

Ex Ante Review in Realizing the Constitutionality of Law Regulations in Indonesia



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ABSTRACT: This study aims to describe the model of constitutional review in France and the model of constitutional review (constitutional review) in Indonesia and to describe the prospect of implementing ex ante review in realizing the constitutionality of laws and regulations in Indonesia. The research method used in this research is normative juridical using secondary legal data. Based on the results of the study, it can be concluded that the most influential comparison on the model of constitutional testing in Indonesia and France is in the position of the examiner's subject and the test object. The testing subject in Indonesia is carried out by the Constitutional Court, which is located as one of the judicial power institutions (judicial institutions), while the object of testing is in the form of laws that have been ratified and promulgated.

KEYWORDS: ex ante review; constitutionality; Regulation

INTRODUCTION

Indonesia as a democratic legal state (demokratische rechtsstaat), the law is considered the most important source, namely as a formalized form of embodiment of the aspirations of the people, also based on the law the government has the main authority (attributive authority) to carry out legal actions (in accordance with the principle of law). legaliteitsbeginsel known in state administrative law). One of the aspects of the constitutionality of the formation of laws and regulations must be based on the system of laws and regulations or the hierarchy of laws and regulations.¹ However, the quality of the laws and regulations in Indonesia is questionable because of the many laws declared unconstitutional by the Constitutional Court.

The factor in the formation of the law does not rule out the possibility that there is a discrepancy or disharmony between the law and between the law and the 1945 Constitution of the Republic of Indonesia (UUD NRI 194.² For example, the law that is mandated by the 1945 Constitution of the Republic of Indonesia is the Regional Government Law which was tested in Decision No. 005/PUU-V/2007 Review of Law No. 32 of 2004 concerning Regional Government although now that law has been replaced with Law No. 23 of 2014 then there is also Law no. 42 of 2008 concerning Presidential and Vice-Presidential Elections based on Decision No. 102/PUU-VII/2009. Law No. 7 of 2004 concerning Water Resources has also been tested several times based on the decision no. 058-059-060-063/PUU-II/2004 and No. 008/PUU-III/2005 which states that the implementation of Law No. 7 of 2004 without Article 7, Article 9, Article 40 paragraph (4), Article 45 paragraph (3), and Article 98, becomes difficult and has no binding legal force.³

Indonesia has accommodated a constitutional review or what is commonly called a constitutional review or judicial review to test a law against the 1945 Constitution of the Republic of Indonesia which was carried out at the Constitutional Court (MK). However, the weakness is when losses may have occurred due to the implementation of a law that is contrary to higher legislation. In contrast to Indonesia, in France the mechanism for constitutional review is carried out before the law in question officially becomes a legislative act that is binding on the general public and is still in the form of a draft law (preventive constitutional review or a priori constitutional review). The author is interested in studying more deeply about the model of constitutional review in France (Constitutional Council) by taking into account the problems of the quality and substance of the laws and regulations in Indonesia. This research will focus on discussing the problem. How is the comparison of the model of constitutional review in France and the model of constitutional review in Indonesia? And what are the prospects for implementing Ex Ante Review in realizing the constitutionality of laws and regulations in Indonesia?

¹ Dewa Gede Atmadja, dkk. *Teori Konstitusi dan Konsep Negara Hukum*, Setara Press: Malang, 2015, hlm. 176.

² Hardjono, *Legitimasi Perubahan Konstitusi: kajian terhadap perubahan UUD 1945*, Pustaka Pelajar: Yogyakarta, 2009, hlm. 98.

³ Martitah, *Mahkamah Konstitusi Dari Negative Legislature ke Positive Legislature*, Konstitusi Press: Jakarta, 2013, hlm. 136.

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RESEARCH METHODE

The research method used is normative juridical using a comparative law approach. The type of data used in this study is secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. Primary legal materials consist of the basic norms of Pancasila, the 1945 Constitution of the Republic of Indonesia, Law No. 8 of 2011 in conjunction with Law No. 24 of 2003 concerning the Constitutional Court, Law no. 12 of 2011 on the Establishment of Legislation, Constitution of the Fifth Republic of France 1958. Secondary legal materials consist of Thesis, Thesis, Legal Dissertation, constitutional journals and legal journals. tertiary legal materials consist of an Indonesian dictionary, a legal dictionary, and an English dictionary.

