Constitutional Authority Based on the Constitutional Court Decision in Indonesia

Iskandar Muda¹, Bintan R. Saragih ², Ferry Edwar³

¹Universitas YARSI, Indonesia, E-mail: iskandarmudaaphamk@yahoo.co.id
²Universitas Pelita Harapan, Indonesia, E-mail: bintan.saragih@uph.edu
³Universitas Trisakti, Indonesia, E-mail: ferryedward127@gmail.com

Submitted: June 19, 2022; Reviewed: January 1, 2023; Accepted: April 14, 2023.

Article Info

Abstract

At least there has been a development regarding the constitutional authority of the Constitutional Court in four ways based on its decision. It is also true that the Constitutional Court’s decision is final and binding, but not in the sense of not being examined further. This study uses normative research methods. The results revealed four developments in the constitutional authority of the Constitutional Court in three ways: passive, active, and passive-active methods. Furthermore, it was also revealed; that there are also development efforts that have occurred more than once in the same matter. Therefore, in the future when the Constitutional Court decides on cases related to its authority, ideally by observing the limiting signs of the previous decision and considering the three basic characteristics of constitutional interpretation. Likewise, in the future there is another development regarding the constitutional authority of the Constitutional Court. In that case, it is appropriate to also pay attention to the three basic characteristics of constitutional interpretation.

A. Introduction

The Constitutional Court was established in 2003 in Indonesia. This Court has various functions as stipulated in the 1945 Constitution of the State of the Republic of Indonesia (1945 Constitution) and Law No. 24 the Year 2003 concerning the Constitutional Court of the Republic of Indonesia (Law No. 24
the Year 2003). However, there have been four developments in the constitutional authority of the Constitutional Court based on its decision.

The first, on April 12, 2005, based on Constitutional Court Decision No. 066/PUU-II/2004, there is the "growth" in the constitutional review authority of the law. The *a quo* decision stated in Article 50 of Law No. 24 the Year 2003 contradicts the 1945 Constitution. After *a quo* decision means the Constitutional Court has the authority to constitutional review all laws, both enacted "after" and "before" the Amendment of the 1945 Constitution. The second, on February 8, 2010, based on Constitutional Court Decision No. 138/PUU-VII/2009, is an "addition" of the constitutional authority of the Constitutional Court and an authority to have judicial review of the Government Regulations instead of Law (Perppu). As previously known, in

---

2Regarding to the understanding of "the development of the constitutional authority of the Constitutional Court based on its decision "referred to in this article is: "Compliance with an activity carried out by the Constitutional Court when exercising its constitutional authority. Where after exercising its authority; based on its decision to produce something which includes development, addition, new ideas, and/or maybe even later there will also be a change in the constitutional authority of the Constitutional Court." For more details and clearer please read in main heading 3: Basic Authority, Development Concept, and Development Method.
3The Constitution as the main element of Constitutional Law, in this case John Alder said that the study of Constitutional Law must be selective but must cover the broad objectives of the political arrangements of the country concerned at least and the main rights of individuals protected by law. Look at John Alder, General Principles of Constitutional and Administrative Law, Fourth Edition, New York: Palgrave Macmillan, (2002), p. 4.
4David A. Strauss said: “The drafters of the Constitution and its amendments deserve credit for many things, but one of their accomplishments that may not be sufficiently recognized is that they drafted many provisions that have enough flexibility to allow us to read them in ways that accommodate our current understandings.” See at on. David A. Strauss, “Does The Constitution Mean What It Says?, Harvard Law Review 129, No. 1 (2015) : 14. Based on this statement, it can be said that not always the interpretation of words in the constitution is always textual. It also means that the interpretation of the constitution must also follow the changing times.
5The using of “judicial review” term not “constitutional review” used at the Constitutional Court has an authority to review a Perppu, to make easier in understanding certainly. As known before in the System Indonesian Law, There are two state institutions have an authority to review a Perppu; The House of Representatives has an authority to review a Perppu (legislative review of Perppu) and the Constitutional Court has an authority to review a Perppu too (judicial review of Perppu). For more details see at on Iskandar Muda, “Fenomena Two in One Pengujian Perppu,” Jurnal Konstitusi 15, No. 2 (2018) : 258-259. And also see on Iskandar Muda, “Tidak Dinamis Namun Terjadi Dinamika Dalam Hal Uji Konstitusional Norma Zina,” Jurnal Yudisial 11, No. 3 (2018): 294.
6In the legal system in Indonesia; based on Article 22 paragraph (2) of the 1945 Constitution it is stated that: “In the event compelling exigency, the President is entitled to stipulate government regulations in lieu of laws.” In this case; Eric A. Posner and Adrian Vermeuleassume that presidential power has grown dramatically in the last few decades but these forces are ineffectivelimited by law. The striking reality of presidential power, as they
the 1945 Constitution and Law No. 24 of the Year 2003, no article states that the Constitutional Court has the authority to conduct a judicial review of the Perppu.

