

Expansion of the Nature of Constitutional Court Decisions from *Negative Legislature* to *Positive Legislature* in Constitutional Law in Indonesia



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ABSTRACT: The nature of the Constitutional Court's decision in Indonesia experience an expansion of meaning, which initially only gave *negative legislature* decisions but gave several positive *legislature decisions* in reviewing the Law. It is necessary to know how the constitutionality and analysis of the legal considerations of the Constitutional Court's decision which are *positive in nature* in reviewing laws in the field of constitutional law. The approach method used in this study is normative juridical by examining the legal principles contained in statutory regulations. Based on the results of the research, the constitutionality of the Constitutional Court's decisions which are *positive legislature* is an extension of the authority of the Constitutional Court in reviewing the Laws granted by the 1945 Constitution of the Republic of Indonesia, Law Number 23 of 2004 concerning the Constitutional Court, and Law Number 48 of 2009 Power Justice. Legal considerations for decisions that are *positive legislature* in reviewing laws in the field of constitutional law are aimed at providing substantive justice for the community, given in urgent situations, and avoiding a legal vacuum if the material of the law is canceled so as to avoid legal chaos (chaos) .

KEYWORDS: Constitutional Court; *Legislature Positive* Decisions; Statutory Test

I. INTRODUCTION

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "Indonesia is a country based on law". The application of the rule of law principle in Indonesia has its own characteristics called the Pancasila Law State which is implemented without directly referring to *the Rechtsstaat* which is developing in Europe and *The Rule of Law* which is developing in America but combines the two legal concepts.

According to Moh Mahfud MD as quoted by M. Husnu Abadi and Wira Atma Hajri in their book stated:

"Indonesia's legal state is characterized by a mixture of the concepts of *rechtsstaat* , *the rule of law* , a formal legal state and a material legal state which are then given Indonesian values so that it becomes a Pancasila legal state."¹

The reforms that took place brought new nuances to the Indonesian constitutional system in which there was a shift in the position of state institutions. The Constitutional Court was born as part of the judicial power institution through Law Number 24 of 2003 concerning the Constitutional Court. The formation of the Constitutional Court is necessary because Indonesia has made fundamental changes to the 1945 Constitution which has adopted new constitutional principles such as the principle of separation of powers *and checks and balances* as a substitute for the supremacy of the parliament that was in effect previously. The position of the Constitutional Court as part of the judiciary is at the same level or equal to the Supreme Court in the Indonesian constitutional system.

Normatively, according to Hans Kelsen who was the originator of the world's first Constitutional Court as quoted by Jimly Ashhiddiqie stated that the Constitutional Court is a *negative legislature* that cancels norms. ²In Indonesia, the Constitutional Court is regulated in Article 24C of the 1945 Constitution of the Republic of Indonesia as a *negative legislature* , while the DPR as a *positive legislature* is regulated in Article 20 of the 1945 Constitution of the Republic of Indonesia. In exercising one of its powers, namely reviewing laws, the Constitutional Court may only interpret the contents of the Constitution. ³The Constitutional Court may not issue regulatory decisions or create new norms, which is what is referred to as a *negative legislature* as stated in Article 57 paragraph (2a) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court.

¹ Moh. Mahfud MD in M. Husnu Abadi and Wira Atma Hajri , *Loading of Legal Norms That Have Been Canceled by the Constitutional Court*. (Yogyakarta: CV Budi Utama, 2017), p. 21.

² Jimmy Asshiddiqie , *Models of Constitutional Review in Various Countries*, (Jakarta: Secretariat General and Clerk of the Indonesian Constitutional Court, 2006), p. 28.

³ Mahfud MD , *Limiting Signs and Expansion of the Authority of the Constitutional Court* , Journal of Law Vol. 16, No. 4, October 2009, p. 453 .

