

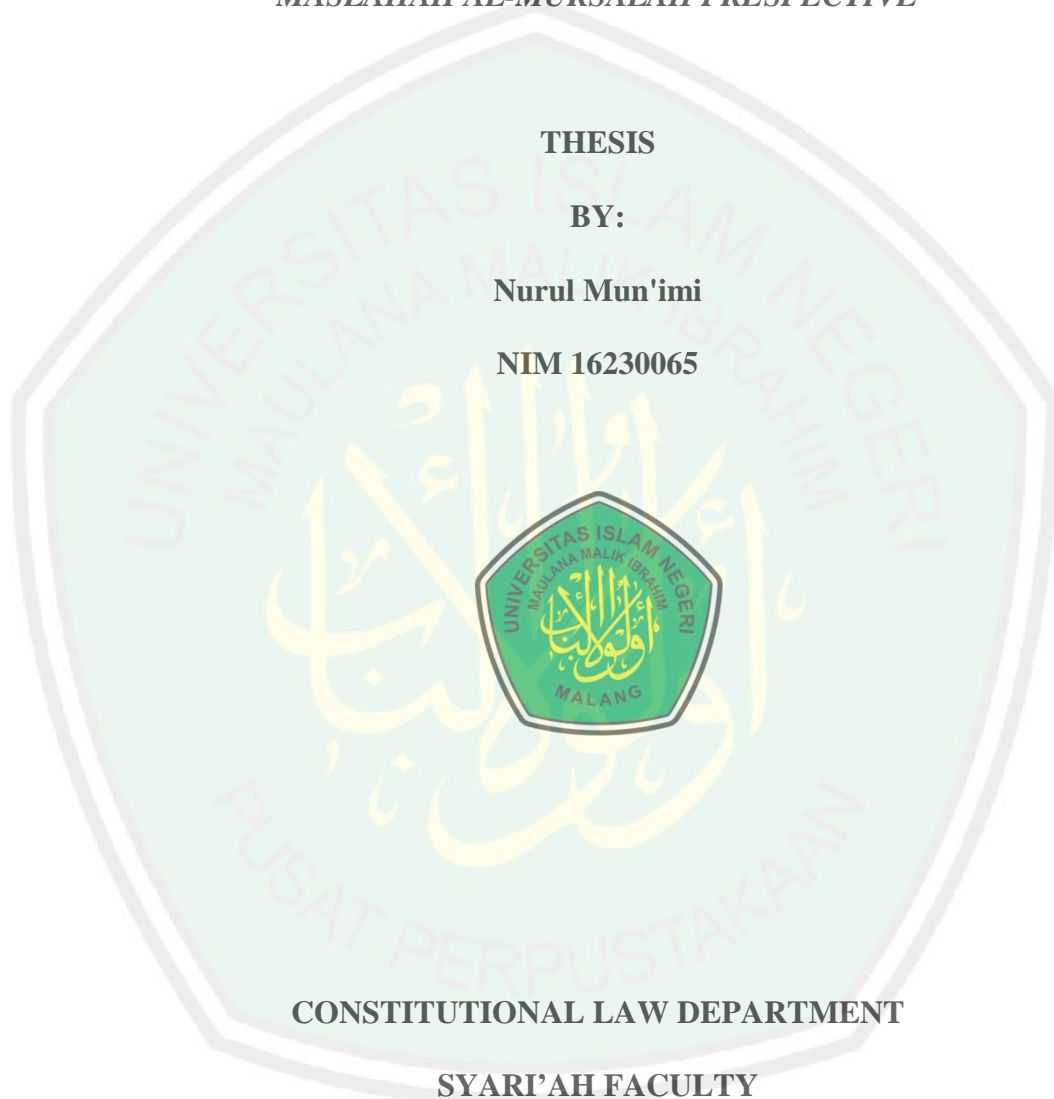
**ANALYSIS OF THE DECISION OF THE CONSTITUTIONAL COURT  
NUMBER 02 / PUU-XVII / 2019 CONCERNING THE RIGHT TO  
CERTIFICATION BENEFITS FOR PAUD TEACHERS IN AL-  
MASLAHAH AL-MURSALAH PRESPECTIVE**

**THESIS**

**BY:**

**Nurul Mun'imi**

**NIM 16230065**



**CONSTITUTIONAL LAW DEPARTMENT**

**SYARI'AH FACULTY**

**STATE ISLAMIC UNIVERSITY MAULANA MALIK IBRAHIM**

**MALANG**

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**MALANG**

**2020**

## STATEMENT OF THE AUTHENTICITY

In the name Allah,

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

**ANALYSIS OF DECISION OF THE CONSTITUTIONAL COURT  
NUMBER 02 / PUU-XVII / 2019 CONCERNING THE RIGHT TO  
CERTIFICATION BENEFITS FOR PAUD TEACHERS *IN THE  
PRESPECTIVE OF AL-MURSALAH MASLAHAH***

Its truly the writer's original work wich can be legally justified. If this thesis is proven result of duplication or plagiarism from another scientific work, it as precondition of degree will be stated legally invalid

Malang, 24 Februari 2020

Writer



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NUMBER 02 / PUU-XVII / 2019 CONCERNING THE RIGHT TO  
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XVII / 2019 Perspective masalah mursalah

No.	Hari/ Tanggal	Consultation Materials	Initials
1.	21 oktober 2019	Proposal	
2.	21 oktober 2019	Chapter I, II, dan III	
3.	27 oktober 2019	Revision of chapter I and II.	
4.	29 Oktober 2019	Revision of chapter III	
5.	18 November 2019	Chapter IV	
6.	20 November 2019	Revision of chapter IV	
7.	4 Desember 2019	chapter V	
8.	27 Januari 2020	Revision of chapter V	
9.	21 februari 2020	Abstract	
10.	24 Februari 2020	ACC CHAPTER I, II, III, IV, and V	

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PRESPECTIVE OF AL-MURSALAH MASLAH**

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- |                                    |               |
|------------------------------------|---------------|
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## MOTTO PAGE

Obey, Devote, and Serve

The joy of life in this world is when you can apply the three things, namely being obedient, devoted, and serving. Obey, serve and serve the Creator, scholars, and the government.





## THE ARABIC-LATIN TRANSLITERATION GUIDELINES

Transliteration is the transfer of the Arabic script into Indonesian (Latin) writing, not translating Arabic into Indonesian. Included in this category is the Arabic name of the Arabic nation, while the Arabic name of the Arabic nation is written as the national language spelling, or as written in the book that is the reference. Writing book titles in gootnote and bibliography, still uses transliteration provisions.

There are many options and transliteration provisions that can be used in writing scientific papers, both of which are international standards. National or specific provisions used by certain publishers. Transliteration used by the Faculty of Sharia, State Islamic University (UIN) Maulana Malik Ibrahim Malang uses EYD plus, namely transliteration based on the Joint Decree (SKB) of the Minister of Religion, Education and Culture of the Republic of Indonesia, January 22, 1998, No. 159/1987 and 0543.b / U / 1987, as stated in the Manual of Arabic Transliteration (A Guide Arabic Transliteration), INIS Fellow 1992.

The Arabic-Latin alphabet transliteration used in the preparation of this thesis is guided by the joint decree of the Minister of Religion and the Minister of Education and Culture of the Republic of Indonesia Number 158/1987 and 0543b / u dated January 22, 1988.

## A. Konsonan Tunggal

Arabic font	Name	Latin letters	Information
ا	Alif	Not symbolized	
ب	Ba'	B	Be
ت	Ta'	T	Te
ث	Sa'	S	s (with the point above)
ج	Jim	J	Je
ح	Ha'	H	Ha (with the dot below)
خ	Kha'	Kh	K dan h
د	Dal	D	De
ذ	Zal	Z	Z (with the point above)
ر	Ra'	R	Er
ز	Za'	Z	Zet
س	Sin	S	Es
ش	Syin	Sy	Es dan ye
ص	Sad	S	Es (with the dot below)
ض	Dad	D	De (with the dot

			below)
ط	Ta'	T	Te (with the dot below)
ظ	Za'	Z	Zet (with the dot below)
ع	'Ain	'	Comma upside down
غ	Gain	G	Ge
ف	Fa'	F	Ef
ق	Qaf	Q	Qi
ك	Kaf	K	Ka
ل	Lam	L	'el
م	Mim	M	'em
ن	Nun	N	'en
و	Wawu	W	W
هـ	Ha'	H	Ha
ء	Hamzah	,	Apostrof
ي	Ya'	Y	Ye

#### A. Konsonan Rangkap karena syaddah ditulis rangkap

مُنْعِدَّة	Ditulis	Muta'addidah
عِدَّة	Ditulis	'iddah

### B. Ta 'Marbutah at the end of the word

1. When ta 'Marbutah is read and written it is written with h, except for Arabic words that have been absorbed into Indonesian, such as prayer, Zakat and so on.

حِكْمَةٌ	Ditulis	Hikmah
جِزْيَةٌ	Ditulis	Jizyah

1. If ta 'Marbutah is followed by the article "al" and the second reading is separated, then it is written with h

كَرَامَةُ الْأَوْلِيَاءِ	Ditulis	Karamah al-auliya'
--------------------------	---------	--------------------

2. If ta 'Marbutah lives with fahma, kasrah and dammah are written t

زَكَاةُ الْفِطْرِ	Ditulis	Zakat al-fitr
-------------------	---------	---------------

### B. Short Vowels

َ	Fathah	Ditulis	A
ِ	Kasrah	Ditulis	I
ُ	Dammah	Ditulis	U

### C. Long Vowels

1	Fathah +alif جَاهِلِيَّة	Ditulis Ditulis	A Jahiliyyah
2	Fathah +ya تَنَسَّى	Ditulis Ditulis	A Tansa
3	Kasrah +ya كَرِيم	Ditulis Ditulis	I Karim
4	Dammah+ya فُرُوض	Ditulis Ditulis	U Furud

#### D. Dual Vowels

1	Fathah+ya' mati بَيْنَكُمْ	Ditulis Ditulis	Ai Bainakum
2	Fathah+wawu mati قَوْل	Ditulis Ditulis	Au Qaul

#### E. Sequential short vowels in one word

Writing short vowels in sequence in one word separated by apostrophes (‘)

1	أَنْتُمْ	Ditulis	A’antum
2	لَيْنُ شَكَرْتُمْ	Ditulis	La’in syakartum

#### F. Said Alif Clothing + Lam

1. If the word Alif + Lam is followed by the qamariyyah letter, it is written with al.

الْقُرْآن	Ditulis	Al-Qur'an
الْقِيَّاس	Ditulis	Al-Qiyas

2. If the article Alif + Lam is followed by Syamsiyah, it is written by using the syamsiyah letter that follows it, and the letter l (el) is omitted.

السَّمَاء	Ditulis	as-Sama
الشَّمْس	Ditulis	as-Syams

### G. Uppercase

Uppercase writing is adjusted to Enhanced Spelling (EYD).

### H. Writing words in a series of sentences

The words in a series of sentences are written according to the sound or pronunciation.

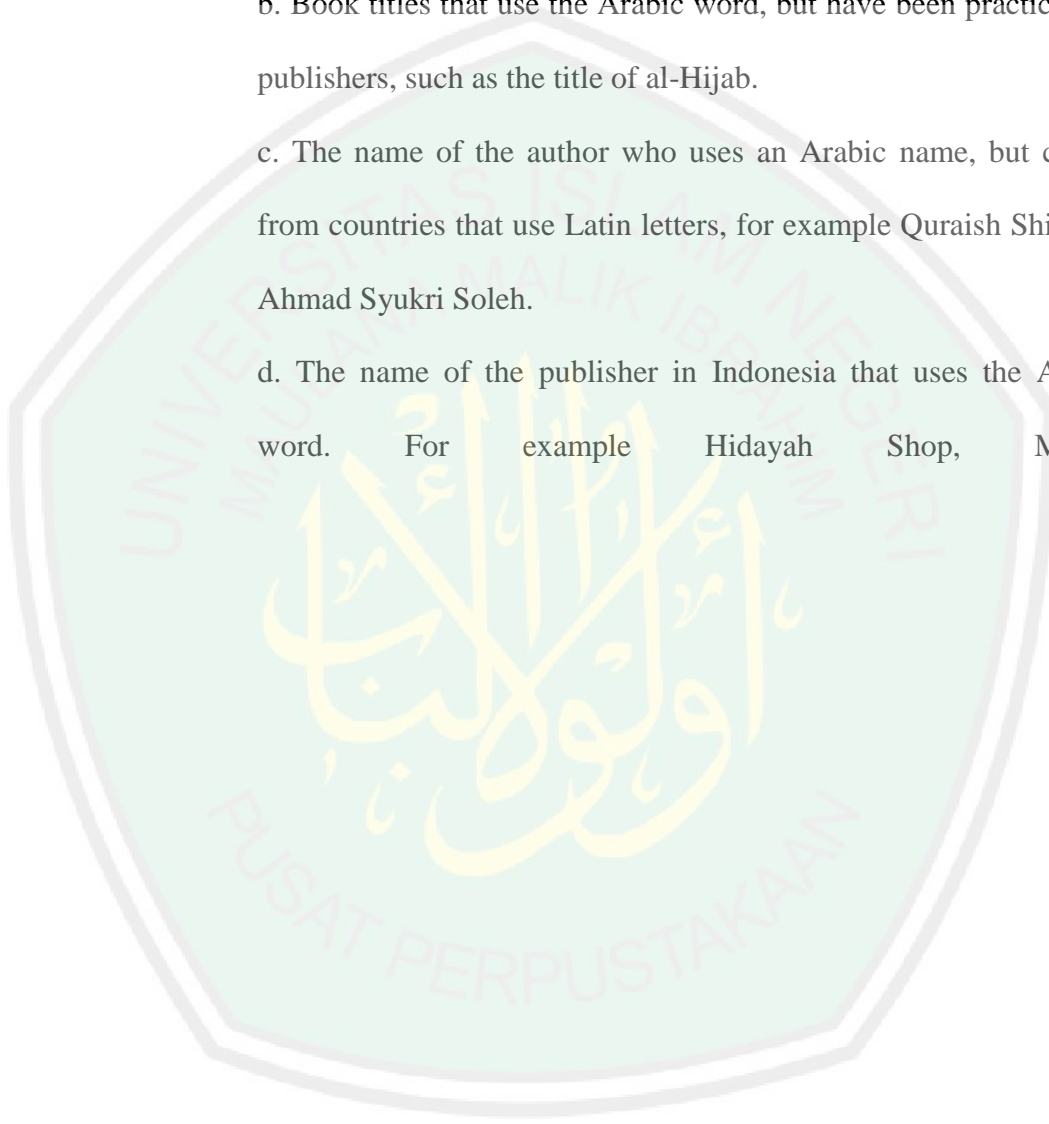
ذَوِي الْفُرُوضِ	Ditulis	Zawi al-furud
أَهْلُ السُّنَّةِ	Ditulis	Ahl as-Sunnah

### I. Exceptions

This transliteration system does not apply to:



- a. Arabic vocabulary that is common in Indonesian and can be found in the Indonesian General Dictionary, for example: al-quran, hadith, mazhab, syariah, lafaz.
- b. Book titles that use the Arabic word, but have been practiced by publishers, such as the title of al-Hijab.
- c. The name of the author who uses an Arabic name, but comes from countries that use Latin letters, for example Quraish Shihahb, Ahmad Syukri Soleh.
- d. The name of the publisher in Indonesia that uses the Arabic word. For example Hidayah Shop, Mizan.



## FOREWORD

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Alhamd li Allahi Rabb al-Alamin, la Hawl wala Quwwat illa bi Allah al-'Aliyy al-'Adhim, with only Your grace and guidance, the writing of a thesis entitled “ **Analysis of the decision of the constitutional court number 02/puu-xvii/2019 concerning the right to certification benefits fr paud teachers in al-maslahah al-mursalah prespective** ” can be resolved with an outpouring of His love, peace and peace of mind. Shalawat and Greetings we give to our Majesty, the Prophet Muhammad SAW who has taught us about from the realm of darkness to the realm of light in this life. Hopefully we are classified as believers and receive intercession from him in the hereafter. Amen

With all the power and efforts as well as assistance, guidance and direction and the results of the discussion from various parties in the process of writing this thesis, then with all humility the author would like to express his gratitude to:

1. Prof. Dr. H. Abd. Haris, M.Ag, as the Rector of Maulana Malik Ibrahim State Islamic University Malang.
2. Dr. Saifullah, S.H, M.Hum, as Dean of the Sharia Faculty of the Maulana Malik Ibrahim State Islamic University Malang.
3. Dr. M. Aunul Hakim, S.Ag, M.H, as the Head of the Department of Constitutional Law (Siyasah), Sharia Faculty, Maulana Malik Ibrahim State Islamic University Malang.
4. Thesis trial examiners.

5. Dra. Jundiani, SH, M.Hum, as the author's supervisor, as well as the author's supervisor. Syukr Katsir, the writer congratulates him on the time he has devoted to guidance, direction, and motivation in completing this thesis writing.

6. All lecturers at the Sharia Faculty of the State Islamic University of Maulana Malik Ibrahim Malang who have delivered teaching, educating, guiding, and practicing their knowledge sincerely. May Allah SWT give His reward which is commensurate to all of him.

7. Staff staff of the Islamic Faculty of the State Islamic University of Maulana Malik Ibrahim Malang, the author would like to thank you for participating in the completion of this thesis.

8. Parents who support and give enthusiasm in completing this task.

9. All parties that cannot be mentioned one by one.

Hopefully what I have gained while studying at the Sharia Faculty of the State Islamic University of Maulana Malik Ibrahim Malang can be of benefit to all readers, especially for me personally. Here the author as an ordinary human being who never escapes mistakes and sins, realizes that this thesis is still far from perfection. Therefore, the author really hopes for criticism and suggestions from all parties for the perfection of this thesis, so that it can be more useful. Amen.

Malang, 24 February 2020

Author,

Nurul Mun'Imi

NIM 16230065

## ABSTRAK

Nurul Mun'Imi, 16230065, **Analisis putusan Mahkamah Konstitusi Nomor 02/PUU-XVII/2019 tentang Hak Atas Tunjangan Sertifikasi bagi Guru PAUD dalam Prespektif Al-Maslahah Al-Mursalah**. Skripsi, jurusan Hukum Tata Negara, Fakultas Syari'ah, Universitas Islam Negeri (UIN) Maulana Malik Ibrahim Malang, Pembimbing: Dra. Jundiani, S.H,M.Hum.,

---

**Kata kunci: Mahkamah Konstitusi, hak tunjangan sertifikasi.**

Skripsi ini merupakan hasil penelitian pustaka (library research), berjudul "Analisis Putusan Mahkamah Konstitusi Nomor 02/PUU-XVII/2019 tentang Hak atas Tunjangan Sertifikasi bagi guru paud dalam Prespektif al-Maslahah al-Mursalah". Adapun rumusan masalah, yaitu: Apa pertimbangan hakim dalam putusan Mahkamah Konstitusi Nomor 02/PUU-XVII/2019 tentang Hak atas Tunjangan Sertifikasi bagi guru paud dalam Prespektif al-Maslahah al-Mursalah? Dan Bagaimana analisis masalah mursalah terhadap putusan Mahkamah Konstitusi Nomor 02/PUU-XVII/2019 ?

Jenis penelitian dalam penelitian ini yaitu penelitian normatif. Ada dua sumber bahan dalam penelitian ini yaitu, pertama, bahan hukum primer sebagai bahan/ data utama dalam melakukan penelitian ini. Kedua, bahan hukum sekunder yang terdiri dari bahan / data seperti buku-buku, jurnal-jurnal, skripsi yang ada relevansinya dengan judul penelitian ini. Teknik pengumpulan data yang digunakan adalah dengan cara studi kepustakaan (library research). Teknis analisis data yang diterapkan dalam penelitian ini menggunakan content analysis yaitu penulis mencari dan melakukan analisis putusan Mahkamah Konstitusi.