The third, on September 19, 2012, based on the Constitutional Court Decision No. 3/SKLN-X/2012, there is the "growth" in the constitutional authority of the Constitutional Court regarding the Dispute Authority of State Institutions Case (SKLN). One of the legal considerations (ratio decidendi) used by the Court in a quo decision is: "... the disputed authority in the SKLN case does not have an authority explicitly (expressis verbis) mentioned in the 1945 Constitution, but includes the authority of the delegation sourced from the attribution authority mentioned in the 1945 Constitution too."7

The fourth, on May 19, 2014, based on Constitutional Court Decision No. 97/PUU-XI/2013, there is "growth" with the new ideas" in deciding cases on the Disputes on Regional Head Election Results. A quo decision states that: the provisions of the Article 236C of Law No.12 the Year 2008 concerning the Second Amendment to Law No. 32 the Year 2004 concerning Regional Government (Law No. 12 the Year 2008) are contrary to the 1945 Constitution.8

However, a quo decision also said the Constitutional Court could handle Disputes on Regional Head Election results while no law governs it. When referring to various types of Constitutional Court decisions, a quo decision is interesting to study, as known based on a quo decision, on the one side, states that the Constitutional Court does not have the authority to handle the disputes of the Regional Head Election Results. In contrast, on the other hand, it states that it has authority during. There is no law governing this case.9

The decision of the Constitutional Court is final and binding, but it does not mean that it should not be examined further, such as Satya Arinanto’s point of view:10

"The Constitutional Court acts as an 'arbitrator,' which means that a court institution can provide an opinion or decision on which party is 'more correct' not the 'most correct' in debating a 'constitutional' or 'unconstitutional' matter. Of course, in social science, 'absolute truth' is rather difficult to be obtained."

There is an understanding as mentioned above, then connected with the phenomenon of "the development of the constitutional authority of the

---

8Article 236C a quo mandate the diversion of authority to decide the disputes of PHP Kada from the Constitutional Court to Supreme Court.
Constitutional Court based on its decision” therefore; it is useful for further research in the future. Therefore there are two objectives of this study. First, how the concept and method of developing the constitutional authority of the Constitutional Court are based on its decision? Second, how the development of the constitutional authority of the ideal Constitutional Court in the future will be?

The results and updates in this study reveal four developments in the constitutional authority of the Constitutional Court in three ways: passive, active, and passive-active methods. The novelty of this research is that there has been a development of the constitutional authority of the Constitutional Court in four ways based on its decisions. There are four developments in the constitutional authority of the Constitutional Court in three ways: passive, active, and passive-active ways. This research will contribute when the Constitutional Court decides cases related to its authority, ideally by considering the limiting signs of previous decisions and the three basic characteristics of constitutional interpretation.

B. Discussion

1. Basic Authority, Development Concept, and Development Method

The presence of the Constitutional Court in the constitutional system in Indonesia has a role as the guardian of the constitution, for the constitution always be used as a foundation and carried out consistently by each component and society. Therefore, the Constitutional Court is entrusted with the constitutional authority\(^\text{11}\) (constitutionally entrusted powers)\(^\text{12}\) as affirmed in Article 24C paragraph (1) of the 1945 Constitution, such as:

"The Constitutional Court has the authority to adjudicate at the first and final instance, the judgment of which is final, to review laws against the constitution, to judge on authority disputes of state institutions whose authorities are granted by the constitution, to judge on the dissolution of a political party, and to judge on disputes regarding the result of a general election."

Specifically, the authority of the Constitutional Court is regulated in Article 10, paragraph (1) of Law No. 24 the Year 2003, which is stated as follows:

a. the review of laws against the 1945 Constitution of the State of the Republic of Indonesia;

\(^{11}\)Constitutional means: concerned with, in accordance with, or regulated by the constitution of the country. see Anonim, Kamus Besar Bahasa Indonesia, edisi keempat. Jakarta: PT. Gramedia Pustaka Utama, (2008), p. 727.

b. decide upon disputes related to the authorities of state institutions whose authorities are granted under the 1945 Constitution of the State of the Republic of Indonesia;

c. decide upon the dissolution of political parties; and

d. decide upon disputes concerning the results of general elections.

By that time, the constitutional authority of the Constitutional Court has developed. Therefore, to facilitate an understanding, the concept of developing the constitutional authority of the Constitutional Court referred to in this study by referring to opinions as stated by Jimly Asshiddiqie, that is:  

"The constitution is never perfect; therefore, it is always open to changes for improvement. Completion of the constitution must not be changed or use formal amendments, but it can be interpreted or practiced by the daily constitution too so that it always makes the 1945 Constitution as a living constitution."  

Based on Jimly Asshiddiqie's understanding, it can be interpreted that the development of the constitutional authority of the Constitutional Court can alternate based on the decisions of the Constitutional Court when exercising its constitutional authority. Furthermore, the existence of Jimly Asshiddiqie's point of view was finally integrated with an understanding of the development based on the Indonesian Dictionary (KBBI), Black's Law Dictionary, Alphabetical Thesaurus of Indonesian Language Center and Oxford Paperback Dictionary & Thesaurus, eventually, the development itself referred to "Development of the Constitutional Authority of the Constitutional Court" is: "Compliance with an activity carried out by the Constitutional Court when exercising its constitutional authority. After exercising its authority, based on its decision to produce something which includes growth, addition, new ideas, and/or maybe there will be a change in the constitutional authority of the Constitutional Court later too."

