

Guarding Constitution of Indonesia through the Court

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I. Introduction

Since third amendment of Undang-Undang Dasar 1945 (The Republic of Indonesia Constitution) in 2001, Indonesia has established The Constitutional Court that shall possess the authority to try a case at final and binding 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 the constitution, deciding over the dissolution of a political party, and deciding over disputes on the results of a general election. Based on article 24 C sub article (2), The Constitutional Court also possess the authority to issues a decision over a position concerning alleged violation by the President and/or the vice President as provided by the constitution.

The idea to have an institution in charge of constitutional jurisdiction is by no means a new one in Indonesia. In fact, it had already been debated as early as 1945 when the founding fathers of the new republic were drafting the 1945 constitution. The concept of a Supreme Court vested with powers of judicial review was proposed by Muhammad Yamin, himself a strong advocate of democracy, rule of law and human rights protection. Judicial review authority for the Supreme Court would clearly have strengthened the principle of separation powers, the very idea, however, did not fit into the integralist concept of state promoted by prominent constitutional law expert Raden Soepomo, who consequently rejected it. The authors of the original 1945 Constitution decided against judicial review authority. But the new idea was kept alive, it was brought up ever now and again, in the 1970s, for example, by the Indonesian Judges Association (IKAHI) and in the 1980's by the Indonesian Lawyer's Association (PERADIN).¹

Formally, it can be significantly proposed to establish the institution which has the power to guard the constructions into the period as follows:

The first wave occurred in the Session of the BPUPK in 1945 when this institution arranged a draft of the Constitution for the state.² In this BPUPK session, Yamin, a member, proposed this draft. However, other members, including Soepomo, rejected this draft of the Constitution which was arranged by the BPUPK and taken over by and legalized by PPKI (Committee for the Preparation of Indonesian Independence) on 18 August 1945 as the proclamation constitution, did not attach the authority of the Constitutional Court to verify laws.³ The legislators of the 1949 RIS Constitution and 1950 UUDS (1950 Provisional Constitution) seemed to follow the idea

¹ Petra Stockmann, *The new Indonesian Constitutional Court*, Hans Seidel Foundation, Jakarta, 2007

of the founders and drafters of the 1945 Constitution and rejected the judicial authority to verify laws.

The second wave occurred when the Constituent Assembly elected at the 1955 General Election held their sessions during the period from 1957 to 1958 in order to arrange and draft a new Constitution as the replacement for the 1950 UUDS. The session held by the Constituent Assembly approved a Constitutional Court to hold the authority for verifying laws and governmental actions by employing the 1945 Constitution as the benchmark for determining validity of laws and actions. Yet, it was canceled because President Soekarno, through the Presidential Decree dated 5 July 1959 re-enacted the Proclamation Constitution of 17 August 1945 and dissolved the Constituent Assembly. This decree was deemed to have re-enacted the 1945 Constitution which clearly did not allow for a Constitutional Court to verify laws and governmental regulations or actions.

The third wave occurred at the beginning of the New Order administration (1965-1970) and reached its culmination in 1970 when the DPR-GR together with the Government discussed Law No. 14 of 1970 regarding the Principles of Judicial Authority as the replacement for Law No. 19 of 1964.⁴ After 1970, until the collapse of the authoritarian regime of Soeharto in 1998, the debate regarding the issue of a Constitutional Court was not only on the back-burner but had largely been forgotten as an issue at all. The People's Consultative Assembly elected at General Elections in the New Order era did not change its stance on this issue in spite of the growing.²

A window of opportunity for constitutional jurisdiction opened in the ensuing *era reformasi* (reformation age), after the fall of Soeharto. NGO's still had it on their agenda for democratization and judicial reform. Members of the MPR (the People's Consultative Assembly), in charge of constitutional amendment became aware that several states had recently introduced constitutional jurisdiction into their system of government, among others Thailand and South Korea. Study tours abroad seem to have further strengthened their conviction that constitutional jurisdiction was an important element in a system that was based on separation rather than integration of powers. By August, 13, 2003, The Constitutional Court of Republic of Indonesia had been established which has 9 judges who elected by Parliament (3 judges), President (3 judges) and Supreme Court (3 judges). Then, recently, the first generation of judge had been replaced by the new judges, some of the incumbents are still in the position.

2. The Idea of The Establishment Behind The Constitutional Court

The idea of establishment of a Constitutional Court is discussed in two parts, namely: the idea of Constitutionalism and the authority of the Constitutional Court.

² Benny K. Harman, THE ROLE OF THE CONSTITUTIONAL COURT IN INDONESIAN LEGAL REFORM, Gramedia, Jakarta, 2006

1. Constitutionalism

The establishment of a Constitutional Court in each country is triggered for a variety of reasons, however in general, the establishment of a Constitutional Court is initiated by a process of political change from authoritarian power into democracy. The rejection of authoritarianism has an impact on the demand for a democratic state administration which appreciates human rights.²⁰ Likewise, for the establishment of the Constitutional Court in Indonesia. Basically, the establishment of the Constitutional Court may not be separated from the past experiences in the administration of the authoritarian regime, essentially a closed power that does not respect human rights. The idea of establishing the Constitutional Court is motivated by a desire to have better administration of authority and state administration. There are at least four triggers for the foundation of a Constitutional Court; namely, (1) as a development of the constitutionalism concept, (2) a checks and balances mechanism; (3) clean and transparent state administration, and 4) protection for human rights.

