The Position of Constitutional Court Regulations in the Hierarchy of Legislative Regulations

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***Abstract*—Amendments to the 1945 Constitution strengthen Indonesia's position as a state of the rule law, with the Constitutional Court as the new institution exercising judicial control. The Constitutional Court has the authority to review laws and decide disputes over the authority of state institutions and others. However, the hierarchy of Constitutional Court Regulations in the statutory structure has yet to be explicitly regulated in the 1945 Constitution, even though its existence is recognized by Law Number 12 of 2011. Constitutional Court Regulations are prepared to meet the needs of the Constitutional Court's duties. Still, it needs to be considered so as not to cause problems—a complex hierarchy.**

***Keywords*—Hierarchy; Legislation; Constitutional Court Regulations;**

I. INTRODUCTION

The amendments to the 1945 Constitution have further emphasized Indonesia's position as a legal state as explicitly stated in Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia (from now on referred to as the 1945 Constitution). Previously, the concept of a rechtsstaats legal state was included in the Explanation of the 1945 Constitution before the amendment, namely in the State Government System section. This provision states, "The Indonesian state is based on law (rechtsstaat), not based on mere power (machtsstaat). In the process of the third amendment, a new institution with special authority has been created, a form of judicial control within the framework of a system of checks and balances between the branches of government power.[1] One idea in the judicial power structure is to form an institution that exercises judicial power, namely a Constitutional Court (MK). Apart from being a judicial institution that carries out the functions of judicial power, the Constitutional Court is also a judicial institution formed to uphold law and justice within the scope of its authority.[2]

The authority possessed by the Constitutional Court has been determined in Article 24C in paragraph (1) and paragraph (2), formulated as authority and obligation. These authorities include:

A. K. Jaelani et al. (eds.), *Proceedings of the International Conference on Cultural Policy and Sustainable Development (ICPSD 2024)*,
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a. testing laws against the Constitution;
b. decide disputes over the authority of state institutions whose authority is granted by the Constitution;
c. decide on the dissolution of political parties; And
d. resolve disputes regarding general election results.

Meanwhile, the Constitutional Court must provide a decision based on the DPR's opinion regarding alleged legal violations committed by the President and/or Vice President according to the Constitution. In exercising its authority, the Constitutional Court is regulated through procedural law, which is intended as a law that governs procedures and procedures for authority. Therefore, to regulate this matter, Law Number 24 of 2003 concerning the Constitutional Court was drafted as most recently amended by Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court (Sheet Republic of Indonesia Year 2020 Number 216, Supplement to the State Gazette of the Republic of Indonesia Number 6554, from now on referred to as the Constitutional Court Law). The procedural law regulated in the Constitutional Court Law is divided into two parts, namely procedural law, which contains general rules for proceedings at the Constitutional Court, and special rules according to the characteristics of each case that falls under the authority of the Constitutional Court. Then, for the smooth implementation of its duties and authority, the Constitutional Court was given the authority to complete the procedural law according to the Constitutional Court law.[3]

Furthermore, based on Article 86 of the Constitutional Court Law, the Constitutional Court can further regulate matters necessary for the smooth implementation of its duties and authority so that the Constitutional Court is given the authority to form Constitutional Court Regulations or other regulations. Through the Constitutional Court Regulations, the Constitutional Court regulates one related to procedural law (Tata Beracara), which is intended for the community as its legal subject. However, some issues deserve attention regarding the regulation of the Constitutional Court Regulations, namely the PMK, which should only be internal and apply to institutions. Still, it turns out that many of the norms contained in the PMK are in direct contact with subjects. Law outside the Constitutional Court, namely the procedural guidelines at the Constitutional Court.[4] Therefore, based on the description above, it is necessary to conduct a study regarding the position of the Constitutional Court Regulations based on the hierarchy of statutory regulations.

