

The Shield of Transformation of Constitutional Sovereignty: The Judgment of Constitutional Court

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The Shield of Transformation of Constitutional Sovereignty: The Judgment of Constitutional Court

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Abstract

The history of Indonesia constitutional is a proof that Indonesia has undergone a transformation of constitutional sovereignty. The constitutional sovereignty¹ means that the constitution is the supreme authority in a country. As guardian of constitution, the constitutional court⁴ has substantial role in the process of transformation of constitutional sovereignty. The purpose of this research is to analyze that the judgment of the Constitutional Court is shields of constitutional sovereignty by using a historical dynamic of constitutionalism of Indonesia. The result of this research will demonstrate that the judgments¹ have been issued by the constitutional court. They are the proofs that Indonesia has experienced a transformation of constitutional sovereignty.

Keywords: *Transformation, Sovereignty, Constitutional, the Judgment of Constitutional Court*

Understanding the history is a torch to illuminate the past, and to prevent us repeating the mistakes of the past. But we can not revise the history to suit our will. "

Claude G. Bowers (1878-1958)

1.Introduction

Constitutional life of a country can not be separated from the presence of both a written constitution or the constitution unwritten constitution¹ because the constitution is the supreme law that contains vision and include life values grow and develop in a society. Therefore, the constitution has vital role in the constitutional system and this urges an establishment of an institution that serves as the guardian of constitution.

Amendment of Constitution ratified on August 13, 2003 gave birth for the Constitutional Court (MK)² as an institution of Indonesian judicial power, and the Supreme Court (MA) in the state system of Indonesia³. The Constitutional Court of the Republic of Indonesia has four authority and the one obligation set out in Section 24C and Section 7B of the Constitution. The task of the Constitutional Court is to interpret the law with constitution as the guardian of the constitution and the sole interpreter of the constitution⁴ in order to protect constitutionality of the state administration.

The judgment of Constitutional Court has a final and binding force⁵. The existence of the Constitutional Court in Indonesia indicates that Indonesia is in process was proceed to uphold the supremacy of constitution⁶. This research will prove that there has been a transformation of constitutional sovereignty in terms of the judgment of Constitutional Court.

This research is very important for Indonesia, because Indonesia is on progress to be constitutional state. Therefore, it is necessary for studying constitutional sovereignty to avoid repetition of the cycle of modern king sovereignty and absolute state sovereignty repeat in Indonesia.

¹ K.C. Wheare, *Modern Constitution*, Oxford University Press, London-New York-Toronto, 1979. p. 61-62, which translated into Indonesian K.C. Wheare, *Konstitusi-Konstitusi Modern (Modern Constitution)*, Nusa Media, Bandung, 2015, p. 61-62, Dahlan Thalib, dkk., *Teori Dan Hukum Konstitusi*,p 58-59.

² The Constitutional Court of Indonesia is inseparable from the history that has happened among other cases, *Madison vs Marbury* in the US, the idea of Hans Kelsen in Austria, the idea of Moham Yamin in BPUPKI, and debate of Committee MPR at sessions in order amendment constitution and Janedjri M. Gaffar, *Kedudukan, Fungsi Dan Peran Mahkamah Konstitusi Dalam Sistem ketatanegaraan Republik Indonesia*, (Surakarta: Mahkamah Konstitusi Republik Indonesia, 2009) p. 3, see also Ahmad Fadli Sumadi, *Politik Hukum Konstitusi dan Mahkamah Konstitusi (aktualisasi konstitusi dalam praksis kenegaraan)*, Setara Press, Malang, 2013 p. 41.

³ Article 24 paragraph (2) of the Constitution states that: "the judicial power held by an institution Supreme Court, and by a Constitutional Court."

⁴ Secretary Jenderal of Constitutional Court, *Pendidikan Kesadaran*Op.Cit p. 131-132 see also Jimly Asshiddiqie dalam *Cetak Biru, Membangun Mahkamah Konstitusi sebagai Institusi Peradilan Konstitusi yang Modern dan Terpercaya*, Sekretariat Jenderal MKRI, 2004, p. iv.

