CHALLENGES OF INDONESIA AS A DEVELOPING COUNTRY IN FULFILLING EDUCATIONAL RIGHTS

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Abstract

The Indonesian Constitution explicitly in Article 31 of the 1945 Constitution of the Republic of Indonesia states that every citizen has the right to education and is obliged to attend primary education. The government is required to finance by prioritizing the education budget of at least 20% of the State and regional expenditure revenue budget. However, Indonesia, as a developing country with a sizeable demographic bonus, is a challenge that is not easy to fulfill the right to education for every citizen. In this paper, the author will discuss how the challenges of the Government of Indonesia as a developing country to fulfill the right to education for each of its citizens. The research method used is a normative juridical approach to the case testing of laws in the Constitutional Court. The results of the study found that Indonesia as a developing country that has sought various ways to fulfill the right to education by including the figure of 20% of the National Budget in the Constitution explicitly. Nevertheless, the issue of how capable the State is in fulfilling the provision will be carried out in stages according to the ability of the state budget.

Keywords: Indonesia, Developing Countries, Educational Rights.

I. INTRODUCTION

he change of non-democratic government regimes has always been marked by political turmoil and unrest in society. Social friction and conflict at the level of the elite as well as among the grassroots is almost certain to occur between those who try to maintain the status quo and those who want change. These times we are familiar with the period of democratic transition. Failure to go through a period of democratic transition has resulted in the return of non-democratic regimes holding the reins of government power. Be thankful we as an Indonesian nation that has gone through a period of successful democratic transition. Success began with changing the constitution which was the birthplace of several non-demoratic regimes on the motherland.

It is the modifiers of the 1945 Constitution that break down and undermine the "mythical sacredness" of the

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1945 Constitution which was originally glorified and cannot be changed. Even though from the beginning Sukarno in the BPUPK session said that the 1945 Constitution that was made was "temporary". It means that from the very beginning Sukarno also realized that the 1945 Constitution brought a juridical defect since his birth because it tended to give too much power to the President (heavy executive). At least the disability can be seen in several things, namely: (i) supreme power in the hands of the MPR; (ii) Articles that are too "flexible" so that they can lead to multiple interpretations; (iii) Authority to the President to regulate important matters by law; (iv) The formulation of the 1945 Constitution concerning the spirit of state administrators has not been sufficiently supported by the provisions of the constitution. The amendment to the 1945 Constitution was an initial milestone in legal reform in Indonesia. Because with a change in the constitution, the political system and legal style of our country has changed. Therefore, almost all new order legal products that were not in accordance with the spirit of the post-amendment of the 1945 Constitution were replaced. Here the proposition applies that when political configurations change, laws also change and change (Moh, Mahfud MD, 2009, p. 373-374).

The conception of power distribution (distribution of power) which was originally adopted by placing the MPR as the highest state institution, turned into a conception of the separation of powers based on Montesque's theory and positioned all state institutions on equal footing, so that there was no longer the highest state institution. The highest is the constitution (supreme law of the land). Therefore the distribution of power is based on the provisions contained in the constitution in accordance with the principle of constitutionalism.

The Constitutional Court was born in the 3rd amendment in the process of amending the 1945 Constitution. The birth of the Constitutional Court was not only to ensure that there were no legal products that contradicted the constitution as the highest law, but also as a means of strengthening the mechanisms of mutually balancing and supervising each other (checks and balances) between branches of state power so as to minimize efforts to abuse authority (abuse of power), because according to Lord Acton, "power tends to corrupt, absolute power is corrupt absolutely,".

This paper will discuss how the Constitutional Court as the guardian of the constitution and the guardian of the state's ideology perform their constitutional duties through decisions that are able to influence and color legal reforms and constitutions in Indonesia, especially decisions of the state. which has a hook on the national economy and employment.

II. DISCUSSION

As one form of economic development policy, various economic laws and regulations can be issued which can be grouped into four fields, namely: (1) Creating a Healthy Economy, which regulates the limits of behavior and sanctions from / for related parties involved. intends to create a healthy economy; (2) Company Field and Activities of Running Company, namely regulating the freedom of business and running a business and the signs that must be obeyed in it; (3) the field of protecting the public interest, i.e. general rules which aim to protect the interests of the people in development (economy) and prevent the negative impacts of the implementation of development and economic activities on society; and (4) Finance, Banking and Fiscal Sector, which regulates financial, banking and fiscal issues and some things that must be obeyed (Janus Sidabalok, 2006, p. 94-97).