RESULT AND DISCUSSION

1. Comparison of the Constitutional Review Model in France and the Constitutional Review Model in Indonesia

Table 1. Comparison of Constitutional Testing in Indonesia and France

No.	Indikator	Indonesia	Perancis
1.	Legal basis	The 1945 Constitution of the Republic of Indonesia (UUD 1945) Article 24C paragraph (1), Law Number 8 of 2011 concerning the Constitutional Court Jo. Law Number 24 of 2003 concerning the Constitutional Court, and Regulation of the Constitutional Court (PMK) No. 06/PMK/2005 concerning Guidelines for Proceeding Cases for Judicial Review.	<i>Constitution of 4 October 1958 (Constitution du 4 octobre 1958 en vigueur/ la Constitution de la 5e Republique), which regulates the Constitutional Council, is contained in Title VII/CHAPTER VII</i>
2.	Institutions conducting testing	Constitutional Court (Constitutional Court)	The Constitutional Council (Conseil Constitutionnel) in the French constitutional system, this institution is more quasi-judicial in nature
3.	Institution position	Is one of the State Institutions that carry out judicial/judicial powers (functions)	Is a political institution that carries out judicial power (functions) (outside of the judiciary).
4.	Test object (objectum litis)	Laws that have been passed are promulgated (posteriori review/ ex parte review)	Draft laws that have been accepted or approved by parliament but have not been promulgated (before their promulgation). This test is often called a priori abstract review / ex ante review. In addition, the Constitutional Council also tested the rules and regulations of the National Assembly and the Senate
5.	<i>Legal standing who can apply for testing</i>	Individual Indonesian citizens, customary law community units, public or private legal entities, and state institutions	President of the Republic, Prime Minister or one of the Chairs of the two chambers of parliament (National Assembly and Senate)
6.	Period of implementation of constitutional review	Neither the Constitutional Court law nor the PMK (Constitutional Court Regulation) clearly regulates how long the judicial review process will take until the Constitutional Court's decision is made. It can be interpreted	After the application is submitted, the Constitutional Council must be able to issue a decision within 1 (one) month, but if it is at the request of the government for very urgent reasons, the time limit can be accelerated to 8 (eight) days.

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		that the completion period is non-limitative (unlimited).	
7.	Decision Making Procedure	Decision making is carried out by a Consultative Meeting of Judges (RPH). Decisions are taken by deliberation to reach consensus, if no consensus is reached, the meeting is postponed until the next deliberation meeting. However, if after serious efforts but still do not produce a unanimous agreement, the decision is taken by majority vote (voting).	Decisions are made unanimously and do not recognize any dissenting opinions (because they are not justified by law). If the result of the voting is a draw, then the next presidential vote will determine. The Chair / President of the Constitutional Council is determined to hold the key vote that determines if the decision is taken by voting and ends in a tie (the deciding vote in case of a tie).
8.	Nature of decision	<i>final and binding</i>	Final and Binding, and there is no other legal remedy to change it
9.	Implications of the Decision	There was no legal action after the decision was issued by the Constitutional Court. Laws declared unconstitutional by the Constitutional Court must be amended or the article in question be deleted from the law.	Draft laws declared unconstitutional by the Constitutional Council, cannot be enacted or implemented. The decision has binding legal force on all administrative powers and organs of the general judiciary.