In the science of Legislation, there is a hierarchy theory. Hierarchy theory states that the legal system is structured in stages, similar to stairs, where legal norms have super and subordination relationships in a spatial context. This means some norms regulate the behavior of other norms that are higher or lower than them in the legal hierarchy.[5] Norms that regulate actions or behavior of other norms are called superior, while norms that regulate these actions are called inferior.[6] Superior norms have the power to determine the actions or behavior of norms below them in the legal hierarchy. Meanwhile, inferior norms are norms whose actions or behavior are regulated by norms that are at a higher level of legal hierarchy than them.

The hierarchy of statutory regulations has a vital meaning, considering that a law is valid if it is formed or compiled by an authorized institution or official based on higher norms.[7] Lower norms will not conflict with higher norms, creating a tiered or hierarchical legal code.[8] According to Hans Kelsen, legal norms are tiered and layered in a hierarchy (structure) in the sense that a lower norm applies, originates, and is based on a higher norm. A higher norm applies, originates, and based on higher norms, and so on until we arrive at a norm that cannot be explored further and is hypothetical and fictitious, namely the Basic Norm.[9] Every legal regulation must meet clarity criteria in its legal hierarchy so that its validity can be easily tested. This ensures that these regulations have a clear position in the legal structure and can be recognized and well-understood by the public and the parties involved. Clarity of the legal hierarchy helps assess the consistency and conformity of regulation with higher norms, thus facilitating the testing process against standards of validity and enforceability. Because every legal regulation is hierarchical and arranged vertically with certain characters and layers.[10] Thus, fulfilling the clarity element in the statutory rules hierarchy makes it easier to test the legality and enforceability of these regulations in the applicable legal system.

Legislation is an instrument that has legitimacy in regulating society in a democratic country. This is because these regulations are formed by legislative power, which has binding and coercive control. In the context of democracy, laws, and regulations, which are legislative products, play an essential role in creating fair and equitable game rules for all of society. The legislative principles Jeremy Bentham created require that ideas be clear and precise, guided by the word benefit, upholding unity and sovereignty and clearly distinguishing all other units and sovereignty.[11] Apart from that, John Locke argued that laws made by legislative power must be designed to provide goodness for the wider community or contain elements of the public interest.[12] In Locke's view, the legislature's role is to represent collective interests and social justice, so the laws produced must prioritize common welfare and interests. Legislative Theory is an approach that studies and analyzes ways or methods of compiling and forming statutory regulations. This includes planning, drafting, discussing, determining, and promulgating these

regulations, focusing on seeking clarity of meaning or cognitive understanding.[8] Thus, this Theory also considers other essential aspects, such as consistency with higher laws, enforceability in the regulatory hierarchy, and compatibility with applicable legal principles. Thus, legislative Theory helps ensure that the regulations made have legitimacy and legal force and positively contribute to maintaining order and justice in a legal system.

In the formation of statutory regulations, a rationale must be applied that underlies the formation of the statutory regulations, in addition to the application of general and specific principles.[13] Apart from following general and widely applicable principles, they also need to pay attention to unique or specific aspects according to the particular context and objectives that the regulations wish to achieve. The principles of forming legislative regulations are a guideline or a signpost in forming reasonable legislative regulations.[8] Thus, the process of forming statutory regulations is not only based on general legal principles but also considers special needs and characteristics relevant to the legal subject being regulated and its legal environment, according to Lon L. Fuller, quoted by Satjipto Rahardjo, looking from the perspective of forming laws and regulations, see law as a tool for regulating society. The aim of forming legislative regulations will be successful if they pay attention to the principles of legality to a certain extent, namely: a. must not contain merely ad-hoc decisions; b. The regulations that have been made must be announced; c. no regulations may apply retroactively because if rejected, they cannot become guidelines for behavior; d. Regulations must be prepared using a formula that can be understood: e. A system should not contain rules that conflict with each other; f. Regulations must not contain demands that exceed what can be done; g. There should not be a habit of frequently changing rules so that a person loses orientation; and h. There must be a match between the regulations promulgated and their implementation. These principles are more than just requirements for a legal system's existence; they provide qualifications for a legal system that contains a particular morality.[14]

