

Repositioning the Role of the Constitutional Court as Positive Legislature in Indonesia

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Abstract The position of the Constitutional Court (MK) is as negative legislature. But in a certain decision the Constitutional Court acts as a positive legislature. Repositioning can be interpreted as a placement back to its original position; rearrangement of existing positions; placement to a different or new position. The significance of this article is to give a solution to this issue so that the authority of the Constitutional Court could return to its original position, as outlined in the 1945 Constitution of the Republic of Indonesia. The ruling of this research is based on legal, philosophical and sociological considerations which can't be separated from legal interpretation. The new norms born of the Constitutional Court decision which is positive legislature directly has legal implications for the wider community. The is equivalent to the Act because it is final and binding.

1 INTRODUCTION

Standards in improving the quality of democracy are used for outside political evaluations concerning the minimum understanding of democracy. What is the quality of democracy? The term "systemic turn" contained in the literature on deliberative democracy is now a promising thing. There are many special theories that are used for questions about deliberative systems because little is offered about the criteria needed by the system to be deliberative democratic. The purpose of this paper is to contribute to the systemic approach by establishing some desiderata that satisfactory accounts of the deliberation system must consider when developing these criteria. This is done by analyzing the main properties of a deliberative system in relation to three essential aspects of democracy: representation, equality, and inclusion. Among other things, it is argued that when theorizing criteria for what a deliberative system requires, a systemic account should carefully distinguish between political and epistemic representation, between political and epistemic equality, and between political and epistemic inclusion.

This article first reconstructs and assesses current conceptualizations of the quality of democracy. Thereafter, it reconceptualises the quality of democracy by equating it with democracy pure and simple, positing that democracy is a synthesis of political freedom and political equality, and spelling out the implications of this substantive assumption. The proposal is to broaden the concept of democracy to address two additional spheres: government decision-making — political institutions are democratic inasmuch as a majority of citizens can change the status quo — and the social environment of politics — the social context cannot turn the principles of political freedom and equality into mere formalities. Alternative specifications of democratic standards are considered and reasons for discarding them are provided.

Positive legislatures (Martitah, 2013) are not as popular as *negative legislatures*. The authority of the Constitutional Court should not be a *positive legislature* but a *negative legislature*. According to Hans Kelsen in the book *General Theory of Law and State*, affirming ... "A court which is competent to abolish laws individually or generally function as a negative legislator" (Kelsen, 1961). For a constitution to have meaning, the constitution must be functional, in the sense that the constitution is effectively able to

fulfill its functions, so that there is no gap between what is written in the Constitution and the reality of it, how the constitutional is used in everyday life of the citizens of Indonesia (“Peranan Mahkamah Konstitusi Dalam Membangun Kesadaran Berkonstitusi, Konstitusionalisme Demokrasi,” 2010). In this case the Constitution of the Republic of Indonesia, here in after abbreviated to the 1945 Constitution.

In parliamentary systems the legislature is supposed to hold the executive accountable. And yet there has long been concern that this legislative supervision is ineffective because of the political bond between the government of the day and the majority in Parliament. There are indications that courts have taken on a compensatory role, by acting as substitutes for this failing legislative oversight (Zwart, 2010).

Sovereignty of a country is defined as the highest authority within the country to regulate its function. The government has the right to regulate the whole interests of its people, through various state institutions and other devices, without interference from other countries. Sovereignty of a country is used to regulate and run state organizations in accordance with the laws and regulations of the country, and the people must obey and submit to the government outlines.

An important agenda of reformation in Indonesia is the change of the 1945 Constitution of the Republic of Indonesia (abbreviated as the 1945 Constitution). The demands of the people that developed in the reformation era, one of which was a legal reform that led to the realization of the supremacy of law under a constitutional system, that served as an effective basic reference in the process of carrying out the state and people's daily lives. In an effort to realize an effective legal system, the restructuring of legal institutions and supported by the quality of human resources and the culture and legal awareness of the community with the reform of legal materials that are structured harmoniously and is continuously updated according to the needs of the community. It all started with the agenda of the three reforms in 1998, namely institutional reform, instrumental reform and cultural reform. There are at least three matters of the reformation that is related to the discourse to improve our law enforcement through the reform of the judiciary, especially the judicial power.

