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An Indonesia-France Comparison: The Design Mechanism for Legislation Establishment and Legislation Regulation Evaluation

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ABSTRACT

The good laws and regulations are in harmony with other laws and regulations. The disharmony of a statutory regulation with other regulations, both at the same level and at different levels, will cause a complex problem. As a result, these regulations can be canceled due to things that are contrary to constitution, laws and other regulations. This research is a qualitative research. The research method used is a combination of normative research supported by empirical field research data, namely research that uses information from research targets or subjects who are usually called informants or respondents through data collection instruments such as interviews and then combines it with data from library materials, especially those related to legal issues. Indonesia based on Law No. 12 of 2011 in conjunction with Law 15 of 2019 has determined a review system and monitoring in law formation, but the best practice from French regarding legislation reviews by independent institutions, called constitutional council and evaluation methods that implement by Australian with the sunset regulation and rescheduling culled methods provides a new perspective on the formation and evaluation in Indonesia, there will be consequences in adopting it either partially or completely that will be discussed in further research.

Keywords: *Legislation Establishment, Legislation Evaluation, Laws Formation*

INTRODUCTION

Indonesia adheres to three models of judicial review, namely the judicial review against the Constitution by the Constitutional Court, review of legislation under the law against the Act by the Supreme Court, and review of decree or actions of administrative bodies or officials state by the State Administrative Court.¹

The good laws and regulations are in harmony with other laws and regulations. The disharmony of a statutory regulation with other regulations, both at the same level and at different levels, will cause a complex problem. As a result, these regulations can be canceled due to things that are contrary to constitution, laws and other regulations.

This disharmony can be seen in judicial review submission of an Act on 1945 Constitution to Constitutional Court and Supreme Court, in Constitutional Court from 2004 to April 2019, there are 1231 submitted cases with 203 granted, 433 rejected, 481 cannot accepted (NO) and the rest is constitutional court decision. The number of submitted cases in constitutional court shows that the formed products (UU) still have many weaknesses, then the elements of an article are contrary to Indonesian constitution. The draft law originating from DPR is coordinated by the DPR's apparatus which specifically handles the legislation.

Regulations on Prolegnas are regulated in Article 16 of Law No. 12 of 2011 concerning the Formation of Laws and Regulations which state that planning for the formulation of laws is carried out in Prolegnas. The Prolegnas is equipped with instruments for setting priorities in the formation of laws. Next, the Prolegnas mechanism is regulated in Perpres No. 87 of 2014 concerning Implementing Regulations of Law No .12/2011 concerning the Formation of Regulations and Regulations that become binding regulations for all ministries and non-ministerial government agencies when preparing and proposing a Draft Law.²

In addition to the review in its formation, the reform of legislation can actually conduct through the laws and regulations review that have been made by analyzing at its effectiveness, with periodic reviews implemented by DPR for laws (commonly referred as legislative review).³ Reviewing something is commonly done in other countries, including in France. Therefore, in this research, researchers will describe and analyze the comparison of legislation formation and legislation evaluation between Indonesia and France.

¹ Tundjung Herning Sitabuana, Ahmad Redi, and Shella Felicia, "The Review of Regulations Through Ministry of Law and Human Rights," in *Proceedings of the Arbitration and Alternative Dispute Resolution International Conference (ADRIC 2019)* (Paris, France: Atlantis Press, 2020), <https://doi.org/10.2991/assehr.k.200917.015>.

² Bimo Satria Fajrin Nugroho and Muhamad Adji Rahardian Utama, "Legal Protection of Copyright in the Globalization Era: A Comparison of Indonesia and China," *Journal of Law and Legal Reform* 1, no. 4 (July 31, 2020), <https://doi.org/10.15294/jllr.v1i4.39424>.

³ Jimly Asshiddiqie, *Hak Menguji (Toetsingsrecht) Yang Dimiliki Hakim Dalam Sistem Hukum Indonesia* (Jakarta: Raja Grafindo Persada, 2006).

RESEARCH METHODOLOGY

This research is a qualitative research. Qualitative research is a process of naturalistic inquiry that seek an in-depth understanding of social phenomena within their natural setting. It focuses on the “why” rather than “what” of social phenomena and relies on the direct experiences of human beings as meaning-making agents in their everyday lives.⁴ The research method used is a combination of normative research supported by empirical field research data, namely research that uses information from research targets or subjects who are usually called informants or respondents through data collection instruments such as interviews and then combines it with data from library materials, especially those related to legal issues, with an approach that emphasizes the search for norms contained in legislation provisions and existing legal theories, and uses a conceptual approach from the views and doctrines that developed in law.⁵

The data collection are conducted through primary legal materials and secondary legal materials. Primary legal materials are called binding legal materials. The primary legal materials used in this research consist of statutory regulations.⁶ Primary legal materials are intended to obtain information related to research, regarding the formation and review of a statutory regulation, both at highest level and the lowest level.