The most influential comparison is found in the position of the subject and object of the test. The subject of constitutional review in Indonesia is carried out by the Constitutional Court which is domiciled as one of the judicial power institutions (judicial institutions) besides the Supreme Court which has the same high or equal position, which is intended as the guardian of the constitution. Such a position is a consequence of Indonesia adopting a system of separation of powers after replacing the division of power system which has resulted in a fundamental change in the format of state institutions after the amendment to the 1945 Constitution. invited. If someone who has legal standing feels that his constitutional rights have been harmed after the enactment of the law, he can file a request for a constitutional review at the Constitutional Court. The authority of the Constitutional Court as can be seen in Article 24C paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia, namely "The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine laws against the Constitution, decide on disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties and decide disputes regarding the results of the general election. and is obliged to give a decision on the opinion of the House of Representatives regarding alleged violations of the President and/or Vice President according to the Constitution."⁴

The procedural law of the Constitutional Court explains the provisions governing who may apply for proceedings at the Constitutional Court for judicial review of the Constitution as stipulated in Article 51 paragraph (1) of Law no. 23 of 2004 concerning the Constitutional Court which states the following:⁵

"The applicant is a party who considers his constitutional rights and/or authorities to be impaired by the enactment of the law, namely:

- a. Individual Indonesian citizens;
- b. The customary law community unit is still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law;
- c. Public or private legal entities;
- d. State institutions."

The process of submitting a petition for judicial review has been regulated in Law No. 24 of 2003 concerning the Constitutional Court and Regulation of the Constitutional Court (PMK) No. 06/PMK/2005 concerning Guidelines for Proceeding for Legal Examination Cases, including:

1. submission of application (identity, posita and petitum);

⁴ Pasal 24C UUD 1945

⁵ Lihat pasal 31 Undang-Undang No. 23 Tahun 2004 tentang Mahkamah Konstitusi.

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2. checking the completeness of the application;
3. registration of applications in the BRPK;
4. formation of a panel of judges, trial scheduling;
5. preliminary examination hearing;
6. trial for examining the main points of the case and the evidence;
7. Judges Consultative Meeting (RPH), and;
8. verdict.

The judicial review under the authority of the Constitutional Court is to constitutionally examine a law, namely to examine the extent to which the law in question is compatible or contradicts (*tengesteld*) with the Basic Law. Constitut is *deboogste wet*, if the Constitutional Court decides a law is contrary to the Basic Law, then the law has no binding legal force.⁶

The subject of constitutional review in France is held by the Constitutional Council (*Conseil Constitutionnel*) which is a quasi-judicial institution. The French *Conseil Constitutionnel* was founded in 1958, following the ratification of the Fifth French Republic in 1958 (October 4, 1958). John Bell stated that there were two main reasons why the Constitutional Council was formed instead of the Constitutional Court, namely:⁷

1. the law is a reflection of the general will (*volonte generale*) so that it is impossible to carry out a constitutional review of the law,

2. The principle of separation of powers does not allow the judiciary to test legislative products.

Mauro Cappelletti stated that:⁸ “*The exercise of judicial review, however, I quite different from usual judicationfunction of applying the law Therefore the task of fullfiling a constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes.*” There are three main reasons why the Constitutional Council is more accurately referred to as a political (quasi-judicial) institution, namely⁹

1. Arrangements regarding the Constitutional Council constitutionally based on the French Constitution are placed in a separate chapter outside of the chapter on Judicial Power, namely Chapter VII. While the matter of judicial power is regulated separately in Chapter VIII,

2. Members of the Constitutional Council are not judges nor are they required to have legal education. As can be seen in the French Constitution and the laws governing the French Constitutional Council there is not a single mention which indicates that the members of the Constitutional Council are judges. Likewise, to become a member of the Constitutional Council, it is not required to have legal education as it has become mandatory for someone to become a judge anywhere, and

3. Historically, the establishment of the Constitutional Council was the result of a compromise between two contradictory schools of thought, the principle of parliamentary supremacy as a reflection of people's sovereignty and untrust of the judiciary on the one hand with the need for basic law enforcement as contained in the constitution and the check principle. and balances against the all-powerful parliament on the other. Therefore, since its inception, the Constitutional Council was not meant to be a judicial institution or judicial power.

