A Formal Mechanism in the Judicial Review on the of the 1945 Constitution of the Republic of Indonesia by Constitutional Court

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Abstract

The formal legislational testing of the 1945 Constitution is naturally an effort to assure the protection of the citizens' constitutional rights from any absolute behaviors of the power holders because such absolute behaviors may result in the breaking of the fundamental rights of the citizens, and to avoid this, justice and benefits in terms of the proces of regulations in the forms of procedures, mechanism and the formation systems should be given as much as possible to the citizens. The formal legislational testing of the 1945Constitution is intended to establish better laws (leges condere legem melius mutato proposito) since in the legislational process, the principles of establishment are often ignored.

Keyword : Constitution, A Formal mechanism.

A. Background of the Study.

The state of the Republic of Indonesia is a legal state[1] with the principle of democracy[2], as stated in the C1945 Constitution of the Republic of Indonesia.[3]. In this democratic country, it is the people who hold the power in determining the general direction and policies of the state by establishing a constitution and legislations as the rule of the game in serving the life of the nation and state.

Based on the 1945 Constitution of the Republic of Indonesia, establishment is organized in the Article 5 verse (1), Jo Articles 20 and 21. The in the articles it is stated that the power of making the laws are hold of two organs, namely the *Dewan Perwakilan Rakyat* (DPR) (House of representative) and the president, although the authority is heavily in the House of Representative. The president acts as an organ that will implement the laws. And the members of the DPR are the representatives of the people determined through the general election acting as expressing the people's aspiration.

[1] The term Legal State is a general term, while the specific one is stated by M. Tahir Azhary in his book *Negara Hukum: Suatu Studi Tentang Prinsip-prinsipnya Dilihat Dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah dan Masa Kini* (Jakarta : Kencana Prenada Media Group, Cetakan ke-3, 2007) pp 83-84. The concept of state law covers 5 types: Islam Monocracy, rechtsstaat, rule of law, socialist legality and Pancasila state law.

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[3] The 1945 Constitution, article 1 clauses: (1) The State of Indonesa is in the form of Republic, (2). Souvereignty is under the hand of the people and is implemented according to the Constitution, and (3). The State of Indonesia is a legal state..

Meanwhile, dealing with the system of establishing the laws is determined in the Article 22A of the 1945 Constitution of the Republic of Indonesia, stating that the system of such establishent is then stated in the laws, and their implementation has beeen stated in the 2011 Law no. 12 on the Legislation. In terms of the substance, the 2011 law no 12 regulate the formal process and also the principles of of lesgislation at either central or local levels.

Legislation as a legal poduct is also a political product[4] viewing laws as the formalization or crystalisation of inter-related and -competed political desires. In the framework of laws, Moh. Mahfud MD confirmed that the laws are born as a results of the political process in the DPR, called political draft.[5] As a results of such political process, the laws made might be intervere by subjective political interests of the makers so that the process and procedures do not match with the prevailing regulations.

Therefore, a concept of legislational testing of the Constitution, of which the basic idea is made by John Marshall[6], then called *judicial review*. Meanwhile the establishment of a specific judicature, out of the Supreme Court, to handle the lawsuit of judicial review was firstly proposed by Hans Kelsen when he became a member of Chancelery in renewing the Austrian Constitution in the 1919-1920 and it was at that time the famously called Constitution Court (*Verfassungsgerichtshof*) out of the Supreme Court, that specifically handled thes *judicial review.*[7]

Related to the legislation process, Hans Kelsen states that judicial review is an institution with power to control or to regulate legislation.[8] With such judicial review, the laws from political processes may be appreciated or tested in terms of their constitutionality on the Constitution which is the highest normative regulation in a state, and the authorised institution to evaluate and to test the laws is the judicature institution with an authority to abbrogate a law or to state that a law is not legally tying.

