

JUSTICES' FREEDOM OF CONSTITUTIONAL INTERPRETATION METHOD IN THE INDONESIAN CONSTITUTIONAL COURT

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Abstract

This paper lays out the method of interpretation used by the Indonesian Constitutional Court in interpreting the articles within 1945 Indonesian Constitution, primarily in judicial reviews and disputes on the authority of state organ. Among the existing and mostly applied interpretation methods in jurisprudence, the Court does not consider it self bound by a single method. The resort to various interpretation methods, dependent on the nature of the case at hand, indicates that the Court is progressive and tends to favour contextual approach. Nonetheless, since the Court is composed of nine different individuals, the interpretation approach will largely depend on each Justice's legal thought.

Keywords: *interpretation method, original intent, deconstruction.*

Intisari

Tulisan ini mencoba menelusuri metode tafsir yang dipergunakan oleh Mahkamah Konstitusi dalam menafsirkan ketentuan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, terutama dalam perkara pengujian undang-undang dan sengketa kewenangan lembaga negara. Dari beberapa metode tafsir yang ada dan lazim dipergunakan dalam bidang ilmu hukum, ternyata Mahkamah Konstitusi tidak mengikat dirinya pada satu metode tafsir saja. Penggunaan beberapa metode tafsir oleh Mahkamah Konstitusi secara bergantian, tergantung perkara yang dihadapi, menunjukkan sifat progresif dan pemahaman kontekstual. Namun karena Mahkamah Konstitusi adalah kumpulan dari sembilan individu hakim konstitusi maka metode tafsir yang dipergunakan sangat tergantung pada kecenderungan dari masing-masing hakim.

Kata Kunci: metode tafsir, intensi asal, dekonstruksi.

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A. Introduction

Article 24C (1) and (2) of the post-amendment 1945 Indonesian Constitution (“the Constitution”) defines the duty and the four jurisdictions of the Constitutional Court of the Republic of Indonesia (“Const. Court”, “the Court”). Article 24C (1) stipulates:

[...] the Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections.

The second paragraph of the same article imposes the Court with the duty to issue a decision over an opinion of the Indonesian House of Representatives (“DPR”) concerning alleged violations of this Constitution by the President and/or Vice President.

Outside the Constitution, rules governing the Court are encapsulated in Act No. 24 of 2003¹ as amended by Act No. 8 of 2011 on Constitutional Court (“CCA”). Article 10 (1) and (2) CCA constitutes as the legal ground on which the Court operates. It also reiterates the Court’s authorities — which are originally provided for in Art. 24C (1) and (2) of the Constitution.

While the wordings of Art. 10 (1) CCA only replicate those of Art. 24C (1) of the Constitution, Art. 10 (2) CCA features more details. This article specifies the scope of Art. 24C (2) of the Constitution by stipulating that the Court is:

[...] to issue a decision over an opinion of the DPR concerning allegation that the President and/or Vice President has committed a violation of the law in the form of treason against the state, corruption, bribery, other serious criminal offences, or misconduct, and/or no longer fulfils the requirements to be a President and/or Vice President as prescribed by the Constitution.

There were lengthy debates concerning the establishment of the Const. Court during the constitutional amendment negotiation in the 2000–2001 parliamentary sessions. One of the most contentiously-debated issue was concerning the Court’s future jurisdiction. And even after the Court’s jurisdictions and duties had been agreed upon, the *ad hoc* Committee formed by the People’s Consultative Assembly (“MPR”) did not convene any session to discuss the appropriate constitutional interpretation method that the Court may undertake when exercising its duties and authorities.

Despite having been amended, the CCA remains silent with regards to which interpretation method should the Court undertake. The CCA only sets forth that the constitutionality of parliamentary acts may only be reviewed against the Constitution, and not against other laws.² Implicitly, this provision seems to ‘direct’ the Court to interpret according to the original intent of the drafters of the Constitution. However, owing to the fact that the CCA does not determine a certain standard interpretation method, the Court is free to set aside the original intent factor in its judgment. Therefore, when it is not obliged to read the Constitution in accordance to its original intent, the Court may arbitrarily use other interpretation methods, as long as the end result of the interpretation does not deviate from the three ideals of the law: justice, legal certainty, and purposiveness.

The usage of each interpretation method might yield a new reading which is most likely different from the other methods. The more various and plural the Court’s interpretation method is, the more flexible the Constitution would be (because the Court interprets the Constitution and makes an interpretation based on it). This paper will investigate whether the Court adheres to a singular interpretation method or

¹ State Gazette of the Republic of Indonesia Year 2003 No. 9, Supplement to State Gazette of the Republic of Indonesia No. 4316.

² Consult Art. 50A CCA.

else employs various different methods, either in judicial review cases as well as in dispute of authority cases; and to what extent shall the Court's choice of interpretation method can be warranted.

B. Discussion

Talking about the law is talking about justice that must be enforced by assigning some value to the notion of 'truth'. Mardjono Reksodiputro, citing Witteveen, believes that society's understanding about the law can be classified into three phases: when the law is understood as a set of rules that is determined by an institution having the authority to do so; when the law is understood as a struggle to put justice into realisation; and when the law is understood as a phenomenon arising from the interaction among human beings in their social life.³

That third phase of understanding is affirmed by Sunaryati Hartono's finding who investigated the grounds of legal philosophy in the Preamble to the Constitution. She found that the Preamble is more inclined to seeing the law not as something that is unadulterated or unaffected: rather, as something that is "[...] very much influenced by historical, social, geological, cultural, political, economic, intellectual capacity, and technology/science literacy factors [...]"⁴

Factors that influence the law change relatively frequent through the ages. Consequently, the value of 'truth' and 'justice' that the Constitution and the parliamentary acts uphold is also relative. In addition, of course, we should not forget that the Constitution and the parliamentary acts are actually forged by a constellation of political powers (and interests) that is perpetuated

by political parties who purport to be the representative of the society.⁵ The Constitution is drafted or amended by the MPR, which is constituted by members of the DPR and members of the Regional Representative Council ("DPD"), and parliamentary acts are jointly drafted by the President and the DPR. Political parties make up the membership of the DPR, and they are always involved in the making of the laws.

