

How the Constitutional Court can Undo Constitutional Damage by Referring to the Constitution and Laws and Regulations

Novan Mahendra Pratama

Cangkir Opini Foundation, Surabaya, Indonesia

ABSTRACT

The Constitutional Court's decision as a remedy for constitutional losses does not necessarily lead to the restoration of constitutional rights. Therefore, even though the Constitutional Court had decided, there were also petitioners who still considered the losses suffered by the Constitutional Court not yet recovered. This happens because one of the powers that the Constitutional Court has is the review of the Law against the 1945 Constitution of the Republic of Indonesia, where this authority is different from the authority of constitutional complaint which provides restoration of constitutional rights to those concerned only.

KEYWORDS

Loss; Recovery; Constitutional; Constitutional Court and Constitutional Court Decisions.

1. Introduction

If the application for legal testing is granted by the constitutional court then it will lead a citizen to the restoration of constitutional rights that are violated due to the enactment of a Law. The consequences of the law that will occur related to the granting of the application for testing of the law are: (i) The material of the Law whether the paragraph, article, chapter or the whole law that is contrary to the NRI Constitution of 1945 is void and not binding, (ii) -constitutional rights that have been harmed due to the enactment of an Act, (iii) The inclusion of this matter in the State News of the Republic of Indonesia. Constitutional rights are rights guaranteed by the constitution. The guarantee can be in the form of a statement expressly or implied in the constitution. Because it is included in the constitution, all branches of state power are obliged to respect it. Therefore, recognition and respect for constitutional rights as part of the constitution at the same time means a limitation on state power (Palguna, 2013). Based on the explanation above, when there is a violation of constitutional rights, it is necessary to restore the applicant for constitutional rights as citizens, because these rights have been guaranteed in the constitution. If a citizen does not get restoration of his constitutional rights, it tends to have legal consequences and other consequences, because his constitutional rights as a citizen do not get legal certainty.

2. Research Results and Analysis

The Urgency to Restore The Constitutional Rights of Aggrieved Citizens Constitutional Court decisions on Judicial Review always cite the five criteria for constitutional impairment formulated by the Constitutional Court for the first time in 2005 as follows:

- a. There are constitutional rights and / or powers of the applicant;
- b. The applicant's constitutional rights and / or authorities have been impaired due to the enactment of the law being tested;
- c. Losses must be specific and actual or potential;
- d. The existence of a causal relationship (causal verband) between the loss and the law being tested;

The formulation given by the constitutional court regarding constitutional impairment has become a doctrine to measure whether the parties submitting an application to the constitutional court have the legal standing to act as petitioners.⁹ The five criteria for constitutional impairment are interpretations made by the constitutional court of Article 51 of the constitutional court law. In the a quo article, the constitutional court interprets the criteria for constitutional impairment that apply to applicants with various qualifications, whether as individual Indonesian citizens (hereinafter referred to as Indonesian citizens), customary law communities, public or private legal entities and state institutions.

The formulation of the conditions for constitutional impairment which has been interpreted by the constitutional court has undergone several adjustments. One of them is the addition of the phrase "authority"¹⁰ which at the beginning of the formulation of the conditions for constitutional impairment at the constitutional court only emphasized the element of "rights" of the parties who could submit themselves as petitioners to the constitutional court. The addition of the element of "authority" in the measure of constitutional impairment is to comply with the provisions in Article 51 of the Law on the Constitutional Court. The addition of the element of "authority" in the formulation of constitutional losses to accommodate the possibilities of state institutions that can act as petitioners in cases of disputes over the authority of state institutions whose authority is granted by the 1945 Constitution of the Republic of Indonesia. In the context of regulating "state institutions", the constitution does not mention "rights" from state institutions. What is regulated in the constitution regarding state institutions is the authority that must be exercised (Bisaryadi, 2017). Therefore, the element of constitutional impairment that is assessed if the applicant is a state institution is not about "rights", but there is a loss in constitutional "authority" that is owned.