In every conversation about state institutions, there are two key elements that are interrelated, namely organs and function. An organ can be defined as a form, while a function is its contents; the organ is

the status of the form (English: form, German: *Form*) while the function is the movement of the container according to the purpose of its formation. In the 1945 Constitution of the Republic of Indonesia, the organs in question, there are those whose names are explicitly mentioned, and there are also those which are mentioned explicitly only of their functions. There are also institutions that are mentioned are capped good upon its name or function and authority will be governed by lower regulations. If it is related to the above, then it can be stated that in the 1945 Constitution, there were no less than 28 institutional legal subjects or state constitutional and state administrative subjects which were referred to in the 1945 Constitution.

The subjects of institutional law can be referred to as state organs in a broad sense. Textually, in relation to the President and Vice President, which are regulated in Chapter III of the UUD, starting from Article 4 paragraph (1) in the regulation, concerning the authority of the state government, which contains 17 articles; 3) The Vice President whose existence is also regulated in Article 4 is in paragraph (2) of the UUD. Article 4 paragraph (2) of the 1945 Constitution affirms, "In carrying out its obligations, the President is assisted by one Vice President"

Related to the regulation of reasons and procedures for the dismissal of the President within a term of office. Theoretically, this is a logical consequence of the political will to reinforce the Presidential administration system which is one of the basic agreements of the Ad Hoc I Committee of the MPR. If looking further at the regulation regarding the dismissal of the President in his term of office, it is also a consequence of the adherence to the doctrine of separation of powers with the checks and balance system mechanism in the Amendment to the UUD 1945.

In the presidential system, the President can still be dismissed in the middle of the road through a mechanism known as "impeachment". However, in this system, limited impeachment can only be done for reasons of violation of the law (criminal) involving personal responsibility (individual responsibility). Beyond legal reasons, the process of dismissal claims cannot be carried out as in the parliamentary system through a "vote of censure" mechanism. Therefore, there is no need for concern if the President resigns and the Vice President appears as a substitute even though he is from a different party.

The history of state administration in Indonesia noted that there were four presidential changes

before their term ended. First, President Soekarno was dismissed through MPRS Decree No XXXIII/MPRS/1967 concerning Revocation of President Soekarno's State Government Power, Second, President Soeharto stopped after the MPR/DPR Chair announced the MPR's request that Soeharto resign following the Student demonstration and other elements of society on May 21, 1998; Third, President BJ. Habibie stopped after the MPR was held accountable at the 1999 MPR Special Session, and Fourth, President KH. Abdurrahman Wahid was dismissed by the MPR through the MPR Decree Number II/MPR/2001 concerning the responsibility of the President of the Republic of Indonesia KH. Abdurrahman Wahid, because he was absent and refused to give responsibility in the Special Session of the People's Consultative Assembly in 2011, and was considered to be involved in the case of the Bulogate funds.

If of the case of the dismissal of the President is further seen, it is known that during his term before the Amendment to the 1945 Constitution, in particular that the dismissal of Soekarno and Abdurrahman Wahid was based solely on political considerations rather than other reasons. This is due to the fact that the judiciary is not involved in judging legally the truth of the acts alleged to the two Presidents.

In the context of the rule of law, this clearly contradicts the notion that any dismissal of the President must go through a constitutional juridical system with an independent and impartial judiciary. The next problem is related to the reasons and procedures for the dismissal of the President of Indonesia within the term of office, in the Third Amendment to the 1945 Constitution regulated in several articles, namely Article 3 paragraph (3), Article 7A and 7B, Article 8 paragraph (1), (2), (3) and Article 24 C paragraph (1) and (2).

In the concept of *rechtsstaat*, it was extracted from the basic ideas of Immanuel Kant and Frederic Julius Stahl and developed in continental European countries. The concept of *rechtsstaat* Immanuel Kant came up with the concept of a formal legal state or commonly called *nachtwakersstaat*. In the sense that the state guarantees individual freedom as a member of society, the state is not allowed to interfere in the affairs of its citizens, so this concept is then widely known as the concept of a liberal state. The state is only there to protect its citizens. Unlike Julius Stahl, as quoted by Miriam Budiardjo, the intended *rechtsstaat* has elements namely: (a). recognizing the rights of citizens; (b). the separation or division of state power to guarantee human rights commonly

known as *Trias Politica* (c). government based on regulations (*wetmatigheid van bestuur*) and (d) the existence of administrative courts in disputes.