The object of testing is a draft law (before their promulgation). Applications for judicial review of bills may be submitted by the President of the Republic, the Prime Minister, or by one of the Chairs of the two chambers of parliament (the National Assembly and the Senate). The Constitutional Council is the only constitutional review organ that has very exclusive (limited) access. Restrictions on those who can apply for testing (rights on standing to sue) to certain organs and are not given to the general public due to the fact that the draft law has not yet taken effect so that it has not yet caused legal consequences (can be in the form of losses) for the community. Therefore, not giving standing rights to the community is the right step, when the people themselves have not felt a loss from the implementation of the draft law that will be enacted later. organic (organic law) or non-organic (non-organic law). An organic draft law is a draft law that is formed on an order or mandate directly from the constitution (the source of the authority for its formation comes directly from the constitution and usually involves basic or basic matters). Meanwhile, an ordinary draft law is a draft law that is formed without a direct order from the constitution (other than organic law).¹⁰

The Constitutional Council is also given the responsibility to examine and verify the constitutionality or suitability of legal texts or regulations under the constitution, including: Organic laws, which generally involve legislation that establishes, renews the position, or functions of institutions or public bodies; Rules of Conduct of the National Assembly, Senate; International treaties (international treaties); Ordinary legislation which is not included in the category of laws (organic laws).

⁶ Martitah, *Sistem Pengujian Konstitusional (Constitutional Review) di Indonesia*, Konstitusi Press, Jakarta:2015, hlm.74.

⁷ John Bell, *French Constitutional Law*, Clarendon Press, Oxford-New York, 1992, hlm. 29.

⁸ Mauro Cappelletti, *The Judicial Process Comparative Prespective*, Oxford, Clarencon Press, 1989, hlm. 143-144.

⁹ Arif ainul Yaqin, *Pengujian Konstitusional (constitutional review) di Perancis*, artikel hukum, dalam <http://equityjusticia.blogspot.co.id/2015/02/normal-o-false-false-in-x-none-x.html>. Diakses pada hari Kamis, tanggal 9 Februari 2017, pukul 11.54 WIB.

¹⁰ Jimly Asshidique, *Model-Model Pengujian Konstitusional di Berbagai Negara*, Sinar Grafika, Jakarta, 2010, hlm.136.

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The process of reviewing the draft law consists of three stages, namely first in the applicable provisions, after the application is registered with the Constitutional Council, the formal process begins with the appointment of the president of one of the members to act as rapporteur. A rapporteur also has three main responsibilities, namely collecting a number of data related to the case with the assistance of the secretariat. the data consists of: Travaux préparatoires, namely the minutes of the trial of the commissions in parliament, Public responses to the draft law that is being prepared by parliament, Application letters obtained from state institutions and communicating with parties related to the problem facing law. Collect relevant data and previous council decisions, Collect various doctrinal views, Administrative reports if this is deemed necessary, Prepare draft decisions, At this stage the rapporteur is usually assisted by the staff and secretary general. when the Constitutional Council listens to the word of the Government, represented by the staff of the government's Secretariat General (in this case the parliament), the results of this meeting are then recorded and published. The Secretary General has the duty to ensure that the rapporteur is fully aware of the potential effects of the law and jurisprudence applied to the case. The task as carried out by the secretary general is carried out because the majority of the members of the Constitutional Council are not made up of legal expert.¹¹ This third task is to take place in a plenary session. In this final stage, the members will hold discussions and vote on the decision. In principle, a plenary session attended by seven members is considered a quorum, except that due to time constraints it is impossible to postpone the reading of the verdict. This stage will begin with the presentation of the report from the rapporteur. Furthermore, the board members will intensively discuss the report and determine their attitude towards the conclusions of the report that has been submitted. For France, decisions are made by unanimous consensus and dissenting opinions are not justified by law. If the voting result is a draw or balanced, then the next President's vote will determine.¹² After laying down the constitutional nature, the arguments contained in the draft decision text, at the next stage will be debated one by one (point-by-point).

The decision of the Constitutional Council on the draft law being reviewed is final and binding. If the Council considers that the draft law can be promulgated (approve to be promulgated), it means that the draft law is in accordance with the constitution, thus there is no other reason to submit a request for review to the Council after the law is legally enacted and binding on the general public.¹³ Meanwhile, if the draft law is declared unconstitutional, the draft law cannot be enforced.

