

JUDICIAL ACTIVISM IN INDONESIA: CONSTITUTIONAL CULTURE BY THE CONSTITUTIONAL COURT

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Abstract: Constitutional Court is important as a prerequisite for the principle of the rule of law and democracy in Indonesia. The Constitution Amendment by Indonesian National Assembly has authorized judicial power to the Supreme Court and Constitutional Court with authority to judicial review of legislation to the constitution. The Constitutional Court as the Guardian of the Constitution has the role of establishing a constitutional culture in Indonesia. The commitment to constitutionalism is a distinctive constitutional culture that will also develop the constitution. The commitment to UUD 1945 is the limitation to the powers and a guarantee of constitutional rights that must be protected by the Constitutional Court with authority to review as the implementation of Indonesia constitutionalism. Constitutional culture discusses in this paper focuses on understanding the constitutional culture that will affect the implementation of the constitution by “the formal institutions of the state,” especially concerning the citizens. The Constitutional Court, in reviewing the legislation to the constitution, has applied various methods of Constitutional interpretation to enforce the law and substantive justice. Several decisions showed that the constitutional interpretation made by the Constitutional Court was the extension of the existing notions of UUD 1945 or the event of constitutional change. The Constitutional Court leads to judicial activism, and it can be said that the constitutional court has become a super body. On the other hand, the presence of the Constitutional Court is expected to complement the government system of Indonesia, in line with its function to encourage the performance of other state institutions, in this case, the legislator, to establish better legislation.

Keyword: Judicial Review, Constitutional Interpretation, Constitutional Culture.

Abstrak: Mahkamah Konstitusi menjadi syarat penting bagi terwujudnya prinsip negara hukum dan demokrasi di Indonesia. Perubahan Konstitusi oleh Majelis Permusyawaratan Rakyat telah membagi kekuasaan kehakiman kepada Mahkamah Agung dan Mahkamah Konstitusi dengan kewenangan pengujian undang-undang terhadap Konstitusi. Mahkamah Konstitusi sebagai Penjaga Konstitusi memiliki peran tersendiri dalam membangun budaya konstitusi di Indonesia. Komitmen terhadap konstitusionalisme merupakan budaya konstitusi yang khas yang juga akan mendinamisasi konstitusi itu sendiri. Komitmen terhadap UUD 1945 sebagai pembatasan kekuasaan dan jaminan hak konstitusional yang harus dilindungi oleh Mahkamah Konstitusi dengan kewenangan pengujian sebagai implementasi konstitusionalisme Indonesia. Budaya konstitusi yang dibahas

dalam tulisan ini fokus pada pemahaman budaya konstitusi yang akan mempengaruhi pelaksanaan konstitusi oleh “lembaga formal negara”, terutama dalam kaitannya dengan warga negara. Mahkamah Konstitusi dalam menguji undang-undang terhadap konstitusi telah menggunakan berbagai metode penafsiran Konstitusi untuk menegakkan hukum dan keadilan substantif. Dari beberapa putusan tampak bahwa penafsiran konstitusi yang dilakukan oleh Mahkamah Konstitusi merupakan perluasan dari pengertian UUD 1945 yang sudah ada atau bahkan mengubah konstitusi. Mahkamah Konstitusi mengarah pada judicial activism dan dapat dikatakan bahwa Mahkamah Konstitusi telah menjadi super body. Di sisi lain, kehadiran Mahkamah Konstitusi diharapkan dapat melengkapi sistem pemerintahan Indonesia, sesuai dengan fungsinya dapat memotivasi kinerja lembaga negara lainnya, dalam hal ini pembentuk undang-undang agar dapat membentuk peraturan perundang-undangan yang lebih baik.

Kata Kunci: Judicial Review, Penafsiran Konstitusi, Budaya Konstitusi.

Introduction

The implementation of the constitution (known as UUD 1945) in Indonesia will create Indonesian constitutional culture as part of the Indonesian legal culture. The existence of the Constitutional Court in the amendment of UUD 1945 is an important element of the Indonesian constitutional culture. Many works of literature in the theory of the constitution mentioned the role of the judges in interpreting the constitution that complement and actuate the constitutional state. The question is - what constitutional culture will be created by the Constitutional Court as the guardian of the constitution and the Judges as the sole interpreter of the constitution?

Nicolai G. Wenzel defined constitutional culture as an attitude about constitutional constraints and constitutionalism. Furthermore, he stated, “Constitutional culture includes the implicit and explicit, stated, and unstated, conscious and subconscious, thoughts, feelings, beliefs, impressions, and norms a group holds about the nature, scope and function of constitutional constraints”.¹ Constitutional culture, then, can be said to include: the disposition of regular citizens to recognize and accept that they are governed by a written document; one that creates institutions of government and sets limits on what the government may do; the accepted belief that the governing charter is created by the citizens; the knowledge that the charter is not timeless, but rather that the citizens may change it or revoke it under certain circumstances; and the understanding that until the charter changes, we are bound by it and should accept its ultimate results even though we are free to disagree.²

Francis Snyder identified that “The concept of constitutional culture is a variant of but narrower than that of legal culture”.³ One particularly important subculture is the legal culture of “*insiders*”, that is, the judges, prosecutors, and lawyers working in the legal system. Since law is their business, their values and attitudes make a difference to the system. This is at least a plausible suggestion, the exact extent of this influence depends on some dispute among scholars.⁴

1 Nikolai G. Wenzel, ‘Beyond Parchment, beyond Formal Rules: Constitutional Culture and Constitutional Political Economy’ 8 *ama-gi The Journal of the Hayek Society of the London School of Economics*. Vol.8 (1), 20-21.

2 Jason Mazzone, ‘The Creation of a Constitutional Culture’ (2005) 40 *Tulsa Law Review* 671.

3 Francis Snyder, ‘The Unfinished of the European Union: Principles, Processes, and Culture’ [2003] *International Conference on Law and Justice in the 21st Century* <<http://opj.ces.uc.pt/portugues/novidds/comunica/FrancisSnyder.pdf>>, 19.

