THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

INTERNATIONAL SHORT COURSE

"THE CONSTITUTIONAL COURT AND CONSTITUTIONALISM IN POLITICAL DYNAMICS"

YOGYAKARTA, INDONESIA, 2 - 3 OCTOBER 2018

PROCEEDING

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INTERNATIONAL SHORT COURSE
2018

The Contitutional Court and Contitutionalism in Potlitical Dynamics

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SHORT COURSE DAY I

1. The First Presentation for the First Day of the Short Course was delivered by the Former Chief Justice of the Constitutional Court of the Republic of Indonesia, Mr. Hamdan Zoelva. The presentation is titled "Constitutionalism at the Crossroads, Law, Politics, and Society", and puts forward the importance in Constitutionalism on carrying out the Government. There are two levels in the implementation of Constitutionalism, the first level is the Constitution itself, as the supreme text, with the interpretation done by related authorities given the function of such, for example the Constitutional Court. The Second Level relates to the laws, regulations and norms created under the Constitution, and having close relations to the Constitution. The Constitution plays an important role in ensuring that an abuse of Democracy does not happen, by way of the separation of powers.
2. During Discussions, questions arise regarding how the Constitution can follow changes within the society, as well as the political influence that could hinder the interpretation of the Constitution to adapt towards the need of the people. It is true that amendments could be made towards the Constitution, however it is the role of the judges in interpreting the laws within the Constitution in a way that could foresee the effect of such decision in the future. Separating completely Political Influences towards Judicial system is almost impossible, therefore it is the duty of the Judge to make sure that exterior and internal influences are kept into a minimum to ensure impartiality of the judicial process. The Paper presented by Mr. Hamdan Zoelva is attached as **ANNEX I.**

3. The Second Presentation was delivered by the Justice of the Constitutional Court of the Republic of Indonesia, Mr. I Dewa Gede Palguna, with the title of "Law and Politics in Indonesia: Sustainability and Change". The Government of Indonesia during the period of 1999-2002 made four amendments toward its Constitution. Before the Amendments, sovereignty of the State was done fully by the People's Consultative Assembly (MPR), however in truth such power was carried out by the President. This caused the social revolution done by students in 1998 demanding Reformation. To rectify the matter, amendments were made towards the Constitution, one of them was the establishment of the Constitutional Court, as the Judicial power to interpret and handle cases regarding the Constitution, Political Parties, and the General Elections. Having those duties, the Constitutional Court becomes a more political Court compared to the Conventional Courts in Indonesia.

4. During the discussions of the Second Presentation, questions once again arise regarding the separation between Political Influences and the Judicial system, and the redlines of how judges maintain the impartiality of the Court from other influences. It was once again explained that separating political influences and issues with judicial process, especially within the scope of work of the Constitutional Court is almost impossible. This does not mean that the Judicial System is driven by political will. For example under the Constitutional Court authority, they handle cases related to the dissolution of Political Parties and matters related to the General Election. Therefore substantively, the Constitutional Court cannot separate itself from Political issues and influences because it is part of the decision making process to put into consideration the related political situation. The paper and presentation of Mr. I Dewa Gede Palguna are attached as **ANNEX I.**

5. The Third Presentation was delivered by Former Justice of the Constitutional Court, Mr. Mauarar Siahaan, with the title "Political Pressure on the Constitutional Court Decisions". Judges in general use the same principles within the Bangalore Principles of 2002 that obligates Judges to have six core values of Independence, which are Impartiality, Integrity, Equality, Competence and Diligence. However in practice it is difficult for judges not to fall within the pressures from a number of sources from outside, such as threats and interventions, or within the judges itself, such as certain religious or political views. With impartiality it is hoped that judges have the power to reject such threats and interventions, by equipping themselves with sufficient information from credible sources of law and the needed expert views.

6. Discussions on the Third Presentation touched upon the issue of impartiality of the judges and how in some instances pressures are actually needed in the judicial processes. Examples were given during the case of Hizbut Tahrir handled by the Constitutional Court, where pressure mounted for judges not to dissolve the organization. However after receiving all information, also from experts and from Hizbut Tahrir themselves, the organization was still dissolved. Regarding pressure, certain issues need pressures for change to be made, a good example would be the 1998 reformation. If at the time students and the people didn't pressure the government for change, amendments toward the Constitution wouldn't have been made. The copy of the Presentation of Mr. Mauarar Siahaan is attached as **ANNEX I.**

7. The Fourth and last presentation of the First Day of the Short Course was delivered by the Professor of the Faculty of Law of the University of Surakarta, Mr. Aidul Fitriciada Azhari titled "Can the Constitutional Court be Free of Politics?". As a matter of principle, the Constitutional Court should be free from any political influences. However in reality such separation is almost impossible to achieve, and in some cases actually relate to each other. The Bangalore Principle states that "no outsider, be it government, group, individual or another judge, should interfere, or attempt to interfere" with the judges way in conducting and concluding a case. The Constitutional Court requires the political system to respect and recognize judicial independence, in order for the Constitutional Court be free from Politics.

8. Discussions during the Fourth Presentation touched upon issues of the justices within the Constitutional Court, in particular on the process of the appointment of the justices could hinder their impartiality, or have them act unethically. Regarding the appointment of the Justices for the Constitutional Court, Article 24C does stipulate that nine justices that are appointed to the Constitutional Court consist of three appointed by the President, three from the National Assembly, and three from the Supreme Court. This may therefore cause Justices to have a certain allegiance from the Governmental Branch that appointed them. This occurrence is normal and is the reason that the Justices are appointed in the same number from the Governmental Branches as stated in the Constitution, to ensure decisions that are made reflect the need of the Country. Therefore such allegiance is not unethical. The presentation of Mr. Aidul Fitriciada Azhari is attached as **ANNEX I.**

DAY III : 3 OCTOBER 2018

SHORT COURSE DAY II

9. The Session welcomed presentations from representatives of Countries present. For the first Session, presentations were given by representatives from Cambodia, Afghanistan, Thailand, South Korea, and Indonesia. The presentation had a common theme of the role of their respective Constitutional Court or Judicial Body that has the authority to handle Constitution based questions.

10. Regarding Constitution of Cambodia, until present eight amendments have been made, with the goal of ensuring the progressiveness of the Constitution with the needs of the people. For the amendment process, it goes through two procedures. First is the Proposal to amend the Constitution that the Constitutional Council will inform the King an amendment that will need to be made. After an approval is received, then the amendment will be brought up to the National Assembly, for the second process of the amendment, which is the Adoption. Adoption of the amendment will then be official after an approval of 2/3s of Members of the National Assembly. However there are limitations towards amendments to be made to the Constitution of Cambodia, which are to not amend the Constitutional Monarchy of Cambodia, and not to change the Liberal Multi-Party Democracy that the Government of Cambodia adopts.

11. Representative from Afghanistan reiterated further the important role that the Independent Commission for Overseeing the Implementation of the Constitution of the Islamic Republic of Afghanistan (ICOIC). As Afghanistan continues to uphold their Constitutional State Based Regime, the role of ICOIC becomes more important. ICOIC was established as the Government Body to monitor compliance of the President, the three Branches of the Government (Legislative, Executive, and Judicative), and all governmental institutions including non-governmental institutions, with the provisions of the Constitutions. With such authority, it will seem that ICOIC is the Supreme Body within Afghanistan as it monitors the work of all Governmental branches and bodies, however ICOIC does not have decision making powers or law making authorities, and acts as a consultative body towards Constitutional matters. The Presentation from Representative of Afghanistan is attached as **ANNEX I.**

12. The Constitutional Court of Thailand has played a number of important roles, especially with relations to their function within the processes related to the General Election. Thailand has faced a number of political turmoil and the Constitutional Court of Thailand has been actively working in upholding the laws of the Constitution to maintain public order during the crisis. In 1997, Thailand established what is known as the "People's Constitution", which was the Constitution of the Kingdom of Thailand B.E. 2540. The need to establish that Constitution stems from the need to reach a stable democratic regime, as in the previous periods political crises were faced. However even with the establishment of the People's Constitution, a number of political crisis occurred and therefore a number of new constitutions were enacted, in the year of 2006, 2007, 2014 and 2017. The Constitutional Court has carried out duties and powers under the Constitution for each period of enforcement, especially enforcing the separation of powers. The Paper from Representative of Thailand is attached as **ANNEX I.**

13. The Constitutional Court of the Republic of Korea was established in 1988, and this year celebrated their 30 year anniversary. The Court was established on the basis of the desire to establish a true democracy, and has played an important role in performing its role as the highest institution entrusted with the task of interpreting the Constitution to safeguard the constitutional order. A number of cases that were handled by the Constitutional Court had a fundamental impact on the regime and the practice of Democracy within the Country. In the case regarding the petition to move the Capital of the Republic of Korea to Chungcheong region, the process was deemed unconstitutional on the grounds that it did not follow the procedure of going through a national referendum, therefore the Capital remained in Seoul. The Court has also handled two Presidential impeachments, first in 2004 against President Roh Moo-hyun and in 2016 against President Park Geun-hye. Both petitions were upheld and the Presidents were removed from the office. The Court in practice has faced a number of criticisms of the separation between political influences in adjudicating matters in the political scope. The criticism is valid however the Court maintains its independence when handling questions and cases, and continues to make decisions impartially. The Paper from Representative from the Republic of Korea is attached as **ANNEX I.**

14. The Constitutional Court of the Republic of Indonesia was established mainly to guarantee the Constitutional Rights of the citizens of Indonesia. Article 24 C of the Indonesian Constitution explains further the duties of the Constitutional Court that includes adjudicating decisions of the Court, decide on disputes over the authority of state institutions whose authority is granted by the Constitution, also decide on matters of the General Election, such as the dissolution of political parties.

15. In this sense, the Constitutional Court must ensure that no laws are in contrary with the Constitution. Court Decisions of the Constitutional Court are different in nature with conventional courts, as they cover not only litigants such as the applicant, government, and governmental bodies and branches, but also binding to all citizens, state institutions and other legal entities within the jurisdiction of Indonesia. One of the ways the Court could fulfill the constitutional rights of the citizens is by way of Judicial Review, as a form of realization of checks and balances between branches of power, therefore Judicial Review is a form of constitutionalism improvement for the government. The Papers from Representatives of Indonesia are attached as **ANNEX I.**

16. The Second Session of the Short Course presented a number of presentations regarding each Country's Constitutional Court and their practice of Constitutionalism. Representatives delivering presentations are from Turkey, Kazakhstan, Mongolia, Russia, Uzbekistan, and Malaysia.

17. For Turkey, on 16 April 2017 a referendum for constitutional amendments was approved by Turkish citizens, to adopt a presidentialism governmental system changing it from the parliamentary system, and the change entered into force on 24 June 2018. The change of the governmental system abolished the Board of Ministers, and the function of the executive power will be exercised by the President. Article 104 of the Turkish Constitution grants the President to issue "Presidential Decrees" on matters relating to executive power. Article 148 then continues that the review of such decrees fall within the scope of Judicial Review of Constitutionality conducted by the authority of the Constitutional Court. Therefore as certain governmental power shifts to the President of Turkey, it also increases the responsibility of the Constitutional Court of Turkey, as the Institution having the power to review Presidential Decrees, to ensure separation of power is well established and democracy is well carried out, equipped with the help of its vast case-law and institutional capacity. The Paper from Representative of Turkey is attached as **ANNEX I.**

18. Constitutionalism in Kazakhstan is ensured by their Constitutional Council. The Council was established in 1995, and acts as an independent state body, does not belong to the judiciary system and not included within the unified system of the branches of power. Article 11 of the Constitution of Kazakhstan provides guarantees to the independence of the Council, including the non-interference in activities of the Chairperson and members of the Council, their compliance to official ethics, and unaccountability of the Chairperson and its members unless consented by the Parliament of Kazakhstan or caught in the scene of a crime or proven to commit a grave crime. The Competence of the Constitutional Council includes

decisions regarding elections, and compliance of Constitution of resolution adopted by the Parliament, verification of the constitutionality of legal acts in ensuring the protection towards human and civil rights, and conclusion towards amendments to the Constitution. The Constitutional Council continues to become a real driving force for the development of constitutional and legal relations within the Country. The Paper from Representative of Kazakhstan is attached as **ANNEX I.**

19. The Constitution of Mongolia acts as the fundamental law of state management which establishes powers of state organs, and their boundaries, therefore a separation of power is established ensured by the laws within the Constitution. The Constitutional Court was established in 1992 to carry out activities of organs exercising state powers in accordance with the Constitution and limit their powers in order to protect values of democracy and fundamental rights of citizens. As the state body having the authority to ensure the supremacy of the Constitution, the Constitutional Court has the power to make null and void decisions of the three main branches of the government (Executive, Legislative, and Judiciary) if found that such decisions are contradictory to the Constitution. The Paper from the Representative of Mongolia is attached as **ANNEX I.**

20. The Federal Constitution of Malaysia clearly states the separation of power between Legislative, Executive, and Judiciary, and spells out the functions of the three branches. The Constitution implements the system of "check and balance", which each of the branches of the government is given specific powers of oversight over the other branches, and also powers to restrain the actions of other branches of the government. The aim is to ensure a balance of power between the three branches of the government. One way to ensure the check and balance by the Court is through Judicial Reviews, as it has the function to ensure that decisions of executive or a public body was concluded according to law. Judicial review is regulated by order 53 of the Rules of Court 2012, which expresses in Rule 3 of the regulation that the application of judicial review could be achieved if leave of court is obtained, and applicants have legitimate grievance. In *Ahmad Jefri bin Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors*, the court also concludes that the strict regulation under the Order 53 has a function to *"*protect those entrusted with the enforcement of public duties against groundless unmeritorious or tardy harassment". The Paper from Representative of Malaysia is attached as **ANNEX I.**

21. Established in 1991, the Constitutional Court of the Russian Federation has been viewed as an institution to guarantee democracy and the separation of power. Article 125 of the Constitution of the Russian Federation provides that the Constitutional Court is a judicial body of constitutional review, which independently exercises judicial power by means of constitutional judicial proceedings. The Court also has the authority to handle disputes concerning competence between Federal Bodies, Constituent entities, and Supreme Bodies. The Court does not interfere with the competence if other constitutional bodies, such as the Court does not have the authority to make new law, as that function lies with the Parliament. Since the Court was established, it handled only two cases of disputes regarding the competence between State Bodies, which had to be resolved by a Judgement

of the Court. Over the last three years, the Constitutional Court has received 43.300 appeals, among them complaints from citizens, and groups of citizens and legal entities. The issues raised in the appeals normally are regarding protection of constitutional rights and freedom of citizens, such as protection of labour rights, housing rights, and social protection. The Paper from Representative of Russia is attached as **ANNEX I.**

22. The President of Uzbekistan famously declared during the 72nd session of the UNGA that it is not the people that serve the state organs, but the state organs must serve the people. Uzbekistan recognizes the unconditional supremacy of the Constitution and laws of the Republic of Uzbekistan, therefore the state bodies, officials and citizens must act in accordance with the Constitution and laws. Uzbekistan has adopted the Strategy of Actions on Five Priority Directions of Development for the period of 2017-2021, that has its aim to implement the constitutional principle that democracy in Uzbekistan is based upon universal principles and human rights. With the strategy adopted, the Constitutional Court plays a significant role to ensure the rule of law and further reform the judicial and legal system. The Strategy also mandates that appropriate amendments to the Constitution to be made, to strengthen the independence of the Constitutional Court, and to further protection of human rights. The Constitutional Court continues to be the governmental body having the role to ensure the supremacy of the Constitution. The Paper from Representative of Uzbekistan is attached as **ANNEX I.**

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ANNEX I

PAPERS
SHORT COURSE

SHORT COURSE
DAY I

FORMER CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Dr. Hamdan Zoelva, SH., MH.

