



ROLE OF THE CONSTITUTIONAL COURT IN
CONSOLIDATING DEMOCRACY IN INDONESIA

BY

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degree of Doctor of Philosophy in Law

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ABSTRACT

The principal aim of this research is to evaluate the role of the Constitutional Court in relation to consolidation of democracy in Indonesia by examining its decisions and the effect that the decisions made. This qualitative research uses doctrinal legal approach as well as examining application of law. It transpires that the Constitutional Court, through its decision, has become an important institution in supporting the quality of elections. Through its decisions, the Constitutional Court has played a significant role in protecting the fundamental rights of citizens through the judicial review of election acts which secure the quality of democracy. The Constitutional Court has also contributed significantly to the creation of a more conducive political situation in the elections. It is also observed that the Constitutional Court has successfully contributed to the working of the general elections in 2004 and 2009 in securing the fundamental rights of citizens in the general elections and settling of disputes over the result of general elections. In addition, the Constitutional Court has also created a more conducive political situation and contributed significantly to the process of consolidating local democracy in Indonesia. In spite of these achievements, it is found the Constitutional Court has not played a significant role in settling disputes concerning constitutional authority among state organs. This study ends with some recommendations which can be made for an enhanced role of the Constitutional Court, such as by letting the MPR has to take the initiative to amend the 1945 Constitution on two points, firstly, to re-design the structure and authority of the Constitutional Court and secondly, the DPR needs to amend the Constitutional Court Act so as to resolve the current issues of the Constitutional Court, such as more independence of the justices, better supervision to the justices, better recruitment of justices and stronger support of the justices.

ملخص البحث

تهدف هذه الدراسة إلى تقييم دور المحكمة الدستورية فيما يتعلق بتعزيز الديمقراطية في إندونيسيا، من خلال دراسة قراراتها، وتحليل آثار القرارات المتخذة. وهذه الدراسة تستخدم المنهج النوعي القانوني الأساسي، فضلاً عن الدراسة التطبيقية القانونية. ومن خلال القرارات الصادرة عن المحكمة الدستورية ظهر أن للمحكمة الدستورية أهمية في دعم نوعية الانتخابات، كما لعبت دوراً مهماً في حماية الحقوق الأساسية للمواطنين، وذلك من خلال مراجعة قضائية لقوانين الانتخابات، وتأمين نوعية الديمقراطية. فضلاً عن ذلك فقد ساهمت المحكمة الدستورية مساهمة كبيرة في إيجاد وضع سياسي أكثر ملاءمة في الانتخابات. وبالإضافة إلى ذلك يلاحظ أن المحكمة الدستورية قد أسهمت بنجاح في الانتخابات العامة في عامي ٢٠٠٤ و ٢٠٠٩ وذلك في تأمين الحقوق الأساسية للمواطنين في الانتخابات العامة، وكذلك في فصل الخلافات وحسمها، بشأن النزاع في نتيجة الانتخابات العامة. ولم يُكتف بذلك بل أنشأت المحكمة الدستورية وضعاً سياسياً أكثر ملاءمة، فقد ساهمت المحكمة بشكل كبير في عملية تعزيز الديمقراطية المحلية في إندونيسيا. وعلى الرغم من هذه الإنجازات الكبيرة، فإن الدراسة كشفت أن لمحكمة الدستورية لم يظهر دورها بشكل بارز في تسوية النزاعات المتعلقة بسلطة دستورية بين أجهزة الدولة. وفي الخاتمة توصي الدراسة ببعض التوصيات التي يمكن تقديمها لتعزيز دور المحكمة الدستورية ليقوم مجلس الشورى الشعبي (MPR) بأن تأخذ زمام المبادرة لتعديل دستور عام ١٩٤٥ في نقطتين؛ أولاً في إعادة تصميم هيكل المحكمة الدستورية وسلطتها، وثانياً أن يقوم مجلس النواب بتعديل ما يحتاج إليه بخصوص القضايا الراهنة في مواد قانون المحكمة الدستورية، مثل مزيد من استقلالية القضاة وإشرافهم بشكل أفضل، وتعيين أفضلهم ودعم أقواهم.

