

CHAPTER II

LITERATURE REVIEW

A. Constitutional Court

The 1945 Constitution is a part of our daily life, so it needs a mechanism to guarantee and guard the constitution by the establishment of the Constitutional Court. With the existence of the Constitutional Court, the 1945 Constitution must be implemented, if necessary, a Law shall be nullified by the Constitutional Court if it is contrary to 1945 Constitution.¹³

The 1945 Constitution asserts that sovereignty is in the hands of the people and implemented based on the 1945 Constitution. In line with the above matter, one of the important substances of the amendment of 1945 Constitution is the existence of the Constitutional Court which has the function to handle certain matters in the constitution, so the constitution can be implemented in accordance with the will of the people.¹⁴

In Indonesia, Constitutional Court begins with the adoption of the idea of the Constitutional Court in constitutional amendment by the People's Consultative Assembly (MPR) in 2001 as formulated in the third amendment of 1945 Constitution Article 24 Paragraph (2), Article 24C, and Article 7B on September 9th, 2001. The idea of the establishment of

¹³ Jimly Asshiddiqie, 2007, *Konstitusi dan Ketatanegaraan Indonesia Kontemporer*, Jakarta: The Biography Institute, p. 88.

¹⁴ Nanang Sri Darmadi, "Kedudukan dan Wewenang Mahkamah Konstitusi dalam Sistem Hukum Ketatanegaraan Indonesia" *Jurnal Pembaharuan Hukum*, Vol. 2, No. 2, p. 262.

Constitutional Court is one of the development of modern law which emerged in 20th century.¹⁵

Institutionally, the existence of the Constitutional Court as one of the judicial body is not under the Supreme Court. It means that there are two highest judicial body, namely Supreme Court and Constitutional Court. If previously the position of the Supreme Court is the highest judicial body, now there is another judicial body that is not under the Supreme Court. The position of the Supreme Court is same as with the position of Constitutional Court.¹⁶

The establishment of the Constitutional Court aims to strengthen the guard against the development of democracy, and the Constitutional Court has the duty to guard the implementation of the constitution while preventing the violation of the constitution. To complement this main function, in its development the Constitutional Court also serves as a democratic balancer, which aims to make democracy well managed and not deviate or violate the values of truth and justice.

The Law established by the parliament certainly contains many interests of political parties that may be contrary to the constitution. Therefore, for citizens and other parties who feel their constitutional rights in the Constitution are impaired by the existence of that Law, it may ask the Constitutional Court to nullify the enforcement of that Law.

¹⁵ Amrizal J. Prang, "Implikasi Hukum Putusan Mahkamah Konstitusi", *Jurnal Ilmu Hukum*, Vol. 13, No. 53, p.80.

¹⁶ AD. Basniwati, "Kedudukan dan Wewenang Mahkamah Konstitusi dalam Sistem Ketatanegaraan Republik Indonesia", *Jurnal IUS*, Vol.2, No.5, 2014, p.252.

If the Constitutional Court believes that there is a constitutional impairment caused by that Law, then the Constitutional Court will nullify the applicability of that Law.

The regulation on the Constitutional Court in the 1945 Constitution occurred through the third amendment of the 1945 Constitution (2001) and the fourth amendment (2002). The regulation on the Constitutional Court is contained in Article 24 C consisting of six Paragraphs and Article III of the Transitional Rules of the 1945 Constitution.¹⁷

As a follow up of the arrangement of Constitutional Court in the Constitution, the government and the House of Representatives (DPR/ *Dewan Perwakilan Rakyat*) discussed the establishment of Law on the Constitutional Court. This law was finalized and ratified on 13 August 2003 into Law Number 24 of 2003 on the Constitutional Court.¹⁸

The existence of the Constitutional Court in the national justice system completes the settlement of cases that arise within the state. With the establishment of the Constitutional Court, various issues in the field of politics are now resolved through court mechanisms and resolved legally.¹⁹

The Constitutional Court has the authority to protect the Constitutional Rights of citizens, or called constitutional complaint.

Constitutional Complaint is a complaint or lawsuit filed by an individual

¹⁷ Patrialis Akbar, 2013, *Lembaga-Lembaga Negara Menurut UUD NRI Tahun 1945*, Jakarta: Sinar Grafika, p. 177-179.

¹⁸ Maryadi Faqih, "Nilai-Nilai Filosofi Putusan Mahkamah Konstitusi yang Final dan Mengikat", *Jurnal Konstitusi*, Vol.7, No. 3, 2010, p.118.