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. However, in its development, the Constitutional Court has issued decisions several times with orders to establish new norms or *positive legislature*. Article 57 paragraph (2a) of Law Number 8 of 2011 was also annulled through the Constitutional Court decision No. 48/PUU-IX/2011.

Decisions of the Constitutional Court that are *positive legislature* in which the verdict contains new norms, among others, is Decision No. 102/PUU-VII/2009 concerning testing of Law no. 42 of 2008 concerning the Election of President and Vice President against the 1945 Constitution of the Republic of Indonesia which was decided constitutionally conditionally, Decision No. 11/PUU-VIII/2010 concerning the review of Law Number 22 of 2007 concerning General Elections against the 1945 Constitution of the Republic of Indonesia, Decision No. 13/PUU-XVI/2008 which tests Law Number 24 of 2000 concerning International Agreements.

In fact, there are no normative regulations in Indonesia which prohibit the Constitutional Court from carrying out its role as a *positive legislature*. However, the existence of *positive* and *negative legislatures* is still being debated. In fact, the Constitutional Court, whose role as guardian of the constitution, is only trying to be able to provide fair and prosperous decisions for all parties. This is in line with several functions of the Constitutional Court that can be applied in exercising its authority, namely the Constitutional Court as the guardian of the constitution, as the controller of decisions based on the democratic system (*control of democracy*), as the interpreter of the constitution, as a protector of citizens' constitutional rights (*the protector of the citizens' constitutional rights*), as a protector of human rights (*the protector of human rights*).⁴ *positive legislative decision* is a decision that provides a new norm in it. Even though it raises pros and cons, the interesting thing about the decisions of the Constitutional Court which are *positive legislature* is that even though the decisions of the Constitutional Court which are regulatory do not have a place in the rules of the game, the decisions of the Constitutional Court are still implemented by *stakeholders*.

Based on the things above the writer has made two problem formulations as follows; How is the constitutionality of the Constitutional Court's decision which is *positive legislature* in reviewing laws in the field of constitutional law? What is the analysis of legal considerations from the decisions of the Constitutional Court which are *positive legislature* in reviewing laws in the field of constitutional law?

II. RESEARCH METHODS

The approach method used in this research is normative juridical. The *normative juridical* approach method is an approach that examines secondary data or in other words examines the legal principles contained in the Legislation.⁵ The research specification used in dissecting the problems in this study uses descriptive analysis. Aims to make a systematic, factual and accurate description, picture or painting of the facts, characteristics and relationships between the phenomena being investigated.⁶ Data collection uses library research which collects secondary data, namely data obtained indirectly from the source but through other sources. Secondary data includes primary, secondary and tertiary legal materials as follows; Primary legal materials, namely legal materials that have binding power include the 1945 Constitution of the Republic of Indonesia, Law No. 24 of 2003 concerning the Constitutional Court, Law No. 4 of 2004 concerning Judicial Powers, Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court, MK Decision No. 5/PUU-IV/2006, MK Decision No. 102/PUU-VII/2009, MK Decision No. 11 /PUU-VII I/2010, MK Decision No. 48/PUU-IX/2011, and the Constitutional Court Decision No. 13/PUU-XVI/2018. Secondary legal materials consisting of books, journals and articles related to the Constitutional Court. Tertiary legal material which is legal material that provides instructions for primary and secondary legal materials, namely the Big Indonesian Language Dictionary (KBBI). Data analysis used is qualitative analysis, namely information data in the form of verbal sentences, not in the form of symbols or numbers.