⁵ See on Article 24C paragraph (1) constitution, Article 1 paragraph (1) point d UU No. 24 on 2003 about Constitution Court, LN RI No. 98 on 2003, TLN RI No. 4316) *juncto* Article 29 paragraph (1) point e Act No. 48 on 2009 about kekuasaan Kehakiman (LN RI No. 157 Tahun 2009, TLN RI No. 5076).

⁶ Jimly Asshiddiqie, *Konstitusi Bernegara: Praksis Kenegaraan Bermartabat dan Demokratis*, Setara Press, Malang, 2015. p. vii

2. Materials And Method

The method that be used is data analysis which is a decision of Constitutional Court that would be able to describe transformation of constitutional sovereignty in Indonesia.⁷ The approach to solve this problem is using the approach of case study reviewing Constitutional Court decision relating to education, development of state control doctrine and state institutions. The data will be analyzed by using a legal interpretation and construction.⁸ By doing interpretations of law, it will be a legal interpretation through legal discovery or *rechtsvinding*. Then, the legal construction is done through legal arguments *a contrario*⁹ will answer the legal issues.

Thus, a methods of legal discovery will produce legal argument that can answer law issues through legal logical and systematical. In the last, this article will be able to show that Indonesia has transformation of constitutional sovereignty by proved the Judgment of Constitutional Court.

3. Results/Discussion

Constitutional sovereignty means that the constitution is the supreme power in the state. Based on the history of the constitutional and confirmed by the Constitutional Court's decision, confirms that Indonesia is being transformed towards constitutional sovereignty. The Indicators are used to confirm that there has been transformation of constitutional sovereignty by decisions of the Constitutional Court. These decision are grouped by categories such as:

- a. Basic Rights of the enjoyment of education;
- b. The Development of State Control Doctrine;
- c. Constitutionality of Institutional State.

3.1 Basic Rights of Education

Some of the judgments of the Constitutional Court with regard constitutional review of laws against the constitution relating to transformation of constitutional sovereignty on category of basic rights of education, including Judicial Review of Law No. 20 of 2003, Law No. 12 of 2012, and Law No. 20 of 2013.

- a. *The Constitutional Court Decision No. 5/PUU-X/ 2012 on the Judicial Review Application Law No. 20 of 2003 on National Education System of the Constitution*

⁷ This research is a type of normative or dogmatic research that is searching for the truth in the science of law to see regulations written into the main object of study. Furthermore, the notion of normative law can be found at Suratman dan H. Philips, *Metode Penelitian Hukum*, Alfabeta, Bandung, 2013, hal. 54. Then Abdulkadir Muhammad on *Hukum dan Penelitian Hukum*, PT Citra Aditya Bakti, Bandung, 2004, p. 101-102. And also Bambang Sunggono on *Metode Penelitian Hukum*, Raja Grafindo Persada, Jakarta, 1997, p. x

⁸ Suratman, dkk. 2013. *Metode Penelitian Hukum*, Bandung: Penerbit Alfabeta. p. 86.

⁹ *Ibid.*

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The decision of Constitutional Court are granted the request of the applicant in its entirety: Article 50 paragraph (3) of Law No. 20 of 2003 on National Education System contrary to the constitution and does not have legal binding.

Constitutional Court Decision No. 5/PUU-X/2012 meant that in Article 50 paragraph (3) is contradictory to constitution and does not have legal binding, Position the constitution became the highest law in Indonesian and has moral values in them.

3

- b. *The Constitutional Court Decision No. 33/PUU-XI/2013 on the Judicial Review Application Law No. 12 of 2012 on Higher Education of the Constitution*

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The decision of Constitutional Court is rejected the request of the applicant in its entirety. It meant that Law No. 12 of 2012 on Higher Education does not conflict with Constitution. Reasons cited include: 1) the autonomy of public universities is an effort to achieve the goals of higher education; 2) a management form of public universities is not liberalization of higher education and does not conflict with the Constitution; 3) autonomy of financial management of higher education is not close access to affordable and quality education for society.

