as Negative Legislator

That is, it can only abolish and cancel norms, not form new norms.

- Absence of Special Enforcement Agencies

The Constitutional Court is a judicial institution with an executorial unit such as bailiffs or police. Therefore, decisions are very dependent on other branches of power to follow up on these decisions, in this case, the DPR and the President.

- There is no deadline for implementing the decision

The decision does not immediately implement closely related to legislative institutions that require new legal instruments in the form of revisions or new laws, which form a formal procedural character.

- There are no juridical consequences for neglecting the decision

There is no sanction if the Constitutional Court decision does not follow up.

As is well known, the actual content of Article 416 paragraph (1) of Law no. 7 of 2017 has been tested in the Constitutional Court in 2014, namely through Article 159 paragraph (1) of Law No. 42 of 2008 concerning the Election of President and Vice President. Article 159 paragraph (1) of Law 42/2008 is the same as Article 416 paragraph (1) of Law 7/2017. Namely, it reads: "The elected Candidate Pairs are Candidate Pairs who receive more than 50% (fifty percent) of the total votes in the Presidential and Vice-Presidential Election with at least 20% (twenty percent) of the votes in each province spread over more than ½ (half) the number of provinces in Indonesia" (Tyson, 2020).

The Constitutional Court Decision No. 50 / PUU-XII / 2014 also states that Article 159 paragraph (1) of Law 42/2008 contradicts the 1945 Constitution if applied to the Presidential Election, followed by two candidate pairs was referring to Article 10 paragraph (1) letter d of Law no. 12 of 2011, which states that one of the content materials that must regulate by law is a follow-up to the Constitutional Court decision. However, the fact is that the Constitutional Court decision was not followed up by the President and DPR when revising the Election Law. Finally, the new Election Law revokes Law

no. 42 of 2008, and *mutatis mutandis* made the Constitutional Court decision No. 50 / PUU-XII / 2014 is no longer valid. The Constitutional Court decision No. 50 / PUU-XII / 2014 was in vain, and the law seemed to be going back before the decision making (Adharani, Nurlinda, Nadia, Yusuf, & Sarah, 2019).

Based on the above factors, it is only natural that the Supreme Court does not consider the Constitutional Court's decision in deciding the case for judicial review of Article 3 paragraph (7) PKPU No. 5 of 2019 on Law no. 7 of 2017. So that since the issuance of the two decisions, namely the Constitutional Court Decision No. 39 / PUU-XVII / 2019 and Supreme Court Decision No. 44 P / HUM / 2019, which is still a question which decision should implement?

Indeed should not be allowed to drag on. There must be a concrete solution so that a similar incident does not happen again (Wever et al., 2012). There are two important notes about the ideal form of testing legislation in Indonesia, namely:

Ideally, the Constitutional Court functions to ensure the consistency of all laws and regulations so that this institution only examines conflicts of statutory regulations ranging from the highest to the lowest degree. Therefore, testing the statutory regulations under the law against higher laws is ideal if given to the Constitutional Court. That way, linear consistency and synchronization of all laws and regulations are in one institution, namely the Constitutional Court. Ideally, the Supreme Court handles all inter-person conflict events and the dissolution of political parties and so on will become the Supreme Court's authority, and the Supreme Court is freed from the authority to examine the laws and regulations.

CONCLUSION

From the above explanation, it can conclude that judicial review is one of the critical mechanisms in guarding legislation products not to do not injure citizens' constitutional rights. If two different judicial institutions exercise the authority in examining these laws and regulations, a clash can occur in deciding cases with the same substance of the problem. Of course, this will lead to inconsistencies in regulations and legal uncertainty in society Supreme Court and the Constitutional Court's positions are equal and do not supervise each other. On the other hand, the position of the Constitutional Court regulations is higher than the MA, not ideal for the two institutions which have the same spirit in upholding justice. Necessary to have a clear and ideal division of duties, namely by giving the authority of a court of law to the Constitutional Court and a court of justice to the Supreme Court. That way, there is no longer any worries about conflicting decisions issued by the two judiciary institutions.

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