III. RESULTS AND DISCUSSION

A. Constitutionality of Legislative *Positive* Constitutional Court Decisions in Reviewing Laws in the Field of Constitutional Law

Positive legislative decisions are found in types of decisions, namely conditional constitutional decisions, conditional unconstitutional decisions, decisions that formulate new norms, and *ultra petita decisions*.

a) Conditional constitutional decision (*Conditionally Constitutional*)

A conditional constitutional decision is a decision whose ruling contains a content of constitutional norms or does not conflict with the constitution if it is interpreted according to what is determined by the Constitutional Court. If the conditions stipulated by the Constitutional Court are met, the article or paragraph of the law being petitioned for review remains constitutional and has binding legal force. Conditional constitutional decisions are the entry point for *positive legislative decisions of the Constitutional*

⁴ Jimmy Asshiddiqie, "Principles of Post-Reform Indonesian Constitutional Law" in Bachtiar, *Problems of Implementing Constitutional Court Decisions on Testing Laws Against the Constitution*, (Jakarta: Penebar Swadaya Group, 2015) p. 109.

⁵ Ronny Hanitijo Soemitro, *Legal and Jurimetric Research Methods*, (Jakarta: Ghalia Indonesia, 1990), p. 10.

⁶ Moh. Nazir, *Research Methods*, (Jakarta: Ghalia, 1998), p. 63.

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Court . Positive legislature can be found in conditional constitutional decisions, especially those in the field of state or constitutional law. One of them is the Constitutional Court Decision Number 102/PUU-VII/2009 which tests Law Number 42 of 2008 concerning the General Election of the President and Vice President.

Through this type of decision, Constitutional Justices can make legal discoveries and breakthroughs in making decisions. If the judge decides that an article or paragraph in a law does not have binding force and is canceled even though the application submitted is of very urgent interest, there will be a legal vacuum. In such circumstances to prevent the occurrence of a legal vacuum the judge gives a decision with certain conditions, if these conditions are met then the paragraph or article of the law being reviewed remains constitutional.

b) *Conditionally* Unconstitutional Decision

Ruling of this type states that a content of norms is considered contrary to the constitution if it is not in accordance with what has been determined by the Constitutional Court. Basically, the background for the emergence of conditional unconstitutional decisions is the same as conditional constitutional decisions. From the data on conditional unconstitutional decisions that have been issued by the Constitutional Court, there are several *positive legislatures*. Among them is the Constitutional Court Decision Number 13/PUU-XVI/2018 which tests Law Number 24 of 2000 concerning International Agreements. Through this type of decision, Constitutional Justices can make legal discoveries and breakthroughs in making decisions.

Positive legislative decisions found in conditional constitutional decisions are usually found in the sentences below:

“...contradicts the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is interpreted....”

or

“...does not have binding legal force as long as it does not meet the requirements....”

c) Decisions that formulate new norms

In principle, the type of decision that formulates new norms, the Constitutional Court changes or makes new certain parts of the articles or paragraphs in the Law being reviewed, so that the norms of the Law change from the previous ones.⁷The Constitutional Court can also abolish a word or phrase in an article from the Law being reviewed. Judging from the ruling, the Constitutional Court has formulated a new norm in its decision by deleting a word and phrase in an article of the law. In fact, the entry point for decisions that formulate new norms can come from conditional constitutional and conditional unconstitutional decisions as previously explained.

d) *Petita* Verdict

Ultra petita decision is a decision in which the verdict provides more than what was requested by the applicant. Before becoming a Constitutional Justice, Moh. Mahfud MD emphasized that decisions containing *ultra petita* are included in *positive legislative decisions*, which are essentially interventions in the legislative realm.⁸

Ultra verdict petita can also be dropped in order to avoid legal chaos that occurs, so that delaying the entry into force of a law being tested can be an appropriate alternative while waiting for changes to new rules from the legislature. This aims to create legal certainty.