¹⁹ Patrialis Akbar, *Op. Cit*, p. 137.

to the Constitutional Court on the act or omission of a public institution resulting in the violation of the constitutional rights of the person concerned.²⁰ The objects of complaints may be directed to governmental bodies, court decisions, or Laws.²¹

Until now, there are still many parties who do not understand with the existence of the Constitutional Court. It happens not only in the community but also in state officials. The Constitutional Court is a part of the judicial authorities besides the Supreme Court which is an independent power to administer the judiciary to uphold law and justice.²²

B. Constitutional Court Decision

The Constitutional Court which is established on August 13, 2003, is an institution established as an independent judiciary to administer justice to uphold law and justice. The Constitutional Court has four authorities and one duty. Based on Article 24 C of the 1945 Constitution *juncto* Article 10 of Law Number 24 of 2003 on the Constitutional Court (Constitutional Court Law), the authority of the Constitutional Court is to hear at the first and final level where the decision is final to:

1. Examine the Law against the Constitution;
2. To decide the disputes on the authority of state institutions in which the authority is granted by the Constitution;

²⁰ I Dewa Gede Palguna, 2013, *Pengaduan Konstitusional (Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, Jakarta: Sinar Grafika, p. 1.

²¹ *Ibid.*, p. 2.

²² Jimly Asshiddiqie, *Op. Cit.*, p.385

3. To decide the dissolution of political parties;
4. To decide the disputes concerning election results;
5. To give a decision on the opinion of the DPR regarding alleged violations by the Presidents and / or Vice President.²³

Based on Article 24 C paragraph (1) of the Constitutional Court Law, the Constitutional Court is the court at the first and final level where the decision is final. Article 47 of the Constitutional Court Law states that the decision of the Constitutional Court obtains a legal force since it was pronounced in the plenum.

Based on Article 57 Paragraph (3) of the Constitutional Court Law, the decision of the Constitutional Court which is granting the petition shall be published in the state's news no more than 30 days after the decision has been pronounced. This is because, the granting decision, whether granting in whole or in part, has changed the legal norm. While the decision stating that the petition is unacceptable or the petition is rejected does not need to be published in state's news because it does not change the legal norm.²⁴

The Constitutional Court Decision is taken in the Consultative Meeting of Judges. In the decision making process, every constitutional judge shall submit a written consideration or opinion to the petition.²⁵

²³ Tim Penyusun Buku Hakim Kostitusi Soedarsono, S.H., 2008, *Putusan Mahkamah Konstitusi Tanpa Mufakat Bulat (Catatan Hakim Konstitusi Soedarsono)*, Jakarta: Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi, p. 2-3.

²⁴ Jimly Asshiddiqie, *Op. Cit*, p. 92.

²⁵ Article 45 paragraph (5) Law No. 24 of 2003 on The Constitutional Court.

The petition should be made by deliberation to reach consensus.²⁶ If still not reached the consensus, then the decision is taken by majority vote.²⁷

The Consultative Meeting of Judges must be followed by the 9 Constitutional Judges, except there is an unavoidable obstacle that causes a Constitutional Judges unable to attend the Consultative Meeting, then the decision may be taken by 7 or 8 Constitutional Judges.

Furthermore, when the Consultative Meeting of Judges is followed by 8 judges of the constitution, and the decision does not reach the consensus, there is a possibility of comparison of votes in decision making is 4 to 4. For example in the case of judicial review of the Law there are 4 constitutional judges granted and 4 constitution judges refused. In this case, when the composition of the voice ratio is the same, the chairman's vote will decide the Constitutional Court Decision.²⁸

The decision of the Constitutional Court are made based on the 1945 Constitution in accordance with the evidence examined in the court and the judge's conviction.²⁹ The decision shall be based at least 2 evidences.³⁰

The decision reached in the consultative meeting of the judge may be pronounced in the plenary session/ plenum on the same day, or may be postponed on another day. The timing of the court decision shall be

²⁶ Article 45 paragraph (4) and paragraph (7) Law No. 24 of 2003 on The Constitutional Court.

²⁷ Article 45 paragraph (6) Law No. 24 of 2003 on The Constitutional Court.

²⁸ Tim Penyusun Hukum Acara Mahkamah Konstitusi, *Op. Cit.*, p. 56.

²⁹ Article 45 paragraph (1) Law No. 24 of 2003 on The Constitutional Court.

³⁰ Article 45 paragraph (2) Law No. 24 of 2003 on The Constitutional Court.

notified to the parties.³¹ The decision is signed by the judge and the clerk.³² Each decision of the Constitutional Court shall contain:³³

1. The head of the decision, states “FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD”;
2. The identity of the party, petitioner and defendant (if there is a defendant), either principal or attorney;
3. Summary of petition;
4. Legal considerations that become the basis of the decision;
5. Judicial Decision;
6. Day, date of decision, name of the Constitutional Judge, and Clerk.