Legal theory has practical benefits as an instrument in the study and analysis of phenomena that arise and develop in society, nation and state (HS Salim, 2010, p. 19). Related to this, what can be used as an example is the theory of the legal hierarchy (The Hierarchy of Law) of Hans Kelsen's teachings, which implies that legal norms are a tiered arrangement and that any lower legal norms derive from higher rules (Armen Yasir, 2007, p. 10). Based on the theory of legal hierarchy in the legal system in Indonesia; the law must not conflict with the 1945 Constitution of the Republic of Indonesia (1945 Constitution) which is in a higher hierarchy.

A. Constitutional Authority of the Constitutional Court

Based on Article 24C paragraph (1) of the 1945 Constitution, it has been determined that the Constitutional Court has four constitutional authorities and a constitutional obligation. Article 10 paragraph (1) letters a through d of Law Number 24 of 2003 in conjunction with Law Number 8 of 2011 on the Constitutional Court reinforce this provision by detailing the four authorities of the Constitutional Court, namely:

1. Reviewing the law against the 1945 Constitution;
2. Deciding on authority disputes of state institutions, whose authority are granted by the Constitution;
3. Deciding on the dissolution of political parties; and

4. Deciding on disputes over general elections results.

Meanwhile, based on Articles 7A and Article 7B paragraphs (1) to (5), and Article 24C paragraph (2) of the 1945 Constitution, which are then reaffirmed in Article 10 paragraph (2) of the Constitutional Court Law, the Constitutional Court has the obligation to make a decision on the opinion of the House of Representatives in the event that the President and/or Vice President have committed a violation of the law or a disgraceful act, or have not fulfilled the requirements as President and/or Vice President as referred to in the 1945 Constitution. In addition to the four authorities and one obligation, the Constitutional Court also has functions derived from the authorities, that is, guardian of the constitution, final interpreter of the constitution, guardian of democracy, the protector of citizens' constitutional rights, and protector of human rights.

In the meantime, the Constitutional Court as the guardian of the constitution (the guardian of constitution), since its inception, was not only designed to guard and maintain the constitution as the supreme law of the land, but also guard the Pancasila as the state ideology (the guardian of the state) ideology). This can be seen in the authority of the Constitutional Court in deciding the dissolution of political parties. In Article 68 of the Constitutional Court Law, it is stated that political parties can be dissolved if the ideology, principles, objectives, programs and activities of political parties conflict with the 1945 Constitution. Because Pancasila is the spirit of the 1945 Constitution contained in the Preamble section, it is a necessity that Pancasila also is a test stone in the case of the dissolution of political parties. Even further, in examining, adjudicating, and deciding a constitutional case, then besides basing on the articles of the 1945 Constitution, it must also be based on Pancasila as a touchstone in every constitutional case. The abstract values of Pancasila have been used as a standard for evaluating the constitutionality of legal norms, in this case the law, then manifested and reflected in each of the decisions of the Constitutional Court. Not only that, as a constitutional guard agency, the Constitutional Court saw the importance of every effort to establish Pancasila as a fundamental staatsfundamental which is the soul of the 1945 Constitution. This is in line with the vision of the Constitutional Court in guarding the establishment of the constitution through an independent, impartial and fair constitutional court. with one of the missions, namely to build a constitutional justice system that is able to support the enforcement of the constitution. In this context the constitutional duty of the Constitutional Court as the guardian of the constitution basically includes the task of guarding the establishment of the Pancasila as the basis and ideology of the state. This is the reason why in addition to being the guardian of the constitution, the Constitutional Court also acts as the guardian of the state's ideology.

B. Substantive Justice in the Constitutional Court's Ruling

As a judicial institution, the character of the Constitutional Court as a constitutional court is different from other courts. The Constitutional Court is a judiciary of norms that has the authority to examine the constitutionality of a norm against the constitution (the 1945 Constitution). When the norm actually causes a constitutional loss and contradicts the Constitution as the supreme law of the land, the norm can be revoked. This is the background of the birth of the Constitutional Court and the doctrine of constitutional review. According to Hans Kelsen, in order to guarantee the implementation of the constitution as the highest law, there should be an organ that is authorized to review whether a legal product is against the constitution. This authority of constitutional review is basically the authority of constitutional courts throughout the world. Meanwhile, other authorities are additional and are based on constitutional practices in each country. In addition, the judicial review mechanism is an effective means of strengthening the mechanisms of mutual oversight and mutual checks and balances between branches of state power. This is intended to reduce the abuse of power because according to Lord Acton, "power tends to corrupt, absolute power corrupt absolutely".

