# The Politics of Judicial Law in the Development of the National Health Law

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## Abstract

Normatively, the follow up on the Constitutional Court's Decree has been regulated in the Constitution No.12 of 2011. Yet, the mentioned norm has not optimally regulated the follow up of the Constitutional Court's Decree as one of the main sources in the planning and the renewal of the national law. This is shown by the fact that there was a norm which was annulled by the Constitutional Court, yet it was still written in the new Constitution. Because of that, the Constitutional Court's verdict, especially those regarding the politics of judicial law, is crucial to be included in the national law planning and development documents as a guide for the lawmakers in the form of the Constitution. This is because the Constitutional Court's decree includes the politics of the judicial law, which determines the road of the national health law's development, so that the constitution in the aspect of health will not be against the 1945 Constitution.

This research is a qualitative study, by using the post-positivism paradigm and the juridical-normative approach. The research approach used is statute approach and case approach. The research approach is used to see the politics of the judicial law contained in the Constitutional Court's Decree which should have been the guide of the national health law development.

***Keywords:*** *verdict, politics of judicial law, law development.*

## Introduction

The constitutional change which happened in the period of 1999-2002 has changed the design and the structure of the governance in Indonesia. The birth of some new stately institutions such as the Constitutional Court, the Regional Representatives, and the Judicial Commission are the means to strengthen the check and balance mechanism between the stately institutions. The Constitutional Court was created in the third amendment of the constitution's change. Yet, this institution was only effective in carrying out its constitutional tasks after the issuing of the constitution which regulates the Constitutional Court, which was the Constitution No. 24 of 2003 regarding the Constitutional Court on August 13th, 2003. The Constitutional Court consists of nine judges in which each three were appointed by the President, the Legislative House, and the Supreme Court with a five-year term of office. They may then be reappointed for one term of office.

Based on the stipulations of Article 24C of the Republic of Indonesia's 1945 Constitution, *juncto* of the Constitution No. 8 of the years 2011 the Constitutional Court has four rights and one responsibility, which are:

(1) Testing the Law against the Republic of Indonesia's 1945 Constitution;

(2) Making the verdict upon stately institution power dispute, in which its power was given by the Republic of Indonesia's 1945 Constitution;

(3) Making the verdict on the dissolution of political parties; and

(4) Making verdict on the disputes of the general election results.

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The presence of the Constitutional Court and its constitutional review is aimed to create the check and balance mechanism between the stately institutions so that there are no misuses of power in the establishment of the state, as stated by Lord Acton[1], *"power tends to corrupt, absolute power corrupt absolutely.* Because of that, as the executor of the check and balance mechanism, if the health constitutions as the legislative house's products are proved to be against the constitution, it can be revoked by the Constitutional Court. Apart from undergoing constitutional trials, the Constitutional Court is also known as undergoing norm trials. This is because there is the Constitutional Court's power in testing the constitutionality of a constitution.

In its development, especially after the change of the 1945 Constitution, there are new legal sources which must become the guide in undergoing the national law renewal, which is the Constitutional Court's verdict. Normatively, the Constitutional Court has the role as the negative legislature, which functions in annulling the norms in the constitution, including those regarding health. According to Hans Kelsen[2]*," The annulment of a law is legislative function, an act-so to speak-of negative legislation. A court which is competent to abolish laws-individually or generally-function as negative legislature".* Meanwhile, according to Siahaan[3] the Legislatives and the Presidents act as the positive legislature who creates the law.

Generally, Bagir Manan states that the efforts to renew the colonial law are not only limited by the formation of the constitutional regulations. Yet, it may also be done through the judge's verdict[4]. In that verdict also, this article aims to explain and to discuss the politics of the judicial law in the Constitutional Court's verdict in the process of creating law, especially those regarding health.

## Discussion

In general, the Politics of Law's definition according to experts and specialists is substantively and basically the same. According to Moh. Mahfud MD[5], politics of law is legal policy or formal line (policy) concerning health law which will be enacted by formulating a new law or by replacing the old law, in order to achieve the State's goals. From several existing definitions, the core of Politics of Law's definition is legal and health policy that will or has been nationally implemented by the Indonesian government. That is namely: *first,* a legal development in which its main point is making and updating the legal materials so that they can meet the needs; *second,* the implementation of the existing health legal provision, including the affirmation of the institution and the guidance functions by the law enforcers. From these definitions, it showed that politics of law encompasses the process of legal making and legal implementation that can indicate the nature and the direction in which health law will be established and enforced.

