

Constitutional Court as the Guard of Enforcement Constitution: Is It Challenging?

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ABSTRACT

Indonesia is committed that the rule of law as an idealized preposition to be achieved must always be pursued through constitutional enforcement. This confirms, Indonesia wants the law as the commander or front guard in solving all problems of state life, including democratic life, especially in election. Therefore, the legal step of the losing party to bring a claim to the Constitutional Court is a legitimate and constitutional effort. So, this paper would like to gain a solution towards Constitutional Court during the election.

Keywords: *Constitutional Court, guard of enforcement constitution, democracy*

1. INTRODUCTION

The State of Indonesia is a state of law, has become an important postulate contained in the constitutional text of the 1945 Constitution of Indonesia. That means, Indonesia is committed that the rule of law as an idealized preposition to be achieved must always be pursued through constitutional enforcement. This confirms, Indonesia wants the law as the commander or front guard in solving all problems of state life, including democratic life. Indonesia does not want the appearance of disorder, chaos or anarchy that can distance itself from a dignified and civilized country. Not fall into failed states [1].

Various efforts must of course be done and created, to continue to maintain and care for a country that adheres to the constitution. In addition to the commitment to upholding the constitution that must be demonstrated by elements and state actors, initiatives that are pithy from various circles of society must remain and be supported. Because in addition to being a form of participation, it is also a form of control from the community so that the state is always obedient and consistently runs and enforces the constitution. Both, the state and society must be able to go hand in hand, strengthen each other and develop constitutional enforcement in a better direction. Including the implementation of democratic systems through elections, both presidential and legislative elections.

Now, it cannot be denied that the amendment to the 1945 Constitution of the Republic of Indonesia since the reformation has encouraged the development of a democratic constitutional structure based on the principles of the rule of law and a state based on the constitution. The amendment gave birth to the state institutional buildings which are in each other's position equally and mutually control [checks and balances] with their respective authorities which are affirmed in the constitution. In this

case, the constitution becomes a supremacy and / or sacred document which becomes a reference in all aspects of state life.

One of the fundamental changes in the 1945 Constitution of the Republic of Indonesia is the regulation of the authority of the Constitutional Court in Article 24C of the 1945 Constitution, which is part of the concept or doctrine of the said chronology and balances as a result of the development of the modern idea of a democratic government system based on the rule of law. separation of powers (separation of powers) and protection from the advancement of human rights [2]. There are 2 (two) main tasks carried by constitutional review, namely:

1. Ensure the functioning of the democratic system in relation to the consideration of roles (interplay) between branches of legislative, executive and judicial institutions (judiciary). Constitutional review is intended to prevent abuse of power by one branch of power in such a way.

2. Protect every individual citizen from the abuse of power which harms their fundamental rights guaranteed by the constitution [3].

In fact, the supremacy of the constitution implies that the constitution is placed as the highest law governing and limiting the power of state institutions in Indonesia. The amended constitution stipulates that there is no longer "the highest state institution". All state institutions are equal and carry out their powers in accordance with their respective fields stipulated in the 1945 Constitution of the Republic of Indonesia in a democratic system that is believed to be in an ideal order [4].

So, in fact, the position of the Constitutional Court was so important in the design of Indonesian constitutionality after the reformation that the Constitution stipulated very strict qualifications for prospective constitutional judges in addition to the submission mechanism which had to be proposed by proposing three elements of State institutions

namely the President, the Parliament, and the Supreme Court. The point is that the Constitutional Court is an ideal constitutional enforcement agency containing nine "great men" [great men] [5].

For this reason, the Constitutional Court's position is implicitly even overcoming and higher than other institutions. Because the Basic Law [implicitly] gives authority to the Court as the most authentic and authentic interpreter of the constitution. Even the Constitutional Court (MK) is considered the most elegant way to settle disputes over election results, including the results of the presidential election between Jokowi Widodo Vs Prabowo Subianto.

Because in a Democratic State, popular participation is a basic principle, in accordance with the understanding of the term democracy, which means "Government by the People". However, since the beginning of the 20th century, the principle that democracy is government by the people, so that as much as possible and as deep as possible the people's participation in decision making is needed. That can be seen, or reflected in the presidential election process that has just been held. The winner, of course, gets a majority vote as a result of people's participation in the election.