In the meantime, constitutional supremacy is not merely interpreted as the supremacy of the text of the articles of the 1945 Constitution, because the 1945 Constitution is a manifestation of the agreement of all the people, within which ideology and moral values are contained as guiding principles of legal substance formed through mechanisms regulated in the 1945 Constitution. In this conception, the interpretation of the text of the 1945 Constitution continuously changes according to the achievement of ideals, the contextualization of the constitution, and the changes in society itself. Although collective agreement has been formulated in the Constitution, it does not mean that the process ends there. The social processes that form a collective agreement always take place and must be taken into consideration in the interpretation of the Constitution. In this context, it is said that the constitution is not an inanimate object but a living thing in that the values contained therein need to be adapted to the times, the dynamics of people's lives, and experience in constitutional practices and living constitution, so that the reading of the constitution needs to be on the deepest meaning (moral reading).

This condition has given rise to Constitutional Court decisions that have thawed the legal freeze by bringing a new paradigm of substantive justice that often breaks the status quo in the practice of law by putting aside old interpretations of the law, and even in some cases by deviating from the principles of the law that have been held by jurisprudence. Various decisions have been born from the Constitutional Court's progressiveness in supporting the efforts to uphold the constitution, democracy, and the values. When adjudicating a case, the Court will decide by using a paradigm to improve the development of the just law in a better direction. The improvement of the development of the just law is of course closely related to the application of the principles of democracy (people's sovereignty) and nomocracy (legal sovereignty), which contain justice values.

Since its inception 16 years ago, the Constitutional Court has played important and strategic roles and positions in the efforts to protect the citizens' constitutional rights. In the course of guarding the constitution and democratic process, it is not uncommon for the Constitutional Court to issue landmark decisions, because in its legal considerations, the Constitutional Court also considers the sense of substantive justice within society. Although initially the decisions were difficult to accept and considered controversial, later the public gradually became aware of the meanings, benefits, and reasons behind them. For example, the Constitutional Court overturned Article 50 of the Constitutional Court Law on the limitation of the Constitutional Court's judicial review authority only to laws established after the First Amendment to the 1945 Constitution (vide Decision 066/PUU-II/2004 dated April 12, 2005). At first, this decision had caused controversy among legal observers, but if the provisions had not been annulled, it would have closed the opportunity for justice seekers to be able to review laws passed before the amendment to the 1945 Constitution, such as the Criminal Code, the Criminal Procedure Code , the Correctional Law, the Marriage Law, the Narcotics Law, Law Number 02/Pnps/1964, even though, for example, some norms in these laws actually harmed the constitutional rights of citizens and were contrary to the Constitution. Therefore, the Constitutional Court canceled Article 50 of the Constitutional Court Law.

Some other landmark decisions that changed the way law works are as follows:

1. In Decision Number 11-17/PUU-I/2003 dated February 24, 2014 on the Political Rights of Former Members of Forbidden Organizations in the General Elections,

2. In Decision Number 5/PUU-V/2007 dated July 23, 2007 on independent candidates running in regional head election

3. Decision Number 22-24/PUU-VI/2009 dated December 23, 2008 on the changes in the calculation of elected candidates from the serial number to highest votes

4. Decision Number 102/PUU-VII/2009 dated July 6, 2009 allows the use of ID or passport as a voting requirement in the presidential election because of technical constraints that had the potential to reduce citizens' right to vote

5. Decision Number 34/PUU-XI/2013 dated March 6, 2014 limits the petition for judicial review to only once.

6. Decision Number 85/PUU-XI/2013 dated February 18, 2015 on the management of water resources restores the obligation to water resources management to the state, while the private sector only receives residual authority in water resources management.

