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Position and Authority of the Constitutional Court as a Guardian of the Constitution

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Abstract: The provisions of Article 24C of the 1945 Constitution have given the Constitutional Court the authority of the Constitutional Court as an institution that resolves cases related to the Indonesian constitution, which makes the Constitutional Court a guardian of the constitution. A special feature of the Constitutional Court is the authority to conduct judicial review. The role of the Constitutional Court as a guardian of the constitution is seen as incomplete because there is no regulation of constitutional questions. This research is a normative juridical research with a statutory approach and a conceptual approach, secondary data is obtained through a library study and then analyzed qualitatively juridically. The results of the study state that the Constitutional Court as the guardian of the constitution is positioned as a constitutional state organ with the philosophical basis of the authority of the Constitutional Court based on substantive justice. The realization of the Constitutional Court as a guardian of the constitution will be sharper if there is a constitutional question mechanism. Therefore, it is necessary to change the legal basis related to the authority of the Constitutional Court which includes the constitutional question as the authority of the Constitutional Court.

Keyword: Constitutional Court, Guardian of Constitution, Constitutional Complaint, Constitutional Question

INTRODUCTION

The constitutional system basically contains two aspects, namely aspects related to the power of state institutions and their relationship with each other among the state institutions and the relationships between state institutions and citizens. These relationships can be seen in the country's constitution (Hoesein, 2009, p. 26).

Baron Secondat de Montesquieu or commonly known as Montesquieu has given great ideas in constitutional law through the theory of trias politica, in principle the theory of trias politica divides state power into three powers of State Institutions, namely: Legislative; Executive; and the Judiciary, as an independent State Institution and in a position that is parallel to each other (Suparman, 2023, p. 60).

The establishment of the Constitutional Court in Indonesia began with the reform movement that occurred in 1998 which ended the new order regime (Silaban & Kosariza, 2021, p. 61). In the third amendment to the Constitution of the Unitary State of the Republic of Indonesia in 1945, a new branch of judicial power was created in addition to the Supreme Court

(MA), namely the Constitutional Court (MK) as one of the new actors of judicial power in the Indonesian constitutional system (Asshiddiqie, 2006, p. 29). This is as affirmed in Article 24 paragraph (2) of the 1945 Constitution of the Unitary State of the Republic of Indonesia which states:

“Judicial power is exercised by a Supreme Court and the judiciary under it in the general judicial environment, the religious judicial environment, the military judicial environment, the state administrative judicial environment, and by a Constitutional Court.”

Constitutionally, the authority of the Constitutional Court is regulated directly in Article 24C of the Constitution of the Unitary State of the Republic of Indonesia of 1945, basically the authority of the Constitutional Court is to adjudicate at the first and last level whose decision is final to test the law against the Constitution, decide disputes over the authority of state institutions whose authority is granted by the Constitution, decide the dissolution of political parties, and decide disputes about the results of the general election. In addition, the Constitutional Court is also authorized to give a ruling on the opinion of the House of Representatives regarding alleged violations committed by the President and/or Vice President.

Based on the provisions of Article 24C of the 1945 Constitution of the Unitary State of the Republic of Indonesia, the focus of the Constitutional Court's authority is to resolve cases related to the 1945 Constitution of the Unitary State of the Republic of Indonesia as the Indonesian constitution, which makes the Constitutional Court the guardian of the constitution (Setiawan, 2017, p. 10).

The Constitutional Court as the guardian of the constitution is certainly not easy, the intellectual competence and personality competence of Constitutional Judges should have high standards so that in carrying out their duties and functions the Constitutional Judges can adhere to the basis of the state (constitution) and not to the interests of the ruler or politics. Hans Kelsen argued that the constitution is not only a written rule but also what is practiced in state administration activities and is not only related to state institutions and their completeness, but also includes the mechanism between the relationship between state organs and their citizens (Asshiddiqie, 2009, p. 96).

A special feature of the constitutional court is the authority to test laws and regulations against higher regulations or the constitution (judicial review) as an effort check and balance between state institutions. The great history of judicial *review* began with the *Marbury vs. Madison* case in 1803 in America, the American Supreme Court has tested and annulled an American law because its substance is contrary to the American constitution (Sri Darmadi, 2015, p. 260).

