Constitutional Dialogue in the Indonesia Election Law: Tension between the Indonesian Constitutional Court and the Legislature

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Abstract: This paper elaborates the Indonesian Constitutional Court's competences on specific issue of judicial review on the Election Law and dispute settlement of election in Indonesia. It is addressed to examine relationship between the Constitutional Court of the Republic of Indonesia and the Legislative branch on the issue of the Election Law. The Indonesian Constitution (the Amendment) determines two important election issues, first is the type of elections, namely the legislative election and the presidential election. Other issues is the institutional arrangements of election and the principles of electoral administration. The Constitution gives the legislature the power to make election law regulating the election agencies, the election systems, the election processes and dispute settlement of the election results. With regard to the democracy, election Law is the authority of the election agencies. However, the power to make election Law has to be check by the Court. This paper indicates that the Indonesian Constitutional Court is an active-progressive court in dealing with Election Law. Therefore, the Court tends to be very decisive in its decisions. While handing down strong decisions to uphold important constitutional principles could bring great benefits to citizens, the Court is eager to strengthen support for democracy. On the other hand, the role of the Court on special issue of judicial review tends to encroach on the territory of the Legislative. This paper end up with the proposal of a new approach for Indonesian Constitutional Court on the issue of Election Law. It is argued that the Court has to prevent the characters as an "activist", "decisive" and "reactive". The Court has to conduct constitutional dialogue with the Legislature specifically on the constitutional meaning in term of election.

SCIENCE AND TECHNOLOGY PUBLICATIONS

1 INTRODUCTION

The Indonesian Constitution (the Amendment) implies three aspects of general election, namely the type of elections, the general election organizer, and dispute settlement of general election. On the type of elections, Article 22 E Section (2) stipulates that the general election is for electing the House of Representative member, Regional Representative Council member, the president and the vice president, and the House of Representative at local level. On the head of local government, Article 18 Section (4) clarifies that the Governor, Regent, Mayor is democratically elected. On the general election organizer, the Indonesian Constitution confirmed that the general election is organized by a general election commision. Furthermore, with regards to the dispute settlement of general election, Article 24 Section (1) confirmed that one of the competences of the Indonesian Constitutional Court is dispute settlement of the general election result. To this extent, issues on election law, namely on the general election system, the general election procedures, and the dispute settlement on the general election process are issues which is delegated and futher regulated on Law. It has the meaning that the law maker has the competences to decide the design of general election system, electoral proccess and dispute settlement regarding to the process or procedural of the general election. In this context, the law maker has broad power to decide the election law in Indonesia.

On the other hands, the law making power has to be balance by the judicial power, specifically the Constitutional Court in term of judicial review on Law including the Law on general election and other laws relevance to the institutional arrangement as well as the Law relevance to the electoral process. Judicial review has its roots on the principle of constitutional supremacy and constitutionalism. From the constitutional supremacy perspective, any Law under the Constitution shall not be contradictory to the Constitution. Therefore, there should be a

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mechanism to review the constitutionality of a law (the constitutionality of legislation). In constitutionalism perspective, the limitation of power is imposed. The limitation means that the absence of control mechanism on the legislature tends to abuse of power. The situation could contribute the possibility of law making in contrary to the norms of the Constitution (Marzuki, 2010). On the other issues, the constitutionalism also means the recognitions of the human rights which have consequences for the enforcement of those rights by an independent judiciary, including the protection from existence of Laws that could harm human rights. Although judicial review stands on the principle of constitutional supremacy and constitutionalism, in a constitutional democracy state, the judicial review always raises normative question of two things; namely institutional legitimacy and how these institutions should be run. Furthermore, in the context of constitutional democracy, the judicial review has placed the Constitutional Court as a superior institution in control relations of the branches of legislative and executive power. At the national level, views and concerns arise as a response to some of the Indonesian Constitutional Court decisions in judicial review cases on electoral law such as: Decision No. 22-24/PUU-VI/2008 on the issue of majority vote in Electoral Constituencies (Proportional Representation List). Decision No. 102/PUU-VII/2009: Decision contains norm-making (directive) as in popular case of "the used of ID cards in the Presidential Election". In fact that the context of the constitutional court competence on the dispute settlement on the general election result encourages the Constitutional Court to act beyond its competences by deciding the disqualification of one of the head of local government candidate as it was decided on the Courrt Decision No. 45/PHPU.D-VIII/2010. On the dispute settlement of the election result, the Constitutional Court decides the final result of the candidates votes as on such case, the Constitutional Court decides to disqualify the candidate.