4 Lawrence M. Friedman, *American Law, an Introduction* (WW Norton & Company), 21.

Indonesian Constitutional Court, one of the judicial institution and the guardian of the constitution⁵, serves to review the legislation to the constitution. Especially, in the implementation of the judicial review, the court using the interpretation methods frequently in examining cases. The Constitutional Court, with its functions, becomes an important element in forming the Indonesian constitutional culture. The literature on constitutional law and theory often mentioned the role of judges in the constitutional interpretation and the dynamics of the constitution. The next question is what kind of constitutional culture to be developed by the Constitutional Court as the guardian of the constitution.⁶ and the judges as the sole interpreter of the constitution⁷?

The transitional provisions of UUD 1945 (amendment) Article III stated that the court must be established no later than August 17, 2003. Before the court was formed, the Supreme Court (known as Mahkamah Agung) held all powers. Since the adoption of the Fourth Amendment of UUD 1945 (August 11, 2002) to the establishment of the Constitutional Court on August 13, 2003, the Supreme Court had received 14 cases under the authority of the court. However, at the time of the transfer of the case from the Supreme Court to the Constitutional Court on October 15, 2003, none of these cases was completed by the Supreme Court.⁸

Law No. 24/2003 concerning the Constitutional Court as the further regulation from art 24C (6) UUD 1945 determines that "the appointment and dismissal of judges of the constitution, laws, and other provisions of the Constitutional Court shall be regulated by Law since August 13, 2003. It is authorized by the provisions of Article 24C (6) of the UUD 1945.⁹ The Constitutional Court is one of the judicial institutions enforcing the law and justice based on Pancasila.¹⁰ Judicial power is the state power to conduct an independent judiciary to uphold law and justice, the state for the implementation of the Law of the Republic of Indonesia, as mentioned in Law no. 48/2009 in Judicial Power:

The establishment of constitution Court has proceeded with the recruitment of judge candidates following the procedure set forth in Article 18 section 1 of Constitutional Court Law No. 24 /2003, "Constitutional Judges consist of three selected by the Supreme Court, three by the House of Representatives (DPR), and three by the President, ...". Constitutional Court was formally established on August 16, 2003, the Supreme Court is in charge as the transitional institution running the Constitutional Court function by Article III of the Transitional Provisions of the 1945 Constitution. Thus, the court's full authority for the constitution has ended. Therefore, in the following section, we discuss the authority of the Constitutional Court as a tool to carry out its role as the guardian of the constitution as determined in the 1945 Constitution. The constitutional court role shall be assessed using comprehensive powers granted by the 1945 Constitution to the institution.

Article 24 C paragraph (1) of the 1945 Constitution states that the court has the authority to hear at the first and the last in which the decision is final. This provision indicates that the Constitutional Court that has no justice that is below and not a subordinate of

5 Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* (Konstitusi Press 2006), 347; Jimly Asshiddiqie, *Gagasan Dasar Tentang Konstitusi Dan Mahkamah Konstitusi*, 2.

6 Jimly Asshiddiqie (n 5), 19.

7 ibid, 374.

8 Jimly Asshiddiqie, *Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Republik Indonesia* (Paper Presented at Training Sespati dan Sespim Polri 2008), 14; Constitutional Court Secretariat, *6 Tahun Mengawal Demokrasi Dan Konstitusi, Sekretariat Jenderal Dan Kepaniteraan Mahkamah Konstitusi* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2009), 27.

9 Article 2 Law No. 24/2003 concerning Constitutional Court.

10 Article 1 Law. No. 48/2009 concerning Judiciary.

the existing state institutions. This is in contrast with the Supreme Court justice that has justices under it and represents them.¹¹

The Constitutional Court and The Judicial Review

Nearly two decades after the amendment of the Indonesian Constitution (UUD 1945), the Constitutional Court become one of the most influential on the dynamization of the constitutional system. Moreover, the paradigm change in the implementation of the constitution includes the interpretation of the constitution. The constitutional culture is established in the exercise of the authority of the Constitutional Court, especially in judicial review of the legislation to the constitution by interpreting the constitution itself. The interpretation process, methods, including the reason or argument and the ground underlying the interpretation process, configure the constitutional culture.

The debate over whether the legislation is a legal product or politics has been longstanding and influenced by various factors. During the past regime, Presidential Decree July 5, 1959, guided democracy; the decision process is based on deliberation and consensus and the spirit of mutual cooperation under the leadership of President Soekarno, who be an authoritarian. The regime was later replaced by the new order regime with the legislative product becoming conservative/orthodox, with the justification of development programs focusing on the economy that should be secured with 'national stability as a prerequisite'.¹² Those conditions were supported by UUD 1945 that authorized the president to form legislation, and Parliament (the House of Representative or DPR) only approved. In other words, the president plays a role in forming the legislation. On the other hand, there was no mechanism review for these legislation products by another institution, especially the judiciary, although the legislation is actually contrary to the constitution.¹³

However, the idea of the review mechanism has begun to emerge, as stated by the Ad Hoc Committee of the Interim National Assembly (MPRS) in 1966-1967, who wanted to give the authority of reviewing the legislation to the Supreme Court. The idea was supported by the Chief of the Supreme Court, whose arguing that the Supreme Court is one of the pillars of democracy, in addition to the DPR and the president. Another idea arises from the Minister of Justice, Oemar Seno Adji, who proposed that the review authority should be in the hand of the People's Consultative Assembly (MPR) because, at that time, it was the sole guardian of the constitution.¹⁴ Sri Soemantri proposed a different idea to authorize the review to a constitutional council.¹⁵ Mahfud then concluded that principally Indonesia needs an institution with authority to review the legislation.¹⁶

There is no single provision in the UUD 1945 (the original) explaining that the constitution determines the review of the legislation. Although, the idea of the necessity of judicial review had appeared in Indonesian history when the founding fathers created the constitution before independence. In the discussion of the Constitution draft in the Agency of Indonesian Independence Preparation (BPUPKI), one of the BPUPKI members, Mr. Muhammad Yamin, has proposed that the Supreme Court should be given the authority to review the legislation. However, the idea was rejected by Mr. Supomo based on two

11 Dian Aminudin dan Sirajuddin Faturokhman, *Dian Aminudin Dan Sirajuddin, Mahkamah Konstitusi Di Indonesia* (Citra Aditya Bakti press 2004), 32.

12 *ibid*, 198.

