Authority of Constitution Court of the Republic of Indonesia based on Amendment of Constitution and the Development Thereof

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Indonesian Constitution that prevails up to the present is 1945 Constitution or it can also be said as “1959 Decree Constitution”. This is the constitution that sustains amendment in the year 1999-2002 because of the demand of reformation. The amendment of the Constitution has produced several new institutions, inter alia Mahkamah Konstitusi1 (Constitution Court). This presents new authority in institutions of Indonesia. MK (Constitution Court) has produced a lot of judgments especially that relates to the testing of law, disputes of authority of state institutions and dispute of general election result. Whilst the case on dissolution of political party and dismissal of president has never occurred. the position of the judgment of MK (Contribution Court) that is called as verdict does include a state decision that contains legal norm, even it can be said that the legal norm that emerges resulting from the judgment of MK (Contribution Court) constitutes legal norm that possesses a constitutional standard which is higher than any law that is not yet tested in MK (Contribution Court). MK (Contribution Court) judgments that get wide attention, be like inter alia ultra petita principle, conditionally unconstitutionally, the role of positive legislative, obrogation of law that is given a deadline/time limit and the franchise of the participants of general elections of district heads. The research method chosen by the author in the form of explanatory legal study is an explanatory legal. With this explanatory legal research method will be used in examining the Authority Of Constitution Court of The Republic of Indonesia.

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of Indonesia Based on Amendment of Constitution And The Development Thereof. MK (Contribution Court) can be classified as negative legislative. MK (Contribution Court) had placed its position not as negative legislative anymore but it can be considered as having done its function as positive legislative. Negative legislative is the appearance of new legal norm in law/ordinance resulting from any contents of subject matter in the said law that had been eliminated by the Judgment of MK (Contribution Court). To be concluded a conclusion that it has occurred a development of constitutional law in the field of regulation as the consequence of MK (Contribution Court) judgment. As a tester of legal norm of law against legal law of Constitution, then MK (Contribution Court) judgment that cause new legal norm to appear hierarchically is more constitutional than the legal norm of law that is not yet tested in MK (Contribution Court).

[Keywords : Authority, Amendment and Constitution Court]

1. Introduction

As a matter of fact, Indonesian people has already possessed a constitution since pre independence, namely at the time of occupation of Japanese Army, The first constitution was Basis Law that was ratified by Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (BPUPKI)² = Research Agency For The Preparation Effort of Independence of Indonesia. Later on August 18, 1945 one day after declaration of Independence, PPKI (Research Agency For Indonesian Independence) formed the constitution called Constitution of the Republic of Indonesia (then known as UUD 1945 (1945 Constitution). In the year 1949, 1945 Constitution was changed to RIS (United Indonesian Republic) Constitution, and one year later it was changed to 1950 Provisional Constitution Several year laters the said Provisional Constitution was changed to 1945 Constitution through a Presidential Decree that was know as Presidential Decree of July 5, 1959. Thus, Indonesian Constitution that prevails up to the present is 1945 Constitution or it can also be said as “1959 Decree Constitution”. This is the constitution that sustains amendment in the year 1999-2002 because of the demand of reformation.

The amendment of 1945 Constitution as a mandate of the reformation finally can be treated exhaustively in the fourth Amendment with the official name Constitution of the State of the Republic of Indonesia of 1945 (hereinafter it is written as 1945 Constitution). The amendment of the Constitution has produced several new institutions, inter alia Mahkamah Konstitusi³ (Constitution Court), besides other institution such as Dewan Perwakilan Daerah (DPD) = House of Regional Representatives and Judicial Commission. In order to more understand what a constitutional court is, and what are the functions thereof, hereinbelow it will be presented as follows :

2. Constitution Court

In the whole world, any states that possess a kind of institution such as Constitution Court are 78 states, thus Indonesia, constitutes the 78th state that has possessed such institution.⁴ The United State of America was the first state that
introduced the function of constitutionality court with a case that was famous at that time, namely the case of “Marbary versus Madison of the year 1803”\(^5\). The President of the Supreme Court of the United States John Marshall\(^6\) was the first who carried out the authority to interpret constitution to abrogate the law that previously had been ratified by the Congress of the United States of America. Such authority of the Supreme Court was in fact has not been provided in the Constitution of the United States of America. Therefore such case can be deemed as Judicial Interpretation, namely alteration of constitution through interpretation of a judge or court as the opinion of KC Whee are ?\(^7\). Since the said case then it is know the term material test right to the law against constitution. This right to test is then known by the term “judicial review” that is deemed as automatically being possessed by the Supreme Court of the United States of America as “The Guardian of the Constitution of the United States of America”\(^8\).