APPROVAL PAGE

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DECLARATION

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DEDICATION

This thesis is respectively dedicated to my late mother, Murni for her patience and warm support, even though she cannot see my successful period of study; my father, Lukman Umar, for his patience waiting and strong motivation for my success in the Ph.D programme; my beloved wife, Rinawati for her dedication, support, and understanding; my daughters, Raihan Azzahra and Raisha Aziza for their patience and sacrifices when I left them all to take this meaningful step in my career as a lecturer; my grandmother, Syamsinar, for her warm hugs and unforgettable moments when I was a child; my brothers Da An and his wife, Ni It, and Da Ujang and his wife, Susi, Patria and his wife, Mimi, Zikri and his wife, Yarni and sister Dini and her husband, Waluyo, for their care and understanding regarding my long study; my mother- and father-in-law, Hirdawati and Syafri for their support; my brothers-in-law, Apit and Icat (and his wife; Echa); and sisters-in-law Ira and her husband, Ican, El and her husband, Romi, and Nini and her husband Rozi, for their support as one happy extended family; Apak Arifin and Etek Ely and family at Selayang, Selangor for their support since I took my master degree up to the time of my Ph.D; my special thanks to Pak Zal and Tek Des of Sentul, Kuala Lumpur. I also owe a lot to the late Mami and Papi and their family in Jakarta who always supported my study since the time of my bachelor degree at Gadjah Mada University. May Allah grant them all the best in life in this world and in the hereafter!

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TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page.....	iv
Declaration	v
Copyright Page.....	vi
Dedication	vii
Acknowledgements.....	viii
List of Tables	xv
List of Figures	xvi
List of Decisions	xvi
List of Statutes	xix
List of Abbreviations	xx
CHAPTER ONE: INTRODUCTION	1
1.1 Background of the Study.....	1
1.2 Objectives of the Study	7
1.3 Statement of the Problem	8
1.4 Hypothesis.....	9
1.5 Methodology	10
1.6 Scope and Limitations of the Study	11
1.7 Literature Review	14
1.8 Overview of Chapters	26
1.9 Concluding Remarks	28
CHAPTER TWO: THEORY AND PRINCIPLE OF CONSOLIDATION OF DEMOCRACY AND CONSTITUTIONAL ADJUDICATION	30
2.1 Introduction	30
2.2 Basic Concept of Democracy.....	30
2.3 Transition to Democracy in Indonesia	38
2.4 Consolidation of Democracy in Indonesia.....	40
2.5 Theoretical and Principle of Constitutional Adjudication	49
2.5.1 The Definition of Constitutional Adjudication	50
2.5.2 The Origin and Development of Constitutional Adjudication	52
2.5.3 The Conceptual Ground of Constitutional Adjudication in Various Jurisdictions	62
2.6 Models (Types) of Constitutional Adjudication	78
2.6.1 American Model.....	78
2.6.2 European Model or Austrian Model.....	81
2.6.3 France Model.....	84
2.6.4 Mixed Model of America-Continental	88
2.7 Important Issues on Various Constitutional Adjudications	91
2.8 Concluding Remarks	97

CHAPTER THREE: CONSOLIDATION OF DEMOCRACY IN INDONESIA	99
3.1 Introduction	99
3.2 Political Changes Leading Indonesia towards Democratic Consolidation	99
3.2.1 Democracy before Amendment of the 1945 Constitution.....	99
3.2.2 Democracy in Indonesia after Reform	104
3.3 Problems Facing the Consolidation of Democracy in Indonesia.....	110
3.4 Concluding Remarks	115
CHAPTER FOUR: CONSTITUTIONAL ADJUDICATION IN INDONESIA	117
4.1 Introduction	117
4.2 The History of Constitutional Adjudication in Indonesia	117
4.3 The Framework of Constitutional Adjudication in Indonesia.....	128
4.3.1 The House of Representatives (DPR)	129
4.3.2 The President	133
4.3.3 The Supreme Court	135
4.3.4 The Constitutional Court	137
4.4 Major Constitutional Changes since 1945 in Indonesia.....	148
4.4.1 Old Order Period 1945-1965	148
4.4.2 New Order Period 1966-1998	152
4.4.3 Reform Order Period 1998-Present	152
4.5 Problems Facing Constitutional Adjudication in Indonesia.....	168
4.6 The Circumstances of Change Which Lead to the Constitutional Change.....	170
4.6.1 The Founding the New Constitution Order Following the Departure of Soeharto in 1998	170
4.6.2 Debate on the Emergence of Constitutional Court in Indonesia ..	173
4.6.3 Why the Constitutional Court is the Answer?.....	174
4.7 The Foundation and Bases of Indonesian Constitutional Court.....	181
4.7.1 The Foundation.....	181
4.7.2 The Bases of the Indonesian Constitutional CoURT	183
4.8 Strengths and Weaknesses of the Indonesian Constitutional Court.....	190
4.8.1 Strengths	190
4.8.2 Weaknesses	193
4.9 Concluding Remarks	203
CHAPTER FIVE: JUDICIAL REVIEW OF ACTS	206
5.1 Introduction	206
5.2 Framework of Evaluation.....	206
5.3 Tools of Assessment	208
5.3.1 Elements of Democratic Consolidation.....	208
5.3.2 Structure of Relation of the Constitutional Court and Democratic Consolidation	211
5.4 Major Decisions in the Area of Judicial Review of Acts.....	212
5.5 Decisions on Upholding of the Rule of Law.....	222
5.6. Achievements of the Constitutional Court in the Consolidation of Democracy through Judicial Review	224

