COMPETING CONCEPTS: HUMAN RIGHTS IN INDONESIA'S CONSTITUTIONAL SETTING

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ABSTRACT

The debate on human rights in Indonesia was commenced by the nation's founding fathers during the drafting of the 1945 Constitution. The discourse on rights experienced a decline, especially in scholarly debate, during President Suharto's New Order regime, which held power from 1966 to 1998. After the regime fell, calls for the constitutional protection of human rights resurfaced. However, these were largely motivated by political demands to hold Suharto's authoritarian regime accountable for past human rights abuses. Debate has also focused on the legal concept of rights. With the adoption of constitutionalism, along with constitutional amendments, the term 'constitutional rights' came to fore. Rights, as basic or fundamental rights, are often identified with human rights. However, when the concept of constitutional rights arises, it is important to discuss the legal conceptual differences between the two. This paper analyses the debate in Indonesia on the different legal concepts between fundamental rights, human rights and constitutional rights. The first part of the paper examines the history of the debate on rights in Indonesia. The second part describes the intertwining of human rights and constitutional rights, especially after the constitutional amendments. It also touches on the theoretical aspects of rights. It then discusses the development of constitutional rights and their protection by the Constitutional Court.

Keywords: Constitutional Court, Constitutional Rights, Human Rights, Politicization of Rights.

INTRODUCTION

Constitutional rights, as a legal concept, were rarely discussed in Indonesian academic discourse and public debate prior to the four constitutional amendments of 1999–2002. The Indonesian public's greater familiarity with the term human rights, rather than constitutional rights, is not only because of the context of Indonesia's modern political history. Rather, the distinction between constitutional rights and human rights reveals a different approach in legal theory on the concept of rights.

The debate to enumerate rights within the Indonesian Constitution took place during the drafting of the 1945 Constitution. The drafters were divided into two camps. One camp believed that embedding a Bill of Rights would contradict the collectivist nature of the 1945 Constitution. This camp argued that rights are founded on liberal idea of individualism. The other camp argued

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that rights should be incorporated in the Constitution to limit the state's power over citizens. These two conflicting positions were outlined during the founding fathers' meetings within the two institutions for the preparation of Indonesian independence: the Investigating Committee for Preparatory Work for Independence and the Preparatory Committee for Indonesian Independence. Minutes of the debates were compiled by Bahar and Hudawati (1998) Kusuma (2009).

The proposal to include rights in the Constitution was not entirely repudiated by the majority during the meetings. The drafters accommodated certain rights to be enshrined as constitutional provisions, among others, the right to work and a decent life, the right to participate in national defence and the right to education. Yet, the discussion on rights was not a prominent part of subsequent discourse of Indonesian constitutional history. Majda El Muhtaj (2005) notes there are at least three viewpoints regarding the guarantees of human rights in the 1945 Constitution. First is the view that the Constitution does not contain comprehensive guarantees of human rights. Second is that human rights are enshrined in the 1945 Constitution. The third view argues the 1945 Constitution only contains principles to guarantee human rights.

With the adoption of human rights in constitutional provisions following the fall of the Suharto regime, there is a notion that human rights have shifted and politicized into constitutional rights as legal rights. The establishment in 2003 of the Constitutional Court, which serves as the protector of constitutional rights, cemented this perceived shift. In exercising its authority to review the constitutionality of laws, the Constitutional Court established standing for parties to argue that their rights in question are those enumerated in the Constitution. Despite this shift, the development of the discourse on human rights in Indonesia has not changed. The concept of human rights is still widely understood in the context of rights that were breached during Suharto's 32-year regime, especially in the effort to hold the state accountable for violations of such rights.

LITERATURE REVIEW

Borrowing from Ginsburg's (2014) typology of constitutionalism, prior to the amendments to the 1945 Constitution, Indonesia had a hybrid constitutionalism model. The hallmark of such a model of constitutionalism is the accumulation of power in Parliament, which is the apex of power, as the bearer of sovereignty. This is coupled with the presence of a dominant political party that controls the parliament, which would elect the president, based on the assumption that the people lacked of political maturity. In the Indonesian context, prior to constitutional amendment, constitutional system focuses on power in Parliament, as it follows the Leninist/socialist constitutionalism model. Parliament refers to the People's Consultative Assembly. On the other hand, although the constitutional structure resembles the Leninist/socialist model of constitutionalism, the Constitution is still a document that is used as guidance. This is another important element to refer to as hybrid constitutionalism.