In its development, Politics of Law is not only made by legislators, namely it is made by the People' Representative Council and the President. It can also be carried out by the Constitutional Court as a judicial institution whose one of its authorities is to test the constitutionality of a constitution against the 1945 Constitution. The Constitutional Court's decision often determines in which direction the legislators must direct their legal politics.

In fact, it is not uncommon for the Constitutional Court to act as a positive legislature, because the Constitutional Court does not only state that a legal norm is contrary to the constitution so that it does not have binding legal force, but the Constitutional Court also takes the role of a law-maker because it participates in formulating new norm in its conditionally constitutional or conditional unconstitutional decisions. According to Stone, the Constitutional Court's involvement in the legislative process by formulating norm in its decision can also be referred to as judicialization of politics. The following is Stone's[6] full opinion.

"Judicialization of politics is the intervention of constitutional judges in legislative processes, establishing limits on law-making behavior, reconfiguring policy making environments, and sometimes, drafting the precise terms of legislations"

Therefore, the Constitutional Court must now be seen as a law-making body other than the President and the People's Representatives Council. According to Asshiddiqie[7], this is seen as a convergence between the legal systems. This is because, recently there is a strong tendency in the environment of countries that adopt the system of judge-made law to give a greater role to the

Constitution as in the civil law system. Conversely, in the civil law environment there is also a desire to enlarge the court's role as a law-making institution.

The Constitutional Court acts as a positive legislature. Because the Constitutional Court is involved in formulating new norm by making the interpretation so that the norm referred to does not conflict with the constitution. Morover, the Constitutional Court gives an interpretation of the health constitution when the rules in the constitution do not clearly regulate something in question or give orders to the legislator to revise the norms in a constitution until a certain time limit. If the legislator does not make the revision to a norm in a constitution as instructed in the decision of the Constitutional Court, then that norm directly becomes unconstitutional. The order in the decision of the Constitutional Court was termed by Paczolay[8] as a constitutional mandate. However, the term used by the author is judicial legal politics because the Constitutional Court has given directions of the national legal development which will be addressed.

On the other hand, based on Laksono's[9] research examining the decisions of the Constitutional Court from 2003-2015, there are several variants of the constitutional mandate contained in the Constitutional Court's decisions, they are as follows:

1. The Decision of the Constitutional Court that contains suggestion, recommendation, advice, or encouragement to make amendment, improvements, or formulation of the Constitution;

2. The Decision of the Constitutional Court that provides the alternatives normalization in formulating the Constitution;

3. The Decision of the Constitutional Court that contains prohibition to contain a certain norm;

4. The Decision of the Constitutional Court that must contain a specific norm in formulating Constitution;

In the rule of law perspective, disregarding judicial decisions is considered as a bad precedent. Law supremacy doctrine within the conception of the rule of law has obliged all parties to obey the judicial decision. Although there are some parties which argue, from the perspective of authority separation theory, the institution with authority to make laws is the parliament, therefore the judiciary may not function as a parliament. However, in the development of the idea of judicial review, it turns out that the function of the Constitutional Court is not only limited as negative legislature, but also functions as positive legislature. According to Stone, the involvement of the Constitutional Court in the legislative process by drafting norms in its decisions may be referred as judicialization of politics.

This matter is also in accordance with Asshiddiqie's opinion that currently, there is a tendency for countries which adopt civil law system to broaden the role of the judiciary in making laws. Conversely, in countries which adopt common law system, there is a tendency to give major roles to the law. This is also an indicator that the constitutional doctrine in one country always develops following the development of law and society.

Within the period 2013-2019, there were at least 26 times the testing of laws in health sector which included laws on health, laws on medical practice, laws on animal husbandry and animal health, laws on health personnel, hospital law. There are 6 (six) issues which are often disputed by their constitutionality according to Junaidi[10], namely:

1. Phrases regarding health caution;

2. Revocation of criminal sanctions for nurses who perform medical and pharmaceutical services;

3. Safeguarding the use of addictive substances so as not to interfere and endanger public health and public environment;

