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Relativization of Principle Application: Weak Establishment of Legal Regulations and the Relevance of Decisions of the Constitutional Court

Inna Fauziatal Ngazizah[1),*], Taufik[2)]

[1)]Institut Agama Islam Negeri Kudus
[2)]Sekolah Tinggi Keguruan dan Ilmu Pendidikan Taman Siswa Bima

*Correspondence Author: innafauzi@iainkudus.ac.id

ABSTRACT

In the process of regulatory and law-making that become legislative authorities, no longer pays attention to the principles of law in the process so that it has implications for judicial review application at the Constitutional Court. This research is focused on; 1) The process of implementation and consideration of regulatory and law-making by the legislative. 2) the relativization of law's principle has implications for the results of judicial review by the Constitutional Court. The research methods used are normative research with a statutes approach, and a conceptual approach, and are analyzed using historical, systematic, and hermenetic interpretations to draw results and conclusions. The results showed that in the process of formil and materiil in the process of regulatory and law-making tends to ignore the principle of law as a fundamental aspect. This has an impact on increasing judicial review application by the Constitutional Court, especially on the Fiduciary Guarantee law and the Job copyright Law which affirms the abandonment of law's principles in substance and process so as to affect the enforceability of the law in the community

Keywords: *Relativization; Principle of Law; Regulatory And Law-Making*

ABSTRAK

Penyusunan pembentukan peraturan perundang-undangan yang menjadi kewenangan legislatif, tidak lagi memperhatikan kaidah asas hukum dalam prosesnya sehingga berimplikasi pada permohonan Pengujian Undang-Undang (Judicial Review) di Mahkamah Konstitusi. Penelitian ini difokuskan pada; 1) Proses implementasi dan pertimbangan Pembentukan Peraturan Perundang-Undangan oleh legislative. 2) Relativisasi asas hukum berimplikasi pada hasil Judicial Review oleh Mahkamah Konstitusi. Metode penelitian yang digunakan adalah penelitian normatif dengan pendekatan perundang-undangan, dan pendekatan konseptual, dan di analisa menggunakan interpretasi historis, sistematis, dan hermenetik untuk menarik hasil dan kesimpulan. Hasil penelitian menunjukkan bahwa dalam proses formil maupun materiil dalam pembentukan peraturan perundang-undangan legislatif cenderung mengabaikan asas hukum sebagai aspek fundamental. Hal ini berdampak pada peningkatan permohonan Judicial Review di Mahkamah Konstitusi, khususnya putusan tentang Undang-Undang Jaminan Fidusia dan Undang-Undang Cipta Kerja yang menegaskan pengabaian asas hukum dalam substansi dan prosesnya sehingga mempengaruhi keberlakukan undang-undang tersebut di masyarakat..

Kata Kunci: Relativisasi; Asas Hukum; Pembentukan Peraturan Perundang-Undangan

INTRODUCTION

There has been controversy in the preparation of laws and regulations in terms of the application of legal principles. Relativization of principles is a tendency in drafting laws and regulations that no longer pay attention to rules and norms in their drafting(Widayati 2020). The formation of laws in accordance with the mandate of the 1945 Constitution is the duty and authority of the legislature (Musana 2020). This is the basis for data issued by the mkri.id which shows that there have been fluctuations in law testing cases decided by the Constitutional Court, namely from 2020 to 2021, namely as many as 260 recapitulation of law testing cases, with details of 188 decisions (S. M. K. R. Indonesia 2022). So far, the author has observed the form of the process of drafting laws and regulations in a hurry as stated by Muhammad Nur Sholikin (Hidayat 2021) will have an impact on the results *Judicial Review* by the Constitutional Court based on the annulment and improvement of the formal and material aspects of a Law.