Such decisions generates fundamental problems concerning on the proper role of judiciary in the context of the framework of the institutional relationship within the constitutional law system, in accordance to the principle of separation of powers, particularly the authority of the Court in conducting a proportional judicial review in democracy. The strengthening of the judiciary branch brings consequences to the development of the role of judicial power to conduct further justice that overstepping powers and authorities, which has been the political domain of the executive power and legislative power (Koopmans, 2003). To response such phenomenon, the German law Journal (2007) , in particular publishes a controversial provocative issues, namely the coup on the courtroom (coup de'tat in the courtroom), with the main article from Alec Stone Sweet, describing the phenomenon of widespread and more powerful judiciary. Meanwhile, Hirschl (2004) describes such phenomon as "juristochracy," and Schepelle calls it as a 'courtocracy' where in different countries, the constitutional reform has transformed the power of the representative bodies to the judicial institution by the recognition of human rights in the Constitution and the mechanism of judicial review. The transformation in this case, has the meaning that the important public policies which originally was in the hands of the elected-agencies and made on the basis of consensus or majority decision was to be switched to the judiciary (Bugarij, 2001; Bell, 1983). Such transformation was also shifting the concept of democracy, from the 'majority rule' to the 'real-democracy', namely, the constitutional democracy as a shift of the "democracy governed predominantly by the principle of parliamentary sovereignty" (Hirschl, 2004).

For such purpose, this article analyse the institutional relation between the Constitutional Court and the Law Maker and its implication to the development of the election law in Indonesia. This article also offers constitutional dialogue method on the development of the election law.

2 JUDICIAL REVIEW OF LEGISLATION ON ELECTION LAW

The Judicial review by the Constitutional court which refers to the Constitution is a constitutional adjudication activity. The constitutional adjudication in principle is how the court could work on the Constitution. In different words, the adjudication is on how the justice decides or has to decide cases on the constitutional adjudication. In this context is the issue of theory of judging. As the interpretation is about an inherent activity on the judicial review, the basic question on such constitutional interpretation is that how the Constitution has to be interpreted. In other words, the judicial review is not a matter of assessing whether or not chapters, articles, or sections in the Law are in accordance to the Constitution. The judicial review is even more about implemented the

constitutional norms once the Justice decides the meaning of constitutional norm. Threfore, the judicial review has dimentions of interpretation on reviewed Law, which is in practice known as statutory interpretation, and the constitutional interpretation as tool to review the Law. On the later dimension, the judicial review is not only giving interpretation of the constitutional text, but also how the constitutional interpretation is implemented on the reviewed Law. To this extent, the judicial review against the Law is very often on the area of both activities of interpretation and construction (Barnett, 2011).

On the second activity, it indicates that the Constitution has always to be interpreted. There are some reasons on this point. First, because the Constitution has the characters of lasting, inclusive, principled, and fundamental (Pitkin, 1987), therefore the substance in the Constitution is on the basic aspect and fundamental principles. The consequences of the basic and fundamental principles in the Constitution is that it needs further regulations which has to be available because of the Constitution say or because of the urgency of regulation which delegates to the Law as inferior to the Constitution. On this point, the Constitution has to be interpreted to make sure that the Law as delegated is not contradictive to the Constitution. Secondly, the used of language on the Constitution has the characters of open texture. Therefore, the meaning is often not single in term of interpretation or construction. For example on the general election context on the Indonesian Constitution has the term " democratically elected", "direct, general, and free, secret, honest and equal" as principle of election. Interpretation of such words or phrase or sentences on the Constitution depends on the subject who do interpretation as well as the approach which they may use. Textually, such kind things would not be interpreted when it has no conflict. On the constitutional adjudication, Justice Hughes states that '*a constitution is without meaning until the judges pour meaning into its provisions'*. (Motala & Cyril Ramaphosa, 2003). Third, the Constitution making depends on the moment and specific context. Consequently, the interpretation of the Constitution is not the same as when it was made and when it is developed. If the interpretation of the Constitution has fix meaning, it needs to be contructed once it is implemented in the judicial review. Such third argument delivered interpretation into two perspectives, namely orginalism dan non-originalism.

