

The Authority of the Constitutional Court in Establishing New Norm Post-Amendment of the Indonesian Constitution

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Abstract. The problem in this research is that after the amendment of the Indonesian Constitution, the establishment of the Constitutional Court included judicial review as one of its authorities. As a court, the Constitutional Court generally acts as a negative legislator, where any law declared unconstitutional is declared null and void and not binding in any legal capacity. However, the Constitutional Court often formulates new norms to replace the unconstitutional provisions of the law, which leads to its position as a positive legislator. Therefore, the purpose of this research is to identify and analyze the basis and reasoning of the Constitutional Court in formulating new norms. In conducting this research, normative legal research method is used. The results show that the Constitutional Court creates new norms when there is a legal vacuum, the formulation of conflicting laws, or the emergence of various interpretations due to unclear or biased laws.

Keywords: Authority of the Constitutional Court; Legislative Power; Negative Legislator; Amendment, Indonesian Constitution

INTRODUCTION

One of the state institutions that exercise judicial power in Indonesia is The Constitutional Court. Its position in testing laws is normatively limited to being a negative legislator, involving the cancellation or deletion of provisions in laws that conflict with the Indonesian Constitution. Nevertheless, the Court has also become a positive legislator, creating, or formulating norm (Sari & Raharjo, 2022). The establishment of the Constitutional Court in the state system of the Republic of Indonesia was an effort to strengthen the principle of checks and balances to achieve a fully controlled and monitored government institution (Siallagan, 2010).

One of the widely discussed authority or functions of the Court is the testing of laws

against the Constitution. Laws that are concluded to conflict with the Indonesian Constitution cannot be enforced or have any binding force. Therefore, the authority will end only when a law or its provisions conflict with the Indonesian Constitution.

Regarding this matter, Jimly Assiddiqie (2020) stated that the position of the Constitutional Court is as a negative legislator. This means it can only decide on a norm that conflicts with the Indonesian Constitution without producing new insertions into the Law. This role is the essence of the Constitutional Court, as highlighted by the hierarchy of legal norms and institutions (Assiddiqie, 2020). Hans Kelsen emphasized that the judiciary has authority to invalidate a

law or declare a non-binding law legally by acting as a negative legislator (Kelsen, 1973).

The positive legislator jurisdiction, in which the judiciary has the authority to establish a norm, is a jurisdiction shared by both legislative power holders and the judiciary (Hilbink, 2012). Conversely, negative legislator is a passive/negative legislative authority that repeals/cancels a norm or declares a nonbinding legal norm. This authority of testing a norm is under the judiciary. However, there has been a shift in function, where the Constitutional Court has assumed the role of a positive legislator. This can be seen in practice, where its decisions as a positive legislator are very often found in its legal products. This is visible in the pronouncement of a tested article or paragraph as the Conditionally Unconstitutional or the Conditionally Constitutional, as well as the formulation of a new provision. Its authority as a positive legislator was legitimized by the Constitutional Court Decision Number 48/PUU-IX/2011 (Nugraha et al., 2020).

Generally, the Constitutional Court maintains its consistency as a judicial institution that only tests the constitutionality of norms of law. It also applies the principle of non-Ultra Petita in conducting a review of the law. According to Sukirman (2022), a Court cannot make a decision that extends beyond the scope of the request presented to it (Ultra Petita) (Sukirman, 2022).

Based on the principle of non-Ultra Petita, the Constitutional Court should only decide on laws or articles that conflict with the Indonesian Constitution. In practice, Court tests laws against the Constitution and decides on the Unconstitutional and unenforceable articles. However, it has assumed an additional role of issuing binding legal norm to replace the articles of the law that have been tested. As an institution authorized to test laws against the Constitution (Toetsing Recht), the Constitutional Court often exceeds the requests or Petitem presented before it (Ultra Petita). Court has ruled on ultra petita regulations several times while testing cases, including decisions that extend beyond the limits of presented requests, create new norm, and are related to the interests of the Constitutional Court (J. H. Siahaan, 2014).