Hasil penelitian ini menyimpulkan pertama: pertimbangan hakim dalam memutuskan perkara dalam putusan N0. 02/PUU-XVII/2019 didasarkan pada : 1) memeriksa permohonan pemohon, bukti-bukti yang diajukan pemohon, keterangan DPR, keterangan ahli dari presiden dan pemohon 2) putusan MK Nomor 45/PUU-XVI/2018 3) putusan MK Nomor 006/PUU-IV/2006 4) putusan MK Nomor 56/PUU-VI/2008.

Kesimpulannya adalah bahwasanya para pendidik non formal seharusnya sadar akan statusnya yang sebagai guru Non formal dimana tidak bisa meminta gaji seperti guru formal dan fasilitas seperti apa yang telah didapatkan oleh guru formal. Ini juga berkaitan dengan anggaran Negara yang mana anggaran Negara. Yang mana jika semua guru pendidikan non formal harus masuk pada konsep yuridis yang kemudian harus mendapatkan sertifikasi maka hal ini justru bertentangan dengan UUD 1945.

## ABSTRACT

Nurul Mun'Imi, 16230065, **Analysis of the decision of the Constitutional Court Number 02 / PUU-XVII / 2019 concerning the Constitutional Rights of the Allowances for Certification in the perspective of the Mlahalah Maslahah.**

Thesis, majoring in Constitutional Law, Faculty of Sharia, Maulana Malik Ibrahim State Islamic University (UIN) Malang, Supervisor: Dra. Jundiani, S.H, M.Hum .,

**Keywords: Constitutional Court, certification allowance rights.**

This thesis is the result of library research, titled "Analysis of the Constitutional Court Decision Number 02 / PUU-XVII / 2019 concerning the Constitutional Rights of Certification Allowances in the Mlahalah Maslahah Prespective". As for the formulation of the problem, namely: What are the judges' considerations in the Constitutional Court's decision No. 02 / PUU-XVII / 2019 concerning the Constitutional Rights of the Allowances for Certification in the Problems of the Presidency of Mass Problems? And how is the problem analysis of the problem with the decision of the Constitutional Court Number 02 / PUU-XVII / 2019 concerning the Constitutional Rights of the Certification Allowance in Mursalah Maslahah Perspective?

The type of research in this study is normative research. There are two sources of material in this research, namely, first, the primary legal material as the main material / data in conducting this research. Second, secondary legal material consisting of material / data such as books, journals, theses that have relevance to the title of this study. Data collection technique used is by library research. The data analysis technique applied in this study uses content analysis, which is the writer searches for and analyzes the decision of the Constitutional Court.

The results of this study conclude first: the judge's judgment in deciding cases in the NO ruling. 02 / PUU-XVII / 2019 is based on: 1) examining the petition of the petitioner, the evidence submitted by the petitioner, the statement of the DPR, expert statement from the president and the applicant 2) the decision of the Constitutional Court Number 45 / PUU-XVI / 2018 3) the decision of the Constitutional Court Number 006 / PUU-IV / 2006 4) MK's decision Number 56 / PUU-VI / 2008.

The conclusion is that non-formal educators should be aware of their status as non-formal teachers who cannot ask for salaries such as formal teachers and what facilities have been obtained by formal teachers. This also relates to the State budget which is the State budget. Which is if all non-formal education teachers must enter into the juridical concept which then must obtain certification then this is in conflict with the 1945 Constitution.



## المخلص

نور المنعيمي ، 16230065 ، تحليل قرار المحكمة الدستورية رقم 02 / 2019 / PUU-XVII / بشأن الحقوق الدستورية لبدلات منح الشهادات من منظور ملاح الله مسلح. أطروحة ، تخصص في القانون الدستوري ، كلية الشريعة ، جامعة مولانا مالك إبراهيم الإسلامية الإسلامية (UIN) مالانج ، المشرف : Dra. Jundiani ، S.H ، M.Hum .

الكلمات المفتاحية: المحكمة الدستورية ، حقوق بدل الشهادة.

هذه الأطروحة هي نتيجة لأبحاث المكتبة ، بعنوان "تحليل قرار المحكمة الدستورية رقم 02 / 2019 / PUU-XVII / بشأن الحقوق الدستورية لبدلات إصدار الشهادات في ملحة المصلحة". صياغة المشكلة ، وهي: ما هي اعتبارات القضاة في قرار المحكمة الدستورية رقم 02 / 2019 / PUU-XVII / بشأن الحقوق الدستورية لبدلات التصديق في مشاكل منظور الملاله؟ وكيف يتم تحليل المشكلة للمشكلة مع قرار المحكمة الدستورية رقم 02 / 2019 / PUU-XVII / بشأن البديل الدستوري للحصول على بدل الشهادة في Mhalhalah Masalahah المرتقب؟

نوع البحث في هذه الدراسة هو البحث المعياري. هناك مصدران للمواد في هذا البحث ، وهما أولاً ، المادة القانونية الأولية باعتبارها المادة / البيانات الرئيسية في إجراء هذا البحث. ثانياً ، مادة قانونية ثانوية تتكون من مواد / بيانات مثل الكتب والمجلات والرسائل العلمية ذات الصلة بعنوان هذه الدراسة. تقنية جمع البيانات المستخدمة هي من خلال البحث في المكتبة. تستخدم تقنية تحليل البيانات المطبقة في هذه الدراسة تحليل المحتوى ، وهو الكاتب الذي يسعى ويحلل قرار المحكمة الدستورية.

نتائج هذه الدراسة تستنتج أولاً: حكم القاضي في الفصل في القضايا في الحكم رقم 0. يستند 02 / 2019 / PUU-XVII إلى: (1) فحص عريضة مقدم الطلب ، والأدلة المقدمة من مقدم الطلب ، وبيان DPR ، وبيانات الخبراء من الرئيس ومقدم الطلب (2) قرار المحكمة الدستورية رقم 45 / 2018 (3) قرار المحكمة الدستورية رقم 006 (4) 2006 / PUU-IV / قرار عضو الكنيست رقم 56 / 2008. PUU-VI /

الاستنتاج هو أن المعلمين غير الرسميين يجب أن يكونوا على دراية بوضعهم كمعلمين غير رسميين لا يمكنهم طلب رواتب مثل المعلمين الرسميين وما هي التسهيلات التي تم الحصول عليها من قبل المعلمين الرسميين. وهذا يتعلق أيضاً بميزانية الدولة وهي ميزانية الدولة. وهو ما إذا كان يجب على جميع معلمي التعليم غير الرسمي الدخول في المفهوم القانوني الذي يجب أن يحصل بعد ذلك على شهادة ، فهذا يتعارض مع دستور عام 19



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## BAB I

### PENDAHULUAN

Indonesia is a state of law, where law is an important reference in the implementation of the state. According to the theory of the rule of law or *rechtssovereiniteit*, the highest authority in a country is law.<sup>1</sup> Indonesia is a constitutional state law, state power is limited by the constitution.<sup>2</sup> In the four classic features of the continental European legal state commonly called *rechtsstaat*, there is an element of limitation of power as one of the main features of the rule of law.<sup>3</sup>

The rule of law is inseparable from the role of the ruler, power is an individual or group's ability to do its work.<sup>4</sup> According to Montesquei, who followed the mindset of John Locke, he divided state power into three branches of power. Indonesia adheres to the Montesquei mind, namely the country's system is run by the State Higher Institutions which are in the realm of the legislative, executive, and judiciary. With the three high institutions of this country, there is no dominant institution in carrying out the functions of government.

Montesquei prioritizes judicial (judicial) power functions. The branch of judicial power is developed as a unified system that culminates in the Supreme Court (MA) and the Constitutional Court (MK), the branch of judicial power

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<sup>1</sup> Soehino, *Staatswissenschaft*. (Yogyakarta: Liberty. 2005) .hlm.156.

<sup>2</sup> Jimly Asshiddiqie, *Introduction to Constitutional Law, cet.II*, (Jakarta: Rajawali Press, 2010), p.281.

<sup>3</sup> Sri Soemantri, et al., *Indonesian State Administration in Indonesian Political Life: 30 Years Return to the 1945 Constitution, cet.I*, (Jakarta: Pustaka Sinar Harapan, 1993), p.281.

<sup>4</sup> Peter Mahmud Marzuki, *Introduction to Legal Studies*, (Prenadamedia Group.2016). p. 73.

culminates in judicial power which can also be understood to consist of the Supreme Court and the Constitutional Court. At first, there was no known Constitutional Court.

The existence of the Constitutional Court's ideas can indeed be said to be relatively new. In 1945 when the 1945 Constitution was formulated, the idea of the Constitutional Court had not yet appeared. After Indonesia entered the Era of Reform and democracy, the idea of establishing the Constitutional Court became very widely accepted. Now, in the third amendment to the 1945 Constitution, provisions regarding the Constitutional Court have been adopted into the formulation of the 1945 Constitution.

One of the authority of the Constitutional Court is judicial review. This is a way to get justice related to laws that are detrimental to the community or when the community considers the law to be unfair and not worthy of enactment. Like what is done by non-formal PAUD educators and HIMAPAUDI who do not accept the Teacher and Lecturer Law because they feel unfair and there is discrimination against the right to obtain certification, therefore they conduct a judicial review to the Constitutional Court.<sup>5</sup>

The background of the judicial review began on December 18, 2018, when one of the non-formal PAUD teachers felt discrimination between formal PAUD teachers and non-formal PAUD teachers.

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<sup>5</sup> Aa Rabi <https://www.radarbanten.co.id/guru-paud-nonformal-tak-dianggap-guru/>



The emergence of the issue or case caused the reaction of non-formal PAUD teachers to submit judicial review articles 1 number (1) and 2 paragraph (1) of Law Number 14 of 2005 concerning Teachers and Lecturers (State Gazette of the Republic of Indonesia Number 4586) to article 27 paragraph (2), article 28D paragraph (1), and article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia to the Constitutional Court. They are suing articles (1) and (2) because they have a reason, which is why they are:

1. "The Teacher and Lecturer Law eliminates recognition, guarantees, protection, certainty and equal treatment for non-formal PAUD educators before the law".
2. "The Law on Teachers and Lecturers removes guarantees of decent work and livelihood for non-formal PAUD educators".
3. "The Law on Teachers and Lecturers contains discriminatory provisions for non-formal PAUD educators. The lawsuit was proposed so that they (non-formal PAUD teachers) were also recognized as gur, so that they could also or were entitled to get certification as well as formal PAUD teachers.

All PAUD teachers in kindergarten, RA, KB, TPA have the same noble duties as set out in PAUD standards, Permendikbud No.137 / 2014 and Permendikbud PAUD curriculum 146/2014. Non-formal and non-formal Paud are also accredited by BAN PAUD. Every Early Childhood needs to get qualified teachers and decent institutions without seeing where this child is being served.



PAUD educators who are recognized and given status as teachers are only PAUD educators on the formal education track. Applicants who are PAUD educators on a non-formal path are not legally recognized as teachers. Whereas the provisions of Article 28 Paragraph (2) of Law No.20 of 2003 concerning National Education System have emphasized that PAUD educators can not only be run through formal education channels, but also non-formal.

With the recognition of the profession of the applicant as part of the national education system, the applicant clearly has constitutional rights guaranteed in the 1945 Constitution including the right to recognition, guarantees and legal protection.

The use of the term teacher can be known in the following provisions:

a) Minister of Education and Culture Regulation No. 58 of 2009 concerning early childhood education standards in the attachment to part III of the standards of educators and education personnel has referred to PAUD educators as follows: "PAUD educators in the formal education pathway consist of teachers and accompanying teachers. While PAUD educators in the non-formal education pathway consist of teachers, teacher assistants and caregivers.

b) Article 24 Paragraph (2) Permendikud No. 137 of 2014 concerning the National Standard for Early Childhood Education has used the term "teacher" for PAUD educators, as stated "Early childhood educators consist of paud teachers, companion teachers and young assistant teachers".

c) Article 29 paragraph (1) government regulation Number 19 of 2005 concerning national education standards has used the term teacher to refer to PAUD educators as follows:

"Educators in early childhood education have: (1) academic qualifications of minimum diploma education of four (D-IV) or undergraduate (S1), (2) background in tertiary education in early childhood education, other education, or psychology, and (3) teacher professional certificates for PAUD".

Law Number 20 of 2003, article 40 paragraph 1, states that teachers (educators) and education personnel are entitled to obtain:

- a) Adequate and adequate social welfare income and guarantees
- b) Awards in accordance with the tasks and work performance
- c) Legal protection in carrying out the duties and rights of intellectual property
- d) And, the opportunity to use educational facilities, infrastructure and facilities to support the smooth implementation of tasks.

But in this case the Constitutional Court rejected all material tests or judicial reviews submitted by the public. The constitutional court ruled that case Number 02 / PUU-XVII / 2019, which was filed by Annisa Rosadi, where he was an educator at PAUD Al-Ihsan having his address at Jln. H.Murtadlo VI, RT.012 / RW.05, Paseban Village, Senen District, Central Jakarta. He gave his power to the named prof. Dr. Yusril Ihza Mahendra SH, M.SC., Zulkarnaen Yunus, SH, Agus Dwiwarsono, SH, Ridho Putra Gugum, SH, Adria Indra Cahyadi, SH, MH, Eddi Mulyono, SH, Deni Aulia Ahmad, SH, M.Iqbal Sumarlan Putra, SH, MH, Khoirul Fadli, SH, MH, Elfano Eneilmy, SH, MH, Yusmarini, SH, Muhammad

Dzul Ikram, SH, MH, are all advocates and legal consultants who are members of the IHZA & IHZA Law firm and all of them are referred to as applicants. They will submit about Law No. 14 of 2005 concerning Teachers and Lecturers article 1 number (1) and article 2 paragraph (1). Because in the provisions of the Act does not recognize and give status to the applicant profession as a teacher.

The decision to refuse the judicial review has again become a polemic, many accusations have been blamed to the Constitutional Court (MK) for the Constitutional Court's decision related to the constitutionality of certification of PAUD Non-Formal Teachers who are considered discriminating between PAUD Formal and Non-Formal PAUD Teachers.

The Constitutional Court once again held a judicial review session in the context of the struggle to eliminate inequality for non-formal early childhood education teachers.

State administration expert, Yusril Ihza Mahendra, who is the attorney of the petitioner, said that the regulation discriminated against non-formal PAUD teachers because they were considered not a teacher. As a result, non-formal PAUD teachers cannot be appointed as employees, are paid official salaries, are given benefits, and are certified as teachers.<sup>6</sup> The government does distinguish between formal PAUD schools and non-formal PAUD schools. But whether the rights of a formal PAUD teacher and non-formal PAUD teacher must be

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<sup>6</sup> Nashih Nasrulah <https://republika.co.id/berita/pogkiq430/nasional/hukum/19/03/14/pod1oc320-aturan-guru-paud-nonformal-yang-digugat-di-mk>

distinguished. State administration expert Yusril considers that non-formal PAUD teachers teach the same thing as teachers in formal education. Yusril also said "There should be no unequal opportunity in achieving a decent standard of living and there should be no discrimination in the treatment of people who have the same duties and obligations.

Chairman Himpaudi, Netti Herawati, who also participated in the judicial review, hopes that there will be no more discrimination against paud teachers. Chairman Himpaudi said whether a teacher in informal and formal lines must be differentiated even though what he wants to achieve is the best interests and growth for the child. Himpaudi also appealed to the government that when wanting an extraordinary nation in the future, early childhood education becomes the foundation. Because if the foundation is strong then this nation will be strong.

Hundreds of thousands of non-formal PAUD teachers who join under HIMPAUDI carry out the State's duty to educate the nation's life. They teach in clear PAUD institutions, licensed to meet National Education standards with clear curricula such as Formal PAUD. The existence of non-formal PAUD is equally recognized by the State as the Formal PAUD (Law on National Education System). However, the educators are not recognized as Teachers (article 1 (1) and article 2 (2) Law No. 14 of 2005 concerning teachers and lecturers). As a result, their right to get protection and respect in carrying out their profession, welfare in accordance with their profession and the opportunity to gain continuous professionalism is not gained.

Since April 2015, HIMPAUDI has fought for this equality by visiting the Indonesian Parliament and the Ministry of Education and Culture, asking for an audience with President Jokowi. In fact, there have been many letters sent by PAUD teachers directly to the president.

The deputy chairperson of the Banten DPRD emphasized that in terms of competencies both formal and non-formal PAUD teachers were equal. Both types of teachers join a tiered education program to improve competence, but non-formal teachers are not given certification allowances. "Only formal PAUD teachers receive professional allowance and certification allowance. While non-formal PAUD teachers are only professional allowances," he said.

General Chairperson Himpaudi Netti Herawati emphasized that the revision of the Teacher and Lecturer Law was a struggle for early childhood education teachers from non-formal institutions to ask for equal rights related to various allowances and opportunities for competency development from the government. "That's why we ask the Constitutional Court to review the Teacher and Lecturer Law. Netti asserted, Himpaudi appealed to the Constitutional Court that the rules regarding the provision of certification and training allowances in the Teacher and Lecturer Law include non-formal PAUD teachers. There should be no discrimination just because of the difference in the place of teaching.

In Islam, establishing a decision must be based on shari'a rules contained in the Qur'an, Hadith, or Qiyas, if there is no specific argument prohibiting it, which is important in accordance with the objectives of the Shariah '. So for the maker of a decision must be based on the benefits that are not regulated in the



Qur'an, as-sunnah mapun ijmak, this benefit is known as al-maslahah al-mursalah (benefit only).<sup>7</sup>

Based on literature or academic research that the author reads. No one has examined the analysis of the Constitutional Court's decision No. 2 / PUU-VII / 2019 regarding the constitutional right of certification, especially if analyzed with the theory of al-maslahah al-mursalah. So the background or reason for issuing a ruling on constitutionality towards the Constitutional Court is interesting for further investigation.

## **2. Formulation of the problem**

Based on the background explanation above, the main problems in this study can be formulated, namely:

- 1) What is the basic consideration of the Constitutional Court judges in decision No. 2 / PUU-XVII / 2019 of the decision?
- 2) What is the decision of the Constitutional Court Number 2 / PUU-XVII / 2019 in the perspective of al-maslahah al-mursalah?

## **3. Research Purposes**

### **1. Research Objectives**

a. In accordance with the main problems formulated above, the purpose of this study is to explain and analyze the decision of the Constitutional Court Number 02 / PUU-XVII / 2019. Where the author wants to examine about how the basic legal considerations of the Constitutional Court judges on its decision

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<sup>7</sup> CNN Indonesia, <https://www.cnnindonesia.com/nasional/20190314161718-12-377311/yusril-gugat-uu-ke-mk-agar-pengajar-paud-setara-guru-formal>



that distinguishes the right of a teacher to get certification between non-formal paid teachers and formal paid teachers.

b. To find out how the Constitutional Court's decision Number 2 / PUU-XVII / 2019 in the perspective of al-maslahah al-mursalah.

#### **4. Benefits of Research**

##### **a. Theoretical Use**

This research can enrich the repertoire of knowledge in the state administration law in the electoral field in Indonesia, especially regarding all aspects concerning discussing disputes regarding the right of certification allowance for non-formal teachers. Apart from that, the existence of this paper can increase the treasury of scientific works collections by contributing also to the development of state administration law in Indonesia.

##### **b. Practically**

This research is expected to be a frame of reference and foundation for further writers, and can provide input to readers regarding disputes regarding the right of certification allowance for non-formal teachers.

#### **5. Research Methods**

Legal research is a scientific activity that is based on certain methods, systematics and thoughts, which aims to study one or several specific legal phenomena by analyzing them.

