



THE INDONESIAN CONSTITUTIONAL COURT'S INTERPRETATION OF THE CONSTITUTION RELATED TO THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

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It is a great pleasure to be invited to this honorable international conference in commemoration of the 60th Anniversary of the Turkish Constitutional Court. On this occasion, the Indonesian Constitutional Court would like to congratulate the Turkish Constitutional Court for celebrating its 60th Anniversary and successfully hosting this international conference.

The theme for this international conference, “Interpretation of Constitution in the Protection of Fundamental Rights and Freedoms” is an important agenda for Indonesia and the world. This is because the protection of fundamental rights and freedoms is an essential element for the development of the constitutional democratic state. While the Constitutional Court has authorities to protect citizens' rights through constitutional interpretation. Therefore, the Constitutional Court has functions not only as the guardian of the constitution but also as the sole and final interpreter of the Constitution.

The idea of a democratic state based on the rule of law should be seen from the perspective of the protection of fundamental rights and freedoms as guaranteed by the 1945 Constitution of the Republic of Indonesia. The idea to include human rights in the 1945 Constitution was discussed by the framers of the Constitution. The Indonesian Constitution was amended four times from 1999 to 2002. The second amendment in 2002 guarantees human rights, which are outlined specifically in Chapter XA on Human Rights, from Article 28A to Article 28J of the 1945 Constitution. These constitutional provisions assure human dignity, the right to equality, personal liberty, civil and political rights, socio-economic rights, and other important fundamental rights and freedoms. The constitutional safeguards

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have had a significant impact on the development of constitutional democracy in Indonesia today.

The protection of human rights and its implementation is further regulated in Law No. 39 of 1999 on Human Rights and other legislation guarantees the recognition and respect of other person's rights and freedoms based on morality, religious values, security, and public order in a democratic society.

If placed in a more universal context, the citizens' rights as mentioned in the Constitution and laws is following the spirit of the formulation of human rights as stated in international human rights treaties, including the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) which has been ratified through the Law No. 29 of 1999 concerning Ratification of the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Civil and Political Rights (ICCPR) which has been ratified through Law No. 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights, and the Law No. 11 of 2005 concerning Ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR). All of these international treaties guarantee human rights for everyone without discrimination. The consequences of this ratification are these treaties became national law, and the government was immediately obliged to respect, protect, implement and advance the human rights contained in them.

The Interpretation of the Constitution by the Constitutional Court

One of the efforts to protect fundamental rights and freedoms has been the establishment of the Constitutional Court of Indonesia which was initiated by the process of political change from authoritarian power to constitutional democracy. It is in line with the momentum of the constitutional amendments during the reform era. The third constitutional amendment of 2001, provided for the creation of a Constitutional Court of Indonesia, which was duly established in 2003.

The Constitutional Court of Indonesia is one of the state institutions exercising independent judicial power in administering the judicial system with the aim of enforcing law and justice. The Constitutional Court has five authorities as set forth in Article 24C paragraph (1) and paragraph (2)

of the 1945 Constitution including constitutional review of law against the Constitution; disputes of authorities between state institutions which are the authorities granted by the Constitution; political parties' dissolution; elections disputes; and impeachment of president and/or vice president.

Based on its power and authorities, the Constitutional Court essentially functions as a guardian of the Indonesian Constitution, democracy, fundamental rights and freedoms. Whenever there are laws that are repressing or denying the citizens' rights, then based on request by the people, the Constitutional Court can play its role to protect, to promote, and to rehabilitate the constitutional rights of citizens from such suppression.

The Constitutional Court's decision is final and binding, so the Constitutional Court also functions as the "final interpreter of the Constitution." When exercising its power to review the constitutionality of laws, the Constitutional Court must interpret the Constitution by following textual and contextual dynamics. This is also in line with the living constitution theory, the 1945 Constitution must be understood as a constitution that has dynamics.

Provision regarding the method of interpreting the constitution is also regulated in Article 5 paragraph (1) of the Law No. 48 of 2009 on Judicial Power stipulate that "Judges and constitutional judges must explore, follow and understand the legal values and a sense of justice that lives in society."

In addition, the standards for determining the constitutionality of a law must be the text of the Constitution, which means the Constitutional Court must use original intent as a benchmark for interpreting the Constitution. The original intent protects the original ideas and enthusiasm during the formulation of the Constitution and law.

The result of the interpretation of the text becomes a parameter to measure the norms of the law being reviewed to be in accordance with the Constitution. The Constitutional Court's decision is a way out of resolving conflicts between laws and the Constitution.