Another thing that has experienced adjustments is the formulation of constitutional loss requirements related to the question that often arises, are the conditions for constitutional impairment cumulative or not? This means, does the applicant not fulfill one or more of the conditions for constitutional impairment without having a legal standing as the petitioner? In the Decision of the Constitutional Court Number 11 / Judicial Review-V / 2007, the Constitutional Court added the phrase "cumulative in nature" in assessing the five conditions of constitutional impairment that must be met by the parties.

The application of the doctrine of constitutional impairment is not always fixed and the assessment of the doctrine is not carried out strictly. The Panel of Constitutional Justices can open the gate as wide as possible to allow the applicant's legal position to pass and immediately consider the main points of the constitutional case submitted by the petitioners who are in dispute.

In addition, the problem is regarding matters relating to the consistency of the assessment of constitutional impairments conducted by the Council of Constitutional Justices. The criteria regarding the formulation of constitutional impairment when viewed from a philosophical aspect are designed to be able to serve as a filter

regarding constitutional cases that are examined by the Panel of Constitutional Justices. Does it have the potential and significant constitutional impact on national life (Lee, 2012).

The explanation above can mean that any consideration of the Constitutional Court of Justice which deviates from the formulation of the doctrine of constitutional impairment must be explained in as much detail as possible by the Constitutional Court. If in this case the constitutional court cannot explain in detail the reasons for the need for the constitutional court to deviate from the doctrine of constitutional impairment in a decision, it can be concluded that the decision is not in accordance with the doctrine. If the root of the problem lies in the doctrine that has been held so far and the doctrine is not appropriate, then it is appropriate for the constitutional court to take steps to improve and try to perfect the formulation of the doctrine.

There are irregularities if it is proven that constitutional rights have been impaired, but in the ruling it says rejecting the petitioners' petition because the norms tested are considered not contradicting the 1945 Constitution of the Republic of Indonesia. For example regarding the review of the State Civil Apparatus Law, in this case the constitutional court confirmed that the argument for constitutional rights is potentially harmed because it eliminates the opportunity for an applicant who is an honorary employee to be appointed as an employee of the State Civil Service. The Petitioners argue about the violated constitutional rights guaranteed in Article 27 paragraph (2), Article 28D paragraph (1) and (2) the 1945 Constitution of the Republic of Indonesia. However, the constitutional court in the main argument of the petition argued that the selection and testing process in order to work in a government environment must be carried out without the need for differentiation in order to fulfill the constitutional rules in Article 27 paragraph (2), Article 28D paragraph (1) and Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In this regard, it can be interpreted that on the one hand, the constitutional court justifies the constitutional rights of the applicants who have been harmed and on the other hand, the constitutional court also justifies the selection process which has been deemed to be detrimental to the interests of the applicant.

The Constitutional Court has the opinion that what is included in the "rights" that are harmed are not only those contained in the 1945 Constitution of the Republic of Indonesia but also in the provisions of the 1945 Constitution of the Republic of Indonesia (Bisariyadi). This has appeared several times in the decisions of the constitutional court where the constitutional court elevates the status of rights that were not regulated in the constitution to become constitutional rights. For example, the right to a fair trial process (right to fair trail) as part of the law enforcement process (rule of law) and the right to legal assistance (right to counsel).

Regarding the requirements for constitutional rights and / or authority, it is an interpretation that has been made of Article 51 of the Law on the Constitutional Court. This matter must be considered from two points of view, the constitutional court's point of view and the applicant's point of view. From the applicant's point of view, the applicant must be able to clearly describe in the contents of his petition and at the same time be able to prove that there is a loss as a result of the running of an applicable law. What needs to be noted is that the petition must be compiled systematically without repeating it, at the same time accompanied by convincing evidence. The petitioner also needs articles in the constitution to serve as a reference regarding the existence of constitutional rights and / or authorities that have been impaired..

From the point of view of the constitutional court, the constitutional court conducts examination and evidence related to the impaired constitutional rights and / authorities of the applicant. The element of "constitutional rights and / or authorities" in the doctrine of constitutional impairment will only result in overlapping examinations in the main case. This does not mean that the assessment of the constitutional court must be carried out at the beginning, on the part of the legal position of the decision.

