

# THE NEED OF A CONSTITUTIONAL COURT IN INDONESIA\*

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*This idea is a reflection of the aspiration of the Indonesian people to build up a democratic and justice society. The problem is where is the position of this institution in our state structure? The author express the alternative outlook that place "Pengadilan Tata Negara" (as the translation of Constitutional Court) under the Supreme Court and paralel with the four courts sub-system; not separate from the Supreme Court which is used the term "Mahkamah Konstitusi" as the other translation of the word Constitutional Court. To make this idea come true, the House of People's Representative (DPR) must use their right to amendment the Law No. 14/1970, especially the article on the structure of Indonesian court.*



... If in such state there is no recourse to a constitutional court, a cleft may gradually develop between the ideas contained in the text of the constitution and the fundamental beliefs prevailing at a given time ...

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### Introduction

The aspiration of the Indonesian people to build up a state which is democratic and desires to exercise social justice and humanitarianism as stated in the Elucidation of the articles 28 clause (1), 29, and 34 of the 1945

\*Paper presented on the Asian Law Centre Conference: "Indonesian Law - the First 50 Years" in Law School Council Chamber, 1st floor, Law School, The University of Melbourne, Australia, 28 September 1995.

<sup>1</sup> President of the Federal Constitutional Court of the Federal Republic of Germany. See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham and London: Duke University Press, 1989, pp. ix.

Constitution is getting stronger today. The complete text of the Elucidation states that:<sup>2</sup>

...These articles, both concerning citizens only as well as those concerning all residents, contain the aspiration of the Indonesian people to build up a state which is democratic and desires to exercise social justice and humanitarianism.

In the event of the commemoration of the 50th year of Indonesian independence, the government and the House of Peoples Representatives (DPR) must consider the need of a Constitutional Court in Indonesia.

Some scholars and experts have risen also the need of a Constitutional Court in Indonesia. But their ideas are different with mine. In their view, the proposed Constitutional Court is a separate court named *Mahkamah Konstitusi*. Its position will not under the Supreme Court (*Mahkamah Agung*), which is the pinnacle in the court structure in Indonesia today.

One of the ideas for instance, proposed to establish a Constitutional Court as a shortcut proposal. The proposal was made by various groups, especially practising lawyers. According to this proposal, the Constitutional Court's jurisdiction would be limited to testing the constitutionality of any law or regulation, and its decision would be final and not subject to appeal. Because of its status, the proposed Constitutional Court would consist of the most respected lawyers, scholars and even statesmen whose integrity was unquestioned.<sup>3</sup>

Even though this good idea emerged in the early years of the New Order, and reemerged in 1970s, but has never been thoroughly discussed. The government made no response, and the idea disappeared. The good idea remains only an idea.<sup>4</sup>

This idea was reemerged in Jakarta recently by Din Muhammad, Kepala Pusat Penelitian dan Pengembangan, Pendidikan dan Latihan (Kapuslitbang/ Diklat, or the Chief of the Center for Research and Development, Education

<sup>2</sup> Satya Arinanto, 'Indonesia: Democratization of constitutional and political life since the 1992 General Election and the 1993 Plenary Session of the People's Consultative Assembly', in Cheryl Saunders and Graham Hassall (eds.), *Asia-Pacific Constitutional Yearbook 1993*, Melbourne: Centre for Comparative Constitutional Studies University of Melbourne, 1995, pp. 55.

<sup>3</sup> Todung Mulya Lubis, 'In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990', Juris Scientiae Doctor Dissertation, Boalt Hall Law School University of California Berkeley, 1990, pp. 124.

<sup>4</sup> *Ibid.*

and Training) of the Indonesian Supreme Court.<sup>5</sup> Substantially, the basic idea of this proposed Constitutional Court is the same with the previous proposal.

The background of the reemerged proposal was particularly because Indonesia still has plenty of legal products (around 400 hundred products) from the colonial era, especially from the Dutch era, that have to be replaced because they are no longer suitable and no longer conform to the public feeling of justice.<sup>6</sup> Some of them are the Kitab Undang-Undang Hukum Dagang (KUHD, or the Code of Business Law) and Kitab Undang-Undang Hukum Perdata (KUH Perdata, or the Civil Code).<sup>7</sup>

In response to the reemerged proposal by Din Muhammad, in an interview with the *Kompas* daily, I proposed a different concept and position of Constitutional Court. In my opinion, the proposed Constitutional Court must be named *Pengadilan Tata Negara*,<sup>8</sup> another translation in Indonesian language from the words *Constitutional Court*. As mentioned above, the other widely used translation of the word *Constitutional Court* is *Mahkamah Konstitusi*.

In my opinion, the proposed Constitutional Court will serve as the "fifth pillar" of the Indonesian courts, apart from the General Court (*Peradilan Umum*), the Military Court (*Peradilan Militer*), the Religious Court (*Peradilan Agama*), and the Administrative Court (*Peradilan Tata Usaha/Administrasi Negara*). All of these courts - including the proposed Constitutional Court - must be placed under the Supreme Court. So the proposed Constitutional Court is not a separate court from the current court system.

