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Application of Jurisprudence to the Judicial Review Authority in Constitutional Court Decisions

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Abstract: *The validity of jurisprudence as one of the recognized legal sources in Indonesia has drawn broad attention and has emerged as an area for attention to conduct research. Indonesia heavily influenced by the civil law system basically does not commit to jurisprudence. However, if there are considerably contrary decisions with prior decisions, it becomes a debate about how the validity of existing jurisprudence. The Constitutional Court as one of the actors of judicial power has the authority to conduct judicial review of the 1945 Constitution of the Republic of Indonesia. In line with such authority, the Constitutional Court is sometimes conflicted with a previous decision which has presented a landmark yet it is not followed. In other words, there is contrary between the previous and the present decisions. To investigate the matter, the present study focuses on how the jurisprudence applies to judicial review in the Constitutional Court decisions. The analytical method adopted literature study through a case study approach. The conclusion obtained in this line of research is that jurisprudence refers to source of legislation that can be a reference in deciding a case for judicial review yet it does not bind judges to deviate it based on logical reasons in accordance with the principles of the judicial independence and accountability and the living constitution.*

Keywords*: Testing laws; Jurisprudence*

INTRODUCTION

In the legal context, jurisprudence is one source of law that judges may refer to various types of persuasive authority to decide a case. There has not been one understanding on the definition of jurisprudence. Widely cited non-binding sources, the broad understanding of jurisprudence is because Indonesia is mostly affected by the civil law system and thus judges may deliberately follow

existing jurisprudence or even differ from jurisprudence.

The Constitutional Court as one of the actors of judicial power mandated by Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia has the authority to adjudicate at the first and last level whose decisions are final and binding to examine the law with regard to the Basic Law, decide upon disputes over the authority of state institutions whose authority is granted by the Basic Law, decide upon the dissolution of political parties and decide on disputes over the results of general elections and are obliged to give decisions on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the Constitution.

In exercising its authority, such as examining laws based on the 1945 Constitution of the Republic of Indonesia NRI, sometimes the Constitutional Court is clashed with the decision of the previous judicial review containing the same norms. As the only norm court that has authority based on the constitution, it seems strange that with the same norms, the Constitutional Court gives a different decision.

Therefore, as a theoretical matter, the Constitutional Court's ruling might be contrary with the previous ruling which contains the same constitutionality norms or issues, needless to say, in the Constitutional Court's ruling Number 25/PU-XIV/2016 against the decision of the Constitutional Court Number 003/PUU-IV/2006 which examines the material Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 on Corruption Eradication.

Therefore, in an effort to address such crucial issues, this research-based paper will analyze the validity of jurisprudence in testing laws in the Constitutional Court.

METHOD

The current research method adopted normative juridical through a case study approach. The cases studied and analyzed are several decisions of the Constitutional Court that are relevant to the formulated topics. In addition to Constitutional Court decisions, there are also books, journals and other literature reviews

that support and relate as a material for legal reviews of the considerably rules in accordance with written legal research. Normative research is carried out on matters that are theoretical principles of law, legal basis and legal concepts. In this study, the researchers collected legal material in the form of a Constitutional Court decisions and conduct analysis using jurisprudence theory and its validity, the principles of the judicial independence and accountability and the living constitution conception.

DISCUSSION

Jurisprudence Position in the Indonesian Legal System

One of the discussions in legal studies is about the source of law. The source of law is anything that gives rise to or gives issuance to legislation or the origin of laws. Legal sources according to Kansil[1] can be seen in terms of material and formal aspects. Formal legal sources include: statutes, custom, judges' decisions (jurisprudence) and treaty. Based on four sources of law, how is the validity of jurisprudence in examining laws in the Constitutional Court a topic of discussion, because the existence of jurisprudence is often a debate. The debate occurred because of the legal system used by Indonesia which is a Dutch heritage, such as civil law which places jurisprudence as one of the sources of non-binding legal references by judges in deciding a case.

