

# Embodying The Meaning Of The Guardian Of The Constitution In The Role Of The Constitutional Court Of Reducing Constitutions Indicated By Policy Corruption

*by* Suharno .

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# Embodiment Of The Guardian Of The Constitution In The Role Of The Constitutional Court Of Reducing Constitutions Indicated By Policy Corruption

Suharno<sup>1</sup>, Amir Junaidi<sup>2</sup>, Muhammad Aziz Zaelani<sup>3</sup>

<sup>1, 2, 3</sup> Lecturer on Law Faculty, Universitas Islam Batik Surakarta

<sup>\*</sup>Corresponding Author:

Email: [zael.aziz@gmail.com](mailto:zael.aziz@gmail.com)

## Abstract

Purpose of this study was to answer two problems: (i) how is the guardian of the constitution embodied through the function of the Constitutional Court; and (ii) how the Constitutional Court as the guardian of the constitution reduces constitutions that are indicated by the policy corruption. Policy corruption is an invisible and covert element that able to threaten the synergy of the legal system and the public interest. The form of policy corruption is realized in the form of a law. Efforts that can be made to reduce the policy corruption are to implement the tight control over the media, which in this case is relevant to the function of the Constitutional Court. This study was classified as doctrinal research with primary and secondary legal materials. Comparative approach and case approach were used to answer the legal issues. The results showed that First, the guardian of the constitution through the function of the Constitutional Court through the optimization of the Constitutional Court Judges as the agent of constitution, strengthening the execution of the Constitutional Court decisions and collaborative steps with other state institutions in enforcing the constitutional guardianship. Second, the Constitutional Court as the guardian of constitution in reducing laws indicated by the policy corruption is manifested in the form of a Constitutional Court decision that can be retroactive to recover the impact of legal losses that are indicated by the policy corruption, the decision of Constitutional Courts justified by ultra vires to anticipate the chain of constitutions that indications of policy corruption, the decision of Constitutional Courts strengthened in terms of its execution and the Court can examine or test the Constitution Drafting (bill/ RUU) (a priori review) as a preventive measure to prevent the enactment of laws that indicate policy corruption.

**Keywords:** Policy Corruption, Constitutional Court, Constitution.

## 1. INTRODUCTION

The current policy corruption has come to the surface with a massive impact on state financial losses. Therefore, it is difficult to find a government administration that is free from the corrupt behavior. If this condition continues, then there will be a metastatic effect of corruption. The problem of corruption is cross-systemic, thus it can be attached to all social systems including Feudalism, Capitalism, Communism, and even Socialism [1]. The policy-making factor as a subject that intersects with the political elements makes it impossible to separate from the political will of the supporting party, and other supporting elements behind it. Policy makers become objects that are prone to the political determination, thus influencing the policy. The dynamics of policy formulation in Indonesia are indicated by the many factors associated with the ongoing democratization process [2]. Corrupt policies can occur on all fronts, including the constitutional making [2]. Therefore, constitutions can indicate policy corruption that is feared of causing losses to the state.

The issue of the constitutions is indeed complex, however in this case the constitutional review mechanism is found. The Constitutional Court (MK) has become the pillar of constitutional enforcement by inspiring its essence as the guardian of the constitution. The Constitutional Court, through its decision in examining the constitution stoward the basic constitution, must understand this essence. In fact, all this time, the Constitutional Court has performed the function of preventing

corruption through the judicial review. Corrupt systems are minimized through the judicial reviews in order to guard against the potential abuse of power, otherwise if a judicial review is not carried out it will result in a crime [3]. Therefore, the Constitutional Court can play a role in preventing corruption through its decisions toward the constitutions that indicate policy corruption. This is also part of the spirit of the guardian of the constitution, which is protecting the rights of citizens guaranteed in the constitution from the loss of policy corruption. It is interesting to study the interpretation and embodiment of the guardian of the constitution in various countries and draw the gist of it to be compared to the Indonesian. This research wants to answer two problems: (i) how is the guardian of the constitution embodied through the function of the Constitutional Court; and (ii) how the Constitutional Court as the guardian of the constitution reduces constitutions that are indicated by the policy corruption.