The relativity of the meaning of statutory norms, in particular the Constitution's, showcases the importance of constitutional interpretation methods. Its importance should continue to be reiterated because the elucidation to the Constitution — which was drafted separately from the substantive text — has ceased to be acknowledged as a portion of the Constitution. Further, even if the old elucidation survives and remains valid as reference in interpreting the Constitution, it is simply too brief and unclear.

Practical experience teaches us that in a system that perceives the law as being hierarchically constituted, constitutional interpretation is the job of the lawmakers who draft the laws inferior to the Constitution. In other words, lawmakers are the interpreters of constitutional norms through the legislation process.

The position of the lawmakers as the 'unofficial interpreters' of the Constitution was balanced by the establishment of the Const. Court which is mandated by Arts. 24 and 24C of the Constitution. Such explicit mandate affirms the position of the Court as the official interpreter of the Constitution. The power to do constitutional interpretation whenever the constitutionality of a parliamentary act is questioned now rests with the Court.

³ See Mardjono Reksodiputro, "Mencoba Memahami Hukum dan Keadilan", in Sri Rahayu Oktoberina and Niken Savitri (Eds.), 2008, *Butir-Butir Pemikiran dalam Hukum: Memperingati 70 Tahun Prof. Dr. B. Arief Sidharta, S.H.*, Refika Aditama, Bandung, pp. 108-109.

⁴ See Sunaryati Hartono, "Mencari Filsafah Hukum Indonesia yang Melatarbelakangi Pembukaan Undang-Undang Dasar 1945", in Sri Rahayu Oktoberina and Niken Savitri (Eds.), 2008, *Butir-Butir Pemikiran dalam Hukum: Memperingati 70 Tahun Prof. Dr. B. Arief Sidharta, S.H.*, Refika Aditama, Bandung, pp. 149-156.

⁵ In here, we should distinguish the ideal concept of political party from what its actual realisation in practice. In its ideal concept, political party can help the people to articulate their interests. In practice, however, the way political parties carry themselves seldom or even never reflect the interest of the people. Political parties grow detached from their creators: the voice of their constituents. They evolve into wild creatures: they are running out of control and keen to struggle more for their own personal agenda rather for their constituents.

Interpreting is not equal to supplementing. In interpreting the Constitution, the Court should consider itself bound to the existing construction of words and phrases in the Constitution. It may not supplement nor delete any word or phrase in the Constitution with the intention of making it be more favourable to its interpretation. Phrases and sentences in the Constitution may be interpreted liberally provided that the Court does not change (either by supplementing or deleting words, phrases, and sentences) the provision of the Constitution and produce a new sentence that can be given different interpretation from the original construction.

Alas, the restriction does not apply when the Court interprets a parliamentary act against the Constitution. In interpreting an act, the Court is authorised to redact or delete (but it may not supplement)⁶ words, phrases, or sentences in the reviewed act even to the effect that the new construction gives an entirely new and different meaning from the original construction.

It is foreseeable that the following basic concept: (i) that the value of justice and truth in the Constitution is relative; and (ii) that the Constitution and the laws are formed via the constellation of political powers — become a crucial issue in reaffirming the function and authority of the Court. As an institution that exercises the judiciary power, the Court may never bow down to sectarian interests (in particular political interests), even though it is undeniable that the Court was actually born from among such frenetic sectarian interests.

It is worth studying, the value of justice and truth in the Constitution and its inferior statutory regulations. We take into the fore the theory of mythology and theory of connotation by Roland Barthes (1915–1980). In essence, Barthes said that all things that are considered reasonable in a culture, including the law, are actually the products of a partisan or arbitrary interpretation

(or, connotation) that gets institutionalised. A connotation that has been established or institutionalised later changes and evolves into a myth. Further, if the myth has been established and if its meaning does not have any significant opposition, it will transform into an ideology. The term ideology in this context roughly refers to layman's meaning: i.e. the concepts or principles that people hold on to as their guidance in life.

Barthes's critique — that which is related with the law being manifested in statutory regulations — reiterates the relative position of values of statutory norms that we have previously discussed. The consequence of such relative position is that the possibility of objection or even disagreement about how one should interpret an existing and established statutory regulation is wide open.

1. Methods in Interpreting the Law

Interpreting is in essence an arbitrary activity. However, the development of science and the demand to a consistent interpretation give rise to the needs for an interpretation method. Each branch of science, including legal science, has their own interpretation method. In legal science, each discipline (e.g. criminal law, civil law, or constitutional law) has different customs in interpreting the law. Several methods listed below are the general methods used to interpret the law, which are commonly referred to by the Court when interpreting the norms of our Constitution.

a. Grammatical Interpretation

Grammatical interpretation is a method of interpretation that is based on the reading of the construction of the Constitution's own printed words. Meaningful combinations or meanings of the construction of the words must be reached via a contextualisation of the words according to the known and commonly-accepted meanings. Words that are considered as having been commonly accepted include those words that are

⁶ Supplementing words, phrases, and/or sentences is the authority of the lawmakers through revision or amendment of the law.

commonly used by the lawmakers who write the statute and by the society who read the statute.⁷ Sources in finding the meaning of words are, *inter alia*, dictionary and conversation or discourse.