So far, the study of the relativization of the application of principles in the formation of laws and regulations has a tendency to three discussions. *First* Concepts and ideas for using the *omnibus law* in the formation of laws and regulations both at the central and regional levels (Supriyadi and Purnamasari 2021);(Aryani 2021). *Second* the use of legal principles in the preparation of laws and regulations which emphasizes the Implementation of Legal Principles in the Formation of Participatory and Fair Laws and Regulations,(Widayati 2020), and discuss the principle of openness in the Law *Omnibus Law*(Nurjaman 2021). *Third*. The formation of laws and regulations as a means of national legal development where the concept of forming laws and regulations must be based on *Basic norm* (Basic Norms) and Human Rights(Febriansyah 2016), and emphasizing on constitutional planning to form good laws and regulations(Noviawati 2018). Of these three tendencies, there have not been many studies that focus on considerations *legislative* in applying legal principles in the formation of laws and regulations.

The purpose of this paper is to complement the shortcomings of previous studies that did not pay attention to the diversity of knowledge from philosophical aspects to important matters in the application of legal principles. In particular, this paper shows that the tendency in the process of drafting laws is in a hurry and spreading legal norms. In line with that, two questions are answered in this paper: 1) What is the process of implementation and consideration of the formation of laws and regulations? 2) How does the principle of relativization have implications for the results *of judicial review* by the Constitutional Court? Second, the definition of the problem is the main study in this article.

The article on "controversy" in the relativization of the application of principles; the weak formation of laws and regulations and the relevance of the Constitutional Court's decision is based on an argument that the process of drafting laws does not pay attention to the applicable drafting rules, and tends to ignore the application of principles, so that in the end it has an antinomial impact on the law itself, and has a broad and strategic impact on society. And the formation of legislative laws and regulations tends not to position legal principles as the heart of written rules. In the process, the legislature denied the existence of fundamental legal principles that had an impact on the application for *Judicial Review* at the Constitutional Court.

METHOD

This research is focused on the Relativization of the Application of Principles; Weak Formation of Laws and Regulations and the Relevance of Constitutional Court Decisions**.** The author is interested in researching this problem because the application of principles is important in the process of forming laws and regulations which is a political agreement between the people and the legislature which if in the process or the substance does not heed the principles will have implications for the application for *Judicial Review* at the Constitutional Court.

The type of research used is normative research using a *statutes approach* and a conceptual approach. Furthermore, in this paper, the type of data used is secondary data in the form of laws and regulations that are studied more deeply along with the decision of the Constitutional Court on Law Testing which is further analyzed to obtain relevant data. Namely Law Number 11 of 2012 concerning the Establishment of Laws and Regulations, and the Constitutional Court Decision Number 91/PUU-XVIII/2020, namely the decision in the case of Formal Testing of Law Number 11 of 2020 concerning Job Creation, and Number 18/PUU-XVII/2019 in the case of Testing Law Number 42 of 1999 concerning Fiduciary Guarantees.

The data analysis method uses legal interpretation techniques, namely in the form of historical interpretation by paying attention to the history of the formation of the laws and regulations, systematic interpretation by connecting a law and regulation with the entire legal system, and hermenetics or interpretation of the meaning in a text in interpreting the principles contained in the laws and regulations in order to obtain valid research results.

RESULT AND DISCUSSION

Implementation Process and Consideration of the Formation of Laws and Regulations.

Planning

Planning is the initial stage that requires coordination between the DPD and the President in drafting the Bill (Draft Law).(Article 16, Law Number 12 of 2011 concerning the Process of Forming Laws and Regulations) Planning of laws and regulations is carried out through the national legislation program (Prolegnas). Prolegnas itself is a National Legislation Program which is a national program that has the goal of implementing the legal system.(Article 17, Law No. 12 of 2011 concerning the Process of Forming Laws and Regulations). Prolegnas is an instrument for planning programs for the formation of laws that are prepared in a planned, integrated and systematic manner. Planned is the preparation of prolegation that is deliberately carried out in meeting the legal needs of the community. Integrated is an implementation that is always coordinated by involving the president, the DPR and the DPD.(Dalimunthe 2017) Systematic itself is the preparation of national legislation through certain methods and measures.

The preparation of stages in the national legislative program is carried out after the preparation of the Academic Manuscript and Bill.(Article 43 paragraph (3) and paragraph (4), Law Number 12 of 2011 concerning the Process of Forming Laws and Regulations). In certain circumstances, the formulations contained in academic texts and bills are not fully contained in the arrangement of the national legislation.(Fadli 2018) This is due to certain circumstances. It aims to overcome extraordinary circumstances, conflict situations, or natural disasters.(Dalimunthe 2018) In addition, certain other circumstances can take the form of the existence of a bill that is nationally important to be mutually approved. In the case of a bill proposal outside the national legislative program that comes from the government, it must be approved by the president. The permit is in the form of an initiative permit obtained after the initiator submits an application to the president or direct direction from the president in a cabinet meeting.