1. *Legislature's Positive Decision as an Expansion of the Authority of the Constitutional Court*

Decision which is a *positive legislature* is an extension of the authority of the Constitutional Court whose justification is regulated both in the 1945 Constitution of the Republic of Indonesia and in the laws under it. We can see the *first* expansion in Article 24C of the 1945 Constitution of the Republic of Indonesia itself. This article is limited or limited to only regulating what powers the Constitutional Court has, the elaboration of which is given in the Law on the Constitutional Court. The Constitution cannot be interpreted implicitly (only what is written) but requires special abilities or special methods to interpret what is actually the original intent contained therein.⁹Because in this case the Constitutional Court has the function of translating the Constitution or *the sole of interpretation* (constitutional interpreter), it does not rule out the possibility that the Constitutional Court will seek interpretation of the norms contained in the 1945 Constitution of the Republic of Indonesia. We can see *the second* expansion of *the positive legislature* in Law No. 24 of 2003 concerning the Constitutional Court. Indeed, there is no clause in any article in the law that provides for a regulation that the Constitutional Court can make *positive legislative decisions*. But let's look at the journey of the Constitutional Court Law first. Article 57 of the *a quo* Law only stipulates that the ruling of the Constitutional Court contains stating

⁷ be grateful Ash'ari, Meyrinda Rahmawaty Hilipito, Mohammad Mahrus Ali, *Model and Implementation of Court Decisions Constitution in Review of Laws (Study of 2003-2012 Decisions)*, p. 13.

⁸Moh. Mahfud MD in Martitah, *Constitutional Court From Negative Legislature to Positive Legislature*, (Jakarta: Constitution Press), p. 175.

⁹ Sharia Nurhayati, *Constitutional Court as Positive Legislature in Reviewing Laws Against the 1945 Constitution of the Republic of Indonesia*, JOM Faculty of Law, Vol. 2, No. 2, October 2015, p. 10.

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that the content of the Law is contrary to the Constitution, the formulation of the Law is contrary to the Constitution, and the verdict is only in favor.

The Constitutional Court Law has undergone changes, namely Law Number 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court, there are several articles related to decisions that can and cannot be issued by the Constitutional Court which have been amended, such as Article 45A which prohibits giving *ultra petita* decisions and Article 57 paragraph (2a) which prohibits giving decisions other than those referred to in paragraphs (1) and (2), orders to legislators, and formulating new norms to replace norms from laws that are contrary to the Constitution NRI 1945. Or more specifically, may not issue a *positive legislative decision*. This is because before the amendment to the law was carried out, the Constitutional Court had indeed made *positive legislative decisions several times*.

Articles 45A and 57 paragraph (2a) were then annulled through Decision Number 48/PUU-IX/2011 concerning the review of Law Number 24 of 2003 concerning the Constitutional Court as previously explained. This means that if the two Articles have been annulled, the Constitutional Court may give a decision that is not only limited to Article 57 paragraphs (1) and (2) alone, the Court may make a decision by making a new norm with conditions or considerations that have been determined as in the case of urgently, there will be a legal vacuum resulting in legal chaos (chaos), and to fulfill social justice.

Third and final expansion is based on Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power which reads:

"Judges and judges of the constitution are obliged to explore, follow, and understand the legal values and sense of justice that live in society."

The article stipulates that constitutional judges in deciding a case must look at the values that live in society, not only those in written regulations. Although it is not clearly stated in the clause that the Constitutional Court can give *positive legislative decisions*, the explanation says that this provision is intended so that the decisions of constitutional judges are in accordance with the law and the people's sense of justice. This means that it can be concluded that one way to understand legal values and a sense of justice in society is through a *positive legislative decision*.

Article 5 paragraph (1) of the Law *a quo* provides arrangements for judges to be able to exercise *judicial activism* in making decisions, including constitutional judges. When the Constitutional Court performs its role as a *positive legislature*, the Constitutional Court has carried out *judicial activism*. *Judicial activism* is a legal interpretation that encourages judges to make decisions in accordance with the moral law that lives in society.¹⁰ Provisions for judicial activism in Indonesia are contained in Law Number 8 of 2009 concerning Judicial Power, namely Article 5 paragraph (1) which requires judges to explore the sense of justice that lives in society.¹¹

Constitutional judges use the law discovery method in carrying out *judicial activism* against decisions that are *positive legislature*. When making a decision the Constitutional Court Judge is not only controlled by existing legal regulations (in terms of the constitution), but is also controlled by social, political and personal forces.¹²