The Court used grammatical interpretation in a state agency dispute authority case, registered in the Court's docket under reference number 2/SKLN-X/2012. The case concerned a dispute between the President of the Republic of Indonesia (as the Applicant) and DPR (as Respondent I) and the State Audit Board ("BPK") (as Respondent II). Below we quote an excerpt of the Court's opinion (par. 3.14), which clearly displays its generous use of grammatical interpretation in reading Art. 23 of the Constitution:

[3.14] Considering, that in the context of state finance, the President reserves an exclusive right to propose the government's work program and draft state budget every year by submitting a Draft State Revenues and Expenditures Budget ("RAPBN") to DPR. Such a position, on the one side, grants the President the authority to draft the state revenues and expenditures budget because the President is the one who will execute and manage such state revenues and expenditures [vide Art. 23 (2) of the Constitution], but on another side, the President is barred from executing and managing state budget in the absence of the DPR's approval [vide Art. 23 (3) of the Constitution]. In this regard, as the representative body of the people, the DPR holds the position that allows it to approve or to not approve an RAPBN that the President is going to manage and execute. There shall be no disbursement of state's monies either for expenditures or for financing if such disbursement is not mentioned in the State Revenues and Expenditures ("APBN") that the DPR has approved. In here, [we can appreciate] the critical

meaning of the DPR's budgetary function as provided for in Art. 20A of the Constitution.

b. Systemmatical Interpretation

Systemmatical interpretation is a method of interpretation where a provision or a statutory regulation shall be viewed as inter-related with other statutory regulations. That said, in order to understand the meaning or intention of a statutory regulation, one must read other statutory regulations that govern similar matters and/or that are more or less relevant with the statutory regulation that one seeks to understand.⁸ Systemmatical interpretation is rarely used to interpret the Constitution because there are no other statutory regulations that sits in the same hierarchical position with the Constitution. One, however, can use systemmatical interpretation method to interpret parliamentary acts, for example the Act on the Commission for the Eradication of Criminal Acts of Corruption may be interpreted using systematical interpretation method by reading it in conjunction with the provisions of the Indonesian Penal Code and the Indonesian Criminal Procedure Code.

An example of the Const. Court's use of systematical interpretation method is visible in its judgment (reference number 1/SKLN-IX/2011) that concerns the dispute of state authority whose powers are given by the Constitution, between the Regent of Sorong (Applicant) and the Mayor of Sorong (Respondent). The contentious issue was the scope of the phrase "regional authorities" mentioned in Art. 18 of the Constitution. The Court reasoned in paragraph 3.11. when explaining the Applicant's *subjectum litis* that that phrase should be understood to mean "Regional Government and (together

⁷ Sudikno Mertokusumo and A. Pitlo, 1993, *Bab-Bab tentang Penemuan Hukum*, Citra Aditya Bakti, Bandung, pp. 58-60. See also, Mertokusumo's review on interpretation method in Sudikno Mertokusumo, 2004, *Penemuan Hukum: Sebuah Pengantar*, Liberty, Yogyakarta, pp. 57-58.

⁸ Sudikno Mertokusumo and A. Pitlo, *Op.cit.*, pp. 60-63.

with) the Regional House of Representatives (“DPRD”). The Court interpreted “regional authorities” after putting Art. 18 (1)⁹ in the context of Art. 18 (3)¹⁰, thus it used systematic interpretation method.

c. Historical Interpretation

Historical interpretation method aims to interpret the law by looking deep into the legislative history and the formation process of the law. This in-depth revisitation of legislative history may be conducted by tracing back the conversation and communication that took place during the drafting of a statutory regulation.¹¹ In the context of constitutional interpretation, this method suggests that one should read the original intent of the formation and/or the amendment to the Constitution as contained in the Minutes of the Meetings of the Agency for Investigating Efforts for the Preparation of Indonesian Independence (“BPUPKI”) and/or the Minutes of the Meetings of the MPR 1999–2002 concerning the Amendments to the Constitution. In addition, the spiritual background that prevailed during the process of amendment to the Constitution can also be understood in depth by listening to information or reading notes of the drafters of the amendments.

Slightly differing from the above definition, Pontier, as cited by Edward Hiarij, stated that, “Interpretation using legislative history is the determination of the meaning of a legal norm formulation conducted by searching the connection with authors or in general with the societal context in the past.”¹²

An example of the Const. Court’s use of historic interpretation is apparent from a 2003

case (docket reference number 001-021-022/PUU-I/2003) concerning the judicial review of the Electricity Act (Act No. 20 of 2002) against the Constitution. The Court interpreted the phrase “state control” per Art. 33 of the Constitution using historic interpretation, taking into account in particular the opinion of Mohammad Hatta. The following is an excerpt of the judgment that cites Mohammad Hatta’s opinion and the pre-amendment Elucidation to the Constitution:

Considering, that consistent with historic interpretation [method], in the pre-amendment Elucidation to the Constitution the meaning of such provision was “The economy is based on economic democracy which envisages prosperity for everybody. Therefore, economic sectors which are essential for the country and which affect the life of the people, must be controlled by the state. Otherwise the control of production might fall in the hands of powerful individuals who could exploit the people. Hence, only enterprises which do not affect the life of the general population may be left to private individuals.” [...] Considering, that Mohammad Hatta who is one of our nation’s founding fathers, has expressed that state control shall mean as follows, “The aspiration that is implanted in Art. 33 of the Constitution is that great production must be exercised by the government with the aid of foreign capital loan. If this strategy does not succeed, it is necessary to grant foreign entrepreneurs to invest their capital in Indonesia subject to conditions set out by the government [...] That was our way of thinking of how economic development is carried out on the basis of Art. 33 of the Constitution [...].”