The next stage of the national legislative program includes several stages, including, the stage of gathering inputs, the stage of filtering inputs, the stage of initial determination, the stage of joint discussion and the stage of determining the national legislation.(Ubbe 2018).

Preparation

The preparation is the stages as stated in Article 98 paragraph (1) of Law Number 12 of 2011. Harmonization aims to harmonize a Draft Law in line with Pancasila, the 1945 Constitution and in accordance with the techniques for drafting laws and regulations.(Munawar 2021) Preparation is a stage that has the purpose of ensuring that the implementation regulations delegated from the law can be compiled so that the implementation can run effectively. The preparation stage consists of three stages, namely, the preparation of academic manuscripts, the preparation of draft laws and harmonization.

The following are the details in the stage of drafting laws and regulations: *First* The bill proposed by the House of Representatives consists of commissions, joint commissions, and members of the House of Representatives (through several steps (Harmonization, rounding and consolidation of the design concept) before being submitted to the president through a letter submitted by the leadership of the House of Representatives. The President then gave a mandate to ministers to discuss the draft with the House of Representatives within 60 days after the letter was received.

Second The bill proposed by the president. (Article 165 paragraph (1) of Law of the Republic of Indonesia Number 17 of 2014 concerning the People's Consultative Assembly, the House of Representatives, the Regional Representative Council). Bills originating from the president are prepared by ministers or non-ministerial government agencies. The preparation process automatically also forms a committee in harmonizing, rounding and consolidating related to the concept of the Bill. The preparation of the draft law is coordinated with the minister in the field of law. If the draft is fully prepared, then the next stage is to submit it to the leadership of the House of Representatives through a letter from the President and ministers who are assigned to discuss it no later than 60 days after the letter is submitted. If in the discussion the president and the House of Representatives discuss the same material, then the bills coming from the president and the House of Representatives are juxtaposed at the same time.

Third The bill originates from the DPD. (Article 166 paragraphs (1) and (2)) Law of the Republic of Indonesia Number 17 of 2014 concerning the People's Consultative Assembly, House of Representatives, Regional Representative Council). The bill is accompanied by an academic manuscript to be submitted to the leadership of the House of Representatives in writing. In this case, the harmonization, rounding and consolidation of the conception of the bill was conveyed in the plenary meeting. The plenary meeting itself is a meeting attended by members and leaders of the House of Representatives. The meeting became the meeting with the highest level in the implementation of the duties and authorities of the participating members of the DPR leadership.

Discussion

The *discussion* was carried out by the DPR, DPD and the President through 2 levels of talks. (Article 168 of Law of the Republic of Indonesia Number 17 of 2014 concerning the People's Consultative Assembly, the House of Representatives, the Regional Representative Council). Level 1 is the discussion stage which is at the commission meeting, the joint commission, the legislative body, the budget body and the special committee (Article 169 letter a of Law of the Republic of Indonesia Number 17 of 2014 concerning the People's Consultative Assembly, the House of Representatives, the Regional Representative Council). While Level 2 is a form of plenary meeting. (Article 171 paragraph (1) of Law of the Republic of Indonesia Number 17 of 2014 concerning the People's Consultative Assembly, the House of Representatives, the Regional Representative Council). At the second level, it begins with the submission of reports from the first level which are the results of discussions by the forum. Next is the statement of approval or rejection from each faction and member is conveyed orally. After the statement of each faction, it was continued with the submission of the final opinion from the president. The end of the discussion stage is the joint approval of the House of Representatives and the President.

Certification

The ratification of the draft law is marked by the president's signature on the text (Article 72 paragraph (1) and Article 73 paragraph (1), (3) and (4) of Law Number 15 concerning amendments to Law Number 12 of 2011 concerning the Legislative Formation Process). The signing of the text was carried out within a period of 30 days after the approval between the president and the House of Representatives at the previous stage. If the president does not sign the draft within a period of time, the text will definitely become a law. The level of verification is generally divided into two, namely, the stage of material verification and formal verification.

