

UNDERSTANDING THE DECISION OF THE CONSTITUTIONAL COURT NUMBER 90/PUU-XXI/2023 IN THE PERSPECTIVE OF CIVIL LAW AND COMMON LAW PERSPECTIVES

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Abstract

This research discusses the understanding of the Constitutional Court Decision Number 90/PUU-XXI/2023 in the perspective of Civil Law and Common Law. The decision has a significant impact on the Indonesian legal system, because it contains interpretations and implications that are relevant to both legal systems. significant differences which are then applied to adherent countries in accordance with the spirit of law enforcement. As for Indonesia, the use of the legal system is more inclined to the Civil law legal system even though it also implements several rules in the Common Law legal system, so that the application of the legal system in Indonesia is more suitable to be called prismatic. The results of this research are expected to contribute to the development of legal thinking in Indonesia and become an important reference for legal practitioners, academics, and policy makers in drafting or revising relevant laws.

Keyword: Decision, Constitutional Court, Civil Law, Common Law

1. Introduction

This decision originated from the proposal of a student from Surakarta University, Almas Tsaqibbirru, who won a lawsuit on the age limit of presidential and vice presidential candidates. The final decision of the Constitutional Court states that the age limit for presidential and vice-presidential candidates is at least 40 years old or under that age as long as they have experience as state officials and / or regional heads obtained through the election or regional election process.

Legal expert from Universitas Muhammadiyah Sidoarjo (Umsida), Rifqi Ridho Phahlevy also spoke about this matter. The substance of the ruling has implications for the potential advancement of Gibran Rakabuming, who is currently the mayor of Solo, as a vice presidential candidate paired with Prabowo.

In Case Number 90/PUU-XXI/2023, the Constitutional Court partially granted the petition that tested Article 169 letter Q of Law Number 7 Year 2017 on General Elections (Election Law). Where the point that was granted was the heart of the application which

was actually also submitted by several applicants in cases including No.29/PUU-XXI/2023, No.51/PUU-XXI/2023, and No.55/PUU-XXI/2023.

Interestingly, in cases No.29/PUU-XXI/2023, No.51/PUU-XXI/2023, and No.55/PUU-XXI/2023 the Court stated that the petition had no legal reason, so the substance of the petition was rejected. The difference in the Constitutional Court's stance in these four cases indicates the inconsistency of the Court's attitude and legal construction in dealing with the same case at the same time. Typically, differences in attitudes in a short period of time occur due to changes in context or extraordinary scientific and philosophical developments, a condition termed disruption, or what Kuhn called revolution.

The Court's decision to grant the petition can be understood as the Court's acceptance (5 judges) of the position and arguments put forward by the petitioner in Case No. 90/PUU-XXI/2023. This attitude will raise many questions, especially related to the position of the applicant and the reasoning of the applicant which is scientifically considered inappropriate and not worthy of being granted. He also saw the applicant's *posita* at points 16-21, the argument of constitutional loss which was explicitly linked to the opportunity for Gibran's candidacy as solo mayor, should be used by the Constitutional Court to assess the applicant's legal standing. The grand narrative in the applicant's argument does not convincingly represent the aspirations of legal subjects who are eligible as PUU applicants at the Constitutional Court.

The applicant's statement in *posita* points 16-21 implies that there is no direct loss that is logically proven to have been suffered by the applicant. The argument is more logical to be submitted by political parties considering their position as parties authorised to nominate candidates and vice presidential candidates in the Election Law.

Given that the validity of the Constitutional Court's decision is bound by the principle of *erga omnes*, the applicant's argument, which is more impressive of individual interests, is not appropriate to be used as material for consideration of the Constitutional Court's decision. Because it may later apply generally, the basis for considering the decision should consider the interests and aspirations of the wider community.

Regardless of the problems in the formation of the decision, this moment can be seen as a door for the birth of national leadership by young people. With the reality of the state that shows the decay of democracy and the octopus of corruption by the current elite, the Constitutional Court's decision can be used as an instrument to bring up a new style of leader. Young people are fresher and relatively uncontaminated by corrupt political practices that have been prevalent in the oligarchy.

Based on the background described above, this research problem can be formulated as follows: How is the comparison between the Common Law legal system and the Civil Law legal system? and how is the assessment of the Constitutional Court Decision Number 90/PUU-XXI/2023 in the perspective of Civil Law and Common Law?

