

CONSTITUTIONAL COURT AND CONSTITUTIONAL DEMOCRACY IN INDONESIA

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Abstract

The constitution is the embodiment of the conception of the rule of law both *Rechtsstaat* and The Rule Of Law, where the state is not only based on power alone (absolutism/*machtstaat*), but is based on law, symbolized in a constitution. Therefore, the constitution must always be guarded and guarded, because all forms of deviation of power, both by holders of power and the rule of law under the constitution against the constitution, are a form of denial of popular sovereignty. The constitutional court as the guardian and sole interpreter of constitution has a very strategic role in the implementation of constitutional democracy in Indonesia. There are two things from the results of the analysis carried out: First, the substance of constitutional democracy is a government that has limited power and is not justified in acting arbitrarily against its citizens. Restrictions on government power are contained in the constitution or in other laws and regulations. Second, the role of the Constitutional Court in maintaining the implementation of constitutional democracy in Indonesia can be seen from its authority which is able to guarantee the implementation of the constitutional rights of citizens from the substance of the law that contradicts the 1945 Constitution, and in maintaining the principle of checks and balances between governmental powers, in order to achieve stability in government and the principles of constitutional democracy in Indonesia.

Keywords: Constitution, constitutional, democracy, sovereignty, people.

1. Introduction

Democracy has become a highly respected term in the history of human thought about an ideal socio-political order. In modern times, almost all countries adhere to the sovereignty of the people in their constitution and claim to be adherents of constitutional democracy. The constitution is closely related to the democratic system adopted by a country.

Almost all modern countries have a Constitution (except for a few countries like Britain, Israel, Saudi Arabia and some more). Even though it has a Constitution, there are no countries that have the same Constitution. Differences occur due to various factors such as the form of the state, the form of government, the history of the country, the ideals of the state, including ideological differences in the political, economic, social and other fields.¹

The Constitution contains a fundamental rule regarding the first joints to establish a large building called the state. The joints must of course be sturdy, strong and not easily collapsed so that the state building remains upright.² The constitution is the main legal basis that must be owned by a country to legitimize itself as a rule of law. The constitution is the embodiment of the legal state conception of both *Rechtsstaat* and The Rule Of Law, where the state is not only based on power alone (absolutism/*machtstaat*), but is based on law, which is embodied at the same time symbolized in a constitution, as a form of social contract of citizens with the state. The constitution is a form of the sovereignty of the people to the state, through the constitution of the people, giving up part of their rights to the state. Therefore, the constitution must always be guarded and guarded, because all forms of deviation of power, both by holders of power and the rule of law under the constitution against the constitution, are a form of denial of popular sovereignty.

In the context of constitutional democracy, there are characteristics, namely a government whose power is limited and not enforced to act arbitrarily against the people. These restrictions are stated in the constitution. In a

¹ Jimly Asshiddiqie, Bagir Manan et al, *Gagasan Amandemen UUD 1945 dan Pemilihan Presiden Secara Langsung/The Idea of the 1945 Constitution Amendment and the Direct Presidential Election*, (Jakarta: Setjen & Kepaniteraan MKRI, 2006), 2.

² Mirza Nasution, *Negara dan Konstitusi/State and Constitution*, (Medan: FH USU, 2004), 2.

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constitutional democratic system, state power is in the hands of the people. The power holder is limited by the constitution so that it does not violate the human rights of the people.³

The 1945 Constitution of the Republic of Indonesia affirms that sovereignty is in the hands of the people and carried out according to the Constitution. It was also emphasized that the Indonesian state was a legal state. In line with the above constitutional principles, one of the important substances of the amendment to the 1945 Constitution of the Republic of Indonesia is the existence of the Constitutional Court as a state institution that functions to handle certain cases in the state administration, in order to maintain the constitution to be carried out responsibly in accordance with the will of the people and the ideals of democracy. The existence of the Constitutional Court is at the same time to maintain the implementation of a stable state government, and is also a correction to the experience of constitutional life in the past caused by multiple interpretations of the constitution.⁴

The Constitutional Court (MK) maintains that checks and balances occur in the branches of state power. The Constitutional Court is also often referred to as constitutional judiciary, namely the state organ that has the authority to resolve legal disputes based on the constitution. The Constitutional Court is one of the pillars of constitutional democracy, meaning that democracy is carried out with the aim of realizing the rule of law, namely: justice, order, independence and freedom, and prosperity and welfare.⁵

Constitutional authority of the Constitutional Court in implementing the principle of checks and balances that places all state institutions in equal position so that there is a balance in the administration of the state. The existence of the Constitutional Court is a concrete step to be able to correct each other's performance between state institutions and maintain the implementation of constitutional democracy. Based on the description above, the aim of this paper is

³ Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara/ Constitutional Testing Models in Various Countries*, (Jakarta: Konstitusi Press, 2005), 8-9.