During the New Order, a political slogan was popularized, that is: to implement Pancasila and the 1945 Constitution in a pure and consistent manner. This first appeared in the MPR statement that *"... the guarantee of the implementation of the Mandate of People's Suffering can only be given with a complete understanding of Pancasila in all aspects of state and social life,*

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and with a pure and consistent implementation of the spirit and the provisions of the 1945 Constitution" (Appendix to the Decree of the MPRS No. XX/MPRS/1966). The MPR in the New Order deliberately use the slogan "*people's suffering*" which, ironically, introduced by Soekarno as an appeal to gain people trust as it related to the struggle of Indonesian people for independence against colonialisation. The New Order's slogan to consistently implement the Constitution was part of the idea of liberal constitutionalism by making the 1945 Constitution a guideline in state administration, despite the fact that the New Order often manipulated constitutional policies in order to maintain power (Anderson, 1983).

With regard to the protection of human rights, in the early days of the New Order regime there were efforts to manifest the protection of human rights in a charter. A Human Rights Symposium in June 1967 concluded with the drafting of the charter (Suny, 1992). At the same time, the MPRS also prepared a draft on the *"Charter of Human Rights and the Rights and Obligations of Citizens*". Nonetheless, the majority of MPRS members voted not to adopt the charter. In the view of A.H. Nasution, Speaker of the MPRS during that period, as quoted in Lubis (1993), this was the momentum for the decline of human rights in the New Order era. The draft charter was never adopted during Suharto's 32-year regime.

Following the amendments of the 1945 Constitution over 1999–2002, Indonesia tended to adopt the liberal constitutionalism model (Ginsburg, 2014). An indication of this liberalism was the public participation in the drafting of the constitutional amendments. The constitutional reform by the MPR was part of the people's demands that brought down the Soeharto regime (Horowitz, 2013). In the legal context, the Indonesian model of liberal constitutionalism is indicated by the amendment to Article 1(2) of the 1945 Constitution. Previously, the article stipulated "*sovereignty shall be vested in the hands of the people, and is exercised by the MPR*". It was revised to, "*sovereignty shall be vested in the hands of the people and be executed according to the Constitution*". This indicates a shift from the hybrid constitutionalism model that had emphasized the supremacy of Parliament to more liberal constitutionalism, especially with the revision of the words *"is exercised by the MPR"*.

The fall of the New Order regime amid massive protests and a severe economic crisis in May 1998 paved the way for the democratization process (Liddle, 1999). However, the reformation period after Suharto's fall was not the first time in Indonesia's history to embrace a constitutional democratic government. Herbert Feith (1962) observed that efforts to organize a constitutional democratic government had existed from December 1949 to March 1957, despite fluctuating political dynamics. Feith's research was complemented by that of Adnan Buyung Nasution (1995), who discussed the constitutional government during the period of the Constitutional Assembly, which was elected in 1955 to draw up a new constitution and met from 1956–1959, only to be dissolved by founding president Sukarno.

When Suharto took power there were mass killings that activists deemed to be gross violations of human rights. Therefore, it was not surprising that one of the discourses that was absent during New Order, despite the regime's slogan to implement the 1945 Constitution in a pure and consistent manner, was the debate on human rights. The recognition of human rights in new laws and regulations began after the fall of the authoritarian regime (Azhar, 2014). Civil society groups endorsed the discussion on the protection of human rights and advocated for their inclusion in various legal instruments, ranging from draft laws, ratification of international

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conventions and the Constitution.

However, the transitional situation from the authoritarian New Order regime made the discourse on human rights raised by civil society groups more inclined to hold the regime accountable for its past human rights violations. A 2011 report by the International Center for Transitional Justice and the Commission for Disappeared Persons and Victims of Violence identified three stages in the discourse on the protection of human rights in the period of 1998 to 2011. The first period (1998–2000) was full of hope, with various resolutions and decrees enacted to enforce to the protection of human rights and the establishment of institutions mandated to handle human rights violations. The second period (2001–2006) was a period of compromised mechanisms, where the policies and institutions that should have provided protection against human rights violations did not accomplish expected results and their work was not followed up by the government. The third period (2007–2011), deemed one of stalled reform, was marked by the return of retired military officers to the national political stage, accompanied by stalled efforts to resolve past human rights violations. Careful reading of the report shows that human rights is generally understood as gross violations of rights that refer to international human rights instruments.