##### **a. Type of Research**

The type of research is normative legal research (juridical normative) so more than one approach can be used.<sup>8</sup> In this research, the statutory approach (statue approach) and conceptual approach are used. Which research takes from the Constitutional Court Decision Number 2 / PUU-VII / 2019, books, journals, magazines, manuscripts, documents, etc., which are related to the decision of the Constitutional Court regarding the recognition of Non-Formal PAUD Educators so that they can also being recognized as a teacher is the same as acknowledging a formal PAUD teacher.

#### b. Research Approach

Research approach is a method or way of conducting research. from the expression of the concept it is clear that what is desired is an information in the form of a description and requires the meaning behind the legal material. in this study using a case approach (Case Approach).

#### c. Data Types

In legal research there is no data known, because in legal research specifically juridical normative sources of legal research are obtained from the literature rather than from the field, for that the term known is legal material. in normative legal research library materials are the basic ingredients which in research science are generally called secondary legal materials. In secondary legal materials are divided into primary and secondary legal materials.

#### 1. Primary Legal Materials

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<sup>8</sup> Ali Zainuddin, *Legal Research Methods* (Jakarta: Sinar Grafika Pustaka, 2017), p. 21

Primary legal material is an authoritative legal material which means it has authority. The primary legal material consists of:

a. Law No. 14 of 2015

b. Law No.20 of 2003

2. Secondary legal material

Why legal materials that are helpful or support primary legal material in research that will strengthen the explanation therein. Among the secondary legal materials in this study are books, journals, and documents that are related to the author's research.

3. Tertiary legal material

Is a legal material that provides instructions or explanations for primary and secondary legal materials such as dictionaries, encyclopedias and others.<sup>9</sup>

d. Data Collection Methods

The collection of legal materials in library research is a documentary technique, which is collected from the study of archives or library studies such as books, papers, articles, magazines, journals, papers or expert works. In addition, the interview is also one of the legal material collection techniques that support the documentary technique in this study and serves to obtain legal material that supports research if needed.<sup>10</sup>

### **G. Methods of Processing Legal Materials**

In this study, the processing of legal materials is used by means of editing, namely re-examination of legal materials obtained mainly from its completeness,

<sup>9</sup> Suharsimi Arikunto, *Research Procedure: A Practice Approach* (Jakarta: PT Asdi Mahasatya, 2002), 236.

<sup>10</sup> Marzuki, Peter Mahmud, *Legal Research* (Jakarta: Prenada Media, 2005), p. 181.

clarity of meaning, suitability, and relevance to other groups. After editing, the next step is coding, that is, giving a note or sign stating the type of source of legal material (literature, laws or documents), the copyright holder (author's name, year of publication) and the order of the formulation of the problem.

Next is the reconstruction of materials (reconstructing), which is rearranging legal materials in an orderly, sequential, logical manner so that they are easily understood and interpreted. And the last step is systematic legal material (systematizing) namely placing legal materials sequentially according to the systematic framework of discussion based on the order of the problem.<sup>11</sup>

#### **H. Methods of analysis of legal materials**

In this study, after the legal materials are collected, the legal materials are analyzed to get a conclusion. The form in legal material analysis technique is content analysis. As explained earlier, in normative research, no field data is needed for later analysis of something that is behind the data. In this type of legal material analysis the documents or archives analyzed are referred to as "text" content analysis showing that integrative and conceptual analysis methods tend to be directed to find, identify, process, and analyze legal materials to understand their meaning, significance and relevance.<sup>12</sup>

This research is descriptive-analytical in nature. Namely research by collecting data, then describe, classify, and analyze issues related to the problem to be studied in depth and comprehensively. Then the writer seeks and collects data related to the decision of the Constitutional Court Number 2 / PUU-XVII /

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<sup>11</sup> Masruhan, *Legal Research Methodology* (Surabaya: CV Cahaya Intan Xii, 2014), 76.

<sup>12</sup> Abdul Kadir Muhammad, *Law and Legal Research* (Bandung: Citra Aditya Bakti, 2004), 91.

2019 About the recognition of Non-Formal PAUD Educators so that they can also be recognized as Teachers as well as the recognition of Formal PAUD Teachers after the data is collected then the authors analyze the data.

## 6. First Research

Previous research is needed to confirm, clarify, and see the strengths and weaknesses of various theories used by other authors in a study or discussion with the same problem. In this case the researcher found several previous research results with the same topic but there were differences in the object under study or the angle. research point of view. Some of the research results are as follows:

**Previous research table**

No.	research name	Research title	Types of research	Equation	Difference
1.	Muhammad Aos Nuari/ Mahasiswa UI/ Program studi administrasi Negara.	Analysis of the implication of teacher certification policies in the districts palmerah, Jakarta barat.	Normatif	Together discussed teacher certification	The research that will be investigated by researchers is to analyze the Mk decision number 02 puu-XVIII2019.



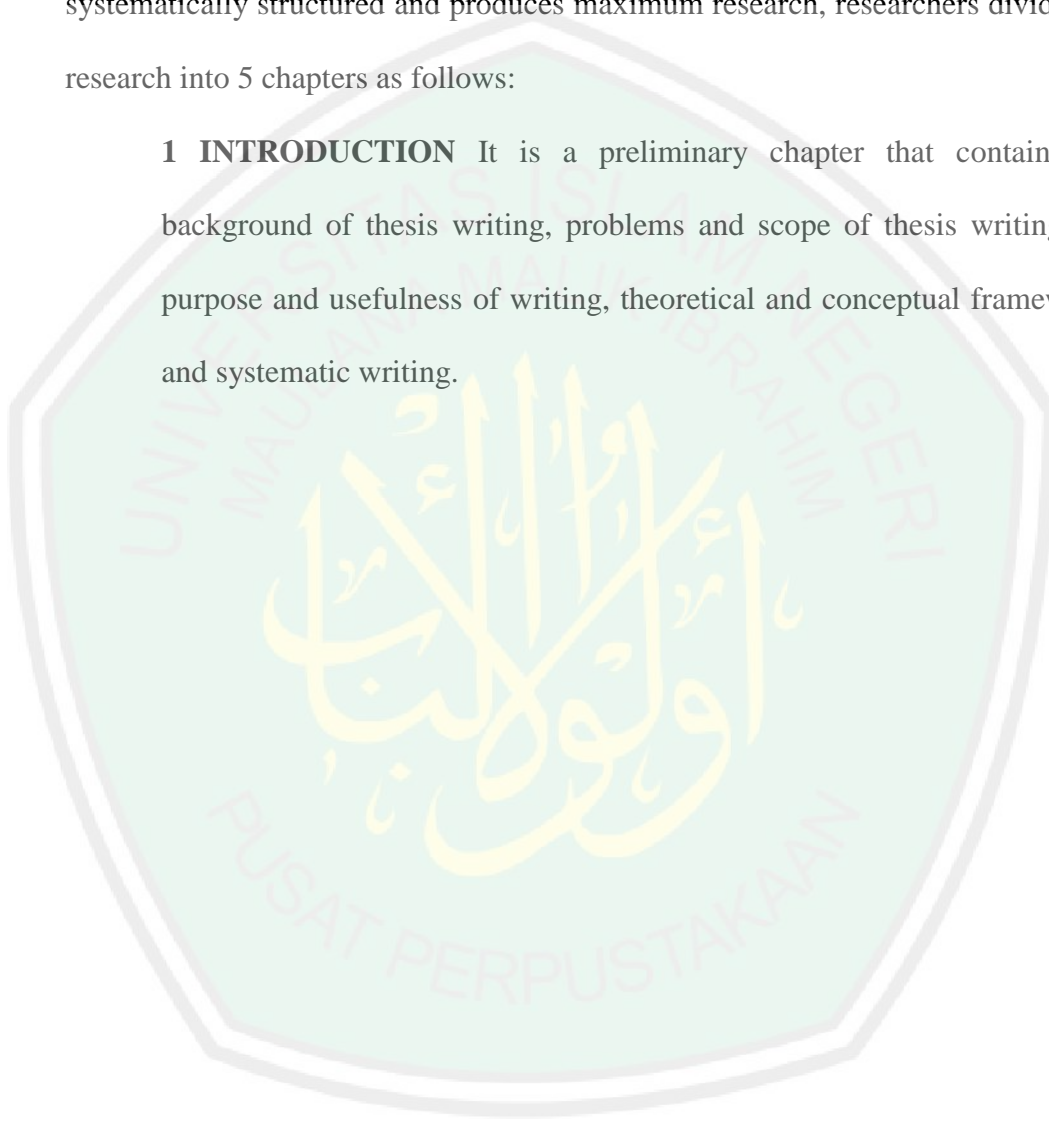
					Using the concept of masalah mursalah theory.
2.	Joko Subagyo	Legal Protection of teacher welfare: a case study in the Surakarta city area.	Empiris	Together discussed teacher certification	The research that will be investigated by researchers is to analyze the Mk decision number 02 puu-XVIII2019.  Using the concept of masalah mursalah theory.



## 7. Systematics Discussion

To facilitate the discussion in this study, and also so that this research is systematically structured and produces maximum research, researchers divide this research into 5 chapters as follows:

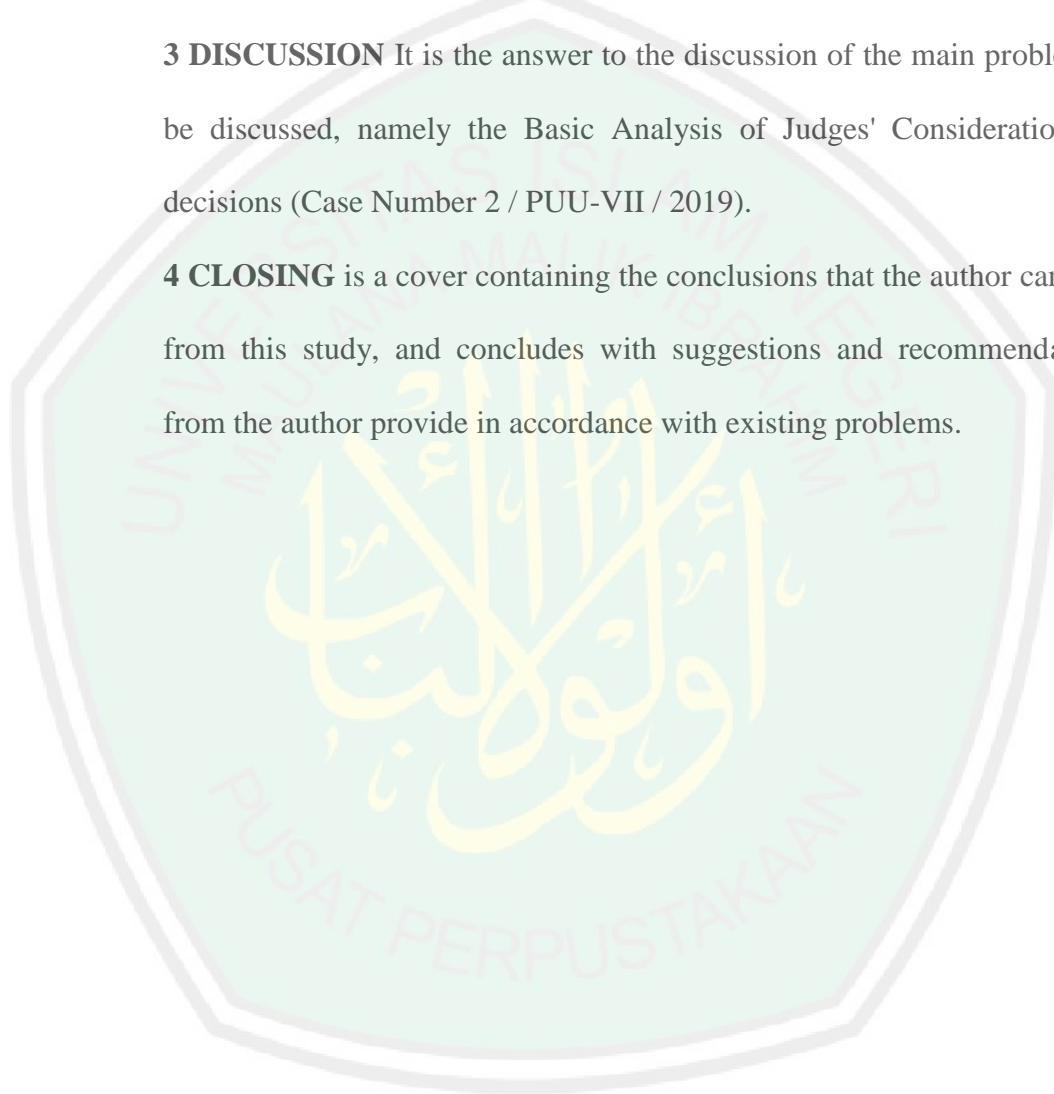
**1 INTRODUCTION** It is a preliminary chapter that contains the background of thesis writing, problems and scope of thesis writing, the purpose and usefulness of writing, theoretical and conceptual frameworks and systematic writing.



**2 LITERATURE REVIEW** Is a literature review chapter as an introduction in understanding general understandings of the subjects which are theoretical reviews which will later be used as comparative study material between theory and practice.

**3 DISCUSSION** It is the answer to the discussion of the main problem to be discussed, namely the Basic Analysis of Judges' Considerations in decisions (Case Number 2 / PUU-VII / 2019).

**4 CLOSING** is a cover containing the conclusions that the author can take from this study, and concludes with suggestions and recommendations from the author provide in accordance with existing problems.



## CHAPTER II

### LITERATURE REVIEW

#### A. Conceptual Definition

##### 1. Understanding the Teacher

In order to better understand what the teacher means, we can refer to the opinions of the following experts:

###### a. Husnul Khotimah

According to Husnul Chotimah (2008), the understanding of the teacher is the person who facilitates the process of transferring knowledge from learning resources to students.

###### b. Ngalim Purwanto

according to Ngalim Purwanto, the understanding of a teacher is a person who has given knowledge or intelligence to someone or a group of people.

###### c. Law No. 14 of 2005

According to Law No. 14 of 2005 concerning Teachers and Lecturers, the understanding of teachers is a professional educator who has the main task of educating, teaching, guiding, directing, training, evaluating and evaluating students in early childhood education through formal channels of basic education and secondary education.<sup>13</sup>

##### 2. Duties and Responsibilities of a Teacher

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<sup>13</sup> UU no. No. 14 of 2005 concerning Teachers & Lecturers

Referring to the understanding of the teacher above, an educator or teacher has the duty and responsibility to teach, educate, train students to become qualified individuals, both in terms of intellectual and morals.

The main tasks of the teacher are as follows:

a. Teaching Students

A teacher is responsible for teaching science to students. In this case, the main focus of teaching activities is in intellectual matters so that students know about the material from a scientific discipline

b. Educating Students

Educating students is different from teaching a science. In this case, the activity of educating is aimed at changing student behavior for the better. The process of educating students is more difficult to do than teaching a science. In addition, a teacher must be able to be a good example for his students so that students can have a good character according to the norms and values that apply in society.

c. Train Students

A teacher also has a duty to train his students to have basic skills and abilities. When in public schools teachers train students in basic skills and skills, in vocational schools the teachers provide advanced skills and abilities.

d. Guide and Direct

Students may experience confusion or doubt in the teaching-learning process. A teacher is responsible for guiding and directing their students to stay on the right track, in this case in accordance with educational goals.

#### e. Give Encouragement to Students

The final point of the task of a teacher is to give encouragement to students to try hard to get ahead. Forms of encouragement given by a teacher to his students can be a variety of ways, for example giving gifts.

### 3. Obligations of Educators and education personnel

Obligations Educators and education staff are obliged to:

- a. creating an educational atmosphere that is meaningful, fun, creative, dynamic, and dialogical;
- b. have a professional commitment to improve the quality of education;
- c. and, set an example and maintain the good name of the institution, profession and position in accordance with the trust given to it.

### 4. Kinds of Education

#### a. Formal education

In accordance with article 1 paragraph 11 of Law Number 20 of 2003 concerning the national education system, clarified by article 1 paragraph 6 of government regulation number 17 of 2010 concerning the administration of education, states that what is meant by formal education is a structured and tiered education path consisting of education primary, secondary, and tertiary education.<sup>14</sup>

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<sup>14</sup> Law Number 20 of 2003 concerning the national education system

The basis of the administration of formal education has also been regulated through government regulation number 66 of 2010 concerning changes to government regulation number 17 of 2010 concerning management and administration of education. Especially article 60 paragraph 1 which states that the implementation of formal education includes: early childhood education formal channels in the form of kindergarten (TK), and Raudhotul Athfal (RA), basic education (for example: elementary, MI, junior high school, MTS). Secondary education (high school, MA, SMK, MAK), and higher education (for example: Diploma, Bachelor, Master, Specialist, Doctor).

b. Non-formal education

Non-formal education according to article 1 paragraph 12 of Law Number 20 of 2003 concerning the National education system, which is strengthened by the issuance of government regulation Number 17 of 2010 concerning management and administration of education, particularly article 1 paragraph 31 states that Non-Formal Education is a channel of education outside of formal education which can be implemented in a structured and tiered manner.

The implementation of non-formal education is regulated in article 26 of Law Number 20 of 2003 concerning the national education system, and also article 100 paragraph 1 of government regulation number 17 of 2010 concerning management and administration of education, including: organizing non-formal education units and organizing non-formal education units regulated in article 100

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paragraph 2, while the implementation of non-formal education programs is regulated in article 100 paragraph 3.

Organization of non-formal education units includes educational units, institutes of courses and training institutions, study groups, community learning centers, amjelis taklim, education of children in the non-formal lane.

The delivery of non-formal education programs includes: life skills education, early childhood education (for example: play groups, child care parks), youth education, women's empowerment education, literacy education, vocational education and job training, equality education.

#### c. Informal education

The implementation of informal education activities has been stated in article 27 of Law Number 20 of 2003, and also article 116 of Government Regulation Number 17 of 2010. Informal education is carried out by families and the environment in the form of independent learning activities.<sup>15</sup> One example of informal education is early childhood education. Early childhood education in the form of informal education in the form of family education or education organized by the educational environment carried out by the family is one of the bases that will shape the character, habits, and behavior of children in the future.

#### 5. Educator's right

Educators and education personnel are entitled to:

- a. adequate and adequate income and social welfare guarantees;
- b. awards in accordance with duties and work performance;

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<sup>15</sup> Law Number 20 of 2003 concerning the National education system

- c. career development in accordance with the demands of quality development;
- d. legal protection in carrying out the duties and rights to the results of intellectual property; and
- e. the opportunity to use educational facilities, infrastructure and facilities to support the smooth implementation of tasks.

#### 6. Definition of Certification

Teacher Certification in the Education Path and Portfolio Assessment is contained in Republic of Indonesia Government Regulation No. 14 of 2005 which explains that for quality assurance and quality control of education in accordance with National Education Standards (SNP), evaluation, accreditation, and certification are carried out<sup>16</sup>. in the Law of the Republic of Indonesia Number 14 of 2005 concerning Teachers and Lecturers stipulated that:

1. Educators are required to have academic qualifications, competencies, educator certificates, physically and mentally healthy and have the ability to realize national education goals.
2. Teacher academic qualifications are obtained through higher education undergraduate programs (S1) or diploma programs IV (D-IV) in accordance with their fields of work as teachers.<sup>12</sup> Whereas for lecturers, the minimum academic qualifications are postgraduate education (S2) programs. which is accredited according to their field of expertise.

Teacher competencies as educators include pedagogic competencies, personality competencies, professional competencies, and social competencies.