The concept of *judicial review* is the result of the development of modern law on the democratic system of government which is based on the rule of law, namely the principle of separation of powers and the protection of fundamental human rights (Hausmaninger, 20003, p. 139). Judicial review or constitutional review generally has 2 (two) main task scopes, namely *First*, ensuring the functioning of the democratic system in the relationship of balancing roles between legislative, executive, and judicial powers. *Second*, to protect every individual citizen from abuse of power by state institutions that harm the basic rights guaranteed in the constitution (Asshiddiqie, 2010).

The protection of citizens to be in accordance with the constitution is theoretically not only through *judicial review*, but there is also the protection of citizens carried out through constitutional complaint. Constitutional complaints are a forum for citizens who feel that their constitutional rights or rights provided by the constitution are violated or ignored by a public institution. In addition, in Indonesia itself, there is no regulation regarding the constitutional question, which is a mechanism for testing the Law if a judge in an ordinary court (under the Supreme Court) who is adjudicating a case has doubts about the constitutionality of the rule to

be applied, so it is necessary to submit a constitutional question to the Constitutional Court (Gede Palguna, 2010, p. 2).

Based on this background description, it appears that the role of the Constitutional Court as a guardian of the constitution is seen as incomplete. So it is interesting to study in this study entitled "*The Position and Authority of the Constitutional Court as a Guardian Of The Constitution*" with the limitations of the research on (1) what is the philosophical basis of the position and authority of the Constitutional Court as a guardian of the constitution? and (2) how to reconceptualize the Constitutional Court as a guardian of the constitution?

METHOD

This study uses a normative juridical method, so the research focuses on literature studies to examine legal theories, norms, concepts, and laws and regulations (Soekanto, 1985, p. 13). This research also uses a legislative approach and a conceptual approach. The legislative approach is an approach that is carried out by analyzing rules and regulations related to the topic of the problem (Marzuki, 2010, p. 96). Meanwhile, the conceptual approach is an approach that is carried out by studying legal doctrines, legal definitions, legal concepts, and legal principles related to the topic of the problem (Marzuki, 2010, p. 135). The data used in this study is in the form of secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials obtained through literature study by inventorying, collecting, reading, and analyzing. The data that has been collected is then analyzed qualitatively juridically, which is research carried out through in-depth secondary data as a whole thing and then put into descriptive sentences (Sugiyono, 2009, p. 216).

RESULT AND DISCUSSION

Philosophical Basis of the Position and Authority of the Constitutional Court as Guardian of the Constitution

Montesquieu has given a great idea in constitutional law through the theory of trias politica, trias politica comes from the Greek word i.e. “*tri*” which means three, “*as*” which means the center or shaft, and “*politica*” which means power (Ruhenda et al., 2020). In principle, the trias politica theory divides state power into three powers of State Institutions, namely: Legislative; Executive; and the Judiciary, as an independent State Institution and in a position that is parallel to each other (Suparman, 2023, p. 60).

Based on the philosophy of political science, Montesquieu's thought on the trias of politica is related to the school of idealistic philosophy, because it places great emphasis on democracy in the body of government. So that through the concept of trias politica, it is hoped that the human rights of citizens will be more guaranteed in the life of the nation and state as stipulated in the constitution (Suparman, 2023, p. 68). What is meant by idealistic philosophy is a philosophical system that emphasizes thinking and psychology on things that are true (ideal conditions) (Margi & Khazanah, 2019, p. 26).

The great history of judicial *review* began with the Marbury vs. Madison case in 1803 in America, the American Supreme Court has tested and annulled an American law because its substance is contrary to the American constitution (Sri Darmadi, 2015, p. 260). John Marshall is of the view that the U.S. Supreme Court has the authority to declare a law contrary to the U.S. constitution.