### Judicial Review

Judicial review is an old constitutional issue in Indonesia. It has been a subject of debate since the time of deliberations on the 1945 Constitution

<sup>5</sup>*Kompas*, [The Indonesian widely published newspaper], 17 June, 1995, pp. 10.

<sup>6</sup>*Ibid.* See also Frans H. Winarta, 'Constitutional Court needed to uphold laws', *The Jakarta Post*, 21 June, 1995.

<sup>7</sup>*Kompas*, 21 June, 1995, *loc. cit.*

<sup>8</sup>See *Kompas*, 20 June, 1995, pp. 10. See also Satya Arinanto, 'Gagasan tentang Mahkamah Konstitusi' [The Idea of A Constitutional Court], *Catatan Hukum di Harian Kompas* [A Law Note in the Indonesian *Kompas* daily], 3 July, 1995, pp. 10.

prior to independence.<sup>9</sup> The debates continue today and are still inconclusive.<sup>10</sup>

The debates reemerged at the same time with the discourses on the need of a Constitutional Court in Indonesia. In my opinion, this important right must be vested upon the Supreme Court, which I dream to have a role as the authoritative interpreter of the Constitution.<sup>11</sup>

Historically, the same opinion was raised by one of the Indonesian founding fathers, Muhammad Yamin. He proposed in 1945 that the Supreme Court's power be extended beyond that as last resort in rendering verdicts, to reviewing possible constitutional conflicts between laws enacted by the government and DPR. The other founding father, Soepomo, a law professor and the former President (Rector/Chancellor) of the University of Indonesia didn't in absolute terms reject the Yamin's proposal.<sup>12</sup>

Soepomo argued that in a state based on the *integralistic staatsidee* - one of the theories of state he proposed in his speech to the members of the Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI, or the Investigating Body for the Preparation of Indonesian Independence) on 31 May 1945 - it would be inappropriate to grant power to one branch of power to control the other. According to him, every branch should cooperate.<sup>13</sup>

For Soepomo, judicial review as proposed by Muhammad Yamin could only be practiced in a state based on separation of powers, or in his terms, *liberal democracy*. Soepomo also declared that he could not accept judicial review because to his knowledge, no consensus had ever been reached among constitutional scholars, and because Indonesian lawyers still lacked experience on this question.<sup>14</sup>

<sup>9</sup>See Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* [Text of the Preparation of the 1945 Constitution], 3 vols., Jakarta: Yayasan Prapantja, 1959, Vol. 1, pp. 234, 336, 341, and 342. See also Todung Mulya Lubis, *loc.cit.*, pp. 117.

<sup>10</sup>Todung Mulya Lubis, *loc.cit.*, pp. 117.

<sup>11</sup>*Kompas*, 20 June, 1995, *loc. cit.*. See also Satya Arinanto, 'Gagasan tentang Mahkamah Konstitusi', *loc. cit.* As a comparative perspective see also Donald P. Kommers, *op. cit.*, pp. xi-xii. In this book Professor Kommers describes that as an authoritative interpreter of the Basic Law (The Constitution of the Federal Republic of Germany), the Federal Constitutional Court has handed down a vast number of cases and opinions that invite comparison with the constitutional jurisprudence of other advanced liberal democracies.

<sup>12</sup>Muhammad Yamin, *op. cit.*, pp. 341-342. See also Todung Mulya Lubis, *loc. cit.*, pp. 118.

<sup>13</sup>*Ibid.*

<sup>14</sup>*Ibid.*

World constitutional history has demonstrated that in order to administer justice, judicial power should be separated from political power. In 17th and 18th century Europe, stories of painful injustices were abundant when the two powers were combined. Aware of this, Montesquieu (1689-1755) advocated the separation of powers. The United States (1776) then was the first modern state to adopt this system. In post World War II, many new nations, including Indonesia (1945), followed with some variations.<sup>15</sup>

The doctrine of the separation of powers might well support an argument that it is not the ordinary courts to review administrative decisions. In other words, if review is to be undertaken it should be undertaken, as it in France, by administrative courts. So judicial review enforces the rule of law and is the means by which executive action is confined to the powers and functions assigned to it by law. The interests of individual are protected accordingly.<sup>16</sup>

If we look at the debates between Muhammad Yamin and Soepomo, apparently the two founding fathers didn't refer to the famous statement of Chief Justice Marshall in *Madison vs Madbury* (5 US (1 Cranch) 137, 2 L.Ed.60 1803) which proposed that judicial review be granted to the Supreme Court, given that there is no such provision in the 1945 Constitution. The United States Constitution does not say anything about judicial review either, but Chief Justice Marshall based his decision on his oath as Chief Justice which he interpreted to mean that it was his constitutional duty to protect the constitution. On this premise, he empowered the Supreme Court to be a guardian of the Constitution.<sup>17</sup>

For the case of Indonesia, in my opinion, it is important to have judicial review vested upon the Supreme Court. In the future I hope that the Supreme Court will also serve as the *authoritative interpreter* and the guardian of the Indonesian constitution.