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<sup>16</sup> E. Mulyasa, *Competency Standards and Teacher Certification*, (Bandung: PT.Remaja Rosdakarya Offset, 2009), p, 117

Furthermore, in the explanation of the Law of the Republic of Indonesia Number 14 of 2005 stated that what is meant by pedagogical competence is the ability to manage learners' learning which includes understanding of learners, designing and implementing learning, evaluating learning outcomes, and developing learners to activate various potentials it has. What is meant by personal competence is the ability of educators' personality that is steady, noble, wise and authoritative, and is an example for students. Then what is meant by professional competence is the ability of educators in mastering broad and in-depth learning material, which enables educators to guide students in mastering the competencies that are set. Furthermore, what is meant by social competence is the ability of educators to communicate and interact effectively and efficiently with students, fellow educators, parents / guardians of students, and surrounding communities. Religious teachers need to realize that, as with formal education teachers in general, they are required to have the required academic qualifications, have competence, and follow the certification process to determine their professional level in carrying out their duties, roles and responsibilities as educators. religion.<sup>17</sup>

To know and be able to determine whether a religious teacher has met professional standards and other standards, the religious teacher must take a certification test. In the Law of the Republic of Indonesia Number 14 of 2005 stated that certification is the process of granting educator certificates for teachers and lecturers. In its operation, what is meant by teacher certification is the process

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<sup>17</sup> Law on Teachers & Lecturers

of granting educator certificates to teachers who have met the competency standards as referred to in Law of the Republic of Indonesia Number 14 of 2005.<sup>18</sup>

According to the form of implementation, teacher certification is carried out through two channels, namely:

(1) certification of teachers in positions through education channels,

Teacher certification in office through education channels Teacher certification in office through Education Paths is based on Ministry of Education Regulation No. 40 of 2007. This pattern is intended for outstanding teachers. Teacher certification in positions through the Education Path is oriented towards junior teachers who excel and teach in basic education (MI and MTs). The organizer is a tertiary institution designated by the Minister of National Education with a duration of 2 (two) semesters. The teacher certification program in the office through education and competency testing is aimed at protecting the teaching profession from deviant educational practices. Thus things that can damage the image of the teaching profession can be minimized, so that the program is able to guarantee the community from unqualified and unprofessional educational practices.

As with teachers in general, the flow of certification of religious teachers in positions through the education channel can be explained as follows:

a. Teachers who are eligible to take part in teacher certification through education channels register with the district / city education office by completing the documents according to the implementation guidelines.

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<sup>18</sup> Law on Teachers & Lecturers

- b. The district / city education office conducts administrative selection for prospective participants in accordance with existing guidelines.<sup>19</sup>
- c. The district / city education office proposes 1 (one) junior high school teacher per field of study and 2 elementary school teachers who have been selected to the Directorate General of Higher Education for further processing.
- d. Recap of candidates for certification through the education route along with the complete documents sent to the Directorate General of Higher Education.
- e. The Directorate General of Higher Education facilitates academic selection conducted by LPTK certification providers through education channels to determine prospective program participants. The Directorate General of Higher Education determines the allocation of participants in each designated LPTK.
- f. Participants who pass the academic selection follow the Initial Ability Mapping to determine the number of SKS that must be taken while participating in teacher certification through education.
- g. Junior high school teachers (subject in Civics, Indonesian, English, Mathematics, Natural Sciences, Social Sciences, Arts, Physical Education, and counseling guidance teachers) preferably teach according to their educational background.
- h. Have a minimum 5-year work term with a maximum age of 40 years when registering.

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<sup>19</sup> Mansur Muslich, *Certification of Teachers Towards Professionalism of Educators*, (Jakarta: Bumi Aksara, 2015), p. 2.



i. Having academic / non-academic achievements and professional development work at the district / city, provincial or national level organized by the central government, regional governments or organizations / institutions.

j. Willing to attend education for 2 semesters and leave teaching assignments.

k. Approved by the district / city education office with the consideration that the learning process in schools is not interrupted. After completing the teacher certification program in the position through the education route and passing the competency test, the program participants will receive an Educator Certificate signed by the Chancellor of Higher Education organizing the program. The form and specifications of educator certificates given to teachers in accordance with the decision of the Director General of Higher Education No 02 / KSG-DIKTI / 2007 and Number 02 / KSG-DIKTI / 2008.

#### 7. Certification Objectives

In principle, teacher certification aims to:<sup>20</sup>

1. determine the eligibility of teachers in carrying out their duties as agents of learning and realizing the goals of national education,
2. improve the process and quality of educational outcomes,
3. increase teacher dignity,
4. improve teacher professionalism, and
5. improve teacher welfare.

## **B. Theory Study**

<sup>20</sup> Kunandar, *Professional Teacher Implementation of Education Unit Level Curriculum and Success in Teacher Certification* (Jakarta: PT. Raja Grafindo Persada, 2007), p. 79

## **Al-Maslahah al-Mursalah Theory**

### 1. Understanding Al-Maslahah Mursalah

According to the ulama of ushul, some scholars used the term *al-maslahah al-mursalah* with the word *al-munasib al-mursal*. some are using *al-ishtishlah* and some are using *al-ishtishlah* and some are using the term *al-istidlal al-mursal*.<sup>21</sup> Although these terms seem to have the same goal, each has a different review. Every law established on the basis of benefits can be reviewed from three aspects, namely:

First, see the mashlahah contained in the case in question.

For example making a marriage certificate as a complement to the administrative marriage contract today. The marriage certificate has benefits. However, the benefit is not based on the argument that shows the importance of making the marriage certificate. The benefit from this point of view is called *al-maslahah al-mursalah* (maslahah which is detached from the special proposition), but in line with general instructions of Islamic sharia.

Second, Seeing that in accordance with the aim of syara '(*al-washf al-munasib*) which requires the existence of a legal provision in order to create a benefit.

For example, the marriage certificate contains properties that are in accordance with the objectives of syara ', among others, to maintain the status of offspring. However, the nature of this conformity is not shown by a special proposition. Therefore, from this side it is called *al-munasib al-mursal*

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<sup>21</sup> Rahmat Syafe'I, Science of Usul Fiqh, (Bandung: Pustaka Setia, 2015). P.117.

(conformity to the purpose of the syara 'apart from the special proposition of syara').

third, look at the process of determining the law of a problem indicated by a special argument. In this case is the determination of a case that it is recognized as valid by one of the objectives of syara '. This process is called *istishlah* (exploring and establishing a problem).

If the law is viewed from the first aspect, the term *al-mashlahah al-mursalah* is used. This term is the most famous. When viewed from the second aspect, the term *al-munasib al-mursal* is used. The term is used by Ibn Hajib and Baidawi. For the third aspect, the term *al-Istishlah* is used, which is used by Al-Ghazali in *Al-Mustasyfa*, or the term *al-isti'dal al-mursal*, as used by Al-Syatibi in *Al-Muwafaqat*.

Although the scholars differed in looking at *al-maslahah al-mursalah*, the nature is one, that is, every benefit in which there is a purpose of shara 'in general. But there is no argument that specifically accepts or rejects it. Below, a number of ulama's views on the nature and understanding of *al-maslahat al-mursalah* will be discussed.<sup>22</sup>

According to Abu Nur Zuhair, *al-maslahah al-mursalah* is a trait in accordance with the intentions of lawmakers (Allah) in general, but there is no basis on which to specifically prove whether or not it is recognized. Al-Ghazali states that every problem that returns to the maintenance of the intentions of the

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<sup>22</sup> Imron Rosyadi, *Ash-Syatibi's Thought about Maslahah al-mursalah*, (Surakarta: Muhammadiyah University), p. 83

Shari'ah is known from the Qur'an, as-Sunnah and ijma ', but is not seen from the three bases specifically and not through the qiyas method, so al-maslahah is used al-mursalah. If you use qiyas, there must be an original proposition (*maqis alaih*). The way to know maslahah that suits that purpose is some unlimited propositions, both from the Qur'an, sunnah, qarinah-qarinah and from cues, therefore, the way of extracting such maslahah is called *al-maslahah al-mursalah* . That is, apart from a few propositions specifically, but including the general instructions of some propositions syara ' .<sup>23</sup>

From Al-Ghazali's statement it can be concluded that *al-maslahah al-mursalah* (*Ishtishlah*) in his view is a istidlal method (looking for the proposition) of the nafs syara 'which is not an additional proposition to the nash syara', but it does not come out of nash syara '. According to his view, he is a hujjah qath'iyyat as long as it implies maintaining the meaning of syara ', even though in its application zhanni.

Furthermore, Al-Ghazali asserted that if we interpret maslahah with the maintenance of the intention of shara 'then there is no way for us to disagree in following it, even obliging to believe that such a problem is a blasphemy of religion.<sup>24</sup> If it is said that there is a difference of opinion in that matter, the difference is only a conflict between one issue with another or the conflict between the goals of sharia 'with another. In this case, we are obliged to choose more powerful.

<sup>23</sup> Mukhsin Jamil (ed.), *Benefit and Renewal of Islamic Law*, (Semarang: Walisongo Press, 2008), 24.

<sup>24</sup> Al-Ghazali, *Al-Mustayfa Fi'Ilm Al-Ushul* .terj. Amir Syarifuddin, Ushul Fiqh 2, (Jakarta: Kencana Prenada Media Group, 2014), hlm. 382.

Al-Syatibi, one of the scholars of the Maliki school of thought said that *al-maslahah al-mursalah* is every principle of sharia 'which is not accompanied by specific narrative evidence, but in accordance with the actions of the sharia'. Then the principle is valid as a legal basis and can be used as a reference as long as it has become a principle and used syara 'the qath'i. From the understanding put forward by Al-Syatibi, it can be concluded that:

*Al-maslahah al-mursalah* according to Asu-syatibi is a problem with no specific texts, but in accordance with the actions of sharia.

The compatibility of *maslahah* with syara 'is unknown from one proposition and the whole text which results in the law of qath'. although in parts they do not indicate qath'i.

After a number of definitions of *al-maslahah al-mursalah* have been put forward according to some ulama ushul, it can be concluded that the nature of *al-maslahah al-mursalah* in Islamic Sharia is any benefit that is not based on a special text that shows mu'tabar (recognized) or not manfa ' at that.

As for *al-maslahah al-mursalah* according to Imam Malik as the result of al-Syatibi analysis is a *maslahah* that is in accordance with the objectives, principles, sharia, which functions to eliminate narrowness, both *dharuriyyat* (primary) and *hajiyyat* (secondary). Explanation of the definitions above, also shows that not everything that contains problems is, if not included in the *maqashid shari'ah*.<sup>25</sup>

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<sup>25</sup> Abdullah Wahab Khallaf, *Usulul Fiqh Science*, trans. Noer Iskandar al-Bansany, Rule of Islamic Law, Cet. 8, (Jakarta: PT. Raja Grafindo Persada, 2002), 125.



We also cannot say that *al-maslahah al-mursalah* is everything that a priest does in his authority, such as the decision of an imam to free a slave, kill him, and ransom him with wealth. These policies have been stated in the Qur'an and the Sunnah.

It is also not said *al-mashlahah al-mursalah* if there are two conflicting benefits and each has an amplifier or invalidator. This does not make sense in the category far from the amplifier and canceller.

In addition, it also does not include *al-maslahah al-mursalah* all benefits that are contrary to authentic texts or qiyas, both in general and muthlaq. Because all the contradictions between the two are reinforcing to cancel it, it is invalid to say mursh.

However, *al-maslahah al-mursalah* should not be understood to have no propositions to be based on or far from the arguments of the invalidator. But it must be understood that *al-maslahah al-mursalah* is based on the proposition contained in the syara ', but it is not addressed to *al-maslahah al-mursalah*. It can be said through distant methods, such as guarding the spirits, intellect and descent.<sup>26</sup>

## 2. The object of Al-Maslahah Al-Mursalah

By paying attention to some of the explanations above it can be seen that the *al-maslahah al-mursalah* field in addition to being based on sharia law 'in general, must also consider the customs and relationships between one human

<sup>26</sup> Muhammad abu Zahra, *ushul al-fiqh* (Jakarta: pustaka firdaus, 2005), p. 424.

being with another. The field is the main choice for achieving benefit. Thus, the aspect of worship is not included in the field.<sup>27</sup>

What is meant in terms of worship is anything that does not give an opportunity to reason to seek the benefit of all the laws contained therein. Among them, the provisions of shari'ah about the size of hadif, the provisions of inheritance, the provisions of the number of months in the iddah of a woman whose husband died or were divorced. And everything that has been determined its size and prescribed based on the benefit that comes from shara 'itself.<sup>28</sup>

In summary, it can be said *that al-maslahah al-mursalah* is focused on a field where there are no texts, both in the Qur'an and as-Sunnah that explain the laws that have reinforcement through an I'tibar. Also focused on things that are not found the existence of ijma 'or qiyas associated with the incident.

### **3. Kinds of Maslahah al-Mursalah**

Ushul fiqh experts put forward a number of maslahah divisions, when viewed from several aspects.

In terms of the quality and importance of the benefit, the experts of usul fiqh divide it into three types,<sup>29</sup> namely:

#### **1. Maslahah al-Dharuriyah**

Which is the fate associated with the basic needs of humanity in the world and the hereafter. There are five benefits like this, namely (1) preserving religion,

<sup>27</sup> Rachmat Syafe'i, *Science of Usul Fiqh* (Bandung: CV Reader Setia, 1998), 117.

<sup>28</sup> Nasrun Haroen, *Ushul Fiqh I* (Jakarta: Wagos Wacana Ilmu, 2001), p. 92

<sup>29</sup> Amir Syarifuddin, *Usul Fiqh*, (Jakarta: Prenamedia Group, 2008), p. 377.

(2) caring for the soul, (3) caring for the mind, (4) caring for the offspring, and (5) preserving property. These five benefits are called al-mashalih al-khamsah.

To embrace a religion is a human nature and instinct that cannot be denied and desperately needed by humanity. For this need, God prescribed the religion that must be maintained by everyone, both related to 'aqidah, worship and mu'amalah.<sup>30</sup>

The right to life is also the most basic right of every human being. In this connection, for the benefit, salvation of the soul and human life, Allah prescribed various laws related to it, such as the Shari'ah Qishash, the opportunity to use natural resources for human consumption, the marriage law for continuing human generations, and various other laws. .

Reason is a decisive goal for someone in living his life and lives. Therefore, God makes the maintenance of reason as a principal. For this reason, God forbids drinking alcohol, because it can damage the mind and human life.

Heredity is also a major problem for humans in order to maintain human survival on this earth. To preserve and continue the offspring, Allah prescribes marriage with all the rights and obligations that result.

Finally, humans who cannot live without possessions. Therefore, property is something dhoruri (principal) in human life. To get it, Allah prescribed various offspring and to preserve one's property. Allah prescribed the punishment of thieves and robbers.

## 2. Maslahah al-Hajiyah

<sup>30</sup> Hasbi Asy-Siddiqiy, *philosophy of Islamic Law*. (Jakarta: Bulan Bintang, 1975), p. 373.

It is an evil which is needed in perfecting the basic basic needs in the form of relief to maintain and maintain basic human needs. For example, in the field of worship given relief summarizing (qashr) prayer and breaking for the traveler.<sup>31</sup>

### 3. Maslahah al-Tahsiniyah

Is a benefit that is complementary in the form of freedom that can complement the previous benefit. For example, it is recommended to eat nutritious foods, dress well, do sunnah services as additional practices, and various types of methods to remove impurities from the human body.

These three benefits need to be distinguished, so that a Muslim can determine priorities in taking a benefit. The benefit of dhoruriyah must take precedence over the benefit of the pilgrimage, and the benefit of the pilgrimage must take precedence over the benefit of *tahsiniyyah*.<sup>32</sup>

Seen in terms of the content of the maslahah, the ulama of ushul fiqh divided it to:

#### a. Maslahah al-‘ammah

Which is a public benefit that concerns the interests of many people. Which where this benefit is used for the benefit of the majority of the people or most people.

#### b. Maslahah al-Khashash

It is a personal benefit and this is very rare, as is the benefit associated with terminating someone's marital relationship who is declared lost (maqfud).

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<sup>31</sup> Ibid, hlm. 94.

<sup>32</sup> Ibid., hlm. 100.

The importance of the second division of these benefits relates to which priority should take precedence if between public benefit contradicts personal benefit. In the struggle of these two benefits, Islam takes precedence over the general benefit rather than the personal benefit.

#### **4. Basic validity of Maslahah Mursalah**

Before the authors state the basics of the maslahah, the ulama's opinion on the maslahah will be presented first.

Basically scholars differ in opinion in looking at maslahah, while they view as *hujjah syar'iyah* and are one of the arguments for legal development, while other scholars view the opposite.

Abdul Wahhab Khalaf in his book wrote that Imam Malik and Ahmad and their followers held to *istislah* as a *shar'i* method for obtaining laws relating to events that did not exist either in texts or *ijma'*.

As-Shafi'i and his followers in this case reject *istislah*. They are principled that someone who holds to *istislah* identical with people who hold *istihsan*, and *istislah* is identical with *itihsan*.

He further said:

"And may not for (a judge or mufti) determine the law and give a fatwa based on *istihsan* because *istihsan* has no certainty and is not included in the context of understanding." (Al-Qur'an, As-Sunnah, *ijma* or *qiyas*).

The Hanafiyah scholars in some books are indeed declared as scholars who do not want to hold onto *istihsan* and do not consider it as *syar'iy*



proposition.<sup>33</sup> So to test the truth of this statement it is necessary to have the above problem related to the facts as follows:

a. Iraqi fiqh scholars are in fact in the ranks of the 'ulama who hold the sharia law opinion' aimed only at creating human benefit and it is fostered based on the legal illathy which is the place to enter maslahah.

b. Iraqi fiqh clerics are known as scholars who worship with istihsan. They divide it with other means to the istihsan whose bases are 'urf, darurah and maslahah. With this, they can indirectly hold on to the murshah mashah and worship with istidlah. It is an impossibility if on the one hand reject istihsaan and on the other hand reject istislah.

Al-Qarafi as stated by Abu Zahrah actually has a more extreme view. He stated that maslahah was factually used as a proof by all Imams on some issues of furu'iyah. In his view, the madzab ulama practiced qiyas and they determined illat based on the munasab even though there was clearly no argument to admit it.

Sheikh Muhammad Abduh is well-known as a mujtahid who adheres to maslahah, this can be proven by his fatwa style and interpretation of the verses of the Qur'an. He once advised the government or the authorities and fiqh experts and the haim at that time so that they would not let go of public benefit considerations in terms of issuing fatwas and establishing legal provisions. He also once explained that public benefit is the basic basis of the political arena and

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<sup>33</sup> Muhammad Abu Zahrah, *Usul Fiqh* (Jakarta: Pustaka Firdaus, 2016), p. 231.

the rules of civilization consistently without justifying something that is forbidden and neglecting something that is required.<sup>34</sup>

Of the several scholars who worshiped the *maslahah*, the famous priest Malik used it the most, although he rejected this statement by most of his followers.

Indeed factually Imam Malik in many ways often provides fatwas with *maslahah*.<sup>35</sup> So in this connection the following facts can be stated:

- a. If there is a vacuum in the State treasury or the welfare needs of the soldiers increases, while the State treasury is insufficient, in this case the head of the State is allowed to impose these needs on the rich people at that time until financial conditions return to normal or at least meet the needs. More than that, the head of state is also allowed to impose the above requirements on them while they are harvesting crops and fruits, with the aim of preventing wealth monopoly efforts among the rich. The problematic side of this provision is that a head of state if he does not take decisive action in such circumstances will weaken his position and will cause various disasters which will ultimately damage the stability of the State.
- b. In investigating the theft of Malik the priest allowed to beat a person suspected of having committed a crime with the intention that he confessed his actions.

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<sup>34</sup> Nasrun Haroen, *Usul Fiqh 1* (Jakarta: Logos, 1996), 114.