2. Prospek Penerapan *Ex Ante Review* Dalam Mewujudkan Konstitusionalitas Peraturan Perundang-Undangan Di Indonesia

In practice in Indonesia, judicial review and constitutional review by judicial institutions are aimed at assessing whether or not a statutory regulation is hierarchically higher. Examination of the constitutionality of the law is the examination of the value of the constitutionality of the law both in formal and material terms (formele of materielle toetsing).

Legislation products that are the object of testing, are broadly due to: Substance, very vulnerable to smuggling of unconstitutional norms. Process, drafting laws that are not open and do not absorb people's aspirations, it will be difficult to achieve an accuracy (enforceability), balance (adequacy).), and implementation (implementability).

For example, the draft regional head election law (RUU Pilkada). The Pilkada Bill which was discussed by the DPR was rejected by most of the people because the DPR's political elite wanted to restore the regional head election system by the people to an election by the DPRD. Constitutionally, the central debate regarding the disapproval of the Pilkada Bill refers to the phrase "democratically elected" in the constitution. Article 18 paragraph (4) of the 1945 Constitution states that: Governors, Regents and Mayors as regional heads of provinces, regencies and cities are elected democratically. This phrase has become a constitutional debate whether or not if the electoral system is returned to the regions, the election is returned by the DPRD. However, the legislators have made it concrete to be directly elected through Article 56 of Law no. 32 of 2004 concerning Regional Government (before it was changed to Law No. 23 of 2014 concerning Regional Government), it has been explicitly emphasized that regional heads are democratically elected based on the principles of direct, general, free, confidential, honest and fair (luber jurdil). Although it is often interpreted as an open legal policy from the legislators, the President and the DPR cannot arbitrarily change the mechanism for selecting regional heads into elections with a representative system. In addition, the election of regional heads is related to the relationship between the center and the regions, in this case the DPD should also be involved in the discussion of the Pilkada Bill. This formal disability is becoming more evident by seeing the decision of the Constitutional Court No. 92/PUU-XI/2012 which requires a tripartite discussion of the DPR-President-DPD in every draft law related to Article 22D of the 1945 Constitution.

The increasing quantity of testing has made the public doubt the quality of the legislation/legislation made by the parliament. For consideration, the author mentions the supervision of regional regulations (executive review). Supervision of regional legal products according to their nature is as follows:¹⁴

¹¹ Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford University Press, New York, 1992, hlm. 132-133. Diakses di laman <http://www.books.google.co.id/>.

¹² Ibid.

¹³ Jimly, *Asshidique, Model-Model Pengujian.....* op.cit. hlm. 138.

¹⁴ Irawan Soejito, *Membuat Undang-Undang*, (Liberty, Yogyakarta, 1988), hal. 123

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General supervision is the supervision carried out by the central government on the overall implementation of the duties and authorities that have been given by the central government to the regions. Preventive supervision is supervision in the form of giving approval or refusing ratification. Preventive supervision is carried out before the decision (legal product) comes into effect. Repressive supervision is supervision that is carried out after the legal product is enacted and can be carried out on all regional regulations and/or regional head decisions. The basis for carrying out the supervision of regional legal products in the Regencies/Cities in the Provinces based on Law no. 23 of 2014 concerning Regional Government. There are 3 (three) types of supervision of regional legal products which include: evaluation, clarification and facilities.

Evaluation is an assessment and assessment of the draft regional regulation to find out whether it is in accordance with or contrary to the public interest or higher laws and regulations, and other laws and regulations. The governor has the authority to supervise regional legal products. Preventive supervision can be seen when a regency/city regional regulation has been approved by the regency/city DPRD together with the regional head but has not been stipulated and enforced or is still in the form of a draft regency/city regional regulation. If it has obtained approval from the Governor through an evaluation and is stipulated by the Regent/Mayor, a regency/municipal regional regulation shall begin to be implemented and take effect.