CONSTITUTIONALISM AT THE CROSS ROAD OF : Law, Politics and Society

Dr. Hamdan Zoelva, SH., MH.

Pendahuluan

Ketika berbicara tentang konstitusionalisme, maka kita berbicara pada spektrum persoalan yang sangat luas, tidak saja tentang hukum dan legalitas tetapi juga berbicara tentang politik, kekuasaan, perubahan sosial serta landasan teori atau filsafat dalam bernegara. Konstitusionalitas tidak sama dengan legalitas. Jika legalitas hanya berkaitan dengan aspek ketaatan pada peraturan dan norma hukum, maka konstitusionalitas berkaitan dengan filsafat, hukum, politik dan masyarakat dalam satu kesatuan.

Konstitusionalisme tidak menempatkan konstitusi pada menara gading, tetapi menempatkan konstitusi yang harus bersentuhan dengan aspek sosial dan politik dan seringkali harus menerima kompromi dengan kenyataan-kenyataan sosial ketika konstitusi itu diterapkan. Sangat berbeda dengan hukum pidana yang sangat legalistik, konstitusi seringkali berkompromi dengan kondisi sosial politik yang melingkupinya, karena tegaknya konstitusi membutuhkan legitimasi, yaitu penerimaan rakyat atas implementasi konstitusi. Dengan demikian memahami konstitusi tidak cukup hanya dengan memahami teks konstitusi tetapi juga harus memahami filsafat, idiologi, politik serta masyarakat, sehingga memberi ketajaman dalam menafsirkan konstitusi.

Putusan kontroversial Hakim Marshal Ketua Mahkamah Agung Amerika Serikat dalam kasus Merbury Vs Madison tahun 1803 yang menjadi tonggak dimulainya juducial review adalah salah satu contoh penafsiran konstitusi yang sangat progresif, tidak kaku dan berani. Hakim Marshal tidak berpegang pada aspek legalitas semata tetapi pada masa depan negara hukum dan konstitusionalisme Amerika Serikat untuk masa-masa selanjutnya.

Pada kesempatan topik kali ini, kita akan mendiskusikan bagaimana konstitusionalisme berinteraksi dengan hukum, politik dan kekuasaan serta masyarakat baik pada tahap pembentukan maupun pada tahap implementasi dalam kehidupan bernegara.

Konstitusionalisme

Konstitusi dapat dibagi dalam dua tingkat yaitu pada tingkat pertama berupa teks konstitusi yang pada umumnya tertulis yang akan disebut sebagai teks otoritatif dan pada tingkat kedua, yaitu ketika konstitusi dilaksanakan dalam kehidupan bernegara secara konkrit. Teks otoritatif bersifat tetap, tidak berubah, stabil dan kaku kecuali teks itu diubah oleh lembaga yang berwenang. Teks konstitusi pada umumnya memuat rumusan dasar dan tujuan pembentukan negara, pembentukan organ-organ negara yang menyelenggarakan kekuasaan negara beserta kekuasaan dan wewenangnya masing-masing, jaminan hak-hak asasi warga negara, serta hubungan antara organ negara dan warga negara. Teks otoritatif diperdebatkan, dirumuskan dan ditulis oleh para perumusnya (*founding fathers*) dengan maksud untuk menjadi dasar dan petunjuk dalam

penyelenggaraan negara untuk mencapai tujuan negara pada pada umumnya berlaku dalam jangka panjang bahkan diharapkan sampai ke generasi-generasi bangsa selanjutnya.

Lahirnya teks otoritatif dapat melalui berbagai cara, antara lain melalui kesepakatan para founding fathers, perumusan oleh badan perwakilan rakyat, atau perumusan oleh badan perwakilan rakyat kemudian diikuti permintaan persetujuan langsung oleh rakyat, pemberian oleh negara kolonial atau bahkan dipaksakan oleh pemenang perang. Sejak pada tingkat pertama perumusan teks otoritatif itu, pengaruh politik, kekuasaan, serta situasi sosial dan kondisi suatu bangsa sangat memengaruhi lahirnya teks otoritatif itu.

Konstitusi sebagai teks otoritatif hanya memuat hal-hal yang umum dan tidak mungkin mengatur segala aspek kehidupan negara secara detail sehingga dengan mudah setiap persoalan yang dihadapi dapat langsung merujuk pada teks yang ada. Oleh karena itu teks otoritatif itu membetuhkan perumusan lebih lanjut dalam berbagai norma undang-undang dan segala peraturan di bawahnya, kebijakan pemerintah serta dalam berbagai putusan pengadilan. Pada posisi inilah konstitusi berada pada tingkat kedua. Pada tingkat ini terjadi perbedaan dan perdebatan atas makna dari satu teks otoritatif yang sama. Perbedaan sangat mungkin terjadai karena perbedaan dalam memahami teks otoritatif yang disebabkan oleh perbedaan kepentingan, latar belakang sosial budaya serta perbedaan kepentingan antara satu kelompok warga bangsa dengan kelompok yang lainnya. Bahkan perbedaan dapat terjadi diantara perumus konstitusi karena konstitusi hanya memuat kesepakatan-kesepatan umum saja yang tidak menuliskan hal-hal detail. Tradisi perumusan kebijakan negara di bawah konstitusi yang selalu merujuk pada konstitusi pada tingkat kedua inilah yang disebut tradisi konstisionalisme.

Konstitusi pada tingkat kedua ini dipahami beragam, memiliki banyak makna dan penafsiran yang sangat dipengaruhi oleh situasi politik, maupun kondisi masyarakat yang berubah atau berbeda-beda dari waktu ke waktu atau dari satu kelompok masyarakat dengan kelompok yang lainnya. Konstitusi menjadi jangkar yang mengikat gerak dan kebebasan pembentukan kebijakan negara dalam batas-batas tertentu karena adanya pengaruh sosial dan politik pada kurun waktu tertentu. Dengan demikian teks otoritatif konstitusi dapat ditafsirkan dalam berbagai makna pada situasi atau keadaan yang berbeda dalam batas-batas tertentu. Pada tingkat ini pula konstitusi menjadi tidak steril dari politik, kekuasaan serta kondisi kehidupan sosial yang berubah. Seperti digambarkan oleh Ferejohn, konstitusionalisme dalam praktik adalah suatu proses interpretasi dalam masyarakat, yang dilakukan anggota-anggotanya sebagai bagian dari kekuasaan politik dan secara bersama-sama mencari untuk menentukan apa yang dimungkinkan atau dipersyaratkan oleh konstitusi atas persoalan tertentu. Dengan demikian, konstritusionalisme harus dipahami sebagai interpretasi budaya atau sejarah, termasuk teks, yang dalam hal ini makna konstitusi bergantung pada konteks penerapannya.

Oleh karena itu, secara umum dapat dinyatakan bahwa konstitusionalisme adalah tradisi atau kebiasaan penyelenggaraan kehidupan negara yang selalu berpedoman dan merujuk pada konstitusi. Konstitusionalisme merupakan ajaran yang menempatkan konstitusi pada posisi yang supreme atau hukum tertinggi yang berlaku di suatu negara (the supreme law of the land).

Demokrasi dan Konstitusi

Secara singkat demokrasi dapat dimaknai sebagai pemerintahan yang berkedaulatan rakyat yaitu pemerintahan oleh rakyat, dari rakyat dan untuk rakyat. Demokrasi modern lahir akibat

penyelenggaraan pemerintahan despotik oleh para raja yang memiliki kekuasaan absolut yang menentukan segala hukum dan kebijakan negara, tanpa melibatkan rakyat. Bahkan rakyat seperti menjadi objek dan tidak memiliki hak dalam menentukasn jalannya pemerintahan dan negara. Pemerintahan demokrasi memberi digniti kepada rakyat sesuai hak-haknya yang dibawa sejak lahir yang biasa disebut hak asasi manusia dan negara memberikan jaminan, penghormatan dan perlindungan atas hak-hak asasi mansia.

Paling tidak, terdapat sebelas prinsip demokrasi yang dapat dikemukakan di sini, yaitu : kedaulatan rakyat, pemerintahan berdasarkan persetujuan dari yang diperintah, kekuasaan mayoritas, jaminan hak-hak minoritas, jaminan hak asasi manusia, pemilihan yang bebas dan jujur, persamaan di depan hukum, proses hukum yang jujur, pembatasan pemerintahan secara konstitusional, pluralisme sosial, ekonomi, dan politik; serta nilai-nilai toleransi, pragmatisme, kerjasama dan mufakat (Lihat Hamdan Zoelva, 2016 : 191). Urofsky, mengidentifikasi adanya sebelas prinsip demokrasi, yaitu : konstitusionalisme, pemilihan demokratis, federalisme, negara bagian dan pemerintahan lokal, pembentukan undang-undang, peradilan yang independen, kekuasaan presiden, peranan media, peranan kelompok penekan, hak publik untuk mengetahui, melindungi hak minoritas, kontrol sipil atas militer (Jimli Ashshidieqie, 2006 : 25-28).

Demokrasi lahir dari liberalisme dan jaminan kebebasan individu melalui pengakuan, jaminan serta perlindungan hak-hak asasi manusia. Demokrasi menjamin digniti seseorang sebagai manusia yang melekat hak-haknya sejak lahir, sehingga demokrasi dalam proses pemilihan pemimpin memberi ruang pada kekuasaan oleh mayoritas (rule by majority). Oleh karena itu, demokrasi tanpa konstitusi dapat melahirkan tirani mayoritas atas minoritas karena salah satu prinsip demokrasi adalah pengaturan oleh mayoritas (majority rule). Sebaliknya konstitusi tanpa demokrasi melahirkan tirani kekuasaan atas nama hukum dan konstitusi, karena pada dasarnya negara (pemerintah) selalu menjadikan legitimasi hukum dan konstitusi sebagi alasan pembenar atas setiap kebijaknnya walaupun bertentangan dengan kehendak rakyat. Demokrasi adalah rule by mayority dan memberi kebebasan mengatur atas nama mayoritas sementara konstitusi membatasi kebebasan, karena itu lahir prinsip demokrasi konstitusional (constitutional democracy) yaitu demokrasi yang dibatasi oleh konstitusi untuk menghindari demokrasi berubah menjadi tirani oleh mayoritas.

Pada sisi lain, untuk menghindari lahirnya hukum dan konstitusi yang melanggar prinsip-prinsip demokrasi, proses pembentukan hukum, konstitusi dan segala kebijakan negara harus memperhatikan jaminan dan hak kekebasan manusia, harus dibentuk melalui proses yang transparan, mendengarkan pendapat rakyat, mengolsuntasikan dengan rakyat, dapat diawasi dan dikontrol oleh rakyat serta memberi wewenang kepada pengadilan untuk membatalkan segala undang-undang dan peraturan yang bertentangan dengan prinsip demokrasi.

Dengan hubungan timbal balik dan saling mlengkapi antara konstitusi dan demokrasi, maka segala kebijakan dan tindakan pemerintah mendapatkan legitimasi, baik legitimasi konstitusi maupun legitimasi rakyat.

Konstitusi dan Perubahan Sosial

Perubahan sosial adalah hukum alam yang tidak bisa dihindari. Apabila hukum tidak bisa menjawab perubahan-perubahan sosial yang ada maka hukum kehilangan ruhnya dan kehilangan legitimasi. Bahkan ketika hukum yang mapan tidak lagi sanggup mengatasi dan memberi solusi

keadilan pada rakyat pada masa dan situasi situasi akan muncul sikap ketidakpatuhan sosial pada aturan dan hukum yang mapan sehingga lahir apa yang disebut social disobidience (ketidakpatuhan sosial). Ketika muncul social disobience tatanan yang semula mapan dan teratur, tiba-tiba menjadi kacar, berantakan dan kemudian akan lahir tatanan hukum baru dengan norma dan aturan yang baru. Begitu proses lahir dan berkahirnya berbagai gerakan revolusi di seluruh dunia, yang dari revolusi itu melahirkan tatanan sosial dan norma yang baru. Oleh karena itu, daripada lahir sikap social disobidience yang akan terus melahirkan revolusi dan perubahan sosial yang mengancam ketistabilan kehidupan dan kekacauan, maka hukum dan konstitusi harus menyesuikan diri dengan perkembangan dan perubahan sosial yang ada sehingga hukum harus dapat diubah atau ditafsirkan agar tetap memperoleh legitimasi.

Demikian halnya dengan konstitusi sebagai teks otoritatif tertulis, tidak mungkin dapat menjawab seluruh persoalan kehidupan kenegaraan dari waktu ke waktu. Teks konstitusi memerlukan perubahan atau penafsiran yang dapat menjawab konteks sosial politik yang terjadi. Jika tidak, maka konstitusi kehilangan legitimasi dan tidak dapat mengatasi kehidupan masyarakat yang berubah.

Konstitusi dan Kekuasaan

Dalam situasi masyarakat yang kacau dan tidak stabil, tidak dapat dihindari peran kekuasaan dan politik menjadi lebih besar sehingga pada saat itulah ancaman atas konstitusionalisme bisa terjadi. Salah contoh pengalaman Indonesia yang dapat dikemukakan di sini adalah ketika kekacauan politik yang terjadi di Indonesia pada akhir tahun 1950an, masa pemerintahan Presiden Soekarno, dengan alasan untuk menegakkan ketertiban sosial dan menyelamatkan negara, Presiden Soekarno mengeluarkan Dektrit Presiden yang terkenal dengan Dektrit Presiden 5 Juli 1959 yang membatalkan konstitusi yang sedang berlaku dan menggantinya dengan konstitusi yang lain dan membubarkan lembaga pembentuk konstitusi yang dibentuk dari hasil pemilihan oleh rakyat yang pada saat itu sedang bertugas membentuk konstitusi. Demikian juga pada akhir tahun 1966 sampai pada tahun 1967 terjadi kekacauan politik dan perubahan sosial yang cepat, sehingga melahirkan tatanan kehidupan tatanan sosial yang baru yang dikenal dengan istilah masa Orde Baru. Hal yang hampir sama terjadi pada tahun 1998-1999 di Indonesia tatanan sosial yang kacau selalu melahirkan keadaan-keadaan baru dan ketika itu peran politik dan kekuasaan menjadi sangat menonjol daripada hukum dan konstitusi.