Theoretically, the Constitutional Court (*Verfassungsgerichtshoft*) first introduced in 1919, according to Hans Kelsen, the implementation of the constitution on legislation can be effectively guaranteed only if an organ other than the legislature is given the task of examining whether a legal product is constitutional or not, and does not enforce it if according to this organ is unconstitutional, it was only unanimously in 1920 that the concept of the

Constitutional Court was ratified through the Constitutional Convention of October 1, 1920, as per the Austrian Federal Constitution (Asshiddiqie, 2010, p. 33).

The dynamics of Indonesian statehood also require the presence of constitutional protection, the need for constitutional protection can only be met after the reform of government in Indonesia, so that in the third amendment to the Constitution of the Unitary State of the Republic of Indonesia in 1945 a judicial power institution was formulated in addition to the Supreme Court (Margi & Khazanah, 2019, p. 28). This is as affirmed in Article 24 paragraph (2) of the 1945 Constitution of the Unitary State of the Republic of Indonesia which states:

“Judicial power is exercised by a Supreme Court and the judiciary under it in the general judicial environment, the religious judicial environment, the military judicial environment, the state administrative judicial environment, and by a Constitutional Court.”

With regard to the authority of the Constitutional Court, the 1945 Constitution of the Unitary State of the Republic of Indonesia has regulated in Article 24C of the 1945 Constitution of the Unitary State of the Republic of Indonesia. State institutions in Indonesia are divided into two types, namely, *constitutional state organ* and *state auxiliary organ*. First, *constitutional state organ* is a State Institution whose authority is directly granted by the 1945 Constitution of the Unitary State of the Republic of Indonesia. Second, *state auxiliary organ* is a State Institution whose authority is given by other laws and regulations not by the constitution. (Iswandi & Prasetyoningsih, 2020, pp. 138–139).

The regulation of the authority of the Constitutional Court in the 1945 Constitution of the Unitary State of the Republic of Indonesia places the Constitutional Court as a *state constitutional organ*. Following up on the mandate of the 1945 Constitution of the Unitary State of the Republic of Indonesia, the Government and the House of Representatives discussed the Law on the Constitutional Court. On August 13, 2003, the House of Representatives together with President Megawati Soekarno Putri passed Law Number 24 of 2003 concerning the Constitutional Court. This event placed Indonesia as the 78th country to form the Constitutional Court (Margi & Khazanah, 2019, p. 29).

Based on Article 24C of the 1945 Constitution of the Unitary State of the Republic of Indonesia *jo.* Law Number 24 of 2003 concerning the Constitutional Court, as last amended by Law Number 7 of 2020, is essentially the authority of the Constitutional Court, among others::

- a) Testing the Law on the Constitution of the Unitary State of the Republic of Indonesia in 1945;
- b) Deciding disputes over the authority of state institutions whose authority is granted by the Constitution of the Unitary State of the Republic of Indonesia in 1945;
- c) Deciding on the dissolution of political parties;
- d) Decide disputes about the results of the general election as well as; and
- e) The obligation to give a verdict on the opinion of the House of Representatives that the president and/or vice president is suspected of having committed violations of the law in the form of treason against the state, corruption, bribery, other serious crimes or reprehensible acts and/or no longer meets the requirements of the president and vice president as referred to in the Constitution of the Unitary State of the Republic of Indonesia in 1945.

The authority given by the law certainly positions the Constitutional Court as the guardian of the constitution, the final interpreter of constitution, the guardian of democracy, the protector of citizen's constitutional rights, the protector of human rights (Saadah, 2019, p. 240). The exercise of the authority of the Constitutional Court is very closely related to guarding the constitution (*the guardian of constitution*). Philosophically, the authority of the Constitutional Court is based on substantive justice, namely justice born from legal reasoning on a sociolegal approach to understand legal problems in society contextually based on careful,

honest, impartial, rational and objective considerations (M. Syamsudin, 2014). Substantive justice is an intersection of procedural justice that emphasizes formal rules.

The Constitutional Court is designed to be the guardian of the constitution and the final interpreter of constitution through its decisions (Sri Darmadi, 2015, p. 680), Constitutional judges are free to think, apply principles, and apply theories using legal hermeneutics (Haryono, 2019, p. 33). However, the Constitutional Judge could not decide to exceed what was requested (*ultra petita*).

