JURNAL KONSTITUSI

Volume 19 Nomor 3, September 2022

JK	Vol. 19	Nomor 3	Halaman 503 - 740	Jakarta September 2022	P-ISSN 1829-7706 E-ISSN 2548-1657

Terakreditasi RISTEKDIKTI Nomor : 21/E/KPT/2018

PUSAT PENELITIAN DAN PENGKAJIAN PERKARA DAN PENGELOLAAN PERPUSTAKAAN MAHKAMAH KONSTITUSI REPUBLIK INDONESIA

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

JURNAL KONSTITUSI

Vol. 19 No. 3	P-ISSN 1829-7706 | E-ISSN: 2548-1657	September 2022
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Jurnal Konstitusi memuat naskah hasil penelitian atau kajian konseptual yang terkait dengan putusan Mahkamah Konstitusi, isu-isu ketatanegaraan dan kajian hukum konstitusi.
Jurnal Konstitusi adalah media triwulan, terbit sebanyak empat nomor dalam setahun (Maret, Juni, September, dan Desember).

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Redaksi Jurnal Konstitusi

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REPUBLIK INDONESIA

JURNAL
KONSTITUSI

Volume 19 Nomor 3, September 2022

DAFTAR ISI

Dari Redaksi

Pada edisi September 2022 ini Jurnal Konstitusi kembali hadir menyuguhkan karya terbaru yang membahas sejumlah persoalan seputar hukum dan ketatanegaraan. Sebagaimana diketahui bahwa Jurnal Konstitusi merupakan sarana media keilmuan di bidang hukum konstitusi dan ketatanegaraan dari hasil penelitian atau kajian konseptual. Pada edisi ini terdapat 10 (sepuluh) artikel yang terdiri dari 4 artikel berbahasa Indonesia dan 6 artikel berbahasa Inggris dengan isu utama mengenai implementasi konstitusi, putusan Mahkamah Konstitusi, dan berbagai isu ketatanegaraan yang berkembang secara global.

Artikel pertama berjudul "*Ratio Legis* Pembatasan Kedudukan Hukum bagi Pembentuk Undang-Undang dalam Pengujian Undang-Undang (*Legal Ratio of Legislator's Standing Limitation for a Constitutional Review*)" oleh Dian Agung Wicaksono dan Enny Nurbaningsih. Artikel ini mengkaji *ratio legis* pembatasan kedudukan hukum bagi pembentuk Undang-Undang (UU) dalam pengujian UU oleh Mahkamah Konstitusi. Pembahasan meliputi 2 (dua) hal, yaitu dinamika penggunaan kedudukan hukum pembentuk Undang-Undang dalam pengujian Undang- Undang dan *ratio legis* pembatasan kedudukan hukum bagi pembentuk Undang-Undang dalam pengujian Undang-Undang. Artikel ini menggunakan metode penelitian yuridis normatif dengan menganalisis data sekunder berupa peraturan perundang-undangan, putusan Mahkamah Konstitusi, dan literatur yang terkait doktrin kedudukan hukum pembentuk UU dalam pengujian UU. Hasil penelitian menunjukkan bahwa *ratio legis* pembatasan kedudukan hukum bagi pembentuk UU dapat ditelusuri melalui pertimbangan hukum Mahkamah Konstitusi dalam putusan-putusan pengujian UU sejak tahun 2003-2019.

Artikel kedua berjudul "Karakteristik Pemakzulan Presiden di Indonesia (*Characteristic of Presidential Impeachment in Indonesia*)" oleh Catur Alfath Satriya.

Penulis menuangkan gagasannya mengenai salah satu fitur dari sistem presidensial, yaitu proses pemakzulan Presiden. Sebelum amandemen Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Indonesia tidak mempunyai mekanisme yang jelas untuk memakzulkan presiden di tengah masa jabatannya. Pemakzulan presiden ditentukan oleh suara mayoritas di Majelis Permusyawaratan Rakyat (MPR). Isu ini timbul karena pemakzulan presiden hanya melalui proses politik tanpa adanya proses hukum. Pasca amandemen Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, konsep pemakzulan presiden lahir berdasarkan gagasan sistem presidensial dimana presiden tidak dapat diberhentikan hanya melalui proses politik, melainkan harus ada proses hukum terlebih dahulu. Penulis menjelaskan bagaimana proses pemakzulan presiden di Indonesia dengan membandingkannya dengan negara lain. Metode penelitian yang digunakan yaitu metode yuridis normatif. Berdasarkan hasil analisis, penulis berpendapat bahwa proses pemakzulan presiden di Indonesia secara normatif tidak sesuai dengan prinsip *checks and balances*. Hal ini dikarenakan proses pemakzulan presiden di Indonesia tidak melibatkan kamar kedua (*second chamber*) dalam prosesnya.

Artikel ketiga berjudul "Parate Executie dalam Fidusia Menurut Ratio Decidendi Mahkamah Konstitusi (*Parate Executie Concept in Fiduciary Based on Ratio Decidendi of Constitutional Court Decision*)" oleh Rumawi, Udiyo Basuki, Mellisa Towadi, dan Supianto. Artikel ini bertujuan untuk menganalisis subjek hukum yang haknya terlanggar oleh lahirnya suatu undang-undang, yang dapat dibatalkan keberlakuannya ke Mahkamah Konstitusi. Undang-undang yang melanggar hak subjek hukum adalah penormaan *parate executie* pada *fiduciare*. Analisis pertama, ontologi *parate executie* yang merugikan pihak tertentu; dan analisis kedua, *ratio decidendi* putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. Metode analisis didasarkan pada analisis dogmatis yuridis, yaitu menganalisis Putusan Mahkamah Konstitusi dengan doktrin dari para pakar dan regulasi. *Parate executie* merupakan hak yang melekat pada penerima fidusia yang dapat dilaksanakan apabila pemberi fidusia melakukan ingkar ikrar. Hal ini berarti bahwa agunan dilelang via penawaran umum yang diajukan kepada penerima jaminan. Wanprestasi yang dilakukan pemberi fidusia terjadi apabila ada kesepakatan antara pemberi dan penerima fidusia. Penetapan wanprestasi terjadi berdasarkan upaya hukum yang dilakukan oleh salah satu atau kedua belah pihak. Kesepahaman penagih bersama pemeroleh *fiduciare* tentang timbulnya ingkar ikrar yang dialami oleh pemberi fidusia dapat melahirkan *parate executie*.

Artikel keempat berjudul "Relevansi Monisme dan Dualisme bagi Pemberlakuan Perjanjian Internasional di Indonesia (*The Relevance of Monism and Dualism for the Implementation of Treaty in Indonesia*)" oleh Ary Aprianto. Artikel ini membahas tentang pemberlakuan perjanjian internasional (PI) di Indonesia yang masih diwarnai perdebatan mengenai pendekatan yang dipilih Indonesia, apakah monisme atau dualisme. Artikel ini merupakan hasil penelitian yang menggunakan metode yuridis

normatif dengan mempertanyakan relevansi monisme-inkorporasi dan dualisme-transformasi dalam menentukan pemberlakuan PI. Dua aspek yang dibahas adalah persetujuan parlemen dan penyusunan peraturan nasional untuk melaksanakan PI. Dari hasil penelitian, Penulis menarik berkesimpulan bahwa dikotomi monisme dan dualisme memiliki keterbatasan sehingga tidak relevan dijadikan dasar dalam menentukan pemberlakuan PI. Penulis menegaskan bahwa persetujuan parlemen dibutuhkan bagi pemberlakuan PI, baik di negara monis maupun dualis. Sejumlah negara dualis bahkan meminta persetujuan parlemen sebelum ratifikasi dilakukan. Penyusunan peraturan nasional pun lazim dilakukan negara monis dan dualis. Upaya ini dilakukan bukan untuk memenuhi tuntutan teoritis pendekatan monisme dan dualisme, tetapi untuk menjamin harmonisasi dan kemampuan negara dalam melaksanakan kewajibannya.

Artikel kelima berjudul "*Constitutional Issue of the Executional Power of Fiduciary Certificates as Equal to Court Decision* (Permasalahan Konstitusionalitas Kekuatan Eksekutorial Sertifikat Fidusia yang disamakan dengan Putusan Hakim)" oleh Elisabeth Nurhaini Butarbutar. Penulis mengkaji tentang berlakunya UU Jaminan Fidusia yang menimbulkan kerugian hak konstitusional karena menyetarakan kekuatan eksekutorial putusan hakim yang berkekuatan hukum tetap dengan sertifikat fidusia, Oleh karena itu, menarik untuk dianalisis sehingga diketahui dasar normatif penyetaraannya, dan pertimbangan hakim Mahkamah untuk menyatakan inkonstitusional. Analisis dilakukan berdasarkan Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. Teknik pengumpulan data dilakukan dengan studi dokumen dan analisis secara preskriptif dan deskriptif. Hasil penelitian menunjukkan bahwa dasar normatif kekuatan eksekutorial pada sertifikat fidusia lahir dari kesepakatan yang didaftarkan untuk memperoleh kekuatan eksekutorial sehingga dapat digunakan sebagai bukti sempurna untuk membuktikan debitur cidera janji, kecuali ditentukan lain oleh pengadilan. Pertimbangan hukum hakim untuk menyatakan inkonstitusional ketentuan yang diuji didasarkan pada tidak adanya kepastian hukum dalam penentuan waktu cidera janji dan mekanisme pelaksanaan eksekusi Sertifikat Fidusia.

Artikel keenam oleh Ahmad Siboy dan Dewi Cahyandari dengan judul "Relasi Putusan DKPP dan PTUN dalam Pelanggaran Kode Etik Penyelenggara Pemilu (*The Relationship between DKPP and PTUN Decisions Regarding Ethical Violation by General Election Administrators*)". Artikel ini mengkaji tentang pemberhentian Komisioner Penyelenggara Pemilu melalui putusan Dewan Kehormatan Penyelenggara Pemilu (DKPP) tidak bersifat final dan mengikat pada tataran eksekutorialnya, mengingat putusan tersebut dapat dibatalkan oleh Pengadilan Tata Usaha Negara. Artikel ini menguraikan kewenangan DKPP dan PTUN dalam penyelesaian pelanggaran etik yang dilakukan oleh penyelenggara Pemilu sekaligus mengurai implikasi dan relasi putusan dari kedua lembaga tersebut. Selain itu, juga menawarkan konsep ideal tentang desain penyelesaian pelanggaran etik penyelenggara Pemilu di masa

mendatang. Metode penelitian yang digunakan adalah yuridis normatif. Hasil penelitian menunjukkan bahwa DKPP dan PTUN memiliki kewenangan yang saling beririsan, namun dengan putusan yang berbeda. DKPP murni mengadili persoalan etik dan PTUN mengadili Keputusan Presiden yang merupakan tindak lanjut dari putusan DKPP. Penulis merekomendasikan terhadap kasus yang beririsan di masa mendatang, maka atas pelanggaran kode etik harus diselesaikan dengan mekanisme penyelesaian oleh lembaga yudikatif.

Artikel ketujuh oleh Mia Hadiati dan Febriansyah Ramadhan dengan judul "Mencermati Perbedaan Putusan Mahkamah Konstitusi tentang Batas Usia Minimum Menikah (*Observing The Differences of Constitutional Court Decision about The Minimum Legal Age of Marriage*)". Artikel ini berisi penjelasan tentang perbandingan pertimbangan hakim dalam putusan MK Nomor 74/PUU-XII/2014 dan Nomor 22/PUU-XV/2017. Selain itu, Penulis juga menguraikan latar belakang Mahkamah Konstitusi mengubah pendiriannya dari satu putusan ke putusan berikutnya. Lebih lanjut, Penulis mengungkapkan bahwa perbedaan yang mendasari kedua putusan tersebut adalah perbedaan penggalian sumber hukum oleh hakim dalam pertimbangan hukumnya.

Artikel kedelapan berjudul "Efektivitas Penerapan Pidana Mati dalam Keadaan Tertentu Menurut Undang-Undang Pemberantasan Tindak Pidana Korupsi (*The Legitimacy of Death Penalty Application of Certain Conditions in the Anti-Corruption Law*)" oleh Rodes Ober Adi Guna Pardosi dan Yuliana Primawardani. Artikel ini membahas tentang penjatuhan hukuman mati dalam Pasal 2 ayat (2) Undang-Undang Pemberantasan Tipikor bagi pelaku tindak pidana korupsi yang dianggap merugikan negara dan dapat berdampak luas menyangkut hajat hidup orang banyak. Terdapat pro dan kontra terkait penjatuhan hukuman mati tersebut, terutama pada kalimat "Keadaan tertentu" yang dikaitkan dengan korupsi dana bantuan sosial penanganan covid-19. Selain itu, pasal tersebut juga dianggap bertentangan dengan kewajiban pemerintah dalam upaya penghormatan, perlindungan, dan pemenuhan HAM. Penulis menyimpulkan bahwa pasal tersebut tidak dapat memenuhi aspek yuridis untuk menjerat pelaku korupsi karena tidak termasuk dalam persyaratan "keadaan tertentu" dan juga dianggap inkonstitusional karena tidak sesuai dengan konstitusi yang memberikan perlindungan terhadap hak hidup seseorang. Penjatuhan pidana mati juga terbukti kurang tepat digunakan dalam pemberantasan tipikor sebagaimana terlihat dalam *Corruption Perception Index* 2019.

Artikel kesembilan berjudul "Gagasan Pengaduan Konstitusional sebagai Kewenangan Mahkamah Konstitusi Indonesia (*The Proposal of Constitutional Complaint for the Indonesian Constitutional Court*)" oleh Tanto Lailam, Putri Anggia, dan Irwansyah. Artikel ini mengkaji persoalan tentang gagasan pengaduan konstitusional pada Mahkamah Konstitusi Indonesia yang dilatarbelakangi oleh persoalan ketidakjelasan pengaduan konstitusional dalam tataran praktis dan cukup banyaknya jumlah kasus yang muncul. Metode penelitian yang digunakan adalah normatif dengan pendekatan

perundang-undangan, analisis, dan pendekatan kasus. Dasar pemikiran pelembagaan pengaduan konstitusional merupakan pengejawantahan nilai-nilai konstitusionalisme dalam bernegara hukum Pancasila sebagai penyempurnaan *checks and balances*, basis perlindungan hak asasi manusia, dan bertujuan mewujudkan pemerintahan yang baik. Kebijakan yang dapat dilakukan untuk mewujudkan gagasan pengaduan konstitusional yaitu melalui amandemen Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, penafsiran non originalis, atau melalui perubahan Undang-Undang Mahkamah Konstitusi. Batasan objek dalam pengaduan konstitusional dapat berupa putusan pengadilan, tindakan penyelenggara negara dalam penafsiran konstitusi dan undang-undang, serta ketetapan MPR RI.

Artikel terakhir pada Edisi September 2022 ini berjudul "Ketiadaan Pengaturan Tindak Lanjut Putusan Mahkamah Konstitusi: Sebuah Kerugian? *(The Absence of Constitutional Court's Decision Follow Up: Is it A Loss?*)" oleh Vera Wheni S. Soemarwi, Yeremia Wijaya, dan Arthuro Richie Gunawan. Pembentukan Mahkamah Konstitusi sebagai pengawal konstitusi (*The Guardian of Constitution*) yang melindungi hak asasi warga negara memberikan harapan pelaksanaan prinsip *rule of law*. Mahkamah Konstitusi diharapkan mengambil peran yang besar dalam penegakan dan perlindungan hak konstitusi warga negara dalam setiap putusannya. Harapan ini menjadi kosong tanpa makna sejak pengajuan permohonan *judicial review* Pasal 59 ayat (2) Undang-Undang Nomor 8 Tahun 2011 tentang Perubahan Atas Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi (UU No 8/2011) yang dinyatakan tidak mempunyai kekuatan hukum mengikat oleh Putusan MK Nomor 49/PUU-IX/2011. Penulis menggunakan metode sosio-yuridis dengan data sekunder yang dikumpulkan melalui studi pustaka. Terdapat dampak dari penghapusan ketentuan Pasal 59 ayat (2) yang telah dirumuskan dalam UU No 7/2020, yaitu adanya penyimpangan prinsip *rule of law* dan produk legislasi yang disahkan setelah UU No. 7/2020 berlaku tidak mampu menjamin hak konstitusi warga negara.

Akhir kata, redaksi berharap semoga kehadiran Jurnal Konstitusi dapat memperkaya khazanah pengetahuan dan wawasan pembaca di bidang hukum dan konstitusi di Indonesia serta bermanfaat dalam upaya membangun budaya sadar konstitusi.

Redaksi Jurnal Konstitusi

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Dian Agung Wicaksono dan Enny Nurbaningsih

***Ratio Legis* Pembatasan Kedudukan Hukum bagi Pembentuk Undang-Undang dalam Pengujian Undang-Undang**

Jurnal Konstitusi Vol. 19 No. 3 hlm. 503-527

Diskursus mengenai pembatasan kedudukan hukum bagi pembentuk UU dalam pengujian UU bukanlah isu yang benar-benar baru untuk dianalisis. Namun demikian, hal tersebut tetap perlu untuk diteliti dalam kerangka menggali *ratio legis* pembatasan kedudukan hukum bagi pembentuk UU dalam pengujian UU oleh Mahkamah Konstitusi. Penelitian ini secara spesifik menjawab pertanyaan: (a) bagaimana dinamika penggunaan kedudukan hukum pembentuk Undang-Undang dalam pengujian Undang-Undang? (b) apa *ratio legis* pembatasan kedudukan hukum bagi pembentuk Undang-Undang dalam pengujian Undang-Undang? Penelitian ini menggunakan metode yuridis normatif, dengan menganalisis data sekunder berupa peraturan perundang-undangan, putusan Mahkamah Konstitusi, dan literatur yang terkait dengan doktrin kedudukan hukum pembentuk UU dalam pengujian UU. Hasil dari penelitian ini menunjukkan bahwa *ratio legis* pembatasan kedudukan hukum bagi pembentuk UU dapat ditelusuri melalui pertimbangan hukum Mahkamah Konstitusi dalam putusan-putusan pengujian UU sejak tahun 2003-2019.

Kata Kunci: Kedudukan Hukum; Pembentuk Undang-Undang; *Ratio Legis*.

Dian Agung Wicaksono dan Enny Nurbaningsih

Legal Ratio of Legislator's Standing Limitation for a Constitutional Review

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

The discourse on limiting the legislators standing to submit a constitutional review is not an entirely new issue to analyze. However, these things still need to be examined to explore the legal ratio of limitation of the legislator's standing to submit a constitutional review by the Constitutional Court. This research specifically answers the questions: (a) how are the dynamics of the use of the legislators standing in the constitutional review? (b) what is the legal ratio for limiting legislators standing in the constitutional review? This study uses a normative legal research method by analyzing secondary data in the form of legislation, the Constitutional Court decisions, and literature related to legislators standing to submit the constitutional review. The results of this study indicate that the legal ratio limiting legislators' standing can be traced through the legal considerations of the Constitutional Court decisions from 2003-2019.

Keywords: *Legislators; Legal Ratio; Legal Standing.*

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Catur Alfath Satriya

Karakteristik Pemakzulan Presiden di Indonesia

Jurnal Konstitusi Vol. 19 No. 3 hlm. 528-553

Salah satu fitur dari sistem presidensial adalah adanya proses pemakzulan presiden. Sebelum amandemen, Indonesia tidak mempunyai mekanisme yang jelas untuk memakzulkan presiden di tengah masa jabatannya. Pemakzulan presiden ditentukan oleh suara mayoritas di Majelis Permusyawaratan Rakyat (MPR). Hal tersebut menjadi masalah karena pemakzulan presiden hanya menggunakan proses politik dan tidak ada proses hukum di dalamnya. Setelah amandemen, konsep pemakzulan presiden lahir berdasarkan gagasan bahwa di dalam sistem presidensial presiden tidak dapat diberhentikan hanya melalui proses politik harus ada proses hukum terlebih dahulu sebelum proses politik. Oleh sebab itu, artikel ini akan menjelaskan bagaimana proses pemakzulan presiden di Indonesia dengan membandingkannya dengan negara lain. Metode penelitian yang digunakan dalam menulis artikel ini adalah metode penelitian yuridis normatif. Dari analisis yang penulis lakukan, proses pemakzulan presiden di Indonesia secara normatif tidak sesuai dengan prinsip *checks and balances*. Hal ini dikarenakan proses pemakzulan presiden di Indonesia tidak melibatkan kamar kedua (*second chamber*) dalam prosesnya.

Kata kunci: Pemakzulan Presiden; *Checks and Balances*; Konstitusi.

Catur Alfath Satriya

Characteristic of Presidential Impeachment in Indonesia

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

One of the features of the presidential system is the process of presidential impeachment. Before the amendment, Indonesia did not have a clear mechanism to impeach the president in the middle of his term. The impeachment of the president is determined by a majority vote in the People's Consultative Assembly. This is a problem because the impeachment of the president only uses a political process, and there is no legal process in it. After the amendment, the presidential impeachment concept was born that in a presidential system, the president cannot be dismissed only through a political process; there must be a legal process before the political process. Based on the analysis, the process of presidential impeachment in Indonesia does not follow the principle of checks and balances. This is because the impeachment process for the president in Indonesia does not involve the second chamber in the process.

***Keywords**: Presidential Impeachment; Checks and Balances; Constitution.*

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Rumawi, Udiyo Basuki, Mellisa Towadi, dan Supianto

***Parate Executie* dalam Fidusia Menurut *Ratio Decidendi* Putusan Mahkamah Konstitusi**

Jurnal Konstitusi Vol. 19 No. 3 hlm. 554-579

Artikel ini bertujuan untuk menganalisis subjek hukum yang haknya terlanggar oleh terbitnya suatu undang-undang, dimana undang-undang dimaksud dapat dibatalkan keberlakuannya ke Mahkamah Konstitusi. Undang-undang yang melanggar hak subjek hukum adalah penormaan *parate executie* pada *fiduciare*. Analisis pertama, ontologi parate executie yang merugikan pihak tertentu; dan analisis kedua, *ratio decidendi* putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. Tulisan ini menggunakan analisis dogmatis yuridis. Putusan Mahkamah Konstitusi dianalisis dengan doktrin dari para pakar serta regulasi. *Parate executie* merupakan hak yang melekat pada penerima fidusia yang bisa dilaksanakan kalau pemberi fidusia melakukan ingkar ikrar. Agunan dilelang via penawaran umum diajukan penerima jaminan. Wanprestasi yang dilakukan pemberi fidusia terjadi apabila ada kesepakatan antara pemberi dan penerima fidusia. Wanprestasi terjadi berdasarkan upaya hukum dalam penentuan wanprestasi. Kesepahaman penagih bersama pemeroleh *fiduciare* timbulnya ingkar ikrar dialami oleh pemberi fidusia dapat melahirkan *parate executie*.

Kata Kunci: Cidera Janji; Fidusia; Mahkamah Konstitusi; Parate Executie; Ratio Decidendi.

Rumawi, Udiyo Basuki, Mellisa Towadi, dan Supianto

Parate Executie Concept in Fiduciary Based on Ratio Decidendi of Constitutional Court Decision

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

This article aims to analyze legal subjects whose rights have been violated by the Fiduciaire Act. The Act law can be revoked by the Constitutional Court. The act that violates the rights of subjects is the rule in the provisions of parate executie on Fiduciaire Act. The first analysis is the ontology of parate executives that inflict certain subjects, and the second analysis is the ratio decidendi decision of the Constitutional Court Number 18/PUU-XVII/2019. This paper uses dogmatize analysis. The decisions of the Constitutional Court are analyzed with the doctrine of experts and regulations. Parate execution is a right attached to the recipient fiduciary which can exercise if the fiduciary giver breaks the commitment. Collateral is auctioned through a public offering submitted by the recipient of guarantee. Default by a fiduciary giver occurs if there is an agreement between the giver and the fiduciary recipient. Default occurs based on legal remedies in determining the default. The agreement of the collector with the fiduciary acquirer, the emergence of a broken pledge experienced by the fiduciary giver can give birth to a parate executie.

Keywords: *Default; Fiduciary; Constitutional Court; Parate execution; Ratio Decidendi.*

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Ary Aprianto

Relevansi Monisme dan Dualisme Bagi Pemberlakuan Perjanjian Internasional di Indonesia

Jurnal Konstitusi Vol. 19 No. 3 hlm. 580-605

Pemberlakuan perjanjian internasional (PI) masih diwarnai perdebatan mengenai pendekatan yang dipilih Indonesia, apakah monisme atau dualisme. Dengan menggunakan metode normatif, penelitian ini mempertanyakan relevansi monisme-inkorporasi dan dualisme-transformasi dalam menentukan pemberlakuan PI. Dua aspek kunci akan diulas, yaitu persetujuan parlemen dan penyusunan peraturan nasional untuk melaksanakan PI. Disimpulkan bahwa dikotomi monisme dan dualisme memiliki keterbatasan sehingga tidak relevan dijadikan dasar dalam menentukan pemberlakuan PI. Persetujuan parlemen dibutuhkan bagi pemberlakuan PI, baik di negara monis maupun dualis. Sejumlah negara dualis bahkan meminta persetujuan parlemen sebelum ratifikasi dilakukan. Penyusunan peraturan nasional pun lazim dilakukan negara monis dan dualis. Bukan untuk memenuhi tuntutan teoritis sejalan pendekatan monisme dan dualisme, tetapi untuk menjamin harmonisasi dan kemampuan negara dalam melaksanakan kewajibannya.

Kata kunci : Dualisme; Monisme; Perjanjian Internasional.

Ary Aprianto

The Relevance of Monism and Dualism for the Implementation of Treaty in Indonesia

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

The application of treaty is still influenced by different views on the approach chosen by Indonesia, whether monism or dualism. By using normative method, this study questions the relevance of monism-incorporation and dualism-transformation approaches in determining the application of treaty. Two key aspects will be reviewed, namely parliamentary approval and the drafting of national regulations to implement treaty. It concludes that the dichotomy of monism and dualism has various limitations, and is irrelevant for determining the application of treaty. Parliamentary approval is required for treaty application, both in monist and dualist countries. Several dualist countries have even sought parliamentary approval before ratification can take place. The formulation of national regulations is common in monist and dualist countries. Not to fulfill theoretical demands in line with the monism and dualism approaches, but to ensure harmonization and the ability of state to carry out its obligations.

Keywords : *Dualism; Monism; Treaty.*

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Elisabeth Nurhaini Butarbutar

Constitutional Issue of the Executional Power of Fiduciary Certificates as Equal to Court Decision

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

The enactment of the Fiduciary Guarantee Law is expected to be able to answer problems in the financing business, but it causes a loss of constitutional rights because it equalizes the executorial power of a judge's decision legally binding with fiduciary certificates. The analysis was carried out by Constitutional Court Decision Number 18/PUU-XVII/2019; the was carried out by document study and analyzed prescriptively and descriptively. The results showed that the normative basis of the executive power on the fiduciary certificate was born from an agreement registered. So that it can be used as perfect evidence to prove the debtor in breach of contract, and the judge's legal consideration to declare the inconsistent provisions tested are based on not the existence of legal certainty in determining the time of breach of contract (default) and the mechanism for the execution of the Fiduciary Certificate.

Keywords*:* Equalization; Executive Power; Fiduciary Certificate; Judge's Decision; Unconstitutional*.*

Elisabeth Nurhaini Butarbutar

Permasalahan Konstitutionalitas Kekuatan Eksekutorial Sertifikat Fidusia yang disamakan dengan Putusan Pengadilan

Jurnal Konstitusi Vol. 19 No. 3 hlm. 606-622

Berlakunya UU Jaminan Fidusia, diharapkan mampu menjawab permasalahan dalam usaha pembiayaan, namun menimbulkan kerugian hak konstitusional karena menyetarakan kekuatan eksekutorial putusan hakim yang sudah berkekuatan hukum tetap dengan sertifikat fidusia, oleh karena itu menarik untuk dianalisis sehingga dikentahui dasar normatif penyetaraannya, dan pertimbangan hakim Mahkamah untuk menyatakan inkonstitusional. Analisis dilakukan bahan hukum Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. Teknik pengumpulan data dilakukan dengan studi dokumen dan dianalisis secara preskriptif dan deskriptif. Hasil penelitian menunjukkan bahwa dasar normatif kekuatan eksekutorial pada sertifikat fidusia lahir dari kesepakatan yang didaftarkan untuk memperoleh kekuatan eksekutorial sehingga dapat digunakan sebagai bukti sempurna untuk membuktikan debitur cidera janji kecuali ditentukan lain oleh pengadilan, dan pertimbangan hukum hakim untuk menyatakan inkonsistensional ketentuan yang diuji didasarkan pada tidak adanya kepastian hukum dalam penentuan waktu cidera janji dan mekanisme pelaksanaan eksekusi Sertifikat Fidusia.

Kata kunci: Inkonstitusionil; Kekuasaan Eksekutif; Keputusan Hakim; Pemerataan; Sertifikat Fidusia

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Ahmad Siboy dan Dewi Cahyandari

On the Relationship between DKPP and PTUN Decisions regarding Ethical Violation by General Election Administrators

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

The commissioner of the general election administration was discharged through the decision of the General Election Administrator Honorary Council (DKPP). The decision is not final and binding at the executive branch, considering that the decision can be cancelled by the Administrative Court. This study aims to define the authority of DKPP and PTUN in resolving ethical violations committed by election administrators and parse the implications and relationships of the decisions of the two institutions. This paper also proposes an ideal concept for the design of solving ethical violations of election administrators in the future. This study uses normative juridical methods. The results showed that the DKPP and PTUN have overlapping authority but with different decisions. DKPP purely adjudicates ethical issues, and the Administrative Court adjudicates the Presidential Decree, which is a follow-up to the DKPP decision. To avoid conflicting decisions on cases that intersect, violations of the code of ethics in the future must be resolved with a settlement mechanism by the judiciary.

Keywords: General Election Administrator; Violation of Code of Ethics; Decision.

Ahmad Siboy dan Dewi Cahyandari

Relasi Putusan DKPP dan PTUN dalam Pelanggaran Kode Etik Penyelenggara Pemilu

Jurnal Konstitusi Vol. 19 No. 3 hlm. 623-642

Pemberhentian komisioner penyelenggara Pemilu melalui putusan Dewan Kehormatan Penyelenggara Pemilu (DKPP) tidak bersifat final dan mengikat pada tataran eksekutorialnya mengingat putusan tersebut dapat dibatalkan oleh Pengadilan Tata Usaha Negara. Penelitian ini bertujuan untuk menguraikan kewenangan DKPP dan PTUN dalam penyelesaian pelanggaran etik yang dilakukan oleh penyelenggara Pemilu sekaligus mengurai implikasi dan relasi putusan dari kedua lembaga tersebut. Bersamaan dengan itu, penelitian ini juga menawarkan konsep ideal tentang desain penyelesaian pelanggaran etik penyelenggara Pemilu di masa mendatang. Penelitian ini dilakukan dengan menggunakan jenis penelitian yuridis normatif. Hasil penelitian menunjukkan bahwa DKPP dan PTUN memiliki kewenangan yang saling beririsan namun dengan putusan yang berbeda. DKPP murni mengadili persoalan etik dan PTUN mengadili Keputusan Presiden yang merupakan tindak lanjut dari putusan DKPP. Dalam rangka untuk menghindari konflik putusan atas kasus yang beririsan maka atas pelanggaran kode etik dimasa mendatang harus diselesaikan dengan mekanisme penyelesaian oleh lembaga yudikatif.

Kata Kunci: Penyelenggara Pemilu; Pelanggaran Kode Etik; Putusan.

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Mia Hadiati dan Febriansyah Ramadhan

Observing The Differences in Constitutional Court Decision About the Legal Age of Marriage

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

In 2014–2017, there were two tests of the same norms in the Marriage Law, namely the Constitutional Court Decision Number 74/PUU-XII/2014 and 22/PUU-XV/2017. However, there is a difference in the verdict between one judgment and the next. In Constitutional Court Decision Number 22/PUU-XV/2017, the Constitutional Court changed the previous stance that stated that the age limit norm was constitutional, changing it to unconstitutional, which led to the follow-up of the lawmakers to revise the Marriage Law. This study will compare judges' considerations in the decisions of Constitutional Court Number 74/PUU-XII/2014 and Number 22/PUU-XV/2017. It will be sought against the Constitutional Court's background changing its stance from one ruling to the next. This research uses normative research methods with a conceptual and philosophical approach to legislation. The results showed that the difference underlying the two rulings was in the excavation of legal sources by judges in their legal considerations.

Keywords: *Minimum Age limit for Marriage; Norm Testing; The Verdict of the Constitutional Court.*

Mia Hadiati dan Febriansyah Ramadhan

Meninjau Perbedaan Putusan Mahkamah Konstitusi tentang Norma Batas Usia Minimum Perkawinan

Jurnal Konstitusi Vol. 19 No. 3 hlm. 643-672

Pada tahun 2014 -2017, terjadi 2 kali pengujian norma yang sama dalam UU Perkawinan yakni Putusan MK Nomor 74/PUU-XII/2014 dan 22/PUU-XV/2017. Akan tetapi, ada perbedaan amar putusan antara satu putusan dengan putusan berikutnya. Dalam Putusan MK Nomor 22/PUU-XV/2017, MK mengubah pendirian yang sebelumnya menyatakan bahwa norma batasan usia adalah konstitusional, berganti menjadi inkonstitusional yang berujung pada tindak lanjut para pembentuk undang-undang untuk melakukan revisi terhadap UU Perkawinan. Dalam penelitian ini akan dibahas mengenai perbandingan terhadap pertimbangan hakim dalam putusan MK Nomor 74/PUU-XII/2014 dan Nomor 22/PUU-XV/2017. Akan dicari latar belakang MK mengubah pendiriannya dari satu putusan ke putusan berikutnya. Penelitian ini menggunakan metode penelitian normatif dengan pendekatan perundang-undangan secara konseptual dan filosofis. Hasil penelitian menunjukkan bahwa perbedaan yang mendasari kedua putusan tersebut adalah perbedaan penggalian sumber hukum oleh hakim dalam pertimbangan hukumnya.

Kata Kunci: Batas Usia Minimum Perkawinan; Pengujian Norma; Putusan MK.

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Rodes Ober Adi Guna Pardosi dan Yuliana Primawardani

The Legitimacy Death Penalty Application of Certain Conditions in the Anti-Corruption Law

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

This article discusses the imposition of the death penalty as stipulated in Article 2 paragraph (2) of the Corruption Eradication Law for perpetrators of criminal acts of corruption that are deemed to be detrimental to the State and can have a wide impact on the lives of many people. In this case, there are many pros and cons related to the imposition of the death penalty as stipulated in article 2 paragraph (2) of the Corruption Eradication Law, especially in the sentence "Certain conditions" in that article which are related to the corruption of social assistance funds for handling Covid-19. Apart from that, this article is also considered to be against the Government's obligations in the effort to respect, protect and fulfill human rights. This article concludes that The Article cannot fulfill the juridical aspect of prosecuting corruption actors because it is not included in the requirements of "certain conditions" and is also considered unconstitutional because it is not in accordance with the constitution, which provides protection for a person's right to life. The imposition of the death penalty has also been proven to be inappropriately used in eradicating corruption, as seen in the 2019 Corruption Perception Index.

Keywords*:* corruption; death penalty; certain conditions; human rights.

Rodes Ober Adi Guna Pardosi dan Yuliana Primawardani

Legitimasi Penerapan Pidana Mati konteks keadaan Tertentu dalam Undang-Undang Pemberantasan Tipikor

Jurnal Konstitusi Vol. 19 No. 3 hlm. 673-692

Artikel ini membahas mengenai penjatuhan hukuman mati yang tertuang dalam Pasal 2 ayat (2) Undang-Undang Pemberantasan Tipikor bagi pelaku tindak pidana korupsi yang dianggap merugikan negara dan dapat berdampak luas menyangkut hajat hidup orang banyak. Dalam hal ini terdapat pro dan kontra terkait penjatuhan hukuman mati yang tertuang dalam Pasal 2 ayat (2) Undang-Undang Pemberantasan Tipikor, terutama pada kalimat "Keadaan tertentu" pada pasal tersebut yang dikaitkan dengan korupsi dana bantuan sosial penanganan covid-19. Selain itu pasal tersebut juga dianggap bertentangan dengan kewajiban pemerintah dalam upaya penghormatan, perlindungan dan pemenuhan HAM. Artikel ini menyimpulkan bahwa pasal tersebut tidak dapat memenuhi aspek yuridis untuk menjerat pelaku korupsi karena tidak termasuk dalam persyaratan "keadaan tertentu" dan juga dianggap inkonstitusional karena tidak sesuai dengan konstitusi yang memberikan perlindungan terhadap hak hidup seseorang. Penjatuhan pidana mati juga terbukti kurang tepat digunakan dalam pemberantasan tipikor sebagaimana terlihat dalam *Corruption Perception Index* 2019.

Kata kunci: HAM; Keadaan Tertentu; Korupsi; Pidana Mati.

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Tanto Lailam, Putri Anggia, dan Irwansyah

The Proposal of Constitutional Complaint for the Indonesian Constitutional Court

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

The research focuses on the proposal of a Constitutional Complaint for the Indonesian Constitutional Court. The background causes of the constitutional weakness to protection and fulfilment of constitutional rights, especially the absence of a Constitutional Complaint mechanism. Research methods used normative legal research methods with statutory, analytical, and case approaches. The study results show that legal thinking, including an embodiment of the values of constitutionalism in the rule of law of Pancasila, complements a checks and balances system, the basis for protecting fundamental rights, and aims to realize good governance. There are several steps/methods to giving this authority, amendments to the 1945 Constitution, non-original interpretations, and revision of the Constitutional Court Act. Several objects of dispute are the Court's verdict, the problems of interpreting the 1945 Constitution and law by a state official, People Consultative Assembly decisions, and others.

Keywords: Complaints; Constitutional, Constitutional Court; Opportunity; Problem; Proposal.

Tanto Lailam, Putri Anggia, dan Irwansyah

Proposal Pengaduan Konstitusional untuk Mahkamah Konstitusi Indonesia

Jurnal Konstitusi Vol. 19 No. 3 hlm. 693-719

Penelitian ini tentang proposal pengaduan konstitusional pada Mahkamah Konstitusi Indonesia. Penelitian ini dilatarbelakangi persoalan ketidakjelasan pengaduan konstitusional dalam praktik, sementara kasus yang muncul cukup banyak. Metode penelitian yang digunakan adalah normatif dengan pendekatan perundang-undangan, analisis, dan pendekatan kasus. Hasil penelitian menunjukkan bahwa dasar pemikiran pelembagaan meliputi: pengaduan konstitusional merupakan pengejewantahan nilai-nilai konstitusionalisme dalam bernegara hukum Pancasila, sebagai penyempuna checks and balances, basis perlindungan hak asasi manusia, sekaligus bertujuan mewujudkan pemerintahan yang baik. Langkah kebijakan dapat dilakukan melalui amandemen Undang-Undang Dasar 1945, atau penafsiran non originalis, atau melalui perubahan Undang-undang MK. Objek sengketa yang menjadi batasan dalam pengaduan konstitusional, yaitu: putusan pengadilan, tindakan penyelengara negara dalam penafsiran konstitusi dan undang-undang, Ketetapan MPR, dan lainnya.

Kata kunci: Konstitusional; Mahkamah Konstitusi; Peluang; Pengaduan, Problem; Proposal.

Kata Kunci bersumber dari artikel
Lembar abstrak ini boleh dikopi tanpa ijin dan biaya

Vera W. S. Soemarwi, Yeremia Wijaya, dan Arthuro Richie Gunawan

The Absence of Constitutional Court's Decision Follow Up: Is it A Loss?

The Indonesian Journal of Constitutional Law Vol. 19 No. 3

The establishment of the Constitutional Court as the guardian of constitution that protects the citizens' human rights gives hope for the implementation of "rule of law" principle. The Constitutional Court is expected to play a big role in upholding and protecting the citizens' constitutional rights through each of its decisions. This expectation has become meaningless since Article 59 (2) of Law Number 8/2011 is declared to have no binding legal force by the Constitutional Court Decision Number 49/PUU-IX/2011. What are the impacts of the elimination of Article 59 (2) which has been formulated in Law Number 7/2020? This research is socio legal studies that uses secondary data that are collected through literature study. The elimination of Article 59 (2) in Law Number 7/2020 shows violation of the rule of law principles. In addition, the legislation products which are legitimized based on Law Number 7/2020 are unable to guarantee the citizens' constitutional rights.

Keywords: The Principles of Law-Making; Policy-Making Process; Rule of Law.

Vera W. S. Soemarwi, Yeremia Wijaya, dan Arthuro Richie Gunawan

Ketiadaan Pengaturan Tindak Lanjut Putusan Mahkamah Konstitusi: Sebuah Kerugian?

Jurnal Konstitusi Vol. 19 No. 3 hlm. 720-740

Dibentuknya Mahkamah Konstitusi (MK) sebagai pengawal konstitusi yang melindungi hak asasi warga negara memberikan harapan pelaksanaan prinsip *rule of law*. MK diharapkan mengambil peran yang besar dalam penegakan dan perlindungan hak konstitusi warga negara dalam setiap putusannya. Harapan ini menjadi kosong tanpa makna sejak Pasal 59 ayat (2) UU No. 8/2011 dinyatakan tidak mempunyai kekuatan hukum mengikat oleh Putusan MK Nomor 49/PUU-IX/2011. Bagaimana dampak penghapusan Pasal 59 ayat (2) yang telah dirumuskan dalam UU No. 7/2020? Jenis penelitian ini merupakan penelitian hukum normatif dengan menggunakan jenis data sekunder yang dikumpulkan dengan teknik pengumpulan data studi kepustakaan. Penghapusan Pasal 59 ayat (2) dalam UU No. 7/2020 berdampak terhadap penyimpangan prinsip *rule of law* dan produk legislasi yang disahkan setelah UU No. 7/2020 berlaku tidak mampu menjamin hak konstitusi warga negara.

Kata Kunci: Asas Pembentukan Perundang-Undangan; *Policy-Making Process; Rule of Law.*

Ratio Legis Pembatasan Kedudukan Hukum bagi Pembentuk Undang-Undang dalam Pengujian Undang-Undang

Legal Ratio of Legislator's Standing Limitation for a Constitutional Review

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Naskah diterima: 17-05-2021 revisi: 18-07-2022 disetujui: 08-08-2022

Abstrak

Diskursus mengenai pembatasan kedudukan hukum bagi pembentuk UU dalam pengujian UU bukanlah isu yang benar-benar baru untuk dianalisis. Namun demikian, hal tersebut tetap perlu untuk diteliti dalam kerangka menggali *ratio legis* pembatasan kedudukan hukum bagi pembentuk UU dalam pengujian UU oleh Mahkamah Konstitusi. Penelitian ini secara spesifik menjawab pertanyaan: (a) bagaimana dinamika penggunaan kedudukan hukum pembentuk Undang-Undang dalam pengujian Undang-Undang? (b) apa *ratio legis* pembatasan kedudukan hukum bagi pembentuk Undang-Undang dalam pengujian Undang-Undang? Penelitian ini menggunakan metode yuridis normatif, dengan menganalisis data sekunder berupa peraturan perundang-undangan, putusan Mahkamah Konstitusi, dan literatur yang terkait dengan doktrin kedudukan hukum pembentuk UU dalam pengujian UU. Hasil dari penelitian ini menunjukkan bahwa *ratio legis* pembatasan kedudukan hukum bagi pembentuk UU dapat ditelusuri melalui pertimbangan hukum Mahkamah Konstitusi dalam putusan-putusan pengujian UU sejak tahun 2003-2019.

Kata Kunci: Kedudukan Hukum; Pembentuk UU; *Ratio Legis*.

Abstract

The discourse on limiting the legislators standing to submit a constitutional review is not an entirely new issue to analyze. However, these things still need to be examined to explore the legal ratio of limitation of the legislator's standing to submit a constitutional review by the Constitutional Court. This research specifically answers the questions: (a) how are the dynamics of the use of the legislators standing in the constitutional review? (b) what is the legal ratio for limiting legislators standing in the constitutional review? This study uses a normative legal research method by analyzing secondary data in the form of legislation, the Constitutional Court decisions, and literature related to legislators standing to submit the constitutional review. The results of this study indicate that the legal ratio limiting legislators' standing can be traced through the legal considerations of the Constitutional Court decisions from 2003-2019.

Keywords: *Legislators; Legal Ratio; Legal Standing.*

A. PENDAHULUAN

1. Latar Belakang

Diskursus mengenai kedudukan hukum atau *legal standing* pembentuk Undang-Undang (UU) bukanlah isu yang benar-benar baru untuk dianalisis. Sudah terdapat beberapa kajian sebelumnya mengenai kedudukan hukum pembentuk UU dengan studi kasus terhadap suatu putusan spesifik, misalnya Wita Rohana Pandiangan,[1] Sofia Asri Rahmani,[2] dan Muhammad Salman Al-Farisi.[3] Namun demikian, sependek penelusuran Penulis belum terdapat suatu jurnal ilmiah yang secara khusus membahas mengenai kedudukan hukum pembentuk UU dalam pengujian UU di MK. Hal ini berbeda bila dibandingkan dalam praktik peradilan Amerika Serikat, di mana kajian mengenai kedudukan hukum pembentuk UU ini telah jamak dikaji dalam jurnal ilmiah, misalnya Carl McGowan,[4] David G. Mangum,[5] Jonathan Wagner,[6] Ernest A. Benck Jr,[7] Arthur H.

1 Wita Rohana Pandiangan, "Legal Standing Anggota DPR Dalam Pengujian Undang-Undang Di Mahkamah Kostitusi (Studi Terhadap Beberapa Putusan Mahkamah Konstitusi)" (Skripsi Departemen Hukum Tata Negara Fakultas Hukum Universitas Sumatera Utara, 2017).

2 Sofia Asri Rahmani, "Legal Standing Anggota DPR RI Dalam Judicial Review Undang-Undang Terhadap Undang-Undang Dasar 1945: Studi Putusan Mahkamah Konstitusi Nomor 20/PUU-XIV/2016" (Skripsi Program Studi Ilmu Hukum Fakultas Syariah dan Hukum UIN Sunan Gunung Djati Bandung, 2018)

3 Muhammad Salman Al-Farisi, "Tinjauan Yuridis Terhadap Legal Standing Pemohon Pengujian Undang-Undang Yang Berstatus Anggota Dewan Perwakilan Rakyat Di Mahkamah Konstitusi" (Skripsi Program Studi Ilmu Hukum Fakultas Hukum Universitas Hasanuddin, 2018).

4 Carl McGowan, "Congressmen in Court: The New Plaintiffs," Georgia Law Review 15, no. 2 (1981): 252–252

5 David G. Mangum, "Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs," Brigham Young University Law Review, no. 2 (1982): 376

6 Jonathan Wagner, "The Justiciability of Congressional-Plaintiff Suits," Columbia Law Review 82, no. 3 (1982): 528–31

7 Ernest A. Benck Jr., "Standing for State and Federal Legislators," Santa Clara Law Review 23, no. 3 (1983): 811–12

Abel,[8] R. Lawrence Dessem,[9] David J. Weiner,[10] Anthony Clark Arend and Catherine B. Lotrionte,[11] dan William D. Gohl.[12] Hal mengemuka dan menjadi diskursus publik salah satunya karena Setya Novanto pada awal tahun 2018 mengajukan pengujian UU Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi ke Mahkamah Konstitusi.[13] Hal tersebut ternyata bukanlah fenomena pertama pengujian UU oleh Anggota DPR, sebelumnya pada awal tahun 2013, Lily Wahid karena dipecat dari keanggotaan DPR juga mengajukan pengujian UU Nomor 17 Tahun 2009 tentang MPR, DPR, DPD, dan DPRD ke Mahkamah Konstitusi.[14] Menarik dari 2 (dua) contoh kasus di atas, Mahkamah Konstitusi konsisten untuk menyatakan tidak dapat diterima atau *niet ontvankelijk verklaard*, dengan pertimbangan hukum bahwa Pemohon tidak memiliki kedudukan hukum untuk mengajukan pengujian UU *a quo*.

Hal ini mengindikasikan bahwa Anggota DPR sebagai bagian dari pembentuk UU diberikan pembatasan kedudukan hukum dalam pengujian UU oleh Mahkamah Konstitusi. Hal ini menarik untuk digali lebih jauh mengenai *ratio legis* pembatasan kedudukan hukum tersebut, dengan sebelumnya melakukan pemetaan secara komprehensif terhadap putusan-putusan pengujian UU oleh Mahkamah Konstitusi dengan Pemohon pengujian adalah pembentuk UU, sejak Mahkamah Konstitusi berdiri pada tahun 2003 hingga tahun 2019.

2. Perumusan Masalah

Berdasarkan latar belakang di atas, maka permasalahan yang diangkat dalam penelitian ini adalah: (1) Bagaimana dinamika penggunaan kedudukan hukum pembentuk Undang-Undang dalam pengujian Undang-Undang? (2) Apa *ratio legis* pembatasan kedudukan hukum bagi pembentuk Undang-Undang dalam pengujian Undang-Undang?

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8 Arthur H. Abel, "Burger Court's Unified Approach to Standing and Its Impact on Congressional Plaintiffs," Notre Dame Law Review 60, no. 5 (1985): 1194

9 R. Lawrence Dessem, "Congressional Standing to Sue: Whose Vote Is This, Anyway?," Notre Dame Law Review 62, no. 1 (1986): 2

10 David J. Weiner, "The New Law of Legislative Standing," Stanford Law Review 54, no. 1 (2001): 210–12

11 Anthony Clark Arend and Catherine B. Lotrionte, "Congress Goes to Court: The Past, Present, and Future of Legislator Standing," Harvard Journal of Law & Public Policy 25, no. 1 (2001): 218

12 William D. Gohl, "Standing up for Legislators: Reevaluating Legislator Standing in the Wake of Kerr v. Hickenlooper," Northwestern University Law Review 110, no. 5 (2016): 1274–79

13 Kristian Erdianto, "MK: Permohonan Uji Materi Setya Novanto Terkait UU KPK Tak Relevan," 2018, https://nasional.kompas.com/read/2018/02/21/12114661/mk-permohonan-uji-materi-setya-novanto-terkait-uu-kpk-tak-relevan.

14 Redaksi Detik, "Tak Terima Dipecat Dari DPR, Lily Wahid Ajukan Judicial Review Ke MK," 2013, https://news.detik.com/berita/d-2199872/tak-terima-dipecat-dari-dpr-lily-wahid-ajukan-judicial-review-ke-mk.

3. Metode Penelitian

Penelitian ini adalah penelitian hukum (*legal research*), yang tergolong dalam penelitian hukum normatif, karena dalam penelitian hukum ini, hukum dikonsepkan sebagai apa yang tertulis dalam peraturan perundang-undangan (*law in books*) atau hukum dikonsepkan sebagai kaidah atau norma yang merupakan patokan berperilaku manusia yang dianggap pantas.[15] Penelitian hukum normatif merupakan upaya untuk mencari data sekunder dengan menggunakan penelitian kepustakaan.[16] Penelitian hukum ini menggunakan pendekatan peraturan perundang-undangan dan pendekatan konseptual. Selain itu, penelitian hukum ini juga menggunakan studi kasus, yaitu putusan-putusan pengujian UU oleh Mahkamah Konstitusi dengan Pemohon pengujian adalah pembentuk UU.

Bahan penelitian ini berupa data sekunder, yang berupa bahan hukum primer, bahan hukum sekunder, dan bila diperlukan juga menggunakan bahan hukum tersier. Bahan hukum primer berupa putusan-putusan pengujian UU oleh Mahkamah Konstitusi dengan Pemohon pengujian adalah pembentuk UU. Bahan hukum sekunder sebagai penjelas dari bahan hukum primer digali dari buku, artikel jurnal, dan hasil penelitian sebelumnya yang relevan.

Cara pengambilan data dalam penelitian ini adalah dengan melakukan studi pustaka terhadap buku, artikel, hasil penelitian, dan peraturan perundang-undangan yang berkaitan dengan pertimbangan hukum dalam putusan-putusan pengujian UU oleh Mahkamah Konstitusi dengan Pemohon pengujian adalah pembentuk UU. Lebih dahulu akan dilakukan analisis terhadap putusan-putusan pengujian UU oleh Mahkamah Konstitusi dengan Pemohon pengujian adalah pembentuk UU. Setelah mengetahui konstruksi yuridis dari pertimbangan hukum putusan-putusan tersebut, maka selanjutnya akan dianalisis dan dijustifikasi bahwa terdapat pembatasan terhadap kedudukan hukum pembentuk UU sebagai pemohon dalam pengujian UU oleh Mahkamah Konstitusi. Data yang diperoleh dianalisis secara deskriptif kualitatif, yaitu dengan melakukan analisis yang pada dasarnya dikembalikan pada tiga aspek, yaitu mengklasifikasi, membandingkan, dan menghubungkan. Dengan perkataan lain, seorang peneliti yang mempergunakan metode kualitatif, tidaklah semata-mata bertujuan mengungkapkan kebenaran belaka, akan tetapi untuk memahami kebenaran tersebut. Data yang telah terkumpul dari penelitian kepustakaan selanjutnya akan dianalisis secara kualitatif untuk menjawab permasalahan penelitian yang diajukan.

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[15] Amirudin and H. Zainal Asikin, *Pengantar Metode Penelitian Hukum,* (Jakarta: PT. Raja Grafindo Persada, 2003), 29.

[16] Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Umum* (Jakarta: Raja Grafindo Persada, 2007), 23.

B. PEMBAHASAN

1. Dinamika Penggunaan Kedudukan Hukum Pembentuk Undang-Undang dalam Pengujian Undang-Undang

Sebelum lebih lanjut membahas mengenai pembatasan *legal standing* bagi pembentuk UU dalam pengujian UU, menjadi penting untuk kemudian memahami terlebih dahulu siapa yang dimaksud dengan pembentuk UU dalam hukum positif di Indonesia. Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI Tahun 1945), ketentuan mengenai pembentukan UU diatur dalam Bab VII mengenai Dewan Perwakilan Rakyat (DPR), yang menyebutkan bahwa DPR memegang kekuasaan membentuk UU, dengan ketentuan bahwa setiap rancangan UU (RUU) dibahas oleh DPR dan Presiden untuk mendapat persetujuan bersama, dilanjutkan dengan Presiden mengesahkan RUU yang telah disetujui bersama untuk menjadi UU.[17] Dengan demikian, telah jelas bahwa UU merupakan produk yang dibentuk oleh DPR dengan ketentuan setiap RUU wajib mendapatkan persetujuan bersama DPR dan Presiden untuk dapat disahkan menjadi UU. Ketentuan konstitusional tersebut kemudian diperintahkan untuk diatur lebih lanjut pada level UU,[18] yang menegaskan bahwa UU adalah Peraturan Perundang-undangan yang dibentuk oleh DPR dengan persetujuan bersama Presiden,[19] dengan tahapan mencakup perencanaan, penyusunan, pembahasan, pengesahan atau penetapan, pengundangan.[20] Dengan demikian, menjadi semakin jelas bahwa pembentuk dari UU adalah DPR dan Presiden.

Namun demikian, seringkali bagi khalayak umum terdapat satu entitas lagi yang juga disebut sebagai pembentuk UU, yaitu Dewan Perwakilan Daerah (DPD). Hal ini perlu untuk diluruskan bahwa keberadaan DPD bukanlah pembentuk UU yang terlibat pada keseluruhan tahapan dalam pembentukan UU sesuai dengan ketentuan peraturan perundang-undangan yang berlaku. Hal yang memang tidak dapat dipungkiri adalah DPD turut terlibat dalam tahapan-tahapan pembentukan UU, namun secara parsial. Terlebih pasca Mahkamah Konstitusi mengeluarkan Putusan Mahkamah Konstitusi

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17 Pasal 20 ayat (1), ayat (2), dan ayat (4) Indonesia, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945" (n.d.).

18 Pasal 22A Indonesia.

19 Pasal 1 angka 3 *Undang-Undang Nomor 15 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan* (Republik Indonesia, 2019); Lihat juga Pasal 71 huruf a *Undang-Undang Nomor 2 Tahun 2018 Tentang Perubahan Kedua Atas Undang-Undang Nomor 17 Tahun 2014 Tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Dan Dewan Perwakilan Rakyat Daerah* (Republik Indonesia, 2018).

20 Pasal 1 angka 1 Republik Indonesia, *Undang-Undang Nomor 15 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan*.

Nomor 92/PUU-X/2012 yang "mengembalikan" kewenangan konstitusional DPD dalam pembentukan UU yang direduksi pada level UU[21], semakin menimbulkan kesan bahwa DPD adalah bagian dari pembentuk UU.

Namun, bila merujuk pada pengaturan dalam UUD NRI Tahun 1945 dan peraturan pelaksanaan yang mengatur kewenangan DPD, relatif jelas disebutkan keterlibatan DPD dalam tahapan pembentukan UU, yaitu:

a. *Dewan Perwakilan Daerah dapat mengajukan kepada Dewan Perwakilan Rakyat rancangan undang-undang yang berkaitan dengan otonomi daerah, hubungan pusat dan daerah, pembentukan dan pemekaran serta penggabungan daerah, pengelolaan sumber daya alam dan sumber daya ekonomi lainnya, serta perimbangan keuangan pusat dan daerah, serta yang berkaitan dengan perimbangan keuangan pusat dan daerah.*[22]
b. *Dewan Perwakilan Daerah ikut membahas rancangan undang-undang yang berkaitan dengan otonomi daerah, hubungan pusat dan daerah; pembentukan, pemekaran, dan penggabungan daerah; pengelolaan sumber daya alam dan sumber daya ekonomi lainnya, serta perimbangan keuangan pusat dan daerah; serta memberikan pertimbangan kepada Dewan Perwakilan Rakyat atas rancangan undang-undang yang berkaitan dengan pajak, pendidikan dan agama.*[23]
c. *Dewan Perwakilan Daerah dapat melakukan pengawasan atas pelaksanaan undang-undang mengenai otonomi daerah, pembentukan, pemekaran dan penggabungan daerah, hubungan pusat dan daerah, pengelolaan sumber daya alam dan sumber daya ekonomi lainnya, pelaksanaan anggaran pendapatan dan belanja negara, pajak, pendidikan, dan agama serta menyampaikan hasil pengawasannya itu kepada Dewan Perwakilan Rakyat sebagai bahan pertimbangan untuk ditindaklanjuti.*[24]
d. *Rancangan undang-undang anggaran pendapatan dan belanja negara diajukan oleh Presiden untuk dibahas bersama Dewan Perwakilan Rakyat dengan memperhatikan pertimbangan Dewan Perwakilan Daerah.*[25]
e. *menyusun program legislasi nasional yang berkaitan dengan otonomi daerah, hubungan pusat dan daerah, pembentukan dan pemekaran serta penggabungan daerah, pengelolaan sumber daya alam dan sumber daya ekonomi lainnya, serta yang berkaitan dengan perimbangan keuangan pusat dan daerah.*[26]

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21 Mahkamah Konstitusi, Putusan Mahkamah Konstitusi Nomor 92/PUU-X/2012 (2012).
22 Pasal 22D ayat (1) Indonesia, Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
23 Pasal 22D ayat (2) Indonesia.
24 Pasal 22D ayat (3) Indonesia.
25 Pasal 23 ayat (2) Indonesia.
26 Pasal 249 ayat (1) "Undang-Undang Nomor 17 Tahun 2014 Tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Dan Dewan Perwakilan Rakyat Daerah" (2014).

Mencermati ketentuan konstitusional *a quo* dapat dilihat bahwa DPD memang memiliki kewenangan konstitusional untuk turut serta terlibat dalam 3 (tiga) dari 5 (lima) tahapan pembentukan UU, yaitu: (a) tahapan perencanaan; (b) tahapan penyusunan; dan (c) tahapan pembahasan. Namun demikian, walaupun DPD terlibat dalam beberapa tahapan pembentukan UU tidak serta merta DPD dapat disebut sebagai pembentuk UU. Hal ini dikarenakan menurut ketentuan konstitusional secara tegas menyebutkan bahwa UU adalah Peraturan Perundang-undangan yang dibentuk oleh DPR dengan persetujuan bersama Presiden.

Sebelum lebih lanjut menelusuri dinamika kedudukan hukum pembentuk UU dalam pengujian UU, perlu terlebih dahulu diperjelas ketentuan normatif yang mengatur mengenai kedudukan hukum Pemohon dalam pengujian UU. Ketentuan mengenai kedudukan hukum Pemohon diatur dalam UU Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi (UU MK), yang berbunyi:[27]

> *(1) Pemohon adalah pihak yang menganggap hak dan/atau kewenangan konstitusionalnya dirugikan oleh berlakunya undang-undang, yaitu:*
> *a. perorangan warga negara Indonesia;*
> *b. kesatuan masyarakat hukum adat sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia yang diatur dalam undang-undang;*
> *c. badan hukum publik atau privat; atau*
> *d. lembaga negara.*
> *(2) Pemohon wajib menguraikan dengan jelas dalam permohonannya tentang hak dan/atau kewenangan konstitusionalnya sebagaimana dimaksud pada ayat (1).*
> *(3) Dalam permohonan sebagaimana dimaksud pada ayat (2), pemohon wajib menguraikan dengan jelas bahwa:*
> *a. pembentukan undang-undang tidak memenuhi ketentuan berdasarkan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945; dan/atau*
> *b. materi muatan dalam ayat, pasal, dan/atau bagian undang-undang dianggap bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.*

Lebih lanjut, dalam Penjelasan Pasal 51 Undang-undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi (UU MK) dijelaskan bahwa yang dimaksud dengan "hak konstitusional" adalah hak-hak yang diatur dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Selain itu, Pemohon perorangan WNI termasuk juga di dalamnya kelompok orang yang mempunyai kepentingan sama. Mencermati ketentuan *a quo*, maka dapat dilihat kedudukan hukum Pemohon pembentuk UU

[27] Pasal 51 Republik Indonesia, "Undang-Undang Nomor 24 Tahun 2003 Tentang Mahkamah Konstitusi" (2003).

berdasarkan penalaran hukum yang wajar digunakan adalah Perorangan WNI, baik secara perorangan maupun berkelompok. Hal ini dikarenakan tidak mungkin lembaga negara pembentuk UU, dalam hal ini DPR dan Presiden, mengajukan permohonan pengujian UU terhadap produk yang dihasilkannya sendiri dalam kualifikasi kedudukan hukum Pemohon sebagai lembaga negara.

Namun demikian, dalam rangka penelusuran dinamika kedudukan hukum pembentuk UU dalam pengujian UU, Peneliti membuat perluasan kualifikasi pembentuk UU, meliputi: **Kualifikasi Pertama**, Lembaga Negara, berupa DPR. Kualifikasi DPR sebagai lembaga negara pembentuk UU mendapatkan justifikasi didasarkan pada ketentuan Pasal 20 ayat (1) UUD NRI Tahun 1945 bahwa DPR memegang kekuasaan membentuk UU. **Kualifikasi Kedua**, Lembaga Negara, berupa Presiden. Kelembagaan Presiden sebagai lembaga negara pembentuk UU mendapatkan justifikasi didasarkan pada ketentuan Pasal 20 ayat (2) UUD NRI Tahun 1945 bahwa Presiden bersama dengan DPR membahas setiap RUU untuk mendapat persetujuan bersama.

Kualifikasi Ketiga, Perorangan WNI, berupa Anggota DPR. Perorangan WNI yang berkedudukan sebagai Anggota DPR mendapatkan justifikasi sebagai pembentuk UU karena Anggota DPR merupakan bagian dari kelembagaan DPR dan secara tegas diatur bahwa Anggota DPR berhak mengajukan usul rancangan UU. Namun demikian, dalam hal kualifikasi pemohon pengujian UU, terdapat beberapa catatan yang perlu diperhatikan terkait kualifikasi Perorangan WNI yang berkedudukan sebagai Anggota DPR, yaitu:

a. *UUD NRI Tahun 1945 secara eksplisit telah menentukan hak konstitusional bagi Warga Negara Indonesia, Anggota DPR, maupun DPR,*[28] *sehingga tidak serta merta Perorangan WNI yang berkedudukan sebagai Anggota DPR dapat menggunakan kualifikasi pemohon Perorangan WNI an sich bila yang diuji adalah norma yang menimbulkan kerugian atau potensi kerugian atas kewenangan konstitusional yang dimiliki oleh Anggota DPR;*
b. *Anggota DPR yang sudah ambil bagian dan turut serta dalam pembahasan dan pengambilan keputusan secara institusional atas suatu UU yang dimohonkan pengujian akan dinyatakan tidak memiliki kedudukan hukum melalui pengaturan dalam Peraturan Mahkamah Konstitusi;*[29] *dan*
c. *Perorangan WNI yang berkedudukan sebagai Anggota DPR hanya dapat mengajukan pengujian UU terhadap norma yang menimbulkan kerugian atau potensi kerugian atas kewenangan konstitusional yang eksklusif dimiliki oleh Anggota DPR, meliputi Pasal 11 ayat (1) dan ayat (2), Pasal 12 ayat (3), Pasal 13 ayat (2), Pasal 14 ayat (1), Pasal 20 ayat (1), Pasal 20A ayat*

[28] Mahkamah Konstitusi, Putusan Mahkamah Konstitusi Nomor 20/PUU-V/2007 (2007).
[29] Mahkamah Konstitusi, Putusan Mahkamah Konstitusi Nomor 51-52-59/PUU-VI/2008 (2008).

(2), Pasal 22 ayat (2), Pasal 24B ayat (1), Pasal 24A ayat (3) serta Pasal 24C ayat (3), Pasal 7A dan 7B UUD NRI Tahun 1945.[30]

Kualifikasi Keempat, Lembaga Negara, berupa DPD. Kelembagaan DPD sebagai lembaga negara yang dijustifikasi terlibat dalam pembentukan UU didasarkan pada Pasal 22D UUD NRI Tahun 1945, walaupun hanya secara parsial terlibat dalam 3 (tiga) dari 5 (lima) tahapan pembentukan UU, yaitu: (a) tahapan perencanaan; (b) tahapan penyusunan; dan (c) tahapan pembahasan. Selain itu, peneguhan keterlibatan DPD dalam pembentukan UU juga dikuatkan dalam Putusan Mahkamah Konstitusi Nomor 92/PUU-X/2012, yang "mengembalikan" kewenangan konstitusional DPD dalam pembentukan UU yang direduksi pada pengaturan di level UU. Hal ini menjadi catatan tersendiri dalam penelusuran dinamika kedudukan hukum pembentuk UU dalam pengujian UU, karena dengan demikian seharusnya sebelum adanya Putusan Mahkamah Konstitusi Nomor 92/PUU-X/2012, yang dibacakan[31] pada tanggal 27 Maret 2013, maka permohonan pengujian UU yang diajukan oleh kelembagaan DPD tidak dapat dimaknai sebagai permohonan pengujian yang diajukan oleh pembentuk UU, karena walaupun secara normatif telah memiliki kewenangan konstitusional untuk terlibat dalam tahapan pembentukan UU, namun pada kenyataannya kewenangan tersebut direduksi pada pengaturan di level UU.[32] Dengan demikian, pemohon pembentuk UU dalam pengujian UU tidak dapat hanya dimaknai secara normatif memiliki kewenangan untuk membentuk atau setidak-tidaknya terlibat dalam tahapan pembentukan UU, tetapi harus terlibat secara empiris dalam tahapan pembentukan UU yang diujikan.

Kualifikasi Kelima, Perorangan WNI, berupa Anggota DPD. Perorangan WNI yang berkedudukan sebagai Anggota DPD mendapatkan justifikasi sebagai pembentuk UU karena Anggota DPD merupakan bagian dari kelembagaan DPD yang memiliki justifikasi untuk terlibat dalam pembentukan UU didasarkan pada Pasal 22D UUD NRI Tahun 1945 dan Putusan Mahkamah Konstitusi Nomor 92/PUU-X/2012 sebagaimana telah diuraikan pada Kualifikasi Keempat. Demikian pula terkait dengan catatan dalam Kualifikasi Keempat, *mutatis mutandis* berlaku pula untuk Kualifikasi Kelima.

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30 Mahkamah Konstitusi, Putusan Mahkamah Konstitusi Nomor 23-26/PUU-VIII/2010 (2010).

31 Putusan Mahkamah Konstitusi bersifat prospektif (berlaku ke depan), karena Putusan Mahkamah Konstitusi memperoleh kekuatan hukum tetap sejak selesai diucapkan dalam sidang pleno terbuka untuk umum. Lihat dalam Pasal 47 Republik Indonesia, Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi.

32 Pemahaman ini dikecualikan dalam konteks UU terkait perimbangan keuangan pusat dan daerah menurut Pasal 22D ayat (1), ayat (2), dan ayat (3) UUD 1945, yang menurut Mahkamah Konstitusi telah melibatkan kelembagaan DPD, *mutatis mutandis* Anggota DPD. Lihat dalam Mahkamah Konstitusi, Putusan Mahkamah Konstitusi Nomor 71/PUU-IX/2011 (2011).

Kualifikasi Keenam, Badan Hukum, berupa Partai Politik. Pemohon pengujian UU dalam kualifikasi Badan Hukum, berupa Partai Politik, menjadi salah satu kualifikasi pemohon pembentuk UU yang perlu ditelusuri dinamikanya karena mendapat justifikasi berdasarkan Putusan Mahkamah Konstitusi Nomor 51-52-59/PUU-VI/2008. [33]Partai Politik didudukkan memiliki keterkaitan dengan pembentukan UU, yaitu partai politik yang sudah ambil bagian dan turut serta dalam pembahasan dan pengambilan keputusan secara institusional atas suatu UU yang dimohonkan pengujian akan dinyatakan tidak memiliki kedudukan hukum melalui pengaturan dalam Peraturan Mahkamah Konstitusi. Pertimbangan dalam putusan *a quo*, memberikan pemahaman baru mengenai keterkaitan kedudukan hukum Partai Politik dalam pembentukan UU, sehingga menjadi relevan kualifikasi pemohon Badan Hukum, berupa Partai Politik untuk turut ditelusuri dinamika kedudukan hukumnya sebagai pembentuk UU dalam pengujian UU.

Adapun hasil penelusuran dinamika kedudukan hukum yang diajukan oleh kualifikasi pembentuk UU dalam pengujian UU disajikan dalam tabel berikut ini:

Tabel 1. Penelusuran Kedudukan Hukum Kualifikasi Pembentuk Undang-Undang sebagai Pemohon dalam Pengujian Undang-Undang Tahun 2003-2019

No.	No. Perkara	Objek Pengujian	Pemohon
1.	006/PUU-III/2005	UU Nomor 32 Tahun 2004 tentang Pemerintahan Daerah	Perorangan WNI (Anggota DPD)
2.	008/PUU-IV/2006	UU Nomor 22 Tahun 2003 tentang Susunan dan Kedudukan Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah dan UU Nomor 31 Tahun 2002 tentang Partai Politik	Perorangan WNI (Anggota DPR)
3.	024/PUU-IV/2006	UU Nomor 12 Tahun 2003 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah dan Dewan Perwakilan Rakyat Daerah, UU Nomor 23 Tahun 2003 tentang Pemilihan Presiden dan Wakil Presiden, UU Nomor 32 Tahun 2004 tentang Pemerintahan Daerah, UU Nomor 2 Tahun 2002 tentang Kepolisian Negara Republik Indonesia, dan UU Nomor 34 Tahun 2004 tentang Tentara Nasional Indonesia	Perorangan WNI (Anggota DPD)

[33] Mahkamah Konstitusi, Putusan Mahkamah Konstitusi Nomor 51-52-59/PUU-VI/2008.