As we know with the results, as a result of the process of a democratic system where Jokowi came out victorious or won the people's mandate. And the general election commission (KPU) as the election organizer has completed the national recapitulation and set Jokowi Ma'aruf Amin's pair as the winner of the presidential election. Therefore, the legal step of the losing party to bring a claim to the Constitutional Court is a legitimate and constitutional effort.

2. BACKGROUND

2.1 Justice Power by the 1945 Constitution

In the mandate of Article 24 Paragraph [1] of the 1945 Constitution of the Republic of Indonesia [1945 Constitution of the Republic of Indonesia] emphasizes that the Judicial Power is an independent power to administer justice to uphold law and justice. Judicial power in itself has institutionalized authority and / or authority. Thus the judicial power is a power that not only de facto "controls", but also has the right to control. As argued by Lord Acton that "power tends to be corrupt and absolute power is corrupt absolutely".

For this reason, in practice the administration of judicial power is not devoid of various abuses of authority. So, in order to meet the demands of a sense of justice that is increasingly evolving changes in matters of judicial authority do not only concern Article 24 Paragraph [1] above. Through the amendment to the 1945 Constitution of the Republic of Indonesia in addition to the addition of articles and paragraphs, several new institutions such as the Constitutional Court were also formed. The new institution is expected to complement efforts to uphold law and justice in an increasingly modern and democratic society.

In this context, it is necessary to emphasize that the authority of the Constitutional Court as stipulated in Article 24 C Paragraph [1] and Paragraph [2] is limitative, different from the authority of the Supreme Court which may be

added on the basis of the law, as confirmed in Article 24A Paragraph [1] The authority of the Constitutional Court is limited or limited in the 1945 Constitution of the Republic of Indonesia, namely:

- a. The Constitutional Court has the authority, adjudicating at the first and last level whose decisions are final, to review the law against the Constitution.
- b. Decide on a dispute over the authority of a State institution whose authority is granted by the Basic Law.
- c. Decide upon dissolution of political parties.
- d. Deciding upon disputes regarding the results of general elections.
- e. The Constitutional Court must render a decision on the opinion of the House of Representatives regarding alleged violations by the President and / or Vice President according to the law.

In addition to that authority, the Constitution of the State is also firmer, The Republic of Indonesia of 1945 regulates Judicial Power. In Article 24 it is stated that the Judicial Power is an independent power to administer justice in order to enforce law and justice. In Article 24 paragraph {2} it is stated that; "Judicial power is exercised by a supreme court and other judicial bodies which are under the general court, religious court, military court, state administrative court, and by a Constitutional Court". Thus the Judicial Power after the 1945 Constitution of the Republic of Indonesia was changed, remains a very fundamental power and is part of the system of state power that has the function of upholding justice.

For this reason, judicial power in the composition of state power according to the 1945 Constitution of the Republic of Indonesia after changes remain in place as independent powers, free from interference from other powers. In the new Republic of Indonesia power structure, judicial power is exercised by the Supreme Court {MA}, other judicial bodies under the Supreme Court, namely the General Courts, State Administrative Courts, Military Courts, and the Religious Courts and Constitutional Courts. This means that in the Indonesian judicial system according to the 1945 Constitution of the Republic of Indonesia NRI known two branches of justice, namely the Ordinary Court (ordinary court), which is centered in the Supreme Court and the Constitutional Court, the Constitutional Court.

Institutionally the actors of judicial power, both the Supreme Court and the Constitutional Court are independent from the interference of the authority of other institutions in enforcing law and justice. The guarantee of independence is affirmed in the 1945 Constitution of the Republic of Indonesia (Article 24 Paragraph (1)). At the level of implementation in the law, there is an arrangement that the organization, administration and financial of the two actors of judicial power are separated from executive power and directly under the authority and authority of each court.

In fact, apart from that, there is a guarantee of the independence of judges, both at the Supreme Court and all levels of the judiciary below, as well as at the Constitutional Court. To maintain that independence, judges are prohibited from concurrently serving as other state officials (such as DPR members, DPD members, judges or justices, ministers or other officials), members of political parties,

businessmen, advocates, and civil servants. Judges in the judicial environment under the Supreme Court, which were originally civil servants, are given a guarantee of independence as special state officials and no longer status as ordinary civil servants.

In maintaining the principle of independence of judicial power, the position of the Constitutional Court is very strategic, because the guarantee of independence is not only stated in the constitution but also in the law. Therefore, the law that was born that regulates the power of the judiciary may threaten the principle of independence. In this case, the authority to control laws that deviate from the meaning and guarantee of the constitution is in the hands of the Constitutional Court.