⁴ General explanation of Law Number 24 of 2003 on the Constitutional Court.

⁵ Ibid.

to analyze the role of the Constitutional Court in the implementation of constitutional democracy in Indonesia.

2. Analysis and Discussion

2.1. Constitutional Democracy

Democracy comes from Greek, which is *demos* which means people (people) and *cratos* which means government or rule. Democracy means the meaning of a political system in which the people hold the highest power, not the power by the king or the nobility. The concept of democracy has long been debated. In ancient Greece, democracy as an idea and political order was the concern of state thinkers. Some are pro and some are contra. Plato and Aristotle did not really believe in democracy and put democracy in a bad form of government. This famous philosopher believes in monarchies, whose rulers are wise and pay attention to the fate of their people.⁶

Etymologically, democracy (*democratie*) is the highest form of government or state power, where the highest source of power is the power of the people gathered through an assembly called the People's Consultative Assembly (*die gesamte staatsgewalt liegt allein bei der majelis*). While Sri Soemantri defines Indonesian democracy in terms of formal (indirect democracy) as a democracy in which the implementation of popular sovereignty is not carried out directly by the people but through representative institutions such as the DPR and MPR, and democracy in the sense of life according to Sri Soemantri is democracy as a philosophy of life (democracy in philosophy).⁷

According to Miriam Budiardjo, basically democracy is divided into two streams, namely constitutional democracy and democracy which bases itself on the teachings of communism.⁸ Characteristic of constitutional democracy is a government that has limited power and is not justified in acting arbitrarily against its citizens. Restrictions on government power are contained

⁶ Mahfud MD, et.all, *Wacana Politik dan Demokrasi Indonesia/Indonesian Political and Democratic Discourse*, (Yogyakarta: Pustaka Pelajar, 1999). 65.

⁷ Sri Soemantri, *Perbandingan Antar Hukum Tata Negara/Comparison between Constitutional Laws*, (Bandung: Alumni, 1971), 26.

⁸ Miriam Budiardjo, *Dasar-Dasar Ilmu Politik/Basics of Political Science*, (Jakarta: PT Gramedia Pustaka Utama, 2002), 55.

in the constitution or in other laws and regulations. Therefore, it is often called constitutional government.⁹

Constitutional democracy that grows and develops rapidly in Indonesia requires the harmonization of theories and knowledge possessed by all components of the nation with the forms and implementation of existing democratic principles, including the issue of General Election. The application of this principle is expected to create a constitutional life order that runs in full balance towards the goal of the Unitary Republic of Indonesia, namely the creation of a just and prosperous society based on Pancasila and the 1945 Constitution.¹⁰

Constitutional democracy, which is also called democracy under the rule of law, has basic requirements for carrying out democratic governance. These conditions according to the International Commission of Jurists (1965) are:¹¹

- 1) Constitutional protection (guaranteeing individual rights and determining procedural ways to obtain protection for guaranteed rights);
- 2) a free and impartial judiciary body;
- 3) Free general elections;
- 4) Freedom to express opinions;
- 5) Freedom of association/organization and opposition; and
- 6) Citizenship education.

In accordance with the characteristics of constitutional democracy, the application of constitutional democracy in Indonesia can be seen in the provisions of the 1945 Constitution which limits the authority of state institutions in carrying out government functions. The limitation of authority is intended to protect citizens from the arbitrary actions of the government. In addition, it can also be seen from the recognition of human rights in Article 28.

⁹ Ibid, 52.

¹⁰ Ibid.

¹¹ Op. Cit, Mahfud119.

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According to the provisions of the 1945 Constitution of the Republic of Indonesia after the Fourth Amendment,¹² in the institutional structure of the Republic of Indonesia there are (at least) 9 (nine) state organs that directly receive direct authority from the Constitution. The nine organs are (i) the House of Representatives, (ii) the Regional Representative Council, (iii) the People's Consultative Assembly, (iv) the Supreme Audit Board, (v) the President, (vi) Vice President, (vii) the Supreme Court, (viii) Constitutional Court, and (ix) Judicial Commission. In addition to the nine institutions, there are also several institutions or institutions that have the authority in the Constitution, namely (a) the Indonesian National Army, (b) the Indonesian National Police, (c) Local Governments, (d) Political Parties. In addition, there are also institutions that are not named, but are called functions, but the authority is stated to be regulated by law, namely: (i) central bank which is not named "Bank Indonesia", and (ii) the election commission which also not a name because it is written in lower case. Both Bank Indonesia and the General Election Commission which are now holding electoral activities are independent institutions that get their authority from the Act.¹³

The limitation of power of state institutions that obtain authority attributively above is a tangible form of the implementation of constitutional democracy in Indonesia. Furthermore, to guarantee the implementation of constitutional democracy, protect the constitutional rights of citizens and maintain the continuity of the principle of check and balance between these state institutions is the duty of the Constitutional Court in accordance with the 1945 Constitution.