2. Theoretical Background

The above problems can be the subject of legal studies, seen from the legal tradition adopted by a country, basically there are two kinds of legal traditions, namely the Anglo Saxon legal tradition (Common Law Tradition) and Continental Europe (Civil Law Tradition). In the Common Law Tradition, the main source of law is the customs that live in the community as well as agreements that have been agreed upon by the parties. Whereas in the Civil Law Tradition, laws and regulations enacted by the Government are the main source of law. (Sinaga, 2006)

The common law tradition emerged in England during the Middle Ages and was applied in English colonies across the continent. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth centuries by countries that previously had different legal traditions, such as Russia and Japan, which sought to reform their legal systems in order to gain economic and political power compared to Western European countries. For Americans familiar with the terminology and legal processes based on English common law, the civil law tradition felt alien and confusing. Although England had many deep cultural ties with the rest of Europe in the Middle Ages, the legal traditions it developed differed from others for a number of historical reasons. One of the most fundamental differences was that judicial decisions formed the basis of the common law legal tradition and legislative decisions formed the basis of the civil law legal tradition. (John Henry, 1969)

3. Methodology

The research used in writing is normative juridical. The sources of legal materials used in this research are primary legal materials and secondary legal materials. (Nasution, 2012) The types of approaches used in this research are statutory approaches, case approaches and legal concept analysis approaches. The data processing method used is the analysis method which is then outlined in descriptive analysis writing.

4. Result and Discussion

Civil Law is the oldest and most influential legal system in the world. It originated from the Roman-Germanic tradition. Around 450 BC, the Roman Empire created their first written set of rules called the "Twelve Tables of Rome". The Roman legal system spread across the world with the expansion of the Roman Empire. This legal system was codified by Emperor Justinus in the 6th century. The Corpus Juris Civilis was finalized in 534 AD. When Europe began to have self-government, Roman law was used as the basis of each country's national law. Napoleon Bonaparte in France with his Code Napoleon in 1804 and Germany with its Civil Code in 1896. (Madridista, n.d.)

Common law, on the other hand, is based on tradition and develops from precedents used by judges to resolve issues. For centuries, there has been a fierce debate between civil law and common law. Jeremy Bentham who was later supported by John Austin was a proponent of civil law, and they considered that the common law system contained

uncertainty and called it the "law of the dog". On the other hand, one of the proponents of the common law system, F.V. Hayek, said that the common law system is better than civil law because it guarantees individual freedom and limits government power.

The best way to overcome the above differences is to approach it from a historical aspect as Benjamin N. Cordozo says history in illuminating the past illuminates the present, so that in illuminating the present it illuminates the future. The common law tradition was born in 1066, when the Normans defeated and conquered the indigenous people (Anglo Saxons) in England. Meanwhile, civil law was born first when the Corpus Juris Civilis of Justinian was published in Constantinople in 529 AD, which was heavily influenced by Roman law.

The root of the substantial difference between the two legal systems lies in the source of law used by the Court in deciding a case. The civil law system uses codification as a source of law, while the common law system uses previous judicial decisions as a source of law or better known as the doctrine of stare decisis. Another prominent difference concerns the role of the court. In civil law countries, judges are part of the government. This is inseparable from the history that underlies the creation of this difference. Before the revolution, French judges were enemies of the people rather than defenders of the people's interests because they favored the interests of the King. This condition triggered the French revolution led by Napoleon. The pre-revolutionary experience inspired Napoleon to place judges under government supervision to prevent "rule by judges" as had happened before the revolution. This made the government's power in civil law countries dominant. (Lloyd Mc Cullough, n.d.)

This distinction has been maintained in continental civil law systems that inherited the Roman Law tradition. In France, for example, the courts distinguish between cases involving the government and apply different laws to those governing private sector relations. This position makes the ordinary courts in France procedurally unauthorized to review government policy. In contrast, common law countries, which derive from the English tradition, have independent courts. The power to determine the law is therefore vested in the Supreme Court as the highest court. (Madridista M. , n.d.) Common Law, based on judicial decisions. Through judicial decisions that embody legal certainty, although still recognizing the rules made by the legislature.

Civil Law is law that acquires binding force, because its legal sources are embodied in regulations in the form of laws and arranged systematically in certain codifications or compilations. This main principle is adopted considering the main value which is the purpose of law is legal certainty. Therefore, based on the legal system adopted, judges cannot freely create laws that have general binding force. A judge's decision in a case is only binding on the litigants (deductive mindset). Giving more priority to doctrine and adopting Montesquieu's theory of separation of powers where the legislator's function is to legislate, while the court functions to apply the law.

Common Law legal sources are not organized systematically in a certain hierarchy as in the Continental European legal system. In the Anglo Saxon legal system there is a "role" given to a judge who functions not only as a party in charge of determining and

interpreting legal regulations, but his role is very large, namely shaping the entire system of community life. Judges have very broad powers to interpret the applicable laws and create new legal principles that will serve as a guide for other judges to decide similar cases (inductive thinking). In this system, great priority is given to jurisprudence and the principle of judge made precedent as the mainstay of the law.