For example, Pratiwi, Mangku, and Yuliantini (2020) reported that Constitutional Court Decision Number 46/PUU-VIII/2010 resulted from the examination of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Institution of the Republic of Indonesia Year 1974 Number 1, Additional State Gazette of the Republic of Indonesia Number 3019). According to this decision, "A child born out of wedlock only has a civil relationship with the mother and her family." The examination of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage was found contradictory to the Indonesian Constitutional. As a result,

the article was declared to have no legally binding force (Pratiwi et al., 2020).

The Constitutional Court further created a new legal formulation to replace Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage with the following statement, "A child born out of wedlock has a civil relationship with his/her mother and her family, as well as with the man who can be proven by science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with his/her father's family" (Handini, 2019).

Similarly, the Constitutional Court made decisions that directly created a new norm to replace the formulation of the tested provision, leading to its status as a positive legislator. This can be seen in the following decisions (Brawijaya, 2016):

- a. The Constitutional Court Decision No. 102/PUU-VII/2009 concerning the testing of Article 28 and Article 111 of Law No. 42 of 2008 concerning the Election of the President and Vice President.
- b. The Constitutional Court Decision No. 4/PUU-VII/2009 concerning the testing of Article 12 letter g and Article 50 paragraph (1) letter g of Law No. 10 of 2008 concerning the Election of Members of the House of Representatives of the Republic of Indonesia (DPR), Regional Representative Council (DPD), and Provincial Legislative Council (DPRD).

These two Constitutional Court decisions were examined based on the following considerations:

- a. The decisions have more substantive/material provisions compared to the other Conditionally Constitutional decisions,
- b. The decisions determine the validity period of the tested articles or paragraphs, and
- c. The decisions impose an additional burden on the respondent.

Some of these decisions indicate that Court has deviated from the non-Ultra Petita principle and exceeded authority to examine laws against the Indonesian Constitutional. In these cases, the Constitutional Court created a new normative formulation of a law to replace the law, article, or paragraph being examined. Therefore, it played the role of a positive legislator equal to actual legislative institutions that work with the President, such as the DPR (Ilyas, 2022).

According to John Locke in Suny (1978), the theory of separation of power by Sir Ivor Jennings and the theory of negative and positive legislator by Hans Kelsen separates power in each country into: 1) legislative power, referring to the power to form laws, and 2) executive power, which is the power to enforce laws. Locke concluded that legislative and executive powers should be separated, leading to the development of 3) federative power, which signifies the power to

wage war and peace, make alliances and treaties, and all actions with all persons and bodies outside the country (Suny, 1978). Subsequently, Montesquieu in Suny (1978) stated that there are three types of power in every government, namely 1) legislative power, referring to the power to form laws, 2) executive power, indicating the power to enforce laws, and 3) judicial power, denoting the power of Court to adjudicate violations of the law. Regarding these three powers, Montesquieu implemented a system of separation in terms of the institution or organization and the performance of its tasks or functions (Suny, 1978).

Sir Ivor Jennings also explained power separation in a material and formal sense (Kumarasingham, 2016). Power separation in a material sense is the division that is firmly maintained by tasks or functions and separates power into three branches, namely legislative, executive, and judiciary (Amirudin et al, 2024). Each institution has and executes only one power. Legislative power is held by the President or Minister, while judicial power is usually possessed by the Supreme Court (Mariyam et al, 2020). Meanwhile, formal power' separation refers to occasions where power' division is not firmly maintained (Junaidi et al, 2020).

This research focused solely on authority, necessitating the mention of the theory of negative and positive legislator by Hans Kelsen. According to Kelsen (1995),

"The possibility of canceling a law made by legislative branch by another is a limitation on the legislative branch. Such a possibility exists because, besides positive lawmakers, there are also negative lawmakers, namely parliaments elected by the people. Subsequently, there is almost inevitably an antagonism between both lawmaking institutions. This antagonism can be reduced by establishing that members of the Constitutional Court should be selected by parliament" (Kelsen, 1995).

Jimly Assiddiqie clarified in Kurniawati & Liany (2019) that the position of the Constitutional Court is a negative legislator. This means the essence of Court's authority is to decide on a norm in a law contrary to the Constitutional without offering new insertions into the law (Kurniawati & Liany, 2019).