The laws that have been made and implemented have not certainly been in accordance and in line with the Constitution, either in their establisment process or in their materials that may result in the Constitution will become unclear since the changes in values make the meanings vague.[9] And, a mechanism to correct law on the Constitution is called *Judicial Review*[10] ot to test of constitutionality of the law[11]

In the library research or in practice, there are two types of the rights to test, namely:

a. Formal Testing right *(Formele toetsingsrecht);*
b. Material Testing right *(Materiele toetsingsrecht)*[12]

Formal testing right means a right to evaluate whether a legislative product such as a law is born through procedures as stipulated/determined in the prevailing legislation or not. Whereas, material testing right is to examine and then to evaluate whether the content of a legislation is in line with or is in oppisition to the higher levels of regulations, whether a certain power *(verordenende macht)* has a right to make certain regulations.[13]

[4] Moh. Mahfud MD., *Politik Hukum di Indonesia,* (Jakarta : PT. Pustaka LP3ES Indonesia, 2001), p. 7.
[5] Jimly Asshiddiqie, *Perihal Undang-Undang di Indonesia,* (Jakarta : Sekretariat Jendral Mahkamah Konstitusi Republik Indonesia, 2006), p. 323.
[6] John Marshal as the Head of the US Supreme Court in taking in hand of Marbury vs Madison cases in 1803 where the US Supreme Court in the case had abbrogated the stipulations in the 1789 Judiciary Act because they were seen to be in opposition with the US Constitution. Although there was not any stipulation in the US Constitution and laws that gave authorities of judicial review to the US Supreme Court, but the Supreme Court opinioned that it was their constitutional obligation because it had made an oath to implement and to keep the Constitution.
[7] Model-Model Pengujian Konstitusional di Berbagai Negara (Jakarta: Konpress, 2005), p. 29.
[8] John E. Ferejohn, *Constitutional review in the Global Context, in 6th New York University Journal, Legis & Pub. Poly 49, 52.*
[9] Siti Fatimah, *Praktek Judicial review Di Indonesia* Yogyakarta: Pilar Media, 2005), p. 14.
[10] *Encyclopedia Americana*, volume 16 describes that 'Judicial review' is the power of court of a state to determine whether legislation, either the legislaive or executive products are in line wih the Constitution or not.
[11] Constitutionality testing used by Jimly Assidddiqie, in his book, *Hukum Acara Pengujian Undang-Undang,* (Jakarta: Yarsis Watampone, 2005), p. 5.
[12] Ph. Kleintjes, dalam Sri Soemantri M, *Hak Menguji material di Indonesia*, (Bandung: Alumni, 1982), p. 5
[13] Ibid, p. 6-8.

Any authority to test laws on the Constitution the Constitution Court makes is merely done in the field of material testing (*materiile toetsingsrecht)*, even the number of formal testing made to the Constitution Court so far is just 10 and they are never proposed in isolation but together with material testing.[14] Whereas, according to Saldi Isra[15], the purification of legislation process may happen if no formal testing process happens.

The formal testing in the 1945 Constitution of the Republic of Indonesia in its implementig regulation is never explicitly stated in what and how to test, but according to Jimly Asshiddiqie[16] the criteria used to evaluate the constitutionality of a law from the formal testing *(formele toetsing)* are that the law is determined in the appropriate form, by appropriate institution, and the appropriate procedure, and if the three criteria are furtherly described, the formal testing may cover the testing of the procedures in establishing the law in the discussion or in the decision making of the regulation into a law:

a. Testing of the form or structure of the law;
b. Testing the authority of the institution that makes the decision in the process of the establishment of the law; and;
c. Testing of other matters excluding material testing.[17]

The criteria Jimly Asshiddiqie proposes is his own personal opinion, meanwhile the 1945 Constitution or other regulation of the implementation do not clearly regulate whether this may be included into moral hazard, besides the four testing criteria that do not include into material testing.

Based on the description which was mentioned above, some problems on the base of considerations and parameters to test formally a law against the 1945 Constitution of the Republic of Indonesia in Indonesia appear.

