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三三七(一七〇七)

Constitutional Court of Indonesia

By Azhar*

I. Introduction

After more than 50 years the official conviction that regard separation of powers was not a system that we wanted as a way to govern the country, experience has taught us that eventually we come to believe that power is something untrustworthy and tend to corrupt that needs to be checked and controlled. Only after a series of amendments of the 1945 Constitution, as a respond to public clamor for reform that we adopted a constitutional control mechanism through the establishment of a constitutional court.¹ Even though its jurisdiction is seen quite limited, it brings significant changes in the setting up and organization of State's functions in a system of checks and balances.

With the establishment of the constitutional court within the system as part of the judicative power, and by the swearing in of 9 Justices of the Constitutional Court on August 16, 2003, Judicial Control based on the Constitution is now officially in place. Transitional period, after the amendment that adopted the Constitutional Court system up to the time that the 9 Justices took oath in August 16 2003, its function in adjudicating constitutional cases temporarily

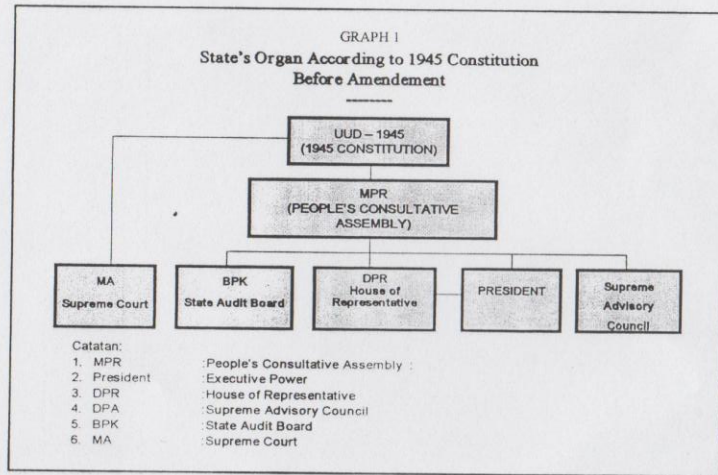
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conducted by the Supreme Court will be transferred to the CC, including pending cases that have been filed and registered in the Supreme Court within 60 days after the establishment of the CC. Its establishment signifies a new era in Constitutionalism and supremacy of law, at least for the time being in form if not in the real process. A system of checks and balances between the Legislative, the Executive and the Judicative power is already in place.

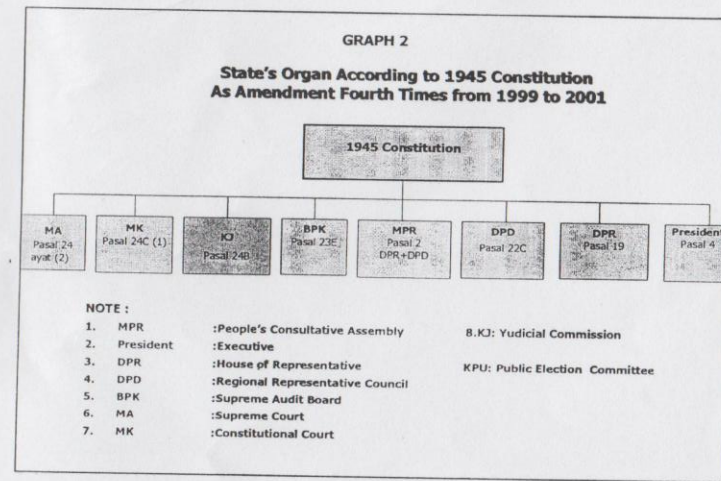
II. Amendments of the 1945 Constitution.

After the fall of the new-order regime in 1998 prompted by the economic crisis, demands to make reforms in all fields of life were responded among others by the amendments of the 1945 Constitution, from the first one in 1999 to the fourth in 2001

The characteristics of the 1945 constitution prior to amendment, which had always been accentuated was that the constitution provided and guaranteed a strong and stable Executive/Presidency, with large authority. Later practice had also enlarged the President's authority by the issuance of the People's assembly's decree empowering the President as the mandate holder of the People's Assembly. Prior to amendment, People's Assembly was the highest State's organ that holds sovereignty. The formulation that the President was the holder of mandate from the assembly developed the scope of power in a way that came almost beyond control. Notwithstanding the general elucidation provided that Indonesia is a State based on Rule of Law not on power (*rechtstaat*) and the Power of the President was not without limit, the absence of checks and balances due to the weaknesses of the legislative and the judicative, that were unable to exercise control over the Executive, made the President very powerful (graph1).