Reconceptualization of the Constitutional Court as a Guardian of the Constitution

Vicky C. Jackson and Mark Tushet argue that there are basically 2 (two) models of constitutional judicial review institutions, namely. *First*, decentralized model is the power to conduct judicial review not by one judicial institution alone or centrally, but can be carried out by many judicial institutions. *Second*, the centralized model is the power to conduct judicial review only in one judicial institution (Amsari, 2013, p. 144). Indonesia actually has 2 (two) judicial institutions that are authorized to conduct judicial review, namely the Constitutional Court for testing the Law on the Constitution of the Unitary State of the Republic of Indonesia in 1945 and the Supreme Court for testing laws and regulations (Government Regulations, Regional Regulations, Regional Head Regulations, and others) against the Law.

The Constitutional Court conducted a legal test against the 1945 Constitution of the Unitary State of the Republic of Indonesia. The rights inherent in the Constitutional Court are known as *toetsingsrecht*. In testing theory (*toetsing*), Differentiated between *materiële toetsing* and *formeële toetsing*. Formal testing rights (*formeële toetsing*) is the authority to assess whether a process of making legislative products (Laws) has been carried out in accordance with the provisions or regulated in applicable laws and regulations. Meanwhile, the right to test material (*materiële toetsing*) is the authority to assess the content of legislative products (laws) that are in accordance with or contrary to the constitution (Fatmawati, 2005, pp. 5–6).

The Constitutional Court is designed to be the guardian of the constitution and the final interpreter of constitution through its decisions (Sri Darmadi, 2015, p. 680). The exercise of the authority of the Constitutional Court is very closely related to the guardian of the constitution. Philosophically, the authority of the Constitutional Court is based on substantive justice, namely justice born from legal reasoning on a sociolegal approach to understand legal problems in society contextually based on careful, honest, impartial, rational and objective considerations (M. Syamsudin, 2014).

Based on the provisions of Article 24C of the 1945 Constitution of the Unitary State of the Republic of Indonesia, the focus of the Constitutional Court's authority is to resolve cases related to the 1945 Constitution of the Unitary State of the Republic of Indonesia as the Indonesian constitution, which makes the Constitutional Court the guardian of the constitution (Setiawan, 2017, p. 10). However, the authority of the Constitutional Court to decide disputes over the results of the general election (Presidential and Legislative Sessions) is also included, thus making the Constitutional Court not only a constitutional court but also a political court (*juridicalization of politics*) (Satriawan, 2018, p. 49).

A special feature of the constitutional court is the authority to test laws and regulations against higher regulations or the constitution (*judicial review*) as an effort to check and balance between state institutions. The concept of judicial review is the result of the development of modern law on the democratic system of government which is based on the rule of law, namely the principle of separation of powers and the protection of fundamental human rights (Hausmaninger, 20003, p. 139). Judicial review or constitutional review Generally, there are 2 (two) main scope of tasks, namely *First*, ensuring the functioning of the democratic system in the relationship of balancing roles between legislative, executive, and judicial powers. *Second*,

to protect every individual citizen from abuse of power by state institutions that harm the basic rights guaranteed in the constitution (Asshiddiqie, 2010).

One of the functions of the Constitutional Court is as *the guardian of the constitution*. So that one of the most important tasks in maintaining the constitution is in order to provide protection for the constitutional rights of citizens. The protection of citizens to be in accordance with the constitution is theoretically not only through *judicial review*, but there is also the protection of citizens carried out through constitutional complaint and constitutional question.

Victor Ferreres Comella argues that Constitutional complaint: provides one of the major powers of constitutional courts to protect the fundamental rights of citizens. It is defined as a complaint to a constitutional court, lodged by individuals who feel their fundamental or constitutional rights are being violated by public authority (Ferreres Comella, 2004, p. 710). Constitutional complaint is actually similar to the term judicial review used in the Indonesian legal system, only judicial review has a broader meaning of the object of testing, namely being able to test the legality of laws and regulations under the Law, while Constitutional complaint is the object of study is testing the law against the constitution, so what is tested is its constitutionality (Sariffudin, 2021).