In the world, the institution that holds the authority of constitutional court can be classified to become 5 (five) types, namely (1) Supreme Court such as the United States of America model since 1803; (2) Constitutional Council such as French model of 1958; (3) Constitutional Arbitration such as in Belgium, (4) Tribunal constitution in Venezuela one room special at the circles of the Supreme Court and (5) Constitutional Court Austria model since 1920. This last one is the one that is followed by the state of Indonesia and has been adopted in the third Amendment of 1945 Constitution in 2002 Article 24C. What have been provided in our constitution regarding the existence of the Constitution Court can be seen in the following description.

3. **Five Authorities of Constitution Court**

There are five authorities of Constitution Court which have been determined in 1945 Constitution of the third Amendment of Article 24C Paragraph (1), namely:

1. to test (judicial review) the law against Constitution;
2. to resolve the dispute about the result of general election (Pemilu = General Elections);
3. to resolve the dispute of authority of the state institution the authority thereof is given by Constitution;
4. to resolve the dispersal of political parties;
5. shall give resolution upon the House of People’s Representative’ opinion regarding the presumption of violation done by President and/or Vice President according to Constitution. Thus there are 4 authorities and one constitutional obligation for the MK (Constitution Court). The court done by the Constitution Court constitutes the court of original jurisdiction and the last jurisdiction the judgment thereof is final in character.
3.1 Test of Law

Bill of Law that has been approved by the House of People’s Representatives and the President to become Law, now can be tested materially (judicial review) by the Constitution Court upon request of certain party. In Article 24C Paragraph (1) of 1945 Constitution of the third Amendment, inter alia it is mentioned that the Constitution Court has the right to hear/try at the original jurisdiction and at the last jurisdiction, the judgment thereof has permanent characteristic to test the law against the Constitution. This Constitution Court should have been formed on August 17, 2003, and prior to be formed any and all authorities shall be done by the Supreme Court (Transitory Regulation Article III).

With the new provisions that provide the power which forms the law thereinabove, then any matter that need to be underlined here is a fact that the ratification of the bill of the law to become an ordinance does not constitute something that has been final. The said ordinance can be questioned by the society which feel being damaged if the ordinance is for sure to be realized, or by a group of people it is evaluated that the said ordinance is in contradiction with the legal norm that exist thereon, namely in contradiction with 1945 Constitution.

3.2 To Resolve the Dispute About the Result of General Elections

The dispute resulting from general elections (pemilu) covers the legislative and presidential election. In its development it also covers the disputes resulting from the election of the districts heads. The authority of Constitution Court in the field of this general elections has been furtherly provided in Law Number 24 of 2003 on Constitution Court (hereinafter it is written as UUMK 2003 (CC LAW 2003). In its broad outline the provision on this general election can be described as follows:

The application for solving the disputes resulting from general elections must be made by (a) an individual of Indonesian Citizen i.e. member candidate of the House of Regional Representatives as participant of general elections (b) individual of Indonesian Citizen i.e. memlu candidate of the House of Regional Representatives; (c) pair of President and Vice President candidates as participant of general elections for President and Vice President; and (d) political parties as participant of general elections, as well as (e) pair of district head and vice-district head candidates in the direct election for district heads.

Application can only be made within the period of at the latest 3x24 (three times twenty-four) hours as of KPU (General Elections Committee) pronounces the decision of the result of general elections naturally, and such application must influence:

a) the elected of the member candidate of the House of Regional Representatives thereof.
b) act of determining pairs of candidates that include in the second rotation of President and Vice President election as well as the elected pair of the candidates of President and Vice President;

c) acquisition of seats of political parties as participants of general elections at an election region.