The basic recall used by the Constitutional Court is the issue of constitutionality that has been considered and decided by the Constitutional Court Decision No.103 / PUU-X /2012, dated December 12, 2013.

3

- c. *The Constitutional Court Decision No. 122 / PUU-XII/2014 on the Judicial Review Application Law No. 20 Year 2013 on Medical Education of the Constitution*

The Article of judicial review is Article 36 paragraph (1), (2), (3) and Article 39 paragraph (1) and (2) of the Law of Medical Education of constitution. Constitution Court Decision is reject the application for entirety.

The Court considers that the application has no legal grounds. The main problem in this decision is that should be considered by the Court, namely (i) the doctor competency test, (ii) Issuance of certificates of competency doctor, and (iii) primary care doctor and also the Constitutional Court say that the applicant does not have legal standing to give application.

Some Constitutional Court decisions related to constitutional rights of education such as Constitutional Court No 5/ UU-X/2012, No. 33/PUU-XI/2013, and No. 122/PUU-XII/2014 described that court decisions has enforce supremacy of the constitution.

3.2. The Development of State Control Doctrine

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Some of the judgments of the Constitutional Court regarding to judicial review of laws with constitution related to the change of state sovereignty in the category the development of state control doctrine (*Hak Menguasai Negara*) such as the Forestry, Electricity and Minerals.

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- a. *The Constitutional Court Decision No. 32/PUU-VIII/2010 on Judicial Review Application Law No. 4 of 2009 on Mineral and Coal Mining of the Constitution*

The judgment of Constitutional Court is granted the request of the applicant in part. The Constitutional Court only accepts the application of Article 10 letter b.

Based on the Constitutional Court Decision No. 32/PUU-VII/2010 provides for the obligation of the state to protect, respect and fulfill the interests of the community and its land area will be incorporated into the mining regions and communities that will be affected. The decision illustrates the change in sovereignty of countries that were previously the only state "... considering the views ... the public" in accordance with Article 10 letter b of Law No. 4 of 2009 through this decision the state has an obligation to protect, respect and fulfill the interests of the community that the regions and soil hers will be incorporated into the mining regions and communities that will be affected.

- b. *Constitutional Court Decision No. 35 / PUU-X / 2012 on Judicial Review Application Law No. 41 of 1999 on Forestry of the Constitution*

The judgment of Constitutional Court verdict on the petition granted the request of the applicant in part The Court only accepts the application of Article 1 letter 6, Article 4 paragraph (3), and Article 5.

The Court Decision is strengthens that has been change of state sovereignty to popular sovereignty in the development of state control doctrine. Based on this decision, the word "states" in Article 1 of Law No. 41 of 1999 on Forestry to be abolished "indigenous forest is a forest located in the area of indigenous people." And Article 4 paragraph (3) of Law No. 41 of 1999 on Forestry "state forest control by taking into account the rights of indigenous people, all still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia stipulated in the legislation. Prior to the decision of this forest is state forest interpreted the absence of recognition of indigenous forest. Only after the verdict gives the strength that indigenous forests separated from state forests as a form of popular sovereignty.

- c. *Constitutional Court Decision No. 85 / PUU-XI / 2013 on Judicial Review Application No. 7 of 2004 on Water Resources of the Constitution*

The decision of the Constitutional Court on the petition of the petitioner is granted in its entirety. UU No. 7 of 2004 is contradictory to the Constitution of the Republic of Indonesia and does not have binding legal force. Law No. 11 of 1974 on irrigation reenact replace Law No. 7 of 2004 on Water Resources.

SDA Law in practice has been interpreted differently from consideration in the Decision No. 058-059-060-063/PUU-II/2004 and No. 008/PUU-III/2005. Court needs assert that in Indonesia, meaning that the land and water and natural resources contained in it are controlled by the state and utilized for the benefit of the people mandated that in the view of the founders of the nation, especially the framers of the Constitution, water is a very important element and the basics of life and human life or dominate the life of many people. One important element in human life that dominate the life of many, water should be controlled by the State of Article 33 paragraph (2) and (3) of the Constitution.

