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TECHNICAL PROBLEMS IN THE REVIEWING OF GOVERNMENT REGULATION IN LIEU OF LAW (PERPPU) AT THE CONSTITUTIONAL COURT FROM THE PERSPECTIVE OF LEGAL CERTAINTY

Abstract

The need for formal legal sources in constitutional activities in public life cannot be ascertained due to a country's dynamics and political conditions. It is still also related to the need for regulatory provisions that align with current conditions. Government Regulations in Lieu of Law (PERPPU) are issued by the President in response to compelling urgencies, leveraging his constitutional authority to enact such regulations. Since PERPPU is a subjective product of the President, as mandated by the 1945 Constitution, it must be immediately reviewed by The House of Representatives (DPR) for approval or revoked if rejected. With the issuance of the PERPPU, certain parties may undoubtedly feel constitutionally disadvantaged. In such cases, the way that can be taken is to conduct a judicial review of the Constitutional Court as has been established in legal precedent. This research includes legal research. It is called legal research because the object of research is related to law. The type of research used is normative juridical. The approaches used in this research are the statute, conceptual, and case approaches. The results showed that many cases of PERPPU reviewing at the Constitutional Court lost the object of reviewing because it was enacted into law by the DPR. The loss of reviewing object PERPPU reviewing at the Constitutional Court becomes a technical problem in PERPPU reviewing that must be anticipated in the procedure for reviewing at the Constitutional Court.

Keywords: the loss of reviewing object, legal certainty, PERPPU

INTRODUCTION

As a state of law, as stated in Article 1 (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), it must certainly apply the principles of constitutionalism in state administration. As argued by Jimly Asshiddiqie, the law must be the supreme authority in the life of the state (Asshiddiqie, 2014). The implementation of the concept of legal supremacy is realized through the enactment of Law Number 12 of 2011 concerning the Formation of Legislation (hereinafter referred to as Law

12/2011) which describes the types and hierarchy of laws and regulations from the highest to the lowest as stated in Article 7 of Law 12/2011, namely the Constitution, MPR Decree, Law/PERPPU, PP, PERPRES, Provincial Regional Regulation (PERDA), Regency/Municipal Regulation (PERDA).

In line with their respective authorities, these regulations may be established by state institutions or authorized officials to fulfill work programs, achieve state objectives, and uphold human rights. The seven regulations are hierarchically arranged, guided by the principle of *lex superiori derogate legi inferiori*, which means if there is a conflict between high and low laws and regulations, the high one must take precedence. Therefore, in formulating regulations, state institutions or authorized officials must harmonize them by considering the regulations at higher levels, ensuring synchronization.

In the enactment of Government Regulation in Lieu of Law (PERPPU), the President enacted the regulation based on compelling urgency (Article 22 of the 1945 Constitution). However, the meaning of 'compelling urgency' has yet to be clarified by legislation. According to Muh Yamin, as quoted by Fitra Arsil, the issuance of PERPPU reflects the President's discretion regarding the presence or absence of an emergency threat (Mahkamah Konstitusi, 2023). With the formation of the PERPPU, it certainly creates a new law, which means that it becomes the legal basis for the government in implementing according to its contents. The implementation of this law will certainly impact the constitutional rights of the citizens who may be potentially harmed by the issuance of the PERPPU.

Compelling urgency, according to Bagir Mannan, is characterized by 2 (two) principal components, namely (1) the existence of a crisis and (2) the existence of urgency. The intended crisis is that there is a disturbance that causes urgency, and it is urgent. Meanwhile, urgency means that there is a real disturbance that reasonably needs immediate action (Manan, 1999). Meanwhile, according to Jimly Asshiddiqie, a compelling urgency is (a) reasonable necessity, (b) limited time, and (c) absence of reasonable doubt (Asshiddiqie, 2007). Jimly's characterizations align closely with Mannan's definition, namely the existence of urgent needs, limited time available, and disturbances threatening the nation's and state's safety.