Hukum dan konstitusi efektif berlaku ketika kehidupan sosial dan politik yang aman, damai dan tertib. Sebaliknya ketika kehidupan sosial politik yang kacau maka politik dan kekuasaan justeru menjadi lebih menonjol. Walaupun dalam banyak hal, norma konstitusi tetap dipergunakan untuk mengatasi berbagai perubahan yang cepat dalam masyarakat, karena konstitusi pada umumnya menjadi alat untuk mendapat legitimasi. Oleh karena itu dapat dikatakan bahwa semakin mapan dan tertib suatu negara, maka peran konstitusi dan hukum semakin besar dan dipercaya untuk menyelesaikan segala persoalan kenegaraan, tetapi pada saat perubahan sosial yang cepat, justeru peran kekuasaan dan politik lebih menonjol dari peran hukum dan konstitusi. Walaupun demikian, konstitusi dan prinsip konstitusionalisme tetaplah menjadi sumber legitimasi pemerintahan.

Dalam kondisi situasi sosial yang sedang berubah itulah, dalam teori hukum dikenal keadilan transisional, yaitu keadilan dalam masa transisi yang dapat saja berbeda dengan keadilan

dalam situasi yang mapan. Pada kondisi yang kacau dan masyarakat yang berubah cepat, hukum tetap ingin memberikan perannya dalam menyelesaikan persoalan sosial, tetapi tidak cukup dengan norma-noma hukum yang lama yang sudah mapan karena berbagai tuntututan perubahan hal-hal yang baru sehingga diperkenalkan keadilan transisional yang sekedar memberi rasa keadilan dalam masa transisi. Seringkali dalam masa ini, kompromi-kompromi pilitik justeru lebih efektif menyelsaikan masalah dan mendapat legitimasi kuat daripada hukum yang ditegakkan secara ketat.

Penafsiran Konstitusi

Konstitusionalisme dan penafsiran konstitusi tidak bisa dipisahkan. Di negara-negara yang menganut tradisi konstitusionalisme, setiap kebijakan negara selalu merujuk pada konstitusi. Partai politik bersama pemerintah yang berkuasa dalam membentuk undang-undang atau kebijakan apa pun selalu menjadikan konstitusi sebagai rujukan kebijakan dan konstitusi menjadi sumber legitimasi kebijakan pemerintah. Pada sisi lain, partai oposisi, kelompok kepentingan serta akademisi yang tidak setuju dengan kebijakan pemerintah juga akan selalu merujuk pada konstitusi untuk mendelegitimasi kebijakan pemerintah menilai apakah kebijakan-kebijakan itu tepat atau tidak dari perspektif konstitusi. Konstitusi menempati posisi sentral dalam negara yang menganut tradisi konstitusionalisme, sehingga cara memahami dan menafsirkan konstitusi menjadi sangat penting.

Seperti telah diuraikan sebelumnya, norma konstitusi tidak hanya dapat dipahami dari teks tertulis, tetapi harus juga digali dan ditelusuri dari apa yang ada dibalik teks atau bahkan teks tidak menjangkaunya. Cara pemahaman inilah yang disebut sebagai metode interpretasi konstitusi. Perbedaan pilihan metode interpretasi dapat melahirkan perbedaan pandangan atas suatu isu konstitusional yang sedang dihadapi.

Dalam kajian hukum tatanegara, seperti yang dikemukakan oleh Ziyad Motala, terdapat dua kelompok besar model penafsiran konstitusi yaitu metode interpretivist dan metode non-interpretvist (Ziyad Motala, 2002 : 17). Penafsiran interpretivist atau dapat juga dikelompokkan sebagai penafsiran beckward-looking adalah metode penafsiran yang lebih formalistik dengan konstruksi yang ketat mengenai teks konstitusi. Metode ini hanya mempertimbangkan bahan-bahan yang terbatas pada teks dan sejarah lahirnya atau original intent. Metode ini sangat formalistik dan teknikal serta mendelegitimasi setiap metode interpretasi yang berhubungan dengan sumber lain selain teks konstitusi dan dokumen sejarahnya yang membuktikan kehendak dari pembuatnya. Metode penafsiran yang dapat dimasukan dalam kelompok ini yaitu penafsiran berdasarkan makna bahasa, gramatika, sistematik, berdasarkan original intent serta preseden. Metode ini melahirkan cara pandang konstitusi yang legalistik dan kaku dan termasuk kelompok yang dikenal dengan kelompok judicial restrain dan memliki pandangan yang dianggap konservatif.

Sedangkan metode penafsiran non-interpretivist atau dapat juga dikelompokkan sebagai metode penafsiran forward-looking, tidak hanya membatasi diri pada teks dan original intent serta sejarah lahirnya teks. Tetapi metode ini memperluas penafsiran konstitusi pada nilai-nilai dan sumber di luar teks dan sejarah lahirnya teks misalnya teori dalam bidang filsafat moral suatu bangsa, hak asasi manusia, dan berbagai teori mengenai kehendak masyarakat atau tujuan sosial. Metode ini sering dikelompokkan sebagai pendekatan konstitusi yang hidup, memberi makna konstitusi berdasarkan konteks waktu dan kemanfaatannya ketika diterapkan. Hal yang menjadi fokus dalam metode interpretasi ini, di samping pada teks dan oriniginal intent, juga pada keperluan

dan kemanfaatan bagi masyarakat ketika konstitusi itu diterapkan sehingga yang diutamakan adalah legitimasi dan dukungan sosial atas makna konstitusi. Metode ini dapat juga disebut open-ended experiential approach sehingga menjadi sangat progresif. Metode penafsiran yang masuk pada kelompok ini terdiri dari penafsiran teleologis serta metode penafsiran yang berdasarkan pada tujuan dan kemanfaatan hukum. Para penganut kelompok ini lebih progresif dalam menafsirkan konstitusi dan masuk dan kelompok yang biasa dikenal dengan kelompok judicial activism.

Bagi para penganut judicial activism hubungan antara konstitusi dan politik sangat berhimpitan sehingga penafsiran konstitusi sangat mungkin dipengarhi oleh pandangan publik dan cita politik yang hendak dibangun dan lebih khusus lagi pada idiologi dan cita politik yang melekat pada para hakim konstitusi yang memutuskan perkara, sedangkan judicial restrain akan selalu membatasi diri dan menghindar dari pengaruh politik dan tekanan publik.

Peradilan Konstitusi Sebagai Pengawal Konstitusionalisme

Kekuasaan yang diberikan kepada negara (organ negara) oleh konstitusi, seringkali disalahgunakan oleh pemegang kekuasaan. Kepentingan rakyat kadang diabaikan, bahkan atas nama konstitusi pemegang kekuasaan negara dapat menindas rakyat. Padahal kekuasaan negara harus diselenggarakan sesuai dengan kehendak rakyat dan untuk kepentingan rakyat. Inilah yang seringkalki menjadi masalah dalam penyelenggaraan negara. Oleh karena itu, untuk mencegah terjadinya penyalahgunaan kekuasaan atau untuk meluruskan arah kebijakan negara, selain melalui kesadaran konstitusional, harus pula ada organ negara yang mengawal norma konstitusi agar konstitusi benar-benar dilaksanakan dan ditaati dalam praktik penyelenggaraan negara.

Hampir semua negara demokrasi dan negara hukum modern menyediakan mekanisme untuk mengawal konstitusi sesuai kebutuhan dan pilihannya masing-masing. Sebahagian negara karena kebutuhan dan sesuai dengan sistem hukum yang dianutnya membentuk organ khusus untuk mengawasi jalannya negara agar sesuai dengan kehendak yang termuat dalam konstitusi. Organ negara yang khusus tersebut dapat berupa suatu lembaga peradilan konstitusi atau lembaga lainnya yang bukan dalam bentuk lembaga peradilan. Di banyak negara yang menganut sistem kontinental membentuk lembaga peradilan konstitusi tersendiri misalnya di Indonesia, Jerman, Korea Selatan dan lain-lain, sementara di negara yang menganut tradisi hukum Ango-Amerika peradilan konstitusi berada dalam peradilan umum atau di Mahkamah Agung misalnya di Amerika Serikat. Di beberapa negara tertentu membentuk badan atau dewan yang khusus untuk meninjau konstitusionalitas undang-undang, misalnya di Peracis dikenal Dewan Konstitusi, di China membentuk organ khusus dalam lembaga Kongres Rakyat China serta di Afghanistan mengenal Komisi Pengawas Implementasi Konstitusi. Jadi, organ yang mengawasi ketaatan dalam pelaksanaan konstitusi selalau ada pada negara-negara modern, terlebih di negara-negara demokrasi.

Jika ditelusuri sejarah lahirnya gagasan perlunya lembaga peradilan untuk mengawal konstitusi, tidak bisa dipelapaskan dari pengalaman dalam pengujian UU oleh Mahkamah Agung Amerika Serikat dalam kasus Marbury Vs Madison pada tahun 1803. Melalui kasus itu doktrin judicial review oleh lembaga peradilan mulai dikembangkan. Dalam kasus tersebut Mahkamah Agung Amerika Serikat membatalkan ketentuan dalam Undang-Undang Kehakiman (Judiciary Act 1789) karena dinilai bertentangan dengan konstitusi Amerika Serikat. Putusan itu sendiri pada dasarnya keluar dari kelaziman yaitu melanggar prinsip pemisahan kekuasaan yang dianut Amerika Serikat yaitu seharusnya wewenang pembentukan dan pembatalan UU ada di tangan legislatif

(Congress). Putusan tersebut didasarkan pada doktrin negara hukum, dimana konstitusi harus ditempatkan sebagai hukum tertinggi dan para hakim konstitusi bersumpah untuk menegakkan konstitusi. Dari kasus tersebut berkembang ide pembentukan Mahkamah Konstitusi oleh para akademisi seperti yang dikemukakan oleh Hans Kelsen (Austria), yang hingga sekarang berediri berbagai peradilan konstitusi di seluruh dunia.

Pada masa sekarang ini, peradilan konstitusi - baik yang terpisah dari peradilan umum ataupun yang tergabung dalam peradilan umum - pada akhirnya menjadi tumpuan untuk mengawal prinsip negara yang menganut konstitusionalisme. Peran lembaga peradilan konstitusi, para hakim konstitusi serta seluruh organ yang ada di dalamnya menjadi sangat penting untuk menegakkan prinsip konstitusionalisme. Untuk menjamin agar lembaga ini dapat menegakan konstitusi secara benar, maka dibutuhkan beberapa prinsip yang harus dilaksanakan, yaitu : i) Lembaga peradilan konstitusi harus dijamin oleh konstitusi sendiri sebagai lembaga peradilan yang independen. Jika tidak ada jaminan independensi, lembaga ini cenderung dimanfaatkan untuk legitimasi kekuasaan politik sehingga politik berada di atas hukum. ii) Selain jaminan konstitusi, para hakim konstitusi harus independen pula, tidak berafiliasi dengan partai politik atau berafiliasi atau berada di bawah pengaruh organ negara yang lainnya. iii) Para hakim konstitusi harus menguasai dan memahami konstitusi secara benar, mendapatkan jaminan keamanan dan jaminan hidup yang layak dan memadai, serta tidak dapat diberhentikan dalam jabatannya dengan mudah, serta iv) Peradilan konstitusi harus memiliki berbagai perangkat yang memperkuat indepndensi peradilan konstitusi termasuk peranan pegawai dan peneliti di Mahkamah Konstitusi.

Independensi peradilan konstitusi pada umumnya dapat terganggu atau justeru menjadi tidak independen jika peradilan konstitusi berada dibawah kekuasaan atau organ politik, atau para hakimnya didominasi oleh partisan atau anggota partai politik tertentu. Oleh karena itu komposisi hakim konstitusi harus mencerminkan berbagai kelompok atau aliran yang ada dalam masyarakat dan tidak hanya diduduki atau satu kelompok tertentu.

JUSTICE OF
THE CONSTITUTIONAL COURT
REPUBLIK OF INDONESIA

I Dew Gede Palguna

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

LAW AND POLITICS IN INDONESIA: SUSTAINABILITY AND CHANGE

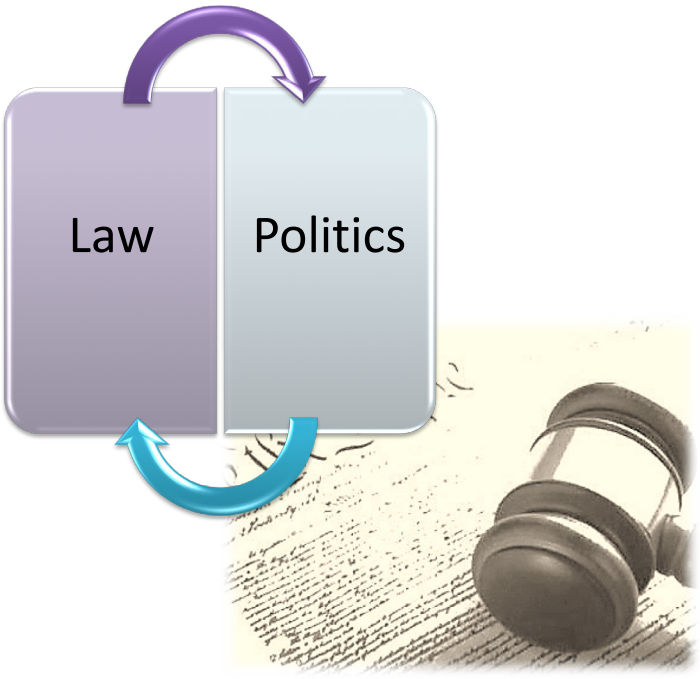
Justice I.D.G Palguna
The Constitutional Court of the Republic of Indonesia

International Short Course - AACC
Yogyakarta, 2 October 2018

Relationship between Law and Politics

Which one is more influential?

How to support each other?