As well, Sudikno Mertokusumo also argues that jurisprudence is as a court in general (judicature, rechtspraak), the implementation of law in a concrete case when there are claims for rights carried out by an independent body and held by the state and free from any influence or anyone by giving binding decisions and authoritative. In jurisprudence, there are two principles that influence whether a judge follows the previous judge. The principles consist of:[2]

1. Precedent Principle

   This principle means that a judge is bound by other judges, both equal and higher. Judges in adjudicating and deciding cases must not deviate from other judges, both equal and higher. The precedent principle is adopted

[1] Kansil. *Tanya Jawab Pengantar Ilmu Hukum*. Jakarta: Sinar Grafiti, p. 14.

[2] Dudu Duswara Machmudin. (2000). *Pengantar Ilmu Hukum (sebuah Sketsa)*. Bandung: PT Refika Aditama, p. 97.

in the United States, United Kingdom, and South Africa. The precedent principle, or also known as stare dicisie, is a judicial institution that is better known in the Anglo-Saxon State or the Common Law System.

2. Free Principle

   This principle means that a judge is not bound by the decisions of other judges, both equal and higher. Unrestricted words here mean that a judge, in deciding a case, may follow the decisions of previous judges, both equal and higher, may also not follow. This free principle is adopted by continental European countries or civil law systems such as the Netherlands, France and Indonesia.

In terms of theory and practice, jurisprudence has been accepted as a source of law, both in the civil law system and in common law. But the binding power of jurisprudence for judges in the civil law system is indeed different from the common law system.[3] For common law countries (Britain, the United States and South Africa), jurisprudence is indeed the most important source of law. Judge made law takes the most important place next to statutory law.[4] Whereas legally, the binding force of jurisprudence for countries with a civil law legal system is only binding on persuasive precedents, and thus, judges under it or afterwards are allowed not to follow jurisprudence.

The difference in the principle of precedent (stare decicis) in common law and jurisprudence has lost its sharpness during the twentieth century. If the decision of the Anglo-American court has binding power, the decision of the civil law court to obtain persuasive power.[5] The authority of the civil law ruling is almost close to the strength of the binding principle precedent in the Anglo-American system. Thus, if in the civil law system a decision considered as jurisprudence can have a large persuasive authority, then a series of decisions that are consistent with a particular legal issue can be considered binding. This consistency

[3] Paulus Effendi Lotulung. (1997). *Peranan Yurisprudensi sebagai Sumber Hukum*. Jakarta: Badan Pembinaan Hukum Nasional, p. 10.

[4] L.J. van Apeldoorn. (2004). *Pengantar Ilmu Hukum*. Jakarta: PT. Pradnya Paramita, p. 161-162.

[5] Sebastiaan Pompe. (2012). *Runtuhnya Institusi Mahkamah Agung*, Jakarta: Lembaga Kajian dan Advokasi Untuk Independensi Peradilan, p. 605.

is supported by the fact that the highest courts in various countries that adhere to the civil law system have referred to their own decisions and thus have created permanent jurisprudence. Which can be said to be contrary to the doctrines and practices of early civil law. As a result, court decisions in most civil law countries have a law-making impact that reaches beyond the litigants.[6]

Judges decisions can become a source of formal law if they are followed by the next judge known as jurisprudence. Jurisprudence can be born in connection with the principle in law that judges must not refuse to hear cases submitted to them. Judges as law enforcement and justice are obliged to try, follow and understand the legal values that live in the community, so in handling cases the judge can do:[7]

1. Implement in concreto the legal rules that already exist (in abstracto) and apply since before.
2. Search for yourself the rules of law based on the legal values that live in society

Jurisprudence cannot be separated from the development of legal science in Indonesia. The role of jurisprudence in Indonesia is of such importance, in addition to being a source of jurisprudential law, it becomes a guideline for judges in deciding cases. Jurisprudence is a legal product from the judiciary.[8] The function of the jurisprudence itself in the case of a judge making a decision is to fill the legal vacuum because according to Algemene Bepalingen van Wetgeving voor Indonesia (A.B.), the judge must not reject the case because there is no law governing it. The legal vacuum can only be overcome and covered through judge made law which will serve as a guideline for jurisprudence until the creation of a complete and standard legal codification.[9]

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[6] *Ibid*, p. 605-606.

[7] S.F Marbun dan Moh. Mahfud MD. (2006). *Pokok-Pokok Administrasi Negara*, Yogyakarta: Liberty, p. 36.