RESEARCH METHODS

This research was conducted as a normative legal or library type, by examining only secondary data or library materials (Soerjono & Mamudji, 1995). In this research, the law was conceived based on applicable written legal norm or rules produced by legislative bodies, such as the Constitutional, codification, laws, government regulations, presidential regulations, etc. (Abdulkadir, 2004). Two approaches were employed, namely, the statute approach, involving the examination of all relevant laws and regulations, and the concept approach, which explored views and doctrines to find ideas that produce legal understandings, concepts, and

principles related to the issue of discussion (Marzuki, 2011).

DISCUSSION

Authority of the Constitutional Court after Amendment of the Indonesian Constitution

The Constitutional Court is one of the state institutions that functions as a judiciary. As stated in Article 24 of the Indonesian Constitutional, "The judicial power is exercised by a Supreme Court and subordinate Court in the general, religious, military, and administrative Court systems, alongside the Constitutional Court." Additionally, Article 1 of the Law on the Constitutional Court states, "The Constitutional Court is one of the judiciaries referred to in the Constitutional of the Republic of Indonesia" (Indonesia, 2003).

Based on Article 24C paragraph (1) of the Indonesian Constitutional, the Constitutional Court has four the Constitutional authority and one the Constitutional obligation. Article 10 paragraph (1) letters a to d of Law No. 24 of 2003 on the Constitutional Court reaffirms these four authorities, which are:

1. Examine the Law against the Indonesian Constitutional.
2. Rule on disputes between state institutions whose authority is granted by the Indonesian Constitutional.
3. Decide on the dissolution of political parties.
4. Decide on disputes about election results.

According to Article 7 paragraphs (1) to (5) and Article 24C paragraph (2) of the Indonesian Constitutional, reaffirmed in Article 10 paragraph (2) of the Constitutional Court Law, the Constitutional Court can give a decision on the DPR's opinion that the President and Vice President have violated the law, acted dishonorably, or failed to meet their official requirements (Jaelani et al., 2019).

The Constitutional Court has at least 10 kinds of signs that should be obeyed in exercising authority of Judicial Review. They are 1) a regulating decision may not be made while performing a test, 2) an Ultra Petita regulation should be avoid during a review, 3) a law should not become a basis for canceling other laws while making a decision, 4) issues delegated by the Constitutional to legislative institution should not be interfered with or regulated by law appropriate to the political choices of the Constitutional Court during decision-making, 5) the decision of Court should not be based on an unclear theory adopted by the Constitutional, 6) the principle of *nemo judex in causa sua*, namely deciding matters related to own interests, should not be violated during a review, 7) the Constitutional Court judges should not express opinions to the public on concrete cases being examined, including in seminars and official speeches, 8) judges should not seek cases by encouraging individuals to file lawsuits or applications, 9) judges should not proactively offer themselves as mediators in political disputes between state

or political institutions, and 10) Court should avoid making opinions about the existence and amendment of the Constitutional. The Constitutional Court is only obliged to implement or guard the existing Constitutional while maintenance or change is the responsibility of other authorized institutions (Mahfud, 2009).

In the General Theory of Law in Rachman (2021), Hans Kelsen affirmed that Court's competence to abolish laws highlights its role as a negative legislator (Rachman, 2021). However, Laica Marzuki in Martitah (2013), tended to ignore Hans Kelsen's view with the rationalization of the positive legislator as judicial activism. Marzuki proposed that "let the Constitutional Court make regulative decisions, as an innovation appropriate to the existing sense of justice. This is called Judicial Activism" (Martitah, 2013).

Moreover, a clash occurs when a positive legislator is met with Ultra Petita restrictions and cannot accommodate outside the petition based on authority of the Constitutional Court. In this case, the Constitutional Court will serve as a positive legislator by offering a decision outside authority granted by the Indonesian Constitutional, which has been repeatedly violated already (Setiadi et al., 2021).

