Overlapping Rules of Testing Legislation Regulations at the Supreme Court and the Constitutional Court from the Principle of Legal

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ABSTRACT

The author made this paper with the title "Overlapping Decisions on Judicial Review of Legislation in the Supreme Court and the Constitutional Court Judging from the Principle of Legal Certainty" because as a state of law and regulation of constitutional rights guarantees (Article 28 D paragraph 1 The 1945 Constitution of the Republic of Indonesia) which in this case is legal certainty is often violated by the enactment of laws and regulations. Therefore, as an effort to guarantee that regulations do not conflict with each other, a mechanism for reviewing laws and regulations is arranged. The Constitutional Court is tasked with reviewing laws against the Constitution, while the Supreme Court decided to review the legislation under the constitution against the constitution. However, the problem was that this last resort actually resulted in legal uncertainty again occurring when the Supreme Court and Constitutional Court's decisions regarding the judicial review laws and regulations contradict each other. Therefore, the writing of this thesis will focus on finding the source of the overlapping problem and the possible solutions to solve the problem.

Keywords: *Overlap, Testing Legislation, Legal Certainty, Supreme Court, Constitutional Court*

1. INTRODUCTION

Indonesia as a country law is the ideal of reform which is realized through the 3rd amendment to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Of all the principles of the rule of law in Indonesia, there are principles that must be implemented, namely the protection of human rights. It is undeniable that the consequence of the rule of law itself is the presence of various laws and regulations in Indonesia, from the highest to the lowest. According to Article 7 of Law Number 12 of 2011 concerning the Establishment of Legislations as amended by Law Number 15 of 2019, there is a hierarchy of laws and regulations. The explanation shows the many types of legislation in Indonesia. As of November 14, 2019, the number of laws and regulations in Indonesia reached 42,996 regulations. One form of protection of human rights and the constitutional rights of citizens is the presence of a judicial institution to conduct tests on existing legislation products so that violations of human rights due to the enactment of a statutory regulation can be avoided. Likewise, Machmud Aziz stated that the purpose of testing the laws and regulations is to provide efforts to replace, improve, and justify a statutory material so that it does not conflict with the basic law/constitution or other applicable laws and regulations. are under the law so as not to conflict with other laws and the constitution so that a statutory

regulation can create legal certainty, justice and legal protection for the wider community. Based on this explanation, it can be concluded that the existence of a mechanism for testing laws and regulations in Indonesia is not only in the context of protecting but also in order to achieve a harmony between laws and regulations both horizontally and vertically. When there is a conflict against a statutory regulation with other laws and regulations, Indonesian positive law has provided a solution, namely the existence of amechanism*judicial review*. Which in principle is the right to examine the judiciary against a statutory regulation. In Indonesia alone legislation testing conducted by two of the judiciary, namely the constitutional court and the supreme court. This is regulated in Article 9 of Law Number 12 of 2011 concerning the Establishment of Legislation as amended by Law Number 15 of 2019 with the following provisions:

a. If a law is alleged to be in conflict with the 1945 Constitution of the Republic of Indonesia, the review is carried out by the constitutional court.
b. Meanwhile, if the legislation under the law contradicts a law, the examination is carried out by the Supreme Court.[9]

However, the purpose of implementing regulations that do not conflict with each other actually occurs as a result of the Supreme Court Decisions and the Constitutional Court Decisions which sometimes overlap. For example, it can be seen in the Constitutional Court Decision Number 30/PUU-XVI/2018 with the Supreme Court Decision Number 65 P/HUM/2018. The case for review by the Constitutional Court was filed by Muhammad Hafidz who stated that Article 182 of the Election Law was detrimental to his constitutional rights because there was no legal certainty over the phrase "Other work" in the provisions of the legislation. On this basis, the applicant requested that the Constitutional Court decide and stated that "Other jobs" must be expanded to mean as administrators/functionaries of political parties. The Constitutional Court also granted the request so that further Candidates for Members of the Regional Representatives Council may not come from political party administrators. Based on this decision, the General Elections Commission issued KPU Regulation number 26 of 2018 concerning the Second Amendment to the General Election Commission Regulation Number 14 of 2018 concerning the Nomination of Individual Election Contestants for Members of the Regional Representatives Council which in its provisions prohibits prospective DPD members from being from political party administrators at the central level, at the provincial level as well as political party administrators at the district/city level. However, on 24 September 2018, Dr Oesman Sapta submitted an application to the Supreme Court to review the KPU Regulation. However, the Supreme Court based on Decision Number 65 /P/HUM/2018 canceled the provisions prohibiting candidates for DPD members from concurrently serving as administrators of political parties to the applicant. As a result, there is a legal dualism between the Supreme Court Decision and the Constitutional Court Decision.