---

13 This statement was stated by Jimly Asshiddiqie in a panel discussion held by Kompas Co. in August 2012. See Jimly Asshiddiqie, “Kaji Ulang Amandemen UUD 1945,” Kompas (10 Nov. 2002), p. 3.

14 The development is the things develop. See Anonim, Kamus..., op cit, (2008), p. 662.


16 Based on Tesaurus Alfabetis Bahasa Indonesia Pusat Bahasa, the meaning of development is: (i) continuation, progress, addition, development, change, sequence, progress and (ii) path, chronology, sequence. See Anonim, Tesaurus Alfabetis Bahasa Indonesia Pusat Bahasa, Cet. I. Jakarta: PT Mizan Pustaka, (2009), p. 290.

The four developments in the constitutional authority of the Constitutional Court have occurred based on four decisions done by three methods. These are: by using the passive, active, and passive-active Methods. Furthermore, it will be elaborated as follows:

a. Constitutional Court Decision No. 066/PUU-II/2004 resulted in the "growth" of the constitutional review authority of the law. Thus, the Constitutional Court has the authority to constitutional review laws enacted before the Amendments of the 1945 Constitution of the Republic of Indonesia. The method used is a passive method (development authority constitutional court in the sense of passive); it means that there is a decision of the Constitutional Court in the context of making developments when exercising its authority as stated in Article 24C paragraph (1) of the 1945 Constitution.

b. Constitutional Court Decision No. 138/PUU-VII/2009 resulted in an "addition" in authority. The method used is an active method (constitutional court development authority in the sense of active); it means that the authority of the Constitutional Court is based on its decision, but it does not have an authority explicitly (expressis verbis) mentioned in the Article 24C paragraph (1) of 1945 Constitution. Thus, the Constitutional Court authorized judicial review of the Perppu.

c. Constitutional Court Decision No. 3/SKLN-X/2012 results in the "growth" in terms of deciding upon the SKLN case thus, the authority disputed in SKLN does not have an authority explicitly (expressis verbis) mentioned in the 1945 Constitution of the Republic of Indonesia but also includes the delegation authority originating from the attribution authority mentioned in the 1945 Constitution of the Republic of Indonesia. The method used is a passive method (development authority of the Constitutional Court in the sense of passive); it means that there is a decision of the Constitutional Court in the context of making developments when exercising its authority as stated in Article 24C paragraph (1) of the 1945 Constitution.

d. Constitutional Court Decision No. 97/PUU-XI/2013 resulted in "growth with new ideas" deciding cases on Disputes on PHP Kada, a quo decision stating that the Constitutional Court does not have the authority to decide upon PHP Kada case. However, before the existence of a justice court that handles the PHP Kada case; the Constitutional Court also stated that Constitutional Court had the authority to handle the PHP Kada case. The method used is a passive-active method (development authority of the Constitutional Court in the sense of passive-active); it means that there is a Constitutional Court decision to carry out a law order, but in the decision, the Constitutional Court declared there is not an authority, however before the existence of a justice court that handles PHP Kada case, the Constitutional Court stated that Constitutional Court has an authority to handle PHP Kada case too. Even after a quo decision, the Constitutional Court only once decided on a quo dispute as it had been based on
Constitutional Court Decision No. 9/PHPU.D-XII/2014. In another case, the Constitutional Court decided *a quo* dispute based on the mandate of Article 157 paragraph (3) of Law No. 10 of the Year 2016.\(^{18}\)

To find out more clearly, the four developments related to the constitutional authority of the Constitutional Court and its methods can be seen in figures 1, 2, 3, and 4 as follows.

**Figure 1.**
The Growth of an Authority of the Constitutional Review of the Law and Its Methods (Passive method)

<table>
<thead>
<tr>
<th>Constitution, Based on Article 24C paragraph (1) of 1945 Constitution, Constitutional Court has an authority “… to review laws against the Constitution, …”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law Based on Article 50 of Law No. 24 Year 2003: “Laws that can be applied for review are those that were enacted after amendment of 1945 Constitution.”</td>
</tr>
<tr>
<td>Development Method The growth of an authority of constitutional review on the laws can be said as passive method (development authority constitutional court in the sense of passive); it means there is the decision of the Constitutional Court in the context of making developments when exercising its authority as stated in Article 24 C paragraph (1) of Constitution 1945.</td>
</tr>
<tr>
<td>The Growth Constitutional Court Decision No. 066/PUU-II/2004 which was stated on the open plenary sessions to the public on on April 12, 2005, clause Article 50 of Law No. 24 Year 2003 declared contrary to 1945 Constitution. After <em>a quo</em> decision means the Constitutional Court has an authority to handle the constitutional review of all laws; both the laws enacted after and before amendment of the 1945 Constitution.</td>
</tr>
</tbody>
</table>

\(^{18}\)Law No. 10 Year 2016 concerning the Second Amendment to Law Number1 Year 2015 concerning about the Establishment of Government Regulation in Lieu of Law No. 1 Year 2014 concerning the Election of Governors, Regents and Mayors Becomes Law.
Constitutional Authority Based…
Iskandar Muda, Bintan R. Saragih, and Ferry Edwar

Figure 2.
The Addition of Constitutional Authority of the Constitutional Court
Thus It has an Authority to Have Judicial Review of Perppu
and Its Methods (Active Method)

Constitution
Based on Article 24C paragraph (1) of 1945 Constitution, Constitutional Court has an authority: “… to review laws against the Constitution, …”

Law
Based on Article 10 paragraph (1) letter a of Law No. 24 Year 2003; Constitutional Court has an authority: “the review of laws against the 1945 Constitution of the State of the Republic of Indonesia.”