13 Sri Soemantri, *Hak Menguji Materil Di Indonesia* (Alumni Press 1997), 9.

14 *ibid*, 362.

15 Moh Mahfud MD, *Politik Hukum Di Indonesia* (7th edn, Rajawali Perss 2017), 362.

16 *ibid*, 363; Zaki Ulya, 'Politik Hukum Pembentukan Komisi Kebenaran Dan Rekonsiliasi Aceh: Re-Formulasi Legalitas KKR Aceh' (2017) 2 *Petita : Jurnal Kajian Ilmu Hukum dan Syariah*.

grounds; first, that the constitution is being drafted without adopting the concept of power separation, and second, the lack of jurist and experience on the subject.¹⁷ Though, the idea of the importance of the judicial review has been proposed by Muh Yamin when he speaks about the organ of the state, he said:

“The Supreme Court, as judiciary power and review the legislation to the customary law, Islamic law (sharia) and the constitution and to void the legislation, the decision of the Supreme Court sent to the President and the Parliament (DPR).”¹⁸

On another occasion, Yamin said:

“The Supreme Court not only has the power in judgment, it should also become the body that could review the legislation made by legislative to the Indonesian constitution.”¹⁹

Sri Soemantri concluded that, first, Yamin wanted to put the provision of judicial review by the Supreme Court in the draft of the constitution; second, as the consequences, the Supreme Court should have the authority to review the legislation. Soepomo, another formulator, disagreed with the idea because of the lack of experience of the Indonesian jurist in reviewing legislation.²⁰

Even though the original UUD 1945 did not put the provision of judicial review of legislation, by the national assembly decision in 1966, the Interim National Assembly has the authority in reviewing legislation to the constitution by the National Assembly decree XIX/MPRS/1966 in reviewing of state legislation product, except the National Assembly decree that was not in line the constitution.²¹ However, it cannot be considered as a judicial review because the reviewing institution is not the judiciary. Instead, it was done by the political institution or political review.

Sri Soemantri wrote that on the basis of the general principles of the constitution, the principles of the rule of law in the Indonesian constitution UUD 1945, a legal norm connected to the system. The hierarchical principles, as stipulated in the National Assembly decree XX/MPRS/1966, states that the lower norm could not contradict the higher one; if it happens, the lower norm could be reviewed by the court.²²

After the amendment of the constitution, the constitution amendment embodies the idea of judicial review of legislation in article 24 C. It explicitly gives the authority to the constitutional court to review legislation to the constitution. Indeed, in the early year before the constitutional court formed, there was a petition to review the legislation, and transitional provision of the constitution determined that before the constitutional court formed, the authority of the court run by the Supreme Court was at the latest on August 17 2003.

The petition of judicial review of the legislation to the constitution did not require any

17 Jimly Asshiddiqie (n 8), 12.

18 Sri Soemantri (n 13), 72. “Mahkamah Agung melakukan kekuasaan kehakiman dan membanding undang-undang supaya sesuai dengan hukum adat, hukum Islam (syariah) dan dengan Undang-Undang Dasar dan melakukan aturan pembatalan undang-undang, pendapat Balai Agung (Mahkamah Agung) disampaikan pada Presiden yang mengabarkan berita itu kepada Dewan Perwakilan”

19 “Balai Agung (Mahkamah Agung) janganlah saja melaksanakan bidang kehakiman, tetapi juga hendaknya menjadi badan yang membanding, apakah Undang-undang yang dibuat oleh Dewan Perwakilan tidak melanggar Undang-Undang Dasar Republik Indonesia.”

20 Jimly Asshiddiqie (n 8), 73.

21 Sri Soemantri (n 13), 17.

22 ibid, 83.

concrete case.²³ In other words, it could be a petition registered only one day after the legislation validation by the president. It is different with the review of the lower legislation, such as Government regulation, presidential regulation, and local legislation, that could be reviewed by the Supreme Court if any concrete case occurs.

Judicial Independence To Ensure The Review

The judicial power is independent in judging to enforce the law and justice based on Article 24 section (1) UUD 1945.²⁴ Independency is the most distinctive character for the judiciary power, as Bagir Manan said.²⁵ First, judiciary power is independent of the intervention of other branches of power; Second, the relation of the judicial power with the other branch is more reflected in the separation of power than the diffusion of power. If any relation exists, it is only in the check and balances mechanism or in a specific procedure and not related to the authority in judging.

It must be some guarantees in judicial independence because naturally, the judiciary is weaker than the other power branches. Judicial independence is needed in guaranteeing impartiality and fairness in judging directly or indirectly, involving other institutions' interests.²⁶ Alexis de Tocqueville has been identified the characteristics of judicial power as follows.

1. The first characteristic of judicial power, among all peoples, is to serve as arbiter.
2. The second characteristic of judicial power is to deliver a verdict concerning particular cases and not concerning general principles.
3. The third characteristic of judicial power is to be able to act only when it is called upon or following the legal expression when it is appraised.²⁷

In several writings of judicial independence,²⁸ Bagir Manan, former chief justice of the Indonesian Supreme Court, referred to the explanation of the original constitution, the Federal Republic of Indonesia Constitution and Interim Constitution 1950, which means "free from the influence of the executive power". The judicial power contains the two following terms.

1. Judges should be free from any influence (legislative or executive), and judges should also be free from the judiciary elements and from the outside influence, such as public opinion, press, etc.
2. The independence and the freedom of judges as limited to the implementation of judicial power or the judicial function of judges.²⁹

The doctrine or according to the law, the judicial power is implemented by the judiciary with the judges. In other words, we could say that judicial independence is the independence

23 Article 51 Section (1) Constitutional Court Act, Article 3 PMK No. 06/PMK/2005 in Guidance of Judicial Review Procedure.

24 Article 24 Section (1) UUD 1945 "Kekuasaan kehakiman merupakan kekuasaan yang merdeka untuk menyelenggarakan peradilan guna menegakkan hukum dan keadilan."

25 Bagir Manan, *Menegakkan Hukum Suatu Pencarian* (Asosiasi Advokat Indonesia 2009), 82; Tim Lindsey and Simon Butt, *Indonesian Law* (Oxford University Press 2018).