No.	No. Perkara	Objek Pengujian	Pemohon
4.	20/PUU-V/2007	UU Nomor 22 Tahun 2001 tentang Minyak dan Gas Bumi	Perorangan WNI (Anggota DPR)
5.	10/PUU-VI/2008	UU Nomor 10 Tahun 2008 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah dan Dewan Perwakilan Rakyat Daerah	• Lembaga Negara (DPD) • Perorangan WNI (Anggota DPD)
6.	11/PUU-VI/2008	UU Nomor 32 Tahun 2004 tentang Pemerintahan Daerah dan UU Nomor 29 Tahun 2007 tentang Pemerintahan Provinsi Daerah Khusus Ibukota sebagai Ibukota Negara Kesatuan Republik Indonesia	Perorangan WNI (Anggota DPD)
7.	51-052-059/PUU-VI/2008	UU Nomor 42 Tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden	Badan Hukum (Partai Politik)
8.	107/PUU-VII/2009	UU Nomor 10 Tahun 2008 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah dan Dewan Perwakilan Rakyat Daerah	Perorangan WNI (Anggota DPR)
9.	110-111-112-113/PUU-VII/2009	UU Nomor 10 Tahun 2008 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah dan Dewan Perwakilan Rakyat Daerah	• Perorangan WNI (Anggota DPR) • Badan Hukum (Partai Politik)
10.	117/PUU-VII/2009	UU Nomor 27 Tahun 2009 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	Perorangan WNI (Anggota DPD)
11.	129/PUU-VII/2009	UU Nomor 4 Tahun 2004 tentang Kekuasaan Kehakiman, UU Nomor 5 Tahun 2004 tentang Perubahan Atas UU Nomor 14 Tahun 1985 tentang Mahkamah Agung, dan UU Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi	Perorangan WNI (Anggota DPR)
12.	131/PUU-VII/2009	UU Nomor 10 Tahun 2008 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	Perorangan WNI (Anggota DPR)

No.	No. Perkara	Objek Pengujian	Pemohon
13.	151/PUU-VII/2009	UU Nomor 39 Tahun 2008 tentang Kementerian Negara	Perorangan WNI (Anggota DPR)
14.	152/PUU-VII/2009	UU Nomor 27 Tahun 2009 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	Perorangan WNI (Anggota DPR)
15.	23-26/PUU-VIII/2010	UU Nomor 27 Tahun 2009 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	Perorangan WNI (Anggota DPR)
16.	38/PUU-VIII/2010	UU Nomor 27 Tahun 2009 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah, dan UU Nomor 2 Tahun 2008 tentang Partai Politik	Perorangan WNI (Anggota DPR)
17.	62/PUU-VIII/2010	UU Nomor 37 Tahun 2008 tentang Ombudsman Republik Indonesia	Perorangan WNI (Anggota DPD)
18.	75/PUU-VIII/2010	UU Nomor 32 Tahun 2004 tentang Pemerintahan Daerah	Perorangan WNI (Anggota DPR)
19.	71/PUU-IX/2011	UU Nomor 33 Tahun 2004 tentang Perimbangan Keuangan Antara Pemerintah Pusat dan Pemerintahan Daerah	Perorangan WNI (Anggota DPD)
20.	36/PUU-X/2012	UU Nomor 22 Tahun 2001 tentang Minyak dan Gas Bumi	Perorangan WNI (Anggota DPD)
21.	89/PUU-X/2012	UU Nomor 42 Tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden, UU Nomor 8 Tahun 2012 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah, dan UU Nomor 32 Tahun 2004 tentang Pemerintahan Daerah	Perorangan WNI (Anggota DPR)
22.	92/PUU-X/2012	UU Nomor 27 Tahun 2009 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah dan UU Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan	Lembaga Negara (DPD)

No.	No. Perkara	Objek Pengujian	Pemohon
23.	20/PUU-XI/2013	UU Nomor 8 Tahun 2012 tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	Perorangan WNI (Anggota DPD)
24.	75/PUU-XI/2013	UU Nomor 20 Tahun 2001 tentang Perubahan Atas UU Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi	Perorangan WNI (Anggota DPR)
25.	85/PUU-XI/2013	UU Nomor 7 Tahun 2004 tentang Sumber Daya Air	Perorangan WNI (Anggota DPD)
26.	73/PUU-XII/2014	UU Nomor 17 Tahun 2014 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	• Badan Hukum (Partai Politik) • Perorangan WNI (Calon Anggota DPR terpilih)
27.	79/PUU-XII/2014	UU Nomor 17 Tahun 2014 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	Lembaga Negara (DPD)
28.	82/PUU-XII/2014	UU Nomor 17 Tahun 2014 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	Perorangan WNI (Anggota DPR)
29.	7/PUU-XIII/2015	UU Nomor 23 Tahun 2014 tentang Pemerintahan Daerah	Badan Hukum (Partai Politik)
30	20/PUU-XIV/2016	UU Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik dan UU Nomor 20 Tahun 2001 tentang Perubahan Atas UU Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana	Perorangan WNI (Anggota DPR)
31.	21/PUU-XIV/2016	UU Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi sebagaimana telah diubah dengan UU Nomor 20 Tahun 2001 tentang Perubahan Atas UU Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi	Perorangan WNI (Anggota DPR)

No.	No. Perkara	Objek Pengujian	Pemohon
32.	109/PUU-XIV/2016	UU Nomor 17 Tahun 2014 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah sebagaimana telah diubah dengan UU Nomor 42 Tahun 2014 tentang Perubahan Atas UU Nomor 17 Tahun 2014 tentang Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat Daerah	Perorangan WNI (Anggota DPD)
33.	64/PUU-XV/2017	UU Nomor 10 Tahun 2016 tentang Perubahan Kedua Atas UU Nomor 1 Tahun 2015 tentang Penetapan Peraturan Pemerintah Pengganti UU Nomor 1 Tahun 2014 tentang Pemilihan Gubernur, Bupati, dan Walikota menjadi UU	Perorangan WNI (Anggota DPD)
34.	95/PUU-XV/2017	UU Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi	Perorangan WNI (Anggota DPR)
35.	96/PUU-XV/2017	UU Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi	Perorangan WNI (Anggota DPR)

Sumber: **Diolah Penulis, 2020.**

Berdasarkan Tabel 1 diatas, setidaknya terdapat beberapa hal perlu dicermati lebih lanjut, yaitu: **Pencermatan Pertama**, rekapitulasi kualifikasi pembentuk UU dalam pengujian UU. Data dalam rekapitulasi ini menjadi penting untuk ditelaah dalam kerangka untuk mengetahui siapakah kualifikasi pembentuk UU yang paling sering menggunakan kedudukan hukum pembentuk UU dalam pengujian UU. Berdasarkan rekapitulasi kualifikasi pembentuk UU dalam pengujian UU dapat pula ditelusuri motivasi kualifikasi pembentuk UU dalam menggunakan kedudukan hukum pembentuk UU. Rekapitulasi atas kualifikasi pembentuk UU dalam pengujian UU dapat dilihat pada tabel berikut ini:

Tabel 2. Rekapitulasi Kualifikasi Pembentuk Undang-Undang sebagai Pemohon dalam Pengujian Undang-Undang Berdasarkan Periode Keketuaan Mahkamah Konstitusi Tahun 2003-2019

Keketuaan	Rekapitulasi Kualifikasi Pembentuk UU dalam Pengujian UU					
	K1	**K2**	**K3**	**K4**	**K5**	**K6**
Jimly Asshiddiqie	-	-	2	1	4	-
Moh. Mahfud MD	-	-	10	1	4	2
M. Akil Mochtar	-	-	-	-	1	-
Hamdan Zoelva	-	-	3	1	1	1
Arief Hidayat	-	-	4	-	2	1
Anwar Usman	**-**	**-**	**-**	**-**	**-**	**-**
JUMLAH*	**0**	**0**	**19**	**3**	**12**	**4**

Keterangan:

K1:	Lembaga Negara Presiden	K4:	Lembaga Negara DPD
K2:	Lembaga Negara DPR	K5:	Perorangan WNI Anggota DPD
K3:	Perorangan WNI Anggota DPR	K6:	Badan Hukum Partai Politik

Sumber: **Diolah Penulis, 2020.**

Berdasarkan Tabel 2 di atas, dapat dilihat bahwa kualifikasi Pemohon pembentuk UU yang paling banyak mengajukan pengujian UU adalah Perorangan WNI Anggota DPR, sedangkan kualifikasi Pemohon pembentuk UU yang tidak pernah mengajukan pengujian UU adalah kelembagaan Presiden dan kelembagaan DPR, yang notabene keduanya merupakan entitas pembentuk UU yang memiliki legitimasi sebagai pembentuk UU menurut UUD NRI Tahun 1945. Namun demikian, tidak semua dari perkara dengan kualifikasi Pemohon pembentuk UU Perorangan WNI Anggota DPR sebagai Pemohon serta merta menggunakan status jabatan Anggota DPR untuk mendapatkan kedudukan hukum dalam pengujian UU. Hal tersebut dapat dilihat dari pemetaan motif penggunaan kualifikasi Pemohon pembentuk UU untuk mendapatkan kedudukan hukum dalam pengujian UU yang disajikan dalam tabel berikut ini:

* Jumlah dari rekapitulasi ini sebanyak 38, lebih banyak dari jumlah perkara dengan kualifikasi pembentuk UU sebagai Pemohon dalam pengujian UU, yaitu 35 perkara. Hal ini dikarenakan dalam 3 perkara terdapat lebih dari 1 (satu) kualifikasi pembentuk UU sebagai Pemohon, yaitu:
a. Putusan Mahkamah Konstitusi Nomor 010/PUU-VI/2008, dengan 2 (dua) Pemohon, yaitu: Lembaga Negara (DPD) dan Perorangan WNI (Anggota DPD);
b. Putusan Mahkamah Konstitusi Nomor 110-111-112-113/PUU-VII/2009, dengan 2 (dua) Pemohon, yaitu: Perorangan WNI (Anggota DPR) dan Badan Hukum (Partai Politik); dan
c. Putusan Mahkamah Konstitusi Nomor 73/PUU-XII/2014, dengan 2 (dua) Pemohon, yaitu: Perorangan WNI (Anggota DPR) dan Badan Hukum (Partai Politik).

Tabel 3. Pemetaan Motif Penggunaan Kualifikasi Pemohon Pembentuk Undang-Undang dalam Pengujian Undang-Undang Tahun 2003-2019

Kualifikasi Pemohon Pembentuk UU dalam Pengujian UU	Motif Penggunaan Kualifikasi Pemohon Pembentuk UU dalam Pengujian UU
Lembaga Negara Presiden	-
Lembaga Negara DPR	-
Perorangan WNI Anggota DPR	a. Mengadvokasi hak konstitusional Pemohon dari berlakunya norma UU yang menghalangi hak konstitusional Pemohon sebagai Perorangan WNI *an sich*. b. Mengadvokasi hak konstitusional Pemohon dari berlakunya norma UU yang menghalangi Pemohon sebagai Anggota DPR untuk mendapatkan kedudukan/ jabatan dalam cabang kekuasaan legislatif. c. Pemohon tidak menjelaskan relevansi status jabatan sebagai Anggota DPR dengan permohonan yang diajukan. d. Hanya menyebutkan status jabatan sebagai Anggota DPR, namun memilih kualifikasi Pemohon sebagai Perorangan WNI *an sich*.
Lembaga Negara DPD	Mengadvokasi kewenangan konstitusional Pemohon dari berlakunya norma UU yang potensial atau faktual berdampak pada fungsi kelembagaan DPD.
Perorangan WNI Anggota DPD	a. Mengadvokasi hak konstitusional Pemohon dari berlakunya norma UU yang menghalangi Pemohon sebagai Anggota DPD untuk terlibat dalam pengisian jabatan dalam cabang kekuasaan eksekutif. b. Mengadvokasi hak konstitusional Pemohon dari berlakunya norma UU yang menghalangi Pemohon sebagai Anggota DPD untuk mendapatkan kedudukan/ jabatan dalam cabang kekuasaan legislatif. c. Pemohon tidak menjelaskan relevansi status jabatan sebagai Anggota DPD dengan permohonan yang diajukan. d. Mengadvokasi hak konstitusional konstituen Pemohon sebagai Anggota DPD dari berlakunya norma UU.

Kualifikasi Pemohon Pembentuk UU dalam Pengujian UU	Motif Penggunaan Kualifikasi Pemohon Pembentuk UU dalam Pengujian UU
Badan Hukum Partai Politik	a. Mengadvokasi hak konstitusional Pemohon dari berlakunya norma UU yang menghalangi Pemohon Badan Hukum Partai Politik untuk mendapatkan kedudukan/jabatan dalam cabang kekuasaan legislatif. b. Mengadvokasi hak konstitusional Pemohon dari berlakunya norma UU yang menghalangi Pemohon Badan Hukum Partai Politik untuk terlibat dalam pengisian jabatan dalam cabang kekuasaan eksekutif.

Sumber: **Diolah Penulis, 2020.**

Berdasarkan Tabel 3 di atas, dapat dilihat bahwa motivasi penggunaan kualifikasi Pemohon pembentuk UU pada Pemohon Perorangan WNI lebih memiliki motif yang bervariasi dalam memanfaatkan status jabatan Anggota DPR atau Anggota DPD yang melekat pada Pemohon Perorangan WNI. Hal ini berbeda dengan kualifikasi Pemohon pembentuk UU pada Pemohon Lembaga Negara DPD atau Badan Hukum Partai Politik yang lebih *ajeg* digunakan untuk memperjuangkan kepentingan kelembagaan masing-masing dalam pengujian UU.

Variasi motif dalam memanfaatkan status jabatan Anggota DPR atau Anggota DPD yang melekat pada Pemohon Perorangan WNI didasarkan pada preseden dalam putusan pengujian UU bahwa Pemohon seringkali tidak dapat membedakan kapasitasnya dalam mengajukan pengujian UU, apakah sebagai Perorangan WNI *an sich* atau Perorangan WNI dengan status jabatan sebagai Anggota DPR atau Anggota DPD. Merespons Pemohon dengan kualifikasi pembentuk UU pada Pemohon Perorangan WNI yang seringkali tidak dapat membedakan hak konstitusional yang didalilkan dimiliki, maka Mahkamah Konstitusi telah memberikan pertimbangan hukum pada beberapa putusan penting (*landmark decisions*), yang bila dirujuk secara sistematis berdasarkan *tempus* perkara, terlihat bahwa pertimbangan hukum tersebutlah yang mempengaruhi variasi motif penggunaan kualifikasi Pemohon pembentuk UU pada Pemohon Perorangan WNI.

Pencermatan Kedua, pemetaan putusan penting (*landmark decisions*) terkait kedudukan hukum pembentuk UU dalam pengujian UU. Sebagaimana telah diuraikan sebelumnya, bahwa bila ditelusuri lebih lanjut, dapat diketahui bahwa variasi motif penggunaan kualifikasi Pemohon pembentuk UU pada Pemohon Perorangan WNI

dipengaruhi dengan putusan-putusan penting dalam pengujian UU yang menggariskan penggunaan kualifikasi Pemohon pembentuk UU. Pemetaan putusan penting tersebut dapat dilihat pada tabel di bawah ini:

Tabel 4. Pemetaan Putusan Penting (*Landmark Decisions*) terkait Kualifikasi Pemohon Pembentuk Undang-Undang dalam Pengujian Undang-Undang Tahun 2003-2019

Kualifikasi Pemohon Pembentuk UU	Putusan Penting	Pokok Pertimbangan Hukum
Lembaga Negara Presiden	-	-
Lembaga Negara DPR		-
Perorangan WNI Anggota DPR	20/ PUU-V/2007	UUD NRI Tahun 1945 secara eksplisit telah menentukan hak konstitusional bagi Warga Negara Indonesia, Anggota DPR, maupun DPR, sehingga tidak serta merta Perorangan WNI yang berkedudukan sebagai Anggota DPR dapat menggunakan kualifikasi pemohon Perorangan WNI *an sich* bila yang diuji adalah norma yang menimbulkan kerugian atau potensi kerugian atas kewenangan konstitusional yang dimiliki oleh Anggota DPR.
	51-52-59/PUU-VI/2008	Anggota DPR yang sudah ambil bagian dan turut serta dalam pembahasan dan pengambilan keputusan secara institusional atas suatu UU yang dimohonkan pengujian akan dinyatakan tidak memiliki kedudukan hukum (*legal standing*) melalui pengaturan dalam Peraturan Mahkamah Konstitusi.
	23-26/PUU-VIII/2010	Perorangan WNI yang berkedudukan sebagai Anggota DPR hanya dapat mengajukan pengujian UU terhadap norma yang menimbulkan kerugian atau potensi kerugian atas kewenangan konstitusional yang eksklusif dimiliki oleh Anggota DPR, meliputi Pasal 11 ayat (1) dan ayat (2), Pasal 12 ayat (3), Pasal 13 ayat (2), Pasal 14 ayat (1), Pasal 20 ayat (1), Pasal 20A ayat (2), Pasal 22 ayat (2), Pasal 24B ayat (1), Pasal 24A ayat (3) serta Pasal 24C ayat (3), Pasal 7A dan 7B UUD NRI Tahun 1945.

Kualifikasi Pemohon Pembentuk UU	Putusan Penting	Pokok Pertimbangan Hukum
Lembaga Negara DPD dan Perorangan WNI Anggota DPD	71/PUU-IX/2011	Pembahasan UU terkait perimbangan keuangan pusat dan daerah menurut Pasal 22D ayat (1), ayat (2), dan ayat (3) UUD 1945, yang menurut Mahkamah Konstitusi telah melibatkan kelembagaan DPD, *mutatis mutandis* Anggota DPD.
	92/ PUU-X/2012	Mengembalikan kewenangan konstitusional DPD dalam pembentukan UU yang direduksi pada pengaturan di level UU, yaitu pada tahapan: (a) perencanaan; (b) penyusunan; dan (c) pembahasan.
Badan Hukum Partai Politik	51-52-59/PUU-VI/2008	Partai Politik didudukkan memiliki keterkaitan dengan pembentukan UU, yaitu partai politik yang sudah ambil bagian dan turut serta dalam pembahasan dan pengambilan keputusan secara institusional atas suatu UU yang dimohonkan pengujian akan dinyatakan tidak memiliki kedudukan hukum (*legal standing*) melalui pengaturan dalam Peraturan Mahkamah Konstitusi.

Sumber: **Diolah Penulis, 2020.**

Berdasarkan pada Tabel 4 di atas, dapat dilihat bahwa Mahkamah Konstitusi dalam beberapa putusan yang dapat dikualifikasikan sebagai putusan penting (*landmark decisions*) telah memberikan pedoman penggunaan kualifikasi Pemohon pembentuk UU dalam pengujian UU, termasuk memperluas makna pembentuk UU bukan semata kelembagaan Presiden dan kelembagaan DPR yang secara eksplisit diatur dalam UUD NRI Tahun 1945, namun juga Anggota DPR, DPD dan Anggota DPD, serta Partai Politik pengusung Anggota DPR.

2. *Ratio Legis* Pembatasan Kedudukan Hukum bagi Pembentuk Undang-Undang dalam Pengujian Undang-Undang

Berdasarkan data penelusuran dinamika penggunaan kedudukan hukum pembentuk UU dalam pengujian UU yang telah diuraikan pada pembahasan sebelumnya, dapat dilihat bahwa *ratio legis* pembatasan kedudukan hukum pembentuk UU dalam pengujian UU setidaknya didasarkan pada 2 (dua) alasan: **Pertama**, dikotomi hak konstitusional yang melekat. Dalam putusan penting (*landmark decisions*) yang telah disajikan pada Tabel 4 dapat dilihat bahwa salah satu alasan pembatasan kedudukan

hukum pembentuk UU dalam pengujian UU adalah karena UUD NRI Tahun 1945 secara eksplisit telah menentukan hak konstitusional bagi Warga Negara Indonesia, Anggota DPR, maupun DPR, sehingga tidak serta merta Perorangan WNI yang berkedudukan sebagai Anggota DPR dapat menggunakan kualifikasi pemohon Perorangan WNI *an sich* bila yang diuji adalah norma yang menimbulkan kerugian atau potensi kerugian atas kewenangan konstitusional yang dimiliki oleh Anggota DPR. Bahkan kemudian, Mahkamah Konstitusi telah merinci mana-mana hak konstitusional Pemohon Perorangan WNI dengan jabatan Anggota DPR, untuk kemudian dapat dibedakan dengan hak konstitusional Pemohon Perorangan WNI *an sich*.[34] Pembedaan dikotomis mengenai hak konstitusional yang melekat pada masing-masing kualifikasi Pemohon pembentuk UU menjadi alasan fundamental pembatasan kedudukan hukum pembentuk UU dalam pengujian UU.

Kedua, justifikasi empiris keterlibatan dalam pembentukan UU. Merujuk pada Tabel 4 di atas dapat dilihat pula alasan lain dalam pembatasan kedudukan hukum pembentuk UU dalam pengujian UU, yaitu dengan melihat kondisi empiris keterlibatan kualifikasi Pemohon pembentuk UU dalam pembentukan UU. Hal tersebut dapat dilihat pada: **Justifikasi Empiris Pertama**, Putusan Mahkamah Konstitusi Nomor 51-52-59/PUU-VI/2008, yang menegaskan keterlibatan Anggota DPR dan Partai Politik pengusung Anggota DPR yang dibatasi untuk menjadi Pemohon dalam pengujian UU dengan justifikasi memiliki keterkaitan dengan pembentukan UU, yaitu Anggota DPR dan Partai Politik yang sudah ambil bagian dan turut serta dalam pembahasan dan pengambilan keputusan secara institusional atas suatu UU yang dimohonkan pengujian akan dinyatakan tidak memiliki kedudukan hukum (*legal standing*) melalui pengaturan dalam Peraturan Mahkamah Konstitusi. Putusan *a quo* memberikan alasan pembatasan kedudukan hukum pembentuk UU dalam pengujian UU dikarenakan justifikasi empiris dalam pembentukan UU yang diajukan pengujian, sehingga kongruen dengan alasan dikotomi hak Anggota DPR sebagaimana telah diuraikan sebelumnya. Hal ini didasarkan pada bangunan logika bahwa bila hak untuk terlibat dalam pembentukan UU telah digunakan oleh Anggota DPR, maka *mutatis mutandis* Anggota DPR tidak lagi memiliki alasan hukum untuk mempermasalahkan pelaksanaan hak yang telah dilakukan sendiri oleh Anggota DPR. Adapun untuk Partai Politik, bangunan logika di atas *mutatis mutandis* diterapkan karena Anggota DPR berasal dari Partai Politik.

[34] Bandingkan dengan Bisariyadi, "Membedah Doktrin Kerugian Konstitusional," *Jurnal Konstitusi* 14, no. 1 (2017): 40; Lihat juga Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015).

Justifikasi Empiris Kedua, Putusan Mahkamah Konstitusi Nomor 71/PUU-IX/2011, yang menegaskan pembahasan UU terkait perimbangan keuangan pusat dan daerah menurut Pasal 22D ayat (1), ayat (2), dan ayat (3) UUD NRI Tahun 1945, telah melibatkan kelembagaan DPD, *mutatis mutandis* Anggota DPD. Walaupun Mahkamah Konstitusi baru "mengembalikan" kewenangan konstitusional DPD dalam pembentukan UU yang direduksi pada pengaturan di level UU pada Putusan Mahkamah Konstitusi Nomor 92/PUU-X/2012, namun sejatinya Mahkamah Konstitusi telah mengakui keterlibatan DPD dan Anggota DPD dalam pembentukan UU yang terkait perimbangan keuangan pusat dan daerah sejak Putusan Mahkamah Konstitusi Nomor 71/PUU-IX/2011. Konsekuensinya kelembagaan DPD dan Anggota DPD tidak diperkenankan untuk mengujikan UU yang terkait perimbangan keuangan pusat dan daerah karena oleh Mahkamah Konstitusi dinilai telah memiliki andil dalam tahapan pembentukan UU tersebut.

Berdasarkan kedua justifikasi empiris di atas, dapat dilihat bahwa permohonan pengujian UU yang diajukan oleh pembentuk UU harus memiliki dimensi implementasi dari kewenangan pembentukan UU. Jadi, wujud keterlibatan empiris dalam tahapan pembentukan UU yang diujikan menjadi indikator mendasar kualifikasi Pemohon pembentuk UU untuk dibatasi atau tidak sebagai Pemohon dalam pengujian UU. Dalam hal Pemohon pembentuk UU terlibat dalam tahapan pembentukan UU yang diujikan, *mutatis mutandis* hal ini menjadi *ratio legis* dalam pembatasan kedudukan hukum pembentuk UU dalam pengujian UU.

C. KESIMPULAN

Pertama, dinamika penggunaan kedudukan hukum pembentuk Undang-Undang dalam pengujian Undang-Undang ditelusuri melalui putusan Mahkamah Konstitusi sejak tahun 2003-2019 setidaknya terdapat beberapa hal perlu dicermati, yaitu: **Catatan Pertama**, kualifikasi Pemohon pembentuk UU yang paling banyak mengajukan pengujian UU adalah Perorangan WNI Anggota DPR, sedangkan kualifikasi Pemohon pembentuk UU yang tidak pernah mengajukan pengujian UU adalah kelembagaan Presiden dan kelembagaan DPR, yang notabene keduanya merupakan entitas pembentuk UU yang memiliki legitimasi sebagai pembentuk UU menurut UUD NRI Tahun 1945. Namun demikian, tidak semua dari perkara dengan kualifikasi Pemohon pembentuk UU Perorangan WNI Anggota DPR sebagai Pemohon serta merta menggunakan status jabatan Anggota DPR untuk mendapatkan kedudukan hukum dalam pengujian UU. **Catatan Kedua**, motivasi penggunaan kualifikasi Pemohon pembentuk UU pada

Pemohon Perorangan WNI lebih memiliki motif yang bervariasi dalam memanfaatkan status jabatan Anggota DPR atau Anggota DPD yang melekat pada Pemohon Perorangan WNI. Hal ini berbeda dengan kualifikasi Pemohon pembentuk UU pada Pemohon Lembaga Negara DPD atau Badan Hukum Partai Politik yang lebih *ajeg* digunakan untuk memperjuangkan kepentingan kelembagaan masing-masing dalam pengujian UU. Variasi motif dalam memanfaatkan status jabatan Anggota DPR atau Anggota DPD yang melekat pada Pemohon Perorangan WNI didasarkan pada preseden dalam putusan pengujian UU bahwa Pemohon seringkali tidak dapat membedakan kapasitasnya dalam mengajukan pengujian UU, apakah sebagai Perorangan WNI *an sich* atau Perorangan WNI dengan status jabatan sebagai Anggota DPR atau Anggota DPD. Merespons Pemohon dengan kualifikasi pembentuk UU pada Pemohon Perorangan WNI yang seringkali tidak dapat membedakan hak konstitusional yang didalilkan dimiliki, maka Mahkamah Konstitusi telah memberikan pertimbangan hukum pada beberapa putusan penting (*landmark decisions*), yang bila dirujuk secara sistematis berdasarkan *tempus* perkara, terlihat bahwa pertimbangan hukum tersebutlah yang mempengaruhi variasi motif penggunaan kualifikasi Pemohon pembentuk UU pada Pemohon Perorangan WNI.

Kedua, *ratio legis* pembatasan kedudukan hukum bagi pembentuk Undang-Undang dalam pengujian Undang-Undang oleh Mahkamah Konstitusi didapatkan berdasarkan penelusuran dan analisis terhadap putusan-putusan pengujian UU dengan Pemohon pembentuk UU pada tahun 2003-2019, sebanyak 35 (tiga puluh lima) putusan, yang pada pokoknya alasan pembatasan pemberian kedudukan hukum bagi pembentuk UU dalam pengujian UU didasarkan pada: (a) dikotomi hak konstitusional yang melekat; dan (b) justifikasi empiris keterlibatan dalam pembentukan UU. Kedua *ratio legis* tersebut didasarkan pada pertimbangan hukum Mahkamah Konstitusi pada beberapa putusan penting (*landmark decisions*) terkait kualifikasi Pemohon pembentuk UU dalam pengujian UU.

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Karakteristik Pemakzulan Presiden di Indonesia

Characteristic of Presidential Impeachment in Indonesia

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Abstrak

Salah satu fitur dari sistem presidensial adalah adanya proses pemakzulan presiden. Sebelum amandemen, Indonesia tidak mempunyai mekanisme yang jelas untuk memakzulkan presiden di tengah masa jabatannya. Pemakzulan presiden ditentukan oleh suara mayoritas di Majelis Permusyawaratan Rakyat (MPR). Hal tersebut menjadi masalah karena pemakzulan presiden hanya menggunakan proses politik dan tidak ada proses hukum di dalamnya. Setelah amandemen, konsep pemakzulan presiden lahir berdasarkan gagasan bahwa di dalam sistem presidensial presiden tidak dapat diberhentikan hanya melalui proses politik harus ada proses hukum terlebih dahulu sebelum proses politik. Oleh sebab itu, artikel ini akan menjelaskan bagaimana proses pemakzulan presiden di Indonesia dengan membandingkannya dengan negara lain. Metode penelitian yang digunakan dalam menulis artikel ini adalah metode penelitian yuridis normatif. Dari analisis yang penulis lakukan, proses pemakzulan presiden di Indonesia secara normatif tidak sesuai dengan prinsip *checks and balances*. Hal ini dikarenakan proses pemakzulan presiden di Indonesia tidak melibatkan kamar kedua (*second chamber*) dalam prosesnya.

Kata kunci: Pemakzulan Presiden; *checks and balances*; Konstitusi.

Abstract

One of the features of the presidential system is the process of presidential impeachment. Before the amendment, Indonesia did not have a clear mechanism to impeach the president in the middle of his term. The impeachment of the president is determined by a majority vote in the People's Consultative Assembly. This is a problem because the impeachment of the president only uses a political process, and there is

no legal process in it. After the amendment, the presidential impeachment concept was born that in a presidential system, the president cannot be dismissed only through a political process; there must be a legal process before the political process. Based on the analysis, the process of presidential impeachment in Indonesia does not follow the principle of checks and balances. This is because the impeachment process for the president in Indonesia does not involve the second chamber in the process.

***Keywords**: Presidential Impeachment; checks and balances; Constitution.*

A. PENDAHULUAN

1. Latar Belakang

Amandemen UUD 1945 memberikan pola hubungan yang baru antar lembaga negara di Indonesia. Pola hubungan yang awalnya bersifat vertikal hierarkis menjadi horizontal fungsionalis. Selain pola hubungan yang baru tersebut lahir juga beberapa lembaga negara baru seperti Dewan Perwakilan Daerah (DPD), Mahkamah Konstitusi (MK), dan Komisi Yudisial (KY). Jimly Asshiddiqie mengatakan bahwa ada lima poin yang menjadi perhatian dari hasil amandemen UUD 1945. *Pertama*, adanya pergeseran kekuasaan legislatif dari tangan Presiden ke DPR. *Kedua*, adanya sistem pengujian konstitusional (*judicial review*) suatu Undang-Undang terhadap Undang-Undang Dasar oleh Mahkamah Konstitusi. *Ketiga*, MPR tidak lagi menjadi lembaga negara tertinggi namun hanya sebagai lembaga tinggi negara yang sederajat dengan lembaga tinggi negara yang lain. *Keempat*, MPR tidak lagi menjadi lembaga pengejawantahan kedaulatan rakyat. *Kelima*, hubungan antar lembaga tinggi negara bersifat saling mempengaruhi satu sama lain berdasarkan prinsip *checks and balances*.[1] Lahirnya lembaga tinggi negara yang baru merupakan bentuk nyata adanya keinginan untuk memperkuat prinsip *checks and balances* dalam hubungan antar lembaga tinggi negara.

Salah satu bentuk proses *checks and balances* adalah proses pemberhentian Presiden atau yang biasa dikenal dengan *impeachment* Presiden. Pengaturan *impeachment* Presiden di Indonesia secara rinci baru ada setelah amandemen UUD 1945. Sebelumnya, proses *impeachment* Presiden lebih mengedepankan proses politik dibandingkan dengan proses hukum. Hal ini dapat dilihat bagaimana proses *impeachment* Presiden Soekarno dengan Presiden Abdurrahman Wahid yang tidak ada proses peradilan sama sekali. *Impeachment* sendiri merupakan bagian dari fungsi pengawasan tertinggi yang dimiliki oleh lembaga perwakilan.

Dalam perkembangannya artikel yang menuliskan mengenai *impeachment* pasca amandemen Undang-Undang Dasar 1945 semakin banyak dan beberapa tulisan

[1] Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, (Jakarta: Rajawali Pers, 2012), 291-292

menjelaskan mengenai perbandingan proses pemakzulan presiden di Indonesia sebelum amandemen Undang-Undang Dasar 1945 dengan setelah amandemen Undang-Undang Dasar 1945 sebagaimana yang ditulis oleh Reza Syawawi[2] dan Arry[3]. Selain itu, tulisan mengenai perbandingan proses *impeachment* di Indonesia dengan negara lain yang menggunakan sistem pemerintahan presidensial juga sudah pernah ditulis oleh Syofyan Hadi[4] dengan membandingkan proses *impeachment* di Indonesia dengan negara Amerika Serikat dan Filipina. Penelitian sebelumnya pada prinsipnya menurut penulis hanya memberikan deskripsi mengenai proses *impeachment* di Indonesia namun tidak ada yang menjawab apakah proses *impeachment* di Indonesia sudah sesuai dengan prinsip *checks and balances*. Penelitian yang paling mendekati dengan artikel penulis adalah penelitian yang dilakukan oleh Pan Mohamad Faiz dan Muhammad Erfa Redhani[5] yang menjelaskan mengenai perbandingan peran kamar kedua parlemen dengan kekuasaan kehakiman dalam proses pemberhentian presiden. Namun, penelitian yang dilakukan oleh Pan Mohamad Faiz dan Muhammad Erfa Redhani menggunakan objek perbandingan yang terlalu luas yaitu negara dengan sistem pemerintahan presidensial, parlementer, dan campuran. Sementara itu, objek perbandingan yang penulis gunakan dalam artikel ini lebih spesifik yaitu negara dengan sistem pemerintahan presidensial dan struktur parlemen bikameral yang secara anatomi lebih mirip dengan sistem pemerintahan Republik Indonesia.

Oleh sebab itu, penelitian yang dilakukan oleh penulis mencoba memberikan perspektif baru yaitu ingin menjelaskan proses pemakzulan presiden di Indonesia dengan melihat bagaimana peran setiap lembaga tinggi dalam proses *impeachment* presiden di Indonesia. Analisis ini dilakukan dengan melakukan komparasi proses *impeachment* presiden di negara lain yang menggunakan sistem pemerintahan presidensial dengan struktur parlemen bikameral. Dengan melakukan perbandingan, penulis berusaha untuk menjawab bagaimana karakteristik dari proses pemakzulan presiden di Indonesia.

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2 Reza Syawawi, "Pengaturan Pemberhentian Presiden dalam Masa Jabatan Menurut UUD 1945 (Studi Komparatif Sebelum dan Sesudah Perubahan)", *Jurnal Konstitusi* 7, No. 6 (Desember 2010): 62-90

3 Arry, "Impeachment Dalam Sistem Presidensial: Kajian Teoritik dan Normatif di Indonesia Sebelum dan Sesudah Amandemen Undang-Undang Dasar 1945", *Jurnal Online Mahasiswa* 3, No. 1 (Februari 2016): 5-12

4 Syofyan Hadi, "Impeachment Presiden dan/atau Wakil Presiden (Studi Perbandingan antara Indonesia, Amerika Serikat, dan Filipina)", DIH: *Jurnal Ilmu Hukum* 12, No. 23 (Februari 2016): 5-13, https://doi.org/10.30996/dih.v12i23

5 Pan Mohamad Faiz, Muhammad Erfa Redhani, "Analisis Perbandingan Peran kamar Kedua Parlemen dan Kekuasaan Kehakiman dalam Proses Pemberhentian Presiden", *Jurnal Konstitusi* 15, No. 2 (Juni 2018): 236-251, https://doi.org/10.31078/jk1521

2. Perumusan Masalah

Berdasarkan penjelasan latar belakang yang penulis uraikan, pengaturan mengenai *impeachment* secara rinci baru dikenal di Indonesia setelah amandemen UUD 1945. Di dalam prosesnya terdapat 3 lembaga tinggi negara yang terkait dengan proses *impeachment* yaitu Dewan Perwakilan Rakyat (DPR), Mahkamah Konstitusi (MK), dan Majelis Permusyawaratan Rakyat (MPR). Ketiga lembaga tersebut mempunyai fungsi masing-masing dalam kaitannya dengan proses pemakzulan presiden di Indonesia. Oleh sebab itu, di dalam artikel ini penulis ingin menjelaskan bagaimana karakteristik dari proses pemakzulan presiden di Indonesia dilihat dari perspektif teori pemakzulan presiden dan apakah proses pemakzulan presiden di Indonesia sudah sesuai dengan prinsip *checks and balances*.

3. Metode Penelitian

Dalam melakukan penelitian ini, penulis menggunakan metode penelitian normatif yaitu metode penelitian yang menekankan pada sumber hukum tertulis dan beberapa referensi mengenai doktrin-doktrin ilmu hukum khususnya hukum tata negara. Selain itu, penulis juga melakukan perbandingan bagaimana proses *impeachment* di Indonesia dengan proses *impeachment* di 13 negara yaitu Amerika Serikat, Filipina, Brazil, Argentina, Bolivia, Chili, Kolombia, Republik Dominica, Paraguay, Uruguay, Afrika Selatan, dan Kenya dengan membandingkan Undang-Undang Dasar 1945 dengan undang-undang dasar di 13 negara tersebut.

B. PEMBAHASAN

1. Sejarah impeachment

Konsep pertama *impeachment* pertama kali diperkenalkan oleh Inggris pada abad ke-14, walaupun Inggris merupakan negara kerajaan namun *impeachment* telah digunakan oleh parlemen untuk mencari pertanggungjawaban raja. *Impeachment* pertama kali diimplementasikan di Inggris pada bulan November 1330 pada masa pemerintahan Edward III terhadap Roger Mortimer, Baron of Wigmore yang kedelapan, dan Earl of March yang pertama. Tahun 1642, di Inggris terjadi pertarungan yang hebat antara eksekutif (raja) dengan parlemen. Ketika itu parlemen melakukan *impeachment* terhadap Earl of Stafford yaitu seorang menteri dari Raja Charles I yang melanggar hukum dan memperkenalkan pemerintahan tirani yang sewenang-wenang. Menurut Berger, penggunaan *impeachment* ini memperlihatkan sejarah penting dalam kerajaan

Inggris terutama pandangan tentang kekuasaan absolut yang beralih ke supremasi parlemen.[6]

Di Amerika Serikat, pembahasan mengenai konsep *impeachment* sudah dilakukan sejak awal negara tersebut berdiri. Dikarenakan oleh perasaan trauma mengenai kekuasan raja yang absolut di Inggris, para *founding fathers* Amerika Serikat memandang *impeachment* sebagai instrumen yang fundamental dalam mengontrol para pejabat publik yang mempunyai kekuasaan yang besar agar ketika mereka berbuat korup bisa dilengserkan oleh mekanisme yang sesuai dengan konstitusi. Pada awalnya, ketika negara Amerika Serikat berdiri, beberapa negara bagian sudah mempunyai mekanisme *impeachment* masing-masing. Seperti di konstitusi Pennsylvania bahwa pejabat publik dapat diberhentikan apabila telah melakukan maladministrasi atau sudah tidak berkompeten dalam mengemban jabatan tersebut. Sementara itu, di konstitusi New York dan North Carolina bahwa pejabat publik dapat diberhentikan apabila melakukan korupsi dan maladministrasi[7]. Selanjutnya, pembahasan mengenai *impeachment* dilakukan di konvensi ketatanegaraan Amerika Serikat pada tahun 1787 di Philadelphia yang dihadiri oleh 13 negara bagian. Di dalam konvensi tersebut setidaknya ada 4 hal yang dibahas mengenai *impeachment* yaitu; (1) mengenai persidangan dalam proses *impeachment*; (2) apakah *impeachment* bisa dikenakan ke presiden; (3) Jenis-jenis kesalahan atau kejahatan apa yang termasuk dalam prasyarat *impeachment*; dan (4) Berapa suara yang dibutuhkan untuk menyatakan pejabat yang sedang dalam proses *impeachment* diberhentikan dari jabatannya. Dari pembahasan tersebut lahirlah ketentuan mengenai *impeachment* yang termaktub di dalam Konstitusi Federal Amerika Serikat.[8]

Impeachment di Amerika Serikat pertama kali dilakukan pada tahun 1797 yang dituduhkan kepada Senator William Blount yang mengambil sikap permusuhan kepada militer. Pada tahun 1796 Blount terlibat dalam upaya pengembangan perekonomian Louisiana dan Florida yang terkait dengan penjualan tanah. Pada tahun 1797, *House of Representatives* melakukan *impeachment* kepada Blount yang mengakibatkan diberhentikan dari jabatannya. Proses *impeachment* ini menjadi pembahasan sampai tahun 1799, karena banyak anggota yang ikut di dalam *Constitutional Convention* tahun 1787 mengatakan bahwa *impeachment* tidak dapat dilakukan oleh anggota legislatif dan *impeachment* terhadap Blount sesungguhnya tidak sesuai dengan konstitusi.[9]

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6 Tarihoran, Naf'an, *Pemakzulan Presiden Amerika Serikat* (Jakarta: Pt. Raja Grafindo Press, 2020), 22-24
7 John Murphy, *The Impeachment Process*, (New York: Chelsea House, 2007), 22-24
8 Murphy, *The Impeachment Process,* 24-37
9 Tarihoran, *Makna Impeachment Presiden Bagi Orang Amerika*, 26-27

Dalam perjalanan sejarah politik dan ketatanegaraan Amerika Serikat, Presiden Amerika Serikat yang pernah menjalani proses *impeachment* ada empat yaitu;[10] (1) Presiden Andrew Johnson yang dituduh atas 3 pasal pelanggaran yaitu kelalaian tugas, pelanggaran sumpah, dan merendahkan konstitusi. Proses *impeachment* diajukan oleh *house* karena Presiden Andrew Johnson memecat Menteri Perang Edwin M. Stanton dan menggantinya dengan Jenderal Lorenzo Thomas tanpa ada persetujuan dari *Senate*. Namun, proses *impeachment* tersebut tidak berhasil memberhentikan Presiden Andrew Johnson karena kurang satu suara di *Senate*; (2) Presiden Richard Nixon yang dituduh terlibat dalam upaya pembobolan kantor Komisi Nasional Partai Demokrat di Gedung Watergate untuk memasang alat penyadap pada Juni 1972. Presiden Richard Nixon juga dituduh menyalahgunakan kekuasaan dengan mengerahkan alat negara seperti FBI dan Kementerian Kehakiman untuk menutupi skandal. Namun, sebelum dilakukan *impeachment voting* di *House* Presiden Richard Nixon mengundurkan diri pada 8 Agustus 1974; (3) Presiden Bill Clinton yang dituduh atas skandal perselingkuhan dengan pegawai magang gedung putih Monica Lewinsky. Namun, proses *impeachment* tersebut tidak dapat memberhentikan Presiden Bill Clinton karena tidak mendapat persetujuan dari *Senate* pada Februari 1999; dan (4) Presiden Donald Trump yang dituduh melakukan penyalahgunaan kekuasaan dan upaya menghalang-halangi kongres. Namun, proses *impeachment* tersebut tidak dapat memberhentikan Presiden Donald Trump karena suara yang dibutuhkan di *Senate* masih kurang untuk memberhentikan Presiden Donald Trump.[11]

2. Teori dan Model *impeachment*

Adanya pengaturan *impeachment* merupakan konsekuensi logis apabila suatu negara ingin memperkuat sistem Presidensial. Hal ini merupakan bagian dari *checks and balances* antara kekuasaan legislatif dengan kekuasaan eksekutif namun dikarenakan legitimasi kekuasaan eksekutif tidak berasal dari kekuasaan legislatif, maka perlu dibuat mekanisme agar kekuasaan legislatif tetap mempunyai kontrol terhadap kekuasaan eksekutif. Oleh sebab itu, perlu dibuat aturan mengenai *impeachment*. Secara luas definisi *impeachment* bisa diartikan yaitu merupakan perangkat yang diberikan oleh konstitusi kepada lembaga legislatif untuk memberhentikan presiden di tengah masa jabatannya. Secara sempit definisi *impeachment* yaitu sebuah pengadilan politik untuk

[10] *Trump Dimakzulkan! Ini Presiden AS Lain yang di-Impeachment,* CNBC Indonesia, diakses tanggal 20 Mei 2022, https://www.cnbcindonesia.com/news/20191219090738-4-124313/trump-dimakzulkan-ini-presiden-as-lain-yang-di-impeachment/

[11] Donald Trump lolos dari Pemakzulan: Apa dampak dirinya, Joe Biden, dan Amerika Serikat, BBC News Indonesia, diakses tanggal 20 Mei 2022, https://www.bbc.com/indonesia/dunia-55914470

memberhentikan presiden di tengah masa jabatannya[12]. Namun yang perlu diperhatikan dalam mekanisme *impeachment* terdapat proses hukum dan proses politik.

Secara teoritis, menurut Naoko Kada pembagian model mekanisme *impeachment* di dunia dibagi menjadi dua yaitu *legislature-dominant* dan *judiciary-dominant*. *Legislature-dominant* yaitu model mekanisme *impeachment* yang memberikan kewenangan kepada lembaga legislatif sebagai pemutus terakhir apakah Presiden dapat diberhentikan atau tidak. Sementara itu, *judiciary-dominant model* yaitu model mekanisme *impeachment* yang memberikan kewenangan kepada lembaga yudisial sebagai pemutus terakhir apakah Presiden dapat diberhentikan atau tidak[13]. Sementara itu, Anibal Perez Linan membagi model mekanisme *impeachment* menjadi 3 yaitu: (1) *Congressional Model*; (2) *Judicial Model*; dan (3) *Mixed Model*. *Congressional model* yaitu apabila keputusan terakhir untuk memberhentikan Presiden berada di tangan lembaga legislatif. Sedangkan, *Judicial model* yaitu apabila keputusan terakhir dari proses pemberhentian Presiden berada di tangan lembaga yudisial. *Mixed Model*[14] yaitu model yang menggabungkan tipe pemberhentian Presiden dengan *Congressional model* dan *Judicial model*[15]*.* Selain itu, model mekanisme *impeachment* juga bisa dibagi menjadi 3 yaitu: (1) *American model*; (2) *Judiciary-dominant model*; dan (3) *Unicameral model*. *American model* yaitu model mekanisme *impeachment* yang menempatkan kamar pertama sebagai pihak yang mengajukan tuduhan atau yang memulai proses *impeachment* dan kamar kedua yang berperan sebagai juri. Sementara itu, *judiciary-dominant model* yaitu model mekanisme *impeachment* yang memberikan kewenangan kepada lembaga perwakilan untuk menyelenggarakan persidangan yang dilaksanakan oleh lembaga yudisial. *Unicameral model* yaitu model mekanisme *impeachment* yang menempatkan lembaga legislatif yang sama sebagai yang mengajukan tuduhan atau yang memulai proses *impeachment* sekaligus yang menyelenggarakan persidangan.[16]

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12 Anibal Perez Linan, *The Institutional Determinants of Impeachment*, https://www.researchgate.net/publication/228423583_The_Institutional_Determinants_of_Impeachment (2000): 6-7.

13 Naoko Kada, "Politics of Impeachment in Latin America", (PhD diss., University of California, San Diego, 2002), 100-110.

14 Gisela Pereyra Doval and Esteban Actis, "The Political and Economic Instability of Dilma Rousseff's Second Government in Brazil: Between Impeachment and the Pragmatic Turn", *India Quarterly* 72, no. 2 (2016): 125. https://www.jstor.org/stable/48505491. Di Brazil proses *impeachment* yang ditempuh oleh Presiden berbeda tergantung dari dakwaan atau tuduhan yang diajukan oleh *lower house*. Apabila terkait dengan pidana umum, maka yang menyidangkan adalah Mahkamah Agung. Namun, apabila terkait dengan pidana yang berkaitan dengan jabatan, maka yang menyidangkan adalah Senat. Oleh sebab itu, Brazil termasuk dalam *mixed model*.

15 Anibal Perez-Linan, *Presidential Impeachment and the New Political Instability in Latin America* (New York: Cambridge University Press, 2007), 133-143.

16 Victor J. Hinohosa, and Aníbal S. Pérez-Liñán, "Presidential Survival and the Impeachment Process: The United States and Colombia", *Political Science Quarterly* 121, no. 4 (2006): 654-655. http://www.jstor.org/stable/20202766. .

Secara teoritis, *impeachment* merupakan kewenangan khas yang dimiliki oleh lembaga legislatif yang mana apabila di dalam suatu negara tersebut struktur parlemennya adalah bikameral, maka kamar kedua juga terlibat dalam mekanisme *impeachment*. Peran lembaga legislatif dalam proses *impeachment* pada umumnya sebagai pihak yang memulai proses *impeachment* dengan melakukan investigasi melalui komite khusus yang apabila investigasi sudah selesai diselesaikan dan dilaporkan ke lembaga legislatif, maka lembaga legislatif akan mengambil suara apakah tuduhan terhadap presiden dapat dilanjutkan atau tidak dengan ketentuan yang bervariasi di masing-masing negara.[17] Selain lembaga legislatif, beberapa negara juga menempatkan lembaga yudisial (kekuasaan kehakiman) dalam proses *impeachment* dengan peran yang bervariasi. Di Amerika Serikat, proses *impeachment* tidak melibatkan lembaga yudisial namun Ketua Mahkamah Agung Amerika Serikat yang akan memimpin persidangan *impeachment* apabila presiden yang disidangkan dalam persidangan *impeachment*. Di negara lain seperti di Honduras, sampai tahun 2013, lembaga yudisial merupakan satu-satunya lembaga yang bisa memberhentikan presiden di tengah masa jabatannya. Di Kolombia, lembaga yudisial dapat memberhentikan presiden di tengah masa jabatannya apabila pelanggaran yang dilakukan oleh presiden termasuk dalam kejahatan pidana umum.[18]

Di beberapa negara mekanisme *impeachment* juga melibatkan publik seperti di Gambia proses *impeachment* disertai dengan referendum yang menyatakan apakah publik mendukung atau menolak pemberhentian presiden yang diajukan oleh lembaga legislatif. Di Austria yang menganut sistem semi presidensial, lembaga legislatif dapat mengajukan referendum untuk memulai proses *impeachment*. Di Bolivia, Ekuador, dan Venezuela publik dapat mengajukan petisi untuk mengadakan referendum untuk memberhentikan presiden.[19]

Dalam perkembangannya, *impeachment* yang awalnya merupakan fitur yang bertujuan untuk memperkuat sistem presidensial menjadi instrumen yang dapat digunakan oleh lembaga legislatif untuk menciptakan instabilitas politik yang bermuara pada pemberhentian presiden. Oleh sebab itu, secara tidak langsung presiden di dalam sistem pemerintahan presidensial harus memiliki dukungan

[17] Tom Ginsburg, Aziz Huq, and David Landau, "The Comparative Constitutional Law of Presidential Impeachment", *The University of Chicago Law Review* 88, no. 1 (2021): 129-130. https://www.jstor.org/stable/26966492.
[18] Ginsburg, Haq, and Landau, "The Comparative Constitutional Law of Presidential Impeachment": 132.
[19] Ginsburg, Haq, and Landau, "The Comparative Constitutional Law of Presidential Impeachment": 134-135.

yang kuat di lembaga legislatif selain mendapatkan dukungan dari rakyat. Hal ini bertujuan untuk memperkuat posisi presiden sebagai pemimpin suatu negara. [20]

3. Teori Struktur Parlemen

Secara teoritis maupun praktik pada umumnya, struktur parlemen di dunia dibagi menjadi dua yaitu unikameral dan bikameral. Unikameral yaitu struktur parlemen yang hanya mempunyai satu lembaga perwakilan sedangkan bikameral yaitu struktur parlemen yang mempunyai dua lembaga perwakilan. Dalam menentukan struktur parlemen suatu negara, Fatmawati mempunyai indikator sebagai berikut: (1) Memiliki kewenangan sesuai dengan fungsi parlemen; (2) Memiliki anggota tersendiri yang merupakan wakil dari warga negara dengan kategori dan metode seleksi tertentu; dan (3) Memiliki struktur kelembagaan tersendiri dan aturan-aturan tersendiri tentang prosedur dalam lembaga tersebut[21]. Secara umum, struktur parlemen bikameral biasanya digunakan di negara dengan bentuk federal, luas, dan dengan sistem pemerintahan presidensial. Sementara itu, struktur parlemen unikameral biasanya digunakan di negara dengan bentuk kesatuan, kecil, dan dengan sistem pemerintahan parlementer. [22]

Secara teoritis, ada 3 (tiga) bentuk perwakilan yang dikenal di dunia yaitu: (1) representasi politik (*political representation*); (2) representasi territorial (*territorial representation*); dan (3) representasi fungsional (*functional representation*)[23]. Selain terkait dengan representasi, lahirnya konsep struktur parlemen bikameral bertujuan untuk mencegah tirani mayoritas dalam proses legislasi dikarenakan dalam proses legislasi perlu ada *Double check* atau *second review* agar produk legislasi yang dikeluarkan tidak hanya menguntungkan mayoritas saja. Setidaknya ada 2 kekuatan yang dimiliki oleh kamar kedua dalam kaitannya dengan proses legislasi yaitu kekuatan untuk menunda (*delaying power*) dan kekuatan untuk menentukan agenda (*agenda setting power*) yang sangat berpengaruh terhadap proses legislasi.[24] Paolo Passaglia dalam tulisannya menjelaskan setidaknya ada 5 (lima) model terkait dengan kamar

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[20] Anibal Perez Linan, "A Two-Level Theory of Presidential Instability", *Latin American Politics and Society* 56, no. 1 (2014): 37-38. http://www.jstor.org/stable/43286513.

[21] Fatmawati, "Struktur dan Fungsi Legislasi Parlemen dengan Sistem Multikameral", (Disertasi Doktor Universitas Indonesia, Jakarta, 2009), 51

[22] Kyle Kopchak, "Overview of Bicameral Legislatures Potential Impact on the Executive Selection Process", *Indiana Journal of Constitutional Design* 9, Article 2 (Maret 2022): 1

[23] Adventus Toding, "DPD dalam Struktur Parlemen Indonesia: Wacana Pemusnahan versus Penguatan", *Jurnal Konstitusi* 14, No. 2 (Juni 2017): 305

[24] Abhinay Muthoo, and Kenneth A. Shepsle, *The Constitutional Choice of Bicameralism*, MPRA Paper 5825 (2007), 10-17.

kedua yaitu: (1) *aristocratic model*; (2) *counter-majoritarian model*; (3) *chamber of further reflection model*; (4) *corporatist model*; dan (5) *territorial model*.[25]

Selain itu, Arend Ljiphart juga membuat empat kategori struktur kamar yang terdiri dari: (1) *Strong bicameralism*; (2) *Medium-strength bicameralism*; (3) *Weak bicameralism*; dan (4) *Unicameral legislatures*. Pembagian empat kategori tersebut didasarkan pada argumentasi sebagai berikut: (1) Bagaimana kewenangan formal masing-masing kamar sebagaimana yang diatur di dalam Undang-Undang Dasar ataupun peraturan perundang-undangan yang lain; (2) Bagaimana legitimasi demokrasi dari masing-masing kamar. Apakah masing-masing kamar mempunyai kewenangan formal yang setara dengan legitimasi demokrasinya. Apabila terdapat ketidaksetaraan maka bisa dikatakan struktur parlemen tersebut asimetris. Namun, apabila setara antara kewenangan formal dengan legitimasi demokrasinya, maka struktur parlemen tersebut simetris; dan (3) Bagaimana metode pemilihan antar masing-masing kamar. Apabila terdapat perbedaan, maka struktur parlemen tersebut bersifat *incongruent*.

Dari penjelasan di atas, dapat dilihat bahwa *strong bicameralism* mempunyai karakteristik simetris dan *incongruence*. Sementara itu, *medium-strength bicameralism* mempunyai karakteristik tidak adanya salah satu dari simetris dan *incongruence* dan *weak bicameralism* memiliki karakteristik asimetris dan *congruence*. [26]

4. Mekanisme impeachment Presiden di Indonesia

Di Indonesia *impeachment* dimaknai sebagai proses pemberhentian Presiden di dalam masa jabatannya oleh lembaga legislatif (DPR) yang dikarenakan adanya pelanggaran hukum tertentu. Pengertian *impeachment* di Indonesia lebih sempit dibandingkan dengan pengertian *impeachment* di Amerika Serikat. Istilah *impeachment* pun baru familiar digunakan setelah amandemen UUD 1945 yang mana hal ini merupakan konsekuensi logis apabila ingin memperkuat sistem pemerintahan Presidensial yang merupakan kesepakatan yang sudah diambil oleh Panitia Ad Hoc I Badan Pekerja MPR. Panitia Ad Hoc I Badan Pekerja MPR berpendapat bahwa ciri sistem pemerintahan Presidensial yaitu: (1) adanya masa jabatan Presiden yang bersifat tetap (*fixed term*); (2) Presiden merupakan kepala negara dan kepala pemerintahan; (3) Adanya mekanisme saling mengawasi dan mengimbangi atau yang biasa disebut dengan *checks and balances;* dan (4) adanya mekanisme *impeachment*.[27]

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[25] Paolo Passaglia, "Unicameralism, Bicameralism, Multicameralism: Evolution and Trends in Europe", *Perspective on Federalism* 10, issue 2 (2018): 10.

[26] Fatmawati, "Struktur dan Fungsi Legislasi Parlemen dengan Sistem Multikameral", 31-32

[27] Mahkamah Konstitusi, *Mekanisme Impeachment dan Hukum Acara Mahkamah Konstitus*i, (Jakarta: Mahkamah Konstitusi, 2005), 2

Sebelum amandemen UUD 1945 proses pemberhentian Presiden di Indonesia sangat politis tidak melibatkan lembaga yudisial. Ada 2 Presiden di Indonesia yang pernah diberhentikan di tengah masa jabatannya yaitu Soekarno dan Abdurrahman Wahid. Soekarno diberhentikan oleh MPRS dikarenakan adanya petunjuk bahwa Soekarno terlibat dengan peristiwa G-30 S/PKI. Oleh sebab itu, akhirnya MPRS menolak pidato pertanggungjawaban Soekarno yaitu Nawaksara dan Pelengkap Nawaksara.[28] Sementara itu, Presiden Abdurrahman Wahid diberhentikan oleh MPR dikarenakan adanya dugaan keterlibatan sang Presiden dalam kasus *Bruneigate* dan Yanatera Bulog.[29] Dari dua kasus pemberhentian Presiden di atas dapat dilihat bahwa alasan pemberhentian Presiden pada waktu itu sangatlah politis dan mengganggu kestabilan politik pada saat itu. Tidak adanya mekanisme hukum dalam proses pemberhentian Presiden memberikan kekhawatiran posisi Presiden akan mudah digoyang oleh lawan politiknya. Adanya pengaturan *impeachment* di dalam UUD 1945 setelah amandemen memberikan kepastian hukum dalam proses pemberhentian Presiden sehingga lebih menjamin adanya kestabilan pemerintahan.

Secara garis besar, proses *impeachment* Presiden di Indonesia melibatkan 3 lembaga negara yaitu DPR, Mahkamah Konstitusi, dan MPR. DPR berperan dalam proses penuntutan dalam hal ini proses penuntutan tersebut merupakan bagian dari hak menyatakan pendapat yang dimiliki oleh DPR. Hak menyatakan baru dapat diajukan apabila diusulkan oleh paling sedikit 25 anggota yang menyatakan adanya dugaan bahwa Presiden dan/atau Wakil Presiden melakukan pelanggaran hukum berupa pengkhianatan terhadap negara, korupsi, penyuapan, tindak pidana berat lainnya maupun perbuatan tercela dan/atau Presiden dan/atau Wakil Presiden sudah tidak lagi memenuhi syarat sebagai Presiden dan/atau Wakil Presiden.[30] Pengusulan

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[28] Indonesia, *Ketetapan Majelis Permusyawaratan Rakyat Sementara tentang Pencabutan Kekuasaan Pemerintahan Negara dari Presiden Soekarno*, *Ketetapan MPRS No. XXXIII/MPRS/1967*. Lihat Hamdan Zoelva, *Impeachment Presiden: Alasan Tindak Pidana Pemberhentian Presiden Menurut UUD 1945*, (Jakarta: Konstitusi Press, 2005), 97-99

[29] Kasus *bruneigate* yaitu kasus mengenai dana bantuan dari Sultan Brunei Darussalam sebesar US $ 2 juta yang mengaitkan nama Presiden Abdurrahman wahid. Sedangkan kasus Yanatera Bulog yaitu kasus mengenai bantuan dana Yanatera Bulog sebesar Rp 35 Milyar. Dua kasus tersebut memicu DPR untuk mengajukan usul penggunaan hak mengadakan penyelidikan terhadap dua kasus tersebut. Kesimpulan yang didapat oleh DPR yaitu: Dalam kasus dana Yanatera Bulog, Pansus berpendapat "Patut diduga bahwa Presiden Abdurrahman Wahid berperan dalam pencairan dan penggunaan dana Yanatera Bulog. Sementara itu, untuk kasus Dana Bantuan Sultan Brunei Pansus berpendapat "Adanya inkonsistensi pernyataan Presiden Abdurrahman Wahid tentang masalah bantuan Sultan Brunei Darussalam menunjukan bahwa Presiden telah menyampaikan keterangan yang tidak sebenarnya kepada masyarakat. Presiden Abdurrahman Wahid akhirnya diberhentikan oleh MPR melalui Ketetapan MPR RI No. II/MPR/2001. Lihat Hamdan Zoelva, Impeachment Presiden: Alasan..., 99-104

[30] Dewan Perwakilan Rakyat, *Peraturan Dewan Perwakilan Rakyat Republik Indonesia tentang Tata Tertib*, Peraturan DPR No. 1 tahun 2014, Ps. 178 ayat (1)

tersebut harus disertai dengan dokumen minimal yaitu: (1) Materi dan alasan pengajuan usul pernyataan pendapat; dan (2) Materi dan bukti yang sah atas dugaan adanya tindakan atau materi dan bukti yang sah atas dugaan tidak dipenuhinya syarat sebagai Presiden dan/atau Wakil Presiden.[31] Usulan disampaikan kepada pimpinan DPR, lalu Pimpinan DPR akan mengumumkannya dalam rapat paripurna DPR. Setelah itu, Badan Musyawarah akan membahas dan menjadwalkan rapat paripurna untuk memberikan kesempatan kepada pengusul untuk menjelaskan kepada semua fraksi. Setelah itu, rapat paripurna akan memutuskan apakah usulan dapat diterima atau tidak.[32] Apabila tidak diterima, maka usulan tersebut tidak dapat diajukan kembali pada masa sidang itu.[33] Namun, apabila diterima maka DPR akan membentuk panitia khusus yang terdiri dari semua fraksi.[34] Panitia khusus tersebut bertugas untuk membuat laporan panitia khusus. Apabila laporan panitia khusus ditolak oleh DPR, maka laporan tersebut selesai dan tidak dapat diajukan kembali.[35] Namun, apabila laporan tersebut diterima oleh DPR, maka laporan tersebut akan dilanjutkan ke Mahkamah Konstitusi untuk mendapatkan putusan.[36] Setelah itu, proses berlanjut ke Mahkamah Konstitusi, proses di Mahkamah Konstitusi berlangsung selama 90 hari sejak perkara tersebut diregistrasi di Buku Registrasi Perkara Konstitusi. Terdapat 6 tahap di dalam proses persidangan tersebut:[37]

1. *Tahap I: Sidang Pemeriksaan Pendahuluan*
2. *Tahap II: Tanggapan oleh Presiden dan/atau Wakil Presiden*
3. *Tahap III: Pembuktian oleh DPR*
4. *Tahap IV: Pembuktian oleh Presiden dan/atau Wakil Presiden*
5. *Tahap V: Kesimpulan, baik oleh DPR maupun oleh Presiden dan/atau Wakil Presiden*
6. *Tahap VI: Pengucapan Putusan*

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[31] Dewan Perwakilan Rakyat, *Peraturan Dewan Perwakilan Rakyat Republik Indonesia tentang Tata Tertib*, Ps. 178 ayat (2)

[32] Dewan Perwakilan Rakyat, *Peraturan Dewan Perwakilan Rakyat Republik Indonesia tentang Tata Tertib*, Ps. 180 ayat (1)

[33] Dewan Perwakilan Rakyat, *Peraturan Dewan Perwakilan Rakyat Republik Indonesia tentang Tata Tertib*, Ps. 180 ayat (3)

[34] Dewan Perwakilan Rakyat, *Peraturan Dewan Perwakilan Rakyat Republik Indonesia tentang Tata Tertib*, Ps.180 ayat (2)

[35] Dewan Perwakilan Rakyat, *Peraturan Dewan Perwakilan Rakyat Republik Indonesia tentang Tata Tertib*, Ps. 182 ayat (3)

[36] Dewan Perwakilan Rakyat, *Peraturan Dewan Perwakilan Rakyat Republik Indonesia tentang Tata Tertib*, Ps. 182 ayat (2)

[37] Mahkamah Konstitusi, *Peraturan Mahkamah Konstitusi tentang Pedoman Beracara dalam Memutus Pendapat Dewan Perwakilan Rakyat Mengenai Dugaan Pelanggaran oleh Presiden dan/atau Wakil Presiden*, PMK No. 21 tahun 2009, Ps. 9 ayat (3)

Dalam memutus pendapat DPR tersebut, ada 3 kemungkinan MK memutuskan. Pertama, amar putusan menyatakan bahwa permohonan tidak dapat diterima dikarenakan permohonan tidak memenuhi persyaratan formil. Kedua, amar putusan menyatakan bahwa permohonan ditolak dikarenakan Presiden dan/atau Wakil Presiden tidak terbukti. Ketiga, amar putusan membenarkan pendapat DPR dikarenakan bahwa Presiden dan/atau Wakil Presiden terbukti melakukan pelanggaran hukum dan/atau Presiden dan/atau Wakil Presiden tidak lagi memenuhi syarat sebagai Presiden dan/atau Wakil Presiden.[38]

Apabila Mahkamah Konstitusi membenarkan pendapat DPR, maka DPR akan menyelenggarakan rapat paripurna untuk meneruskan usul pemberhentian Presiden dan/atau Wakil Presiden kepada MPR. MPR setelah menerima usul DPR wajib menyelenggarakan sidang untuk memutus usulan DPR tersebut disertai dengan putusan Mahkamah Konstitusi dalam kurun waktu paling lambat 30 hari setelah MPR menerima usulan tersebut.[39]

5. Mekanisme *impeachment* di negara lain

Impeachment presiden pada umumnya melibatkan 2 proses yaitu proses hukum dan proses politik. Proses hukum yaitu dengan forum pengadilan yang mempunyai prosedur tersendiri sedangkan proses politik yaitu melibatkan lembaga perwakilan rakyat yang ditentukan dengan *voting*. Penulis akan membahas bagaimana mekanisme *impeachment* di negara yang menggunakan sistem presidensial dengan struktur parlemen bikameral. Dalam hal ini, penulis menganalisis mekanisme pemberhentian presiden atau *impeachment* di 13 negara sebagai berikut:

a. Mekanisme Pemberhentian Presiden di Amerika Serikat

Di dalam Konstitusi Amerika Serikat yang berwenang untuk mengajukan tuduhan pemberhentian Presiden adalah *House of Representatives.*[40] Setelah itu, apabila disepakati secara mayoritas tuduhan pemberhentian Presiden tersebut akan disidangkan di hadapan *Senate.*[41] Namun, yang memimpin sidang tersebut

[38] Mahkamah Konstitusi, *Peraturan Mahkamah Konstitusi tentang Pedoman Beracara dalam Memutus Pendapat Dewan Perwakilan Rakyat Mengenai Dugaan Pelanggaran oleh Presiden dan/atau Wakil Presiden*, PMK No. 21 tahun 2009, Ps. 19 ayat (3)

[39] Majelis Permusyawaratan Rakyat, *Peraturan Majelis Permusyawaratan Rakyat tentang Tata Tertib*, Peraturan MPR No. 1 tahun 2014, Ps. 117 ayat (1)

[40] Pasal I ayat 2 Poin 5 Konstitusi Amerika Serikat berbunyi:*"The House of Representatives shall choose their Speaker and other officers; and shall have the sole Power of Impeachment."*

[41] Pasal I ayat 3 Poin 6 Konstitusi Amerika Serikat berbunyi: *"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall be President and no Person shall he convicted without the Concurrence of two thirds of the Members present."*

adalah Ketua Mahkamah Agung Amerika Serikat. Di dalam sidang tersebut anggota *Senate* menjadi juri yang menentukan Presiden bersalah atau tidak. Senate dapat memakzulkan Presiden apabila 2/3 dari seluruh anggota Senate setuju bahwa Presiden harus dimakzulkan. Syarat Presiden Amerika Serikat dapat diberhentikan dari jabatannya setelah didakwa apabila dinyatakan bersalah melakukan pengkhianatan (*treason*), penyogokan (*bribery*), atau kejahatan berat (*high crimes*), dan pelanggaran lainnya (*misdemeanors*).[42]

b. Mekanisme Pemberhentian Presiden di Filipina

Di dalam Konstitusi Filipina dijelaskan bahwa Presiden dapat diberhentikan apabila terbukti telah melanggar konstitusi, pengkhianatan, penyuapan, gratifikasi dan korupsi, pelanggaran berat, dan pengkhianatan terhadap kepercayaan publik (*betrayal of public trust*). [43] Di dalam Konstitusi Filipina, lembaga yang berwenang untuk mengajukan *article of impeachment* adalah *House of Representatives*.[44] Dorongan untuk melakukan *impeachment* juga dapat berasal dari warga negara melalui resolusi atau *endorsement* yang akan disampaikan oleh anggota *House of Representatives* dengan dimasukan ke dalam *Order of Business* selama 10 hari setelah itu akan disampaikan kepada Komite. Lalu komite melakukan dengar pendapat dan setelah mendapatkan mayoritas dukungan akan dijadikan resolusi oleh *House of Representatives*.[45] Resolusi tersebut minimal mendapatkan dukungan minimal 1/3 dari seluruh anggota *House of Representatives*.[46] Apabila *article of impeachment* sudah disepakati maka proses akan dilanjutkan ke *Senate*.