Furthermore, apart from the expert explaining the principles of forming statutory regulations, the PPP Law also expressly regulates this matter. In Article 5 and its explanation, the PPP Law determines that forming Legislative Regulations must be carried out based on the principles of forming good Legislative Regulations, which include: a. clarity of purpose (that every legal regulation must have a clear purpose to be achieved); b. appropriate institution or official forming regulations (that every type of Legislative Regulation must be made by a state institution or authorized official forming Legislative Regulations. These Legislative Regulations can be canceled or voidLaw law if they are made by a state institution or official who is not approved); c. suitability between type, hierarchy and content material (that in the Formation of Legislative Regulations one must really pay attention to appropriate content material in accordance with the type and hierarchy of Legislative Regulations); d. can be implemented (that every Legislation Formation must take into account the effectiveness of the Legislation in society, both philosophically, sociologically and juridically); e. effectiveness and usefulness (that every Legislation is made because it is really needed and helpful in regulating the life of society, nation and state); f. clarity of formulation (that every Legislative Regulation must meet the technical requirements for drafting Legislative Regulations, systematics, choice of words or terms, as well as legal language that is clear and easy to understand so that it does not give rise to various kinds of interpretations in its implementation); and g. openness (in the Formation of Legislative Regulations starting from planning, preparation, discussion, ratification or stipulation, and promulgation is transparent and open. Thus, all levels of society have the broadest possible opportunity to provide input in the Formation of Legislative Regulations).

III. METHOD

This research uses a normative legal approach, including conceptual and statutory approaches. The conceptual approach leads to the analysis of relevant legal concepts and theories in the research context. In contrast, the legislative approach involves the study of laws, statutory regulations, and other legal sources. Normative Legal Research, or doctrinal legal research, can be described as investigating legal library materials. The library materials collected in this research include previous research, laws, statutory regulations, and other legal sources relevant to the research topic. Using these materials, the author will prepare an analysis and answer the problems raised in this research. This approach allows researchers to understand and interpret law based on theories, concepts, and legal provisions in available library materials.

IV. RESULTS AND DISCUSSION

A. Position of Constitutional Court Regulations

The 1945 Constitution (UUD 1945), both before and after being amended, does not provide explicit provisions regarding the hierarchy or position of various laws and regulations in Indonesia in its articles. In addition, the 1945 Constitution only explicitly stipulates certain types of recognized statutory regulations, namely Laws, Government Regulations instead of Laws, and Government Regulations. The types and hierarchy of Legislation are then

confirmed through Law Number 12 of 2011 concerning the Formation of Legislative Regulations as amended by Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislative Regulations (PPP Law). The PPP Law regulates the types and hierarchy of statutory regulations as stated in Article 7 paragraph (1), which states that the types and hierarchy of statutory regulations consist of: 1) The 1945 Constitution of the Republic of Indonesia; 2) Decree of the People's Consultative Assembly; 3) Laws/Government Regulations instead of Laws; 4) Government Regulations; 5) Presidential Regulation; 6) Provincial Regional Regulations; and 7) Regency/City Regional Regulations. The PPP Law, through Article 7 paragraph (2), also stipulates that the legal force of the Legislative Regulations has been determined, namely by this hierarchy. TLaw Law then also explains through Article 8 paragraph (1) that types of statutory regulations other than those referred to above include regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, the Supreme Court, the Constitutional Court, Financial Audit Agency, Judicial Commission, Bank Indonesia, Ministers, bodies, institutions or commissions of the same level established by Law or the Government by order of Law, Provincial Regional People's Representative Council, Governor, Regency/City Regional People's Representative Council, Regent/Mayor, Village Head or equivalent. Article 8 paragraph (2) explains that the existence of statutory regulations, as referred to above, is recognized and has binding legal force as long as it is ordered by higher statutory regulations or is formed based on authority. Therefore, the PPP Law acknowledges the existence of Constitutional Court Regulations even though Constitutional Court Regulations are not listed in the hierarchy of statutory regulations. In research conducted by Rudy and Reisa Malida, it was found that based on an analysis of the position of state institutions, Constitutional Court Regulations, as one of the legal products of the Constitutional Court Institution, have a hierarchical position parallel to Presidential Regulations.[4] The position of Constitutional Court Regulations, which are "equivalent" or at the same level as Presidential Regulations, is a "conditional" position, which, in principle, Constitutional Court Regulations should have the character of regulating the internal institutions of the Constitutional Court so that Law Law governs the procedural law of the Constitutional Court.[15] The Constitutional Court Regulations contain orders from the Constitutional Court Law. So, this delegation can be justified to regulate further a rule that is not yet clear in Law law.