Development Method
The authority addition can be said as an active method (development authority constitutional court in the sense of active); it means that the authority of the Constitutional Court based on its decision, but it does not have an authority explicitly (expressis verbis) such as stated on the Article 24C paragraph (1) of 1945 Constitution.

The Addition
Constitutional Court Decision No. 138/PUU-VII/2009 which was stated on open plenary sessions to the public on Februari 8, 2010; Constitutional Court has an authority to judicial review of the Perppu.

Figure 3. The Growth of Constitutional Authority to Decide the Dispute of SKLN Case and Its Methods (Passive method)

Constitution
Based on Article 24C paragraph (1) of Constitution 1945 Constitutional Court has an authority: ”...to judge on authority disputes of state institutions whose authorities are granted by the Constitution, …”

Law
Based on Article 10 paragraph (1) letter b of Law No. 24 Year 2003; Constitutional Court has an authority: ”... to decide upon disputes related to the authorities of state institutions whose authorities are granted under the 1945 Constitution of the State of the Republic of Indonesia.”

Development Method
The growth of constitutional authority decides on the SKLN cases can be said as a passive method (development authority constitutional court in the sense of passive); it means that there is a decision of the Constitutional Court in the context of making developments when exercising its authority as stated on Article 24C paragraph (1) of Constitution 1945.

The Growth
Constitutional Court Decision No. 3/SKLN-X/2012 stated in the open Plenary Session to the public on September 19, 2012, the Court stated: ”... the authority disputed in the SKLN case must not have an authority explicitly (expressis verbis) mentioned in the 1945 Constitution of the Republic of Indonesia, but also includes the authority of the delegation sourced from the attribution authority mentioned in the 1945 Constitution of the Republic of Indonesia.”
**Figure 4. The Growth with a New Idea of Constitutional Authority**

**Deciding upon the PHP Kada Case and Its Methods (Passive-Active method)**

<table>
<thead>
<tr>
<th>Constitution</th>
<th>Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Based on Article 24C paragraph (1) of Constitution 1945 Constitutional Court has an authority: &quot;..., and to judge on disputes regarding the result of a general election.”</td>
<td>Based on Article 236C of Law No. 12 Year 2008 mandates the transfer of authority to decide upon the dispute of PHP Kada from the Supreme Court to the Constitutional Court.</td>
</tr>
</tbody>
</table>

**Development Method**

The growth of constitutional authority decides on the dispute of PHP Kada case can be said as a passive-active method (development authority constitutional court in the sense of passive-active); it means that there is a decision of Constitutional Court in the context of carrying out a law order, however in that decision, the Constitutional Court states that It does not have an authority, however in the decision stated that the Constitutional Court has also an authority as long as there is not law regulating it yet.

<table>
<thead>
<tr>
<th>The Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Court Decision No. 97/PUU-XI/2013 which was announced in the open Plenary Session to the public on May 19, 2014; The Court stated that: clauses on the Article 236C of Law No. 12 Year 2008 does not have binding legal force, means that the Constitutional Court does not have an authority to handle the dispute of PHP Kada. However, the decision also said that the Constitutional Court has an authority to handle the dispute of PHP Kada as long as there was not law regulating it yet.</td>
</tr>
</tbody>
</table>

Based on the four figures of the development of the constitutional authority of the Constitutional Court and the method as exposed above, there are two categories practically. First, if it is said to be "growth" it means that the authority already exists and then grows and develops (see Figures 1, 3, and 4). Second, if it is said as the "addition" it means that the authority doesn’t exist yet, but it becomes eventually. Thus the authority adds (look at Figure 2).

2. **The Ideal Development of Constitutional Authorities in The Future**

Goodwin Liu and friends\(^\text{19}\) said that to remain faithful to the Basic Law is to interpret words and apply its principles by preserving the meaning of the

---

constitution and democratic legitimacy from time to time. The original understanding is an important source of constitutional understanding. Still, other sources are also important such as sources from judges, elected officials, regular daily habits of citizens, lessons from precedents and historical experience, practical consequences of the rule of law, and developing norms and community traditions.