Philipus M. Hadjon quoted D.H.M. Meuwissen, argued that constitution is an element that must exist in the concept of a rule of law because the constitution guarantees the protection of the basic rights of citizens. This is because the existence of the Constitution or constitution in question should contain written provisions regarding the relationship between the authorities and the people. Another thing that is required is the division of state power which includes the power of making laws in the hands of the parliament, free judicial power and which only does not deal with disputes between individuals of the people but also between the authorities and the people and government who base their actions on the law invite (*wetmatig bestuur*). Finally, he acknowledged and protected the right of freedom of the people (*vrijheidsrechten van de burger*).

Before further discussion, the context of office in Indonesia is a fixed work environment that contains certain functions which overall reflect the goals and work procedures of an organization. In order for the office and functions to become concrete and to move towards the goals and objectives, there must be office holders, namely officials, that is, individuals who sit or are seated in a position with the authority to carry out certain functions

2 METHOD

The ruling of this research is based on legal, philosophical and sociological considerations which can't be separated from legal interpretation.

3 FINDING AND DISCUSSION

The sovereignty of the people in the hands of the people, had been done entirely by the Consultative Assembly People, with the change of the three sovereignty of the people, are then implemented according to the Constitution (UUD) (Sekretariat Jenderal MPR RI, 2003). In order to understand the position of the Constitutional Court and to reposition it more appropriately within our constitutional system (Mahfud MD, 2009), it is necessary to review the background of the reform of the judicial world, in particular, the reform of the judicial power, which culminated in 1998.

This reason a Constitutional Court cannot be a Court that decides shallow and narrow. (The expression belongs to Cass Sunstein). Judging in Constitutional matters requires, not only a certain vision about the length and strength of the Constitution that provides the basis for the decision, but also a strong conviction about its legitimacy. These are the two grounds upon which a coherent constitutional case-law can be built. Therefore, any Constitutional Court that uses these two grounds as the proper basis of its decisions cannot be considered, by this motive, an “activist”, in the pejorative sense of the expression (Amaral, 2016).

Efforts to reconsider the reform of the world of justice, judicial power becomes important to answer questions about the direction of the completion of the Constitutional Court if there will be further amendments to the 1945 Constitution. Let see the Norwegian system of judicial review of the constitutionality of legislative norms is the second oldest in the world. With no explicit basis in the Constitution of 1814 (still in existence and hence the second oldest still in existence in the world as well, it grew by court practice since around 1820, the final decisions mainly those of the Supreme Court were systematically respected by the other constituted powers. Immediately after the Supreme Court judges were forced (by a 1863 statute) to vote individually while stating their reason in public, the first case came (1866) where the reason clearly expose the doctrinal basis of judicial review on which the activity of the judiciary (namely the Supreme Court itself) were based (Smith, 2010).

Moreover, the fundamental changes were made through the 1945 amendment which included changes in the conception of the state of law so that it became more open than just the conception (*rechtsstaat*), became a legal state without any mention of foreign terms such as (*rechtsstaat*), or *the rule of law*. The change of the judicial authority establishing two judicial powers namely the Supreme Court (MA) and the Constitutional Court (MK) plus a state institution, whose duties are not in the field of judicial authority but related to the judicial power of the Judicial Commission (KY).

Since the issuance of Law Number 12 Year 2008, which is the amendment to Law Number 32 Year 2004, the authority of the Constitutional Court plus one is to decide the dispute on the result of regional election (*pilkada*) which previously became the competence of the Supreme Court. The transfer of authority over the dispute of the results in this election is a consequence of the provisions of Law Number 22 Year 2007 on Election Organizer.