Constitutional question contains two meanings, general and specific. In a general sense, constitutional question is a term that refers to every question related to the constitution. Meanwhile, in a special sense, constitutional question, is a mechanism for testing the Law if a Judge in an ordinary court (under the Supreme Court) who is adjudicating a case has doubts about the constitutionality of the rule to be applied, so it is necessary to constitutional question to the Constitutional Court (Gede Palguna, 2010, p. 2). Mahfud MD argued that the constitutional question is a testing process where judges in regular courts ask the Constitutional Court about the constitutionality of the laws and regulations used to decide the case that is being handled (Mahfud MD, 2009).

The constitutional question is one of the aspects that cannot be separated from the history of the existence of the Constitutional Court, according to Hans Kelsen, the fact that the Constitutional Court is needed is to enforce the constitution (Schwartz, 2000), so that the Constitutional Court really becomes the guardian of the constitution. The constitutional question can strengthen the protection, respect and fulfilment of constitutional rights of citizens. Thus, if there are citizens who lack awareness or the ability to defend their constitutional rights, they will still receive the minimum protection of constitutional rights without having to actively apply for a constitutional review case to the Constitutional Court (Muhammad Faiz, 2016). I Gede Dewa Palguna argued that there are 3 (three) advantages if Indonesia wants to implement the constitutional question, including (Gede Palguna, 2010, pp. 16–17):

- a) The constitutional question mechanism will further maximize the respect, protection, and fulfillment of citizens' constitutional rights. This is because, citizens who lack awareness and/or ability to defend their constitutional rights can still enjoy the fulfillment of their constitutional rights when a law, according to reasonable reasoning, has the potential to harm their constitutional rights, without the person concerned having to actively submit the judicial review to the Constitutional Court;
- b) Judges will not be forced to enforce laws that they believe are unconstitutional;
- c) Providing uniformity in the interpretation of laws and regulations, Indonesia, which formally or traditionally does not adhere to the principle of *stare decisis* or the principle of precedent, it will help to form a unity of view or understanding among judges outside the constitutional judge.

The application of constitutional questions to the authority of the Constitutional Court will further strengthen the role of the Constitutional Court as the guardian of the constitution, but what needs to be considered is related to the implementation of constitutional questions.

Whether the constitutional question can be submitted directly by the Judge at the District Court, the Religious Court, the Military Court, the State Administrative Court, and the High Court that it has or whether the submission of the constitutional question must be submitted by the Judge who is handling the case to the Supreme Court and the Supreme Court is the one who submits it to the Constitutional Court. However, according to the author, if the constitutional question needs to be carried out in stages, the judicial process will be very long, thus deviating from the principle of fast, simple, and low-cost justice. Therefore, it is necessary to mature the concept of implementing the constitutional question in Indonesia.

CONCLUSION

The Constitutional Court has a position as a constitutional state organ, this is because the authority it has is directly sourced from the 1945 Constitution of the Unitary State of the Republic of Indonesia (Indonesian Constitution). The exercise of the authority of the Constitutional Court is very closely related to the guardian of the constitution. Philosophically, the authority of the Constitutional Court is based on substantive justice, namely justice born from legal reasoning on a sociolegal approach to understand legal problems in society contextually based on careful, honest, impartial, rational and objective considerations. In order for the role of the Constitutional Court as the guardian of the constitution to be stronger, the Constitutional Court needs to consider the authority of the constitutional question. The thing that needs to be considered in the implementation of constitutional questions is related to the mechanism for applying constitutional questions. With the addition of the Constitutional Court's authority regarding the constitutional question, it is necessary to change the legal basis that regulates the addition of this authority.

