

THE STATUTORY REVIEW FOR THE CITIZENS' RIGHTS PROTECTION

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Abstract

Laws are made by the authorities to regulate society, there is a tendency for laws to be used as a tool as a tool of social engineering. However, in making it vulnerable to laws being deposited that affect their objectivity, so that the law seems far away from society and away from the spirit of the constitution, even though the constitution is guardian. Therefore, the institutions provide canalization by examining the material of the law by regulation review. In addition to ensuring that laws that are born do not violate the constitution, it must also be ensured that the law must provide protection to the community. Rights are the power to receive or do something that should be accepted or carried out solely by certain parties and cannot be by any other party which in principle can be sued by force. Protection of citizens' rights is an important element in a rule of law and democracy. Without the protection of rights, the kana state operates in a totalitarian form of power.

Keywords : Statutory Review, Citizen's Right, Protecton of Law

A. INTRODUCTION

Legal certainty is essential in regulating substance and the statutory format of a state's life framework. It is based on the idea that constitutional life must be based on a legal order spirit manifested through statutory regulations. This statement is theoretically known as "a state based on law" is one element of the rule of law. The other elements are the separation of powers, independent judicial powers, and guarantees of human rights.¹

The examination of government regulations needs to be carried out in the framework of the regulatory independence spirit. This is because political power emphasizes the importance of testing government regulation to examine objections. and adherences by the government in community activities. Therefore, efforts to influence the process of examining objection requests need to be eliminated or minimized within the framework of an independent judicial spirit process.

¹ The three branches of power are judicative, executive, and legislative. Read Ismail suny, Division of State power, or comparative investigations in the constitutional law of England, the United States, the Soviet Union in Indonesia (Jakarta: Aksara Baru, 1985), 1-4.
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B. INDEPENDENCE OF THE JUDICIARY.

The debate on judicial independence is inseparable from the discussion of judicial power as a branch of state power which closely related to the rule of law concept,² where an independent and impartial judicial process is one of the conditions for its establishment.³ Furthermore, the discussion on the independence of the judicial power is inseparable from the theoretical debate on the separation of powers because it is intended to ensure the independence.⁴ The guarantee of independent judicial power is an important element in the law concept.⁵ This is because the relationship between the powers separation and the rule of law concept lies in the limits regulation of the judiciary, executive and legislature, and their branches in the constitution.⁶

The independence of the judicial power is seen in the placement of each individual as equal before the law and the enactment of ordinary tribunals for every citizen.⁷ Apart from an independent and impartial judicial process, there are two other characteristics of the rule of law concept, namely the guarantee of human rights protection regardless of race, gender, cultural background, economic condition, political views, and the principle of legal certainty.⁸ Ismail Suny stated that the independence and impartiality of the judiciary is one of the ten minimum conditions for a society to be created under the rule of law.⁹ Therefore, there is a strong basis for the presence of an independent judicial power as mandated in the explanation of the 1945 Constitution.

An independent judicial process is the absence of influence from third parties or other institutions outside the judicial power, where the judge's decision is created on the basis of facts correlation in the trial and the relationship with the applicable law.¹⁰ There are two reasons that explain the importance of third-party neutrality in the judicial process.¹¹ *First*, the principle of

² There is no clear definition of "the rule of law." or at least invite a variety of understandings. For example, A.V. Dicey, a leading British law degree associate "the rule of law" with the concept of liberalism and the right to material test (judicial review) on government actions in issuing regulations. In the twentieth century, the discussion about "the rule of law" is contrasted with the term "the rule of man". see Ricard H.Fallon, Jr. "The rule of law as concept in constitution Discourse" Columbia Law Review 97, no.1 (1997), 1-2, lihat juga A.V.Dicey, Introduction to the study of law of the constitutions, 2nd edition, (London; MacMillan, 1959), 181-205.

³ There are five elements in the rule of law, wherein more detail are " (1) the first element is the capacity of legal rules, standards, or principles to guide people in the conduct of the affairs, (2) the second element of the Rule of Law is efficiency, or the law needs to guide people, (3) the third element is stability, in which the need to reasonably stable, to facilitate planning and coordinated action over time, (4) the fourth element of the rule of law is the supremacy of legal authority, meaning the law should rule officials, including as well as ordinary people citizens. (5) the final element involves instrumentalities impartial justice, meaning court should be available to enforce the law and should employ fair procedures", Baca Richard H.Fallon, Jr., " The Rule of Law a concept in constitutional Discourse." Columbia Law Review, Vol 97 (Januari 1997) 8-9.