The Constitutional Court's Role in the Protection of the Fundamental Rights and Freedoms

Since its establishment in 2003, the Constitutional Court of Indonesia has decided important cases on the protection of fundamental rights and freedoms, which can be seen in its landmark decisions. One of the

important decisions of the Constitutional Court concerns the protection of freedom of religion. This because the Republic of Indonesia is a religiously diverse country.

In 2017, the Constitutional Court granted a judicial review of the Law Number 24 of 2013 concerning Civil Administration Law that will pave way for Indonesian native-faith followers (*penghayat kepercayaan*) to have their beliefs officially recognized by the government. The judicial review was filed in 2016 by followers of four indigenous faiths who argued that the law violated the principle of equality before the law. The Court argued that by leaving the religion fields blank, indigenous-belief followers had also suffered problems in exercising their rights, including difficulties in marriage registration and accessing civil administration services. The religion field on family registration and electronic identity cards (ID card) of people adopting indigenous beliefs should now show that they are "native-faith followers" without details about their native faith.

In this native-faith followers case, the Court considered that the disputed articles provided no legal certainty and violated principles of equal justice for all citizens. The Court, further said that articles in the law that required people adopting indigenous native faiths to leave the religion column in their ID cards blank were discriminatory. These articles treat different things that should be the same, namely citizens who live in beliefs that are recognized according to laws and regulations in accessing public services and citizens' native-faith followers. According to the Constitutional Court, the limitation of these rights has nothing to do with respect for the rights and freedoms of others and is not related to the fulfilment of just demands in the life of a democratic society. On the other hand, the limitation of these rights actually leads to unfair treatment of citizens nativefaith followers Thus, it turns out that the reasons for the limitation of rights as regulated in Article 28J paragraph (2) of the 1945 Constitution have not been fulfilled so that the different treatment constitutes a discriminatory act. In deciding the case, the Court found that "Article 61 paragraph (2) and Article 64 paragraph (5) of the Civil Administration Law contradict the 1945 Constitution and these articles are not legally binding."

Another Constitutional Court landmark decision can be found in the case of freedom of speech. As a foundational principle of democratic institutions, freedom of speech creates the space for the exchange of ideas and to make an effective democracy. The Constitutional Court has

annulled many freedom of speech provisions allowed the Constitution. For example, in the lese majeste case (2006), which involved a political activist and a lawyer prosecuted for insulting President. In deciding the case, the Constitutional Court found that the Criminal Code Articles originated from Dutch colonial rule, known as hate sowing (*haatzaai-artikelen*), which were designed to safeguard the royal family and colonialists from opinion and criticism by citizens. The Constitutional Court concluded that the articles violated the Constitution. Through this decision, the Court protects the right to freedom of speech by keeping state institutions transparent and responsive to public opinion and criticism.

A further example is a case on the right to vote in elections (2019). This case was submitted by a number of democracy activists, who argued that many citizens could not exercise their constitutional right to participate in elections because they do not have an electronic ID card. In deciding this case, the Constitutional Court said that the minimum requirement for voters to be able to exercise their right to vote is to have an Electronic ID card, in accordance with the Population Administration Law. However, if there are citizens who have the right to vote but don't have an Electronic ID card, the Court allowed them to vote in the General Election by using a recommendation certificate (*Surat Keterangan*), issued by the Population and Civil Registry Office in Indonesia, as proof they had registered their data.

Based on these constitutional cases, the Indonesian Constitutional Court has become one of the main actors in the protection of fundamental rights and freedoms. In the case of the freedom of religion, freedom of speech, and the right to vote in elections, the Constitutional Court has made strong constitutional interpretation related to the development of democracy in Indonesia.

Apart from the important role of the Constitutional Court, it is imperative that the Constitutional Courts must continue to improve their role in guaranteeing this religious freedom. The important role of the Constitutional Court in protecting constitutional rights merits attention because an independent judiciary is indispensable to making constitutionalism more than an embellishment.

It is not possible to cover all aspects of the topic in a single presentation. Summarizing the above, it can be concluded that the constitutional interpretation by the Constitutional Court is important for the protection of fundamental rights and freedoms in Indonesia.

Finally, the good relations and cooperation that have been established between countries and fellow of the Constitutional Courts and equivalent institutions shall continue to be established and improved in the future to promote fundamental rights and freedoms globally. Once again, the Indonesian Constitutional Court would like to congratulate the Turkish Constitutional Court on celebrating its 60th anniversary, may the coming year achieve even greater success.