Based on the background that the author has described, the author draws a problem, namely:

1. How is the overlap in the testing of laws and regulations in Indonesia in terms of the principle of legal certainty?
2. How to guarantee the testing of laws and regulations with legal certainty?

2. ANALYSIS

2.1 Causes of Overlapping Decisions of the Supreme Court and the Constitutional Court

It is important in finding a solution to resolve a legal problem to first find out the cause, so that later on we can find the best solution. Regarding the causes of the overlapping decisions of the Supreme Court and the Constitutional Court above, the authors did not find the right literacy sources to conclude as the main cause of the overlapping decisions of the Supreme Court and the Constitutional Court regarding the testing of laws and regulations. Therefore, the author will use a lot of expert opinions and analyze them to find the most logical causes that cause the overlapping of the Supreme Court and Constitutional Court decisions. In general, the opinions expressed regarding the alleged causes of overlapping decisions of the Supreme Court and the Constitutional Court are:

i. Ego centric and different views that occur in the MK and MA
ii. ii. The law that serves as the touchstone in the examination of legislation under the Supreme Court is unclear. Also, the test is not based on an analytical and comprehensive legal opinion
iii. The examination at the Supreme Court is closed and the applicant's competitiveness against existing legal issues.

The first is related to the ego centricity between the Supreme Court and the Constitutional Court as the cause of the overlap that was conveyed by Mr. Viktor. According to him, the conflicting decisions of the Constitutional Court and the Supreme Court in the case of reviewing laws and regulations occurred because of different opinions between the judges of the Constitutional Court and the Supreme Court justices who examined the case in

the same time frame. According to him, through Decision No. 93 / PUU-XV / 2017, has declared Article 55 of the Law on the Constitutional Court against the 1945 Constitution and does not have binding legal force throughout the camp does not mean: *"Testing the legislation under legislation being conducted Supreme Court postponed the examination if the enactment The law that is the basis for reviewing the regulation is in the process of reviewing the Constitutional Court until there is a decision by the Constitutional Court."* The purpose of the provisions of the norm is that the Supreme Court Judge who will examine, hear and decide on the petition for the Judicial Material Rights Case can adjust to the Constitutional Court's Decision, especially related to the legal considerations in the Decision, when the Article that is used as a test stone in the Supreme Court is being tested for constitutionality. in the Constitutional Court. However, in practice, the Supreme Court Judges who decide cases have different legal views/considerations, so that in some cases there are different legal views/considerations in the Supreme Court Decision and the Constitutional Court Decision on the same issue.

Against the above opinion, the author agrees that there are different decisions between the Constitutional Court and the Supreme Court due to different legal views. For example, in testing the legislation which is the second example in writing this thesis. The reason used by the Constitutional Court is that the DPD is an individual representative of the people, while the DPR is a representative of a political party. In addition, in the legal considerations made by the Constitutional Court in point 3.17, it was stated that "considering that for the 2019 election; because the registration process for candidates for DPD members has begun, in the event that there are prospective candidates for members of DPD who happen to be administrators of a political party affected by this decision, the KPU may provide an opportunity for the person concerned to remain as a candidate for DPD member as long as he has declared his resignation from the management of the political party. as evidenced by a written statement of legal value regarding the said resignation. Henceforth, members of the DPD since the 2019 election and subsequent elections who have been the administrators of political parties are contrary to the 1945 Constitution." With these considerations in mind, we can see that the Constitutional Court actually wanted the decision to be implemented since 2019. However, the Supreme Court, through Supreme Court Decision Number 65 P/HUM/2018, canceled this provision. In the second case, differences of opinion or ego centricity are even more visible. The Constitutional Court's decision does not legalize double counting which has implications for the acquisition of Legislative seats, while in Supreme Court Decision No. 15 P/HUM/2009 legalizes Double counting to occur.