RESULT AND DISCUSSION

The Practice of Laws Formation in Indonesia

The formation of laws in Indonesia is conducted by House of Representatives (DPR) and will be discussed together with the President for mutual approval in accordance with the mandate in Article 20 paragraphs (1) and (2) of 1945 Constitution. The laws that discussed by DPR and President will be included in National Legislation Program. In forming a law, it is necessary to pass several stages, such as planning, drafting, discussion, ratification/stipulation and promulgation. These stages make the formation of the law are transparent and accountable in its design implementation. In addition, regarding the process of forming the laws/legislation, there are 4 necessary things, Initiatives for Forming

⁴ Sharique Ahmad et al., “Qualitative v/s. Quantitative Research- A Summarized Review,” *Journal of Evidence Based Medicine and Healthcare* 6, no. 43 (October 28, 2019): 2828–32, <https://doi.org/10.18410/jebmh/2019/587>.

⁵ Peter Marzuki, *Penelitian Hukum: Edisi Revisi* (Prenada Media, 2017), <https://books.google.co.id/books?id=CKZADwAAQBAJ>; Sri Mamudji and Soerjono Soekanto, *Penelitian Hukum Normatif* (Jakarta: PT. Raja Grafindo Persada, 2012), https://books.google.co.id/books?id=_Y1GPAAACAAJ.

⁶ Mamudji and Soekanto, *Penelitian Hukum Normatif*.

Laws, Considerations in laws and regulations formation, Influence in making laws and regulations, also Arguments and voting.⁷

The proposal and drafting of DPR initiative can be implemented in two ways, called based on National Legislation Program and Members' initiative, Commissions, Joint Commissions or Baleg. The preparation of National Legislation Program by DPR is coordinated by DPR through the Baleg. The draft law (RUU) initiated by Representative Council may be proposed by members, commissions or a combination of commissions accompanied by a draft law, academic text and/or information containing the main ideas and regulated content. The drafting of DPR initiative law will be assisted by Legislation Assistance Team (Baleg). Apart from that, there are several other institutions that functionally have the authority to prepare a law that will be proposed by DPR's initiative. This legislation is the Center for Study of Data and Information Services (PPPDI) which is in charge of conducting research on the Bill and Drafting Team substance of Secretariat General of House Representatives which changes the research results into regulation.

To be proposed as DPR initiative law, the Legislative Leader (Baleg) sends a letter to DPR leadership accompanied by a list of names and signatures of proposer and their faction after harmonization name, unanimity, and conception consolidation by legislative sector (Legislation Agency).

DPR Initiative Proposal

The formation of DPR initiative law is conducted by Commission, joint commission, Legislation, special committee, or Budget Agency. The stages of harmonization, unification, and consolidation of draft law conception include technical aspects, substance, and principles for laws and regulations formation by Legislative which can form a committee that consist of half members of Parliament that formed it.

The committee will explicitly harmonize, unify, and strengthen the conception of draft law that covering technical aspects, substance, and principles for the formation of laws and regulations that can construct the drafting team, small team, and/or a synchronization team. Each team has its duties and functions, the formulation team is responsible and reports their work results at meeting committee, small team is in charge of formulating the material for draft law and general explanations or in accordance with the decisions of work meeting and synchronization team in charge of harmonizing the formulation of draft law by the decisions of work meetings, work committee meetings, and the results of formulation team.

After the harmonization, unanimity and concept consolidation by legislative have been conducted, the Plenary Meeting can only be held after the proposal for

⁷ Faried Ali, *Hukum Tata Pemerintahan Dan Proses Legislatif Indonesia* (Jakarta: PT. Raja Grafindo Persada, 1996).

draft regulation is accepted by chief of DPR. The leadership of DPR notifies their Members about the entry of proposed laws and it is distributed to all Members. The Plenary Meeting is held to decide whether the proposed regulations can be accepted or not, after the factions give their opinion. The decisions in Plenary Meeting can be in the form of Approval, Approval with amendments; or Rejection

When the DPR initiative laws has been sent to President, but has not received a letter of introduction from President, it can be withdrawn based on plenary meeting decision, but when the discussion has been implemented at level 1, it can only be withdrawn through a joint agreement between DPR and President.