After the fall of the New Order, the government issued various policies in the context of protecting human rights. The drafting and publication of laws and regulations that protect human rights signified greater freedom for citizens after the repression of the New Order (Bhakti, 2004). It also served as a form of political statement that the new administration of President B.J. Habibie, as Suharto's successor, was different from the previous regime (Hadiprayitno, 2010). This included the MPR. In 1998, the MPR initiated a decree that contained provisions for the protection of human rights (MPR Decree No. XVII/MPR/1998 on Human Rights). The decree included a charter, which served as a model of human rights adapted to Indonesian situations. The charter stated that *"…driven by the soul and spirit of the Proclamation of Independence of the Republic of Indonesia, the Indonesian people have a view of human rights and human obligations, coming from religious teachings, universal moral values, and the noble values of the nation's culture, and are founded in Pancasila and the 1945 Constitution."*

The MPR also expressed respect for the Universal Declaration of Human Rights since Indonesia is a member of the United Nations. Nonetheless, the charter does not adopt and adhere to the Universal Declaration of Human Rights completely.

Advocating Constitutional Rights after the Inception of the Constitutional Court

During the New Order regime and the early Reform era, the term "*human rights*" was used more commonly in both public debates and academic discourse than the term "*constitutional rights*" or "*basic/fundamental rights*". In a study by Setara Institute (2013), the pattern of the relationship between human rights and constitutional rights is constructed as if human rights are transformed into constitutional rights. Not only that, the study also emphasizes that human rights have a wider scope than constitutional rights. The study argues in accordance to the hierarchy that international law has a higher position than constitutional law, since it has a global scope. On the other hand, constitutional rights that were the subject of constitutional law only have a binding effect in the domestic sphere. This claim can be contentious, but the study

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did not give further discussion.

The term "*constitutional rights*" began to earn public awareness with the adoption of constitutionalism in the amendments to the 1945 Constitution. As a consequence of constitutionalism, the Constitutional Court was established in 2003. The Law on the Constitutional Court introduced the term "*constitutional rights*". The Law requires that any party to be given standing before the Court needs to argue its "*constitutional right*" that was violated by a law that is being challenged. The elucidation of the Law defines "*constitutional right*" as the rights enumerated in the 1945 Constitution (elucidation of Art. 51(1) Law No. 24 of 2003).

The limits set by the definition in the Law are aligned with the constitutional design of judicial review in Indonesia. The Constitution provides that judicial review is conducted by two separate courts. This follows the strict hierarchy of laws and regulations in Indonesia (Art. 7(1) Law No. 12 of 2011). The constitutional arrangement for separate judicial review is that the Constitutional Court has the power to review whether laws are against the Constitution, whereas the Supreme Court is empowered to review any regulations to ensure they comply with existing laws, not to the Constitution.

The Law on the Supreme Court (Law No. 3 of 2009) gives the Supreme Court a function of judicial review procedure. In terms of standing for a party to file a petition before the Supreme Court, the Law on the Supreme Court states that the party needs to argue that its rights were breached by the challenged regulation (Art. 31A(2) Law No. 3 of 2009). In contrast to the Law on the Constitutional Court, it only mentions the term "*rights*".

Both the Constitutional Court Law and the Supreme Court Law imply there is a distinction between "*constitutional rights*" and other "*rights*" enumerated in laws and regulations. Former Constitutional Court Chief Justice, Jimly Asshiddiqie (2007) argued that constitutional rights are rights guaranteed in and by the 1945 Constitution. In addition, Asshiddiqie said that rights stipulated in laws and regulations be termed "*legal rights*". Former Constitutional Court Justice I Dewa Gede Palguna (2013) argued that constitutional rights are rights guaranteed by basic law or the Constitution, whether stated explicitly or implicitly. The definition by Palguna provides an insight that constitutional rights are not only those enumerated in the Constitution. In its decisions, the Constitutional Court has deliberately considered rights that are not listed in the Constitution. Those rights include the right to legal counsel (*see* Decision No. 006/PUU-II/2004), right to presumption of innocence (Decision No. 133/PUU-VII/2009) and right to vote and to be elected (Decision No. 011-017/PUU-I/2003 and No. 102/PUU-VII/2009). In comparative view, the common law tradition familiar with this practice where in the US the rights are conceived as unenumerated rights, while in Australia these rights are described as implied rights.