REFERENCES

- Amsari, F. (2013). *Perubahan UUD 1945*. Rajawali Press.
- Asshiddiqie, J. (2006). *Konstitusi dan Konstitusionalisme*. Konpress.
- Asshiddiqie, J. (2009). *Pengantar Ilmu Hukum Tata Negara*. Rajawali Pers.
- Asshiddiqie, J. (2010). *Model-model Pengujian Konstitusional di Berbagai Negara*. Sinar Grafika.
- Fatmawati. (2005). *Hak Menguji (Toetsingsrecht) Yang Dimiliki Hakim Dalam Sistem Hukum Indonesia*. Rajawali Press.
- Ferreres Comella, V. (2004). The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism. *Texas Law Review*, 82(7).
- Gede Palguna, I. D. (2010). Constitutional Question: Latar Belakang dan Praktik Di Negara Lain Serta Kemungkinan Penerapannya di Indonesia. *Jurnal Hukum*, 1(17).
- Haryono. (2019). Penegakan hukum Berbasis Nilai Keadilan Substantif. *Jurnal Hukum Progresif*, 7(1).
- Hausmaninger, H. (20003). *The Austrian Legal Sistem*. Wien.
- Hoesein, Z. A. (2009). *Judicial Review di Mahkamah Agung RI Tiga Dekade Pengujian Peraturan Perundang-Undangan*. Raja Grafindo Persada.
- Iswandi, K., & Prasetyoningsih, N. (2020). Kedudukan State Auxiliary Organ Dalam Sistem Ketatanegaraan di Indonesia. *Jurnal Penegakan Hukum Dan Keadilan*, 1(2).
- M. Syamsudin. (2014). Keadilan Prosedural dan Substantif Dalam Putusan Sengketa Tanah Magersari. *Jurnal Yudisial*, 7(1).
- Mahfud MD. (2009). *Konstitusi dan Hukum dalam Kontroversi Isu*. Rajawali Press.
- Marzuki, P. M. (2010). *Penelitian Hukum*. Kencana.
- Margi, S., & Khazanah, M. (2019). Kedudukan Mahkamah Konstitusi Dalam Kelembagaan Negara. *Jurnal Rechten: Riset Hukum Dan Hak Asasi Manusia*, 1(3).

- Muhammad Faiz, P. (2016). A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court . *Constitutional Review*, 2(1).
- Ruhenda, Haldi, Mustapa, & Septiadi. (2020). Tinjauan Trias Politika Terhadap Terbentuknya Sistem Politik dan Pemerintahan di Indonesia. *Journal of Governance and Social Policy*, 1(2).
- Saadah, N. (2019). Mahkamah Konstitusi Sebagai Pengawal Demokrasi dan Kontruksi Khususnya Dalam Menjalankan Constitutional Review. *Jurnal Administrative Law & Governance*, 2(2).
- Sariffudin. (2021). Partisipasi Publik Dalam Pembentukan Peraturan Perundang-Undangan. *Prosiding Webinar Nasional Berseri Perkembangan Hukum Tata Negara Di Masa Pandemi*.
- Satriawan, M. I. (2018). Memurnikan Mahkamah Konstitusi. *Jurnal SASI*, 24(1).
- Schwartz, H. (2000). *The Struggle for Constitutional Justice in Post-Communist Europe*. University of Chicago Press.
- Setiawan, H. (2017). *Rekonseptualisasi Kewenangan Mahkamah Konstitusi Dalam Upaya Memaksimalkan Fungsi Mahkamah Konstitusi Sebagai Guardian of Constitution* [Tesis]. Universitas Diponegoro.
- Silaban, V., & Kosariza. (2021). Kedudukan Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Republik Indonesia. *Limbago: Journal of Constitutional Law*, 1(1).
- Soekanto, S. (1985). *Penelitian Hukum Normatif "Suatu Tinjauan Singkat"*. Rajawali Press.
- Sri Darmadi, N. (2015). Kedudukan Dan Kewenangan Mahkamah Konstitusi Dalam Sistem Hukum Ketatanegaraan Indonesia. *Jurnal Pembaharuan Hukum*, II(2).
- Sugiyono. (2009). *Metode Penelitian Pendidikan Pendekatan Kuantitatif, Kualitatif, dan R&D*. Alfabeta.
- Suparman, O. (2023). Konsep Lembaga Negara Indonesia Dalam Perspektif Teori trias Politica Berdasarkan Prinsip Checks and Balances System. *Jurnal Hukum Islam Dan Humaniora*, 2(1).