2.2 Independence of Judge's Key Democracy Process

Judicial power is a history of the struggle for beliefs about the need to establish that power on the one hand, dealing with the political desire of the authorities to rule it on the other side. Then, the independence of the Judge is the key to the independence of democracy itself. Because from the beginning, this independence of power was believed to be the most reliable way in democratic life to guarantee individual rights, to protect those rights from the authorities' authoritarian behavior.

The independence of judicial power, a theme in studies of constitutionalism that was so popular in its history, emerged and attracted various circles towards the end of the 17th century in the west, not in a symbolic sense, but in essence. Judicial power is directly related to two main points. First, before the 17th century only a handful of people in modern discourse contained independent status "apart from those bearing that status, independence, all slaves of legal value as property which were traded in classical economic transactions at the time. Second, the existence of desire, often characterized by "glory" into a noble desire to change the social political order that is nonpolitical, into complete polity.

Presence, the Constitutional Court is an institution that is intended to examine the constitutionality (constitutional review) of a law or decisions of state organs against the constitution. Therefore the Constitutional Court is often referred to as the guardian of the constitution. With its authority to declare the unconstitutionality of a law, it appears that the position of the Constitutional Court is above the legislative body. That is why from the beginning Hans Kelsen had stated that this institution was formed with powers that were above the legislature and should be politically undesirable, especially if it was decided that a law was unconstitutional (Hans Kelsen, 1961: 156). The 1945 Constitution of the Republic of Indonesia, authorizes the Constitutional Court to examine the law against the constitution, decide upon disputes of authority between state institutions whose authority is given by the constitution, decide upon disputes over the results of general elections, decide upon the dissolution of political parties and decide upon the DPR's opinion on proposed impeachment.

President (Article 24C of the 1945 Constitution of the Republic of Indonesia).

Although it is realized, the formation of institutions. justice similar to the Constitutional Court in various countries is closely related to the development of the principles and theories of modern state administration adopted by various countries that adhere to the principles of constitutionalism, the rule of law, the principle of checks and balances, the principles of democracy and guarantee of protection of human rights, and the political experience of each - each country. The existence of the Constitutional Court is needed in upholding these principles.

Furthermore, it can be elaborated that democratic axioms about law are: law is not a decree, decrees by the authorities. The law, in the realm of democracy is assumed to be a crystallization, no matter how relativistic, the deposits of interest, the relationship of desire in its dialectical nature between the various political groups that speak. Because of such an act, democracy from its inception relied on law and the courts to fortify its existence. That is due to the belief that that is the only way to guarantee the rights, human rights or partial, of every individual to be free from arbitrary actions by the authorities.

Even in the realm of democracy, the law, because the text is elastic, not rigid, does not reach future developments, because the designer does not have the ability to anticipate resulting in law, in its nature, provides an opportunity for authorities to abuse it. Avoiding democracy from authoritarianism by making law the primary attribute in the state, for constitutionalists, it is not enough to rely on the social control that is widespread in society. Constitutionalists, said Charles F. Andrian, rely on legal and procedural controls in the government itself [6].

Authorizing the two judicial organs as examiners of the constitutionality of the norms of the Act against the Constitution and the degree of consistency of norms under the Act against the Act, indeed cannot be judged based on the principle of efficiency and effectiveness. It's a matter of choice and political agreement. Maybe that is why the scheme for examining the regulatory authority under the Act against the Act, is not distributed by all the courts below, but is concentrated only on the Supreme Court. The MPR, reasonable enough to be suspected, has a belief that democracy is not familiar with efficiency, but rather familiar with responsibility.

Finally, as a concluding note, I must say conclusively that the independence of judicial power, from its origin is always longed for and fully believed to be a reliable way of ensuring individual rights, fencing those rights from the authorities' authoritarian behavior. Often upsets the ruler, resulting in this power has an attraction to be controlled by the ruler. The successes and failures of the business are determined entirely by the judges' independence. Once again, the independence of judges is the key to the independence of the existing democratic process.

2.3 Differences in Election Results in the Constitutional Court

The 2019 presidential election has reached the finish line, when Prabowo took constitutional steps addressing the election results to the Constitutional Court. It is in the Judicial battlefield that election disputes are resolved more elegantly. A battle of evidence, a battle of data, and a battle of witnesses to convince the nine constitutional judges about the election.