In this judgment, the Court concluded that, “The people collectively are constructed

⁹ “The Unitary State of the Republic of Indonesia shall be divided into provinces and those provinces shall be divided into regencies (*kabupaten*) and municipalities (*kota*), each of which shall have **regional authorities** which shall be regulated by law.” [emphasis added].

¹⁰ “The authorities of the provinces, regencies and municipalities shall include for each a Regional House of Representatives (DPRD) whose members shall be elected through general elections.”

¹¹ *Ibid.*, pp. 63-65.

¹² Edward O.S. Hiarij, 2009, *Asas Legalitas & Penemuan Hukum dalam Hukum Pidana*, Erlangga, Jakarta, p. 67.

by the 1945 Constitution as giving the mandate to the state to make policy (*beleid*) and perform the administration (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*) and oversight (*toezichthoudensdaad*) with the purpose of the greatest prosperity of the people.”

d. Teleological Interpretation

Teleological interpretation gives meaning to a text by basing it on the purpose or objective of the formation of the statutory regulation. Succinctly spoken, teleological interpretation is an interpretation method that links the meaning of a norm with its objective.¹³ If opting to use this method, the Court shall interpret the Constitution by looking at the preparatory documents or by listening to the information provided by the jurists who amended the Constitution, **not** for understanding the meaning of the norm, but only for appreciating the purpose and objective that the jurists sought to achieve. Interpretation shall be drawn based on that purpose and objective. In teleological interpretation, the objective of the lawmakers is always re-interpreted to suit the contemporary societal condition.

The Const. Court used teleological interpretation in a judgment concerning the judicial review of the Organisation of General Election Act (Act No. 22 of 2007) against the Constitution (docket reference number 11/PUU-VIII/2010). The Court held that,

[...] The General Election Supervisory Body (“Bawaslu”) as stipulated in Chapter IV Art. 70 to Art. 109 of Act No. 22 of 2007 shall be understood as a body that organises general election, which assumes the duty of supervising the implementation of general election. Therefore, the function of organising General Election shall be exercised by: an organiser, in this regard the General Election Commission (“KPU”) and a

super-visor, in this regard the General Election Supervisory Body (“Bawaslu”). Even further, the Honorary Board which supervises the behaviour of General Election organisers, must also be defined as an institution that makes up the unity of the function of general election organisation.

This holding was taken after the Court considered the objective of Art. 22E (5) of the Constitution, which is to establish a general election that. “Shall be organised by a general election commission that shall be national, permanent, and independent in nature.”

The Court’s reasoning in this judgment, particularly in paragraph 3.18 point 5, shows clear signs that the Court chose to resort to teleological interpretation:

That in order to guarantee the organisation of general election that is direct, public, free, secret, honest, and fair, Art. 22E (5) of the Constitution stipulates that, “The general elections shall be organised by a general election commission that shall be national, permanent and independent in nature”. The sentence “a general election commission” in the Constitution does not refer to a name of an institution; rather it refers to the function of general election organisation that is national, permanent, and independent in nature. Therefore, the Court holds that the function of general election organisation shall not only be carried out by the General Election Commission (“KPU”), but also by general election supervisory institution, in this case the General Election Supervisory Body (“Bawaslu”), as one unity of function of general election organisation that is national, permanent, and independent in nature. This interpretation better suits the norm of the Constitution which mandates that the organisation of general election shall be independent in nature to allow for the realisation of a general election satisfying the direct, public, free, secret, honest, and fair principles. [...] Consequently, the Court holds that the

¹³ Sudikno Mertokusumo and A. Pitlo, *Op.cit.*, pp. 65-66.

General Election Supervisory Body ("Bawaslu") as stipulated in Chapter IV Art. 70 to Art. 109 of Act No. 22 of 2007 shall be understood as a body that organises general election, which assumes the duty of supervising the implementation of general election. Therefore, the function of organising General Election shall be exercised by: an organiser, in this regard the General Election Commission ("KPU") and a supervisor, in this regard the General Election Supervisory Body ("Bawaslu"). Even further, the Honorary Board which supervises the behaviour of General Election organisers, must also be defined as an institution that makes up the unity of the function of general election organisation. With this, the guarantee that the organisers of general election are independent can be realised and clarified.

e. Hermeneutic Interpretation

Hermeneutic interpretation is an interpretation method that attempts to "unearth meanings by taking into account the horizons that encapsulate the text [that we seek to interpret]. These horizons are the horizons of the text, of the author, of other people, and of the readers."¹⁴ In essence, hermeneutic interpretation method studies the text, studies the context, and then it conducts contextualisation.

It might be inappropriate to classify hermeneutic interpretation in one group with the other interpretation methods that we have previously discussed. It is probably more suitable to say that hermeneutic interpretation is a more general interpretation method and that other methods are simply the more special ones and are the subsequent derivation of hermeneutic method.

In contrast to the other interpretation methods, hermeneutic method is more difficult as it requires the jurist and inter-

preter to take into account several existing points of view or understandings about the norms being interpreted and afterwards compare them. In principle, hermeneutic method aims to understand (*verstehen*) and the resulting perception or understanding will be used as the basis to make a decision or to draw further conclusions.

