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Implementation of The Ius Curia Novit Principle in Examining Case At The Constitutional Court of The Republic of Indonesia

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Abstract

This study examines the application of the *ius curia novit* principle in the legal interpretation of pretrial single judge decisions that examine the validity of a person's determination as a suspect which is very obvious from the decision of the first and final District Court as the first and last dispute breaker. This research belongs to the type of doctrinal research with a statutory approach. This study concludes, among the decisions of the District Courts that adjudicate pretrial cases there are decisions that only examine formal matters or that prioritize objective elements, namely limited to administrative problems that have been carried out by investigators, on the other hand there are decisions that are more daring. Into the subjective element, which includes considering the quality of the examination that has been carried out. This means that there is still a disparity in the judge's decision in testing the validity of the determination of the suspect. Therefore, this study will examine the application of the *ius curia novit* principle in the decisions of the pretrial single judge who examines the validity of the determination of a person as a suspect. The result of the research is that the application of the *ius curia novit* principle in the examination at the Constitutional Court confirms that the judge cannot refuse to examine a case because the law does not exist or is not clear. Judges are considered to know the law in understanding the legal settlement of cases submitted to them, based on the principles of propriety, legal certainty, and justice.

Keywords

Ius curia novit, case, principle, law, constitutional court, judge.

1. Introduction

The Constitutional Court is one of the independent judicial power actors and has functions and roles in the framework of upholding the constitution and the principles of the rule of law, by its authorities and obligations as stipulated in the Constitutional Court.1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution). The Constitutional Court as one of the elements of judicial power has the authority to adjudicate at the first and final levels whose decisions are final and binding, including: (Bilodeau, 2010).

1. Examine the law against the Constitution;
2. To decide on disputes over the authority of state institutions whose authority is granted by the Constitution;
3. Decide on the dissolution of political parties; and
4. Decide on disputes about the results of the general election.

As one of the actors of judicial power, the Constitutional Court has the task of adjudicating, examining, and deciding cases submitted to the Constitutional Court based on constitutional considerations. The Constitutional Court is an institution established to oversee the constitution and to administer constitutional courts, so it is

also known as the constitutional court. It is said to be a constitutional court institution, reflected in 2 (two) things, namely: (Garlicki, 2007).

1. Matters that fall under the authority of the Constitutional Court are constitutional cases, namely cases concerning the consistency of the implementation of constitutional norms; and

2. As a consequence, the main basis used by the Constitutional Court in examining, adjudicating, and deciding cases is the constitution itself. Although there are provisions of the applicable law and regulate how the Constitutional Court exercises its authority if the law is contrary to the constitution, the Constitutional Court can override or even cancel it if requested.

In every decision made by the Constitutional Court, the decision is an interpretation of the constitution. Thus, there are 6 (six) functions attached to the existence of the Constitutional Court which is carried out through its authority, namely:

1. The guardian of the constitution
2. The guardian of democracy
3. Protector of a state ideology
4. Protector of human rights
5. The protector of the citizen's constitutional rights
6. The final interpreter of the constitution.

Thus, the constitutional function possessed by the Constitutional Court is the judicial function to uphold law and justice in creating the constitutional rights of every citizen (Ratner, 1960).

As the interpreter of the constitution, the proceedings at the Constitutional Court use general principles that apply to all judicial bodies as well as specific ones by the characteristics of the judiciary of the Constitutional Court. The principles used in proceedings at the Constitutional Court, among others: (Kumm, 1999).

1. *Ius curia novit*;
2. The trial is open to the public;
3. Independent and impartial;
4. Judiciary is carried out quickly, simply, and at low cost;
5. The right to be heard equally (*Audi et alteram partem*);
6. Judges are active and passive in the trial; and
7. Presumption of validity (*praesumptio iustae causa*).