In the context of election Law, regularly, every 4 or 5 years, the election Law could be changed. After the first Amendment of the Indonesian Constitution on 1999, the election law has been changed from 1999, 2008, 2013 dan 2018. From all changes there are two significant aspects in term of institutional power. First, the frequency of periodic changes is not a matter of a sign that regular elections are started but the law maker, the DPR is very powerful on determine the substances of election law in term of system, mechanism, and dispute settlement. Second, after the establishement of the Constitutional Court, the Court decisions has significantly contributed to the development of election law. The cases below will show us about approaches that Justices of constitutional court argue concerning election law:

1. Case No 22 – 24/PUU – VI/2008

   On the determination of the elected candidate in the DPR, the DPD, dan the DPRD election, the Court decision has significant impact according to the case No 22 – 24/PUU – VI/2008. One of the review on such case is the review on Article 214 a, b, c, d, dan e Law No. 10 Tahun 2008 on the DPR, DPD, and DPRD election which has the point to determine the elected candidate who gets about 30% votes from the BPP, or below when no one gets 30% from the BPP, or below when no one gets 30% from the BPP more than proportional votes for a political party participate in the election. The Constitutional Court argues that Article 22E ayat (1) UUD 1945 stipulates that the election is conducted with broad participation from people on the basis of democracy principle, direct, general, free, secret ballot, honest, and fair. The election of the DPR, the DPD, and the local DPRD with the proportional system according to Law No. 10/2008 gives more freedom to the people in determining legislative candidate. The Constitutional Court argues the consequences would be easier to determine who is elected and the legislative candidate who gets vote or more support from the people. To this extent, Article 214a, b, c, d, and e the Law No 10/2008 is contradictive to the Constitution. Therefore it is decided unconstitutional.

2. Case No. 102/PUU-VII/2009

   On the popular case of the usage of identity card, the Court decided that Article 28 and Article 111 the Law No 42/2008 on the presidential election is constitutional. The Court made legal norm on the right to vote for those who is unlisted on the fixed voter listed (Daftar Pemilih Tetap/DPT). The formulation of regulation on who and how the the voting right is implemented for the unlisted voter is a form of law making process by the Court. Although the regulation is just an order to

the general election commission to make regulation on the unlisted voter which have been unregistered in the voter list.

3. Case No. 45/PHPU.D-VIII/2010
   In general, the decision on the dispute settlement on the result of general election, including the election of head of local government is about the final result of the election. Commonly, the decision is to determine the voting result or in case of general election violation. The Court could order the reelection. Notwithstanding, the Court decision on the case of Kotawaringin Barat would be different from other cases in term that the Court was not only disqualifying the candidates but also to order general election commission to decide the mayor and vice mayor is elected.

The Court contribution in election system is not only from its decision but also in the context of dispute settlement of the election result, specifically on the head of local government election. On the case of head of local government elections, the object (objectum litis) is the result of the calculation process as it is regulated on Article 106 Section (2) the local government Law, which state that " any objections as mention in Section (1) is only in terms of the result of votes calculation which influence the elected candidate." Notwithstanding when the constitutional court conducts trial and decide the dispute settlement of the result of Eeast Java head of local government, the Court was not only deciding the dispute settlement with regards to the vote calculation, but also conduct trial on the violation which significantly influenced on the result of vote calculation. On its consideration on Decision No 41/PHPU.D-VI/2008 on the dispute settlement of the election result of the Eat Java head of local government, the Court conducted judicial review on Article 106 Section (2) of the Law on the local government against the Constitution. The output of the judicial review is the interpretation of Article 106 Section (2) the local government Law. In such case, the case was actually not about judicial review but on the dispute settlement of the election result. The judicial review which conducted by the Court was a *pseudo judicial review*. In 2010, when the court decided case No 45/PHPU.D-VIII/2010 on the dispute settlement of the head of local government of Municipality Kotawaringin Barat and other cases, the Court has the same argument to conduct not only dispute settlement on the election results, but also violation which structured, sistematically, and has significant impact to the votes.

On some arguments, the Court in the context of judicial review and the dispute settlement of the election results and response implication to the law maker, could be implied that the judicial review, the relationship between the Court and the law maker is representative of two tension which has dichotomy character, namely constitutionalism and democracy with the single question on who the supreme power on upholding the Constitution (Van Hoecke : 2001). In some perspectives, the Constitutional Court is assumed to be beyond its competences. The Constitutional Court has tendency to be more activism. The response against such perspective could be seen in the amendment of the Constitutional Court Law (Law No. 8 Year 2011). On Article 57 Paragraph 2 (a) of the Law, it is stipulated that in order to limit the model of the Court decision, the Court Decision has to be not in the form of ultra petita. Furthermore, the Court's Decision has not to be made as norms since the DPR is the law maker.