Constitutional courts may pass legal standing as long as the conditions in the second set of constitutional impairment doctrines are met. A case can and deserves to be categorized into a constitutional case if there are constitutional rights and / or authorities that are violated or harmed and not only are there "offense" with the rights stated in the 1945 Constitution of the Republic of Indonesia. Thus, the interpretation of the constitution in terms of constitutional rights will be more developed and not limited to the limitations of legal standing.

Apart from the above, the formulation of the second requirement in the doctrine of constitutional loss regarding the applicant's assumption that there will be a loss of constitutional rights and / or authority over the passage of a legal norm is also a requirement that is normative and overlaps with the subsequent requirements in the doctrine of constitutional impairment. The form of loss must be specific and actual or at least potential to occur. There must be a causal relationship between losses and the norms in law. Therefore, the requirements for the elements in the doctrine of constitutional impairment which consist of two groups, namely "the existence of constitutional rights and / or authority" and "the existence of a loss" need special attention and also need to be considered by the Constitutional Court to be refined so that in the future the doctrine of constitutional impairment not too loose.

In terms of improving the doctrine of constitutional impairment, the Constitutional Court must also be able to think ahead to perfect this doctrine. There are two sides that must be considered by the Constitutional Court to improve doctrine. On the one hand, tightening the doctrine of constitutional impairment will allow the Constitutional Court not to move freely. On the other hand, making the doctrine of constitutional impairment too loose will also have the effect that the constitutional court is considered inconsistent.

The constitutional court should have improved the current doctrine of constitutional impairment which is still being applied. Because the doctrine of constitutional impairment at the current constitutional court is the five conditions above which apply to all applicants (in this case citizens, indigenous peoples, legal entities and state institutions) at each request.

In the future, the Constitutional Court must make a measure of constitutional loss that depends on the qualifications of the applicant (citizens, indigenous peoples, legal entities and state institutions). Measures of the respective losses must be made so that when their constitutional rights or authorities are violated and / or impaired, the Constitutional Court already has a measure of the constitutional loss and has a way out to restore the impaired constitutional rights as soon as possible.

3. Constitutional Court Decisions as Remedy for Constitutional Losses

Constitutional losses suffered and / or experienced by citizens due to the enactment of legal norms have resulted in those citizens suffering constitutional losses. Whereas constitutional rights are rights that have been guaranteed in the constitution. It is appropriate that all branches of state power are obliged to protect them so that all citizens get these rights without anyone feeling violated and even suffering constitutional losses.

If citizens suffer constitutional losses and there is no effort to restore these rights as they should, it will create legal uncertainty. The 1945 Constitution of the Republic of Indonesia is the basic law that guarantees the constitutional rights of all citizens so that they are not violated or harmed. For citizens who feel their constitutional rights have been violated or harmed, they can file a judicial review to the Constitutional Court.

The Constitutional Court is one of the state institutions that has the authorization for attribution by the 1945 Constitution of the Republic of Indonesia to conduct a constitutional review (judicial review) of a norm that binds all citizens. In testing the constitutionality, the Constitutional Court will test the Act against the 1945

Constitution of the Republic of Indonesia, as one of its powers. In this examination, the Constitutional Court will give a decision on the norms being tested for its constitutionality.

If the Constitutional Court is of the opinion that there is no constitutional loss experienced by the petitioner, then the Court will not cancel the implementation of a binding norm. However, on the other hand, if the Constitutional Court believes that there is a constitutional loss that has occurred both factually and potentially, the Constitutional Court will cancel the operation of such norms so that citizens who suffer constitutional losses receive restoration of constitutional rights that have been guaranteed in the 1945 Constitution of the Republic of Indonesia.

The explanation above shows the importance of restoring constitutional rights that have been guaranteed in the 1945 Constitution of the Republic of Indonesia. For this reason, it is necessary to take quick action in restoring these constitutional rights by adhering to the law and all statutory regulations that become its instruments. Constitutional rights are privileged because their existence is regulated in the 1945 Constitution of the Republic of Indonesia. For the Indonesian State that applies the principle of the rule of law, it has consequences for implementing constitutional supremacy as the highest form of rule of law.