Basic and Reasons for the Constitutional Court to Formulate New Norm to Replace Norm Contrary to the Indonesian Constitutional

Articles 56 paragraph (3) and 57 paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court were amended by Law Number 8 of 2011 concerning amendment to the Constitutional Court Law and the latest amendment to Law Number 7 of 2020 concerning the Third amendment to Law Number 24 of 2003 concerning the Constitutional Court. According to these articles, granting a petition means the Constitutional Court declares that the law being tested is wholly or partly contrary to the Indonesian Constitution. Such a law will have no binding legal force since it was pronounced legally null and void in a plenary session open to the public. Asy'Ari et al., (2013) presented other models in the Constitutional Court Decision with differing characteristics (Asy'Ari et al., 2013). The conditionally Constitutional and the Conditionally Unconstitutional decision models legally do not cancel and declare a norm invalid (Cox & Samaha, 2013). However, both models contain an interpretative decision on a content material paragraph, article, and a part or a whole law that is declared contrary or has no binding legal force. The model that delays the enactment of a decision (the limitedly Constitutional) aims to provide space for a

norm found contrary to the Constitution to remain and have binding legal force until a certain period (Armia, 2017).

Another decision model is the formulation of a new norm to overcome the Unconstitutional application. A new formulation is temporary and will be taken over by a legislator of the relevant law (Eddyono, 2018). In this decision model, the Constitutional Court changes or makes a new formulation of a certain part of a tested law, resulting in changes from the previous norm (Awanisa et al, 2021). The formulation can take the form of Conditionally Constitutional or Conditionally Unconstitutional decisions. This means a norm remains the Constitutional and maintains its legality by fulfilling the interpretation specified in the Constitutional Court's decision (Safa'at & Widiarto, 2021). Meanwhile, failure to fulfill the interpretation specified in Court's decision will lead to the declaration of a legal norm as the Unconstitutional, contrary to the Indonesian Constitutional, and void of binding legal force (Ewendia et al, 2020). According to Mahfud MD in Fauzi (2023), the Constitutional Court may make a decision that has no guidance in procedural law and, in extreme cases, depart from the law when a sense of justice is not achieved (Fauzi, 2023).

Conversely, Jimly Asshiddiqie in Roux & Siregar (2016) attested that the position of the Constitutional Court is as a negative legislator, meaning it can only

categorize a norm as contrary to the Constitution without offering new insertions into the law (Roux & Siregar, 2016). Despite the differences in views, the Constitutional Court has made a legal breakthrough by formulating a new norm. Mahfud MD, in Setiawan (2017), stated the reasons for the Constitutional Court to formulate new norm to replace the old after testing to reveal a contradiction to the Indonesian Constitutional (Setiawan, 2017). The reasons are (1) the decision of the Constitutional Court results in a legal vacuum, (2) a law conflicts with other laws, and (3) various interpretations are generated because the law is vague or biased. Any decision by the Constitutional Court should be regulated as the Conditionally Constitutional.

In the case of a legal vacuum, according to the law, participants of elections should be registered in the Permanent Voters List (DPP) (Triono & Sumarja, 2022). However, this is the Unconstitutional because people unregistered in DPP lose their Constitutional right to vote. This legal vacuum led the Constitutional Court to decide that "Anyone who is not registered on the DPP but has an Identity Card or Passport may vote." Through this formulation, the Court created a new temporary formulation to be taken over by revising related laws and regulations (Harisudin & Alfiella, 2022).

Similarly, a law that contradicts another according to tests against the

Indonesian Constitutional may cause the Constitutional Court to formulate new norm to overcome the contradiction (Ananda, 2021). For example, the contestation of individual candidates in Regional Head Elections differs in and outside Aceh. Individual candidates are allowed, and aspirants cannot go through political parties in Aceh, while the reverse is the case in other regions. As a result, candidates outside Aceh filed a judicial review of the Regional Head Election Law to the Constitutional Court. Due to the contradiction between the two laws, the Constitutional Court made a new regulatory norm that allows candidates to be individuals in all regions of Indonesia, with no exception (Rullyandi et al, 2022).