⁴ Melvin A.Arquillo, A Case Survey of the 1970 Supreme Court, Decision on Political Law." University of Santa Thomas Law Review (Aug-Sept 1971),22.

⁵ *Negara hukum* concept is an Indonesian translation of the term "the rule of law" as adopted in the Anglo Saxon legal tradition and "*rechtstaats*" in the Continental European legal tradition.

⁶ Dieter C.Umbach, "Basic Elements of the rule of law a Democratic of society." Beatrice Gorawantschy, et al., the rule of law and democracy in the Philippines (Diliman: University of Philippine, 1985),24.

⁷ A.V. Dicey, Introduction to the study of the law of the constitution. Op.Cit.193.

⁸ T.Mulya Lubis, In Search of Human Rights, Op.Cit.,88.

⁹ Ismail Suny, Mencari Keadilan, sebuah Otobiografi (Jakarta: Ghalia Indonesia, 1982), 262.

¹⁰ A.V. Christopher M.Larkins, "Judicial Independence and Democratization: a Theoretical and Conceptual Analysis," The American Journal of Comparative Law 4. Vol.XLIV (Fall 1996),608.

¹¹ Ibid

third-party neutrality is related to the application of court decisions.¹² Ideally, when the judges are uninterested in a case and put up an abnormal attitude towards one of the parties, regardless of differences in their economic background, then they have the ability to apply the parties in a position of justice before the law. They also have the ability to protect the rights and security of one party from the violation of the other. Therefore, independent judges are assumed to be able to decide cases based on objective principles of law and not on social or litigant positions. Furthermore, the independent judges' attitudes tend to prevent parties with strong societal positions from manipulating the law in their interest rather to obtain a fair and impartial legal process as citizens.

Second, Judicial independence becomes very important when the government is involved in a dispute or case because it tests the court impartiality. Therefore, a trusted judicial process prevents judges from being biased towards the government's interests when examining disputes. Therefore, the position of judges without the influence of government power is important, and they need to be protected from any forms of threats, intervention, and manipulation that prevent them from passing the right judgment.¹³ Conversely, the rule of law concept fails to work when judges are afraid to challenge government interests or criticize their actions.¹⁴ As a consequence of applying the principle of equality before the law, authoritarian and autocratic powers need to be removed from the rule of law discourse. This is because the two types of power ascertain that the exercise of governmental power is fraught with the absence of legal certainty, the non-implementation of an independent and impartial judiciary, and the failure to apply the principle of equality before the law. It is important to convey this assertion because and add the word "democratic" to the terminology because governments with an authoritarian and autocratic style also claim to be the rule of law. In a narrow sense, independence of judicial power is defined as the absence of institutional interference outside the court, or more precisely, the influence of executive and legislative powers when following the logic of *trias politica*, on the ongoing judicial process. In a broader sense, it is understood as the independence of the judiciary in carrying out non-judicial functions, namely finance, recruitment, and promotions of judges.

Therefore, independence of the judiciary is a pillar of the rule of law, which is intended as the absence of interference from non-judicial functions, especially the executive in its implementation.¹⁵ However, legal corridors in the form of statutory regulations for the implementation of functions need to be implemented in order to prevent the unlimited exercise of judicial powers. The reflection of the limitation on the implementation of judicial functions is seen in the regulation of judicial competence and court jurisdiction, which is carried out to protect the rights of defendants or justice seekers.

¹² Tejomurti, Kukul. "Right to Safety and Security for Passengers Traveling By The Public Road Transportation." *Yustisia Jurnal Hukum* 6, no. 1 (2017).

¹³ Pujiyono Pujiyono, "Legal Protection For The Loss Of The Passenger Of Online Transportation." *Yustisia Jurnal Hukum* 8, No. 2 (2019), pp. 221-222

¹⁴ Ahmad, S. D. (2019). Legal Protection for Creators of Cinematographic Works against Copyright Infringement through Streaming and Free Download Sites. *Journal of Legal, Ethical and Regulatory Issues*, 22(3), 1-7.