Constitutional Reform in Indonesia

Problematic conditions before the reform era

Demands for Constitutional Reform

1. Amendment of the 1945 Constitution
2. Elimination of the dual doctrine of military functions
3. Enforcement of the rule of law, promotion for human rights, and eradication of corruption, collusion and nepotism (KKN)
4. Decentralization and fair relations between central and regional (Regional Autonomy)
5. Realizing press freedom
6. Realizing democratic life

3

Agreements on Constitutional Amendment

- The Preamble can't be change
- Maintaining the Unitary State of the Republic of Indonesia
- Reinforce the presidential system
- Explanations of constitutional provision is eliminated
- Constitutional provisions are changed by *addendum*

Substances of the Constitutional amendment

Principle of State Administration	Direction of State Administration	Human Rights Guarantee

• Constitutional supremacy
• People sovereignty and democracy
• Rule of law
• Separation of powers
• Presidentialism
• Republic and Unitary
	• Politics
	• Economy and Welfare
	• Religion
	• Education
	• Culture
	• Environment
	• Defense and Security
		• Civil and political rights
		  • Right to life
		  • Equality before the law
		  • Freedom of expression
		• Economy, social and cultural rights
		  • Right to education
		  • Right to environment

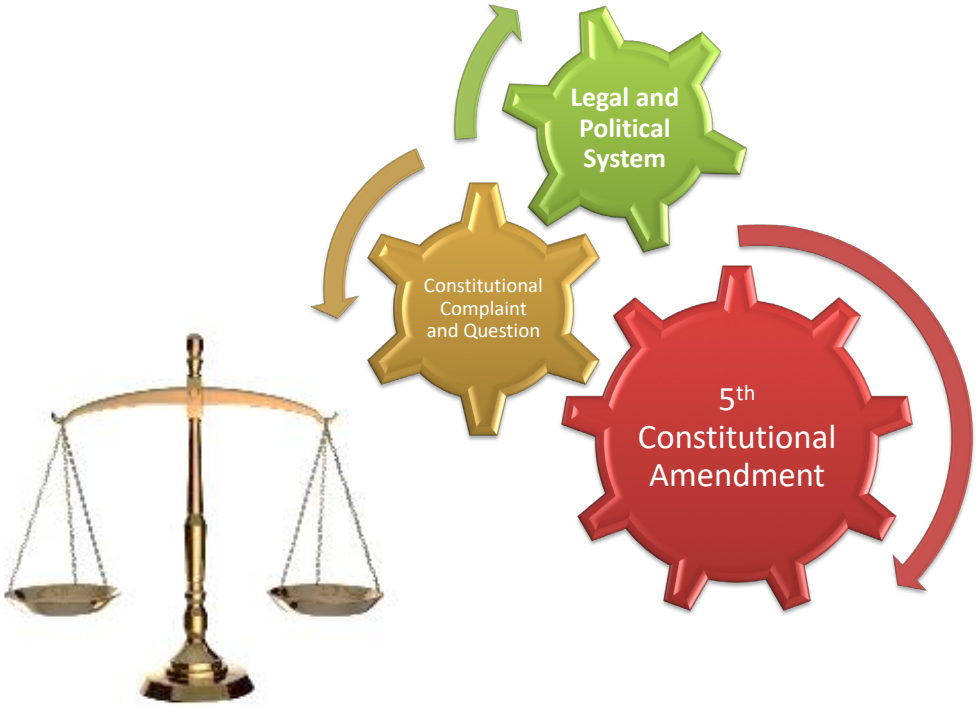
The Indonesian Constitutional Establishment

- History and background of the establishment
- Jurisdiction of the Indonesian Constitutional Court
- The current developments

6

Maintaining Constitutional Sustainability

Possibilities of Future Changes



8

THANK YOU

9

PROFESSOR OF LAW OF
MUHAMMADIYAH UNIVERSITY OF SURAKARTA

Aidul Fitriciada Azhari

Can the Constitutional Court Be Free from Politics?[1]

Aidul Fitriciada Azhari[2]

A. Introduction

According to universal principle of judicial independence, the Constitutional Court should be free from politics. It can be seen in several international documents, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCR), the Bangalore Principles of Judicial Conduct (2002) and Mt. Scopus International Standards of Judicial Independence (2008). Based on UDHR and ICCPR, the independent and impartial tribunal are fundamental values of human rights. Furthermore, The Bangalore Principles state that "a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law". Likewise, Mt. Scopus International Standards state that "An independent and impartial judiciary is an institution of the highest value in every society and an essential pillar of liberty and the rule of law."

In relation with politics, Bangalore Principles particularly state that "Judges shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason." It means that courts and judges also should be free from politics, direct or indirect, for any quarter or for any reason.

However, in reality, courts and judges are impossible to be free from politics, particularly for the Constitutional Court which is operated in political circumstances. Institutionally, the Constitutional Court can be free from other branches (*i.e.* legislative and executive). The separation of powers doctrine in many democratic countries provide guarantee for the Constitutional Court to enjoy an independence of judiciary. However, it does not automatically give guarantee for the Constitutional Court to be free from politics. Judicial recruitment through legislature selection, governmental appointment and contested election are methods to recruit the judges which is inevitable will be operated in a full of political interests.[3]

1 Paper presented at the International Symposium and Short Course conducted by the Constitutional Court of the Republic of Indonesia, Yogyakarta, Indonesia, 1-3 October 2018.

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3 Fiona O'Connell & Ray McCaffrey, "Judicial Appointments in Germany and the United States," Paper 60/12, the Research and Information Service of Northern Ireland Assembly, 15 March 2012, <available at http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2012/justice/6012.pdf> accessed on 12 September 2008; Charles Gardner Geyh, Methods of Judicial Selection and Their Impact on Judicial Independence, Daedalus Fall, 2008, pp. 86-101.

The Constitutional Court has also been expanding his role which called as "judicialization of politics", in which courts have taken on new and important roles relatively to legislatures.[4] In this context, the Constitutional Court in general has been taking role in policy making from the legislature. Additionally, the development of deliberative democracy in many democratic countries also creates new relation between the Constitutional Court and politics. Deliberative democracy provides a wide space for political participation in legal process of the Constitutional Court that integrated with information and communication technology (ICT), so that the legal process should be operated based on binary logic as used in ICT process. In this context, Niklas Luhmann described that legal process operates in the autopoietic of legal system that "normatively closed, but cognitively open"[5]. It means, the Constitutional Court will be open for many political factors to catch political and social consciences, but in decision making process works in a closed system that operates based on binary logic, namely legal and illegal, so that the output is only of one of two possibilities: legal or illegal.[6]

For that reason, it is obvious that in reality the Constitutional Court cannot be separated completely from political circumstances. Thus, the problem for our discussion is not about how the Constitutional Court can be free from politics anymore, since essentially the Constitutional Court cannot really be free from politics. The problem is, however, how the political influences can be reduced from the Constitutional Court. For that reason, this paper will discuss about principle of judicial independence and the Constitutional Court in relation with political influences. This is a part of normative analysis on what relation between the Constitutional Court and politics based on provisions of judicial independence in several international documents. The second part will discuss about the relation between the Constitutional Court and deliberative democracy. This part will utilize theory of the auto poetic of legal system to analyse relation between the Constitutional Court and deliberative democracy. The last part will analyse judicialization of politics by the Constitutional Court.

B. Judicial Independence

Based on the judicial independence principle, the courts and judges have to be separated from politics. According to the Bangalore Principle of Judicial Conduct (2002), independence is the first value described as: "*Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects*." The Bangalore explains that the application of independence value as follows: "*A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason*."

4 John Ferejohn, *Judicializing Politics, Politicizing Law,* 65 Law and Contemporary Problems 41, p. 41.

5 Niklas Luhmann, "The Unity of the Legal System," Gunther Teubneur, *Autopoietic Law: A New Approach to Law and Society,* Walter de Gruyter, Berlin/New York, 1988, p. 20.

6 Clemens Mattheis, *The System Theory of Niklas Luhmann and the Constitutionalization of the World Society*, 4 Goettingen Journal of International Law 625, p. 633.

In regard with the value of independence, the Commentary of Bangalore Principle explains further that:

The core of the principle of judicial independence is the completeliberty of the judge to hear and decide the cases that come before the court; nooutsider – be it government, pressure group, individual or even another judge -should interfere, or attempt to interfere, with the way in which a judge conducts acase and makes a decision.[7]

The phrase of "*free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason*" also points to politics as any extraneous factors. Similarly, the phrase of "*no outsider – be it government, pressure group, individual or even another judge*" points to politics as the outsider factors which is not only in the form as government that institutionally has political interest, but also as pressure groups and individual (such as political figure and state officer) that have political agenda to influence the policy making.

Nevertheless, the Commentary of Bangalore Principle explains that: "*The adoption of constitutional proclamations of judicial independence does not automatically create or maintain an independent judiciary. Judicial independence must be recognized and respected by all three branches of government*." [8] It means that the judicial independence demands a reciprocal relation between all three branches of government and the other political forces. Consequently, without recognize and respect from the other branches of government, the judicial independence cannot be created and maintained by the judiciary.

In the context of the Constitutional Court, politics is the dominant factor since Constitutional Court naturally works in political sphere. However, the Constitutional Court has to be free from any political aspects for maintaining the principle of judicial independence. But also, the Constitutional Court cannot automatically maintain the judicial independence without recognition and respect from all three branches of government and the other political forces such as political parties and pressure groups. It means that the Constitutional Court can be free of politics if there are recognize and respect from the other branches of government and the political forces such as political party and pressure groups.

Relation between the Constitutional Court and politics can be explained more specific in Mt. Scopus International Standards of Judicial Independence (2008) particularly on relation between the Constitutional Court and Executive, the court and legislature, judicial appointment, promotion, judicial removal and discipline and relation between the Constitutional Court and media. Concerning relation between the Constitutional Court and executive Mt. Scopus in general enacted that the executive shall not have control over judicial function and judicial administration. It covers judicial appointment, promotion, discipline, and removal of judge that should be free from control of the executive. In particular, Mt Scopus determines that "*The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual*

7 United Nations Office on Drugs and Crimes, *Commentary on the Bangalore Principles of Judicial Conduct,* 2007, Par. 22.

8 *Ibid*., Par. 25.

judges, or of the Judiciary as a whole" (Par. 2.23.).It means that for maintaining the judicial independence even statement by the Minister or the other government officer which adversely affects the independence of judge or the Judiciary as a whole can be identified as a form of political pressure.

In relation to legislature, the Mt. Scopus enacts that "*The Legislature shall not pass legislation which reverses specific court decisions*" (Par. 3.1.). Mt. Scopus also states that "*In case of legislation reorganising or abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same or materially comparable status*" (Par. 3.3.). Meanwhile, concerning the removal of judges, "*The Legislature may be vested with the powers of removal of judges, upon a recommendation of a judicial commission or pursuant to constitutional provisions or validly enacted legislation*" (Par. 3.5.). Therefore, either in judicial function or in judicial administration, the legislature shall not have control over the Court.

Regarding judicial appointment, "*The method of judicial selection shall safeguard against judicial appointments for improper motives and shall not threaten judicial independence*" (Par. 4.1.).The phrase of "improper motives" also refers to political motives. For that reason, the judicial appointment should be exercised by the "*establishing judicial selection boards or commissions in which members or representatives of the Legislature, the Executive, the Judiciary and the legal profession take part, should be viewed favourably, provided that a proper balance is maintained in the composition of such boards or commissions of each of the branches of government*" (Par. 4.2.b).

Concerning the relation with media, Mt. Scopus states that "*It should be recognized that judicial independence does not render judges free from public accountability, however, the media and other institutions should show respect for judicial independence and exercise restrains in criticism of judicial decisions*" (Par. 6.1.). Thus, "*The media should show responsibility and restraint in publications on pending cases where such publication may influence the outcome of the case*" (Par. 6.3.). It implies that judicial independence should be exercised in line with public accountability, but at the same time the media should show respect for judicial independence and restrain any publication or opinion that may influence the judicial decisions.

From all provisions above, it can be concluded that normatively the Constitutional Court should be free from extraneous or outsider should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision. In context of politics, the extraneous or outsider can refer to government, legislature, pressure group (such as NGO and mass organisation), political party, individual (such as political figure or government officer) and media as political forces which have power to influence or attempt to influence over the Constitutional Court. However, the adoption of constitutional proclamation of judicial independence does not automatically create or maintain an independence judiciary. Furthermore, judicial independence must be recognized and respected by all the branches of government, political parties, pressure groups, political figures, and media. Consequently, in practice, the Constitutional Court requires the political system which respects and recognizes judicial independence in order to

the Constitutional Court can be free from politics. It is a democratic political system which is substantially protecting freedom by maintaining the judicial independence in order to right and freedom can be protected by the Constitutional Court. Without a democratic system of politics, the Constitutional Court cannot maintain the judicial independence.

Conversely, the Constitutional Court should have capacity to protect himself from political influences. Moreover, in the era of information marked by deliberative democracy, the Constitutional Court must be operated in a political sphere that sieges the Constitutional Court in every time. The next part will discuss the operation of the Constitutional Court in the sphere of deliberative democracy.

C. Deliberative Democracy and Autopoietic of Law

As explained above, maintaining the Constitutional Court from political influences requires a democratic system of politics. Naturally, the Constitutional Court has been created to counter the majoritarian of legislative decision, particularly through judicial review.[9] In representative democracy, the will of people should be expressed by the legislature based on majoritarian rule. However, in practice, the majoritarian rule sometimes cannot really express the will of people because many interests in the legislature are more dominant than effort to represent the will of people. Thus, it contradicts the constitutionally people sovereignty. Consequently, the law which is produced by the legislature principally contradicts the constitution. In this context, the Constitutional Court has been created to counter the majoritarian will which is expressed in the law through judicial review process.

The counter majoritarian function of the Constitutional Court points to a new shift of democracy from people sovereignty which is represented by the legislature to a kind of people sovereignty which is represented also by the judiciary. Democratic process is not only exercised by the legislature through a political process, but also by exercised by the judiciary through a judicial process. In this context, essentially the Constitutional Court will review and guarantee the validity of substance and/or making process of the law according to a constitutionally people sovereignty.

In substantial perspective, as represented by Alexander Bickel and Jesse Choper, substantially majoritarianism cannot be trusted to fully satisfy the demands of justice. Independent Courts are thus better positioned to arrive at the right answer when issues of principle or individual rights are at stake.[10] While in procedural perspective, refers to Jürgen Habermas, the constitutional or judicial review in which guaranteeing the procedural fairness and openness of democratic processes is a manifestation of deliberative democracy.[11]

The institution of judicial review requires a public sphere which provides participation for citizens to deliberate the laws produced by the legislature through a legal process before the Constitutional Court. An effective deliberation demands a rational communication that enables

9 Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Constitutional Commentary 61, pp. 62-63.

10 Colin Farrelly, *Deliberative Democracy and the Institutions of Judicial Review*, 35 Social Theory and Practice 327, p. 329.

11 *Ibid*.

public opinions to be deliberated openly and fairly before the Constitutional Court. A rational communication is a key concept of deliberative democracy which is not only needed by the citizens, but also for judicial process in the Constitutional Court.[12] A judicial process at the Constitutional Court is essentially a process to rationalization of politics in which the opinion, the interest and the fact will be deliberated rationally before the Constitutional Court.[13] In this context, the Constitutional Court is communicated to the public to review and validate politics based on the constitutional norms.

How the Constitutional Court operates within deliberative democracy can be explained also by autopoiesis of law theory. The autopoietic theory views that law is a system of communication, namely communication events in form of legal acts.[14] As a system of communication, a legal system operates in two different situations, namely a normative closed but cognitively open.[15] The autopoiesis of legal system is normatively closed because the legal system closed to the environment and self-reproduces its elements to provide validity of norm based on the specified binary code, namely legal/illegal.[16] By this code, the law is been created. Only the legal system operates with this code and no other system that able to state a human act as legal or illegal. However, at the same time, the legal system is also cognitive open when the system makes communication with environment and open to all information that provided outside. Therefore, in the autopoiesis concept, the legal system operates continuously by communication with environment based on a simultaneous operation between the closure normative self-reproduction and the openness cognitive system. The system is open to all information, but the system will process based on a close binary code, namely legal/illegal so that the output of system is also legal or illegal.