<sup>35</sup> HasbiyAllah, *Fiqh and Usul Fiqh Istimbath and Istidlal* (Bandung: Rosda, 2013), 104.

c. A woman left by her husband and she has been patiently waiting for her arrival in a few years so that this situation has caused suffering for her, while the news from her husband has been interrupted, then in this case according to Imam Malik the elder may marry another person after 6 years after his break up the news. With this fatwa, Imam Malik prioritizes the benefit of his wife rather than the benefit of her husband who goes. A woman who is defeated and she is a woman who has not broken her menstruation but it turns out she must undergo a holy period that is so long, then according to the priest Malik she can be married with three months after 9 months past the calculation of the usual pregnancy period. So the total is one year. in this case he prioritizes the benefit of his wife from the consciousness of bearing the iddah for an indefinite period.

d. If a country or region has been hit by various illicit practices and such have been distributed evenly until there are no more halal employment practices, even though the need for fulfillment is not just a subsistence, and the circumstances do not allow a person to move to the country or other regions, then in this case it is permissible for that person to make unlawful efforts as long as he is truly unable to change the situation or look for other halal businesses. All this is intended only to deny consciousness and fulfill needs.

The various examples that the author has suggested above have been able to support the statement that the Malik Imam is the most widely applied ulama of

masalah. However, in reality can not be separated from the pros and cons cycle.

About this As-Syaukani concluded as follows:

First, it must not hold on to masalah absolutely, that is the opinion of the public.

Secondly, it is possible to hold to masalah absolutely. This opinion was narrated from Imam Malik.

Third, may hold to the masalah with the terms of the masalah in accordance with the arguments syar'iy, both kuliyy and juziy. This opinion was narrated by Ibnu Burhan in the book *Al-Majlis* from As-Shafi'iy.

Fourth, may hold to the masalah with the condition that the masalah are daruriyah, qat'iyah and kulliyah. This opinion was developed by Hambali and al-Baidawi.<sup>36</sup>

The grouping of As-Syaukani can be simplified again in two groups that face each other diametrically, that is, groups that accept and reject including those with conditions. These two groups each have reasons why they reject and accept masalah as a source of law.<sup>37</sup> The reasons for the refusing group are as follows:

First, that Allah will not leave people alone without presenting laws that can guarantee their benefit. Thus Allah has enjoined the laws through the Qur'an and Sunnah as well as the laws attributed to the scholars, then they did not disagree on this opinion. Likewise Allah has given instructions to them that if they differ in their views on masalah which have no provisions in the Qur'an and As-Sunnah or ijma 'then that problem should be returned to the above legal sources

<sup>36</sup> Muksin Jamil, *Benefit and Renewal of Islamic Law*, (Semarang: Walisongo Press, 2008), p. 24.

<sup>37</sup> Abu Rakhmad, *Usul Fiqh* (Semarang: Karya Abadi Jaya, 2015), 240

by analogy or other means. This means that Allah has given shari'a and its blessings and if the benefit of mankind still wants from what Allah has shari'ated, he will surely arrange it and it is impossible to leave it alone.

Second, that all essential benefits for humans have been arranged in such a way by God by establishing them as a legal provision or by not recognizing the *maslahah* as the basis for legal development. thus all the benefits that are outside of it cannot be used as a basis for *tasyri* '. And because the *syar'iy* law is only a law prescribed by God or a law that is fostered on the benefit of the *memag* which is recognized by him as the basis for legal development, it is clear that *istislah* is not a *syar'iy* proposition and is illegitimate.

Third, that the problem that is separated from the proposition that recognizes or rejects is an unclear problem that contains the possibility of what is recognized and rejected. In this condition it is not impossible to be veiled in the desires, desires and subjective desires of humans which will only result in blurring of the eyes between *mafsadah* and *maslahah*. *Mafsadah* may be seen as a problem, and vice versa. *Akalpun* is not impossible to be fooled anyway, finally he will give decisions without perfect knowledge base. It is true that even normal humans and mature minds will not escape the influence of subyrction and self-deception in the face of values, therefore legal development based on *maslahah* is a platform for the erection of various errors and the door of sub-legal determination.

The reasons for groups that accept *maslahah* as a source of law are as follows:



1. In various realities the friends have used *maslahah* as a basis for establishing the law, including:<sup>38</sup>

a. The Companions have gathered the Qur'an in one Manuscript. This fact never happened in the time of the Prophet. They carry out such wisdom solely because of *maslahah*, namely maintaining the Qur'an so that it is not wasted and its authenticity is not lost due to the death of the friends who memorized the Qur'an. And this is an implementation of God's word which states its preservation.

b. *Khulafaur rasyidin* stipulates the necessity of entrepreneurs in the service sector to provide compensation for other people's goods damaged in his hands, even though according to their origin they are people who are given a trust. Such wisdom is carried out with the consideration that if they are freed from having to pay compensation they will undoubtedly ignore and underestimate their responsibility towards others in their hands. *Ali ibn abi talib* has confirmed the basis of this wisdom is *maslahah*. He said "humans will not get good unless with such wisdom.

c. *Umar* had separated the possessions of the officials who were to be suspected because they had mixed their personal assets with the assets obtained from his position. *Umar* argued that in these actions there were benefits for government officials. Besides that he also forbade them to use the opportunity to accumulate wealth and seek profits by illegal means. His actions were merely motivated by consideration of the public interest

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<sup>38</sup> Sarmin gratitude, sources of Islamic law, (Surabaya: Al-Ikhlâs 1993), pp. 196-197.

and not because of the intent of the persecution. So through his policy, Umar hopes to be able to find out the balance sheet comparison of the officials' assets before and after they hold their positions.

d. Umar once spilled milk mixed with water in order to give lessons to people who used to do such manipulations. His actions were based on consideration of *maslahah* so that they would not be used to manipulating them again for the next period.

2. *maslahah* if it is in line with the objectives of legal development, it must be used as a legal proposition that stands alone and is not seen to be outside the path of other laws, because using the *maslahah* means supporting the achievement of the objectives of legal development and otherwise letting it means also allowing that goal, even though letting the intended purpose is an unjustified action.

3. if in a case, clearly states that there is a problem that is in line with the problem that is recognized by the shariah 'then the problem is left alone, undoubtedly resulting in humans will get into trouble and narrowness. And this is not in accordance with the basics of legal development in the Qur'an.<sup>39</sup>

From the different perceptions and arguments of the scholars regarding the fact of this fact, it can be further underlined that in principle the scholars differed in their views in seeing the true essence of the *maslahah*. Some argue, practicing *maslahah* means establishing the law on the basis of ratio and subjectivity only without regard to the intentions of *syara* '. In this context Al-Ghazali writes: "Any problem that does not lead to the maintenance of the intention understood from

<sup>39</sup> Abu Ishak Al-Syathiby, *al-Muwafaqat fi Usul al-Shari'ah*, (Bairut: Dar Al-Ma'ififah, 1975), 6.

the book, as-sunnah or ijma 'and is included as a foreign problem which is not in line with the actions of the Shari'ah, then it is a problem that is invalidated and must be discarded and whoever is practicing it means he makes his own shari'ah.<sup>40</sup>

Furthermore, the range of what is meant by the maslahah and how the Al-Ghazali in the other parts of writing wrote as follows:

وإذا فسّرنا المصلحة بالمحافظة على مقصود الشرع فلا وجه للخلاف في التباعها بل يجب القطع بكونها حجة.

"If we interpret maslahah by maintaining the intention of syara 'then there is no way to disagree in following it even we must determine that it is a proof.

Al-Ghazali's opinion above seems to have succeeded in subduing the understanding of the true essence of maslaha, that is, the maslahah which maintains the intentions of shari'ah, which supports and interferes with its application and realization in the midst of community life. Therefore it absolutely has a strategic position and is no longer a place of difference of opinion about its authenticity. Functionally, it is a means of maintaining the intentions of the syara 'as the goal to be achieved. So if realizing that goal is a necessity, of course, realizing the means of a necessity as well and that is nothing but maslahah.

Through itiqra 'the purposes of syara' as the goal to be achieved, it can be stated as follows:

1. Cleanse the soul of each individual so that he can be a source of good for society and the environment and not vice versa. To fulfill this purpose the worship of Islam is sharia as a means of cleansing the soul and various

<sup>40</sup> Alaidin Koto, *Science of Fiqh and Usul Fiqh* (Jakarta: PT Grafindo Persada, 2014), 116.

diseases which are usually languishing in the hearts of every individual, besides it has a social function, namely in strengthening the kinship between each other.

2. Uphold justice in the midst of society. For this reason, Islam establishes the principle of justice in all legal rules, court decisions, testimonies and in the field of muamalah by giving rights to those who are entitled to receive it. Islam also instills the principle of "in quality before law" so that Islam does not tolerate any form of discrimination between the rich and the poor, between the strong and the weak, between one state and another.

3. realize a benefit. For this reason, it can be understood that all the laws prescribed by Allah through the Qur'an and Sunnah must contain essential and universal benefits, and therefore the desired benefit is not a subjective subjective benefit.

Expressing the intentions of the syara 'above, will also help clarify the position of the maslahah in the Islamic legal system at the same time can help a common ground of various contradictory perceptions about its blasphemy.<sup>41</sup> Then it can be obtained a clarity that the maslahah is really the goal of the Islamic law's shari'a and therefore there is no reason not to maintain and pay attention to it. This statement is not a 'cleric who can deny that Ibn Qayyim gave a similar statement that the Islamic Shari'ah is based on the wisdom and benefit of mankind both in the world and the hereafter. He reflects justice, mercy and benefit sera wisdom in all its rules. If every rule that no longer pays attention to justice, mercy and benefit

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<sup>41</sup> Romli SA, *Introduction to the Science of Usul Fiqh Methodology for Establishing Islamic Law* (Depok: Kencana, 2017), 192-193.

and wisdom as mentioned above is not included in Islamic sharia even though with any interpretation.

Included in something that can support the above statement is the word of Allah SWT:

يا أيها الناس قد جاءكم موعظة من ربكم وشفاء لما في الصدور و هدى ورحمة للمؤمنين

"O people, verily have come to you and healers for the diseases (which are in the chest) and guidance and wisdom for those who believe." (Qur'an, Jonah: 57).

Mustafa Al-Maraghi when interpreting the above verse explains the words "rahmatan lil believers" as a positive impact of the Qur'an that can seep into the hearts of believers. These impacts include manifesting a spirit of sacrifice in virtue, giving help to people who are miserable, controlling themselves from committing persecution, abuse and betrayal.

In another part Allah SWT says:

وما أرسلناك إلا رحمة للعالمين

"And we have not sent you but to (be) a mercy to the worlds." (Surat al-Anbiya ': 107).

Mustafa Al-Maraghi when interpreting this verse also explained that the Prophet also brought the laws in which there are benefits of life both in the world and the hereafter, except that only those who disbelieve in Allah ignore and exclude themselves from the benefit, and that is because fragility of readiness and awareness in him. He did not want to accept and give thanks for Allah's mercy and blessing so he did not get happiness both in life in the hereafter and in this world.



The existence of Islamic law as a law that contains benefits for all mankind both implicitly and explicitly is a legal reality that is hard to deny, especially textually. This gives the understanding that every benefit that is truly essential and essential and general in nature will always get justification from the past law. This also means that *maslahah* or *istislah* with all the conditions of its application can be accepted as a source of law in the context of the justification and indeed accepting *maslahah* as a source of law has been supported by the Qur'anic and As-Sunnah texts. On this basis it can be believed the existence of Islamic law as a system will be able to answer the challenges of modernity throughout the ages while still ensuring the characteristics of the law itself in the form of flexibility and elasticity in all its rules.

### **5. Terms of Applicability *Maslahah***

Ulema who accept *maslahah* as a source of law especially Malik as the most popular Imam uses it determine some conditions that must be met in explaining it.<sup>42</sup>

Zakaria Al-farisi in his book *masadirul ahkamil Islamiyyah* provides other conditions as a complete requirement of the above, including:

1. That benefit should be essential and not imaginative in the sense that if the person who has the opportunity and who focuses on it believes that fostering the law based on the benefit will be able to benefit and reject the consciousness of mankind. It is different if only some believe that there is benefit, for example about the benefit of the prohibition of divorce by the husband and then the right is

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<sup>42</sup> Abdul Wahab Kholaf, *Usul Fiqh Science* (Semarang: Dina Utama, 1994), p. 71.

given absolutely to the judge alone. Such is not the ultimate benefit but the imaginative benefit that will only destroy family and community life.

2. The benefit should be universal and not partial. An example is what was stated by Al-Ghazali, namely: if in a battle against the infidels they fortify themselves and make defense through some captive Muslims, while the infidels are feared that they will launch aggression and can destroy the majority of Muslims then attack against them must be done, although it will result in the death of some Muslims who actually must be protected by the safety of his soul. This is based on the consideration of the public interest by continuing to prioritize victory and resilience.

These are some of the conditions that must be met in applying *maslahah* as a source of law. and by stating some of the conditions it can be avoided that an indication of the application of *maslahah* means setting the law subjectively emotionally as is often alleged by some scholars.

#### **6. Terms of worship with *maslahah mursalah* as a method of installing Islamic law**

*Maslahah mursalah* is a method developed by 'ulama ushul fiqh in terms of law. in this case the conditions that must be met, with the possibility that the problem is not to be misused by various parties. In realizing benefit in accordance with the aim of *syara'*, it is necessary to have restrictions on the *maslahah* in order to avoid interpretations of the method of *maslahah* from other interpretations that are not in accordance with the provisions of the text. Abdul Wahab Khalaf explained the two conditions for using the problem masses as follows:

First, it is said that the benefits must be in the form of essential benefits that clearly bring a good or benefit and are able to refuse to harm alone without looking at the negative consequences caused.

Secondly, the Maslahah does not contradict the provisions in the Qur'an, Sunnah Rosulullah Saw or with Ijma '.

According to Imam Malik, the terms of the problem are as follows:

- a. The benefits or goodness that are used must be in accordance with the object in using the problem masuraah. In this case what is meant is the goals of people who use maslahah mursalah, and circumstances that occur in the field that do not get any ijma 'or qiyas associated with the incident.
- b. The arguments of the maslahah mursalah do not negate the principal arguments that have been determined and do not contradict the arguments of qoth'iyyah.
- c. The problem is that the problem can be accepted by the mind in a problem. And if the problem is offered to scholars, they can accept it.

Basically jumhur 'ulemas accept maslahah mursalah as one of the reasons in establishing syara law'. Although they have different opinions in placing the terms and how to apply them. The reasons are as follows:

- a. The benefit of humans that continues to grow and increase in accordance with the guidance of the times.
- b. Both peratura, law investigations and decisions issued by the Companions and the tab'in are the paths taken for mutual benefit such as

the example of the policy pursued by Abu Bakr Ash-Siddiq in gathering al-qur'an and writing all verses on the Manuscripts sheet.

c. Hanafiyah scholars emphasize that in order to make the *maslahah* as a proposition, it is necessary to assume that the *maslahah* has a full role in the law. In this case what is meant is like a verse, hadith or *Ijma* 'to be' *illat* or motivational law that can be applied in establishing a law. For example in ancient times someone who asked Rosulullah Saw about the status of cat food scraps was considered unclean or not. There is a hadith narrated by Imam Malik from Abi qatadah as follows:

"That Rosulullah peace be upon him, said about cats. That the cat is not unclean, because in fact the cat is a house animal that always surrounds you, not (to be unclean) for you".

Explanation of the above hadith is the nature of the study of *hkm* which is *thawwaf* meaning that animals that are always at home, sleep at home and find it difficult to separate them. Based on these characteristics, the cat food residual law is unclean. So from that explanation *thawwaf* is a study of the law of *thoharoh* to avoid difficulties in caring for and maintaining cats.

The concept of *maslahah mursalah* is essentially eliminating *kemudharatan* to achieve the goal of *syara*'. Therefore, Hanafiyah scholars accept *maslahah mursalah* as an argument in establishing the law. However, with the conditions and types of benefits contained in the text of the roof *Ijma* 'is in a position in harmony or the same as the type of properties supported by texts or *ijma*'. The Hanafiyyah applied the concept of *maslahah mursalah* by using the

istihsan method, which is a method of law enforcement from the qiyas or general rules to other laws because of the existence of several indications or other causes.

Acceptance of the problem as a proposition becomes a debate among the scholars.<sup>43</sup> The fiqh scholars who accepted and applied the maslahah as the argument for determining the law were the Malikiyah scholars and the Hanabilah scholars. Maslahah mursalah is considered as an intermediary of the thought of the texts of the texts not the texts detailed in the qiyas. According to Imam Syathibi the quality and position of the maslahah is qath'I (certain) even though in its application it is zhanny (relative). Malikiyah Ulema and Hanabilah provide three conditions so that the problem masses can be used as an argument in determining a law including:

- a. Maslahah should be addressed in accordance with the objectives of the syariah '
- b. The quality of the nature and type of maslahah is supported by the text in general
- c. The destination is rational and certain
- d. Maslahah in question must be for the benefit of many people not for individuals or groups.

Shafi'i scholars make maslahah mursalah as the proposition of shara ', however, Imam Shafi'i includes in the qiyas. as well as punishing the drinkers for the punishment of those who accuse zina, 80 times.

Thus, many ulama scholars accept maslahah mursalah as one method to attribute Islamic law.

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<sup>43</sup> Fatchurrohman, Basics of Islamic Fiqh Law development, (Bandung: PT.Al-Ma'arif, 1986), pp. 105-106.



The reasons are as follows:

- a. The results of the thought of the verse or hadith states that every law contains benefits for humanity.
- b. The benefit is influenced by the development and the demands of the times
- c. The benefit which is used as the proposition is a reference seen by scholars from some of the behaviors of friends.

### **C. Constitutional Court**

#### **1. Definition of the Constitutional Court**

The Constitutional Court is a high state institution that is equal and equal to the Supreme Court in the Indonesian constitutional system which holds judicial authority.<sup>44</sup> The Constitutional Court is also a state institution that has the authority to exercise judicial review or constitutional review of the Law on the 1945 Constitution and other specific tasks, namely in the prerogative or judicial forum that specifically decides the opinion of the DPR that the president violates the president's violations certain things mentioned in the Constitution so that they can be dismissed.

In connection with the provisions of the Constitutional Court, it has been regulated in the 1945 Constitution in article 24C which consists of 6 paragraphs which is preceded by an arrangement by the judicial commission in article 24B. In the order of institutional arrangements only intended related to the existence of the Supreme Court and not the Constitutional Court. But along with the development of the Law on the Judicial Commission. The Constitutional Court is made as a

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<sup>44</sup> Moh. Mahfud, *Differences in Constitutional Law Post Constitutional Amendments* (Jakarta: Rajawali Press, 2012), p. 118.

dignified object so that the honor and behavior of the judge in carrying out his duties and authority is overseen by the Judicial Commission.

The Supreme Court is the peak of the judiciary related to the demands of the struggle for justice for individuals or other legal subjects, in contrast to the Constitutional Court which deals with the demands for the struggle for justice for the public interest which is not for individuals or individuals. In this case the Constitutional Court hears cases involving the examination of abstract legal norms and political institutions. So it can be seen if the difference between the Supreme Court is the Court of justice (adjudicating justice to bring about justice). Whereas the Constitutional Court is a court of law (adjudicates the legal system and the justice system itself).

## **2. Authority of the Constitutional Court**

The Constitutional Court has the main function and role of maintaining the constitution in order to uphold the principle of constitutionality of law. such is the case for the countries which adopted the Constitutional Court in their constitutional system. In the context of safeguarding the constitution, the 1945 Constitution explains that the existence of the Constitutional Court as a State institution that functions to handle certain cases in the state administration. In order to be carried out responsibly according to the will of the people and democratic ideals. The Constitutional Court also functions for the implementation of a stable State government. As a correction to the constitution.

The function of the establishment of the Constitutional Court is also to guarantee that it will not come out of legal products coming out of the

constitutional corridor so that the citizens' constitutional rights are maintained and the constitutional guarded by their constitutional provisions in Article 24C paragraph (1) and (2) the authority of the Constitutional Court as follows:<sup>45</sup>

1. The Constitutional Court has the authority to adjudicate at the first and last place the final decision to review the Law on the 1945 Constitution, to decide on a dispute over the authority of a State institution whose authority is granted by the 1945 Constitution. Decide upon the dissolution of political parties and decide on disputes over election results.
2. The Constitutional Court must render a decision on the opinion of the House of Representatives regarding alleged violations of the president and vice president according to the 1945 Constitution.