The clarification mechanism (repressive supervision) is implemented when the district/city regulations and the Regent/Mayor regulations have been enacted and promulgated. The clarification mechanism has been regulated in the Minister of Home Affairs Regulation Number 80 of 2015 concerning the Establishment of Regional Legal Products. The result of the clarification is in the form of a statement in accordance with the public interest and/or higher regulations, or contrary to the public interest and/or contrary to higher regulations. The Provincial Secretary on behalf of the Governor issues a letter to the Regent/Mayor containing a statement that it is appropriate or contains a recommendation that the regional government make improvements to regional regulations and/or revoke regional regulations.

The last stage is facilitation. The facilitation stage for the establishment of Regional Legal Products is a coaching action in the form of providing technical guidelines and instructions, directives, technical guidance, supervision, assistance and cooperation as well as monitoring and evaluation carried out by the Minister of Home Affairs to the provinces and the Minister of Home Affairs and/or the Governor to Regencies/ The city on the content of the draft regional law product in the form of a regulation before it is stipulated in order to avoid cancellation.

The executive review process above shows that before being ratified, promulgated, and enforced (still in the form of a draft regional regulation) an evaluation must be carried out on the draft regional regulation carried out by the Governor as the representative of the Central Government in the region (for Regency/City regional regulations). . This is done to anticipate that the draft regional regulations before being stipulated and promulgated in the regional gazettes do not conflict with the public interest and/or higher statutory provisions. This process considers that laws which are legal products within the national scope must also receive special attention in order to maintain the quality of laws and regulations, not only at lower levels of regulation (in this case, provincial, district/city regulations).) but also the law as a form of voluntary general which also pays attention to and maintains constitutional values in its realization. Therefore, an alternative solution to the constitutional testing model is needed.

Constitutional review is very important and necessary to maintain the consistency of national legal politics as a stream of the constitution. The model offered in this constitutional review is that it elaborates the basic model of constitutional preview which is a combination of testing models in France and Indonesia, taking into account the testing process that will be implemented in Indonesia as a state of law. referring to the Rosseau-mian idea, on the one hand, views that the law (act) is identical with the general will (general will). However, on the other hand, the legislature is also synonymous with popular sovereignty. In this case the people have an important role related to the legislature as the holder of popular sovereignty. The people have the highest authority to oversee and execute legal provisions. The process of forming laws in Indonesia consists of five stages¹⁵, beginning with the planning stage or what is commonly referred to as the national legislation program. This is followed by preparation, discussion of material by the President, DPR and DPD (specifically on certain topics), ratification and promulgation. The preparation of a national legislation program can be carried out on the basis of legal needs in the context of carrying out state activities or on the basis of constitutional orders. After the third stage, namely the discussion and having finished discussing the law, people who feel that their constitutional rights will be harmed when the law is promulgated and enforced can apply for a constitutional review (ex ante review/elaborates the basic model of constitutional preview) to the Constitutional Court. . However, in this case, not all laws must be tested before being promulgated, only organic laws that must and must be tested. For non-organic laws, the stipulation is that they do not have to be tested first, but if the public feels that the non-organic bill is detrimental to their constitutional rights, they can test it before the Constitutional Court before it is promulgated or ratified. If the decision is that the law is constitutional then the

¹⁵ Dista Amalia Arifah, 'Indonesia's Cybercrime Case', *Jurnal Bisnis Dan Ekonomi*, 18.2 (2011), 185–95.

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law can be ratified and promulgated, but if on the contrary, the law is declared unconstitutional then it is returned to the DPR for correction.¹⁶

In the second offer, the test subject is from the legislative element, namely the legislative body. The legislative body itself is a permanent instrument of the DPR, based on Law no. 17 of 2014 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representatives Council, and the Regional People's Representative Council (MD3). In view of the duties of the legislative body, it is necessary to strengthen the duties and authorities of the legislative body to examine each legislation in the form of a draft law with the benchmarks of the 1945 Constitution, especially laws that are directly delegated by the 1945 Constitution. However, the difference offered in the second alternative This is the subject that proposes the review, if elaborates the basic model of constitutional preview is carried out by the Legislative Body, then the Legislative Body will preview the material for the draft law which includes organic law, and non-organic draft laws do not have to be carried out. previews. Although the task of monitoring and reviewing the Law is a very heavy and large task, considering that the main task of the Legislation Body is to complete the target of legislation as the output of the DPR RI, it is hoped that this new task can be carried out by dividing the task together with the Government.