26 Bagir Manan (n 25), 83.

27 Alexis de Tocqueville, *Democracy in America: The Historical-Critical Edition of De La de'mocratie En Ame'rique* (liberty fund, inc 2009), 169-170; Philip Sales, 'The Contribution of Legislative Drafting to the Rule of Law' (2018) 77 Cambridge Law Journal 630; Kuskridho Ambardi, R William Liddle and Saiful Mujani (eds), 'Introduction: Indonesia and Critical Democracy', *Voting Behavior in Indonesia since Democratization: Critical Democrats* (Cambridge University Press 2018).

28 The latest in Bagir Manan (n 25), 84.

29 Bagir Manan dan Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara Indonesia* (Alumni 1997), 79.

of judges. Bagir Manan also cited Gerhard Robbers, who mentioned two meanings of freedom of judges: first, no one, especially government or administrative agency, could determine what the punishment in judging; second, the exercise of judicial power did not make any consequences for the judges privately.³⁰

Article 24 section 2 UUD 1945 stipulates that the judicial power is implemented by a Supreme Court and other judiciaries under the ordinary court, religious court, military court, and administrative court and Constitutional Court". Article 24 C UUD 1945 stipulates that "the Constitutional court have the authority in judicial review of legislation to the constitution, adjudication on competence dispute between state agencies that have the power from the constitution, adjudication on the impeachment of the president, adjudication on the dissolution of a Political Party and adjudication in election disputes.³¹ The authority and duty of the constitutional court in reviewing the legislation (made by the Legislative Power and the President jointly), enabled the court a role in determining the process of legislation and the substance of the legislation through the interpretation of the constitution, with authority in formal and material review. The authority, especially in Judicial review of legislation and adjudication on competence dispute between state agencies, allowed the court to legitimize and validate the other state agencies' authority. In contrast, we could say that the court could restrict the power and authority of other state agencies.

The Constitutional Court Regulation Number 09/PMK/2006 declares the determination code of ethics and conducts of constitutional judges that refers to the Bangalore Principles of Judicial Conduct 2002, section independency principles, as follows.³²

"Independensi hakim konstitusi merupakan prasyarat pokok bagi terwujudnya cita negara hukum, dan merupakan jaminan bagi tegaknya hukum dan keadilan. Prinsip ini melekat sangat dalam dan harus tercermin dalam proses pemeriksaan dan pengambilan keputusan atas setiap perkara, dan terkait erat dengan independensi Mahkamah sebagai institusi peradilan yang berwibawa, bermartabat, dan terpercaya. Independensi hakim konstitusi dan pengadilan terwujud dalam kemandirian dan kemerdekaan hakim konstitusi, baik sendiri-sendiri maupun sebagai institusi dari pelbagai pengaruh, yang berasal dari luar diri hakim berupa intervensi yang bersifat memengaruhi secara langsung atau tidak langsung berupa bujuk rayu, tekanan, paksaan, ancaman, atau tindakan balasan karena kepentingan politik, atau ekonomi tertentu dari pemerintah atau kekuatan politik yang berkuasa, kelompok atau golongan tertentu, dengan imbalan atau janji imbalan berupa keuntungan jabatan, keuntungan ekonomi, atau bentuk lainnya."

The Constitutional Court Judges' independence is a prerequisite to achieving the rule of law and as the guarantee of law enforcement and justice. The principles are implied and should reflect in the proceeding process and the decision-making in many cases and should be connected to the independence of the court in prestige, dignity, and reliability. The independence of the judges and the court manifested in the autonomy and freedom of judge individually and institutionally from other influences internally or externally, directly or indirectly forming persuasion, pressure, force, threat, or vengeance of politics or economically from the government (executive) or the ruling political power, certain groups, with certain return or commitment in any position, economics or other forms. (Translated by the author)

30 Bagir Manan (n 25).

31 Article 24 C Section (1) UUD 1945.

32 Constitutional Court Regulation No. 09/PMK/2006 Codes of Conduct of Constitutional Judges.

Though, the implementations are as follows.

1. *Hakim konstitusi harus menjalankan fungsi judisialnya secara independen atas dasar penilaian terhadap fakta-fakta, menolak pengaruh dari luar berupa bujukan, iming-iming, tekanan, ancaman atau campur tangan, baik langsung maupun tidak langsung, dari siapapun atau dengan alasan apapun, sesuai dengan penguasaannya yang seksama atas hukum.*
 2. *Hakim konstitusi harus bersikap independen dari tekanan masyarakat, media massa, dan para pihak dalam suatu sengketa yang harus diadilinya.*
 3. *Hakim konstitusi harus menjaga independensi dari pengaruh lembaga-lembaga eksekutif, legislatif, dan lembaga-lembaga negara lainnya.*
 4. *Dalam melaksanakan tugas peradilan, hakim konstitusi harus independen dari pengaruh rekan sejawat dalam pengambilan keputusan.*
 5. *Hakim konstitusi harus mendorong, menegakkan, dan meningkatkan jaminan independensi dalam pelaksanaan tugas peradilan baik secara perorangan maupun kelembagaan.*
 6. *Hakim konstitusi harus menjaga dan menunjukkan citra independen serta memajukan standar perilaku yang tinggi guna memperkuat kepercayaan masyarakat terhadap Mahkamah.*
1. The Constitutional judges should perform their functions independently based on the assessment of the facts, reject the external influence forming persuasions, lure, pressure, threat or intervention, directly or indirectly from anyone or any reason, corresponding their competence of law carefully.
 2. The Constitutional judges should act independently from the pressure of the society, mass media, and the parties in the dispute are examined.
 3. The constitutional judges should preserve their independence from the influence of the executive, legislative or other state agencies.
 4. In exercising judiciary functions, the constitutional judges should free from colleagues' influences in decision-making.
 5. The constitutional judges should encourage, enforce, and increase the guarantee of independence in exercising judiciary function individually or institutionally.
 6. The constitutional judges should preserve and perform independence figures and increase the high standard of attitude to strengthen the public trust in the court.³³ (translated by author)

The Development of Constitutional Culture in the Judicial Review Cases

The Types and Forms of Constitutional Court Decision

The court's decision is an important legal product and becomes the legitimacy for the parties doing or not doing a certain action, or exercise or no exercise some authority by the state institution or government agencies, as stated in the legislation. In another sense, the decision of the Constitutional Court became the final, and ultimate source of legality after a variety of other legal products are issued, either by the legislature or the executive. Sujit Choudry said that, especially in constitutional law, the Constitutional court, as the authoritative interpreter of the law, particularly in constitutional cases, validates and legitimizes the exercise of power by executives and legislatures.³⁴ Nevertheless, the judiciary was not the only institution competent and had the authority in interpreting the constitution, as stated by Heinrich Scholler, that the legislators (legislative body)

³³ Constitutional Court Regulation No. 09/PMK/2006.