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42 Pasal II ayat 4 Konstitusi Amerika Serikat berbunyi: *"The President, Vice President and all Civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery or other high crimes and Misdemeanors."*

43 Pasal XI ayat 2 Konstitusi Filipina berbunyi: *"The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from offices as provided by law, but not by impeachment."*

44 Pasal XI ayat 3 poin 1 Konstitusi Filipina berbunyi: "*The House of Representatives shall have the exclusive power to initiate all cases of impeachment"*

45 Pasal XI ayat 3 poin 2 Konstitusi Filipina berbunyi: *"A verified complaint for impeachment may be filed by any Member of the House of Representatives or by any citizen upon a resolution or endorsement by any Member thereof, which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof."*

46 Pasal XI ayat 3 poin 3 Konstitusi Filipina berbunyi: *"A vote of at least one-third of all the Members of the House shall be necessary either to affirm a favorable resolution with the Articles of Impeachment of the Committee, or override its contrary resolution. The vote of each Member shall be recorded."*

Senate mempunyai kewenangan untuk mengadili dan memutuskan setiap kasus *impeachment.* Persidangan tersebut dipimpin oleh Ketua Mahkamah Agung. Pemberhentian Presiden berhasil apabila mendapatkan dukungan 2/3 dari semua anggota *Senate*.[47]

c. Mekanisme Pemberhentian Presiden di Brazil

Di dalam Konstitusi Brazil kewenangan untuk memulai *impeachment* Presiden berada di *Chamber of Deputies*. Proses *impeachment* baru dapat dimulai apabila terdapat kesepakatan minimal 2/3 dari seluruh anggota *Chamber of Deputies*.[48] Selain *Chamber of Deputies*, *Federal Senate* memiliki kewenangan untuk mengadili dakwaan *impeachable offenses* yang diajukan oleh *Chamber of Deputies*.[49] Di dalam Konstitusi Brazil syarat Presiden untuk bisa diberhentikan ada 2 yaitu apabila Presiden telah melakukan *criminal offenses* atau melakukan *impeachable offenses*. Di dalam Pasal 86 Konstitusi Brazil dijelaskan bahwa apabila 2/3 dari seluruh anggota *Chamber of Deputies* menyetujui dakwaan *impeachment* terhadap Presiden-baik dakwaan atas dasar *criminal offenses* yang akan diadili oleh Mahkamah Agung Brazil maupun dakwaan atas dasar *impeachable offenses* yang diadili oleh *Federal Senate*- maka Presiden harus berhenti sementara dari tugas dan jabatannya sampai proses peradilan tersebut mengeluarkan putusannya.[50]

Namun, apabila selama 180 hari proses peradilan tidak dapat memberikan hasil, maka status pemberhentian sementara Presiden dicabut.[51]

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47 Pasa XI ayat 3 poin 6 Konstitusi Filipina berbunyi: *"The Senate shall have the sole power to try and decide all cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate."*

48 Pasal 51 ayat 1 Konstitusi Brazil berbunyi: "*The Chamber of Deputies has exclusive power: To Authorize, by two-thirds of its members, institution of legal charges against the President and Vice-President of the Republic and the Ministers of the Federal Government"*

49 Pasal 52 ayat 1 Konstitusi Brazil berbunyi: "*The Federal Senate has exclusive power: To try the President and the Vice-President of the Republic for impeachable offenses, as well as Ministers of the Federal Government and the Commanders of the Navy, the Army and the Air Force for crimes of the same nature connected with them"*

50 Pasal 86 ayat (1) Konstitusi Brazil berbunyi: *"If two-thirds of the Chamber of Deputies accept an accusation against the President of the Republic, he shall be tried before the Supreme Federal Tribunal for common criminal offenses or before the Federal Senate for impeachable offenses." (1). The President shall be suspended from his duties: (I) In common criminal offenses, if the accusation or criminal complaint is received by the Supreme Federal Tribunal; (II) In impeachable offenses, after proceedings are instituted by the Federal Senate.*

51 Pasal 86 ayat (2) Konstitusi Brazil berbunyi: "*If, after a period of one hundred eighty days, the trial has not been concluded, the President's suspension shall end, without prejudice to normal progress of the proceedings."*

d. Mekanisme Pemberhentian Presiden di Argentina

Di dalam Konstitusi Argentina, kewenangan untuk memulai proses *impeachment* Presiden berada di *House of Deputies*. Proses *impeachment* Presiden baru dapat dimulai apabila 2/3 anggota yang hadir menyetujui.[52] Setelah dari *House of Deputies*, proses *impeachment* Presiden dilanjutkan ke *Senate*. Selanjutnya, *Senate* akan mengadakan sidang *impeachment* Presiden. Sidang *impeachment* Presiden dipimpin oleh Ketua Mahkamah Agung Argentina. Di dalam sidang ini, Presiden baru dapat dinyatakan bersalah apabila 2/3 anggota *Senate* yang hadir menyatakan bahwa Presiden terbukti melakukan kesalahan dan melawan hukum.[53]

e. Mekanisme Pemberhentian Presiden di Bolivia

Di dalam Konstitusi Bolivia, kewenangan untuk mengajukan tuduhan *impeachment* Presiden berada di *Attorney General* atau Jaksa Agung. Setelah itu, Mahkamah Agung berwenang untuk melakukan sidang *impeachment* terhadap Presiden apabila Presiden dianggap telah melakukan perbuatan kriminal. Namun, persidangan tersebut harus mendapatkan persetujuan dari *Pluri-National Legislative Assembly* [54]dengan minimal mendapat persetujuan 2/3 dari anggota yang hadir dan rekomendasi dari Jaksa Agung apabila dirasa perlu untuk mengadakan persidangan. Presiden akan diberhentikan selamanya apabila terbukti bersalah di persidangan *impeachment* tersebut.[55]

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[52] Pasal 53 Konstitusi Argentina berbunyi: *"Only the House of Deputies has the power to impeach before the Senate the President, the Vice-President, the Chief of the Ministerial Cabinet, the Ministers, and the Justices of the Supreme Court, in such cases of responsibility as are brought against them for misconduct or crimes committed in the fulfillment of their duties; or for ordinary crimes, after having known about them and after the decision to bring an action had been voted by a majority of two-thirds of its members present."*

[53] Pasal 59 Konstitusi Argentina berbunyi: *"The Senate shall have the sole power to judge in public trial those impeached by the House of Deputies, and its members must be on oath when sitting for this purpose. When the President of the Nation is impeached, the Senate shall be presided by the Chief Justice of the Supreme Court. No person shall be declared guilty without the concurrence of two-thirds of the members present."*

[54] Pasal 145 Konstitusi Bolivia berbunyi: *"The Pluri-National Legislative Assembly is composed of two chambers, the Chamber of Deputies and the Chamber of Senators, and it is the only body with authority to approve and sanction laws that govern the entire Bolivian territory."*

[55] Pasal 184 ayat (4) Konstitusi Bolivia berbunyi: *"To try, in plenary as a collegial court and as the sole instance, the President of the State, or the Vice President of the State, for crimes committed in the performance of their mandate. The trial shall be undertaken upon prior authorization of the Pluri-National Legislative Assembly, by a vote of at least two-thirds of the members present, and a request supported by the Prosecutor or the Attorney General of the State who shall formulate the accusation if he believes that the investigation provides the basis for trial. The process shall be oral, public, continuous and uninterrupted. The law shall determine the procedure."*

f. Mekanisme Pemberhentian Presiden di Chili

Di dalam Konstitusi Chili yang berwenang untuk mengajukan tuduhan pemberhentian Presiden adalah *Chamber of Deputies*. Tuduhan tersebut akan dilanjutkan ke *Senate* apabila tuduhan tersebut disepakati secara mayoritas dari seluruh anggota *Chamber of Deputies*.[56] Selanjutnya, *Senate* akan menjadi *juri* dan memutuskan apakah Presiden dapat dimakzulkan atau tidak. Dalam memutuskan, Senate membutuhkan suara 2/3 dari seluruh anggota *Senate* untuk dapat memakzulkan Presiden.[57]

g. Mekanisme Pemberhentian Presiden di Kolombia

Di dalam Konstitusi Kolombia yang berwenang untuk mengajukan tuduhan pemberhentian Presiden adalah *House of Representatives*.[58] Setelah dari *House of Representatives* tuduhan tersebut dilanjutkan ke *Senate*. *Senate* akan memeriksa apakah tuduhan yang disampaikan valid atau tidak.[59] Selama proses berlangsung, Presiden diberhentikan secara otomatis untuk sementara waktu. Di dalam proses persidangan, *Senate* hanya bisa memberikan 3 jenis sanksi, yaitu: (1) *discharge from office*; (2) *temporary suspension*; atau (3) *absolute suspension*. Namun, apabila tuduhan *impeachment* membuktikan bahwa terdapat pelanggaran yang harus dihukum dengan hukuman yang lain, maka Mahkamah Agung yang akan mengadili. Apabila tuduhan pemberhentian Presiden hanya berkaitan dengan *common crimes*, maka yang berwenang untuk mengadili Presiden adalah Mahkamah

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[56] Pasal 52 ayat 2 Konstitusi Chili berbunyi: *The exclusive powers of the Chamber of Deputies are: "To declare that there is cause for the accusation against the President of the Republic, the vote of the majority of the deputies in exercise will be needed."*

[57] Pasal 53 ayat 1 Konstitusi Chili berbunyi: *The exclusive powers of the Senate are: "To take cognizance if the accusations that the Chamber of Deputies brings in pursuant to the previous article. The Senate shall act as jury and will be limited to state whether or not the accused is guilty or not of the crime, breach or abuse of power of which he is being accused. The declaration of guilt must be pronounced by two thirds of the senators in exercise in the case of an accusation against the President of the Republic, and by the majority of senators in exercise in the other cases."*

[58] Pasal 178 ayat (3) Konstitusi Kolombia berbunyi:*"To charge before the Senate, when constitutional reasons may exist, the President of the Republic or Whoever replaces him/her, the judges of the Constitutional Court, the judges of the Supreme Court, the members of the Council of State and the Attorney General of the Nation."*

[59] Pasal 174 Konstitusi Kolombia berbunyi: *"It is the responsibility of the Senate to take cognizance of the charges brought by the House of Representatives against the President of the Republic or whoever replaces him/her; against the judges of the Supreme Court of Justice, of the Council of the State and the Constitutional Court; against the members of the Supreme Council of the Judiciary, and against the Attorney General of the Nation, even though they may have ceased to exercise their functions. In this case, the Senate shall determine the validity of the charges concerning actions or omissions that have occurred in the discharge of their duties."*

Agung.[60] Di dalam memproses tuduhan pemberhentian Presiden, *Senate* mempunyai kewenangan untuk membentuk satuan khusus untuk melakukan investigasi. Dalam menentukan hukuman, *Senate* membutuhkan persetujuan 2/3 dari anggota *Senate* yang hadir. [61]

h. Mekanisme Pemberhentian Presiden di Republik Dominika

Di dalam Konstitusi Republik Dominika yang berwenang untuk mengajukan tuduhan pemberhentian terhadap Presiden adalah *Chamber of Deputies*. Tuduhan tersebut dapat diteruskan ke *Senate* apabila tuduhan tersebut disetujui oleh ¾ dari seluruh anggota Chamber of Deputies. Apabila tuduhan sudah diterima maka Presiden harus diberhentikan sementara sampai adanya putusan terhadap tuduhan *impeachment* tersebut.[62]

Senate akan memberikan putusan apakah tuduhan *impeachment* tersebut dapat diterima atau tidak dengan syarat minimal disetujui yaitu 2/3 dari seluruh anggota Senate. Namun, apabila berkaitan dengan pelanggaran pidana, Mahkamah Agung Republik Dominika yang memiliki kewenangan untuk memberikan sanksi kepada Presiden.[63]

i Mekanisme Pemberhentian Presiden di Meksiko

Di dalam Konstitusi Meksiko yang berwenang untuk mengajukan tuduhan pemberhentian Presiden adalah *House of Representatives*. Presiden hanya dapat diberhentikan apabila terbukti melakukan pengkhianatan terhadap negara dan pelanggaran pidana berat.[64] *House of Representatives* dapat mengajukan tuduhan pemberhentian Presiden apabila disepakati secara mayoritas oleh seluruh anggota

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60 Pasal 175 ayat (3) Konstitusi Kolombia berbunyi: *"If the charge refers to common crimes, the Senate shall confine itself to declare if there are grounds or not for further measures, and in the affirmative case it shall place the accused at the disposal of the Supreme Court."*

61 Pasal 175 ayat (4) Konstitusi Kolombia berbunyi: *"The Senate may commission a task force from among its own ranks for investigation, reserving for itself the decision and definitive sanction to be pronounced in a public session by at least two-thirds of the votes of the Senators present."*

62 Pasal 83 ayat (1) Konstitusi Republik Dominika berbunyi: *"To accuse before the Senate public officials elected by popular vote, those elected by the Senate and by the National Counsel of the Magistrature for the commission of serious wrongs in the exercise of the offices. The accusation may only be made with the favorable vote of two thirds of the membership. When they are about the President and the Vice President of the Republic, they shall require the favorable vote of three quarters of the membership. The accused person shall have their office suspended from the moment in which the Chamber declares that the accusation has been made."*

63 Pasal 154 ayat (1) Konstitusi Republik Dominika berbunyi: *"It is the exclusive responsibility of the Supreme Court of Justice, without prejudice to the other powers that the law confers it: "To come to learn, in the only instance, the criminal cases against the President and the Vice President of the Republic…."*

64 Pasal 108 Konstitusi Mexico berbunyi:*"The President of the Republic, during his term in office, may be impeached only for treason or serious common crimes."*

House of Representatives. Setelah diajukan oleh *House of Representatives*, *Senate* akan menyelenggarakan sidang pengadilan dan menentukan apakah Presiden dapat dimakzulkan atau tidak. Pemakzulan Presiden berhasil apabila disepakati 2/3 dari seluruh anggota *Senate* yang hadir. [65]

j. Mekanisme Pemberhentian Presiden di Paraguay

Di dalam konstitusi Paraguay yang berwenang mengajukan tuduhan pemberhentian Presiden adalah *Chamber of Deputies*. Tuduhan tersebut akan dilanjutkan untuk disidangkan oleh *Chamber of Senators* apabila disepakati sebanyak 2/3 dari seluruh anggota *Chamber of Deputies* yang hadir. *Chamber of Senators* akan menyidangkan Presiden dan membuktikan apakah Presiden bersalah atau tidak. Presiden dapat dimakzulkan apabila 2/3 dari seluruh anggota *Chamber of Senators* menyatakan bahwa Presiden harus melepaskan jabatannya.[66]

k. Mekanisme Pemberhentian Presiden di Uruguay

Di dalam Konstitusi Uruguay yang berwenang untuk mengajukan tuduhan pemberhentian Presiden adalah *Chamber of Representatives*. Tuduhan tersebut harus disetujui secara mayoritas apabila ingin disidangkan.[67] Apabila sebanyak 2/3 dari seluruh anggota *Chamber of Representatives* menyetujui tuduhan *impeachment* tersebut maka Presiden harus diberhentikan sementara terlebih dahulu selama proses *impeachment* berlangsung.[68] Setelah itu tuduhan akan disidangkan oleh

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65 Pasal 110 Konstitusi Mexico berbunyi: *"The procedure shall be as follows: the House of Representatives shall substantiate the case, shall hear the accused and the absolute majority of the members of the House shall declare the impeachment. Then the House of Representatives shall submit the impeachment to the Senate."*

66 Pasal 225 Konstitusi Paraguay berbunyi:*"The President of the Republic, the Vice President, the Ministers of the Executive Power, the Ministers of the Supreme Court of Justice, the Attorney General of the State, the Defender of the People, the Comptroller General of the Republic, the Sub-Comptroller and the members of the Superior Tribunal of Electoral Justice, may only be submitted to political trial for malfeasance of their functions, for crimes committed in exercise of their offices or for common crimes." "The accusation will be formulated by the Chamber of Deputies, by a majority of two-thirds. It will correspond to the Chamber of Senators, by absolute majority of two-thirds, to judge in public trials those accused by the Chamber of Deputies and, in such cases, to declare them guilty, for the sole purpose of removing them from their offices. In the cases of supposed commission of crimes, the prior records will be passed on to the ordinary justice."*

67 Pasal 93 Konstitusi Uruguay berbunyi:*"The Chamber of Representatives has the exclusive rights of impeachment, before the Chamber of Senators, of the members of both Chambers, of the President and Vice President of the Republic, the Ministers of State, the member of the Supreme Court of Justice, the Contentious-Administrative Tribunal, the Court of Accounts, and of the Electoral Court, for violation of the Constitution or for the other serious offenses, after taking cognizance of the matter upon petition by a party or by one of its members, and having decided that there are grounds for prosecution."*

68 Pasal 172 Konstitusi Uruguay berbunyi: *"If the impeachment is approved by a two-thirds vote of the total membership of the Chamber of Representatives, the President of the Republic shall be suspended from office."*

Chamber of Senators. Apabila 2/3 dari seluruh anggota *Chamber of Senators* menyetujui tuduhan pemberhentian tersebut, maka Presiden harus melepaskan jabatannya.[69]

l. Mekanisme Pemberhentian Presiden di Afrika Selatan

Di dalam Konstitusi Afrika Selatan yang berwenang untuk mengajukan tuduhan pemberhentian Presiden adalah *National Assembly*. *National Assembly* dapat memberhentikan Presiden apabila disetujui oleh 2/3 anggota *National Assembly*.[70] Alasan pemberhentian Presiden hanya mencakup 3 hal yaitu pelanggaran terhadap konstitusi, pelanggaran pidana, dan ketidakmampuan untuk menjalankan pemerintahan.

m Mekanisme Pemberhentian Presiden di Kenya

Di dalam Konstitusi Kenya yang berwenang untuk mengajukan tuduhan pemberhentian Presiden adalah *National Assembly*. Anggota *National Assembly* dapat mengajukan mosi *impeachment* apabila mendapatkan dukungan dari 1/3 anggota *National Assembly* yang lain.[71] Jika mosi *impeachment* yang diajukan tersebut disepakati oleh minimal 2/3 anggota *National Assembly*, maka *Speaker of National Assembly* akan memberitahukan *Speaker of Senate* tentang mosi tersebut dalam jangka waktu dua hari.[72] Dalam jangka waktu 7 hari setelah menerima pemberitahuan dari *Speaker of National Assembly*, *Speaker of Senate* wajib menyelenggarakan sidang *Senate* untuk mendengarkan mosi *impeachment* yang telah dibuat dan membentuk komite khusus untuk melakukan investigasi.[73]

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69 Pasal 102 Konstitusi Uruguay berbunyi: *"The Chamber of Senators is competent to initiate the public trial of those impeached by the Chamber of Representatives or a Departement Board, as the case may be, and to pronounce sentence, by a two-thirds vote of its full membership, and such sentence shall have the sole effect of removal from office."*

70 Pasal 89 ayat (1) Konstitusi Afrika Selatan berbunyi: *"The National Assembly, by a resolution adopted with a supporting vote of at least two-thirds of its members, may remove the President from office only on the: (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office*

71 Pasal 145 ayat (1) Konstitusi Kenya berbunyi: *"A member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President: (a) On the ground of a gross violation of a provision of this Constitution or of any other law; (b) Where there are serious reasons for believing that the President has committed a crime under national or international law; or (c) For gross misconduct*

72 Pasal 145 ayat (2) Konstitusi Kenya berbunyi: *"If a motion under clause (1) is supported by at least two-thirds of all the members of the National Assembly: (a) The Speaker shall inform the Speaker of the Senate of that resolution within two days; and (b) The President shall continue to perform the functions of the office pending the outcome of the proceedings required by this Article.*

73 Pasal 145 ayat (3) Konstitusi Kenya berbunyi: *"Within seven days after receiving notice of a resolution from the Speaker of the National Assembly: (a) The Speaker of the Senate shall convene a meeting of the Senate to hear charges against the President; and (b) The Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.*

Komite khusus ini akan melaporkan ke *Senate* dalam jangka waktu 10 hari apakah terjadi pelanggaran hukum yang dilakukan oleh Presiden. Apabila terbukti terdapat pelanggaran hukum yang dilakukan oleh Presiden, maka *Senate* dapat memberhentikan Presiden dengan persetujuan 2/3 dari seluruh jumlah anggota *Senate*. [74]

6. Analisis Mekanisme *Impeachment* di Negara Lain dan di Indonesia

Dari 13 negara yang penulis jelaskan di atas, terdapat 11 negara yang menggunakan struktur parlemen bikameral simetris dan 2 negara bikameral asimetris. Negara yang menggunakan struktur parlemen bikameral simetris adalah Amerika Serikat, Filipina, Argentina, Brazil, Bolivia, Chili, Kolombia, Republik Dominika, Mexico, Uruguay, dan Paraguay. Sementara itu, negara yang menggunakan struktur parlemen bikameral asimetris adalah Kenya dan Afrika Selatan. Apabila dilihat dari bentuk negaranya, 4 negara berbentuk federasi sedangkan 9 negara berbentuk kesatuan. Negara yang berbentuk federasi yaitu Amerika Serikat, Argentina, Brazil, dan Mexico. Sementara itu, negara yang berbentuk kesatuan yaitu Filipina, Bolivia, Chili, Kolombia, Republik Dominika, Paraguay, Uruguay, Kenya, dan Afrika Selatan. Berdasarkan analisis yang penulis lakukan, apabila dikaitkan dengan klasifikasi model *impeachment* dari Anibal Perez Linan, maka hasilnya adalah sebagai berikut:

Congressional model	***Mixed Model***	***Judicial Model***
Amerika Serikat	Brazil	Bolivia
Filipina	Kolombia	
Argentina	Republik Dominika	
Chili		
Mexico		
Paraguay		
Uruguay		
Kenya		
Afrika Selatan		

Dalam hal negara yang menggunakan *congressional model*, terdapat perbedaan dalam pelaksanaan *senate trial*. Ada beberapa negara yang pelaksanaan *senate trial* dipimpin oleh Ketua Mahkamah Agung dan ada yang tidak. Berikut penjabarannya:

[74] Pasal 145 ayat (7) Konstitusi Kenya berbunyi: *"If at least two-thirds of all the members of the Senate vote to uphold any impeachment charge, the President shall cease to hold office.*

Congressional Model	
***Senate trial* dipimpin oleh Ketua Mahkamah Agung**	***Senate trial* tidak dipimpin oleh Ketua Mahkamah Agung**
Amerika Serikat	Chili
Filipina	Mexico
Argentina	Paraguay
	Uruguay
	Kenya

Apabila dikaitkan dengan klasifikasi model *impeachment* dapat dilihat bahwa mekanisme *impeachment* presiden di Indonesia termasuk dalam *congressional model* atau *legislature-dominant model*. Hal ini dapat dilihat di Indonesia keputusan akhir *impeachment* Presiden berada di tangan lembaga perwakilan rakyat yaitu Majelis Permusyawaratan Rakyat (MPR). Namun, apabila dibandingkan dengan negara lain terdapat perbedaan yang cukup signifikan. Pertama, *impeachment* Presiden di Indonesia tidak melibatkan Dewan Perwakilan Daerah. Negara yang menggunakan *Congressional model* mayoritas melibatkan perwakilan daerah (*regional representatives*) dalam proses *impeachment* Presiden. Hanya Afrika Selatan saja yang tidak melibatkan perwakilan daerah (*regional representatives*) dalam proses *impeachment* Presiden. Hal ini dikarenakan struktur parlemen bikameral di Indonesia adalah bikameral asimetris. Hal ini dapat kita lihat perbandingan kewenangan formal yang dimiliki oleh DPR lebih dominan dibandingkan dengan yang dimiliki oleh DPD. Dalam konteks *impeachment*, keterlibatan DPR lebih dominan dibandingkan dengan DPD, DPR terlibat secara kelembagaan dan keanggotaan di dalam MPR namun DPD hanya terlibat secara keanggotaan di dalam MPR. Hal ini menurut penulis tidak sesuai dengan prinsip *checks and balances* karena ketidakseimbangan peran antara DPR dan DPD sebagai kamar kedua dalam proses *impeachment* Presiden di Indonesia. Kedua, dari 13 negara yang penulis analisis, tidak ada keterlibatan peran Mahkamah Konstitusi dalam proses *impeachment* Presiden. Hal ini berbeda dengan Indonesia yang melibatkan Mahkamah Konstitusi dalam memberikan pendapat hukum apakah proses *impeachment* Presiden dapat dilanjutkan ke MPR atau tidak.

C. KESIMPULAN:

Impeachment merupakan salah satu fitur yang dimiliki oleh suatu negara untuk menjaga *checks and balances* antara kekuasaan legislatif dan eksekutif. Adanya mekanisme *impeachment* di Indonesia merupakan konsekuensi logis diperkuatnya sistem pemerintahan Presidensial yang ingin diadopsi pasca reformasi. *Impeachment* Presiden di Indonesia melibatkan 3 lembaga tinggi negara yaitu DPR, Mahkamah Konstitusi, dan MPR. Mekanisme *impeachment* Presiden di Indonesia termasuk ke dalam kategori *legislature-dominant* atau *Congressional model*. Hal ini dikarenakan proses *impeachment* Presiden di Indonesia meletakkan keputusan akhir *impeachmen*t di tangan lembaga legislatif dalam hal ini adalah MPR. Namun, menurut penulis mekanisme *impeachment* Presiden di Indonesia tidak sesuai dengan prinsip *checks and balances*. Hal ini dikarenakan DPR dalam proses *impeachment* terlalu dominan. Selain itu, tidak terlibatnya DPD sebagai kamar kedua secara kelembagaan dalam proses *impeachment* Presiden semakin menandakan bahwa proses *impeachment* Presiden di Indonesia tidak sesuai dengan prinsip *checks and balances.*

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Parate Executie dalam Fidusia Menurut *Ratio Decidendi* Putusan Mahkamah Konstitusi

Parate Executie Concept in Fiduciary Based on Ratio Decidendi of Constitutional Court Decision

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Naskah diterima: 09-06-2020 revisi: 13-07-2022 disetujui: 08-08-2022

Abstrak

Artikel ini bertujuan untuk menganalisis subjek hukum yang haknya terlanggar oleh terbitnya suatu undang-undang, dimana undang-undang dimaksud dapat dibatalkan keberlakuannya ke Mahkamah Konstitusi. Undang-undang yang melanggar hak subjek hukum adalah penormaan *parate executie* pada *fiduciare*. Analisis pertama, ontologi parate executie yang merugikan pihak tertentu; dan analisis kedua, *ratio decidendi* putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. Tulisan ini menggunakan analisis dogmatis yuridis. Putusan Mahkamah Konstitusi dianalisis dengan doktrin dari para pakar serta regulasi. *Parate executie* merupakan hak yang melekat pada penerima fidusia yang bisa dilaksanakan kalau pemberi fidusia melakukan ingkar ikrar. Agunan dilelang via penawaran umum diajukan penerima jaminan. Wanprestasi

yang dilakukan pemberi fidusia terjadi apabila ada kesepakatan antara pemberi dan penerima fidusia. Wanprestasi terjadi berdasarkan upaya hukum dalam penentuan wanprestasi. Kesepahaman penagih bersama pemeroleh *fiduciare* timbulnya ingkar ikrar dialami oleh pemberi fidusia dapat melahirkan *parate executie*.

Kata Kunci: Cidera Janji; Fidusia; Mahkamah Konstitusi; Parate Executie; Ratio Decidendi.

Abstract

This article aims to analyze legal subjects whose rights have been violated by the Fiduciaire Act. The Act law can be revoked by the Constitutional Court. The act that violates the rights of subjects is the rule in the provisions of parate executie on Fiduciaire Act. The first analysis is the ontology of parate executives that inflict certain subjects, and the second analysis is the ratio decidendi decision of the Constitutional Court Number 18/PUU-XVII/2019. This paper uses dogmatize analysis. The decisions of the Constitutional Court are analyzed with the doctrine of experts and regulations. Parate execution is a right attached to the recipient fiduciary which can exercise if the fiduciary giver breaks the commitment. Collateral is auctioned through a public offering submitted by the recipient of guarantee. Default by a fiduciary giver occurs if there is an agreement between the giver and the fiduciary recipient. Default occurs based on legal remedies in determining the default. The agreement of the collector with the fiduciary acquirer, the emergence of a broken pledge experienced by the fiduciary giver can give birth to a parate executie.

Keywords: *Default; Fiduciary; Constitutional Court; Parate execution; Ratio Decidendi.*

A. PENDAHULUAN

1. Latar Belakang

Konsep negara hukum sudah dipikirkan oleh para pendiri negara (*the founding fathers*) Indonesia sebagaimana yang dirumuskan secara tegas dalam konstitusi yang berlaku di Indonesia. Negara hukum yang dimaksud ialah negara yang menegakkan supremasi hukum untuk menegakkan kebenaran dan keadilan serta tidak ada kekuasaan yang tidak dipertanggungjawabkan.[1] Dalam konsep Negara Hukum, diidealkan bahwa yang harus dijadikan panglima dalam dinamika kehidupan kenegaraan adalah hukum,[2] bukan politik maupun ekonomi. Ada beberapa prinsip yang dimiliki oleh negara hukum antara lain: supremasi hukum (*supremacy of law*), persamaan dalam hukum

[1] Fanny Tanuwijaya, "Membangun Negara Hukum Yang Kuat Melalui Penyelenggaraan Sistem Peradilan Pidana Berbasis Konstitusionalitas," *Yurispruden* 1, no. 2 (June 30, 2018): 130, https://doi.org/10.33474/yur.v1i2.959.

[2] Udiyo Basuki, Rumawi Rumawi, and Mustari Mustari, "76 Tahun Negara Hukum: Refleksi Atas Upaya Pembangunan Hukum Menuju Supremasi Hukum Di Indonesia," *Supremasi: Jurnal Pemikiran, Penelitian Ilmu-Ilmu Sosial, Hukum Dan Pengajarannya* 16, no. 2 (2021): 167, https://doi.org/10.26858/supremasi.v16i2.24192.

(*equality before the law*), asas legalitas (*due process of law*), pembatasan kekuasaan, organ-organ campuran yang bersifat independen, peradilan bebas dan tidak memihak, peradilan tata usaha negara, peradilan tata negara (*constitutional court*), perlindungan hak asasi manusia, bersifat demokratis (*democratische rechtsstaat*), berfungsi sebagai sarana mewujudkan tujuan bernegara (*welfare rechtsstaat*), transparansi dan kontrol sosial, dan Ber-Ketuhanan Yang Maha Esa.[3]

Para subjek hukum tidak pernah ragu apabila disebut Indonesia sebagai negara hukum.[4] Di dalam negara hukum, kesetaraan dalam berkedudukan dimuka undang-undang dan dimuka urusan kepemerintahan dimiliki bagi setiap subjek, serta hukum dan pemerintahan tersebut wajib dijunjung tanpa kecuali.[5] Kesetaraan kedudukan hukum tersebut, diakui, dijamin, dilindungi, pasti di depan undang-undang serta diperlakukan secara setara di depan norma undang-undang merupakan hak subjek hukum.[6] Di samping itu, merupakan hak asasi subjek hukum meliputi "perlindungan diri pribadi, keluarga, kehormatan, martabat, dan harta benda, rasa aman, perlindungan dari ancaman ketakutan".[7] Di negara hukum, sewenang-wenang pengambilalihan hak milik pribadi tidak diperkenankan merupakan hak subjek hukum.[8] Hal tersebut adalah tanda adanya negara Indonesia sebagai wilayah hukum nan tidak dapat diragukan keberadaannya oleh siapa pun. Hak-hak subjek hukum tersebut dilindungi oleh negara Indonesia sebagaimana termaktub dalam konstitusinya.

Pelanggaran terhadap hak-hak subjek hukum dapat muncul sewaktu-waktu dan di manapun serta bisa muncul dari siapapun termasuk salah satu dari dokumen resmi berupa undang-undang. Apabila subjek hukum hak-haknya terlanggar oleh terbitnya suatu undang-undang, maka norma dimaksud bisa diminta untuk dibatalkan keberlakuannya melalui Mahkamah Konstitusi.[9] Undang-undang yang dianggap dapat melanggar hak subjek hukum adalah Ketentuan yang selanjutnya berbunyi sebagai berikut: "Apabila debitur cidera janji Penerima Fidusia mempunyai hak untuk menjual Benda yang menjadi objek Jaminan Fidusia atas kekuasaannya sendiri".[10] Lembaga

[3] Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia," Makalah, tt, 8–15, https://www.pn-gunungsitoli.go.id/assets/image/files/Konsep_Negara_Hukum_Indonesia.pdf.
[4] Republik Indonesia, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945" (1945) Pasal 1 Ayat (3).
[5] Indonesia Pasal 27 Ayat (1).
[6] Indonesia Pasal 28D Ayat (1).
[7] Indonesia Pasal 28G ayat (1).
[8] Indonesia Pasal 28H Ayat (4).
[9] Indonesia Pasal 24C Ayat (1).
[10] Pasal 15 Ayat (3) Republik Indonesia, "Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia (Lembaran Negara Republik Indonesia Tahun 1999 Nomor 168; Tambahan Lembaran Negara Republik Indonesia Nomor 3889)" (1999).

Jaminan Fidusia memberi kemudahan kepada Pemberi Fidusia untuk tetap dapat menguasai objek yang dijaminkan untuk melakukan kegiatan usaha. Jaminan Fidusia memberikan hak kepada pihak Pemberi Fidusia untuk tetap menguasai benda yang menjadi objek Jaminan Fidusia berdasarkan kepercayaan.[11]

Ketentuan tersebut yang digunakan oleh subjek hukum tertentu, dalam hal ini penerima fidusia, mengambil objek jaminan fidusia sewaktu-waktu dengan alasan subjek hukum lainnya, dalam hal ini pemberi fidusia, dianggap wanprestasi oleh penerima fidusia. Bagi pemberi fidusia bahwa wanprestasi yang dijadikan dasar untuk menarik objek fidusia merupakan pengajuan sepihak penerima fidusia. Pemberi dan penerima fidusia terikat dengan perjanjian yang mereka sepakati sebagaimana tercantum dalam akta pemberian fidusia sebagai perjanjian tambahan, yang sebelumnya dilakukan perjanjian pokok. Perjanjian tambahan berupa akta pemberian fidusia didaftarkan di kantor pendaftaran fidusia dan terbit sertifikat fidusia. Atas dasar itulah, objek fidusia dapat dijual dengan kekuasaan sendiri oleh penerima fidusia sewaktu-waktu, apabila wanprestasi dilakukan pemberi fidusia. Hal demikian dalam hukum jaminan dinamakan *parate executie*. Suatu cara eksekusi yang mudah bagi penerima objek jaminan salah satunya penerima fidusia. Terminologi *parate executie* menggetarkan para pihak untuk saling berlindung dan mencoba membongkar definisi dan implikasi *parate executie*.[12]

Pemberi fidusia berpendapat bahwa ketentuan *parate executie* tersebut merugikan hak-hak konstitusionalnya dan karena dilakukan uji materi ketentuan tersebut ke Mahkamah Konstitusi. Suatu kerugian konstitusional apabila terpenuhi parameter tertentu antara lain: pertama, UU1945 memberikan kepada pemohon kepunyaan dan/atau wewenang yang dijamin konstitusi; kedua, norma yang berlaku dianggap menghilangkan kedaulatan dan/atau kewenangan pemohon dalam pengujian dimaksud; ketiga, sesuai penalaran yang proporsional bisa dipastikan akan terjadi adanya hak dan/atau kewenangan konstitusional yang kerugiannya wajib bersifat khusus dan aktual atau setidak-tidaknya potensial; keempat, keberlakuan undang-undang yang dimohonkan pengujian memiliki hubungan sebab akibat terhadap kerugian dimaksud; dan kelima, kehilangan kedaulatan dan/atau wewenang diakui konstitusi semacamnya yang didalihkan tak akan atau tidak berulang kembali, apabila adanya kemungkinan

[11] Akhmad Yasin, "Dampak Jaminan Fidusia Kredit Kendaraan Bermotor Yang Tidak Didaftarkan Terhadap Penerimaan Negara Bukan Pajak," *Jurnal Konstitusi* 17, no. 4 (January 25, 2021): 832, https://doi.org/10.31078/jk1746.

[12] Misnar Syam and Yussy Adelina Mannas, "Kedudukan Parate Eksekusi Pada Jaminan Fidusia Dengan Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *ADHAPER: Jurnal Hukum Acara Perdata* 8, no. 1 (February 19, 2022): 151, https://doi.org/10.36913/jhaper.v8i1.175.

dengan dikabulkannya permohonan.[13] *Parate executie* yang diatur dalam norma jaminan fidusia memantik persoalan teknisnya, karena masih belum memiliki perangkat hukum yang jelas mengenai tata cara hukum perampasan pelaksanaan jaminan fidusia.[14]

Uraian tersebut memantik untuk menganalisis yang pertama, mengenai maksud *parate executie* yang mengakibatkan kerugian pihak tertentu atas berlakunya ketentuan norma tersebut, serta yang kedua, mengenai pertimbangan hukum putusan Mahkamah Konstitusi perihal norma yang mengatur mengenai *parate executie* di dalam jaminan fidusia. Dua hal tersebut akan diuraikan sebagai suatu bentuk permasalahan sebagaimana rumusan masalah yang diuraikan di bawah ini.

2. Perumusan Masalah

Berdasarkan uraian di atas ditetapkan rumusan masalah sebagai berikut:

a. Apa ontologi *parate executie* dalam perjanjian jaminan di Indonesia?
b. Apakah *parate executie* dalam jaminan fidusia menurut ratio decidendi putusan Mahkamah Konstitusi Republik Indonesia nomor 18/PUU-XVII/2019?

3. Metode Penelitian

Dalam upaya untuk menjawab permasalahan dimaksud, metode analisis yang digunakan dalam penulisan ini adalah yuridis normatif,[15] dengan pendekatan konseptual, pendekatan perundang-undangan, dan pendekatan perbandingan. Adapun analisis dilakukan secara deskriptif kualitatif[16] dengan menggunakan metode deduktif. Penarikan kesimpulan dilakukan secara preskriptif.[17]

B. PEMBAHASAN

1. Ontologi *parate executie* dalam perjanjian jaminan di Indonesia

Parate executie merupakan hak untuk kemudian kreditur (penerima objek jaminan), sebagai manifestasi kelancaran kegiatan perdagangan / bisnis. Perlu disimak

[13] Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 006/PUU-III/2005," 2005; Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 11/PUU-V/2007," 2007.

[14] Antonius Nicholas Budi, "Abolition Of Parate Executie As A Result Of Constitutional Court Ruling Number 18/PUU-XVII/2019," *Jurnal Hukum Dan Peradilan* 9, no. 2 (July 30, 2020): 257, https://doi.org/10.25216/jhp.9.2.2020.255-274.

[15] Supianto Supianto and Rumawi Rumawi, "Implikasi Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 Terhadap Pelaksanaan Eksekusi Jaminan Fidusia," *DIVERSI : Jurnal Hukum* 8, no. 1 (February 18, 2022): 82, https://doi.org/10.32503/diversi.v8i1.1181.

[16] Fendi Setyawan, "Institusionalisasi Nilai Pancasila Dalam Pembentukan Dan Evaluasi Peraturan Perundang-Undangan," *Jurnal Legislasi Indonesia* 18, no. 2 (June 30, 2021): 251, https://doi.org/10.54629/jli.v18i2.819.

[17] Peter Mahmud Marzuki, *Penelitian Hukum*, Cet. ke-6 (Jakarta: Kencana Prenada Media Group, 2010), 171.

ratio decidendi putusan mahkamah konstitusi yang dahulu yaitu Putusan Mahkamah Konstitusi Republik Indonesia Nomor 70/PUU-VIII/2010, sebagai berikut:

> *"dalam hal debitur cidera janji maka hak relatif tersebut berlaku. Hak pemegang Hak Tanggungan pertama bersifat relatif (relatief recht), artinya berlaku hanya untuk seseorang tertentu atau lebih yang dapat melaksanakannya (Een relatief recht–ook wel persoonlijk recht genoemd—is een recht dat slechts in relatie tot een of meer bepaalde personen kan worden uitgeoefend). Hak tersebut menciptakan tuntutan kepada orang lain untuk melakukan sesuatu, memberikan sesuatu, dan/atau tidak melakukan sesuatu".*[18]

Pertimbangan hukum mahkamah konstitusi ketentuan pengaturan *parate executie* dalam hak tanggungan. Ketentuan norma Pasal 6 Undang-Undang Nomor 4 Tahun 1996 dinyatakan bahwa "apabila debitur cidera janji, pemegang Hak Tanggungan pertama mempunyai hak untuk menjual obyek Hak Tanggungan atas kekuasaan sendiri melalui pelelangan umum serta mengambil pelunasan piutangnya dari hasil penjualan tersebut". Ketentuan tersebut dipertegas dalam Pasal 20 ayat (1) huruf (a) Undang-Undang Nomor 4 Tahun 1996 bahwa "Apabila debitor cidera janji, maka berdasarkan: (a) hak pemegang Hak Tanggungan pertama untuk menjual obyek Hak Tanggungan sebagaimana dimaksud dalam Pasal 6". *Parate executie* merupakan hak relatif yang dimiliki oleh kreditur apabila wanprestasi dilakukan oleh debitur. Hak relatif diciptakan tuntutan kepada debitur agar melakukan, memberikan, dan/atau tidak memberikan objek jaminan kepada kreditur. Tuntutan dapat dilaksanakan apabila telah terjadi wanprestasi dilakukan debitur.

Apabila *ratio decidendi* tersebut dibandingkan dengan *legal opinion*-nya Herowati Poesoko,[19] saksi ahli yang diajukan oleh pemerintah dalam perkara Nomor 70/PUU-VIII/2010, ada kemiripan antara pendapat hukum saksi ahli tersebut dengan *ratio decidendi* putusan mahkamah konstitusi tersebut. Pendapat saksi ahli tersebut secara lengkap sebagai berikut:

"hak relatif yang dimaksudkan itu, ciri hak relatif hanya berlaku untuk seorang tertentu. Yang berarti apabila kita masukan dalam Pasal 6, ciri hak relatif adalah secara ex lege hanya berlaku bagi pemegang hak tanggungan pertama secara pribadi untuk menjual obyek hak tanggungan atas kekuasaan sendiri, bukan kuasa termasuk seorang advokat. Ciri yang kedua, ciri hak relatif mempunyai tuntutan kepada orang lain untuk melakukan sesuatu, memberikan sesuatu, dan tidak

[18] Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 70/PUU-VIII/2010" (2010), 39.

[19] Herowati Poesoko, Guru Besar Hukum Acara Perdata Fakultas Hukum Universitas Jember, yang menulis disertasi tentang *parate executie*.

melakukan sesuatu. Yang kalau kita mengambil pada Pasal 6-nya maka disini ciri hak relatif bagi pemegang hak tanggungan pertama, mengajukan kepada kantor lelang untuk melakukan penjualan obyek hak tanggungan milik debitur yang cidera janji secara lelang melalui pelelangan umum. Ciri yang ketiga, objek hak relatif adalah prestasi. Yang berarti dalam Pasal 6 UUHT, prestasi dari hasil penjualan melalui lelang digunakan sebagai sumber pelunasan piutang yang diterimakan kepada pemegang Hak Tanggungan pertama. Berpijak pada Pasal 6 yang terkandung ciri-ciri hak relatif yang substansinya preskriptif, maka hak menjual objek Hak Tanggungan atas kekuasaan sendiri, hanya berlaku bagi pemegang Hak Tanggungan pertama secara pribadi. Logika hukumnya, pengajuan parate executie oleh seorang kuasa hukum bahkan seorang advokat bertentangan dengan Pasal 6 Undang-Undang Hak Tanggungan".[20]

Uraian *ratio decidendi* putusan Mahkamah Konstitusi di atas dengan pendapat hukum saksi ahli Herowati Poesoko memiliki kesamaan pandangan perihal *parate executie*. Dengan demikian, antara pendapat ahli (doktrin) dengan *ratio decidendi* putusan mahkamah konstitusi di atas mengenai *parate executie* tidak ada pertentangan.

Parate executie adalah karakteristik khas hukum agunan yang memberikan kemudahan untuk kreditur apabila debitur ingkar janji maka hasil penjualan lelang diambil pelunasan piutangnya kreditur atau dengan kata lain kewajiban tidak dilaksanakan debitur sebagaimana mestinya.[21] Hak istimewa tersebut dapat dijadikan instrumen yang ampuh bagi dunia perdagangan/bisnis dalam pemberian kredit. Dunia bisnis tidak khawatir dengan kredit yang dikucurkan untuk debitur. Bagi debitur hak yang diberikan kepada kreditur tersebut dapat meringankan dan cepat dalam penyelesaian hutang yang dihadapinya.[22] *Parate executie* diberikan rumusan makna oleh para ahli yang intinya menjalankan atau melakukan sendiri. Parate eksekusi sesuai pemikiran Mariam Darus Badrulzaman adalah "menjalankan sendiri atau mengambil sendiri apa yang menjadi haknya tanpa perantaraan hakim".[23] Parate eksekusi sesuai pendapat tartib adalah "eksekusi yang dilakukan sendiri oleh baik pemegang hipotek pertama dengan *beding van eigen machtige verkoop* maupun pemegang gadai, berhubung debitur sebagai pemberi hipotik dan pemberi gadai tidak dapat membayar hutang pokok maupun bungannya".[24] Parate eksekusi oleh Purnama Tioria Sianturi didefinisikan sebagai "pemegang hak tanggungan dapat melakukan

[20] Mahkamah Konstitusi Republik Indonesia, "Risalah Sidang Perkara Nomor 70/PUU-VIII/2010 Perihal Pengujian UU No. 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945" (n.d.).
[21] Irfan Fachruddin, "Terobosan Terhadap Prinsip Hipotik," *Varia Peradilan* VII, no. 77 (1992): 138.
[22] Fachruddin, 139.
[23] Mariam Darus Badrulzaman, *Bab-Bab Tentang Hypotheek*, IV (Bandung: PT. Citra Aditya Bakti, 1991), 65.
[24] Tartib, "Catatan Tentang Parate Eksekusi," *Varia Peradilan* XI, no. 124 (1996): 149.

penjualan penjualan barang jaminan secara langsung dengan bantuan Kantor Pelayanan Kekayaan Negara dan Lelang (KPKNL) tanpa perlu persetujuan pemilik barang jaminan dan tidak perlu meminta *fiat* eksekusi dari pengadilan".[25] *Parate executie* menurut J. Satrio, merupakan "lembaga hukum yang digunakan kreditur sebagai upaya untuk menguangkan tagihannya dan karena itu mirip seperti dengan suatu eksekusi."[26]

Eksekusi objek hak tanggungan secara *parate executie* diatur dalam norma Pasal 20 Ayat (1) huruf a Undang-Undang Hak Tanggungan: *"*apabila debitor cidera janji, maka berdasarkan: a. Hak pemegang Hak Tanggungan pertama untuk menjual obyek Hak Tanggungan sebagaimana dimaksud dalam Pasal 6". Hak untuk menjual objek hak tanggungan diatur dalam ketentuan Pasal 6 Undang-Undang Nomor 4 Tahun 1996, bahwa: "apabila debitur cidera janji, pemegang hak tanggungan pertama mempunyai hak untuk menjual obyek hak tanggungan atas kekuasaan sendiri melalui pelelangan umum serta mengambil pelunasan piutangnya dari hasil penjualan tersebut". Ketentuan Pasal 6 Undang-Undang Nomor 4 Tahun 1996 termaktub pula dalam hipotik sebagaimana ketentuan Pasal 1178 ayat (2) BW dinyatakan bahwa:

> *"namun kreditor hipotek pertama, pada waktu penyerahan hipotek boleh mensyaratkan dengan tegas, bahwa jika utang pokok tidak dilunasi sebagaimana mestinya, atau bila bunga yang terutang tidak dibayar, maka ia akan diberi kuasa secara mutlak untuk menjual persil yang terikat itu di muka umum, agar dari hasilnya dilunasi, baik jumlah uang pokoknya maupun bunga dan biayanya. Perjanjian itu harus didaftarkan dalam daftar-daftar umum, dan pelelangan tersebut harus diselenggarakan dengan cara yang diperintahkan dalam Pasal 1211".*

Parate executie dalam ketentuan Pasal 6 Undang-Undang Nomor 4 Tahun 1996 berbeda dengan ketentuan Pasal 1178 ayat (2) KUH Perdata, karena ketentuan Pasal 6 Undang-Undang Nomor 4 Tahun 1996 mengenai penjualan atas kekuasaan sendiri objek hak tanggungan kewenangan penerima hak tanggungan diberikan oleh undang-undang (secara *ex lege*) bukan diberikan oleh debitur pemberi hak tanggungan yang terdapat dalam akta pemberian hak tanggungan, sedangkan kewenangan kreditur penerima hipotek pertama untuk menjual atas kekuasaan sendiri objek jaminan hipotik diberikan oleh pemberi hipotik dalam perjanjian hipotik.

Parate executie juga diatur dalam gadai sebagaimana ketentuan Pasal 1155 KUHPerdata dinyatakan bahwa:

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[25] Purnama Tioria Sianturi, *Perlindungan Hukum Terhadap Pembeli Barang Jaminan Tidak Bergerak Melalui Lelang*, I (Bandung: CV. Mandar Maju, 2008), 79.

[26] J. Satrio, *Parate Eksekusi Sebagai Sarana Mengatasi Kredit Macet* (Bandung: PT. Citra Aditya Bakti, 1993), 2.

> *"Bila oleh pihak-pihak yang berjanji tidak disepakati lain, maka jika debitur atau pemberi gadai tidak memenuhi kewajibannya, setelah lampaunya jangka waktu yang ditentukan, atau setelah dilakukan peringatan untuk pemenuhan perjanjian dalam hal tidak ada ketentuan tentang jangka waktu yang pasti, kreditor berhak untuk menjual barang gadainya dihadapan umum menurut kebiasaan-kebiasaan setempat dan dengan persyaratan yang lazim berlaku, dengan tujuan agar jumlah utang itu dengan bunga dan biaya dapat dilunasi dengan hasil penjualan itu. Bila gadai itu terdiri dan barang dagangan atau dan efek-efek yang dapat diperdagangkan dalam bursa, maka penjualannya dapat dilakukan di tempat itu juga, asalkan dengan perantaraan dua orang makelar yang ahli dalam bidang itu".*

Hak *parate executie* dalam gadai, lahir demi undang-undang sejak debitur ingkar janji kalau tidak diperjanjikan lain. Muatan ketentuan Pasal 1155 KUHPerdata hanya bersifat mengatur (*aanvullend recht*), berarti dapat disimpangi. Artinya, ketentuan Pasal 1155 KUHPerdata dapat diperjanjikan kedua belah pihak, misalnya kreditur tak berwenang menjual sendiri benda jaminan apabila debitur wanprestasi.[27]

Manfaat lembaga *parate executie* agar kemudahan diperoleh kreditur untuk pemberesan hutangnya minus demi banyak bea, durasi, serta energi ketika debitur wanprestasi. Kemudahan dengan *parate executie* agar kredit akan diberikan oleh perbankan kepada debitur yang membutuhkan dana untuk keperluannya. Untuk itulah, pembentuk regulasi menyodorkan wahana *parate executie* pada kreditur demi mendapatkan pembayaran tagihannya yang pertama kali via norma di dalam Pasal 1178 ayat (2) KUH Perdata. Penerima hipotek pertama diberikan untuk mengikrarkan *beding van eigenmachtige verkoop* (ikrar demi melego atas kekuasaan sendiri). Seraya mengikrarkan wewenang tersebut, kreditur dapat serta-merta menjual objek agunan di depan publik jikalau debitur wanprestasi tanpa wajib *fiat* dari ketua pengadilan negeri.[28] BW (*Burgerlijk Wetboek*) Nederland Tahun 1830, mulanya belum mencantumkan kemungkinan perlu mencantumkan "*beding van eigenmachtige verkoop*". Setelah itu Tahun 1833 ditambahkan ayat (2) pada Pasal 1223 yang substansinya sepadan dengan Pasal 1178 ayat (2) KUH Perdata bahwa diberikan wewenang pada penerima hipotik pertama demi mengikrarkan kewenangan penjualan bersendikan kekuasaan mandiri apabila debitur wanprestasi.[29]

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[27] Ari Wirya Dinata, "Lembaga Jaminan Fidusia: Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *Nagari Law Review* 3, no. 2 (April 28, 2020): 96, https://doi.org/10.25077/nalrev.v.3.i.2.p.84-99.2020.

[28] Zidna Aufima, "Akibat Hukum Bagi Notaris Dalam Pembuatan Akta Jaminan Fidusia Pasca Terbitnya Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 Tentang Eksekusi Jaminan Fidusia," *Journal of Judicial Review* 22, no. 01 (June 30, 2020): 72, https://doi.org/10.37253/jjr.v22i1.772.

[29] Rumawi Rumawi, "Prinsip Pelelangan Obyek Hak Tanggungan Secara Parate Executie Akibat Wanprestasi Dalam Perjanjian Kredit," *Jurnal Rechtens* 3, no. 1 (2014): 83, https://doi.org/10.36835/rechtens.v3i1.93.

Di dalam implementasi Pasal 1223 ayat (2) BW Nederland (1178 ayat (2) KUH Perdata Indonesia), HR (*Hoge Raad*, MAnya Nederland) diikuti yang disebut "*lastgeving-teorie*" atau teori mandat. Kreditur penerima hipotik melego tanah yang dijadikan objek agunan selaku juru kuasa dari pemilik tanah. Beberapa ahli menimbang teori yang dipakai HR tersebut tidak lazim sebab kalau kreditur melaksanakan penjualan bersendikan kuasa, maka sewajibnya yang menyerap hasil pelegoan ialah debitur dan tidak kreditur. Dan yang lebih tak lazim lagi sebab pelegoan tersebut dilaksanakan oleh kreditur, dengan alasan melaksanakan wewenangnya sendiri dan juga di dalam praktik telah lazim dikenal bahwa penerima hipotek berwenang mengalihkan hak milik atas tanah yang dilegonya pada pemesan tanah bersendikan berita acara lelang, kekuasaan demikian diibaratkan sudah didapat dari haknya untuk melaksanakan eksekusi.[30]

Di dalam *arrest*-nya tertanggal 30 April 1934 (N.J 1934,1721) HR masih dianut paham mandat, yang disebutkan bahwa kreditur melego bersendikan kuasa mutlak. semenjak *arrest* HR tertanggal 11 April 1941 (NJ. 1941, 10), berlangsung situasi peralihan pendapat dengan digunakan istilah yang netral oleh HR. Dalam *arrest* HR tanggal 25 Januari 1977 (NJ. 1977, 362), bahwa pemberian perintah (*lastgeving*) maupun kuasa sudah tidak disinggung sama sekali, dan bahkan disebutkan bahwa kreditur yang melego ex-Pasal 1223 ayat (2) BW Nederland atau (Pasal 1178 ayat (2) KUH Perdata Indonesia) selaku kreditur yang melakukan wewenangnya (eksekusi) ala yang digampangkan (*vereenvoudigde wijze van executie*).[31]

Pemikiran lembaga peradilan dan putusan di negara Indonesia mengenai *parate executie* bersendikan "*beding van eigenmachtige verkoop*", bahwa dalam salah satu putusan dianut sebuah pemikiran yang bisa diucapkan sangat kontroversi terkait pelaksanaan eksekusi "*beding van eigenmachtige verkoop*" ialah Putusan Mahkamah Agung RI Nomor 320K/Pdt/1980 tertanggal 20 Mei 1984. Vonis terkandung tiada membenarkan pelanggaran *executorial verkoop* bersendikan klausula *eigenmachtige verkoop* dilaksanakan secara mandiri oleh kreditur minus via ketua pengadilan negeri, dengan dalih: *pertama*, setiap pelelangan (*executoriale verkoop*) didasarkan Pasal 224 HIR, wajib melalui pengadilan negeri; *kedua*, pelelangan tak sah, jikalau secara langsung

[30] Djumardin and Ety Mul Erowati, "Eksistensi Sertifikat Jaminan Fidusia Yang Telah Ditandatangani Sebelum Berlakunya Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *Jurnal Education And Development* 8, no. 3 (August 10, 2020): 952, http://journal.ipts.ac.id/index.php/ED/article/view/2232.

[31] Johannes Ibrahim Kosasih, Anak Agung Istri Agung, and Anak Agung Sagung Laksmani Dewi, "Parate Eksekusi Pasca Putusan Mahkamah Konstitusi (MK) NO. 18/PUU-XVII/2019 Dan No: 02/PUU-XIX/2021 Terhadap Eksekusi Jaminan Fidusia Atas Lembaga Pembiayaan Leasing," *Jurnal IUS Kajian Hukum Dan Keadilan* 10, no. 1 (April 24, 2022): 117, https://doi.org/10.29303/ius.v0i0.971.

dilaksanakan jawatan lelang, karena yang maknai dengan jawatan umum pada Pasal 1211 KUH Perdata merupakan pengadilan, tidak jawatan lelang.[32] Namun menurut Djuhaendah Hasan, ketentuan Pasal 1211 KUH Perdata ditentukan bahwa: pertama, penjualan harus dilakukan dimuka umum; kedua, didasarkan kebiasaan setempat; dan ketiga, penjualan objek jaminan diselenggarakan pejabat lelang,[33] yang sekarang disebut pejabat lelang adalah "orang yang berdasarkan peraturan perundang-undangan diberi wewenang khusus untuk melaksanakan penjualan barang secara lelang".[34]

Parate executie adalah wewenang melego atas kekuasaan sendiri objek jaminan yang dipunyai kreditur pertama tanpa perlu izin ketua pengadilan negeri. Sertifikat hak tanggungan atau sertifikat fidusia dapat digunakan untuk eksekusi objek jaminan hak tanggungan atau fidusia. Kedua sertifikat itu mengikat tidak hanya antara pemberi dan penerima jaminan namun juga mengikat seluruh pihak ketiga yang berkaitan dengan objek jaminan.

Parate executie merupakan wewenang relatif yang dimiliki penerima jaminan dalam hal ini kreditur. Hak relatif hadir apabila wanprestasi dilakukan oleh pemberi jaminan dalam hal ini debitur. Hak relatif hanya berlaku untuk seorang tertentu, tidak untuk pihak lain. Dalam konteks objek jaminan, hak relatif hanya diperuntukkan penerima objek jaminan sebagai kreditur, dan tidak bisa dikuasakan kepada pihak lain. Objek jaminan hanya dapat dijual oleh penerima objek jaminan sebagai kreditur, dan tidak bisa dikuasakan kepada pihak manapun untuk menjual objek jaminan tersebut.

Kewenangan nisbi memiliki klaim pada pihak asing (lain) demi melakukan sesuatu hal, memberikan sesuatu hal, dan tak melaksanakan sesuatu hal tertentu. Kewenangan nisbi bagi penerima objek jaminan dapat menjual objek jaminan secara pelelangan umum melalui kantor lelang. Wanprestasi yang dilakukan oleh pemberi objek jaminan selaku debitur dapat berakibat objek jaminan dijual melalui pelelangan umum oleh penerima objek jaminan selaku kreditur kepada kantor lelang.

Hak relatif terdapat prestasi sebagai objek. Objek jaminan yang dimiliki oleh pemberi objek jaminan selaku debitur dapat dijual oleh penerima objek jaminan selaku kreditur. Hasil penjual objek jaminan tersebut oleh kreditur diambil sebagai

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[32] Nurul Ma'rifah, "Kepastian Hukum Terhadap Kreditur Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 Dan Nomor 2/PUU-XIX/2021," *Notary Law Journal* 1, no. 2 (April 29, 2022): 206, https://doi.org/10.32801/nolaj.v1i2.23.

[33] Djuhaendah Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah Dan Benda Lain Yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Horisontal* (Bandung: PT. Citra Aditya Bakti, 1996), 248.

[34] Pasal 1 Angka 14 Kementerian Keuangan Republik Indonesia, "Peraturan Menteri Keuangan Republik Indonesia Nomor 27 /PMK.06/2016 Tentang Petunjuk Pelaksanaan Lelang (Berita Negara Republik Indonesia Tahun 2016 Nomor 270)" (2016), https://jdih.kemenkeu.go.id/fullText/2016/27~PMK.06~2016Per.pdf.

pelunasan hutang debitur. Apabila ada sisa dari penjualan tersebut, maka diberikan pada debitur. Sekiranya hasil pelelangan tak cukup buat pelunasan utang debitur, maka kreditur dapat menagih kembali kepada debitur.

Parate executie sebagai hak relatif yang dimiliki oleh penerima objek jaminan atau pemegang objek jaminan selaku kreditur dilindungi oleh hukum. *Parate executie* memiliki kesesuaian makna dalam perspektif yurisprudensi mahakamah konstitusi, doktrin/pendapat ahli, dan peraturan perundang-undangan. Ketiga memperkuat keberadaan *parate executie*. Kekuatan hukum kedudukan *parate executie* dapat memperlancar kegiatan lalu lintas dunia bisnis. Para pihak seperti debitur memperoleh pinjaman dari kreditur, dan kreditur dapat memberikan pinjaman kepada debitur. Kedua saling percaya dan objek jaminan merupakan bagian dari kesepakatan mereka. Para pihak yang terlibat dalam lalu lintas kegiatan bisnis tersebut dapat aman terlindungi dengan eksistensi *parate executie*.

Berdasarkan uraian tersebut bahwa *parate executie* dalam hukum jaminan dapat dipersingkat bahwa *parate executie* memiliki unsur: pertama, *parate executie* diberikan oleh undang-undang; kedua, *parate executie* dituangkan dalam perjanjian dalam akta perjanjian penjaminan; ketiga, *parate executie* adalah hak relatif (nisbi); *parate executie* tidak dapat diwakilkan/dikuasakan dalam penjualannya; keempat, *parate executie* tidak perlu *fiat* ketua pengadilan negeri dalam pelaksanaan eksekusinya; kelima, *parate executie* lakukan dengan objek jaminan dijual dimuka umum, keenam, *parate executie* terwujud dengan adanya wanprestasi yang dilakukan pemberi jaminan.

2. *Parate executie* dalam jaminan fidusia menurut *ratio decidendi* putusan Mahkamah Konstitusi Republik Indonesia nomor 18/PUU-XVII/2019

Agunan *fiduciare* merupakan terobosan baru penemuan hukum oleh pengadilan. Dalam hukum jaminan kebendaan yang tertuang dalam KUH Perdata jaminan terdiri dari dua jenis yaitu pertama, agunan objek berjalan, dan kedua, agunan objek tetap. Agunan yang pertama adalah gadai yang ditentukan di dalam ketentuan Pasal 1150-1160 KUH Perdata, sedangkan jaminan yang kedua adalah hipotek/hak tanggungan yang diatur di dalam ketentuan Pasal 1162-1178 KUH Perdata *jo*. Undang-Undang Nomor 4 Tahun 1996. Pengaturan agunan kebendaan yang dalam KUH Perdata masuk sistem tertutup. Artinya, selain jaminan gadai dan jaminan hipotik/hak tanggungan tidak ada jenis jaminan kebendaan lainnya.[35] Dengan diakuinya fidusia sebagai jaminan kebendaan, maka KUH Perdata khususnya Buku Kedua telah lepas prinsip tertutup

[35] Oey Hoey Tiong, *Fidusia Sebagai Jaminan Unsur-Unsur Perikatan* (Jakarta: Ghalia Indonesia, 1984), 22.

yang dianutnya.[36] Fidusia sebagai jaminan kebendaan yang diakui oleh putusan-putusan pengadilan, kemudian diakui oleh penerbit undang-undang dengan terbitnya Undang-Undang Nomor 42 Tahun 1999. *Fiduciare* dibandingkan gadai saling menguntungkan kreditur dan debitur, karena debitur di samping memperoleh kucuran kredit dari kreditur, juga objek fidusia masih digunakan oleh debitur.[37] Hal yang sama juga dialami oleh kreditur, objek fidusia tidak perlu disimpan oleh kreditur dan kreditur dapat mengucurkan dananya kepada debitur, karena kreditur tidak perlu menyiapkan tempat dan biaya penyimpanan objek fidusia, dan dana yang dimiliki kreditur bisa diputar dengan pencairan kredit kepada debitur. Hal tersebut saling menguntungkan bagi kreditur dan debitur.

Di dalam ketentuan Pasal 15 ayat (3) Undang-Undang Nomor 42 Tahun 1999 ditentukan bahwa kreditur penerima fidusia memiliki wewenang untuk menjual atas kekuasaan mandiri objek fidusia apabila debitur pemberi fidusia cidera janji. Ketentuan Pasal 15 ayat (3) tersebut terdapat beberapa antara lain: wanprestasi dilakukan oleh debitur sebagai pemberi fidusia, penjualan atas kekuasaan sendiri oleh kreditur sebagai penerima fidusia, dan objek fidusia sebagai objek jaminan. Ketentuan tersebut dalam khasanah hukum jaminan disebut dengan *parate executie*. *Parate executie* merupakan wewenang untuk menjual atas kekuasaan sendiri objek jaminan fidusia oleh penerima jaminan apabila cidera janji dilakukan oleh pemberi jaminan. Dalam konteks jaminan fidusia, *parate executie* adalah wewenang untuk menjual atas kekuasaan sendiri objek fidusia oleh penerima fidusia apabila wanprestasi telah dilakukan oleh pemberi fidusia.

Parate executie tersebut dapat dilaksanakan oleh penerima fidusia apabila wanprestasi dilakukan pemberi fidusia, namun Ketentuan Pasal 15 ayat (3) tersebut tidak mengatur waktu terjadinya wanprestasi yang telah dilakukan pemberi fidusia. Ketidakjelasan waktu terjadinya wanprestasi tersebut dapat mengakibatkan ketidakpastian hukum bagi pemberi fidusia. Ketentuan tersebut dianggap merugikan hak konstitusional warga negara telah divonis oleh Mahkamah Konstitusi dengan Putusan Nomor 18/PUU-XVII/2019.

Mahkamah Konstitusi Republik Indonesia dengan putusan nomor 18/PUU-XVII/2019, di dalam *ratio decidendi* putusan tersebut poin 3.16 paragraf 3 dinyatakan:

> *"substansi norma dalam Pasal 15 ayat (3) UU 42 Tahun 1999 berkaitan dengan adanya unsur debitur yang cidera janji yang kemudian memberikan hak kepada kreditur penerima fidusia untuk menjual atas kekuasaannya sendiri objek jaminan fidusia. Persoalannya adalah kapan cidera janji itu dianggap telah terjadi dan*

[36] Munir Fuady, *Jaminan Fidusia* (Bandung: PT. Citra Aditya Bakti, 2003), 12.
[37] Tiong, *Fidusia Sebagai Jaminan Unsur-Unsur Perikatan*, 22.

> *siapa yang berhak menentukan? Inilah yang tidak terdapat kejelasannya dalam norma Undang-Undang Fidusia. Dengan maksud lain, ketidakjelasan tersebut membawa konsekuensi hukum berupa ketidakpastian hukum perihal waktu sesungguhnya debitur pemberi fidusia telah melakukan cidera janji yang berakibat timbulnya kewenangan yang bersifat mutlak pada pihak kreditur penerima fidusia untuk menjual objek jaminan fidusia yang berada dalam kekuasaan debitur".*[38]

Dalam *ratio decidendi* putusan tersebut berintisari bahwa wanprestasi atau cidera janji pemberi fidusia yang termaktub di dalam norma Pasal 15 ayat (3) tersebut tidak diatur batas dan waktu terjadi cidera janji yang dilakukan debitur pemberi fidusia. Di samping itu, apabila cidera janji/wanprestasi tersebut terjadi, siapa yang menentukan keciderajanjian pemberi fidusia. Ketidakjelasan waktu dan siapa yang memutuskan keberadaan ingkar ikrar di dalam pengaturan Pasal 15 ayat (3) tersebut dapat mengakibatkan ketidakpastian hukum bagi pemberi fidusia. Dengan demikian *parate executie* tersebut tidak bisa dilakukan oleh penerima fidusia, karena *parate executie* dapat dilaksanakan apabila cidera janji/wanprestasi pemberi fidusia, sedangkan waktu dan siapa yang menentukan terjadinya cidera janji/wanprestasi tersebut masih tidak jelas.

Di samping persoalan waktu dan siapa penentu terjadinya cidera janji/wanprestasi tersebut, *parate executie* dapat dilaksanakan apabila kreditur pemberi fidusia secara sukarela menyerahkan objek fidusia kepada penerima fidusia. Hal ini dikemukakan dalam *ratio decidendi* Mahkamah Konstitusi Republik Indonesia dengan putusan nomor 18/PUU-XVII/2019 dalam poin 3.17 paragraf 3 juga bahwa:

> *"Sepanjang debitur pemberi hak fidusia telah mengakui adanya cidera janji (wanprestasi) dan secara sukarela menyerahkan objek fidusia dalam perjanjian fidusia, maka menjadi kewenangan sepenuhnya bagi kreditur penerima fidusia untuk dapat melaksanakan eksekusi sendiri (parate eksekusi). Namun, apabila yang terjadi sebaliknya, debitur pemberi hak fidusia tidak mengakui adanya cidera janji (wanprestasi) dan keberatan untuk menyerahkan secara sukarela objek fidusia dalam perjanjian fidusia, maka kreditur penerima fidusia tidak boleh melaksanakan eksekusi sendiri, melainkan harus memohon pelaksanaan eksekusi kepada pengadilan negeri. Dengan demikian, hak konstitusionalitas debitur pemberi fidusia dan kreditur penerima fidusia terlindungi secara seimbang".*[39]

Ratio decidendi tersebut termaktub bahwa *parate executie* bisa diselenggarakan jikalau kreditur pemberi *fiduciare* mengakui cidera janji serta kreditur penerima *fiduciaire* menerima objek fidusia dari debitur pemberi fidusia yang secara suka cita

[38] Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," 2019, sec. Poin 3.16.
[39] Indonesia, sec. Poin 3.17.

menyerahkannya. Hal yang berbeda akan terjadi, apabila cidera janji tidak diakui oleh debitur pemberi fidusia, dan tidak mau memberikan agunan fidusia pada kreditur penerima agunan fidusia. Di dalam perihal ini, *parate executie* yang dimiliki oleh kreditur penerima fidusia tak bisa dilaksanakan bagi kreditur penerima agunan fidusia, karena tidak ada pengakuan terjadinya cidera janji dan objek fidusia tidak diserahkan oleh debitur pemberi fidusia.

Permasalahan kapan waktu terjadi wanprestasi dan siapa penentu keberadaan ingkar ikrar tersebut, Mahkamah Konstitusi dengan vonis nomor 18/PUU-XVII/2019 mempersembahkan jalan keluar atas kemelut pengaturan Pasal 15 ayat (3) tersebut sebagaimana tercantum di dalam *ratio decidendi* dalam poin 3.18 paragraf satu juga bahwa:

> *"norma Pasal 15 ayat (3) UU 42 Tahun 1999 khususnya frasa cidera janji atau wanprestasi hanya dapat dikatakan konstitusional sepanjang dimaknai bahwa adanya cidera janji atau wanprestasi tidak ditentukan secara sepihak oleh kreditur penerima fidusia saja melainkan atas dasar kesepakatan antara kreditur penerima fidusia dengan debitur pemberi fidusia atau atas berdasarkan upaya hukum dalam penentuan terjadinya cidera janji".*[40]

Ratio decidendi tersebut Mahkamah Konstitusi memberi solusi jalan keluar kemelut waktu cidera janji tersebut bahwa ingkar ikrar di dalam norma Pasal 15 ayat (3) tersebut terjadi atas kesepakatan rongak debitur pemberi serta kreditur penerima agunan fidusia atau atas berlandaskan upaya hukum dalam penentuan terjadinya cidera janji. Cidera janji debitur pemberi fidusia terjadi apabila ada kesepakatan celah debitur pemberi dan kreditur penerima *fiduciare* yang menyatakan bahwa telah terjadi wanprestasi oleh debitur pemberi fidusia. Atau cidera janji tersebut terjadi apabila ada upaya hukum untuk penentuan terjadinya cidera janji yang dilakukan debitur pemberi fidusia. Upaya hukum ini tentu dilakukan oleh kreditur penerima fidusia.