5.6.1	Secure the Quality and the Working of Election.....	224
5.6.2	Save The Two Turn Over Test	226
5.7	Problems Facing the Judicial Review.....	230
5.8	Concluding Remarks	231

CHAPTER SIX: CONFLICT OF JURISDICTION AMONG STATE

ORGANS	234	
6.1	Introduction	234
6.2	Major Decisions in the area of Disputes concerning Jurisdiction among State Organs	234
6.2.1	Rejected Decisions	236
6.2.2	Accepted Decision.....	238
6.2.3	Not Accepted Decisions Due to Subjectum Litis	240
6.2.4	Not Accepted Decisions Due to Objectum Litis	243
6.3	Achievements of the Constitutional Court in the Consolidation of Democracy in Indonesia through Settlement of Disputes concerning Jurisdiction among State Organs.....	255
6.4	Problems Facing the Settlement of Disputes concerning the Conflict of Jurisdiction among State Organs.....	257
6.5	Concluding Remarks	261

CHAPTER SEVEN: THE CONSTITUTIONAL COURT AND DISPUTES

OF GENERAL ELECTION	263	
7.1	Introduction	263
7.2	Legislative Election.....	263
7.2.1	Legislative Election in 2004.....	264
7.2.2	Legislative Election in 2009.....	265
7.2.3	Comment on Decisions	267
7.3	Presidential Election in 2004 and 2009.....	268
7.3.1	Presidential Election 2004.....	268
7.3.2	Presidential Election 2009.....	270
7.3.3	Comment on Decisions	272
7.4	Local Election	273
7.4.1	Landmark Decisions on Local Election Disputes (2008-2013) ...	273
7.4.2	Comment on Landmark Decisions	284
7.5	Achievements of the Constitutional Court in the Consolidation of Democracy through the Settlement of Disputes Concerning the Result of General Election	287
7.5.1	Save the Two Turn over Test	287
7.5.2	Legitimate a Stronger Elected Government	288
7.5.3	As State Mediator or Facilitator	288
7.6	Problems Facing the Settlement of Disputes Concerning the Result of General Election.....	289
7.6.1	Design of Structure.....	289
7.6.2	Scope of Authority	291
7.6.3	Procedures	292
7.6.4	Too Much and Too Exaggerated	292
7.6.5	Code of Ethics	295
7.6.6	Recruitment of Justices	297

7.6.7 Superbody, but Lack of Supervision	298
7.7 Concluding Remarks	299
CHAPTER EIGHT: DISSOLUTION OF POLITICAL PARTY: ITS ISSUES AND DEVELOPMENT.....	301
8.1 Introduction	301
8.2 Dissolution of a Political Party and the Authority of the Constitutional Court: The Background.....	302
8.3 Major Issues of the Dissolution of Political Party	316
8.4 Experience and Lessons from other Countries.....	320
8.5 Concluding Remarks	325
CHAPTER NINE: OPINION ON IMPEACHMENT QUESTION FROM THE DPR: ITS ISSUES AND DEVELOPMENT	326
9.1 Introduction	326
9.2 History of Impeachment in Indonesia	326
9.3 Impeachment in the 1945 Constitution	328
9.3.1 The Scope of Impeachable Offences.....	329
9.3.2 Procedures	332
9.4 Abdurrahman Wahid Case	338
9.4.1 Events Leading to Impeachment	338
9.4.2 The Analysis.....	339
9.5 Major Issues in the Impeachment Provision Independence of the Constitutional Court.....	346
9.6 Experience and Lesson from other Countries	348
9.7 Concluding remarks	356
CHAPTER TEN: CONCLUSION	358
10.1 Introduction	358
10.2 Success, Significance and Achievements of the Constitutional Court ...	358
10.3 Shortcomings of the Constitutional Court	365
10.4 Recommendations	366
10.4.1 Recommendation to the MPR.	366
10.4.2 Recommendation to the DPR.....	368
10.4.3 Recommendation to the Constitutional Court.....	369
BIBLIOGRAPHY	370
APPENDIX A: List of Interviewees	386
APPENDIX B: List of Questions	388