Common law is generally not codified. This means that there is no comprehensive compilation of legal rules and statutes. While the common law does rely on some statutes that are the product of legislative decisions, it is largely based on precedent, meaning legal decisions that have been made in similar cases before. These precedents are preserved over time through historical court records as well as documented in collections of case law known as yearbooks and reports. These precedents are applied in the decision of each new case as determined by the presiding judge. As a result, judges have a major role in shaping the law in America and the UK.

Civil Law, codified law. In countries with a comprehensive civil law system, the codification of the law is constantly updated to include court proceedings, applicable procedures, and appropriate penalties for each offence. Such codification distinguishes between different categories of law: it sets out the substantive law that is subject to criminal or civil prosecution, procedural law sets out how to determine whether a particular act constitutes a criminal offence, and criminal law sets out the appropriate penalties.

In the civil law system, the role of the judge is to establish the facts of the case and to apply the provisions of the applicable laws. Although the judge often brings formal charges, investigates the matter, and decides the case, he or she works within the framework created by a comprehensive set of legal codifications. The judge's decision is consequently less important in shaping civil law than the decisions of legislators and legal scholars who interpret statutes. The following description explains the historical roots of these differences.

Civil Law: divided into public law and private law. Public law includes legal regulations governing the power and authority of the ruler/state as well as the relationships between society and the state. Included in public law are constitutional law, state administrative law and criminal law. Private law includes legal regulations governing the relationship between individuals in fulfilling their needs. Included in private law is civil law which also includes civil law and commercial law.

Common law also recognises the division of public and private law. The definition given to public law is almost the same as the definition given by the Continental European legal system. Meanwhile, private law is more intended as legal rules regarding property rights (law of property), law of person, law of contract and law of torts which are scattered in written regulations, judicial decisions and laws.

Civil Law: This system applies in many European countries and their colonies such as Angola, Argentina, Arménia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Germany, Greece, Haiti, Honduras, Italy, Netherlands, Indonesia and others. Common Law: This system applies in the United Kingdom and most of its colonies, commonwealth

countries such as the Bahamas, Barbados, Canada, Dominica, Fiji Islands, Gibraltar, Jamaica, New Zealand, TOGO, and others.

Civil Law and Common Law are two different legal systems. Satjipto Rahardjo in his book *Legal Science* (p. 235) argues that in this world we do not find only one legal system, but more than one. The legal system in question includes elements such as: structures, categories, and concepts. Differences in these elements result in differences in the legal system used.

Satjipto further said that we recognize two different legal systems, namely the Continental European Legal System and the English Legal System. People also commonly use the term Roman-German Legal System or Civil Law System for the former, and Common Law System for the latter. (Rahardjo, 1991) Regarding the differences between Civil Law and Common Law, in short, the differences between the two can be seen from the characteristics of each legal system. Here are the characteristics of both in full.

The term Civil Law originated in mainland Europe and is based on Roman law, with Civil Law's most important feature being a codified system of key legal principles. (Noho) Where the Civil Law system is characterized is that it utilizes a basic division into civil law and public law. Such categories are not recognized in the Common Law system.

Understanding Constitutional Court Decision Number 90/PUU-XXI/2023, does Indonesia follow the Common Law legal system? Throughout our research, Indonesia adheres to the Civil Law system. When handling a case, judges will look for appropriate regulatory references and are active in finding facts and careful in assessing evidence, so as to obtain a complete picture of the case.

However, in practice and development, the judiciary in Indonesia no longer fully applies the Civil Law system because it has acquired and applied some characteristics that are identical to the Common Law system.

The Common Law System (Anglo Saxon), especially in Indonesia, can be traced in the sources of law in Indonesia, including jurisprudence and custom. The purpose of this jurisprudence, a decision taken by the judge based on his consideration in deciding a case that has not been regulated in the law. Meanwhile, customs are local habits that have been recognized and live in the community, in Common Law terms called "local rules". Meanwhile, according to Prof Mahfud in a public lecture, the Indonesian state is neither a Common Law (Anglo Saxon) nor Civil Law (Continental Europe) legal state system but a Prismatic legal state, where the state is based on the ideals (ideas about law) of Indonesian law. So, the existence of these two systems is as a counterweight and their adoption is not absolute, there is still a filtering process in it.

Indonesia itself adheres to the Civil Law legal system, but in practice and development, its application or adoption is not absolute. There is no prohibition for a country to use two legal systems at once. This is because the legal system is an open system that must be able to accommodate developments that occur in society.

To assess the decision of the Constitutional Court Number 90/PUU-XXI/2023, which has been widely discussed because it is considered to have political content, the author

uses two optics to make an assessment of whether the decision is in accordance with the rule of law.