When the president accepts the regulation submitted by DPR, the president will assign the relevant minister who will be in charge of the substance of proposed regulation for further coordination with relevant ministers/non-ministerial government. The government envoy will convey the government's views and opinions as well as suggestions for improvement of a Problem Inventory List (DIM). With no longer than 60 days after DIM is submitted to President, the President will appoint a Minister who will represent him to discuss the regulation at DPR meeting.

Regulation Drafting based on Prolegnas

The main task of inter-ministerial committee is to discuss principal issues regarding the regulated object along with its scope and direction. After that, the members of inter-ministerial committee (officials, legal experts and/or legislative drafters) are asking the opinion from Minister/leadership. In their preparation, the proposer may invite experts from universities or other social, political, professional and community organizations according to their needs.

The regulation formulation progress must be reported periodically by inter-ministerial committee to the proposer in obtaining the decisions and directions. When it is deemed to have been completed, the Chair of Inter-Ministerial Committee submits it to Minister for approval and when it is necessary, the law can be disseminated for further refinement.

The alignment, the conceptions and techniques harmonization of drafting legislation will be implemented by Minister of Law and Human Rights (Menkumham) from the regulation that has been submitted by proposer, no longer than 14 (fourteen) days after the law is received, the Minister must provide the consideration and initial approval to the harmonization regulation. After it is completed, the regulation can be submitted to DPR RI.

Laws Drafting Outside the Prolegnas

The submitted regulation under certain circumstances (outside National Legislation Program) in resolving urgent situations, it requires the consultation with Minister of Law and Human Rights in the context of harmonization, unanimity, and stabilization of the draft laws. The results of Menkumham discussion with

appointed inter-ministerial committee (officials, legal experts and legislative drafters) and opinion from the coordination/communication involving universities, organizations (political, social, professional and community) in providing opinion and responses to the laws which will be submitted. The coordination that achieves harmony, unanimity, and stability in regulation draft, it can be submitted to president and will be forwarded to DPR RI.

Draft Law (RUU) on Initiative for Regional Representatives Council (DPD RI)

Based on article 22D paragraph (1) of 1945 Constitution, the Regional Representative Council (DPD) can also submit a draft law (RUU) relating to regional autonomy, central and regional relations, the formation and amalgamation of regions, management of natural resources and economic resources, as well as those related to central and regional finance.

The submission of DPD initiative laws is a regional law through national legislation program (Prolegnas). The law proposed by DPD is suggested by Legislative Drafting Committee (PPUU) which prepares the material for regulation and academic manuscripts that form the law submission basis. When the law was agreed through DPD plenary session, it has become a legal proposal for DPD initiative in accordance with Article 276 of MD3 Law.

Based on article 277 of MD3 Law, it is necessary to propose a law for DPD to DPR by submitting a cover letter to the chief of DPD to chief of DPR with a copy to President, who appoints the PPUU to represent the DPD in discussing the law in DPR. The proposed Bill along with Academic Paper (NA) will be discussed with the Minister that represent the president (appointed no longer than thirty days after receiving the proposed DPD law) who will discuss the regulation with DPR RI and DPD RI (no longer than sixty days from the receipt of president's letter from the DPR chief, this procedure is in accordance with Article 166 of MD3 Law.

The decisions from the plenary session are made by deliberation and consensus, but the decision can be made through the majority vote (voting). The decisions that have been reached on discussed law are sent to president for the ratification. When there is no mutual agreement between DPR and President, then the law may not be submitted at the DPR session again.

The Legislation Ratification

The final process in of forming a law is ratification and promulgation. The law that has been jointly approved by DPR and President, within of 7 (seven) days, the chief of DPR is submit to the President for ratifying into a law. After being received by president, it will be ratified by president for no longer than thirty days after the law is approved by DPR and President.

The ratified laws by president will be promulgated by Minister whose duties and functions are to implement the government affairs in the field of law, then the Law can apply and have binding legal force in general, or when the bill has not been

signed by president for no longer than thirty days after the mutual approval, the law remains valid as a regulation and must be promulgated in accordance with Article 20 paragraph (5) of 1945 Constitution and Article 73 paragraph (2) of Law Number 12/2011.