The Constitutional Court, here in after referred to as the Constitutional Court, has the authority as regulated in Article 24C of the 1945 Constitution which is part of the concept of *checks and balances*. This concept itself is the result of the development of the modern idea of a system of democratic government based on the idea of the *rule of law*, the *separation of powers* and the protection of the promotion of human rights (Asshiddiqie, 2006). There are two main tasks carried through the *constitutional review*, namely: a) Ensure the functioning of the democratic system in the *interplay* between the branches of legislative, executive, and judiciary. *Constitutional review* is intended to prevent the occurrence abuse of power by one branch of power; b) Protecting every individual citizen from abuse of citizen power that harms their fundamental rights guaranteed by the constitution.

There are three decisions of the Constitutional Court analyzed and can be categorized as positive legislature. First Decision Number 46 / PUU-VIII / 2010 on the Rights and Status of Outer Child Marriage. Second, Decision Number 102 / PUU-VII / 2009 on Presidential and Vice Presidential Election (Presidential Election). Third, Decision Number 110-111-112-113 / PUU-VII / 2009 on General Election of Members of the People's Legislative Assembly, Regional Representatives Council, and Regional House of Representatives. In these three decision, the Constitutional Court does what is referred to as a positive legislature function in its decision. In Indonesia let see how electoral rules affect the occurrence of legislative party switching? It is said that electoral systems that encourage politicians to cultivate a personal vote parties' ability to retain members.

In such systems, compared to party-centred systems, I expect that only parties that suffer electoral setbacks to be more likely to witness switching, as their candidates are less concerned with party labels, and local supporters might follow them to the new party, thus reducing switching costs. The greater incentives to cultivate a personal vote in candidate-centred electoral systems result in politicians relying more on local supporters and less on party label for their re-election.

The breakthrough referred to Mahfud MD, emphasized that in carrying out its authority the Constitutional Court has signs that must be obeyed. Those signs as presented by Mahfud MD in the event of fit and proper **test** Prospective Constitutional Candidate in the House of Representatives consists of 10 kinds, as follows: (1) In conducting the examination, the Constitutional

Court shall not make a decision that is regulatory; (2) In conducting the test, the Constitutional Court shall not make Ultra Petita; (3) In making a decision, the Constitutional Court shall not make the law as the basis for the cancellation of other laws; (4) In making a decision, the Constitutional Court shall not interfere with the matter delegated by the Constitution to the legislature to regulate it by law in accordance with its own political choice; (5) In making a decision, the Constitutional Court may not base on theories that are not expressly embraced by the Constitution; (6) In conducting the examination, the Constitutional Court shall not violate the principle of *nemo iudex in causa sua*, namely to decide matters relating to its own interests; (7) The judge of the Constitutional Court shall not speak or express opinions to public or concrete cases being examined by the Constitutional Court, including at official seminars and speeches; (8) The judge of the Constitutional Court may not seek a case by encouraging anyone to file a lawsuit or petition to the Constitutional Court; (9) The Constitutional Court judge shall not proactively offer himself as an intermediary in cross-border politics between State institutions or between political institutions; and (10) The Constitutional Court may not participate in making an opinion on existence or about the good or bad of the Constitution, or whether the prevailing Constitution needs to be amended or maintained. The Constitutional Court is only obliged to execute or guard the existing Constitution and apply, whereas the affairs of maintaining or altering are the affairs of other authorized institutions (Mahfud MD, 2009).

For example, the Constitutional Court's decision can not contain norms, the Constitutional Court may not decide upon the petition (*ultra petita*), or in case of Dispute over Election Result (PHPU), the Constitutional Court only has the authority to decide disputes or miscalculations of vote count recapitulation. However, the practice of these signs is difficult to always obey. The Court sometimes needs to make legal breakthroughs to bring about justice (Mahfud MD, 2009). The development, there are some decisions of the Court that is *ultra petita* (not requested) that leads to intervention into the field of legislation, there is also a decision, in which assessed to violate the principle of *nemo iudex in causa sua* (the prohibition of deciding matters concerning itself), as well as decisions that tend to regulate or verdict based on the contradiction between one law with another law, whereas the judicial review for the *judicial review* which can be done by the Constitutional Court is a vertical namely

the constitutionality of the Law against the Constitution, not a matter of clash between one Act with another law (Mahfud MD, 2009).