The second reason that was presented and suspected to be the cause of the overlap was that the law that served as a touchstone in the judicial review in the Supreme Court was not clear and the examination was not based on the analytical and comprehensive legal opinion presented by Mr. I Dewa Gede Paguna. According to him, the Constitutional Court interprets the Constitution and from that it arrives at the conclusion whether or not the law requested for review is contrary to the 1945 Constitution. Meanwhile, the Supreme Court uses the law as a basis for testing the legislation under the Act. the law for which testing is requested. That is, the Supreme Court uses the law as a starting point to interpret whether the statutory regulations under the law petitioned for review are contrary or not to the law. The question is which laws can be used by the Supreme Court to examine the laws and regulations under the law that is being petitioned for review? Is it the whole law or just the relevant laws? For example, if the question is a Regional Regulation, can all laws be used as a basis for testing or only laws relating to regional government? The absence of a common view on this matter, among other things, will be the cause of differences in decisions between the Constitutional Court and the Supreme Court. The resolution of this matter is important because Article 55 of the Constitutional Court Law states, "The examination of legislation under the law that is being carried out by the Supreme Court must be stopped if the law that is the basis for reviewing the regulation is in the process of reviewing the Constitutional Court. until there is a decision of the Constitutional Court." Thus, if the questions above are not answered, there will be uncertainty (and this can trigger a conflict between the Supreme Court's decision and the Constitutional Court) because it is not clear which law is meant by the "law that is the basis for testing" . In addition, when compared to the practice in various countries, there are also many (even more) countries that practice the mechanism for reviewing laws and regulations only by examining files, not through *oral hearings* as is practiced at the Constitutional Court (RI). Although the trials only examined files, the decisions were highly respected for their analytical and comprehensive legal considerations so that they truly met the principle of *judicial accountability*.

For the second reason above, according to the author, it is not appropriate to be the basis for the conflicting decisions of the Supreme Court and the Constitutional Court. Because in fact we can find that both the Supreme Court's Decision and the Constitutional Court's Decision regarding the examination of existing laws and regulations have always used a comprehensive legal basis. In addition, the Supreme Court's decision regarding the review of

statutory regulations under the Supreme Court has a legal / legal test stone only based on what was requested by the applicant. With this analysis, it can be concluded that the reason for "the law that is the touchstone in the examination of legislation under the Supreme Court is unclear. Also, the examination is not based on an analytical and comprehensive legal opinion, it is not appropriate to be used as the cause of the overlapping of the testing of laws and regulations at the constitutional court and the supreme court.

