



Analysis of Constitutional Court Decision No. 30/PUU-XVI/2018 and Supreme Court Decision No. 65p/Hum/2018 Concerning the Prohibition of Concurrent Positions for Regional Representative Council Candidates (DPD)

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ABSTRACT

This study aims to analyze the disparities in the Constitutional Court's decision number 30/PUU-XVI/2018 and the Supreme Court's decision number 65P/HUM/2018 regarding the prohibition of concurrent positions as candidates for members of the regional representative council, as well as the legal implications of the disparity of the two decisions. The type of research method used in this research is the normative legal research method, namely legal research that refers to written regulations or other legal materials. The results of this study indicate that the disparity or fundamental difference from the Constitutional Court Decision Number 30/PUU-XVI/2018 and the Supreme Court Decision Number 65P/HUM/2018 is the different time in enforcing the ban on candidates for DPD members from political party officials. This disparity or difference can occur due to several factors, among which are the first; The different authorities between the Constitutional Court and the Supreme Court in examining a statutory regulation, the second; The Constitutional Court and the Supreme Court in examining a statutory regulation use different touchstones, and the third is the different views of the judges of the Constitutional Court and the Supreme Court in analyzing cases. The legal implications of the disparity of the two decisions are the absence of legal certainty and the violation of the constitutional rights of citizens.

Keywords: Verdict Analysis; Supreme Court; Constitutional Court; Double job

1. Introduction

The nation's founding fathers made it very apparent that Indonesia is a democratic legal state. Article 1 of the general explanation of the 1945 Constitution of the Republic of Indonesia covering the state governance system states: "The State of Indonesia is based on law (*rechtsstaat*) and not on mere power (*machtstaat*)". This vow was made by the nation's founding fathers. In accordance with the concept of *nomocratie*, i.e., authority exerted by law, *nomos*, the actual leader in state administration is the law itself, in accordance with the principles of the Rule of Law, and not the individual (Asshiddiqie, 2011). The above-described notion of a developing rule of law cannot be divorced from the conditions of social growth that can be analyzed through the dynamics of the existing state administration. So as to influence the evolution of legal state thought (Hoesein, 2016), As explained by Stahl, that the concept of a rule of law which is referred to as *rechtsstaat* includes four important elements, namely:

- a. Protection of Human Rights (HAM)
- b. Power Sharing
- c. Constitutional Government
- d. State Administrative Court

Regarding the system for governing the state, everything is limited so that the executive, legislative, and judicial institutions of state power can work in accordance with the duties, functions, and authorities granted by the constitution and/or by legislation (Robuwan, 2018). The strength of the judiciary as one of the state's institutions is evidence of the Indonesian constitution's assertion of commitment to the concept of a rule of law state. In accordance with the spirit of Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which mandates the free exercise of judicial power, the institution vested with the authority to carry out

the functions of judicial power in upholding the rule of law should be an autonomous and independent institution, free from other state powers. Pangarso, 2018). Specifically, judicial power is exercised by two state institutions: the Supreme Court and subordinate judicial bodies, and the Constitutional Court.

As a result of the presence of the Constitutional Court, the Indonesian judicial system is classified as a bifurcation system. In this situation, it is the Constitutional Court that has the authority to conduct a judicial review of a law against the constitution (Wardani, 2019; Huda, 2008). However, the application of the judicial review authority in Indonesian constitutional practice does not give this authority exclusively to the Constitutional Court, but the Supreme Court is involved in the exercise of the judicial review capacity (Audha, 2021; Fadjar, 2020).

According to Hamdan Zoelva, this amendment to the Constitution has established a new state institution in the judiciary: the Constitutional Court, which is positioned adjacent to the Supreme Court. In accordance with the Republic of Indonesia's Constitution of 1945, the Supreme Court has just two constitutional powers: first, to adjudicate at the cassation level, and second, to evaluate legislative rules under the law. Through this capacity, the Supreme Court, in accordance with the "checks and balances" principle, serves as a regulator of the regulatory authority possessed by the President/Government and other institutions having regulatory authority derived from the laws (Zoelva, 2016).