The Constitutional Court's positive judgment and bringing great legal implications towards the creation of new norms in society, still holds crucial issues, especially in the normative sphere. Decision of the Constitutional Court Number 46/PUU-VII/2010 concerning the Testing of Article 2 paragraph (2) and Article 43 paragraph (1) Law Number 1 Year 1974 concerning Marriage, for example one of the Constitutional Court's decisions that aim for more human benefit high. The rules are used by judges solely to humanize human beings and not to exclude the purpose of the law itself. Another example is the Decision Number 102/PUU-VII/2009 on the Tests of Article 28 and Article 111 of Law Number 42 Year 2008 regarding the General Election of President and Vice President. Voters whose names have not been listed in the Permanent Voters List (DPT) may continue to exercise their voting rights using identity cards (KTP) or passports. The release of this decision also further explains the Constitutional Court in understanding one of the most basic rights for citizens, namely the right to vote. Especially for woman . Brien and Piscopo examine how increases in the number of female parliamentarians shape three outcomes: policies and policymaking, public opinion, and the legislature as a workplace. Reviewing the literature, the authors conclude that female representatives indeed diversify legislative agendas, especially regarding women and other vulnerable groups. Women's presence also erodes negative perceptions about women as political leaders, both among the public and among politicians. However, O'Brien and Piscopo also find that women's presence meets resistance, particularly because parliaments' internal cultures and leadership structures remain male-dominated. Gender quotas mediate all these trends: Quotas raise the number of female parliamentarians and accelerate political and social change but may also provoke backlash.

The debate between economic and political explanations of the adoption of proportional representation (PR) has occupied an important place in recent years. The existing tests of these competing explanations have generated inconclusive results. Reformulating Rokkan's hypotheses, we show that both partisan dissatisfaction with the translation of seats to votes and strong electoral competition at the level of the district affect the decisions of politicians to support changes in electoral institutions. In the empirical part, we evaluate the relative importance

of (a) district level electoral competition and vulnerability to the rise of social democratic candidates (b) partisan calculations arising from disproportionalities in the allocation of votes to seats and (c) economic conditions at the district level, more specifically variation in skill profiles and 'co-specific investments' in explaining legislators' support for the adoption of proportional representation.

Unlike the Constitutional Court Decision Number 110-111-112-113/PUU-VII/2009 on Vote Counting in Legislative Election 2009. The Court's Decision gives certainty to the "vote" clause in Article 205 paragraph (4) of Law Number 10 of 2008, so it does not lead to multiple interpretations.

The Constitutional Courts belonging the European model depart more and more from their traditional role as "*negative legislator*" which refers to the effect of their acts consisting in removal from legal system of those rules contrary to the Basic Law becoming, to a certain extent, a "*positive legislator*" official interpreter of the Constitution, revealing the content of constitutional and even infraconstitutional rules in their case law, whose effects are nothing but specific forms of impuls or coercion of the legislator to proceed in a certain sense (Safta, 2012).

The basis of judges' consideration of the Constitutional Court makes the decision of a positive legislature covers two types of legal considerations, first, to ensure the citizens' constitutional rights and the two argumentations. Consideration of digging, following, and understanding the legal values that lives in society. This is done in order to realize substantive justice. Consideration of argumentation is through the method of interpretation to find the law. So, on the positive legislature decision studied in this research. The Constitutional Court judges based on the restrictive interpretation of narrowing meanings.

Martitah is (Martitah, 2013) of the view, the practical implication of the above statement, there must be a boundary beam which is regulated in the Constitutional Court Law which regulates among others: 1) the judge in view of the matter is urgently timed; 2) a legal vacuum occurs if no positive legislature decision is made, which may cause chaos in society; 3) the existence of usefulness, benefit, and substantive authenticity based on the demands and needs of the community to be achieved; 4) the decision has a legal basis and is not questioned by the public; 5) the decision of the Constitutional Court, which is called the positive legislature, is implemented only for one time and, or until the formation of the Act, make its successor; 6) The