The trial process and the structure of the Const. Court's judgment is comparable to a dialogue that seeks to understand the text and context disputed by the applicant. This is apparent from the outline of the Court's judgment, in particular the statement of facts section. The section reports the interpretation of the disputed constitutional norms according to: (i) the applicant; (ii) the government both in its capacity as the executive and the legislative body; (iii) DPR as the lawmakers; and (iv) experts.

The five interpretation methods that we have previously covered are the most commonly-used methods of constitutional interpretation in our Const. Court and it is very rare that a litigant chooses to use only one singular method. Indeed, in practice there are several constitutional interpretation methods that grow up as being more dominant. However, such dominance is not caused by a 'competition' among methods; rather it is only the logical consequence arising because of the divergence of usage frequency where some methods are used more oftenly while some other are used only rarely.

2. A Deconstruction on (the Meaning) of the Constitution

Interpretation is needed to transform abstract provisions to more down-to-earth ones which are more familiar with the society's norms and values. This down-to-earth reading of the Constitution is

¹⁴ Jazim Hamidi, 2006, *Revolusi Hukum Indonesia: Makna, Kedudukan, dan Implikasi Hukum Naskah Proklamasi 17 Agustus 1945 dalam Sistem Ketatanegaraan R.I.*, Konpress, Jakarta, pp. 33-44. As a comparison, read E. Sumaryono, 1999, *Hermeneutik: Sebuah Metode Filsafat*, Kanisius, Yogyakarta, pp. 23-26.

needed because in its relation with the people, the law straddles two sociological doctrines: law as a tool of social control — that the law should be positioned to perpetuate certain societal condition and order — and law as a tool of social engineering — that the law should be positioned as a tool to change certain societal condition and order. The law would be rejected or not respected whenever it is inconsistent with the prevailing norms and values that the society believes in and adheres to.

Both sociological doctrines try to understand the law as a ‘mere’ social phenomenon that, together with the other social phenomena, influence the constellation of social relation. The meaning of the law (as a statutory regulation) therefore changes rapidly with the other social changes. Social change brings the possibility that some day, the law must be interpreted outside what the lawmakers gave.

The law is arrogant if it monopolises the meaning of the law by assigning to it only the meaning given by the lawmakers, both in the drafting of the Constitution and of the inferior statutory regulations. True, that from the perspective of the law *per se*, this consistency is laudable because it provides legal certainty. Legal certainty would indeed perish if interpretation of the law keeps changing rapidly over time. However, this view later receives opposition from scholars of various discipline who have unique ideals of the proper legal interpretation method.

One huge contribution to legal interpretation method, and the one which has been applied as a constitutional interpretation method, is the theory of deconstruction developed by Jacques Derrida (1930–2004), a professor of philosophy and linguistics. Derrida’s idea revolves around the interpretation of the meanings of words or sentences. In principle, Derrida states that a

writing is autonomous, i.e. that any interpretation of a word, phrase, or sentence, shall be arbitrary in nature. Therefore, meanings that people affix to a writing entirely depend on the individual who reads or interprets it. It is impossible to convey a singular meaning for a word, phrase, or sentence.¹⁵

Derrida’s deconstruction interpretation method is unable to be detached from the long history of linguistic philosophy, in particular the development of structuralism. In the realm of linguistics, structuralism can be explained as a model of reading where each word is deemed as having an already established meaning.¹⁶ Hence, the composition of words, phrases, and/or sentences form an overarching structure carrying the consolidation of properties or meanings of each constituent words, phrases, and/or sentences which form the structure.

One structuralism figure is Ferdinand de Saussure (1857–1915) who laid down the foundation of word interpretation using the connection between the signifier and the signified. For Saussure, a word as a signifier steadily represents a certain reality. The connection between the signifier and the signified is not subject to changes. In legal studies, structuralism view has been fused with historic interpretation method (or, interpretation based on original intent) which stands upon the belief that the intention of a statutory regulation always echoes the intention of the lawmakers.

Derrida contests Saussure’s proposition by forwarding the idea of deconstruction. According to Derrida, the relation between the signifier and the signified is not absolute. The relation can be suspended and assigned with new meaning that could be entirely different from the meaning that the original maker had intended to be. “[...]”

¹⁵ For further and deeper discussion of Derrida’s thoughts, read “Dekonstruksi, Strategi (Mem)Permain(k)an” in Muhammad Al-Fayyadl, 2005, *Derrida*, LKiS, Yogyakarta, pp. 78-88. Or see Kees Bertens, 2006, *Filsafat Barat Kontemporer: Prancis*, Gramedia Pustaka Utama, Jakarta, pp. 374-377.

¹⁶ Linguistic studies and legal science share similarities in several aspects. It is from this fact that Derrida’s deconstruction can be utilised as a metod of constitutional interpretation. One writing that connects linguistic studies with legal science is Paul Scholten’s work titled *De Structuur der Rechtswetenschap* as translated by B. Arief Sidharta, 2003, *Struktur Ilmu Hukum: Prof. Mr. Paul Scholten*, Alumni, Bandung, pp. 35-46.

deconstruction is an activity of critical thinking, that does not unconditionally accept academic thinkings that might have existed for years in our mind [...].”¹⁷

Putting the matters in the context of statutory regulations, it is unjustified if the meaning of a statutory regulation is equated with the meaning that it bore in its inception. The spirit of deconstructing the law should be to find a new meaning of statutory regulation which is aligned to the societal development, so as to conceive justice that carries contemporary nuance.