Reforms in the system through the amendments of the 1945 Constitution has brought a very significant changes in constitutional process, especially by stripping off the formula that People's Assembly was the realization of State sovereignty and as the highest State's organ.² The President was also no longer the holder of the People's Assembly. The sovereignty has been returned to the people by direct general election of the President and/or Vice President. House of Representative has also been empowered further in budgeting, legislating and controlling function. The last mechanism of Checks and Balances in the form of constitutional control both over the Executive and Legislative power as well, has been adopted by the establishment of the Constitutional Court as part of the judicial control already implemented previously by the Supreme Court (graph2).



III. The Position of the Constitutional Court and Its Jurisdiction.

Constitutional Court as part of the judicial control, base its judgment on the principles and values contained in the Constitution, as the basic norm (*grundnorm*) at the top of the hierarchy. It has an important role in the efforts to uphold the Constitution and the Supremacy of law in accordance with its competence and jurisdiction. Its main function is to adjudicate constitutional cases in the framework of guarding the Constitution. So that it will be implemented responsibly according to the will of the people and ideals of democracy. Its existence is also expected to be able to safeguard a stable administration of government in the country.

From its title or name that explicitly stipulated in the Constitution, and from the description of its authority or jurisdiction in articles 24(2) and 24C of the Constitution, one can conclude that the Constitutional Court carries out constitutional control through the

adjudication of subject-matters that fall within its jurisdiction. It implements the principle of check and balance by treating other branch of power and organ equally. Its establishment must also be seen as a process of reciprocal control over the performances of the other branches of power. But as we may find later it is unclear how to control the CC and how its accountability will take form.

As part of judicial power, its independence is guaranteed under article 24 (1) of the Constitution, and no one or no institution can exert its influence over the CC inappropriately in implementing its duty. It must be free from outside directives. On the other hand, Justices of the CC are also committed to the general principles accepted universally in implementing an independent judicial process i.e. among others, the principle of impartiality or neutrality, equal treatment and nondiscrimination.

IV. Safeguards of The Judiciary.

Safeguards of the judiciary are provided in general terms under the constitution, among others are:

- a. CC justices can only be investigated, arrested and detained under the order of the Attorney General after obtaining permit from the President, except if get caught red-handed in the act of a crime being sanctioned with death penalty, and/or a crime against the State (Art.6(1)(2) Act no.24/2003)³.
- b. The CC is authorized to regulate its own organization and administration.
- c. The Budget of The CC is managed independently and borne by the national budget
- d. It is authorized to fill the lacunae in the law of procedure by granting the CC a rule making power.

- e. Tenure of 5 years and can be elected for another 5 years term if eligible.

Other safeguard that may be seen as personal is the system of remuneration or income that gives security in exercising his duty, which is not mentioned in the law, except by stating that CC Justices are State's official with protocol and financial rights regulated in accordance with rules and regulation provided in Act on of State's official (art.5, 6(1)). But there is no guarantee of justice except the integrity of the Justice itself. I think the Legislature realized it as well that it is reflected in the qualification and eligibility of the Justices to be recruited. They are required to posse's integrity and personality without flaw, a man with statesmanship that master constitutional law and also does not assume concurrent responsibility. (Art.24C(5) 1945 Constitution) Act no 24/2003 provided additional qualification and eligibility, such as minimum age of 40 years, and no conviction of committing a crime sanctioned up to a 5 years imprisonment, and also not being declared bankrupt. These qualifications themselves, if correctly possessed by the Justices are ideal safeguards that can guarantee independence and impartiality of the CC.

V. Jurisdiction of The Constitutional Court

Constitutional Court is competent to adjudicate in the first and final instance, cases that are brought before it, and they are:

- a. Review of the constitutionality of a law;
- b. Dispute over the authority of the State's organ conferred upon by the Constitution;
- c. Dispute over the dissolution of Political party;
- d. Dispute over the result of general election;

e. Dispute over the opinion of the House of Representatives that the President and/or Vice-President is being presumed to have committed violation of the law i.e. treason, corruption, bribery, other serious crime or disgraceful deeds, and/or being no more eligible to be President and/or Vice President as stipulated under the 1945 Constitution.

All subject-matters mentioned above are legal disputes that have to be heard, adjudicated and decided by the Constitutional Court (CC), and its decision is final once it has been pronounced in open trial. The decision is final, since there is no more appeal or review possible in the system and the decision becomes binding. It is worth mentioning here, that there are also arguments or opinion among colleagues, that for the last mentioned subject-matter under the jurisdiction of the Constitutional Court, the decision is not final in that it is still to be considered and decided by the People's assembly in a majority of 2/3 votes out of 3/4 present members. I personally believe that as a judicial decision of the CC it is final in terms of the inexistence of appeal and review. But the process in the people's assembly is another matter which is political in nature, and as far as the legal process is concerned, it is already final. Enforcement in this cases whether to execute or not depends very much upon the political process and consideration which is beyond the competence of the CC.

a. Judicial Review on the Constitutionality of A Law.