Moreover, under the terms of Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the Constitutional Court is one of the judicial authority actors other than the Supreme Court. Thus, the Constitutional Court is a judicial institution, as a part of the judicial power, that decides certain issues within its jurisdiction based on the requirements of the Republic of Indonesia's 1945 Constitution (Jimly). Article 24C, paragraph 1, of the 1945 Constitution of the Republic of Indonesia stipulates that the Constitutional Court has the competence to hear cases at the first and final levels whose verdicts are definitive.

- 1) Examine the law against the Constitution
- 2) Deciding disputes over the authority of state institutions whose powers are granted by the Constitution
- 3) Decide the dissolution of political parties
- 4) Resolving disputes about the results of general elections

In spite of the fact that the Constitutional Court and the Supreme Court have been specifically vested with judicial review authority over the scope of legislative restrictions, the Constitution does not define the Constitutional Court's role. In practice, however, decisions issued by these two judicial power entities regarding judicial review frequently spark controversies (Syahrizal, 2007).

The legality of candidates for members of the Regional Representatives Council (DPD) who come from political parties is a topic that has sparked substantial controversy in a number of different areas. Regarding this issue, the Constitutional Court and the Supreme Court issued contradictory decisions in assessing the legal issue, giving rise to a legal polemic, specifically regarding the Supreme Court's decision to grant Oesman Saputra Odang's petition for judicial review of KPU Regulation (PKPU) No. 26/2018. Article 60A of PKPU 26/2018 was repealed by the Supreme Court, which required potential DPD members to resign from their positions as political party administrators if they were acting in that capacity during the nomination period.

The complaint was brought because the KPU eliminated Oesman Sapta Odang as a candidate for DPD member from the final list of candidates (DCT) for DPD members. Due to Osman Sapta Odang's position as General Chair of the Hanura Party and his failure to file a letter of resignation from the political party in accordance with PKPU No. 26 of 2018, his candidacy was revoked (before being cancelled). In reality, PKPU No. 26 of 2018 is a follow-up to Constitutional Court Decision No. 30/PUU-XVI/2018, the substance of which expands the meaning of the phrase "other work" in Article 182 letter I of Law No. 7 of 2017 regarding Elections (Election Law) to include administrators (functionaries) of political parties. Thus, a candidate for DPD membership who is currently functioning as a political party administrator is required to resign from his existing position. However, with the Supreme Court's ruling, the legal situation has become more clear. Because the Supreme Court overlooked Constitutional Court Decision No. 30/PUU-XVI/2018, which stressed the significance of Article 182 letter I of the Election Law. As a result, the legal standing of future DPD candidates who are currently administrators of political parties is uncertain. The legal question referred to is whether the concerned person can be determined as a candidate based on the Supreme Court's judgment, or whether his candidacy is still annulled based on the Constitutional Court's and PKPU No. 26 of 2018 findings. Consequently, the KPU faced two

dilemmas at the time: whether to follow the decisions of the Constitutional Court or the Supreme Court. Ultimately, the KPU elected to obey the rulings of the Constitutional Court. However, difficulties of this nature must be avoided in the future since they indicate a lack of legal clarity; everything rests on the address of the decision whether to follow up or not, and thus the political will. Obviously, this conduct is in direct opposition to the principles of the rule of law.

2. Method

This research employs the normative legal research method, which relies on written regulations or other legal materials, including primary, secondary, and tertiary legal sources. The approach utilized in this study consists of a conceptual approach, which involves incorporating views and doctrines from relevant legal disciplines, and a statutory approach, which uses statutory regulations as the basis for analysis. The research focuses on the statutory regulations related to the research subject. In this research, the method used for collecting legal materials is literature review, which involves gathering and examining statutory regulations, literary books, legal scholars' opinions, journals, and other related materials, including interviews.

3. Result and Discussion

3.1. Result

a. Disparity between Constitutional Court and Supreme Court Decisions

The authority of the MK and MA in making decisions is based on the power granted by the 1945 Constitution. The authority of the MK to review laws against the 1945 Constitution is outlined in Article 24C paragraph (1) of the 1945 Constitution, while the authority of the Supreme Court to review statutory regulations is outlined in Article 24A of the 1945 Constitution. invitation in violation of the law. This institution tries to ensure consistency across all levels of legislation in Indonesia, which employs a decentralized judicial review procedure (Asshiddiqie, 2013).