Wanprestasi atau non performa atau disebut dengan *default* atau *non fulfillment breach of contract* merupakan ketidakmampuan atau kelalaian debitur dalam pelaksanaan pemenuhan bebasnya. Mengikuti Subekti ialah "apabila debitor tidak melaksanakan seperti apa yang dijanjikannya, maka dikatakan debitur melaksanakan wanprestasi, artinya debitor apa atau lalai atau ingkar janji atau melanggar kesepakatan, bila debitor melakukan atau berbuat sesuatu yang tidak boleh dilakukannya".[41] Sementara mengikuti Munir Fuady, "wanprestasi merupakan tidak dilakukan prestasi atau kewajiban seperti yang dibebankan dalam kontrak terhadap pihak-pihak tertentu

[40] Indonesia, sec. Poin 3.18.
[41] R. Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermasa, 1985), 1.

seperti yang tercantum dalam kontrak yang bersangkutan".[42] Artinya, wanprestasi atau cidera janji adalah tidak terpenuhinya kewajiban sebagaimana ditetapkan dalam perjanjian, yang disebabkan kelalaian debitur secara terencana ataupun tidak terencana, dan sebab dalam situasi dan kondisi kahar (*overmacht / force majeure*).[43] Mengikuti M. Yahya Harahap, "wanprestasi adalah melaksanakan kewajiban yang tidak tepat pada waktunya atau dilakukan tidak menurut selayaknya seperti yang dicantumkan dalam kesepakatan. Seorang debitur dikatakan berada dalam keadaan wanprestasi, apabila debitur tersebut dalam melaksanakan perjanjian telah lalai sehingga terlambat dari jadwal waktu yang telah ditentukan atau dalam melakukan prestasi tidak menurut sepatutnya/selayaknya".[44]

Di dalam Pasal 1 angka 14 Rancangan Undang-Undang tentang Perkreditan Perbankan dinyatakan bahwa "wanprestasi adalah cidera janji yang dilakukan oleh salah satu pihak dan/atau kedua belah pihak, karena tidak melaksanakan kesepakatan baik seluruh dan/atau sebagian yang telah disetujui bersama".[45] Wanprestasi dalam terminologi perbankan disebut kredit macet, yaitu angsuran kredit dan bunga beserta dendanya tidak dibayar debitur.[46] Bank Indonesia memetakan kredit bank ke dalam beberapa kategori yang dilaksanakan bersandarkan kolektibilitas meliputi: a. lancar; b. dalam perhatian khusus; c. kurang lancar; d. diragukan; atau e. macet.[47] Sepanjang huruf b hingga huruf e selaku kredit tidak sehat atau problematis. Terminologi pinjaman berproblematis sudah digunakan di dalam ranah perbankan di Indonesia yang dinamakan dengan *problem loan*, adalah suatu istilah yang telah biasa eksistensinya diterapkan di dalam perbankan seluruh dunia. Pada asasnya, permasalahan kredit bermasalah ialah permasalahan perdata yang sesuai terminologi hukum privat, merupakan korelasi debitur dan kreditur dalam relasi utang piutang. Relasi tersebut disebabkan keberadaan dari kesepakatan tertentu. Debitur berikrar pengembalian daba yang dipinjamnya dengan diikuti bea dan anakannya, dan pihak kreditur mengasihkan kredit terhadap debitur.

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42 Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)* (Bandung: PT. Citra Aditya Bakti, 2001), 87–88.

43 Djaja S. Meilala, *Hukum Perdata Dalam Perspektif BW* (Bandung: Nuansa Aulia, 2012), 175.

44 M.Yahya Harahap, *Segi-Segi Hukum Perjanjian* (Bandung: Alumni, 1986), 60.

45 Pasal 1 Angka 14 Republik Indonesia, "Rancangan Undang-Undang Tentang Perkreditan Perbankan," 2020, https://www.hukumonline.com/berita/a/ruu-tentang-perkreditan-perbankan-hol2874?page=all.

46 M. Khoidin, *Kekuatan Eksekutorial Sertifikat Hak Tanggungan* (Yogyakarta: LaksBang, 2005), 10.

47 Pasal 12 Bank Indonesia Republik Indonesia, "Peraturan Bank Indonesia Nomor 14/ 15 /PBI/2012 Tentang Penilaian Kualitas Aset Bank Umum (Lembaran Negara Republik Indonesia Tahun 2012 Nomor 202; Tambahan Lembaran Negara Republik Indonesia Nomor 5354)" (2000), https://www.bi.go.id/id/publikasi/peraturan/Documents/b2f0e7f226eb4fdaaf905efde1f9e3d7pbi_141513.pdf.

Kreditur berupaya melakukan usaha preventif walaupun kredit yang sudah dikeluarkan berakhir menjadi kredit bermasalah, lalu kreditur akan membuka usaha represif. Usaha-usaha represif yang semula akan dilaksanakan yaitu melaksanakan usaha penyelamat kredit, manakala usaha penyelamatan kredit tidak bisa dilaksanakan atau kendatipun telah dilaksanakan namun tidak menorehkan hasil maka bank akan mencari jalan usaha penagihan kredit. Persyaratan sebuah tindakan yang bisa disebut non prestasi sudah ada di dalam Pasal 1243 KUH Perdata yang dinyatakan "apabila seseorang telah lalai melaksanakan kewajibannya kepada pihak lain dan tetap tidak melaksanakan kewajiban tersebut, meskipun telah diingatkan, maka pihak tersebut dapat dikatakan telah melakukan wanprestasi, atas kelalaian tersebut yang bersangkutan wajib mengganti kerugian yang ditimbulkannya".

Pertimbangan hukum Putusan Mahkamah Agung Republik Indonesia Nomor 3434K/Pdt/2000 tertanggal 29 Maret 2007, bahwa debitur telah lupa melakukan pemenuhan bebannya setiap bulan angsurannya sehingga kreditur berhak minta pemenuhan melalui pengadilan meskipun tenggang waktu belum lampau sesuai dengan akta kredit. Dalam pertimbangan putusan tersebut bahwa debitur wanprestasi karena lalai membayar angsuran tiap-tiap bulan sebagaimana tertuang klausula dalam akta perjanjian kredit, meskipun belum jatuh tempo. Beraneka ragam untuk pihak-pihak yang tidak melaksanakan prestasi meskipun sedari awal sudah setuju guna dilakukan serasi dengan kesepakatan. Ragam ingkar ikrar meliputi:[48] 1. Wanprestasi (*non performa*) berbentuk tidak memberikan performa; 2. non performa sebab telat memberikan performa; 3. Non performa sebab tidak penuh dalam memberikan performa; dan 4. Non performa yang melaksanakan suatu hal yang tidak diperkenankan dalam perjanjian.

Dampak hukum keberadaan ingkar ikrar meliputi:[49] a. kreditur bisa mengharuskan pelaksanaan pemenuhan persetujuan, atau pemenuhan persetujuan diiringi ganti rugi, dan pembatalan persetujuan disertai ganti rugi. Hal seperti dinormakan dalam Pasal 1267 KUH Perdata, "pihak yang tidak dipenuhi terhadapnya perikatan, dapat memilih; memaksa pihak yang lain yang tidak memenuhi perikatan untuk memenuhi persetujuan, jika hal itu masih dapat dilakukan, atau menuntut pembatalan perjanjian, dengan penggantian biaya, kerugian dan bunganya". b. debitur wajib memenuhi pembayaran ganti rugi terhadap kreditur seperti norma Pasal 1243 KUH Perdata. Dalam Pasal 1243 KUH Perdata bahwa: apabila debitur wajib memenuhi menyulih bea, kemudaratan,

[48] R. Subekti, *Hukum Perjanjian* (Jakarta: Intermasa, 1987), 45; Meilala, *Hukum Perdata Dalam Perspektif BW*, 175–76.
[49] Meilala, *Hukum Perdata Dalam Perspektif BW*, 176.

dan anakan sebab tidak melakukan perikraran, meski debitur diputuskan lupa tetap wajib melakukan pemenuhan perikatan, atau debitur melakukan pemenuhan tersebut dilakukan melampaui batas waktu yang telah ditentukan. Kredit yang dipinjam oleh debitur dari kreditur harus dikembalikan sejumlah dan keadaan semula sebagaimana yang diperjanjikan. Hal secara tegas dinyatakan di dalam Pasal 1763 KUH Perdata bahwa: "Barang siapa meminjam suatu barang wajib mengembalikannya dalam jumlah dan keadaan yang sama dan pada waktu yang diperjanjikan".[50] Jika perikatan dilahirkan dari perjanjian timbal balik, kreditur dapat dibebaskan dirinya dari kewajiban memberikan kontraprestasi. Dalam Pasal 1266 KUH Perdata bahwa: apabila syarat batal dicantumkan dalam perjanjian timbal balik, jika salah satu pihak tidak memenuhi kewajiban, maka perjanjian tersebut tidak batal demi hukum, namun pembatalan tersebut wajib disampaikan kepada pengadilan negeri.

Klasifikasi cidera janji tersebut di atas perlu dikaitkan dengan ketentuan Pasal 1238 KUH Perdata bahwa debitur dalam keadaan lalai dan karena itu ia wanprestasi apabila telah ditegur atau diingatkan, dan tidak memenuhi kewajibannya dengan baik atau debitur tersebut lalai memenuhi kewajibannya sebagaimana batas waktu yang telah ditentukan dianggap cidera janji. Ketentuan Pasal Pasal 1238 KUH Perdata bersifat menambah atau bersifat terbuka, artinya para pihak dapat menyimpangi ketentuan tersebut. Para pihak dalam perjanjian kredit membuat klausula bahwa apabila debitur tidak membayar angsuran pada tanggal yang telah disepakati dalam perjanjian dapat dianggap cidera janji, dengan demikian debitur tidak perlu lagi disomasi atau ditegur oleh kreditur.[51] Dengan tafsir Mahkamah Konstitusi atas norma cidera janji dalam *anggitan* Pasal 15 ayat (3) Undang-Undang Nomor 42 Tahun 1999, eksistensi ingkar ikrar tidak diperkenankan diputuskan oleh kreditur secara mandiri, namun berdasarkan persetujuan oleh keduanya atau berdasarkan usaha hukum yang memutuskan ingkar ikrar sudah terjadi. Tafsir tersebut mengikat para pihak dan para pihak tidak dapat menyimpangi tafsir atas ketentuan tersebut, karena: pertama, tafsir terhadap ketentuan dimaksud di dalam vonis Mahkamah Konstitusi Republik Indonesia adalah sederajat dengan *qanun* di bawah Undang-Undang Dasar 1945; dan kedua, undang-undang fidusia tidak mengatur sifat sistem terbuka atau sistem tertutup sebagaimana dalam sistem terbuka dan sistem tertutupnya dalam KUH Perdata. Dengan demikian, cidera janji sebagaimana tafsir Mahkamah Konstitusi tersebut adalah setara ketentuan norma undang-undang, dan undang-undang terkait fidusia ialah norma yang memaksa para pihak dan tidak dapat disimpangi oleh debitur

[50] Republik Indonesia, "Kitab Undang-Undang Hukum Perdata (KUH Perdata)" (n.d.), sec. Pasal 1763.
[51] J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia* (Bandung: PT. Citra Aditya Bakti, 2002), 263.

dan kreditur dalam penentuan terjadinya cidera janji debitur. Kesepakatan para pihak dalam menentukan terjadinya cidera janji debitur merupakan kewajiban para pihak yang tidak dapat disimpangi. Kreditur tidak dapat menentukan secara sepihak bahwa cidera janji telah dilakukan oleh debitur. Debitur dan kreditur harus bersepakat untuk penentuan cidera janji bagi debitur.

Parate executie dalam hukum jaminan fidusia dapat dipersingkat bahwa *parate executie* memiliki unsur: pertama, *parate executie* diberikan oleh undang-undang fidusia; kedua, *parate executie* dituangkan dalam perjanjian dalam akta perjanjian penjaminan fidusia; ketiga, *parate executie* adalah hak relatif (nisbi) yang dimiliki oleh penerima fidusia; *parate executie* dilaksanakan oleh prinsipalnya dalam hal ini penerima fidusia, dengan kata lain tidak dapat diwakilkan/dikuasakan dalam penjualannya; keempat, *parate executie* tidak perlu *fiat* ketua pengadilan negeri dalam pelaksanaan eksekusinya; kelima, *parate executie* terwujud dengan adanya wanprestasi yang dilakukan pemberi jaminan. Keenam, *parate executie* dalam agunan *fiduciare* bisa diselenggarakan jikalau objek *fiduciare* diberikan secara sukacita dari debitur pemberi *fiduciaire* pada kreditur penerima *fiduciaire*. Pemberian secara sukarela tersebut merupakan manifestasi pengakuan pemberi fidusia bahwa ingkar ikrar sudah terjadi dalam dirinya terhadap kesepakatan yang telah disepakati bersama penerima fidusia. Ketiadaan penyerahan objek fidusia secara sukarela oleh pemberi fidusia kepada penerima fidusia merupakan hal yang mustahil *parate executie* dapat terwujud dan dilaksanakan oleh pihak penerima fidusia.

Cidera janji yang diuji tersebut masih menyisakan pertanyaan, karena cidera janji pemberi fidusia diatur dalam beberapa norma di undang-undang fidusia. Cidera janji dalam Undang-Undang Jaminan Fidusia terdapat dalam beberapa pasal tidak hanya pada ketentuan Pasal 15 ayat (3). Norma ketentuan 'cidera janji' di antaranya termuat pada kentuan antara lain: Pasal 15 ayat (3), Pasal 21 ayat (2), Pasal 21 ayat (4), dan Pasal 33. Norma-norma tersebut oleh lembaga pengadilan perlu ditafsirkan.[52] Terminologi penafsiran seringkali dipadankan dengan istilah interpretasi yang merupakan serapan dari kata dalam bahasa Inggris *interpretation*. *Interpretation* merupakan

> *"The process of determining what something, esp. The law and legal document, means; the ascertainment of meaning to be given to words or other manifestations of intention. Sedangkan interpretation clause didefinisikan sebagai a legislative or contractual provision giving the meaning of frequently used words or explaining how the document as a whole is to be construed."*[53]

[52] Herowati Poesoko, "Penemuan Hukum Oleh Hakim Dalam Penyelesaian Perkara Perdata," *ADHAPER: Jurnal Hukum Acara Perdata* 1, no. 2 (2015): 228, https://doi.org/10.36913/jhaper.v1i2.20.

[53] Bryan A Garner, ed., "Black's Law Dictionary, Abridged, 9th" (St. Paul, MN: West Publisihing CO, 2010), 894–95.

Penafsiran hukum (interpretasi) adalah sebuah pendekatan pada penemuan hukum dalam hal peraturannya ada tetapi tidak jelas untuk dapat diterapkan pada peristiwanya.[54] Interpretasi atau penafsiran adalah cara mencari arti dan makna suatu peraturan perundang-undangan. Penafsiran dapat dilakukan antara lain: 1) Interpretasi bahasa atau tata bahasa (*grammaticale interpretatie*). ketentuan atau kaidah hukum (tertulis) diartikan menurut arti kalimat atau bahasa sebagaimana diartikan oleh orang biasa yang menggunakan bahasa secara biasa (sehari-hari). 2) Penafsiran historis atau sejarah. Penafsiran cara ini adalah meneliti sejarah daripada undang-undang yang bersangkutan. a. Penafsiran menurut sejarah pembuatan undang-undang (*wet historische interpretatie*). b. Penafsiran menurut sejarah hukum (*rechts historische Interpretatie*). 3) Penafsiran sistematis. penafsiran sistematis, ialah suatu penafsiran yang menghubungkan pasal yang satu dengan pasal yang lain dalam suatu perundang-undangan yang bersangkutan atau pada perundang-undangan hukum lainnya, atau membaca penjelasan suatu perundang-undangan, sehingga dimengerti apa yang dimaksud.[55] 4) Penafsiran sosiologis. Penafsiran sosiologis/teleologis adalah penafsiran yang disesuaikan dengan keadaan sosial yang di dalam masyarakat agar penerapan hukum dapat sesuai dengan tujuannya adalah kepastian hukum berdasarkan asas keadilan masyarakat.[56] 5) Penafsiran otentik. Penafsiran otentik atau penafsiran secara resmi (*authentieke interpretatie* atau *officieele interpretatie*) ialah penafsiran secara resmi, dalam penjelasan undang-undang sebagai lampiran dan tambahan lembaran negara dari undang-undang yang bersangkutan. 6) Penafsiran perbandingan. Penafsiran perbandingan ialah suatu penafsiran dengan membandingkan antara hukum lama dengan hukum positif yang berlaku saat ini, antara hukum nasional dengan hukum asing dan hukum kolonial.[57] 7) Penafsiran interdisipliner. Penafsiran ini dilakukan dalam suatu analisis masalah yang menyangkut pelbagai disiplin ilmu. Dan 8) Penafsiran multidisipliner. Penafsiran ini, seseorang atau seorang hakim harus mempelajari suatu atau beberapa disiplin ilmu lainnya di luar ilmu hukum.[58]

Salah satu metode penafsiran dalam penemuan hukum adalah penafsiran/ interpretasi sistematis. Interpretasi sistematis atau interpretasi logis yaitu menafsirkan

[54] Afif Khalid, "Penafsiran Hukum Oleh Hakim Dalam Sistem Peradilan Di Indonesia," *Al-Adl : Jurnal Hukum* 6, no. 11 (2014): 10, http://dx.doi.org/10.31602/al-adl.v6i11.196.

[55] Nurmin K Martam, "Tinjauan Yuridis Tentang Rechtsvinding (Pemenuhan Hukum) Dalam Hukum Perdata Indonesia," *Gorontalo Law Review* 1, no. 1 (April 23, 2018): 85, https://doi.org/10.32662/golrev.v1i1.99.

[56] Diah Imaningrum Susanti, *Penafsiran Hukum Teori Dan Metode* (Jakarta: Sinar Grafika, 2019), 48.

[57] Enju Juanda, "Konstruksi Hukum Dan Metode Interpretasi Hukum," *Jurnal Ilmiah Galuh Justisi* 4, no. 2 (June 6, 2017): 162–64, https://doi.org/10.25157/jigj.v4i2.322.

[58] Yudha Bhakti Ardhiwisastra, *Penafsiran Dan Konstruksi Hukum* (Bandung: PT. Alumni, 2012), 12.

undang-undang sebagai bagian dari keseluruhan sistem perundang-undangan dengan jalan menghubungkannya dengan undang-undang lain. Penafsiran atau interpretasi hukum sebagai argumentasi yang merupakan dasar dan cara penemuan hukum hakim atau ijtihad hakim dalam putusan. Hakim dalam merumuskan dan menyusun pertimbangan hukum harus cermat, sistematis dan dengan bahasa Indonesia yang benar dan baik. Pertimbangan disusun dengan cermat artinya pertimbangan hukum tersebut harus lengkap berisi fakta peristiwa, fakta hukum, perumusan fakta hukum penerapan norma hukum baik dalam hukum positif, hukum kebiasaan, yurisprudensi serta teori-teori hukum dan lain-lain, yang dipergunakan sebagai argumentasi (alasan) atau dasar hukum dalam putusan hakim.[59] Penafsiran hukum (*legal interpretation*) senantiasa diperlukan dalam penerapan hukum tertulis untuk menemukan dan membentuk hukum. Penemuan hukum merupakan kegiatan untuk memperjelas tentang ketentuan-ketentuan hukum tertulis yang sudah ada, yang dapat diberlakukan bagi suatu aspek kehidupan tertentu.[60]

Berdasarkan penafsiran sistematis, ketentuan norma cidera janji yang termaktub di dalam norma Pasal 21 ayat (2), Pasal 21 ayat (4), dan Pasal 33 mengikuti ketentuan Pasal 15 ayat (3) Undang-Undang Nomor 42 Tahun 1999. Namun, Ketentuan Pasal 21 Ayat (2), Pasal 21 Ayat (4), dan Pasal 33 Undang-Undang Nomor 42 Tahun 1999 tidak ikut serta diuji, dan Mahkamah Konstitusi juga tidak ikut menafsirkan ketentuan cidera janji dalam tiga pasal selanjutnya. Apakah cidera janji dengan maksud bahwa keberadaan ingkar ikrar tidak diperkenankan dilakukan secara mandiri dari kreditur, namun dilaksanakan bersendikan permufakatan oleh kedua pihak atau bersendikan usaha hukum yang memutuskan keberadaan ingkar ikrar sudah terjadi, dari tafsir Mahkamah Konstitusi atas norma ketentuan Pasal 15 Ayat (3) Undang-Undang Nomor 42 Tahun 1999 juga ikut memaknai kata cidera janji yang terdapat pada ketentuan Pasal 21 Ayat (2) jo. Pasal 21 Ayat (4) *jo*. Pasal 33 Undang-Undang Nomor 42 Tahun 1999. Alhasil, penafsiran cidera janji tersebut hanya pada ketentuan Pasal 15 ayat (3) Undang-Undang Nomor 42 Tahun 1999 semata. Hal inilah masih membuka peluang secara terbuka bahwa penerima fidusia tidak menggunakan cidera janji dalam ketentuan Pasal 15 ayat (3) Undang-Undang Nomor 42 Tahun 1999, namun para penerima fidusia masih bisa menggunakan cidera janji pemberi fidusia dalam norma Pasal 21 ayat (2) *jo*. Pasal 21 ayat (4) *jo*. Pasal 33 Undang-Undang Nomor 42 Tahun

[59] Nur Iftitah Isnantiana, "Legal Reasoning Hakim Dalam Pengambilan Putusan Perkara Di Pengadilan," *Islamadina* 18, no. 2 (October 16, 2017): 51–52, https://doi.org/10.30595/islamadina.v18i2.1920.
[60] Tommy Hendra Purwaka, "Penafsiran, Penalaran, Dan Argumentasi Hukum Yang Rasional," *Masalah-Masalah Hukum* 40, no. 2 (2011): 117, https://doi.org/10.14710/mmh.40.2.2011.117-122.

1999, ketika akan melaksanakan *parate executie* yang dapat dimiliki oleh penerima fidusia berdasarkan akta fidusia.

C. KESIMPULAN

Berdasarkan pembahasan pemecahan masalah sebagaimana telah diuraikan di atas, bisa disarikan inti pokoknya antara lain:

1. *Parate executie* merupakan hak atau wewenang yang inheren dalam penerima jaminan yang bisa dilaksanakan kalau debitur pemberi agunan bertindak cedera ikrar. *Parate executie* dilakukan oleh penerima jaminan tanpa ijin dari pemimpin pengadilan negeri. Objek agunan yang dilego via penjualan di depan publik diajukan sendiri oleh penerima jaminan. Pihak manapun tidak diperkenankan mewakili penerima jaminan dalam pengajuan permohonan pelelangan umum kepada kantor lelang.
2. Cidera janji yang dilakukan debitur pemberi fidusia terjadi apabila ada kesepakatan antara pemberi dan penerima fidusia. Atau wanprestasi dimaksud terjadi atas berdasarkan upaya hukum dalam menentukan terjadinya wanprestasi. Kesepakatan antara pemberi dan penerima fidusia terjadinya cidera janji yang dialami oleh pemberi fidusia dapat lahirnya *parate executie* yang dimiliki oleh penerima fidusia. Namun, terjadinya cidera janji yang dialami pemberi fidusia tidak serta merta *parate executie* dapat dilakukan penerima fidusia jikalau debitur pemberi fidusia tak berkenan menyerahkan secara sukarela benda agunan fidusia kepada kreditur penerima agunan fidusia. *Parate executie* dapat dilaksanakan oleh penerima fidusia dengan syarat terjadinya cidera janji diakui oleh pemberi fidusia, dan objek fidusia diserahkan secara sukarela oleh pemberi fidusia. Hal itu dimulai dari terjadinya kesepakatan para pihak dalam penentuan cidera janji yang dilakukan debitur. Hal demikian merupakan ketentuan yang wajib dilaksanakan para pihak dan tidak dapat disimpangi dalam penentuan cidera janji debitur.

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Relevansi Monisme dan Dualisme Bagi Pemberlakuan Perjanjian Internasional di Indonesia

The Relevance of Monism and Dualism for the Implementation of Treaty in Indonesia

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Naskah diterima: 18-05-2021 revisi: 02-08-2022 disetujui: 08-08-2022

Abstrak

Pemberlakuan perjanjian internasional (PI) masih diwarnai perdebatan mengenai pendekatan yang dipilih Indonesia, apakah monisme atau dualisme. Dengan menggunakan metode normatif, penelitian ini mempertanyakan relevansi monisme-inkorporasi dan dualisme-transformasi dalam menentukan pemberlakuan PI. Dua aspek kunci akan diulas, yaitu persetujuan parlemen dan penyusunan peraturan nasional untuk melaksanakan PI. Disimpulkan bahwa dikotomi monisme dan dualisme memiliki keterbatasan sehingga tidak relevan dijadikan dasar dalam menentukan pemberlakuan PI. Persetujuan parlemen dibutuhkan bagi pemberlakuan PI, baik di negara monis maupun dualis. Sejumlah negara dualis bahkan meminta persetujuan parlemen sebelum ratifikasi dilakukan. Penyusunan peraturan nasional pun lazim dilakukan negara monis dan dualis. Bukan untuk memenuhi tuntutan teoritis sejalan pendekatan monisme dan dualisme, tetapi untuk menjamin harmonisasi dan kemampuan negara dalam melaksanakan kewajibannya.

Kata kunci : Dualisme; Monisme; Perjanjian Internasional.

Abstract

The application of treaty is still influenced by different views on the approach chosen by Indonesia, whether monism or dualism. By using normative method, this study questions the relevance of monism-incorporation and dualism-transformation approaches in determining the application of treaty. Two key aspects will be reviewed, namely parliamentary approval and the drafting of national regulations to implement

treaty. It concludes that the dichotomy of monism and dualism has various limitations, and is irrelevant for determining the application of treaty. Parliamentary approval is required for treaty application, both in monist and dualist countries. Several dualist countries have even sought parliamentary approval before ratification can take place. The formulation of national regulations is common in monist and dualist countries. Not to fulfill theoretical demands in line with the monism and dualism approaches, but to ensure harmonization and the ability of state to carry out its obligations.

Keywords : *Dualism; Monism; Treaty.*

I. PENDAHULUAN

1. Latar belakang masalah

Hukum internasional (HI) pada hakikatnya bersifat netral, dalam arti bahwa keberadaan HI tidak dengan serta membuatnya menjadi bagian dari hukum yang berlaku (*applicable law*) di tataran domestik. Keberlakuan HI, termasuk perjanjian internasional (PI), ditentukan oleh hukum nasional (HN) atau pengadilan nasional.[1] UUD 1945 sebagai hukum dasar di Indonesia tidak memuat rujukan yang memadai mengenai PI dan pemberlakuannya. Pasal 11 UUD 1945 hanya menyinggung subyek HI yang menjadi mitra Indonesia dalam membuat PI, lembaga negara yang berwenang membuat PI, dan muatan PI yang mengharuskan adanya persetujuan DPR.

Pasal 11 tersebut dijelaskan lebih lanjut oleh UU Nomor 24 Tahun 2000 tentang Perjanjian Internasional (UUPI). Namun demikian, UU tersebut masih membuka ruang debat mengenai pemberlakuan PI, di antaranya mengenai sifat peraturan perundang-undangan yang mengesahkan PI - apakah hanya mengindikasikan persetujuan untuk mengikatkan diri pada PI (formalitas) atau juga mentransformasikan PI ke dalam HN.[2]

Terdapat dua pendekatan yang menjelaskan hubungan antara HI dan HN, yaitu monisme dan dualisme. Menurut monisme, HI dan HN merupakan satu kesatuan sistem. PI yang telah diratifikasi otomatis menjadi bagian dari hukum yang berlaku dan pada prinsipnya dapat langsung diterapkan di tataran domestik.[3] Pengecualiannya

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1 André Nollkaemper, *National Courts and the International Rule of Law*, 1st ed. (New York: Oxford University Press, 2011), 69.

2 Damos Dumoli Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia* (Bandung: Refika Aditama, 2010) 79, 121; Damos Dumoli Agusman, "The Law Approving Treaties ('UU Pengesahan'): What Does It Signify?," *Jurnal Bina Mulia Hukum* 1, no. 1 (September 2016): 78–79, https://doi.org/10.23920/jbmh.v1n1.8; Lihat juga Setyo Widagdo, "Pengesahan Perjanjian Internasional Dalam Perspektif Hukum Nasional Indonesia," *Arena Hukum* 12, no. 1 (Mei 2019): 195–214. https://doi.org/10.21776/ub.arenahukum.2019.01201.10

3 Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 97.

adalah pada PI yang menuntut dibuatnya peraturan pelaksana, atau yang dikenal sebagai *non-self executing treaty*.[4]

Dualisme menyatakan bahwa HI dan HN adalah dua sistem hukum yang terpisah. PI yang telah diratifikasi harus melalui proses transformasi melalui peraturan domestik. Walaupun negara telah melakukan ratifikasi, PI yang belum ditransformasi tidak menjadi bagian dari hukum yang berlaku.[5]

Ketidakjelasan mengenai pendekatan yang diambil Indonesia melatarbelakangi berbagai kontradiksi pelaksanaan PI. Sebagaimana telah diulas, pengadilan Indonesia pernah menggunakan PI secara langsung dalam kasus yang ditangani (pendekatan monis), misalnya dalam sengketa tanah Kedutaan Besar Malaysia dan Kedutaan Besar Arab Saudi. Indonesia juga memberikan kekebalan dan keistimewaan bagi diplomat asing secara langsung dengan merujuk pada *Vienna Convention on Diplomatic Relations* 1961 (VCDR) dan *Vienna Convention on Consular Relations* 1963 (VCCR), dua konvensi yang sudah diratifikasi.[6] Dalam menangani gugatan perdata akibat tanah longsor di Gunung Mandalawangi, Jawa Barat, pengadilan menggunakan prinsip *precautionary principle* dalam *Rio Declaration on Environment and Development* walaupun disadari bahwa prinsip tersebut bukanlah bagian dari HN. Hal itu dilakukan untuk mencegah kekosongan hukum, terutama karena penegakan hukum lingkungan hidup dilakukan sesuai standar internasional.[7]

Sementara itu dalam kasus-kasus lainnya, pengadilan Indonesia menekankan perlunya transformasi PI, misalnya dalam kasus antara NMB dan PT. Nizwar.[8] Ada pula ahli yang beranggapan bahwa pelaksanaan VCDR dan VCCR di atas bukanlah praktek monisme, melainkan ekspresi pelaksanaan kewajiban internasional Indonesia.[9]

[4] Damos Dumoli Agusman, "Self Executing And Non Self Executing Treaties What Does It Mean?," *Indonesian Journal of International Law* 11, no. 3 (2014): 320-344–344, https://doi.org/10.17304/ijil.vol11.3.501

[5] Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 97; Wisnu Aryo Dewanto, "Akibat Hukum Peratifikasian Perjanjian Internasional Di Indonesia: Studi Kasus Konvensi Palermo 2000," *Veritas et Justitia* 1, no. 1 (2015): 47.2020, http://journal.unpar.ac.id/index.php/veritas/article/view/1416.","plainCitation":"Agusman, Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia, 97; Wisnu Aryo Dewanto, "Akibat Hukum Peratifikasian Perjanjian Internasional Di Indonesia: Studi Kasus Konvensi Palermo 2000," Veritas et Justitia 1, no. 1 (June 30, 2015

[6] Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 6; Agusman, "The Law Approving Treaties ('UU Pengesahan'): What Does It Signify?," 80.

[7] *Kasus Mandalawangi (Kasasi)* (Mahkamah Agung Republik Indonesia 2007); Andri Wibisana, "The Development of the Precautionary Principle in International and in Indonesian Environmental Law," *Asia Pacific Journal of Environmental Law* 14, no. 1 (Januari 2011): 195, https://ssrn.com/abstract=2131666.

[8] Wisnu Aryo Dewanto, "Status Hukum Internasional Dalam Sistem Hukum Indonesia," *Mimbar Hukum* 21, no. 2 (Juni 2009): 334, https://doi.org/10.22146/jmh.16260; Dewanto, "Akibat Hukum Peratifikasian Perjanjian Internasional Di Indonesia," 43.

[9] Dewanto, "Akibat Hukum Peratifikasian Perjanjian Internasional Di Indonesia," 51–52.parliamentary

Kontradiksi mengenai berlakunya PI di Indonesia terlihat jelas di Mahkamah Konstitusi (MK). Saat uji materil terhadap UU Nomor 38 Tahun 2008 tentang Pengesahan Piagam ASEAN (perkara nomor 33/PUU-IX/2011), pemerintah menyatakan bahwa UU Nomor 38 Tahun 2008 hanya memuat persetujuan DPR untuk meratifikasi Piagam ASEAN, dan tidak memberlakukan Piagam ASEAN sebagai norma HN. Oleh karena itu, pemerintah berpendapat bahwa MK tidak berwenang menguji Piagam ASEAN. Argumen ini bernuansa dualisme, merujuk ke pandangan para ahli hukum Indonesia di atas.[10]

Namun demikian, saat uji materil UUPI (perkara nomor 13/PUU-XVI/2018) pemerintah menyampaikan bahwa masih ada perdebatan mengenai pendekatan yang diambil Indonesia, apakah monisme atau dualisme. Disampaikan juga bahwa pemerintah tidak terlalu mempersoalkan dikotomi tersebut, dan bahwa tradisi hukum Indonesia dan UUPI disusun sejalan dengan semangat monisme primat hukum internasional.[11]

Dalam perkara Piagam ASEAN, MK secara mayoritas menyatakan berwenang untuk menguji UU Nomor 38 Tahun 2008 dan Piagam ASEAN. Namun demikian, MK menolak argumen penggugat bahwa sejumlah pasal dalam Piagam ASEAN bertentangan dengan UUD 1945. MK beranggapan bahwa pasal-pasal yang diperkarakan memuat kebijakan ekonomi makro yang perlu diuraikan secara lebih detil dalam peraturan nasional, sebagaimana diatur pasal 5 ayat 2 Piagam ASEAN. Tanpa adanya peraturan pelaksana, Piagam ASEAN belum efektif berlaku.

Penelitian ini tidak membahas pendekatan spesifik yang perlu diambil Indonesia mengingat para ahli telah banyak menyampaikan pandangan. Pendekatan monis

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approval in the Indonesian context is not the same as the United States Senate's approval. The Indonesian Government signed the Palermo Convention on December 12, 2000 and ratified it on April 20, 2009. The issue discussed here regards the legal status of this Convention. In the 80's it was assumed that any treaties ratified or acceded, would ipso facto be enforceable in Indonesia. I argued that Indonesia should be regarded as a state applying the monist approach, which legal practice seems to reject. I stand for the monist approach especially with regard to the legal status of the 2000 Palermo Convention. In addition I also argue about the importance of differentiating between Indonesia's international obligations and the issue of direct applicaton of the Convention by national couts. Keywords: Ratification, Integration, Implementation, Treaty, Indonesia's legal system","container-title":"Veritas et Justitia","DOI":"10.25123/vej.1416","ISSN":"2460-4488","issue":"1","language":"en","note":"number: 1","source":"journal.unpar.ac.id","title":"Akibat Hukum Peratifikasian Perjanjian Internasional di Indonesia: Studi Kasus Konvensi Palermo 2000","title-short":"Akibat Hukum Peratifikasian Perjanjian Internasional di Indonesia","URL":"http://journal.unpar.ac.id/index.php/veritas/article/view/1416","volume":"1","author":[{"family":"Dewanto","given":"Wisnu Aryo"}],"accessed":{"date-parts":[["2020",12,22]]},"issued":{"date-parts":[["2015",6,30]]}},"locator":"51-52","label":"page"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

[10] ''Putusan Mahkamah Konstitusi Nomor 33/PUU-IX/2011'', 2011.

[11] ''Putusan Mahkamah Konstitusi Nomor 13/PUU-XVI/2018'', 2018.

disarankan, misalnya, oleh Agusman.[12] Pendekatan dualis disuarakan antara lain oleh Dewanto dan Juwana, dan menjadi semakin populer pasca putusan MK mengenai Piagam ASEAN.[13] Pratomo menyarankan gabungan antara monisme dan dualisme, sementara Butt berargumen bahwa Indonesia pada dasarnya adalah monis namun mengambil pendekatan dualis atas pertimbangan kepraktisan.[14]

Penelitian ini berangkat dari pemikiran bahwa dikotomi antara monisme dan dualisme telah menipis. Cassese misalnya menegaskan bahwa HI dan HN bukanlah dua sistem hukum terpisah. Walaupun memiliki perbedaan dari segi esensi maupun pemberlakuannya, HI dan HN saling memperkaya muatan masing-masing.[15] Contohnya, Indonesia mengamandemen UUD 1945 dengan memasukkan berbagai norma hak asasi manusia (HAM) pada *Universal Declaration for Human Rights*. UU Nomor 39 Tahun 1999 tentang Pengadilan HAM disusun dengan mengambil sejumlah muatan dalam *Convention on the Prevention and Punishment of the Crime of Genocide* (Konvensi Genosida) dan Statuta Roma. Dua PI tersebut hingga kini belum diratifikasi Indonesia.

Karena PI dibuat oleh negara, muatan PI juga disesuaikan dengan kepentingan negara. Contoh baik adalah konsep negara kepulauan dalam *United Nations Convention on the Law of the Sea* yang diusung Indonesia dengan memperhatikan Deklarasi Djuanda dan UU Nomor 4 Tahun 1960 tentang Perairan Indonesia. Selain itu, di negara dualis, PI yang belum ditransformasikan tetap dianggap mengikat di tataran domestik, utamanya untuk memperkaya HN dan menjaga agar negara tidak melanggar tanggung jawab internasionalnya.[16]

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12 Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 141.

13 Hikmahanto Juwana, "Kewajiban Negara Dalam Proses Ratifikasi Perjanjian Internasional: Memastikan Keselarasan Dengan Konstitusi Dan Mentransformasikan Ke Hukum Nasional," *Undang: Jurnal Hukum* 2, no. 1 (Oktober 2019): 21–22, https://doi.org/10.22437/ujh.2.1.1-32; Dewanto, "Status Hukum Internasional Dalam Sistem Hukum Indonesia," 336; Dewi Nurul Savitri, "Constitutional Preview and Review of International Treaties: France And Indonesia Compared," *Constitutional Review* 5, no. 1 (Mei 2019): 49, https://doi.org/10.31078/consrev512.

14 Eddy Pratomo, *Hukum Perjanjian Internasional: Dinamika Dan Tinjauan Kritis Terhadap Politik Hukum Indonesia* (Jakarta: Elex Media Computindo, 2016): 420; Simon Butt, "The Position of International Law within the Indonesian Legal System," *Emory International Law Review* 28, no. 1 (2014): 10.

15 Antonio Cassese, *International Law*, First Edition. (Oxford: Oxford University Press, 2001): 166.

16 John H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis," *The American Journal of International Law* 86, no. 2 (April 1992): 319; Eddy Pratomo, *Hukum Perjanjian Internasional: Dinamika Dan Tinjauan Kritis Terhadap Politik Hukum Indonesia*, (Jakarta: Elex Media Computindo, 2016), 336.

2. Perumusan masalah

Kritik terhadap monisme dan dualisme sebenarnya telah disuarakan di Indonesia walau belum terlalu elaboratif.[17] Ada banyak sudut pandang yang bisa digunakan untuk menelaah keterbatasan monisme dan dualisme, misalnya apakah HI dan HN berasal dari struktur hukum yang sama atau berbeda (telah diuraikan ringkas di atas); prinsip pemisahan kekuasaan (*separation of power*) yang justru dianggap sebagai fondasi utama dualisme; serta kondisi di mana PI dilaksanakan secara langsung (*direct effect*) dan tidak langsung (*indirect effect*).

Penelitian ini mempertanyakan relevansi monisme dan dualisme dalam menentukan bagaimana PI menjadi bagian dari hukum yang berlaku. Guna menjawab pertanyaan ini, perhatian akan diberikan pada persetujuan parlemen terhadap ratifikasi PI (yang merupakan dasar bagi keberlakuan PI di tingkat domestik) dan perlunya pembentukan peraturan nasional untuk melaksanakan PI.

3. Metode penelitian

Penelitian ini menggunakan metode normatif, yang pada hakikatnya merupakan penelitian berbasis studi kepustakaan.[18] Pendekatan normatif akan digunakan untuk menelaah dikotomi antara monisme dan dualisme dalam menentukan pelaksanaan PI di tataran domestik, serta apakah dikotomi tersebut masih tetap relevan di Indonesia. Dalam konteks ini, penulis akan menelaah pemberlakuan PI di negara berkarakteristik monis (Belanda dan Jerman) dan dualis (Inggris dan Kanada), serta membandingkannya dengan diskursus pemberlakuan PI di Indonesia. Telaah di atas akan memanfaatkan berbagai bahan hukum primer dan sekunder, yaitu peraturan perundang-undangan dan yurisprudensi, serta tulisan ilmiah para ahli hukum dan laporan lembaga.[19]

B. PEMBAHASAN

1. Berlakunya PI di tataran domestik

Pendekatan dualisme mengedepankan metode transformasi dalam pemberlakuan PI. Menurut Starke, transformasi ini bersifat formal dan substantif yang dampaknya

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[17] Ninon Melatyugra, "Teori Internasionalisme Dalam Sistem Hukum Nasional," *Refleksi Hukum: Jurnal Ilmu Hukum* 9, no. 2 (Oktober 2015): 202, https://doi.org/10.24246/jrh.2015.v9.i2.p199-208; Prita Amalia and Garry Gumelar Pratama, "Kewenangan Mahkamah Konstituti Dalam Melakukan Judicial Review Terhadap Undang-Undang Ratifikasi Perjanjian Perdagangan Internasional - Laporan Penelitian" (Pusat Penelitian dan Pengkajian Perkara, dan Pengelolaan Perpustakaan, 2018): 105–106.

[18] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Press, 2009), 13.

[19] Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1. (Juni 2020): 26, http://doi.org/10.14710/gk.7.1.20-33.

adalah perubahan PI, yang semula adalah norma HI menjadi norma HN.[20] Negara pada hakikatnya menerapkan peraturan domestik yang mentransformasikan PI.[21] Adapun monisme mengedepankan metode inkorporasi, di mana negara menerapkan PI secara langsung dalam kapasitasnya sebagai norma HI.[22] Dengan kata lain, melalui transformasi atau inkorporasi, PI menjadi bagian dari hukum yang berlaku di negara tersebut dan mengikat ke luar (hubungan internasional negara) maupun ke dalam (hubungan antara negara dengan subyek internalnya).

Perlu dipahami bahwa peristilahan di atas tidak bersifat umum. Ada pula ahli yang menggunakan istilah ”inkorporasi”, “resepsi” (*reception*), atau adopsi dalam menjelaskan perubahan PI menjadi norma HN (konteks dualisme). Menurut Jackson, perbedaan istilah ini terjadi karena ”transformasi” tidak didefinisikan secara khusus.[23] Oleh sebab itu, lazim dijumpai penulis asing yang menggunakan istilah ”PI yang tidak diinkorporasi” (*unincorporated treaty*) atau ”PI yang tidak diimplementasi” (*unimplemented treaty*) ketika menjelaskan dualisme.[24]

Dari penjelasan ringkas ini, dapat dimaklumi bahwa sejumlah ahli asing memahami ”transformasi” sebagai sebuah ”akibat”, yaitu berubahnya hakikat PI yang semula adalah norma HI menjadi norma HN. Perubahan ini terjadi karena PI telah ”diinkorporasi” atau ”diimplementasi” melalui peraturan domestik. Semua istilah itu digunakan dalam konteks dualisme walaupun “inkorporasi” juga lazim digunakan dalam kerangka monisme.

Di Indonesia sendiri, ”inkorporasi” dan ”transformasi” dimaknai sebagai sebuah proses spesifik, di mana ”inkorporasi” dilekatkan pada monisme sementara ”transformasi” dilekatkan pada dualisme.[25] Sementara itu, “implementasi” digunakan Agusman untuk menyebut peraturan domestik yang dibuat untuk melaksanakan *non-self executing treaty*. PI jenis ini memuat norma-norma yang pelaksanaannya

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[20] J.G. Starke, *Introduction to International Law*, 10th ed. (London: Butterworth & Co., 1989), 76; Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 97.

[21] Michael Van Alstine, “Conclusion,” in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, 1st ed. (New York: Cambridge University Press, 2009): 606–607; Anthony Aust, “United Kingdom,” in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, 1st ed. (New York: Cambridge University Press, 2009), 479.

[22] Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 97; Nollkaemper, *National Courts and the International Rule of Law*, 73–74.

[23] John H. Jackson, “Status of Treaties in Domestic Legal Systems: A Policy Analysis,” *The American Journal of International Law* 86, No. 2 (April 1992): 315.

[24] Aust, “United Kingdom,” 479; Donald R. Rothwell, “Australia,” in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, 1st ed. (New York: Cambridge University Press, 2009), 147; Gib van Ert, “Canada,” in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study 1st ed*, (New York: Cambridge University Press, 2009), 168–171.

[25] Dewanto, “Status Hukum Internasional Dalam Sistem Hukum Indonesia,” 336; Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 98.

menuntut keberadaan peraturan domestik, terlepas dari apakah negara mengedepankan pendekatan monis atau dualis. *Implementing legislation* ini berbeda dengan *incorporating legislation* (monis) dan *transforming legislation* (dualis).[26]

Ahli hukum lainnya, Juwana, memaknai "transformasi" dalam konteks dualisme dan pelaksanaan *non-self executing treaty*. Ini terlihat dari argumennya mengenai pentingnya proses "transformasi" PI, yang menekankan pada perbedaan subyek HI dan HN, serta perlunya harmonisasi HN dan PI, terutama terhadap PI yang bersifat *law-making*.[27]

Ketiadaan pengertian "transformasi" juga menimbulkan kendala tersendiri. Apakah "transformasi" hanya berupa penulisan kembali PI ke dalam bahasa setempat?[28] Penulisan kembali PI ke dalam bahasa setempat tentu penting agar PI dapat dipahami oleh aktor-aktor domestik. Namun demikian, transformasi di luar sekedar alih-bahasa juga diperlukan guna memastikan muatan PI dapat disampaikan dalam konteks yang mudah dimengerti aktor domestik.[29]

Walaupun transformasi umumnya dilakukan melalui UU (*act of parliament*), Jackson berpandangan bahwa transformasi juga bisa dilakukan melalui peraturan yang dibuat lembaga administratif (eksekutif) atau keputusan pengadilan, sepanjang keduanya dimungkinkan.[30] Di Indonesia, pandangan yang dominan adalah bahwa transformasi dilakukan melalui UU, sejalan dengan kewenangan parlemen sebagai lembaga legislatif. Ini terlihat misalnya pada UU Nomor 19 Tahun 2002 tentang Hak Cipta (transformasi atas *Berne Convention for the Protection of Artistic and Literary Works*, yang disahkan lewat Keppres Nomor 18 Tahun 1997), atau UU Nomor 30 Tahun 1999 tentang Arbitrase and Alternatif Penyelesaian Sengketa (transformasi atas *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*, yang disahkan lewat Keppres Nomor 80 Tahun 1981).[31]

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[26] Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 101; Lihat juga Agusman, "Self Executing And Non Self Executing Treaties What Does It Mean?"

[27] Juwana, "Kewajiban Negara Dalam Proses Ratifikasi Perjanjian Internasional," 20–21.

[28] Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 106, 115; Lihat juga *Judicial Review of the Law of Treaties*, 146.

[29] Juwana, "Kewajiban Negara Dalam Proses Ratifikasi Perjanjian Internasional," 22–24; Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis," 324.

[30] Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis," 315; Wisnu Aryo Dewanto, "Implementing Treaties in Municipal Court," *Mimbar Hukum* 23, no. 1 (2011): 7, https://doi.org/10.22146/jmh.16194.

[31] Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 106, 114–115; Pratomo, *Hukum Perjanjian Internasional: Dinamika Dan Tinjauan Kritis Terhadap Politik Hukum Indonesia*, (Jakarta: Elex Media Computindo, 2016), 434; Dewanto, "Status Hukum Internasional Dalam Sistem Hukum Indonesia," 43–44, 56–57.

Hal lain yang juga menarik untuk dibahas adalah pandangan bahwa PI yang mengalami transformasi akan berubah menjadi norma HN. Menurut Nollkaemper, norma internasional yang mengalami proses transformasi pada hakikatnya berstatus ganda, yaitu sebagai norma HN sekaligus HI. Hal ini terutama terlihat pada norma HAM internasional.[32]

Sejalan pandangan Nollkaemper, Philip dkk berpandangan bahwa norma HI, walaupun telah bertransformasi menjadi HN, tetap harus ditafsirkan dengan menggunakan ketentuan internasional. Ini adalah untuk menjaga integritas dan kepastian HI. Metode penafsirannya merujuk pada pasal 31-32 *Vienna Convention on the Law of Treaties*/VCLT, yang sudah dianggap sebagai kebiasaan internasional.[33] Beberapa prinsip penafsiran PI dalam pasal-pasal tersebut di antaranya prinsip itikad baik (*good faith*), pengertian awal (*ordinary meaning*) terhadap suatu istilah dan konteksnya, serta tujuan PI. Dengan demikian, dapat dipahami bahwa sejumlah ahli tidak sepaham dengan pandangan bahwa PI beralih menjadi norma HN setelah bertransformasi. Paling tidak, karakter internasional PI tidak dapat sepenuhnya dihilangkan.

Beragam pandangan di atas seakan menggarisbawahi resiko jika perbedaan antara monisme dan dualisme terlalu digeneralisir. Selain penggunaan istilah yang sama untuk menjelaskan hal berbeda, negara pun memiliki praktek yang beragam dalam melaksanakan PI, tanpa harus terikat secara kaku pada kombinasi monisme-inkorporasi atau dualisme-transformasi.[34]

Komentar senada juga disampaikan Verdier, yang menggarisbawahi bahwa monisme dan dualisme sesungguhnya hanya mencoba menjelaskan hubungan antara HI dan HN, dan tidak dapat dengan serta-merta dikaitkan dengan praktek negara dalam melaksanakan PI.[35] Sementara itu, Ammann menekankan bahwa monisme dan dualisme bukanlah tombol *on and off* (*on-off switch*) karena negara dapat mengambil berbagai praktek yang berbeda sesuai kepentingan masing-masing, termasuk kombinasi praktek yang bernuansa monisme dan bernuansa dualisme.[36]

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[32] Nollkaemper, *National Courts and the International Rule of Law*, 218.

[33] Helmut Philipp Aust, Alejandro Rodiles, and Peter Staubach, "Unity or Uniformity? Domestic Courts and Treaty Interpretation," *Leiden Journal of International Law* 27, no. 1 (March 2014): 79–81, https://doi.org/10.1017/S0922156513000654

[34] Alstine, "Conclusion," 564–565.

[35] Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation," *The American Journal of International Law* 109, no. 3 (2015): 516; Lihat juga Nollkaemper, *National Courts and the International Rule of Law*, 82–84, https://ssrn.com/abstract=2731663

[36] Odile Ammann, "Dualism Is Overrated – As Is Monism: A Response to Julian Ku," *Opinio Juris*, 15 November 2016, http://opiniojuris.org/2016/11/15/dualism-is-overrated-as-is-monism-a-response-to-julian-ku/., diakses 11 Februari, 2021

Bentuk kongkrit argumen di atas dapat dilihat pada praktek Indonesia terhadap Statuta Roma dan Konvensi Genosida. Kebutuhan mendesak untuk menutup kemungkinan dibentuknya tribunal internasional oleh PBB, guna mengadili individu WNI yang diduga terlibat aksi kekerasan pasca jajak pendapat di Timor Timur, menjadi alasan disusunnya UU PHAM, dengan mengakomodir elemen-elemen Statuta Roma dan Konvensi Genosida. Melalui UU PHAM, Indonesia dapat menunjukkan keinginan dan kemampuannya melakukan proses hukum terhadap aksi-aksi kekerasan dimaksud.[37] Walaupun proses pemberlakuannya mengambil mekanisme transformasi, Indonesia tidak melakukan ratifikasi terhadap dua instrumen tersebut. Di satu sisi, praktik ini dapat dipahami mengingat genosida dan kejahatan terhadap kemanusiaan telah diakui sebagai *jus cogens* sehingga pencegahan dan penindakannya wajib dilakukan semua negara.[38] Di sisi lain, tanpa menjadikan genosida dan kejahatan terhadap kemanusiaan tindak pidana dalam HN, penindakan, termasuk penuntutan dan pemidanaan, tidak bisa dilakukan. Sebagaimana akan diuraikan, praktik transformasi di atas juga dilakukan oleh negara yang dikenal berkarakteristik monis dan dualis.

Contoh lainnya adalah UUPI yang mengambil sejumlah muatan dalam VCLT, walaupun Indonesia hingga kini tidak menjadi pihak pada konvensi. Indonesia menganggap bahwa muatan VCLT mencerminkan kebiasaan internasional sehingga mengikat Indonesia tanpa harus menjadi pihak.[39] Pengadilan Indonesia juga tidak mempermasalahkan berlakunya PI secara langsung sepanjang ditujukan untuk memperkaya HN dan mengisi kekosongan hukum, seperti dalam kasus di Mandalawangi.

Sloss pun menggarisbawahi beragamnya praktik negara sehingga sulit mengategorikan negara berdasarkan pendekatan yang diambilnya. Secara umum, dia membedakan negara-negara berdasarkan dua kategori umum, yaitu monis hibrid (*hybrid monist*) dan dualis tradisional (*traditional dualist*).[40]

2. Pelaksanaan PI di negara monis hibrid

Beberapa ciri khas negara monis hibrid adalah bahwa pembuatan PI merupakan kewenangan eksekutif namun penyampaian keterikatan pada PI (sesuai pasal 11 VCLT) hanya bisa dilakukan setelah memperoleh persetujuan di muka (*prior approval*) dari parlemen. Sebagai lembaga utama yang berwenang membuat HN, *prior approval* parlemen mendasari pelaksanaan PI secara langsung di tataran domestik (*domestic*

[37] ''Putusan Mahkamah Konstitusi Nomor 065/PUU-II/2004'', 2004.
[38] Lihat misalnya "Report of the International Law Commission (A/74/10)," 2019, 146–147.
[39] ''Putusan Mahkamah Konstitusi Nomor 13/PUU-XVI/2018'', 2018.
[40] David Sloss, "Treaty Enforcement in Domestic Courts: A Comparative Analysis," in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study 1st ed* (New York: Cambridge University Press, 2009), 7.

validity). Namun demikian, tergantung pada HN, tidak semua PI memerlukan *prior approval*.[41]

Dua negara monis hibrid yang menarik dirujuk adalah Belanda dan Jerman, apalagi banyak tradisi hukum Indonesia yang dipengaruhi Belanda. Menurut Nollkaemper, pengikatan Belanda pada PI hanya dilakukan setelah mendapat *prior approval* parlemen. PI tersebut otomatis terinkorporasi ke dalam HN dan mengikat di tataran domestik. Prinsip ini merupakan bagian dari konstitusi tak tertulis Belanda, yang kemudian direfleksikan ke dalam konstitusi tertulis.[42] Pasal 91 ayat 1 Konstitusi Belanda menyatakan bahwa "*The Kingdom shall not be bound by treaties, nor shall such treaties be denounced, without the prior approval of the States General*". Ayat 2 pasal yang sama menyatakan bahwa persetujuan parlemen diberikan dalam bentuk UU (*act of parliament*).[43]

Prinsip serupa juga ditemukan di Jerman. Pasal 59 Konstitusi Jerman menyatakan bahwa presiden berwenang membuat PI, dan bahwa PI yang mengatur hubungan politis (*political relations*) atau hal-hal yang berkaitan dengan UU federal memerlukan persetujuan parlemen.[44] Hubungan politis ini antara lain adalah yang berhubungan dengan kedaulatan, integritas wilayah, atau aliansi militer. Persetujuan parlemen diberikan dalam bentuk UU federal (*federal law*).[45] Ketentuan penting lain dalam Konstitusi Jerman adalah pasal 25, yang menyatakan bahwa ketentuan umum HI (*general rules of international law*) menjadi bagian integral hukum federal. Ketentuan tersebut bersifat superior terhadap HN dan secara langsung menciptakan hak dan kewajiban bagi penduduk.

Ada pendapat yang mengatakan bahwa persetujuan parlemen di Jerman memiliki dua fungsi, yaitu wujud persetujuan parlemen untuk mengikatkan negara pada PI, dan memberi PI kedudukan (*rank*) dalam hirarki HN. Terhadap pendapat ini, Paulus

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41 Alstine, "Conclusion," 570.

42 Andre Nollkaemper, "The Netherlands," in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, 1st ed. (New York: Cambridge University Press, 2009) 331; Joseph Fleuren, "The Application of International Law by Dutch Court," *Netherlands International Law Review* 57, no. 2 (Agustus 2010): 246, DOI:10/S0165070X10200062.

43 Lihat Ministerie van Algemene Zaken, "The Constitution of the Kingdom of the Netherlands 2018 - Report - Government.nl," rapport (Ministerie van Algemene Zaken, February 28, 2019), diunduh 12 Mei, 2021, https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands.

44 Terjemahan dalam bahasa Inggris, lihat Federal Ministry of Justice and Consumer Protection, "Basic Law for the Federal Republic of Germany," https://www.gesetze-im-internet.de/englisch_gg/, diakses 25 April 2021.

45 Andreas L. Paulus, "Germany," in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, 1st ed. (New York: Cambridge University Press), 209, 214–216. (yang dikutip halaman yang mana 209 atau 214 atau 215 atau 216)

menyebutkan adanya dua pandangan berbeda, yaitu pandangan transformasi, di mana UU federal mentransformasikan PI menjadi HN (sejalan pendekatan dualisme); dan pandangan eksekusi, di mana norma HI dalam PI tetap terjaga walau PI dilaksanakan dalam konteks domestik. Secara praktik, pengadilan Jerman mengambil pandangan berbeda dalam kasus-kasus yang berbeda.[46]

Walaupun telah menjadi bagian dari HN Belanda, tidak semua PI dapat secara langsung menciptakan hak dan kewajiban bagi individu (*direct effect*). Pasal 93 Konstitusi menjelaskan bahwa PI yang muatannya mengikat secara individual akan memiliki kekuatan mengikat setelah dipublikasikan (*state gazette*).[47] Pasal ini disusun untuk menjelaskan keberadaan *self-executing treaties*, yang rumusannya memang dimaksudkan untuk secara langsung memiliki dampak pada individu. PI berkarakteristik inilah yang langsung memiliki kekuatan mengikat di Belanda.[48]

Konsep "*direct effect*" ini merupakan salah satu konsekuensi dari prinsip pembagian kekuasaan antar-lembaga negara. Berdasarkan konsep tersebut, pengadilan tidak dapat secara sepihak membuat hukum yang berlaku umum guna mengisi kekosongan hukum dalam mengadili perkara yang melibatkan rumusan PI yang terlalu abstrak.[49]

Dalam mengidentifikasi *self-executing treaties*, pengadilan Belanda biasanya mengecek dua hal, yaitu "maksud" (*intention*) para pembuat PI, dan perumusan ketentuan dalam PI. "Maksud" ini dapat diketahui dari konteks PI secara umum. Yang paling jelas adalah apakah PI memandatkan negara untuk membuat peraturan domestik.[50] Selain itu, ketentuan yang relevan dalam PI juga harus dirumuskan secara lengkap dan jelas, dalam arti bahwa pengadilan dapat menafsirkan hak dan kewajiban yang terkandung dalam ketentuan, siapa penerimanya, dan prosedur dalam melaksanakan hak dan kewajiban.[51] Selain itu, *self-executing treaties* juga akan diuji dari dapat atau tidaknya individu secara langsung menggunakan PI untuk mengklaim haknya di pengadilan (*invocability*).[52]

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46 Paulus, ''Germany'', 216–218; Dieter Grimm, Mattias Wendel, and Tobias Reinbacher, "European Constitutionalism and the German Basic Law," in National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law - National Reports 1st ed (The Hague: TMC Asser Press, 2019), 484.

47 Terjemahan dalam bahasa Inggris, lihat "The Constitution of the Kingdom of the Netherlands 2018" (Ministry of the Interior and Kingdom Relations, Februari 2019).

48 Fleuren, "The Application of International Law by Dutch Court," 248.

49 Fleuren, "The Application of International Law by Dutch Court,", 254; Andre Nollkaemper, "The Netherlands," 333.

50 Nollkaemper, *National Courts and the International Rule of Law*, 135.

51 Nollkaemper, *National Courts and the International Rule of Law*, 137–138.

52 Nollkaemper, "The Netherlands," 332, 341–348; Nollkaemper, *National Courts and the International Rule of Law*, 117–118; Lihat juga Agusman, "Self Executing And Non Self Executing Treaties What Does It Mean?"

Oleh karena itu, Belanda umumnya membuat peraturan nasional atau mengamandemen peraturan yang ada untuk melaksanakan PI yang sebenarnya sudah menjadi bagian dari HN. Peraturan tersebut mentransformasikan (istilah yang digunakan Nollkaemper) lebih lanjut PI guna memastikan agar tanggung jawab Belanda selaku negara pihak dapat dilaksanakan, dan terjadinya harmonisasi dalam HN.[53]

Contohnya adalah Statuta Roma, yang diratifikasi Belanda pada 17 Juli 2001, yaitu setelah UU persetujuan parlemen disahkan pada 5 Juli 2001. Dalam UU disebutkan bahwa Statuta Roma disetujui untuk seluruh wilayah kerajaan, dengan melampirkan naskah Statuta dan terjemahannya dalam bahasa Belanda.[54] Kata "persetujuan" (*goegdekeurd* / *approved*) juga terdapat, misalnya, pada UU tanggal 5 Juli 2017 yang menyetujui ratifikasi *Paris Agreement*.

Selanjutnya, "*ICC Implementation Act*" disahkan pada 20 Juni 2002, yang memuat prosedur kerja sama antara Belanda dengan ICC. Belanda juga mengamandemen sejumlah peraturan nasional, seperti UU pidana, UU acara pidana, dan UU kepolisian. Sementara itu, untuk mendukung pelaksanaan tanggung jawab Belanda sesuai *Paris Agreement* dan komitmen Uni Eropa dalam isu perubahan iklim, UU Iklim (*Klimaatwet*) disahkan pada 2 Juli 2019. UU tersebut memuat kebijakan iklim jangka panjang Belanda, termasuk komitmen nasional mengurangi emisi gas rumah kaca.[55]

Terkadang, PI juga dirujuk langsung oleh peraturan nasional Belanda. Misalnya, UU Orang Asing (*Aliens Act*) mengatakan bahwa izin tinggal dapat diberikan kepada "pengungsi" (*refugee*). UU tersebut tidak memuat definisi "pengungsi" melainkan merujuk pada definisi dalam *Convention on the Status of Refugee*, yang Belanda adalah negara pihaknya. [56]

Jerman pun biasa menyusun peraturan domestik untuk melaksanakan PI jika PI memang memandatkan untuk itu, atau mendukung pelaksanaan tanggung jawab internasional Jerman. Dicatat oleh Pratomo, Jerman meratifikasi *Convention on Biological Diversity* (CBD) setelah mendapat persetujuan parlemen lewat UU (*Act concerning the Convention on Biological Diversity 1993*). Untuk melaksanakan CBD, Jerman kemudian

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53 Fleuren, "The Application of International Law by Dutch Court," 253; Nollkaemper, "The Netherlands," 335.

54 Terjemahan dalam bahasa Inggris, lihat Ministerie van Buitenlandse Zaken, "Rijkswet van 5 juli 2001, houdende goedkeuring van het op 17 juli 1998 totstandgekomen Statuut van Rome inzake het Internationaal Strafhof," officiële publicatie (Ministerie van Justitie, July 17, 2001), https://zoek.officielebekendmakingen.nl/stb-2001-343.html., diakses pada 25 April 2021.

55 Ministry of Economic Affairs and Climate Policy, "Long Term Strategy on Climate Mitigation" (Ministry of Economic Affairs and Climate Policy, Desember 2019), 3; Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, "Klimaatwet," wet, https://wetten.overheid.nl/BWBR0042394/2020-01-01., diakses pada 26 April 2021.

56 Nollkaemper, "The Netherlands," 336.

mengamandemen *Federal Act of Nature Conservation*.[57]

Contoh lainnya adalah Statuta Roma, yang diratifikasi Jerman pada 11 Desember 2000. *Prior approval* parlemen dituangkan dalam UU, yang memberi kewenangan pada pemerintah dan pengadilan untuk melaksanakan Statuta Roma, layaknya UU nasional, jika rumusannya memungkinkan untuk dilaksanakan secara langsung.[58] Sebelum ratifikasi dilakukan, Jerman juga mengamandemen pasal 16 konstitusinya untuk memberi peluang ekstradisi warga negara Jerman ke ICC.[59]

Selanjutnya Jerman membuat dua UU, yaitu *Code of Crimes against International Law*, dan *Law on the Cooperation with the International Criminal Court*. UU yang pertama menjadikan kejahatan-kejahatan yang menjadi yurisdiksi ICC kejahatan pula sesuai HN Jerman, sementara UU ke dua mengatur beragam bentuk kerja sama antara Jerman dengan ICC, seperti penangkapan dan penahanan, ekstradisi, serta bantuan hukum. Kedua UU tersebut disusun bukan hanya untuk menjamin pelaksanaan tanggung jawab internasional Jerman, tetapi juga bagian dari kontribusi Jerman bagi pengembangan hukum pidana internasional.[60]

3. **Pelaksanaan PI di negara dualis**

Contoh klasik negara dualis adalah Inggris, yang kemudian diikuti oleh negara persemakmuran seperti Australia dan Kanada. Konstitusi Inggris (dan juga Kanada) umumnya tidak tertulis, dan menekankan bahwa pemerintah berwenang mengikatkan negara pada PI dengan atau tanpa persetujuan parlemen (prerogatif), sementara parlemen berwenang membuat HN.[61] Dengan demikian, PI tidak mempunyai kekuatan mengikat secara domestik sebelum ditransformasi menjadi HN.[62]

Alasan utama di balik praktek dualis Inggris adalah pembagian kekuasaan di antara pemerintah dan parlemen.[63] Prinsip tersebut berawal dari perebutan kewenangan

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57 Pratomo, *Hukum Perjanjian Internasional*, 363.

58 Kirsten Schmalenbach, "International Criminal Law in Germany," in *The Implementation of International Law in Germany and Africa*, 1st ed. (Pretoria: Pretoria University Law Press, 2015), 383.

59 Federal Foreign Office, "International Criminal Law," *German Federal Foreign Office*, https://www.auswaertiges-amt.de/en/aussenpolitik/themen/internatrecht/international-criminal-law/229216., diakses pada 26 April 2021.

60 Ibid.; Schmalenbach, "International Criminal Law in Germany," 388–389.

61 Aust, "United Kingdom," 477; van Ert, "Canada," 167.

62 Alstine, "Conclusion," 567–568; Anthony Aust, *Modern Treaty Law and Practices*, 3rd ed. (Cambridge: Cambridge University Press, 2013), 476; Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 97; Laura Barnett, "Canada's Approach to the Treaty-Making Process" (Library of Parliament, Mei 2018), https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200845E., diakses pada 15 April 2021.

63 Aust, Modern Treaty Law and Practices, 167; Melissa A. Waters, "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties," Columbia Law Review 107, no. 3 (April 1997): 637, https://ssrn.com/abstract=934108; Dewanto, "Akibat Hukum Peratifikasian Perjanjian Internasional di Indonesia," 54–55.167; Melissa A. Waters, \\uc0\\u8220{}Creeping

antara Raja Inggris dengan Parlemen pada abad ke-17, yang hasilnya adalah bahwa kewenangan legislatif berada di tangan parlemen sementara urusan luar negeri (termasuk PI) menjadi kewenangan Raja (pemerintah).[64] Ditekankan oleh Young dkk, dualisme diterapkan Inggris untuk mencegah pemerintah membuat peraturan domestik secara sepihak, dengan alasan untuk melaksanakan PI.[65]

Praktek umum transformasi di Inggris adalah melalui UU yang isinya menyatakan bahwa PI memiliki kekuatan mengikat secara domestik, dengan melampirkan naskah PI (*scheduling*).[66] Biasanya Inggris terlebih dulu memastikan bahwa HN telah sesuai dengan PI, termasuk dibuatnya UU transformasi, sebelum ratifikasi dilakukan. Mengingat kompleksitas pembuatan UU, praktek ini dilakukan untuk memastikan bahwa sedari awal pengikatan Inggris, tidak ada HN yang bertentangan dengan PI.[67]

Contohnya adalah *Diplomatic Privileges Act* tanggal 31 Juli 1964, yang mentransformasi VCDR.[68] Lampiran (*schedule*) 1 UU tersebut memuat pasal-pasal VCDR mengenai kekebalan dan keistimewaan diplomatik yang berlaku di Inggris, di antaranya pasal 22-24 dan 27-40. Bagian 2 UU menyatakan bahwa pasal-pasal dalam Lampiran 1 mempunyai kekuatan mengikat di Inggris Raya ("*shall have the force of law in the United Kingdom*"). Piagam ratifikasi VCDR baru diserahkan Inggris pada 1 September 1964 (merujuk *United Nations Treaty Collections*). VCDR sendiri mulai berlaku pada 24 April 1964. Model serupa juga ditemukan pada *Consular Relations Act* 10 April 1968, yang mentransformasi VCCR. Menurut *United Nations Treaty Collections*, piagam ratifikasi baru diserahkan Inggris pada 9 Mei 1972, sementara VCCR mulai berlaku 19 Maret 1967.

Inggris menandatangani Statuta Roma pada 30 November 1998, sementara instrumen ratifikasi disampaikan pada 4 Oktober 2001. Di sela waktu tersebut, *International Criminal Court Act* disahkan pada 4 Mei 2001 yang mentransformasi

Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties,\\uc0\\u8221{} {\\i{}Columbia Law Review} 107, no. 3 (April 1997

64 Aust, "United Kingdom," 477.

65 Alison L. Young and Patrick Birkinshaw, "Europe's Gift to the United Kingdom's Unwritten Constitution - Juridification," in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law - National Reports*, 1st ed. (The Hague: TMC Asser Press, 2019), 131.

66 Aust, "United Kingdom," 479.

67 Aust, *Modern Treaty Law and Practices*, 174; Arabella Lang, "Parliament's Role in Ratifying Treaties" (House of Commons Library, February 17, 2017), 7, https://commonslibrary.parliament.uk/research-briefings/sn05855/; Ministry of Justice and Ministry of Defense, "The Governance of Britain War Powers and Treaties: Limiting Executive Powers" (Her Majesty's Stationery Office, Oktober 2007), 70.

68 *Diplomatic Privileges Act 1964* (Statute Law Database, 1964), https://www.legislation.gov.uk/ukpga/1964/81/contents., diakses pada 1 Maret 2021.