One aspect of the constitutionality of the provision of article 50 Act no.24/2003, which limits the subject matter (acts) to be reviewed only to Acts or law enacted after the first amendment in 1999, has become a controversy in itself. The limitation is without clear legal reasoning and also shows inconsistencies with the principles of non-discrimination as well as other fundamental rights and freedom

of the people protected by the Constitution. That article is debatable and subject to review as controllable norm.

Despite the adversary nature of the adjudication in the procedural law of the CC which is inferred from the obligation to summon and to hear the defendant in order for the CC to obtain sufficient information and data, the mechanism of judicial review is triggered by a petition-which in Indonesian Civil procedural law indicates no contest-filed by:

1. Individual(s) citizen of Indonesia;
2. Adat-law community as far as it is a living reality and consistent with the development and principle of Unitary State of The Republic of Indonesia;
3. Public as well as Private Corporation;
4. State's Organ or institution.

The petition shall explain in detail the infringed rights of the individual or the constitutional authority of the State's Institution which is being decreased or damaged by the enactment of an Act or law. The CC will base its review on the constitutionality of a law on two grounds:

1. Required formality on the formation of the law;
2. The consistencies of the act and/or part of the Act to the values and principles in the Constitution.

The first ground of the review will concern on whether the required formality has been fulfilled and the Act being reviewed is a product of competent and authorized organ. The second ground will be based on a question whether or not the substance of the law are consistent with the values and principles contained in the constitution as legal ideals of the people in the objective of their will to create a State. If the Act or law at hand contains values and provisions

inconsistent with the values and principles in the Constitution or deviate from the legal ideals of the people contained in the Constitution, irrespective its correct formality, that law or act is to be declared unconstitutional and void. The ruling can partially nullify the reviewed act with respect to certain articles or part of the Act as well as nullify the Act in complete form which makes it loses its binding force.

b. Dispute over the authority of State's organ conferred upon by the Constitution.

The petitioner that has legal standing in such a dispute is the State's institution that derives its authority from the Constitution and has direct interest in the disputed authority. Supreme Court is being excluded from this category.

c. Dissolution of Political Party.

The petitioner that has legal standing in such a case is the Government i.e. Department of Justice, which bases its petition on ground that ideology, principles, programs and activities of a certain political party contravenes the 1945 Constitution of the Republic of Indonesia. If the petition is accepted and the judgment of the court declared the political party's ideology, principles, activities and program indeed contravene the Constitution, the political party will be declared dissolved and the Government will nullify its registration.

d. Dispute over the Result of General Election.

Petition will be filed by individual candidate of Regional Representative Council, the pair of candidate for Presidency/Vice Presidency and Political Party that takes part in the general election. The petition is filed only in effort to challenge the decision of the General election Committee (KPU) on the result of national general election that influences the determination of the Candidate elect, and

the number of seat obtained by a Political Party as participant of the General election. The petitioner shall have to explain and show the mistake of the vote computation conducted by The General Election committee (KPU) and the correct computation according to the Petitioner, to be declared by the CC.

e. Dispute over the Opinion of the House of Representative that the President/Vice President is being presumed to have committed Law violation.

This kind of dispute that may arise before the CC is perhaps a kind of dispute that all parties would like to avoid, since it may create a constitutional crisis and the presumed violation is being reached only with challenge and respond from the Party involved. The presumed violation stipulated in the act is State treason, corruption, bribery and other serious crime and also the status of becoming no more qualified to be President/Vice President according to article 6 1945 Constitution. Article 10(2) Act no 24/2003 gives definition of the violation involved. But some of them especially disgraceful deeds by the President/Vice President are not clear enough by saying that disgraceful deed is conduct that may humiliate or hurt the dignity of the Presidency/Vice Presidency. The more or less similar problem we can encounter in interpreting conditions that indicate that the President/Vice President is losing eligibility as stipulated in Article 6 of the Constitution, especially the mental ability to run the Presidency/Vice-Presidency. Debate during the process of amending the constitution that we could follow and information 1 hat we could gather from member of Ad Hoc Committee assigned to formulate the amendment, the idea they had in mind during discussing this provision was impeachment that is found in the US Constitution. But perhaps euphemism that prevailed produced a category that may

be accepted by all parties, and the legislature ended up in a category of Opinion instead of Charges or Indictment. Nevertheless the Opinion of the House being presented to the CC is basically a legal dispute containing charges or indictment that the President/Vice President is presumed to have committed violation of Law. The House is to prove the opinion or the charges with evidence before the CC. The President/Vice President has certainly the right to be heard and to defend him/herself before the CC renders judgment as to whether He/She is guilty of the charges. In that situation it is irrelevant to distinguish the Opinion of the House from a Charge or indictment.