In the application made, the applicant shall describe explicitly about: the error of the result of counting of votes pronounced by the General Elections Committee and the right counting result according to the applicant; the request to abrogate the result of counting of votes pronounced by the General Elections Committee; as well as to decide the right result of the counting of votes according to the applicant.

3.3 To Resolve the Dispute on the Authority of State Institutions

The arrangement of this authority is aimed to the state institutions the authority thereof is directly given by the Constitution. The intended state institutions are among others: MPR (People’s Consultative Assembly), President, DPR (House of People’s Representatives), DPD (House of Regional Representatives), BPK (State Audit Agency), Judicial Commission, as well as Provincial and Regency Administration, Especially the Constitution Court it cannot become a party in the dispute of authority amongst state institutions their authorities are given by the 1945 Constitution of the Republic of Indonesia to the Constitution Court.

In this dispute of authority the party that become the applicant is the state institution the authority thereof is given by the 1945 Constitution of the Republic of Indonesia that has direct interest to the authority being disputed. The applicant shall describe explicitly in its application about direct interest of the applicant and describes the authority being disputed as well as to mention clearly the state institution that become the defendant.

In the session, the Constitution Court can issue a decision that order the applicant and/or the defendant to provisionally cease the implementation of authority being disputed until there is a judgment from the Constitution Court. The said judgment from the Constitution Court regarding the dispute of authority is extended to the House of People’s Representatives, and the President.

3.4 To Resolve the Dissolution of Political Parties

Upon the prevailing of the Law of Constitution Court No.24 of 2003, then the dissolution of political parties can only be done through the judgment of the Constitution Court. This dissolution of political parties must be done upon application of the Government. In this case, the Government as the Applicant shall describe explicitly in its application about the ideology, principle, objective, program, and activity of the political party concerned, which is considered as in contradiction with the Constitution of the Republic of Indonesia of 1945.
Based on such application, the Constitution Court conveys the application having already been registered in the Registration Book Constitutional Cases to the political party concerned within the period of at the latest 7 (seven) business days since the application has been registered in the Registration Book of Constitutional Cases.

In case the Constitution Court has the same opinion that he application does not meet the condition referred to in Article 68, the dictum of the judgment declares that the application cannot be accepted. In case the Constitution Court has the opinion that the application is reasonable, the dictum of the judgment declares that the application is granted. In case the Constitution Court is of the opinion that the application is not reasonable, the dictum of the judgment declares that the application is refused.

The judgment of the Constitution Court regarding application upon dissolution of political party shall be adjudicated within the period of at the latest 60 (sixty) business days since the application is registered in the Registration Book of Constitution Cases. The Judgment of the Constitution Court regarding dissolution of a political party is extended to the political party concerned. Implementation of the dissolution of the said political party is done by abrogating the registry to the Government. This Judgment of the Constitution Court is pronounced by the Government in the State Gazette of the Republic of Indonesia within the period of at the latest 14 (fourteen) days as of the judgment has been received.

3.5 To Resolve the House of People’s Representatives Opinion on Dismissal of the President

To dismiss the President and/or the Vice President, the People’s Consultative Assembly cannot act alone anymore as has ever been occurred in the case of dismissal of President Soekarno in 1967 and President Abdurrahman Wahid in 2001, but it has involved as new institution called the Constitution Court. This Constitution Court that will determine whether the President and/or the Vice President really has violated the law or not. This violation of law is in the form of committing of treason to the state, corruption, bribery, other heavy criminal act, or disgraceful deed, and/or an opinion that the President and/or the Vice-President does not meet the condition anymore as President and/or Vice President.

The accusation of the House of People’s Representatives thereinabove can just be refused by the Constitution Court. If according to the Constitution Court it is adjudicated that the President and/or the Vice President does not make any infringement that is accused of, then the People’s Consultative Assembly has no authority the person concerned. Thus, the institution that is dominant to decide whether the President and/or the Vice President is able to be dismissed by the People’s Consultative Assembly is the Constitution Court. By observing the position and the authority of the People’s Consultative Assembly as formulated
above, it can be said that the power of the People’s Consultative Assembly has lessen a lot. Any problem that may occur in the future is if for example, the People’s Consultative Assembly decides that the President and/or the Vice President violates the law, however the People’s Consultative Assembly apparently does not dismiss the President and/or the Vice President. Such case is possible to be happened in view that the People’s Consultative Assembly is a political institution, and in making decision it can be based on majority vote, not based on legal objectivity. As a comparison it can be seen in the case “Monice Lewinsky”, that continues with impeachment process to American President Bill Clinton. The “Impeachment Judicature” done by the Congress at latest released Clinton because the vote to be required (namely 2/3 of the congress members) to declare that Clinton was guilty could not be fulfilled.14