In this paper, the author will focus on the process of holding a trial related to one of the principles of proceedings at the Constitutional Court, namely the principle of *ius curia novit*. Thus, the interesting problem in this paper is how to apply the *ius curia novit* principle in the examination at the Constitutional Court. This issue becomes interesting considering that with the number of cases submitted to the Constitutional Court, judges of the Constitutional Court are prohibited from rejecting cases submitted to the Constitutional Court. In addition, as an interpreting institution for the

constitution, the Constitutional Court must be able to provide legal certainty and constitutional justice to justice seekers. This simple article does not mean to justify that in proceedings before the Constitutional Court, all applications will be accepted. The application submitted to the Constitutional Court, apart from being the authority of the Constitutional Court, has also been administratively verified by the Registrar of the Constitutional Court. In this paper, a study will be conducted to find out that proceedings at the Constitutional Court can be applied to the principle of *ius curia novit*.

2. Research Method

This research is normative legal research that focuses on issues of legal principles, legal synchronization, and legal comparisons to find answers to the problems studied, as formulated in problem identification (Brand, 2006; Christiani, 2016; Von Bogdandy, 2009). Viewed from the point of view of its purpose, this research is also a problem solution research, in this case, a solution in the form of a legal remedy to the problem of applying the *ius curia novit* principle in the trial process at the Constitutional Court, so that no constitutional rights are harmed. The type of data used is secondary data consisting of legal materials, both primary, secondary, and tertiary legal materials. Ingredients Primary laws include the 1945 Constitution of the Republic of Indonesia, the Constitutional Court Law, as well as the Act, legislation in several countries concerning the Constitutional Court. The secondary legal materials used in this research, among others, consist of literature, research results that are relevant to the problem being studied, writings or articles published in journals or other scientific publication media that are relevant to the problem being studied, papers or papers submitted in scientific meetings (seminars, workshops, symposiums, and so on). Tertiary legal materials that explain primary and secondary legal materials in this study are in the form of dictionaries and encyclopedias.

3. Results and Discussion

In the provisions of Article 10 paragraph (1) of the Law of the Republic of Indonesia, Number 48 of 2009 concerning Judicial Power states, "The court is prohibited from refusing to examine, try, and decide on a case that is submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and judge him". This article applies a principle known as the *ius curia novit* principle, so even though the law does not exist or is unclear, the judge must examine and try it.

The application of the *ius curia novit* principle in Indonesia, which is a derivative of Article 5 paragraph (1) of the Judicial Power Act states: "Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that live in a society". In the Elucidation of Article 5 paragraph (1) of the Law

on Justice, it is stated that "This provision is intended so that the decisions of judges and constitutional judges are by the law and the community's sense of justice". This provision is by the principle of *rechtweigening* or the principle of the prohibition against refusing a case. However, in practice, although the judge may not reject the case submitted as stipulated in the *ius curia novit* principle, this implies that the court must also be considered to know the law (*de rechtbank kent het recht*),

Judges as final decision givers are considered to know the law so they cannot refuse cases on the grounds of unclear rule. Judges are required to continue to give decisions by exploring, following, and understanding the legal value and sense of justice that live in a society (Setiawan, 2021). Therefore, judges as court organs are considered to understand the law (Cohen, 1969). For this reason, the judge must be able to provide services to every justice seeker who asks him for justice. If the judge, in providing services in dispute resolution, does not find written law, the judge is obliged to explore the unwritten law to decide cases based on law and justice as a wise person and fully responsible to God Almighty, himself, society, nation, and society.

Based on the principle of *ius curia novit*, judges are considered to know and understand all laws. The judge has the authority to determine which objective law must be applied (*toepassing*) by the subject matter of the case being examined and concerning the legal relationship to the case. Therefore, the matter of finding and applying objective law is not the rights and authorities of the parties but is the duty and authority of the judge. The parties are not obliged to prove what law must be applied, because the judge is considered to know the law, based on the principles of propriety, legal certainty, and justice.

In addition, the principle of *ius curia novit* is also intended so that judges carry out their obligations in examining, judging, and deciding cases based on law, not outside the law. The principle of *ius curia novit* views that every judge knows the law and is obliged to try every case that is brought to him. According to Yahya Harahap, *ius curia novit* means that judges are considered to know all the laws so that the Court may not refuse to examine and hear cases (Irwan et al., 2018). The principle which views that "the judge knows the law" (the court knows the law), is the duty of a judge to determine what law must be applied to certain cases and how to apply it (Bobek, 2008).