C. National Economy and Constitutional Court Ruling

Case for judicial review of laws submitted to the Constitutional Court is not limited to one particular aspect, but includes all aspects of life as long as those aspects are regulated and set forth in a law. Neither aspects of the Law in the field of the national economy are not spared from testing. However, before discussing the decision of the Constitutional Court related to the field of national economy, it is necessary to first know and understand the politics of law in the field of national economy regulated in the 1945 Constitution as the supreme law (the supreme law of the land). In the post-amendment of the 1945 Constitution, the politics of national economic law is regulated in Article 33 of the 1945 Constitution which states:

(1) The economy is structured as a joint effort based on family principles.

(2) Production branches which are important for the state and which control the livelihoods of the public are controlled by the state.

(3) The earth and water and the natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people.

(4) The national economy shall be implemented based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity.

(5) Further provisions regarding the implementation of this article are regulated in the law.

Article 33 of the 1945 Constitution is one of the articles which did not change in the momentum of the constitutional change that occurred in the period 1999-2002, even though at that time there were several attempts to change the article because it was considered to be no longer in accordance with the times. However, the change was canceled due to differences of opinion and a long debate in the BP MPR session. In the end the meeting forum decided that the provisions of Article 33 paragraph (1), paragraph (2), and paragraph (3) were not changed (Jimly Asshiddiqie, 2010, p. 258). Even Article 33 was later refined by adding two new verses, so that it became five verses. Meanwhile, Article 34 which originally only consisted of 1 (one) provision without paragraphs, was amended and added with 3 new paragraphs, so it became 4 paragraphs. While the title of Chapter XIV which was originally only "Social Welfare", was added to "National Economy and Social Welfare" (Jimly Asshiddiqie, 2010, p. 258).

This improvement was made to reduce the potential for misunderstanding. Article 33 Paragraph (1) of the 1945 Constitution which contains provisions on the principle of kinship carries the risk of being misunderstood and misused in practice, so it needs to be balanced with the principle of togetherness contained in Article 33 paragraph (4) of the 1945 Constitution. With the principle of togetherness in Article 33 paragraph (4) , then the principle of kinship in Article 33 paragraph (1) must be understood in a broad sense, no longer in an organic sense, in the form of economic agents who must take the form of cooperatives in the sense of a narrow business entity. In addition, with the principle of togetherness, the principle of kinship is not misused or even made a joke as if related to the understanding of a family system that has a negative connotation (Jimly Asshiddiqie, 2010, p. 258).

Meanwhile, in its function as the final interpreter of the constitution, the Constitutional Court often provides a constitutional interpretation of the provisions of Article 33 of the 1945 Constitution, especially when trying cases of judicial review cases that are closely related to mining and energy, for example examining Electricity Law, Law on Oil and Gas, Law on Water Resources, and Investment Law. Almost all of the laws petitioned for testing by the Constitutional Court both in the fields of mining, energy, and natural resources contain Article 33 of the 1945 Constitution as a touchstone. In a law whose test stones use Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution, the Constitutional Court has made a constitutional interpretation of the phrase "controlled by the state". According to the Constitutional Court, state control in a broad sense derives from the sovereignty of the Indonesian people over all sources of earth's wealth, water, and natural resources contained therein, including the notion of public ownership by the people's collectivity over the said resources. The people are collectively constructed by the 1945 Constitution giving a mandate to the state to conduct policies (beleid) and management actions (bestuursdaad), regulation (regelendaad), management (beheersdaad) and supervision (toezichthoudendaad) for the purpose of the great prosperity of the people. The state's bestuursdaad function is carried out by the government with its authority to issue and revoke licensing facilities (vergunning), licenses (licenties), and concessions. The regulatory function by the state (regelendaad) is carried out through legislative authority by the DPR with the government, and regulation by the government (executive). The management function (behersdaad) is carried out through a share-holding mechanism and / or through direct involvement in the management of a State-Owned Enterprise (BUMN) or BUMN as an institutional instrument through which the state c.q. the government makes use of its control over the resources of that wealth to be used for the greatest prosperity of the people. In addition, the Constitutional Court also provides a constitutional interpretation of the phrase "branches of production which are important to the state" by classifying them into three categories, namely (i) those branches of production are important to the state and control the livelihoods of many people; or (ii) important for the state but does not control the lives of many people; or (iii) not important to the state but controlling the livelihoods of many people (Development Team, 2008, p. 169). All three must be controlled by the state in order to be used for the greatest prosperity of the people. In this position, the state also has the role to determine when a branch of production is not important to the state and does not control the lives of many people. At this point a branch of production can be handed over to the private sector only if the branches of production are not important to the state and do not control the livelihoods of many people.