The advantages of implementing the ex ante review model with the concept of elaborates the basic model of constitutional preview in Indonesia: (1) with a preventive mechanism, ex ante review will accommodate legal products in the form of laws that protect constitutional rights, (2) minimize the occurrence of value deviations. -values and constitutional rights that have been regulated in the 1945 Constitution, (3) if there is a dispute about whether a law is contradictory or not, which is generally not a juridical issue but a political issue, this concept will indirectly create legal norms that are far from unilateral interests, (4) prevent futile legal reforms so that the legal rules created or formed can last a long time and are futuristic, (5) the power to form laws and their promulgation is not disturbed by complaint in the Constitutional Court, because the draft law has been tested previously a in the Constitutional Court, and (6) Can strengthen the newly formed legislation if the one conducting the preview is the legislative body.

The disadvantages or weaknesses of implementing ex ante review in Indonesia are: (1) The lack of clarity on the principle of check and balance, because the concept of trias politica is the judiciary (judicial power) which in this case is held by the Constitutional Court, which differs in authority from the legislature as a law maker (legislators) so that it is vulnerable to causing involvement (interference) between the authority of the Constitutional Court later to handle the review of draft laws with the legislative authority as a law-making institution, (2) The Constitutional Court seems to participate in carrying out the legislative authority in terms of making laws. This is different from the case if the preview is carried out by the Legislative Body which is still the authority to be involved in the process before the law is passed or promulgated. However, there is a weakness, namely that the one conducting the preview is one of the legislative institutions (legislation bodies) so that it is very likely that the draft law that was formed even though it has been previewed, will not be tested on the material of the draft law with the benchmark of the 1945 Constitution, (3) If a draft law that has been tested in the Constitutional Court, in the future after becoming a law (which has been ratified and promulgated) is re-submitted by the public on the grounds that constitutional rights have been violated, it will result in a waste of testing at the Constitutional Court and doubt the Constitutional Court as the last entrepreneur. of the constitution or the guardian of the constitution.

CONCLUSION

The most influential comparison on the model of constitutional review in Indonesia and France is in the position of the examiner's subject and the object of the examination. The testing subject in Indonesia is carried out by the Constitutional Court, which is located as one of the judicial power institutions (judicial institutions), while the object of testing is in the form of laws that have been ratified and promulgated. The test subject in France is held by the Constitutional Council (Conseil Constitutionnel) which is a quasi-judicial institution, while the object of examination is in the form of draft laws. The object of testing between the two countries, namely Indonesia and France, is an important benchmark in measuring the prospect of implementing an ex ante review in Indonesia. The prospect of implementing Ex Ante Review in realizing the constitutionality of laws and regulations in Indonesia needs to be considered for future solutions. The application of the ex ante review model with the name elaborates the basic model of constitutional preview with the following process after the discussion of the draft law by the President and the DPR (before ratification and promulgation), people who feel that when the law is enacted and enacted can submit a review to the Court Constitution. However, in this case, not all laws must be tested before being promulgated, only laws that are organic in nature must and must be tested. Meanwhile, for non-organic law, the testing is not mandatory. However, if the public feels that the non-organic draft law is detrimental to their constitutional rights, they can test it with the Constitutional Court first before being promulgated or ratified. If the decision is that the law is constitutional then the law can be ratified and promulgated, but if otherwise the law is declared unconstitutional then it is returned to the DPR for correction. The main purpose of this ex ante review model is to create a

¹⁶ Dessy Artina, 'Keterwakilan Politik Perempuan Dalam Pemilu Legislatif Provinsi Riau Periode 2014-2019', *Jurnal Hukum IUS QUIA IUSTUM*, 23.1 (2016), 123-41.