[8] Puslitbang Hukum dan Peradilan Badan Litbang Diklat Kumdil MA RI. (2010). *Kedudukan dan Relevansi Yurisprudensi Untuk Mengurangi Disparitas Putusan Pengadilan*,Jakarta: Penerbit Balitbang Pendidikan dan Pelatihan Hukum dan Peradilan MA RI, p. 103.

[9] Sudikno Mertokusumo. (2003). *Mengenal Hukum (Suatu Pengantar)*, Yogyakarta: Liberty Yogyakarta, p. 31.

Ratio Decidendi Deviations of Jurisprudence in the Constitutional Court Decision

A judge is one of the officials who is authorized by law to exercise judicial authority. In carrying out their duties, judges have independence in the sense of being free from interference from other state authorities, and freedom from coercion, directives or recommendations that come from extra judicial parties, except in matters permitted by law. More concretely the freedom of judges contains 4 (four) definitions as follows:[10]

a. Not affected by litigation parties, both material and formal parties;
b. Not affected by pressure, directors coercion or extra judicial party recommendations from anyone and from any parties;
c. Free and brave to take the initiative and improve in the task of examining and adjudicating a case for the development of the law itself, for the sake of justice and truth, for the development and for the existence of an independent and sovereign nation;
d. Freedom that is responsible to God Almighty, country and nation, society, good name of corps and her/himself.

According to Yahya Harahap,[11] the autonomy scope of the freedom of judges in carrying out the judicial function includes five points, as follows:

a. Interpreting the laws and regulations,
b. Seeking and figuring out legal principles and foundations,
c. Creating a new law when facing a legal vacuum,
d. Contra legem if the provisions of an article of legislation are contrary to public interests,
e. Free to follow jurisprudence.

According to Sudikno Mertokusumo,[12] in the Indonesian legal system, in principle, a judge is not bound by a previous judge's decision regarding a case or legal issue similar to what he will decide. The contradiction in the decision of the Constitutional Court Number 003 / PUU-IV / 2006 against the decision of the Constitutional Court Number 25 / PU-XIV / 2016, can be understood because there are various issues and changes sociologically.

[10] Supreme Court of the Republic of Indonesia. (2006). *Yurisprudensi Mahkamah Agung RI*. p. 150

[11] M.Yahya Harahap. (1995). "*Peran Yurisprudensi sebagai Standar Hukum Sangan Penting Pada Era Globalisasi*", published in the Justice Library, p. 87.

[12] Sudikno Mertokusumo. *Mengenal Hukum, Op. Cit.*, p. 93-94.

Sociological problems occur because the community develops and is always undergoing change, which requires different legal needs to follow developments in society. In the ruling of the Constitutional Court Number 003 / PUU-IV / 2006, it seems that such decision has not provided legal certainty thus it may open the space for deviations by law enforcement officers.

Theoretically, deviations in the jurisprudence of the Constitutional Court decisions can be understood based on the practice of judicial independence and judicial accountability in which the judge has the freedom to examine and decide upon cases of judicial review by being able to account for his/her decisions to the public and the concept of living constitution that describes the constitutionality of norms is dynamic and not rigid.

Conception of Judicial Independence and Accountability

The term independent or independence is an uptake word of Independence which means the state of quality of being independent; a country freedom to manage all its affairs, whether external or internal without countrol by other country.[13] The independence of judicial power consists of two components as stated by Paulus E Lotulung, institutional independence and individual independence.[14] Article 24 Paragraphs (1) and (2) of the 1945 NRI Constitution state that:

(1) Judicial power is an independent power to administer justice in order to enforce law and justice.
(2) Judicial power shall be exercised by a Supreme Court and the judiciary below it within the general court, the religious court environment, the military court environment, the state administrative court environment and by a Constitutional Court.

Independent judicial power apart from the influence of governmental power, as desired by the 1945 Constitution of the Republic of Indonesia, as an effort to guarantee and protect people's freedom from possible arbitrary actions from the government if judicial power is

[13] Bryan A Garner. (1999). *Black Law Dictionary*, seventh edition, United States of America: West group, p. 773.