In accordance with Article 22 (2) of the 1945 Constitution, every PERPPU must undergo approval by the House of Representatives (DPR) to become law, or it must be revoked as stipulated in Article 22 (3) of the 1945 Constitution. Consequently, the validity period of a PERPPU is inherently short due to its formation under compelling urgency. The submission of a Government Regulation in Lieu of Law (PERPPU) to the House of Representatives (DPR) implies the DPR's authority to scrutinize its material content, as mandated by the Constitution. This testing authority granted to the DPR finds its legal basis in the 1945 Constitution, as emphasized by Philipus M. Hadjon, who asserts that the strongest authority derives from legislative provisions (Hadjon, 1994).

On the other hand, the Constitutional Court (MK) as a state institution, one of the branches of judicial power, is given attributive authority by the 1945 Constitution. Article 24C (1) states that it is authorized to review laws against the Constitution. This review encompasses both material and formal aspects. Material review involves examining the content that is considered contrary to higher legislation (Mahfud MD, 2010). While the formal review is reviewing the procedure for making laws and regulations (Alrasyid, 2004).

The Constitutional Court, through a petition in case 138/PUU-VIII/2009 on the review of PERPPU No. 4/2009 on the amendment of Law No. 30/2002 on the Corruption Eradication Commission, has reviewed the PERPPU. The case's verdict determined that the Constitutional Court had the authority to review the PERPPU. The authority to review PERPPU is not mandated in the Constitution, but the authority is obtained through an interpretation.

Since case 138/2009, many PERPPU review cases have been submitted to the Constitutional Court. There have been at least 27 petitions for review of 16 PERPPUs. However, these petitions have yet to be granted, primarily due to their inadmissibility. One of the reasons cited for this is the loss of the object of reviewing, often because the subject matter of the petition has already been enacted into law by the DPR. The loss of the object of review can be seen in the decision of case 91/PUU-XI/2013 concerning the review of PERPPU Number 1 of 2013 concerning the Second Amendment to Law Number 24 of 2003 concerning the Constitutional Court.

The problem is that there have been technical problems in the reviewing of PERPPU by the Constitutional Court, where the stipulation of PERPPU into law by the DPR eliminates the object of judicial review at the Constitutional Court. Meanwhile, the material content of the PERPPU and the law are substantially parallel. Suppose the PERPPU stipulation into law eliminates the object of judicial review to the Constitutional Court. In that case, the PERPPU should not be reviewed by the Constitutional Court because the conditions for testing the PERPPU still depend on the legal position of other state institutions.

METHODS

This research included legal research. It is called legal research because the research object is legal matters (Marzuki, 2016). This research adopts a normative juridical method, using a statute approach, conceptual approach, and case approach. The statute approach is used to examine laws and regulations related to PERPPU and the judicial review mechanism at the Constitutional Court, while the case approach analyzes several MK decisions concerning PERPPU, such as Decision No. 138/PUU-VIII/2009 and Decision No. 91/PUU-XI/2013. By employing these approaches, the research aims to provide a comprehensive understanding of the technical problems encountered in PERPPU reviews

RESULTS AND DISCUSSION

As an implementation of the state of law in Indonesia as stipulated in Article 1 (3) of the 1945 Constitution, prioritizing adherence to the law in the state administration is imperative, guided by the principles of constitutionalism. Products that have been determined as to their type (Article 7 of Law 12/2011) are likely to produce products that contradict the principles and foundations of good legal formation as determined by Article 5 of Law 12/2011, for example, contradicting the higher hierarchy (Kelsen, 1978). In the context of synchronization, the fourth amendment to the 1945 Constitution in 2002 established an authority of the judiciary, one of whose powers is to examine legislation from the law down to the regulations above it.

To ensure the coherence of norms across all levels of governance, it is essential to establish a mechanism for reviewing the constitutionality of norms. The constitutionality of norms can be interpreted that the norms in a legal product do not conflict with those listed in the Constitution.