¹⁵ Considering the importance of judicial identity, the Canadian Department of Justice from 1980 to 1985 conducted a survey on the implementation of judicial functions in all Canadian states, including the State of Quebec.

Read Shimon Shetreet dan Jules Deschenes, *Judicial Independence: the Contemporary Debate* (Dordrecht: Martinus Nijhoff Publishers, 1985), 381.

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Apart from the need to protect the interests of citizens through statutory regulations, Plato warned against the imperfection of the law¹⁶. PHe even predicted the possibility for the emergence of a legal approach practice which, although in line with the law, is against human rights or a sense of justice. Therefore, regarding the imperfections of the law in the framework of protecting the rights of citizens, Plato further stated the following¹⁷

.....” law does not perfectly comprehend noble attributes and therefore cannot enforce what is best.”

However, behind the imperfections of the law, Plato still recognizes it as a tool used to overcome tyrannical power that always threatens the lives of individual citizens and society.¹⁸ Plato's admission has placed legal instruments as a tool used to protect the interests of society. Legal protection is an important part of the law enforcement process, which is an instrument used for public protection. Statutory regulations and legal officers are two of the three elements of the legal system.

C. RULE OF LAW CONCEPTS

The rule of law concept has historical roots in the struggle to uphold democracy. Therefore, its definition is often used as the concept of a democratic rule of law.¹⁹ This simply means that there is no citizen is above the law, hence everyone needs to obey it without exceptions.²⁰ Equality before the law is one of the rule of law elements in Anglo Saxon tradition (Rule of Law),²¹ which is recognized as universal values. Equality and justice are closely related to the process of law enforcement, which is a practical instrument in accordance with the sense of justice in society and acts as an expression of democratic values in a democratic country. Due to the relationship between the values supporting democracy and the rule of law elements, equality and justice are often used as one breath to determine the ideal form of a rule of law that protects the rights of citizens.²²

The third element is the legal culture, and all three mentioned in the legal system determine the effectiveness and success of the law enforcement process. The initial note that needs to be conveyed is that the success of the law enforcement process is closely related to achieving a sense of justice in society as a fundamental element in a democratic legal system. John Rawls reported the importance of the legal system in applying the principles of freedom and justice, which is a necessity to society.²³ According to Rawls, ²⁴ A legal system is a

¹⁶ Karen G.Turner, et.al (eds)Op.Cit.,5

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ Pujiyono, Pujiyono, and Hari Purwadi. "Consumer Protection in Resale Price Maintenance Practices." *International Journal of Multicultural and Multireligious Understanding* 8, no. 1 (2021): 17.

²⁰ Teofisto T.Guingona, "Rule of Law and Democracy in the Phillipines."Beatrice Gorawantschy,*et.at..Op.Cit,15*.

²¹ If the characteristics of the rule of law are mentioned as the existence of equality before the rule of law and due to process of law, the elements in rechstaat include protection of human rights, independent judicial power, separation of powers, rule based on law, and administrative justice.

Read Muhammad Tahir Azhary, the rule of law, *Studi tentang Prinsip-prinsipnya dilihat dari segi hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini* (Jakarta: Bulan Bintang, 1992),73.

Read also Todung Mulya Lubis, *In Search of Human Rights, Op.Cit.,88*.

²²Arbi Sanith, *Perwakilan Politik di Indonesia* (Jakarta: Penerbit CV Rajawali, 1985), 25.

²³John Rawls, *Ai Theory of justice* (Massachusetts: The Belknap Press of Harvard University Pess Cambridhe< 1971), 235.

²⁴*Ibid*.

compelling order covered by regulations for the public and aimed at the interests of individual citizens of society as a guide for the achievement of social order. An understanding of the legal system is parallel to assimilating the law. Therefore, when Austin understands the law as an order addressed to all legal subjects, then the legal system is a collection of rules.²⁵

H.L.A. Hart also views law as a system containing a set of rules that are hierarchically related and complex in structure.²⁶ Hans Kelsen further defined law as a more specific command because an order is a manifestation of personal will.²⁷ Kelsen proposes that the legal meaning is related to the authority given to individuals that give orders.²⁸ However, the order Kelsen meant was different from those issued by bandits to drain a person's money. Therefore, regarding the statement of giving the order, Kelsen further stated the following,²⁹

“A command is binding, not because the commanding individuals have an actual superiority in power, rather because they are “authorized” or “empowered” to issue commands of a binding nature. Furthermore, they are “authorized” or “empowered” only if a normative order, which is presupposed to be binding, confers them the capacity to issue binding commands.”