The logical consequence of the supremacy of the constitution is the guarantee of constitutional rights in the 1945 Constitution of the Republic of Indonesia. With this guarantee, it will have an impact on citizens who feel that their guarantee of constitutional rights has been impaired both factually and potentially, which makes these citizens feel they have no legal certainty. Therefore, regarding the constitutional rights of citizens who have been harmed by the enactment of a norm (in this case a law), it is appropriate for these constitutional rights to be restored as soon as possible.

Article 24C paragraph 1 of the 1945 Constitution of the Republic of Indonesia is a source of attribution authority owned by the Constitutional Court. Within one of its powers, there is the authority to conduct judicial review of the 1945 Constitution of the Republic of Indonesia. In that authority, the Constitutional Court can issue decisions based on the doctrine of constitutional impairment which it has interpreted based on the Constitutional Court Law.

As stipulated by the Constitutional Court Law, there are several forms of decisions issued by the Constitutional Court based on their authority, the form of decisions are as follows: In the case that the Constitutional Court is of the opinion that the applicant and / or his petition do not comply with the requirements as referred to in Article 5024 and Article 51, the ruling states that the petition cannot be accepted;

- (1) If the Constitutional Court is of the opinion that the petition is grounded, the ruling states that the petition is granted;
- (2) In the term of the petition is granted as referred to in paragraph 2, the Constitutional Court shall clearly state the content of paragraphs, articles and / or parts of the law which are contrary to the 1945 Constitution of the Republic of Indonesia;
- (3) In the term of the formation of the law does not meet the provisions for the formation of laws based on the 1945 Constitution of the Republic of Indonesia, the ruling states that the petition is granted;
- (4) This article has been declared no longer binding and has no binding legal force by the Constitutional Court based on Decision Number 004 / Judicial Review - I / 2003 which was pronounced on Tuesday, December 23, 2003. The Court has put aside the provisions of this article that In the term of the law does not contradict

the 1945 Constitution of the Republic of Indonesia, either partly or wholly regarding its formation or material, the verdict states that the application is rejected.

From the provisions of the Constitutional Court Law above, it can be seen that the Constitutional Court Decision and its verdict can only be found in three forms, which are (i) unacceptable, (ii) granted and (iii) rejected. Then the Constitutional Court Decision must be read out in an open court to the public so that the decision is legally binding and not null and void.

The Constitutional Court Law stipulates that "the Constitutional Court's decision has permanent legal force since it was pronounced in a plenary session open to the public". This means that the Constitutional Court Decision is valid for future prospective (forward looking), not for backward looking (Ashidique, 2006). Therefore, all subjects of legal acts and legal subjects according to the old legal regime prior to the issuance of the Constitutional Court Decision must be considered valid by the new legal regime after the issuance and enactment of the Constitutional Court Decision.

From the authority of the Constitutional Court in the 1945 Constitution of the Republic of Indonesia which handles constitutional cases so that the Constitutional Court Decision is issued, this also often raises questions. Is the Constitutional Court Decision a form of remedy? Because if examined further, the majority of the Constitutional Court decisions issued are based on cases of judicial review in which the petitioners are Indonesian citizens. This can be seen that the Indonesian citizens who feel their constitutional rights are violated or harmed the most.

If the majority of the problems that arise are regarding the Judgment of the Law, then the hope of the petitioners is that their constitutional rights can be restored. Even though we know that in the formulation of the norms of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it states "... to test the law against the Constitution ..." (bold print by the author). This diction will only provide two legal certainties, namely that it can remain valid or invalid. Not to the restoration of constitutional rights as in the authority of constitutional complaint (Bisariyadi, 2016).

Since its inception until mid-2010, the Constitutional Court has received quite a number of requests for Judicial Review which constitute a constitutional complaint. However, as we know, the authority of the Constitutional Court is determined limitatively in the 1945 Constitution of the Republic of Indonesia without mentioning the authority for constitutional complaint. This resulted in many petitioners being declared "unacceptable" (niet onvankelijk verklaard) on the grounds that the Constitutional Court was not authorized to adjudicate the petition because there was no authority to judge it (Zoelva, 2010).