Constitutional review (*toetsingrecht*) is fundamentally the authority to review. It reviews a regulation at a level lower than the one above it (Martosoewignjo, 1987, p. 8). The reviewing authority must, of course, look at the Constitution that regulates it. However, reviewing a regulation usually cannot be separated from the judiciary. If the judiciary is authorized to review a regulation, it is called a judicial review (Mannan, 1992, p. 93).

The reviewing mechanisms in the 1945 Constitution are delineated in Article 24 of the 1945 Constitution, where judicial power (judiciary) in Indonesia is organized by two state institutions, namely the Supreme Court (MA) and the Constitutional Court (MK). Specifically, Article 24A (1) and Article 24C (1) of the 1945 Constitution allocate distinct reviewing authorities for both institutions. The Supreme Court is vested with the authority to assess laws against other laws, while the Constitutional Court is empowered to test laws against the fundamental law.

However, let's consider the types of laws and regulations in Indonesia (Article 7 of Law 12/2011). Certain types of regulations are not explicitly stated as legal products that can be reviewed. These include the MPR Decree (TAP MPR) and Government Regulation in Lieu of Law (PERPPU). TAP MPR is a regulation that falls between the Constitution (UUD) and laws (UU). Meanwhile, PERPPU is a type of regulation parallel to the law.

PERPPU itself is a government regulation issued by the President due to compelling urgency (Article 22 (1) of the 1945 Constitution). The meaning of compelling urgency has yet to be regulated. The reason for the current compelling urgency is always based on a theoretical basis. The element of "compelling urgency" must show two general characteristics, namely: (1) crisis and (2) urgency. A crisis exists when there is a grave and sudden disturbance. Urgency (emergency) is when various circumstances occur that were not taken into account beforehand and demand immediate action without waiting for prior deliberation. Alternatively, there have been signs of a real beginning and according to reasonableness, if it is not regulated immediately, it will cause disturbances both for the community and for the running of the government (Manan, 1999).

According to Jimly Asshiddiqie, there are three material requirements for the issuance of PERPPU, namely (Asshiddiqie, 2007): (a) There must be an urgent or *reasonable necessity* to

act; (b) The time available is limited (*limited time*) or there is a time crunch; and (c) There are no other alternatives available or according to reasonable reasoning (*beyond reasonable doubt*) other alternatives are not expected to be able to overcome the situation. Thus, the establishment of PERPPU is the only way to overcome the situation.

If these three conditions are met, the President, with his constitutional authority, can enact the regulations necessary to fulfill the functions of state administration and smooth the wheels of government that he leads. What material can and needs to be contained in the PERPPU certainly depends on the needs faced in practice (*the actual legal necessity*). In fact, certain provisions concerning the protection of human rights guaranteed in the fundamental law may be determined otherwise in the PERPPU as long as it is intended to overcome emergencies to protect the entire nation and the entire homeland of Indonesia (Asshiddiqie, 2007, p. 282).

In Constitutional Court Decision No. 138/2009 in conjunction with Constitutional Court Decision No. 54/2023, the outlined conditions are (1) the presence of urgent needs, (2) the occurrence of legal void, (3) the usual procedure takes a long time, and (4) the DPR is not in session. In establishing a PERPPU, even though it is a subjective authority, the President must fulfill the requirements mentioned earlier, even if the requirement is not a regulatory mandate but a judicial institution's decision.

With the aforementioned conditions, PERPPUs utilized for compelling urgency must secure the approval of the DPR to be enacted as law (Article 22 (2) of the 1945 Constitution). Consequently, the validity of a PERPPU, in terms of its formation requirements, has a very limited timeframe, because as soon as possible, it must be discussed in the DPR to be enacted into law if approved by the DPR or must be revoked if the DPR disagrees (Article 22 (3) of the 1945 Constitution). This mechanism is part of the review conducted by the legislature of a legal product commonly referred to as legislative review/political review.