4. Provision of a designated space to smoke;

5. Health warning in cigarette production alongside with the sanctions;

6. Related to health financing sources originating from the government.

Below are several decisions which contain important guidelines which are considered by legislators in constructing laws, particularly in the development of health law. The examples of the Constitutional Court verdicts where the application grants the Petitioner's and contains constitutional mandate, include:

1. Decision Number 4/PUU-V/2007 concerning the testing of Constitution Number 29 Number 2004 regarding Medical Practices. In this decision, the Constitutional Court stated that the provisions of criminal sanctions in Article 75 paragraph (1), Article 76, Article 79, letter a of the Medical Practices are contrary to the constitution. The Constitutional Court eradicated criminal sanctions and only applied a fine to doctors or dentists who practiced without having registration certificate and practice permit as stipulated in Article 75 paragraph (1) and Article 76 of the Constitution and the threat of imprisonment as regulated in Article 79 letter a Medical Practice Constitution. Within this decision, Constitutional Court also provides guidelines to legislators in regulating criminal sanctions, to uphold criminal law which is humanist and closely related to the code of ethics. Therefore, the provision of criminal sanctions has to uphold the following guidelines: (i) criminal threats may not be used to achieve any particular goal which fundamentally might be able to be achieved in other ways which are as effective yet with less suffering and loss, (ii) criminal threats may not be used if the side effects are more detrimental than the actions to be criminalized, (iii) criminal threats has to be rational, (iv) criminal threats has to maintain harmony between order, in accordance with law, and competence (order, legitimation, and competence), and (v) criminal threats has to maintain the equality between community protection, honesty, procedural justice. Thus, the provision of appropriate sanction for doctors or dentists who practice with neither registration certificate nor license to practice would be a fine sanction.

2. Decision Number 12/PUU-VIII/2010 concerning the testing of the Constitution Number 36 of 2009 regarding Health. In this decision, the Constitutional Court has revoked the provisions of Article 108 paragraph (1) of the Health Constitution regarding the elucidation of the following phrase "health personnel" which contained in the elucidation section of Article 108 paragraph (1) of the Health Constitution and enclose the definition of "health personnel" in Article 108 paragraph (1) of the Health Constitution instead. This means, the Constitutional Court has repositioned the norms from the elucidation into the Article 108 of the Health Constitution. Under its consideration, Constitutional Court stated that the placement of exclusion provisions in the Explanation is considered as an improper placement, because such provisions are also included in the category of normalization and are not supposed to merely be explained. Moreover, the normalization contained in the said elucidation may have implications for the imposition of criminal sanctions, despite the existence of said sanction provisions may be found in another article. Norms are supposed to be placed within the article. Exception provisions are highly limited as they do not provide neither protection to patients in emergency nor provide protection to health workers. The test begun when Misran, a nurse who was also the head of the Community Health Center (Puskesmas) and was assigned in a remote area in East Borneo in where no doctor and pharmacist felt disadvantaged by the enactment of Article 108 paragraph (1) of the Health Law and its explanation. With this provision, Misran, as both of the head of Puskesmas and a nurse was unable to optimally carry out their duties in providing health services to patients, notably when there are patients who need emergency measures as one of the impacts of the narrow definition of health personnel and be jotted down in the article instead of in the explanation. With the eradication of norm regarding who are referred to as health workers in the elucidation of Article 108 paragraph (1) of the Health Constitution, then was placed in the Article 108 paragraph (1) section has guaranteed legal certainty for health workers in providing optimal services to the community.

3. Decision Number 57/PUU-IX/2011 concerning Testing of Constitution Number 36 of 2009 concerning Health. In this decision, the Constitutional Court has revoked the phrase "may" in the Elucidation Article 115 paragraph (1) of the Health Constitution which states, "For several specific places such as workplaces, public places, and other places **may** provide designated area to smoke". Therefore, the provision of designated smoking areas at workplace, public places, and other places is no longer optional, but considered as a necessity.

From this provision, it can at least be concluded that the decision of the Constitutional Court was accounted for the making of a law. In other words, the Constitutional Court's decision should be an important source of law which has to be considered to form a national health law.

## Conclusion

The presence of the Constitutional Court after

the constitutional amendment has a significant role in striving to form a national health law. As the decision of Constitutional Court often contains judicial legal politics which has to be a ground rule for the legislators, which in this case are President and the House of Representatives. The decision of Constitutional Court has to be upheld in making a law related to health sector, thereby such laws will not contradict the constitution as the supreme law (the supreme law of the land).

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