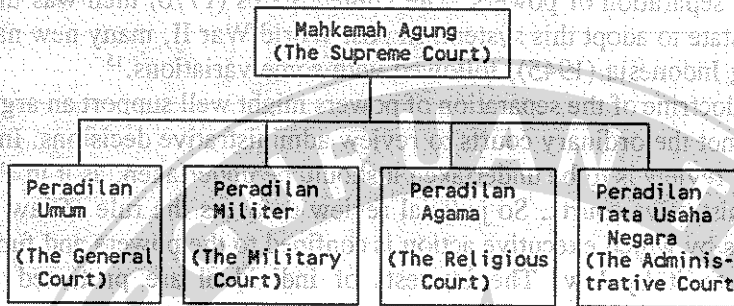
<sup>15</sup>Charles Himawan, 'How not to intervene in a judicial process', *The Jakarta Post*, 16 May, 1995, pp. 1.

<sup>16</sup>Anthony Mason, 'The Rule of Law and Judicial Review', Paper presented at The Second Annual Australia Lecture which was held under the auspices of the Australia-Indonesia Institute, the Australian Studies Centre and the Faculty of Law University of Indonesia, Jakarta, 20 October, 1994, pp. 37.

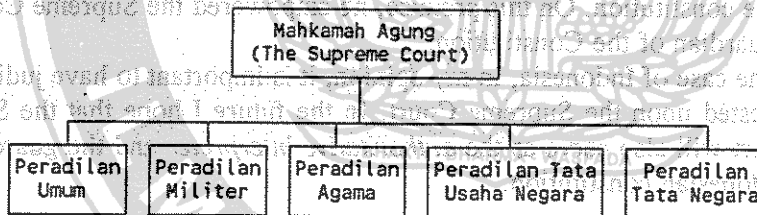
<sup>17</sup>Todung Mulya Lubis, *loc.cit.*, pp. 118-119.

### The Constitutional Court

Article 10 clause (1) of the Law No. 14/1970 on Judicial Power stipulates the kinds and the structure of the Indonesian courts as follows:



In my opinion, the proposed Constitutional Court must be named *Pengadilan Tata Negara*, and it will serve as the "fifth pillar" of the Indonesian courts, apart from the General Court (*Peradilan Umum*), the Military Court (*Peradilan Militer*), the Religious Court (*Peradilan Agama*) and the Administrative Court (*Peradilan Tata Usaha/Administrasi Negara*). All of these courts, including the proposed Constitutional Court, must be placed under the Supreme Court as follows:



To bring this idea into reality, I propose the House of People's Representatives (DPR) use their right to amendment. In my opinion, they could propose to amendment article 10 clause (1) of the Law No. 14/1970 on the kinds and the structure of the Indonesian court.

The existence of a Constitutional Court in Indonesia today is in line with the aspiration of the Indonesian people to build up a state which is democratic and desires to exercise social justice and humanitarianism as stated in the Elucidation of the articles 28 clause (1), 29, and 34 of the 1945 Constitution:



### Conclusion

The aspiration of the Indonesian people to build up a state which is democratic and desires to exercise social justice and humanitarianism as stated in the Elucidation of the articles 28 clause (1), 29, and 34 of the 1945 Constitution is getting stronger today. In the event of the commemoration of the 50th year of Indonesian independence, the government and the House of People's Representatives (DPR) must consider the need of a Constitutional Court in Indonesia.

Some scholars and experts have risen also the need of a Constitutional Court in Indonesia. But their ideas are different with mine. In their view, the proposed Constitutional Court is a separate court named *Mahkamah Konstitusi*, and its position will not under the Supreme Court (*Mahkamah Agung*) which is the pinnacle of the court structure in Indonesia today.

In my opinion, the proposed Constitutional Court must be named *Pengadilan Tata Negara*, and it will serve as the "fifth pillars" of the Indonesian courts, apart from the General Court (*Peradilan Umum*), the Military Court (*Peradilan Militer*), the Religious Court (*Peradilan Agama*), and the Administrative Court (*Peradilan Tata Usaha/Administrasi Negara*). In my view, all of these courts - including the proposed Constitutional Court - must be placed under the Supreme Court (*Mahkamah Agung*).

To make this idea comes true, the House of People's Representatives (DPR) must use their right to amendment a Law. This right is one of some other rights owned by the DPR. By using this right, they could propose some amendments to the Law No. 14/1970 on Judicial Power, especially an amendment to the article 10 clause (1) of the Law No. 14/1970 on the kinds and the structure of the Indonesian court.

The existence of a Constitutional Court (*Pengadilan Tata Negara*) is one of some basic needs of the Indonesian people today, especially to bring about the founding fathers' idea to uphold a state based on law (*rechtsstaat*), an ideal concept of a modern state which is not based on mere power (*machtsstaat*).

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