Furthermore, Goodwin Liu and their friends argued that when describing this approach, they first started from the premise that a constitutional interpretation must remain faithful to the document's character. The most important thing in this case is three things, that is:20

a. The constitution is the basic charter of society the constitution states that there are opportunities but important principles of government.

b. Documents that the public can understand; that's why the constitution was made. Franklin Roosevelt once said; This is a public document, not a lawyer's contract. However, constitutional interpretation is not the task of the judiciary alone. The important role of interpreting the constitution belongs to the judges. It is, therefore, neither confusing nor incorrect that judicial doctrine is often shaped by current views through social movements, legislation, and historical practice.

c. The constitution is a statement of our ideals and an instrument of operational command. The pledge of ideals and the implementing rules are contained in the constitution. But in this case the constitution is not only an aspirational bias but also confirms our commitment to carry out our ideals in practice. Implementing these promises guarantees loyalty to the constitution, not only as pearls of wisdom written on paper but ideally related to the routine problems of life. Constitutional principles, in a broad sense applied to certain controversies, must consider the experience and practical legal ramifications. Not only as related to legal principles but whether our lives are in the right state. In this way, interpretation is useful as a manifestation of constitutional guarantees.

Furthermore, the three basic characteristics of constitutional interpretation are used to discuss the development of an ideal constitutional authority of the Constitutional Court in the future. Moreover, in this case two things should be noted, first, considering the development of the constitutional authority of the Constitutional Court that has already occurred. Second, as well as considering the efforts to develop the constitutional authority of the Constitutional Court have occurred too, as is known as these efforts are the application of constitutional review of the Circular Letter (SE), Supreme Court Decision, Stipulations of the Provisional People’s Consultative Assembly (Tap MPR,
Ketetapan Majelis Permusyawaratan Rakyat), and Herziene Indonesi Reglement (HIR).\textsuperscript{21}

\textbf{a. Considering the Developments that have been Occured}

It was reiterated that what is intended by "development of the constitutional authority of the Constitutional Court" is: "Compliance with an activity carried out by the Constitutional Court when exercising its constitutional authority. After exercising its authority, based on its decision to produce something that includes growth, addition, new ideas, and/or maybe even there will be a change in the constitutional authority of the Constitutional Court later too. "Therefore, if we see the development of the constitutional authority of the Constitutional Court that has occurred, the next "compliance" may occur at least in two things. First, the very potential to occur is any change in terms of its authority in deciding upon the dispute of PHP Kada and second; the judicial review of the Perppu may also occur in "compliance" regarding legal procedures.

PHP Kada, why the development of the constitutional authority of the Constitutional Court has occurred in deciding upon the dispute of PHP Kada is very potential to occur because the authority is temporary, as it is known based on Article 157 paragraph (3) of Law No. 10 the Year 2016; the cases of dispute in determining the final stage of vote acquisition are examined and tried by the Constitutional Court until the establishment of a special justice court. It means that if a special justice court has been formed to handle the dispute of PHP Kada, the Constitutional Court does not have the authority to adjudicate the dispute of PHP Kada.

Judicial review of the Perppu, the implementation of the constitutional authority of the Constitutional Court in terms of judicial review of the Perppu, the "compliance" may cause phenomenon and this phenomenon is "very phenomenal" when compared with the development of the constitutional authority of the other Constitutional Court. Both from the beginning of the authority and in the procedure of carrying out the authority, whereas the Constitutional Court carries out the procedure, it is also constitutionally appropriate to respect the existence of the authority of the House of Representatives to examine the Perppu (legislative review) as we know that based on Article 22 paragraph (2) of Constitution 1945 stated that “Such government regulation shall obtain the approval of the People’s Representative Council in its next session. “And then the Article 22 paragraph (3) of Constitution 1945 stated that: “If such government regulation fails to obtain approval, it shall be revoked.” It means that two state institutions have

\textsuperscript{21}Herzien Inlandsch Reglement (HIR) is often translated as "Reglemen Indonesia Yang Diperbaharui" (RIB; Reglemen Indonesia Yang Diperbaharui), that is the procedural law in civil and criminal proceedings in force in the Java and Madura islands. This \textit{reglement} came into force in the Dutch East Indies era, listed in State Gazette (staatblad) No. 16 Year 1848.
the authority to review the Perppu in this case; thus, there is a phenomenon referred to as: “The Phenomena of Two in One in Perppu Review.”

Based on Iskandar Muda’s point of view, at least three forms of “The Phenomena of Two in One in Perppu Review” can be seen. First, there is a judicial examination for constitutionality to Perppupre-legislative review, there is the presence of judicial review of the Perppu at the Constitutional Court, but after that (in a short time), there will be the legislative review of the Perppu at the House of Representatives. Second, suppose there is the judicial examination for constitutionality to Perppu post-legislative review. In that case, there is a judicial review of the Perppu at the Constitutional Court, whereas before, the legislative review of the Perppu at the House of Representatives was ongoing. Third, it is possible to be judicial review of the Perppu at the Constitutional Court in the form of the first or second phenomenon referred to above. Still, in the protracted time, the House of Representatives does not give a decision not to approve or approve the Perppu becomes the law as mandated based on Article 22 paragraph (2) of 1945 of the constitution, stated that: “Such government regulation shall obtain the approval of the People’s Representative Council in its next session.”