B. Research Methods.

These studies are examines and describes about the considerations and parameters of any formal testing statute laws against the Constitution of the Republic of Indonesia Year 1945. Based on this mindset, the kind of research is a combination of normative and empirical legal research. Normative research (normative legal research) it means examining the legal materials or literature that has relevance to the subject matter under study, both primary legal materials, secondary law and tertiary legal materials. This research is a normative juridical (legal normative research), this kind of research, according to Soerjono Soekarno, the realm of normative research include: a study of the principles of law, legal systematic, the synchronization level of law, legal history and comparative law. In contrast to this normative study of social research, therefore the method used is also different with social research. This study examines the formal testing laws against the Constitution of the State towards the Rule of Law, by way of studying philosophy, legal principles, concepts and theories of law and the legal framework that explores particular problems. Deepening of the legislation, cases and opinions of jurists also used, as well as the deepening of the formal review of laws against the Constitution. To clarify the analysis of this study, the authors use several approaches, namely:

1. The Conceptual Approach it means that concept moved from views and doctrines developed in theory of law. This approach is intended to examine and analyze the study of the concept of law, in the form of principles, norms; testing theories about the legislation specifically testify the laws.
2. Statute Approach is done by reviewing all laws and regulations relevant to the legal issues that are being addressed. This approach is done by assessing against all forms of legislation in accordance with the relevant hierarchy with legal issues that are being studied.
3. The Historical Approach is done through examining the historical background of what is learned and the development of arrangements regarding the issues faced. This approach is used within the framework of the history of the underlying legal order history which being used testing legislation particularly formal testing laws.

[14] A. Moekthie Fadjar, *Kuliah Teori Hukum Tata Negara Dan Hukum Administrasi Negara,* taanggal 20 Maret 2010. Dari 10 gugatan formil yang diajukan, 8 gugatan ditolak dan dua sisanya masih dalam persidangan.

[15] Saldi Isra, *Purifikasi proses Legislasi Melalui undang-Undang, Pidato Pengukuhan Sebagai guru Besar Tetap Dalam Bidang Hukum Tata Negara Pada Fakultas Hukum Universitas`Andalas,* (Padang: 11 Februari 2010).

[16] Jimly Asshiddiqie, *Hukum Acara ..... Op.Cit, hlm. 57,* lihat juga Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia*, (Jakarta : Bahan Ilmu Populer, 2007), hlm. 589.

[17] Jimly Asshiddiqie, Hukum Acara....., Ibid.

4. The Comparative Approach is done by comparing the laws of a country with the legislation of one or more other countries regarding the same. In this approach is used to compare / comparison concept or execution of formal review of laws against the Constitution in several other countries.

Based on the issues raised in this study and was associated with the objectives to be achieved, then the specification of this research is descriptive-analytical, In this study used qualitative legal analysis techniques, namely primary legal materials, secondary and tertiary have been obtained beforehand reduced to sort out the truth as well as compliance with legal materials discussion of this research.

Legal materials that have been reduced and are in accordance with the discussion of research, directly described in the form of abstraction legislation and other legal materials. All of material which has described in law being analyzed to explore the nature and existing information in the form of legal events or legal consequences. In the juridical analysis method qualitative, data or object of these research collected will be identified by reference to the quality or the quality of data or material that law by not described as it is, but also will be given the argument about the nature of the formal testing of laws against the Constitution of the Republic Indonesia 1945 properly, so they will know what is really meant by the formal testing with what urgency for the implementation of judicial review in Indonesia.

C. Basis of Considerations and Parameters to Test Formally of a Law Against the 1945 Constitution of the Republic of Indonesia

Any effort to make the Constitution as the source of the highest law requires the basic constitutional stipulations to be implemented through legislation under the Constitution. The legislation made by the legislative and the regulation of the implementation made by the executive should not be in opposition to the Constitution itself. One of the efforts is to establish a constitution judicature as proposed by Hans Kelsen. To do that, it is necessary to have a specific organ such as special court called *Constitution Court,* or a control over the constitutionality of laws (judicial review given to the ordinary court, especially the Supreme Court in the United States.[18]

The citizens' have constitutional rights, that have been assured by the Constitution (the 1945 Constitution of the Republic of Indonesia) have been protected from any absolute behavior of the rulers', where this might result in any flaw in citizens' fundamental rights. The formal law testing of the Constitution is intended to "Give as much justice and benefits as possible to the people". If the process of legislation has ignored its legislation, what is seen is not only the text, but also the procedures, mechanism, and system of the formation. The formal law testing on the 1945 Constitution of the Republic of Indonesia is intended to form better laws (*leges condere legem melius mutato proposito*) since the process of legislation has ignored the principles of formation.