The binary code in the autopoiesis legal system pointed out that the legal system is integrated with the ICT which also operates based on the binary code. It is an inevitable consequence of the ICT development which also influences the legal development. The development of ICT also creates a deliberative democracy which using a massive social media in political communication. The ICT enable public discourse is created timeless and borderless. Every people can produce information and create opinions in every time and from any place in the world. However, all information and opinion are inputs which will be enter into a closed legal process that operated based on binary code and produce the output as legal or illegal.

The Constitutional Court as a part of legal system also operates the autopoietic of law. The Constitutional Court unavoidable works in political circumstances. As a normative system, the Constitutional Court will operate in a closed system based on binary code to decide a case, whether legal or illegal. However, at the same time, the Constitutional Court simultaneously make communication with the political environment and open to political discourse which will be information for deliberation in legal process before the Constitutional Court. For that reason,

12 Jürgen Habermas, "Popular Soverignty as Procedure" at James Bohman and William Rehg, *Deliberative Democracy Essays on Reason and Politics*, The MIT Press: Cambridge, Mass, 1997, pp. 56-58.

13 *Ibid.,* pp. 56-57.

14 Clemens Mattheis, *op. cit*. p. 632.

15 NiklasLuhmann, *loc cit.*

16 Clemens Mattheis, *op. cit*. p. 633.

the Constitutional Court can be free of politics in the meaning that the Constitutional Court has been creating a normative character to politics through judicial legal process. This process is famous as the judicialization of politics which a common phenomenon in the Constitutional Court development in many countries.[17] The next part will be discussing the judicialization of politics in relation with the Constitutional Court.

D. Judicialization of Politics

Referring Ferejohn, there are at least three ways in which courts have taken on new and important roles relative to legislatures – which has been called as the judicialization of politics, as follows:

> *First*, courts have been increasingly able and willing to limit and regulate the exercise of parliamentary authority by imposing substantive limits on the power of an institution. *Second*, courts have increasingly become places where substantive policy is made. *Third*, judges have been increasingly willing to regulate the conduct of political activity itself—whether practiced in or around legislatures, agencies, or the electorate—by constructing and enforcing standards of acceptable behaviour for interest groups, political parties, and both elected and appointed officials.[18]

Meanwhile, Rebecca Hamlin described at least nine distinct forms of political activity to which called as the judicializationof politics, as follows:[19]

a. *Judicial review*. Judicial review is a form judicialization of politics due to the judicial review has clearly and considerably expanded role of the Constitutional Court and the judges in response many important and controversy political issues;

b. *Constitutionalization*. Judicialization refers to the expansion of constitutional supremacy at the expense of parliamentary sovereignty. For them, judicialization is not the same as judicial review, but is the unavoidable outcome of vague constitutions combined with the exercise of judicial review. It can occur when legislators choose to transfer powers away from legislatures and towards courts by constitutionally extending the court's jurisdiction;

c. *Judicial Activism*. The Constitutional Court assert themselves aggressively, choosing to take advantage of a constitutional entry point. And when courts are counter-majoritarian, judges are activist and politics are judicialized;

d. *Judicial Independence*. Judicialization refers to a process by which courts evolve towards more independence, perhaps achieving judicial activism at the end point, which will ensure judge develops his ability to make rulings free of influence from other actors;

17 John Ferejohn, *loc. cit.*

18 *Ibid.*

19 Rebecca Hamlin, Leila Kawar, and Gemma Sala. "The Judicialization of Politics: An Essentially Contested Concept." Paper presented at the Five College Faculty Seminar in Legal Studies, Amherst, MA, October 15, 2015, pp. 6-13, <available at http://www.academia.edu/35542282/The_Judicialization_of_Politics_An_Essentially_Contested_Concept. > accessed 21 September 2018.

e. *Mega-Politics*. Judicialization around the global trend of court involvement in "mega-politics" - making highly contested political issues into judicial ones. Judicialization can take many forms, but the most significant type of judicialization occurs when courts take up topics involving core political controversies. Electoral processes, the definition of the nation and its sovereignty, restorative justice or corroboration of regime transitions are all political questions of the highest magnitude;

f. *Busy Courts*. Judicialization can be found when courts become busier, though some scholars view judicialization as an across-the-board increase in caseload of a judicial system and others describe the judicialization of particular policy areas;

g. *Adversarial Processes in Public Administration*. The term judicialization refers to the ongoing transformation of areas of governance, such as refugee status determination, towards a more adversarial and legalistic approach to decision-making, which is pointed out by the adoption of legal language, arguments, and structures by non-judicial actors;

h. *Courts as Cultural Referents*. Judicialization is occurred in the sphere of public culture when the legal concepts advanced by the Constitutional Court are taken and referred by actors outside the judicial arena in order to increase the salience and importance of certain issues in the public domain;

i. *Legislative Auto-limitation*. Judicializationcan be found when the anticipation of constitutional review affects the actions of legislators, so that encourages the lawmakers to introduce constitutional language and interpretations in parliamentary debates in order to provide strong backing or criticism of legislative initiatives and to prevent a judicial veto.

Based on descriptions above, it can be seen that the Constitutional Court has increasingly engaged in political process. Ferejohn noted that the Constitutional Court frequently intervene in policy-making processes also means that other political actors, as well as groups seeking political action, have reason to take the possibility of judicial reaction into account. Consequently, the political debates in law making process at the legislature must aim to response the possibility of the Constitutional Court decision.[20]

Another consequence, it is no surprise if the judicial appointment or selection of the judge of the Constitutional Court has been coloured by partisan political issues to response the Constitutional Court which has been playing an active or even aggressive in some political issues, such affairs as election regulation, campaign finance, organization of parties and interest groups, and maintenance of the electoral system.[21] The engagement actively and even aggressive of the Constitutional Court in political-making process has stimulated the government and the

20 John Ferejohn, *op. cit.*,pp.41-42.

21 *Ibid*. p. 43.

legislature to calculate the judicial appointment/selection of the Constitutional Court in order to give political advantage for them.

In Indonesia, for instance, judicial appointment of the Constitutional Court shall select nine judges who are exercised by three institutions of branches, namely the President, the House of Representatives, and the Supreme Court, which respectively select three judges. Except for the selection by the Supreme Court, the judicial selection by the President and the House of Representatives will inevitably be influenced by politics. Institutionally, both the President and the House of Representatives has been giving respect and recognize to the Constitutional Court, but in relation with judicial selection by the President and the House of Representatives cannot be assured free of politics. The tendency of the Constitutional Court to increase his judicial activism in some political issues particularly concerning electoral regulation, electoral system, political party, has encouraged the President and the House of Representatives to calculate politically the judicial appointment of the Constitutional Court.

In relation with judicial appointment by the President, the selection of judge conducted by a selection committee which is appointed by the President. Although the selection committee is intended to maintain the independence of judicial selection, however, there is no guarantee the President does not have political preference when the President appoints members of committee. Similarly, the judicial selection by the House of Representatives cannot be avoided from many political interests when members of the House of Representatives choose someone to sit as a judge on the Constitutional Court. Therefore, albeit institutionally the President and the House of Representatives has respected to the Constitutional Court in judicial decision making process, but in relation judicial appointment which carried out through governmental appointment and legislature selection cannot be avoided from political interest. Moreover, when the Constitutional Court has shown the increase of judicial activism in some political issues in which the President and the House of Representatives have many political interests thereof.

Additionally, refers to study of Dominic J. Nardi, Jr. on his dissertation titled "Embedded Judicial Autonomy: How NGOs and Public Opinion Influence Indonesia's Constitutional Court" can be concluded that Indonesian NGOs had a significant effect on the Constitutional Court's agenda and jurisprudence and at the same time the Constitutional Court responds to public opinion when deciding cases. In fact, the Constitutional Court was more responsive to NGOs and public opinion than to the president or legislature. At the very least, the finding indicate that judicial behaviour is not merely the result of interactions between the judiciary and the elected branches, but also result of interactions between the judiciary and public. It pointed out that judges of the Constitutional Court are not isolated in an ivory tower, but rather embedded in a larger social and political milieu.[22]

22 Dominic J. Nardi, Jr., "Embedded Judicial Autonomy:How NGOs and Public Opinion Influence Indonesia'sConstitutional Court," *PhD Dissertation in Political Science*, Michigan: The University of Michigan, 2018, pp. 204-205.

E. Conclusion

From entire analysis above can be concluded that principally the Constitutional Court should be free of politics in order to maintain the judicial independence. However, the adoption of constitutional provision of judicial independence cannot be automatically exercised without a democratic political system which encourages the other branches of government to recognise and respect to the Constitutional Court.

In reality, the Constitutional Court cannot completely be free of politics because the Constitutional Court will be operated in political circumstances. Furthermore, in line with deliberative democracy, the Constitutional Court should be responsive to public discourse and deliberation in order to maintain the constitutional principle of people sovereignty. For that reason, the Constitutional Court can operates the judicial process based on the autopoiesis of law principle, namely normatively closed but cognitively open, so that the Constitutional Court will work in political environment without influenced significantly by any political factors.

In development, there are several tendencies which pointed out that the Constitutional Court has expanded significantly his role in many important political controversies. It is called conceptually as judicialization of politics. However, the judicialization politics has encouraged the President and the House of Representatives to calculate politically the judicial appointment of the Constitutional Court. Consequently, albeit the other branches of government institutionally respect to the Constitutional Court, but unavoidable any political influences, particularly in judicial appointment.

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FORMER JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Maruarar Siahaan

POLITICAL PRESSURE ON THE CONSTITUTIONAL COURT DECISIONS: AN INDONESIAN EXPERIENCE[1]

Maruarar Siahaan[2]

A. Introduction

The independence of Justices and the guarantees required in order to strengthen constitutionalism and rule of law for Constitutional Justices are very important factors in terms of political pressure in Constitutional Court decision-making. The *Code of Ethics and Code of Conduct* of the Indonesian Constitutional Justices states that the independence and impartiality of Justices is a prerequisite for the materialization of the ideals of a rule of law and is a guarantee for the enforcement of law and justice.[3] This principle is said to have to be reflected in the examination and decision-making of each case. This is closely related to the judiciary as an authoritative, dignified, and trusted institution. The independence and impartiality of Constitutional Justices is manifested in the independence and neutrality of the Justices, both individually and as institutions that must be free from various influences. In practice, Constitutional Justices must also carry out their judicial functions independently and neutrally on the basis of a fair assessment.

On the other hand, the Constitutional Court Law calls for statesmanship as one of the requirements for a Constitutional Justice.[4] Regardless of the characterization that may be imposed on the statesmanship of a candidate for Constitutional Justice, one of the main duties and authority of the Justices of the Constitutional Court of Indonesia is to conduct a judicial review of the law, meaning that they must have been involved in politics, in which case the Justices can decide that a law does not have binding legal force if proven to contradict the Indonesian Constitution. The legislative authority of the House of Representatives and the President, starting with the political process of hearing the aspirations of the very diverse Indonesian people, can be said to be a political representation of those in power, especially referring to Hans Kelsen's statement that the authority of the Constitutional Court Justices who revoke a law on the basis of the unconstitutionality of its norms, which is actually a legislative function in the negative sense so called a negative legislator.[5] It is very clear to us that Constitutional Justices are no stranger to politics and are even involved in the crux of politics. In this context, Ran Hirschl termed the

1 Paper presented in the International Short Course held by the Constitutional Court of the Republic of Indonesia on October 2, 2018.

2 Former Justice of the Constitutional Court of the Republic of Indonesia (2003-2013).

3 Kode Etik dan Perilaku Hakim Konstitusi ini dikenal dengan *Sapta Karsa Utama* yang memuat tujuh nilai utama yang harus ditaati oleh setiap Hakim Konstitusi.

4 Pasal 15 ayat (1) Huruf c Undang-Undang Nomor 8 Tahun 2011 tentang Perubahan Atas Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi.

5 Hans Kelsen, *General Theory of Law and State,* New York: Russel & Russel, 1973.

role of the judiciary, including the Constitutional Court that actively resolves political issues, "the judicialization of politics."[6]

There is criticism that the Indonesian Constitutional Court is a *superbody*, because the nine Constitutional Justices, or even just five in case of non-unanimous vote, have the authority to revoke laws, which are the work of the House of Representatives consisting of 560 members as well as the President.[7] This kind of criticism is not only experienced by the Constitutional Court in Indonesia, but also in other countries. Another criticism touches on how the Constitutional Court Justices, who are not elected by the people, are be able to annul the decisions of representatives who are directly elected by the people. All those things show that the Constitutional Court is closely related to politics. In contrast to other jurisdictions that are given a limitation of authority, the Indonesian Constitutional Court's authority is not restricted to judicial review cases that have political elements, which are often referred to as the political question doctrine.[8]

B. Independence and Impartiality of Constitutional Justices

The Code of Ethics of Constitutional Court Justices in Indonesia, which is based on *The Bangalore Principles of Judicial Conduct 2002*, includes the principle of Justice's independence, which is also a constitutional principle. This principle is intended so that Justices have an impartial or neutral attitude of any party in the entire judicial process. However, that attitude must also be supported by other principles related to integrity that must be possessed in order to be able to decide cases with integrity. In order to demand compliance of the parties, trust is also needed on the Justices and the decisions, which can only be obtained from decisions made by the highest standards of these principles as well as strong legal argumentation and rationality in the legal considerations.

Various Codes of Ethics and Conduct of Justices in the world have been agreed upon by many countries and become references for codes of ethics of Justices, including that of Indonesia, which was established based on *The Bangalore Principles of Judicial Conduct 2002*. In *The Bangalore Principles* there are six main principles, namely independence, impartiality, integrity, propriety, competence and diligence, and wisdom. The constitutional principles outlined in *The Bangalore Principles*, especially the independence of Justices, are a prerequisite for the realization of the ideals of the rule of law, and are a guarantee for the upholding of law and justice. Those principles are deeply rooted and must be reflected in the examination and decision-making of each case, and are closely related to the independence of the court as an authoritative, dignified, and trusted institution.[9]

6 Ran Hirschl, "The Judicialization of Politics" in Gregory A. Caldeira , R. Daniel Kelemen, and Keith E. Whittington, eds., *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, DOI: 10.1093/oxfordhb/9780199604456.013.0013.

7 For debates on this subject, see e.g. William Mishler and Reginald S. Sheehan, March 1993, "The Supreme Court as a Countermajoritarian Institutional? The Impact of Public Opinion on Supreme Court Decisions," *The American Political Science Review*, Vol. 87 No. 1, pp. 87-101, DOI: 10.2307/2938958; Michael C. Dorf, December 2010, "Majoritarian Difficulty and Theories of Constitutional Decision Making," *The University of Pennsylvania Journal of Constitutional Law*, Vol. 13 (2), pp. 283-304.