Based on these considerations, the utilization of water there must be severe restrictions in an effort to preserve and sustainability. As there may be restrictions on the State Power

¹¹ of Water Resources. ²³ No. 7 of 2004 on Water Resources by the decision gives enormous power to the private sector to manage the Water Resources of Indonesia. This is considered contrary to the Constitution.

³ d. *Constitutional Court Decision No. 95/PUU-XII/2014 on Judicial Review Application Law No. 18 of 2013 on Preventing and Combating Deforestation and Law No. 41 of 1999 on Forestry of the Constitution*

Grant ⁷ the request of the applicant for the most part;

1. Article 50 paragraph (3) letter e of Law No. 41 of 1999 on Forestry contradictory ²¹ the Constitution to the extent not interpreted that provision is excluded communities that live for generations in the forest and is not intended for ⁷ commercial purposes;
2. Article 50 paragraph (3) letter e of Law No. 41 of 1999 on Forestry.

¹ This is one of the Constitutional Court decisions outstanding. The Constitutional Court, it is to guarantee the fulfillment of the constitutional rights of indigenous forest communities. This decision also shows the process of sovereignty transfer that is the country's sovereignty in terms of the right to control the state shifted to the sovereignty of the people.

Some of Constitutional Court decision is relating to the Right to Control State including No. 32/PUU-VIII/2010, No. 35/PUU-X/2012, No. 85/PUU-XI/2013, No. 95/PUU-XII/2014 shows that there has been a change the system in which is the state sovereignty to people sovereignty. That is proof that Indonesia has transformation of constitutional sovereignty.

3.3 Dispute Institutional Countries

¹ Some of the judgments of Constitutional Court is regard to judicial review of laws and Constitution related to transformation of constitutional sovereignty dispute in the state institutions category. Here are some Constitutional Court decision related to state institutional dispute ever handled by the Constitutional Court.

⁴ a. *Constitutional Court Decision No. 068/SKLN II/2004 on Case Highlights Dispute Authority of State Institutions in the case of the appointment of the Chairman of the BPK by the President*

The object of dispute this petition is the authority of the appointment of Chairman of the BPK by the President. Constitutional Court in this case ¹ declare that DPD as the applicant then the President and Parliament as a defendant is a state institution who ¹ authority granted by Constitution. Authority disputed by the applicant is correct authority to propose the appointment of the chairman of the BPK and also true authority of the President and Parliament to appoint the Chairman of the BPK such as mandated by the constitution. However, in this case the applicant can not prove their arguments to the Court because at the time the increase on chairman of BPK, council has not been constituted and yet contain members. The Court decided that the President and the Parliament is a state institution when it has the constitutional authority to appoint the chairman of the BPK without any considerations of the DPD, because at that time there was no DPD.

- b. *Constitutional Court Decision No. 025/SKLN II/2005 Case Highlights Dispute Authority of State Institutions in terms of determining the certainty Leadership in Lampung Province*

Dispute objects in this application is the determination of certainty Leadership in Lampung Province. Constitution Court Decision is reject the application for entirety. Type Case No. 025/SK⁸N-III/2005 is justified and not in conflict with the law with due regard to Article 35 of Law No. 24 of 2003 regarding the Constitutional Court, which states that "1) the applicant may withdraw a request before or during the hearing the Court Constitutions do. 2) the wi²⁹drawal referred to in paragraph (1) resulted in the petition can not be filed again. Under the provisions of Article 35 of the Law of Constitutional Court led to the Petitioner can not reapply for a quo.

- c. *Constitutional Court¹ Decision No. 004 / SKLN-IV / 2006 on the principal case Dispute Authority of State Institutions regarding the appointment and dismissal of the regent and deputy regent approval by the Minister of Home Affairs*

The judgment of Constitution Court is reject the application for entirety. In the Constitutional Court's decision No.004/SKLN/2006, states to define the object of the dispute is not only interpret textually sound of Constitution which authorizes certain institutions, but also the possibility of seeing their implicit powers contained in a principal authority and the necessary authority (necessary and proper) for running the authority of the principal. The principal powers is contained in an Act. This means that the Court declare the petition can not be accepted (*niet ontvankelijk verklaard*). In this dispute over state institutions in dispute in the Constitutional Court is the President, Minister of Home Affairs, Parliament, and the Regent.

