

Constitutional Courts as Positive Legislators: The Role of Indonesian Constitutional Court in Interpreting and Applying the Constitution

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Abstract : As in other democratic countries, the constitutional court of Indonesia has the role of interpreting and applying the Constitution in order to preserve its supremacy testing the constitutionality of statutes. With its strong power to enforce and guard the Constitution, the court is now challenged to provide people an opportunity to understand their constitutional rights close up. At the same time, the court has built up an enviable reputation among constitutional courts in new democracies for the technical quality of its legitimacy in the legal sense. Since its establishment in 2003, the Constitutional Court of Indonesia has decided more than 190 statutes in judicial review case. It has been remarkably successful to make a credible start on its work of guarding the Constitution. Unsurprisingly, many argue that the Court has elevated Indonesia's democracy to a whole new level. In accomplishing its roles judicial review, the basic principle that can be identified is that the Constitutional Court must always be subordinated to the Constitution. It is not being allowed to invade the field of the legislator. In doing so, the court does not have any discretionary political basis in order to create legal norms or provisions that could not be deducted from the Constitution itself. When interpreting a statute "in accordance with the constitution", the court recognizes and reasserts that it is strictly forbidden to extend the scope of a legal provision in such a way that would create a general norm not established by the law-maker. This paper aims to identify and assess the latest role of Indonesian Constitutional Court in interpreting and applying the Constitution. In particular, it questions 1) the role of the Constitutional Court in judicial review; and 2) the role of the court to assist the legislators in the accomplishment of their functions in order to preserve its supremacy testing the constitutionality of statutes. Concerning positive legislator, jurisprudential and judicial review theories will be approached. The empirical part will include qualitative and comparative research. Main questions to be addressed: Can the Constitutional Court be functionalized as positive legislator? What are the criteria for conducting role of Constitutional Courts as Positive Legislators and how can it be accepted? Concerning the subordination of Constitutional Courts to the Constitution and judicial review, both qualitative and quantitative methods will be used, and differences between Indonesia and German Constitutional Court will be observed. Other questions to be addressed: Can Constitutional Courts have any discretionary political basis in order to create legal norms or provisions that could not be deducted from the Constitution itself. Should the Constitutional Court always act as a negative legislator? However, the Constitutional Court in Indonesia has played role as positive legislators which create dynamic of Indonesian legal development. In performing the task of reviewing the constitutionality of statutes, the Constitutional Court has created legal norms or provisions that could be deducted from the Constitution itself.

Keywords : constitution, court, law, rights

Conference Title : ICLS 2015 : International Conference on Law and Society

Conference Location : Paris, France

Conference Dates : June 25-26, 2015