There has been a shift in the role of the Constitutional Court from a *negative legislature* to a *positive legislature*. According to Ronald Dworkin,¹³ the Constitutional Court has applied *judicial discretion*. *Judicial discretion* here means that in an urgent situation the Constitutional Court can play a role as a *positive legislature* in exercising its authority to review a law by issuing its decisions. In this case it does not mean that the Constitutional Court has the authority as a legislature makes laws, but the Constitutional Court finds the law in carrying out its authority to review laws.

If the Constitutional Court does not issue a decision by formulating a new norm, then it is feared that there will be problems if the decision only states that it cancels a norm in the law being reviewed. The decision to formulate the new norm will overcome the legal vacuum if it is true that a part of the law being reviewed is annulled. The formulation of new norms in *positive legislative decisions* is basically only temporary, later these norms will be taken over in the formation or revision of the law being tested.¹⁴

B. Positive Legal Considerations of Constitutional Court Decisions in Reviewing Laws in the Field of Constitutional Law

Following are some analyzes of legal considerations for the decisions of the Constitutional Court which are *positive legislature* in Reviewing Laws in the Field of Constitutional Law :

a) MK Decision Number 5/PUU-IV/2006

¹⁰ Martitah, *Op. cit.* p. 301.

¹¹ Aprina Chintya, *Judicial Activism in Judge Decisions* accessed from <http://www.pa-purwodadi.go.id/index.php/26-dinding-depan/artikel/357-judicial-activism-dalam-decision-hakim> on 20 December 2020 at 19:13 WIB.

¹² Martitah, *Op.cit.*, p. 25.

¹³ Hari Chan, *Modern Jurisprudence in Loc.cit.*

¹⁴ Shukri Ash'ari, Meyrinda Rahmawaty Hilipito, and Mohammad Mahrus Ali, *Model and Implementation of Constitutional Court Decisions in Reviewing Laws (Study of 2003-2012 Decisions)*, *Journal of the Constitution Vol. 10, No. 5*, p. 13.

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The Constitutional Court's decision Number 5/PUU-IV/2006 is a test of Article 20 of Law Number 22 of 2004 concerning the Judicial Commission (KY) contrary to Article 24B paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The essence of the petition is that the applicants request that the supreme judge not be included in a party supervised by KY.

a quo decision was made *ultra petita* or more than what was requested. The essence of the *a quo decision* is three important points, namely:

- a. Constitutional judges do not include judges supervised by KY,
- b. Supreme Court judges including judges who can be supervised by KY,
- c. substances related to supervision and imposition of sanctions on judges are cancelled.¹⁵

The Constitutional Court rendered such a decision by arguing that it is necessary to consider substantial matters related to the meaning of judges. Constitutional judges are not included in the parties supervised by the Judicial Commission, this can be seen from the Judicial Commission which is regulated in Article 24B of the 1945 Constitution of the Republic of Indonesia and the Constitutional Court which is regulated in Article 24C of the 1945 Constitution of the Republic of Indonesia. The Judicial Commission was formed earlier than the Constitutional Court. The Constitutional Court Law also stipulates that the Constitutional Court has its own Honor Council which oversees the implementation of its code of ethics.

Apart from that, the evidence from the minutes of the *Ad Hoc Committee* (PAH) I meeting of the Working Committee of the MPR in the trial gave information when the formulation of the provisions regarding KY in Article 24B of the 1945 Constitution of the Republic of Indonesia was never meant to cover the Constitutional Court.

While the Supreme Court justices are among the parties supervised by the KY, this is as stated in Article 24B paragraph (1) of the 1945 Constitution of the Republic of Indonesia that the KY is independent and has the authority to propose the appointment of Supreme Court judges and has other powers in order to maintain and uphold honor, dignity and judge behavior. There it does not mention the word "supervision" but "maintaining and upholding honor..." the same as in the KY Law. If it is written like that, then the Petitioners should no longer need to make such a request because it is written that maintaining and upholding honor is part of the KY's authority through supervision.