## II. METHOD

This study was done by using the normative legal research with a literature study as the data collection technique of the legal materials. The comparative approach was used in understanding the meaning of the essence of the guardian of the constitution by the Constitutional Court in various countries. This approach was used to understand the constitutions of other countries regarding the scope of the implementation of the guardian of the constitution. The case approach was also used in concluding the role of the Constitutional Court in reducing constitution that indications of policy corruption in related to the embodiment of the guardian of the constitution.

### I. RESULT AND DISCUSSION

#### Embodiment of the Guardian of the Constitution through the functions of the Constitutional Court

Amendments to the 1945 Constitution created the Constitutional Court as a judicial institution in guarding the constitution. The existence of the Constitutional Court is needed in maintaining the purity of the constitution (the guardian of the constitution). One of the functions of the Constitutional Court is to test the Constitution toward the 1945 Constitution (constitutional review). The decision of Constitutional Court has the legal force, still considering the provisions of Article 24 C paragraph (1) of the 1945 that: "The Constitutional Court has the authority to judge at the first and last levels whose decisions are final to examine the constitution toward the Basic Constitution, decide disputes over the authority of State institutions whose authority is granted by the Constitution, decide the dissolution of political parties, and decide on disputes over the results of general elections." It is clarified by Article 47 of Constitution Number 24 Year 2003 concerning the Constitutional Court: "The decision of the Constitutional Court has permanent legal force since it was pronounced in a plenary session open to the public" [4]. The decision of Constitutional Court is final, means that no legal action can be made against it. Since the Constitutional Court decision was read out in an open court to the public, it immediately has the permanent legal force which is final and creates a new norm. The decision of Constitutional Court is generally binding, not only to the litigant but also binding to all citizens (*erga omnes*). The decision of Constitutional Court is binding since in the constitutional review, the object put on trial is the norm in the constitution that is regulating in general (*regeling*). The function of the Constitutional Court in examining and adjudicating constitutions petitioned for the constitutional review is one of the form of elaboration of the function of Constitutional Court in guarding the constitution. In this case, escort is carried out repressively toward constitutions that are against or not in accordance with the constitution.

The embodiment of the guardian of the constitution can also be seen from the different perspectives in each country. American tradition, for example, assigns the role of the guardian of the

constitution to the Supreme Court since it also has authority in the constitutional review cases. Peran MA Amerika test the act related John Marshall doctrines (*John Marshall's doctrine*). The testing is carried out on constitutionality issues by all the ordinary courts through a procedure called a decentralized or diffuse or dispersed review in cases examined by an incidenter. This means that such testing is not institutional in nature as an independent case, but it is included in other cases being examined by judges in all layers of the court [5]. Substantially, decisions regarding the unconstitutionality of a constitution are declaratory and retrospective, that is, they are “*ex tunc*” with consequences that are “*pro praeterito*” that lead to the backward retroactive effectiveness [5]. The interpretation of the function of the guardian of the constitution in America reaches the stage of signing a statement directed at the subordinate officials to ignore the provisions of the constitution drafting (bill/ RUU) which are deemed clearly unconstitutional. “Thus, in some instances, signing statements have directed subordinate officials to disregard provisions of a bill that are thought to be clearly constitutional and severable [6].”

The Austrian Constitutional Court in the practice of constitutional review, is given the authority to examine in a “posteriori” (a posteriori review) or “a priori” (a priori review), even in implementing its authority, the Austrian Constitutional Court is able to conduct constitutional testing particularly on abstract norms (actio), although the testing of concrete norms is also possible (concrete review). Austrian MK ordained “as a model of constitutional review derived from its being the only court especially vested with the power to deal with violations of constitutionally guaranteed rights” [7]. The Austrian Constitutional Court is also able to give consideration to the government in responding to the international agreements [8]. Another model, the constitutional review in France, can further test the international treaties made by the government, which came into effect since the constitutional amendments in 1974 [9]. This is good as a preventive measure to reach policies based on the international agreements that harm the people as a function of the guardian of the constitution. Like the Austrian Constitutional Court, the French Constitutional Court is also able to test constitutions in a preventive and repressive manner. Preventively and repressively, the *Conseil Constitutionnel* does a preventive review (a priori review) of the bill, while the special chambers test repressively (a posteriori review) of the constitution [5]. The Federal Constitutional Court (*Bundesverfassungsgericht*) in Germany has large powers which have been used as a reference for the ideal model of a number of countries that form the constitutional guarding organs. The German Constitutional Court acts before the law, politics and society [10]. *Bundesverfassungsgericht* through the German constitution is also able to establish rules and determine certain procedures for the political decision making processes [11].