The history of the testing right of the regulation is not only based by the ultra vires doctrine, that has been used in the British system in the Great Britain, but also but the United States Tradition. Through the Madison vs Marbury Case in 2000, the Judge Marshall had made a decision that has become the crossbar for the birth of the teaching of constitution supremacy in testing regulations.[19] The existence of the right to test is intended to keep fundamental values contained in the Constitution of a country.

Based on the stipulation in Article 24 verse (2) of the 1945 Constitution, on August 13, 2003 the 2003 Law no. 24 on the Constitution Court was legislated. In the explanation of this law, it is stated that the existence of the Constitution Court as a state institution serving to handle certain cases in matters pertaining to form of government in order to guard the Constitution. One of the authorities of the Constitution Court is to test laws on the 1945 Constitution of the Republic of Indonesia. If the Constitution considers the stipulations in a law is in opposition to the Constitution, the Constitution Court will say that the stipulations the law do not have any legal binding power.[20]

In discussing the changes in the 1945 Constitution in the reformation era, opinions regarding the importance of a Constitution Court reappeared.

[18] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional Di Berbagai Negara,* (Jakarta: Konpress, 2005), p. 28-29.
[19] Bambang Sutiyoso dan Srihastuti Puspitasari, *Aspek-Aspek Perkembangan Kekuasaan Kehakiman di Indonesia,* UII Press, Cetakan Pertama, Yogyakarta, 2005, *p.* 108.
[20] Article 57 verse (1) the 2003 Law No.24 on Constitution Court..

The changes in the 1945 Constitution in the reformation era have caused the MPR (People's Consultative Council) supremacy to shift into Constitution one.[21] It is the changes in the basic thoughts that alter the institutional and constitutional mechanism and also state institutions in solving any disputes among the state institutions which are now considered equal and serve as check and balances. But there are some exhortations to test regulations not only the regulations under the law and also the law testing on the Constitution. And the authority to test should be given to specific institutions out of the Constitution Court. Therefore, the existence of the independent Constitution Court besides the Supreme Court is a necessity.

D. Legal Bases of Formal Law Testing against the 1945 Constitution of the Republic of Indonesia

1. The 1945 Constitution of the Republic of Indonesia

Article 24, verse (1) of the 1945 Constitution states that: *The Supreme Court has an authority to administer justice at the appeal (to the Supreme Court) level, to test any regulations under the law against the law and has other rights as stated in the law.*

Article 24C, verse (1) of the 1945 Constitution states that:

The Constitution Court has a right to administer justice at the first and last levels of which the decision is final to test laws against the Constitution, to decide any disputes of authority among state authorities of which the authorities are given by the Constitution, to decide the dispersal of political parties, and to decide any disputes of the results of general election.

Based on the stipulations stated in the two articles it is clear that either the Supreme Court or the Constitution Court possesses rights or authorities to make tests formally and materially. The difference between the two courts is that the first is to test limitedly, namely the testing of regulations against the law,[22] while the second is to test laws.

2. The 2003 Law No. 24 on the Constitution Court Jo the 2011 Law No. 8 on Changes of 2003 Law No. 24 on the Constitution Court

The Constitution Law has rights or authorities to test laws against the 1945 Constitution based on the Article 10 verse (1) of the 2003 Law bo. 24 on the Consitution Court, stating: "*Constitution Court has authority to administer justice at the fisrt and last levels of which the decision is final to (1) test Laws against the 1945 Constitution of the Republic of Indonesia."*