³⁴ Sujit Choudry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' 74 Indiana Law Journal 828.

also have the authority to interpret the constitution.³⁵ In other words, in exercising their constitutional rights, the executive could interpret the constitution too.

The decision of judicial review is divided into three types (Article 56 of Law No. 24/2003), i.e., approved, rejected, and unacceptable. However, in practice, there are more than three types of final decisions in reviewing legislation against the constitution UUD 1945; they are as follows.

- a) **Approved**, if the judges conclude that the request concerning the adjudication on the unconstitutionality of legislation has its reason, and the legislation or an article or a section of the legislation is stated unconstitutional, or the court could expressly state that part of the petition is approved, the decision of the unconstitutionality of the legislation as a whole may be made and declared. Contrary to the provisions of the constitution UUD 1945, it is no longer legally enforceable. The petition can also be approved if the procedures of establishing the legislations do not meet the provisions of the Constitution UUD 1945, the verdict can be stated as:
 - a. fully approved;
 - b. partially approved;
- b) **Rejected**, if the judges conclude that the legislation is constitutional in the procedure and substance.
- c) **Conditionally constitutional or conditionally unconstitutional** (the constitutionality is rejected or approved with certain conditions);³⁶ The decision is rejected but in consideration of the constitutionality of the law providing certain conditions. In the implementation, if the condition is not reached, it became unconstitutional and conditionally unconstitutional if it is in contrary;
- d) **Unacceptable**, if the judges conclude that the petition does not meet the procedure, such as the petitioner does not have the legal standing.

Faiz Rahman and Dian Agung Wicaksono cited Hamdan Zoelva, the President of Constitutional Court 2013-2016, that constitutional court decision provides the interpretation (guidance, direction, guidelines, and terms to create new norms) which can be classified as conditionally constitutional decisions and conditionally unconstitutional decisions. If the interpretation determined by the Constitutional Court is fulfilled, then a norm or law remains constitutional. However, if the interpretation determined by the Constitutional Court in its decision is not fulfilled, a legal norm or law is unconstitutional so that it must be declared contrary to the constitution and has no binding legal force.

Several decisions of the Constitutional Court issued conditionally constitutional by the Constitutional Court are interesting to be discussed regarding the interpretation of the constitution. Particularly, the legislation reviewed in these decisions is likely to be re-reviewed and open to different interpretations by judges in the future.

1. Conditionally Constitutional Decision

- a. *The first conditionally constitutional decision*: The Government position to water and the fulfillment of the rights to water

35 Heinrich Scholler, 'Notes in Constitutional Interpretation, Kopfzeilentext', *Reading Materials, Constitutional law and constitutional court* (Faculty of Law, Indonesia University 2004), 4; Obikwu, 'The Federal Constitution, National- Ethnic Minority Groups and the Creation of States: The Post-Colonial Nigerian Experience' (2017) 2 *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah*; A Ahsa Thohari, 'The Manifestation of the Rechtsidee of Pancasila in Regulating the Constitutional Rights in Indonesia' (2019) 4 *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 149.

36 Muchammad Ali Safa'at, et. all, *Hukum Acara Mahkamah Konstitusi* (Sekretariat Jenderal Mahkamah Konstitusi RI 2011), 142.

This decision is important because rights to water to the livelihood of the people, Case Number 058-059-060-063/PUU-II/2004³⁷ and case Number 008/PUU-III/2005 are the review of Water Resources Law that become the first conditionally constitutional decision of the Constitutional Court. As mentioned earlier, that conditionally constitutional decision made the same Law/legislation could be reviewed by the constitutional court more than once because the first decision only gives a certain condition on the reviewed norm. It enables for the second petition of the same norm on the legislation/Law to the constitutional court, whereas the provision on the constitution UUD 1945 said that the Constitutional Court's decision is final and binding. Constitutional Court decision is final and directly binding since spoken and there is no remedy that can be taken.³⁸

The Constitutional Court found that Article 33, section 3 must be placed in the context of Human Rights and become part of Section 28H of the constitution UUD 1945. The utilization and enjoyment rights to water are a derivative from the right to life guaranteed by the constitution UUD 1945, the right to lease of water is the rights to obtain and use (to get some profit) or exploit the water determined by the government. It enables the private sector to take some roles in the management of water resources, as long as the government still take the main role indicated by (1) formulating policies (*beleid*), (2) administering (*bestuursdaad*), (3) regulating (*regelendaad*), (4) managing (*beheersdaad*), and (5) overseeing (*toezichthoudendaad*) that indicated in the provision of Water Resource Law No. 7/2004;

In the decision, the Constitutional Court started with the original intent of the Constitution formulator according to Article 33 and ended with the interpretation of the social context, as recorded in consideration of the following verdict.

“Considering that the founding fathers’ vision has given the foundation for the proper regulation of water with the provisions of the Constitution UUD 1945, Article 33 section 3 “Earth, water and the natural resources which therein contained shall be authorized by the state and used for the prosperity of the people.”³⁹ It is systematically linked to Article 28H UUD 1945 as the ground for recognizing the rights to water as part of the rights to physical and spiritual prosperity life. It means that it is the substance of human rights. Nevertheless, in the consideration, the judges not only apply the original intent and systematics interpretation methods but also broaden the interpretation of the original intent of the formulator with the social context.⁴⁰

Based on these considerations, there are some key concepts in the Constitutional Court's interpretation of the Article 33 UUD 1945.⁴¹ First, the Constitutional Court asserts that any interpretation of the provisions of the UUD 1945 should be contextualized to the aims of nationhood and statehood, as stated in the fourth paragraph of the preamble of UUD 1945. Second, the interpretation of Article 33 should be related to the context of the aims of nationhood and statehood of Indonesia. Wherein, the concept of state authorization is the concept of public law dealing with the principle of people sovereign. Earth, water, and the natural resources which therein contained belong to the public and to be used for the people's welfare. Third, the concept of private ownership in those sectors, as long as the role of the state is not reduced to the only regulating function, but include the formulating

37 Constitutional Court Decision Number 058-059-060-063/PUU-II/2004 on Review of Law Number 7/2004 concerning Water Resources. www.mahkamahkonstitusi.go.id.