Material ratification is carried out by the legislative body after the Bill has been enacted as a Law. The law that has been implemented cannot be changed again either technically or substantively except through a new procedure. The stage of law ratification as a symbol of the completion of the debate on the bill in the legislature.

Formal ratification is carried out to strengthen the legal status of material ratification. The law will be deemed binding when it has been signed by the authorized official. This signature has then been considered formally valid. Definitively, the signing was carried out without any new provisions that followed.

Invitation

The promulgation of the draft law is a form of ratification by the House of Representatives and the President of the new law. The promulgation of laws is placed in the State Book and the Supplement to the State Gazette. This State Book is a form of the stem of the Law. Meanwhile, the Supplement to the State Book is a form of explanation of the Law and its attachments. This stage of promulgation requires a number and signature from the minister of Law and Human Rights (Article 81 of Law Number 15 of 2011 concerning amendments to Law Number 12 of 2011 concerning the Legislative Formation Process). The purpose is as a symbol of certainty that everyone knows the laws that directly or indirectly apply to every Indonesian citizen.

Dissemination

Dissemination aims to inform the public and/or get input from the community or stakeholders. The dissemination stage is carried out by the House of Representatives and the Government through the special DPR fittings in the field of legislation. The dissemination began with information on the national legislation program (Prolegnas), the preparation and discussion of the Draft Law (RUU) to the promulgation of the Law. There are two ways to disseminate the bill, the way the bill comes from the House of Representatives which is carried out by commissions/committees/agencies/special fittings handling the field of legislation. While the second way comes from the presidency which is carried out by the establishment of the flagship.

The process of forming laws basically requires the role of the public(Firdaus 2021). The public in question is community participation. Law number 12 of 2011 concerning the formation of laws and regulations itself provides the right to the public to provide suggestions or inputs, both orally and or in writing, during the process of forming laws and regulations is ongoing (Setia 2020). The delivery of public participation comes from meeting forums with opinions, seminars, workshops, work visits, socialization or discussion (Rosidin 2019). The community in question is the community that has a relationship with the implementation of the draft Law that will be passed in the future (Oktaviana 2020). Community involvement is expected to be able to shape the formation of laws and regulations that are really needed and provide benefits to the community at large (Abdul Kadir Jaelani Lusia Indrastuti, 'Structuring the Legislative System in Supporting National Economic Development, Proceedings of the National Seminar on Transcendent Law', in Proceedings of the National Seminar on Transcendent Law (Doctoral Program in Law, Muhamadiah University of Surakarta, 2019), p. 106, ISBN 978-602-361-217-8). In addition, the involvement of public participation is also able to reduce regulatory obesity which does not provide benefits to society at large (Zubaidy n.d.). Benefits for all Indonesian people to realize prosperity and welfare for all Indonesian people.

Benefits as one of the principles in the law can ideally be seen in the laws that are formed can provide benefits to the community. In addition to the benefits, there are principles of justice and certainty that are the essence of the formation of laws and regulations. However, the reality is that not all laws show the legal principles contained in them. Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining philosophically aims to carry out the government's function in making regulations for the benefit of the community at large without ruling out legal certainty for everyone, especially parties related to mining in Indonesia (Yuking 2021).

On the other hand, the Mineral and Mineral Law is considered to provide significant benefits for mining entrepreneurs only. Article 169A as one of the ones that has received a sharp spotlight is considered to provide convenience for mining business people to extend the contact of work (KK) or the Coal Mining Concession Agreement (PKP2B) without auction (Abani 2021). This can be interpreted that the principle of justice for equality does not exist. In addition, the Mineral and Mineral Law contains problems related to healthy environmental governance(Novita 2020). The amendment to the Law is considered to damage access to roads, agricultural land, unprotected mining pits and eliminate the right of regional autonomy to participate in managing the regional wealth it owns.