Iskandar Muda also reveals; twelve Decisions of the Constitutional Court stated that: “Petitioners' requests cannot be accepted,” based on consideration the Petitioners have lost the object of their petition certainly; that is, related to Perppu has been approved by the House of Representatives into the law and also it applies on the legal procedure for the second phenomenon; it can aim to prevent potential disputes of authority between the Constitutional Court and the House of Representatives too, in this case the Perppu examination request can be processed in the Constitutional Court, but with the note that the Constitutional Court decrees the decision after the results of the legislative

---

23Ibid, p. 268. An this article, 11 decisions are stated. While in this paper there are 12 decisions, that is by its addition Constitutional Court Decision No. 58/PUU-XV/2017.
review of the Perppu at the House of Representatives. Why is the legal procedure for the first and second phenomena intended to prevent potential authority disputes between the Constitutional Court and the House of Representatives? Try to imagine; for example, when the Constitutional Court declared a temporary unconstitutional Perppu after that, the Perppu was approved by the House of Representatives, or it could be when the Constitutional Court declared a temporary constitutional Perppu after that the Perppu did not get approval from the House of Representatives. In this case, there is the possibility of a potential dispute of authority between the Constitutional Court and the House of Representatives occurred.

Then, when we observe the third phenomenon, Iskandar Muda also reveals; that using the legal procedure is more complicated than the first and the second phenomena. However, any legal procedure used intended to prevent the possibility of protracted unconstitutionality of Perppu later due to the House of Representatives does not carry out the mandate of Article 22 paragraph (2) of the 1945 Constitution, stated that: “Such government regulation shall obtain the approval of the People’s Representative Council in its next session.” Legal procedures in handling this third phenomenon; the basis for consideration is the ius curia novit principle, the person standing injudicious, the right to be heard in a balanced, the active judges in the trial, and the principle of independence and impartiality. On the legal procedure, the Constitutional Court could proceed to the review of the Perppu but with the record, The Constitutional Court is obliged to present the directly related parties (from the House of Representatives and the President) and other related parties who have an indirect interest, where all parties have the right to be heard. It can not be separated deal with this case if it is deemed necessary the Constitutional Court can summon witnesses and/or experts in the trial. However, it will be better if the Constitutional Court first ensures that the Petitioner has legal standing.

Based on the three forms of “The Phenomena of Two in One in Perppu Review” and the legal procedure mentioned above, finally Iskandar Muda

---

26 Related to the possibility of protracted unconstitutionality of Perppu, Moh. Mahfud MD has said: “There will be the time when the Perppu was made unilaterally by the President but politically the House of Representatives could not convene to discuss it because of a certain situation, either because of an abnormality or because it was deliberately hampered by certain political forces thus the House of Representatives can not convene…” See the different reason (Concurring Opinion) of Moh. Mahfud MD in the Constitutional Court Decision No. 138/PUU-VII/2009, p. 30.
27 Regarding to this Article 22 paragraph (2) of Constitution 1945; Jimly Asshiddiqie argued that if the current trial period is three months, then the age of Perppu will only be around 4-6 months, then after that it must be revoked or accepted as a new Law. See Jimly Asshiddiqie. Komentar Atas Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Cetakan pertama. Jakarta: Sinar Grafika, (2009), p. 71.
delivers his opinion that: it can also be said as two types of the Constitutional Court authority in terms of the authority of judicial review of the Perpppu. The first and second forms of legal phenomena and procedures can be said to be a kind of passive authority. It means that the Constitutional Court has a decision on the judicial review of the Perpppu after the results of the legislative review of the Perpppu at the House of Representatives. In this case, it can be interpreted to prevent potential authority disputes between the Constitutional Court and the House of Representatives. While the third legal phenomenon and procedure can be said to be a kind of active authority, it means that Constitutional Court can have a ruling on judicial review of the Perpppu if it occurred before it; thus in this case it "really" happened, the protracted unconstitutionality of the Perpppu because the House of Representatives does not carry out the mandate of Article 22 paragraph (2) of 1945 Constitution.

By considering the development of the constitutional authority of the Constitutional Court, which has already occurred, it can also examine the legal considerations of the Court when developing the constitutional authority of the Constitutional Court thus, it can understand its limitations finally. Therefore, it will be explained briefly in the following table.

### Table 1. The Ideal Developments by Considering the Limitation of Developments Based on the Developments of Constitutional Authorities of the Constitutional Court Occurred (The Limitation of Development following the Three Basic Characters of Constitutional Interpretation)

<table>
<thead>
<tr>
<th>No</th>
<th>The Developments</th>
<th>Limitation of Developments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The Growth of Constitutional Authority in Terms of Constitutional Review of Laws.</td>
<td>There is no restriction, which means the Constitutional Court has the authority to handle the constitutional review of all laws enacted before the Amendment of the 1945 Constitution of the Republic of Indonesia.</td>
</tr>
<tr>
<td>2</td>
<td>Increasing Constitutional Authority; thus, it has authority to judicial review of the Perpppu.</td>
<td>The right thing that Constitutional Court to know about the limitation is if in, one day should carry out the third legal procedure, such as a kind of active authority toward the implementation of judicial review of the Perpppu.</td>
</tr>
<tr>
<td>3</td>
<td>The Growth of Constitutional Authority in Deciding SKLN.</td>
<td>The disputed authority in the SKLN case must not have an authority explicitly (expressis verbis) such as mentioned in the 1945 Constitution of the Republic of Indonesia but also includes the authority</td>
</tr>
</tbody>
</table>

---

The Growth with a New Idea of Constitutional Authority in Deciding PHP Kada.