The *ius curia novit* principle has long been known in the civil law system so that the disputing parties do not need to postulate or prove the law that applies to their case because judges are considered to know the law (Anindita & Adnan, 2017). On the other hand, in the common law system, the *ius curia novit* principle is unknown, the parties must postulate what law will be applied, whether by or contrary to jurisprudence, must be presented and explained before a judge (Sass, 1968). Meanwhile, historically, the *ius curia novit* principle, which is known in the civil law

legal system, comes from the legislature, namely the sect that considers the only law to be law and there is no law other than that (Parisi, 2007).

A judge who submits a case to him is obliged to examine and try the case until it is finished, even though the law governing it is incomplete or non-existent, the judge is obliged to find the law by interpreting, exploring, and understanding the legal values that live in the community. in society. The application of the *ius curia novit* principle demands the creativity of judges in using tools to make it happen in the form of legal discovery methods (Wechsler, 1959).

Judges are the last law enforcers in upholding justice and must apply the principle of *ius curia novit* in every decision. The judge's decision must contain dispute resolution so that it is the end of the series of examination processes of a case. The judge's decision is part of the law enforcement process that aims to achieve truth and justice so that the quality of a decision is highly correlated with the professionalism, moral intelligence, and sensitivity of the judge's conscience (Provine, 1986). Legal considerations in a decision must be logical and by legal reasoning so that justice is realized based on legal norms and common sense. If the legal considerations in the decision are not interconnected and in accordance, resulting in the decision being not sufficiently considered (*onvoldoende gemotiveerd*),

To find and apply justice and truth, court decisions must be by the basic objectives of court decisions, namely:

1. It is an authoritative solution, meaning that the decision must provide a way out of the legal problems faced by the parties;
2. Justice delayed is justice denied, so the judge's decision must contain efficiency, namely fast, simple, and low cost;
3. The judge's decision must be by the purpose of the law on which the decision is based;
4. Decisions made must contain aspects of stability, namely social order, and public peace;
5. There is equal opportunity for litigants.

The social development of the community also influences the demands for dynamic legal developments, causing every legal regulation that is made to always be one step behind the reality of society. The principle of *ius curia novit* was first discovered in the writings of medieval jurists (glossators) on ancient Roman law (Coleman, 2003). The principle of *ius curia novit* is a principle that views that "the judge knows the law" (the court knows the law). Therefore, a judge must determine what law should be applied to a particular case and how it should be applied. The application of the *ius curia novit* principle in the judge's decision also emphasizes the judge's freedom in making decisions. Judges must be free from the influence of other powers outside the jurisdiction of the court, but must also be free from the influence of their interests. Freedom for judges in making decisions is the key to sound decisions,

without the freedom of judges, decisions that breathe justice, expediency, and legal certainty are not open.

In essence, the freedom of judges is also freedom for judges in the process of examining cases. The judge is free to make a decision based on the law and his belief. Judges should not only be mouthpieces and mouths of the law even though they are always legalistic. In other words, as stated by Bagir Manan, the judge's decision must not only fulfill legal formalities or just maintain order, but must also function in encouraging improvements in society and building social harmonization in relationships. The relationship between the freedom of judges and the principle of *ius curia novit* is very visible when judges are faced with a legal vacuum or unclear laws, with the freedom of judges in giving decisions.

For the sake of realizing justice for justice seekers, judges are obliged to explore unwritten law if no basis is found in the written law. If the provisions of the existing law are felt to be contrary to the public interest, propriety, civilization, and humanity, or the values that live in society. According to Yahya Harahap, judges are free and authorized to take counter-*legem* actions, namely making decisions that are contrary to the articles of the law in question. The magnitude of the judge's authority in giving decisions does not necessarily free the judge to act arbitrarily. Therefore, boundaries must be created without sacrificing the principle of freedom as the essence of judicial power. Regarding this matter, Alfred M. Scott in his book *Supreme Court v Constitution* stated: (Segal & Spaeth, 2002).