The decision number 30/PUU-XVI/2018 of the Constitutional Court examined Article 182 letter I of the Election Law. The judgement declared, "The phrase 'other job' in Article 182 letter I is antithetical to the 1945 Constitution and is not legally enforceable so long as it is not taken to include political party leaders" (functionaries). In its legal analysis, the Constitutional Court determined that this provision violated Article 28D, paragraph 1, of the 1945 Constitution because DPD members are territorial representatives and DPD members cannot be political party officials or come from political parties in order to prevent political distortions in the form of multiple representation so that political parties will have representatives in both the DPR and the DPD.

In this judgement, the Constitutional Court attempted to explain the reasons behind the establishment of the Regional Representative Council (DPD). The formation of the DPD is intended to reorganize Indonesia's representative institutions into two chambers (bicameral). The Regional Representative Council (DPD) reflects the notion of regional representation, while the People's Representative Council (DPR) reflects political representation. Representative institutions such as the DPD embody the fourth tenet of Pancasila, "People guided by wisdom in deliberations/representations," as well as Article 1 paragraph (2) of the 1945 Constitution, which declares, "Sovereignty resides in the people and is exercised in accordance with the law." In the administration of a democratic rule of law, this state institution really represents the will of the people.

In order to maintain the dignity of the constitution and to realize a good democratic system, the author believes that the Constitutional Court should grant the Petitioner's request in its entirety where the phrase "other work" in Article 182 letter I of Law Number 7 of 2017 regarding General Elections is contrary to the 1945 Constitution and does not have binding legal force as long as there is no constitutional amendment (functionaries). In the meantime, Supreme Court Decision No. 65/P/HUM/2018 examined Article 60A paragraph (1) of KPU Regulation No. 26 of 2018 on the Second Amendment to KPU Regulation No. 14. The ruling stated that the provisions of Article 60A were contrary to higher statutory regulations, but it still has binding legal force and is generally applicable so long as it is not retroactively applied to 2019 DPD election participants who have participated in the 2019 Election Stages, Programs, and Schedules.

As explained in the preceding discussion regarding the Ratio Decidendi of the Constitutional Court Decision number 30/PUU-XVI/2018 and the Supreme Court Decision number 65P/HUM/2018, there is a fundamental disparity or difference between the two Decisions, specifically regarding the timing of the Enforcement of

Prospective Member Prohibitions DPD from the Board of Political Parties. The Constitutional Court's decision to evaluate the constitutionality indicated that it took effect after the 2019 election, but the Supreme Court's decision to review KPU regulations stated that it took effect after the 2019 election. walk. The Constitutional Court stated that its ruling will be implemented for the elections in 2019 and would not be retroactive. As the election procedure had not yet reached the Final Candidate List (DCT) level when the Constitutional Court decision was given, it is still conceivable for regulatory changes affecting candidates for DPD members to arise. In the meantime, the Supreme Court Ruling has determined that the Constitutional Court Ruling must be implemented after the 2019 Election, as the stages of the nomination process with the existing requirements have already been completed prior to the existence of the Fixed Candidate List (DCT), making it impossible to change the nomination requirements.

In addition to the reasons for the variance in the interpretation of the ongoing 2019 General Election Stages, Program and Implementation Schedule, there are several reasons for the disparity or basic difference between the two decisions, such as:

- 1) Regarding Authority; The Constitutional Court has the same authority as specified in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, where one of its powers is to evaluate laws that violate the 1945 Constitution. In the meantime, the Supreme Court has the ability, according to Article 24A of the 1945 Constitution of the Republic of Indonesia, to analyze laws and rules enacted under law vs statutory regulations.
- 2) Different Touchstones; When reviewing Article 182 letter I of Law No. 7 of 2017 regarding General Elections, the Constitutional Court utilized the 1945 Constitution of the Republic of Indonesia, while the Supreme Court cited Law No. 12 of 2011 on Formation of Legislation.
- 3) Judge's perspective; When assessing cases, judges of the Constitutional Court tend to delve into the content of the rules, but judges of the Supreme Court tend to employ a systematic interpretation that refers exclusively to the law. Brian Z. Tamanaha distinguishes between two categories of judges, namely formalists and realists. Formal in pursuing solutions, namely by carefully examining legal texts, whereas realism focuses on law in practice, which is based on cases and how they should be addressed, and is not constrained by text.