The authority of the Constitutional Court is regulated specifically and in detail in article 10 of the Constitutional Court law as follows:

- a. Examine the constitution of the 1945 Constitution of the Republic of Indonesia.
- b. Resolving the dispute, the authority of the State institution whose authority is given by the 1945 Constitution.
- c. Decide upon dissolution of political parties.
- d. Arranging disputes about election results,
- e. The Constitutional Court is obliged to give a decision on the opinion of the House of Representatives that the president and or vice-president are alleged to have violated the law in the form of State betrayal, corruption, bribery, other

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<sup>45</sup> Alex sobour, *psikologi umum*, (Bandung: CV. Pustaka Setia, 2003), hlm. 301.

serious crimes, or despicable acts, and / or no longer qualify as president and or vice president as referred to in the 1945 Constitution.

#### **D. Description of the decision of the Constitutional Court Number 2 / PUU-VII / 2019**

The Constitutional Court has tried and issued a decision on case Number 2 / PUU-VII / 2019, Case for testing article 1 number (1) and article 2 paragraph (1) of Law Number 14 of 2005 concerning Teachers and Lecturers in 2018 but the application was rejected by the Constitutional Court based on legal considerations. description of the decision as follows:

##### 1. Applicant's identity

In the Judicial review case article 1 number (1) and article 2 paragraph (1) of Law Number 14 of 2005 concerning Teachers and Lecturers of the 1945 Constitution. there are applicants, of which the applicant is the Non-Formal Teacher Paud.

Applicant: Annisa Rosadi, occupation as an Al-Ihsan PAUD Educator. Who lives in Jalan Salemba Tengah Gg. II Number 49 RT / RW 014/004, paseban village, senen sub-district, Central Jakarta.

##### 2. Sit Case

Submission of material review case article 1 number (1) and article 2 paragraph (1) of Law Number 14 of 2005 concerning Teachers and Lecturers have been submitted by the petitioners on December 18, 2018 which were received and registered in the Registrar's Office of the Constitutional Court on Tuesday, dated 18 December 2018, based on the deed of receipt of application file Number 211 /

PAN.MK / 2018 and recorded in the Constitutional Case Registration Book Number 2 / PUU-XVII / 2019 on taggal 4 January 2019, which was amended and received by the Court clerk of the Court on 28 February 2019 with the following description:

1. Regarding the authority of the Constitutional Court, political changes in Indonesia occurred in the amendments to the 1945 Constitution, one of which resulted in a change in the provisions of article 24 paragraph 2 of the 1945 Constitution which reads "judicial power is exercised by the Supreme Court and the judicial body underneath it in the general justice environment, the religious justice environment , military court environment, administrative court environment and by a Constitutional Court ".
2. Whereas in accordance with the provisions of article 24C (paragraph 1) of the 1945 Constitution, which states "The Constitutional Court has the authority to adjudicate the first and last level of decision which is final to examine the law against the constitution, decide upon all disputes over the authority of the State institutions whose authority is granted by the 1945 Constitution, decides the dissolution of political parties and resolves disputes about the results of elections.
3. The Constitutional Court has the authority to conduct judicial review of the 1945 Constitution based on Article 10 paragraph 1 of Law Number 24 concerning the Constitutional Court which has been amended by Law Number 8 of 2011 amendment of Law Number 24 of 2003 concerning the Constitutional Court .



4. That the Constitutional Court was formed as the guardian of the constitution. If there are laws that contradict the constitution, the Constitutional Court can cancel the Act in whole or in part. .

#### **E. Background of Constitutional Court Decision Number 2 / PUU-XVII / 2019**

The decision of the Constitutional Court Number 2 / PUU-XVII / 2019 is due to a request from the applicant that they sued for several reasons, the reasons include:

1. Whereas according to the petitioner, with the non-formal status and position given as teachers for PAUD educators, the Teacher and Lecturer Law only partially recognizes PAUD educators. In this case, the applicant considers the Teacher and Lecturer Law to eliminate recognition, guarantees, protection, legal certainty and equal treatment for non-formal PAUD educators, especially to eliminate job security and decent livelihoods and provide discriminatory arrangements for non-formal PAUD educators. Whereas in Law Number 20 of 2003 concerning the National Education System (hereinafter referred to as the National Education System Law) it has recognized that Early Childhood Education (PAUD) is an inseparable part of the national education system, and if you look at the arrangements regarding formal education and non-formal education it can be understood that the two do not have significant differences because they are both carried out in a structured and tiered manner and have the same position and even complement each other.<sup>46</sup>

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<sup>46</sup> Decision of the Constitutional Court Number 2 / PUU-VII / 2019.

2. Whereas according to the applicant, educators in formal PAUD and non-formal PAUD both carry out the educational function of children. In this case the recognition and granting of teacher status only to formal PAUD educators is irrelevant, moreover non-formal PAUD educators are actually recognized as PAUD tutors in article 17 of 2010 regarding management and administration of education according to the applicant having no clear legal basis where the recognition originates because the term PAUD guardian itself is not contained in the National Education System Law itself so it does not provide legal certainty for the applicant.

3. Whereas according to the applicant, the implementing regulations for the National Education System Law actually recognize non-formal PAUD educators. One of the norms in the implementing regulations states that educators in non-formal PAUD consist of teachers, teacher assistants and caregivers [vide Permendikbud Number 58 of 2009 concerning Early Childhood Education Standards]. In other implementing regulations norms namely article 24 paragraph (2) of the Ministry of Education and Culture Regulation No. 137 of 2014 concerning the National standards for Early Childhood Education states, "early childhood educators consist of PAUD teachers, assistant teachers, and young assistant teachers". Furthermore, in article 29 paragraph (1) of government regulation No. 19 of 2005 concerning the National Education standards it is stated that the qualifications of early childhood educators are (1) minimum academic qualifications of education diploma four (D-IV) or bachelor (S1); (2) higher

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education background in early childhood education, other education, or psychology; and (3) teacher professional certificates for PAUD. Thus, according to the applicant, the actual implementing regulations of the National Education System Law also have used the term teacher to state educators in formal and non-formal PAUD. In addition, formal PAUD and non-formal PAUD are placed in the guidance and supervision of the same Directorate, namely the Directorate General of Non-Formal and Informal Education. The existence of such differences in regulations raises legal uncertainty for the applicant's status as non-formal PAUD educators.<sup>47</sup>

#### **F. Reason of the applicant and reasons for refusal of judges**

##### **1. Reason of the applicant**

The reasons for the applicant include, for a number of reasons, here I will describe a number of reasons including:

a. That the applicant is an individual citizen of the Republic of Indonesia, working full time as an educator in PAUD AL-IHSAN, an early childhood education unit on the non-formal route which is located at Jl. H. murtadho VI, RT.012 / RW.05, paseban village, senen sub-district, Central Jakarta. The applicant was appointed as an educator through a decree on the appointment of PAU AL-IHSAN educators Number 05 / SK-PAI / 04/07 dated April 5, 2007 (attached) exactly 2 (two) years after Law Number 14 of 2005 concerning Teachers and Lecturers (hereinafter called "Teacher and Lecturer Law") is declared valid. In addition, when the a quo petition was submitted to the Constitutional Court, the applicant's dedication as a

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<sup>47</sup> Ibid

non-formal PAUD educator in the AL-IHSAN PAUD had entered its 11th year (eleven). Thus, the applicant has experienced and felt firsthand the constitutional losses resulting from the enactment of the Teacher and Lecturer law for approximately eleven years;

b. That the applicant suffers from the enactment of the provisions of article 1 number 1 and article 2 paragraph (1) of Law Number 14 of 2005 concerning Teachers and Lecturers (hereinafter referred to as "Teacher and Lecturer Law"), because the two provisions do not recognize and Giving status to the applicant profession as a teacher. Article 1 number 1 of the Law on Teachers and Lecturers defines Teachers as "... professional educators with the main task of educating, teaching, guiding, directing, training, evaluating and evaluating, students in early childhood education through formal education, basic education and secondary education ". While article 2 paragraph (1) of the Teachers and Lecturers Law also saves the status of teachers only to those who are "... professional staff at the level of basic education, secondary education, and early childhood education in the formal education pathways that are appointed in accordance with the laws and regulations. invitation";

c. That with the enactment of the provisions as described above, PAUD educators who are recognized and given status as teachers are only PAUD educators on the formal education path. Applicants who are PAUD educators on a non-formal track are legally not recognized as teachers. Whereas the provisions of article 28 paragraph (2) of Law Number 20 of 2003 concerning the National Education System (hereinafter referred to as the "National Education System Law") have

emphasized that early childhood education can not only be carried out through formal education channels, but also non-formal and informal . With the recognition of the profession of the petitioner as part of the national education system, the applicant clearly has constitutional rights guaranteed in the 1945 Constitution of the Republic of Indonesia including the right to recognition, guarantees, protection, and certainty of legal justice and equal treatment before the law as guaranteed by article 28D paragraph (1), has the right to work and a decent living for humanity as guaranteed by article 27 paragraph (2), and is entitled to the same opportunity to develop oneself and be free from discriminatory treatment as guaranteed by article 28C paragraph ( 1) and article 28I paragraph (2). d. That the non-recognition of the applicant profession (PAUD educators on the non-formal path) as a teacher has made all the guarantees of constitutional rights not fulfilled. In carrying out the profession as PAUD educators on the non-formal pathway, the applicant does not get recognition, guarantees, protection, and fair legal certainty and equal treatment before the law. the applicant also does not get guarantees for decent work and livelihood. The applicant also did not get the same opportunity to develop themselves because the guarantee was discriminatory only given to PAUD Educators on the formal path. None of the guarantees of constitutional rights have been accepted by the applicant, so there has been a real violation of the applicant's constitutional rights as PAUD educators on the non-formal channels.

e. That due to the non-recognition of the applicant as a teacher, all guarantees of teacher rights stipulated in article 14 paragraph (1) of the Teacher and Lecturer



Law have never been accepted by the applicant. during 11 (eleven) years of work the applicant has never earned an income above the necessities of life. The applicant has never received a salary and all kinds of benefits attached to the salary as stipulated in article 15 paragraph (1) of the Law on Teachers and Lecturers. During 11 (eleven) years of work the applicant has never had the opportunity to obtain an educator certificate. The applicant has also had the same opportunity to develop and improve academic qualifications and competencies such as teacher certification. Even though the applicant has bagged a PAUD S-1 diploma and will complete his PAUD S-2 education in the near future, still the applicant will never have the opportunity to take Teacher certification because Teacher certification is only given to Teachers as referred to in article 1 number 1 and article 2 paragraph ( 1) Law on Teachers and Lecturers where PAUD educators on the non formal path are not included in it.

e. The only reason that made the applicant suffer all the losses was the enactment of the provisions of article 1 number 1 and article 2 paragraph (1) of the Teacher and Lecturer Law. Thus it is clear that there is a causal relationship (causal verband) between the loss suffered by the applicant and the enactment of the provisions of article 1 number (1) and article 2 paragraph (2) of the Teacher and Lecturer Law which if the court can provide a constitutional interpretation that includes the applicant's profession ( non-formal PAUD educators) as Teachers, of course it will end the constitutional loss that the applicant experiences.

## **2. Reasons for Refusing Judges**

The reason for the rejection of the lawsuit filed by the applicant is because of several reasons, including:

That the consequences of the existence of a pathway in education, namely formal, non-formal and informal, the designation and qualifications of educators are also different. The qualifications and competency requirements of educators in the formal track are legally differentiated from the qualifications and competencies of the non-formal education track. Differences in qualification and competency requirements are the same for educators in formal and informal PAUD so this is a deviation from the provisions of the legislation and not a demand to be juridically equated and states that there have been violations of constitutional rights.

1. Whereas the petitioner in his petition argues that the difference between formal and non-formal education is merely administrative (number 10 page 13 revised application), but in fact article 26 of the Law on the Education System has explained in detail the differences in the characteristics of the non-formal education unit that distinguishes it from the formal education unit. Non-formal education is a line of education outside of formal education as a substitute, supplementary, and / or complementary formal education with an emphasis on mastering knowledge and functional skills and developing professional attitudes and personalities.

2. Whereas article 26 paragraph (3) mentions non-formal education including life skills education, early childhood education, youth education, women's empowerment education, literacy education, vocational education and job

training, equality education, education and other education aimed at developing the ability of students. The meaning of this formal education is further regulated in article 26 paragraph 4 of the National Education System Law, which is a non-formal education unit consisting of special institutions, training institutions, study groups, community learning centers, and taklim assemblies, and similar educational units. Based on these provisions, it is clear that the difference between formal and informal is more than just administration. It is true that article 26 paragraph (6) states the results of non-formal education can be valued equivalent to the results of formal education programs, but after going through the process of evaluating equalization by institutions appointed by the government or the government with reference to national education standards, but not all types of education are on the path non-formal education can be equated with formal education pathways, namely only equality education packages a, b and c that can be valued on a par with formal education pathways in elementary, junior high, and high school.

3. Non-formal education units can be implemented in a structured and tiered manner but does not eliminate the nature and purpose of the intended education, namely substitute, supplementary, or complementary to formal education in the context of supporting lifelong education. So that if the non-formal education pathway is implemented in a structured and tiered manner then mutandally mutandis, the non-formal PAUD educators cannot be equated with PAUD educators in the \ formal education pathways as teachers. For example educators

in the equality period (as a non-formal education channel) are not also called teachers.

4. a legal provision cannot be interpreted partially (in fragments) and *argumentum a contrario* (only two contested possibilities), but must be examined comprehensively by paying attention to philosophical, sociological, systematic, and historical aspects. These aspects have been calculated clearly in the National Education System Law and the Teacher and Lecturer Law. Even Article 28 of the National Education System Law has clearly classified the forms of early childhood education in the form of formal education in the form of kindergarten (RA), *raudlotul athfal* (RA), or other forms of equivalent. While early childhood education in the form of non-formal education in the form of play groups (KB), child care parks (TPA), or other forms of equals.

5. In a responsive legal perspective, formal and non-formal arrangements are based on historical awareness and facts about community participation in education. In this case the majority of PAUD is managed by the community, then the community can determine their own form of PAUD to be established, as well as in terms of students, in this case the parents of students can choose the form that is considered suitable to the needs of children ..

The Petitioner argues that the institutionalization of Formal and Non-formal PAUD is united in one department in the Ministry of Education and Culture which is considered to be meaningful. This is a form of recognition of non-formal PAUD educators as teachers as in formal PAUD. The government

needs to emphasize that organization and work procedures are in the context of organizing functions but then do not necessarily relate to recognition as a teacher.

The context of educators in non-formal PAUD must be returned to the national education system that has been regulated in the National Education System Law and in the case of teachers referring to the provisions in the Teacher and Lecturer Law.

1. The government states that the national education system as an implementation of the 1945 Constitution of the Republic of Indonesia has regulated various aspects of education comprehensively and even has progress in terms of progressive realization, including recognition of early childhood education. The national outstanding system has also provided a choice of educational, formal, non-formal, and informal channels. These pathways have system implications or consequences in the form of recognition of guarantees, protections, legal certainty according to the type or path of education. this means it is not discrimination, it is not unequal treatment, because it is a consequence of the education route.

2. Then there is the Government's explanation for the argument of the applicant that the Teacher and Lecturer Law eliminates the guarantee of decent work and livelihood for non-formal paud educators (article 27 paragraph (2)).

Whereas the government declares article 1 number 1 and article 2 paragraph (1) of the Teacher and Lecturer Law not contradictory to article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The government will further elaborate on the argument and reasons for maintaining the proposed petition being tested, as follows: h. Then it was added to the



government's explanation of the applicant's argument that the Teacher and Lecturer Law contained discriminatory provisions against non-formal early childhood educators. [Article 28I paragraph (2)].

The government will then outline the arguments and reasons for maintaining the constituency of the law being petitioned for trial, as follows:

a. Whereas according to the petitioner, the Teacher and Lecturer Law contains provisions that are discriminatory against non-formal PAUD educators. that the regulation of the Teacher and Lecturer Law which regulates or sets limits on teachers as educators for formal educators is not a discriminatory form. Because this is a consequence of the non-formal education pathway which is essentially the path of education outside of formal education with emphasis and mastery of knowledge and functional skills as well as the development of attitudes and personality.

b. As a consequence of the education channels, namely formal, non-formal and informal, the designation and qualifications of educators are also different. The qualifications and competency requirements of educators in the formal track are legally differentiated from the qualifications and competencies of the non-formal education track. The difference in qualifications and competency requirements for educators has different consequences on the rights and obligations for educators in the formal and informal channels. If in the application, it turns out that there are the same qualifications and competencies for educators in formal and non-formal PAUD, then this is a deviation from the provisions of the laws and regulations and

not a claim to be juridically equated and states that violations of constitutional rights have occurred.

c. That this can be seen as a choice of policy (legal policy) which can be taken as an analogy from the decision of the Constitutional Court Number 37-39 / PUU-VIII / 2010. Ie, different educational paths, the arrangements regarding educators are also different so that the difference is in accordance with the characteristics of the needs of the position (position) of each. This difference is something that can be justified because it does not cause discrimination, which is in accordance with the principle of not treating the same thing to a different or vice versa treating differently to the same thing.

d. Protection and guarantee as well as equal treatment before the law are not intended to provide equal rights, but rather that legal protection is guaranteed by the State through clear statutory provisions for educators on formal education channels and educators on non-formal channels, so this is not including discriminatory treatment on any basis as referred to in Article I paragraph (2) of the 1945 Constitution.<sup>48</sup>

i. Then there are expert witnesses

That to strengthen his statement, there are several expert witnesses consisting of Dr. Nur Ainy Fardana Nawangsari, M.si., Dr. Dian Puji N. Simatupang, S.H., and Prof. Dr. Yoyon Suryono, MS, whose written statement was received by the Court's Registrar on March 12, 2019, March 18, 2019 and

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<sup>48</sup> Decision of the Constitutional Court Number 2 / PUU-VII / 2019.

March 19, 2019, and heard his statement at the hearing on March 14, 2019, March 20 2019 and April 2 2019, which essentially is as following:

1. Dr. Nur Ainy Fardana Nawagsari, M.si

Early childhood is a golden age, which in neuroscience studies is an important period of brain and nerve cell development which determines development in later ages. Optimizing early childhood development can be through proper early childhood education. Early childhood educators are educational efforts aimed at children from birth to six-year-olds carried out through the provision of educational stimuli to help physical and spiritual growth and development so that children have readiness to enter further education. In the policy of the government of the Republic of Indonesia, the guidance is regulated in law.

Early Childhood Education in Indonesia is regulated in Law Number 20 Year 2003 concerning the National Education System in article 28, which states: (1) Early Childhood Education is held prior to basic education. (2) Early Childhood Education can be organized through formal, non-formal and / or informal education channels. (3) Early Childhood Education in the form of formal education is in the form of kindergarten (TK), Raudhatul Athfal (RA), or other similar forms. (4) Early Childhood education in non-formal channels is in the form of play groups (KB), Child Care Parks (TPA), or other equivalent forms.

The following are the theoretical foundations that strengthen the development efforts carried out through informal, formal and non-formal education channels:

### A. Cognitive Development Theory Approach (Piaget)

Children's cognitive development refers to the theory put forward by Piaget. Gradual cognitive development is characterized by certain abilities (Santrock, 1995).<sup>49</sup>

Cognitive development at the earliest stage is motor sensory. This stage lasts from birth to about the age of 2 years and includes progress in the baby's ability to organize and coordinate the sensations he receives through physical movements. The sub stages are: Simple reflexes, first habits and primary circular reactions, secondary circular reactions, coordination of secondary circular reactions, tertiary circular reactions, curiosity about something new and internalizing the scheme. The role of parents and caregivers is very large to provide stimulation, conducive situations and support for infants to children around the age of 2 years in order to optimize cognitive development.