Statuta Roma.[69] Melalui UU tersebut, kejahatan-kejahatan yang diatur dalam Statuta Roma dinyatakan sebagai kejahatan pula di Inggris, Wales, dan Irlandia Utara. UU itu juga mengatur mekanisme kerja sama antara Inggris dan ICC, seperti dalam penangkapan dan penahanan individu, dan penyerahannya kepada ICC.

Kanada juga melakukan praktek umum serupa. Misalnya *United Nations Foreign Arbitral Awards Convention*, tanggal 17 Juni 1986, yang disahkan untuk mengimplementasikan Konvensi New York 1958 (rumusan yang digunakan dalam bahasa Inggris adalah "*An Act to implement the United Nations* ..."). UU tersebut menyebut bahwa Konvensi New York 1958 disetujui (*approved*) dan memiliki kekuatan hukum di Kanada (*have the force of law in Canada*). Seluruh naskah Konvensi kemudian dimuat dalam Lampiran (*schedule*). Merujuk situs Konvensi New York 1958, Kanada melakukan aksesi pada 12 Mei 1986, yaitu sebelum UU disahkan.

Melampirkan naskah PI bukan satu-satunya metode transformasi di Inggris dan Kanada. *Human Rights Act* 1988, menurut Aust, tidak dimaksudkan untuk menjadikan *European Convention on Human Rights* (ECHR) bagian dari HN Inggris, namun hanya menjadi dasar hukum agar HN Inggris ditafsirkan sejalan dengan ECHR.[70] Ini terlihat pada pasal 3 di mana disebutkan bahwa legislasi nasional harus dibaca dan dilaksanakan sesuai dengan (*compatible with*) ECHR. Pasal 2-nya menyebutkan bahwa pengadilan, ketika mengadili perkara yang berkaitan dengan ECHR, harus juga mempertimbangkan keputusan atau pendapat *European Court of Human Rights*.

Kanada biasanya tidak membuat UU transformasi untuk PI bidang HAM karena HN Kanada diyakini telah memadai bagi perlindungan HAM. Namun demikian, sebelum melakukan ratifikasi, Kanada tetap melakukan pemetaan terhadap HN-nya guna memastikan bahwa HN tidak bertentangan dengan PI, dan bahwa PI dapat dilaksanakan menggunakan HN yang ada.[71]

Terkait dengan persetujuan parlemen, beberapa negara dualis telah mengarah ke konsep *prior approval*. Melalui *Ponsonby Rules*, yang diperkenalkan pada 1924, pemerintah Inggris berinisiatif menyampaikan kepada parlemen naskah PI yang akan diratifikasi. Tujuannya adalah untuk memperkuat akuntabilitas pemerintah, dan

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69 Robert Cryer, "Implementation of the International Criminal Court Statue in England and Wales," *The International and Comparative Law Quarterly* 51, no. 3 (2002): 734, https://doi.org/10.1017/S002058930006633.

70 Aust, "United Kingdom," 487.

71 Laura Barnett, "Canada's Approach to the Treaty-Making Process" (Library of Parliament, Mei 2018), diunduh 15 April 2021, https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200845E; van Ert, "Canada," 169–171.

bukan untuk menjadikan PI sebagai bagian dari HN.[72] Parlemen juga tidak memiliki kewenangan untuk mencegah ratifikasi PI, dan hanya bisa memberikan tekanan politik kepada pemerintah sekiranya PI dinilai merugikan.[73]

Ponsonby Rules kemudian menjadi semacam konvensi ketatanegaraan di Inggris. Pada 2010, ketentuan tersebut dimuat dalam *Constitutional Reform and Governance Act* (CAGRA). Melalui CAGRA, pemerintah memberi parlemen waktu 21 hari untuk mempertimbangkan PI. Selama periode itu, pemerintah tidak dapat melakukan ratifikasi. CAGRA juga memberi Parlemen (*House of Commons*) kewenangan untuk mencegah dilakukannya ratifikasi.[74] Pengecualian terhadap mekanisme di atas adalah PI dalam kerangka Uni Eropa (CAGRA disahkan sebelum Inggris keluar dari Uni Eropa) yang seluruhnya memerlukan persetujuan parlemen untuk menjadi HN.[75]

Pelibatan parlemen secara lebih mendalam sebelum PI diratifikasi juga dilakukan Kanada. Sejak 2008, pemerintah Kanada menyampaikan kepada parlemen PI yang akan diratifikasi, berikut analisis kepentingan Kanada. Parlemen memiliki waktu 21 hari untuk mendiskusikan PI tersebut. Namun demikian, rekomendasi parlemen bersifat tidak mengikat, dan pemerintah tetap memiliki kewenangan penuh untuk melakukan atau tidak melakukan ratifikasi.[76] Pelibatan parlemen secara dini dan mendalam juga dilakukan di Australia, seperti telah diuraikan Pratomo.[77]

PI yang belum ditransformasi juga memiliki akibat hukum di negara dualis. Para ahli menjelaskan hal ini dalam kerangka "*presumption of conformity*" (keyakinan bahwa pelaksanaan HN harus sesuai dengan kewajiban internasional negara, termasuk berdasarkan PI yang telah diratifikasi) atau "*legitimate expectation*" (harapan publik bahwa aparat negara akan bertindak sesuai dengan kewajibannya dalam PI, walaupun PI tersebut belum ditransformasikan).[78] Pandangan-pandangan tersebut dapat dilihat misalnya di Inggris, Kanada, dan Australia. Sejauh apa pengadilan dapat menggunakan PI yang belum ditransformasi memang masih menjadi perdebatan. Namun demikian, pada prinsipnya, PI yang belum ditransformasi dapat digunakan

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72 Aust, "United Kingdom," 478; Ministry of Justice and Ministry of Defense, "The Governance of Britain War Powers and Treaties: Limiting Executive Powers" (Her Majesty's Stationery Office, Oktober 2007), 71–72; Pratomo, *Hukum Perjanjian Internasional*, 343.

73 Lang, "Parliament's Role in Ratifying Treaties."

74 Lang, "Parliament's Role in Ratifying Treaties.".

75 House of Commons Information Office, "Treaties - Factsheet P14" (House of Commons, Agustus 2010), 5.

76 Barnett, "Canada's Approach to the Treaty-Making Process."

77 Pratomo, *Hukum Perjanjian Internasional*, 327–334.

78 Sloss, "Treaty Enforcement in Domestic Courts: A Comparative Analysis," 7; Young and Birkinshaw, "Europe's Gift to the United Kingdom's Unwritten Constitution - Juridification," 130; Rothwell, "Australia," 147; van Ert, "Canada," 215.

pengadilan untuk memperkaya HN dan menjaga agar negara tidak melanggar tanggung jawab internasionalnya.

Praktek di atas, yang diistilahkan Waters sebagai "*creeping monism*", telah berlangsung lama. Praktek tersebut mencerminkan pergeseran tradisi dan praktik dualisme ke arah monisme.[79] Praktek ini sangat masuk akal mengingat ratifikasi berarti pengikatan negara pada PI, yang konsekuensinya adalah negara tidak dapat melakukan hal-hal yang bertentangan dengan PI, seperti dijelaskan dalam pasal 18 dan 26 VCLT. Negara pun tidak dapat berlindung di balik HN untuk membenarkan tindakan yang bertentangan dengan PI.

Praktik di atas penting bagi PI di bidang HAM, yang umumnya memerlukan pelaksanaan secara langsung (*direct application*) agar perlindungan HAM semakin optimal. Hal ini terlihat misalnya pada *General Comment* No. 31 *Human Rights Committee* (badan HAM yang dibentuk oleh *International Covenant on Civil and Political Rights* / ICCPR). Ditekankan bahwa negara pihak perlu memastikan bahwa ICCPR dapat dilaksanakan di tingkat domestik, serta menjamin kesesuaian antara HN dengan ICCPR. Beberapa metode yang disarankan Komite adalah pelaksanaan ICCPR secara langsung (*direct applicability*), menggunakan HN yang ada, atau menafsirkan HN secara konsisten dengan ICCPR.

4. Masihkah dikotomi monisme dan dualisme relevan bagi Indonesia?

Diskusi di atas membuktikan keragaman, dan kesamaan, praktik negara terlepas negara tersebut berkarakteristik dualis atau monis hibrid. Keragaman dan kesamaan praktik tersebut lebih didasari pada pertimbangan logis, daripada sebagai konsekuensi dikotomi monis dan dualis.

Negara monis hibrid maupun dualis sama-sama memerlukan persetujuan parlemen untuk menjadikan PI bagian dari hukum yang berlaku. Perbedaannya hanya pada waktu diberikannya persetujuan, apakah sebelum ratifikasi (monis) atau sesudah ratifikasi (dualis). Dalam konteks ini, terlihat kemiripan antara pasal 11 UUD 1945 dengan Konstitusi Belanda dan Jerman terkait kewenangan pembuatan PI dan peran parlemen. Pembuatan PI menjadi kewenangan eksekutif namun dilaksanakan dengan persetujuan parlemen. Tetapi memang Konstitusi Belanda dan Jerman telah memadai untuk dengan tegas ditafsirkan bahwa PI, setelah mendapat persetujuan parlemen, menjadi bagian dari hukum yang berlaku dan dapat diterapkan secara langsung (*direct effect*) sepanjang dapat diindikasikan dari rumusan dan tujuan para pembuatnya.

[79] Waters, "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties", 640.

Seiring menguatnya prinsip akuntabilitas, negara-negara dualis ternyata juga meminta persetujuan (atau pandangan) parlemen sebelum ratifikasi dilakukan. Serupa dengan mekanisme yang biasa diterapkan negara monis. Walaupun tidak selalu mengikat (di Kanada, misalnya), *prior approval* dari parlemen dapat memperkuat fungsi kontrol terhadap pemerintah, meningkatkan kehati-hatian dalam pembuatan PI, sekaligus meningkatkan legitimasi keterikatan negara.[80] Konsekuensinya adalah bahwa perbedaan monisme dan dualisme, dalam konteks waktu diberikannya persetujuan parlemen, menjadi tidak relevan.

Selain itu, pendekatan dualisme berawal dari dinamika politik dalam sejarah Inggris, yang kemudian melembaga melalui pembagian kewenangan antara eksekutif dan parlemen. Dengan demikian, keharusan adanya transformasi PI tidak selalu berawal dari pandangan bahwa HI dan HN bersifat saling terpisah.

Praktik negara monis hibrid dan dualis menunjukkan bahwa pembuatan peraturan nasional adalah hal yang lumrah. Tidak pula diperdebatkan apakah peraturan tersebut merupakan peraturan pelaksana bagi PI yang sudah mengikat di tingkat domestik (*implementing legislation*, jika meminjam istilah Agusman) atau peraturan transformasi (dualisme). Praktik tersebut dilakukan untuk melaksanakan tanggung jawab internasional negara, yaitu harmonisasi dan memastikan bahwa PI (terutama *non-self-executing treaties*) dapat dilaksanakan di tingkat domestik. Alasan-alasan ini sangat realistis dan bersifat esensial baik di negara dualis maupun monis.[81]

Negara juga tidak menerapkan kebijakan *one-size-fits-all* dalam melaksanakan PI. Walaupun secara umum dilakukan dengan membuat peraturan nasional (misalnya praktek Inggris, Belanda dan Jerman dalam menindaklanjuti Statuta Roma), pelaksanaan PI juga bisa dilakukan dengan mengatur agar pelaksanaan dan penafsiran HN konsisten dengan PI (contoh Inggris dalam melaksanakan ECHR) atau dengan memanfaatkan HN yang ada (contoh Kanada dalam melaksanakan PI bidang HAM). Dengan demikian, transformasi (dualis) tidak hanya berupa penulisan kembali PI, atau melampirkan naskah PI, dalam peraturan nasional.

Transformasi di Inggris dan Kanada dituangkan sangat jelas dalam UU. Dalam beberapa contoh kasus di Inggris dan Kanada, UU memuat persetujuan parlemen

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80 Verdier and Versteeg, "International Law in National Legal Systems," 522; ''Putusan Mahkamah Konstitusi Nomor 13/PUU-XVI/2018'', 2018.

81 Verdier and Versteeg, "International Law in National Legal Systems,", 432; Juwana, "Kewajiban Negara Dalam Proses Ratifikasi Perjanjian Internasional," 19–20; I. Wayan Parthiana, "Beberapa Masalah Dalam Pengimplementasian Kewajiban Negara Indonesia Di Bawah Perjanjian Internasional Ke Dalam Hukum Nasional Indonesia," *Veritas et Justitia* 3, no. 1 (Juni 2017): 183–188, http://doi.org/10.25123/vej.v3i1.2529.

sekaligus kalimat "*have the force of law*" yang menegaskan keberlakuan PI di tingkat domestik. Barulah kemudian pemerintah melakukan ratifikasi, walau ada pula kasus di mana PI diratifikasi terlebih dulu. Dengan demikian, UU pada hakikatnya memiliki dua maksud, yaitu mewadahi persetujuan parlemen, dan menyatakan keberlakuan PI di tingkat domestik (transformasi). Pengecualiannya misalnya pada UU Inggris mengenai ECHR, seperti telah diuraikan. Sayangnya konteks seperti di atas masih menjadi perdebatan di Indonesia karena masih kuatnya perbedaan pandangan mengenai pendekatan yang diambil Indonesia.

Negara dualis dan monis hibrid juga memiliki kesamaan yaitu memetakan HN sebelum meratifikasi PI. Selain mencegah pertentangan antara HI dan HN, praktek ini juga akan memastikan negara dapat melaksanakan tanggungjawabnya sedari awal PI diratifikasi. Di Indonesia, ahli hukum telah mempertanyakan seberapa efektif pemetaan HN dilakukan sebelum PI diratifikasi.[82] Seperti disinggung oleh Butt, banyak PI di Indonesia yang dibiarkan "*dormant*" setelah ratifikasi dilakukan, dan baru menjadi perhatian setelah munculnya situasi yang relevan.[83] Hal ini tentunya adalah ironi. Terlepas dari berbagai analisis dan saran, apakah Indonesia monis atau dualis, faktanya adalah Indonesia ternyata tidak melakukan hal-hal yang umum dilakukan negara monis dan dualis.

Uraian di atas menunjukkan bahwa monisme dan dualisme, dalam konteks hubungan antara HI dan HN serta pelaksanaan PI di tingkat domestik, sebaiknya tidak lagi menjadi pertimbangan utama dalam menentukan politik hukum Indonesia. Paling tidak pemahaman bahwa monisme dan dualisme merupakan dua pendekatan terpisah, masing-masing dengan praktek yang berbeda dan dapat dipertentangkan, tidak dapat dijadikan rujukan.[84] Opsi penerapan PI secara langsung (*automatic incorporation*) atau melalui transformasi adalah persoalan yang perlu dijawab berdasarkan kepentingan nasional, rumusan PI sendiri, dan efektivitas pelaksanaan tanggung jawab negara pihak.[85]

Pengikatan negara pada PI pada hakikatnya bersifat utuh, di mana kewajiban melaksanakan PI tidak hanya dibebankan pada pemerintah atau parlemen (dalam konteks PI yang mendapat persetujuan parlemen). Pengadilan pun memiliki tanggung jawab dalam memastikan terpenuhinya kewajiban internasional negara.[86]

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82 Juwana, "Kewajiban Negara Dalam Proses Ratifikasi Perjanjian Internasional," 10–16.

83 Butt, "The Position of International Law within the Indonesian Legal System," 10.

84 Lihat misalnya tabel perbandingan antara monisme dan dualisme, dalam Agusman, *Hukum Perjanjian Internasional: Kajian Teori Dan Praktik Indonesia*, 97. (sumber kutipan buku dilengkapi kembali)

85 Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis," 323; Nollkaemper, *National Courts and the International Rule of Law*, 82.

86 Lihat misalnya Committee on Economic, Social and Cultural Rights, "General Comment No. 9," Desember 3, 1998, paragraf 14; Committee on the Rights of the Child, "General Comment No. 5," November 27, 2003, paragraf 12. (Ini sumbernya apa artikel atau sumber lainnya, dilengkapi kembali)

Konteks tersebut mendorong pengadilan negara-negara dualis untuk tetap memberi perhatian pada kewajiban negara berdasarkan PI yang belum ditransformasi. Walaupun PI tersebut belum menjadi bagian HN, tidak berarti norma-normanya dapat dikesampingkan begitu saja.[87]

Sejalan pandangan di atas, pemahaman tentang hubungan antara HI dan HN perlu ditata kembali. PI yang telah diratifikasi mengikat negara secara domestik dan internasional sehingga seluruh organ negara tidak dapat melakukan perbuatan yang bertentangan dengan PI. Namun demikian, ada kemungkinan PI tersebut belum dapat dijadikan dasar bagi individu untuk mengklaim haknya di pengadilan (*invocability*) atau bagi pengadilan dalam menguji pembatasan hak dan kewajiban individu. Situasi ini terjadi karena rumusan PI yang terlalu umum atau PI memang memandatkan dibuatnya peraturan pelaksana di tingkat domestik.

C. KESIMPULAN

Secara ringkas ditekankan bahwa HI dan HN bukanlah dua sistem hukum terpisah. Keduanya memang sering kali berbeda pada cakupan dan landasan pemberlakuannya namun praktik negara telah lama mendorong proses saling mempengaruhi antara HI dan HN.

Penelitian ini menunjukkan bahwa persetujuan parlemen diperlukan oleh negara monis hibrid dan dualis sebelum PI berlaku (dengan sejumlah pengecualian, sesuai HN masing-masing). Persetujuan parlemen di negara hibrid monis diberikan sebelum ratifikasi dilakukan (*prior approval*) sementara di negara dualis persetujuan diberikan setelah ratifikasi. Upaya memperkuat demokrasi dan akuntabilitas kemudian menjadi

[87] Dewanto, "Akibat Hukum Peratifikasian Perjanjian Internasional Di Indonesia," 51.parliamentary approval in the Indonesian context is not the same as the United States Senate's approval. The Indonesian Government signed the Palermo Convention on December 12, 2000 and ratified it on April 20, 2009. The issue discussed here regards the legal status of this Convention. In the 80's it was assumed that any treaties ratified or acceded, would ipso facto be enforceable in Indonesia. I argued that Indonesia should be regarded as a state applying the monist approach, which legal practice seems to reject. I stand for the monist approach especially with regard to the legal status of the 2000 Palermo Convention. In addition I also argue about the importance of differentiating between Indonesia's international obligations and the issue of direct applicaton of the Convention by national couts. Keywords: Ratification, Integration, Implementation, Treaty, Indonesia's legal system","container-title":"Veritas et Justitia","DOI":"10.25123/vej.1416","ISSN":"2460-4488","issue":"1","language":"en","note":"number: 1","source":"journal.unpar.ac.id","title":"Akibat Hukum Peratifikasian Perjanjian Internasional di Indonesia: Studi Kasus Konvensi Palermo 2000","title-short":"Akibat Hukum Peratifikasian Perjanjian Internasional di Indonesia","URL":"http://journal.unpar.ac.id/index.php/veritas/article/view/1416","volume":"1","author":[{"family":"Dewanto","given":"Wisnu Aryo"}],"accessed":{"date-parts":[["2020",12,22]]},"issued":{"date-parts":[["2015",6,30]]}},"locator":"51","label":"page"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

pertimbangan bagi negara dualis untuk meminta persetujuan atau pandangan parlemen sebelum meratifikasi PI. Walaupun tidak menjadi bagian dari proses transformasi (dualis), persetujuan atau pandangan parlemen dapat menjadi landasan yang kuat untuk mendorong PI menjadi bagian dari hukum yang berlaku setelah ratifikasi dilakukan.

Penyusunan peraturan nasional untuk melaksanakan (atau mentransformasi) PI lazim dilakukan di negara monis hibrid dan dualis. Pertimbangannya semata-mata untuk memastikan harmonisasi antara HN dengan PI, dan kesiapan negara untuk melaksanakan kewajibannya sesuai PI. Dengan demikian, tidak akan terjadi situasi di mana PI tidak dapat dilaksanakan karena pengadilan menilai bahwa rumusan PI masih terlalu umum atau tidak konkrit dalam menciptakan hak dan kewajiban.

Pertimbangan ini bersifat logis dan esensial sehingga mengesampingkan perbedaan pandangan normatif antara monisme dan dualisme. Dengan kata lain, perlunya penyusunan peraturan nasional untuk melaksanakan PI ditentukan berdasarkan muatan dan tujuan PI, termasuk dapat atau tidaknya muatan PI dijadikan dasar untuk membatasi dan mengklaim hak dan kewajiban (*invocability*), serta kepentingan yang hendak dicapai negara. Mengedepankan dikotomi monis-inkorporasi dan dualis-transformasi dalam konteks ini sangat tidak relevan. Pertimbangan logis di atas seharusnya semakin dikedepankan mengingat kewajiban internasional negara, menurut PI, berlaku secara eksternal dan internal.

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Constitutional Issue of the Executional Power of Fiduciary Certificates as Equal to Court Decision

Permasalahan Konstitutionalitas Kekuatan Eksekutorial Sertifikat Fidusia yang disamakan dengan Putusan Pengadilan

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Naskah diterima: 03-06-2020 revisi: 19-04-2022 disetujui: 02-08-2022

Abstrak

Berlakunya UU Jaminan Fidusia, diharapkan mampu menjawab permasalahan dalam usaha pembiayaan, namun menimbulkan kerugian hak konstitusional karena menyetarakan kekuatan eksekutorial putusan hakim yang sudah berkekuatan hukum tetap dengan sertifikat fidusia, oleh karena itu menarik untuk dianalisis sehingga dikentahui dasar normatif penyetaraannya, dan pertimbangan hakim Mahkamah untuk menyatakan inkonstitusional. Analisis dilakukan bahan hukum Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. Teknik pengumpulan data dilakukan dengan studi dokumen dan dianalisis secara preskriptif dan deskriptif. Hasil penelitian menunjukkan bahwa dasar normatif kekuatan eksekutorial pada sertifikat fidusia lahir dari kesepakatan yang didaftarkan untuk memperoleh kekuatan eksekutorial sehingga dapat digunakan sebagai bukti sempurna untuk membuktikan debitur cidera janji kecuali ditentukan lain oleh pengadilan, dan pertimbangan hukum hakim untuk menyatakan inkonsistensional ketentuan yang diuji didasarkan pada tidak adanya kepastian hukum dalam penentuan waktu cidera janji dan mekanisme pelaksanaan eksekusi Sertifikat Fidusia.

Kata kunci: Inkonstitusionil; Kekuasaan Eksekutif; Keputusan Hakim; Pemerataan; Sertifikat Fidusia.

Abstract

The enactment of the Fiduciary Guarantee Law is expected to be able to answer problems in the financing business, but it causes a loss of constitutional rights because it equalizes the executorial power of a judge's decision legally binding with fiduciary certificates. The analysis was carried out by Constitutional Court Decision Number 18/PUU-XVII/2019; the was carried out by document study and analyzed prescriptively and descriptively. The results showed that the normative basis of the executive power on the fiduciary certificate was born from an agreement registered. So that it can be used as perfect evidence to prove the debtor in breach of contract, and the judge's legal consideration to declare the inconsistent provisions tested are based on not the existence of legal certainty in determining the time of breach of contract (default) and the mechanism for the execution of the Fiduciary Certificate.

Keywords*:* Equalization; Executive Power; Fiduciary Certificate; Judge's Decision; Unconstitutional*.*

A. INTRODUCTION

1. Background

Based on Article 1131 jo. Article 1132 of the Civil Code, all existing and future debtor's assets, both movable and immovable, are guaranteed for the repayment of all debts they have made. This means that all creditors have the same right to get repayment of all of the debtor's assets unless there are valid reasons for repayment of other creditors. A valid reason for obtaining repayment is carried out by making a material guarantee agreement as specified in Article 1134 of the Civil Code.

A fiduciary agreement is a material guarantee agreement that was born from jurisprudence to meet the needs of a financing business that requires a debtor's material guarantee given to creditors in trust as a guarantee for repayment of debt in a financing agreement. Fiduciary as a guarantee institution is recognized by the enactment of Law Number 42 of 1999, which is expected to be able to answer problems in the financing business, but instead, it creates new problems because Article 15 paragraph (2) and paragraph (3) of the Law equates the Fiduciary Guarantee Certificate with a decision. A judge with permanent legal force has the power of execution so that if the debtor defaults, then the fiduciary holder has the right to sell the fiduciary object in his own power. The equalization of the executive power in the judge's decision which has permanent legal force through the case settlement process (due process) with a fiduciary guarantee certificate born on the basis of this agreement, can cause problems in its application because it often leads to arbitrary actions by fiduciary recipients (creditors) to collect loans. Debtor's debt is even often followed by vigilante

actions in the form of anarchic actions from the holder of the guarantee right to take the object of collateral forcibly so as to create fear and demean the debtor's dignity.

The executive power of a fiduciary certificate is based on an agreement between the parties who made it, and to ensure the implementation of the agreement, a guarantee in the form of material is given by the debtor to the creditor as repayment. Thus, the guarantee is an additional agreement (*accessoir*) made by the parties to ensure the implementation of the agreement in the form of a debt agreement. The agreement is then stated in a notarial deed as stipulated in Article 5 of the Law on Fiduciary Guarantees, and furthermore, Article 11 requires that the registration of a guarantee deed to determine that objects burdened with Fiduciary Guarantees must be registered to obtain a Fiduciary Certificate which has a gross deed that has the power of a judge's decision is legally binding (*in kracht van gewijsde*).

The normative basis for the executorial power of the judge's decision, sourced from Article 1917 paragraph (1) in conjunction with Article 1920 of the Civil Code and Article 134 Rv, which contains the principle of *res judicata proveritate habetur,* meaning what is decided by the judge must be considered correct, related to the *similia similibus principle*, which means a case that is similar must be decided equally and the principle of *ne bis in idem*, meaning that the same case cannot be tried a second time. Violation of rights is the basis for civil cases to be resolved in Court. The Court is an effort to settle cases related to the main task of the judge to hear and resolve cases that are submitted to him. In the legal system itself, basically, there is justice (*Normgerechtigkeit*), and through the process of resolving cases, that justice is then translated/interpreted by the judge and applied to concrete events, which then produce a decision so that justice turns into justice according to the judge (*Einzalfallgerechtigkeit*).

In an effort to settle cases, the judge's decision becomes Law as well as a source of Law. In an effort to settle cases, the judge's decision becomes law as well as a source of law. The shift to accept judges' decisions as law is a manifestation of the behavior of judges who are active in the trial and play an active role in exploring and seeking the values of justice that exist in society so that the function of judges in Indonesia is no longer just applying the law according to the law (la bouche de la loi) but also serves to create laws. is made based on an agreement between the debtor who gives material rights to his wealth to the creditor to guarantee repayment through the sale of the object of collateral. At the same time, the decision is the final result of the process of resolving the case through the Court. The judge's decision is a law as well as a source of Law that has binding power to be implemented. The

implementation of the decision is carried out by order and under the leadership of the Chief Justice of the District Court, who decides the case.

The application for a judicial review of the provisions of Article 15, paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law relating to the attachment of an executive title to a fiduciary guarantee certificate so that it can be executed is the same as a decision based on a gross deed which reads "*For Justice Based on Belief in the one and only God*." With the executorial title, the judge's decision has the power to be implemented. This becomes the basis for the creditor to sell the object of collateral with his own power as the settlement of his receivables from the sale proceeds. It is even more potent because it is carried out without going through the execution process in the form of unilateral actions taken by the creditor that can harm the debtor. Based on Article 51 paragraph (1) of the Law on the Constitutional Court, there are two things that must be proven in the petition for judicial review of the 1945 Constitution, namely whether or not there is a constitutional position as an applicant (*legal standing*), namely the rights and/or authorities granted by the Constitution Court of the Republic of Indonesia, and whether or not there is a loss of rights and/or authority arising from the enactment of the Law for which judicial review is requested.

In his application, the petitioners. Postulated that there was a loss of constitutional rights as a result of the withdrawal of the fiduciary object by the fiduciary recipient by using the services of *a debt collector*. Withdrawal of a fiduciary object in the Fiduciary Guarantee Certificate Number W11.01617952.AH.05.01, which is based on the provisions of equalizing the gross power of the deed in the Fiduciary Certificate, which is based on the agreement of the parties with a decision as a case settlement in Court. As a result, the fiduciary holder can execute the fiduciary object with his own power to take over the controlled goods without going through the correct legal procedure.

Against this petition, the constitutional judges in Case Number 18/PUU-XVII/2019 decided that the constitutional rights of the Petitioners were proven to be impaired as a result of the enactment of Article 15 paragraph (2) of the Fiduciary Guarantee Law which gives executive powers to the Fiduciary Guarantee Certificate. The juridical consequence of the enactment of these provisions has an impact on Article 15 paragraph (3) which gives the Fiduciary Recipient the right to sell the fiduciary object in his own power if the debtor breaks his promise. Even the judges of the Court are of the opinion that although the Petitioners did not request a review of the Elucidation of Article 15 paragraph (2) of the Law, the Elucidation of the norms of Article 15 paragraph (2) must automatically be adjusted because it is considered

that the Court's considerations have an impact on the Elucidation of Article 15 paragraph (2). Therefore, it is interesting to examine in depth the normative basis for equating the judge's decision legally binding (*in kracht van gewijsde*) with a fiduciary certificate and to know the legal considerations of the judges of the Court to declare the inconsistency of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law.

2. Research Questions

In this research, the problem is:

a. *What is the normative basis for the executorial power of a fiduciary certificate so that it is equated with a judge's decision legally binding (in kracht van gewijsde)?*
b. *How are the judge's legal considerations for declaring the provisions of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law contrary to constitutional rights?*

3. Research Method

In general, the purpose of research is to obtain answers to the problems posed.[1] To find out the normative basis of the executorial power of the fiduciary certificate so that it is equated with the judge's decision legally binding (*in kracht van gewijsde*) by analyzing the judge's legal considerations to state Article 15 paragraph (2) and paragraph (3) of the unconstitutional Fiduciary Guarantee Law, an analysis of secondary data in the form of the primary legal material is carried out, namely the Constitutional Court Decision Number 18/PUU-XVII/2019, relating to the executive power of the Fiduciary Guarantee Certificate. The application of Law for the settlement of a case is an attempt to find positive legal norms that are abstract to some instances as positive legal norms in concrete, which is carried out by analyzing the legal considerations of the panel of judges. Research on legal norms is often called doctrinal legal research.[2] In addition, it is carried out analytically-juridically to find the normative basis for equalizing fiduciary rights certificates with judge's decision in its implementation. In this study, the Law is conceptualized as a norm, which is contained in the Law as a product of certain sovereign powers.

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1 E. Nurhaini Butarbutar, *Metode Penelitian Hukum, Langkah-Langkah Untuk Menemukan Kebenaran Dalam Ilmu Hukum, Cetakan Kesatu* (Bandung: PT Refika Aditama, 2018), 122.
2 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Media Group, 2014), 35.

B. RESULTS & DISCUSSION

1. Normative Basis of Executive Power on Fiduciary Certificates

The petition for judicial review in this Constitutional Court Decision is related to Article 15, paragraph (2), and paragraph (3) of the Fiduciary Guarantee Law, which equalizes the executorial power of the Fiduciary Guarantee Certificate with the judge's decision legally binding (*in kracht van gewijsde*). As a result, if the debtor does not carry out its performance properly, the creditor can obtain repayment from the proceeds from the sale of the fiduciary object based on the gross deed contained in the Fiduciary Guarantee Certificate. In its consideration, the Court is of the opinion that the unconstitutionality of the provisions of Article 15 paragraph (3) of the Fiduciary Guarantee Law is a juridical consequence of the existence of norms in Article 15 paragraph (2). The substance of the norm in Article 15 paragraph (3) has a direct effect on the provisions of Article 15 paragraph (2), which determines the executive power of a fiduciary guarantee certificate so that there are the same constitutionality problems, namely the lack of certainty regarding the procedure for implementing decisions and uncertainty regarding the determination someone is said to be in default. To better understand the normative basis contained in the provisions of Article 15, paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law, the birth of the executive power of a fiduciary certificate which is equated with a judge's decision legally binding (*in kracht van gewijsde*), it must be understood the nature and legal system of guarantees and laws. The subsequent execution will be discussed one by one as follows:

a. The Nature and Legal System of Fiduciary Guarantees

Fiduciary guarantees are material rights (*zakelijk recht*) given by the debtor to the creditor for a specific item to get repayment. Fiduciary guarantees are born from jurisprudence which is then regulated in Law, to meet the needs of the community in the field of financing businesses that require collateral by means of transferring ownership rights of an object by the debtor to the creditor based on trust in the sense that ownership of the object is still physically controlled by the debtor. A fiduciary is a material guarantee so that material properties are attached as regulated in Book II of the Civil Code. Objects that are objects of collateral must be able to be submitted and must be registered as also stipulated in Article 11 of the Fiduciary Law, that objects that are burdened with fiduciary guarantees must be registered. If a fiduciary guarantee is not registered, the creditor does not have a fiduciary guarantee certificate and does not have the right of preference (right

of preference) to receive repayment from other creditors. As material security is said to violate the principle of inbezit stelling attached to the pawn because the pawn object that is used as collateral, which should be under the authority of the debtor, remains in the hands of the debtor.

The consideration of the application of fiduciary as a material guarantee is based on the need for legal traffic in providing financing facilities for debtor with collateral in the form of goods financed by consumer financing institutions which are controlled directly by the debtor.[3] Guarantee rights are accesoir in the sense that they cannot stand alone but depends entirely on the main agreement, namely the loan agreement, because what is guaranteed is the repayment of the debt or the debtor's achievement that was born because of the agreement, as also confirmed in Article 4 of the Fiduciary Law. Article 1 of the Fiduciary Guarantee Law stipulates that fiduciary is the transfer of ownership rights to an object in trust with the condition that the transfer of material rights to the creditor remains in the physical possession of the owner of the object.

Fiduciary objects are collateral rights to movable objects, both tangible and intangible and immovable, especially buildings that cannot be encumbered with mortgage rights which are handed over to the debtor to the creditor as a guarantee of repayment of the debt with a priority position. The surrender of collateral rights to the debtor's property that is given to the creditor creates confidence in the creditor as a guarantee for the settlement of his receivables which creates confidence in the certainty of the repayment of his receivables by the debtor.[4] The guarantee agreement is an agreement that does not stand alone but is an additional from the main agreement, namely a debt agreement that aims to obtain repayment of receivables. Therefore, the basis for the occurrence of collateral rights is a debt agreement between the debtor and the creditor, so based on Article 1338 paragraph (1) jo. Article 1320 of the Civil Code, the agreement made by the debtor with the creditor becomes Law for those who make it so that the basis for binding the debt agreement and fiduciary guarantee agreement is the agreement of the parties. A contract between two parties raises the rights of one party and its obligations to the other party, which can be assessed with money, so

[3] Arista Setyorini and Agus Muwarto, "Akibat Hukum Perjanjian Pembiayaan Konsumen dengan Pembebanan Jaminan Fidusia yang Tidak Didaftarkan," Mimbar Keadilan, August 1 (2017): 119, https://doi.org/10.30996/mk.v0i0.2187.

[4] E. Nurhaini Butarbutar, *Hukum Harta Kekayaan, Menurut Sistematika KUH Perdata Dan Perkembangannya* (Bandung: PT Refika Aditama, 2012), 69.

in the context of a credit contract, it is a business activity that raises rights and obligations between creditor and consumer that the recipient of the credit facility.[5]

In accordance with the principle of agreement in Article 1338 paragraph (1) of the Civil Code, which contains norms, binding agreements for those who make them are then concreted through the Fiduciary Guarantee Law. Fulfilment of achievements/agreements is a consequence arising from the agreement; if one of the parties does not carry out the achievement, it will cause legal problems called a breach of contract or default. The occurrence of default is the basis for the occurrence of a case that reaches the front of the trial due to a dispute or violation of rights committed by one party against another party that results in loss to the person being violated.[6]

The provisions of Article 15 paragraph (3) of the Fiduciary Guarantee Law only mention that in the event the debtor defaults, the fiduciary holder has the right to sell the object of the guarantee without further explaining when the debtor is considered to be in default and who has the right to determine the default? This ambiguity brings juridical consequences in the form of the absence of legal certainty regarding the two issues, thus bringing juridical consequences to the absolute authority of the fiduciary holder to determine for himself that the debtor has defaulted, which gives birth to the right of the fiduciary holder (the creditor) to take repayment of his receivables from the proceeds of the sale of the object itself..

Theoretically, the absence of arrangements for determining the debtor in a state of default in the Fiduciary Guarantee Law can be overcome by the implementation of the principle of *lex specialist derogate lex generalis*. Article 1238 of the Civil Code has regulated in such a way when a person is said to have defaulted; namely, the debtor is declared negligent by a warrant or with a similar deed, so that although the Fiduciary Guarantee Law as a special provision does not clearly regulate it, the determination of a person's breach of contract must be preceded by a lawsuit to the Court to find out. A person in a state of default as required by Article 1238 of the Civil Code. In the civil law system, the authority to determine a person's breach of contract must be by a court decision, unless the agreement that has been made is not denied by one of the parties because based on *the principle*

[5] E. Nurhaini Butarbutar, "Implementation of Good Faith Principle as an Efforts to Prevent the Business Disputes," *Journal of Advanced Research in Law and Economics* 11, no. 4 (2020): 1131–36, .https://doi.org/10.14505//jarle.v11.4(50).07

[6] Hazar Kusmayanti, "Tindakan Hakim Dalam Perkara Gugatan Wanprestasi Akta Perdamaian," *Jurnal Yudisial* 14, no. 1 (2021): 99–116, https://doi.org/http://dx.doi.org/10.29123/jy.v14i1.

of freedom of contract contained in the agreement, an agreement made together cannot be unilaterally revoked.

Basically, the norms contained in the provisions of the article require the parties to fulfil their achievements/agreements, and if a dispute arises over the agreement that causes default, it must be proven through the trial process. Through the proceedings at the trial, the judge will determine the existence of a default or an event of a violation of the agreement made by both parties, because the purpose of proof is to provide certainty to the judge of the truth of the disputed concrete events..[7] The excellent and robust quality of evidence has a close relationship with the proof of the arguments so that it can convince the judge, and convincing the judge correlates with the granting of an application.[8]

A Fiduciary Guarantee Certificate that has evidentiary power can be used as perfect evidence that there has been a violation of the rights of the fiduciary recipient to get the payment of his receivables. Article 165 HIR/Article 285 Rbg stipulates that an authentic deed is perfect proof of what is stated in it. This means that the authentic deed has a high probability of approaching the truth because it has been confirmed by the authorized official. It is said to be perfect evidence because the truth of the contents of the deed is determined by the parties and recognized by the official who explains and fulfils the form determined by Law, which is made by or before a public official as referred to in Article 1868 of the Civil Code.

With there is Fiduciary Guarantee Certificate, the fiduciary recipient has perfect evidence, just like a judge's decision legally binding (*in kracht van gewijsde*), so that his right to get repayment of his receivables is guaranteed through the sale of the fiduciary object in accordance with the nature of the guarantee to get repayment, not to own. As a norm contained in the provisions of the article, the debtor must fulfil his achievements/obligations in accordance with the agreement guaranteed by the sale of fiduciary objects. However, if a dispute arises over the existence of a default, then it should be resolved in Court to obtain certainty that a default has occurred, which in turn gives the fiduciary holder the right to carry out the execution on their own power. The decision of the Panel of Judges relates to the norms contained in the Fiduciary Guarantee Certificate when the parties

[7] E. Nurhaini Butarbutar, "Arti Pentingnya Pembuktian dalam Proses Penemuan Hukum" *Mimbar Hukum*, Volume 22, nomor 2, Juni (2010) : 347 https://doi.org/10.22146/jmh.16225

[8] Retno Widiastuti and Ahmad Ilham Wibowo, "Pola Pembuktian Dalam Putusan Pengujian Formil Undang-Undang Di Mahkamah Konstitusi," *Jurnal Konstitusi* 18, no. 4 (February 17, 2022): 803, https://doi.org/10.31078/jk1844.

do not find an agreement regarding the occurrence of a default and the fiduciary provider is not willing to release the object for sale as repayment of his debt. Therefore, the Panel of Judges is of the opinion that the determination of default must first be resolved based on the judge's determination, and the execution of the Fiduciary Guarantee Certificate must be based on procedural Law as applicable to the implementation of court decisions that already have legal force, considering the nature of the procedural law system which is public Law, as a sub-system of the civil procedural Law that is coercive.

b. Normative Basis of Executive Power

As a material law, the Fiduciary Guarantee Law only regulates the rights and obligations of the fiduciary giver and recipient as legal subjects who have an interest in the Law. However, according to the petitioners, the Law only guarantees the implementation of the creditor's right to obtain repayment of his receivables from the sale of objects that are burdened by a fiduciary. Even the regulation of the strength of the Fiduciary Guarantee Certificate includes the words "*For Justice based on Belief in the one and only God*," just as the judge's decision is considered unable to provide justice and tends to provide different treatment between creditors and debtors so that they are considered unable to provide protection for the debtor's ownership that is burdened with a fiduciary guarantee. The executive power of the decision is related to the strength of evidence so that certainty is obtained about the occurrence of an event.

The strength of proof in the civil judge's decision is regulated in Article 1916 paragraph (2) of the Civil Code, by determining that the judge's decision is a truth because it contains an assumption that the judge's decision is correct in accordance with the principle of *res judicata proveritate habetur* so that it can be carried out based on the procedure stipulated in the procedural Law. The binding power of a judge's decision is based on the purpose of the judge's decision itself, namely to resolve or end a dispute and determine its rights or Law.

Norms are defined as values contained in regulations or decisions, which are value formulations that regulate how to behave or about actions that are prohibited or recommended to be carried out. In addition, the judge's decision is also often used by other judges as a basis for re-deciding similar cases so that the judge's decision is referred to as a source of Law. The judge's decision is also the justice obtained from the proceedings in the Court for the purpose of restoring the imbalance in society due to violations of the Law.

The basis of the binding power of the judge's decision is stated in Article 1917 of the Civil Code, which stipulates that the power of a judge's decision that has obtained absolute power is not broader than just the decision so that it has juridical consequences for the application of the *ne bis in idem* principle. The power of proof of the judge's decision is stated and made in an authentic form that can be used as documentary evidence as specified in the 1918 Civil Code, which is strengthened by Jurisprudence Number 101K/Sip/1955 dated August 19, 1955

The existence of executive power in the judge's decision is based on the provisions of Article 2 paragraph (1) of the Law on Judicial Power and its Elucidation by stipulating that the trial shall be conducted "*For Justice Based on Belief in the one and only God*." which is in accordance with Article 29 of the 1945 Constitution of the Republic of Indonesia. Therefore, all judiciary throughout the territory of the Republic of Indonesia is a state court to apply and enforce Law and justice based on Pancasila and the Republic of Indonesia Constitution of 1945. In addition, judges make decisions based on valid evidence through legal proceedings. This means that what the judge has decided is the truth so that it can be implemented.

In general, the Law can be divided between material Law and formal Law; material law (substantive Law) is a provision on human relations that stipulates actions that are required or prohibited or allowed, accompanied by sanctions for violators, while formal Law (procedural Law) regulates ways to implement and maintain material law. The relationship between the two, according to Paton[9] that "*between substantive and procedural law was difficult to draw a clear line distinguishes between them.*" On the other hand, procedural law cannot stand alone without material law. In contrast to the executorial power of the Fiduciary Certificate, which comes from an agreement that is based on Article 15 paragraph (1) of the Fiduciary Guarantee Law, the Fiduciary Guarantee Certificate contains the Grosse deed "*For Justice Based on Belief in the one and only God*." In accordance with the provisions of Article 224 HIR/258 Rbg, the Fiduciary Guarantee Certificate as a notarial deed can be implemented or executed as a court decision.

If the creditor does not get his rights as stated in the fiduciary guarantee certificate as material Law, then the fiduciary recipient has the right to sell the fiduciary object in his own power. Violation of these rights must be submitted to the head of the district court in advance, as the procedure for carrying out

[9] George, Whitecross, and Paton, *A Text Book of Jurisprudence* (Oxford: Clarendon Press, 1975), 45.

the execution according to HIR/Rbg to be carried out by force (*execution force*) is the same as the judge's decision legally binding (*in kracht van gewijsde*). The execution of the decision is an effort to realize the achievements required by the judge through his decision. The act of execution is carried out to maintain legal certainty in the decision and to fulfill a sense of justice for the party who has been won in the case.[10]

The implementation of a judge's decision legally binding (*in kracht van gewijsde*) must take place and be under the leadership of the Chief Justice of the District Court. As an achievement that was arising from the Court's decision legally binding (*in kracht van gewijsde*), it should still be carried out voluntarily, but the reality in society often cannot be carried out by the defeated party. Therefore, by aid State Tool, by order of the Chief Justice of the District Court, it can be carried out by force. Although it is not clearly regulated in the Fiduciary Guarantee Law regarding the process of carrying out the execution of fiduciary objects, the regulation in HIR/Rbg can be applied for the execution of a court's decision legally binding (*in kracht van gewijsde*). According to Article 196 HIR/Article 207 Rbg, if the defeated party is unwilling or negligent to fulfil the contents of the decision peacefully, then the winning party submits a request, either verbally or by letter, to the Chairman of the District Court to implement the decision, and by order of the Chief Justice of the District Court to summon the defeated party and warned him (*aanmaning*) that he should fulfil the decision within the time determined by the chairman, which is a maximum of eight days.

The Fiduciary Guarantee Certificate is interpreted the same as a court decision that has permanent legal force so that if the creditor feels that his rights have been violated due to a violation of the agreement, the creditor can apply to the Head of the District Court to carry out the execution of the Fiduciary Certificate without the need to file a lawsuit. Based on the Grosse deed, the creditor does not need to file a lawsuit to the Court, but it is enough to submit an application to carry out the contents of the Grosse deed. In contrast to other authentic deeds, in dealing with debtors who are in default, they are required to file a lawsuit to the Court to implement the contents of the deed.

The procedure for the request for execution is the same as applying for the execution of a decision because a fiduciary guarantee certificate arises from an agreement made in a formality that has been determined by Law so that it does

[10] Panusunan Harahap, "Eksekutabilitas Putusan Arbitrase oleh Lembaga Peradilan," *Jurnal Hukum dan Peradilan*, 7, No 1 (2018) : 127, 10.25216/jhp.7.1.2018.127-150.

not need to be proven again through the trial process. Therefore, what is stated in it is considered correct unless there is evidence against it that determines otherwise. This is in line with the conclusion of the constitutional judges regarding the meaning of the phrase "with respect to fiduciary guarantees if there is no agreement on breach of contract and the debtor objected to voluntarily surrendering the object that is the fiduciary guarantee, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out, and applies the same as the execution of court's decisions legally binding (*in kracht van gewijsde*)."

2. Legal Considerations

The applicants for a husband and wife, debtors in a fiduciary agreement based on the Fiduciary Guarantee Certificate Number W11.01617952.AH.05.01 postulate that one of the constitutional rights of the applicant is guaranteed legal protection and the principle of equality before the Law as regulated in Article 28D paragraph (1) of the Constitution of the Republic of Indonesia has been violated because of the enactment of legal norms contained in the Fiduciary Guarantee Law which gives creditors the right to sell fiduciary objects on their own power. One of the Constitutional Court Decision in Case 18/PUU-XVII/2019 is that the provisions of Article 15, paragraph (2) and paragraph (3) are declared to have no binding legal force because they are contrary to the 1945 Constitution of the Republic of Indonesia. In accordance with the principle of objectivity and accountability, then the decision must be accompanied by reasons or judge's considerations as the basis for judging, and these considerations become the basis for the judge's responsibility in his decision.

In their consideration, the panel of constitutional judges stated that the unconstitutional issue regarding the enactment of Article 15 paragraph (2 paragraph (3) of the Fiduciary Guarantee Law was based on the element of legal protection in the form of legal certainty and justice that should be given to creditors and debtors in a fiduciary guarantee agreement, as stated in one of the preambles for the formation of the Law. Justice, in general, is a fundamental problem for law enforcement, significantly when it is associated with the opinion that the purpose of Law is to create justice. The law must be fair and the perfect way to create justice, must have certainty, and must provide benefits to society.[11] Also aims to create legal certainty and benefit. These three elements are legal values or ideals (*Idee des Recht*) proposed by Radbruch

[11] Endang Pratiwi, "Teori Utilitarianisme Jeremy Bentham: Tujuan Hukum Atau Metode Pengujian Produk Hukum?" *Jurnal Konstitusi*, 19 No 2 (2022) : 268, 10.31078/jk1922

that Law contains the ideals/goals to create legal certainty (*Rechtssicherheit*), provide benefits (*Zweckmassigkeit*) and justice (*Gerechtigkeit*). The element of legal certainty guarantees that the Law must be carried out according to its sound. The application of this element is more directed to the implementation of the Law or legislation against every seeker of justice for a concrete event in the judge's decision. The emphasis on the principle of legal certainty has resulted in judges being more inclined to maintain written legal norms from existing favourable laws.[12]

In consideration, the constitutional court stated that the norms regulated in Article 15, paragraph (2) and paragraph (3) have implications for the existence of legal uncertainty regarding the determination of a person; in this case, the fiduciary giver (the debtor) is declared to be in breach of achievement or default and the procedure or mechanism for carrying out the execution. The arrangement for granting powers to be executed is the same as a court's decision legally binding (*in kracht van gewijsde*), is not explained further apart from only providing an understanding of the executorial power in the Elucidation of Article 15 paragraph (2), namely an action can be carried out without going through a court because it is considered final. Moreover, bind the parties so that the decision can be implemented. This explanation shows that there is a dualism in the implementation of executions in the Indonesian legal system, which creates legal uncertainty. The Law of execution, which is a sub-system of procedural Law and is a coercive law, has clearly determined in Article 196 HIR/ Article 208 RBg that the execution of executorial titles such as Fiduciary Guarantee Certificates must be carried out in accordance with the execution of court decisions that have permanent legal force, namely must be carried out by the clerk and bailiff on the order of the chairman of the district court based on the request for execution by the party who won and must be included in the Minutes of Execution.

Uncertainty in the execution of the Fiduciary Guarantee Certificate, which has the title of execution, has the potential for arbitrary creditor actions from creditors; even in social reality, there are often acts of violence that are not "humane" from creditors or their proxies against the debtor to take fiduciary objects that are collateral forcibly. Payment of debts. Therefore, the judge's consideration stated that to provide legal certainty to the parties, the execution of the Fiduciary Guarantee Certificate should not be carried out by the fiduciary recipient himself but must be carried out according to legal mechanisms and procedures for the execution with a judge's decision legally

[12] Fence M Wantu, "Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan dalam Putusan Hakim di Peradilan Perdata," *Jurnal Dinamika Hukum* 12, no. 3 (September 15, 2012): 479-489, http://dx.doi.org/10.20884/1.jdh.2012.12.3.121.

binding (*in kracht van gewijsde*). Furthermore, against the provisions of Article 15 paragraph (3), the constitutional judges argued that the exclusive authority granted by the article to creditors to sell fiduciary objects on their own power causes injustice and violations of debtor's rights. The debtor, as the owner of the object of collateral, must also be protected by giving him the right to defend himself from the alleged occurrence of default and also get the protection of the ownership of his property rights by getting the opportunity to participate in the sale and obtain the remaining proceeds from the sale of the object of the fiduciary guarantee at a reasonable price. Regarding the absence of balanced legal protection in a fiduciary agreement, the panel of constitutional judges relates to the absence of transfer of property rights to the fiduciary object from the debtor to the creditor as the fiduciary recipient, which reflects that the substance of such an agreement clearly shows an imbalance in bargaining position between the rights giver. Fiduciary (the debtor) with the recipient of fiduciary rights (the creditor) because the fiduciary giver (the debtor) is in a position as a party in need.

The imbalance in the bargaining position in an agreement triggers legal disputes in the implementation of the agreement. Article 1338 paragraph (3) of the Civil Code has determined that an agreement must be carried out in good faith. However, applying the principle of good faith in an agreement can prevent disputes by formulating the rights and obligations of the parties in a balanced manner.[13]

The approval of the substance of such an agreement, in the opinion of the panel of judges, is a hidden intention that the occurrence of the guarantee agreement is not based on an agreement because the agreement can only occur when both parties are free of will as an essential condition in determining the validity of an agreement. Therefore, based on Article 1321 of the Civil Code, it is determined that the will becomes defective if it is carried out because there are elements of coercion, fraud, and oversight, and in its development, it is due to abuse of circumstances.

C. CONCLUSION

Based on the analysis of the problems posed, it is known that the normative basis of the executive power in the fiduciary guarantee certificate was born from an agreement to provide material rights between the debtor to obtain repayment of their receivables. Made in the form of a notarial deed which is then registered

[13] E., Nurhaini Butarbutar, "Implementation of Good Faith Principle as an Efforts to Prevent the Business Disputes," 1136.

to obtain executive power so that it can be used as perfect evidence to prove the debtor is in breach of contract unless otherwise determined by the Court, and the judge's legal considerations to state the provisions of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law. Contrary to constitutional rights based on the absence of legal protection in the form of legal certainty in determining the time of the breach of contract and the mechanism for the execution of the Fiduciary Certificate, which is equated with a judge's decision legally binding (*in kracht van gewijsde*), which has the potential for arbitrary actions, and the granting of exclusive authority for creditors to sell fiduciary objects on their own power shows that there is no balanced legal protection between creditor and debtor.

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The Relationship between DKPP and PTUN Decisions regarding Ethical Violation by General Election Administrators

Relasi Putusan DKPP dan PTUN dalam Pelanggaran Kode Etik Penyelenggara Pemilu

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Naskah diterima: 12-12-2020 revisi: 07-07-2022 disetujui: 02-08-2022

Abstrak

Pemberhentian komisioner penyelenggara Pemilu melalui putusan Dewan Kehormatan Penyelenggara Pemilu (DKPP) tidak bersifat final dan mengikat pada tataran eksekutorialnya mengingat putusan tersebut dapat dibatalkan oleh Pengadilan Tata Usaha Negara. Penelitian ini bertujuan untuk menguraikan kewenangan DKPP dan PTUN dalam penyelesaian pelanggaran etik yang dilakukan oleh penyelenggara Pemilu sekaligus mengurai implikasi dan relasi putusan dari kedua lembaga tersebut. Bersamaan dengan itu, penelitian ini juga menawarkan konsep ideal tentang desain penyelesaian pelanggaran etik penyelenggara Pemilu di masa mendatang. Penelitian ini dilakukan dengan menggunakan jenis penelitian yuridis normatif. Hasil penelitian menunjukkan bahwa DKPP dan PTUN memiliki kewenangan yang saling beririsan namun dengan putusan yang berbeda. DKPP murni mengadili persoalan etik dan PTUN mengadili Keputusan Presiden yang merupakan tindak lanjut dari putusan DKPP. Dalam rangka untuk menghindari konflik putusan atas kasus yang beririsan maka atas pelanggaran kode etik dimasa mendatang harus diselesaikan dengan mekanisme penyelesaian oleh lembaga yudikatif.

Kata Kunci: Penyelenggara Pemilu; Pelanggaran Kode Etik; Putusan.

Abstract

The commissioner of the general election administration was discharged through the decision of the General Election Administrator Honorary Council (DKPP). The decision is not final and binding at the executive branch, considering that the decision can be cancelled by the Administrative Court. This study aims to define the authority of DKPP and PTUN in resolving ethical violations committed by election administrators and parse the implications and relationships of the decisions of the two institutions. This paper also proposes an ideal concept for the design of solving ethical violations of election administrators in the future. This study uses normative juridical methods. The results showed that the DKPP and PTUN have overlapping authority but with different decisions. DKPP purely adjudicates ethical issues, and the Administrative Court adjudicates the Presidential Decree, which is a follow-up to the DKPP decision. To avoid conflicting decisions on cases that intersect, violations of the code of ethics in the future must be resolved with a settlement mechanism by the judiciary.

Keywords: General Election Administrator; Violation of Code of Ethics; Decision.

A. INTRODUCTION

1. Backgrounds

General election administrators hold a significant position in both national and local elections. Election administrators are responsible for general election administration in the interest of the sovereignty of the people involved in direct, public, independent, confidential, honest, and fair elections. Incompetence and irresponsibility of election administrators could mishandle leadership transition, leaving this transition to no avail. Similarly, general election administration potentially helps gain benefits from the authority. General election administrators will attract more attention from candidate pairs in every event of the election since they need the services or role of the commissioners responsible for administering the election to gain benefits in unfair ways.

From these authorities of authority and responsibilities attached to the commissioners of election administrators, the commissioners, especially the members of the Election Commission (KPU). The commissioners are supervised in terms of their ethics and laws to ensure that their integrity and independence are maintained. Violations of ethics and Law committed by the commissioners can definitely lead to serious sanctions.[1]

[1] Puspitasari, Dyan. "Peran Dewan Kehormatan Penyelenggara Pemilu dalam Menjaga Kemandirian dan Integritas Penyelenggara Pemilihan Umum di Indonesia." Lentera Hukum 5 (2018): 384 https://heinonline.org/HOL/LandingPage?handle=hein.journals/lenth5&div=30&id=&page=

The sanctions for the commissioners of the KPU case are the latest breakthroughs in the system aiming to enforce the integrity of the general election administrators in Indonesia. So far, it has been the norm that state administrators are under supervision and subject to sanctions when they are found to violate the Law, while ethics-related matters have been off the radar. The supervision over the attitude of a state administrator, including those as general election administrators, departs from the awareness, implying that violations of ethics committed by state administrators and general election administrators lead to violations of the Law.

Arguments over ethical violations that may end up as violations of the Law can be inevitable. Corruptions arise from such violations of ethics. It could start with the condition where a person in charge of the election administration has a meeting with an official holding the highest position in a political party or a legislative candidate. This initial meeting may extend to a discussion intended to benefit the political party concerned or the legislative candidate. A meeting between the commissioner of KPU and an official of a political party is certainly deemed to violate the code of ethics, probably leading further to bribery for the sake of the political party and the legislative candidates concerned.

The establishment of a special organization intended to handle violations of ethics in general election administration also marks the determination to nurture ethics among general election administrators. Election Administrator Honorary Council (DKPP) was officially established to judge ethical violations committed by general election administrators[2] on 12 June 2012 under Law Number 15 of 2011 concerning General Election Administrators.[3]

Since its establishment, DKPP has delivered thousands of decisions over violations of ethics committed by KPU commissioners at central and regional levels. The decisions issued by DKPP involve a warning, temporary discharge, permanent discharge, and dishonourable discharge. The decisions of DKPP involving the dishonourable discharge of general election administrators are final and binding,[4] meaning that no appeal can be lodged by the commissioners of KPU following the decisions issued. Every commissioner that has been tried by DKPP will have to remain with the verdict delivered. One case that has become polemic following the Decision of DKPP Number

[2] Chakim, M. Lutfi. "Desain institusional dewan kehormatan penyelenggara pemilu (DKPP) sebagai peradilan etik." *Jurnal Konstitusi* 11, no. 2 (2016): 398.

[3] https://dkpp.go.id/sejarah-dkpp/ retrieved on 19 June 2022 at 21:20 WIB

[4] Nasef, M. Imam. "Studi Kritis Mengenai Kewenangan Dewan Kehormatan Penyelenggara Pemilu dalam Mengawal Electoral Integrity di Indonesia." Jurnal Hukum Ius Quia Iustum 21, no. 3 (2014): 395. https://doi.org/10.20885/iustum.vol21.iss3.art3

317-PKE-DKPP/X/2019, whose one of the indictments states "imposing a sanction of permanent discharge on the reported VII Evi Novida Ginting Manik as the member of KPU of the Republic of Indonesia in the time this decision is declared".[5]

Following this DKPP decision, the President issued Presidential Decree Number 34/P of 2020 concerning the dismissal of Evi Novida Ginting from her position as a commissioner of KPU. The Presidential Decree was contested by Evi Novida Ginting to an Administrative Court (PTUN). After a lengthy trial process, PTUN granted her request by revoking the Presidential Decree. This revocation by the PTUN following the dismissal of the commissioner from her position indicates that the dismissal of Evi Novida Ginting from her position has been invalid.

The Decision of PTUN has led to a quandary. On the one hand, the President had to respect the decision issued by PTUN by putting Evi Novida Ginting back in her position as a commissioner at KPU. On the other hand, the President had to respect the decision of DKPP, which was final and binding since no legal remedies could be taken following the issuance of the decision.

2. Research Questions

This research focuses on the authority and the connection between the decision of DKPP and the decision of PTUN to set resolutions to the violations of general election ethics.

3. Methods

This research employed normative-juridical methods and conceptual, statutory, and case approaches. The primary legal data were taken from legislation and PTUN and DKPP decisions regarding the resolutions of the violations of the code of ethics in general elections. The secondary data were from previous studies, journals, and books to support the primary ones. Data collection was performed by inventorying and clarifying the legal data according to their sub-problems analyzed, and all data were analyzed based on descriptive-analysis techniques.

B. DISCUSSION

1. The authority of the General Election Administrator Honorary Council (DKPP)

The DKPP is a part of general election administrators; this institution is responsible for establishing electoral justice in ethical issues of KPU and the General Election Supervisory Body (Bawaslu) officer.[6]

[5] Putusan DKPP Nomor 317-PKE-DKPP/X/2019, 36
[6] https://id.wikipedia.org/wiki/Dewan_Kehormatan_Penyelenggara_Pemilihan_Umum retrieved on 18 June 2022 at 09:20 WIB

Objectum litis, or the object that can be tried by the DKPP, is restricted to ethical violations, as mentioned earlier, not criminal violations, meaning that ethical violations are not always criminal violations. However, criminal offences can be seen as ethical violations.[7] The violations of ethics, in this case, are more linked to the attitude of a commissioner of the KPU to other parties within the internal or external scopes. The external violations may involve the interaction between a commissioner and another party in a general election, such as a political party, a legislative candidate, and a regional head candidate.

Commissioners of KPU are prohibited from interacting with other groups (candidates and team) related to the neutrality of their duties. Those interactions (with ethical issues and conflict of interest) are prohibited in every situation. General election administrators should maintain interactions that could lead to the intervention of the general election administration process.

The interaction of KPU and Bawaslu with candidates is legally permitted in the registration process and meeting with some conditions. Framing ethical cases are not easy; its principal basis is an abstract issue with no rigid and detailed rules. Moreover, human attitudes that can be categorized as ethical tendencies are extensive.

This extensive scope often leads to subjective consideration given by the panel of judges of the DKPP in the trial dealing with ethical code issues. During the trial process, the judges mostly refer to extensive interpretations in deciding a case, and these interpretations could extend the definition of a provision in legislation.[8]

The DKPP decision is final and binding, which means no further legal remedy. The decision with no appeal process is an ethical violation of the election justice process.

However, some problematic issues arose following the trial handled by the DKPP. First, upon the decision regarding the ethical violation committed by the commissioner, DKPP dismissed the person concerned from her position. The decision is deemed unreasonable and unacceptable within the scope of current legal systems in Indonesia, contrary to the fact that a commissioner of KPU is appointed under the mechanism of the Law. That is, the dismissal should also involve legal mechanisms or legal systems. The involvement of legal systems indicates that law enforcement will have binding power when this case is tried by state judicial bodies such as the Supreme Court and Constitutional Court.

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[7] Asshiddiqie, Jimly. Peradilan Etik dan Etika Konstitusi: Perspektif Baru tentang Rule of Law and Rule of Ethics & Constitutional Law and Constitutional Ethics (Edisi Revisi). Sinar Grafika, (2022), XIV.

[8] Monteiro, Josef M. "Teori penemuan hukum dalam pengujian undang-undang dan peraturan pemerintah pengganti undang-undang." Jurnal Hukum PRIORIS 6, no. 3 (2018): 271

On the contrary, DKPP is not a judicial body, and, thus, the decisions of the DKPP cannot cover the territory of laws. Within the purview of the state of Law, ethical issues and laws represent two different scopes, and they cannot blend despite their connection. The standards of ethics are not applicable in the legal systems in Indonesia that refer to Continental Europe, indicating that court decisions always follow current or written laws (ius contituendum).

Second, the decision delivered by the DKPP followed by the dismissal of a commissioner due to the ethical violation committed contravenes the doctrine that a person is innocent until they have been proven guilty (A presumption of innocence).[9] The sanction following the decision declared by the DKPP was not at all based on a court decision issued by a judicial body, contravening the provision in Article 1 Paragraph 3 of the 1945 Constitution stating "the State of Indonesia is a state based on the rule of law", meaning that legal issues go beyond ethics-related matters.

Third, DKPP is not categorized as a court, and this position indicates that DKPP is not authorized to dismiss a person from his/her position as a commissioner of KPU. The decision of DKPP was only restricted to ethical decisions, and it did not hold the power to dismiss the commissioner. Ethical decisions give recommendations to be brought further to a court to be later decided whether a defendant should be dismissed from his/her position. This unacceptable authority can be further compared to the position of judicial commission as the highest state body authorized to enforce the dignity of judges.[10] With such an authority, the Judicial Commission has the right to supervise the performance of judges in Indonesia. Following any reports indicating that a judge violates the code of ethics, the Judicial Commission initiates a trial to decide whether the judge is proven guilty of an ethical violation. Only if proven guilty will this case go further to an internal trial held by the Supreme Court that is authorized to dismiss a person from his/her position.

On the other hand, the decisions of DKPP are dependent on the way that these decisions cannot be executed without approval from the President. In the case of Evi Novida Ginting, the decision of DKPP was contingent on the approval of the President in terms of whether the President Implemented the decision or not. Are this decision

[9] Remaja, I. Nyoman Gede. "Penerapan Asas Praduga Tak Bersalah Bagian dari Perlindungan Hak Asasi Manusia yang Harus Dijamin oleh Negara." Kertha Widya 6, no. 1 (2018): 10. https://ejournal2.unipas.ac.id/index.php/KW/article/view/491

[10] BERTIN, BERTIN. "Fungsi Pengawasan Komisi Yudisial terhadap Perilaku Hakim Dihubungkan dengan Independensi Hakim sebagai Pelaku Kekuasaan Kehakiman." PhD diss., Tadulako University, (2013): 1. https://www.neliti.com/publications/152071/fungsi-pengawasan-komisi-yudisial-terhadap-perilaku-hakim-dihubungkan-dengan-ind

binding the President to fully conform? There is no certain reasoning for the President to arrange to be dismissed from his/her position only by the decision made by the DKPP unless the President is concerned about the dismissal of a commissioner from KPU. With this dependency, the President was faced with two options: approving the decision of the DKPP and issuing the Presidential Decree concerning the dismissal or rejecting the decision without any presidential decree to be issued.

Both options are not easy for the President to decide. On the one hand, refusing to issue the decree can also mean disrespect for the decision issued by the DKPP as a state organization. On the other hand, the decision to issue a Presidential Decree may be taken as an administrative measure taken by the Head of the state. It means that this decree may be taken as something not more than just a formality to legitimate the decision issued by the DKPP.

To some extent, if the President has not intended to conform to the decision, then the decision does not represent a final decision. The President's decree issued may also be considered another violation of the Law committed by the President. This will be contrary to the norm where the President, as the Head of the state administration, must act according to the Law. This is also congruent with the legality principle in the State Administrative Law, mentioning het vermoede van rechtmateheid bestur.[11] Maybe those choice is the safest way that President can consider because there are no legal consequences which entail.

2. The Authority of State Administrative Court (PTUN)

The Administrative Court (PTUN) is within the Supreme Court. As a judicial body, PTUN functions to enforce the Law and justice; PTUN, within the purview of state administration, is authorized to deal with state administrative disputes defined:

> *"State administrative disputes arise from the domain of state administration between a person or a private legal entity and a state administrative body or official, either at central government or regional level as a consequence of the issuance of the Decision of State Administration regarding employment disputes according to the current legislation".*[12]

According to Article 1 point 10 of Act Number 51 of 2009, the aspects of State Administrative Disputes involve the following:

a) A dispute or conflict arising in the domain of state administration (government administration)

[11] S.F. Marbun. Hukum Administrasi Negara , Yogyakarta: FH UII Press, 2012, 104
[12] Pasal 1 angka 10 Undang-Undang Nomor 51 Tahun 2009 tentang Peradilan Tata Usaha Negara

b) The subject of dispute between officers or institutions of state administration and a person or a private legal entity
c) A dispute or a co*nflict following the decision issued by a state administrative decision*

The above aspects indicate that arising state administrative disputes are mainly the consequences of State Administrative decisions. In terms of quality, the state administrative decisions represent the causes, while state administrative disputes represent the effects. In terms of a contrario, administrative court disputes arise when no state administrative decision is issued by a state administrative body/official. Thus, an administrative court decision is an objectum litis of a state administrative dispute. Article 1 point 9 of Law Number 51 of 2009 defines a State Administrative Decision as a written decision issued by a State Administrative Body or official outlining the concrete, individual, and final legal actions of the State Administration in accordance with the Law, which have legal consequences for a person or private legal entity.

Departing from the provision in Article 1 point 9 mentioned above, all the decisions issued by the State Administration can serve as the objects of state administrative disputes. However, several decisions of State Administration are not included as the objects of PTUN, as set forth in Article 2 letter g of act Number 5 of 1986 concerning Administrative Court.