The authority to put the test of the 1945 Constitution includes the testing of the process of legislation (formal test) and material testing of law (material testing) is based on the Article 51 of the 2003 Law no.24 on the Constitution Court, stating: "*In the appeal as stipulated in the verse (2), the requester supplicant is obliged to describe clearly that:*

a. *The legislation does not meet the stipulations based on the 1945 Constitution of the Republic of Indonesia and/or*
b. *The content material in the verse, article, and/or parts of law is considered as in opposition to the 1945 Consitution of the Republic of Indonesia.*

On the formal testing, In the Article 51A verse (2) of the 2011 Law no. 8 on Changes of the 2004 Law no. 24 on the Constitution Court, it is stated "*In appeal to testing in the form of appeal of formal testing, examination and decision made by the Consitution Court is based on the regulations regulating the ways of making regulations"*

Based on the legal stipulations, the Constitution Court has authorities to examine, to try and to decide any appeal of formal testing, why?

3. The 2011 Law No.12 on Legislation

Based on Article 10 verse (1) of the 2011 Law no. 12, the materials that should be arranged through laws is:

[21] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme,* (Jakarta: Mahkamah Konstitusi Republik Indonesia dan Pusat Studi HTN Fakultas Hukum Universitas Indonesia, 2004), p. 187.

[22] Further arrangement of limited testings made by the Supreme Court has been stated in Article 26 of the 1970 Law no. 26 on Main Stipulations of the Powers of Judicial Affairs Jo. Article 31 of the 1985 Law no. 14 on the Supreme Court, or its law of procedures as stated in the Supreme Courts' regulation no 1 in the year of 1999.

a. Further arrangement on the stipulations of the 1945 Constitution of the Republic of Indonesia;
b. Order of a law to be arranged by law;
c. Legitimation of certain international agreements;
d. Follow up the decisions of the Constitution Court; and/or
e. Fulfillment of legal need in the society.

Meanwhile the formation of law is regulated in articles: Articles 16 to 23, 43 to 51, and articles 65 to 74 of the 2011 Law no. 74.

E. Testing of the implementation or procedures in making laws, either in the discussing or in making the decision of drafts of a law into a law

1. Decision Making by the DPR Should Meet the Quorum Condition

Quorum adalah *the minimum number of members (usual majority) who must be present for a body to transact a business or take a vote*.[23] In making a law, agreement is the ultimate authority of the legislaive institution that cannot be shared with another institutionn. Since a legislative institution is a group of elected representatives, all modern state constitution conditions a minimal limit of presence in each decision making especially the one for the interest of the people.

The presence of legislative members in the process of decision making is a must. The present should be for all members, but should be in line with conditioned minimum number. Moreover, the presence is physically one where it is needed for three reasons. It is in accordance with the stipulations the Article 5 verse (1) and Article 20 of the 1945 Constitution of the Republic of Indonesia.

According to Jeremy Waldron[24] *legislatures have a bad name in legal and political philosopy, a name sufficiently disreputable to cast doubt on their credentials as respectable source of law.* It is in line with the process of institutionalizing a constitutional democracy in Indonesia.

Principally, each law produced by the DPR and the President is an accumulation of ideas on the arrangement of collective life in handling the society, the nation and the state. Each member of DPR or fraction in the parliament naturally represents ideas of various groups of constituents who have given their mandate through general election. Therefore, each draft of a law cannot be determined and legalized into a law if there is a significant refusal to the law as a public politician that is collectively binding. Political and legal faith that law is determined and legalized through an invalidly flaw process is a bad precedent for the legislation process in the DPR since it results in systemic ignorance of the principle of law supremacy in institutionalizing the constitutional democracy in Indonesia.

The problems are clear that the people's mandate given through general election certainly cannot only be met by administrative representativeness of presence by members of the DPR. The people political mandate given to the representatives necessitate the fulfilment of two principles of representativeness, namely representativeness in ideas and in physical presence.

Each member of the DPR is required to meet the reprsentativeness of their physical presence in parliament meetings, specially the one intended to make decisions that require the fulfilment of a quorom assembly as stated by the law.