The Comparison of Laws Formation and Evaluation in Indonesia and France

The law formation in France according to Constitution of France Republic (1958) was conducted by two-chamber parliament consisting of the National Assembly and the Senate, where the law could be submitted by either the Prime Minister or members of Parliament. The granting authority between National Assembly and Senate to accept proposed law from the government, except that the proposed government regulation on finance and social security must be submitted to National Assembly first, and the law on regional organization and on institutions representing the French in abroad must be submitted to the Senate initially. Granting the same authority to National Assembly and Senate in discussing the law from government submitted to them as balance and control, National Assembly and Senate are given the same authority to give consideration to a law that has been approved by one of them. They also given the same authority to propose amendments to the regulation.

The current constitution of France is the Constitution of 5th French Republic which was adopted on 28th September 1958. The motto of French Republic is "La devise de la République est « Liberté, Égalité, Fraternité ». Son principe est: gouvernement du peuple, par le peuple et pour le peuple". (The Republic slogan is: freedom, equality, and brotherhood, with the principle: Government of the people, by the people, and for the people).

The stages of law formation in France are conducted in following stages:

1. The law can be submitted by either the Prime Minister or Parliament members.
2. The Government initiative law is submitted to one of the parliaments, specifically the regulation on finance and social security must be submitted to National Assembly and the law on the territories organization and on institutions representing the French nation in abroad must be submitted to the Senate.
3. The discussion of Government's proposed law is conducted in one parliament, then the results are submitted to the other parliament for consideration.
4. The discussion of the law is implements in a permanent commission, unless the Government is currently discussing requires in a special room.
5. Members of Parliament and the Government have the right to make changes to the regulation under discussion.

6. When there is a difference of opinion among the Government, National Assembly, and Senate during the regulation's discussion process, then at the parties' request, the Constitutional Council will determine within 8 days.
7. Each law is discussed in both legislation for mutual agreement, but the Prime minister is able to form the joint committee when there are still have the differences after 2 (two) discussions or the government declares an urgency state after 1 (one) discussion in each parliament. However, when the Joint Committee cannot reach an agreement, the final decision is based on the National Assembly.
8. Exceptionally when there is a difference of opinion between two parliament in organic (institutional) discussion law, then the approval is based on the National Assembly through the majority vote, but when the bill is related to the Senate, it must be approved at the same time by both parliaments. Furthermore, the regulation was only promulgated after there was a statement that not contradicting with the constitution from the Constitutional Council.
9. When the National Assembly in first discussion within 40 (forty) days cannot reach an agreement in law discussion of Finance, the Government will submit it to Senate and the Senate must ratify it within 15 (fifteen) days. If the Senate does not also give approval, it will apply the general provisions of the discussion. When within 75 days Parliament does not give approval, the Government will arrange it in an Ordinance (Government Regulation).
10. In the discussion of the regulation regarding Social Security, when the National Assembly in first discussion within 20 (twenty) days cannot reach an agreement, the Government submits it to the Senate and Senate must ratify it within 15 (fifteen) days.

The Constitutional Council is not a Supreme Court since it is not a hierarchy of Administrative Courts, General Courts, and Special Courts. The French Republic is a country that adheres to Continental European legal system which has a Constitutional Council to implement the right to adjudicate. This is because the French Republic adheres to the pure theory of separation of power in its constitution, called the Constitution of Fifth Republic.⁸

The Constitutional Council is the "guarantor" of the constitution to protect the constitution. To implement its duties, the Constitutional Council has the authority has the right to examine (toetsingsrecht).⁹ What is meant by the right to formal

⁸ E M Barendt, *An Introduction to Constitutional Law* (Oxford University Press, 2023), <https://books.google.co.id/books?id=BQ1I0AEACAAJ>.

⁹ Asshiddiqie, *Hak Menguji (Toetsingsrecht) Yang Dimiliki Hakim Dalam Sistem Hukum Indonesia*.

examination is the authority to assessing whether a legislative product such as a law is incarnated through procedures as determined or regulated in the applicable laws and regulations or not.¹⁰ After the amendment of the 1945's Constitution, Indonesia includes the constitutional court in their constitution, known as the Indonesian Constitutional Court (ICC). Practically, the constitutional court which has transplanted in Indonesia seems similar to the Germany model. However, the ICC is not a single court that having authority to review all regulations under the constitution. This due to it has to share its power with the Supreme Court to review the regulations. The ICC is merely has jurisdiction for reviewing a statutes that against the constitution; and on the other hand the Supreme Court has juridiction for the regulations under the statute. This dualism system of judicial review has seemed easy in idea but has obstacles in the practice. In this dualism system of judicial review, Indonesia has widely modified the system existing in Austria as well as in Germany.¹¹

Based on the provisions of Article 56 of Fifth Republic Constitution, the Constitutional Council consists of 9 (nine) members, plus all former French Presidents as ex officio Members. The nine members consist of 3 (three) persons appointed by French President, 3 (three) persons appointed by President of the National Assembly and the last 3 (three) persons appointed by Senate President.