The second last reason that was presented and suspected to be the cause of the overlap was "The examination in the Supreme Court is closed and the competitiveness of the applicant against existing legal problems". This reason was stated by Prof. Ni'matul Huda and Mrs. Titi Anggraini. According to Prof. Ni'matul Huda, "There should be no conflicting judgments on the judicial review in the Constitutional Court and the Supreme Court, because the authority for the examination is clearly different. When the 1945 Constitution gives the Constitutional Court the authority to examine the Law against the Constitution, the Supreme Court must follow the Constitutional Court's decision because the Supreme Court's authority only examines legislation under the Act. That is, if there is already a decision related to the Law in the Constitutional Court, then the Supreme Court when examining the rules under the Law, only needs to adjust to the decision of the Court. If a review of a piece of legislation under the Act is first submitted to the Supreme Court and then the Supreme Court decides that it is not against the law, it means that the decision is used. However, if later someone who proposes a related law to the Constitutional Court is tested against the Constitution it turns out to be contradictory, then the Supreme Court's decision will automatically become invalid. For example: if the KPU regulations are tested against the Election Law, they are not contradictory, then PKPU is valid. But if later someone proposes to review the Election Law with the Constitution and it is decided that it is contrary to the Constitution, then automatically PKPU cannot be applied because the reference Law is already contrary to the Constitution. Remember, if what is being tested is directly related to the PKPU referral. However, if it is in a different article, it does not invalidate the Supreme Court's decision. The trial for testing laws and regulations should be open, so that there is a transparent assessment from the public on how the testing is carried out. The model in the Constitutional Court is ideal. In the Constitutional Court sometimes there are long debates between experts so that it enriches the knowledge of judges and can be an enlightenment for the wider community and also universities. In my opinion, the influence of the trial model on the decision is there. The closed trial of the JT in the Supreme Court is no longer appropriate because what is being tested is also the norm, not the implementation of the norm. The judicial review is ideally under one roof under the Constitutional Court, so that there is consistency in the decision on the judicial review. So that the Supreme Court concentrates on solving concrete cases, the Court examines norms." Meanwhile, according to Ms. Bivitri, "because the Supreme Court and the Constitutional Court are judicial institutions, they must be actively waiting for incoming cases. With such a principle, the supreme court must be presented with a case by someone who certainly does not want to lose. In general, conflicting Supreme Court decisions and Constitutional Court decisions occur in general election cases due to the mentality of not wanting to lose. There are still indications that the Supreme Court is still more flexible in giving its decisions, both politically and corruptly. For example: the OSO case, the Constitutional Court's decision on the election that was brought to the Administrative Court, the presidential determination case that was brought to the Supreme Court for judicial review. The reason is that parties who want to win the election justify any means, and the Supreme Court is considered a loophole to do so because it is suspected of having weak integrity. Differences in the trial procedure for testing laws and regulations greatly affect decision making which has the potential to result in conflict. This happens because the closed litigation process in the Supreme Court results in the litigants being unable to optimally present facts or legal documents. This is different from the constitutional court, which has dialogue at its trial, so that it can complete certain things that can be presented in order to further explore the facts of the case being tried. The difference in testing laws and regulations in the Supreme Court is only limited to applications being tested, while in the Constitutional Court there is extracting facts outside the petition, such as bringing in witnesses, experts and related parties. There was even an FGD on judicial review at the Supreme Court whose conclusion was wrong that the Supreme Court only examined judex juris (not jurex facti). The argument that the Supreme Court examines judex juris only makes them not optimal in exploring a case for a judicial review which results in insufficient evidence so that the legal arguments for the Supreme Court's decision are minimal. The argument for the PUU test decision in the Supreme Court is only based on the submitted file. The non-disclosure resulted in the accountability of the judges being also affected. In the Constitutional Court, because the trial is open to the public, the judges of the Constitutional Court have a sense of responsibility towards external phenomena. So that when making a decision, the Constitutional Court judge will look at all aspects. But if in MA the system is closed so that there is no interest in the judge to carry out accountability by finding facts outside the application. The reason for the trial of

testing laws and regulations under the law in the Supreme Court which only has 14 days is not a reason for the Supreme Court to conduct a closed trial. This is because the main factor rather than the openness of a trial is the management of the trial. In comparison, the types of PHPU cases in the Constitutional Court also have time constraints."

For this last reason, I quite agree that the examination of judicial review should be carried out openly because it is through the constitutional court that there is dialogue at the hearing, so that it can complete certain things that can be presented in order to further explore the facts of the case being tried. The difference in testing laws and regulations in the Supreme Court is only limited to applications being tested, while in the Constitutional Court there is extracting facts outside the petition, such as bringing in witnesses, experts and related parties. With such a mechanism, in deciding a judicial case, one can hear the reasons of other judicial institutions that have decided on the same case so that they can make the same decision. As a result, of course, we will not find overlapping decisions of the Supreme Court and the Constitutional Court. In addition, for reasons of competition efforts in the Supreme Court and the Constitutional Court regarding the decision on the examination of election regulations, it is also seen in the case examples attached to this paper. Where the applicants in overlapping cases, the majority are candidates for election participants who feel aggrieved due to the decision to review regulations by the previous institution. With this, the reason "The examination in the Supreme Court is closed and the competitiveness of the applicant against the existing legal problems" can be concluded as one of the causes of overlapping the testing of laws and regulations on the Constitutional Court and the Supreme Court.