The description of the embodiment of the guardian of the constitution in various countries provides references related to the ideal projection of the embodiment of the guardian of the constitution through the function of the Constitutional Court of the Republic of Indonesia. The embodiment of the guardian of the constitution must be guided by the principle of maintaining the purity of the constitution. Therefore, the responsibility of the Constitutional Court as the guardian of the constitution is related to several parameters, whether or not the Constitutional Court can carry out the function of the guardian of the constitution through its authority. Regarding the authority of the constitutional review, the ideal projection of the embodiment of the guardian of the constitution, particularly in the authority of the constitutional review, the writer classifies it into three main forms: (i) Optimization of the Constitutional Court Judges as the agent of constitution; (ii) Strengthening the execution of the Constitutional Court decisions; and (iii) Collaborative measures with other state institutions in the form of synergies in guarding the constitution.

The first step in the ideal projection of the embodiment of the guardian of the constitution can be realized by optimizing the functions of the Constitutional Court judges. Constitutional Court judges must be the agents of constitution who are always on the side of the constitution. Thus, the

Constitutional Court judges became the subject in guarding the constitution. One of the manifestations is that the Constitutional Court judges are justified in making *ultra vires* and *ultra petita* decisions. This is important since during the process of the case examination, new facts can be found which, although not directly related to the substance of the law being tested, can pose a threat to the rights of people guaranteed in the constitution. The limitations used by the Constitutional Court judges in issuing the constitutional review decisions which mean *ultra petita* and *ultra vires* are the principle of *nemo iudex in propria causa* and general principles of good justice [12].

The second step in the ideal projection of the embodiment of the guardian of the constitution is to strengthen the execution of the Constitutional Court decision. Both the DPR and the President must be pro-active in postponing the judicial review decisions so that constitutions that are synergized with the constitution can immediately be sought. The third step is the ideal projection of the embodiment of the guardian of the constitution formed by the collaborative means between the Constitutional Court and other state institutions in the implementation of guarding the constitution. For example, the Constitutional Court can contribute to the eradication of corruption since corruption is also a threat to the implementation of the constitution. There is a memorandum of understanding which becomes a reference for the justification of this interpretation. This memorandum of understanding was signed by the Secretary General of the Constitutional Court Janedjri M Gaffar and Secretary General Himawan Adinegoro and witnessed directly by KPK Deputy Chair Bambang Widjojanto and the Chief Justice of the Constitutional Court Hamdan Zoelva. The two institutions agreed to increase cooperation in efforts to eradicate and prevent corruption [3].

#### **The Constitutional Court as The Guardian of The Constitution in Reducing Constitutions Indicated of Policy Corruption**

The doctrinal level distinguishes three main forms of governmental instruments, they are: (i) statutory regulations; (ii) decision (*beschikking*); and (iii) policy regulations (*beleidsregel*). Legislation (*wettelijkeregels*) is defined as regulations relating to the constitutions in the form of constitutions themselves or lower regulations which are attributions or delegations of constitution [13]. Meanwhile, a decision is a legal action that is unilateral in the field of government, which is carried out by an agency [14]. Meanwhile, policy regulations are general regulations issued by the government agencies with regard to the implementation of governmental authority over citizens or other government agencies and the making of these regulations does not have a firm basis in the 1945 Constitution and formal constitutions, either directly or indirectly [15]. Walaupun terdapat perbedaan definisi, ada kalanya kebijakan dapat menjelma dalam bentuk keputusan maupun peraturan perundang-undangan. Policies that have entered the field of legal life, then their formulation must also be subject to the technique of making legislation which will be outlined or stated in the form of regulations must meet certain criteria. The procedures of the formulation which is carried out through the statutory regulations is to formulate hypotheses [16]. The form of policy regulation can include the form of all government instruments. Policies can be realized in laws and regulations, government decisions to factual actions that are deemed necessary in overcoming the community problems.