- d. *Constitutional Court¹ Decision No. 1/SKLN-X/2012 on Case Highlights Dispute Authority of State Institutions in determining the phase delay local elections in the Aceh Province*

The object of dispute this petition, the delay stages of local elections in the Aceh Province.

1. The Court found the defendant of the Commission as a body of state authority granted by the Constitution, while KIP Aceh as the second defendant is not a state agency that has the authority granted by Constitution.
2. The Court found the applicant's interior minister as though included in the affairs of presidential authority granted pemerintahan impressed that has positioned itself as a defender of the interests and provide top notch privileges to a particular group, should the applicant as civil servants can treat its citizens in an equal.
3. That the applicant stating the purpose thereof occurrence of specific disorders *Kamtibnas* is not in accordance with security conditions in Aceh that are still favorable in organizing the General Election to determine prospective phase and sequence number within the requested program is going well, the Police Department here is also stated that the security in Aceh yet entered in a dangerous state.
4. That the apparent level of community participation were handed over ID cards is very high ranging from 176.767 pieces as a form of support which is the real

strength of the political landscape, the security issue is the authority of the police which is not an excuse to delay Election has gone well/normal just because no one political parties obviously delay the election would be detrimental Aceh.

5. That request did not specify the applicant's vague because the applicant authority clearly drawn, reduced, blocked, ignored, and are disadvantaged by the Second Respondent in this case KIP Aceh.

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E. Constitutional Court Decision No. 3/SKLN X/2012 on the Principles of the State Institute for Dispute Case in terms of authority is the General Elections of Governor and Vice Governor of Papua

The object of dispute in this petition is the General Election of Governor and Vice Governor of Papua. The verdict on the petition is granted on the grounds that in consideration of the law in the Constitutional Court decision No. 27 / SKLNVI/2008 mentioned Election Commission which is national, permanent, and independent is a state institution that has the constitutional authority to hold elections as referred to Article 22E paragraph (2) of the Constitution, so that the applicant has legal standing to apply for dispute the authority of state institutions and the respondent as a representation of local government is the constitutional authority of state institutions also governed by the Constitution.

The Court did not find convincing evidence that the election of the Governor and Deputy Governor of Papua is the specificity of Papua Province which is different from other provinces in Indonesia, the Court also believes the election of Governor and Vice Governor by Parliament as provided in Article 7 paragraph (1) letter a of Law No. 21 of 2001 does not meet the criteria of specificity or privileges attached to the relevant area, either because the right of the origin attached to the Papua Province which has been recognized and kept alive, as well as the background of the establishment and the real needs of the need for specificity and privileges of Papua as part from the Republic of Indonesia.

The Judgment of 3/SKLN-IX/2012 is the only verdict that states grant the request. In this case obviously the Commission is a state institution whose authority is granted directly by the Constitution, as well as the Parliament of Papua included in subjectum litis and the object of dispute is to hold elections in the province of Papua which authority to hold elections system was taken over by the Parliament of Papua.

1
 Some of the decision of the Court relating to the institutions of the country including 068/SKLNII/2004, 025/SKLNIII/2005, 004/SKLN-IV/2006, 1/SKLN-X /2012, 3/SKLNIX/2012 shows that there has been a change in the system of sovereignty where the system of state sovereignty shifted to a system of people sovereignty. It is a proof that Indonesia has transformation of constitutional sovereignty.

4. Conclusion

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 Decision of the Constitutional Court was used as a transformation shield of constitutional sovereignty in Indonesia. The conclusion of all the Constitutional Court decisions show that the position of the Constitutional Court as the guardian of constitution is very strategic in

constitutional of Indonesian given that the decisions of the Constitutional Court is a final and binding decision. Through decisions in the category of basic rights in the enjoyment of education; right to control the country; institutions constitutionality of the country have proved the sovereignty of constitutional transformation in Indonesia.

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