4. Dynamics of the Judgment of the Constitution Court

At present after it has gone more than one decade, the MK (Contribution Court) has produced a lot of judgments especially that relates to the testing of law, disputes of authority of state institutions and dispute of general election result. Whilst the case on dissolution of political party and dismissal of president has never occurred.

In a constitutional manner, the position of the judgment of MK (Contribution Court) that is called as verdict does include a state decision that contains legal norm, the same with the decision of a law maker that has the character of regulation. Therefor the Judgment of the MK (Contribution Court) constitutes legal norm such as any legal norm that is inserted in a law, even it can be said that the legal norm that emerges resulting from the judgment of MK (Contribution Court) constitutes legal norm that possesses a constitutional standard which is higher than any law that is not yet tested in MK (Contribution Court). The difference is that in the judgment of MK (Contribution Court) it omits any contents of subject matter of law, whereas the law maker precisely creates formulation of contents of subject matter of law. That is why, the MK (Contribution Court) can be classified as negative legislative15, whereas the law maker is as positive legislative, Thus, if it is related to the stipulation of the hierarchy of regulations of legislation, then the position of the Judgment of MK (Contribution Court) should be above the law and below the Decision of MRP (People’s Consultative Assembly).

Among the said judgments of the MK (Contribution Court) can be found several MK (Contribution Court) judgments that get wide attention in the “eyes” of the public because they are evaluated as controversial. Controversial judgment occurred in the cases that are related to inter alia ultra petita principle, conditionally unconstitutionally, the role of positive legislative, obrogation of law that is given a deadline/time limit and the franchise of the participants of general elections of district heads. Hereinbelow will be analyzed the said MK (Contribution Court) judgments in succession as follows:
4-1 Ultra Petita

In fact ultra petita is known only in the regime of civil law, means it does not prevail in the regime of constitutional law and also in the regime of criminal law. The judge in some judgment at criminal session sometimes passes judgment of criminal punishment higher than the punishment requested by the prosecutor.

MK (Contribution Court) as judicature institution in the field of constitution of course is not bound with ultra petita principle. Therefore it is natural if MK (Contribution Court) issues a judgment which occasionally exceeds what has been requested (petitioned) by the Petitioner/Applicant.¹⁶

4-2 Continually Unconstitutionally

The legal norm that has unconditional character to this requirement was for the first time been issued by MK (Contribution Court) in MK (Contribution Court) Judgment No. Testing of Law of Law No.7 of 2004 on Water Resource, however this conditional judgment was not mentioned in the dictum of the judgment but it was mentioned in the consideration on the judgment of the Court. This matter was different with the later Judgment of MK (Contribution Court), as the MK (Contribution Court) Judgment in the Case No.4/PUU-VII/2009 on the testing of Article 2 point g and Article 50 paragraph (1) point g of Law No.10/2008 as well Article 38 point f of Law No. 12/2008. In this context the MK (Contribution Court) did not have the role as negative legislative yet explicitly or indirectly MK (Contribution Court) has the role as maker of legal norm by way of giving new meaning or interpretation to the law being tested. For instance MK (Contribution Court) judgment which states that the article or contents of subject matter in this law is “unconstitutional” if it is not interpreted in accordance with the reading of the legal consideration of the MK (Contribution Court).

4-3 The Role of Positive Legislative

In the MK (Contribution Court) Judgment Number 102/PUU-VII/2009 on the List of Permanent Electors (Daftar Pemilik Tetap = DPT), MK (Contribution Court) was more progressive/forward looking by giving new rules and regulations to the electors in legislative general elections in the form of Kartu Tanda Penduduk (KTP) = Resident Identification Card and Kartu Keluarga (Household Registration Card). In this matter, MK (Contribution Court) had placed its position not as negative legislative anymore but it can be considered as having done its function as positive legislative. MK (Contribution Court) through its judgment has done formulation of regulation as if a maker of law, namely DPR (House of People’s Representatives) together with the President.