LIST OF TABLES

<u>Table No.</u>		<u>Page No.</u>
Table 1.1	Statistics of Constitutional Court's Decisions 2003-2013	2
Table 2.1	Model of Democracy	35
Table 2.2	Element of Democratic Transition and Democratic Consolidation	46
Table 2.3	The Five Major Arenas of a Modern Consolidated Democracy: Inter-related Principles and Mediating Fields	48
Table 2.4	Judicial Review: Justifications and Objections	77
Table 2.5	Models of Constitutional Adjudication	89
Table 3.1	Type of Democracy in Indonesia before the Political Reform	100
Table 4.1	Analysis of Strengths and Weaknesses of Some Models of Local Election Disputes Settlement	195
Table 5.1	The Aspect and Element of Democratic Consolidation	210
Table 7.1	Recapitulation of Legislative Disputes 2004	264
Table 7.2	Recapitulation of Legislative Disputes 2009	266
Table 7.3	Result of Presidential Election 2004 (First Round)	269
Table 7.4	Result of the Presidential Election 2004 (Second Round)	270
Table 7.5	Result of Presidential Election 2009	271

LIST OF FIGURES

<u>Table No.</u>		<u>Page No.</u>
Figure 2.1	The Three Waves of the Emergence of Constitutional Adjudication	60
Figure 4.1	Constitutional Adjudication Structure	141
Figure 4.2	Structure of Government before Amendment	171
Figure 4.3	Structure of Government after Amendment	172
Figure 4.4	Flow Chart of Case Proceedings	189
Figure 5.1	Framework of Evaluation	207
Figure 5.2	Structure of Relation of the Constitutional Court and Consolidation of Democracy	211

LIST OF DECISIONS

a. Judicial Review

Republic of Indonesia, The Constitutional Court Decision No. 011-017/ PUU-I/2003
Republic of Indonesia, The Constitutional Court Decision No. 072-073/PUU-II/2004
Republic of Indonesia, The Constitutional Court Decision No. 005/PUU-IV/2006
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b. Dispute on Jurisdiction among State Organs

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Republic of Indonesia, the Judicial Commission Act 2004

Republic of Indonesia, The Making of Legislation Act 2004

Republic of Indonesia, the Judiciary Act 2004

Republic of Indonesia, the Constitutional Court Act 2004

Republic of Indonesia, the Presidential Election Act 2008

Republic of Indonesia, the Legislative Election Act 2008

Republic of Indonesia, the Decree of the Temporary People's Consultative Assembly
1959

LIST OF ABBREVIATIONS

AAI	Indonesian Bar Association	MK	Constitutional Court
BPK	State Budget Audit	MPR	the People Consultative Assembly
BPPN	Bank Recovery Body (Badan Penyehatan Perbankan National)	PCA	Regulation of Procedure of the People Consultative Assembly
BPUPKI	The Committee for the Preparation of Indonesian Independence	PDIP	Indonesian Democratic Party
BULOG	National Logistics Agency	PKI	the Indonesian Communist Party (<i>Partai Komunis Indonesia</i>)
C	Copyright	POLRI	Indonesian National Police
DPD	Regional Representatives Council	PPKI	Committee for the Preparation of Independence of Indonesia
DPR	the People's Representative Council	RIS	Federal Republic of Indonesia
DPRD	Regional House of Representatives	TAP MPR	MPR's Decree
Ed./eds.	edited by	TNI	Indonesia National Army
Et al	and others	UGM	Universitas Gadjah Mada
F-PD	Democrat Fraction	UI	Universitas Indonesia
F-PDU	Daulah Ummah Fraction	UII	Universitas Islam Indonesia
F-PBB	Star and Crescent Fraction	UMY	Universitas Muhammadiyah Yogyakarta
F-PPP	United Development Fraction	UNAIR	Universitas Airlangga
F-UG	Group Representative Fraction	UNITOMO	Universitas Dr. Soetomo

