

### ABSTRAK

Prinsip proporsionalitas merupakan prinsip yang telah umum digunakan dalam area hukum, salah satunya dalam area hukum konstitusi. Prinsip proporsionalitas telah digunakan dalam peradilan konstitusi di beberapa negara. Salah satu negara yang mengembangkan aplikasi prinsip proporsionalitas dalam peradilan konstitusinya adalah Jerman. Prinsip proporsionalitas pada area hukum konstitusi digunakan dalam hal peradilan konstitusi melakukan *judicial review*. Di Indonesia, prinsip proporsionalitas belum populer dan belum maksimal digunakan oleh hakim MK dalam memutus permohonan *judicial review*. Prinsip proporsionalitas dalam peradilan konstitusi diperkenalkan sebagai prinsip yang dapat digunakan hakim dalam menguji kebijakan yang dianggap membawa kerugian bagi Pemohon agar hakim tidak hanya sekedar mengintrepetasi UUD atau mengutip pasal, namun memberi pertimbangan yang konkrit terhadap aspek kerugian. Beberapa putusan Mahkamah Konstitusi Republik Indonesia telah memperkenalkan penggunaan prinsip proporsionalitas yang digunakan melalui uji proporsionalitas berdasarkan beberapa aspek, yaitu *legitimate aims*, *suitability*, *necessity* dan *balancing in narrow sense*. Penelitian dalam skripsi ini dilakukan untuk menjawab dua isu, yaitu pertama, Prinsip Proporsionalitas dalam Pengujian Undang-Undang (*Judicial Review*) oleh Peradilan Konstitusi (*Constitutional Court*) dan kedua, Perbandingan Prinsip Proporsionalitas dalam *Judicial Review* oleh Mahkamah Konstitusi Republik Indonesia dan *Germany Federal Constitutional Court (Bundesverfassungsgericht)*. Dalam menganalisa kedua isu tersebut, penelitian dalam skripsi ini menggunakan metode sebagai berikut, yaitu *statute approach*, *case approach*, *comparative approach* dan *conceptual approach* dengan tipe penelitian *Reform Oriented Research*. Dari analisa dengan menggunakan metode-metode tersebut, disimpulkan bahwa prinsip proporsionalitas adalah suatu alat uji yang dapat membantu hakim dalam memberikan pertimbangan hukum ketika berhadapan dengan hak-hak yang bersinggungan, pembatasan hak, dan *open legal policy*. Dalam konteks perbandingan antara Indonesia dan Jerman, prinsip proporsionalitas di Jerman lebih berkembang dalam hal pengalaman praktek peradilan konstitusi, konsep, dan teori. Sedangkan, di Indonesia, MKRI belum serta merta mengadopsi dan mengaplikasikannya pada peradilan konstitusi terutama ketika hakim memutus permohonan *judicial review*, sehingga prinsip tersebut belum berkembang baik secara praktek maupun teori di Indonesia. Pada implementasinya, prinsip proporsionalitas relevan digunakan pada *judicial review* terutama yang terkait dengan pasal-pasal dalam konstitusi yang bersifat *open texture* yang membawa konsekuensi memberi *open legal policy* kepada pembentuk undang-undang.

**Kata Kunci** : prinsip proporsionalitas, *judicial review*, Mahkamah Konstitusi, kerugian, pembatasan hak, *open legal policy*.

**ABSTRACT**

*The principle of proportionality is a principle that has been commonly used in the legal area, one of which is in the constitutional law area. It has been used in the constitutional court in several countries. One of the countries that developed the principle of proportionality in the constitutional court is Germany. The principle of proportionality in the area of constitutional law is mostly used for judicial review. In Indonesia, the principle of proportionality has not been popularly and fully used by the constitutional judges at the Mahkamah Konstitusi in judicial review. The principle of proportionality in the constitutional court was introduced as a principle which allow judges to test the norms that are potentially considered to bring harm to the people, so that, the judge will not only interpret the Constitution (the UUD) or use the section of the Constitution, but give a concrete consideration to the aspect of the damage. The Constitutional court (the MKRI) has introduced the use of the principle of proportionality along with proportionality tests based on legitimate aims, suitability, necessity, and balancing in narrow sense. The research in this bachelor thesis wants to analysis two issues; first, the principle of proportionality in the judicial review by the constitutional court; and second, the comparison of the principle of proportionality in the judicial review between the constitutional court of the Republic of Indonesia and the Germany federal constitutional court (bundesverfassungsgericht). In analyzing the two issues, the research in this thesis uses the following methods, namely: statute approach, case approach, comparative approach and conceptual approach with the type of reform oriented research. From the analysis using those methods, this thesis ended up with the conclusion. The principle of proportionality is a test tool which may help judges in giving legal considerations when dealing with the rights of the competing rights, limitation clause, and open legal policy. In the context of comparative between Indonesia and Germany, the principle of proportionality in Germany is more developed as to judicial practices and experiences of the constitution, concepts, and theory. Whereas in Indonesia, MKRI has not yet formally adopted and applied the principle of proportionality, especially when the constitutional judges have to decide in the judicial review. Therefore, the principle has not yet been developed both in practice and in theory in Indonesia. In the implementation, the principle of proportionality are relevantly used in the judicial review, especially when it is about the provisions in the constitution which have the characters of open texture and have a consequence of open legal policy.*

**Keyword** : principles of proportionality, judicial review, constitutional court, constitutional damage, rights limitation, open legal policy.