38 Elucidation of Article 10 ACT. No. 23 Tahun 2004 Tentang Mahkamah Konstitusi.

39 Constitutional Court Decision Number 058-059-060-063/PUU-II/2004, 008/PUU-III/2005 review Law Number 7/2004 Concerning Water Resources 451.

40 *ibid.*

41 *ibid.*

policies (*beleid*), administering (*bestuursdaad*), managing (*beheersdaad*), and overseeing (*toezichthoudendaad*).

b. Conditionally Constitutional Decision that revised in two years

There are three different petitions on the cases of requirement never convicted criminal for Public Official Candidate, in 2007⁴², 2008⁴³ and 2009⁴⁴. There was a revised judgment to the earlier decision of the Constitutional Court. In the decision Number 14-17/PUU-V/2007 on the review of Article 58f Law Number 32/2004 in Local Government, the court interpreted Article 27 section 1 of the constitution UUD 1945 in a broader sense that the election or appointment of any public officer requires public trust. The public officer candidates should meet certain requirements to obtain clean, dignified, honest officers with high morality and integrity.⁴⁵ The legislators (DPR and the President) are authorized to decide the requirements, except as specified in UUD 1945, based on the requirements for the public officers and the provisions of Article 28J Section 2 of UUD 1945. In the decision, the Constitutional Court legitimizes the legislature to determine the condition of all public officers that are not explicitly mentioned by the constitution, including for positions that are filled by-election.

The Consideration of the Constitutional Court is that "Every public officer requires public trust. Therefore, it has been a generally accepted fact by the public that there are certain moral standards required for every person who will work as public officers. One of which is that one should never be convicted as a criminal."⁴⁶ The Conditionally constitutional of Article 6t on the Presidential Election Law, Article 16 Section 1d on Constitutional Court Law, Article 7 Section 2d on Supreme Court Law, Article 58f on Local Government Law, and Article 13g on the Audit Board of Republic Indonesia Law are:⁴⁷

- i. Not including the slight negligence (*culpa levis*) although the sanction is five years or more;
- ii. Not including the political conviction.

However, the Constitutional Court revised the earlier decision in 2009 by the decision Number 04/PUU-VII/2009 on the review of Article 12 g of Law Number 10/2008 on the Election Law.⁴⁸ The requirement of never being convicted for public officer candidates is not valid as long as the judge does not deprive his/her rights to vote. The court decision was revised only two years after the first one.

In this case, there are two possibilities:

1. The judges were not careful in the previous case resulting in them has to revising the decision only in two years, causing by any petition on similar cases. Although the Chief Constitutional Justice, Mahfud MD, has said that Constitutional Court decision becomes the judicial precedent automatically.⁴⁹

42 Constitutional Court Decision Number 14-17/PUU-V/2007 review Article 58 f Law Number 32/2004 Concerning Local Government.

43 Constitutional Court Decision Number 15/PUU-VI/2008 review Article 50 Section (1) g Law Number 10/2008 concerning Election of DPR, DPD, and DPRD Members.

44 Constitutional Court Decision Number 04/PUU-VII/2009 on review of Article 12 g of Law No. 10/2008 concerning Election of DPR, DPD, and DPRD Members.

45 The consideration of Decision No. 14-17/PUU-V/2007 review Article 58 f Law Number 32/2004 concerning Local Government.

46 Constitutional Court Decision Number 14-17/PUU-V/2007.

47 Constitutional Court Decision Number 15/PUU-VI/2008 review Article 50 Section (1) g.

48 Constitutional Court Decision Number 14-17/PUU-V/2007 (n 46).

49 Speech of The President of Constitutional Court (Prof. Dr. Mahfud MD) in the opening ceremony of International Colloquium, Jakarta, April 2011. Since the nature of the Constitutional Court's decision

2. The different situations and political conditions within two years create differences in consideration of the judge in deciding the case. These circumstances trigger a question of whether there is any political influence on the judges (*politicking*)?⁵⁰

*c. Conditionally Constitutional in the review of Presidential Election Law, Decision Number 102/PUU-VII/2009*⁵¹

Notes for the conditionally constitutional decision in the review of Presidential Election Law arisen. First, the consideration of using ID cards and passports (for citizens overseas) as requisite to the rights to vote if not registered in the DPT (Daftar Pemilih Tetap/final voters list) as the safest option in the Presidential election. The obstacle is that Indonesia still faces a complex problem with the demographic administrative records. The choice also equally at risk as large numbers of citizens have more than one or even more ID cards.

Second, the Constitutional Court has a negative prejudice against DPR by stating that alternative arrangements with emergency law at risk voiding by DPR in the legislative review as if DPR did not have good faith in succeeding the Presidential election. Constitutional Court judge is not proportional to other state agencies; the court assumes that Parliament will immediately review the emergency law regarding DPT and disrupt the situation. It is an unhealthy constitutional system, creating mistrust among the state institutions that could impact the implementation of the authority of state institutions or the government. Third, the procedures of inquiring DPR as the legislators has not proceeded. The rights of the DPR to be heard fairly and balanced (*Audi et alteram partem*) as one of the procedural law principles is not implemented. The intens of the legislator in the provision become a consideration in the proceedings.⁵² The principles of independence and impartiality that the judge can examine and decide objectively and fairly are not seen.