The amendment to the Mineral and Mineral Law is considered not to be on the side of the noble ideals of the Indonesian nation. This requires new things in the mining sector that should prioritize regional autonomy. Clear and firm implementing regulations are also needed to improve the right regulations according to the needs of each region. The goal is that environmental losses and damage can be avoided and partiality towards the local community can be fulfilled(Rizal Akbar, Charissa Azha Rasyid 2021). In fact, the Mineral and Mineral Law is also seen as not meeting the formal requirements because it is made behind closed doors, does not carry out public participation, does not involve the Regional Representative Council and Stakeholders(Lelisari 2021).

Relativization of the Principle Has Implications for the Results *of Judicial Review by the Constitutional* Court

The formation of laws and regulations that do not heed legal rules or principles as part of the formal and material process will have implications for *judicial review* at the Constitutional Court (Wongkar 2021). For the record, from 2020 to 2021, there were 260 recapitulation of law testing cases, with details of 188 decisions (S. M. K. R. Indonesia 2022).

For example, the decision in the case of testing the law, namely decision Number 18/PUU-XVII/2019 in the case of Testing Law Number 42 of 1999 concerning Fiduciary Guarantees against the Constitution of the Republic of Indonesia in 1945. The test of the Law requested the Constitutional Court to examine Article 15 (2) and paragraph (3) of the Law on Fiduciary Guarantees because it was considered by the applicant to violate the constitutional right related to the arbitrary actions of the Creditor to forcibly take over the goods that are the object of the fiduciary guarantee.

In the ruling, the Court considers the principles of legal certainty and justice which are fundamental conditions for the enforcement of a norm of law (M. K. R. Indonesia 2019). In the context of Law Number 42 of 1999 concerning Fiduciary Guarantees, the principle is related to the form of legal protection for the parties (creditors and debtors) and the object of the fiduciary guarantee. Furthermore, in the ruling, it is also explained that the Court considers the extent to which the Fiduciary Guarantee Law, especially the norms of the articles related to the fiduciary guarantee agreement, has worked in realizing a form of legal protection, both legal certainty and fairness for the parties bound by a fiduciary agreement and the object of the guarantee in the fiduciary agreement (M. K. R. Indonesia 2019). In the amar, it can be seen that the focus of the Court in giving a decision is the normation of the principles of justice and legal certainty contained in the Law on Fiduciary Guarantees.

Examples of other related rulings *Judicial Review* is Number 91/PUU-XVIII/2020, which is the decision in the case of Formal Testing of Law Number 11 of 2020 concerning Job Creation. The applicant applied to the Court to formally test the formation of the Job Creation Undang_Undang with an omnibus model which is not regulated in the Law on the Formation of Laws and Regulations. In the ruling, the Court considers the participation of the community in the formation of laws. The necessary public participation is the involvement of the public in a serious or meaningful manner (*meaningful participation*) (Damayanti, Syarifuddin, and Haerial 2020). *Meaningful participation* At least meet the requirements: the right to be heard, the right to be considered by the complainant, and the third right to get an explanation or answer to the opinion given. Regarding public participation, the Constitutional Court's ruling states that if the formation of a law with a process and mechanism that actually closes or distances the involvement of community participation to participate in discussing and debating its contents, it can be said that the formation of the law violates the principle of people's sovereignty (*people sovereignty)* (M. K. R. Indonesia 2020).

The principle of people's sovereignty is closely related to the principle of democracy which is based on the people, by the people, for the people (Qoroni and Winarwati 2021). In democracy, power is in the hands of the people as constituents of a country. Justice for the community can be felt if the principle of people's sovereignty can be implemented properly. Justice must be positioned neutrally, meaning that everyone has the same position and treatment without exception (Idayanti, Haryadi, and Widyastuti 2020). Hans Kelsen said that justice in the sense of legality is an application of law that is in accordance with what is stipulated in a legal system consciously (Mukhlishin and Sarip 2020). In another sense, what Kelsen said is that justice is what is called legal positivism and is a subjective justice that tends to be relative. This is based on the fact that the benchmark of justice is the pouring of law in a written regulation and applied comprehensively.