b. Legal Implications of the Disparity of the Supreme Court Decision Number 65P/HUM/2018

A legal action that results from the existence of another legal action. The resulting legal implications have an effect on a rule of law or ongoing legal proceedings. In this instance, the ramifications examined are those of Supreme Court Decision No. 65 P/HUM/2018 to the KPU and on the Legitimacy of PKPU No. 26 of 2018. We will initially discuss:

- 1) It has the authority to issue PKPU 26 of 2018

The KPU is an institution founded on the authority of attribution. The Government forms the General Elections Commission pursuant to Article 22E paragraph (5). (hereinafter referred to as the KPU). KPU is an autonomous institution created in order to conduct free, fair, and transparent elections. In order to fulfill its responsibilities, the KPU is authorized to create and ratify KPU regulations and decisions. This is in accordance with Article 75 of Law No. 7 of 2017 on General Elections, which states:

- a) To conduct elections in accordance with the provisions of this law, the KPU establishes KPU Regulations and KPU judgments.
- b) The KPU regulations mentioned in clause (1) are the application of laws and regulations.

The KPU with such authority issues PKPU number 26 Second Amendment to the General Election Commission Regulation Number 14 of 2018 concerning the Nomination of Individual Candidates for the General Election for Members of the Regional Representative Council. Reading more carefully, the KPU's excuse in making the PKPU aquo is to follow the directions of the Constitutional Court decision in Decision number 30/PUU-XVI/2018 which is contained in the considering point:

- a) In light of the decision of the Constitutional Court No. 30/PUU-XVI/2018 dated 23 July 2018 that the phrase "other work" in Article 182 letter I of Law No. 7 of 2017 concerning General Elections is contrary to the Constitution of the Republic of Indonesia of 2017 1945 and does not have binding legal force as long as it is not interpreted to include political party officials; and whereas, in light of the decision of the Constitutional Court No. 30/PUU-XVI/2018 dated 23 July (functionaries).

- b) The authority of the KPU is also strengthened by the considerations of the Supreme Court in the aquo decision as follows:
- c) As the stance of the Constitutional Court Decision is equivalent to the Law, the Respondent's action to issue KPU Regulation Number 26 of 2018 as a follow-up to the Constitutional Court Decision is a legitimate act. So that it may be recognized if the KPU is indeed authorized to issue PKPU No. 26 of 2018.

So that with such a legal opinion it can be accepted if the KPU really has the authority to issue PKPU No. 26 of 2018.

2) Nature of the Constitutional Court Decision and PKPU reference No. 26 of 2018

Using a study of *Lex Superior Derogat Legi Inferior* and the binding nature of a decision, the legal consequences of KPU and PKPU No. 26 of 2018 will be determined. Article 24A of the 1945 Constitution indicates that one of the Supreme Court's functions is to "review laws and regulations under laws against legislation," but it does not specify that the court's ruling is final.

Article 9 of Supreme Court Regulation No. 1 of 2011 on the Right to Judicial Review prohibits the submission of a request for reconsideration of the objection ruling. The PERMA governs the final nature of the new Supreme Court ruling. Constitutional Court, the finality of decisions owned by the Constitutional Court is governed by Article 24C paragraph (1), which states: "one of the powers possessed by the Constitutional Court is to adjudicate at the first and final levels whose decisions are final in examining laws against laws Base." In accordance with Article 10 of Law No. 24 of 2003, the Constitutional Court, as the first and ultimate court, does not recognize Appeals, Cassation, or Review in Reviewing Laws, so it might be interpreted that the Court's decision is final.