2. Making Decisions Should Fulfill Requirements of Decision Making

Based on the order of the DPR of Republic of Indonesia consisting of 25 CHAPTERs and 313 Articles, in CHAPTER VI on the Order of Formation of Law of the Order of the DPR of Republic of Indonesia stating the discussion of Draft of a law it is made through 2 (two) levels of discussion. The first level discusion is done through the following activities:

1. Introducing to deliberation
2. Discussing a list of problem inventory
3. Extending mini opinions

[23] Bryan A.Garner (edit. in chief) in *Black's Law Dictionary* (1999) the writer cited in ibid, p. 26.
[24] Ibid,p. 30

The stipulations are described in detail in the Order of the DPR of the Republic of Indonesia containing stages in making a law. If the stages as stated in the regulation are not obeyed, the process of procedures of making laws can be legally considered flaw.

3. Discussing Law Should Meet Principles of Good Legislation

The principle of legislation is a compass or sign in good legislation. In a legal field involving state regulation, Burkhardt Krems calls it *staatsliche Rechtssetzung*, so that such legislation involves first, the content of the regulation *(Inhalt der Regelung)*, second the forms and structures of the regulation (Form der Regelung), third method of making the regulation *(Methode der Ausarbeitung der Regelung* and fourth procedures and process of makingthe regulation *(Verfahren der Ausarbeitung der Regelung)*.

According to Hamid S. Attamimi[25] a proper legislation in Indonesia consists of first, the Indonesia legal aspiration, and principles of state based on law and of the government based on Constitution system and other principles.The proper principles of legislation in Indonesia will follow the compass dan guidance given by: Indonesia legal Aspiration, namely Pancasila (Sila means principles) in this case is applicable to Aspiration (Idee), to "Guide Star" and Fundamental Norm of State, Pancasila (Sila in this case is applicable to Norms).

Besides, principles of proper legislation covers: 1) principles of clear purpose, 2) of the necessity of arrangement, 3) of organs/institutions and proper content materials, 4) of ability to be implemented, 5) of recognizability, 6) of equal treatment in the law, 8) of legal certainty and 8) principles of legal implementation according to individual condition.

Article 5 of the 2011 Law no. 12 on Legislation formulizes as follows: *"Legislation should be based on the principles of good legisaltion covering: clarity of purpose, institutionalism or proper shaper of organ; suitability tween types and content materials; implementability; effectiveness and efficiency; clarity of formulation and openess.*

4. Testing of Form, Format or Structure of Law

Principles of formal testing is an evaluation at the level of constitutionality of a regulation covering whether a regulation that has been decided has proper form, good format and structure.

Dealing with formal testing as stated in Article 4 verse (3) Regulation of the Constitutional Court No. 06/PMK/2005 which stating that formal testing is testify a law concerning with the process of legislation and any matter that is not included in material testing.

In legislation, knowledge of form, format or structure of a law is needed, so that there is a uniform in form or format of regulation.

F. Concludeding Remarks:

in my opinion you (writer) should mention your statment by pointing what is the highlight of your finding (menurut pendapat saya sebagaimana simpulan artikel jurnal dituangkan dalam wujud apa pernyataan penting dari penutup tulisan dalam wujud pointers:

1. More focused on Testing formal assessment of the process of the formation of a Law, if it is in accordance with the procedure formation of as a stated in rules and regulations. Consideration Base and parameters formal testing act against the Constitution NRI of 1945 is:

a. The procedures of implementation or procedures formation of law, both are in the discussion above as well as in decision-making on the draft law will become a law;
b. form, the format or the structure of laws which being made;
c. Over the decision was taken in the process of the formation of the law.

[25] If following the division of formal and material principles, Apabila mengikuti pembagian mengenai adanya asas yang formal dan asas yang material, A. Hamid S. Attamimi tends to divide principlesof legislation into formal principles, with the following description: 1). Principles of clear purpose; 2). Of neccesity of arrangement, 3).of proper organ/institution, 4). Of proper content material 5). Of implementability. 6). Principles of recognizability. Whereas, the material principles consists of : 1). Principles of suitability with the Indonesia Legal Aspiration and Fundamental Norm of State, 2). Of Suitability with State Constitution, 3). and principles of law-based state and 4) Of suitability with Constitutional System-based government .. Cited by Maria Farida Indrati S, *Ilmu Perundang-undangan*, Penerbit Kanisius, Yogyakarta, 1998, p. 23.