3. The Law as a System

Establishing a correlation between structuralism and the law requires robust understanding about the system itself. This understanding is crucial because almost all social phenomenon (including legal phenomenon) are built within and live in a particular system.

In several occasions, the law is often understood as being divided into the law in theory and the law in practice. In theory, the law is deemed as an independent system that is not influenced by other sciences or knowledge or theories, and that it is capable of resolving problems that it faces.

Indeed, the law might be capable of answering or resolving its own internal problems, such as conflict of norms or clash among statutory regulations, by for instance applying the *lex superiori derogat legi inferiori* or the *lex specialis derogat legi generali* principles. However, it remains difficult for the law to resolve conflict arising between it and the subject that it governs. In reality, there is an inseparable tie between theory and practice. Theories have always envisioned the righteousness for the society as its goal, thus there would be no use for theories that are not implementable in the society. The

differentiation of the law in theory and the law in practice is actually limp. This is particularly apparent from the fact that criminal law can never completely eradicate theft, corruption, or other crimes. If the law is not always capable of resolving the problem that it faces, then the concept that the law is an independent system warrants revisitation.

Mertokusumo (1924–2011) believed that “the law is a system; i.e., an order, or a complete unity comprising of interrelating parts or elements.”¹⁸ In addition, he stated that “In such unity, conflicts, disputes, or contradiction among its parts are frowned upon. Should conflict occur, then it shall be resolved by and within the system itself, and shall never be allowed to protract.”¹⁹

Further, he explained that legal system is open in nature. According to him, “legal system is the unity of elements (i.e., rules, decrees) that are influenced by cultural, social, economic, historic, and other factors. On the contrary, legal system influences factors outside the system itself. Legal rules are open for different interpretation, and hence development is bound to always take place.”²⁰

The science of sociology recognises at least two main concepts of system. The first concept was introduced by Talcott Parsons (1902–1979) (the “Parsons’s System Theory”) and the second one was Niklas Luhmann’s (1927–1998) critique to Parsons’s theory (“the Luhmann’s System Theory”).

According to Parsons, “Social order is not a coercive order nor it is the product of strategic actors’ egocentric transaction, rather it is a mutual consensus involving three groups at once: the society, its culture, and its personality.”²¹ Parsons forwarded his view that culture is a structured pattern of norms that constitutes as the ground or

¹⁷ Dosse, as quoted in Benny H. Hoed, 2008, *Semiotik dan Dinamika Sosial Budaya*, Komunitas Bambu and Faculty of Cultural Sciences Universitas Indonesia, Jakarta, p. 69.

¹⁸ Sudikno Mertokusumo, 2005, *Mengenal Hukum: Suatu Pengantar*, Second Edition, Liberty, Yogyakarta, pp. 122–123.

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 124.

²¹ See, F. Budi Hardiman, “Teori Sistem Niklas Luhmann”, *Jurnal Filsafat Driyarkara: Kebaruan Teori Sistem Niklas Luhman*, Tahun XXIX, No. 3, 2008.

the underlying basis upon which the structure of social action processes stand.”²² This structure is steady in nature, and therefore the social structure standing on the structure must also be steady.

Luhmann’s system theory departs from Parsons’s postulation. While Parsons tends to deem system as having steady properties because it is founded upon mutual consensus, Luhmann sees it differently. He thinks that the nature of system is relatively unstable, owing to the fact that a system is not built upon consensus, rather it is built by and upon social interaction. The concept of social interaction also covers the concepts of conflict and social change — something that Parsons had failed to recognise. The recognition of social interaction concept affirms that Luhmann’s concept prioritises function more than it prioritises structure.²³

Kneer and Nassehi, as cited by Hardiman, identified three points of modification that Luhmann had made to Parsons’s concept. The first modification is, that social systems are not founded upon norms structure or other certain structure that dominate the society, rather, it is founded upon social interaction. This thought finds its root from the complexity of problems (norms and other) in the society. Luhmann saw a system from its presence compared to other social systems. This point of view is distinct from Parsons’s, who deemed that social system exists singularly for itself.

The second modification is the attitude towards Parsons’s theory, which says that a system will collapse if certain systemic functions are disturbed. Luhmann presented that social systems can replace the damaged functions with alternative functions, thereby assuring the system to keep operating.²⁴

The third modification relates with the maintenance and sustainability of social system. For Parsons, the highest social unit is social system, therefore there is nothing outside social system. Luhmann reached another formulation: that the highest social unit is the world (*Welt*), therefore the existence of a social system is relative if compared to the other social systems. In other words, according to Luhmann, the world is the totality of things that exist, and not a system. The world is also not an environment that requires boundaries. The world does not have boundaries precisely because it is the totality of everything that exists: there is nothing outside the world.²⁵

Parsons found that legal science in fact stands abreast with the concept that a structure exists within a system. Legal science has always been trying to position itself as an independent system (and in fact, the society has also been assuming so) that does not need any assistance from the other systems. Legal science is particularly reluctant to openly borrow concepts or methods from other branches of science, e.g. psychology, sociology, and communication. This rejection against the meddling of non-legal sciences has acquired fairly established footing and framework, on account of Hans Kelsen (1881–1973).

The presence of Luhmann’s System Theory opens up a wider room of interaction between legal science and other branches of science. The theory illuminates that the existence of law is influenced by — and at the same time influences — other existing systems in the universe. The law is not the supreme nor it is a singular system, therefore the law should be returned back to an equal position with its fellow social entities or phenomenon, for all are constantly influencing and being influenced by the others.