Thus, it can be concluded that the decisions of the Supreme Court and the Constitutional Court are legally binding on the KPU, so the KPU must adhere to both of these decisions. The problem that arises is that the KPU must choose which institution to use as a guide when drafting rules for the soon-to-be-held DPD election, and after weighing various factors, the KPU ultimately implements the Constitutional Court Ruling. In addition, the absence of legal certainty and the violation of the petitioner's constitutional rights, in this case Mr. Oesman Sapta Odang and related parties, emerged as a consequence of the differences in the two decisions.

Under the condition that the decisions of the Constitutional Court and the Supreme Court are in conflict, an analysis of the applicability of norms can be used as a guide to determine which decision must be implemented by the KPU from the highest legal standpoint. A norm's validity is a philosophy that explains how and under what conditions a legal norm becomes valid and applies to society.

Through the doctrine of the validity of norms and the hierarchy of norms described previously, it is possible to explain that a regulation actually takes the form of a hierarchy and that regulations at a higher level must serve as the source and basis for the formation of regulations at a lower level and cannot conflict. On the basis of this, it can be stated that superior laws and regulations must be used to determine the legitimacy of inferior laws and regulations. In the event of a discrepancy between the Supreme Court's decision and the Constitutional Court's decision or with the PTUN's decision, the presence of this theory might be utilized as a reference by the KPU when determining what action to take.

Obviously, the existence of a hierarchy between a tested legal product and the foundation for testing has various legal repercussions and legitimacy. If there is a conflict between the Supreme Court's decision and the Constitutional Court's decision, the decision on the basis of review and the object of review has a higher hierarchy; in this case, the Constitutional Court's decision has greater legal validity or enforceability than the Supreme Court's decision.

Thus, the actions of the KPU, which ultimately adhered to the Constitutional Court decision and ignored the Supreme Court decision while still respecting the decision, by continuing to prohibit candidates for DPD members who have held positions as political party administrators since the 2019 Election and by refusing to include them on the Final Candidate List (DCT) for the 2019 election, are appropriate, as the position of the Constitutional Court decision is higher with respect to the Supreme Court decision (Ardiyana et al., 2019).

3.2. Discussion

The study analyzes disparities in Constitutional Court Decision Number 30/PUU-XVI/2018 and Supreme Court Decision Number 65P/HUM/2018 concerning the prohibition of concurrent positions as candidates for members of the regional representative council, along with their legal implications. The research employs the normative legal research method, focusing on written regulations and legal materials. The results indicate a fundamental difference in the timing of enforcing the ban on candidates for DPD members who are political party officials. This disparity arises due to different authorities and touchstones used by the Constitutional Court and the Supreme Court in examining statutory regulations, as well as varying perspectives of the judges in analyzing cases. The legal implications include the absence of legal certainty and the violation of citizens' constitutional rights. These disparities underscore the need for harmonization and clarity in legal interpretations to ensure consistency and safeguard citizens' rights.

4. Conclusion

The fundamental disparity or difference between Constitutional Court Decision Number 30/PUU-XVI/2018 and Supreme Court Decision Number 65P/HUM/2018 lies in the different timelines for the implementation of the prohibition on candidates for the Regional Representative Council (DPD) from being party officials. The Constitutional Court declared it effective since the 2019 General Election, while the Supreme Court stated it would take effect after the 2019 General Election. This disparity or difference may be attributed to several factors, including: firstly, the differing authority between the Constitutional Court and the Supreme Court in testing legislative regulations; secondly, the different criteria employed by the Constitutional Court and the Supreme Court in examining legislative regulations; and thirdly, the divergent perspectives of judges from the Constitutional Court and the Supreme Court in analyzing the case. The existence of such disparity or difference between Constitutional Court Decision Number 30/PUU-XVI/2018 and Supreme Court Decision Number 65P/HUM/2018 implies a lack of legal certainty and the potential infringement of citizens' constitutional rights. The government, specifically the President and the Parliament, should design an appropriate legal policy framework to prevent future disparities between Constitutional Court decisions and Supreme Court decisions. The implementation of Constitutional Court decisions should be continuously disseminated through various media channels and academic seminars to ensure public understanding and awareness of the extent to which Constitutional Court decisions are implemented by the decision's addressees. Thus, it is hoped that future legal uncertainties resulting from disparities between Constitutional Court decisions and Supreme Court decisions can be avoided.

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