Reviewing is fundamentally conducted to maintain the values contained in a rule and not to deviate from the rules above it or the Constitution. If a rule contradicts the rules above it, then the rule is only a word; thus, it has no meaning at all (Huda, 2003).

Meanwhile, in the PERPPU legal product, the reviewing authority is exercised by the DPR, where the DPR holds the authority to legislate laws (Article 20 of the 1945 Constitution). The DPR's review focuses primarily on the formal aspects of the PERPPU, either approving or not stipulating it into law (Article 22 (2) of the 1945 Constitution). The DPR must give the approval in the next session after the stipulation of the PERPPU by the President.

As needed, PERPPU continues to emerge from generation to generation of Presidents. This has led to the assumption that the issuance of PERPPUs is wielded as tools of the ruler's interests. Since 2009, there has been a request for judicial review of PERPPU to the Constitutional Court for the first time on the issuance of PERPPU No. 4/2009 on Corruption Eradication Commission (KPK). Then, ideas emerged about whether or not the Constitutional Court had the authority to review.

Through case 138/2009, the Constitutional Court stated in its legal reasoning that the Constitutional Court has the authority to review PERPPU on several grounds: (a) PERPPU in terms of laws and regulations, namely TAP MPR III/2000 and Law 10/2004, states that PERPPU is equal to laws both in hierarchy and material content; (b) the enactment of PERPPU introduces new norms that can potentially harm the constitutional rights of the community;

(c) the process of reviewing PERPPU in the DPR in the following trial lacks certainty and tends to be lengthy, prompting the need for Constitutional Court intervention.

The Constitutional Court's decision elicited a different response from Ni'matul Huda, who argued that the Constitutional Court was considered to have conducted tasks outside the authority stipulated by the 1945 Constitution, namely Article 24C and Law 24/2003 on the Constitutional Court. According to Huda, the Constitutional Court is only authorized to review laws against the 1945 Constitution (Huda, 2010). He contends that the Constitutional Court is not authorized to review PERPPU because PERPPU is the authority of political review. However, the principle of the Constitutional Court's decision is binding, so the Constitutional Court's decision on reviewing PERPPU is still valid and enforceable like a law (Wibowo, 2020, p. 166).

If seen from the *ratio decidendi* in the Constitutional Court Decision 138/2009 regarding the authority to review PERPPU based on the interpretation of the position of PERPPU, which is parallel to the law, the interpretation is no longer limited to grammatical interpretation. However, this decision embraces a broader approach, incorporating teleological sociological interpretation. Unlike grammatical interpretation, which adheres strictly to textual analysis, this teleological sociological approach considers the societal needs and aims for legal development. Consequently, the Constitutional Court asserts its authority to review PERPPU, acknowledging its broader role in interpreting legal texts beyond mere grammatical constraints.

In addition to causing juridical problems regarding the authority to review PERPPU by the Constitutional Court, the review of PERPPU at the Constitutional Court has also created technical problems. The technical problem during the PERPPU review at the Constitutional Court is that when the testing takes place at the Constitutional Court, the PERPPU is also being discussed as to whether or not to be approved by the DPR.

Approval by DPR takes place very quickly, so it must be decided immediately in a plenary meeting whether or not to approve it as a law. Notably, all PERPPUs proposed and deliberated upon in the DPR have been approved for enactment. This rapid approval by the DPR significantly influences the ongoing PERPPU reviewing process in the Constitutional Court (MK).

In the Constitutional Court Decision Case 91/2013 concerning the review of PERPPU No. 1 of 2013 amending Law 24/2003 on the Constitutional Court, it was ruled that the petitioner had lost the object of the review. The loss of the object of the Constitutional Court's review was because the DPR had already enacted the PERPPU into law. The loss of this object will certainly eliminate the substance of the test, either formal or material testing. This aligns with Maria Farida's assertion that the DPR consistently approves PERPPUs as proposed by the President (Soeprapto, 2007, pp. 192-193).