The exclusion of the state administrative decision regarding general election administration is clearly set forth in point g, implying that only the decisions regarding election results or voting results cannot be tried. In other words, all decisions regarding state administrative decisions in general elections (other than the decisions revealing voting results) can still be tried by the administrative court (PTUN). PTUN has the authority to try the dispute of state administration in a regional head election. The disputes of election state administration represent the disputes between a candidate for Governor and vise, Municipal and vice, for regional election commission (KPUD).[13]

The administrative court has a scope of authority to disputes regarding election administration based on:

a) The participant of the election had an objection to Bawaslu regarding the decision of the regional election commission (KPUD) in three working days.
b) The participation can file the objection to the High Administrative Court (PT TUN) over the dispute of election state administration if only administrative measures or efforts in provincial Bawaslu and General

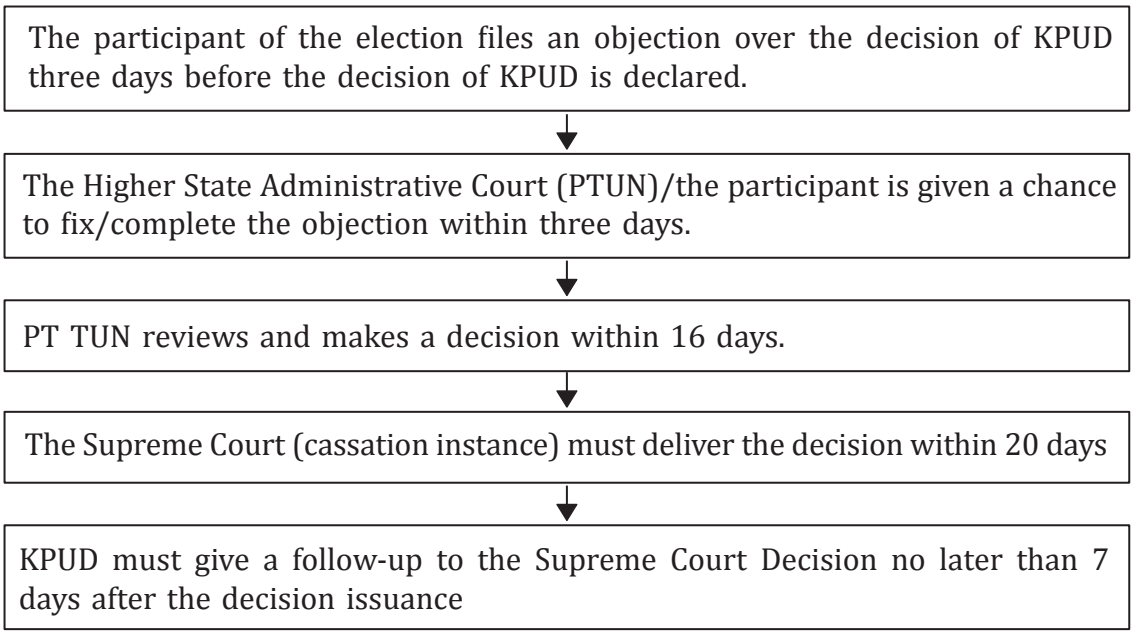
[13] Article 153 point 1 of Law Number 10 of 2016 concerning Regional Head Election

Election Supervisory Committee (Panwaslu) of the Regency/municipality are completed

c) If the object over the disputed matter is that the administration of the election is incomplete, PT TUN gives another three working days to fix the objection. If within three days the objection is not fixed, the judges could deliver a decision declaring that the objection is rejected, and no further legal remedies can be taken.
d) High Administrative Court (PT TUN) is given fifteen days to review and decide.
e) Following the decision of the PT TUN over the dispute concerned, cassation can be considered by submitting it to the Supreme Court within five days after the decision of PT TUN is read. The Supreme Court is responsible for delivering a decision following the request of cassation for twenty working days. The decision made by the Supreme Court regarding the dispute of election state administration is final, and no extraordinary legal remedies or judicial review can be taken.
f) The election administration in the Regency/Municipality must give a follow-up to the Decision of PT TUN or Supreme Court no later than seven working days. However, the obligation to give the follow-up can be done only if the decision is issued at least 30 days since the voting is held.[14]

Diagram 1

Resolution to the Dispute of Election State Administration

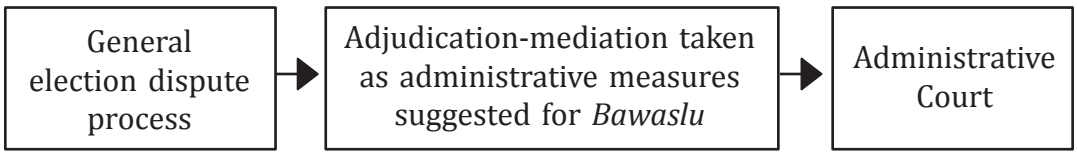


[14] Article 154 of Law Number 10 of 2016 concerning Regional Head Election

The authority of the Administrative Court (PTUN) regarding general elections not only takes place in the dispute of state administration in regional head elections, but it is also obvious in national general elections. The following diagram shows the flow of a dispute resolution process:

Diagram 2

The flow of a Dispute Resolution Process



The above diagram indicates that PTUN has the authority for all state administrative decisions over state administrative disputes arising in regional head elections and national general elections. This authority is only related to public disputes, considering that state administrative decisions regulatory products made by legal authority and give legal consequences. Therefore, PTUN does not hold any authority to judge disputes outside the area of state administrative disputes in either national general elections or regional head elections, including any violations of ethics committed by general election administrators.

Ethical violations are different from violations of laws. Similarly, decisions over ethical violations are not categorized as beshiking or state administrative decisions or regulatory products from executives because the decisions regarding ethical violations are issued by DKPP, which is not an executive body nor an official representing state administration. The position of the DKPP is outlined in consideration of constitutional judges in Constitutional Court Decision Number 32/PUU-XIX/2021, page 145, stating, "The Decisions issued by DKPP are final and binding as intended in Article 112 Paragraph (12) of Law 15/2011". The phrase final and binding create uncertainty regarding whether the weight of this phrase in the Law mentioned is equal to that referred to by the judicial body. That is, it is essential that the court assert that this 'final and binding' as in the decisions of the DKPP is not comparable to that in a judicial body in general since DKPP is an internal instrument in general election administration with its authority given by the Law. The "final and binding" given in the decisions of DKPP must be understood as "final and binding" for the President, KPU, Provincial KPU, KPU at Regency/municipality, or……".

The consideration of the constitutional judges above can be interpreted as: first, the sentence that reads: "is similar to final and binding as in the decisions issued

by a judiciary body" asserts that DKPP is not an executive body but a judicial body, considering that the Supreme Court compares the status of the decisions issued by DKPP to those of a judicial body. If the Supreme Court intends to state that DKPP is an executive body as intended on page 146, the Constitutional Court cannot declare that the decisions of DKPP are not comparable to those issued by a judicial body. This similarity is highlighted in terms of the functionality of DKPP that holds judicative power, not the executive one, despite the fact that DKPP decisions are not fully or precisely comparable to the decisions issued by judicial bodies in general.

Second, the term "DKPP decisions" by constitutional judges indicates that grammatically the Constitutional Court agrees that DKPP has the role in either judicative or executive power. When the Constitutional Court intends to state that DKPP is an executive body, the word "putusan" in Bahasa as "verdict" or "decision" in English is not used, but "keputusan" should be more relevant, as in "decree" in English. "Putusan" is deemed to be a legislative product of a judicial body, while "keputusan" is linked to an executive body, and the word "keputusan" is relevant to "beshiking".

A similar approach to reconstructing the idea that DKPP is not an executive body refers to the provision in law Number 30 of 2014 concerning Government Administration in Articles 1, Point 7 and 8.

a. Article 1 Point 7 states the decision of government administration is also referred to as State Administrative Decision, Decision, the decree by a government body and/or official in the government administration. The statement above indicates that DKPP is not an executive body, considering that DKPP no longer has the function of administering the government. DKPP is to judge in the cases of ethical violations committed by general election administrators (KPU commissioners);
b. Article 1 Point 8 states the Measure taken by the Government Administration, an act of a Government Official or another state administrator to take or not take any concrete action in the state governance. The decision of DKPP to conduct a trial over the allegation of a violation committed by the commissioner of KPU asserts that it is not an act of the government administration, recalling that the concrete act of the government can only be done by an executive body with "keputusan" or a decree, not "putusan" or a verdict.

3. The Relations between DKPP and PTUN in terms of Ethical Violations committed by General Election Administrators

Election Administrator Honorary Council (DKPP) is a state body responsible for the administration of the elections. The position of DKPP in the structure of the state administration in Indonesia does not lie within the legislative, executive, or judicative

purviews.[15] DKPP is independent and intended to only deal with general election administration. PTUN, on the other hand, is a higher state body with its position in a judicative purview or the body that is responsible for judicial power. The administrative court is within the scope of the Supreme Court, along with a religious court, district court, and a court martial. As a judicial body, PTUN is authorized to investigate, judge, and deliver a verdict over all cases of disputes in state administration.

The details above indicate that the Administrative court (PTUN) and DKPP do not have any connection, and neither make the decisions given by these two bodies. That is, the DKPP decision over the ethical violations committed by a commissioner of KPU or general election administrator is understood as a verdict, and it cannot serve as an object of the PTUN, considering that the objectum litis of the PTUN is beshiking, not a verdict.

The theoretical or normative frameworks face many slippery slopes, such as in the case of Evi Novida Ginting. In this case, DKPP declared that Evi Novida Ginting was proven to have violated ethics as a general election administrator, and, following this decision, Evi Novida Ginting was dismissed from her position as a commissioner of KPU. On the other hand, PTUN issued a decision regarding the revocation of the Presidential Decree outlining the dismissal of Evi Novida Ginting from KPU.

From the case of Evi Novida Ginting there are theories used to analyze these two dissenting decisions. The first authority theory has focused on the authority of the state administration to act within the purview of public Law according to the Law in place.[16] This theory indicates that the trial held by the DKPP over the case of Evi Novida Ginting is congruent with the theory of authority because DKPP has gained attributive authority according to Election Administration Law, Elections Law, and Regional Election Law. DKPP is given the authority to judge the cases of ethical violations committed by general election administrators, as in the case faced by Evi Novida Ginting, the commissioner of KPU. From the perspective of the authority theory, it can be concluded that the decision delivered by DKPP holds permanent legal force that Evi had to abide by in a way that she had to take the consequence of being dismissed from her position as the commissioner of KPU. The President that appointed Evi Novida Ginting as a commissioner of KPU also holds the authority to respond to this decision by issuing a decree regarding this dismissal.

[15] Yulistyowati, Efi, Endah Pujiastuti, and Tri Mulyani. "Penerapan Konsep Trias Politica Dalam Sistem Pemerintahan Republik Indonesia: Studi Komparatif Atas Undang–Undang Dasar Tahun 1945 Sebelum Dan Sesudah Amandemen." Jurnal Dinamika Sosial Budaya 18, no. 2 (2017): 330.

[16] HR. Ridwan. Hukum Administrasi Negara, Jakarta : PT. Rajagrafindo, 2008, 102.

Although both the DKPP and the President have taken this legal action (dismissing Evi from her official position) in line with the authority, it does not always mean that both the decision of the DKPP and the Presidential Decree will not spark any further problems. Following the issuance of the presidential decree, Evi could file an objection over the dispute of state administration to PTUN on the pretext of the disadvantage she has to take due to the decree issued. Everyone, like Evy, has his/her right to file an objection of dispute once he/she feels disadvantaged by the Presidential Decree.

The PTUN has the authority to judge the objection filed by Evi Novida Ginting, considering that this was the dispute that was brought further to the PTUN, not the ethical violation she committed. It is obvious that ethical violations and objects of administration court are different objects. Ethical violations have been committed by Evi Novida Ginting decided by DKPP, then PTUN declared the president decree that dismissed Evi Novida Ginting null and void. It represents the decision of an official of State Administration that is final, individual, posing legal consequences, and concrete.

In other words, these two bodies (DKPP-PTUN) formally try the cases according to their competence, and it cannot be said that both try the same cases or that the conflict of authorities or the dispute of authorities takes place between the two, but it is somewhat related to the material implication of the execution of the authority of DKPP and PTUN regarding the case of Evi as the commissioner of KPU. According to the decision delivered by DKPP, Evi Novida Ginting had to be dismissed from her official position, and she no longer has her right to this position. However, in terms of the decision given by PTUN revoking the Presidential Decree over the dismissal, Evi could not be dismissed from her position, and she could remain in her position.

Regarding the opposing decisions of DKPP and PTUN, the President responsible for the issuance of the decree to appoint or dismiss a person from the position as a commissioner of KPU has to face this quandary; the President could remain silent regarding the case tried by the DKPP so that Evi still had to leave her official position, or the President has to issue a new Presidential decree regarding the reappointment of Evi back to the position as a commissioner of KPU if the President refers to the decision delivered by PTUN. In terms of the process or time approach, the President has given the follow-up in response to the DKPP decision regarding this dismissal, and the President performs the task as the Head of the state administration by abiding by the dismissal of the commissioner of KPU according to the decision of DKPP, and, thus, the issuance of the Presidential Decree is compliant with the legislation and enables the DKPP decision to be effective or enforceable. On the other hand, in terms of the substance, if the Presidential Decree regarding the dismissal of the commissioner

is reviewed in PTUN and revoked, the President should also respond to the PTUN decision by reappointing Evi to her previous official position. In this case, the decision of DKPP is final, and binding, which is ineffective and cannot be enforced since the legitimation of the decision issued by DKPP through the Presidential Decree has been cancelled by the PTUN, followed by the Presidential Decree of the revocation of the dismissal of the commissioner of KPU.

The above two decisions indicate that they represent the absolute authority of the President to mediate the substantial relations of the authorities between the DKPP and PTUN over the case of ethical violations committed by commissioners of KPU. The President, in this case, is authorized to give a follow-up to the PTUN decision to issue a Presidential Decree regarding the reappointment of Evi Novida Ginting as the commissioner of KPU. Although the decision issued by PTUN revoked the Presidential Decree regarding the dismissal and instructed the President to give a follow-up to the decision, the President still holds the authority to decide whether a new decree should be issued. On the other hand, the President can also give follow up on the decision of PTUN by being compliant with the decision of PTUN to reappoint Evi Novida Ginting to her position as a commissioner of KPU without heeding the decision of DKPP.

Second, the theory of effectiveness of Law refers to a matter that can be obeyed in the form of legislation or court decisions.[17] In the context of the DKPP decision over the dismissal discussed, this decision can be deemed to be effective if the DKPP decision is executable in a way that this decision is responded to by the President by issuing a decree and dismissing Evi Novida Ginting from her position as a commissioner of KPU, or the DKPP decision is deemed to be ineffective if the President does not give any follow-up, and the DKPP decision will not immediately dismiss Evi from her position, considering that Evi Novida Ginting was appointed under the Presidential Decree, and her dismissal should also be under this decree. This is in line with contrarius actus principle applicable in state administrative law, implying that an appointing body is also responsible for the dismissal.

The DKPP decision regarding the dismissal of a commissioner of KPU is given follow-up by the President by issuing a Presidential Decree Number 34/P of 2020 concerning Dishonorable Discharge of the Member of KPU Tenure Period 2017-2022. However, this decree was further contested in PTUN, and PTUN declared that this Presidential Decree had to be revoked or cancelled, and Evid Novida Ginting had to be reappointed as a commissioner of KPU. This new and contravening Presidential

[17] Achmad Ali, Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence), termasuk interpretasi Undang-undang (Legisprudence), Jakarta: Kencana Prenada Media Group, 2019, 273-274.

Decree indicates that, according to the theory of the effectiveness of the Law, the DKPP decision over the dismissal of Evid Novida Ginting could not be executed despite the final and binding quality of the DKPP decision. In other words, the Presidential Decree that responded to the Decision of PTUN and reappointed Evi Novida Ginting as a commissioner of KPU indicates that the DKPP decision over the dismissal of Evi from her position has not been effective, considering that the final and binding DKPP decision can be cancelled by PTUN through the judicial process following the issuance of the Presidential Decree as a follow-up of the decision of DKPP (the decree concerning the dismissal of Evi Novida Ginting/Presidential Decree Number 34/P of 2020 concerning Dishonorable Discharge of the Member of KPU Tenure Period 2017-2022). Therefore, despite the follow-up given by the President under the decree that dismissed Evi Novida glinting from the position, this condition cannot be said effective for the DKPP decision because this dismissing decree is reviewed as an object or objection in TPUN, and the decision of PTUN instructed the President to revoke the Presidential Decree that dismissed Evi Novida Ginting although this decree was a follow-up for the DKPP decision that is legal and binding. That is, the DKPP decision cannot be substantially enforced since Evi Novida Ginting was held to remain in her official position despite the dismissal by DKPP. The follow-up given by the President to revoke the decree of the dismissal is deemed to be appropriate, considering that the Presidential Decree of the dismissal is an object of dispute in PTUN and, thus, the President is required to abide by the decision issued by a judicial body and the final and binding quality or the effectiveness of the DKPP decision regarding the dismissal can only apply to the process of DKPP decision up to the Presidential Decree regarding the dismissal of the commissioner of KPU (Evi Novida Ginting). The issuance of the Presidential Decree as a follow-up for the DKPP decision will just shift the process to another regime of Law, such as the regimes of state administrative law or the dispute of state administration. Hasyim Asy'ari argues that this is relevant to the Constitutional Court Decision Number 31/2013 on Page 71-72 (3.19), Paragraph 4, stating that sanctions imposed by DKPP refer to the violations of the code of ethics committed by general election administrators. The DKPP decision is final and binding for President, KPU, Provincial KPU, KPU in Regency/Municipality, or Bawaslu. The follow-up for the DKPP decision given by the President, Provincial KPU, KPU of the Regency/Municipality, or Bawaslu refers to the decision of state administration (TUN) that runs individual, concrete, and final government administration. Therefore, only the Presidential Decree, KPU, Provincial KPU, KPU of the Regency/Municipality, or

Bawaslu can be the objects of disputes or objections filed in PTUN. Regarding this case, the Constitutional Court Decision Number 32/PUU-XIX/2021 on page 146 states:

> "Therefore, the decision of Administrative Court that holds permanent legal force must be obeyed, and this is the decision of judicial body with executorial power, or, in other words, this final and binding quality for the President, KPU, Provincial KPU, KPU of the Regency/Municipality, and Bawaslu can be understood as the condition where the President, KPU, Provincial KPU, KPU of the Regency/Municipality, and Bawaslu can only respond with the follow-up to the DKPP decision whose product is being reviewed as a disputed object in Administrative Court. Therefore, the President, KPU, Provincial KPU, KPU of the Regency/Municipality, and Bawaslu that hold the authority to appoint and dismiss an administrator of a general election are not authorized to hold different opinions contravening the DKPP Decision or the Administrative Court Decision that corrects or reinforces the DKPP Decision."

Third, the theory of legal certainty[18] [19] can be literally understood as a law that gives certainty to let people know what to do and to allow the government to run its responsibilities to execute judicial decisions. The settlement of the ethical violation as faced by Evi Novida Ginting, as elaborated earlier, has led to the disparity or polarization of the Decisions of DKPP and PTUN, leading to the absence of legal certainty. On the one hand, the decision of DKPP assertively declared that Evi Novida Ginting was dismissed from her position as a commissioner of KPU, meaning that the DKPP decision carries legal certainty according to the theory of legal certainty, given a follow-up from the President under the Presidential Decree Number 34/P of 2020 concerning Dishonorable Discharge of the Member of KPU Tenure Period 2017-2022.

On the other hand, PTUN granted Evi's request of objection to Presidential Decree as a follow-up to the DKPP decision. PTUN decision also revoked the decree and requested that the President reappoint Evi Novida Ginting to her position.

In terms of legal certainty, the decisions of both DKPP and PTUN meet the legal aspect, although, in terms of substance, one decision contravenes the other.

This conflict of the two decisions has led to uncertainty in the execution portion, resulting in a quandary between the execution of the PTUN decision that holds permanent legal force (incracht) considering that the President did not lodge an appeal or cassation and the execution of DKPP decision that was final and binding.

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[18] Fuller, Lon Luvois. "The morality of law." New Haven And London: Yale University Press. (1969), 33 dan Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence), termasuk interpretasi Undang-undang (Legisprudence),* Jakarta: Kencana Prenada Media Group, 2009, 337-338.

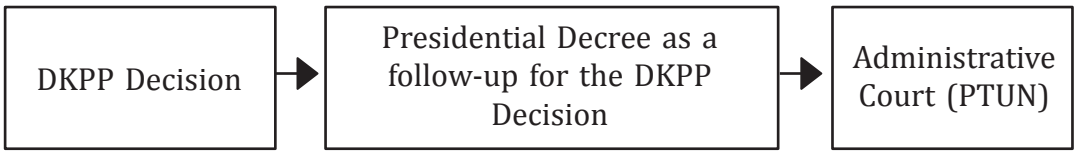
[19] (https://ngobrolinhukum.wordpress.com/2013/02/05/memahami-kepastian-dalam-hukum/) retrieved on 20 June 2022 at 10:30 WIB

In these two decisions, the President neglected the DKPP decision and issued the new Presidential Decree as a follow-up to the PTUN Decision to put Evi back to her previous official position as a commissioner of KPU. In such a case, the President seemed to adhere to the principle of res judicata pro veritate habetur.[20]

Fourth, a trias politica theory refers to power separation, introduced by Montesqiue by dividing the State's Power Institution into three legislative, executive, and judicative bodies,[21] each of which holds its power and function. The legislative power (DPR, DPD, and MPR) has the authority to form a law, while the executive one holds the authority to execute laws, and the judicative body is to enforce the laws.[22] In the case of dismissing a commissioner of KPU from his/her position, the dispute settlement is within the purview of the judicative body, considering that this body functions to enforce the Law and prove whether a person violates the code of ethics or the legislation. Proving the allegation of a violation committed by an official can only take place under the mechanism of due process of Law. Such a process can be held by the Constitutional Court or a judicial body within the purview of the Supreme Court, including PTUN. However, recalling that the violation committed by Evi Novida Ginting was tried by DKPP, the settlement of the issue regarding ethical violations was a bit improper since DKPP is outside the area of the judicial body, and, thus, the court process in DKPP is not materially or substantially relevant to the theory of power division and separation or trias politica, recalling that DKPP executes its authority in the organization outside the judicative power. As a consequence, the DKPP decision, as linked to PTUN, had to be neglected.

Diagram 3

The Relations of the process of Ethical Violation Settlement between DKPP and PTUN



In the time to come, the process of the ethical violation settlement must be integrated in a way that it must be held only by an institution to ensure that two decisions concerning matters that are substantially connected or have a casual

[20] Said, Umar. Pengantar Hukum Indonesia, Jakarta: Sinar Grafika, 2015, 74
[21] Efi Yulistyowati, "Penerapan Konsep Trias Politica Dalam Sistem..."
[22] Fatmawati. Struktur dan fungsi legislasi parlemen dengan sistem multikameral: studi perbandingan antara Indonesia dan berbagai negara. Penerbit Universitas Indonesia Press, 2010, 13

relationship do not repeat. This is expected to reduce a problem involving many state institutions.[23] The trial process over a violation of the code of ethics committed by a commissioner of KPU should be left to the responsibility of a judicative body simply because it is materially proper when this case is handled by the judicative body. Later reduce antinomy, which is a conflict between two elements, but they both need and complement each other[24]. The process running in the judicative body is executed by professional judges knowledgeable about procedural Law. In addition, decisions issued by a judicial body carry force before the Law; unlike in a non-judicial body, the trial is not executed by professional judges, and the decisions do not have the quality as verdicts Nor does it provide legal certainty and adequate protection.[25]

C. CONCLUSION

The dispute settlement over the violation of ethics has new chapter issues, setting uncertainty and ineffectiveness of implementing the decision, a case by Evi Novida Ginting as a commissioner of KPU who dismissed from her official position. Following the review and trial of the Presidential Decree concerning the dismissal by PTUN, instructed the President to revoke the decree and reappoint Evi Novida Ginting to her previous position at KPU. The DKPP decision that is binding and final regarding the settlement of this ethical violation could not be further executed. Therefore, this settlement process should be executed by a judicative, and it has the quality to settle the issue.

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[23] Siboy, Ahmad. "Pilihan Desain Penyelesaian Sengketa Kewenangan Lembaga Negara." De Jure: Jurnal Hukum dan Syar'iah 14, no. 1 (2022): 75-91.

[24] Endang, M. Ikbar Andi, Moh Fadli, Istislam Istislam, and Dewi Cahyandari. "Dialectics of the Urgency of Reforming The Law of State Administrative Justice as a Synthesis." Jurnal Dinamika Hukum 22, no. 1 (2022): 1-18.

[25] Op.Cit. Siboy, Ahmad.

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Observing The Differences in Constitutional Court Decision About the Legal Age of Marriage

Meninjau Perbedaan Putusan Mahkamah Konstitusi tentang Norma Batas Usia Minimum Perkawinan

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Abstrak

Pada tahun 2014 -2017, terjadi 2 kali pengujian norma yang sama dalam UU Perkawinan yakni Putusan MK Nomor 74/PUU-XII/2014 dan 22/PUU-XV/2017. Akan tetapi, ada perbedaan amar putusan antara satu putusan dengan putusan berikutnya. Dalam Putusan MK Nomor 22/PUU-XV/2017, MK mengubah pendirian yang sebelumnya menyatakan bahwa norma batasan usia adalah konstitusional, berganti menjadi inkonstitusional yang berujung pada tindak lanjut para pembentuk undang-undang untuk melakukan revisi terhadap UU Perkawinan. Dalam penelitian ini akan dibahas mengenai perbandingan terhadap pertimbangan hakim dalam putusan MK Nomor 74/PUU-XII/2014 dan Nomor 22/PUU-XV/2017. Akan dicari latar belakang MK mengubah pendiriannya dari satu putusan ke putusan berikutnya. Penelitian ini menggunakan metode penelitian normatif dengan pendekatan perundang-undangan secara konseptual dan filosofis. Hasil penelitian menunjukkan bahwa perbedaan yang mendasari kedua putusan tersebut adalah perbedaan penggalian sumber hukum oleh hakim dalam pertimbangan hukumnya.

Kata Kunci: Batas Usia Minimum Perkawinan; Pengujian Norma; Putusan MK.

Abstract

In 2014–2017, there were two tests of the same norms in the Marriage Law, namely the Constitutional Court Decision Number 74 / PUU-XII / 2014 and 22 / PUU-XV / 2017. However, there is a difference in the verdict between one judgment and the next. In Constitutional Court Decision Number 22/PUU-XV/2017, the Constitutional Court changed the previous stance that stated that the age limit norm was constitutional, changing it to unconstitutional, which led to the follow-up of the lawmakers to revise the Marriage Law. This study will compare judges' considerations in the decisions of Constitutional Court Number 74 / PUU-XII / 2014 and Number 22 / PUU-XV / 2017. It will be sought against the Constitutional Court's background changing its stance from one ruling to the next. This research uses normative research methods with a conceptual and philosophical approach to legislation. The results showed that the difference underlying the two rulings was in the excavation of legal sources by judges in their legal considerations.

Keywords: Minimum Age limit for Marriage; Norm Testing; The Verdict of the Constitutional Court.

A. INTRODUCTION

1. Background

Social values inspired by a society inevitably undergo evolutionary changes.[1] This value does not lie in a vacuum but rather an adjustment to sociological and anthropological conditions, place, and time.[2] Kingsley Davis explains that the shift in social values in society occurs with the influence of globalization and the influence of other cultures. Influence also comes from the development of cyberspace, the internet, electronic information, digital, and legal engineering.[3]

The evolution of value development since ancient times has directly influenced the development of law, which is also the extraction of social values adhered to by society.[4] Social values are a source of material law [5] that 'fills' legal policies and decisions. When

[1] Evolve or evolution is the terminology used in terms of science related to the exact/natural phenomenon. The term is used quite classically since BC by Thales and Anaxinamander who discusses marine life and also the evolution of life. In addition, there are several other characters. In the 18th century Charles Robert Darwin came up with a fairly controversial theory of evolution that discussed human development. The term evolution in this study refers to Lasker's opinion, namely changes in the enrichment of hereditary traits with continuous modification through gradual time stages. Lasker, G. W., *Physical Anthropology* (New York: Holt, Rinehart Winston, Inc, 1976), 76.

[2] The shifting process of these values does not occur spontaneously but is based on awareness and a long time leading to a better life atmosphere, while indirectly shifts or changes will happen slowly and without realizing it.

[3] Davis Kingsley, *Human Society* (New York: The Macmillan Company, 1960), 29.

[4] Mochtar Kusumaatmadja, *Konsep-Konsep Hukum dalam Pembangunan* (Bandung: Alumni, 2006), 102.

[5] Supriyadi, "Fungsi Hukum dalam Masyarakat yang Sedang Membangun," in *Filsafat Hukum Mazhab dan Refleksinya* (Bandung: Remaja Karya, 1989), 55.

these social values evolve, the law will be affected by these values. The Law is not final, but it always makes adjustments to keep up with ongoing developments.[6] One of the developments is the norms of the legal age for marriage which is regulated in Law Number 1 of 1974 concerning Marriage (Marriage Law). This law was enacted under the reign of President Soeharto [7] and passed in the House of Representatives in a plenary session by acclamation on December 22, 1973. On January 2, 1974, it was ratified and promulgated simultaneously on the same day by the President.[8] In Wawan Hermawan's notes, the Marriage Law is based on a relatively complicated political configuration where intense debates and contradictions exist between two religious camps, namely Islam and Non-Islam.[9] One of the norms established in 1974 that was challenged and criticized during the years of reform was the limitation of the legal age for child marriage. In this condition, there was an evolution of social structures and systems from 1974, due to the previous political, legal, and social configurations that were no longer relevant to be applied in the current phase, especially in terms of the development of human rights law which was introduced in the law and obeyed by the community as social engineering norm. Due to the development of human rights law in Indonesia, social understandings and social values eventually shifted from the previous conservative mindset towards a universalist mindset by relying on international human rights law standards.[10]

Adjustment between social values with the law or vice versa can be made in two ways: legislative review and judicial review. Legislative review is the authority of the legislature or the law-making body to amend a statutory regulation.[11] These changes are made to fulfill the community's legal needs and the follow-up to the decision

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6 Satjipto Rahardjo dan Urfan, *Negara Hukum Yang Membahagiakan Rakyatnya* (Yogyakarta: Genta Publishing, 2009), *bagian pengantar*. Apart from that book, Satjipto through his progressive legal ideas also repeatedly conveys the idea of '*law is not the final product*' in several of his writings.

7 At the time this law was enacted, the constitutional system still gave the President the power to make laws, *au contraire* to today which authorized to the Legislative together with the President. In the original article 4 of the 1945 Constitution it is stated: *The President of the Republic of Indonesia holds the power of government according to the Constitution*.

8 Wawan Hermawan, "Pengaruh Konfigurasi Politik terhadap Hukum Perkawinan di Indonesia," http://file.upi.edu/Direktori/FPIPS/M_K_D_U/197402092005011-WAWAN HERMAWAN/Pengaruh_Konfig_Politik_trhdp_Huk_Perk-Jurnal_FPIPS.pdf, diakses pada 20 Desember 2020.

9 Wawan Hermawan, "Pengaruh Konfigurasi."

10 Moh. Mahfud. MD. "Politik Hukum Hak Asasi Manusia di Indonesia". *Jurnal Hukum*. Vol.7 No.14 (Agustus 2000): 15.

11 Muhammad Fadli Efendi. "Mekanisme Legislative Review Peraturan Pemerintah Pengganti Undang-Undang dalam Perspektif Politik Hukum". *Jurnal Veritas Et Justitia*, Vol. 7. No. 2. (2021): 408.

of the Constitutional Court,[12] where the follow-up is carried out at the law product whose nature is the primary rule.[13]

The second way to adjust social values to legal products is through the judicial review. In Indonesia, the authority is held by the Constitutional Court to examine laws against the Constitution.[14] A review by the Constitutional Court is different from a legislative review. In the legislative review, the stages are 'usually' not preceded by a specific actual loss of society, and the basis for change/formation is usually done based on needs and adjustments. Meanwhile, in the judicial review mechanism, it is usually preceded by a factual losses or has already happened and suffered directly by the community due to the enactment of a norm.[15] Furthermore, in the legislative review process, the relationship between the community and the legislators is the absorption of aspirations. Legislators act inclusively to accept and absorb aspirations of society.[16] Meanwhile, in the case of judicial review, the judge does not absorb aspirations, but interprets the law according to the 1945 Constitution.[17] In this interpretation process, the judge will see what losses were experienced, what norms caused the losses, and the basis for testing according to the 1945 Constitution.[18] Judges play a role in reviving legal norms that exist in society and adapting the constitution to the current condition/*the living constitution*.[19]

In 1941, Justice Stoneargued that in an increasingly complex society, congress/ parliament would certainly not be able to perform its functions if it had to find all

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12 Indonesia, *Undang-Undang tentang Pembentukan Peraturan Perundang-undangan*, Law Number 12 of 2011, State Gazette No. 82 of 2011, TLN No. 5234, Art. 10. The stipulations in the provisions of the article contain further provisions regarding the provisions of the 1945 Constitution of the Republic of Indonesia; 2. an order for a law to be regulated by law; 3. ratification of certain international agreements; 4. follow-up on the decision of the Constitutional Court; and/or 5. fulfillment of legal needs in society.

13 Febriansyah Ramadhan, dkk. "Penentuan Jenis Produk Hukum dalam Pelaksanaan Putusan Mahkamah Agung tentang Hak Uji Materil". *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, vol 11, no. 1 (2022): 63. DOI: http://dx.doi.org/10.33331/rechtsvinding.v11i1.850.

14 Indonesia, *Undang-Undang Dasar Negara Republik* Indonesia, 1945 Constitution, Article 24C.

15 I Gede Yusa, dkk. "Gagasan Pemberian Legal Standing Bagi Warga Negara Asing dalam Constitutional Review". *Jurnal Konstitusi*, Vol. 15, No. 4. (2018): 754.

16 The absorption of public aspirations and participation is guaranteed in Article 5 letter g of the P3 Law, namely the principle of openness. In its elucidation, the principle of openness states that the formation of laws and regulations up from the preparation, drafting, discussion, ratification or signing, and enactment should be transparent and open to public. Thus, all levels of society have the widest opportunity to provide input in the formation of laws and regulations.

17 M. Yusrizal Adi Syaputra. "Penafsiran Hukum Oleh Hakim Mahkamah Konstitusi". *Jurnal Mercatoria*, Vol. 4, No. 2, (2011): 83.

18 Inna Junaenah. "Tafsir Konstitusional Pengujian Peraturan di Bawah Undang-Undang". *Jurnal Konstitusi*, Vol. 13, No. 3,(2016): 513.

19 Steilen, M. "Reason, The Common Law, And The Living Constitution". *Journal Legal Theory, 17,* No.4, (2011), 279. https://doi.org/10.1017/S1352325211000164.

the additional facts to produce basic conclusions that support legislative policies to be passed.[20] In addition to Justice Stone, Hamdan Zoelva also explained, to understand the constitution as a living constitution, it is necessary to look at two perspectives. First, the constitution as an authoritative text made by its formulators, with a spiritual condition in accordance with the ideals of the state. Constitutional change can be made through formal changes to norms or changes in meaning in line with the state administration practices in the application of the constitution. Second, when the constitution deals with the real life in the administration of the state. So that the constitution is no longer belongs to the founding fathers but belongs to all Indonesian people and all their stakeholders.[21] This makes the constitution dynamic and alive. Furthermore, the interpretation of the law is constanly evolving. Not only the law is not final, the Constitutional Court's decision is the same. If a legal norm is declared not contradictory to the 1945 Constitution, then in the future it may become unconstitusional, or vice versa.

One of them is the examination of marriage dispensation for minors. Marriage is a very important institution in social life. The existence of this marriage institution is to legalize the relationship between a man and a woman,[22] in the form of an inner and outer bond between a man and a woman as husband and wife wich aims to forming an eternally happy family (household) based on the blessing from the One Godhead.[23] In the previous regulation, Article 10 of the Marriage Law explains that marriage is permitted if the man is 19 (nineteen) years and the woman is 16 (sixteen) years. This age requirement was disputed by a group of people, namely Indry Oktaviani, and the Indonesian Women's Coalition, *et. al.* in 2014. They submitted an application to the Constitutional Court to review Article 10 of the Marriage Law. Through the decision of the Constitutional Court number 30-74/PUU-XII/2014, all of the applicants' petitions were rejected and the Constitutional Court confirmed that Article 10 is constitutional and in accordance with the spirit of the 1945 Constitution. In this decision, there is 1 dissenting opinion submitted by Her Excellency (HE) Judge Maria Farida Indrati.

In 2017, Endang Wasrinah, et. al. submitted an application to o re-examine the provisions of Article 10 of the Marriage Law to the Constitutional Court. Within approximately 3 years from the previous decision, through Constitutional Court

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[20] Fakhris Lutfianto Hapsoro and Ismail, "Interpretasi Konstitusi dalam Pengujian Konstitusionalitas untuk Mewujudkan *The Living Constitution*," *Jambura Law Review* 2, no. 02 (2020): 142, DOI: https://doi.org/10.33756/jlr.v2i2.5644.

[21] Hamdan Zoelva, *Mengawal Konstitusionalisme* (Jakarta: Konpress, 2016), 3.

[22] Salim HS, *Pengantar Hukum Perdata Tertulis (BW)* (Jakarta: Sinar Grafika, 2005), 61.

[23] Indonesia, *Undang-Undang tentang Perkawinan*, UU No. 1 Tahun 1974, LN No.1 Tahun 1974, TLN No. 3019.

Decision number 22/PUU-XV/2017, the Constitutional Court passed down a different decision from the previous one. This decision was made unanimously by the Honorable Judges. In its decision, the Constitutional Court emphasized that the provisions of the norm that distinguishes between the minimum age of marriage for men and women are discriminatory and contrary to the 1945 Constitution. In its consideration, the Constitutional Court stated a constitutional order[24] as well as a time limit for legislators to immediately follow up on it no later than 3 years after the decision was declared.[25]

Based on the explanation above, this research will examine the judge's considerations in the decisions number 30-74/PUU-XII/2014 and number 22/PUU-XV/2017. What is the basis for legal considerations in the two decisions to produce different verdicts? addition to analyzing the judge's considerations, it is also necessary to examine the arguments used by the applicant in the two decisions. In order to obtain a complete understanding, it is also necessary to look at several previous Constitutional Court decisions, which have a similar pattern to the two decisions, particularly the review of norms related to gender discrimination. By reviewing it, we will also find to what extent judges consider the existence of other legal norms governing the legal age of children. After reviewing the entire decision, it can be found how the pattern of extracting legal sources by the judge and also the approach used in this review that results in valuable studies for the development of science in the future, both in the aspects of the Constitutional Court's procedural law, human rights law and marriage law.

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[24] Constitutional Mandate, referred to by Peter Paczolay, which quoted by Fajar Laksono as *mandamus*, that is *a constititional mandate to legislate.* Fajar Laksono Suroso further explained that the constitutional mandate is the mandate given by the Constitutional Court as a judicial institution by giving orders to legislators to evaluate certain legal products. Further see Fajar Laksono Suroso, *Potret Relasi MK– Legislator, Konfrontatif atau Kooperatif?* (Yogyakarta: Genta Publishing, 2018), 7.

[25] In its consideration, the Constitutional Court said that determining the age limit is an open legal policy so that it is the authority of the legislators to regulate it. In his consideration it was stated: "*Whereas previously stated, the determination of the minimum age limit for marriage is the legal policy of the legislators. If the Court set the minimum age for marriage, it will actually close the space for lawmakers in the future to consider more flexibly the minimum age limit for marriage in accordance with legal developments and community developments. Therefore, the Court has given no later than 3 (three) years for legislators to immediately make changes to legal policies related to the minimum age for marriage, in particular as stipulated in Article 7 paragraph (1) of Law 1/1974. Prior to the amendment, the provisions of Article 7 paragraph (1) of Law 1/1974 still apply. If within that time limit the legislators still have not made changes to the minimum age limit for marriage which currently in effect, in order to provide legal certainty and eliminate discrimination caused by these provisions, then the minimum age limit for marriage as regulated in Article 7 paragraph (1) Law 1/1974 will be synchronized with the age of child as regulated in the Child Protection Law and applies equally to boys and girls.*"

2. Research Questions

This section contains the research questions, arranged in the form of questions or paragraphs. This question is a line of thought that will be discussed in the next section. Based on the description of the background, this study will discuss a comparative analysis of the judge's considerations in Constitutional Court decision number 74/PUU-XII/2014 and Constitutional Court decision number 22/PUU-XV/2017.

3. Method

This research uses normative legal research methods. Soerjono Soekanto explained that normative legal research is research conducted by examining positive regulations/laws using library materials or secondary data.[26] The main object examined in this research is the decisions of the Constitutional Court in reviewing the Law regarding the age of child marriage. The position of the Constitutional Court Decision is equal to the law. Constitutional Court Decision immediately has permanent legal force from the moment it is declared, and there are no legal remedies that can be taken. The final nature of the Constitutional Court Decisions includes the final and binding legal force (Explanation of Article 10 paragraph [1] of the Constitutional Court Law). Therefore, this research is normative because the position of the Constitutional Court Decision is equivalent to the Law, so it becomes the primary legal material.[27] The approach used in this study was the statutory and conceptual approach.

B. DISCUSSION

1. Analysis of Judge's Considerations in Constitutional Court Decisions Number 74/PUU-XII/2014 and Number 22/PUU-XV/2017

The dynamics of the Constitutional Court since its establishment (2003) until today show that the changes in the Constitutional Court's considerations in each of its decisions is not a new thing. For example, regarding the Constitutional Court's interpretation towards the authority of regional election disputes by the Constitutional Court.[28] Constitutional Court Judges' interpretation towards constitution and the law is the absolute authority of the judges, not only interpreting, the judge is also required to formulate a reason to solve a problem. The problem does exist, but the

[26] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Rajawali Pers, 1985), 18.
[27] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2005), 151.
[28] R. Nazriyah, "Penyelesaian Sengketa Pilkada Setelah Putusan Mahkamah Konstitusi Nomor 97/PUU-XI/2013", *Jurnal Konstitusi*, No. 3 (2015): 462, DOI: https://doi.org/10.31078/jk1232.

approach to the problem must be chosen selectively so it can be solved with a purely constitutional approach. This is emphasized by Keith E. Whittington, in full he says:[29]

> *"This was a strong claim to judicial authority over the interpretation of constitutional meaning. The judiciary "must of necessity expound and interpret that rule. It was the very essence of the judicial duty" to determine the meaning of th"e Constitution and to lay aside those statutes that contradicted that fundamental law."*

The first decision (Decision Number 74/PUU-XII/2014) rejected the applicant's petition, and stated that the norm regarding the legal age limit for marriage was constitutional. The approach to sources of law submitted by the applicants was very nuanced in religious laws, and finally the judges took this into account (religious law). The Constitutional Court consideration of rejecting the trial is an attempt by the Court to safeguard religious freedom in Indonesia. With the condition of people with various religions and beliefs, taking several teachings from certain religions, it is feared that respect for religious freedom will fade. This was emphasized by Howard Kislowicz, in full he said:[30]

> *"In liberal democracies with religiously diverse populations, it would be surprising and troubling if a judge relied on a religious text or precept to resolve a legal dispute. It would deeply offend principles of religious freedom if individuals were bound by judicial pronouncement to obey the dictates of a faith they do not share."*

Although the applicant's arguments are the reality of early age marriage which is considered very troubling, the Constitutional Court still rejects the petition through the Constitutional Court Decision number 74/PUU-XII/2014. In the next decision, the Constitutional Court changed the decision through the Constitutional Court Decision number 22/PUU-XV/2017 and followed up in the Marriage Law with the hope of creating the family that was aspired by the Marriage Law.

The family is the smallest unit of society consisting of father, mother and children. A family can be formed if there is a bond of love between an adult man and an adult woman which formalized by marriage, in accordance with religious rules and positive law.[31] As a legal basis for marriage, the government tries to accommodate the needs of the community by issuing a Marriage Law which states that to form a family, it must be prepared carefully. Among them, the couple who will form a family that must

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[29] Whittington, Keith E. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, 2007), 83.

[30] Howard Kislowicz, "Judging Religion and Judges Religions", *Journal of Law and Religion* 33, no. 1 (2018): 42. https://doi.org/10.1017/jlr.2018.10.

[31] Muachor Ali Muh, *Buku Pintar Keluarga Muslim* (Semarang: BP 4, 1982), 4.

be mature, both biologically and pedagogically, as well as being responsible, so that later it will lead to physical and spiritual bonds between men and women with the aim of forming a *sakinah mawaddah warohmah* family.[32]

In order to guarantee legal certainty, everything related to marriages that occurred before this which was carried out according to existing laws were valid. Likewise if there is any matter that has not been regulated in this Law, it will regulate automatically by referring the existing provisions (retroactively). The main purpose of marriage[33] as stated in the Marriage Law is to form a happy and long-last family.

To create a happy and long-last family, husband and wife need to help and complement each other, so that each can develop their personality to help and achieve spiritual and material needs (a harmonious family).[34] If referring and reviewing the Marriage Law, it is stated that a marriage is valid if it is carried out according to the law or teachings of religion and belief. In addition, every marriage must be recorded according to the applicable laws and regulations and according to the adhered religion.[35] The recording of each marriage is the same as important events in a person's life, such as births and deaths which are stated in a certificate, which is an official certificate recorded in the registration.[36]

Regarding marriage registration, basically, the Marriage Law adheres to the principle of monogamy.[37] That is, the monogamy principle is by the concern of the

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[32] Tarkariwan Cahyadi, *Pernak-Pernik Rumah Tangga Islam: Tatanan dan Perayaannya Dalam Masyarakat* (Solo: Inetermedia, 1997), 21.

[33] The purpose of marriage is basically to legally carry on lineage in society, by establishing a harmonious and peaceful household life. According to Law No. 1 of 1974, Article 1 formulates that: "Marriage is an physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and long live family (household) based on the One Godhead". From this formulation, it can be understood that the main purpose of marriage is to form a happy and long live family. For that, the husband and wife need to help each other so that each can develop the personality to help and achieve spiritual and material well-being. In addition, the material goals that will be fought for by a marriage agreement have a very close relationship with religion, hence it not only has an external or physical element, but the inner or spiritual element also has an important role (Explanation of Law No. 1 of 1974 concerning Marriage). Therefor marriage is an agreement made by two people, in this case an agreement between a man and a woman with a material goal, namely to form a happy and long live family (household) based on the One Godhead as the first principle in Pancasila. Further see Soedharyo Soimin, *Hukum Orang dan Keluarga* (Jakarta: Sinar Grafika, 1992), 6.

[34] Fuad M. Ritwan, *Membina Keluarga Harmonis* (Yogyakarta: Tuju Publisher, 2008), 8.

[35] Aisyah Ayu Musyafah. "Perkawinan dalam Perspektif Filosofis Hukum Islam". *Jurnal Crepido* 2. No. 02. (2020): 119.

[36] Bakri A. Rahman and Ahmad Sukardja, *Hukum Perkawinan Menurut Islam Undang- Undang Perkawinan dan Hukum Perdata/BW* (Jakarta: PT Hidakarya Agung, 1981), 38.

[37] See Indonesia, *Undang-Undang tentang Perkawinan*, Law Number 1 of 1974, State Gazette number 1 of 1974, TLN No. 3019, Art. 3 paragraph (1). The principle of monogamy is the principle that apply only if the person concerned is willing, because the law and religion of the person concerned allows it, a husband can have more than one wife. However, the marriage of a husband with more

spouse, since some law and religious teachings allow a husband to have more than one wife.[38] However, the marriage of a husband with more than one wife, even though it is desired by the parties concerned, can only be carried out if certain conditions are fulfilled and decided by the Court.[39]

In addition, the Marriage Law adheres to the principle that the prospective husband and wife should have reach maturity both physically and mentally to be able to carry out the marriage, so that they can realize the purpose of marriage properly without ending in divorce and having good and healthy offspring. So as not to end up in divorce and to have good and healthy offspring, prevention must be done by avoiding early marriage. Besides, marriage at an early age has a correlation with population problems. In fact, a lower age for a woman to marry results in a higher birth rate. Therefor, the Marriage Law regulates the legal age limit for marriage for both men and women, which is 19 (nineteen) years for men and 16 (sixteen) years for women.[40]

The Law explains that marriage and all its provisions have been regulated and arranged so well and neatly, so that to carry out a marriage it is better to follow the existing provisions. However, nowadays there are a lot of people in traditional society who are getting married at an early age.[41] What is meant here is a marriage that occur between the prospective partners who are still under the age limit are included in early marriage, because the age of the prospective partner is a juvenile category. Pardoko stated that the factors that can make the reason for early marriage were as follows:[42]

1. *The lack of awareness and socialization of the Marriage Law wich guarantees women's rights, partly because of the low literacy and education level, especially in rural areas that are less accessible by communication channels.*

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than one wife, even though it is desired by the parties concerned, can only be carried out if certain conditions are met and decided in court. Soemiyati, *Hukum Perkawinan islam dan Undang-undang Perkawinan (Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan* (Yogyakarta: Liberty , 1982), 6.

38 **Sam'un, "Asas Monogami Terbuka dalam Perundang-Undangan Perkawinan Islam di Indonesia". *Jurnal Al Hukama'*, Vol. 5 No. 1(2022): 10.** https://doi.org/10.15642/al-hukama.2015.5.1.1-17.

39 Soemiyati, *Hukum Perkawinan Islam dan Undang-Undang No. 1 Tahun 1974 tentang Perkawinan* (Yogyakarta: Liberty, 1982), 6.

40 See Indonesia, *Undang-Undang tentang Perkawinan*, Law Number 1 of 1974, State Gazette number 1 of 1974, TLN No. 3019, Art. 7 paragraph (1).

41 Anonymous, "Mengenal Tradisi Balawang Tujuh, Perkawinan Janda Duda," Lifestyle, 29 November, 2017, https://lifestyle.okezone.com/read/2017/11/29/196/1822273/ mengenal-tradisi-balawang-tujuh-perkawinan-janda-duda, diakses 20 Desember 2020.

42 Zulfiani, "Kajian Hukum Terhadap Perkawinan Anak Dibawah Umur Menurut Undang-Undang Nomor 1 Tahun 1973," *Aceh: Jurnal Hukum Samudra Keadilan* 12, no. 2 (2017): 217-218, https://ejurnalunsam.id/index.php/jhsk/article/view/136.

2. *The low socioeconomic capacity of the parents' also tends to be a reason to marry off their daughters at an early age.*
3. *Education also causes some people to get marriage early, because some people with lower educational background are more likely to be married off by their parents, compared to people with higher education. In the void of time without work, they end up doing unproductive things, one of which is to establishing relationship with the opposite sex, which if out of control can lead to pregnancy outside of marriage.*
4. *Teenagers in the village do not have sufficient knowledge, early marriage to teenagers is also considered as the efforts to prevent promiscuous sexual behavior.*
5. *Cultural Factors, The cause of early marriage is due to the cultural influence that develops in society that the girl must be married immediately so as not to become a spinster. Local culture believes that if their daughter does not get married soon it will be a shame for the family. Regardless of the age or the marital status, most parents accept the proposal because they think the future of their daughter will be better and is expected to reduce the burden of the parents. We often find parents in rural area marrying off their children too soon than their dating period. In rural communities, there is a tendency that families will feel ashamed to have unmarried daughter at a young age. The rural communities are very simple-minded, they prefer to see things solely from their material form.*

Besides the factors above, there are many other factors behind the phenomenon of early marriage, such as promiscuity which leads to unwed pregnancy.[43] And in time, empirical reality shows various negative impacts of early marriage, such as the immaturity of the emotional conditions of men and women which eventually lead to divorce, the death of women due to lack of physical strength during childbirth.[44] Based on some of these empirical realities, the community, both individually and also several groups of Non-Governmental Organizations (NGOs) tested the minimum legal age limit for marriage in the positive law to the Constitutional Court. Up to present, there are two Constitutional Court Decisions i.e. number 74/PUU-XII/2014 and number 72/PUU-XV/2017 that tried the norms for the age limit for marriage. Here's the description:

[43] Farida, "Pergaulan Bebas dan Hamil Pranikah". *Jurnal Analisa*, Vol. 16, No. 1. (2009): 126.

[44] dr. Detty Siti Nurdiati, MPH., PhD, SpOG (K) from Medical Faculty, Gadjah Mada University, Yogyakarta presents a number of data. The data from the study stated that there were a number of causes for the high rate of maternal mortality. About six percent of the case is due to hypertension, 37 percent due to anemia, 48 percent from early marriage and 38 percent from pregnancy under the age of 20 years. This means that early marriage accounts for a fairly high percentage in this case. Accessible via https://www.voaindonesia.com/a/pernikahan-remaja-dan-kasus-kematian-ibu-melahirkan-di-indonesia/3653855.html, accessed on 20 December 2020.

2. Elaboration of Judges' Consideration in Constitutional Court Decision

The amendments to the 1945 Constitution changed the basic paradigm of the state, where in the 1945 Constitution the original text stated that Indonesia is a rechstaat (state of law) in its explanation. After the amendment, the term rechstaat in the 1945 Constitution was changed to the term 'State of Law'.[45] This change in terms has major implications for the system of family law in Indonesia. Indonesia is no longer bound to the family of the rechstaat legal system with its derivative civil law system which is purely based on the law in making legal decisions by prioritizing certainty. Even though it has changed to the concept of a 'pure' rule of law, it does not mean that the Indonesian legal system leads to the rule of law with a derivative of the common law system that puts forward jurisprudence with the main goal of law being justice. In terms offered by Mahfud MD which also refers to the concept proposed by Fred. W Riggs, Post-reformation Indonesia leads to the concept of a prismatic rule of law that integrates various good elements from various existing systems, starting from the form of the rule of law,[46] the legal system to the relationship between the state and religion. In the post-reform Indonesian legal system, the model of extracting legal sources by judges in Article 5 of Law Number 4 of 2009 which provides an oppurtunity for judges to accumulate legal sources in deciding cases to be guided by 'law' which is a feature of the civil law and a 'sense of community justice' which is a feature of the common law. These two systems are integrated in the concept of the Indonesian rule of law to complement each other.

Enrico Simanjuntak said that the characteristics of the common law legal system are case-law-oriented, while the civil law system are codified-law- oriented. However, law and regulations as the basis of legality in the rechtstaats tradition has its own limitations. The laws and regulations never regulate in full and in detail how to fulfill the rule of law in every legal event, therefore jurisprudence, which is a derivative of common law, will complete it.[47] Shidarta said the role of jurisprudence in the development of the legal system in all legal system was felt to be getting stronger from time to time. The reason for strengthening the role of jurisprudence is easyly understandable due to growing skepticism about the ability of laws and regulations to accommodate concrete events in the community. This rule-skepticism was originally

[45] Zaherman AM. "Negara Berdasarkan Hukum (Rechtstaat) Bukan Kekuasaan (Machstaat)". *Jurnal Hukum dan Peradilan*, Vol.6, No. 3, November (2017): 439. http://dx.doi.org/10.25216/jhp.6.3.2017.421-446.

[46] Akhmad Rudi Maswanto, "Nalar Hukum Prismatik Dalam Konteks Hukum Nasional", *Maqashid Jurnal Hukum Islam* Vol.4, No.2 (2021): 52. http://ejournal.alqolam.ac.id/index.php/maqashid.

[47] Enrico Simanjuntak, "Peran Yurisprudensi dalam Sistem Hukum di Indonesia," *Jurnal Konstitusi* 16, no.1 (2019): 87-89. https://doi.org/10.31078/jk1615.

voiced the loudest by adherents of legal realism, including realist movements that focus more on certain issues, such as the critical legal studies schoolar, the critical race theorists, and the feminist studies group.[48]

In the tradition of Indonesian legal system, the role of jurisprudence has never really received a special attention.[49] Normatively, judges are encouraged to explore the values that live in society (see Article 5 of Law Number 48 of 2009 concerning Judicial Power), but in practice judges have not been motivated to produce great jurisprudence in its decisions. According to Shidarta, a decision can be said to be jurisprudence if it contains new rules. By elaborating Shidarta's opinion, the author argues, a decision can be said to be jurisprudence with new rules, by looking at how the legal considerations are. Furthermore, even though there are no new rules, decisions explain in more detail the philosophical/constitutional aspects of each issue under consideration. In lexical terminology, this jurisprudential rule is included in the ratio decidendi, namely the rationale for the decision.[50]

The role of consideration for making decisions (legal consideration) in the Indonesian legal system is as 'guiding star' for the 2 powers in determining the direction of law and policy. First, for the legislative power, all decisions, in this case the decisions of the Constitutional Court, will take on the role of guiding legislators in conducting legislative reviews. There is a moral obligation for legislators to comply with the boundaries set by the Constitutional Court,[51] moreover, it is also guaranteed in Article 10 of Law Number 12 of 2011 on Legislation Making that one of the contents of the law is to follow up on the Constitutional Court's decision. The obligation to follow up is obviously accompanied by the bound of legislators to the judicial reasoning/ *ratio decidendi* of the Constitutional Court's decision. The second is binding to judicial power. This bound refers to the two tops of judicial power, the Supreme Court and the Constitutional Court. In the field of the Supreme Court, judges in deciding cases are bound by all decisions of the Constitutional Court relating to the concrete cases/ cases they handle. This is based on the position of the Constitutional Court's decision which is parallel to the law. While for the Constitutional Court, the judges of the Constitutional Court who decide cases are also bound by their previous decisions.[52]

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48 Shidarta, "Mencari Jarum Kaidah di Tumpukan Jerami Yurisprudensi," *Jurnal Yudisial* 5, no. 3 (2012): 29. https://jurnal.komisiyudisial.go.id/index.php/jy/article/view/128.

49 M. Nur Alamsyah, dkk. "Kedudukan Yurisprudensi dalam Sistem Hukum Indonesia". *Qawanin Jurnal Ilmu Hukum*, Vol.1. No. 2 (2021): 72.

50 Shidarta, "Mencari Jarum Kaidah."

51 Meirina Fajarwati. "Tindak Lanjut Putusan Mahkamah Konstitusi dalam Program Legislasi Nasional," *Jurnal Kajian*, Vol. 22. No. 3, (2017): 197. https://doi.org/ 10.22212/kajian.v22i3.1512.

52 Olly *Viana Agustine, "*Keberlakuan Yurisprudensi pada Kewenangan Pengujian Undang-Undang

This form of the bounding does not mean that the judge must guide by the previous decision, but is bound to conduct a re-discussion in his consideration of the previous decision. Because, in the consideration of the constitutional judges, there are many excerpts from discussions of previous decisions to examine the relevance of previous decisions to the object of the current application. Thus, it can be understood that the judge's consideration/*ratio decidendi* has an important meaning for the development of law in Indonesia in all lines of power.

In the two decisions of the Constitutional Court that examined the article on the minimum age for marriage, there were considerations with two different approaches, hence it is not surprising that the two decisions have different verdicts. The main argument in decision 74/PUU-XII/2014 focuses more on the approach to religious laws adopted in Indonesia. Starting from the Islamic law quoted from the Qur'an, then the Hadith of the Prophet sallallaahu 'alaihi wasallam told by Abdullah Bin Mas'ud Radiallahu 'anhu about the advice to get married once when capable, up to the Hindu religious law contained in Manava Dharmasastra IX.89- 90. In this decision, the Constitutional Court gives consideration to the position of religious law and state law which are positioned side by side in reviewing this norm. In addition to religious law, there is also state law, both of which are side by side and mutually support one another. This is reflected in the opinion of the Court:

> *"In practice, marriage is closely related to sacred beliefs based on sacred religious rules and values that cannot be ignored. This is as emphasized in Article 28B paragraph (1) of the 1945 Constitution which states, "Everyone has the right to form a family and continue their lineage through a legal marriage." The understanding of a legal marriage must be seen from two aspects, namely legal according to religious law and legal according to state law; All religions that apply in Indonesia have their respective rules in marriage and religious law binds all adherents, while the state provides services in the implementation of marriage with state regulations including administrative records for legal certainty for married couples and their offspring."*

By juxtaposing religious and state law in this decision, the Constitutional Court then provides considerations based on the values of religious law. One of them is Islamic law, where marriage is present in the context of alleviating greater harm that occurs due to the influence of social interaction, environment, association, technology and so on that can accelerate the rate of lust.

dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi*, Vol. 15, No. 3 (2018): 645. https://doi.org/10.31078/jk1539.

In Islamic teachings, marriage is one of the commands of Allah Subhanahuwata'ala because it is a very strong and sacred bond and cannot be compared to material things. Some of the principles in marriage are volunteerism, the consent of both parties, the husband and wife partnership, perpetually, and the personality of the spouses. From the principle of marriage, it mentions nothing about minimum age in order to prevent greater harm, partially in today's developments, for the society today, where the possibility of such harm spreads much more quickly because it is influenced by various conditions such as food, environment, association, technology, information disclosure, and so on, thereby accelerating the rate of lust. The desire for lust should be channeled through a legal marriage according to religious teachings so as not to give birth to children out of wedlock or illegitimate children.

In the course of this research, the author also conducted interviews with judges at the Religious Courts of Malang City, where this city is one of the cities with the highest divorce rate for minors.[53] In the interviews, there has never been a marriage dispensation application that was rejected, and one of the reasons for granting a marriage dispensation is almost the same as the Constitutional Court's considerations above, namely to prevent significant harm. It is based on one of the maxims in Islamic law, namely "*innas-sababa wal faragha wal jiddata mafsadatun lil mar'i ayya mafsadatin"* which means leisure time in youth can damage a person from any aspect. The Constitutional Court also considered the reality of early marriage, which ultimately creates a family that ends in disharmony due to the immature conditions of men and women. Constitutional Court also argued that there was no guarantee that raising the age limit will solve the problems that had happened all this time.

In this consideration, the Constitutional Court does self-restraint not to take the authority of the legislators in establishing new norms,[54] where one of the petitions requires the Constitutional Court to determine the ideal minimum legal age for marriage. Consistent with several previous decisions, the determination of quantitative matters (numbers)[55] is included as an open legal policy which is the domain of the legislators.

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[53] Alfi Ramadana, "Angka Perceraian di Kota Malang Tinggi, Perlu Bimbingan Pranikah," Idntimes, 16 Oktober, 2020, https://www.idntimes.com/news/indonesia/alfi-ramadana-1/angka-perceraian-di-kota-malang-tinggi-perlu-bimbingan-pranikah/1.

[54] Dian Agung Wicaksono, dkk. "Mencari Jejak Konsep Judicial Restraint dalam Praktik Kekuasaan Kehakiman," *Jurnal Hukum & Pembangunan* 51 No. 1 (2021): 193.

[55] Mardian Wibowo, *Kebijakan Hukum Terbuka dalam Putusan Mahkamah Konstitusi* (Jakarta: Raja Grafindo persada, 2019), 19

If in the decision of the Constitutional Court 74/PUU-XII/2014, the approach of religious laws dominates the consideration. In that case, it is different from the decision of the Constitutional Court 22/PUU-XV/2017, which is more dominated by the approach of human rights law/international agreements, including *Transforming Our World: the 2030 Agenda for Sustainable Development Goals (SDGs) and the Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). In the previous decision, the approach to the 1945 Constitution was relatively minimum (1 article). However, in this decision the Constitutional Court's approach to the 1945 Constitution was quite large, starting from the aspect of equality before the law to the right to education, which is contained in Article 27 paragraph (1), Article 28B paragraph (1) and (2), Article 28C paragraph (1) and Article 31 paragraph (2) of the Constitution 194. The main arguments in this decision is regarding equal treatment or equality before the law, especially with respect to gender. Through this approach, the Constitutional Court abandoned its previous opinion about testing the minimum age of marriage.

The Court held that while setting a minimum age for marriage is a legal policy, it should not treat citizens differently solely on gender or sexual differences. It is true that due to their nature, to some extent the treatment of men and women demands a distinction, so that in such a context the distinction is not discrimination nor can it be said to violate intolerable morality, rationality, and injustice. However, when the difference in treatment between men and women has an impact or hinders the fulfillment of the fundamental rights or constitutional rights of citizens, whether for those belonging to the group of civil and political rights, as well as those belonging to economic, social and cultural rights, which should not be distinguished solely on the grounds of sex, then such a distinction is clearly discrimination.

Then, regarding the development of Indonesian human rights law configuration, the Constitutional Court gave his view that there were developments where the conditions when the Marriage Law was formed were different from today, where human rights law has progressed quite rapidly. The Court says:

> *"The Court does not deny that when Article 7 paragraph (1) of Law 1/1974 was drafted and discussed, the determination of the age limit was a form of national agreement that was agreed upon after careful consideration and attention to the values prevailing at the time when the a quo Law was drafted. which was later ratified in 1974. However, in the development of the Indonesian state administration which was marked by the amendment of the 1945 Constitution (1999-2002), there was a strengthening of the guarantee and protection of human rights in the constitution by the inclusion of articles on guarantees of*

human rights, including the right to form a family and children's rights. The guarantee and protection of human rights is also a national agreement, in fact it is explicitly formulated in the Constitution. Strengthening the guarantee and protection of a quo human rights certainly requires the Indonesian people to make adjustments to past legal policies which are considered no longer in accordance with legal developments and community developments. In this case, including if there are legal products that contain different treatment on the basis of race, religion, ethnicity, skin color, and gender, it should also be adjusted to the will of the 1945 Constitution which is anti-discrimination."

Like the previous decision, the Constitutional Court did self-restraint by only canceling the norm of the minimum age limit for marriage. The Constitutional Court did not formulate the ideal age figure and submitted it to the legislative review mechanism by the legislators. Nevertheless, the Constitutional Court gives a constitutional mandate[56] and a time limit for legislators to immediately follow up within three years of the decision being passed,[57] and if no changes are made at that time, the minimum age that applies is as stated in the Child Protection Law.

3. Judge's Consideration towards Provision of Child Age Norm in the Legislation

In the decision of Constitutional Court 74/PUU-XII/2014, the Constitutional Court did not discuss the age of children in several regulation concerning child. However, in a subsequent decision, the Constitutional Court gave a fairly in-depth consideration to the existence of child age norms in several laws and regulations. The Court explained that there was a difference in treatment because a married woman implied her status as a child was erased and turned into an adult, while for a man whose minimum age

[56] Constitutional mandate, referred to by Peter Paczolay, which quoted by Fajar Laksono as *mandamus*, that is *a constititional mandate to legislate.* Fajar Laksono Suroso further explained that the constitutional mandate is the mandate given by the Constitutional Court as a judicial institution by giving orders to legislators to evaluate certain legal products. Further see Fajar Laksono Suroso, *Potret Relasi MK– Legislator, Konfrontatif atau Kooperatif?* (Yogyakarta: Genta Publishing, 2018), 7.

[57] In its consideration, the Constitutional Court said that determining the age limit is an open legal policy so that it is the authority of the legislators to regulate it. In his consideration it was stated: "*Whereas previously stated, the determination of the minimum age limit for marriage is the legal policy of the legislators. If the Court set the minimum age for marriage, it will actually close the space for lawmakers in the future to consider more flexibly the minimum age limit for marriage in accordance with legal developments and community developments. Therefore, the Court has given no later than 3 (three) years for legislators to immediately make changes to legal policies related to the minimum age for marriage, in particular as stipulated in Article 7 paragraph (1) of Law 1/1974. Prior to the amendment, the provisions of Article 7 paragraph (1) of Law 1/1974 still apply. If within that time limit the legislators still have not made changes to the minimum age limit for marriage which currently in effect, in order to provide legal certainty and eliminate discrimination caused by these provisions, then the minimum age limit for marriage as regulated in Article 7 paragraph (1) Law 1/1974 will be synchronized with the age of child as regulated in the Child Protection Law and applies equally to boys and girls.*"

of marriage was 19 years, he was still classified as a child. This is a form of treatment difference between men and women. The Court further emphasized:

> *"The constitutional rights referred to include, among others, the right to equal treatment before the law, as regulated in Article 28D paragraph (1) of the 1945 Constitution because legally a woman at the age of 16 which according to Law Number 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection (hereinafter written the Child Protection Act) is still classified as a child, but if she is married, her status will change become an adult. While for men such changes are only possible if they have been married at the age of 19 years; women's rights to grow and develop as children, as regulated in Article 28B paragraph (2) of the 1945 Constitution, also receive different treatment from men where men will enjoy this right for a longer period of time than women; the right to obtain equal opportunities for education with men is also potentially hindered because by making it possible for a woman to marry at the age of 16 years, she will tend to have more limited access to education compared to men, even to fulfill basic education. In addition, the difference in the minimum age limit provides more space for boys to enjoy the fulfillment of their rights as children because the minimum marriage age limit for men exceeds the minimum age for children as stipulated in the Child Protection Law. Meanwhile, for women, the minimum age limit which is lower than the maturity age has the potential to cause the child not to fully enjoy their rights as a child at the age of a child, as forementioned."*

Norms regarding the age of children other than in the Marriage Law are an important consideration in this examination. One of them is to measure children's rights and the implications of a change in status from a child to an adult. In this cace, the Constitutional Court is guided by the principle of the best interests of children, especially regarding access to education which must also be guaranteed.

By taking into account the provisions of the norms for the age of children outside the Marriage Law, the Constitutional Court performs its function as an institution that tests the validity of both vertically/horizontally arranged norms. Ali Safa'at[58] explained that the existence of judicial review from the legal aspect, in line with the existence of the Constitutional Court in examining the law is a consequence of the principle of constitutional supremacy, which according to Hans Kelsen, requires a special court to safeguard the law to ensure compliance with the rule of law. Kelsen, as quoted by Ali Safa'at, said:[59]

[58] M. Ali Safa'at, „Mahkamah Konstitusi dalam Sistem Check and Balances," dalam *Bunga Rampai Konstitusionalisme Demokrasi: Kado Ulang Tahun untuk Prof. A Mukhtie Fadjar* (Malang: Intrans Publishing, 2010), 26.

[59] M. Ali Safa'at, *Mahkamah Konstitusi*, 27.

> *"The aplication of the constitutional rules concerning legislaion can be effectively guaranted only if an organ other than the legislative body is entrusted with the task of testing wether a llaw is constituonal and of annualling it if – accoarding to the opinion of this organ – it is unconstituional. There may be a special organestablishied for this purpose, for instance, a special court, a so-called constituional court."*

This view is a consequence of the hierarchical proposition of legal norms culminating in the constitution as the supreme law of the land.[60] The hierarchy at the same time places the foundation for the validity of a legal norm is the legal norm above it and so on up to the top and up to the first constitution. The consequences of the supremacy of the constitution are not only limited to the hierarchy of norms, but also bind the actions of the state, so that none of the state's actions may conflict with the constitution as a unified system.[61] In terms of the validity of norms, Mahfud MD emphasized that one of the reasons for the birth of a judicial review is that there are many laws and regulations which are substantively considered to be contrary to higher rules, but there is no testing mechanism nor the authorized institution. In reality, many regulations were born out of political corruption but there is no legal instrument to correct them, for which a judicial review was then given to the Constitutional Court.[62]

4. Exploration of Legal Sources in Judge's Consideration

Sources of law are everything in the form of legal documents and/or values which are references to be explored by lawmakers or law enforcers in drafting legal decisions.[63] From this source of law, every lawmaker gets a foundation/anchor as the basis for the decisions/policies they make. Sources of law in the theoretical realm have quite diverse variations, at least divided into two general forms: material law sources and formal legal sources. As a source that forms the basis for policy/ decision formation, material legal sources coexist with formal legal sources.[64] The pairing of these two sources of law is complementary and justifies one source of law with another. Sources of material law are in the form of guiding values, customs,

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60 Nabitatus Sa'adah, "Mahkamah Konstitusi Sebagai Pengawal Demokrasi Dan Konstitusi Khususnya Dalam Menjalankan Constitutional Review," *Adminitrative Law & Governance Journal* 2 No. 2 (June 2019): 240.

61 M. Ali Safa'at, *Mahkamah Konstitusi*.

62 Mahfud MD, *Kekuasaan Kehakiman Pasca Amandemen UUD 1945. Dalam Buku Gagasan Amandemen UUD 1945* (Jakarta: Komisi Hukum Nasional Republik Indonesia, 2008), 15.

63 Sholikul Hadi, "Eksistensi Pancasila Sebagai Sumber Segala Sumber Hukum dalam Konstitusi Indonesia," *Indonesian Journal of Law and Islamic Law*, Vol. 3. No. 2 (2021): 110. https://doi.org/10.35719/ijl.v3i2.128.