The Concept of Constitutionalism is a concept that seeks to provide a limitation on authority. This concept has two elements. The first element is the concept of a legal state where the legal power universally controls the state's authority, and in this respect, the law performs as a control of politics. The second element is the concept of citizen civil rights or the stating that the freedom of citizens is guaranteed by the constitution and the state's authority is limited by the constitution, and this authority must be legitimized by the constitution.²¹ Institutionalization of the Constitutional Court is the implementation of the constitutionalism concept, demanding the existence of power limitations and this institution obtains a mandate from the constitution to settle the problems relating to the constitution and state administration.

2. Checks and Balances Mechanism

One of the characteristics of a proper governmental system is the existence of a checks and balances mechanism in the implementation of authority. The existence of this checks and balances mechanism will enable the mutual control between the existing branches of authority while endeavoring to prevent hegemonic, tyrannical actions, and the centralization of authority. The implementation of the checks and balances principle is required to ensure that there is no overlap among the existing authorities. By referring to the principle of a legal state, then the relevant control system is judicial control. The position of the Constitutional Court as a part of the judicial authority (judicative authority), will encourage the development of the checks and balances mechanism in state administration.

3. Clean and Good Government

A proper governmental system necessitates the existence of clean, transparent, and participative state administration. The Constitutional Court is an authority which may be positioned to perform this type of accountability control against public officials in the

performance of their duties and functions, in this sense there will always be a reference to the morality and the interest of citizens.

4. Protection of Human Rights

Unlimited authority frequently leads to the performance of arbitrary actions in state administration and violations of human rights. The Constitutional Court is a branch of authority which functions to maintain state administration in order that it always refers to democratic principles as well as respecting and protecting human rights.

Recent Development

Now, The Constitutional Court entered the sixth year of its existence. Its role in the Indonesian state administration system has been gaining increasingly recognition and position, particularly with respect to the *check and balances* mechanism. The intensive efforts to introduce the duties and authorities of the constitutional court to strategic community groups have also supported the process of institutional enhancement which is reasonably acceptable among the people and the nation.

During the period from 2005 to 2006, the Constitutional Court has issued decisions on a number of petitions deemed to be significant in affecting the constitutionalism concept in the Indonesian state administration system. Some officials have even reacted to them in amazement. The role of the Constitutional Court in the checks and balances mechanism of the Indonesian state administration system is reflected in the ratio of the number of legislators directly elected by the people to the nine constitutional judges elected by the People's Legislative Assembly (DPR), which reflects how powerful the Constitutional Court is. Therefore, in the preliminary stage towards a consolidated democracy, where violations of the constitution are rampant, the Constitutional Court can play an important role in consolidated democracy and can improve political stability by opening itself and demonstrating a high level of patience as well as by conducting dialogue and socialization

Decision on the 2005 National Revenues and Expenditures Budget (APBN)

The national revenues and expenditures budget, stipulated annually by law, is in fact a calculation of state revenues and expenditures for a particular year. The revenues and expenditures accounts are calculated in a plan prepared based on a particular priority scale. However, it is explicitly provided for in article 31 paragraph (4) of the 1945 Constitution that the state shall prioritize budgets for the educational sector amounting to at least twenty percent of the state revenues and expenditures budget as well as of the regional revenues and expenditures budget, to fulfill the needs for national education. Although the APBN in fact only contains the plan or estimates of the state revenues and expenditures budget with

expenditures accounts, such estimates and plan must be included in law as an attachment, which constitutes an inseparable part of the law, and as such in accordance with article 24C paragraph (1) of the 1945 Constitution the said law can be tested against the 1945 Constitution. Decision of the Constitutional Court No. 26/PUU-III/2005 dated March 22,2006, filed by the Association of Indonesian Teachers (PGRI) and Indonesian Educationalists' Association (ISPI) in its consideration state the following: "...considering the importance of education for the Indonesian nation, it shall not be considered merely as citizens' right, in fact, the 1945 Constitution sees the necessity to determine basic education as citizen's obligation. In order to fulfill the citizens' obligation, the 1945 Constitution in its article 31 paragraph (2) obligates the government to finance it. From the perspective of human rights, the right to obtain education is one of the human rights in addition to civil and political rights, including social, economic and cultural rights. The state's obligation to respect and to fulfill the social, economic ,cultural rights is an obligation to results and not an obligation to conduct as in civil and political rights. The state's obligation in the sense of "Obligation to results" is fulfilled if the state has utilized the maximum available resources in good faith and has performed progressive realization".