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climate for the legislative process that is constitutional in accordance with the values in the 1945 Constitution, so that people will feel safe with their constitutional rights which are also guaranteed in the formation of laws. If during the course of time or after the law is passed and promulgated, it turns out that there are people who feel that their constitutional rights have been violated in the law, then the judicial review of the law can be submitted to the Constitutional Court. The application of this concept also looks at the expansion of the size of constitutional losses by the Constitutional Court, namely by expanding the possibility of constitutional losses, not only to actual losses but also to potential losses which according to reasonable reasoning can certainly occur. If you look at the loss parameters determined by the Constitutional Court, it indicates that the losses suffered have not yet occurred or are about to occur (still abstract and predictive). In the second offer, the test subject is from the legislative element, namely the legislative body. If elaborates the basic model of constitutional preview is carried out by the Legislative Body, then the Legislation Body will preview the material for draft laws which are included in organic law, and non-organic draft laws do not have to be previewed..

BIBLIOGRAPHY

Books

- 1) Atmadja I Dewa Gede dkk. 2015. *Teori Konstitusi dan Konsep Negara Hukum*. Malang: Setara Press.
- 2) Asshidiqie, Jimly. 2010. *Model-Model Pengujian Konstitusional di Berbagai Negara*. Jakarta: Sinar Grafika.
- 3) Hamidi, Jazim dkk, 2012. *Teori Hukum Tata Negara: A Turning Point of the State*. Jakarta: Salemba Humanika.
- 4) Hardjono, 2009. *Legitimasi Perubahan Konstitusi: kajian terhadap perubahan UUD 1945*. Yogyakarta: Pustaka Pelajar
- 5) Martitah, 2013. *Mahkamah konstitusi: Dari Negative Legislature ke Positive Legislature*. Jakarta: Konstitusi press (Konpress).
- 6) -----2015. *Sistem Pengujian Konstitusional (Constitutional Review) di Indonesia*. Jakarta: Konstitusi press (Konpress)
- 7) Soejito, Irawan. 1988. *Membuat Undang-Undang*. Yogyakarta: Liberty.
- 8) Stone, Alec. 1992. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. New York: Oxford University Press.
- 9) Syafaat, M. Ali dan Jimly Asshidiqie, 2006. *Teori Hans Kelsen tentang Hukum*, Jakarta: Konstitusi Press.

Legislation

- 1) Undang-Undang Dasar Negara Republik Indonesia 1945
- 2) Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan.
- 3) Undang-Undang No. 8 tahun 2011 tentang Mahkamah Konstitusi Republik Indonesia. Undang-Undang No. 24 tahun 2003 tentang Mahkamah Konstitusi Republik Indonesia.

Journals/Papers

- 1) Arifah, Dista Amalia, 'Indonesia's Cybercrime Case', Jurnal Bisnis Dan Ekonomi, 18.2 (2011), 185–95
- 2) Bell, John, French Constitutional Law, Clarendon Press, Oxford-New York, 1992.
- 3) Cappelletti, Mauro, The Judicial Process Comparative Perspective, Oxford, Clarendon Press, 1989.
- 4) Dessy Artina, 'Keterwakilan Politik Perempuan Dalam Pemilu Legislatif Provinsi Riau Periode 2014-2019', Jurnal Hukum IUS QUIA IUSTUM, 23.1 (2016), 123–41
- 5) Gerhad van der Schyff, Judicial Review of Legislation, A Comparative Study of The United Kingdom, The Netherlands and South Africa, (London: Springer, 2010), p.135.

Website

- 1) Yaqin, Arif ainul, *pengujian konstitusional (constitutional review) di Perancis*, artikel hukum, dalam <http://equityjusticia.blogspot.co.id/2015/02/normal-o-false-false-in-x-none-x.html>. Diakses pada hari Kamis, tanggal 9 Februari 2017, pukul 11.54 WIB



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