8 Nada Mourtada-Sabba and Bruce E. Cain , eds., 2007, *The Political Question Doctrine and the Supreme Court of the United States*, Lanham, MD: Lexington Books.

9 See the Constitutional Court Decision Number 05/PUU-IV/2006 dated August 23, 2006, which always guides subsequent verdicts, so that it has become permanent jurisprudence.

The independence of Justices and the judiciary is realized in the independence and impartiality of Justices, both individually and as an institution, from various external interventions with direct or indirect effects, in the form of persuasion, pressure, coercion, threats, or return favors due to certain political or economic interests. The implementation is expected to be evident in the attitudes and behavior of Justices, among others, that the Justices must carry out their judicial functions independently on the basis of an assessment of facts, and must reject external influences, lures, pressure, threats or interference, both direct and indirect, from anyone for any reason, in accordance with their thorough control of the law. On the other hand, the Justices must be free or independent from the pressure of the public, media, and from the executive, legislative, and other state institutions, especially the parties in a dispute they adjudicate.[10]

It is very clear that the impartiality or neutrality that the Justices must have is a principle that is inherent in the nature of the Justice's function as a third party entrusted with providing a solution for every case filed with the court. Independence and impartiality or neutrality is inherent in the function of the Justice as a prerequisite for the ideals of a rule of law and a guarantee for upholding justice. Impartiality signifies neutrality accompanied by a deep appreciation of the importance of balance between interests related to the case. This principle must be reflected in the process of examining a case, from the beginning to the end, to then arrive at the decision making stage, so that the decision can be accepted as a fair legal solution for all parties involve and for society in general.

The implementation of the principle will be evident in the attitude of the Justices when handling a case, which includes: (i) carrying out tasks without prejudice and bias toward any party; (ii) displaying behavior, both inside and outside the court, that continues to maintain and enhance public trust in the neutrality/impartiality of Justices; (iii) resigning from a case examination if a Justice cannot or is considered unable to be neutral/impartial because they or any of their family members have a direct interest in the decision.

C. Independent from Influences?

Observing the concept of independence and impartiality in the judicial conduct, it has become a fact that in the examination and decision-making process to complete a petition for judicial review as constitutional adjudication, are in fact very close to politics, where group having interests often emphasize their influence in various ways. The constitutional adjudication process sometimes requires outside influences, both in the form of opinions, experiences, and attitudes in the form of arguments, which are submitted legally in the trial process based on the existing procedural law.

The Constitutional Court, on its own initiative, even often asks certain parties be involved in the process as relevant parties, or asks *amicus curiae* to provide opinions on certain issues related to the petition. The constitutional adjudication process, which refers to the Constitution

10 Secretariat General and Registrar's Office of the Constitutional Court of the Republic of Indonesia, October 17, 2005, *Declaration of Constitutional Justices of the Republic of Indonesia on the Code of Ethics and Conduct of Constitutional Justices of the Republic of Indonesia (Sapta Karsa Hutama)*, contained in the Collection of Constitutional Court Regulations, 2007, pp. 80-81.

as a source of legal politics in the decision, is a dialectical process by the parties involved in the adjudication because of the interpretation of the Constitution. The question is whether it is true that, as stated in the code of ethics of the Constitutional Court Justices, the Justices must be free or independent from the pressure of the public, media, and from the executive, legislative, and other state institutions? Or do they require that influence and pressure in determining policies for constitutional politics?

D. Political Pressure as a Source of Input

In one of his works related to political pressure in the decisions of constitutional cases, Robert F. Nagel wrote the following:

> *"...we suspect that direct political pressure is inconsistent with judicial review itself, for in one way or another most theories of judcial review turn on the belief that judges have something unique to contribute to policy decision making and that the nature of this contribution closely tied to political insulation".*[11]

It seems that Nagel saw political pressure as something inconsistent with the attitude of Justices who should have keep themselves away from political influences. Are Justices free from political mainstreaming at all? Or is there an important role they play in constitutional politics in the Constitutional Court's decisions? Although Indonesia has no experience in deciding on the impeachment of President and/or Vice President, but when the House of Representatives was exercising its rights by forming a Special Committee on Inquiry Rights to uncover the Century Bank case where the Vice President of the Republic of Indonesia was allegedly involved in corruption, if the inquiry right had been used by the House by giving an opinion on the Vice President's blunder to be filed to the Constitutional Court in the impeachment process, the Court would have declared his guilt if the opinion of the House was proven to be correct.

If it was really the case, it can be expected that the political battle that clouded the beginning and end of the inquiry right of the House would have certainly spread to the Constitutional Court. In anticipation to the case, at that time the Indonesian Constitutional Court even immediately completed the legal proceedings related to impeachment as reflected in the Constitutional Court Regulation on the impeachment of President/Vice President.[12]

South Korea has experienced this when in 2004 the Korean National Assembly proposed the impeachment of President Roh Moo-hyun, who was elected through democracy. This decision made many people aware of the political authority of the Constitutional Court.[13] Similarly, the Korean Constitutional Court issued an important decision to impeach President Park Geun-hye on March 10, 2017. This highlights the political element in the cases decided by the Constitutional Court. In fact, Tom Ginsburg with his political insurance theory believes that

11 Robert F. Nagel, 1990, "Political Pressure and Judging Constitutional Cases"*, University of Colorado Law Review*, Vol. 61, p. 685.

12 Peraturan Mahkamah Konstitusi Nomor Nomor 21/PMK/2009 tentang Pedoman beracara dalam memutus pendapat Dewan Perwakilan Rakyat mengenai dugaan pelanggaran oleh Presiden dan/atau Wakil Presiden.

13 Chaihark Hahm, 1 January 2012, "Beyond 'law vs. Politics' in constitutional adjudication: lessons from South Korea", *International Journal of Constitutional Law*, Vol. 10, Issue 1, p. 25, DOI: https://doi.org/10.1093/icon/mos004.

the authority possessed by the Constitutional Court actually guarantees a balance of existing political forces for future political cases.[14]

The Indonesian Constitutional Court repeatedly received political pressure when examining and deciding on constitutional cases. In the judicial review petition for the revocation of the Blasphemy Law, for example, various Islamic groups who rejected the petition filled the courtroom, and even the outside of the Constitutional Court's building every time a hearing was in session. On the contrary, the activists who supported the revocation of the law made systematic moves through the media and its networks. The Constitutional Court received pressure from two sides, both from those who supported and rejected the petition. The same thing happened when the Indonesian Constitutional Court had the judicial review of the Pornography Law and the minimum age for children to marry. Women and child activists try to give political pressure to the Constitutional Court, both inside and outside the hearings, so that the petition would be granted.

In the dispute over regional head elections handled by the Constitutional Court, hundreds of supporters of for regional head candidates in dispute kept vigil from dawn until noon inside the building and at the courtyard of the Constitutional Court, in the hope that the petition was granted by the panel of Justices. Great political pressure was also received by the Constitutional Court while adjudicating a judicial review case of the legal status of the Commissioners of the Corruption Eradication Commission (KPK). The institutional conflict between the Corruption Eradication Commission (KPK) and the Indonesian police, known as "the Gecko vs. Crocodile feud" in 2009, ended in the Constitutional Court. Political pressure from civil society who voiced anti-corruption movement reached its peak after the Constitutional Court played recordings of talks legally-engineered to ensnare the Commissioners of the Corruption Eradication Commission (KPK).

Pressure on the Constitutional Court not only occurs on politics and law, but also in judicial review cases on employment. Various workers groups were often gathered on the day of the hearing to protest and give orations in front of the Constitutional Court building. As long as the protest is carried out peacefully and does not violate the law and does not interfere with the proceedings, the police so far have not taken any action to prohibit or disband the labor protesters.

Political pressure on the judiciary in developed countries, especially outside the court, is generally far less political compared to that in developing countries. This is due to differences in the legal culture between people in developed and developing countries in addressing court decisions and decision-making. Political pressure in several countries may be considered normal and reasonable, but may be categorized as contempt of court in others. For example, the High Court of Australia, the highest court in Australia, once warned its Prime Minister not to give political comments on terrorism cases being tried by the High Court, even inside the Parliament Building. For the High Court of Australia, such political comments may into a contempt of court, because it is considered to interfere with the independence of Justices in deciding the case.

14 Tom Ginsburg, 2003, *Judicial Review in New Democracies: Constitutional Court in Asian Cases,* Cambridge: Cambridge University Press.

The Indonesian people generally hope that the Constitutional Court consistently be independent and impartial in carrying out its judicial functions, especially in judicial review cases, by freeing itself from pressure, intervention, or political influences. However, due to the nature of the judicial review authority, in which the Constitutional Court Justices may revoke laws in fulfillment of its role as a negative legislator as pointed out by Hans Kelsen, "politics" actually has a big role in shaping the Court's decisions. However, what should be food for thought is the definition of political influences and how the "political power" helped shape the Constitutional Court's decisions.

E. Constitutional Court's Decisions as Legal Policy of Constitution

Political pressure does not always refer to that given by members of a particular political group, but by any group, as the desired goal is partiality toward certain policy. One of the things that greatly opened the space for the Indonesian Constitutional Court to have wide discretion in the decision making process when using the judicial review authority is due to the Indonesian Constitution (UUD 1945) consisting of the Preamble and the Body,[15] with *Pancasila* as a value, view of life, ideology, and philosophical foundation that contains principles that are very open to interpretation in measuring the constitutionality of a norm. In a nation that is very diverse in terms of culture, society, and especially religion, the "battle" of interpretation that becomes a "judicial discretion" in the Constitutional Court ruling will become a legal policy derived from the Indonesian Constitution.

In this case, the politics that influences the Constitutional Court can be seen as facts that lay in front of the Justices, who are also tested on the construction of values established by the justices of Pancasila as the basic norm of the state. The influences displayed as facts that became political views of judicial review petitioners and legislators and relevant parties who are involved in the process before the Constitutional Court certainly influence the formation of legal politics in the decisions issued by the Constitutional Court of Indonesia.

In the Indonesian context, the greatest political strength and pressure lies in the issue of diversity. Therefore, a judge in Indonesia is expected to know and explore the values of law and justice in the community. This is confirmed in Article 5 paragraph (1) of Law Number 48 of 2009 on the Powers of the Judiciary that reads, "*Judges and Constitutional Justices shall explore, follow, and understand the legal values and sense of justice within society*."

On the one hand, some pressure is needed in order to see the intensity of plurality of opinions and views existing in society. However, the pressure must aim to open a wider choice for Justices, not just to prioritize the delivery of their own views. That is because the pressure that provides alternative views can be used as a way for Justices to make choices. In some conditions, claims by certain groups can be taken into consideration by judging the validity of the views of the groups they represent.

Generally, the validity of pressure is influenced by its spread, the ability of the group to organize opinions in an organized manner, and the formulation of the views. So, any sporadic and

15 Article II of the Additional Provision of the 1945 Constitution of the Republic of Indonesia

meaningless pressure or view, for example haphazard shouting, will not be heeded at all by the Justices. As long as the pressure is carried out legally and constitutionally it will have benefits, because the Justices will make decisions from the choices available. This is why politics is said to be an art of choice, while Constitutional Justices make decisions based on choices on legal policy of constitution.

F. Conclusion

In principle, a Justice must not be intervened and pressed politically by any party, but there is still a room for influences as long as they are given legally and constitutionally. These influences, for example, are legal arguments and legal reasoning in the petition or trial process through the statements of experts and witnesses presented. This political pressure can occur inside or outside the hearing, in the form of support of the masses in the courtroom, demonstrations and orations, or articles and news in various printed and electronic media. Therefore, political pressure can be said to be an attempt to influence the Justices' decision or constitutional politics that will be decided by the Constitutional Court.

Thus, a Justice must also be able to understand that each party involved wants a decision that either grants or rejects the petition, which is normal. However, a Justice should only consider political pressure as one of the influencing factors when it has relevance to the legal policy that will be implemented, so it is necessary to also assess its consistency with the provisions in the Constitution.

That is, as long as political pressure is constitutional and given legally and does not violate rules, security, order, and ethics, it should be tolerated as part of the form and process of democracy in a country of developing education and economy. As time goes by, the legal culture will develop and mature. This is an inevitable process that we need and must go through. However, a Justice must also have guidelines to maintain their independence and impartiality. The ability to hear these aspirations in a neutral manner is something a Justice must absolutely have, along with constitutional understanding and profound knowledge as well as adequate experience. Therefore, even though someone has become a Justice, developing knowledge, insight, and experience is absolutely necessary.

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Peraturan Mahkamah Konsitusi Nomor 09/PMK/2006 tentang Pemberlakuan Deklarasi Kode Etik dan Perilaku Hakim Konstitusi

The 1945 Constitution of the Republic of Indonesia

SHORT COURSE
DAY II

SESSION I

THE SECRETARY GENERAL OF THE CONSTITUTIONAL COUNCIL CAMBODIA

Ratana Taing

THE CONSTITUTIONAL COUNCIL IN ELECTORAL LITIGATION: A GLANCE AT CAMBODIA'S CONTEXT

A paper for International Symposium and Short Course 2018
"The Constitutional Court and Constitutionalism in Political Dynamics "
1st -5th October 2018, Yogyakarta, Indonesia

BY TAING RATANA [1]

ABSTRACT

This article is made in the attempt at sharing the knowledge on the important roles of the Constitutional Council of the Kingdom of Cambodia in jurisdiction of ruling on the electoral litigation at the final stage. The main parts of this paper cover (i) the Constitutional Council in brief (ii) the electoral litigation and its cause root (iii) procedure of ruling and some concerned key decisions, and (iv) the position of the Constitutional Council in context of electoral litigation.

The readers of this paper will gain knowledge concerning Cambodia's resolution on the political disputes related to the election of the Member of the National Assembly and decision made by the Constitutional Council. Also, the reader will be aware the political environment in Cambodia in recent years.

At the end, this paper made intents to show the stand of the Constitutional Council in the context of Cambodia's political platform, where different political parties have been competing for gaining the power via the universal election.

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ABSTRACT

This article is made in the attempt at sharing the knowledge on the important roles of the Constitutional Council of the Kingdom of Cambodia in its jurisdiction of ruling on the electoral litigation at the final stage. The main parts of this paper cover the Constitutional Council in brief, the electoral litigation and its root cause, ruling procedure and case study. The readers of this paper will gain knowledge concerning Cambodia's resolution on the disputes related to the election of the Member of the National Assembly and decision made by the Constitutional Council. At the end, this paper made intents to show the stand of the Constitutional Council in the context of Cambodia's election period.

1. INTRODUCTION

Cambodia has adopted the policy of liberal multi-party democracy[2] in its constitution of 1993, where different political parties have enjoyed their rights in electoral competition. Election is a key tool for promoting political rights and democracy in modern state. It is also a kind of political platform for providing all political parties the equal opportunity to gain the power. The universal election held every 5 years since 1993 becomes a very crucial mean for Khmer[3] citizen to choose representatives [political parties] through a free and fair mechanism. Thus, political parties, citizen, and mechanism of an election are the three main elements for an election in Cambodia. These three elements to an election are among the main causes of

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2 Article 51 (new) of the constitution

3 Khmer means Cambodian people

electoral litigations; which have always occurred, more or less, in every election. Politicians sometimes could produce more tension during the electoral period. Also, citizen belonged to different political parties could also produce complicated problem during the period of the election. As result, a good mechanism for solving an electoral litigation shall be very important in guaranteeing public confidence in an election.