The Constitutional Court regards human rights to obtain education as an aspiration; therefore it is understandable if the constitutional order in article 31 paragraph (4) is not fully and immediately fulfilled at once, insofar as it is performed in good faith. The Court has even avoided total confrontation in with the Government and the DPR by not declaring the Law on 2005 APBN unconstitutional in its entirety and by providing only limited legal consequences of the unconstitutionality of the national budget law, by declaring only the education account in the budget for the fiscal year of 2005 nonbinding insofar as it is related to the designated highest limit. This means that the Court has ordered the revision of the education budget in the current year by conducting fund reallocation and seeking efficiency in the expenditure accounts for other sector with the aim of increasing the education budget in order to comply with the Constitutional order. The state revenues and expenditures plan in the aforementioned APBN law remains applicable, and confusion in the implementation of the state administration is avoided as much as possible.

Decision on Anticorruption Law

The decision of the Constitutional Court (MK) that has invited the greatest opposition from anticorruption NGOs, the staff of the attorney general's office and the Corruption Eradication Commission (KPK), is the decision to delete the phrase "material unlawfulness" in the elucidation of the article 2 paragraph (1) of law no.31 year 1999 regarding the eradication of crimes. The corruption eradication movement which has become an important agenda item of the present government and KPK, having tremendous authorities as extraordinary measures deviating from the criminal procedure law applicable for the prosecutors and the police, has created a new constitutional problem in comparison to the handling of cases by the attorney general's office and the police. However, the concept or unlawfulness material or substantive law serving as a basis to take legal actions against corruption crimes has remained, namely Law Number 31 year 1999 as amended with law Number 20 year 2001. Upon the request of a defendant whose case being examined by a District Court, the Constitutional Court has granted

the request by annulling the first sentence of the elucidation of article 2 paragraph (1) of the aforementioned Anticorruption Law, which reads as follows:

“Referred to as unlawful in this article shall include unlawfulness both in the formal and material sense, namely even though an act is not regulated in laws and regulations, but it is considered improper because it is not in accordance with the sense of justice or the social norms in the community, such act may be subject to criminal punishment”.

Corruption as intended in article 2 paragraph (1) is an unlawful act that, as in the explanation, can occur not only in violation of the formal law, namely violations to written laws and regulations, but also in violation of material laws because such act is considered improper and disgraceful. In other words, such act is deemed as violating non-formal regulations in the form of custom, and the sense of decency and justice that is adhered to in the community.

Decision on the Judicial Commission

The third amendment to the 1945 Constitution includes the idea of checks and balances by establishing a Constitutional Court, in addition to the Supreme Court, as the exerciser of judicial authority with limited duties, as an institution. With such limited authorities, the Constitutional Court is authorized, among other things, to substantiate the constitutionality of laws and to decide on disputes among state institutions which obtain their authorities from the 1945 Constitution. However, in the same chapter, a new institution is also formed to recruit candidates for Supreme Court justices and to oversee the conduct of judges. The new institution is called Judicial Commission (KY). It is expressly set forth in article 24 paragraph (1) of the 1945 Constitution that the exercisers of judicial authority are the Supreme Court and the Constitutional Court, whereas KY is not included as the exerciser of judicial authority. However, chapter IX regarding judicial authority also provides for KY. According to the original intent of the reformers of the Constitution, the idea for the formation of KY emerges due to the rampant deviations committed by judges, requiring oversight by an external constitutional institution. Such external oversight, in the formulation of the Constitution, is in fact stated in the sentence “to maintain and preserve the honor, dignity, and conduct of judges”. KY interprets that such external supervision can only be performed properly by examining the implementation of judicial authority in deciding cases, in evaluating whether or not there is a violation contradictory to the code of ethics, honor, and dignity of judges. In implementing such supervision, KY has summoned judges trying or making decisions on cases by examining the examining methods and the decisions made and then assessing the aforementioned decisions. Supreme Court justices were of the opinion that this violates the independence of judges and even degrades their dignity. Therefore, 32 Supreme Court justices filed a petition for judicial review on the judicial Commission Law concerning the oversight conducted, which was deemed to violate the 1945 Constitution. The main point of the petition filed by the 32 Supreme Court justices is the request for the exclusion of Supreme Court justices as an object of KY’s supervision of Supreme Court justices be declared unconstitutional. In that Constitutional judges be included as an object of KY’s supervision.

Conclusion

The presence of a Constitutional Court in a new democracy, as an institution needed to strengthen and protect human right in a transitional period, requires a prudent and intelligent approach to avoid confrontations which are highly detrimental to the strengthening of its existence. MK must consider the opposition voiced by politicians and other state administrators who do not accept MK' s decisions so as not to relapse to the condition similar to the one prior to the reform era. Institutional strengthening by applying natural methods requires strategic approaches to certain cases, which are not only based on populist opinions. The progress made by the Indonesian Constitutional Court in the last three years has been remarkable, yet also caused a concern for many people and politicians. Such condition must be addressed prudently by the judge of the Constitutional Court.. Prudence is needed to avoid being trapped in compliments and to carry out the action plan to gain public opinion that is favorable for the achievement of a consolidated democracy through the existence of MK, which serves as the checks and balances mechanism in a sound state administration system.