The next stage is the pre-operational stage of thinking which occurs around the age of 2-4 years. The first sub-stage is the ability to think symbolically or called "symbolic functions". That ability develops the mental world of children quickly. This is shown through the ability of children to use scribble designs to describe humans, homes, cars, clouds and others. In the symbolic sub-stages strengthen egocentrism and animism thinking. Egocentrism is a child's unwillingness to distinguish between his own perspective and the perspective of others. Animism is the belief that immovable objects have qualities like life and

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<sup>49</sup> Decision of the Constitutional Court Number 2 / PUU-VII / 2019.

can act. With these characteristics, basically children need to be introduced to objects in their daily lives, both at home and outside the home environment.

The involvement of parents and family environment at home plays a major role in this stage.<sup>50</sup> Support from parents or caregivers is important, where children spend time with them. Another characteristic of cognitive development that arises in adank is getting interested in various objects or other situations in the surrounding environment. At this stage children also need the freedom to express what is observed and felt through language symbols and scribbles anytime, anywhere and with anyone. Activities carried out are characterized by free exploration, trials are not structured and not yet on specific objectives. Of course, at this age children will have difficulty when it is in structured activities.

The second sub-stage is intuitive thinking, which is pre-operational thinking that occurs around the age of 4-7 years (children are in kindergarten and preparing to enter primary education). At this sub-stage, children begin to use primitive reasoning and want to know the answers to all questions. In addition, at this stage strengthened centration and conservation thinking. Cenration is focusing on one characteristic that overrides all other characteristics. Conservation is a belief in the presence of certain object attributes or situations regardless of shallow changes (Santrock, J.W. 1995). The ability to think like this learning process through fun activities include activities of trying, exploring, discovering, testing, restructuring and cognitive and language that is more complex and closely

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<sup>50</sup> Decision of the Constitutional Court Number 2 / PUU-VII / 2019.



related to the development status of children aged 4-5 years, where they are in kindergarten .

In addition, another characteristic of children who are in the pre-operational stage is that they raise many questions that show curiosity. These questions mark the emergence of children's interest in reasoning and the description of why something happened. These characteristics develop at the age of 4-6 years when children are in kindergarten along with children's readiness to enter the world of schooling and basic education.

b. Theory of social emotional development

In the first year of birth, children develop a sense of trust and distrust. Baby's basic needs are met by responsive and sensitive parents (caregivers). Entering the second year there is a social emotional development that shows autonomy as well as shame and doubt. Children begin to find that they have a will that comes from themselves. Children have a desire to show a sense of autonomy and independence. At this stage children need an environment that supports it to freely express desires and initiatives that are not limited by rules or structured activities. The flexibility of activity, feedback and positive appreciation from parents or caregivers is needed at this stage. They still have difficulties if they are required to follow activities with structured rules. In the early days of a child's life, strengthening the role of parents, caregivers and family is essential. The family is the first place a child gets an education.

Parents influence attitudes, values, ways of learning of children, emotions and ideas that develop in children. When parents are involved in the educational

process, then children tend to have higher achievement, attitudes toward school are more positive and strengthen relationships parents with children (Morrison, 2008).

In early childhood, of course the context of the microsystem is taken into consideration when they will optimize aspects of their development through interaction with the wider environment outside the home. For example, if the characteristics of child development do not yet require a structured learning process and are more dominant towards caregiving needs, then it is best to do education by the family (informal). Conversely, parents can give children the opportunity to follow the path of non-formal or formal education if it is in accordance with the stage of development. This illustrates that the context of child development extends towards the mesosystem as the next layer after the microsystem in the Bronfenbrenner ecological theory.

2. Dr. Dian Puji N. Simatupang, S.H., M.H.

Article 50 paragraph (1) of Law Number 20 Year 2003 concerning the National Education System regulates, "The management of the national education system is then regulated as the management of education in Article 1 number 1 Government Regulation Number 17 of 2010 as amended by Government Regulation Number 66 of 2010 concerning the management and administration of education as, "regulating authority in the administration of the national education system".

The regulation of ministerial authority is carried out for all education channels as regulated in article 13 paragraph (1) of Law Number 20 of 2003,

namely formal, non-formal and informal education channels. In non-formal education as stipulated in article 26 paragraph (6) of Law Number 20 of 2003, it is regulated as an education channel that is "valued equally with the results of formal education programs after passing through the assessment process of visualization by institutions appointed by the government or regional government with reference to national education standards. "

Therefore, government regulation No. 19/2005 regarding National education standards is regulated. In the government regulation, jlas is required and intended for the formal education pathway, but for the non-formal pathway is given flexibility. This is stated in the ninth paragraph of public elucidation PP No. 19 of 2005 which states that national education standards for non-formal channels are only basic and still provide flexibility because of their unstructured characteristics to develop programs in accordance with community needs. This is different for formal channels in which government regulations set minimum criteria regarding the standard components of education, as well as structured and tiered nature.

The difference made in applying the education standard, for formal and non formal channels, is not discrimination, but the government's recognition of the participation of providers of non-formal education, as well as the government's understanding and awareness of the capabilities and conditions of each non-formal education provider that cannot yet be subject to standard obligations minimum education. Likewise, the Minister of Education and Culture Regulation No. 137 of 2014 concerning national standards for early childhood education,

which for non-formal education channels is directed as a standard that is basic and is still given freedom in accordance with its characteristics.

In the case of State administration practices in the form of decisions and / or government administration actions to implement PP Number 19 of 2005 and Permendikbud Number 137 of 2014 then be equated for all formal and non-formal early childhood education providers, organized by the government, regional government, or society, this is a mistake in the practice of administration of the State government, and not a matter of constitutional impairment. In this case, the government administration body or official may have mistakenly intended the dwelling in een objectieve recht that the national education standard is aimed at all channels. Whereas for early childhood education the non-formal pathway remains to be guided and given the flexibility to implement it in accordance with its unstructured characteristics in the development of its educational programs according to the needs of the community. Therefore, if a government administration body or official in implementing PP Number 19 of 2005 Permendikbud Number 137 of 2014 requires education standards for non-formal lines to be incomprehensible to the intentions in the ninth paragraph of PP Number 19 of 2005 which requires that non-formal pathways remain flexible, and it is not obligatory to demand that minimum standards be met. Minimum standards that must be fulfilled are 8 (eight) standards, which include the achievement of the level of development of children, content, process, assessment, education and education personnel, facilities and infrastructure, management and financing.

The distinction is also not as discriminatory as the government continues to provide freedom to formal education providers to carry out their education in different characteristics and without the need to meet standards that are likely to burden non-formal education providers. This, on the other hand, is also a recognition and appreciation of the government for the participation of non-formal education providers, including educators and education staff.

There is a possibility of discrimination if formal and non-formal early childhood education providers are given similarities because both have different characters, because the formal demands of minimum standard obligations must be met and standard procedural requirements, while the non-formal ones are still given the freedom to administer them according to the character in accordance with the needs of the community without having to meet the minimum standards set in the laws and regulations.

The government must of course be fair in prioritizing the limited financial power of the State for funding educators and education personnel in the providers of formal early childhood education in advance because of the minimum standard obligations that have been fulfilled. However, this does not mean that the government does not pay attention to educators and education personnel in the providers of non-formal early childhood education, so that incentives will continue to be pursued in order to advance and provide proportional respect for educators and education staff for non-formal administrators.

With the non-mandatory minimum standards being imposed on educators and education staff on non-formal education providers, their rights cannot be



equalized with educators and education staff on formal education providers. However, the recognition of educators and education personnel in organizing non-formal education units still exists as a form of discretion and to fulfill the character of education in accordance with the needs of the community. In this case the government also does not forbid him to educate him and / or limit his work.

Considering the teacher's provisions as a professional educator requires standards that must be met and appointment procedures that are in accordance with statutory regulations, of course these provisions cannot be applied to those who do not meet the requirements in these procedures. If this provision is abolished, it will eliminate the minimum education standards that must be met by formal education providers and eliminate the requirements and procedures for teacher upgrading in accordance with statutory regulations. Concern over the abolition of this provision is that all teachers are no longer required to meet the minimum standard of education and the requirements for the procedure for appointing teachers according to the terms and procedures in the legislation will certainly be set aside. It is thus feared that it will harm the interests of students in the national education system as a whole. This test is contextually aware of the government to continue to respect and give glory to all educators and education personnel, especially educators and education personnel in non-formal early childhood education. Therefore, firstly, in the application of PP Number 19 of 2005 and Permendikbud Number 137 of 2014 the government must still differentiate for non-formal education providers, namely to provide flexibility to the organizers of non-formal early childhood education, which continues to

provide flexibility to the providers of childhood education non-formal education to carry out their education based on their character in accordance with the needs of the community, so that they can gradually develop and become able to meet the minimum standards set. Third, the appreciation and appreciation of the government to educators and education personnel in early childhood education, especially in non-formal early childhood education must be increasingly multiplied and expanded by both the government and regional governments, so that respect for their dedication to society is increasingly valued.

j. Then there is some data, among them are:

a. Recapitulation of Data on Incentives for Educators for Learning Groups (KB), Child Care Facilities (TPA), Equal Parents Unit (SPS) in 2018.

No	Province	quota	fund
1	Aceh	777	1.864.800.000
2	Bali	220	528.000.0000
3	Bangka Belitung	516	1.238.400.000
4	Bangka Belitung	1	2.400.000
5	Banten	1.849	4.437.600.000
6	Bengkulu	351	842.400.000
7	D.I Yogyakarta	1.748	4.195.200.000
8	Gorontalo	591	1.418.400.000
9	Jambi	329	789.600.000
10	Jawa Barat	839	2.013.600.000
11	JAWA TENGAH	6.621	15.890.400.000

12	JAWA TIMUR	6.432	15.436.800.000
13	KALIMANTAN BARAT	6.715	16.116.000.000
14	KALIMANTAN SELATAN	510	1.224.000.000
15	KALIMANTAN TENGAH	731	1.754.400.000
16	KALIMANTAN TIMUR	85	204.000.000
17	KALIMANTAN UTARA	666	1.598.400.000
18	KEPULAUAN RIAU	304	729.600.000
19	LAMPUNG	220	528.000.000
20	MALUKU	1.700	4.080.000.000
21	MALUKU UTARA	75	180.000.000
22	NUSA TENGGARA TIMUR	61	146.400.000
23	NUSA TENGGARA BARAT	24	57.600.000
24	NUSA TENGGARA TIMUR	2.356	5.654.400.000
25	PAPUA	853	2.047.200.000
26	PAPUA BARAT	169	405.600.000

27	RIAU	71	170.400.000
28	SULAWESI SELATAN	975	2.340.000.000
29	SULAWESI BARAT	8	19.200.000
30	SULAWESI SELATAN	465	1.116.000.000
31	SULAWESI TENGAH	941	2.258.400.000
32	SULAWESI TENGGARA	1.182	2.836.800.000
33	SULAWESI UTARA	122	292.800.000
34	SUMATERA BARAT	213	511.200.000
35	SUMATERA SELATAN	1.134	2.721.600.000
36	SUMATERA SELATAN	951	2.282.400.000
37	SUMATERA UTARA	1.936	4.646.400.000
	The amount	42.741	102.578.400.000

b. Education Budget Ministry of Education and Culture 2017 State Budget Per Program

No	Program	ALLOCATION	%
1	Management support and implementation of other technical tasks of the ministry of	11.868.73	4.7%

	education and culture.		
2	Supervision and improvement of the Accountability of the Ministry of Education and Culture.	194.19	0.5%
3	Primary and Secondary Education	22.478.36	56,4%
4	Early Childhood Education and Community Education	11.853.57	4,7%
5	Research and Development of the Ministry of Education and Culture.	11.099.44	2.8%
6	Language and Literature Development and Development	403.43	1,0%
7	Cultural Preservation	11.927.05	4.8%
8	Teachers and Educational Personnel	9.998.32	25.1%
	Ministry of Education and Culture's total ceiling	39.823.12	100.0 %.

a. Pagu Alokasi Anggaran Kemendikbud TA 2018 Menurut Program

No	Program	APBN 2017	APBNP 2017	PAGU ALOKASI 2018
1.	Management support and implementation of other	1.868,7	1.729,1	1.768,0



	technical tasks of the ministry of education and culture			
2.	Supervision and improvement of the Accountability of the Ministry of Education and Culture.	194,2	188,2	192,1
	Primary and Secondary Education	22.478,4	21.966,3	22.574,2
3.	Early Childhood Education and Community Education	1.853,6	1.721,6	1.805,5
	Research and Development Ministry of Education and Culture	1.099,4	1.022,5	1.154,9
4.	Language and Literature Development and Development **)	403,4	372,7	396,9
	Cultural Preservation	1.927,1	1.717,9	1.829,6
5.	Teachers and Educational Personnel	9.998,3	9.246,5	10.370,6
	Total	39.832,1	37.964,1	40.092,0

\*) Ministry of Education and Culture's total budget Based on Minister of Finance Letter No. S-16 / MK.2 / 2017 Concerning Submission of Budget Allocation Ceiling K / L FY 2018.

\*\*\*) The budget for bookkeeping is still allocated in Balitbang.

b. Targets of Improving the Quality of Educators in Non-formal PAUD

No	Year	Activities	Target educators
1	2015	Bimteks for the improvement of GTK PAUD and Dikmas Competencies	280
2	2016	PCP Basic and Advanced Tiered Training Basic Level Tiered Training	5.170 5.016
3	2017	PCP Beginner Level Basic Level Tiered Training	2.408 10.244
4	2018	PCP Beginner Level Basic Level Tiered Training	1.597 28.440
5	2019	PCP Beginner Level Basic Level Tiered Training	2.000 24.000

NO	Province	Recaputalation			
		2015	2016	2017	2018
1	NTB	41	41	41	41
2	BANGKA BELITUNG	21	18	14	14
3	JAMBI	7	7	7	7
4	Daerah Istimewa	22	22	11	11

	YOGYAKARTA				
5	JAWA TIMUR	152	152	152	152
6	SUMATERA BARAT	95	93	90	90
7	JAWA BARAT	170	170	170	170
8	SULAWESI SELATAN	50	50	50	50
9	DKI JAKARTA	72	65	65	65
10	SULAWESI TENGGARA	37	37	37	37
11	SULAWESI TENGAH	84	71	69	69
12	JAWA TENGAH	118	116	111	111
13	KALIMANTAN TIMUR	36	21	21	21
14	GORONTALO	23	20	11	11
15	SULAWESI UTARA	58	58	58	58
16	BANTEN	9	9	9	9
17	ACEH	43	24	24	24
18	KALIMANTAN BARAT	20	15	8	8
19	NTT	40	40	40	40

20	SUMATERA SELATAN	53	53	53	53
	GRAND TOTAL	1.151	1.082	1.041	1.041

The form of the PAUD Nonformal education unit includes the Play Group (KB) / Daycare Center (TPA) / Similar Education Unit (SPS) is not possible to be able to automatically change / shift to TK, but can only be done by fulfilling the TK establishment requirements as regulated in Article 4 Permendikbud Number 84 of 2014 concerning the Establishment of Early Childhood Education Units.

This clearly shows that there is a clear difference between the establishment of education units in Formal and Non-Formal PAUD. Such as the separation of requirements between Non Formal PAUD education (KB / TPA / SPS) and Formal PAUD Education (TK / RA).

- c. Data on the number of non-formal PAUD units can be submitted as follows:

NO	Province	Jumlah Pendidikan	Satuan
1	Prov. D.K.I Jakarta	3.498	
2	Prov. Jawa Barat	23.748	
3	Pro. Jawa Tengah	15.952	
4	Prov. DI. Yogyakarta	3.347	
5	Prov. Jawa Timur	23.332	
6	Prov. Aceh	3.216	

7	Prov. Sumatera Utara	8.026
8	Prov. Sumatera Barat	3.212
9	Prov. Riau	3.094
10	Prov. Jambi	2.956
11	Prov. Sumatera Selatan	3.865
12	Prov. Lampung	4.080
13	Prov. Kalimantan Barat	2.475
14	Prpv. Kalimantan Tengah	1.505
15	Prov. Kalimantan Selatan	2.166
16	Prov. Sulawesi Utara	1.920
17	Prov. Sulawesi Tengah	1.568
18	Prov. Sulawesi Selatan	2.103
19	Prov. Sulawesi Tenggara	3.439
20	Prov. Maluku	1.164
21	Prov. Bali	1.151
22	Prov. Nusa Tenggara Barat	1.683
23	Prov. Nusa Tenggara Timur	3.645
24	Prov. Papua	4.087
25	Prov. Bengkulu	1.359
26	Prov. Maluku utara	1.542
27	Prov. Kepulauan Riau	894
28	Prov. Banten	4.750



29	Prov. Kepulauan Bangka Belitung	796
30	Prov. Gorontalo	1.102
31	Prov. Kepulauan Riau	1.078
32	Prov. Papua barat	672
33	Prov. Sulawesi Barat	1.277
34	Prov. Kalimantan Utara	518
		139.220

Budget details at the PAUD and Dikmas Directorate of PGTK show data on government policies in the management and organization of Non-formal PAUD education include: improving academic qualifications, increasing competency (improving quality), and providing incentives for Non-formal PAUD educators, as follows:

No	Year	Activities	Educators target
1	2015	Bimteks Peningkatan Kompetensi GTK PAUD dan Dikmas	280
2	2016	PCP Diklat berjenjang dasar dan lanjut Diklat Berjenjang Tingkat Dasar	5.170 5.016
3	2017	PCP Tingkat Dasar Diklat berjenjang Tingkat Dasar	2.408 10.244
4	2018	PCP Tingkat Dasar Diklat berjenjang Tingkat Dasar	1.597 28.440
5	2019	PCP Diklat berjenjang	2.000

		Diklat berjenjang Tingkat Dasar	24.000
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Berdasarkan data-data yang berada di table tersebut sudah jelas menunjukkan bahwasanya sesuai dengan kemaslahatan.



## CHAPTER III

### RESEARCH RESULTS AND DISCUSSION

#### A. Reasons for judges consideration

As has already been explained, in the description of the decision of Chapter III, it is known that this is a case for petition for Judicial Review article 1 number (1) and article 2 paragraph (1) of Law Number 14 of 2005 concerning Teachers and Lecturers of the 1945 Constitution.

The author intends to review the basic considerations of the Court in deciding cases in the decision of the Constitutional Court Number 2 / PUU-VII / 2019. As for the description as follows:

first consideration, Considering that the court has carefully examined the petition of the petitioner, the evidence submitted by the petitioner, the statement of the DPR, the statement of the president, expert statement and witnesses of the applicant as well as the president's expert, the conclusions of the applicant and the president.