4-4 Abrogation of Law by means of Time Limit

The MK (Contribution Court) Judgment Number 012-016-019/PUU-IV/2009 that stated that Article 53 of Law No.30/2002 on Tipikor (Tindak Pidana Korupsi =
Corruption does not have any binding legal power and started effective three years to come since MK (Contribution Court) judgment has been read out that constitutes a legal penetration, in view of the Law of MK (Contribution Court) that says that MK (Contribution Court) Judgment shall be effective since it has been finished being read out at the session (Article 47) of Law of MK (Contribution Court).

In the part of the legal consideration thereof, MK (Contribution Court) says that if within the period of three years it cannot be fulfilled by the law maker, the the provision stipulated in Article 33 of KPK (Komisi Pemberantasan Korupsi) = Corruption Exdication Commission, automatically by operation of law shall not obtain any binding legal power anymore.

The form of judgment that postpones validity of the said MK (Contribution Court) judgment apparently is inspired by the formation of laws and regulations, where validity of a Law effectively can be postponed several times after it has been ratified.

4.5 Judgment of Dispute of Election of District Head

Two judgments of dispute of the result of the general elections of district heads that was evaluated as controversial was the general elections of district heads of the Province of Jawa Timur (East Jawa) and the general elections of district heads of the Regency of Bengkulu Selatan (South Bengkulu). In the judgment of the general elections of Jawa Timur, MK (Contribution Court) did not count rightly anymore the result of votes of the general elections of district heads that was usually being used by MK (Contribution Court) in resolving the case of the general elections of 2004, yet MK (Contribution Court) directly saw the procedure of the counting which was evaluated had been occurred a fraud that was done massively and systematically, so that it was taken a decision to take a vote repartition for three regions in Madura. Whereas in fact in Article 77 paragraph (3) of MK (Contribution Court) Law it was mentioned that in case the applications is granted, MK (Contribution Court) declares to abrogate the result of counting of vote that was pronounced by the General Elections Committee and to determine the result of the right counting of vote. In this case MK (Contribution Court) did not mentioned the actual result of the counting of vote.

In reading of such judgment can be understood because it is in compliance with MK (Contribution Court) function as the guardian of democracy which must be protected honestly and fair. That means that the fraud that happened in the process of counting is not an honest action that should be straited out by MK (Contribution Court).

The MK (Contribution Court) Judgment was in harmony with the action that had been done to the dispute of the result of the general elections of district heads of Bengkulu Selatan, where the process of counting the result of the general elections
of district heads was not found any evidence that there was existed any fraud, however MK (Contribution Court) persistently decided to take a vote repetition with the condition that the elected pair of candidates may not be participated, only because there was an administrative defect due to the negligence of KPU (General Elections Committee). The elected bupati (regent) candidate was evidence having violated Article 58 of Law No.12 of 2008 on Regional Government. Even though this violation had truly been happened, however the punishment that was passed down by MK (Contribution Court) by revoking elected right it was beyond the power of MK (Contribution Court). And what was more ironical, MK (Contribution Court) burdened the mistake of the elected bupati candidate to the elected vice bupati candidate with the reason it was one pair. This matter was clearly in contradiction with legal principle “Greensteaf ronder schald” (no punishment without fault) and the legal principal “nullus/nemo commodum capere potest de injuria sua propria” (nobody may be enjoyed by divergence and violation done him/herself and nobody may be damaged by divergence and violation done by anybody else).

5. Closing

Have as a starting point in some studies of the MK (Contribution Court) judgment therein above, it can be concluded a conclusion that it has occurred a development of constitutional law in the field of regulation as the consequence of MK (Contribution Court) judgment. As a tester of legal norm of law against legal law of Constitution, then MK (Contribution Court) judgment that cause new legal norm to appear hierarchically is more constitutional than the legal norm of law that is not yet tested in MK (Contribution Court). As a guardian of democracy in the general elections of district heads, MK (Contribution Court) also makes a lot of penetrations namely it does not mention anymore the number of the actual result of the general elections. Apparently, MK (Contribution Court) seriously realizes that it may not be fixed only to formal reading of the stipulation of laws and regulations, however it wants to see from the side of substantive justice, therefore MK (Contribution Court) has positioned its elf more as a guardian of constitution and democracy as having been mandated by the constitution. As a commentator of the constitution, MK (Contribution Court) can ust give important notes to a Law as a legal norm interpretation in order it is in accordance with the spirit of constitution. For the writer it is forced that legal security is put aside, or on the contrary for the sake of justice, legal security must be upheld.