The Decision with the Possibility of Conflict of Interest

a. Decision Number 005/PUU-IV/2006 concerning the review of the Judicial Commission Law and Judicial Authority Law concerning the authority of the Judicial Commission

The Constitutional court also examines the petition to review the law related to its authority and organization. In decision Number 005/PUU-IV/2006 concerning the review of the Judicial Commission Law and Judicial Authority concerning the authority of the Judicial Commission, constitutional judges argued that the Constitutional Court as the sole interpreter of the constitution should not merely bind to the method of originalism in the interpretation based on the original intent of UUD 1945. Particularly, if the interpretation caused the provisions of UUD 1945 not to be applied as a system and main idea (*staatsidee*) of the constitution, the Constitutional Court must be understood in the context of the UUD 1945 to develop a democratic constitutional state based on the rule of law, as stated in the Preamble of UUD 1945.”⁵³

which is erga omnes, especially for judicial review of the 1945 Constitution, the Constitutional Court’s decision automatically becomes a law that binds everyone.

50 It relates to the appointment of three judges from the house of representatives (DPR).

51 Constitutional Court Decision Number 102/PUU-VII/2009 review Article 28 and Article 111 Law Number 42/2008 concerning president and vice president election.

52 The notion of constitutional judge Prof. Dr. H.M. Laica Marzuki, SH, in decision number 066/PUU-II/2004 review Law Number 24/2003 concerning Constitutional Court and Law Number 1/1987 concerning Chambers of Commerce and Industry.

53 “Constitutional Court as the sole interpreters of the constitution, should not only fixated to the “originalism” interpretation methods and only employ “the original intent” of the article of UUD 1945, even more, if the interpretation lead to harm the provisions of UUD 1945 as a system or breach the main idea of the constitution as a whole which related to the aim ti be achieved” “... Mahkamah Konstitusi sebagai lembaga penafsir undang-undang dasar (*the sole judicial interpreter of the constitution*), tidak boleh hanya semata-mata terpaku kepada metode penafsiran “*originalisme*” dengan mendasarkan diri hanya kepada “*original intent*” perumusan Article UUD 1945, terutama

In this case, the focus is on the interpretation of Article 24B article (1) UUD 1945, the terms of Constitutional Court and the Supreme Court judges. The general term “judges” in the original intent is addressed to all judges, including Supreme Court judges and the courts below, and the Constitutional Court judges.⁵⁴

The Constitutional Court systematically interprets Article 24 B in Judicial Commission that placed after the provision of the Supreme Court and the provision of the Constitutional Court on Article 24 C. Through the structure of the Articles in UUD 1945; the Constitutional court assumes that the authority of the Judicial Commission in controlling the judges is only to the Supreme Court judges and the courts below, but not to the Constitutional court. It is because the provision of the Judicial Commission is right after the provision of the Supreme Court and it is placed before the provision of the Constitutional Court. Ultra petita decision in judicial review is not new; particularly, the early history of judicial review in the case of *Marbury v. Madison* is an ultra petite decision.⁵⁵ However, notification regarding this kind of decision is in the intention of the decision. The decision concerns the interests of its own institutions of the Constitutional court judges. It seems that the judges do not want to be watched by the judicial commission. On the other hand, the intention of the National Assembly when amending the constitution and forming the Judicial Commission is to support the institutions in Indonesia’s judicial power. The Judicial Commission is an effort to resolve the crisis of law enforcement, distrust of the judiciary institutions, including the Supreme Court as the highest judiciary.⁵⁶

b. *Review of provisions concerning the Constitutional Court judges*

Constitutional Court Decision Number 7/PUU-XI/2013 concerning the review of Constitutional Law stipulates the requirement of age limitation of judge candidates. The decision stated conditionally unconstitutional to the provision: “throughout not interpreted as minimum aged 47 years old and maximum 65 years old at the first period”⁵⁷. Two of nine judges are dissenting with the argument that the petitioner has no legal standing.

The latest plea that could involve the interest of the judges is the review of Law Number 7/2020 as the third amendment of Law number 24/2003 concerning Constitutional Court, the case number 100/PUU-XVIII/2020 concerning age limitation of judges, recruitment process and length of service. Until this article has been written, the review process is still running.

c. *Constitutional Court Decision Number 138/PUU-VII/2009 on the review of Emergency Law (Perpu) Number 4/2009 in the amendment of Law Number 30/2002 regarding the commission against corruption and increasing its power in judicial review*

apabila penafsiran demikian justru menyebabkan tidak bekerjanya ketentuan-ketentuan UUD 1945 sebagai suatu sistem dan/atau bertentangan dengan gagasan utama yang melandasi undang-undang dasar itu sendiri secara keseluruhan berkait dengan tujuan yang hendak diwujudkan. Mahkamah Konstitusi harus memahami UUD 1945 dalam konteks keseluruhan jiwa (*spirit*) yang terkandung di dalamnya guna membangun kehidupan ketatanegaraan yang lebih tepat dalam upaya mencapai cita negara (*staatsidee*), yaitu mewujudkan negara hukum yang demokratis dan negara demokrasi yang berdasar atas hukum, yang merupakan penjabaran pokok pikiran yang terkandung dalam Pembukaan UUD 1945.”

54 Constitutional Court Secretariat, *Naskah Komprehensif Perubahan UUD 1945 Buku VI Kekuasaan Kehakiman*, p.709

55 Website of the Supreme Court, ‘<http://Www.Mahkamahagung.Go.Id/Rnews.Asp?Jid=8&bid=532>’.

56 Constitutional Court Secretariat, *Naskah Komprehensif Perubahan UUD 1945 Buku VI Kekuasaan Kehakiman* (Constitutional Court Secretariat). In the 7th Ad Hoc III meeting of the National Assembly on October 13 1999, Sri Soemantri highlight the supreme court judge’s recruitment mechanism to promote the dignity of the judiciary.

57 The minimum is 47 years and maximum 65 years at the time of first appointment “*Berusia paling rendah 47 (empat puluh tujuh) tahun dan paling tinggi 65 (enam puluh lima) tahun pada saat pengangkatan pertama*”

The decision stated that the petitioner does not have legal standing in the review, but judges in the consideration proceedings of the object reviewed state that the constitutional court had the authority to review the emergency law. It is not in line with the provision of Article 22 UUD 1945 that provides the authority to review the emergency law to DPR. However, there are some opinions agreed to the court with a certain condition. Through an emphasis on sociological and teleological interpretation, such a choice set aside historical and grammatical interpretation, even diverting from the original intent of the provisions in the emergency law in the constitution. This option is solely in guarding the constitution based on the principle that "there should not be a single second a Law that potentially violates the constitution without any evaluation through the judicial review."⁵⁸ Later, the Constitutional Court finally reviewed the emergency law Number 1/2020 concerning the State Financial Policy and stability of the financial system in handling the Corona Virus Disease 2019 (Covid-19) pandemic and/or dealing with threats that endanger the national economy and/or financial system stability (Constitutional Court Decision Number 23/PUU-XVIII/2020 and 24/PUU-XVII/2020). However, the verdict declared that the petitions 'could not be accepted because of the loss of objects of claim due to the consent of DPR to the emergency law and it became legislation during the review process by the court.