The second consideration, Considering that after carefully examining the petition of the petitioner, examining the evidence submitted as described in paragraph [3.8], as well as hearing the statements of the parties as referred to in paragraph [3.9], the principal constitutional issue petitioned by the applicant is whether article 1 number 1 and article 2 paragraph (2) of the Teachers and Lecturers Law contradicts the 1945 Constitution. However, before considering the subject of the constitutional issue, the court will first consider the State's responsibility in the administration of education as previously stated in the

Constitutional Court ruling Number 45 / PUU- XVI / 2018, dated 14 February 2019, which among others states as follows:<sup>51</sup>

a. Considering whereas after hearing the statement of the petitioner, carefully reading the petition along with the evidence submitted as referred to in paragraph [3.8], hearing the statement of the president along with the written statement submitted to the Court and the expert statement submitted as referred to in paragraph [3.9], before considering the subject of the petition further, the court first emphasized that education is part of an effort to educate the nation's life. Meanwhile, educating the life of the nation is part of the purpose of the state as expressly mandated in the fourth paragraph of the opening of the 1945 Constitution. Thus, organizing education for every citizen is a constitutional obligation of the State that is truly realized, the 1945 Constitution further confirms that getting education is the rights of every citizen, as stipulated in article 31 paragraph (1) of the 1945 Constitution. This provision is at the same time a further affirmation of the recognition of educational rights as part of human rights for the improvement of the quality of life and human welfare as stipulated in article in article 28C Paragraph (1) of the 1945 Constitution. It is so important and bases of education in an effort to realize the ideals to reflect the life of the nation so that the 1945 Constitution requires every citizen to attend basic education and the State (cq government) is required to finance basic education as stated in article 31 a yat (2) of the 1945 Constitution. By requiring every citizen to at least attend basic education, according to reasonable reasoning, there are no citizens whose

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<sup>51</sup> Decision of the Constitutional Court Number 2 / PUU-VII / 2019.

rights to education are not fulfilled, at least basic education. To achieve this purpose it can be understood when the 1945 Constitution mandates the State to prioritize the education budget of at least 20% (twenty percent) from the APBN and from the APBD to meet the needs of providing education, as confirmed in post 31 paragraph (4) of the 1945 Constitution;

b. That education, as explained in article number 1 of the National Education System Law, is a conscious and planned effort to create a learning atmosphere and learning process so that participants actively develop their potential to have religious spiritual strength, self-control, personality, intelligence, noble character, and the necessary skills himself, society, nation and state. Because it is a conscious and planned effort, education is not possible without a clear implementation in a system. Therefore, the constitution mandates the government to strive for and implement a national education system that is regulated by law. With this reasoning, it has become apparent that the National Education System Law is an embodiment of the mandate of the 1945 Constitution.

c. Whereas as a system, the National Education System Law regulates all comprehensive concepts and basic understandings relating to or related to education; basic, functions, and objectives of education; the rights and obligations of citizens, parents, the community and the government; students, pathways, levels and types of education; language of instruction ; compulsory education; curriculum, educators and education personnel; educational facilities and infrastructure; education funding; education management; community participation in education; evaluation, accreditation, and certification;



establishment of education units; organizing education by other State institutions; supervision; even including the threat of criminal sanctions. With such comprehensive regulation, the mandate of the 1945 Constitution has been carried out so that the aim of realizing the intellectual life of the nation, *prima facie*, can be regained and there is no constitutional right of citizens to education that is not fulfilled, at least for basic education;

The third consideration, Considering that furthermore the Court also considers it necessary to emphasize that striving and organizing a national education system in order to educate the life of the nation is the mandate of the constitution given to the State as stated in the fourth paragraph of the opening of the 1945 Constitution which is then concretized in article 31 paragraph (2) The 1945 Constitution. The national education system is a whole component of education that is competitively related in an integrated way to achieve the goals of national education and to provide a strong legal basis, it is necessary to establish legislation to provide further rules regarding how the national education system and its implementation.

Along with the times, the emergence of Early Childhood Education (PAUD) as one of the pre-primary education levels is then recognized and given its regulatory space in article 28 of the National Education System Law. PAUD is a coaching effort aimed at children from birth to the age of six carried out through the provision of educational stimuli to help physical and spiritual growth and development so that children have readiness to enter further education [vide article 1 point 14 of the National Education System Law]. The implementation of

PAUD as referred to in article 28 paragraph (2) of the National Education System Law can be implemented through formal, non-formal and / or informal education channels. The existence of non-formal PAUD and informal PAUD is actually a manifestation of the role of the community in organizing national education. Furthermore, as the government's reluctance to mention formal PAUD, non-formal PAUD, and Informal PAUD is not intended to deny the existence of one of the PAUD channels. Article 28 paragraph (2) of the National Education System Law actually wants to state that non-formal PAUD and Informal PAUD are forms of education that are complementary to the existence of formal PAUD. As stated earlier in Chapter IV Rights and Obligations of Citizens, parents, the community, and the government of the National Education System Law, that every citizen has the right to participate in the continuation of the delivery of non-formal and informal education is one form of recognition of the participation of the community.

The implementation of non-formal and informal PAUD can be carried out by adjusting the needs in the community, one example is the curriculum that is used not only using the government standard curriculum but can also be implemented by adding another curriculum as long as it does not conflict with Pancasila and the 1945 Constitution. This cannot be done by Formal PAUD, of course, where the curriculum used is a curriculum set by the government, besides that formal PAUD is required to meet the quality standards of the administration of educators including the standards of their educators. So that if what the petitioner requests for PAUD in the non-formal education path is equated with

PAUD in the formal education path, it will actually close the space for community participation and even close the freedom of the community to organize education in accordance with their needs. Educators referred to by the National Education System Law are qualified educational staff as teachers, lecturers, counselors, tutors, lecturers, tutors, instructors, facilitators, and other designations that are appropriate to their specialty and participate in organizing education and all matters related to educators in a manner generally subject to the National Education System Law also applies the Teacher and Lecturer Law which is then followed up with implementing regulations to provide arrangements not only regarding teacher and lecturer rights but also standards or qualifications and obligations that must be met as an attack on teachers and lecturers. The logical consequence of the recognition of educators as teachers is of course not only inherent in their rights but also their obligations. Formally the Teacher and Lecturer Law is a law that does regulate educators, especially teachers and lecturers, while for educators outside of teachers and lecturers, each arrangement is subject to the a quo law but is subject to other laws and regulations.

The fourth consideration, Considering that related to the argument of the petitioner which states that article 1 number 1 and article 2 paragraph (1) of the Teacher and Lecturer Law does not provide legal certainty to the profession as non-formal PAUD educators, according to the court, the provisions of article 1 number 1 and post 2 paragraph ( 1) Teacher and Lecturer Law is an article regulated in general provisions. As stated in Law Number 12 of 2011 concerning the formation of laws and regulations (Law 12/2011) that general provisions

contain limits on the definition or definition, abbreviations or acronyms used in regulations, and other matters that are general and applicable for arrangements in the following articles, inter alia, provisions which reflect principles, intentions, and objectives without being formulated separately in the article or chapter (vide Lampitan I C.1. number 98 of Law 12/2011). General provisions intended in a statutory regulation are intended so that the definition limits, definitions, or acronyms that function to explain the meaning of a word or term must be formulated in such a way that does not cause a double understanding (vide attachment I C.1. Number 107 of Law 12 / 2011). Thus article 1 number 1 and article 2 paragraph (1) of the Teacher and Lecturer Law petitioned by the applicant is not a regulating norm but instead provides limits on the direction of regulation and who is regulated in the Teacher and Lecturer Law that is petitioned by the applicant is not a norm that is of a nature regulate but instead provide limits on the direction of regulation and who is regulated in the Law on Teachers and Lecturers, with a view to avoiding ambiguity or vagueness in the regulations in subsequent articles, so that the a quo article provides legal certainty. matters relating to the general provisions of the law, have also been considered by the Court in the decision of the Constitutional Court Number 006 / PUU-IV / 2006, dated December 7, 2006, which states, among others:

"Article 1 number 9 is only the definition or definition contained in the general provisions, and is not a norm that is set and related to other articles, so that the petition of the applicant with regard to these provisions is set aside".

Then in the decision of the Constitutional Court Number 56 / PUU-VI / 2008, dated 17 February 2009, stated, among others:

"General provisions referred to in a statutory regulation are intended so that the boundaries of understanding or definitions, abbreviations or or acronyms that function to explain the meaning of a word or term must indeed be formulated so that it does not cause a double understanding".

Fifth consideration, Considering that the petitioner argues that non-formal PAUD educators are not included in article 1 number 1 and article 2 paragraph (1) of the Teacher and Lecturer Law contrary to the 1945 Constitution especially article 27 paragraph (2), article 28C paragraph (2), article 28D Paragraph (1) and Article 28I Paragraph (2) of the 1945 Constitution because it causes the applicant to not get a guaranteed job and a decent living, cannot develop himself to fulfill his life and causes the applicant to be treated discriminatively.

With respect to the petitioner's arguments, demanding the court, as outlined in the consideration in paragraph [3.11], that the a quo norm is a general provision that limits the regulation of who it regulates, the exclusion of PAUD educators in non-formal education channels in the a quo Law does not result in Citizens whose profession is similar to the applicant loses their employment limits even though their existence is not included in the definition mentioned in the a quo norm but is still regulated in other laws and regulations. In addition, the applicant has not violated his right to develop himself for the fulfillment of life's needs because the absence of non-formal PAUD educators in the a quo norm does not impede the applicant's right to receive training or opportunities to improve his



abilities both in practice and academically. Thus article 1 number 1 and article 2 paragraph (1) of the Teacher and Lecturer Law does not prevent the applicant from obtaining guarantees for decent livelihood work, and develops themselves to meet the necessities of life.

Further related to the argument of the applicant regarding the existence of discriminatory treatment due to the enactment of article 1 number 1 and article 2 paragraph (1) of the Teacher and Lecturer Law, the court considers whether there is really a problem of discrimination. With regard to the notion of discrimination in the Constitutional Court ruling No. 028-029 / PUU-IV / 2006, dated April 12, 2007, it has been confirmed as follows:

a. the court is of the opinion that to see whether the provisions of article 35 letter a of the PPTKI Law are discriminatory or not, it must first be known what constitutes a discriminatory definition within the scope of human rights law. Article 1 paragraph (3) of Law Number 39 1999 concerning Human Rights reads, "Discrimination is any restriction, harassment, or exclusion that is directly or indirectly based on human distinction on the basis of religion, ethnicity, race, ethnicity, group, class, social status, economic status, gender, language, political beliefs, which result in the reduction, deviation or elimination, recognition, implementation or use of human rights and basic economic, legal, social, cultural and other aspects of life ". Provisions on the prohibition of discrimination above are also regulated in the

International Covenant on Civil and Political Rights (ICCPR) which has been ratified by Indonesia with law number 12 of 2005 (LN RI of 2005 Number 119, TLN of RI Number 4558). Article 2 of the ICCPR reads, "Each State Party to present present Covenant undertakes to respect and ensure to all individuals with its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinctions of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

b. Considering that, discrimination must be interpreted as any limitation, disruption, or exclusion based on human differentiation on the basis of religion (religion), race (race), color (color), sex (sex), language (language), political unity (political opinion) ...

With reference to the Court's consideration above, it is clear that the distinction between the treatment of formal and non-formal educators is not a matter of discrimination. Because not every difference in treatment is necessarily meant discrimination. The formal education pathway and the informal education pathway as well as the informal education pathway are education pathways that have different characteristics so that something different is certainly appropriate if different arrangements are made. It would be inappropriate and at the same time unfair if something different was indeed treated the same. So that the difference in arrangements related to PAUD educators in formal channels and PAUD educators in non-formal channels is not a discriminatory provision.

## **B. Based on the Al-maslahah al-mursalah perspective.**

In this sub-chapter the author will discuss the essence of the thesis, which is about the decision of the Constitutional Court number 2 / PUU-VII / 2019 in the perspective of Al-Maslahah Al-Mursalah.

Maslahah in the sense of syar'i is to gain benefits and reject harm in order to maintain the purpose of syara '. The purpose of syara 'which must be maintained there are 5 sharia in life, namely: maintaining religion, reason, soul, offspring and property. Efforts to gain an advantage and reject the harm associated with the five aspects of the goal of syara 'are also called maslahah. because the purpose of syara 'in establishing a law is to realize the benefit of the world and reject the occurrence of mafsadah (damage) for humans to benefit in the world and the hereafter.

Therefore, the refusal of the application for judicial review article 1 number (1) and article 2 paragraph (1) of Law Number 14 of 2005 concerning Teachers and Lecturers in the decision of the Constitutional Court Number 2 / PUU-VII / 2019 has referred to the syariah aspects of a benefit . Among these are:

1. Maintaining Religion: The court's policy in rejecting its decision is to avoid accusations of discrimination in matters of fulfilling constitutional rights.
2. Nurturing the Soul: To give children the right to get a better education, more complete equipment at school. So that the child's soul is happy because he feels he is gaining more knowledge. Formal school is prioritized. To eliminate underdevelopment in the world of education, in fact the school is more advanced, and developing.

3. Preserving Reason: The existence of non-formal PAUD is a manifestation of the role of the community in organizing national education. With this, the community can express their ideas and skills in managing non-formal PAUD in order to be more developed and advanced.

4. Maintaining Assets: If Non-Formal Education demands the same thing from the side of educators with formal education, then this certainly has an impact on aspects of the State budget. If all teachers in non-formal education (PAUD teachers, Koran teachers, music tutors, English tutors, Koran teachers all of whom are educators in the non-formal education pathway) must enter into the juridical concept which then must obtain certification, benefits and facilities, then this results in the main constitutional obligations, in this case the 1945 Constitution called basic education funding obligations, with the potential to be disrupted or not fulfilled because it is related to the availability of the State budget, this actually contradicts the 1945 Constitution.

5. Maintaining Descendants: So that the nation's successors continue to study up to the level of college so that he can to advance the world of education, and also he can participate in carrying out his profession as a formal teacher.

When viewed in terms of the content of the *maslahah al-mursalah*, the subject of this study enters the *maslahah amah*, namely the general benefit which concerns the interests of many people. In this case the Constitutional Court does not include non-formal PAUD educators in the Teachers and Lecturers Act also for the benefit which If Non-Formal education demands the same thing from the

side of educators with formal education, then this certainly has an impact on aspects of the State budget. If all teachers in non-formal education (PAUD teachers, Koran teachers, music tutors, English tutors, Koran teachers all of whom are educators in the non-formal education pathway) must enter into the juridical concept which then must obtain certification, benefits and facilities then this results in the main constitutional obligations, in this case the 1945 Constitution called the obligation to finance basic education, has the potential to be disrupted or not fulfilled because it relates to the availability of the State budget, then this would be contrary to the 1945 Constitution. This was done by the Constitutional Court to eliminate kemudharatan. When viewed in terms of its existence, this discussion is included in the problem of the problem, that is, the benefit in which its existence is not supported by syara 'and is not canceled or rejected by syara' through a detailed argument.

The consideration given by the Constitutional Court is also in accordance with the opinion of the 'ulama' in accepting the problem of mursalah as a method of attributing Islamic law "that is the benefit influenced by the development and demands of the times.

Based on the description above, the Constitutional Court rejected the judicial review of article article number 1 (1) and article 2 paragraph (1) of Law Number 14 of 2005 concerning Teachers and Lecturers on the 1945 Constitution.

regarding the constitutional right of certification of non-formal PAUD teachers is in accordance with the existing theory in Islamic law, namely masalah mursalah "take advantage and reject mudharat".



If for example the request is granted, then more will establish a non-formal PAUD school and he does not prioritize the school for college, because even though he is only attacking junior high school graduates, high school, can become a non-formal PAUD teacher. Someone will prefer not to continue to a higher school because they think they can become non-formal educators who will be able to get a guaranteed life because non-formal educators are certain to get certified.



## CHAPTER IV

### CLOSING

#### A. Conclusion

From the data and explanation regarding the analysis of the Constitutional Court decision Number 02 / PUU-XVII / 2019 regarding the decision of the constitutional mahkamah Number 02 / PUU-XVII / 2019 regarding the right to certification allowances for paid teachers in the perspective of *al-maslaahah al-mursalah*, concludes several things:

1. The reasons for the judge in rejecting the decision include:
  - a. the first consideration, Considering whereas the court has carefully examined the petitioner's petition, the evidence submitted by the petitioner, the DPR's statement, the president's statement, the petitioner's expert and witness's statement as well as the presidential expert, the conclusions of the petitioner and the president.
  - b. The second consideration, Considering that after carefully examining the petition of the applicant, examining the evidence submitted as described in paragraph [3.8], and hearing the statements of the parties as referred to in paragraph [3.9], the main subject of the constitutional argument petitioned by the petitioner is whether article 1 number 1 and article 2 paragraph (2) of the Teacher and Lecturer Law contradicts the 1945 Constitution. However, before considering the principal of the constitutional issues, the court will first consider the State's responsibility in the provision of education as previously stated in the Constitutional Court decision Number 45 / PUU- XVI / 2018.

2. The Constitutional Court decisions in the perspective of *al-maslahah al-mursalah* are;

a. Maintaining Religion: The court's policy of rejecting its decision is to avoid accusations of discrimination in fulfilling constitutional rights.

b. Nurturing the Soul: To give children the right to get a better education, more complete facilities and equipment at school. So that the child's soul is happy because he feels he has gained more knowledge. In formal schools, it is prioritized to eliminate backwardness in the world of education, in fact, these schools are more advanced and developing.

c. Maintaining Intellect: The existence of non-formal PAUD is a manifestation of the role of society in organizing national education. With this, the community can express their ideas and skills in managing non-formal PAUD so that it can be more developed and advanced.

d. Maintaining Assets: If non-formal education demands the same thing from the point of view of educators with formal education, then this certainly has an impact on aspects of the State budget. If all teachers in non-formal education (PAUD teachers, Koran teachers, music tutors, English language tutors, Kaji teachers who are all educators in the non-formal education pathway) must enter into a juridical concept which must then obtain certification, allowances and facilities, then this results in the main constitutional obligation, in this case

by the 1945 Constitution it is called the obligation to finance basic education, it has the potential to be disrupted or not fulfilled because it is related to the availability of the State budget, so this is in fact contrary to the 1945 Constitution. Nurturing Offspring: So that the nation's future continues to study up to the university level so that he can advance the world of education, and also he can participate in carrying out his profession as a formal teacher.

### **B. Suggestions**

The author realizes that this research is still far from perfect due to the lack of literature regarding the MK NO decision. 2 / PUU-XVII / 2019 regarding the right to certification allowances for paid teachers in the perspective of *al-maslahah al-mursalah* in books, journals, magazines, because this decision is relatively new, because it is lack of literature, researchers rely more on news between pros and cons related to the Constitutional Court decision, so that it is constrained in understanding the Constitutional Court decision NO. 2 / PUU-XVII / 2019 concerning analysis of the decision of the constitutional court Number 02 / PUU-XVIII / 2019 concerning the right to certification allowances for paid teachers in the perspective of *al-maslahah al-mursalah* in this literature research. In view of the above considerations, the compilers need to provide several suggestions:

1. In the compilers' reading that the results of the analysis of the Constitutional Court decision NO. 2 / PUU-XVII / 2019 regarding the right to certification allowances for paid teachers in the perspective of *al-maslaahah al-mursalah*, no one has yet conducted field research (field

research), therefore the authors hope that there will be other studies that continue this research by supporting field research.

2. The Constitutional Court Decision No. 2 / PUU-XVII / 2019 regarding the right to certification allowances for paud teachers in the perspective of *al-maslaahah al-mursalah* does have a good purpose, because this is a consequence of the non-formal education pathway which is essentially an educational path outside of formal education that can be implemented in a structured and tiered manner, which functions as a substitute, addition and / or complement to formal education with an emphasis on mastering knowledge and functional skills and developing attitudes and personality.

3. If a non-formal PAUD teacher wants to get certification and recognition allowances as a teacher as a non-formal early childhood teacher then it is better to just register as a formal PAUD teacher. So that educators can be recognized as teachers and get certification allowances.

4. Seeing the importance of formal PAUD in Indonesia, it would be nice for all of us as parents to prioritize learning in formal education, because in formal education it can make someone more disciplined, follow the rules, get to know more people with various characters.

5. It is hoped that the public will not be apathetic in overseeing everything the government does to the State, the public must be critical and criticize the government if it issues a decision or policy that is incompatible with or detrimental to the Indonesian people.



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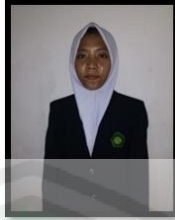
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No.	Hari/ Tanggal	Consultation Materials	Initials
1.	21 oktober 2019	Proposal	
2.	21 oktober 2019	Chapter I, II, dan III	
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6.	20 November 2019	Revision of chapter IV	
7.	4 Desember 2019	chapter V	
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