There are several decisions that are closely related to the role of the Constitutional Court in developing the national economy, namely a decision stating that SOE receivables are not state receivables so that they are settled by the management of each SOE Bank (vide Decision Number 77 / PUU-IX / 2011, dated September 26, 2012), a decision that annulled the Cooperative Act altogether because the design of cooperatives in the

Act was similar to a Limited Liability Company (vide Decision Number 28 / PUU-XI / 2013, dated May 28, 2014), a decision that gave the legislators the opportunity to make provisions concerning joint ventures in the form of joint ventures within a 2-year 6-month deadline [vide Decision Number 32 / PUU-XI / 2013, dated April 3, 2014], a decision which gives a deadline for the holding of a GMS held no later than 21 (two twenty-one days after the district court's decision was obtained (vide Decision Number 84 / PUU-XI / 2013, dated October 9, 2014), a decision which refuse the dissolution of OJK (vide Decision Number 25 / PUU-XII / 2014, dated August 4, 2015), and Decision which rejects the cancellation of part or all of the Law on Tax Amnesty (vide Decision Number 57-59 / PUU-XIV / 2016, dated December 14 2016).

On the other hand, it is undeniable that the stability of the national economy and a conducive business climate depend also on the relations between businesses and workers. Without a harmonious relationship between business people and workers, a conducive business climate will not be possible. A mutually beneficial relationship (symbiotic mutualism) between business people and workers is a necessity in creating a conducive and stable business climate. Although it is realized that there is a disparity in the relationship between business actors and workers, because workers are often in a weak position. Therefore, the formation of trade unions as a referee of negotiations with business actors is a necessity to reach an agreement.

In its position, the Constitutional Court also played a role in creating a harmonious relationship between business actors and workers in order to create a conducive business climate through its decisions. For example, a decision governing the proportionality of representation of trade union members in negotiations with employers (vide Decision Number 115 / PUU-VII / 2009, dated November 10, 2010), a decision stating that only companies are permanently closed can be used as a reason for laying off (vide Decision Number 19 / PUU-IX / 2011, dated 20 June 2012), a decision that provides certainty for the continuity of the work of outsourced workers (vide Putusna Number 27 / PUU-IX / 2011, dated 7 January 2012), a decision that gives workers the right to file request for termination of employment if the employer does not pay wages on time that have been determined for 3 (three) consecutive months or more, even though the employer pays wages on time after that (vide Decision Number 58 / PUU-IX / 2011, dated July 16, 2012), a decision stating that wages and all payments arising from an employment relationship are workers' rights which cannot be waived due to a certain period of time (vide decision Number 100 / PUU-X / 2012, dated 19 September 2013), a decision stating that in the bankruptcy process, payment of workers' wages is ranked below the separatist creditor (vide Decision Number 67 / PUU-XI / 2013, dated 19 September 2013) , a decision which clarifies the written recommendation, which is in the form of a minutes of settlement through mediation (vide Decision Number 68 / PUU-XIII / 2015, dated 29 September 2015).

III. CLOSING

Decisions of the Constitutional Court in the field of labor that seem to provide more protection for workers' rights should not be interpreted negatively, but must be interpreted positively in order to create a conducive business climate and economic climate. If workers' rights are properly fulfilled, this will have an impact on increasing production productivity in the business world which ultimately will not only benefit businesses, but will also benefit workers.

The verdict is the Crown of the judiciary. Therefore, the achievements and role of the Constitutional Court as a judicial institution in coloring the legal and constitutional reform in the country is reflected in its decisions. In deciding a case, the Constitutional Court often applies a progressive legal paradigm that emphasizes the importance of substantive justice rather than procedural justice. This also implies that the decision of a court does not always have to be bound by absolute formalistic-legalistic, but must also be able to achieve one of its main objectives, namely the fulfillment of the values of justice for the community.

Through the decision of the Constitutional Court the public can be more open in their views of the law and the constitution which emphasizes the values of substantive justice and further understanding the progression of the role of the Constitutional Court along with the legal breakthroughs of its decisions which are solely carried out to uphold the norms contained in the constitution.

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