In the aforesaid context, Cambodia has good experience with the electoral litigations occurred during each election and also with an applied mechanism for solving those conflicts. The mechanism for ruling on the electoral litigation in Cambodia comes with different levels: Communal Election Commission (CEC), Provincial Election Committee (PEC), National Election Committee (NEC), and the Constitutional Council (CC) at the last step.

As result, this article made for sharing an experience from the Constitutional Council in its competences in ruling the electoral litigation in Cambodia. The overall objectives of this article will discuss some key points (i) the Constitutional Council in brief (ii) the electoral litigation and its root cause (iii) ruling procedure and case study.

2. THE CONSTITUTIONAL COUNCIL IN BRIEF

The Constitutional Council is a supreme, neutral, and independent institution created by the 1993 Cambodian Constitution. This Institution has been effectively functioning since June 15, 1998.

2.1. MEMBERS OF THE COUNCIL

The Constitutional Council consists one President and eight Members. The President is elected by 9 Members of the Council at the absolute majority vote. The election of the President shall be conducted every three years after the three new members come into office. The President has rank and prerogatives equal to those of the President of the National Assembly. Members have rank and prerogatives equal to those of the Vice-President of the National Assembly. The normal term of the members of the Council shall be 9 years. Every 3 years, three members of this Council shall be replaced. Exceptionally, for the first mandate, some members are appointed and elected for a term of 3, 6, and 9 years.

Three members are appointed by His Majesty the King, while the National Assembly and the Supreme Council of Magistracy elect 3 members each. The Members of the Constitutional Council shall be selected among the high personalities, Khmer national by birth, aged at least 45 years old, graduated from higher education in the fields of law, administration, diplomacy, or economy; and having at least 15 years of professional experiences in the aforesaid fields of work.

2.2. COMPETENCES

According to the Constitution and the Law on the Organization and the functioning of the Constitutional Council, this Council shall have two noticed competences:

(i) *To guarantee the respect of the Constitution*: By this mean, the Constitutional Council interprets the Constitution, to interprets the laws adopted by the National Assembly and completely reviewed by the Senate, and to examine the constitutionally of laws[4] . Also, the Council notifies His Majesty the King on all proposals to amend the Constitution[5].

(ii) *To examine and rule on electoral litigations*: Those elections are the election of the Members of the National Assembly and the election of the Senators. (Article 136 new).

As a principle, the Constitutional Council cannot examine any matter on its own initiative. The Constitutional Council can examine the constitutionality of law before (A pririori) or after (A posteriori) its promulgation. Article 140 (new) of the Constitution states that The King, the Prime Minister, the President of the National Assembly or one-tenth of the National Assembly's Members, the President of the Senate or one-fourth of the Senators, may send the laws adopted by the National Assembly to the Constitutional Council for examination before their promulgation.

According to the provision of Article 141 (new) of the Constitution, the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one-fourth of the Senators, one-tenth of the National Assembly's Members, or the Courts can request the Council to examine the constitutionality of a law after its promulgation. Any citizen has the right to raise the unconstitutionality of the laws through the National Assembly's Members or that of the President of the National Assembly or of the Senators or of the President of the Senate.

3. THE ELECTORAL LITIGATION AND ITS ROOT CAUSE

The electoral litigation is considered as a form of political litigation because an election is closely related to political rights of citizen. In the democratic regime, political parties and individuals belonged to political parties have experienced both satisfaction and dissatisfaction in the election. These two situations are linked to the electoral procedure and electoral result. Electoral competition shall result in 'winning' and 'losing', which are two common circumstances for every election. Thus, procedure for ruling on the electoral litigation shall be taken into account. Along with this mechanism, the understanding of the root cause of the litigation is among crucial part for whole procedure for ruling on electoral litigation. Electoral litigation shall be counted in all stages of the election, not only in only the period of Election Day. It covers the whole process of an election, which starting from the registration of the political parties at the Ministry of Interior. All the stages could meet political conflicts. In Cambodia, there have been electoral litigations occurred, more or less, in time and stages of the election. Different forms of electoral litigation shall be counted (i) litigation concerning the political parties (ii) litigation concerning individual's rights.

3.1. LITIGATION CONCERNING THE POLITICAL PARTIES

Political parties are the interest groups, who share common values and common political ideation. All political parties shall perform their activities in conformity with the provisions

4 Article 136 (new) of the Constitution

5 Article 143 new (former Article 124) of the Constitution. The initiative to review or to amend the Constitution shall be the prerogative of the King, the Prime Minister, and the President of the National Assembly, at the proposal of one fourth of all its members

stated in Law on Political Parties. Most of litigations are found during the period (i) registration of political parties and their candidates at the National Election Committee (ii) electoral campaign, and (iii) announcement of provisional result of the election.

The main root causes of these litigations are noticed. During election period, political parties try to gain benefits as much they can. The way in which to gain benefits of those political parties could make them get enter into violation of laws and other regulations. Among those violations are (i) wrongful acts downgrading other political parties, and (ii) wrongful acts against provisions prohibited by laws. The Constitutional Council is invested the jurisdiction to examine and rule on those litigations at the last step. For 2018 universal election, there was only one case filed to the Constitutional Council.

3.2. LITIGATION CONCERNING THE INDIVIDUALS

Individuals who have rights to vote could be registered in the voting lists. Once they already completed all requirements, the National Election Committee shall register their names in the voting list during the period of updating the voting list. National Election Committee shall post the voting lists in public. Once individuals did not find their names in the voting lists, hence they are invested the rights to issue complaints to the Constitutional Council at the last step.

Root causes of these litigations are found in forms of (ii) mistakes made by those individuals who could not reach registration's requirement for instance they could not provide all required documents such as birth certificates…etc. (ii) mistakes made by the election committee's officers, for instance they made wrong spelling of the names or make losing of the names by any causes. The cases concerning these two causes had been found more in the previous elections. But, during the period of 2018 election, there were very least cases found because National Election Committee has updated its works on registration process by using modern IT systems. For 2018 universal election, there were no cases concerning registration of voting list made at the Constitution Council.

4. RULING PROCEDURE AND CASE STUDY

4.1 RULING PROCEDURE

After receiving any complaint, the President of the Council shall appoint one of the Council's Members as *the Rapporteur*. This rapporteur has the duty to draft a *report* for the Council[6]. In case the Council found that this complaint was not consistent with its jurisdiction, the Council shall notify the concerned party by a *Notification* with reasonable notes. The public hearing shall be made in case the Council found this complaint was made within its jurisdiction. In this case, the Council will become *the Jurisdictional Council* and will process the case as same as Court. Ruling procedure of the Council concerning electoral shall be done with main sessions (i) group session (ii) internal hearing, and (iii) public hearing. These three steps of

6 Practically, to-be-appointed Rapporteur is notified before hands about any possible case submitted to the Council; hence to-be-appointed Rapporteur will have more time for following a trail of that case. It is considered as a good norm to be well prepared for ruling on a case. This is an initiative of H.E. IM Chhun Lim, the President of the Constitutional Council.

working are to make more confident in the Council's decision and for *check and balance*, which is a core tool for promoting the neutrality and impartiality of this Council.

4.1.1. THE GROUP SESSION

The Council's members are divided into three groups. One group consists of three members. The three members of each group shall come from different sources (one from the King, one from the National Assembly, and another one from the Supreme Council of Magistracy). A member of group appointed as *the Rapporteur* for working on concerned case, has duty to draft a *report* for the Council. *The Rapporteur* convenes for group session of three members in order to discuss on the draft of report. Other two members besides *the Rapporteur* have the full right to share their point of view on legal fact and legal ground of the case. This session is usually accompanied by a counsel of secretary, who duties for minute record and other assistances. The report is a foundation for decision-making. After discussion, a draft of decision will be also prepared for the internal hearing session; which was scheduled by the President of the Council.

4.1.2. INTERNAL HEARING

This hearing shall be made from the convocation of the President of the Council. All nine members are invited to this hearing. A counsel of secretary also attends in this session. This session is to provide all the members of the Council for taking part in discussion on the draft of report made by the group and for framing the draft of the decision. This session is for debating and sharing point of view but not for adopting. The result from this session is very crucial for the final decision of the Council to be made in public hearing.

4.1.3. PUBLIC HEARING[7]

Final trial of the Council shall be made in form of *the Public Hearing*. The Council shall announce this hearing to the public by informing the exact date and time for its hearing. The plaintiff and the defendant (mostly NEC) shall be informed by summons. Other concerned person such as witnesses and supporting documents can be brought to this hearing.

4.1.4. QUORUM AND ADOPTION

The time frame for the ruling on the electoral litigations of the following cases (i) 10 days for an appeal contesting to the NEC's decisions and (ii) 20 days for complaints to CC contesting the provisional result of the election. According to Article 14 (New) of the Law on the Organization and the Functioning of the Constitutional Council, public hearing of the Council shall be considered in favour unless there are 5 members attend in the meeting via convocation from the President[8]. The Council shall adopt its decision by absolute majority vote (5 members at minimum).

7 The whole procedure for public hearing, please read Taing Ratana' s article: the Constitutional Law: Election, Structure, Procedure, and Competencies (KAS's publication, Cambodian Constitutional Law, 2016)

8 Absence of some members in this crucial hearing is very rare, except they are in serious health condition.

♦ CASE STUDY ON LITIGATION CONCEENING 2018 ELECTION

During the universal election of 2018 in Cambodia, there was only one electoral complaint submitted to the Constitution Council. The Constitutional Council ruled this case and made decision No196/004/2018 CC.D on August 15, 2018. The decision of the Council consists of 5 main elements (i) the facts (ii) the issues (iii) holdings (iv) reasoning[9], and (v) jurisprudences[10]. The quality of decision is among the priorities that the Council carefully focuses on it. Thus, the Constitutional Council, presided over by current president, has updated the structure of decision writing by including more qualified holdings and reasoning. It is good to look at the below case:

(i) *The facts*[11] : During electoral campaign at Battambang province, there was a gathering of *Num Banh Chok*[12] on July 19, 2018 at Mr. *Chea Chiv's* house, a former senior member of former CNRP[13] ; who is among 118 politicians banned for actively performed political activities for 5 years after his political party found guilty of 'treason' and was dissolved on November 16, 2017 by Supreme Court. Gathering's members take group photos by showing their fingers heading to the sky. These photos taken were posted on face book pages of *Chea Chiv, Kruy Kim Saing*, and *Thong Saroeun*; and were attached to many pages of participants. Along with these photos posted, these aforesaid men wrote down sentences ' *My finger shall be clean if there is no CNRP…clean finger…clean mind…no selling conscientiousness… and my finger is truly nice'*.

(ii) *The Issues*: The central issues of this case are (a) gathering and taking photos during the electoral campaign was considered as illegal activities? (b) posting on face book with those sentences are closely concerned illegal movement aims at destroying 2018 universal election, made by politicians banned from exercising political activities? (c) Are these activities counted in performances prescribe in Article 142 of the Law on the Election of the Members of the National Assembly?

(iii) *The Holdings*: Article 142 of the Law on the Election of the Members of the National Assembly[14] ; Article 34 new (one), Article 41, Article 42 of the Constitution; and Article 19 of ICCPR.

(iv) *The reasoning*[15] : The Constitutional Council found (a) the activities of gathering, taking photos and posting on face books by this group are closely related to political movement made by former chairperson of CNRP, who escapes to France and invokes all local voters for boycotting 2018 election. This invocation had been made under

9 The current president of the Council, **H.E. *Im Chhun Lim***, has promoted this part more and more better for last decisions made by the Council. He asked the Council to provide precise reasoning; hence every party could understand the decision very well.

10 More or less, jurisprudences could be found in decisions made by the Council.

11 These postings were found as subjects to be accused as an illegal activities interrupting/destroying 2018 election that will be held on July 29, 2018. Representative of CPP filed complaint against those activities at CEC, PEC, and NEC. Last, it was submitted to the Constitutional Council.

12 Name of Khmer noodle with Khmer soup ' Samlor Pra Heu' or ' Khmer curry", which is quite popular for villagers during period of festival or any ceremony.

13 Cambodia National Rescue Party

14 This article provides one's performances that are considered as activities of interrupting the voters from exercising their rights to vote.

15 These are brief reasoning among other crucial reasoning of many pages made by the Council.

theme *'clean finger movement'* by using social networking and other medias. Clean finger movement has spread out rapidly and largely from cities to local communities (b) these activities are intentional acts made aims at interrupting voters from exercising their rights to vote or otherwise making confuse among voters or making them lose of confidence on the 2018 universal election (c) all activities performed by all means with intentionally interrupting someone from exercising his/her rights to vote, are considered as activities made in consistent with provision stipulated in Article 142 of the Law on the Election of the Members of the National Assembly,

(v) The jurisprudences: The Constitutional Council re-confirms (a) '*rights to vote is a constitutional rights'* for Article 34 new (one) and *'rights to vote is an important fundamental rights for exercising democracy and one's liberty'* for 142 of the Law on the Election of the Members of the National Assembly (b) *'activities of interrupting […] stated in Article 142 of LEMN'* need only *' its performance element with all kinds of mean' rather than 'Damage'* occurred, and (c) *'rights and obligation are bound'* for Article 41, Article 42 of the Constitution, and Article 19 of ICCPR.

This aforesaid decision is *'a full option'* for writing a decision made by the Council in 2018 universal election. It is [may be] the new trend for upgrading quality of decision made by the Council and providing more confidence for the parties during the election period. It is among great decisions express the commitment of the Council in the position of independent and neutral institution.

5. CONCLUSION

The Constitutional Council is an independent and neutral institution. This Council is invested the sovereign jurisdiction over electoral litigation. No part of any power could interfere into the jurisdiction of the Council. Political interference into other independent institutions is among hot topics for debating in almost countries of this world. Thus, the performance of those independent institutions shall be a measurement in this debate. In all contexts, the Constitutional Council of Cambodia has performed its function in conformity with the Constitution and existing laws of the Kingdom. In the political context and particularly in electoral litigation, the Constitutional Council plays its role as a jurisdictional council invested rights to examine and rule on electoral litigations. The Constitutional Council performs its function in providing 'Justice' to all concerned parties within the context of 'legal certainty'.

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OFFICE OF THE CONSTITUTIONAL COURT OF THAILAND

Sumaporn Srimoung
Pitaksin Sivaroot

The Constitutional Court of the Kingdom of Thailand and Democratic Dynamics: A Focus on Election-oriented Cases

Miss Sumaporn Srimoung[1]
Mr. Pitaksin Sivaroot[2]

ABSTRACT

Since the establishment of the Constitutional Court of the Kingdom of Thailand, it has played an important role in protecting democracy. Its role seemed very active especially during the country's political crises. As general election is one of the mechanisms to stabilise and improve the nation's politics and government, the Constitutional Court of Thailand considers its role is also necessary, and took part in many democratic dynamics in the country by rendering its rulings on the laws related to the general elections.