Footnotes

1. In the whole wo
2. The Agency that was formed at the time of occupation of Japanese Army, under the name Dokuritsu Jimbii Chosakai
3. In the whole world, any states that have institution such as Constitution Law there are 78 states, thus Indonesia constitutes the 78th state that has such an institution; please read Introduction of Jimly Asshiddiqie in constitution Law: Constitution compilation, Ordinance and Regulations in 78 States, Center of Study of Constitutional Law, University of Indonesia, without year, page 1. The Law on this Constitution Court had been ratified by the President on August 13, 2003. Later on Saturday, the 16th day of August 2003 nine Judges of the Constitution Court had pronounced oaths/vows before the President. The nine Judges of the Constitution Court were Jimly Asshiddiqie (elected as Chairman), I Dwra Gede Palguna, Ahmad Roestandi, the there of them constituted proposal of DPR (House of People’s Representatives), Haryono, Abdul Mukti Fajar, HAS Notabaya, proposed by the President, and three succeeding thereof proposed by the Supreme court namely Mohamad Laiza Marzuki, Sudarsono, and Marwah Siahaan. Please read: “Hakim Konstitusidijyjhkam” (“Constitution court is strengthened”) I, Kompas 17, 2003, page 1; and Tempo newspaper August 14, 2003.

4. Please read Introduction of Jimly Asshiddiqie in constitution court: Constitution Compilation, Law and Regulations in 78 States, Centre of Study of Constitutional Law, University of Indonesia, without year page 1.


9. Supreme Court Regulation(Perma) No.2 of 2002 on the Procedure of Organization of Authority of the Constitution Court by the Supreme Court. In said Perma inter alia it was decided that the procedure to submit application on testing the law against CONSTITUTION, dispute of authority of inter state institutions the authority thereof is given by 1945 Constitution, investigating, hearing/trying, and resolving the opinion of DPR (House of People’s Representatives) that President and Vice President are presumed have made an infringement as referred to in Article 7B Paragraph (1) of 1945 Constitution and the Amendments thereof shall be submitted in the form of application.

10. Through the Judgment of the Constitution Court Number 072.073 PUU.II/2004 the direct election of district heads was declared as General Election. However later in the Judgment of the Constitution Court Number 97/PUU-X 1/2013, the direct election of district heads was declared not a general elections as referred to in Article 22E of 1945 Constitution.
11. The decrease of authority of the Consultative Assembly itself is opposing the party that is doubtful if the amendment of the constitution is handed over by the parliament (Assembly), then the parliament will be difficult to be agreeable to decrease its authority.

12. Please see Republic of Indonesia, Constitution of the State of the RI (Republic of Indonesia) of 1945, Article 7B Paragraph (1) and Article 24C Paragraph (1)


14. The victory of Clinton has already been presumed before, because at the impeachment judicature of Senate level, the votes were indeed split up into the Republic can party. Vote, that since the impeachment case has been rolled on at the house of People’s Representatives of the United State America in last December, there was an effort to impeach clinton was supported by 45 votes, while the Democrat fortification that defended Clinton was supported by 45 votes. Please read: “clinton was free”, Kompas, Jakarta, February 13, 1999.

15. Negative legalisative is the appearance of new legal norm in law/ordinance resulting from any contents of subject matter in the said law that had been eliminated by the Judgment of MK (Contribution Court)

16. MK (Contribution Court) judgment about the testing of Law on Matters pertaining to Electricity, and Law of “KKR” (MK (Contribution Court) Judgment Number 006/PUU-IV/2006)

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Republic of Indonesia, Constitution of the State of the Republic of Indonesia of 1945, Article 7B Paragraph (1) and Article 24 C Paragraph (1)


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