The Constitutional Court Decision on the Juridicial Review has a binding legal force since the decision has been read. Although the decision of the Constitutional Court has a binding legal force since the decision has been read, not all of the Constitutional Court Decision which grant the petition of Petitioners can be executed immediately. It is because for the implementation of the Constitutional Court Decision still requires another process with the formation of the new law or Juridicial Review.³⁴

C. Yogyakarta Special Region

³¹ Article 45 paragraph (9) and paragraph (10) Law No. 24 of 2003 on The Constitutional Court.

³² In practice, the decision is signed by Substitute Clerk and not by the Clerk directly.

³³ Article 48 Law No. 24 of 2003 on The Constitutional Court.

³⁴ Inosentius Samsul, 2009, *Pengkajian Hukum tentang Putusan Mahkamah Konstitusi*, Jakarta:Badan Pembinaan Hukum Nasional, p. 102

The establishment of Yogyakarta can not be separated from *Giyanti* Agreement on February 13th, 1755. *Giyanti* Agreement divided Mataram into two regions. Half part became the right of Surakarta Sultanate and the other belonged to Prince Mangkubumi. Prince Mangkubumi / *Hamengku Buwono* (HB) I immediately determined that the Mataram area was named Ngayogyakarta Hadiningrat and the Capital City of Ngayogyakarta Hadiningrat is Yogyakarta. This happened on March 13th, 1755.³⁵

DIY is an autonomous province level located in the southern part of Central Java Island, with the capital city of Yogyakarta. Yogyakarta is bordered by Central Java Province and Indian Ocean, with an area of 3,185.80 km² or about 0.15% of the land area of Indonesia. This region consists of one city and four districts, namely:

1. Yogyakarta City
2. Sleman Regency
3. Bantul Regency
4. Gunung Kidul Regency
5. Kulon Progo Regency

Yogyakarta is known as an area which is rich of cultural potential. Yogyakarta also known by various predicate, namely as a student city and tourism city is enough to describe the privileges of Yogyakarta. Yogyakarta has a long of history, even since before the independence of the Republic of Indonesia.

³⁵ Jihad Rokhadi, "Sejarah Kota Jogjakarta", *Radar Jogja*, October 7th, 2017, available at <https://radarjogja.jawapos.com/radarjogja/read/2017/10/07/18098/sejarah-kota-jogjakarta>, accessed on July 19th, 2018, at 5.52 p.m.

Before the independence of the Republic of Indonesia, Yogyakarta is an area that has its own government, namely Ngayogyakarta Hadiningrat Sultanate and *Kadipaten* Pakualaman. After the declaration of the independence of the Republic of Indonesia, Sri Sultan *Hamengku Buwono IX* and Sri *Paku Alam VII* declared to the President of the Republic of Indonesia that Yogyakarta became the part of the Republic of Indonesia, merged into a unity which declared as the Yogyakarta Special Region.³⁶

The enactment of Law No. 13 of 2012 on The Privilege of the DIY which was ratified on August 31st, 2012 is one of the forms made by the government for Yogyakarta to make Yogyakarta be recognized juridically. It needs a recognition to DIY that DIY is a special region and different from the other regions.³⁷

There are five pillars which is discussed on the Law of privileges of DIY:³⁸

- a. The procedures for filling the position, duties, and the authorities of the Governor and the Vice Governor;
- b. Institutional Government of the Yogyakarta Special Region;
- c. Culture;
- d. Land; and

³⁶ Badan Pemeriksa Keuangan Yogyakarta, "Kajian Hukum tentang Keistimewaan Yogyakarta", available at <http://yogyakarta.bpk.go.id/wp-content/uploads/2013/06/Keistimewaan-DIY.pdf>, accessed on Saturday 10th, 2017, at 2.19 a.m.

³⁷ Dahlan Thaib, 2009, *Ketatanegaraan Indonesia Perspektif Konstitusional*, Yogyakarta: Total Media, p. 55-57.

³⁸ See Article 7 Paragraph (2) of Law No. 13 of 2012 on The Privileges of the Yogyakarta Special Region.

e. Spatial

D. Succession of the Governor

Succession in Indonesian Dictionary is defined as a replacement.³⁹

The Head of Region (the Governor, the Regent, and the Mayor) are known in different countries with different titles. In Federal State such as United States of America, the Governor is the Head of the State Government, in Indonesia the Governor is the Head of Local Government.⁴⁰ Law No. 23 of 2014 on Local Government determines that the implementation of governance shall be carried out by the Regional Government. Governor held for 5 years and for 2 periods.⁴¹ In carrying out its duties, the Governor is assisted by the Vice Governor.⁴²

Considering the importance of the role of the Head of Region in implementing the mechanism of regional autonomy, Article 29 of Law No. 32 of 2004 on Local Government is also regulated on the dismissal of the Head of Region and/ or the Vice Head of Region.