In practice, these cases use the Judicial Review as an entry point for their examination. Cases containing elements of constitutional complaint still came to the Constitutional Court. This situation occurs because there is no other mechanism or path that can be taken by justice seekers or citizens who have been violated or even have their constitutional rights harmed. Finally, the petitioners used the entrance to the judicial review so that their problems could be tried by the Constitutional Court. The Constitutional Court's decision in resolving such cases sometimes also expands the interpretation of the Constitutional Court Decision which is not only limited to stating that the Law contradicts the 1945 Constitution of the Republic of Indonesia, but also the Constitutional Court carries out new formulations to resolve cases by way of its decision by declaring that it is rejected on a note (conditionally constitutional) and granted with a note conditionally unconstitutional (Zoelva, 2010). Learning from various Constitutional Court jurisprudence in the world, to accommodate the adjudication of constitutional complaint, it does not have to change the 1945 Constitution of the Republic of Indonesia. This can be done by developing the decisions of the Constitutional Court through the expansion of

the interpretation of the judicial review authority that is already in the 1945 Constitution of the Republic of Indonesia.

The Constitutional Court can make dynamic and broad interpretations of constitutional rights and legal standing. This view can be accepted that the interpretation of the constitution does not only adhere to the formal legality of the original intent aspects of the constitutional provisions (backward looking), but also views that relate to the practical needs and political benefits of the present and future (Zoelva, 2010).

One of the powers of the Constitutional Court is the review of the Law against the 1945 Constitution of the Republic of Indonesia, whose decision is *erga omnes* in nature. This authority is not a constitutional complaint authority that can provide restoration of individual rights to those concerned or those with an interest in the constitutional loss suffered. The Constitutional Court decision does not necessarily lead to the restoration of constitutional rights. Therefore, even though the Constitutional Court had decided it, there were also petitioners who still considered the losses they suffered had not been recovered by the Court. It is time for the constitutional complaint to be added to the Constitutional Court so that such matters can be accommodated.

4. Conclusion

After understanding the description, discussion and analysis of this essay, the conclusions are as follows: The criteria for constitutional impairment can be used for all qualifications of the applicant, but the criteria for constitutional impairment are not fully applicable to each applicant's qualifications. This happens because the constitutional loss doctrine used by the Constitutional Court needs to be reformulated based on the respective qualifications of the applicant, not as it is today (the formulation of the constitutional loss doctrine for all qualifications of the applicant). This is done so that the measure of the constitutional loss and the form of recovery can be right on target to the applicant in obtaining his recovery.

References

- Asshiddiqie, J. (2006) *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*. Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi.
- Bisariyadi. (2017). *Membedah Doktrin Kerugian Konstitusional*. Jurnal Konstitusi, 14 (1), p. 23-24.
- Bisariyadi. (2016). "Atypical Ruling of The Indonesian Constitutional Court", *Journal Hasanuddin Law Review*. Volume 2 Issue 2. Makassar : Hasanuddin University.
- Fauzan, Encik Muhammad. (2017). *Hukum Tata Negara Indonesia*. Malang: Setara Press.
- Fauzan, Encik Muhammad. (2013). *Fungsi Sosiologis Undang-undang Dasar Negara Republik Indonesia Tahun 1945 Dalam Memenuhi Hak-hak Masyarakat*, *Jurnal Masalah-Masalah Hukum*, 42 (3), p 364-355.
- Lee, E.T. & Elis, J.M. (2012). *The Standing Doctrine's Little Secret*. *Journal Northwestern University Review*, 107 (1), p. 235
- Palguna, IDG. (2013). *Pengaduan Konstitusional (Constitutional Complaint) Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*. Sinar Grafika.
- Zoelva, H (2010). "Penerapan Pengaduan Konstitusional (Constitutional Complaint) di Berbagai Negara". Paper presented on Seminar "Pengaduan Konstitusional (Constitutional Complaint) Sebagai Jaminan Konstitusional Warga Negara Dalam Rangka Supremasi Konstitusi," Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia dan Pusat Studi Hukum Konstitusi Fakultas Hukum Universitas Islam Indonesia.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal. This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).