For the implementation of the growth with a new idea the constitutional authority in terms of deciding PHP Kada does not become the implementation of the authority because there already been a law governing it, which is based on Article 157 paragraph (3) of Law no. 10 the Year 2016 concerning about the Second Amendment to Law Number 1 the Year 2015 concerning about the Establishment of Government Regulations in lieu of Law Number 1 the Year 2014 concerning about the Election of Governors, Regents and Mayors into the Law, states that the disputes concerning about the determination of the final stage of vote acquisition are examined and tried by the Constitutional Court until the establishment of a special judicial court.

Based on the limits of the "four development efforts" as referred to in Table 1 above, whether these limitations are in line with the three basic characteristics of constitutional interpretation, those are: (i) meaningful principles are from the government, (ii) the understanding is developing forged through social movements, legislation, and historical practice, and (iii) to realize the constitutional guarantee "it is not only as a matter of legal principles but also in terms of how we truly live.”

The limitations of the development of constitutional authorities of the Constitutional Court on the numbers 1 and 2 are also following the basic character of the third constitutional interpretation. The limitation on the development of the constitutional authority of the Constitutional Court on the number 3 also follows the basic character of the second and the third constitutional interpretations. Whereas the limitation of the development of the constitutional authority of the Constitutional Court on the number 4 has been following the basic character of the first, second, and fourth constitutional interpretations.
b. Considering the Developmental Efforts that have Occurred

There have been at least four efforts yet to develop the constitutional authority of the Constitutional Court has occurred. The First Constitutional Court Decision No. 24/PUU-VIII/2010 rejects efforts to develop the constitutional authority of the Constitutional Court regarding the constitutional review of the SE.

Second, at least there have been three efforts in the term of constitutional review of the Supreme Court Decision nowadays; nevertheless, the three efforts are in two different paths “entrance” to submit a petition for a constitutional review of the Supreme Court’s Decision. The first two cases were the path to submit "entrance" through the constitutional review of the law. The two cases are not included in one of the constitutional authorities of the Constitutional Court substantially but submitted in the frame of one of the constitutional authorities of the Constitutional Court (constitutional review of the law) so that the Constitutional Court must examine and decide. And the two cases have been decided by Constitutional Court Decision No. 001/PUU-IV/2006 and No. 110-111-112-113/PUU-VII/2009.30 During the second path, one case submits the direct "entrance" of constitutional review of the Supreme Court Decision, in this case as based on the decision of Constitutional Court Determination No. 24/PUU-IX/2011.

Third, at least there are three decisions related to efforts to develop the authority of the Constitutional Court in terms of constitutional review of the Tap MPR. Constitutional Court Decision No. 24/PUU-XI/2013, No. 86/PUU-XI/2013, and No. 75/PUU-XII/2014. However, the three a quo decisions were equally conclusive in the case related to the review of Tap MPR, but there was a different path of the "entrance." The two decisions of (Constitutional Court Decision No. 24/PUU-XI/2013 and No. 75/PUU-XII/2014) related to the direct application with the legal review application of the Tap MPR No. I/MPR/2003 concerning the Review of Material and Legal Status of the Provisions of the Temporary Consultative Assembly and the Provisions of the Consultative Assembly of the Republic of Indonesia from 1960 to 2002. Another case with the other way of the (Constitutional Court Decision No. 86/PUU-XI/2013) is by having a petition of constitutional review of Law 12 the Year 2011 concerning Laws and Regulations.

29In addition, to the developmental efforts in terms of constitutional review: (i) SE, (ii) Supreme Court Decision, (iii) Tap MPR and (iv) HIR, there is another effort too. That is the development effort in terms of the constitutional review of the Decree of the Governor of the First Level Region of South Sumatra Number 142/KPTS/III/1983, nevertheless it isn’t discussed in this paper, because this effort have been terminated by the Constitutional Court Determination No. 023/PUU-III/2005 on February 3, 2006, as for a quo decree because the Petitioner filed the revocation of the case and finally was granted by the Court as a quo decree.

The Last, the fourth, Constitutional Court Decision No. 68/PUU-X/2012, is a decision on the petition for the constitutional review of the HIR. A quo verdict was announced in the open Plenary Session for the public of the Constitutional Court on February 13, 2013 with the decision: "Declaring the Petitioner's application cannot be accepted."

Considering those efforts to develop the constitutional authority of the Constitutional Court have already occurred. Thus we can also examine the legal considerations of the Court when developing the constitutional authority of the Constitutional Court so that we can understand its limitations finally. Therefore, it will be explained briefly in the following table.