64 Theresia Ngutra. "Hukum dan Sumber-Sumber Hukum," *Jurnal Supremasi* Vol.11 No. 2, (2016): 203. https://doi.org/10.26858/supremasi.v11i2.2813.

and social or religious norms.[65] his material legal source is generally not in a formal form, except for religious rules codified in certain holy books. As an abstract thing but adhered to by the community, the existence of material legal sources fills from formal legal sources. In other words, material and formal legal sources are arranged hierarchically. Formal legal sources are present in the form of legal documents, which are formal and written. Formal legal sources are present in the form of laws/other written regulations, international agreements, legal doctrines, and legal decisions made by judges.[66]

The source of law is essentially a place where we can find and explore the law. According to Zevenbergen, sources of law can be divided into material legal source and formal legal source. Material legal source is the place from which the legal material is taken. Material legal source is a factor that helps the formation of law, for example: social relations, political power relations, socio-economic situation, traditions (religious views, decency), international developments, geographical conditions, etc. Formal legal sources are places or sources from which a regulation obtain its legal force. This relates to the form or manner that causes the regulation to formally apply.[67]

Looking at the form of legal sources, which are all recognized in the Indonesian legal system,[68] in the judicial review process, the judge's choice of legal sources will determine how the output of the norm being tested will be. Why? Because between one source of law with other sources of law there is not always in harmony. There is a tendency between material legal sources, which are essentially aligned with formal sources. Conversely, in the discourse of human rights law, this is like a fierce battle between the two poles of universalism human rights vs. particularism human rights.[69]

This condition is seen in the examination of the law regarding the norms for the age limit for child marriage. The judge's choice of the explored legal source will

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[65] Fitzgerald mentions this as a source that has not received formal recognition by law, hence it cannot be directly accepted as law. Quoted from Theresia Ngutra. "Hukum dan Sumber-Sumber Hukum..": 209.

[66] Dina Sunyowati. "Hukum Internasional Sebagai Sumber Hukum dana Sumber Hukum Nasional (Dalam Perspektif Hubungan Hukum Internasional Dan Hukum Nasional Di Indonesia)". *Jurnal Hukum dan Peradilan*, Vol.2 No.1 (2013): 68.

[67] Fais Yonas Bo', "Pancasila sebagai Sumber Hukum dalam Sistem Hukum Nasional," *Jurnal Konstitusi* 15, no. 1 (2018): 32, https://doi.org/10.31078/jk1512.

[68] See in Indonesia, *Undang-Undang tentang Kekuasaan Kehakiman*, Law Number 48 of 2009, State Gazette number 157 of 2009, TLN No. 5076, Art. 5 paragraph (1). In the Law on Judicial Power, it is stated that judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society. Not only law (formal legal sources) that must be explored by judges, but values (material legal sources) are also references that must be explored and their position is proportional to formal legal sources.

[69] Bayu Dwiwiddy Jatmiko. "Menelisik Pengakuan dan Perlindungan Hak Asasi Manusia Pasca Perubahan UUD 1945," *Jurnal Panorama Hukum*, Vol. 3 No. 2 (2018): 220.

determine how the output of the decision will be. In the decision of the Constitutional Court 74/PUU-XII/2014, the main legal sources referred to by the judges were religious values/rules. In his consideration, it begins with a quote from the verse of the Qur'an in the Surah Ar Rum: 21 and the Hadith of the Prophet sallallaahu 'alaihi wasallam which is narrated by Abdullah Bin Mas'ud Radiallahu 'anhu about the urgency to get married as sooner: *O youths, whoever among you has been able to then get married immediately, because it makes the eyes lower and fulfill your sexual needs. Whoever is not able, then do fasting because it will restrain the lust*. Religious arguments, whether in the Qur'an or Hadith, in the Indonesian legal system are classified as material legal source. The holy book is something that is adhered by the wider community as a way of life whose nature is transcendental, intertwined between humans and God (Allah SWT), so that the nature of the scriptures is the general norm in written form. Because it is a general norm that guides the wider community, its existence is 'filling' in formal legal sources in Indonesia.

As the main source of law referred to in the decision of the Constitutional Court 74/PUU-XII/2014, the judge's interpretation of Article 28B paragraph (1) of the 1945 Constitution is also heavily influenced by values in religious law. In his opinion, the Constitutional Court said: In its implementation, marriage is closely related to sacred beliefs based on sacred religious rules and values that cannot be ignored. This is as emphasized in Article 28B paragraph (1) of the 1945 Constitution which states, "Everyone has the right to form a family and continue their lineage through a legal marriage." The understanding of a legal marriage must be seen from two aspects, namely legal according to religious law and legal according to state law. The result of this decision is to reject the applicant's application and state that the age limit for child marriage is constitutional because it is in accordance with the religious values adopted in Indonesia.

Unlike the case with the decision of the Constitutional Court number 22/PUU-XV/2017. Exploration of legal sources carried out by the judges refers to formal legal sources, namely regarding human rights legal norms regarding discrimination. In its interpretation, the Constitutional Court sees the provision on the age limit for marriage as discriminatory because it distinguishes age based on gender. One of the measures used by the Court in assessing whether it is discrimination or not is the impact approach. The resulting impact of the norm has resulted in different legal conditions between men and women. For women, if married under 16 years, it will have an impact on the change in status from children to adults, while for men this does not happen. Changes in the status of women from children to adults will eliminate

the protection of children's rights. With this perspective, the Constitutional Court's interpretation of the articles in the 1945 Constitution in this review is more extensive than before. Not only is the article on human rights law in the 1945 Constitution a touchstone, Law Number 39 of 1999 on Human Rights is also a touchstone as part of human rights law in Indonesia which guarantees no discrimination based on gender. The dominance of formal legal sources that influence judges in this trial is also supported by the existence of Regional Regulations (Perda). Based on the author's observations, the existence of a regional regulation in this case is interpreted by judges as local wisdom that represents regional values related to early marriage.[70] To get a complete picture of the sources of law in the two decisions, the authors present it in the following table:

Table 1. Comparison of Sources of Law

Sources of Law	Putusan MK 74/PUU-XII/2014	Putusan MK 22/PUU-XV/2017
Universal Norms (Holy Books/ International Convention)	Al Qur'an surah Ar Rum: 21	*Transforming Our World: the 2030 Agenda for Sustainable Development Goals (SDGs)*
	Hadith of the Prophet sallallaahu 'alaihi wasallam which is narrated by Abdullah Bin Mas'ud Radiallahu 'anhu about the urgency to get married as sooner	*The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW*
	Manava Dharmasastra IX.89-90	
1945 Constitution	Article 28B paragraph (1) of the 1945 Constitution	Article 27 paragraph (1) of the 1945 Constitution
	-	Article 28B paragraph (1) and (2) of the 1945 Constitution
	-	Article 28C paragraph (1) of the 1945 Constitution
	-	Article 31 paragraph (2) of the 1945 Constitution

[70] Constitutional Court of the Republic of Indonesia, Constitutional Court Decision Number 22/PUU-XV/2017, 56.

Sources of Law	Putusan MK 74/PUU-XII/2014	Putusan MK 22/PUU-XV/2017
Legislations	-	Article 1 Number 3 of Law number 39 of 1999 concerning Human Rights
	-	Law Number 23 of 2002 concerning Child Protection as last amended with Law Number 35 of 2014 concerning Amendment of Law Number 23 of 2002 concerning Child Protection
	-	
Constitutional Court Decision / Jurisprudence	Constitutional Court Decision number 12/PUU-V/2007 concerning existing Islamic teaching in marriage	Constitutional Court Decision number 74/PUU-XII/2014
	Constitutional Court Decision number 49/PUU-IX/2011	-
	Constitutional Court Decision number 37- 39/PUU-VIII/2010	-
	Constitutional Court Decision number 15/PUU- V/2007	-
Empirical Facts*/local wisdom*	-	a. Regulation of Gunung Kidul District Head Number 30 of 2015 concerning Prevention of Child Marriage. b. Regulation of Kulon Progo District Head Number 9 of 2016 concerning Prevention of Child Marriage. c. Regulation of Bengkulu District Head Number 33 of 2018 concerning Prevention of Child Marriage. d. Circular Letter of the Governor of West Nusa Tenggara Province Number 150/1138 of 2014 that recommend marriage age at 21 years both for man and woman.

The pattern of judicial review in the Constitutional Court Decision 22/PUU-XV/2017 is almost similar to the Constitutional Court Decision 88/PUU-XIV/2016, which examines the existence of Article 18 (1) of Law Number 13 of 2012 concerning The Distinction of the Yogyakarta Region (UU KDIY)) which reads: "*Candidates for Governor and candidates for Deputy Governor are citizens of the Republic of Indonesia who must meet the following requirements: m. Submit a curriculum vitae that includes, among other things, records on his/her education, occupation, siblings, wife, and children"*. The critical condition states a requirement for information about the wife, which in reasonable interpretation implies that the only one who can meet that condition is a man. The article explains that only men can apply, and it closes women's opportunities.

The Constitutional Court's decision 88/PUU-XIV/2016 also examines norms with issues regarding gender discrimination. This decision granted the petitioner's request, and stated that the existence of a male requirement was unconstitutional. One of the considerations of the Constitutional Court is: As a state party, obviously there is an obligation based on international law (international legal obligation) for Indonesia to comply with the provisions of international law, especially in this case the observance of the prohibition of discrimination. Therefore, the Court has repeatedly affirmed its position that discrimination is against the 1945 Constitution and at the same time against international law (*see further, among others, the legal considerations of the Constitutional Court Decision Number 028-029/PUU-IV/2006*). The author's assessment on the nature of discrimination by the Constitutional Court is consistent in the two decisions with almost similar patterns and results from almost the same composition of judges.[71]

The relevance between the decision on the age limit for marriage and the requirement for women to become leaders in Yogyakarta is that these two decisions implicitly discuss the fierce debate between human rights universalism and human rights particularism. In the decision of the Constitutional Court 22/PUU-XV/2017, the debate occurred between universal values regarding gender discrimination and religious values, which were the guidelines for the previous, whereas in the decision 88/PUU-XIV/2016 the values of gender discrimination were faced with the values of particularism in the form of customs/history of the palace which had never been led

[71] Constitutional Court Decision Number 74/PUU-XII/2014 was decided by 8 judges: Arief Hidayat, Anwar Usman, Patrialis Akbar, Wahiduddin Adams, I Dewa Gede Palguna, Aswanto, Suhartoyo, Manahan MP Sitompul, and one dissenting opinion submitted by Maria Farida Indrati. Constitutional Court Decision Number 22/PUU-XV/2017 was decided by 9 judges, unanimously: Anwar Usman, Aswanto, Wahiduddin Adams, Saldi Isra, Arief Hidayat, Maria Farida Indrati, I Dewa Gede Palguna, Manahan MP Sitompul , and Suhartoyo.

by a woman before.[72] The Constitutional Court is consistent in its decisions regarding gender, especially women who are discriminated, using sources of international law to examine and cancel norms that contain all forms of gender discrimination.

C. CONCLUSION

Based on the discussion in this study which examines the background of the differences between the two decisions of the Constitutional Court Number 74/PUU-XII/2014 and Number 22/PUU-XV/2017, several conclusions were found as follows: Sources of law in Indonesian legal system are divided into two major forms, namely material legal source, and formal legal source. Both complement and influence each other. The existence of these two sources of law is guaranteed in the Law on Judicial Power. Each judge (as well as constitutional judges) must explore both of them cumulatively. Based on the phrase 'and' in article 5 paragraph 1 of Law on Judicial Powers. In its development, one of the factors that influenced judges' choice of legal sources was the argument put forward by the applicants.

The Constitutional Court reviewed the legal minimum age for marriage in its dynamic decision, where the Constitutional Court Decision 74/PUU-XII/2014 stated that the norm of the age limit for marriage was constitutional. Furthermore, in the Constitutional Court's decision 22/PUU-XV/2017, the Constitutional Court changed its stance by declaring the norm unconstitutional. The difference between the two decisions is in the use of legal sources by judges in their legal considerations. The Constitutional Court's decision 74/PUU-XII/2014 builds its stance on material legal sources that refer to religious principles in several religious scriptures in Indonesia. Because the main argument is built on religious principles which essentially advocate hasty marriage, this affects the judge's interpretation of Article 28B paragraph (1) of the 1945 Constitution regarding the right to form a family, which ultimately considers the existence of a marriage age limit norm as constitutional.

Finally, through Decision 22/PUU-XV/2017, the Constitutional Court abandoned its stance on the previous decision. Due to the different sources of law explored by the judge, in this decision, the Constitutional Court was guided by universal human rights values regarding women and anti-discrimination and was no longer guided by religious principles in the holy book. The dominance of anti-gender discrimination in this decision ultimately influenced the judge's interpretation of the articles of human

[72] Sabdacarakatama, *Sejarah Keraton Yogya* (Narasi: Yogyakarta 2009), 35

rights law in the 1945 Constitution. The Constitutional Court stated that the age limit for marriage was a form of discrimination due to differences in treatment based on sex. The discrimination assessment is based on two things, namely differences in treatment according to norms and the implications of these norms, where women are more disadvantaged if they have to marry before the age of 16 years. The Constitutional Court's stance in this decision is in line with several previous decisions related to gender, one of which is in decision 88/PUU-XIV/2016 concerning the trial of gender requirements in the nomination of the Regional Head of Yogyakarta D.I. In its decision, the Constitutional Court considered this provision to contain gender discrimination and not in line with the universal values of human rights law guaranteed in several international conventions.

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The Legitimacy Death Penalty Application of Certain Conditions in the Anti-Corruption Law

Legitimasi Penerapan Pidana Mati konteks keadaan Tertentu dalam Undang-Undang Pemberantasan Tipikor

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Naskah diterima: 24-08-2021 revisi: 28-03-2022 disetujui: 18-05-2022

Abstrak

Artikel ini membahas mengenai penjatuhan hukuman mati yang tertuang dalam pasal 2 ayat (2) Undang-Undang Pemberantasan Tipikor bagi pelaku tindak pidana korupsi yang dianggap merugikan negara dan dapat berdampak luas menyangkut hajat hidup orang banyak. Dalam hal ini terdapat pro dan kontra terkait penjatuhan hukuman mati yang tertuang dalam pasal 2 ayat (2) Undang-Undang Pemberantasan Tipikor, terutama pada kalimat "Keadaan tertentu" pada pasal tersebut yang dikaitkan dengan korupsi dana bantuan sosial penanganan covid-19. Selain itu pasal tersebut juga dianggap bertentangan dengan kewajiban pemerintah dalam upaya penghormatan, perlindungan dan pemenuhan HAM. Artikel ini menyimpulkan bahwa pasal tersebut tidak dapat memenuhi aspek yuridis untuk menjerat pelaku korupsi karena tidak termasuk dalam persyaratan "keadaan tertentu" dan juga dianggap inkonstitusional karena tidak sesuai dengan konstitusi yang memberikan perlindungan terhadap hak hidup seseorang. Penjatuhan pidana mati juga terbukti kurang tepat digunakan dalam pemberantasan tipikor sebagaimana terlihat dalam *Corruption Perception Index* 2019.

Kata kunci: HAM; Keadaan Tertentu; Korupsi; Pidana Mati.

Abstract

This article discusses the imposition of the death penalty as stipulated in Article 2 paragraph (2) of the Corruption Eradication Law for perpetrators of criminal acts of corruption that are deemed to be detrimental to the State and can have a wide impact on the lives of many people. In this case, there are many pros and cons related to the imposition of the death penalty as stipulated in article 2 paragraph (2) of the Corruption Eradication Law, especially in the sentence "Certain conditions" in that article which are related to the corruption of social assistance funds for handling Covid-19. Apart from that, this article is also considered to be against the Government's obligations in the effort to respect, protect and fulfill human rights. This article concludes that The Article cannot fulfill the juridical aspect of prosecuting corruption actors because it is not included in the requirements of "certain conditions" and is also considered unconstitutional because it is not in accordance with the constitution, which provides protection for a person's right to life. The imposition of the death penalty has also been proven to be inappropriately used in eradicating corruption, as seen in the 2019 Corruption Perception Index.

Keywords*:* corruption; death penalty; certain conditions; human rights.

A. INTRODUCTION

1. Background

Corruption is an act carried out by certain parties, both individuals and corporations, that are detrimental to the State and can have a broad impact on the lives of many people if the preventive and repressive actions taken do not cause a deterrent effect for the perpetrators. In this case, the formal juridical aspects that apply in Indonesia become a reference in imposing criminal sanctions against the perpetrators of corruption.

Corruption can be interpreted as the misuse or misappropriation of state money for personal gain.[1] Law Number 31 of 1999 on Corruption Eradication states that corruption can be carried out against the law to enrich oneself or a corporation that is detrimental to state finances and the state economy. Furthermore, in Article 5 of the Law Number 20 of 2001 on Amendments to Law Number 31 of 1999 on Corruption Eradication, it is stated that corruption can be carried out by civil servants or state officials in the form of gifts or promises. In addition, it can also be done by anyone who gives or promises something so that the civil servant or state administrator does or does not do something in his position, which is contrary to his obligations.

[1] Ridwan Jamal, "Korupsi, Kolusi Dan Nepotisme Dalam Perspektif Hukum Islam (Problem Dan Solusinya)," *Jurnal Ilmiah Al-Syiráh* 7, no. 2 (2009).

This means that corruption is a form of abuse of office solely for personal gain or a particular group. From a legal perspective, there are elements that are included in the criminal act of corruption, namely:

a. *an act against the law,*
b. *abuse powers, opportunities, or certain means,*
c. *obtain material benefits for oneself, others, or corporations, and*
d. *cause losses to the State's financial condition or the economy of a country.*[2]

The types of corruption that are classified include:

a. *an element of bribery in the form of gifts or promises*
b. *commit embezzlement in position,*
c. *commit acts of extortion in its position,*
d. *participate in certain improper procurement*
e. *receive certain gifts that have the potential to lead to gratification.*[3]

These elements are in line with those expressed by Diego Gambetta, who revealed the various conceptions of corruption. In this case, there are three characteristics that are clearly visible, namely, first, "corruption refers to the deterioration of the ethical character of the person/perpetrator." Second, "genetically, corruption is a description of a family of social practices, which can lead to a deterioration in the performance of an institution/organization/institution." Third, "corruption indicates some kind of practice such as bribery or reward for conspiracy". Some of these practices are called corrupt "not only because of their motives or effects but because of the characteristics of the actions themselves.[4] The diversity concepts of corruption, as expressed by Diego Gambetta, has also become a phenomenon that occurs in Indonesia, so it requires serious attention to improving the character/morality of officials and institutions so that bribery or sort of that does not occur.

Corruption practices occur in many countries, including Indonesia. The Government is trying to minimize corrupt practices marked by the establishment of Law Number 31 of 1999 on Eradication of Corruption and strengthened by Law no. 20 of 2000 concerning Amendments to Law No. 31 of 1999 concerning the Eradication of Corruption Crimes. In addition, in Article 2 paragraph (1) of the Government Regulation 71 of 2000 on Procedures for Implementing Community Participation and Giving Awards in the Prevention and Eradication of Corruption Crimes stated,

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2 Zubir Rengil, "Reformulasi Penerapan Sanksi Terhadap Pelaku Tindak Pidana Korupsi Di Indonesia," *Journal Study of Law Enforcement Based Research (EJURIS)* 1, no. 01 (2019): 1–20.

3 H. Sukiyat, *Teori Dan Praktik Pendidikan Anti Korupsi* (Surabaya: CV Jakad Media Publishing, 2020), 54.

4 B. Herry Priyono, *Korupsi: Melacak Arti, Menyimak Implikasi*, (Jakarta: PT. Gramedia Pustaka Utama, 2018), 19.

"Every person, Community Organization, or Non-Governmental Organization has the right to seek, obtain and provide information on allegations of corruption as well as submit suggestions and opinions to law enforcement and/or the Commission regarding cases of criminal acts of corruption." Furthermore, Article 2 paragraph (2) states, "Submission of information, suggestions, and opinions or requests for information must be carried out in a responsible manner in accordance with the provisions of applicable laws and regulations, religious norms, decency, and courtesy."

Article 2 of Government Regulation Number 71 of 2000 indicates that the problem of corruption must involve the participation of the community.[5] The existence of the Corruption Court, which was established based on the provisions of Article 53 of Law Number 30 of 2002 on the Corruption Eradication Commission, is a form of the Government's seriousness in its efforts to eradicate corruption.

The corruption that occurs today, involve state administrator, starting from staff level until high-ranking officials such as ministerial position. At the end of 2020, the public was shocked by the news regarding the arrest of the Minister of Social Affairs, Juliari Batubara, by the Corruption Eradication Commission. The person concerned is suspected of being involved in a corruption case in the procurement of social assistance for Covid-19 handling. It starts with the existence of a social assistance procurement project worth around Rp. 5.9 trillion with a total of 272 contracts and carried out in two stages for handling Covid-19 in the form of basic food packages for people with low incomes. In this case, the social assistance procurement vendor is suspected of bribing the Ministry of Social officials with a fee scheme of Rp. 10,000 (ten thousand rupiahs) for each food package whose value per food package is Rp. 300,000 (three hundred thousand rupiahs).[6] This case has seized the public's attention, especially during the Covid-19 pandemic, in which the social assistance should have been helpful in overcoming the economic disparity of the community and protecting against possible social risks to the community.[7]

The public saw that the action was beyond reasonable limits and became a serious concern related to Article 2 paragraph (2) of the Corruption Eradication Law, which could be applied in this case. The article in question states, "In the event that

[5] Marten Bunga et.al, "Urgensi Peran Serta Masyarakat Dalam Upaya Pencegahan Dan Pemberantasan Tindak Pidana Korupsi," *Law Reform* 15, no. 1 (2019): 85–97.

[6] Muhammad Idris, "Jadi Tersangka Korupsi Bansos, Berapa Gaji Menteri Juliari Batubara?," Kompas, accessed January 22, 2020, https://money.kompas.com/read/2020/12/07/071138726/jadi-tersangka-korupsi-bansos-berapa-gaji-menteri-juliari-batubara?page=al.

[7] Christian Victor Samuel Marzuki, et.al, "Aspek Melawan Hukum Pidana Terhadap Perbuatan Penyalahgunaan Wewenang Dalam Penyaluran Bantuan Sosial Di Masa PSBB," *Jurnal Ilmu Hukum: TATOHI* 1, no. 7 (2021): 672–78.

the criminal act of corruption as referred to in paragraph (1) is committed under certain circumstances, the death penalty may be imposed. The explanation of Article 2 paragraph (2) states that the "certain circumstances" referred to in the provision are a burden for perpetrators of criminal acts of corruption if the crime is carried out under certain conditions, namely when the country is in a state of danger in accordance with applicable laws when a national disaster occurs, corruption repetition, or when the country is in a state of economic and monetary crisis". In short, the article implies that perpetrators of corruption can be punished with the death penalty.

The implementation of the death penalty for perpetrators of corruption is uncommon in Indonesia. It is the oldest type of punishment by the courts. One of the most common reasons for giving the sentence as an effective punishment is that the death penalty is considered the most appropriate for a convict whose crime cannot be corrected. Economically, the implementation of the death penalty, when calculated, turns out to be less expensive than a life sentence. The punishment can also be used as an attempt to create fear so that others will not commit the same crime.[8]

There are pros and cons to the imposition of the death penalty,[9] including what is stated in Article 2 paragraph (2) of the Anti-Corruption Law. Therefore, it is necessary to carry out further discussion of the death penalty from various aspects, both legal and human rights, considering that it is a form of violation of the right to life, as stated in Article 9 paragraph (1) of Law Number 39 of 1999 concerning Human Rights. States, "Everyone has the right to live, maintain life and improve his standard of living."

2. Research Questions

Based on the things that have been stated, the formulation of the problem that can be raised is, first, whether Article 2 paragraph (2) of the Eradication of Corruption can fulfill the juridical aspect in ensnaring the perpetrators of corruption, spesifically corruption related to social assistance funds for handling COVID-19. Second, what is the relevance of the imposition of the death penalty on a person's right to life (human right) considering there is a government obligation to respect, protect and fulfil human rights in Indonesia? Based on these two questions, this paper will discuss more on the formal juridical aspects of Article 2 paragraph (20) and the fulfilment

[8] Yon Artiono Arba'i, *Aku Menolak Hukuman Mati: Telaahan Atas Penerapan Pidana Mati* (Jakarta: Kepustakaan Populer Gramedia (KPG), 2012), 9.

[9] Farhan Permaqi, "Hukuman Mati Pelaku Tindak Pidana Narkotika Dalam Perspektif Hukum Dan Hak Asasi Manusia (Dalam Tinjauan Yuridis Normatif)," *Jurnal Legislasi Indonesia* 12, no. 4 (2015): 1–21.

of the Human Rights Aspects as well as Indonesia's commitment to uphold human rights related to the death penalty that may be applied.

B. DISCUSSION

1. The Development of Corruption in Indonesia

Many parties assume that one of the inhibiting factors for Indonesia from becoming a developed country is the widespread practice of corruption that occurs in Indonesia. In this case, the Government has established various laws and regulations to prevent and handle corruption cases, including Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 on Eradication of Corruption, Law Number 30 of 2002 on the Corruption Eradication Commission, Law Number 46 the Year 2009 on the Corruption Court and other related regulations.

In addition the Government has made various efforts to eradicate corrupt practices by coordinating and collaborating with other state agencies or institutions. The Government's action to accelerate the eradication of corruption was realized by issuing Presidential Instruction No. 5 of 2004 on the Acceleration of Corruption Eradication. The contents of the Presidential Instruction specifically addressed to the Attorney General and the Head of the National Police are:

a. *Optimizing the which investigation/prosecution efforts of corruption to punish the perpetrators and save state's money.*
b. *Prevent and give strict sanctions against abuse of authority by prosecutors (public prosecutors) members of the National Police in the context of law enforcement.*
c. *Increase cooperation between the Prosecutor's Office and the Indonesian National Police, the Financial and Development Supervisory Agency Financial Transaction Reports and Analysis Center, and State Institutions related to law enforcement efforts and recovering state financial losses due to corruption.*[10]

The next step taken by the Government is to stipulate the National Action Plan for the Eradication of Corruption 2004-2009 as a manifestation of the similarity in prevention and prosecution efforts, both in terms of objectives, common perception and similarity in action plans in eradicating corruption.[11] The existence of the National Action Plan for the Eradication of Corruption 2004-2009 is expected to be a guideline for various parties in preparing the corruption eradication program

[10] Husin Wattimena, "Perkembangan Tindak Pidana Korupsi Masa Kini Dan Pengembalian Kerugian Keuangan Negara," Tahkim: Jurnal Hukum Dan Syariah XII, no. 2 (2016): 68–86.
[11] Hengki Mangiring Parulian Simarmata, *Pengantar Pendidikan Anti Korupsi* (Medan: Yayasan Kita Menulis, 2020), 62.

In this regard, the Corruption Eradication Commission is a State Institution specifically formed in order to carry out the task of eradicating corruption. The preamble of Law Number 30 of 2002 stated that the Corruption Eradication Commission was formed because the attempt to eradicate corruption were not optimal. In addition, the government institutions that handle corruption cases are not yet functioning effectively and efficiently. This is also one of the reasons for the formation of the Corruption Eradication Commission. This condition is very bothering considering the widespread practice of corruption in Indonesia, which carried out systematically, thus violating the social and economic rights of the community.[12]

The presence of the Corruption Eradication Commission has brought change in law enforcement against corruption. However, even though the Corruption Eradication Commission has named a suspect in a corruption case, there are still corruption cases that get court decisions which are considered inappropriate or not balanced with the actions that have been carried out.[13]

In this regard, based on the International Transparency, Indonesia's score on Corruption Perception Index (IPK) is 37. This figure puts Indonesia in the 102nd rank. In this case, there was a decrease from the previous year, namely at rank 86 with an index of 40.[14]

Meanwhile, the trend of prisoners in corruption cases and the total number of prisoners and detainees between 2019 and 2020 can be seen in the following table:

Table 1
The trend of Convicts in Corruption Cases[15]

No	Indicator	Dec 2019	March 2020
1	Total Prisoners and Detainees	265,648	270,445
2	Total Corruption Prisoners	5,078	1,906

Source: Lokadata (modified)

The two indicators show a downward trend in corruption cases in 2020, seen from the Corruption Perception Index (CPI) and the number of corruption prisoners, which has decreased from 2019 but in the same year, the public was surprised because

[12] M. Darin Arif Mu'allifin, "Problematika Dan Pemberantasan Korupsi Di Indonesia," *AHKAM: Jurnal Hukum Islam* 3, no. 2 (2015): 311–25.
[13] Risqi Perdana Putra, *Penegakan Hukum Tindak Pidana Korupsi* (Yogyakarta: Deepublish, 2020), 6.
[14] "Indeks Persepsi Korupsi Indonesia 2004-2020," accessed February 2, 2021, https://lokadata.beritagar.id/chart/preview/indeks-persepsi-korupsi-indonesia-2004-2020-1611921280.
[15] "Perbandingan Napi Korupsi Dan Total Terpidana 2019-2020," accessed February 2, 2021, https://lokadata.beritagar.id/chart/preview/total-tahanan-dan-korupsi-2019-2020-1585810257.

corrupt practices in Indonesia developed unexpectedly. The corruption case allegedly committed by the former Minister of Maritime Affairs and Fisheries, Edy Prabowo, who was arrested by the Corruption Eradication Commission, is still clear in case of the lobster's seed export, which became a polemic in the midst of the Minister's controversial policy to open the lobster's seed export faucet until finally being arrested by the Corruption Eradication Commission related to the case.

It did not stop there; the public was again shocked by the arrest of the Minister of Social Affairs, who, in his press conference, the Corruption Eradication Commission stated that the arrest was allegedly due to a request for a fee related to social aid to deal with the Covid-19 pandemic.

Nowadays, the issue of corruption is very ironic; which many high-level state officials are involved in corruption cases. Corruption cases increase in such a way with modus operandi and situations that may not have been thought of before. The corruption that occurred during the pandemic and related to social aid in handling Covid-19 made the public angry in the midst of all parties' efforts to get through this complicated situation.

2. Juridical Aspect of The Death Penalty in Corruption Cases

The death penalty is the heaviest sentence decided by the judge in cases that are considered it can not be educated within a certain period of time in a correctional institution. Actually, the purpose of the death penalty is to prevent crimes and violations.[16] Legislation in Indonesia also has provisions on death penalty for certain cases, such as terrorism, narcotics, corruption and so on, although, in its implementation, there are still pros and cons regarding the death penalty. One of the death sentences can be seen in the case of Freddy Budiman, a drug lord, through the Supreme Court Decision of the Republic of Indonesia Number 1093 K/Pid.Sus/2014, September 8, 2014. In addition, in 2018, the death penalty in the case of terrorism against Mako Brimob was imposed. Through Decision Number 1034/Pid.Sus/2018/PN Jkt.Tim against Anang Rachman and others.[17]

From a legal perspective, the implementation of the death penalty in Indonesia coincided with the enactment of Law Number 1 of 1946 on Criminal Law Regulations. This is in the Criminal Law Regulations in the form of Law Number 73 of 1958 on

[16] Ni Komang Ratih Kumala Dewi, "Keberadaan Pidana Mati Dalam Kitab Undang-Undang Hukum Pidana (KUHP)," *Jurnal Komunikasi Hukum (JKH) Universitas Pendidikan Ganesha* 6, no. 1 (2020): 104–14.

[17] Ahmad Mukhlish Fariduddin dan Nicolaus Yudistira Dwi Tetono, "Imposition of the Death Penalty for Corruptors in Indonesia from a Utilitarian Perspective," *Integritas: Jurnal Antikorupsi,* 8, no. 1 (2022): 1–12.

the Enforcement of Law Number 1 of 1946 for the entire territory of the Republic of Indonesia, which changed Wetboek van Strafrecht voor Nederlandsch Indie to Wetboek van Strafrecht known as the Criminal Code. Until now, the Criminal Code still stipulates the death penalty as one of the main types of punishment (Strafrecht) in addition to imprisonment, confinement and fines (Article 10 of the Criminal Code).[18]

The methods of executing the death penalty, which has been applied in various countries, have varied from the past until now, from the most humane way that does not cause prolonged suffering for those who carry it out to the most horrific and inhumane ways.[19] Meanwhile, the implementation of the death penalty in Indonesia refers to Article 11 of the Criminal Code, which states that the execution of the death penalty is usually carried out by the executioner by tying a rope around the gallows around the convict's neck, then dropping the board on which the convict stands. However, the implementation of the death penalty, as stated in Article 11 of the Criminal Code, is no longer relevant to current conditions. Therefore, in Indonesia, the execution of the death penalty is carried out based on Law Number 2/PNPS/1964 concerning Procedures for Executing the Death Penalty Sentenced by Courts in the General and Military Environment". - the existing provisions of the criminal procedure law regarding the implementation of court decisions, the execution of the death penalty, which is imposed by the court in the general court or military court, is carried out by being shot to death, according to the provisions in the following articles." This means that shooting to death by firing squad is the method used in carrying out capital punishment.[20]

Changes in the provisions of the procedure for executing the death penalty, from hanging to shooting, did not affect the efforts of many parties to abolish this provision. However, it is explained in the Criminal Code that the death penalty is still needed for several reasons, among others, because of exceptional circumstances, namely the danger of disruption to the broader legal order. Another reason is that Indonesia's territory is significant, and its population consists of several types of groups that easily clash, while the police facilities and infrastructure are not complete and so on.[21]

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[18] Tina Asmarawati, *Hukuman Mati Dan Permasalahannya Di Indonesia*, (Yogyakarta: Deepublish, 2013), 6.

[19] Jeaniffer Rachel Gabriella Dotulong, et.al, "Fungsi Dan Pelaksanaan Pidana Mati Dalam Sistem Pemidanaan Di Indonesia," *Lex Administratum* 10, no. 3 (2022): 1–13.

[20] Robby Septiawan Permana Putra, et.al, "Problem Konstitusional Eksistensi Pelaksanaan Pidana Mati Di Indonesia," *Diponegoro Law Journal* 5, no. 3 (2016): 1–18.

[21] Efryan R. T. Jacob, "Pelaksanaan Pidana Mati Menurut Undang-Undang Nomor 2/PNPS/1964," *Lex Crimen* VI, no. 1 (2017): 98–105.

These reasons are also in accordance with what Jonkers put forward on the explanation of the draft Indonesian Criminal Code, which states that there are four categories of crimes that can be threatened with the death penalty (Wirjono Prodjodikoro, 1989: 165), namely:

a. *Crime has potential to threaten the stability of state security (104, 111(2), 102(3), jo .129);*
b. *crime of murder against certain people and/or committed by severe? (140 (3), 340);*
c. *Crimes against property and accompanied by strenuous elements (365 (4), 368 (2));*
d. *Crimes in piracy of sea, river, and beach (444).*[22]

Referring to the four categories of crimes, it can be seen that corruption is included in the category of crimes against property. In this case, the property obtained from abuse or abuse of office to accumulate personal wealth. However, there is still a polemic regarding the death penalty in corruption cases, as stated in the Corruption Eradication Law.

Regarding article 1 paragraph (2) of the Corruption Eradication Law, there is a conflict with the sentence "certain circumstances" which are associated with corruption during the Covid-19 pandemic. In the explanation of the article, the meaning of the sentence is stated, namely when the country is in a state of danger, when a national natural disaster occurs, in the case of repetition of certain acts of corruption, or when the country is in a state of economic crisis.

In this regard, the Chairman of the Corruption Eradication Commission, Firli Bahuri, stated that strict action would be taken against perpetrators of corruption in disaster management funds. The primary consideration in the claim is to protect the interests of the community.[23]

The statement from the Chairman of the Corruption Eradication Commission indicated that corruption in disaster management funds, including the COVID-19 outbreak, could result in the death penalty. This needs to be a concern considering that what is meant by "disaster" in the explanation of the Anti-Corruption Law is "a national natural disaster." In this case, Law Number 24 of 2007 on Disaster Management has the meaning of several forms of disaster as stated in Articles 1 number 2, number 3 and number 4, namely:

[22] lsmu Gunadi dan Jonaedi Efendi, Cepat & Mudah Memahami Hukum Pidana, (Jakarta: Kencana, 2015), 66.
[23] Johannes Mangihot, "KPK: Korupsi Dana Penanganan Bencana Bisa Diancam Hukuman Mati," accessed January 30, 2021, https://www.kompas.tv/article/78655/kpk-korupsi-dana-penanganan-bencana-bisa-diancam-hukuman-mati.

Article 1 number 2: Natural disasters are disasters caused by events or a series of events caused by nature, including earthquakes, tsunamis, volcanic eruptions, floods, droughts, hurricanes, and landslides.
Article 1 number 3: Non-natural disasters are disasters caused by non-natural events or series of events, which include failure of technology, failure of modernization, epidemics, and disease outbreaks.
Article 1 number 4: Social disaster is a disaster caused by an event or series of events caused by humans which includes social conflict between groups or between communities, and terror."

Referring to this, corruption during the Covid-19 pandemic is categorized in Non-Natural Disasters in form of disease outbreaks. Therefore, perpetrators of corruption cannot automatically be sentenced to death because they do not meet the criteria in Article 2 paragraph (2) of the Corruption Eradication Law.

It is also interesting to link the current State of the Covid-19 pandemic with the "state of danger" in which the Explanation of Article 2 of the Corruption Eradication Law is stated. When referring to existing regulations, the establishment of the State of Danger is regulated in Government Regulation in Lieu of Law Number 23 of 1959 on Revocation of Law Number 74 of 1957 (State Gazette No. 160 of 1957). According to Government Regulation in Lieu of Law Number 23 of 1959, Article 1 reads:

(1) The President/Supreme Commander of the Armed Forces declares all or part of the territory of the Republic of Indonesia in a state of danger with a state of civil emergency or a state of military emergency, or a state of war, if:
   1. *security or law and order throughout the territory or in part of the territory of the Republic of Indonesia is threatened by rebellion, riots or as a result of natural disasters so that it is feared that ordinary equipment cannot be overcome;*
   2. *war or danger of war arises, or there is fear of raping the territory of the Republic of Indonesia in any way;*
   3. *The life of the State is in a state of danger or from special circumstances; it turns out that there are or is feared that there are symptoms that can endanger the life of the State.*

The contents of the article state that the determination of the "state of danger" is the absolute authority of the president. The determination of the intended "state of danger" is carried out by the Government accompanied by the stipulation of a civil emergency, a military emergency or a war emergency. The condition of the State when the corruption occurred during the Covid-19 pandemic was not stipulated in a "state of danger," so it would be inappropriate to use the explanation of Article 2 paragraph 2 , "a state of danger" to fulfil the element of the death penalty in the Anti-Corruption Law.

Although the prosecution of the death penalty will still be carried out, the judge's decision will still determine the decision. In this case, the efforts made to decide a case are not limited to juridical technical elements and the application of regulations. However, there are also some principles adopted by judges in court. This condition means the judge will carry out a thorough process and discussion to consider various things in accordance with the values adopted by the judge.[24]

Based on this, the imposition of the death penalty requires specific consideration considering it is related to the loss of a person's life. Therefore, many developed countries such as the Netherlands, Germany, Italy, Switzerland, Portugal, Austria, and Scandinavian countries have abolished the death penalty. However, there are also countries who try to limit the execution of the death penalty by introducing a suspended death penalty, as happened in the People's Republic of China (PRC). This is different from developing countries such as Indonesia, Singapore, Malaysia, the Philippines, Thailand, China, Pakistan, Vietnam and other countries that still maintain the execution of the death penalty.[25]

The existence of countries who have abolished or are still implementing the death penalty, the Corruption Perception Index 2019 conducted a search through transparency.org, which was quoted by the Institute for Criminal Justice Reform; the following data were obtained:

Table 2
Comparison of Countries, CPI Ranking, and Existence of the Death Penalty for Corruption[26]

Country	CPI Rank	Death Penalty for Corruption in National Law
Denmark	1	No
New Zealand	1	No
Finland	3	No
Singapore	4	No
Sweden	4	No
Swiss	4	No
Norway	7	No
Netherlands	8	No

[24] Irfan Ardiansyah, *Disparitas Pemidanaan Dalam Perkara Tindak Pidana Korupsi (Penyebab Dan Penanggulangannya)*, (Pekanbaru: Hawa dan AHWA, 2017), 260.
[25] Tina Asmarawati, *Hukuman Mati dan Permasalahannya Di Indonesia*, 7.
[26] Adhigama Andre Budiman, et.al., *Laporan Situasi Kebijakan Hukuman Mati Di Indonesia 2020: Mencabut Nyawa Di Masa Pandemi*, (Jakarta: Institute for Criminal Justice Reform, 2020), 34.

German	9	No
Luxembourg	9	No
China	80	Yes
Indonesia	85	Yes
Vietnam	96	Yes
Laos	130	Yes
Iran	146	Yes
Iraq	162	Yes

Source: Institute for Criminal Justice Reform

Table 2 does not describe comprehensively empirical data on the relations between the death penalty and corruption rates. However, from these data, it can be seen that the threat of the death penalty does not directly reduce the number of corruption in a country. One of them is in China, which has the death penalty, not only stated in the legislation, but there is no significant decrease in the number of corruption cases that harm the State. This condition shows that the abolition of crime in a country can also achieve the country's goals in anti-corruption practices to the fullest, such as in Singapore, Finland, New Zealand, and Denmark.[27]

Thus, if the execution of the death penalty is considered to have a shock therapy law in hope that the perpetrator can improve himself and perform self-recovery, it is logically unreasonable because the opportunity to improve himself is relatively limited only while waiting for the execution of the death penalty and there is no opportunity to participate again in the midst of the death penalty in the community because he has been given a death sentence. On the other hand, without being sentenced to death, there are actually other alternative forms of punishment, such as life imprisonment with or without revocation of certain rights and imprisonment in remote and remote places. [28]

3. Death Penalty From Human Rights Perspective

The international community recognizes the existence of human rights as fundamental rights that are respected by every nation in the world.[29] Indonesia, as part of it, participates in actualizing human rights through formal legal human rights

[27] Adhigama Andre Budiman, et.al., *Laporan Situasi Kebijakan Hukuman Mati Di Indonesia 2020*, 34.
[28] Edi Yuhermansyah dan Zaziratul Fariza, "Pidana Mati Dalam Undang-Undang Tindak Pidana Korupsi (Kajian Teori Zawajir Dan Jawabir)," *Jurnal LEGITIMASI* 6, no. 1 (2017): 156.
[29] Umar Anwar, "Penjatuhan Hukuman Mati Bagi Bandar Narkoba Ditinjau Dari Aspek Hak Asasi Manusia (Analisa Kasus Hukuman Mati Terpidana Kasus Bandar Narkoba: Freddy Budiman)," *Jurnal Legislasi Indonesia* 13, no. 03 (2016): 241–51.

arrangements.[30] It shows as an effort to provide legal and human rights protection for the rights of its citizens through various laws and regulations. Bagir Manan explained that human rights are categorized into:

a. *Classical and social human rights. Classical rights are stipulated in Article 27 paragraph (1), Article 28 and Article 29 paragraph (2) of the 1945 Constitution. While social rights are formulated in Article 27 paragraph (2), Article 31 paragraph (1), and Article 24 of the Constitution. 1945.*
b. *Human rights relating to Indonesian citizens. This can be read in Article 27 paragraph (2), Article 30 paragraph (1), and Article 31 paragraph (1).*[31]

However, the given protection will not achieve optimal results if there are still conflicts between the laws and regulations. One of them relates to the imposition of the death penalty stipulated in Article 1 paragraph (2) of the Corruption Eradication Law or other cases such as narcotics, terrorism and so on.

The imposition of the death penalty is in contrary to Article 28 A of the 1945 Constitution, which states: "Everyone has the right to live and has the right to defend his life and living." The contents of the article are included in a person's rights that cannot be limited under any conditions (non-derogable rights). Limitation of these rights can be categorized as a form of human rights violation.[32]

Article 6, paragraph 2 of the International Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200 A still allows for the death penalty by stating, "In countries which have not abolished the death penalty, the death penalty may only be imposed for certain crimes which in accordance with the positive law at the time of act of the crime, and does not conflict with the provisions of the Covenant and the Convention on the Prevention and Law of the Crime of Genocide. This sentence can only be carried out on the basis of a final decision handed down by an authorized court."

The contents of the article indicate that the death penalty can only be carried out for crimes of a serious nature, such as the crime of genocide. Etymologically, the term genocide comes from the Greek "Geno", which means "race", and the Latin word "cidium", which means "to kill".[33] Thus, what is meant by the crime of genocide

[30] Warih Anjari, "Penjatuhan Pidana Mati Di Indonesia Dalam Perspektif Hak Asasi Manusia," *E-Journal WIDYA Yustisia* 1, no. 2 (2015): 108.
[31] Yon Artiono Arba'i, *Aku Menolak Hukuman Mati: Telaahan Atas Penerapan Pidana Mati*, 51.
[32] Osgar S. Matompo, "Pembatasan Terhadap Hak Asasi Manusia Dalam Perspektif Keadaan Darurat," *Jurnal Media Hukum* 21, no. 1 (2014): 57–72.
[33] Ketut Alit Putra et.al, "Analisis Tindak Kejahatan Genosida Oleh Myanmar Kepada Etnis Rohingnya Ditinjau Dari Perspektif Hukum Pidana Internasional," *E-Journal Komunitas Yustitia Universitas Pendidikan Ganesha* 1, no. 1 (2018): 66–76.

is an act that aims to cause the destruction in whole or in part of a group, whether ethnic, ethnic or religious. The type of act in question can be in the form of murder, causing physical or mental suffering, the use of drugs to destroy the group, including the act of sterilization.[34]

Referring to the definition of the crime of genocide, it can be stated that the death penalty cannot be applied to corruption even though it has inflict state's finance and disturbed the public. In this case, the perpetrators of corruption can still be sentenced to imprisonment, hoping that the perpetrators of corruption can improve themselves and not repeat the crime so that it can be accepted again by the community.[35]

It supported by the abolition of the death penalty as regulated in the Second Optional Protocol to the International Covenant on Civil and Political Rights. The regulation aims to abolish the death penalty so that there is an obligation for all member States of the convention to abolish the practice of the death penalty in their countries.[36] Although the protocol is an additional instrument, it is able to provide an idea of whether or not the death penalty is in line with the International Covenant on Civil and Political Rights, considering that this protocol was established because of the Covenant.[37] In this case, Indonesia has not ratified the second additional protocol, so the imposition of the death penalty is still stipulated in various applicable laws and regulations. This hinders the Government's efforts to respect, protect and fulfill the rights of its citizens.

In this regard, Antasari Azhar stated that the death penalty has not yet been applied, the death penalty for corruptors is not yet a panacea to overcome corruption; the death penalty for corruptors can be applied if it has fulfilled four principles first, namely:

a. *The death penalty can be applied if the welfare of the people has been achieved;*
b. *The nature of the death penalty against corruptors is the last resort of punishment;*

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[34] Herman Surokumoro, et.al., *Hukum Humaniter Internasional: Kajian Norma Dan Kasus*, (Malang: UB Press, 2020), 118.

[35] Debi Romala Putri dan Ikama Dewi Setia Triana, "Pelaksanaan Pembinaan Narapidana Dalam Mencegah Residivisme Di Lembaga Pemasyarakatan Kelas II B Cilacap," *Jurnal Media Komunikasi Pendidikan Pancasila Dan Kewarganegaraan* 2, no. 1 (2020): 143–54.

[36] Mardenis dan Iin Maryanti, "Pemberlakuan Hukuman Mati Pada Kejahatan Narkotika Menurut Hukum HAM Internasional Dan Konstitusi Di Indonesia," *Jurnal Masalah-Masalah Hukum* 48, no. 3 (2019): 312–318.

[37] Setiawan Wicaksono, "Hambatan Dalam Menerapkan Pasal 6 Kovenan Internasional Tentang Hak-Hak Sipil Dan Politik Sebagai Dasar Penghapusan Pidana Mati Di Indonesia," *Jurnal Penelitian Ilmu Hukum: Pandecta* 11, no. 1 (2016): 65–79.

c. *The death penalty is only applied to corrupt acts that interfere with the lives of many people as regulated by Article 33 of the 1945 Constitution;*
d. *The death penalty for corruptors can be applied if there is a law.*[38]

From these four principles, it can be seen that not all of the principles have been fulfilled even though the death penalty already exists in Indonesian laws and regulations. In this case, the reality of people's welfare is still not in line with expectations. Likewise, other principles still need to be improved on the existing system.

In addition, the death penalty is also considered a cruel and inhuman punishment because it causes the loss of the right to life for humans.[39] The criteria that can be used to measure whether a punishment is a cruel and strange are as follows:

a. *If the nature of the punishment itself is so severe that it can violate human dignity.*
b. *If the way of executing the punishment is very inhumane.*
c. *if the punishment is not customary or very embarrassing*
d. *If the punishment is not commensurate (very severe) compared to the severity of the crime committed.*
e. *If the punishment is not appropriate for the circumstances of the offender.*
f. *If the punishment is aimed at the status of the person, not against the actions, he has done.*
g. *Punishing a crime because of the element of revenge or hatred.*
h. *Punishing crimes against "groups of people", for example, punishing groups of people who believe in sects or religious sects embraced by the majority.*
i. *Punishing criminal acts that are not criminal acts.*[40]

Referring to these various criteria indicates that the death penalty is concluded in the criteria of cruel and strange punishment. The death penalty is also opposed to the following arguments::

a. *there are no statistics showing that in countries who apply the death penalty, the crime rate is lower than in countries that do not apply the death penalty.*
b. *the perpetrator has been proven to have committed one mistake and then was killed (by the death penalty), which in this case is a second crime, namely a moral crime.*

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38 H. Agus Kasiyanto, *Tindak Pidana Korupsi Pada Proses Pengadaan Barang Dan Jasa*, (Jakarta: Kencana, 2018), 169.

39 Habib Shulton Asnawi, "Hak Asasi Manusia Islam Dan Barat: Studi Kritik Hukum Pidana Islam Dan Hukuman Mati," *Jurnal Kajian Ilmu Hukum: SUPREMASI HUKUM* 1, no. 1 (2012): 25–48.

40 Munir Fuady dan Sylvia Laura L. Fuady, *Hak Asasi Tersangka Pidana*, (Jakarta: Prenada Media Group, 2015), 148.

c. the death penalty is inhumane, the right to life is a human right, and human life is sacred.
d. only God gives life to humans, and God also has the right to take their lives
e. there is no frightening effect of the death penalty. A perpetrator of a serious crime or in a frenzy they do not care about the severity of the death penalty.
f. the issue of punishment is a matter decided by a human being who is a judge, judges as humans can be wrong.
g. The death penalty is actually more of retaliation, while the purpose of modern punishment is not revenge but to educate the convict, improve the convict and so on.
h. Very often, the death penalty is handed down due to uncontrollable emotions
i. That in reality, the death penalty is often prejudiced, where the death penalty is often imposed by certain marginal people.[41]

In addition, based on the current situation, there is a shift in the paradigm of punishment from time to time, both in society and in the world. It is more focused on the social goals to be achieved, not on the sanctions. Sanctions are a means of social engineering to achieve the purpose of punishment; however, these sanctions also depend on the perspective of the community where the sanctions are set. The paradigm shift in punishment includes the type of sanctions, the period of punishment as well as the pattern and system of punishment applied.[42]

C. CONCLUSION

Based on the description, it can be concluded that Article 2 paragraph (2) of the Corruption Eradication Law cannot fulfill the juridical aspect to ensnare perpetrators of corruption, especially corruption in the social assistance fund for handling COVID-19, considering that it is not included in the occurrence of natural disasters in the provisions of "certain circumstances". In addition, the imposition of the death penalty on this article is a form of violation of the right to life as stated in the 1945 Constitution and Law Number 39 of 1999. The death penalty can only be imposed for gross human rights violations such as the crime of genocide, as stated in the International Covenant on Civil Rights. And Politics. This condition has caused many countries to abolish the death penalty because, apart from violating human rights, it has also been proven to be inaccurate to eradicate corruption, as seen in the 2019 Corruption Perception Index.

[41] Munir Fuady dan Sylvia Laura L. Fuady, *Hak Asasi Tersangka Pidana*, 134.
[42] Eva Achjani Zulfa, "Menakar Kembali Keberadaan Pidana Mati (Suatu Pergeseran Paradigma Pemidanaan Di Indonesia)," *Lex Jurnalica* 4, no. 2 (2007): 93–100.

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The Proposal of Constitutional Complaint for the Indonesian Constitutional Court

Proposal Pengaduan Konstitusional untuk Mahkamah Konstitusi Indonesia

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Naskah diterima: 11-06-2021 revisi: 14-07-2022 disetujui: 02-08-2022

Abstrak

Penelitian ini tentang proposal pengaduan konstitusional pada Mahkamah Konstitusi Indonesia. Penelitian ini dilatarbelakangi persoalan ketidakjelasan pengaduan konstitusional dalam praktik, sementara kasus yang muncul cukup banyak. Metode penelitian yang digunakan adalah normatif dengan pendekatan perundang-undangan, analisis, dan pendekatan kasus. Hasil penelitian menunjukkan bahwa dasar pemikiran pelembagaan meliputi: pengaduan konstitusional merupakan pengejewantahan nilai-nilai konstitusionalisme dalam bernegara hukum Pancasila, sebagai penyempuna checks and balances, basis perlindungan hak asasi manusia, sekaligus bertujuan mewujudkan pemerintahan yang baik. Langkah kebijakan dapat dilakukan melalui amandemen Undang-Undang Dasar 1945, atau penafsiran non originalis, atau melalui perubahan Undang-undang MK. Objek sengketa yang menjadi batasan dalam pengaduan konstitusional, yaitu: putusan pengadilan, tindakan penyelengara negara dalam penafsiran konstitusi dan undang-undang, Ketetapan MPR, dan lainnya.

Kata kunci: Konstitusional; Mahkamah Konstitusi; Peluang; Pengaduan, Problem; Proposal.

Abstract

The research focuses on the proposal of a Constitutional Complaint for the Indonesian Constitutional Court. The background causes of the constitutional weakness to protection and fulfilment of constitutional rights, especially the absence of a Constitutional Complaint mechanism. Research methods used normative legal research methods with statutory, analytical, and case approaches. The study results show that legal thinking, including an embodiment of the values of constitutionalism in the rule of law of Pancasila, complements a checks and balances system, the basis for protecting fundamental rights, and aims to realize good governance. There are several steps/ methods to giving this authority, amendments to the 1945 Constitution, non-original interpretations, and revision of the Constitutional Court Act. Several objects of dispute are the Court's verdict, the problems of interpreting the 1945 Constitution and law by a state official, People Consultative Assembly decisions, and others.

Keywords: Complaints; Constitutional, Constitutional Court; Opportunity; Problem; Proposal.

A. INTRODUCTION

1. Background

The wave of global reforms that lead to constitutional amendments often raises new hopes for constitutional democracy and the rule of law system. It had realized by amendments to the constitution, changes to the state's institutional structure, and strengthening the protection of fundamental rights. This strengthening also provides solutions to previous legal problems, such as weak checks and balances in the national legislation system and law enforcement and weak guarantee of protection - fulfilment of fundamental rights. One product of the state institutions from the wave of reforms in Indonesia and is idealized to be at the forefront of guarding the constitution and building the protection of fundamental rights with a modern judicial system is the Constitutional Court of the Republic of Indonesia/ Mahkamah Konstitusi Republik Indonesia (hereinafter the MKRI). The Constitutional Courts' best practices in the United States, Germany, and South Korea influenced its formation.

In constitutional law theory, the establishing of the Constitutional Courts in the world has the same functions as follows: protecting the constitution, interpreting the constitution, and guarding democracy (the guardian and the sole interpreter of the constitution, as well as guardian of the process of democratization). In addition, the Constitutional Courts are the protector of the citizen's fundamental rights.[1] There

[1] Tanto Lailam, *Pertentangan Norma Hukum dalam Pratik Pengujian Undang-undang di Indonesia*, (Yogyakarta, LP3M UMY, 2015), 162

are similarities in the authority of the Constitutional Courts, such as constitutional review, dispute resolution of election results, dissolution of political parties, disputes over the authority of state institutions, and opinions in the impeachment process (constitutional complaint). However, the existence of the Constitutional Courts was designed as a judicial institution that first functions of judicial review.[2] The granting of the function of judicial review is correct "malfunctions" in a democratic government.

The establishment of the MKRI as an institution that oversees the Indonesian Constitution (hereinafter 1945 Constitution) and democracy balances government power/ checks and balances system and strengthens guarantees of fundamental rights. It upholds constitutional values, provides protection for citizens' constitutional rights[3], strengthens the mechanism of checks and balances,[4] and creates a clean government. The background of the idea focuses on judicial review that is to solve significant legislation problems in the context of improving the legal system, the dilapidated legal system in Indonesia, the multi-interpretational 1945 Constitution, and the many laws that deviate and oppress the people. Moreover, no mechanisms and institutions have the authority to examine the validity - the constitutionality of laws against Pancasila and the 1945 Constitution.

The amendment 1945 Constitution process (1999-2002) focuses on judicial review authority. It was only natural that the Constitutional Complaint (hereinafter the CC) authority did not have time to be discussed in depth. Especially, it was not too urgent/ main problem to be submitted to the MKRI. However, whatever the results, the history of the amendments to the 1945 Constitution has given birth to the MKRI, which is the hope of the nation to uphold the constitution, organize the administrative structure, and manage the democratic system. The weakness of the 1945 Constitution in the protection of constitutional rights is the absence of the Constitutional Complaint authority. This view is certainly motivated by the fact that constitutional amendments in the reform movement are not the end of the agenda for the realization of a democratic and rule of laws system. It is the beginning of improving the legal and judicial system.

The weakness of the 1945 Constitution is the absence of the CC mechanism as a basis for protecting citizens' constitutional rights against actions by state officials

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2 Simon Butt, "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?," *Asian Journal of Comparative Law* 14, No. 1 (2019): 147–174.

3 In this article, the terms of constitutional rights and fundamental rights are used interchangeably, especially when discussing the power of the Indonesian Constitutional Court.

4 Pan Mohamad Faiz Kusuma, "The Role of the Constitutional Court in Securing Constitutional Government in Indonesia" (Australia, Dissertation University of Queensland, 2016), 1.

who misinterpret the constitution and law, court decisions that violate constitutional rights, and state administrators who default on constitutional obligations that are mandated. This weakness has implications as no judicial institution to enforce this mechanism. The CC did not regulate explicitly, causing the space for the protection of constitutional rights not to be optimal.[5] The purpose of the rule of law and democracy systems is constitutional rights guaranteed by the 1945 Constitution for everyone, when state administrators violate those constitutional rights, then each person can demand the return of his/ her rights based on the 1945 Constitution through a modern and reliable court.

The weakness of the 1945 Constitution, if examined normatively, is that no state institution (especially the judicial power) has the authority to make the CC—however, a spirit of authority from constitutional review implementation by the MKRI. It should be understood that the CC is an inseparable part of constitutional review, but the object of the dispute is to assess the constitutionality of laws and the interpretation of the constitution. According to I Dewa Gede Palguna, the CC is part of constitutional review, while a constitutional review is part of constitutionalism.[6] It means that the normative weakness of the 1945 Constitution is actually not a barrier to continuing to apply it on a limited basis or a case basis (through the entrance to judicial review).[7]

The academic debate becomes a problem of a constitutional review authority of the MKRI (through the interpretation of the 1945 Constitution). Of course, the more democratic and the rule of law systems, the more it will strengthen the need for a legal mechanism to fulfil constitutional rights. Moreover, the cases that have emerged in this decade are more characterized by the CC. The dialectic in the MKRI practices gives hope to institutionalizing the CC firmly and with legal certainty. For this reason, this research opened the veil, unraveled the problem, as well as described the constitutional opportunities that allow a more structured application, at the same time building the main construction of the dispute, which becomes fundamental competencies.

2. Research Questions

Based on the elaboration in research problems, several questions can be formulated in the institutionalization of the CC for the MKRI, including: (1) how is the construction

[5] Pan Mohamad Faiz Kusuma, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review* 2, No. 1 (2016): 103.

[6] I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum terhadap Pelanggaran Hak-hak Konstitusional Warga Negara*, (Jakarta, Sinar Grafika, 2013), 643.

[7] In this article, the terms judicial review and constitutional review are used interchangeably, especially when discussing the power of the Indonesian Constitutional Court.

of legal thinking behind the urgency of institutionalizing the CC? (2) What are the problems and opportunities for institutionalizing the CC?, and (3) What are the competencies in the CC legal mechanism?.

3. Methods

This legal research aims to unravel various issues of protecting the constitutional rights of citizens, some of which do not have a dispute resolution mechanism, at the same time providing the right legal construction related to the institutionalization of the CC in the Indonesian judicial power structure. This research applied a normative legal research method (secondary data) with statutory and analytical approaches. Data collection techniques were carried out in two ways: library research aimed at examining primary legal materials, secondary legal materials, and tertiary legal materials. Data analysis in this study belonged to the descriptive qualitative type. Descriptive analysis was intended to provide an overview or explanation of the object of research by categorizing data as follows: (1) the data was systematized or organized and adapted to the object under study; (2) the data that had been systematized, then described and explained according to the object under study based on theory; (3) the data that has been described is then evaluated and analyzed, assessed using the applicable legal standards and future legal policies. This step is taken to understand the research focus in-depth and comprehensively.

B. DISCUSSION

1. Constitutional Complaint Theory

A Constitutional Complaint is one of the legal mechanisms designed to strengthen the guarantee of the protection of citizens' rights against every action of the state/government/state administrators in all branches of power. The action in question is an action that violates the constitutional rights of citizens or does not take action/fulfilment of legal actions that harm the constitutional rights of citizens. The European Center for Constitutional and Human Rights (ECCHR) states that the CC is "a mechanism that can be brought by individuals whose fundamental rights have been violated through an act of a state authority".[8]

I Dewa Gede Palguna stated that the CC refers to the action of a citizen who claims that one of his constitutional rights has been violated by the act or omission

[8] EECHR, "Constitutional Complaint" https://www.ecchr.eu/en/glossary/constitutional-complaint, accessed on June 5th 2021

of a public official.[9] The public officials referred to are government agencies, court decisions, and laws. Hamdan Zoelva said that the CC is a form of citizen complaints through an adjudication process in Court for actions (policies) or neglect by the state, in this case, state institutions that violate the rights of citizens guaranteed by the constitution.[10]

Gerhard Dannemann characterized the Constitutional Complaint with four factors. *First*, the existence of legal action to restore constitutional rights for violations committed by public/state officials; *second*, the judicial system that focuses on the constitutionality of the action in question and not on other legal issues related to the same case (between the constitutional review and complaint); *third*, the settlement of this authority can be proposed by a person who is negatively affected by the action/ has his constitutional rights impaired; and *fourth*, the Constitutional Courts that decide on this authority to restore the victim's constitutional rights.[11]

In several countries that have a Constitutional Court or similar courts, the authority to hear and decide cases of the CC has become one of the constitutional powers of the Constitutional Courts and similar institutions in a number of countries, such as Germany, Austria, Spain, Turkey, South Korean, and other countries.[12] For example, in Germany, the German Federal Constitutional Court/the *Bundesverfassungsgerich* (hereinafter the German BVerfG) is an institution whose function is to ensure that the Constitution of the Federal Republic of Germany (*Grundgesetz*/Basic Law) is obeyed by the state and citizens, with the main function of ensuring the respect and effectiveness of a free and democratic constitutional order, and the enforcement of fundamental rights. The constitutional powers of the German BVerfG include constitutional review: abstract review and concrete review, individual Constitutional Complaint, federal election disputes (elections disputes), disputes between federal state institutions (disputes between constitutional organs), the dissolution of political parties, and the impeachment of the federal president and the impeachment of judges. The Constitutional Complaint mechanism known as the *verfassungsbeschwerde* was first regulated by the Constitutional Court Act of March 16, 1951 (*Gsetz über das Bundesverfassungsgerichts 16 März 1951*), but was later regulated in Article 93 (1)

[9] Palguna, Constitutional Complaint and the Protection of Citizens the Constitutional Rights", *Constitutional Review* Volume 3 No.1 (2017), 1-24

[10] Hamdan Zoelva, "Constitutional Question Dan Perlindungan Hak-Hak Konstitusional," *Jurnal Media Hukum* 19, no. 12 (2012): 153.

[11] Matthias Goldmann, "The European Economic Constitution after the PSPP Judgment: Towards Integrative Liberalism?," *German Law Journal* 21, no. 5 (2020): 1058–1077.

[12] M. Lutfi Chakim, "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions," *Constitutional Review* 5, No. 1 (2019): 096.

No. 4a and b of the German Constitution through constitutional amendments. Based on data from the German BVerfG performance report in 2021, BVerfG has received 250,580 cases, and 97.9% of that number (245,539 cases) are Constitutional Complaint cases. Around 6000 cases are decided by the German BVerfG every year.[13]

2. The Proposal Constitutional Complaint for the MKRI Authority

a. Foundation of Thought

The CC's institutionalization needs scientific studies and appropriate policy alternatives under the legal policies desired by the community in a democratic and ~~the~~ rule of law system based on the Pancasila and 1945 Constitution. At least a policy foundation is needed to measure the importance of the CC in Indonesia and the effectiveness of its functions in the future, as well as to see whether the MKRI is able to carry out the new mandate. Philosophical, sociological, and juridical foundations are needed to make the right institutional design and absolute competence limits. The philosophical basis is, of course, related to legal ideals (*rechtsidee*) as the highest constitutional value, the ideals to be realized by the CC function, for example, whether the CC can realize the protection and fulfilment of the constitutional rights of citizens. The sociological basis is more focused on the perspective of applying the law in real situations, which is always accompanied by characteristics in the form of acceptance of regulations by a group of people. While the juridical basis places more emphasis on the ordering of laws and regulations, this order or hierarchy is related to the theory of conflicting norms and sources of law, conflicting norms in the sense that the legal norms to be made do not conflict with higher legal norms (UUD 1945), values, legal principles that are the reference in its formation.

Some of the legal thought foundations (philosophical, sociological, and juridical, which are involved in a complete meaning) in the institutionalization of authority include:

First, the embodiment of the values of constitutionalism. The main problem of the constitutionalism concept and the rule of law in Indonesia is a guarantee of the principle of the supremacy of the 1945 Constitution by all elements of the nation and state.[14] One principle is the constitutional rights protection of citizens

[13] Tanto Lailam, "Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional (The Role of the German Federal Constitutional Court in Protecting of Fundamental Rights Based on the Constitutional " *Jurnal Hak Asasi Manusia* (2022): 65.

[14] Maruarar Siahaan, "Integrasi Konstitusional Kewenangan Judicial Review Mahkamah Konstitusi Dan Mahkamah Agung," *Jurnal Konstitusi* 17, No. 4 (2021): 729.

by state administrators. For this reason, the MKRI was formed as part of the branch of judicial power to realize the values of constitutionalism and the rule of law of Pancasila (Negara Hukum Pancasila). Constitutionalism is an understanding related to the function of the 1945 Constitution in a country (written / unwritten). Understanding in the form of power limitation/ governance of how the people's sovereignty is carried out according to the applicable rules. The constitution is meant not only in the sense of a modern/ written but includes values, principles, and norms in society.

Hence, constitutionalism requires the limitation of power, distribution of power, and the doctrine of accountability and transparency for government administration. Constitutionalism that develops in a country departs from the philosophy of people's sovereignty that the people are the owner and source of power in the state. The upholding of constitutionalism is very dependent on the consensus of the people in establishing a country. At least several elements of consensus must be upheld: (1) the agreement of the founding fathers (founders of the state) and the people in formulating and realizing the goals to be achieved and shared goals (e.g., *staatidee/rechtsidee*). (2) the building of the rule of law and democratic systems to be realized as the basis for constitutional government and good governance; (3) agreement on the desired constitutional design (institutions entrusted by the people to run the government) and a democratic filling process.[15]

When transferring power from the people to the government (including general elections), it must be accompanied by a legal mechanism when that power is abused by the government. Lord Acton thought "power tends to corrupt, absolute power corrupts absolutely"[16] will become real, acts of abuse of power and betrayal of the people's consensus are things that often happen when the egoism of power gives rise to authoritarian and oligarchic power. Hence, if the power functioning to realize justice and people's welfare, a legal mechanism to enforce it is needed to remind state administrators to comply with the people's consensus (which is then regulated in the constitution). One of the legal mechanisms is the constitutional review, which includes abstract judicial review, concrete/ specific judicial review, and constitutional complaint.

The constitutional review and complaints are a package to ensure that the power held by the government is not misused or deviates from the consensus

[15] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia,* (Jakarta, Konstitusi Press, 2005), 25
[16] Said Karim, Baharuddin Badaru, and Askari Razak, "The Essence of Law Enforcement For Corruption In West Sulawesi" *IOSR Journal of Humanities and Social Science* (IOSR-JHSS) 24, No. 6 (2019): 10–14.

made by the people. The essence of the embodiment of constitutional values in democratic and the rule of law systems is how every legal issue can be resolved fairly, accountable, and transparently. There should be no dispute that is not resolved by constitutional means, and the state must provide an appropriate way of resolving disputes. By building a framework for thinking about the values of constitutionalism and the rule of law, the CC must exist. If there is none, it means that the state has not fully implemented the implementation of constitutionalism values in a legal state, there will be a violation of the values of constitutionalism by the state, and indirectly the state has corrupted the values of constitutionalism.

Second, perfecting a checks and balances system. Ideally, the position and role of each state institution should be equally strong and mutually controlled in checks and balances relations. In checks and balances, the position of the main state institutions is equal, which has functional linkages and control over the powers of other state institutions. Another view is that the position between these state institutions cannot be higher than the others; only their functions and duties differ. The current state administration design adheres to the doctrine of separation of power, with the principle of the checks and balances system, but it is not yet an ideal system. There are still many gaps deviating from the checks and balances system. Hence, to create an ideal system in this principle is the institutionalization of the CC for the MKRI to protect fundamental rights. At the same time, state institutions work based on the constitution and a checks and balances system.

Third, the basis for the protection of fundamental rights. A democratic and ~~the~~ rule of law system that guarantees the protection and fulfilment of fundamental rights is an absolute thing that state institutions must do. Every state institution has a constitutional obligation to realize the protection and fulfilment of the constitutional rights of citizens under their primary duties and functions. Because of this constitutional obligation, the constitution must provide a dispute resolution mechanism if the protection and fulfilment of constitutional rights are not implemented by state power. The dispute resolution mechanism in the context of protecting and fulfilling these constitutional rights must be comprehensive, lest there be gaps/or the absence of an institution authorized to resolve disputes.

The protection and fulfilment of constitutional rights must be accompanied by legal mechanisms when problems arise. This solely ensures fair legal certainty and an accountable and transparent judicial process. It means that if individual citizens feel that state officials have violated their constitutional rights, then they have the

constitutional right to file their case in a particular court to give a fair decision. Without a clear, accountable, and transparent dispute resolution mechanism, it will lead to weak protection and fulfilment of citizens' constitutional rights and tend to create abuse of power and an anti-criticism/ impunity government.

I Dewa Gede Palguna argument is that legal efforts to protect the constitutional rights of citizens are carried out through the CC. It is a lawsuit filed by an individual to the Court against the actions (or omissions) of a public institution that result in the violation of the basic rights or constitutional rights concerned. The purpose of this authority is that every person or particular group has the freedom and equality in participating in a country and upholding democratic principles, including the responsibility regarding the protection of constitutional rights owned by the community.