In the concept of law, justice is the equality between rights and obligations, that is, between legal subjects. Meanwhile, obligations are what must be fulfilled to fulfill the rights that exist on other parties. In the concept of law, Obligations are limitations and burdens. Between rights and obligations, if there is harmony and balance, justice can be created. Legal justice is a rule that cannot be changed and applies anywhere and anytime (Putri and Arifin 2019).

In line with this discussion, the Constitutional Court's decision on the Fiduciary Guarantee Law, which emphasizes the principle of justice and the principle of legal certainty, has considered an in-depth study of these two principles in its decision. The Court considers that the unilateral withdrawal of the object of fiduciary guarantee by the Creditor is considered not in accordance with the principle of justice which puts the position of the Creditor unbalanced with the debtor. Although the Creditor holds a fiduciary certificate that has executory power, Mahmakah views that the withdrawal of the object of fiduciary guarantee must be made on the basis of agreement between the two parties or on a voluntary basis.

Regarding the agreement between the two parties, if explored further, the underlying principle is the existence of *good faith* . In line with this, the Constitutional Court's decision also emphasizes that the breach of promise/default that is the basis for the Creditor to withdraw the object of the fiduciary guarantee must be based on the agreement of both parties as well. Which means that the promise injury clause should also be mentioned expressively *verbically* in the fiduciary agreement clearly.

Furthermore, the Constitutional Court's decision regarding the Job Creation Law is also not in line with the principles of justice and certainty as referred to in the discussion of this article. In its preparation, the Job Creation Law was made quickly without listening to and considering the opinions of the public (Nurjaman 2021). There are haste carried out by the legislature

that has an impact on the non-fulfillment of formal aspects. Further, the abandonment of *meaningful participation* In the process of forming laws and regulations, it has an impact on the substance of the law that does not reflect the principle of justice which is correlated with the sovereignty of the people. The position of the people as constituents is ignored in the process so that there is an imbalance between the rights received and the obligations imposed.

Regarding legal certainty, according to Gustave Radburch, the principle of legal certainty is one of the basic values of law. The existence of legal certainty can ensure the clarity of a written legal product so that the law becomes clear and there is no hesitation. The existence of the principle of legal certainty is interpreted as a situation in which the law is certain because there is a concrete force for the law concerned(Julyano and Sulistyawan 2019). This means that the principle of legal certainty is a protection for individuals or society from the arbitrary actions of other parties.

Lord Lloyd in Mirza Satria Buana regarding the principle of legal certainty said "*law seems to require a certain minimum degree of regularity and certainty, for without that it would be impossible to assert that what was operating in a given territory amounted to a legal system*". From this view, it can be seen that the importance of the principle of legal certainty is the enforcement of clear law (*certainty*) to avoid chaotic conditions due to unclear laws.[1] Thus, the implementation of the law is absolutely unaffected by any conditions.

The *author's* limitations in this study are the beginning of a conceptual. Further research is needed that focuses more on the rules of normative principles that are more standardized in the formation of laws and regulations. In addition, further research can be carried out by looking at the consistency of the Constitutional Court's decision in deciding the case of testing the law.

The *fact* that the neglect of the rule of law in the process of forming legislation will result in an application for *Judicial Review* at the Constitutional Court as a form of invalidity of the law in society. This study complements previous research that is limited to the implementation of the use of legal principles in the preparation of laws and regulations, and complements the findings of previous research that discusses the formation of laws and regulations as a means of national legal development.

Furthermore, the results of this study, actions that can be taken by *legislative* In forming laws and regulations is by paying attention to the basic rules of law (Widayati 2020) which applies so that the enforcement of a law in society can be accepted. A law that is actually a political product is essentially for the wider community, if it does not include the principle as part of the formal or material process, it will have an impact on the enactment of the law itself, it makes a new habit in the application for testing the law at the Constitutional Court.

CONCLUSION

It turns out that what has been done by the legislature in implementing the basic rules of law does not apply to the Fiduciary Guarantee Law and the Job Creation Law which tend to ignore the norms of the principle so that it becomes a general habit in the process of forming laws and regulations, resulting from the weak function of legislation which leads to *Judicial Review* by the Constitutional Court. The limitations of research and the agenda of follow-up research are expected to be able to support the process of forming laws that pay more attention to the principles in the content of the substance of the article and in the process.

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