B. Process of Preparing Constitutional Court Regulations

The Constitutional Court Law further regulates the basis for implementing the Constitutional Court's authority. However, the Constitutional Court Law provisions have not been able to meet the needs for implementing the rule in question. On the other hand, there is a provision in Article 86 of the Constitutional Court Law, which states that "the Constitutional Court can further regulate matters necessary for the smooth implementation of its duties and authority according to the Law ."Based on the provisions referred to, the Constitutional Court makes every effort to complete legal requirements for the smooth implementation of constitutional duties in the legal forum in the form of Constitutional Court Regulations, Regulations of the Chief Justice of the Constitutional Court, and Decrees of the Chief Justice of the Constitutional Court. Constitutional Court regulations are written regulations that contain generally binding legal norms, both in the judicial and non-judicial fields. The Regulation of the Chairman of the Constitutional Court contains technical judicial guidelines that contain binding rules for employees within the Registrar's Office and the Secretariat General of the Constitutional Court.

Meanwhile, the Decision of the Chief Justice of the Constitutional Court is a written determination containing concrete, individual, and final legal action in the non-judicial field. They are furthermore, based on Article 12 paragraph (3), Article 16 paragraph (3), and Article 20 paragraph (3) Constitutional Court Regulation Number 3 of 2019 concerning Legal Products of the Constitutional Court which confirms that further regulations regarding Procedures for Preparing Regulations The Constitutional Court, Regulations on the Chair of the Constitutional Court, and Decisions of the Chair of the Constitutional Court are regulated through Regulation of the Secretary General of the Constitutional Court Number 32 of 2019 concerning Guidelines for Procedures for Preparing Regulations of the Constitutional Court, Regulations on the Chair of the Constitutional Court, and Decrees of the Chair of the Constitutional Court (Persekjend 32/2019). Persekjend 32/2019 explains that Constitutional Court Regulations are written regulations that contain generally binding legal norms, both in the judicial and non-judicial fields. Instruments for Preparing Constitutional Court Regulations include Legislative Regulations; 2) Academic manuscript (if required); 3) Judicial Decision; 4) Results of the study and/or analysis of the Constitutional Court's decision; 5) Results of Focus Group Discussions (FGD), Seminars, Workshops, and Meetings. Constitutional Court regulations are prepared by Constitutional Justices assisted by the Registrar's Office and the Secretariat General. In addition, to broaden understanding of the substance of the Constitutional Court Regulations, the Court can organize Focus Group Discussions (FGD), seminars, and workshops, as well as other scientific activities involving experts/experts/academics who have competence in their fields.

V. CONCLUSION

Based on the description above, Constitutional Court Regulations have a position at the same level as regulations issued by state institutions based on the 1945 Constitution. However, some state that the position of Constitutional Court Regulations is "conditionally" equivalent to Presidential Decrees, where Presidential Decrees are included in the hierarchy of statutory regulations. The Constitutional Court regulations were formed by the mandate of Article 86 of the Constitutional Court Law, which is intended to fill possible deficiencies or gaps in the procedural law. The process of drafting Constitutional Court Regulations is strictly regulated to ensure clarity, enforceability, and compatibility with applicable legal principles. Thus, the PPP Law appears to recognize the existence of Constitutional Court Regulations as part of statutory regulations and has given them binding legal force as long as they are ordered by higher statutory regulations or are formed based on authority.

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