The Head of Region and Vice Head of Region is dismissal, because:

1. Died;

³⁹ Muhammad Abdul Rahim, "Elit, Cultural Capital, Sabda Raja dalam Suksesi Kepemimpinan Keraton dan Gubernur DIY", *Jurnal Agama dan Hak Asasi Manusia*, Vol. 6 No. 1, 2016, p.204

⁴⁰ Yusnani Hasyimzoem, Iwan Satriawan, Ade Arif Firmansyah, Siti Khoiriah, 2017, *Hukum Pemerintahan Daerah*, Jakarta: Rajawali Pers, p. 158.

⁴¹ Article 60 Law No. 23 of 2004 on The Local Government.

⁴² Yusnani Hasyimzoem, Iwan Satriawan, Ade Arif Firmansyah, Siti Khoiriah, *Op. Cit.*, p.96-97.

2. Own request;
3. Dismissed.⁴³

Yogyakarta does not recognize the mechanism of election in determining the Governor and the Vice Governor. It is because Yogyakarta applies a determination system which is a privilege from the Republic of Indonesia to Yogyakarta. In determining of the Governor and the Vice Governor, the DPRD of Yogyakarta is the only institution authorized in this matter, does not involve other institutions such as the Regional General Election Commission (KPUD/ *Komisi Pemilihan Umum Daerah*)⁴⁴

Determination system is one of the alternatives undertaken by the Republic of Indonesia for DIY due to the historical reason of Yogyakarta itself. The position of the Governor in Yogyakarta can be obtained only by the descendants of *Hamengku Buwono* and the Vice Governor can be obtained only by the descendants of *Raden Paku Alam*. This becomes the privilege of DIY.⁴⁵

The People of Yogyakarta assume that the privilege of Yogyakarta means the election of the Governor and the Vice Governor through

⁴³ Sirojul Munir, 2013, *Hukum Pemerintahan Daerah di Indonesia (Konsep, Azas, dan Aktualisasinya)*, Yogyakarta: Genta Publishing, p. 308.

⁴⁴ Farid Mustofa, 2013, *Mekanisme Pemilihan Kepala Daerah di Daerah Istimewa Yogyakarta Perspektif Demokrasi*, (Skripsi, Fakultas Hukum Universitas Negeri Semarang), pp. 24-33, taken from <http://lib.unnes.ac.id/18447/1/8111409220.pdf> , downloaded on 15th November, 2017, at 7.16 p.m.

⁴⁵ *Ibid.*

determination.⁴⁶ The Governor is the Head of Local Government, called Province.⁴⁷ The Vice Governor is responsible for the Governor.⁴⁸ Constitutionally, the determination system in the election of the Governor and the Vice Governor in Yogyakarta is not contradictory to the constitution as long as the determination gets the legitimacy of the society (the society wants it).⁴⁹

The inauguration of the Governor and Vice Governor shall be done by the President. If the President is unable to do the inauguration, then it shall be replaced by the Vice President, and if the Vice President is unable also, it shall be replaced by the Minister.⁵⁰

⁴⁶ Dina Putri Pratama, Retno Saraswati, Suparno, "Kajian Tentang Politik Hukum Undang-Undang Nomor 13 Tahun 2012 Tentang Keistimewaan Daerah Istimewa Yogyakarta", *Jurnal Universitas Diponegoro*, Vol. 1, No. 2, 2013, p.5-9.

⁴⁷ Jimly Asshiddiqie, 2012, *Perkembangan & Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta: Sinar Grafika, p. 246.

⁴⁸ *Ibid.* p. 251.

⁴⁹ Ismu Gunadi Widodo, "Sistem Penetapan Gubernur Kepala Daerah Istimewa Yogyakarta Dalam Sistem Pemilihan Kepala Daerah Berdasarkan Pasal 18 Ayat (4) UUD 1945", *Jurnal Fakultas Hukum Universitas Bhayangkara Surabaya*, Vol. 1, No. 2, 2011, p. 33.

⁵⁰ Ni'matul Huda, 2014, *Perkembangan Hukum Tata Negara Perdebatan & Gagasan Penyempurnaan*, Yogyakarta: FH UII Press, p. 212.