As we understand together, one of the authorities of the Constitutional Court (Vide Article 24A paragraph (1)) "resolves disputes regarding the results of the General Election. This, inevitably always be a concern and spotlight in the country every time a trial is held. In fact, the disputes trial held at the Constitutional Court as a result of the 2019 Presidential Election between Jokowi vs. Prabowo was considered a political stage taking place at the Constitutional Court.

What is certain and needs to be understood is that the Court is an honorable stage for resolving disputes over election results. In the trial, all the arguments, opinions, butki, and witnesses will be judged by the Panel of Judges. Thus, in this legitimate and constitutional forum the broadest opportunity will be given to prove the validity of the arguments of the lawsuit or petition. Because it must be believed that street actions will not be able to change the election results, other than just the potential to create riots.

So, any argument can be built, as long as it is able to prove that there has indeed been a Structured, Systematic and Massive fraud. Likewise, it must also prove the alleged neutrality of the authorities, with the misuse of the state budget and BUMN. So in the end, the nine Judges of the Constitutional Court will examine in depth (fair) assessing all available evidence, and will decide as objectively as possible.

However, the choice of dispute resolution to the Constitutional Court is considered as a rational and constitutional step in responding to the election results. It is in the field of judicial battle that election disputes are resolved more elegantly. The battle of evidence, the battle of data, and the battle of witnesses to prove everything about the course of the election, and evidence. Not by way of suppression by the masses or demonstrations by moving protesters.

Indeed, in the election process and disputes over election results. Dispute over election results is the authority of the Constitutional Court. Whereas violations and dispute proceedings are resolved by Bawaslu, PTUN, Criminal Justice for criminal violations, and DKPP for ethical violations

Violations of law and disputes in the electoral process are divided into three forms, namely violations of election crimes, violations of electoral ethics and violations of election administration.

Criminal offense is a form of criminal offense regulated in the Election Law. Criminal violations authorize criminal justice. The investigation process starts from public reports or Bawaslu's findings, is verified by Bawaslu regarding suspected criminal acts, followed by police investigations and prosecution by prosecutors to go to court.

Ethical violations, related to behavior and violations by election organizers, can be in the form of public reports or

Bawaslu findings. For violations of ethics, resolved and decided by the Election Organizer Honorary Board (DKPP) and followed up by the KPU.

Administrative violations are violations of procedures, procedures, or mechanisms related to the administration of the implementation of elections in each stage of the election, excluding criminal and ethical violations. Administrative violations include violations in the voter registration process, DPT determination, determination of candidate pairs, campaign implementation, and so on.

Resolving administrative violations is the Bawaslu's authority to resolve. Although money politics is a criminal offense, the law gives Bawaslu the authority to resolve and decide money politics if it is structured, systematic and massive.

Election process disputes are disputes that occur between election participants or election participants and the KPU. Election process disputes are resolved in the first instance by the Election Supervisory Body, and if the parties object to the Election Supervisory Body's decision, can go to the Administrative Court to resolve.

Based on the description of violations that are either partial, structured, systematic, and massive, as well as disputes in the election process, basically become the authority of Bawaslu, PTUN, DKPP, or criminal justice, participants of the 2019 Election should have submitted all violations and disputes over the election process through the mechanism which exists.

According to the 1945 Constitution (article 24C paragraph (1)), the Constitutional Court only resolves and decides disputes over the results of elections. This authority was based on the experience of the 1999 Pemillu who de-locked when determining the election results and the KPU could not make a decision.

At first the dispute over the election results that could be decided by the Constitutional Court was only a dispute over the number of votes, the proof was very simple, just check at what level and how much the number of disputes in question. That is, what is proven is fraud in the recapitulation process and partial violations. In its development, it turns out that the dispute over numbers does not answer the question of electoral justice because violations may not be related to numbers, but also the process.

Therefore, through its decision in disputes over the results of post-conflict local election results, the Constitutional Court is no longer bound to disputes over numbers, fire is also a violation in the process that affects election results. There was an expansion of the Constitutional Court's authority, from which the term structured, systematic and massive (TSM) violation was born.

TSM violations are violations that are massively committed, planned carefully to win fraudulently, and involve government structures, administrators, or election supervisors in stages from the polling station level upwards. In violating TSM, the applicant must be able to prove that the violation was committed by TSM. In general, it is not easy for the applicant to prove because besides having to prove the existence of a violation that is TSM, he must also

be able to prove that the impact of the violation significantly affects electability.