Regarding the substance related to the supervision of judges, where the KY Law does not specify the criteria and indicators as to what judges can be subject to sanctions in exercising their authority. The Judicial Commission Law became without legal certainty in its implementation, so the Constitutional Court gave a decision that all substances related to supervision and imposition of sanctions against judges were cancelled. Articles that have been canceled include Article 20, Article 21, Article 22 paragraph (5), Article 23 paragraph (2), paragraph (3), and paragraph (5).

These three things certainly illustrate that in its decision the Constitutional Court has played its role as a *positive legislature* by providing new norms. If this norm is not given, it will result in a legal vacuum. In addition, the Constitutional Court tried to provide justice for the applicants.

b) MK Decision Number 102/PUU-VII/2009

The Constitutional Court's decision 102/PUU-VII/2009 tested Article 28 and Article 111 of Law Number 42 of 2008 concerning the Election of President and Vice President contrary to Article 27 paragraph (1) and Article 28 paragraph (1) and paragraph (3) of the Constitution of the Republic of Indonesia 1945. The point is that citizens who will use their right to vote in the presidential election must be registered in the DPT. The Petitioner felt disadvantaged because of this rule because his name was not registered on the DPT so he could not exercise his right to vote in the 2009 presidential election.

The court decided with a constitutional conditional after considering several things. Articles 28 and Article 111 of the Law *a quo* are constitutional insofar as they are interpreted to cover citizens who are not registered on the DPT with the following conditions: " In addition to Indonesian citizens who are registered on the DPT, Indonesian citizens who are not yet registered on the DPT can exercise their right to vote by showing their Identity Card. (KTP) that is still valid or a passport that is still valid for Indonesian citizens who are abroad.¹⁶

The legal considerations given by the Court first stated that the right of citizens to vote has been designated as HAM (Human Rights) where human rights are regulated in a separate law, namely Law Number 29 of 1999 concerning Human Rights. The solution that can be done is to update the data but to do this requires quite a long time while the application is submitted closer to election day.

Arrangements through KPU decisions will not be effective considering that time is pressing, and issuing a law product in the form of a Perpu will pose a risk if it turns out to be canceled through *legislative review* during discussions in the next DPR session. So the solution of using a valid KTP and Passport for citizens is the right and effective choice to protect citizens' voting rights.

The Constitutional Court's decision is *self-executing*, meaning it can be directly stipulated by the KPU. In the *a quo* decision, the judges of the Constitutional Court have realized that the stipulation that citizens who can exercise their right to vote are citizens

¹⁵Content of the Constitutional Court Decision Number 5/PUU-IV/2006.

¹⁶Content of the Constitutional Court Decision Number 102/PUU-VII/2009.

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who are registered in the DPT is an administrative procedural provision. Administrative procedures may not override substantial matters such as citizens' right *to vote*. If this is implemented, chaos will occur and result in injustice for citizens who are not registered on the DPT.

c) MK Decision Number 11/PUU-VIII/2010

The Constitutional Court Decision Number 11/PUU-VIII/2010 examines Article 93, Article 94 paragraph (1) and paragraph (2), and Article 95 of Law Number 22 of 2007 concerning General Election Organizers because they are deemed to contradict Article 22E paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

The reason for the Petitioners' submission of the petition is that the Petitioners who are Chairmen and members of the Election Supervisory Body (Bawaslu) have the duty and authority to oversee the implementation of elections where Bawaslu is one of the bodies established under Article 22E paragraph (6) of the 1945 Constitution of the Republic of Indonesia as part of the election management body so that the constitutional authority whose formulation is regulated through this article can be equated with a state institution. However, with the provisions of Article 93, Article 94, and Article 95 of the Law, the independence of the Bawaslu is limited because the candidates for Panwaslu members are proposed by the KPU, not the Bawaslu itself. The Petitioners feel that *the a quo* articles being petitioned for in the review are detrimental to their constitutional rights as Bawaslu. Where Bawaslu does not have the independence to determine the Provincial, Regency/City and District Panwaslu member candidates because the Panwaslu member candidates are proposed by the Provincial KPU and/or Regency/City KPU.