An inconsistent provision with Constitution cannot be enacted or enforced since the Constitutional Council decisions cannot be influenced. The decisions must be accepted by government, all administrative and legal institutions.

Based on the description above, it shows that the procedures for law formation in France and Indonesia do not have significant differences in initiative, but the striking differences are in the stages of discussion and promulgation. This is due to the different character of parliamentary system, where Indonesian bicameral parliamentary system is subtler than French bicameral parliamentary system. In addition, another difference is in the promulgation process of the law. In Indonesia, a law that has received mutual approval between DPR and President can immediately be promulgated into applied regulation. Meanwhile, a law that has been jointly approved by Prime Minister and Parliament can only be promulgated into law when it has received approval from Constitution Council.

The comparison for law formation procedures between France and Indonesia is described in the table below:

¹⁰ Sofyan Sitompul, "Hak Uji Materiil (Menurut Amandeman UUD 1945 Dan Perbandingan MA Di Amerika Serikat)," *Jurnal Legislasi Indonesia* 1, no. 3 (2018): 7–14, <https://e-jurnal.peraturan.go.id/index.php/jli/article/download/276/163>.

¹¹ Muhammad Armia et al., "CONSTITUTIONAL COURTS AND JUDICIAL REVIEW: LESSON LEARNED FOR INDONESIA MAHKAMAH KONSTITUSI DAN PENGUJIAN UNDANG-UNDANG: PEMBELAJARAN BAGI INDONESIA," 2017.

Table 1. The Comparison of Law Enforcement Procedures Between Indonesia and France

Similarities Aspects	Indonesia	France
Government Initiative Rights	The Government's initiative right is proposed by President	The Government's initiative right is proposed by Prime Minister (specifically RUU regarding finance and social security must submit to National Assembly, a law on territories organization and on the institution representing French in abroad must be submitted to Senate)
First legislative initiative right	The initiative right originating from DPR is proposed by DPR members/Commission/Combined Commission/Baleg	right originating from the National Assembly is submitted by the Members of National Assembly)
Second Council Initiative Right	The initiative right proposed by DPD only concerns to law relating to regional autonomy, central and regional relations, the formation, expansion and amalgamation of regions, management of natural resources and other economic resources, as well as relating to balance in central and regional finance.	The Senate has the initiative right for all laws.
Discussion and Consideration	The law discussion is only conducted by DPR and President, except for the law regarding to regional autonomy, central and regional relations, the formation, expansion and amalgamation of regions, management of natural resources and other economic resources, as well as relating to the balance of central and regional finances, including DPD.	The law discussion is conducted by Prime Minister in one of the parliaments, while other assemblies only provide considerations for mutual approval. However, when these considerations are different after 2 (two) discussions, the Prime Minister may form a Joint Committee, when the Joint Committee cannot reach an agreement, the final decision is based on the National Assembly. In the discussion of organic (institutional) laws, when there are differences opinion

		between two parliaments, the agreement is based on the National Assembly.
Approval of laws into legislation	The law approval between DPR and President is ratified by President and promulgated in no longer than 30 days after it is validated.	An approved law by National Assembly and Prime Minister can only be ratified and promulgated into legislation after a statement is made does not conflict with the Constitution of Constitutional Council.
Right to examine (Toetsingsrecht)	Constitutional Court	Constitution Council
Examination Mechanism	Reviewing the Law	The examination of the Draft Law (Preview)

Source: Processed Data by Researchers (2022)

The ratification opportunity by Indonesian state regarding the best practice that has been implemented by French has a great opportunity when it applied in Indonesia, but it will have major consequences for institutions in the legislation formation, especially laws.

CONCLUSION AND SUGGESTION

Conclusion

Indonesia based on Law No. 12 of 2011 in conjunction with Law 15 of 2019 has determined a review system and monitoring in law formation, but the best practice from French regarding legislation reviews by independent institutions, called constitutional council and evaluation methods that implement by Australian with the sunset regulation and rescheduling culled methods provides a new

perspective on the formation and evaluation in Indonesia, there will be consequences in adopting it either partially or completely that will be discussed in further research.

Suggestion

The determination should be made to ratification through the benchmarking in the system of legislation formation and evaluation in force in France as a comparison.

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