²² Parsons’s System Theory is also coined “Structural-functional System Theory”. This nomenclature is based upon Parsons’s analogy that norms structure determines the society function.

²³ Luhmann’s Theory is also coined “Functional-structural System Theory”.

²⁴ F. Budi Hardiman, *Op.cit.*, p. 4.

²⁵ Compare with review on Niklas Luhmann’s social system theory. George Ritzer (Eds.), 2005, *Encyclopaedia of Social Theory*, Volume II, Sage Publications, London/New Delhi, pp. 454–458.

Further, the non-singularity of legal science must be brought to the fore whenever a statutory interpretation effort is being carried on. As a system that does not stand free from other systems, interpretation of the law must always take into account the existence of other social systems. The values or norms within the realm of other social systems must no longer be regarded as a prohibited reference with which one is allowed to interpret the Constitution or inferior statutory regulations. Interpretation based on contemporariness (both in the dimension of time and space) must be allowed to be conducted. In order to be able to do such interpretation, the Const. Court must be prepared to open itself to various interpretation methods and must not confine itself to dominant methods only.

4. Constitutional Interpretation and Original Intent

Speaking in the context of the Court's authority to review parliamentary acts against the Constitution, there might be a problem with regards to the question of whether the Court may rule on the constitutionality of parliamentary acts which subject matters are not explicitly governed or delegated by the Constitution. Responding to this problem is not an easy endeavour. However, the Court is bound to hear judicial review petitions because Indonesian courts are prohibited from declining to hear a case on grounds of lack of relevant laws.

Provided that a judicial review is pending before the Court, while the norms of the Constitution remain silent or ambiguous on the disputed matter, the Court must resort to conducting a constitutional interpretation. As we have previously discussed, there are several interpretation methods available for the nine constitutional justices. In other words, the Court is free to interpret the Constitution by using teleological or historical methods or by referring to the original intent of the reviewed act.

Our point of discussion will now shift to whether the Court must seek to read the 'hidden meaning' of the drafters of the Constitution, or

must it construct an entirely new meaning for the reviewed norms?

The shift of interpretation and meaning will be prejudicial to the achievement of legal certainty, because the Court might hold on to an interpretation that is different from the MPR's initial official interpretation. However, it is also unacceptable if in the quest of securing legal certainty, the Court sets aside the idea of legal purposiveness. In choosing whether to effectuate legal certainty (*Rechtssicherheit*), purposiveness (*Zweckmäßigkeit*), or justice (*Gerechtigkeit*), there is no reason that the Court should be hesitant to 'shake' or calibrate the balance so that a new point of equilibrium can be reached.

A new reading of the Constitution's substance is needed to ensure that Indonesia's ground norms remain relevant in the actual setting. Societal development might, in its course, absorb new values and norms. Keeping the Constitution relevant with contemporary context is critical because in a number of societal conditions, understanding and sense of justice is heavily related with perception that may or may not be influenced by the surrounding environment. However, because one cannot always keep the surrounding environment pure from changes, this in turn might render the meaning of justice unstable.

The 1945 Constitution was drafted under the backdrop of the 1945 political-social condition that, despite the careful and forward-looking drafting process, there are still a number of sections in the Constitution that can be irrelevant as time goes by. An outdated Constitution was the underlying reason behind the four consecutive amendments to the 1945 Constitution: in 1999, 2000, 2001, and 2002 by the MPR Plenary Session.

For exactly the same reason, i.e. adjusting the Constitution to the contemporary needs of the society, there arises a question whether the Const. Court is actually authorised to effect changes or amendments to the Constitution like the MPR did. Under the context of legal purposiveness, the

Court is — ethically speaking — allowed or even required to change the way the Constitution is read because: (i) if conducted via the mechanism laid out in the Constitution, constitutional amendment takes a long process and time; which may be a disadvantage if promptness to respond to the problem is critical; and (ii) there is no state institution that holds the power to interpret the Constitution other than the Const. Court.

Even though there is no statutory regulation that allows the Court to depart from the Constitution's original intent, there is no statutory regulation that explicitly prohibits the Court from departing from the original intent, either. Therefore, the Court holds the authority to interpret the Constitution in any way, just as the MPR is free to use any scientific method to draft a ground norm, and just as the President and the DPR may use any scientific method to draft acts. The freedom to choose constitutional interpretation method may be exercised by the Const. Court only because judicial review (and interpretation) process more or less is tantamount to legal drafting process where the drafters ought and are free to interpret the Constitution as the ground on which the drafted act stands. With regards to the freedom and diversity of interpretation method, Aharon Barak wrote: "A system of interpretation reflects the reciprocal relationship between judiciary-legislature-executive and the will of the individual within that system."²⁶

The Court's freedom to choose constitutional interpretation method must be understood as a freedom to choose a commonly-used method (*inter alia*, grammatical, systematical, historical, hermeneutic, or teleological method) or to devise a new interpretation method, as long as that

method is scientifically accountable and intends to achieve the greatest welfare of the people.

A couple of years after its establishment, the Court's position towards historical interpretation method, or original intent-focused interpretation, began to take shape. A 2006 decision made clearer the Court's position towards original intent, i.e. judgment number 005/PUU-IV/2006, which concerned a judicial review of the Judiciary Commission Act (Act No. 22 of 2004) and the Judiciary Powers Act (Act No. 4 of 2004) against the Constitution. In relevant parts, the judgment states:

Ipso facto, the Constitutional Court, being the sole judicial interpreter of the Constitution, must not solely commit to an originalism interpretation method by merely reading the original intent behind the drafting of the 1945 Constitution's articles, in particular if such method of interpretation results to the dysfunctioning of the Constitutional provisions system and/or is on the contrary of the main idea that underlies the ground norms itself as a whole and the purpose that it seeks to achieve. The Constitutional Court must read the 1945 Constitution in the context of the whole spirit that is crystallised within its norms, for the purpose of building a more proper constitutional life in the quest of achieving the idea of state (*Staatsidee*), i.e. to realise a state based on law which is democratic and to realise a democratic state based on law, as the elaboration of the ideals contained in the Preamble to the Constitution.