2. Article 51 verse (3) of the 2003 Law no. 24 on the Constitution Court explicitly states in formal testing of appeal that "legislation does not fulfill stipulation based on the 1945 Constitution of the Republic of Indonesia." Therefore, formal testing is to test whether norms of legislation has been in line with the norms intended to follow by the the Constitution

B. Recommendation:

1. It is necessary to determine an arrangement as a benchmark in forml testing.
2. Matters appealed in formal testing (petitum) are: to accede of the appealler; to state that the concerned legislation is not in line with any stipulation of legislation based on the 1945 Constitution; and to state that the law does not have legal binding power.
3. Legislation should base on the principles of good and ideal legislation. It is intended to avoid any mistakes and legal implication in constructing norms.

References

Moekthie Fadjar, *Kuliah Teori Hukum Tata Negara Dan Hukum Administrasi Negara,* tanggal 20 Maret 2010.

Bambang Sutiyoso dan Srihastuti Puspitasari, *Aspek-Aspek Perkembangan Kekuasaan Kehakiman di Indonesia*, UII Press, Cetakan Pertama, Yogyakarta, 2005.

Budiardjo Miriam, *Dasar-Dasar Ilmu Politik*, Jakarta :PT. Gramedia Pustaka Utama, edisi revisi kedua, 2008.

Bryan A.Garner (edit. in chief) dalam *Black's Law Dictionary* (1999).

James Mac Gregor Burns et all, *Government By the People*, New Jersey :Prentice Hall, Englewood Cliffs, Thirteenth Alternate Edition , 1989.

Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme,* Jakarta: Mahkamah Konstitusi Republik Indonesia dan Pusat Studi HTN Fakultas Hukum Universitas Indonesia, 2004.

Jimly Assidddiqie, dalam bukunya, *Hukum Acara Pengujian Undang-Undang*, Jakarta: Yarsis Watampone, 2005.

Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara* Jakarta: Konpress, 2005.

Jimly Asshiddiqie, *Perihal Undang-Undang di Indonesia,* Jakarta : Sekretariat Jendral Mahkamah Konstitusi Republik Indonesia, 2006.

Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia*, Jakarta : Bahan Ilmu Populer, 2007.

John E. Ferejohn, *Constitutional review in the Global Context, dalam 6th New York University Journal, Legis& Pub. Poly 49, 52.*

M. Tahir Azhary : *Nerara hukum : Suatu Studi Tentang Prinsip-prinsipnya Dilihat Dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah dan Masa Kini* Jakarta : Kencana Prenada Media Group, Cetakan ke-3, 2007.

Maria Farida Indrati S, *Ilmu Perundang-undangan*, Penerbit Kanisius, Yogyakarta, 1998.

Moh. Kusnardi dan Bintan R. Saragih, *Ilmu Negara*, Jakarta : Gaya Media Pratama, Cetakan ketiga,1995.

Moh. Mahfud MD., *Politik Hukum di Indonesia*, Jakarta : PT. Pustaka LP3ES Indonesia, 2001.

Peter Mahmud Marzuki, *Penelitian Hukum,* (Jakarta: Prenada Media, 200 Ronny Hanintijo, Metodologi Penelitihan Hukum dan Jurimetri, Edisi Revisi (Jakarta : Ghalia Indonesia, 1988.

Ronny Hanintijo, Metodologi Penelitihan Hukum dan Jurimetri, Edisi Revisi Jakarta: Ghalia Indonesia, 1988.

Saldi Isra, *Purifikasi proses Legislasi Melalui undang-Undang, Pidato Pengukuhan Sebagai guru Besar Tetap Dalam Bidang Hukum Tata Negara Pada Fakultas Hukum Universitas`Andalas,* Padang: 11 Februari 2010.

Siti Fatimah, *Praktek Judicial review Di Indonesia* Yogyakarta: Pilar Media, 2005),

Sri Soemantri M, *Hak Menguji Material di Indonesia*, Bandung, Alumni, 1982.