Thus, the legal problem arises on the overlap of the use of "*human rights*" term in the Constitution and the Laws. The separate system of judicial review arranges a demarcation of constitutional rights and other rights. Nonetheless, the term "*human right*" also understands and refers to the rights in the Constitution and in the laws. In Indonesian, "human rights" translates as "*hak asasi manusia*". The word "*asasi*" means "*basic*" which is also synonymous with "*fundamental*". The 1945 Constitutional amendment inserted a new chapter on "*hak asasi manusia*" (Chapter XA of the 1945 Constitution). Rather than understand it as "*basic rights*" or "*fundamental rights*", the chapter is frequently referred to as "*human rights*". Albeit, it is a

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matter of translation semantics but the translation may lead to a misunderstanding of the concept.

Chapter XA of the 1945 Constitution contains a number of rights. Due to their enactment in the Constitution, they are called constitutional rights. This interpretation is consistent with the definition of "*constitutional right*" given in the elucidation on the Law of the Constitutional Court.

On the other hand, there is also the Law on Human Rights (Law No. 39 of 1999), which is still in force. The Law on Human Rights lists a number of rights that are intertwined and have almost the same lexical definitions as the constitutional provision on rights. Following the terms coined by Asshiddiqie, the rights in the Law on Human Rights are classified as "*legal rights*" since they are composed in the law.

This creates a problem regarding the separate systems of judicial review. The problem lies on which court will have the final word on the interpretation of rights that are intertwined in both the Constitution and the Law on Human Rights. Does the Constitutional Court's decision have the edge over the Supreme Court's decision in accordance with the strict hierarchy of laws and regulations? Can the Supreme Court's interpretation of rights differ from the Constitutional Court's decisions? As an illustration, the right to choose a religion and to worship in accordance with one's beliefs is guaranteed in the Constitution (Art. 28E (1)) and in the Law on Human Rights (Art. 22(1) of Law No. 39 of 1999). The Constitution and the Law on Human Rights stipulate the same provision. The question remains on to what extent the right to choose a religion and to worship in accordance with one's beliefs is considered a constitutional right that is subject to the Constitutional Court's interpretation. Or, should that right be considered by the Supreme Court due to its association with the Law on Human Rights? The debate continues further on whether the Supreme Court has the power to interpret certain rights that in their nature contain constitutional issues. Those who hold the view of separating constitutional rights from other rights may argue that the Supreme Court should not provide any interpretation of rights in the Law on Human Rights because that law also holds the status as a constitutional right. Yet, such an argument is flawed because there is a difference in the object of judicial review between the two top courts. The Supreme Court has the authority to review regulations below laws and this function cannot be transferred to the Constitutional Court because it only reviews whether laws are compliance with the Constitution. Therefore, this creates legal problem to which if one's right to religion, for instance, breached by a regulations below the Law, it is should be challenge in the Supreme Court. Yet the Supreme Court cannot provide interpretation since the right of religion is recognized as constitutional right. To bring the case before the Constitutional Court is also erroneous since the Court has limited power to review only laws and not include regulations under the laws. It is necessary, accordingly, for any party to carefully sort out certain rights in laws and in the Constitution in order to argue their case before either the Supreme Court or the Constitutional Court.

One of the roots of the above problem is the November 1998 MPR Decree on Human Rights. The Decree, which includes a human rights charter, became the basis for both the subsequent Law on Human Rights and for some of the rights provisions in the constitutional amendments. The Decree itself orders the implementation of human rights to be guaranteed, regulated and stipulated in instruments of legislation. As a follow-up to the Decree, lawmakers issued the Law on Human Rights, as is expressly stated in that law's preamble. This is

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understandable in consideration of the situation at the time the Law on Human Rights was passed, which was just some 16 months after the fall of the authoritarian Suharto regime. The inclusion of human rights provisions in various laws and regulations was part of an effort to demonstrate the transitional government's political will and seriousness toward democracy. In addition, when the Law on Human Rights came into force in September 1999, the constitutional discourse on the system for reviewing laws and regulations had not yet commenced.

In the drafting of the Law on Human Rights, there was a misunderstanding in following up the MPR Decree on Human Rights. The Decree emphasizes *"…the implementation of human rights is guaranteed, regulated, and set forth in laws and regulations"* (Art. 44). The word "implementation" can be interpreted as an elaboration, follow-up and efforts to enforce human rights. Consequently, there should be no repetition of the provisions in the Decree. However, the Decree was then included as provisions in the Law on Human Rights. The same provision in the Decree, to implement human rights, were also adopted in the Amendment of the 1945 Constitution (Art. 28I (5)). So far, there has been no attempt to streamline these provisions with the judicial review system. This leaves lawmakers an important task to revise the Human Rights Law. One of the factors causing the emergence of the problem is a limited understanding, among laypersons, especially among legal scholars in Indonesia, in regard to the definition of constitutional rights. Many tend to haphazardly identify human rights with constitutional rights. Although in fact, the two incorporate concepts that are open to the possibility to be distinguished from one another.