Courts play an important role in implementing the concept of rule of law during the democratization process, especially in conditions of transition from an authoritarian political system to a democratic society. This is also associated with the role of the courts in preventing the abuse of the judicial process for political purposes.³⁰ In this transitional period, the judiciary is an institution that enforces the constitution, protects human rights, and guarantees democratic procedures. As an ideal illustration, in carrying out the judicial function or constitutional review, judges are not only mediators between political elites, rather they are also able to avoid the unfair exercise of governmental power.³¹ Hence, the courts are very strong actors in maintaining state power through legal channels.

D. Kelsen's Theory and Material Test

Hans Kelsen stated that law is a mere juridical *sollen* that is completely independent from *das sein* or social reality. Therefore, Kelsen rejected the theory of natural law and argued that *huum* is nothing other than a ruler's rule that requires people's obedience.

Furthermore, Kelsen stated that the legal system is hierarchical, where a certain legal provision is rooted in another, higher legal provision. This view is known as the tiered norm theory (*Stufenbau theorie*), introduced by Hans Kelsen and developed by Adolf Merki. The hierarchy of norms is symbolized by its existence determined by norm-making institutions.³²

C.K. Aliens stated the following³³

²⁵Joseph Raz, *The Concept of a Legal System, an introduction to the Theory of a Legal System, Op. Cit.*, 6. Read also Hari Chand, *modern jurisprudence* (Kuala Lumpur: International Law Book Service, 1994), 74.

²⁶John N. Adams and Roger Brownsword, *Understanding Law* (London: Fontana Press, 1992).

²⁷Hans Kelsen, *General Theory of Law and State*, Anders W edberg translation (New York Rus-sell and Russel, 1945), 30-31.

²⁸*Ibid.*, 31.

²⁹*Ibid.*

³⁰Christopher M Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis *The American journal of Comparative Law* 4, Vol. XLIV (Fall 1996), 605.

³¹*Ibi.*, 606.

³²Hari Chand, *Modern Jurisprudence, Op. Cit.*, 100.

³³*Ibid.*

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"Kelsen's conception of norm hierarchy takes the form of superordination and subordination, in which the organs of government create norms and linkages to one another based on these principles."

Kelsen concept is associated with a group of scholars that need the separation of state power,³⁴ with the main idea associated with the concept of separation of powers in the judicial review of legislation.³⁵ According to Kelsen, the judicial review of legislation is an element of democracy, with the implementation referred to in the American Constitution.

As part of efforts to protect the basic rights of citizens, the authority to conduct judicial review of laws and government policies and actions is carried out by the High Court.³⁶ The exercise of the function is intended as an effort to provide protection against restrictions on the exercise of citizens' rights by both the parliament and the executive. The exercise of this right to review function is seen as an extraordinary process because it includes government activities at all levels and their exercise of power.³⁷

The extraordinary nature of the exercise of judicial review rights is also evident from the court's authority to test whether the legislative product is still in its power or has violated the basic rights of citizens. An extraordinary right for judicial review occurs because regulation is part of the constitutional structure. The extraordinary nature of the exercise of judicial review rights occurs because the regulation is part of the constitutional structure, which lies in the non-routine nature of legal proceedings. Therefore, by analyzing the function of the judicial review, this research showed that judicial review is the front line in protecting the rights of citizens.

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³⁴Hans Kelsen, *Pure Theory of Law* (Reine Rechtslehre), English translation Max Knight (Barkeley: University of California Press, 1967). 290-299.

Baca juga Hans Kelsen, *General Theory of Law and State. Op.Cit.*, 269-282.

³⁵ Hans Kelsen, *General Theory of Law and State. Op.Cit.*, 269.

³⁶*Ibid.*, 154.

³⁷³⁷*Ibid.*, 156. The referred government layer is at the governmental organizations level in the state or federal level.

8. Pujiyono, Ahmad, S. D. (2019). Legal Protection for Creators of Cinematographic Works against Copyright Infringement through Streaming and Free Download Sites. *Journal of Legal, Ethical and Regulatory Issues*, 22(3), 1-7.
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