¹² Fourth Amendment to the 1945 Constitution, August 10, 2002.

¹³ Jimly Assiddiqie, *Kedudukan Mahkamah Konstitusi dalam Ketatanegaraan Indonesia/ Position of the Constitutional Court in Indonesian State Administration*, (Surakarta: Makalah Kuliah Umum di Fakultas Hukum Universitas Sebelas Maret, Kamis, 2 September, 2004). Therefore, we can distinguish clearly between the authority of state organs based on the constitutionally entrusted power, and the authority of state organs that are only based on the law's order (legislatively entrusted power), and even in fact there are also institutions or organs whose authority comes from or comes from a mere Presidential Decree. This last example, for example, is the establishment of the National Ombudsman Commission, the National Law Commission, and so on. While the examples of institutions whose authority is given by the Law, for example, are the National Human Rights Commission, the Indonesian Broadcasting Commission, the Financial Traction Analysis and Reporting Center (PPATK).

2.2. Constitutional Court and Implementation of Constitutional Democracy

In every talk about state institutions, there are 2 (two) key elements that are interrelated, namely organs and functie. An organ is a form or container, while a functie is its contents; the organ is the status of its form (English: form, German: *vorm*), while functie is the movement of the container according to the purpose of its formation.¹⁴

The Constitutional Court of the Republic of Indonesia is a new (high) state institution that is equal and equal in height to the Supreme Court (MA). The idea was in line with the idea of testing the constitutionality of the law adopted in the norms of the constitution and even the institutions were formed in isolation.¹⁵

Based on Article 24C of the 1945 Constitution, the attributive authority of the Constitutional Court is as follows:¹⁶

- 1) The Constitutional Court has the authority to adjudicate at the first and final level whose decisions are final to examine the law against the Constitution, decide on disputes over the authority of state institutions whose authority is granted by the Constitution, decide upon the dissolution of political parties, and decide disputes regarding results general election.
- 2) The Constitutional Court must provide a decision on the opinion of the People's Representative Council regarding alleged violations by the President and / or Vice-President in accordance with the Constitution.
- 3) The Constitutional Court has nine constitutional judges appointed by the President, submitted by three Supreme Court members, three by the House of Representatives, and three by the President.
- 4) The Chairperson and Deputy Chairperson of the Constitutional Court are elected from and by constitutional judges.

¹⁴ Jimly Ashiddiqie, *Implikasi Perubahan UUD 1945 Terhadap Pembangunan Hukum Nasional/Implications of Amendments to the 1945 Constitution Against National Law Development*, (Jakarta: Konstitusi Press, 2005), 12.

¹⁵ Jimly Assiddiqie, *Pokok-Pokok Hukum Tatanegara/Constitutional Law Principles*, (Jakarta: Buana Ilmu Populer, 2007), 583.

¹⁶ Tim Penyusun Mahkamah Konstitusi, *Profil Mahkamah Konstitusi/Profile of the Constitutional Court*, Cet. 4, (Jakarta: Sekretariat Jenderal dan Kepanitraan Mahkamah Konstitusi, 2009), 2.

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- 5) A constitutional judge must have integrity and personality that is not reprehensible, fair, statesman who overcomes the constitution and constitution, and does not concurrently serve as a State official.
- 6) Appointment and dismissal of constitutional judges, procedural law and other provisions concerning the Constitutional Court are regulated by law.

From the authority of the Constitutional Court to adjudicate at the first and final level, the decision is final to examine the law against the Constitution and the authority to decide disputes over the authority of state institutions whose authority is granted by the Constitution, are two authorities to maintain the implementation of constitutional democracy in Indonesia. Because by adjudicating the petition of citizens to test the law which is a product of government against the 1945 Constitution, it means that the Constitutional Court has guaranteed the rights of citizens from the arbitrary actions of the government executors. Furthermore, the authority to decide disputes between state institutions whose authority comes from the 1945 Constitution is also a tangible form of the role of the Constitutional Court in maintaining the principle of checks and balances between state institutions, in order to achieve government stability and the principles of constitutional democracy in Indonesia.

3. Conclusion

As a conclusion of the analysis and discussion, it is necessary to put forward the following conclusions: First, the substance of constitutional democracy is a government that has limited power and is not justified in acting arbitrarily against its citizens. Restrictions on government power are contained in the constitution or in other laws and regulations. Second, the role of the Constitutional Court in maintaining the implementation of constitutional democracy in Indonesia can be seen from its authority which is able to guarantee the implementation of the constitutional rights of citizens from the substance of the law that contradicts the 1945 Constitution, and in maintaining the principle of checks and balances between governmental powers, in order to achieve stability in government and the principles of constitutional democracy in Indonesia.

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