**Table 2. The Ideal Developments by Considering Limitation of Development Based on Efforts to Develop Constitutional Authority of the Constitutional Court has Occurred (The Limitation of Developmental Efforts following Three Basic Characters of Constitutional Interpretation)**

<table>
<thead>
<tr>
<th>No</th>
<th>Developmental Efforts</th>
<th>Limitation of Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Constitutional review of the SE.</td>
<td>Suppose another petitioner submits a petition for a constitutional review of the Circular Letter. In that case, the Constitutional Court will likely reject the petition. As known based on the Constitutional Court Decision No. 24/PUU-VIII/2010 in terms of the efforts on constitutional review of the SE, one of the legal considerations is the existence of legal principles stating that for the things which are out of the judiciary authority, thus the revocation can be carried out by the forming agency only.</td>
</tr>
<tr>
<td>2</td>
<td>Constitutional review of the Supreme Court Decision.</td>
<td>Ideally, suppose there is a Petitioner who submits a petition for a constitutional review of the Supreme Court Decision. In that case, the Constitutional Court will likely reject the petition. As known based on one of the legal considerations of Constitutional Court Decision No. 001/PUU-IV/2006 in terms of the efforts on constitutional review of the Supreme Court Decision that is: &quot;The object of the Petitioner's petition does not include on the authority of the Constitutional Court to examine, hear, and decide upon it.&quot;</td>
</tr>
<tr>
<td></td>
<td>Constitutional review of the Tap MPR.</td>
<td>In the future, if there will be a Petitioner on the constitutional review of the Tap MPR, there are two methods. The first, directly with the constitutional review of the Decree of the Consultative Assembly and usually in this case is most likely that the petition will be rejected, as we know that one of the legal considerations of Constitutional Court Decision No. 24/PUU-XI/2013 states: “…MPRS/MPR provisions have a hierarchical position is above the Constitution, thus based on Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia the examination of the MPRS/MPR Decree does not include in the authority of the Court …” and a quo consideration has also been referred by Constitutional Court Decision No.75/PUU-XII/2014. The second, by having the constitutional review of Law No. 12 of the Year 2011, which occupies the Decree of the Consultative Assembly, included in the hierarchy of laws and regulations, it is probable that by this second method, the petition can be granted. Based on the Constitutional Court Decision No. 86/PUU-XI/2013 in the Conclusion section, the Court concluded that: &quot;The Court has an authority to hear the petition of a quo. It means that the first and the second methods are two different things.</td>
</tr>
<tr>
<td></td>
<td>Constitutional review of the HIR.</td>
<td>In the future, if there will be a Petitioner on the constitutional review of the HIR, there will probably be granted while the petition is clear. Based on the Constitutional Court Decision No. 68/PUU-X/2012, in the Conclusions section, the Court concluded that: &quot;The Court has an authority to hear a quo petition.&quot;</td>
</tr>
</tbody>
</table>

Based on the limitation of "four development efforts" as mentioned in Table 2 above, whether these limitations follow the three basic characteristics of constitutional interpretation, those are: (i) meaningful principles are from the government, (ii) the understanding is developing forged through social movements, legislation, and historical practice, and (iii) to realize the constitutional guarantee "it is not only as a matter of legal principles but also in terms of how we truly live."
Based on Table 2, the limitations of the development of constitutional authorities of the Constitutional Court on numbers 1 and 2 also follow the basic character of the third constitutional interpretation. The limitation on the development of the constitutional authority of the Constitutional Court on the number 3 also follows the basic character of the second and third constitutional interpretations. Whereas the limitation of the development of the constitutional authority of the Constitutional Court on the number 4 has also been following the basic character of the first, second, and fourth constitutional interpretations.

C. Conclusion

Based on its decision, the four developments of the constitutional authority of the Constitutional Court have occurred in three ways. First, the method used as in passive method (development authority constitutional court in the sense of passive); means that there is a decision of the Constitutional Court in the context of making developments when exercising its authority as stated in Article 24C paragraph (1) of the 1945 Constitution (see figure 1 and 3). Second, the method used as an active Method (development authority constitutional court in the sense of active); means that there is the existence of the authority of the Constitutional Court based on its decision, but the authority is not declared explicitly (expressis verbis) such as mentioned in Article 24C paragraph (1) of 1945 Constitution (see figure 2). Third, the method used as in passive-active method (development authority constitutional court in the sense of passive-active); means that there is a Constitutional Court decision to carry out the law ordered, however in the decision, the Constitutional Court declared that there is no authority, however before the existence of judicial Court which handled the PHP Kada dispute, the Constitutional Court stated that it has an authority to handle the PHP Kada dispute too (see figure 4).

Based on the facts revealed in this paper, development efforts occur more than once in the same case. Therefore, the ideal development of the constitutional authority of the Constitutional Court in the future should also pay attention to the "developmental limits" as based on various Constitutional Court decisions related to the "development of authority" (see Table 1) and "efforts to develop authority" (see table 2) that have already taken place. Similarly, if later happens again, in any case the development of the constitutional authority of the Constitutional Court, it is also appropriate to consider the three basic characteristics of constitutional interpretation.
References


Muda, Iskandar. “*Fenomena Two in One Pengujian Perppu.*” *Jurnal Konstitusi* 15, No. 2 (2018): 257-281. DOI: https://doi.org/10.31078/jk1522