judges of the Constitutional Court must use moral reading in reading the legal norms tested, so as to be more careful and selective in making a positive decision legislature, because the decision is regulating, final and binding for the general public. This means that if the verdict is in accordance with the needs of the community then the verdict will be accepted and vice versa if the verdict is not appropriate then the verdict will sociologically experience rejection and resistance. Donald Black says in *The Behavior of law*, Yale University of pg. 21, Downward law is greater than upward law. This means that, all else constant, law of every kind – whether a statue, complaint, arrest, prosecution, lawsuit, conviction, award of damages, or punishment – is more likely to have a downward direction than an upward direction. It means that upward deviance is more serious than downward deviance. In the case of a crime, for instance, a victim who is above the offender in rank is more likely to call the police than a victim whose rank is lower than the offender's. In the aggregate, in fact, more calls to the police pertain to upward crimes than to downward crimes. In modern America, for example, the police handle more crimes committed by blacks against whites than the reverse (see Reiss, 1967:53-54), by juveniles against adults the reverse, and, in general, by poorer people against wealthier people than the reverse.

The same applies to court cases. In Imperial Rome, for example it was difficult for a man of low rank to gain a hearing for his case against a superior (Garnsey, 1968:7-8). In the New Haven Colony, in seventeenth-century America, the lower ranks made up the majority of the population, but the court handled more downward than upward complaints (Baumgartner, 1975:27). And, over time, as complaints turn toward the higher ranks, law may even retreat from its former jurisdiction. Thus, in the Massachusetts Bay Colony, which trials came to a halt when the accusations turned upward:

The net of accusation was beginning to spread out in wider arcs, reaching not only across the surface of the country but up the social ladder as well, so that a number of influential people were now among those in the overflowing prisons. Slowly but surely, a faint glimmer of skepticism was introduced into situation. The afflicted girls were beginning to display an ambition which far exceeded their credit. It was bad enough that they should accuse the likes of John Alden and Nathaniel Cary, but when they brought up the name of Samuel Willard, who doubled as pastor of Boston's First Church and President of Harvard College, the

magistrates flatly told them they were mistaken [Erikson, 1966:148, 149]. It is also more difficult to win an upward than a downward case. In the Congo (now Zaire), for instance, where Pygmies were treated as the personal property of Bantus, a Pygmy could never win :[The chief of the BaNdaka] did not consider the Pygmies real people, and therefore they had no right to have cases tried in the tribunal. He said that any complaints by the [Bantu] villagers against Pygmies were heard by him; he judged them himself and no records were kept. He made it quite plain that the judged them himself and no records were kept. He made it quite plain that the judgement always went in favor of the villager [Turnbull, 1961:234]. In Imperial Rome, also the party of higher rank had an advantage : Even if the plaintiff of low rank had been granted an action, and had secured the appearance of his opponent before the praetor [a court officer], he could not have had much confidence in the outcome of the action. For a man of influence would stand a good chance of winning his case, even without corruption or the threat of force. Judges and juries (where there were juries) were easily impressed by qualities such as social prominence, wealth and good character, and this was thought perfectly proper [Garnsey, 1968:9].

4 CONCLUSION

The results of this study conclude that the Constitutional Court has a positive legislature function in its decisions. This is based on the analysis of the three decisions of the Constitutional Court that the author of the adoption of Decision of the Constitutional Court Number 46/PUU-VIII/2010 on the Testing of Article 2 paragraph (2) and Article 43 paragraph (1) Law Number 1 Year 1974, Constitutional Court Decision Number 102/PUU-VII/2009 on the Testing of Article 28 and Article 111 of Law Number 42 Year 2008, Decision of the Constitutional Court Number: 110-111-112-113/PUU-VII/2009 on Counting of Votes in Legislative Election 2009. The concept of positive legislature the author has been appropriate and reflects a sense of justice. This is based on the following argument: (a) The Constitutional Court's decision that contains the positive legislature as part of progressive law enforcement. The creation of a regulatory judgment is based on legal, philosophical and sociological considerations that can not be separated from legal interpretation; (b) The law is not only seen from the spectacles of the text of the law but rather revives the welfare in context.

Realizing that the law is not an independent or absolute rule, the law is surrounded by the values of society. The new norms born from the decision of the Constitutional Court which is positive legislature, and it directly has legal implications for the wider community. The degree is equivalent to the Act because it is final and binding. Reposition of the Constitutional Court with the issuance of a monumental verdict is said to be a verdict containing a new principle which is to refine the old principle without neglecting the old principle contained in the previous judge's decision on similar and similar matters.

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