[14] J.Djohansyah. (2008). *Reformasi Mahkamah Agung Menuju Independensi Kekuasaan Kehakiman*, Jakarta: Kesaint Blanc, p.11.

combined with legislative power, one's life and freedom will be in a arbitrary control, if judicial power is united with executive power, and thus the judge may always act arbitrarily and oppressively.[15]

The Living Conception in the Constitutional Court Decisions

The constitution in the position of a country has a very significant role because it is related to the main issues or fundamentals in the life of a country. This is inseparable from the understanding, that the constitution is a meeting point of the overall interests and beliefs of a society in all fields. As stated by K.C. Wheare, as follows[16]: "a constitution is indeed the resultant of parallelogram of forces –political, economic, and social- which operate at the time its adoption". The perspective of K.C. Wheare can be understood that the constitution has a very broad and unlimited content material regarding a country's political institutions.

The obligation to explore, follow and understand the values that live in society is known as the conception of the living law or the living constitution. The constitution has a dynamic meaning or often referred to as living constitution which is a thought of the flow of nonoriginalism. Non-originalism is a stream of interpretation other than originalism. The adherents of non-originalism are of the opinion that the principle of interpretation which tries to find out the meaning of the constitution based on the conditions at that time the object is not only the text yet the subjects doing the interpretation has figured out the situation at that time.

The view of the flow of non-originalism sees a constitution, at least there are 2 (two) important things. First, the pragmatic view, which argues that interpreting the constitution in accordance with the original meaning in accordance with the formulation and conditions at the time the constitution was formed cannot be applied to provide answers to problems that occur. Second, relating to the purpose of the constitution, the formulator of the constitution formulates the constitution broadly and flexibly

[15] Bagir Manan and Kuntana Magnar. (1997). *Beberapa Masalah Hukum Tata Negara Indonesia*, Bandung: Alumni, p.. 77.

[16] K.C. Wheare. (1969). *Modern Constitution*, London: Oxford University Press, p. 68.

which results in a dynamic constitution.

Interpretation of non-original intent has a difference with the interpretation of originalist, strong reasons that the use of interpretation of non-originalism by the judge is the most appropriate interpretation in understanding the constitution as well as the basis for determining conflicting legal norms are: (1) the drafters of the constitution (at the Philadelphia convention) indicate that they do not want their specific desires to control interpretation.; (2) there is no written constitution that is able to anticipate ways that the government can use in the future to oppress the people, so there are times when it is imperative for judges to fill the void; (3) the designers' intentions are various, sometimes even temporary and often impossible to determine; (4) non-originalism allows judges to prevent crises that can occur due to inflexible interpretations of a provision in the constitution that is no longer able to fulfill the original intent of that provision; (5) non-originalism allows the constitution to develop in accordance with more enlightening notions of matters such as equal treatment of people (blacks), women, and other minorities.[17]

The interpretation of non-originalism provides an understanding that the institution of judicial power, the Constitutional Court as an interpreter institution of the constitution (the sole judicial interpreter of the constitution) should not be solely confined to the method of interpreting "originalism" by basing only on the original intent formulation Article of the 1945 Constitution of the Republic of Indonesia, especially if such interpretation actually results in the non-operation of the provisions of the 1945 Constitution of the Republic of Indonesia as a system and/or contrary to the main ideas underlying the 1945 Constitution of the Republic of Indonesia itself as a whole in relation to the objectives to be realized. The Constitutional Court must understand the 1945 Constitution of the Republic of Indonesia in the context of the whole spirit contained in it in order to build a more appropriate state

[17] I Dewa Gede Palguna. (2013). *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, Jakarta: Sinar Grafika, p. 289-290.

administration in an effort to integrate the legal ideals (rechtsidee) and state ideals (staatsideé) in order to realize a democratic rule of law and a democratic state based on law, which is the elaboration of the main ideas contained in the Preamble to the 1945 Constitution.[18]

According to Maruarar Siahaan, he definitely argued that to bridge the text of the constitution as a product of his day that reflects the values, challenges and problems faced by his formulators in the past to be used as guidelines, values and outlook on life and the basis of state in the present with different problems, challenges and situations. Therefore, in order to fulfill such demands, the constitutional norms required from the 1945 Constitution of the Republic of Indonesia in the past, the challenges and needs of the present age must not only be understood as understood and intended at first when the original drafters formulated them. What must be found is not always the meaning intended by its constituents, but rather what is the meaning desired by the text of the constitutional norm itself to resolve a legal dispute being faced. Justice Brennan, who served as the Supreme Court Judge of America, stated that "the attitude of adhering to the original intent was an arrogant attitude wrapped in humility". And therefore, it is highly recommended that judges in modern times should not only refer to the history of the compilation period, yet to the history of the interpretation and what is meant by the words in the past text.[19]