"A judge who deviates and refuses to follow the existing law, and improvises and sets the law according to his own will is a usurper of power that is not legally his power, he is a tyrant who runs a judicial dictatorship, and consciously or not (the judge) changes the state order from the government by law to government by individuals is tantamount to dictatorship."

To avoid the freedom of judges who are without control so that they are feared to be arbitrary, according to Bagir Manan, there are 5 (five) limitations that cannot be exceeded by judges, namely: (Hijriani & Herman, 2018).

1. The judge only decides based on the law;
2. Judges are prohibited from making decisions beyond what is demanded or requested (*ultra petita*);
3. The judge decides to give justice and not for other purposes other than that;
4. The judge is obliged to check whether the object of the case or dispute submitted is still within the jurisdiction of the court (*justiciability*) or outside the authority of the court (*non-justiciability*); and
5. Judges must be free from all forms of political games in deciding cases and not interfere with the legislative authority as legislators and the executive as the determinant of government policy.

In the context of legal discovery, according to Bagir Manan, there are 4 (four) factors that encourage judges to be obliged to make legal discoveries, as follows:

1. Almost all concrete legal events are not fully regulated in the law;
2. Provisions of laws and regulations that are unclear or contrary to other laws and regulations that require choices so that they can be applied correctly, appropriately, and fairly;
3. As a result of the dynamics of society, there are various kinds of new legal events that are not described in the law or statutory regulations;
4. The principle of prohibition of judges from rejecting cases and also the principle of *ius curia novit* which requires judges to find the law.

According to Bambang Sutiyoso (2016), the basic requirement for judges in making legal discoveries is the application of the principle of *ius curia novit*. If the judge is examining the case submitted to him faces a case for which there is no rule of law or there is a rule of law but the rule of law is not clear, then the judge must seek the law from the legal values and sense of justice that live and develop in society (Sutiyoso, 2016). Meanwhile, according to Wiarda, there are 3 (three) legal discovery systems, namely: (Seyto Handono et al., 2018).

1. The discovery of heteronomous law refers to the classical view that all laws are contained completely and systematically in the law and the task of judges is to judge according to or according to the sound of the law (*bouche de la loi*).
2. The discovery of autonomous law is the discovery of law which is not merely the application of legal regulations to concrete events but at the same time is the creation and formation of law. Judges who adhere to autonomous legal discovery can examine and decide according to their appreciation based on their beliefs and legal awareness.
3. The discovery of mixed law is the development of the two systems of legal discovery so that they influence each other.

According to Butarbutar (2010), Indonesia recognizes both the discovery of heteronomous and autonomous laws. Judges are bound by the law, but judges often have to explain or complete the law according to their views. The main source of legal discovery in Indonesia is statutory regulations, if later they are not found, then seek sequentially on customary law, jurisprudence, international agreements, and doctrines (Butarbutar, 2010).

This principle of *ius curia novit* has also been decided in the Constitutional Court Decision Number 061/PUU-II/2004, dated October 21, 2004. According to the Court, in its legal considerations, that at the beginning of the era of codification of law the adage had been made as one of the legal principles and contained in the Civil Code which is part of the Napoleonic Code in France. Initially, this principle was interpreted narrowly, namely "a judge may not refuse to examine a case because the law does

not exist or is unclear". This interpretation was based on the belief that developed at that time, that the codified written law had completely contained the rules regarding all legal events and legal relationships that might occur in all aspects of human life. However, Codified laws are never complete and are always left behind by developments in society. Thus, in its development, it is interpreted broadly, namely giving the authority to the court (judge) to find the law (*rechtsvinding*) to adjudicate cases submitted to him, when the codified law has not regulated it. The legal findings are intended so that justice seekers (*justitiabelen*) are guaranteed their right to obtain justice, even though the written law has not regulated it, which is then absorbed and universally accepted. According to the Constitutional Court, the *ius curia novit* principle does not conflict with the guarantee for everyone to obtain legal certainty, on the contrary, it strengthens recognition, guarantees, protection, and fair legal certainty.