VI. Procedural Principles.

The CC hears, adjudicates and decides Constitutional dispute under its Jurisdiction. And as such, there is certainly a law of procedure regulating the process. But a question is whether the CC has a procedural law independent of other procedural law such as we have in Criminal, Civil as well as Administrative cases. Act no.24/2003, prescribes provisions on Constitutional procedure which are consistent with principles of any procedural law in general. The Principles applicable and relevant to procedural law in Constitutional cases are among others⁴:

1. Trial open to Public;
2. The right of the parties to be heard;
3. Trial conducted in a simple and speedy process;
4. Equal treatment and non discrimination;
5. Decision has to contain facts obtain from court session and legal consideration.

These principles are being applied also in other field of procedural law, whether Criminal, Civil or Administrative. But perhaps due to specific character of Constitutional dispute, these provisions in Act no 24/2003 are far from sufficient. To fill the gap in procedural law of the CC, the law has stipulated that the CC may regulate the process further with its rule making power in order to implement the exercise of its duty properly.

VII. The Decision of The CC.

Decision making in the CC has a resemblance with decision making in Criminal process in that it makes reference to personal conviction of the Justice based on sufficient and legally obtained evidence submitted to the Court, at least two evidences to corroborate the Petitioner's claim. There are 5 (five) basic parts a CC decision shall contain:

1. Identity of the Parties;
2. Summary of the Petition;
3. Facts as found by the Court through hearing;
4. Legal consideration or legal reasoning;
5. Dictum of the decision.

Decision is being reached through deliberation by the plenary session of the CC, but the hearing can be conducted by a panel of 3(three) Justices. The plenary session of the Justices will try to reach a decision first by attempting through a consensus. If Plenary session can not reach a decision by consensus, deliberation is adjourned till the next plenary session. If Plenary meeting does not reach a decision by consensus after the last one, the majority vote will prevail. But in case plenary meeting does no reach a majority vote,

then the final vote of the chief Justice will be a decisive vote. Dissenting opinion of the member Justice will also be incorporated in the decision. The decision of the CC has a binding force, ever since the CC has pronounced the decision in an open trial, except that in impeachment cases it is still subjected to further process in the People's assembly session. In general all the CC decisions are declaratory in nature, whether it is merely on process matters or on the merit of the case.

All decisions of the CC must be communicated to parties to the Case, especially decision that declare the reviewed Acts-whether partially or completely-null and void and has no longer any binding force, the nullified Act must be published in the State's Gazette within 30 days after its pronouncement. Decision of the CC which is already final after its pronouncement, need not be executed like decision of the Court in Civil as well administrative cases. But decision of the CC on judicial review that nullify an Act or part of it, the CC does not possess coercive power to enforce obedience from the relevant State's organ. Control to secure obedience will come from the public either in the form of public opinion, legal claim or the voters' decision on the next general election.

Conclusion

The Constitutional Court was established in August 2003 as the result of reformation of the people, especially students struggle for democracy in 1998. The Constitutional Court as a new institution with constitutional power in a mechanism of checks and balances, with inexperienced Justices that operate the system prompted many people to doubt the success of this system. This doubt stems from the lack of public trust toward any public institution nowadays. In

short, the establishment of the Indonesian constitutional Court has been successful so far. It made people realize that the constitution is not simply a decorative document. The success owes a lot of to the newly-adopted independent constitutional court system including the constitutional complaint. But it will depend on how strong the determination that the Justices of the Constitutional Court have. Indonesia Constitutional court is facing some challenges such a lack of experience and any attempt to influence the Court's decision from the political and social power which would common to all that runs any new system and threaten the independence of the court. These can be overcome by working hard, learning the knowledge and experience of others who have previously adopted the system a head of us. We have begun the learning process by taking part in comparative study, seminar, and try to take advantage of experience and skill available.

Note

- ¹ Rahardjo Satjipto. 1994. *Between Two Worlds: Modern State and Traditional Society in Indonesia*. *Law & Society Review* 28(3):500-501.
- ² Budiardjo, Ali. Nugroho.; Reksodipuro.; Muchtar.; Karuwin.1999. *Reformasi Hukum di Indonesia [Law Reform in Indonesia]*. Jakarta: Cyberconsult.
- ³ Indonesia 5
- ⁴ Indonesia 6

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(In the Sapporo Gakuin University graduate school on December 17, 2004)

法の効力について (鈴木 敬夫)

四四 (三九四)

し、これが「法的な諸規範が遂行されるまでの重要な保証として作用する」ことを認めている。(a.o., S.335) 「一般的承認説」の評価については「その他」、Welzel, *An den Grenzen des Rechts (Die Frage nach der Rechtsgiltung)*, 1966, S.10ff; Hans-Ludwig Schreiber, *Der Begriff der Rechtspflicht*, 1966, S.105ff.などを参照。

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