The dispute on the results of the post-conflict local election results which are in the form of TSM can be read in the East Java Province Pemilukada decision No. 41/2008, Pemilukada PHPU Kotawaringin Barat 45/2010.

Provisions of article 475 paragraph (2) of Law no. 7/2017 determines that the objections submitted to the Constitutional Court are only objections to the results of vote counting which affect the determination of the candidate pair election. That is, the number of votes questioned in the objection could affect the selection of the candidate pair. Objection submitted, but does not affect the election of each candidate, although proven, certainly rejected by the Court.

For this reason, we respect Prabowo Sandi's political choice that the MK is an elegant way to resolve election disputes. Therefore, anti-democracy groups must be prevented from taking advantage of situations where people are dissatisfied with the election results. Like the riots that occurred on 21 to May 23, 2019, which began from demonstrations over protests of dissatisfaction with the election results. This event, certainly becomes a special note for the democratic system in Indonesia. Presumably the incident, we can be sure, democracy is one of the main problems facing the nation-state of Indonesia in the future. Although, Indonesia has experienced democratization for 20 years, which can be a way to create good governance. However, it must be admitted that no visible signs of the glory of democracy will be realized.

In this context, it certainly becomes a challenge for the Constitutional Court (MK) whose function is to oversee the democratic system in Indonesia. With hope, all matters related to election disputes as a form of dissatisfaction with the democratic process must be submitted / resolved through the Constitutional Court. The public must be aware, resolving the election problem must be the path of the Constitution as the only justified pathway (On The Track) not a solution on the street by bloody means of expression of political violence. Because such efforts only tarnish our democratic system and constitution as a result of an agreement on the life of the nation and state.

3. CONCLUSION

From the description above there are some things that can be concluded. With reference to the 1945 Constitution of the Republic of Indonesia, both in the capacity of the Constitutional Court Upholding the Constitution and in overseeing the democratic process, and several things in exercising judicial power:

First: It is necessary to clarify and emphasize that in terms of the application of the principle of constitutionalism and the principle of the supremacy of the constitution, placing the authority of judicial review on the Constitutional Court also places the Court as "the guardian of the Indonesian constitution"

Second: Reaffirming that the Constitutional Court is the only institution that has the highest authority to interpret the 1945 Constitution of the Republic of Indonesia and accept /

examine and resolve petition disputes over election results (final and binding).

Third: Normatively the position of the Constitutional Court (MK) is in line with other State Institutions, but de facto, the position and position of the Constitutional Court in the constitutional structure in Indonesia today is a substitute for the MPR as the Supreme Body.

Fourth: It can also be concluded that the Constitutional Court is also said to play a role in guarding the process of democratization by providing means and legal avenues for resolving election disputes (Pilpres) with the constitutional (the guardian of the process of democratization).

Fifth: it can also be confirmed in the form of a conclusion that the position and role of the Constitutional Court are also referred to as the protector of human rights.

a. MK as an institution of judicial power and various predicates attached to it, so that it is expected to actually implement the QS Al-Maidah: 8 "and never hate your hatred towards a people, encourage you to act unjustly, apply it, because fairness is closer to Taqwa".

b. As a State Institution that oversees and upholds the constitution, it is hoped that the guarantee of independence and impartiality will be at stake for the decisions of the nine Constitutional Justices who are on the altar of the Constitutional Court.

c. In the form of institutional independence (institutional independence), the Constitutional Court Justice is expected to have a perspective of Democracy in the form of independence in making decisions (Decisional Independence) and guarantees for the protection of human rights.

d. Indonesia, which adheres to the principles of constitutionalism and the rule of law, it is hoped that the existence of the Constitutional Court can uphold these principles.

REFERENCES

- [1] Index of Law State of Indonesia. Indonesia Legal Rountable 2017. pp. XVII
- [2] Article 8 Section (2), Article 9 (B) Act Number 30 Year 2002
- [3] Jimly Asshidiqie, Model-Model Pengujian Konstitusional di Berbagai Negara, 2nd Publication, Jakarta, Konstitusi Press, 2005, pp. 10
- [4] Jimly Asshiddiqie, Perkembangan dan Konsolidator,
- [5] Hamdan Zoelva, Mahkamah Konstitusi dalam sistem Ketatanegaraan RI.
- [6] Jimly Ashiddiqie, Struktur Ketatanegaraan Indonesia setelah Perubahan Keempat UUD Tahun 1945.