These events are intricately linked to the conflict of authority within these state institutions. The enactment of PERPPU into law by the DPR manifests the political review authority as stipulated in Article 22 (2) of the 1945 Constitution. Under this authority, it is certainly the DPR's responsibility to formalize a PERPPU into law even though it is being reviewed by the Constitutional Court. The weak power of the Constitutional Court, which is very dependent on the results of the determination of the DPR, is because the authority of the Constitutional Court itself is derived from mere interpretation.

The Constitutional Court's review can run like a law review if the process of determining PERPPU in the DPR does not run quickly, so the review at the Constitutional Court takes place more quickly. The dependence of the Court's review of PERPPU on the DPR is not good according to the concept of the rule of law. According to Jimly, the law must be used as the commander in state life, not politics or economics (Asshiddiqie, 2014). This sentiment is echoed more explicitly by Sirajuddin and Winardi, who emphasize that the rule of law entails legal certainty, ensuring that governmental actions are regulated and citizens are aware of what to expect (Sirajuddin & Winardi, 2015).

Building upon Sirajuddin and Winardi's viewpoint, the issue regarding the Constitutional Court's declaration of losing the object in PERPPU review stems from the absence of a clear legal basis in legislation regarding reviewing authority. If reviewing authority is legally defined within the framework of the rule of law concept, it becomes immune to influence from any institution or individual (Huda, 2016).

Decisions resulting in the declaration of losing the object can significantly disadvantage the community, especially the petitioners or the applicants, as their pursuit of justice halts due to political mechanisms within the DPR (Zakaria, 2019). Therefore, the regulation of the authority and technical reviewing at the Constitutional Court needs to be improved in the Constitutional Court procedural law so that the petition for review does not lose hope in submitting the PERPPU review. The procedural law of the Constitutional Court should incorporate mechanisms outlined in Constitutional Court Regulation number 2 of 2021, governing the procedure for judicial review of laws.

This technical problem related to the review of PERPPU at the Constitutional Court certainly creates legal uncertainty for the people whose constitutional rights are harmed in relation to the application of the norms in the PERPPU. Reviewing, which is actually an effort to protect the law, has turned into a futile effort. The efforts made have created uncertainty for justice seekers.

The emergence of technical problems, namely the loss of the object of PERPPU review at the Constitutional Court, should actually be anticipated since the effort to declare the authority to review PERPPU. This firm time setting will certainly be used as a basis for the community's choice of attitudes/behavior regarding behaviors that will occur in the future, which Peter Mahmud Marzuki calls predictability. Marzuki cites Roscoe Pound's view that legal certainty enables predictability (Marzuki, 2018). Predictability implies that the law can anticipate possible behaviors, primarily those commonly exhibited by individuals or communities.

Anticipation of various possibilities in reviewing PERPPU by the Constitutional Court requires technical arrangements in the Constitutional Court Regulation on the procedural law of reviewing. The existence of explicit arrangements in the procedural law regarding the mechanism for testing PERPPU will create legal certainty in line with the principles of the state of law. In the principle of the state of law, all activities of state administration must be carried out based on existing laws.

Constitutional Court's Procedural Law regarding the PERPPU review is still used MK or Constitutional Court Regulation number 2 of 2021 concerning Procedure in Law Review Cases. It is stated in Article 1 of the Constitutional Court Regulation that review of laws

includes the review of PERPPU. This means that the procedure for reviewing PERPPU is equated with judicial review of laws.

If the review of a Government Regulation in Lieu of Law (PERPPU) is equated with the review of laws, as explained in Article 8 of the Constitutional Court Regulation. In that case, the stages of case handling, from the submission of the petition to the reading of the decision, will take a relatively long time and have no specified time limit. Regulated under Article 9 of the Constitutional Court Regulation, the petition must be filed or submitted within 45 days of the enactment of the law or PERPPU. A new hearing can be held for the first time no later than 14 days after the application is submitted, based on Article 35 of the Constitutional Court Regulation.