Policies aim at realizing the welfare of the people, however, in the practice they can also be used as a means of detrimental to the state which is called as the policy corruption. Its development is worrying, if policies were previously only used as a tool to commit corruption, but nowadays, policies have turned into a form of corruption itself [17]. Deregulation in the early 1980s was a driving factor for the policy corruption. Resources are mostly controlled by the private sector with an enlarged role, so that many main activities are left to the private sector.



The role of the government in distribution areas is decreasing since it is only a facilitator and regulator, thus the opportunity to commit corruption is reduced. Thus, the concentration of corruption leads to areas the of policy formation. It is at this point that there is vulnerability to the policy corruption [17]. In conclusion, policy corruption can also include a form of constitution which is the authority for the constitutional review by the Constitutional Court.

Understanding the relationship between constitution and policy corruption, it can be emphasized that the role of the Constitutional Court in reducing constitution that are indicated by policy corruption is related to the role of the guardian of the constitution. Thus, the Constitutional Court reducing constitutions indicated that policy corruption was manifested in the following form:

a. **The Constitutional Court Decision Can Be Retroactive As Recovery Impacts of Constitutions Losses on Indicated Policy Corruption**

Retroactive here is classified by the writer as a Constitutional Court Decision which is restorative of: (i) the legal vacuum caused by the constitution that has been revoked by the Constitutional Court, and (ii) the legal consequences arising from the constitutions that are indicated as the policy corruption that have been revoked by the Constitutional Court. This recovery is important since with the enactment of the constitutions that are indicated as the policy corruption, there are parties who take advantage and even legitimize it by the constitutions. Thus, the state losses incurred are large due to this legitimacy. Therefore, it is necessary to do restoration (recovery) that can be realized in the Constitutional Court decision.

First, the retroactive Constitutional Court decision to fill the legal vacuum is seen in Decision 85 / PUU-XI / 2013, where water rights cannot be divided into water use rights. With the decision of Constitutional Court, all norms contained in the SDA Constitution were revoked and had to return to using the 1974 Irrigation Constitution [18]. The retroactive decision of the Constitutional Court is in the form of legal restoration by reviving the Constitution no. 11 of 1974 concerning Irrigation to prevent a legal vacuum until the formation of a new constitution. This raises controversy over whether the Constitutional Court has the authority to enforce or designate constitutions that have been renewed by the constitution being tested. The occurrence of this phenomenon is due to the absence of a phrase of coercion in the Indonesian constitutional system to the legislature to immediately follow up on the decision of Constitutional Court in the judicial review. There are concerns that this loophole can create a legal vacuum and there is no clear legal reference, even though the issue of the Natural Resources Constitution concerns the lives of many people. Therefore, for the sake of benefit and embodiment of the guardian of the constitution, it can be a projection for the Constitutional Court to re-enact the old constitution.

Second, the retroactive decision of the Constitutional Court is to restore the legal consequences arising from the constitution indicates policy corruption that has been revoked by the Constitutional Court. The impact of losses arising from the enactment of the constitution indicates policy corruption is very large and threatens the rights of the people guaranteed by the constitution. David H. Bayley emphasized in his writing entitled "The Effect of Corruption in a Developing Nation", that corruption exists in countless forms, methods and quantities. There are as many excuses for corruption as there are ways in which government influences individuals in the society. There are as many opportunities for corruption as the number of roles that can be played in the government. Corruption can occur in the distribution of export licenses, decisions to conduct criminal case investigations, efforts to obtain a court case report file, admission of prospective students at a university, selection of candidates for government office and contract approval and implementation of everything in the contract [19].

The decision of Constitutional Court must prove that the constitution is still in favor of the public interest. This can be realized by the decision of Constitutional Court restoring the losses arising from the constitution indicates policy corruption. For example: all contracts made on the basis of nature resource constitution become null and void since the legal basis is revoked and there are indications of policy corruption.