4.1 Civil Law Perspective

In responding to and assessing the decision of the Constitutional Court Number 90/PUU-XXI/2023 in the optic of a pure Civil Law legal system, the author will see a decision that is flawed in the assessment of legal theory, namely:

4.1.1 Not Bound by Precedent

In the Civil Law legal system, judges are not bound by precedent or influence from other state institutions. However, in reality, in the decision-making process by the Constitutional Court in Indonesia with decision number No. 90/PUU-XXI/2023, it is indicated that it is strongly influenced by other institutions, in this case the government (President).

This is clearly seen in the results of the code of ethics hearing led by Prof Jimly Asshiddiqie, which showed that the decision-making of the Constitutional Court Judges was very much influenced by other institutions. In this case, the Constitutional Court judge (Anwar Usaman) still has family ties with Vice Presidential Candidate Gibran Rangkabumi Raka.

This is certainly contrary to the judge's code of ethics. The Code of Ethics and Code of Conduct for Judges is a guide to moral virtues for every judge, both inside and outside the office as stipulated in the Joint Decree of the Chairman of the Supreme Court of the Republic of Indonesia and the Chairman of the Judicial Commission of the Republic of Indonesia Number 047/KMA/SKB/IV/2009 - 02/SKB/P.KY/IV/2009 dated 8 April 2009 concerning the Code of Ethics and Code of Conduct for Judges, namely:

Article 7 paragraph (3) letter a

Judges are prohibited from adjudicating cases in which a family member of the judge concerned acts as a representative of a litigant or as a party who has an interest in the case.

Article 7 paragraph (3) letter c

Judges are prohibited from using the authority of the court for personal, family or other third party interests.

Article 9 paragraph (5) letter a

Judges shall not hear a case if they have a conflict of interest, either due to personal and family relationships, or other relationships that are reasonably suspected of containing a conflict of interest.

Article 9 paragraph (5) letter c

Judges are prohibited from hearing a case if they are related to the Chairperson of the Panel, other member judges, prosecutors, advocates, and clerks handling the case.

Article 10 paragraph (2) letter a

Judges are prohibited from abusing their position for personal, family, or other party interests.

4.2 Profesional

The violation committed by the Constitutional Court Judge has broad consequences, where the general public will see the Constitutional Court as an institution where people seek justice as an institution that cannot be trusted.

As a judge who is considered to be the right decision maker, the Constitutional Court Judge should professionally submit the material test submitted by students to other judges to make a decision. Thus, the decision will be considered more objective because it does not have political tendencies between state institutions and personal interests. As is known that based on Article 24 C paragraph (3), the Constitutional Court has 9 judges, (Faiz, 2020) where in hearing the material test Anwar Usman can hand over responsibility to other Constitutional Court judges.

4.3 Common Law Perspective

Bound by Precedent, it is different if you assess the decision of the Constitutional Court No. 90/PUU-XXI/2023 from the optic of the Common Law legal system. Because in the Common Law system, the precedent in question is not the influence of other powers or the influence of the powers of other institutions, but previous decisions. However, by not conveying or referring to the facts in the trial of the previous case.

The explanation above in two perspectives from both the Civil Law and Common Law systems shows that a judge's decision should indeed be a fair decision using legal considerations.

The theoretical study conducted by the author then proves that the decision process of the Constitutional Court in Decision Number 90/PUU-XXI/2023 is a process that violates criminal regulations but rather a serious violation of the judge's code of ethics. Where the implications of this decision are not only on the judicial institution as a Judiciary Institution but also on the minus view of the parties who benefited from the decision.

Based on the rules of law, the decision of the Constitutional Court in terms of Material Tests can only be cancelled through the latest Constitutional Court Decision. However, to maintain the stability of the country ahead of the General Election, according to Prof Jimlly Asshiddiqie, it will still be carried out and if anyone wants to conduct a material review of the Constitutional Court's decision Number 90/PUU-XXI/2023, it can be done in the next 5 years.

5. Conclusion

Based on the results of research and discussion, it can be concluded from the problems found in this study, the Civil Law and Common Law Legal Systems have significant differences which are then applied to adherent countries in accordance with the spirit of law enforcement. While for Indonesia, the use of the legal system is more inclined to the Civil law legal system even though it also implements several rules in the Common Law legal system, so that the application of the legal system in Indonesia is more suitable to be called prismatic.

The assessment of the Constitutional Court Decision Number 90/PUU-XXI/2023 in the Perspective of Civil Law and Common Law, which focuses on the characteristics of the two legal systems, shows that this decision has a legal system defect.

5.1 Suggestion

Based on the problems in this research material, the researchers try to provide recommendations for the development of arrangements related to positive law enforcement in Indonesia, namely: Although the Indonesian legal system has a complementary application system between Civil Law and Common law, this should not be a loophole for violations of the law or the infiltration of rules that weaken the spirit of law enforcement.

With this incident, it is also good to make rules regarding stricter legal sanctions that also regulate criminal sanctions, because sanctions that are only administrative sanctions do not have a deterrent effect on individuals who commit violations.

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