

The Constitutional Court of Indonesia: Its Authorities and Contributions on the Development of Democracy in Indonesia ¹

Dr. A. Latief Fariqun, SH., MH.²
Brawijaya University
Indonesia

In the last three decades before the 1998 governmental reformation, Indonesia was practically under an authoritarian government, even though there were several general elections, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*) and the People's Representative Council (*Dewan Perwakilan Rakyat*). Many factors contributing this situation. The military under President Suharto controlled the government. The Ruling Party "Golkar" dominated the parliament. But the main cause of this practice of authoritarianism was the constitution itself. Before the amendment, the 1945 constitution constructed an executive heavy governmental system which gave the president a very big power without mechanism of checks and balances. It also gave the president an attributive and delegated power to regulate constitutional and fundamental affairs merely with the laws or governmental Decree. The last but not the least, some provisions or articles in the 1945 constitution are vague or ambiguous norms that could be interpreted with various interpretations in accordance with the policy of the president. In practice, the President dominated the law making because the main power of the law making was on the hand of the president and the President's supporting party dominated the People's Representative Council (*Parliament*). Many laws in that era were substantively unconstitutional, but could only be changed through legislative review. This meant that a law could only be amended by the institution that created it without any opportunity to be reviewed by other equivalent institutions. There were no checks and balances then. Based on the construction, Indonesia could not be a democratic government.

Since 1998, Indonesia has been entering the reformation era. There have been growing aspirations demanding democratic reformation, including the amendment of the constitution. Between the year of 1999 until 2002, the 1945 constitution underwent four times fundamental amendments made by the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR)³.

During the debate of the amendments, there was a strong aspiration and demand to adopt a Constitutional Court. The impetus or trigger for the debate regarding the idea to

¹ Paper presented at the IALS Conference entitled "Constitutional Law", on September 11-12, 2009, in Washington, DC, USA.

² Lecturer at the Faculty of Law Brawijaya University, Indonesia.

³ The People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR) consists of the members of the People's Representative Council and the Regional Representative Council. Its main authorities are to amend the Constitution, to inaugurate the President and/or the Vice-President and to remove the President and/or the Vice-President during his/her term office in accordance with the Constitution.

establish the Court was the controversial impeachment of President Abdurrahman Wahid in 2000. Abdurrahman Wahid was unseated based on political reasons and it was decided in a political forum based on a majority votes. In the midst of the controversy surrounding the impeachment of President Abdurrahman Wahid, an idea was put forward to make a constitutional arrangement regarding the mechanism of impeachment, so that a president accused of committing a crime could be brought before a court of law, rather than a political forum such as the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*). This adoption of the Constitutional Court was considered as more strengthening democratic reformation. In 2003 the Constitutional Court was established.

The Constitutional Court has four authorities and one obligation. The Court has the jurisdiction to (1) review laws against the 1945 Constitution; (2) decide on disputes on the authorities of state institutions whose authorities are granted by the 1945 Constitution; (3) decide on the dissolution of political parties; and (4) decide on disputes on general election result.⁴ The Constitutional Court's obligation is to rule on People's Representative Council opinion on any alleged violation by President and/or Vice President pursuant to the 1945 Constitution in order to determine whether People's Representative Council may conduct further impeachment of the incumbent President and/or Vice President.⁵

In the five years since its establishment, the Constitutional Court has been contributing significantly the development of democracy in Indonesia. The Constitutional Court had handled 156 judicial review cases from 74 different laws, 10 cases of authority dispute, and 45 cases of dispute on general election results. Many of the petitions for judicial review were granted, which means that part of the law was decided unconstitutional. In relation to the political rights of the citizens, through various Constitutional Court decisions, every citizen has been able to exercise his/her voting right without discrimination.

In one landmark decision, the Constitutional Court nullified an article of the law concerning General Election preventing former members of the communist party from voting. The Constitutional Court stated that the provision of the Article " constitutes a denial of the human rights of the citizens or discrimination based on political beliefs, and therefore it is contradictory to human rights protection guaranteed by the 1945 Constitution". Through this

⁴ Article 24C of the Amended 1945 Constitution. The authority to review law against the Constitution is granted to the Constitutional Court and the authority to review regulations under laws against laws is granted to the Supreme Court.

⁵ This Constitutional Court obligation shall be referred to Article 7A of 1945 Constitution as following, "The President and/or Vice-President may be removed from his/her position during his/her term of office by the People's Consultative Assembly on the proposal of the People's Representative Council, whether it is proven that he/she has violated the law through an act of treason, corruption, bribery, other serious criminal offences, or through moral turpitude and/or that he/she no longer meets the qualifications to serve as the President and/or Vice-President".

decision, Constitutional Court abolished the political discrimination undergone by the former members of the communist party for more than three decades and allowed them to exercise their right to vote like every other citizen.

Another Constitutional Court's decision contributing to the development of democracy was that of the nomination of the regional head candidate, that is Governor, Regent and Mayor as the respective head of provincial, regency, and municipal government. It once annulled a regional government law which only allowed a person to become a regional head candidate through political parties. Through this decision, any person can be a regional head candidate not only through political parties but also through independent individual nomination.

Further decisions of the Constitutional Court developing democracy were those of nullifying "the Provisions on Contempt against President and Vice President" of the Article 134, 136 *bis*, and 137 and the article of 154 and Article 155 of Criminal of the Indonesian Criminal Code". The first three articles are regulating the criminal acts of contempt against President and Vice President in the forms of one's expressions or thoughts in the public relating to the President and Vice President. These acts should be punished by imprisonment or fine. The Constitutional Court is of the opinion that the three articles are create legal uncertainty because they are highly susceptible to interpretation as to whether a protest, expression of opinion or thought constitutes a criticism or contempt against President and/or Vice President. The second two articles are concern "declares feelings of hostility, hatred or contempt towards the Indonesian Government in public". These acts are criminal and should also be punished by imprisonment or fine. The Constitutional Court considered that the formulation of both articles may create a tendency toward abuse of power, since they can be easily interpreted according to the preference of the rulers. As a consequence, these articles hinder the freedom to express thoughts and attitudes as well as the freedom to convey opinions, and therefore, they are declared contradictory to the 1945 Constitution.

Relating to dispute on General Election results, there were 274 cases filed by 23 out of 24 political parties participated in 2004 General Election. This meant that only one political party did not file a petition to the Constitutional Court. Most of the cases were decided in line with the democratic consolidation. In the case of 2009 Parliamentary Election last April, 2009, there were also hundreds of cases handled by the Constitutional Court and have decided in July, 2009. All cases successfully decided. These decisions have avoided the violation resulting from general election disputes.

Generally, since its establishment in 2003, the Constitutional Court has been doing well their authorities and contributing progresses in human rights and democracy in Indonesia. In the law making process, the Constitutional Court has controlled the constitutionality of the laws enacted by the legislative institutions which are not in line with or contradictory to the constitution. Moreover, the law making is not only a matter of law making legally or constitutionally but also should be democratically. Based on the decisions have been decided by the Constitutional Court of Indonesia, the Court have played the role as the guardian of the

constitution, the balancing power in a majoritarian democracy, protector of the citizens' constitutional rights, the final interpreter of the constitution, and balancing agent in the "*checks and balances*" mechanism among state institutions. These contributions, amid the problems encountered during the transitional period in the last ten years, have been strengthening democratic consolidation.