The absence of specific procedural arrangements for reviewing a PERPPU actually undermines the compelling urgency that justifies its issuance. If the Constitutional Court conducts the review in the same procedure as a judicial review of laws, it will negate the essence of Article 22 (1) of the 1945 Constitution of the Republic of Indonesia. Therefore, the Constitutional Court should conduct a distinct procedure for reviewing PERPPUs, reflecting their temporary and urgent nature.

The momentum for reviewing a PERPPU at the Constitutional Court will be lost if the DPR first converts the PERPPU into law, as is their authority under Article 22 (2) of the 1945 Constitution. If the review of the PERPPU at the Constitutional Court is ongoing, it may result in the loss of the object of the review, a situation that has occurred frequently. An example of this is the Constitutional Court Decision in case number 91/PUU-XI/2013 regarding the review of PERPPU Number 1 of 2013 concerning the Second Amendment to Law Number 24 of 2003 concerning the Constitutional Court.

To ensure legal certainty in the review of a PERPPU, the Constitutional Court can issue a separate regulation regarding the procedure for its review, including strict time limits. This would align with the essence of the issuance of a PERPPU, which is based on compelling urgency and has a temporary validity period. A specific regulation regarding the review of PERPPU can be modeled on Constitutional Court Regulation number 4 of 2023 concerning Procedure in Cases of Dispute over the Results of the General Election of the President and Vice President.

Article 7 of Constitutional Court Regulation 4/2023 states that the submission of an application must be made no later than 3 days after the declaration of the election results of the President and Vice President. Additionally, any decision regarding a dispute over the the Presidential and Vice Presidential elections results must be rendered no later than 14 days after the application is received. This expedited arrangement will ensure and provide certainty to each party that disputes over the results of the Presidential and Vice Presidential elections will be resolved (decided) quickly. This fast procedural arrangement is necessary because the result of the Constitutional Court's decision will affect on the subsequent stage of the President and Vice President general election.

Regulating the review of a PERPPU with specific procedural law and a short testing time will ensure that decisions align with the subject matter of the petition, providing justice for the parties affected by the issuance of the PERPPU. As the interpreter of the Constitution, the Constitutional Court is expected to deliver decisions that address the core issues of the

case, thereby making the review process more focused on the material or formal testing of the PERPPU as stipulated by the President.

A PERPPU, which is temporarily valid and not accompanied by a short review process, will undermine the urgency of reviewing regulations at the Constitutional Court. The Constitutional Court (MK), which aims to provide legal protection for the community, will lose its essence if not equipped with the appropriate means. This lack of proper procedure will eliminate the essence of protection for the community.

CONCLUSION

The review of Government Regulation in Lieu of Law (PERPPU) at the Constitutional Court always coincides with the examination of PERPPU at the DPR. The DPR, in the discussion of PERPPU, always gives approval to the PERPPU to be enacted into law. The stipulation of PERPPU into law in the DPR has an impact on the Constitutional Court's review of PERPPU. In Decision 91/2013 and other cases, the Constitutional Court has always stated that the object of reviewing PERPPU the Constitutional Court always loses the object of reviewing because the DPR has first enacted the PERPPU into law (UU).

The review of PERPPU at the Constitutional Court with the decision to lose the object of the review causes legal uncertainty in the testing of PERPPU by the Constitutional Court because the position of PERPPU review at the Constitutional Court depends on the process of implementing political review in the DPR. The cause of this event is that the authority to review the Constitutional Court is not based on the attributive authority of the Constitution.

In conclusion, the review of PERPPU at the Constitutional Court faces significant challenges, particularly the loss of the review object when the PERPPU is enacted into law by the DPR. This creates legal uncertainty for parties challenging the PERPPU. Therefore, procedural changes at the Constitutional Court are necessary, including setting time limits for PERPPU reviews before they are enacted into law and adjusting MK's procedural rules to ensure that PERPPU reviews are completed fairly and promptly.

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