On the constitutional perspective, with one of the characters that the guaranteee and the protection of human rights, the Court is the guardian to the constitutional rights of citizens by make sure that Law is not contradictive to the constitutional norms and against the constitutional rights.On the other hands, the representative bodies with the legislative function is a institution which is elected by the people within the democratic representative system who has the authority to determine the public policies. The product of such institution is Law. The judicial review which is conducted by the Court is according to the mechanism of 'counter majoritarian' since the Court in this term annuls Law which had been made on the basis of majority agreement within the representative body. In the context of presidentialism, the President of Republic Indonesia is elected by the people is also an institution which has the competence as law maker. Therefore, the judicial review by the Court is not only as a mechanism of 'counter-majoritarian' against the representative body, but also agaisnt the executive power of the President.

According to democracy perspective, there are arguments which identified that the judicial review is against the democracy principle and vice versa. (Bickel, 1986; Waldron, 2003; Kramer: 2007). Moreover, on the issue of people soverignty in the general election as the instrument of the democracy, in democracy principle (demos and kratia), the definition of government from and by the people has the meaning of "rule of the people" which fully influenced and controlled by the people. Such concept contains basic idea that the people has the supreme power to direct within the public domain and

that is being the basic concept which is called 'responsive rule'or 'popular rule', 'popular government' or 'populer sovereignty' or people sovereignty which strictly mentioned in the Constitution. as a consequence of the people sovereignty principle, the majority of citizens who participate in the general election have to hold the basic power for any policies decisions in the representative government system (Zurn, 2007; Hardiman, 2013) . On the concept of people sovereignty which is identically as the democracy principle, the judicial institution reviews the constitutionality of the Law is assumed to be contradictive to the democracy since the law maker has more legitimacy and participatory characters than the judicial institution.

Bickel argues that the prior argument to such objection for this mechanism of judcial review is because the argument of 'counter majoritarian difficulty' (Bickel: 1986), meanwhile, a German Jurist, Schmitt states that the objection of judicial review is beacuse the fear of the consequence which is called judicialization of politic and the judicial institution which tend to have more politic character rather than judicial character (Boix and Stokes, 2013). Marmor, argues that the judicial review is not easy to adjust with the democracy principle since the commitment against the procedural decision making on the democracy and judicial power on the annulment of the legislative decision which has been elected by the people. (Marmor: 2005). The argument which mentioned that the judicial review mechanism is not against the democracy, is argued by Eisgruber (Eisgruber, 2006) . Accordingly, the judicial review gains justification in the democracy principle, namely that the judcial institution upholds democracy values. Dworkin on his work (Dworkin, 1990) "Bill of Rights for Britain", states that the judicial review is needed since democracy has to be protected from the majority tyranny. Siahaan (2010), on the same context as Dworkin, states:

"*It is true that the duties to review the constitutionality of Laws is better to be separately attached to the law maker (the legislative and the executive). The internal review (legislative review atau executive review) is assumed has subjective character.*"

Besides democracy arguments, the debate on the judicial review is also based on the argument of the separation of powers which implemented in the form of separation and division of powers. The separation of powers is by power limits power on the basis of different function of power. To this extent, eventhough there are arguments mentioning that the judicial review is about check and balances against legislative products, and conducted by the independent and impartial power, it does not mean that it could be justified to be taken over by the judicial institution. Grabenwater (2011), Austrian Constitutional Court Justice, on his keynote speech on 2nd Congress of the World Conference on Constitutional Justice, stated that:

"The constitutional judge who respects the separation of powers between legislation and the judicial control of legislation will take due account of the margin of appreciation, of political questions and of the democratic legitimacy of decisions of Parliament."

3 CONSTITUTIONAL DIALOGUE AND PROPORTIONAL ROLE OF CONSTITUTIONAL COURT

The relationship between the Constitutional Court and the law maker in the context of the electoral law making could be seen within the constitutional Dialague. Constitutional dialogue is about descriptive concept and normative concept (Dawson, 2013) . The descriptive concept of constitutional dialogue refers to the practice of interaction and deliberation between legislature and the judiciary over how constitutional commitment should be applied, whereas, in normative concept, constitutional dialogue is more than an observation but a means of defending judicial review (Grabenwater, 2011). Refering tp the three decisions on the electoral law, the Court seemingly applied "judicial activism". It has the meaning that on the constitutional dialogue framework between the law maker and the constitutioal court in term of judicial review shows the domination that the Court has judiciary supremacy. In general, Butt (2006) considers that the Indonesian Constitutional Court could be categorized as adherents of judicial activism under the first two periods of court leadership. Furthermore, Butt refers the Court's activism to South Korean Constitutional Court. According to his perspectives, there are two aspects that could indicate judicial activism, namely the first "active in the sense that it actually performs its function and invalidates statutory provisions - or even entire statutes.-as it deems necessary ". Secondly, it is shown from the consistency of "rejection of legislative attepts to restrict what it believes to be its constitutionally mandated constitutional review of jurisdiction and its theories at its boundaries of its jurisdiction".