Fourth, good governance. Good governance is a manifestation of the people's mandate that must be implemented by the authorities (people's representatives) because, without good governance, it is impossible to fulfil the constitutional rights of citizens. On the other hand, a bad/authoritarian government will amputate the rights of the people by making excuses that no institution is authorized to resolve disputes. The realization of good governance requires the institutionalization of the CC. It is undoubtedly motivated by the fact that it is a form of implementation of constitutional democracy in the form of people's control to protect and restore constitutional rights guaranteed by the constitution. In good governance, dispute resolution mechanisms are the primary key, including the CC. It will be a guard in realizing good governance. For example, a state administrator who misinterprets the law must be rectified through a constitutional complaint.

b. The Problem of Institutionalizing Constitutional Complaint

The idea of a Constitutional Complaint has developed in various countries with good, accountable, and transparent constitutional and judicial systems. Without a good, accountable, and transparent judiciary will be an abuse of power in judicial activities, ineffective law enforcement and justice, as well as pile up cases that do not have a vision of a fast case settlement - with legal certainty and justice. Institutionalizing a Constitutional Complaint is not easy since it needs an in-depth and comprehensive study. At least some problems follow the idea of institutionalizing CC in the MKRI.

First, the historical-sociological perspective. If referring to the original intent interpretation in the 1945 Constitution amendment process, at the time

of formulating the constitutional authority of the MKRI, it only focused on examining laws and did not discuss the CC (if any, they were not clearly spelt out/ implicitly). Of course, due to the major problems to be dismantled in the context of improving the legal system: are the dilapidated legal system in Indonesia; the multi-interpretational constitution; and many laws that deviate and oppress the people. Quoting the opinion of former Constitutional Justice Laica Marzuki, who stated that law could contain a legal crime charge (misdadigrechts),[17] this can be proven by the laws governing centralization causing the slow pace of regional development (regional autonomy) and hindering the independence/welfare of local communities.[18] Not to mention the provisions of laws that restrict freedom of opinion and expression, articles on insulting the president to ensnare political opponents, and others.

This condition then inspired the legal policies of forming the MKRI with the main function of reviewing laws against the 1945 Constitution (without the CC). Whereas theoretically and in legal practice in the reference countries at the time of the Constitutional Courts (e.g., Germany and South Korea), the CC are an inseparable part of the constitutional review authority. Of course, the hope of the drafters when amending the 1945 Constitution was that after the reformed constitution, the reformed constitution must be preserved so that if there is a law that contradicts the reformed constitution, it must be annulled. Including that constitutional review has accommodated the CC because the object is the same, assessing the constitutionality of laws. In addition, a good and responsive system of laws and regulations is created by upholding constitutional and democratic values, protecting and fulfilling fundamental rights, and realizing good and clean governance.

Based on the historical-sociological analysis, there was no mandate to institutionalize the CC during the amendment to the 1945 Constitution, and the drafters did not see the importance of it for Indonesia in the future. Currently, the condition of the state of Indonesia, which is increasingly advanced and democratic, requires the institutionalization of this authority. Hamdan Zoelva's view, in the CC authority, is based on the interpretation of the constitution, which is related to

[17] Laica Marzuki, "Uji Konstitusionalitas Peraturan Perundang-Undangan Negara Kita: Masalah dan Tantangan", *Jurnal Konstitusi*, Volume 7, Nomor 4, (2010): 120

[18] Tanto Lailam, "Problem dan Solusi Penataan Checks and Balances System Dalam Pembentukan Dan Pengujian Undang-Undang di Indonesia (Problem and Solutions for Arranging of The Checks and Balances System in The Process of Making Law and Constitutional Review in Indonesia), *Jurnal Negara Hukum*, Vol. 12, No. 1 (2021): 123.

the interpretation of the text, original intent, and historical (backwards-looking), then the expansion of the interpretation of the authority of the MKRI as regulated in the 1945 Constitution is impossible, except through amendments to the 1945 Constitution.

Second, making the MKRI an institution authorized to resolve the CC is not the only way to protect the constitutional rights of citizens in Indonesia. If the main issue of the CC is regarding the provisions of the law that violate the constitutional rights of citizens, this matter can be brought to the CC as a case for judicial review. However, if the main issue lies in a government policy that violates the law (onreghtmatig overheidsdaad) and the provisions under the law, it can be processed in the general Court, which leads to the Supreme Court. In addition, if the Constitutional Complaint case's subject matter is administration, demands for administrative recovery can be pursued by bringing the case to the state administrative court (Pengadilan Tata Usaha Negara).

From the author's perspective, the CC is very different from the existence of testing legal norms in the Administrative Court or judicial review under the law against laws that are under the authority of the Supreme Court. The CC legal mechanism was submitted after legal remedies had reached a dead end (the law provided no legal remedy regarding the case). One of the objects of this CC is court decisions (including the Administrative Court and the Supreme Court) that violate constitutional rights. Even in practice, in the German BVerfG, the court decisions are the object of the most resolved disputes. It means that if the decisions of the Supreme Court and Administrative Court violate the constitutional rights of citizens, they can be submitted to the MKRI by the CC legal mechanism.

On the other hand, the MKRI has not yet become an authoritative institution capable of properly resolving constitutional review cases. Several decisions of the MKRI have confused lawmakers. Several inconsistent decisions have emerged in the same case (overruling), decisions that have exceeded the applicant's application (ultra petita), recommendations for new norms, retroactive decisions, decisions that apply forward, and decisions that are not solutive and leave legal issues to legislators (open legal policy), and others. Even in decisions regarding institutions authorized to resolve regional election disputes and the institutional independence of the Corruption Eradication Commission, the MKRI tends to be inconsistent (conflicts between decisions). There are several categories of decisions that deviate from the provisions of the MKRI Act. Several times the issue of the low morality of constitutional judges arises in the form of a decrease in integrity

when exercising the authority to review laws and dispute local election results. The decline in integrity by the behaviour of constitutional judges who are not following the morality/ethics of the 1945 Constitution (cases of bribery in carrying out their authority).[19] With these conditions, of course, if the faucet for the CC is opened, it is clear that the MKRI will be flooded with requests for the CC. Based on the experience of the German BVerfG, it has to settle thousands of CC per year.

If the problem is not a solution, then cases will pile up, and there will be a tendency to abuse power, or at least the burden of cases that the Justices of the MKRI will resolve becomes very large. The number of Constitutional Justices, which is only nine justices, will not be able to examine and adjudicate cases of the CC in the thousands per year (based on the experience of the German BVerfG) because of the number of cases from the current authority has placed a heavy burden on settlement (especially general election and regional election disputes).

c. The dynamics of the MKRI's Practices on Constitutional Complaint

Since 2005, the CC has given rise to constitutional debates among constitutional justices and the public. The first case is the decision of the MKRI No. 001/PUU-IV/2006 regarding the review of Law Number 32 of 2004 concerning Regional Government, in particular Article 106, which states that the verdict of the High Court in settlement of local election disputes is final and binding proposed by the pair of Regent and Deputy Regent of Depok Drs. H. Badrul Kamal, MM and KH. Syihabuddin Ahmad, BA. However, in reality, the provisions of the Article were annulled by the Supreme Court's decision No. 01 PK/Pilkada/2005 concerning the Pilkada Depok, which defeated the applicant in the election dispute. In this case, there is a legal framework for an academic debate: "whether the judicial review under the authority of the MKRI includes the authority for CC".

In this decision, 7 Constitutional Justices concluded that the MKRI did not have the authority to make the CC, but there were dissenting opinions from 2 Constitutional Justices: Justice Maruarar Siahaan and Justice Sudarsono. Justice Maruarar Siahaan said that the MKRI could accept the CC with reasons or a legal basis based on the principles contained in the 1945 Constitution. Article 24C of the 1945 Constitution and Article 10 paragraph (1) of Act No.24 of 2003, as well as Article 51 paragraph (1.a). the MKRI Act No. 24/2003 regulates the authority to review laws, including the implementation of laws. Based on the

[19] Tanto Lailam, "Membangun Constitutional Morality Hakim Konstitusi di Indonesia", *Jurnal Penelitian Hukum De Jure* Volume 20, Nomor 4, (2020): 527.

constitutional interpretation authority, such as in the German BVerfG and the Korean Constitutional Court, the MKRI can examine cases of CC. Another dissenting opinion argument from Justice Sudarsono states that Article 51 paragraph (1.a) of the MKRI Act No. 24/2003 states, "The applicant is a party who considers his constitutional rights and authorities to be violated and harmed by law: individual Indonesian citizens. This provision is the basis of fundamental rights, so the constitutional loss here must be interpreted comprehensively as a result of the enactment of the law and the result of court decisions that harm the individual's constitutional rights.

Decision No.013-022/PUU-IV/2006 regarding the review of the Article of insulting the President as regulated in the Criminal Code, in this decision also mentions in detail that the Constitutional Court does not have the authority to make the CC and constitutional questions/tests concrete legal norms (constitutional question). In the decision, the MKRI said that until now, it does not have the authority to make Constitutional Complaint, which occurs when a citizen is seriously harmed by the actions or omissions of a state official or public official while all available ordinary legal remedies are no longer available (exhausted).

Since the emergence of academic debates in the practice of judicial review, which began with differing opinions by Constitutional Court Justice Maruarar Siahaan and Constitutional Justice Soedarsono, many cases characterized by CC through the entrance to judicial review have emerged. More decisions were declared unacceptable on the grounds that the MKRI did not have CC authority, for example, the review of the Indonesian People Consultative Assembly (*Majelis Permusyawaratan Rakyat*) Decree regarding the revocation of state government power from President Soekarno. In addition, the case submitted by the death row convict Amrozi et al. in the examination of Law No. 2/PNPS/1964 on Procedures for the Implementation of the Death Penalty. However, there are also cases characterized by CC which were granted by the MKRI, for example, the case of judicial review of Law No. 10 of 2008 proposed by the Hanura Party, which essentially questioned the misinterpretation of the law in determining the acquisition of legislative seats. Another case is the criminalization case of KPK leaders Bibit S. Riyanto and Chandra M. Hamzah, who later proposed a review of Law No. 30 of 2002 concerning the Corruption Eradication Commission. The essence of the CC filed is the alleged irregularity in the application of the law by investigators.

In 2019, the public's desire for the MKRI to have CC authority was carried out by submitting a review of Law Number 48 of 2009 concerning Judicial Power as stated in the Indonesian Constitutional Court Decision No. 28/PUU-XVII/2019. In this case, the applicant submits an application to the MKRI to interpret that the CC is part of its judicial review authority. By the Court, the application was rejected. The reason for the refusal is that in constitutional theory, it is true that CC is part of examining the constitutionality of the law, but in this context, it is different from the authority of the MKRI, so the court cannot add the authority of CC through the interpretation of the 1945 Constitution.

d. Opportunities for Institutionalizing Constitutional Complaint

Institutionally and the substance of the dispute, the legal policies of the CC can be given to the MKRI as the only state institution whose authority is very close to its characteristics of it, especially in the practice of other countries where CC are an inseparable part of examining the constitutionality of laws. The MKRI also ex officio has the authority to interpret norms and implement the norms of the 1945 Constitution. Of course, it was motivated by the fact that the main dispute that must be resolved in the CC is the wrong interpretation of the 1945 Constitution and laws by state institutions that cause constitutional harm. The institutionalization of the CC for the MKRI can be carried out by several methods/steps, both at the level of constitutional amendments, interpretation of the constitution - conventions, and amendments to the MKRI Act.

These three methods/steps see the urgency of the function of the state institution. It is the same with the function of the CC, which was missed/not included at the time of the establishment of the MKRI. At the same time, see whether this CC is urgent in structuring the functions of state institutions because it will not only give authority to the MKRI but will also change the constitutional structure, relations between state institutions within the framework of the checks and balances system, as well as the basis for protecting fundamental rights which could be the case that it would «explode in large numbers», and the MKRIs internal problems. However, as a commitment to a democratic and rule of law system by upholding fundamental rights, the CC is needed to strengthen guarantees for the protection of fundamental rights and create good governance.

There are several methods/steps for institutionalizing the CC in Indonesia. This method/step is not the most appropriate choice but adapts to the needs of legal policies:

a. Amendments to the 1945 Constitution.

Amendment to the 1945 Constitution is an ideal way to create fair legal certainty and, at the same time, strengthen institutions for the protection of *fundamental* rights in the constitutional system in Indonesia. It can be done by amending Article 24C of the 1945 Constitution. This amendment must be comprehensive because, in addition to adding the authority for CC, it must also create a one-roof review design of legislation. Amendments to the 1945 Constitution will strengthen the institution of CC and strengthen the position of the Constitutional Court as the administrator of the rule of law, democracy, and the protector of the constitutional rights of citizens. Of course, it is difficult to predict when this institutionalization. There is no time certainty, considering that the Indonesian state administration system does not yet fully require a comprehensive constitutional amendment. Moreover, the amendment to the 1945 Constitution in 1999-2002 was a historical event/reform due to the fall of the New Order authoritarianism system (revolutionary legal process). This institutionalization path is more appropriate to be the last alternative and future constitutional law politics in the institutionalization of the CC.

b. Constitutional Interpretation

The institutionalization by interpreting the 1945 Constitution, where the Constitutional Court can make an interpretation by building a legal construction where constitutional complaint becomes part of the judicial review system. The interpretation of the law/constitution is a necessary thing, considering that the law/ constitution in the past and the recap of the content and the ideas behind it are not under the development of the state administration. Constructing the ideas and ideals of the formulator, of course, requires an interpretation adapted to current conditions. The interpretation of the constitution is the spirit of understanding every meaning in the text of the constitution, "reading the constitution is interpreting the constitution".

The Constitutional Court as "the guardian of the constitution and the sole interpreting of the constitution" not only uses historical interpretation/ original intent if it turns out that the interpretation hinders the application of constitutionalism values. At the same time, this interpretation causes the provisions of the 1945 Constitution not to work as a system and/or contradicts the main idea underlying the constitution itself as a whole related to the objectives to be realized. It is impossible to use historical interpretation/ original intent to institutionalize the constitutional complaint. The choice of

interpretation can use a "non-originalist" interpretation which can be the basis for institutionalizing constitutional complaint. The freedom to choose and use the interpretation method must be in the corridor and carried out based on the philosophy of Pancasila and the 1945 Constitution. The judge must be able to reflect on each article text related to the facts of the incident found in the trial into the judge's decision which contains the aura of Pancasila values and the aura of the fundamental values of the 1945 Constitution.

c. Constitutional Court Act Revision

The difficult step to take is the revision of the MKRI Act. The revision in question is to give CC authority as well as procedural law. This choice requires the political will of legislators, whose commitment has yet to be seen. For several times the amendments to the MKRI Act have never touched the authority of CC. The amendments to the MKRI Act have only strengthened additional functions, for example, the settlement of regional election disputes. However, this revision in the future does not rule out the possibility of submitting a constitutional complaint

According to the author, the most appropriate steps in institutionalizing CC are: *first*, the MKRI can interpret the constitution, emphasizing that CC is an inseparable part of constitutional review. This interpretation can use non-original intent or contextual interpretation that CC is urgent as an effort to protect constitutional rights, which so far cannot be resolved in the MKRI. This non-original intent interpretation is also often carried out, for example, in adding authority in testing government regulations in lieu of law (peraturan pemerintah pengganti undang-undang perppu), election dispute resolution, and other issues. The entrance to this institutionalization must go through a judicial review of the law/constitutional review in the case of a CC.

Thus, cases of CC can be resolved by the MKRI, although later, it will be very limited to certain cases (related to judicial review of the constitutionality of laws). This is because it is difficult to make other issues of dispute, for example, reviewing the MPR decree or reviewing regional regulations that are contrary to the 1945 Constitution, as part of a CC. This step will make it easier for the MKRI to make CC part of constitutional conventions, which grow and develop in the practice of state administration. Conventions can occur through repeated practices that grow into habits that state administrators must obey. In addition, the CC can also be applied at the regional level by carrying out the construction of administrative

courts at the provincial level but focusing on the CC against regional institutions and implementing provincial and city district regulations.

Second, After the non-original intent interpretation as the basis for institutionalizing the CC, the next step is to strengthen that interpretation by revising the MKRI Act, which emphasizes the authority of CC in the MKRI Act. *Third*, the last step at the time of the amendment to the 1945 Constitution was by making changes to Article 24C by affirming CC as the authority of the MKRI. In addition to the method/steps of institutionalizing CC mentioned above, it is necessary to change the structure and number of Justices of the MKRI. When the faucet for it is open, it will certainly have an impact on thousands of requests for it in one year (based on the experience of the German BVerfG, the CC cases are more than 5000 per year. If the problem is not resolved, there will be an accumulation of cases, and the burden borne by judges will be even heavier. The step is to increase the number of Justices of the MKRI, which then divides them into two rooms (1 room/senate 8/9 judges), eight constitutional judges per senate as in the German BVerfG structure.

However, suppose the alternative of adding constitutional justices is not possible. In that case, the other way is to reinforce the attitude following the "decision of the MKRI who is not authorized in resolving disputes over the election results" by refusing to examine and try and submitting to lawmakers to immediately implement the MKRI's decision by forming special court for election disputes.

e. Objects of Constitutional Complaint Dispute

One of the crucial points regarding the granting of new functions/authorities to the judiciary is the object of a dispute as a form of absolute competence of the judiciary. The object of CC is different in each country, which of course, follows the political needs of the law and the prevailing judicial power system. Substantive a CC are part of a constitutional review because the issue is the constitutionality of the law/constitutionality of the act of interpreting the constitutional and statutory material. In practice in German BVerfG, CC also has the competence to assess the constitutionality of laws with the dimension of individual complaints. Even the German BVerfG has the authority to review laws in abstract judicial review, specific judicial review, and CC authority.

In contrast to Germany, Indonesia must have a CC model whose object is separate from the constitutional review/ judicial review. A constitutional review is a judicial review of the law's constitutionality, which is reviewed using constitutional

measuring instruments. The constitutionality review of this law uses a formal examination and a material examination (including a special test of materiality/ testing the validity of the law). Formal testing is related to the process of forming laws, or the authority to assess whether a legal product (law) has complied with all the procedures for its formation as determined/regulated in the constitution and applicable laws and regulations. Therefore, a law can be annulled formally if it violates the procedure for establishing law as regulated in the Constitution (Article 20 of the 1945 Constitution). Meanwhile, material testing is more related to its contents (e.g., articles, paragraphs, phrases) which are considered to be contrary to the Constitution. In most cases, the formal examination only cancels the article/paragraph/phrase. But a law as a whole can also be annulled if its content contradicts the Constitution. On the other hand, material testing with special characteristics (applicability testing) has also developed where the performance of the substance/material has been developed, for example, testing of laws that have no validity against the 1945 Constitution, such as reviewing of Law No.45 of 1999.

The CC must be made by the Indonesian legal system and be able to place competence in one of the fields. It must be clearly distinguished which is the subject of the dispute over the judicial review and which is the subject of the constitutional complaint. In practice in Germany, the CC has different objects from examining the constitutionality of laws (abstract and concrete norms). For example, in the latest case of the German BVerfG decision No. 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 on March 24, 2021, in that decision the first senate German BVerfG stated that the provisions of the Federal Climate Change Act (Bundes Klimaschutzgesetz – KSG) set national climate targets and the annual emission amounts allowed up to 2030 are not compatible with basic rights to the extent that they do not have adequate specifications for further emission reductions from 2031 onwards. In practice, the CC has more dimensions of individual rights (individual complaints).

The object of this dispute is interesting to examine in-depth because a CC is one of the legal mechanisms designed to guarantee the protection of citizens' rights against every action of the state/government/state administrators in all branches of power. The action in question is an action that violates the constitutional rights of citizens or does not take action/fulfilment of legal actions that harm the constitutional rights of citizens.. According to I Dewa Gede Palguna, the object of the CC is the act (or omission) of public institutions/government bodies, court

decisions, and laws.[20] For example, cases concerning the implementation of the law, deviations from the law enforcement process, and general court decisions that are considered to violate the Constitution. [21]

Mahfud MD's view that the object of dispute in the CC includes three things:[22] (1) violation of constitutional rights for which there is no legal instrument for litigation or no longer available legal settlement (judicial); (2) the existence of laws and regulations under laws that directly violate the contents of the Constitution, but do not clearly violate higher laws and regulations under the 1945 Constitution; (3) court decisions that violate constitutional rights even though they already have permanent legal force and cannot be challenged again with legal remedies to a higher court.

In the Indonesian legal system, it is necessary to reconstruct the understanding of the elements inherent in CC so that they do not get confused in understanding the object of its dispute by a constitutional review/judicial review. At least some elements are attached to the constitutional complaint:

a. The existence of a guarantee of the constitutional rights of citizens as regulated in the Constitution. This guarantee is the basis for demanding the protection and fulfilment of individual constitutional rights. The existence of a CC is a dispute resolution medium to demand the protection/fulfilment of these constitutional rights.
b. Individual citizens submit the CC to the state/judicial institution with this function, the MKRI, that has special competence.
c. There is an element of constitutional loss. This constitutional loss is caused by the interpretation/application of laws and regulations that are wrong/contrary to the Constitution or not carrying out/implementing court decisions/government administrative decisions (wanprestasi). It is what distinguishes it from examining the constitutionality of the law. The main constitutional review of the dispute is the existence of a legal product in the form of a "law" that is problematic, according to the applicant. It is also different from the review of legislation under the law by the Supreme Court. In addition, the CC differs from an application within the scope of the state administrative

[20] I Dewa Gede Palguna, Constitutional Complaint and the Protection of Citizens the Constitutional Rights", *Constitutional Review* Volume 3 No.1 (2017): 1-24

[21] Hamdan Zoelva, "Constitutional Question dan Perlindungan Hak-Hak Konstitusional," *Jurnal Media Hukum* 19, no. 12 (2012): 152-165

[22] Achmad Edi Subiyanto, "Perlindungan Hak Konstitusional Melalui Pengaduan Konstitusional," *Jurnal Konstitusi* 8, no. 5 (2011): 708–731.

court whose main dispute is in the legal product of a decision or action (negative and positive). In the context of the Indonesian legal system, the CC is not focused on legal products (abstract rules and decisions or norms) but on the implementation/interpretation that is less precise/wrong by state institutions in carrying out their constitutional obligations. Because it could be that the Constitution is right and the interpretation is wrong, it could be that the regulations and decisions are correct. However, the implementation is wrong, including the act of not doing something different from the goal/ not issuing a decision (default) in carrying out the constitutional obligations that should be the responsibility of the state institution (in case).

d. Constitutional losses in CC must be concrete and specific (special), not abstract or still within the framework of being harmed by state officials. It is different from a constitutional review because, in a constitutional review, the construction of a constitutional loss can also be an event that will occur (based on legal reasoning) and can be disputed.
e. There is a causal relationship (*causal verband*) between the losses suffered by the citizen applicant and the actions taken by the government (including not taking action in the context of default). This is different from the constitutional review. The constitutional review is more focused on the cause and effect of the constitutional loss with the enactment of the law. It is also different from administrative justice. In the context of administrative justice law, the focus of the problem lies in default decisions and actions on administrative applications (e.g., permit applications that are intentionally not processed).
f. In the structure of judicial power in Indonesia, ideally, the CC does not aim to cancel legal products (regulations and decisions) but instead demands the fulfilment of constitutional rights by state administrators so that the decisions will have an impact on the fulfilment of constitutional rights. Because cancelling a law product has become the object of a constitutional review dispute, an administrative decision is an object of dispute in the state administrative court.

As an independent authority, the CC must have its object of dispute (absolute competencies):

a. Court decisions that violate constitutional rights.
   Court decisions that violate constitutional rights, Court decisions that are not followed up, and are not implemented by the government (especially in administrative justice cases). Concerning this object, it must be limited whether

the object of the CC can be made after a decision that has permanent legal force or after a review because the review can be carried out many times. Including the decision of the Supreme Court can be the object of dispute in this CC, so assess whether the decision violates constitutional rights or not. In the practice of the German Constitutional Court, the object of disputed CC that is mostly resolved is Court decisions, such as federal Courts (civil and criminal Courts), administrative Courts, tax Courts, state Constitutional Court decisions, and others.[23] In this context, judges in these Courts are subject to and comply with the Constitutional Court's decision.[24]

b. Interpretation of the Constitution/ Law.
State administrators whose authority by the Constitution, but in the exercise of their authority, misinterpret the contents of the Constitution, or state administrators who do not implement the contents of the Constitution, which result in violating constitutional rights. The wrong interpretation by state institutions of the law, the law is right, but the implementation of the law is wrong. Improper application of laws detrimental to constitutional rights does not need to annul the law. It is enough that the application of the law is reported to the MKRI to assess whether it violates constitutional rights. For example, in the case of interpreting the term of office of the replacement KPK leadership, it concerns the option to replace the remaining term of office of the replaced leader or remain in office for five years. This case is included in the judicial review with the decision of MKRI No.5/PUU-IX/2011. This misinterpretation is a form of the disputed object of constitutional complaint, which is enough to question the wrong interpretation.

The interpretation of the Constitution by the state administrators results in a violation of the constitutional rights of citizens. Examples of legal events fall into the category of CC, such as the misuse of national insight tests (test material). The national insight test in the selection of state civil servants can be justified based on the Constitutional Court's decision No.70/PUU-VXII/2019, which states that Article 69B paragraph 1 and Article 69C of the Corruption Eradication Commission Law are constitutional, as long as they do not harm

[23] Tanto Lailam, "Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional (The Role of the German Federal Constitutional Court in Protecting of Fundamental Rights Based on the Constitutional, *Jurnal Hak Asasi Manusia* Volume 13, Nomor 1, (April 2022): 65–80.

[24] Armin Von Bogdandy and Davide Paris, "Building Judicial Authority: A Comparison between the Italian Constitutional Court and the German Federal Constitutional Court," *Revista Derecho del Estado*, no. 43 (2019): 5–24.

constitutional rights. Likewise, the Supreme Court Decision 2 P/HUM/2020 also states that the national insight test for state civil servants is constitutional. In this case, making test materials that deviate from the law deviates from the values of Pancasila and the Constitution, which is not true. Currently, there is a problem with the material of national insight in the process of re-selection of state civil servants at the Corruption Eradication Commission. Several questions have dimensions that are contrary to constitutional values, such as the question «choose Pancasila or the Qur'an» this question aims to clash religious beliefs and commitment to the state, even though religious belief is a fundamental right that must be protected. This question is irrelevant and tends to violate fundamental rights in religion.

c. Conflicts between laws. The conflict between laws is a scourge in itself, and until now, there is no proper dispute resolution mechanism. This conflict of law material needs to be resolved constitutionally. Until now, there is rarely a mechanism for reviewing it. In the future, if there are individual citizens whose constitutional rights are impaired due to a conflict of contents in the law, it is sufficient to file the CC.

d. The MPR decree violates constitutional rights. MPR stipulations for which, until now, no legal settlement mechanism can be included in the category of Constitutional Complaint.

e. Legislation under the law whose material directly refers to the 1945 Constitution. Many regulations were born and refer directly to the Constitution, especially in local government administration. Regional regulations can also be one of the constitutional authorities in the framework of CC. This was done because the Supreme Court was unable to test Regional Regulations against the Constitution. In addition, for example, the cancellation of the Natural Resources Law based on violations of the Constitution contained in Government Regulations. Such as the MKRI's assessment of 6 products of implementing regulations for the Natural Resources Law: Government Regulation Number 16 of 2005 concerning Development of Drinking Water Supply Systems, Government Regulation Number 20 of 2006 concerning Irrigation, Government Regulation Number 42 of 2008 concerning Management of Water Resources, Government Regulation Number 43 of 2006 2008 concerning Ground Water, Government Regulation Number 38 of 2011 concerning Rivers, Government Regulation Number 73 of 2013 concerning Swamps, these six Government

Regulations did not meet the basic principles of limiting the management of water resources as mandated by the 1945 Constitution.[25]

f. Actions by state administrators that violate the Constitution. This authority is a solution to the actions of state officials who often do not follow up on Court decisions or delay/not implement/not issue decisions (default) on the fulfilment of citizens' constitutional rights. State administrators in question are all state administrators both at the central and regional levels, both those established by the 1945 Constitution, laws and regulations under it.

g. Other disputes that arise in the future include limitations on the definition of CC.

Some opinion that the CC can only be filed if all legal remedies have been exhausted or the last legal remedy that can be used by citizens whose constitutional rights have been violated. The requirement for filing a CC is that the case is final and binding (no other legal remedies can be taken) as in the practice of the German BVerfG. In the context of Indonesia, the author disagrees with at least several things: (1) it is necessary to look at the case submitted if the case submitted is a case of violation of constitutional rights caused by a court decision that has permanent legal force, then this opinion can be justified. However, ideally, the CC can be made as the first and last request if the case is in the form of an application/ lawsuit for the negligence of a state administrator and a case of incorrectly applying the Constitution and laws, for example, review of the MPR Decree. (2) efforts to make complaints must be equal to examining the constitutionality of laws in the judicial review system, but the objects of dispute are distinguished, and this decision is final and binding.

C. CONCLUSION

Constitutional Complaint as the basis for the protection and fulfilment of constitutional rights with the rationale include: the Constitutional Complaint is the embodiment of the values of constitutionalism in a rule of law of Pancasila (Negara Hukum Pancasila), as a complement to checks and balances that ensure that state institutions work under the constitution and a system of mutual checks and balances, the basis for the protection of *fundamental* rights, as well as the aim of realizing good governance. From the perspective of legal policies, there are several steps/methods of

[25] Tanto Lailam, "Penataan Kelembagaan Pengujian Norma Hukum di Indonesia", *Jurnal Konstitusi,* Volume 15, Nomor 1, (Maret 2018): 226

institutionalization, amendments to the 1945 Constitution, non-original interpretations, or revisions to the MKRI Act. Some objects of dispute: court decisions, actions of state administrators in interpreting the constitution, actions of state administrators in interpreting/implementing content in law, violations of constitutional rights due to conflicts between laws, the MPR decree, problems with laws and regulations -invitations under laws whose material directly refers to the Constitution, actions by state officials who delay or do not implement/do not issue decisions (defaults) on the constitutional rights of citizens.

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The Absence of Constitutional Court's Decision Follow Up: Is it A Loss?

Ketiadaan Pengaturan Tindak Lanjut Putusan Mahkamah Konstitusi: Sebuah Kerugian?

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Naskah diterima: 15-04-2021 revisi: 31-03-2022 disetujui: 02-08-2022

Abstrak

Dibentuknya Mahkamah Konstitusi (MK) sebagai pengawal konstitusi yang melindungi hak asasi warga negara memberikan harapan pelaksanaan prinsip *rule of law*. MK diharapkan mengambil peran yang besar dalam penegakan dan perlindungan hak konstitusi warga negara dalam setiap putusannya. Harapan ini menjadi kosong tanpa makna sejak Pasal 59 ayat (2) UU No. 8/2011 dinyatakan tidak mempunyai kekuatan hukum mengikat oleh Putusan MK Nomor 49/PUU-IX/2011. Bagaimana dampak penghapusan Pasal 59 ayat (2) yang telah dirumuskan dalam UU No. 7/2020? Jenis penelitian ini merupakan penelitian hukum normatif dengan menggunakan jenis data sekunder yang dikumpulkan dengan teknik pengumpulan data studi kepustakaan. Penghapusan Pasal 59 ayat (2) dalam UU No. 7/2020 berdampak terhadap penyimpangan prinsip *rule of law* dan produk legislasi yang disahkan setelah UU No. 7/2020 berlaku tidak mampu menjamin hak konstitusi warga negara.

Kata Kunci: Asas Pembentukan Perundang-Undangan; *Policy-Making Process; Rule of Law.*

Abstract

The establishment of the Constitutional Court as the guardian of constitution that protects the citizens' human rights gives hope for the implementation of "rule of law" principle. The Constitutional Court is expected to play a big role in upholding and protecting the citizens' constitutional rights through each of its decisions. This expectation has become meaningless since Article 59 (2) of Law Number 8/2011 is declared to have no binding legal force by the Constitutional Court Decision Number 49/PUU-IX/2011. What are the impacts of the elimination of Article 59 (2) which has been formulated in Law Number 7/2020? This research is socio legal studies that uses secondary data that are collected through literature study. The elimination of Article 59 (2) in Law Number 7/2020 shows violation of the rule of law principles. In addition, the legislation products which are legitimized based on Law Number 7/2020 are unable to guarantee the citizens' constitutional rights.

Keywords: *The Principles of Law-Making; Policy-Making Process; Rule of Law.*

A. INTRODUCTION

1. Background

Indonesia is a constitutional state or a state that is ruled by law according to Article 1 (3) of the Third Amendment of 1945 Constitution of the Republic Indonesia (UUD NRI 1945). Unfortunately, there is no law that gives any specific definition for "the constitutional state" nor "the rule of law". To fill the void of "the state that is ruled by law" definition, many experts gave some concepts of the rule of law[1] which one of them could be quoted as *"The idea of rule by law is that law is a means by which the state operates in the conduct of its affairs; that whatever a government does, it should do through laws".*[2] Based on that definition, I conclude that the rule of law is a principle which law is used as an instrument for a state to run administrative functions that all the government actions in a broad sense must be done based on laws.

Constitutional state could also be interpreted as a state that put constitutions as the bases for the power of a state and all forms of the state administration must be done through laws.[3] Soemarwi explained that laws has a function to limit absolute power of a state that is ruled by law and to guarantee its citizens' human rights.[4] Philipus

1 Nadirsyah Hosen, "Emergency powers and the rule of law in Indonesia," *Faculty of Business and Law University of Wologong Research Online,* (Januari 2010): 274-276.

2 Nadrisyah Hosen, "Emergency powers," 274.

3 T. Lindsey, *Indonesia: Devaluing Asian Values, Rewriting rule of Law, in R. Peerenboom (ed.), Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S*, (London: Routledge Curzon, 2004), 49.

4 Vera Soemarwi, "Melegitimasi Tindakan Negara Berdasarkan Kekuasaan (*Machstaat*): Kajian Putusan Nomor 95/B/2017/PT.TUN.Jkt," *Jurnal Yudisial* Volume 12, Issue 2, (2019): 141, DOI: 10.29123/jy.v12i2.294.

M. Hadjon defined the purpose of the rule of law is basically to give protection to the citizens against the government actions based on the human rights principle and the rule of law.[5] As a constitutional state, Indonesia has adhered to the principle of the supremacy of the constitution[6] since the enactment of the Third Amendment of 1945 Constitution of the Republic Indonesia. The consequence of having the constitutional supremacy is the appearance of the Constitutional Court as the Guardian of Constitution which controls the executive and legislative powers and guarantees the protection of the citizens' constitutional rights in every law enacted.

Hans Kelsen said that the guardian of constitution in its original sense referred to a body whose function was to protect the constitution from violations.[7] Violations of constitution that occurred were facts that were against the constitution, either through an act or omission. Besides that, being the guardian of constitution also meant to protect constitution from threats and dangers (Robert A. Licht, 1993).[8] Carl Schmitt said that the civil, criminal, and administrative courts were not "guardians of the constitution", but they were often mistakenly considered as courts that had the right to conduct judicial review.[9] Carl Schmitt stated that the guardian of constitution was a court that reviewed ordinary law for substantive conformity with the provisions of constitutional state and rejected the application of law if it was against the constitution. Based on these definitions, it can be concluded that the guardian of constitution is a role of judiciary that is devoted to conducting a judicial review of law in order to protect the law from any violation.

The constitution mandated the Constitutional Court to be the guardian of constitution that protected the citizens' human rights (The Guardian of Human Rights).[10] This mandate was realized in the form of authorization for conducting judicial review through the Constitutional Court in order to ensure the protection and guarantee the

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5 Nurul Qamar, et al., *Negara Hukum atau Negara Kekuasaan (Rechtsstaat or Machtstaat)*, (Makassar: CV. Social Politic Genius, 2018), 45-46.

6 Constitutional Supremacy is a principle which all state institutions and all branches of state power have an equal position before the constitution in a relationship of "checks and balances" between one another. Before the principle of the supremacy of the constitution, Indonesia adhered to the principle of the supremacy of the parliament where the posititon of the People's Consultative Assembly of the Republic of Indonesia as the highest state institution. Martitah, *Sistem Pengujian Konstitusional (Constitutional Review) di Indonesia*, (Jakarta: Konpress, 2015), i.

7 *"...guardian of the constitution in its original sense, this term refers to an organ whose function it is to protect the constitution against violation."* Lars Vinx, *The Guardian of The Constitution: Hans Kelsen and Carl Schmitt on The Limits of Constitutional Law*, (English: Cambridge University Press, 2015), 174.

8 Robert A. Licht, *Is The Supreme Court The Guardian of The Constitution?,* (USA: The AEI Press, 1993), 47.

9 Lars Vinx, *The Guardian of The Constitution*, 79.

10 Desi Hanara, "Mainstreaming Human Rights in The Asian Judiciary," *Constitutional Review,* Volume 4, Issue 1, (May 2018): 77.

citizens' constitutional rights.[11] Besides that, the possibility of laws to be contradicted with the 1945 Constitution of the Republic Indonesia could be prevented.

In the New Order era, the law-making process in Indonesia was less democratic and tended to be repressive.[12] This was caused by the political configurations that tended to be authoritarian, which gave the executives more dominant roles and made the legal products became conservative or orthodox. [13] Conservative or othodox legislation products reflected the political vision of authorities hence in their law-making process the executives did not involve community participations and aspirations seriously, even if they did it was usually just a mere formality.[14] Those legal products were used as instruments for implementing government's visions and wills that could oppress citizens' and make their human rights not fulfilled.

In the post-reform era, political life gradually changed to be more democratic, it was because the legislation products in the New Order era had been reformed. In the current period, the spirit of reformation is corrupted by the oligarchs. Legislation products that are passed in the current period tend to be contradicted with the spirit of democracy and the law-making process tends to be authoritarian rather than responsive.[15] This can be seen from the lack of public participation in the law-making process.

The law-making method during the New Order era seems to be re-applied in the formulation of Law Number 7 of 2020 onthe Third Amendment of Law Number 24 of 2003 on the Constitutional Court (hereinafter it will be referred as Law 7/2020 or Constitutional Court Law). This can be seen from the lack of transparency and public participation in the law-making process. In this Third Amendment of the Constitutional Court Law, the Article 59 Paragraph (2) has been removed which causes legal uncertainty.

Before the amendment, Article 59 Paragraph (2) in Law Number 8 of 2011 on Amendment of Law Number 24 of 2003 on the Constitutional Court was written "If it is necessary to amend a law that has been reviewed, the People's Representative Council of the Republic of Indonesia (DPR RI) or the President will immediately take action on the Constitutional Court decision as referred to in Paragraph (1) in

[11] Simon Butt, "Traditional Land Rights Before The Indonesian Constitutional Court," *LEAD Journal*, Volume 10, Issue 1, (2014): 60.
[12] Heriyono Tardjono, "Reorientasi Politik Hukum Pembentukan Undang-Undang di Indonesia," *Jurnal Renaissance*, Volume 1, Issue 02, (Agustus 2016): 66.
[13] Solikhul Hadi, "Pengaruh Konfigurasi Politik Pemerintah Terhadap Produk Hukum," *ADDIN*, Volume 9, Issue 2, (Agustus 2015): 383.
[14] Solikhul Hadi, "Pengaruh Konfigurasi Politik," 386.
[15] Heriyono Tardjono, "Reorientasi Politik Hukum," 73.

accordance with the laws and regulations." Article 59 Paragraph (2) does not have binding legal force through Constitutional Court Decision Number 49/PUU-IX/2011.

The Constitutional Judges considered the content of Article 59 Paragraph (2) was ambiguous and created legal uncertainty because the legislators (People's Representative Council and President) would take action on the Constitutional Court Decision only if it was necessary and that was contradicted with Article 24C Paragraph (1) of 1945 Constitution of the Republic Indonesia which stated that the Constitutional Court Decision is final and binding (*erga omnes*) and self-executing. Besides that, Constitutional Court Judges considered there was some errors in Article 59 Paragraph (2), 'The People's Representative Council or the President'. It was because the People's Representative Council or the President should not stand alone in the law-making process as regulated in Article 20 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia that firmly used the phrase 'the People's Representative Council and the President'.

2. Research Questions

the issue that will be discussed in this paper is "how is the impact of the revocation of Article 59 Paragraph (2) in Law Number 7 of 2020 in order to guarantee the protection of the Indonesian citizens' constitutional rights in the law-making process?"

3. Methods

This research is socio legal studies, which uses a social science methodological approach in a broad sense[16]. The research is conducted by reviewing secondary data and library materials[17]. This research uses primary legal materials such as laws on the Constitutional Court and the Constitutional Court Decision Number 49/PUU-IX/2011, and secondary legal materials such as legal literature, academic research, and publication. The technique that is used to collect the data is library research and interviews.

This research also uses statute approach.[18] The statute approach includes the 1945 Constitution of the Republic of Indonesia and the Law Number 7 of 2020 onon the Third Amendment of Law Number 24 of 2003 on the Constitutional Court. The

[16] Sulistyowati Irianto, Memperkenalkan Kajian Socio-Legal dan Implikasi Metodologisnya, dalam bukunya Adrian W. Bedner, Sulistowati Irianto, Jan Michiel Otto, Theresia Dyah Wirastri, *Kajian Socio-Legal, Seri Unsur-Unsur Penyusun Bangunan Negara Hukum* (Bali: Pustaka Larasan, 2012), 3.

[17] Soerjono Soekanto dan Sri Mamudji, Penelitian Hukum Normatif: Suatu Tinjauan Singkat, (Jakarta: Raja Grafindo Persada, 2012), 12.

[18] Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi,* (Jakarta: Kencana Prenada Media Grup, 2013), 136 dan 158.

research analysis technique is descriptive analysis, which is a technique that aims to provide an analysis of the secondary data that relevant to the research.

B. DISCUSSION

1. The revocation of Article 59 Paragraph (2) causes a threat of legal void that can lead to legal uncertainty

The consequence for Indonesia as a *rechtsstaat* is that "the joints in the life of a nation and a state in Indonesia must be based and implemented in accordance with laws".[19] It also applies in making the laws or policies that must be in accordance with laws.

The history of Indonesia shows that absolute power needs to come to an end. The way to end it is by creating a constitutional system and the rule of law concept *(rechtsstaat)*.[20] When a law regulate a matter, it will give a legal certainty for the implementation for that matter. The legal certainty aspect has an important role in the rule of law. Legal certainty contains three principles, such as (1) legal guarantees are carried out in accordance with the norms or laws; (2) parties who have entitled according to law can obtain their rights; and (3) court decisions can be enforced.[21] On the other hand, if there is no law or norm that regulate a matter, it will give a definite impact, viz. a void of law.

A void of law (*recht vacuum* or *wet vacuum*) is a condition where the rules in a state are considered inadequate and unable to guarantee legal certainty for its citizens.[22] The void of law is the impact of the law which is left behind from the society development that always dynamic and fast.[23] It occurs because the legislature, both legislative and executive, are slow or take so much time in making and promulgating a law. In addition, the inconsistency of legislators to fill a legal void and guarantee legal certainty can be seen from many implementing regulations that are mandated by a higher law do not exist or have never been made.[24]

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19 Heriyono Tardjono, "Reorientasi Politik Hukum," 61.

20 Retno Kusniati, "Sejarah Perlindungan Hak Hak Asasi Manusia dalam Kaitannya dengan Konsepsi Negara Hukum," *Jurnal Ilmu Hukum*, Volume 4, Issue 5, (Juli 2011): 79.

21 R. Tony Prayogo, "Penerapan Asas Kepastian Hukum dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 tentang Hak Uji Materiil dan dalam Peraturan Mahkamah Konstitusi Nomor 06/PMK/2005 tentang Pedoman Beracara dalam Pengujian Undang-Undang," *Jurnal Legislasi Indonesia*, Volume 13, Issue 02, (Juni 2016): 194.

22 Hario Mahar Mitendra, "Fenomena dalam Kekosongan Hukum," *Jurnal RechtsVinding Online*, (April 2018): 1.

23 Gamal Abdul Nasir, "Kekosongan Hukum & Percepatan Perkembangan Masyarakat," *Jurnal Hukum Replik*, Volume 5, Issue 2, (September 2017): 177.

24 Hario Mahar Mitendra, "Fenomena dalam Kekosongan Hukum," 2.

To fill a legal void, not only laws that are made by legislature are considered as laws, but also jurisprudence created by judiciary can be considered as a law to fill the emptiness of law *(judge made law)*. Jurisprudence has a very important function to fill the legal void and give legal certainty.[25] Subekti said jurisprudence means court decisions that have permanent legal force and justified by the Supreme Court as a court of cassation, or the Supreme Court decisions itself which are permanent.[26]

Based on the National Legal Development Institution's (BPHN) research in 1995, a judge decision could be called as a jurisprudence if it met the five elements, such as a.) a decision on a legal case that has no law regulates it yet; b.) a decision that has permanent legal force; c.) has repeatedly been used as a legal basis for deciding the same or similar cases; d.) to fulfill a sense of justice; e.) the decision is justified by the Supreme Court.[27] Thus, it can be understood that not all court decisions at the trial court nor high court can be considered as jurisprudence. The Constitutional Court as the guardian of constitution has a very large opportunity to make legal breakthroughs through jurisprudence compared to other courts that are restricted by laws.

The Constitutional Court has obligations to guard constitution and guarantee legal certainty through its every decision. Based on Article 64 of Law Number 24 of 2003 on the Constitutional Court, there are three types of the Constitutional Court decision: (1) the application is unacceptable, in terms of the applicant and/or the application does not meet the requirements; (2) the application is granted, in terms of the application is reasonable; and (3) the application is rejected, in terms of the application is unreasonable.[28] All of those decisions are final as written in Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia jo. Article 10 Paragraph (1) of Law Number 24 of 2003 on the Constitutional Court. Final means the Constitutional Court decision has permanent legal force *(inkracht van gewijsde)* since it was announced and no legal remedies can be taken.[29] In the Elucidation of Article 10 Paragraph (1) of Law 8/2011, it is explained that the final characteristic in a Constitutional Court decision includes binding legal force (final and binding). The binding characteristic in Constitutional Court decision means that the Constitutional

[25] Enrico Simanjuntak, "Peran Yurisprudensi dalam Sistem Hukum di Indonesia," *Jurnal Konstitusi*, Volume 16, Issue 1, (Maret 2019): 100.
[26] Hario Mahar Mitendra, "Fenomena dalam Kekosongan Hukum," 3.
[27] Hario Mahar Mitendra, "Fenomena dalam Kekosongan Hukum," 4.
[28] Achmad Rubaie, "Dilematis Hukum Mahkamah Konstitusi dalam Perspektif Putusan," *AJUDIKASI: Jurnal Ilmu Hukum*, Volume 2, Issue 2, (Desember 2018): 121.
[29] Indonesia, Law of the Constitutional Court, Law Number 24 of 2003, The Elucidation Article 10 Paragraph (1).

Court decision does not solely apply to the applicants or parties in the decision, but it also applies to everyone *(erga omnes)*.

In theory, the Constitutional Court decision which is final and binding means that it automatically applies to the general public and must be followed up, however in practice (law in action) there are still some Constitutional Court decisions that are not implemented accordingly.[30] The fact shows that the Constitutional Court decisions often do not get positive responses from other state institutions. Jaelani in his research said that the Constitutional Court decision will be implemented effectively if there is a deadline for legislators to execute the decision, whereas if there is no deadline, the Constitutional Court decision will not be implemented properly.[31] For example, the Constitutional Court Decision Number 36/PUUX/2012 on request for judicial review of Law Number 22 of 2001 on Oil and Gas. In the decision, there was a command for legislators to make Amendment to Law 22/2011, but in fact the law has not been amended until now. Instead, they made Presidential and Ministerial Regulations.[32]

This kind of act towards the Constitutional Court decision can occur because the Constitutional Court does not have an instrument or executor who is in charge to ensure the execution of its decision.[33] Unlike other judicial institutions or courts, the Constitutional Court does not have an executive unit to force other parties to comply and execute its decision as soon as possible, thus the execution of the Constitutional Court decision highly depends on other parties to execute and take action on the decision that has been made.[34] Besides that, the absence of implementing regulations or laws to force the execution of the Constitutional Court decision is also the main cause why the decision cannot be enforced.

The 1945 Constitution of the Republic of Indonesia and the Constitutional Court Law do not regulate about how the implementation or execution of the Constitutional Court decision should be done. However, in those laws contain statements that the Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final and have legal force since they were announced in the

[30] M. Agus Maulidi, "Menyoal Kekuatan Eksekutorial Putusan Final dan Mengikat Mahkamah Konstitusi," *Jurnal Konstitusi*, Volume 16, Issue 2, (Juni 2019): 342.

[31] Abdul Kadir Jaelani*, et al*., "Executability of The Constitutional Court Decision regarding Grace Period in The Formulation of Legislation," *International Journal of Advanced Science and Technology*, Volume 28, Issue 15, (2019): 816-823.

[32] Abdul Kadir Jaelani, *et al*., "Executability of The Constitutional Court Decision," 818.

[33] Widayati, "Problem Ketidakpatuhan terhadap Putusan Mahkamah Konstitusi tentang Pengujian Undang-Undang," *Jurnal Pembaharuan Hukum*, Volume 4, Issue 1, (April 2017): 10.

[34] Mohammad Agus Maulidi, "Problematika Hukum Implementasi Putusan Final dan Mengikat Mahkamah Konstitusi Perspektif Negara Hukum," *Jurnal Hukum IUS QUIA IUSTUM*, Volume 24, Issue 4, (Oktober 2017): 550.

court open to public also Article 59 Paragraph (2) of Law Number 8 of 2011 on the Constitutional Court which states that the People's Representative Council or the President will take action on the Constitutional Court decision only if it is necessary.[35] But then, Article 59 Paragraph (2) of the Constitutional Court Law is revoked in the Third Amendment of the Constitutional Court Law, namely Law Number 7 of 2020. This surely has an impact on the occurrence of legal void. Regulations or laws that regulate the implementation of the Constitutional Court decision are very important in order to ensure legal certainty.

The implementation of the Constitutional Court decision cannot solely rely on the parties' moral or legal awareness, but it requires rules which can force the execution of the Constitutional Court decision. The regulation which is contained in Article 59 Paragraph (2) of Law 8/2011 is indeed a statement of rule, not an implementing mechanism rules, however the revocation of Article 59 Paragraph (2) weakened the guarantee of legal certainty for implementation of Constitutional Court decision regardless of the juridical characteristics of the decision are final and binding.

The missing rule of the execution of the Constitutional Court decision as regulated in Article 59 Paragraph (2) of the Constitutional Court Law causes a loss of legal guarantee and increases the occurrence of legal void related to the mechanism for implementing the Constitutional Court decision. *Erga omnes* principle cannot be the only foundation for implementing the Constitutional Court decision due to the weak legal protection for that matter. The absence of rule that forces legislators to implement the Constitutional Court decision makes them act slowly to implement the decision or worse they do not do it at all.

2. Weakness of rule of law's enforcement as an impact or error in Article 59 Paragraph (2)

The phrase "if necessary" creates legal uncertainty because it give ambiguous meaning that the People's Representative Council and the President will take action on the Constitutional Court decision only if it is necessary, even though the Constitutional Court decision is final and binding (*erga omnes*) and must be implemented immediately by the People's Representative Council and the President to embody the constitutional system based on the 1945 Constitution of the Republic of Indonesia and as a consequence of understanding the democratic rule of law. The phrase "if necessary" is considered contrary to Article 24C Paragraph (1) of the 1945 Constitution of the

[35] Abdul Kadir Jaelani, *et al.*, "Executability of The Constitutional Court Decision."

Republic of Indonesia which regulates about the characteristic of the Constitutional Court decision that is *erga omnes*.

Besides that, the phrase "the People's Representative Council or the President" is not suitable with Article 20 Paragraph (2) of the 1945 Constitution of the Republic Indonesia which states that every bill or draft law is discussed by the People's Representative Council and the President for mutual consent. The People's Representative Council or the President does not stand alone to discuss a bill, thus it should not use the conjunction "or"[36] which indicates a choice between two subjects, but "and"[37] which indicates the equality of function between two subjects that in this case are the People's Representative Council and the President.

In the Constitutional Court Decision Number 49/PUU-IX/2011 on the judicial review application of Law 8/2011, the applicant stated that the content of Article 59 Paragraph (2) created a blur on legal certainty. The applicant emphasized the ambiguous meaning in Article 59 Paragraph (2) in the phrase "if necessary". It was considered that the People's Representative Council and the President would follow up on the Constitutional Court decisions only if it was necessary. The applicant also stated that the impact of the enactment of Article 59 Paragraph (2) was contrary to Article 28 D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia which guarantees that everyone has the right to get legal certainty. Adhere to the principle of *erga omnes*, the applicant considered that the phrase "if necessary" could be misinterpreted that the mandate for legislators to implement the Constitutional Court decision was not mandatory and the decision that should be follow up or not.

The word "if" is a conjunction to introduce possible or impossible situations or conditions and the results[38], while the word "necessary" means needed in order to achieve a particular result[39], thus the word "if necessary" also means "if needed". The word "if" in a sentence implies there is a condition, not absolute, and not forcing so the use of the word "if" in Article 59 Paragraph (2) causes ambiguous meaning that as if not all the Constitutional Court decisions are final and binding. This is certainly

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[36] Based on Merriam-Webster Dictionary, "or" as a conjuction used as a function word to indicate an alternative, the equivalent or substitutive character of two words or phrases, or approximation or uncertainty: https://www.merriam-webster.com/dictionary/or, accessed on 14 August 2022.

[37] Based on Merriam-Webster Dictionary, "and" as a conjuction used as a function word to indicate connection or addition especially of items within the same class or type: https://www.merriam-webster.com/dictionary/and, accessed on 14 August 2022.

[38] Cambridge University Press, https://dictionary.cambridge.org/grammar/british-grammar/if, accessed on 14 August 2022.

[39] Cambridge University Press, https://dictionary.cambridge.org/dictionary/english/necessary, accessed on 14 August 2022.

contrary to the necessity of implementing the Constitutional Court decision which should be implemented because all of the Constitutional Court decisions are final and binding *(erga omnes)*.

The Constitutional Court judges in their consideration of judicial review of Law 8/2011 stated that the meaning of word "if necessary" was considered contrary to Article 24 C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia which regulates the characteristic of the Constitutional Court decision is final and Article 28 D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia that is related to the applicants' rights of legal certainty. The Constitutional Court considered the application is legally reasonable therefore the application was accepted by stating that Article 59 Paragraph (2) did not have binding legal force through the Constitutional Court Decision Number 49/PUU-IX/2011.

Problems arose when Article 59 Paragraph (2) was revoked in Law Number 7 of 2020 on the Third Amendment of the Constitutional Court Law because there are no more provision that regulates the implementation of the Constitutional Court decision or it could be called as a legal void. It is because the only written provision that regulates the implementation of the Constitutional Court decision is in Article 59 Paragraph (2). The revocation of the article was a rash decision because it could not only make the legal certainty became blur, but also the occurrence of legal void.

The phrase "if necessary" in Article 59 Paragraph (2) also left impression that the Constitutional Court decision did not have the power to order or command the legislators to revise the laws that had been reviewed. If it is deemed necessary, the legislators will finally respond to the result of judicial review that has been in the Constitutional Court decision, otherwise if it is deemed unnecessary the legislators will not take any action on the Constitutional Court decision. Thus, the implementation of the Constitutional Court decision in terms of judicial review became subjective. This subjectivity caused the obscure of legal certainty.

Based on the Constitutional Court's review in its decision number 49/PUU-IX/2011, the phrase "if necessary" was intended to show that not all the Constitutional Court decisions must be follow up by amending the laws. As time goes by, the Constitutional Court decision has various type of decisions besides 3 (three) types of decision, such as the decision that the application is unacceptable, the decision that the application is granted, and the decision that the application is rejected as stated in Article 64 of Law Number 24 of 2003, there are also conditionally constitutional decision, conditionally unconstitutional decision, limited constitutional decision, and judicial

review decision.[40] Any types of the Constitutional Court decisions are final and binding after being announced, even though they have not been implemented yet. This is included for judicial review decision that even though it has not been implemented by the legislators yet, it is still final and have legal force.

The Constitutional Court judges considered that the word "if" in Article 59 Paragraph (2) was deleted or removed, it would cause another misinterpretation that the Constitutional Court decisions would have legal force after there was an implementation from the legislators. Therefore, the Constitutional Court judges concluded that Article 59 Paragraph (2) will still have legal certainty with or without the word "if" or "if necessary".

Then, the reason for revoking the Article 59 Paragraph (2) was that there were a language or phrase errors in writing the article. Language errors could occur not because they had not mastered a language rule system, but because they failed to realize the language rule system that have actually been mastered and wanted to be conveyed.[41] The factor that cause it can be memory limitation or forgetfulness.[42] Language or phrase errors in Article 59 Paragraph (2) can still be corrected considering the errors happened due to the negligence of the legislators in word choice. They were minor errors because there were only a few wrong words, not the entire paragraph. We also need to consider the essence of Article 59 Paragraph (2) as the only written provision that regulates the implementation of the Constitutional Court decision.

The revocation of Article 59 Paragraph (2) caused a legal void *(recht vacuum)* on the rule about implementation of the Constitutional Court judicial review decision. Meanwhile, the consequence for a constitutional state is that every aspect of life as a nation and a state must be based and done in accordance with constitution or law.[43] Law has a function to control or limit power that one has so their actions can be legally and ethically accountable.[44] Thus, if there is a legal basis or a law that regulates about an implementation of an authority, the practice of using the authority must be done in accordance with the law. To prevent arbitrariness by the governments, legal certainty is needed. Legal certainty can be obtained by having legal products

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[40] Mohammad Mahrus Ali, dkk., "Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru," *Jurnal Konstitusi* Volume 12, Issue 3, (September 2015): 633.

[41] Reni Supriani dan Ida Rahmadani Siregar, "Penelitian Analisis Kesalahan Berbahasa," *Jurnal Edukasi Kultura*, Volume 3, Issue 2, (2016): 70.

[42] Reni Supriani dan Ida Rahmadani Siregar, "Penelitian Analisis."

[43] Heriyono Tardjono, "Reorientasi Politik Hukum," 61.

[44] Dachran Busthami, "Kekuasaan Kehakiman Dalam Perspektif Negara Hukum Di Indonesia," *Masalah-Masalah Hukum*, Volume 46, Issue 4, (2017): 336-337.

and legal basis which is clear and concrete that regulates about the implementation of an authority and becomes the standard on how to use the authority.

Judicial review is one of the Constitutional Court's authorities as stated in Article 24 C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Asshiddiqqie, said that the concept of judicial review, particularly about the judicial review by the judiciary, it is necessary to distinguish between judicial review and judicial preview, review means viewing, assessing, or re-examining, which consists of the words "re" and "view", meanwhile preview that consists of the words "pre" and "view" means an activity of viewing the pre-event of something or an object that is already fine in the present.[45]

The Constitutional Court decision does not end when the decision being announced in the court, it requires an implementation.[46] Judicial review decision, whether it is a complete revocation of a law or just amending some parts of a law that is being reviewed, needs to be implemented. For example, if the result of a judicial review decision make the law should be changed in the certain parts, the authorities or the legislator must implement the decision by changing the certain parts that have been determined in the decision.

Judicial review is one of a way to ensure that a law does not contradict with the 1945 Constitution of the Republic of Indonesia, that is why the implementation of the judicial review decision is important because it is a continuation of the judicial review. This means that legal products or law which regulates the implementation of judicial review decision is needed. That is because it will be a legal basis to implement the judicial review decision so there is a legal certainty to implement the Constitutional Court decision especially the judicial review decision. It will also give legal certainty on who has the authorities and obligations as stated in the laws, what kind of authorities and obligations that are given by the laws, and deadline considering the urgency to implement the Constitutional Court decision on judicial review.

The Constitutional Court decision is final and binding once it is announced in the plenary session which is open to public. In fact, it cannot be implemented immediately.[47] Therefore, it is important to have a provision or law that regulates the implementation of the Constitutional Court decision on judicial review because it functions as a standard of legal obligations and coercion for them who authorized by law to implement the decision. Coercion through provisions in a law is an effort to achieve legal certainty. If

[45] Jimly Asshiddiqqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Konstitusi Press, 2006), 4.
[46] Mohammad Agus Maulidi, "Problematika Hukum," 550.
[47] Mohammad Agus Maulidi, "Problematika Hukum," 548.

there is a coercion through legal obligation, it will guarantee the implementation of the Constitutional Court decision, in this case is judicial review decision, then the function of the Constitutional Court as the guardian of constitution and the guardian of human rights can be more optimal. Implementation of Constitutional Court decision that is done efficiently is a main factor to uphold the constitution supremacy, and if we look further, it can be a reflection of the establishment of the rule of law *(rechtsstaat)*.[48]

3. Non-participation in the making of Law Number 7 of 2020

There is a criticism from some people towards the making of Law Number 7 of 2020 because there is no community participation despite of the requirement for transparency (Indrawan, 2017)[49] in the law-making or policy-making process (Rosser, 2004)[50].

As reported by Tribunnews.com on Wednesday, August 26, 2020, the Vice Chairman of Commission III of the People's Representative Council of the Republic of Indonesia stated that the work committee meeting (*Panja*) of the Constitutional Court Bill was declared closed to the public.[51] He also said as reported by Kompas.com on August 27, 2020 that "the committee meeting for Constitutional Court Bill must indeed be closed because we are still discussing the articles in that law, it is to prevent misunderstandings or misperceptions if the articles that have not been approved are published to the public".[52]

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[48] Mohammad Agus Maulidi, "Problematika Hukum," 539.

[49] Transparency is a "Closed door decision making". It can be the enemy both of justice and of sustainability, because it offers opportunities for corruption, collusion and nepotism and prevents the growth of public understanding and potential support for decisions. Mochamad Indrawan, et al., "Mitigating Tensions over Land Conversion in Papua, Indonesia," *Asia & The Pacific Policy Studies*, Volume 4, Issue 1 (January 2017):147-157, https://doi.org/10.1002/app5.157.

[50] *"…**the policy-making process** in Indonesia was dominated by five main sets of actors: the "politico-bureaucrats," the major domestic conglomerates, controllers of mobile capital, major international financial institutions (IFIs) such as the World Bank and the International Monetary Fund; **The politico-bureaucrats**: As Robison has pointed out, New Order officials were not mere bureaucratic functionaries but "politico-bureaucrats" in the sense that they exercised both political and bureaucratic authority* (Robison 1986: 107); ***The mobility of their capital:** meant that they could effectively threaten the Indonesian state with investment strikes unless it adopted policies that they desired. In essence, this meant that there was strong pressure on the state to adopt conservative macroeconomic and fiscal policies, liberalize the trade and investment sectors, deregulate the financial sector, and privatize state enterprises.* Rosser, A., et al., *Indonesia: The politics of inclusion,* (Brighton: IDS, 2004), 3.

[51] Chaerul Umam, "Pembahasan RUU Mahkamah Konstitusi Digelar Tertutup," https://www.tribunnews.com/nasional/2020/08/26/pembahasan-ruu-mahkamah-konstitusi-digelar-tertutup, is downloaded on 20 November 2020.

[52] Haryanti Puspa Sari, "Pembahasan Revisi UU Mahkamah Konstitusi Digelar Tertutup," https://nasional.kompas.com/read/2020/08/27/13541091/pembahasan-revisi-uu-mahkamah-konstitusi-digelar-tertutup, is downloaded on 20 November 2020.

The People's Representative Council's choice to make the committee meeting closed to public caused public disapproval. For example, a community group who were the members of the Save the Constitutional Court Coalition applied judicial review application for formal and material review of Law 7/2020, the Coalition thought that there were six formal problems in the law that one of them was that the discussion of the law-making process was done secretly, without involving the public participation, was rushed, and did not indicate the sense of crisis of the Covid-19 pandemic.[53]

By connecting two dots between the existence of the transparency principle in law-making process and the fact that the discussion of the latest Constitutional Court Bill was held behind closed doors, we can find a point that the transparency in the process of making the Constitutional Court Bill has not been done optimally yet. The work committee meeting which was held closed for public also means that the community participation in the law-making process is considered less significant.

Regarding this, it should be remembered that the Constitutional Court is a state institution that in charge of the judiciary, has an important role in the life of a nation and a state, and has at least five functions as the Constitutional Court viz. *the guardian of the constitution, the final interpreter of the constitution, the protector of human rights, the protector of the citizen's constitutional rights,* and *the protector of democracy.*[54] In making laws or regulations, it is necessary to have some foundations or principles in order to create legal products that have consistency of values.

Maria Farida Indrati in her book "*Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan*" or "Science of Legislation: Types, Functions, and Content Materials" defines the principles of making laws as guidelines or standards in making good laws.[55] In every process of making laws or regulations, the transparency principle is necessary. It needs opinions and aspirations from many people in the community as a form of community involvement in the making laws. It is because the laws that are made will have impacts on people who are lived under the law or ruled by law after all.

Provisions of law-making is stipulated in Law Number 12 of 2011 on the Establishment of Legislations. The transparency principle is one of the principles

[53] Fachri Audhia Hafiez, "Ramai-ramai Gugat Revisi UU MK," https://mediaindonesia.com/politik-dan-hukum/358140/ramai-ramai-gugat-revisi-uu-mk, accessed on 10 Februari 2021.

[54] Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, *Hukum Acara Mahkamah Konstitusi,* Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 10.

[55] Maria Farida Indrati S., *Ilmu Perundang-undangan 1: Jenis, Fungsi, dan Materi Muatan*, (Daerah Istimewa Yogyakarta: PT. Kanisius, 2007), 252.

for making good laws as written in Article 5 letter G of Law 12/2011.[56] Then, it can be concluded that getting involved in a law-making process from the preparation, drafting, and discussion process is community right that should be fulfilled in a law-making process.[57] In addition, Article 96 Paragraph (1) Chapter XI of Law 12/2011, regulates on public rights to give opinions in a law-making process.[58] Then, in Article 96 Paragraph (4) of Law 12/2011, it is stated that to make it easier for the public to give opinions or suggestions, every draft of law or bill must be accessible to the public.[59] The Paragraph (4) contains provision about the application of transparency principle by having community involvement in a law-making process.

Therefore, it can be concluded that to realize the transparency principle in law-making process, it is necessary to have a concrete implementation of transparency in every step of the law-making process. The transparency principle can be implemented concretely by having "Policy Community". It consists of individuals or groups, such as civil society actors, companies, government agencies or officials, and donor organizations, who share social or political goals that are oriented towards a policy goal.[60]

"Policy Community" makes its members, whether in formation of government institutions, companies, or other community groups, are united in a common community. For individuals or organizations that collaborated in "Policy Community", the ones that guide their activities are the common goals which is one of it is about a law-making or law formulation.[61] In conclusion, this "Policy Community" is a way to implement the transparency in the law-making process. "Policy Community" becomes a means or forum for people in the community to try expressing their opinions and their aspirations in a law-making process. Thus, the transparency principle in a law-making process can be realized through "Policy Community" participation.

C. CONCLUSION

In conclusion, Indonesia as a constitutional state should have legal basis in every aspect of s as a nation and a state, including the implementation of the Constitutional

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[56] Indonesia, Law of the Establishment of Legislations, Law Number 12 of 2011, LN.2011/No. 82, TLN No. 5234, Article 5 letter g.
[57] Indonesia, Law Number 12 of 2011, The Elucidation Article 5 letter g.
[58] Indonesia, Law Number 12 of 2011, Article 96 Paragraph (4).
[59] Indonesia, Law Number 12 of 2011.
[60] Jacqueline VEL et al., "Law-Making as a Strategy for Change: Indonesia's New Village Law," *Asian Journal of Law and Society*, Volume 4, Issue 2, (September 2017): 9.(halaman 9 yang dimaksudkan ada di halaman berapa diantara halaman 447-471)
[61] Jacqueline VEL, *et.al.,* "Law-Making as a Strategy for Change."

Court decision. The revocation of Article 59 Paragraph (2) of Law 8/2011 caused the loss of the only provision that regulated about the implementation of the Constitutional Court's judicial review decision by the legislators and led to a legal void and legal uncertainty. The revocation of the article was done because there were phrase errors which made the article was in contrary to the 1945 Constitution of the Republic of Indonesia as a supreme law in Indonesia. However, the phrase errors should not be the reason to revoke the whole paragraph and create a legal void especially about the implementation of the Constitutional Court's judicial review decision. Even though the Constitutional Court decision is final and binding (*erga omnes*), the implementation of the decision still needs a provision to guarantee the implementation and to prevent legal void that has been there since the Constitutional Court was established. The phrase errors in the Article 59 Paragraph (2) should be corrected or revised so it will not contradict with the supreme law. This is because the substance of Article 49 of Paragraph (2) is very important to prevent legal void and problem of the implementation of the Constitutional Court decision which has been considered less effective. In addition, the establishment of Law Number 7 of 2020 should fulfill the transparency aspect as stipulated in Article 5 of Law Number 12/2011. The transparency provides a chance for public to give opinions in a law-making process. One of many ways for implementing the transparency principle in law-making process is through "Policy Community" which can be means for community to give their aspirations for legislations that fulfill a sense of justice.

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Biodata

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Supianto, merupakan dosen tetap di Fakultas Hukum Universitas Islam Jember. Selain sebagai dosen dalam bidang Hukum keperdataan, penulis juga melakukan berbagai riset yang telah dipublikasikan baik di media massa maupun berbagai jurnal ilmiah. Beberapa karya dalam bentuk buku yang sudah diterbitkan antara lain Hukum Jaminan Fidusia, Prinsip Publisitas Pada Jaminan Fidusia (Garudhawaca, 2015) dan buku berjudul Panduan Menuju Profesi Advokat (UIJ Kyai Mojo, 2016).

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Mia Hadiati, menempuh Pendidikan Sarjana Hukum di FH Universitas Padjadjaran dan lulus tahun 1987, dan melanjutkan jenjang Magister di FH Universitas Tarumanagara dan lulus tahun 2003. Pendidikan non-formal yang ditempuh diantaranya Pendidikan non formal Akademik Sekretaris di St. Angela Bandung 1982 dan Pelatihan Mediasi Universitas Tarumanagara Tahun 2010. Saat ini aktif mengajar sebagai dosen tetap di Fakultas Hukum Universitas Tarumanagara (1986-sekarang); pernah menjabat sebagai Kepala Laboratorium FH Untar (2008-2012); Pudek II FH Untar (2012-2016); Wakil Dekan FH Untar (2016-2021); dan saat ini menjabat sebagai Kaprodi Magister Kenotariatan FH Untar. Aktif sebagai Mediator non-hakim Pengadilan Negeri, dan mengajar di Pelatihan Mediator yang diselenggarakan oleh PPMN- FH UNTAR. Aktif menulis artikel di berbagai mediasi terindeks nasional akreditasi Sinta, dan internasional terindeks scopus, melakukan pengabdian kepada masyarakat, penelitian, dan narasumber pertemuan ilmiah tingkat nasional. Dan aktif di Organisasi Forum Dekan/Pimpinan Pendidikan Tinggi Hukum Swasta.

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Tanto Lailam merupakan Dosen Hukum Tata Negara Universitas Muhammadiyah Yogyakarta. Saat ini sedang menempuh studi Phd di University of Cologne, Germany.

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Nomor: 21/E/KPT/2018, Tanggal 9 Juli 2018
Tentang Hasil Akreditasi Jurnal Ilmiah Periode I Tahun 2018

Nama Jurnal Imiah

Jurnal Konstitusi

E-ISSN: 2548-1657

Penerbit: Sekretariat Jenderal dan Kepaniteraan, Mahkamah

Konstitusi Ditetapkan sebagai Jurnal Ilmiah

TERAKREDITASI PERINGKAT 2

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ISSN 1829-7706