The *ius curio novit* principle, when interpreted broadly, can give the court (judge) the authority to find the law (*rechtsvinding*) to hear cases brought to him. In exercising its authority, by the *ius curia novit* principle, cases are submitted to the Constitutional Court, the Constitutional Court may not refuse to examine, hear, and decide on a case that is submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and adjudicate it. , although it is not included in one of the powers of the Constitutional Court, the Constitutional Court still has to examine and try it. This can be seen in the case of the Constitutional Court Number 001/PUU-IV/2006, dated January 25, 2006, which in essence filed a review of the Supreme Court's Decision Number 01 PK/PILKADA/2005, dated December 16, 2005, with the construction of judicial review by arguing that the Supreme Court's decision which has permanent legal force has the same position as the law. In this decision, the Constitutional Court decided that the petition could not be accepted because the Supreme Court's Judicial Review Decision was not included in the category of law which was within the authority of the Constitutional Court to examine it.

In the Decision of the Constitutional Court Number 138/PUU-VII/2009, dated February 8, 2010, regarding the Review of Government Regulations instead of Law Number 4 of 2009 concerning Amendments to Law Number 30 of 2002 concerning the Corruption Eradication Commission. Article 24C paragraph (1) of the 1945 Constitution states that one of the powers of the Constitutional Court is to decide on judicial review of laws against the 1945 Constitution. According to Article 1 point 3 of Law Number 12 of 2011 concerning the Establishment of Legislation. Law is a statutory regulation established by the DPR with the joint approval of the President.

In this Constitutional Court Decision Number 138/PUU-VII/2009, it is stated that the Constitutional Court has the authority to examine although there are no provisions that explicitly state this matter. This is one way to avoid a legal vacuum, who has the authority to test. The Supreme Court does not have authority over this matter, because its position is equal to the law, on the other hand, the Constitutional

Court does not have the authority to examine if it is based on Article 24C paragraph (1) of the 1945 Constitution. Thus, the considerations in the Constitutional Court Decision Number 138/PUU-VII/2009, that the Constitutional Court has the authority to examine, among others:

1. Intended to replace the provisions of the law so that the content material is the content of the law;
2. Created and enforced without waiting for the approval of the House of Representatives, so that the norms regulated in what should be the content of the law apply as binding legal norms as well as norms in law; and
3. In the enforcement of the norm, it can violate the constitutional rights of citizens and contradict the 1945 Constitution.

In the Decision of the Constitutional Court Number 21/PUU-XII/2014, dated April 28, 2015, the addition of the object of pretrial examination, one of which is testing the validity of the determination of a suspect, but is not followed by clear rules, especially regarding matters that can annul a determination of a suspect. Regulation of the Supreme Court Number 4 of 2016 concerning the Prohibition of Reviewing Pretrial Decisions itself substantially regulates guidelines for judges regarding the prohibition of reviewing pretrial cases and cannot specifically be a guide in testing the determination of suspects. The legal problem that occurs is not a legal vacuum (*wet vacuum*) or an incomplete law, because the examination of the determination of the suspect as one of the pretrial powers has been decided in the final and binding decision of the Constitutional Court Decision so that the force of its validity is equal to the law. The availability of the agreement on the determination of the suspect as one of the pretrial powers has been contained in the Constitutional Court's ruling, therefore the discovery of law using the method of argumentation and legal construction is not appropriate to use. The method of legal interpretation or interpretation is more appropriate to be used by judges when interpreting the Constitutional Court Decision so that it can be applied in examining pretrial applications related to the determination of suspects (O'Hagan, 2002).

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Constitutional Court Decision so that it can be applied in the examination of pretrial applications related to the determination of suspects (Liem et al., 2018).

4. Conclusion

The application of the principle of *ius curia novit* in examinations at the Constitutional Court, confirms that judges may not refuse to examine cases because the law does not exist or is unclear. Judges are considered to know the law in understanding the legal settlement of cases submitted to them, based on the principles of propriety, legal certainty, and justice. In exercising its authority, by the *ius curia novit* principle, cases are submitted to the Constitutional Court, the Constitutional Court may not refuse to examine, hear, and decide on a case that is submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and adjudicate it. , although it is not included in one of the powers of the Constitutional Court, the Constitutional Court still has to examine and try it.

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