Referring to the opinion of the Butt, the issue of judicial activism and the restriction of the judiciary must depart from the concept of originalism and non originalism. Since 1990 the term "judicial activism" and "judicial activist" has been discussed in 3,815 articles and reviews in various journals of law. Judicial activism and judicial restraint, relating to "how well they realize the judicial role of bridging the gap between law and society's changing reality and the role of protecting the constitution and its values The term judicial activism was first introduced by Arthur Schlesinger in January 1947 in Fortune magazine. Black's Law Dictionary defines judicial activism as follows:

A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.

Justice Barak (2006), defines judicial activism as follows:

> *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 change in the existing law (invalidating an unconstitutional statute, invalidating secondary legislation that conflicts with a statute, reversing a judicial precedent) or through creating new law that did not previously exist (through interpreting the constitution or legislation, through developing the common law).*

Criticism or a negative view upon judicial activism is because judges are deemed to use their judicial discretion contrary to general principles, such as the principle that judges only exercise the function of applying laws made by legislators. Conversely the judge positioned himself to give consideration to the political, social, and economic policies even replace the position of legislator. Judges decide cases or legal disputes so that they do not become policy-makers, because "Judges are well versed in the law but they are manifestly not the best equipped" to translate "community values into constitutional policies ...".

To this extent, in terms of building an equal relationship on the constitutional dialogue, the role of the Constitutional Court in judicial review is needed, specifically on the issue of election Law for particular issue of election system. Such mechanism of dialogue could be achieved by:

First, on the constitutional issues that clearly delegated entirely to the legislator, which is often referred to as an open legal policy, the Constitutional Court should not overstep the legislative-regulatory zone as a result of the annulment. This means that the Constitutional Court retains the power to annul, but the Constitutional Court has no right to regulate (making law), since the constitution clearly grants the power to the legislator. If the Constitutional Court is oriented to make Laws, it is not necessary to make a decision with a conditional interpretation model or the formulation of new norms, but the Court may only provide sufficient guidance on certain constitutional issues in the consideration of its decision. Moreover, the lawmakers will refine or make a new law with the suggestions according to the Court's decision. As a consequence of the third point, in the decision, the Constitutional Court shall explicitly submit its suggestions to the legislator.

Second, as a consequence of the hierarchy of Laws and the consequences of the separation of powers, the Constitutional Court’s decisions may not contain imperative order to lawmakers to enact law and to make a law with any substances determined by the Constitutional Court. However, this is different from the South African Constitutional Court which indeed in the Constitution authorizes the Constitutional Court to review the bill so that the Constitutional Court's decision becomes the basis of consideration of the substance of the law in the law making process. Similarly to the South African Court, the Hungarian Constitutional Court's authority is ex officio authorized initiating a case in situation of omission by the legislature. Therefore, its decision enforce the legislator to apply the decision in the law making process. The 1945 Constitution has separated powers to each of power holders, so the order to make law is directly derived from the Constitution and not from the Constitutional Court decision. The Constitutional Court's decision only resulted to be followed-up, but not an order for the legislator.

Third, the legitimacy process in the separation power schemes should be part of the Constitutional Court's procedures. Especially if the judicial review of the law is a form of deliberative democracy conducted by the Constitutional Court, then the principle of all parties’ views and opinions must be heard shall be actually done. This principle takes precedence over the legislators, so it is not appropriate to review legislation without hearing any statements from the legislator even though by reason of urgency. In the cases referred to as the use of the

ID cards and in any similar cases such as the use of the right to vote, without hearing the statements of the legislator is a violation of the principle of the *audi et altera partem*.

4 CONCLUSIONS

The Indonesian Constitutional Court is the Court which has the character of judicial activism in judicial review on the Election Law. Such character of judicial activism, in this sense, empowers the principles of fair and democratic election in Indonesia. However, the design of election in Indonesia is within political area. At this point, the Indonesian Parliament has the authority to make Laws in particular issue of elections. In practice, the Court's decisions on the judicial review of the Election Laws is often being resistence from the Parliament. Therefore, the Court has to make the decision more proportionally on the basis of the principle of separation of powers.

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