Thus far, Indonesian political and legal scientists are still uncertain of the relationship between human rights in international legal instruments and constitutional rights that apply within the national jurisdiction. In national law, constitutional rights have the nature of legal rights. Here, the term legal right differs in meaning to the definition coined by Asshiddiqie, as discussed in the above section. In the typology formulated by Joseph Raz (2010), legal rights can be understood as (i) new rights created by law or (ii) rights that already exist naturally and are then recognized by law. Based on the legal subject, individuals and legal entities have rights. However, due to the fact that a legal entity is a legal subject incarnate from law, the rights of a legal entity are promptly referred to as legal rights. This is different to the rights of the individual, as a person may have rights created by law or recognized by law. In terms of the rights of a person, the legal rights in question are not those classified as created by law. The legal rights of a person are recognized by law by means of legislation. This is because the nature of rights is fundamental, as well as universal.

There is also scholarly debate over the conceptual distinction between human rights and basic/fundamental rights. Gianluigi Palombella (2007) postulates that the two terms should not be used synonymously, although there are some similarities in meaning. In general, human rights are also fundamental rights, but Palombella explains that human rights are more individual in nature while fundamental rights contain meaning in relation to human existence in society. Palombella emphasizes that rights included in fundamental rights are in the sense of rights which, when changed, will have an impact in the social system (2007, 398).

The existence of human rights has tremendous effect if they are recognized in pieces of legislation, both at the international and domestic levels. Gerald Neuman (2003) coined the term "*dual positivization*". In international law, the protection of basic rights is classified in

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international human rights law, while in domestic law it is studied within the field of constitutional law. Thus, it is argued that in national law, basic rights are transformed into constitutional rights.

Moreover, Stephen Gardbaum (2008) sees that the basic rights contained in constitutions and international treaties have similarities in terms of function, content and structure. The function of basic rights as constitutional norms and as treaties is to limit the power of government. This is seen from the emergence of basic and human rights having begun at almost the same period, in which both were a response to the massive violations of individual rights during the Second World War. The content regulated in rights at the national and international levels also has similarities. Karel Vasak's classification of rights (1977) is commonly used as a reference. Vasak divides human rights into three generations based on the French Revolution. The first generation (liberate) includes civil and political rights. The second generation includes economic, social and cultural rights. The third generation (fraternity) is referred to as solidarity rights, which demand a collective effort to fulfil their rights.

CONCLUSION

In Indonesia, discussion on the nature of constitutional rights and how these rights are interpreted by the Constitutional Court has not yet received significant attention. Scholarly debates on rights tend to refer to human rights in relation to international human rights law. Thus, the study of rights within Indonesian constitutional law is limited.

Nonetheless, as explained above, the development of constitutional rights in Indonesia, along with the establishment of the Constitutional Court, has progressed rapidly. The Law on the Constitutional Court introduced constitutional rights as rights enumerated in the Constitution. The approach used by the definition in the Law on the Constitutional Court led to certain rights being politicized into the Constitution. In its development, the Constitutional Court introduced the concept that constitutional rights are not only those explicitly stated in the text of the Constitution. There are number of decisions in which the Constitutional Court examines rights that are not in the Constitution, including the right to vote, the right to legal counsel, the right to presumption of innocence. What is important to discuss in more depth is how the Constitutional Court came to the conclusion to take rights that are not stated in the Constitution as constitutional rights and are included as basic rights.

In addition, there are problems in understanding the distinction between constitutional rights and other rights in relation to Indonesia's two systems of judicial review. The Supreme Court examines judicial review cases based on rights that are not enumerated in the Constitution. Yet, constitutional rights and other rights are de facto intertwined. The Law on Human Rights lists rights that are also enumerated in the Constitution. This triggers an institutional and procedural issue within Indonesia's separate judicial review systems. Therefore, it is important for lawmakers to revise the Law on Human Rights. Such revision is necessary to adjust the content of the Law to protect certain rights as derivatives of the constitutional rights enumerated in the 1945 Constitution.

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