- b. The decision of Constitutional Court is justified by *Ultra Vires* as an anticipation of the chain of constitution indicates policy corruption

Policy corruption cannot be done individually, here must be a network and a systematic link in it. The policy was issued to disguise the evil intentions of the perpetrators so that they could rob the money of the nation. Policy corruption is a type of corruption committed by actors with certain positions of authority [20]. During the process of case examination, new facts can be found outside the object of the constitution being tested. This new fact can also be a reality of policy corruption in other constitutions. Thus, the Constitutional Court in its decision can be *ultra vires* including the constitution referred to break the chain of policy corruption. *Ultra Vires* can be exemplified if the Constitutional Court in its decision revokes the constitution that are indicated by policy corruption, all derivative regulations are also revoked and other constitutions that have connectivity must also be examined and tried by the Constitutional Court. *Ultra vires* must be interpreted as *erga omnes* even though it is not directly related to the substance of the constitution being tested since it can be a threat to the rights of the people guaranteed in the constitution. The limitations used by the Constitutional Court judges in issuing the constitutional review decisions which mean *ultra petita* and *ultra vires* are sufficiently guided by the principle of *nemo iudex in propria causa* as well as general principles of good justice [12]. The decision of Constitutional Court which is *ultra vires* has a high urgency to break the chain of policy corruption since policy corruption in the form of constitution is classified as transactive corruption, which shows a reciprocal agreement between the giver and the receiver for the benefit of both parties, usually between business actors with the government apparatus through the policies they make [1].

- c. Strengthened Execution of the Constitutional Court Decisions

Policy corruption is also classified, including the type of kinship corruption (nepotistic corruption), which concerns the abuse of authority and power for various benefits for relatives and groups [1]. Thus, it does not rule out the form of omission of the Constitutional Court decision by not following it up. Even though the decision of Constitutional Court creates a new norm which is equivalent to a constitution, it is different if the Constitutional Court revokes a constitution, in this case the Constitutional Court removes the norm. This allows the act of omission by not automatically making reforms of the constitution based on the decision of Constitutional Court. Therefore, there must be a phrase that enforces the execution of the Constitutional Court decision considering its urgency as a form of the guardian of the constitution. The DPR and the President as well as parties appointed by the decision of Constitutional Court must be pro-act in following up on judicial review decisions so that constitutions that are synergized with the constitution can be sought immediately.

- d. The Constitutional Court Examined the Bill (a Priori Review) as a Preventive Step to Prevent the Enactment of Constitution Indicated of Policy Corruption

The review of constitution in France is divided in a preventive and repressive manner. The *Conseil Constitutionnel* does a preventive review (a priori review) of the bill, while the special chambers test repressively (a posteriori review) of the constitution [5]. Therefore, it does not preclude that there is an expansion of the authority of Constitutional Court to examine the Bill. This has consequences for improving the constitution to accommodate it. However, the



expected result is much better since it minimizes the enactment of constitutions that indicate policy corruption so that there is no need for recovery of legal losses from the enactment of the constitutions. Like the French model, if the constitutional council states that the bill is unconstitutional then it may not be promulgated or implemented as law [21]. Thus, it is important to adopt this as a major preventive measure to prevent losses incurred as a result of the promulgation of constitutions that indicate policy corruption in them.

#### IV. CONCLUSION

The embodiment of the guardian of the constitution through the function of the Constitutional Court is classified into three main forms: (i) optimization of the Constitutional Court Judges as the agent of constitution; (ii) strengthening the execution of the Constitutional Court decision; and (iii) collaborative steps with other state institutions in implementing safeguards toward the constitution.

The Constitutional Court as the guardian of the constitution in reducing constitution indicated policy corruption is manifested in the form of: (i) the decision of Constitutional Court which can be retroactive to recover the impact of constitutions losses that indicate policy corruption; (ii) the verdict of the Constitutional Court was justified in *ultra vires* to anticipate the chain of constitutions indicated by policy corruption; (iii) the decision of Constitutional Court is strengthened in terms of its execution; and (iv) the Constitutional Court can examine the Bill (a priori review) as a preventive measure to prevent the enactment of constitutions that indicate policy corruption.

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