Referring to the living constitution theory, the 1945 Constitution must be understood as a constitution that has textual and contextual dimension dynamics. Hence, the interpretation of the provisions of the norms contained in the 1945 Constitution is not only understood to mean the rules that see the conditions when the norms are formulated, but also see the conditions when the norms are applied in society.

In this regard, David A. Strauss,[20] in The Living Constitution states that

[18] Tanto Lailam. "*Penafsiran Konstitusi Dalam Pengujian Konstitusionalitas Undang-Undang terhadap Undang-Undang Dasar 1945*", *Jurnal Media Hukum* Vol. 21, No. 1 June 2014, p. 12.

[19] Maruarar Siahaan. (2008). *Undang-Undang Dasar 1945: Konstitusi Yang Hidup*, Jakarta: Secretariat General and Registrar of the Constitutional Court, p. 80.

[20] David A. Strauss, The *Living Constitution*,

The living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended. In his opinion, the concept of the living constitution came about because of changes in society, economy, technology and culture that could not have been predicted when the constitution was composed. Thus, it is inevitable if the constitution changes to keep up with the times.[21] In short, the concept of the living constitution is an effort to realize a living, adaptable, and changing constitution simultaneously with existing problems in society.

As already suggested, paradigms that submit fully to the interpretation of law based on the autonomy of the text will only lead to justice based on the text, while what is sought is not such justice but a deeper meaning, such as social justice or substantive justice. Contradictory decisions of the Constitutional Court in the review of Article 2 paragraph (1) and Article 3 of the Anti-Corruption Act prove that the Constitutional Court in interpreting the constitutionality of a law is not rigid and does not only rely on text autonomy, and in turns, the existence of the 1945 Constitution of the Republic of Indonesia as a living constitution will significantly realized. Referring to the theory of the living constitution, the 1945 Constitution shall be set forth as a constitution that has dynamic of both textual and contextual dimensions. The Constitutional Court has the breadth of space to declare anything according to the mandate to maintain and uphold the constitution, while the constitution shall be living constitution in the midst of society, nation and state.

CONCLUSION

As the final arbiter of the law, jurisprudence refers primarily to one

https://www.law.uchicago.edu/news/living-constitution , downloaded August 30th 2018.

[21] Meanwhile, the world has changed in incalculable ways. The nation has grown in territory and its population has multiplied several times over. Technology has changed, the international situation has changed, the economy has changed, social mores have changed, all in ways that no one could have foreseen when the Constitution was drafted. And it is just not realistic to expect the cumbersome amendment process to keep up with these changes. It seems inevitable that the Constitution will also change. It is also a good thing, because an unchanging Constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that keeps us from making progress and prevents our society from working in the way it should.

source of law in judicial review in the Constitutional Court. Jurisprudence applies when the panel of judges believes that the previous decisions are still relevant to current constitutional issues. And in an effort to address such situation, it can be obviously seen in the decisions about the constitutional impairment requirements and the interpretation of the state's right to control in several Constitutional Court decisions. However, there are also Constitutional Court decisions that are different from previous decisions with the same constitutional issues, as in the review of Article 2 paragraph (1) and Article 3 of the Corruption Law. The Constitutional Court decisions changed from the interpretation of formal offense to material offense. The Constitutional Court has assumed that the shifting interpretation of the *a quo* provision because it is mainly considered the application of detrimental element to state finances has manifestly and repeatedly caused legal uncertainty and injustice in efforts to eradicate corruption cases. Based on results obtained in this line of research, it is therefore argued that there is a fundamental reason for the Constitutional Court to change the constitutionality assessment of the previous decisions. This provides suggestion that the jurisprudence on the constitutionality issues of Article 2 paragraph (1) and Article 3 of the Corruption law is not binding for judges due to crucial issues from the previous decisions.

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