a quo decision the Court gave its verdict, namely to partially grant the Petitioner's request, namely removing the word "candidate" and the phrase "... it was proposed by the Provincial/District/City KPU to Bawaslu as many as 6 (six) people for further ..." in Article 93, Article 94 and Article 95 of Law Number 22 of 2007 concerning General Election Organizers.

the a quo decision resulted in a paradigm shift in the process of appointing provincial Panwaslu, regency/city Panwaslu, and sub-district Panwaslu members. The KPU no longer proposes candidates for Panwaslu members, so that the Bawaslu here is guaranteed to be independent in directly determining Panwaslu members.

Bawaslu can be qualified as a public legal entity because it is a legal entity established based on public law or in other words aimed at public interest.¹⁷ Their duties and authorities are also regulated in the *a quo* law, precisely in Article 74. Bawaslu together with the Election Committee and Supervisors is in charge of supervising all stages of the holding of general elections.

The task of the Bawaslu is to oversee the holding of elections. Therefore, it is sufficient for the nomination and appointment of members of the Panwaslu to be carried out by only one institution, namely the Bawaslu. This will guarantee fair legal certainty and prevent disruption to the holding of elections. If the Provincial, Regency/City and Sub-district Panwaslu members are elected by the Provincial and Regency/City KPU, it will make Bawaslu lose its independence as an election management institution. Moreover, Bawaslu has the task of supervising the KPU, so it doesn't make sense if the Panwaslu is actually chosen by the KPU, which is basically supervised by Bawaslu.

a quo Law, to be exact, CHAPTER IV concerning Election Supervisors, Articles 70 to 109, must be interpreted that Bawaslu is an institution tasked with supervising the election process. The function of holding elections is carried out by elements of election management, in this case the KPU and Bawaslu as well.

Article 70 states that "Supervision of Elections is carried out by Bawaslu, Provincial Panwaslu, Regency/City Panwaslu, District Panwaslu, Field Election Supervisors, and Overseas Election Supervisors". In this way, it is clear that Bawaslu and Panwaslu carry out their duties in overseeing the holding of elections as well as with the independence granted by the 1945 Constitution of the Republic of Indonesia. So that it is appropriate for Bawaslu to determine the candidates for Panwaslu members themselves without the interference of other institutions, namely the KPU.

The Constitutional Court has issued a decision that formulates a new norm which is a *positive legislative decision*, in this case not without reason. The Petitioners are entitled to obtain their constitutional rights, especially as part of the Bawaslu which has independence in supervising the implementation of elections so that *the a quo decision* is considered the best and provides justice.

d) MK Decision Number 13/PUU-XVI/2018

The object of the application being examined is Article 10 of Law Number 24 of 2000 concerning International Agreements. These articles are considered contrary to Article 11 paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

Declare that Article 10 of Law Number 24 of 2000 concerning International Treaties is contrary to the 1945 Constitution of the Republic of Indonesia and does not have conditionally binding legal force as long as it is interpreted only to the types of international agreements as mentioned in letters a to f in Article *a quo* that requires the approval of the DPR so that only those types of agreements are ratified by law.

the a quo Law which states:

Ratification of international agreements is carried out by law when it relates to:

¹⁷See MK Decision No. 11/PUU-VIII/2010, p. 17.

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- a. political, peace, defense and national security issues,
- b. changes in territory or determination of the boundaries of the territory of the Republic of Indonesia;
- c. sovereignty or sovereign rights of the state;
- d. human rights and the environment;
- e. formation of new legal rules;
- f. foreign loans and/or grants.