Constitutional Culture Of The Court

Constitutional culture thrives when mobilized groups feel that they can appeal to constitutional norms and procedures to have their dispute resolved. It withers when such appeals go unheard.⁵⁹ Self-restraint remains to be done without prejudice to the principle of independence of judges, with certain conditions that the judge must decide according to the law, justice and based on the general principles of law and principles of justice. Furthermore, Indonesian judges, especially constitutional judges, must preserve the elements of foundations of the republic, such as democracy, the rule of law, constitutionalism, the kinship and mutual assistance principles and also the aim of the republic, as stated in the preamble of the constitution. The decision in judicial review is a final binding, not only binding the parties but also the public, that could lead to certain legal consequences associated following the substance of the law and influence public policies. The conditionally constitutional case occurs when the court adds some new provision so that the same cases could proceed more than once. The decision of the Constitutional Court is double-sided; on the one hand, the judgment is directed at efforts to bring justice to the applicant, but on the other hand, such a decision potentially harms the existence of the law.

The principle of adjudication based on the law is the meaning of law in its broadest sense, including the actualization of the established notions. The legalistic judge does not automatically mean less justice for the people. On the contrary, judicial activism based on the reason of justice does not automatically means that the judge has given a sense of justice in the society. In the state law, the judges should decide according to the law; any decision is solely based on the law, not the will of an individual or groups allowing the abuse of power or arbitrariness.⁶⁰ The principle of adjudication based on the law, besides as the instrument of the rule of law, is also the expression of judicial restraint. Without the obligation to prosecute according to law, judges could become arbitrarily in deciding the case.

58 Ni'matul Huda, 'Penguian Perppu Oleh Mahkamah Konstitusi' (2010) 7 Jurnal Konstitusi 73.

59 'Tshepo Madlingozi, The Constitutional Court, Court Watchers and the Commons: A Reply to Professor Michelman of Constitutional Dialogue, 'interpretive Charity and the Citizenry as SANGOMAS. <http://Constitutionalcourtreview.Co.Za/Chapters/Chapter%202.Pdf>, 66'.

60 Bagir Manan (n 25), 127.

As Nicolai Wenzel said that constitutional culture involves the attitudes towards the constitution and constitutionalism, it can be seen that the Constitutional Court defines the constitution more than the UUD 1945 as the written constitution, as the basis of deciding any judicial review cases. The court is not only decided by the original intent interpretation but it is broadened to the sociological and many other interpretations to achieve the substantive justice as intended.

The following conclusions can be drawn from the previous explanation regarding the constitutional culture of the Indonesian Constitutional Court. First, the Constitutional court has the tendency to expand its authority. Constitutional judges as the interpreter of the constitution, have the power to legitimize the authority of other institutions in the constitution.⁶¹ In interpreting the constitution, constitutional judges must be very careful and, in certain cases applied self-restraint based on its independence and impartiality. The denial of self-restraint by the constitutional court leads to judicial activism.⁶²

The tendency to broaden the meaning of the constitution means that the Cultural constitution, formed in the Constitutional Court, led to the expansion of the meaning of UUD 1945 with different interpretations, especially for cases that gain public attention that made the Constitutional Court, in some occasion, become super body. However, once more, we should return to what KC Where said:

"It is well to ask first just what is meant by saying that judicial interpretation and decision can change a constitution. Courts, it must be emphasized, cannot amend a constitution. They cannot change the words. They must accept the words, and so far, as they introduce change, it can come only through their interpretation of the meaning of the words. The court may, by a series of decisions, elaborate the content of a word or phrase; they may modify or supplement or refine upon their previous decisions; they may even revoke or contradict previous decisions. But throughout, they are confined to the words of the constitutions. The fundamental point to remember is that the judge's proper function is to interpret, not to amend, the words of a statute or of a constitution, and such changes as courts may legitimately bring about in the meaning of a constitution spring from this function of interpretation, not from any inherent or secret function law-making".⁶³

Conclusion

The Constitutional court has the tendency to be a positive legislator by creating new provisions through the conditionally constitutional decisions to complement the provision on the law that had been reviewed. In the cases that may give rise to a conflict of interest, judges tend to broaden their jurisdiction, and there is no indication of self-restraint. The

61 Sujit Choudry (n 34), 828.

62 Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006), 271. "Judicial activism is the judicial tendency—conscious or unconscious—to achieve the proper balance between conflicting social values (such as individual rights against the needs of the collective, the liberty of one person against that of another the authority of one branch of government against another) through a change in the existing law (invalidating an unconstitutional statute invalidating secondary legislation that conflicts with a statute, reversing a judicial precedent) or through creating a new law that did not previously exist (through interpreting the constitution or legislation, through developing the common law). In changing an existing law or creating a new law, the activist judge does not hesitate to invalidate a legal policy created by other branches of government in the past, by judges who preceded him, or by individuals. To achieve his goals, the activist judge is willing to develop new judicial measures and means (including systems of interpretation, ways of overruling precedent, rules that open the court's doors to litigants) that will allow him to change the existing law or create new law."

63 KC Wheare, *Modern Constitution* (Oxford University Press 1966), 105.

principles in the constitution actually should be unity and, in its implementation, should be connecting each other. Basically, the constitutionalism principle is the principle in the limitation of authority. The Constitutional Court is in charge of guarding this principle and protecting the constitutional rights of the citizens. The real principle of power restrictions becomes part of human rights protection. Thus, the duty of an independent and impartial judiciary, as defined in UUD 1945, should guarantee the enforcement of constitutional principles.⁶⁴

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