Further, the 2006 judgment explains the rationale for the Court's *in casu* aversion to consult to the original intent:²⁷

The original intent behind the drafting of the Constitution's norms can be based on a fallacious understanding of a certain definition. Similar error was repeated in

²⁶ Aharon Barak, 2005, *Purposive Interpretation in Law*, Princeton University Press, Princeton, p. 31.

²⁷ Constitutional Court Judgment No. 005/PUU-IV/2006 concerning Judicial Review of the Judiciary Commission Act (Act No. 22 of 2004) and the Judiciary Powers Act (Act No. 4 of 2004) against the 1945 Constitution, 23 August 2006, pp. 179-180. c.f.: Constitutional Court Judgment No. 058-059-060-063/PUU-II/2004 concerning Judicial Review of the Water Resources Act (Act No. 7 of 2004) against the 1945 Constitution. See also, Abdul Mukthie Fadjar's opinion that during the 60 years' of Indonesian independence, Art. 33 of the Constitution has been "read differently through the changes of government régimes, thereby invoking opinions that Art. 33 of the Constitution is a utopic article no longer suitable with the national/global development dynamics where the dichotomy of market-driven economy and state-guided economy systems begins to be irrelevant given the reality that both systems have been amalgamating." Abdul Mukthie Fadjar, "Pasal 33 UUD 1945, HAM, dan UU Sumber Daya Air", *Jurnal Konstitusi*, Vol. 2, No. 2, September 2005, pp. 7-8.

the General Elucidation to the Judiciary Commission Act, which sets forth, "Article 24B of the Constitution sets a firm legal ground for law reform by granting the Judiciary Commission the power to enforce checks and balances, regardless the fact that the Judiciary Commission is not an institution that exercises judiciary powers, rather its function is related with judiciary powers."

The argument affirms the Court's opinion that the truthfulness or the validity of a certain interpretation method carries only relative value because it serves merely as a tool, whereas the *substance* of the interpretation itself is the most important thing. The Court prefers to be free to choose constitutional interpretation method, and legally speaking this is not prohibited.

Subject to the prevailing circumstances, there is an equal chance for each constitutional interpretation method to be used by a constitutional justice. Each of the nine justices is free to have their own opinion and is free to choose constitutional interpretation method. In other words, the method that the Indonesian Constitutional Court refers to in its opinion is not necessarily the method that is unanimously approved by all nine justices. Further, the periodical replacement of justices may end up to a situation where new justices have their 'favourite' interpretation method that may or may not be different from the rest of the other justices'.

This freedom to choose constitutional interpretation method is indeed risky, because there is a possibility that the Court will act arbitrarily or will reach a decision which is inconsistent with its previous judgments. This risk seems to be supported by a valid reasoning, but we must nonetheless take that risk because setting forth a legal instrument always requires a constant compromise in order to align the three ideas of the law: justice, purposiveness, and legal certainty.

If the Court chooses the more open and liberal contextual-based interpretation method, one might fear that the Court would be transforming into an authoritarian judiciary institution because the method allows the Court to liberally interpret constitutional norms according to the (preferred) scholarly knowledge of the justices. There are concerns that the Court might interpret the Constitution according to its own opinion or conviction even though such interpretation might be inconsistent with the written norms of the Constitution. Many fear the Court will in the end of the day usurp the authority of the MPR: a phenomenon that Elster and Holmes call as 'backdoor constitutional amendment'.²⁸

Considering the drafters of the Constitution might have narrow vision, particularly because the interests of political parties impair the purity of constitutional amendments, the Court might alternatively use teleological interpretation (*inter alia*, via contextual interpretation).²⁹ Contextual interpretation that departs from the Constitution's original intent might be unfavourable because it prevents optimal legal certainty, however assuming there is no personal interest in the judgment, this interpretation method can better serve justice and purposiveness ideals. Therefore, the Court needs to calibrate the triadic equilibrium of legal certainty, purposiveness, and justice in order to reach a new point of equilibrium.

C. Conclusion

In examining and deciding judicial review cases, the Indonesian Constitutional Court is authorised to interpret the 1945 Constitution by using the various interpretation method there is, including to leave the Constitution's original intent. However, constitutional interpretation that departs from the original intent is not to be used freely. Indeed, rules governing constitutional

²⁸ Munafrizal Manan, "Mahkamah Konstitusi dan Penafsiran Tekstual", *Koran Tempo*, 26 February 2009.

²⁹ 'Contextual' within the meaning of interpretation is based on the society's real (contemporary) needs and is conducted by taking into account the main purpose of the 1945 Constitution as encapsulated in the Preamble.

interpretation method and freedom to depart from the Constitution's original intent are not explicitly formulated in the CCA. However, we find that various Court's judgments have imposed interpretation method restrictions, including: (1) that interpretation method must ensure the functioning of all constitutional provisions as

a system; (2) that interpretation method must ensure that the main idea inspiring the creation of the Constitution is honoured; and (3) that the Court may depart from the Constitution's original intent provided that the drafters have not provided interpretation in any of the relevant parts of the Constitution.

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