This article is considered contrary to Article 11 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that international agreements that have broad and fundamental consequences for people's lives are related to the burden on state finances, and/or require that changes or enactment of laws must be approved by the House of Representatives. People.

a quo Law provides for the regulation of which categories of international agreements are legalized through the Law. Apart from letters a to f, it is not legalized through a law but through statutory regulations under a law, which in this case is a presidential decree. This is a limitation on the category of international agreements.

The problem with this application actually does not lie in which stages the DPR's approval is given but which international agreements require DPR's approval. The Constitutional Court decision removes the category of international agreements contained in Article 10 letter a to letter f of the *a quo* Law, then replaces the category of international agreements whose ratification is carried out by law not only in letters a to f but also international agreements. other categories such as what is stated in Article 11 paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

This means that international agreements whose ratification is carried out with laws and the approval of the DPR are not only the categories listed in the Article *a quo* but other categories of international agreements that have broad consequences for the people related to the burden on state finances. There remains the role of the DPR in the ratification process, namely the formation of laws as state approval to bind themselves to international treaties.

With regard to the categories of types of international agreements regulated in the 1945 Constitution of the Republic of Indonesia, it is necessary to think that related to the development of an ever-advancing era, it is possible for things to happen that previously had never been thought of by the international or national community. From this, it will open the possibility of new problems that will occur in the future which will have a serious impact. Taking this into account, the formulation in Article 10 of the *a quo* Law will not be able to answer it and meet the growing needs of the international and national community, because the category of international agreements is too limited.

The four decisions above are decisions of the Constitutional Court which are *positive legislatures* which contain new norms in them. To be honest, *the positive legislature* of the Constitutional Court is an abnormal or unusual situation. However, if this decision is not made in accordance with the considerations and analysis of each of the decisions above, there will be an impact that can disrupt the balance of life in society in the field of law and also for state administration in Indonesia, namely *chaos*. Legal considerations for the decision of the Constitutional Court decisions that are *positive legislature*, namely providing substantive justice for the community, the existence of urgent conditions that require it to be immediately terminated by providing new norms, and avoiding legal vacuum if the material of a law is canceled so as to avoid legal chaos (*chaos*).

IV. CLOSING

Based on the discussion that has been put forward, the following conclusions can be drawn;

The constitutionality of the Constitutional Court's decision which is *positive legislature* in judicial review in the field of Constitutional Law is an extension of the judicial review of a law whose justification is regulated in Article 24C of the 1945 Constitution of the Republic of Indonesia, Law Number 23 of 2004 concerning the Constitutional Court and its amendments, namely Law Number 8 of 2011 concerning Amendments to Law Number 23 of 2004 concerning the Constitutional Court and Article 5 paragraph (1) of Law Number 48 of 2009 on Judicial Power. Thus decisions that are *positive legislature* can be accepted and do not conflict with the 1945 Constitution of the Republic of Indonesia and have constitutionality that is implicitly regulated in the 1945 Constitution of the Republic of Indonesia. Because of this, there has been a shift in the role of the Constitutional Court, originally only as a *negative legislature*, now it also plays a role as a *positive legislature*.

Analysis of the legal considerations of Constitutional Court decisions that are *positive legislature* in reviewing laws in the field of constitutional law is to provide substantive justice for the community, there are urgent conditions that require immediate decisions to be made by providing new norms, and avoiding legal vacuum if material The law was canceled so that legal chaos (*chaos*) could be avoided.

Based on the conclusions, the authors recommend first that it is necessary to add legal instruments to the Constitutional Court Regulation (PMK) concerning the authority of the Constitutional Court not only as a *negative legislature* but also as a *positive legislature* in exercising its authority, namely the Review of Laws. Second, the need for regulation regarding the legitimacy of *positive legislative decisions* by making changes to the Constitutional Court Law.

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