Vague or biased laws that result in various interpretations in the community also receive a similar treatment. An example is the Constitutional Court Decision Number 46/PUU-VIII/2010, a decision on the results of the examination of Article 43 paragraph (1) Law Number 1 of 1974 concerning Marriage (Indonesia State Gazette of 1974 Number 1, Supplement to the Indonesia State Gazette Number 3019). According to this decision, "Children born outside of a marriage only have a civil relationship with their mother and her family." Court's conclusion on the results of the examination of Article 43 paragraph (1) Law Number 1 of 1974 concerning Marriage was that the decision was contrary to the

Indonesian Constitutional and has no binding legal force (Subekti, 2010).

The Constitutional Court further formulated a new norm to replace the formulation of Article 43 paragraph (1) Law Number 1 of 1974 concerning Marriage. The formulation stated, "Children born outside of marriage have a civil relationship with their mother and her family and with the man as their father who can be proven based on science and technology or other evidence according to the law to have a blood relationship, including a civil relationship with the father's family" (Lubis, 2017).

As explained by Kahar (2017), this decision does not validate an invalid marriage, nor legalize a child born out of wedlock. It only establishes the child's civil relationship with the biological father. Therefore, the Constitutional Court's decision provides and guarantees the human rights of children born outside a legal marriage (Kahar, 2017).

The analysis of the descriptions above with the instruments of negative and positive legislator Theories of Hans Kelsen reveals the Constitutional Court, as a negative legislator, tests laws against the Constitutional and decides that contrary articles are void of binding force. In addition, the Court has made several regulating decisions that contain new legal norms binding on all people as a substitute for tested articles of law, emphasizing its position as a positive legislator (Salman, 2017). Based on the instrument

proposed by Sir Ivor Jennings in Subechi (2012), the formal power separation is not strictly maintained, as legislative power is executed by more than one state institution or power (Subechi, 2012). The function of forming laws by legislative power, according to the Indonesian Constitutional, does not only exist solely in the DPR institution with the joint approval of the President (Dewi et al, 2016). It is also in the jurisdiction of the Constitutional Court, which has the function of forming laws and new norms (Suparto, 2021). The Constitutional Court has the judicial and legislative power to form norm based on the test results of laws that were found contrary to the Indonesian Constitutional (Simon, 2019). However, this authority is contingent on several conditions, such as (1) the decision of the Constitutional Court results in a legal vacuum, (2) a law contrary to others is formulated, or (3) the law is vague or biased, resulting in various interpretations in the community (Siahaan, 2009).

CONCLUSION

There was a change in the Indonesian Constitutional, leading to the creation of the Constitutional Court. The Constitutional Court is one of the state institutions that functions as an actor of the judiciary in addition to the Supreme Court and other judicial bodies under the Supreme Court, namely the General, Religious, and State Administrative Court. One of authority of the Constitutional Court is

to test laws and conduct Judicial Reviews of the Indonesian Constitutional. Following the decision of the Constitutional Court, the provisions of a Law considered contrary to the Indonesian Constitutional can be stated to lack binding power. This means Court is a negative legislator that invalidates or cancels norm. Authority of the Constitutional Court to formulate new norm was approved after a shift in legislative power due to a change in the Indonesian Constitutional. It was based on a joint agreement between the DPR with the President to enable the Constitutional Court to make regulating decisions. This refers to decisions containing legal norms or articles that have been tested. Therefore, the Constitutional Court has been positioned as a positive legislator resembling the DPR as a law-forming institution with the President's joint agreement. The bases and reasons for the Constitutional Court to create new formulations in replacement of norm contrary to the Indonesian Constitutional are due to several reasons. (1) The decision of the Constitutional Court results in a legal vacuum. This occurs when a problem is observed in the implementation of Court's decision and a norm is contrary to the Indonesian Constitutional or does not have binding legal force. This results in a legal vacuum where the application of norm will raise the Constitutional problems. Therefore, the Constitutional Court may formulate new norms. (2) A law contrary found to be contrary to other laws. This may

cause the Court to decide to formulate a new norm to resolve legal conflicts. (3) The law is ambiguous or biased, resulting in various interpretations in society. In this case, the Constitutional Court may decide to formulate a new norm to eliminate misinterpretations.

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