Ibid	(ibidem) : in the same place	UNPAD	Universitas Padjajaram
ICLASS	International Centre for Law and Sharia Studies	UNS	Universitas Negeri Sebelas Maret
i.e	i.est	UNSRI	Universitas Sriwijaya
IIUM	International Islamic University Malaysia	USA	United State of America
IPOLS	International Programme for Law and Sharia	UUD 1945	The 1945 Constitution
KNIP	National Committee of Indonesia (<i>Komite Nasional Indonesia Pusat</i>)	UUDS 1950	Provisional Constitution
KPU	Election Committee	WNI	<i>Indonesian Citizen</i>
MA	Supreme Court		

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Since the establishment of the Constitutional Court in August 2003 until 2013, the Court has decided 570 cases concerning judicial review. From 2008 to 2013, the Court also decided 685 cases on disputes concerning the result of local elections.¹ The Court has also decided 23 cases on disputes concerning authority among state institutions. The Court has also decided 116 cases on disputes concerning general election disputes in 2004 and 2009.² By handling a huge number of cases, the Constitutional Court has given a meaningful contribution to the practice of constitutional principles, particularly in performing its power as the “guardian of the Constitution.” Therefore, to evaluate a decade of the establishment of the Constitutional Court, it is important to assess the performance of the Constitutional Court. The evaluation is made by analyzing the achievements of the Constitutional Court and the problems faced by it in relation to the consolidation of democracy in Indonesia.

¹ Before 2008, the authority to settle disputes concerning the result of local election, was exercised by the High Court in each province. This authority of the High Court is a delegated authority from the *Mahkamah Agung* (the Supreme Court of Indonesia).

² Mahkamah Konstitusi at 14.00 pm <<http://www.mahkamahkonstitusi.go.id>>, viewed on Thursday, 9 January 2014. See also Laporan Tahunan Mahkamah Konstitusi Tahun 2013, Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi, at 80-97.

Table 1.1 Statistic of Constitutional Court's Decisions 2003-2013

No.	Subject	Year											Total
		2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	
1	Judicial Review	4	35	28	29	27	34	51	61	94	97	110	570
2	Disputes Concerning The Result Of Local Elections.	-	-	-	-	-	18	12	224	131	104	196	685
3	Disputes Concerning Authority Among State Institutions.	-	1	-	3	2	4	1	-	4	6	2	23
4	General Election Disputes	-	45	-	-	-	-	71	-	-	-	-	116

Looking at the experiences of the countries called “the new emerging democracies”, there are so many obstacles that are hampering efforts to develop an effective “rule of law” system which is expected to counterweigh the system of democracy. Firstly, all new emerging democracies in Eastern Europe such as Russia, Ukraine, Uzbekistan, Georgia, and other former Soviet Union States, as well as some Asian countries like the Philippines and South Korea, have a similar problem on how to institutionalize democratic values through law and based on the existing law, as many of them have inherited an undemocratic past.³ Therefore, there are many laws and regulations that have to be reviewed and revised according to the present demand. Secondly, generally the new emerging democracy suffers from the “*anomia* syndrome” meaning that the integrity, the impartiality and the independence of the judiciary are seriously influenced. Under the authoritarian regimes, courts are usually politically intervened by the ruling elite.⁴ In other words, in authoritarian regimes, courts are considered more as the attributes of the authority rather than as the attributes of justice. This situation also happened in Indonesia, in the era of the Suharto regime.⁵ Authoritarian regimes also produce legal professionals without integrity. As a result, judicial corruption becomes very common.

Judges play a significant role in guaranteeing the enforcement of the “rule of law”, which is the key point in achieving equilibrium in the above triadic relations

³ Article 134, 136 and 137 of *Kitab Undang-Undang Hukum Pidana* (A book of Criminal Law of Indonesia) had been nullified by the Constitutional Court of Indonesia because the Court opined that those articles were not in line with the 1945 Constitution. This act is one of the legacies of Dutch Colonialism which was used by Suharto’s Regime to muzzle his enemies or any person who criticized his policy during his 32 years in power.

⁴ Jimly Asshiddiqie. Access to Justice in Emerging Democracies: The Experiences of Indonesia, A Proceeding of Workshop “Comparing Access to Justice in Asian and European Transitional Countries, Indonesia, 27-28 June 2005, in Bertrand Fort (Ed), *Democratizing Access to Justice in Transitional Countries*, Jakarta, 2006, at 10.

⁵ Many political scientists and constitutional law experts describe the era of the Suharto regime as bureaucratic-authoritarian regime which controls every single aspect of the nation, including judicial power.