2.2 Overlapping Solutions for Supreme Court and Constitutional Court Decisions

Against overlapping reasons, the authors resolve it by using the results of interviews with sources and comparisons of countries that also have a system of testing laws and regulations. The solutions that will try to be used consist of:

i. Transparency towards the review of legislation under the law at the Supreme Court
ii. The one-stop review of laws and regulations by the Constitutional Court The

The first solution is the transparency of the open examination of laws and regulations in the Supreme Court. Although only some of the informants stated that the closing of the Supreme Court trial in examining the legislation under the law was the reason for the overlapping of the Supreme Court and the Constitutional Court's decisions, on the other hand all parties agreed that making the examination in the Supreme Court transparent is not a bad thing. However, because in the previous sub-chapter we have classified the closed review of laws and regulations in the Supreme Court as a reason for the overlapping decisions of the Supreme Court and the Constitutional Court, then there must be a solution to this problem. Therefore, the only solution to this problem is to change the existing mechanism related to the process of reviewing laws and regulations in the Supreme Court. Namely changing the system which was originally a filing to an examination consisting of examination of the applicant, the respondent (lawmakers, witnesses, experts, related parties (MK, if a similar case has been tried in the Constitutional Court). the formation of a new law that regulates the examination of statutory regulations under the law against the law

The final solution is the unification of the examination of all laws and regulations under the constitutional court. Specifically this solution, all sources and countries that are used as comparisons lead to testing The judicial review in the United States is a decentralized model, where all courts at every level are given the authority to conduct a judicial review, namely A key characteristic of this model is that the jurisdiction to engage in constitutional interpretation is not limited to a single court. I t can be exercised by many courts, state, and federal, and is seen as inherent to and an ordinary incident of the more general process of case adjudication. Judicial review in the United States cannot be submitted directly to the United States Supreme Court unless there is a concrete case first. Therefore, the object of judicial review in the United States is not limited to laws, but also includes various regulations, administrative acts, and state laws, even state constitutions. All of these can be tested if they are considered contrary to the Federal Constitution (US Constitution) as The Supreme Law of the Land. Whereas in Germany the Federal Constitutional Court decides independently of certain disputes on the compatibility of federal or state law with the Constitution or on the compatibility of state law with federal law. Only the Federal Government, state governments or at least one third of the Bundestag Members have access to apply for the process. This means in particular the opposition in the Bundestag, provided it has at least one third of the seats, has recourse to the Federal Constitutional Court if it considers the law adopted by a majority of MPs unconstitutional. The subject of the test is not only Federal or state laws in other words, not only laws adopted by parliament, but also government regulations or by-laws of independent public bodies.

The explanation above shows that the system used in testing laws and regulations in other countries is a one-roof mechanism. Likewise, the solutions put forward by Mr. I Dewa Gede Palguna,

Mrs. Nimatul Huda, Mrs. Bivitri Susanti and Mr. Viktor Santoto Tandiasa that the review of laws and regulations under one roof by the constitutional court is the most ideal solution to resolve the problem of overlapping decisions. The Supreme Court and the Constitutional Court in testing the laws and regulations. To implement this solution, it is necessary to amend the constitution to transfer the authority to review statutory regulations under laws that previously existed at the Supreme Court to become a constitutional court. In addition, it is also necessary to revise the law on the constitutional court so that this authority can be concreted.

3. CONCLUSION

From these reasons, there are several ways that can be identified to resolve these problems of Contradictopn. The method consists of the easiest way, the medium way and the most difficult way. The easiest way is to grow political will in the Supreme Court and the Constitutional Court to make mutually sustainable decisions so that the community is not harmed by decisions that are out of sync with each other. The moderate method is to revise the law on new judicial powers or make a new law that regulates the review of legislation against laws under the law by the Supreme Court so that it can be carried out openly so that it can be implemented by listening to the parties, including from the Court if a similar case has been heard by the Court. The most difficult way is to amend the 1945 Constitution of the Republic of Indonesia by unifying the examination of all laws and regulations under the Constitutional Court. Thus, it can eliminate the sentimental ego of the two institutions that carry out the testing of laws and regulations.

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