Keywords: Constitutional Court of Thailand, Democracy, Election

1. Introduction

Since Thailand changed its governmental regime in 1932 from absolute monarchy to constitutional monarchy, or "*a democratic regime with the King as Head of the State*" as prescribed in the country's current Constitution B.E 2560 (2017), it has faced Thai-styled democracy, which is not exactly relevant to the Western style, many times. Some scholars argue that this Thai style is as "semi-democracy" or "managed democracy" (see Neher, 1987, 1996; Samudavanija, 1987). A substantial number of its coups d'état and newly-drafted constitutions are two of the outstanding examples for this point.

However, the country has attempted to conduct political reforms to reach a stable democratic regime. The Constitution of the Kingdom of Thailand B.E. 2540 (1997), which was generally known as "People's Constitution," was an outcome of that endeavour. According to that past constitution, many organisations were firstly established for public oversight and scrutinisation to 'check and balance' with legislative, executive, and judicial branches. The Constitutional Court of the Kingdom of Thailand is one of those institutions. Nonetheless, after the enforcement of that constitution, the country fell to be in several states of political turmoil. Thailand, accordingly, enacted its new constitutions; namely the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014), and

1 Constitutional Court Academic Officer (Professional Level), Acting Director of International Affairs Division, Office of the Constitutional Court of Thailand

2 Constitutional Court Academic Officer (Professional Level), Office of the Constitutional Court of Thailand

the Constitution of the Kingdom of Thailand B.E. 2560 (2017), respectively. Throughout the enforcement of these constitutions, the Thai Constitutional Court has played many great roles relevant to political and democratic dynamics for the country's reforms. One of these aspects is election-oriented cases on which the Constitutional Court of Thailand held its rulings.

This paper will examine the concepts of democracy and election. Then, it will focus upon several Constitutional Court rulings relevant to general elections in Thailand, and make an analysis on the Constitutional Court's role. The paper will end up with its conclusion.

2. The Concepts of Democracy and Election

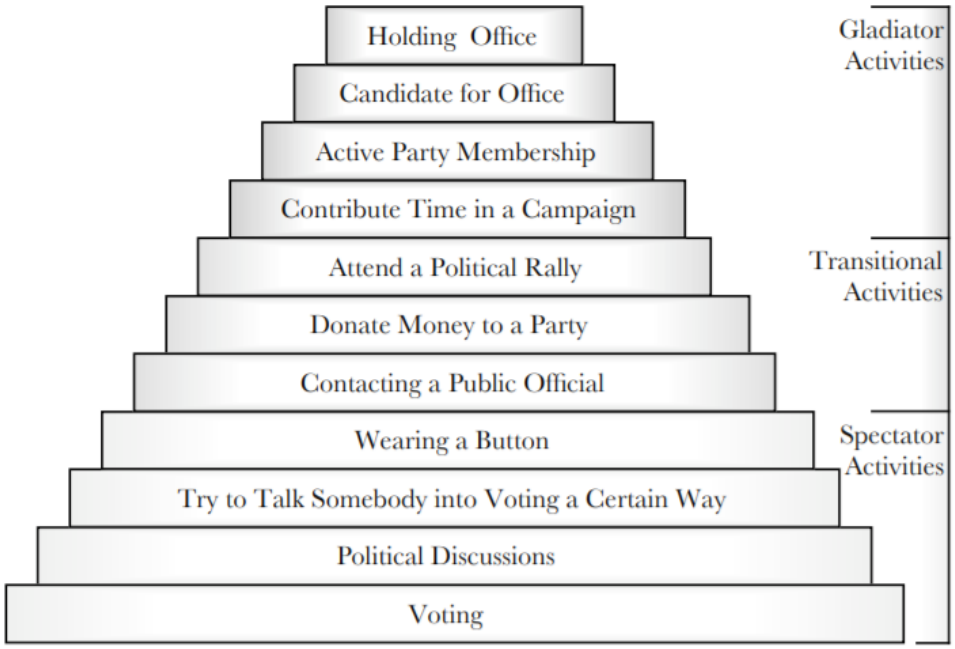
2.1 Democracy

"Government by the people" is a basic definition of democracy. The degree of democracy in individual countries is correlation with the level of citizens' political participation. According to Parry, Moyser and Day (1992), people's political participation can be implied as one of the main ideas of a democratic regime. Democracy of any country could no longer emerge if there is no participation of its citizens.

Jan W. van Deth (2001) studies and analyses many research papers about political participation. He exemplifies many ranges of citizens' political activities; for example, consuming political news, writing letters to officials, boycotting certain products, official and unofficial strike, illegal protest and lawful demonstration, donating money to a political group, voting and election, political party's engagement, holding a political position, and so on.

2.2 Election

With a focus upon an election, Young (2009) points out that an election is the moment of a government under a democratic regime in order to "provide a public model of dignity and respect." An electoral process can be fully assessed until voting is concluded, ballots are counted and results are announced and implemented. Voting and election is one of methods of political participation which reflects on a high degree of democracy in each country.



(Figure 1: Political participation can be conceptualized in a hierarchical manner.
Political involvement is understood in terms of different levels (adapted from Milbrath, 1965)

Therefore, every aspect of election – which is one of the main political participation activities – is important for any country's democratisation. Regarding Thailand, it can be seen in Section 50 (7) of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) prescribed election is a duty of the Thais – stating that "the Thai people shall have a duty to freely exercise his or her right to vote in an election or referendum, taking into account the common interests of the country as a prime concern."

3. Constitutional Court Rulings relevant to Election in Thailand

3.1 Summary of Constitutional Court Ruling No. 9/2549 dated 8th May B.E. 2549 (2006)

The Ombudsman submitted a matter to the Constitutional Court for a ruling under the Constitution of the Kingdom of Thailand B.E. 2540 (1997) on constitutionality problems in the Election Commission's proceedings with respect to the general election of Members of the House of Representatives on 2nd April 2006.

The case background is related to the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006). This Royal Decree consisted of two main substances. *First*, section 3 of the Royal Decree provided for the dissolution of the House of Representatives so as to arrange a new election of Members of the House of Representatives. The Thai Constitutional Court ruled that this substance was an act of the government. The Prime Minister, as the head of the executive branch, should have and exercise his executive power in the parliamentary democratic system for checks and balances with the legislative branch. This act was a relationship between the executive power (the government) and the legislative power (the National Assembly). As

a consequence, the act of the Prime Minister on this matter was not subject to the scrutinising power of the Constitutional Court as one of the judicial organs.

However, with respect to the ***second*** substance, section 4 of the Royal Decree provided for a new general election of Members of the House of Representatives on 2nd April 2006. The determination of the election date was made by the government because it acted as a countersigning party of the Royal Decree. Yet, such determination of election date was related to the administration of election under the powers and duties of the Election Commission as provided by the Constitution B.E. 2540 (1997). Therefore, the government's determination of election date in the Royal Decree shall be done in coordination with the Election Commission Moreover, the Constitution also provided that other tasks – like control, administration, and holding of an election – shall be the powers and duties of the Election Commission. If there is a problem related to the election, the Election Commission had the power to consider and rule on such a problem. Such power of the Election Commission also was subject to the scrutinising power of the Constitutional Court as one of the judicial organs.

The date of general election on 2nd April 2006 was an only 37-day period subsequent to the coming into force o the Royal Decree. In addition, it was found that approximately half of all the valid ballot papers showed abstention votes or "*vote No*," as a significant number of election constituencies were contested by only one candidate from only one political party; namely the 'Thai Rak Thai Party.' Such election candidates failed to obtain the number of vote as required according to relevant laws.

The Constitutional Court of Thailand considered that the democracy was a regime of government where the country's citizens elected their representatives to govern the state. As a result, such election of Members of the House of Representatives on 2nd April 2006 failed to satisfy the spirits of the Constitution B.E. 2540 (1997), which attempted to promote and protect the rights and liberties of the Thai people in their political and governmental involvement – as well as the development of political reforms for the country's stability. The Thai Constitutional Court, thus, ruled that even though the general election on that date was held under the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006) was enacted pursuant to the provisions of the Constitution, the facts having occurred in the mentioned election contributed to an unfair result. The election candidates did not truly receive the votes of the people under a fair and truly democratic regime. As a consequence, the general election on 2nd April 2006 was unconstitutional in accordance with the spirits of section 2, section 3 and section 144 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

3.2 Summary of Constitutional Court Ruling No. 5/2557 dated 21st March B.E. 2557 (2014)

The Ombudsman submitted a matter to the Constitutional Court for a ruling under section 245 (1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not the general election of Members of the House of Representatives on 2nd February B.E. 2557 (2014) pursuant to the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) was constitutional.

The case background indicates that the Ombudsman (applicant) received a complaint letter from a Thai citizen stating that the administration of the Election Commission to hold the general election of Members of the House of Representatives on 2nd February B.E 2557 (2014) was not held on the same day throughout the entire Kingdom of Thailand pursuant to section 108 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court of Thailand found that the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) set a date for the general election of Members of the House of Representatives on 2nd February 2014. The Election Commission had administered the election by setting the dates for submission of political parties' lists of candidates for election of party-list Members of the House of Representatives from 23rd to 27th December 2013, and setting the date for receiving applications for candidacy in the election of constituency Members of the House of Representatives between 28th December 2013 and 1st January 2014. However, due to several political protests and obstructions to candidacy applications, there were 28 constituencies, which had no election candidate.

Section 108 paragraph two of the Constitution B.E. 2550 (2007) provided that "… such election date must be the same throughout the Kingdom." This provision intended to ensure that the election compiled with key fundamental principles of election; for instance, free and equal elections. In other words, all eligible voters should exercise their rights free from any pressure or influence on their decision. Indeed, they should reach a decision independently under an open process of political expression. Thereby, the setting of more than one date of the general election would result in any changes of election campaigns and voting behaviours because of an influence on the election on the subsequent date.

Nevertheless, the Organic Act on the Election of Members of the House of Representatives and Obtaining of Senators B.E. 2550 (2007) authorised relevant organisations to set or declare a new election date.

- **The Organic Act on the Election of Members of the House of Representatives and Obtaining of Senators B.E. 2550 (2007)**
- Section 78 empowered the Election Commission to set "a new election date" in case of being unable to undertake a polling place due to a riot, flood, fire, or force majeure event before the set election date.
- Section 88 empowered the Election Commission to declare a new election in a constituency where there was only one election candidate, and such candidate received the votes of less than 25 % of the number of eligible voters in his or her constituency.
- Section 109 empowered the Election Commission to hold a new election in a polling place if it was reasonably believed that voting in the polling place had been conducted in a fair and just manner.
- Section 111 paragraph one empowered the Supreme Court to order a new election in a case subsequent to the announcement of election results if there was reasonable evidence to believe that voting in a constituency had not been conducted in a fair and just manner, or the election

was won dishonestly through the actions of a person or a political party in violation of the Organic Act on the Election of Members of the House of Representatives and Obtaining of Senators B.E. 2550 (2007), or the Organic Act on Political Parties B.E. 2550 (2007).

With respect to the absence of election candidate in 28 constituencies, a general election in such areas did not take place. Thereby, it was not under the powers and duties of both the Election Commission and the Supreme Court to set or declare a new election date as provided in the above-mentioned provisions.

In addition, section 93 paragraph one and paragraph six of the Constitution B.E. 2550 (2007) was intended to ensure that the House of Representatives had the complete number of 500, who were elected from a general election held on the same day throughout the Kingdom as stated in section 108 of the Constitution. The date of the general election should have been set on one day; that is to say, 2nd February 2014. As a result, to arrange another election in the 28 constituencies on a new date would be unconstitutional.

In short, the Thai Constitutional Court ruled that the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) in regard to the determination of the general election date was unconstitutional or inconsistent with section 108 of the Constitution B.E. 2550 (2007) because the election could not be administered nation-wide on the same day.

4. The Constitutional Court of Thailand and Democratic Dynamics: Election - oriented Cases

According to the two above-discussed case examples of the Constitutional Court rulings, the Constitutional Court of Thailand has played a great role in the country's political arena. Amidst political crises and obstructions, the Constitutional Court has actively sought better solutions which were important for Thailand's political and governmental reforms. This role can be said to be "judicial activism."

Although the Constitutions of the Kingdom of Thailand have been revoked, and, then, the legislative branch has enacted the new ones several times, the Constitutional Court has still upheld the supremacy of the Constitutions of the country in each period of enforcement. In the case of the Royal Decree Dissolving the House of Representatives B.E. 2549 (2006) and the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013), which were under the executive branch's power, some provisions were irrelevant to the spirits of the Constitution. Therefore, the Constitutional Court held a ruling that the provisions falling in a problem were unconstitutional.

Moreover, the Constitutional Court of Thailand considers the principles of election; for example, free election, non-discriminatory election, and voting and election without any pressure or influence, are a key mechanism for the country's reforms, political and governmental stability, and improvement of Thailand's democratic regime with the King as the Head of the State. The Constitutional Court finds that an unfair and unjust manner in an election is unacceptable. Indeed, the best practice for democratisation should be done through free and equal voting and

election. Therefore, the determination of the dates of the general elections mentioned in the two case examples was contrary to or inconsistent with the Constitutions of the Kingdom of Thailand B.E. 2540 (1997), and B.E. 2550 (2007), respectively.

It can be seen that the Constitutional Court of Thailand has had an active role in political dynamics. In order to stabilise democracy in Thailand, it is undeniable that the first and foremost step is to alleviate political turmoil – especially through voting and election. However, non-democratic election is able to bring about a political vicious circle (see Hoadley, 2017; Murray, 1996). To "cut off" any processes in the circumstance, any state institutions – including the Thai Constitutional Court – have take part by exercising their duties and powers in accordance with the Constitution, relevant laws, and world-widely acceptable principle; that is to say, the rule of law.

5. Conclusion

Thailand has adopted a democratic regime with the King as Head of the Sate since its first – and only one – revolution. Although the country has revoked and drafted several new constitutions many times, each of them aimed at both political and governmental reforms. According to the Constitution of the Kingdom of Thailand B.E. 2540 (1997), various organs – including the Constitutional Court of Thailand – were founded to achieve that objective effectively. Since then, the Constitutional Court has played a significant role in protecting the country's democracy. One of its major contributions is its election-oriented case. As election is generally believed to be one of the democratic mechanisms to stabilise and improve politics – particularly at the national level; that is to say, general elections, the Constitutional Court has exercised its duties and powers under the Constitutions in each period of enforcement to lead the country in democratic dynamics as can be seen in the two Constitutional Court's rulings related to the Royal Decrees Dissolving the House of Representatives B.E. 2549 (2006) and B.E. 2556 (2013), respectively.

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SESSION II

RAPPORTEUR JUDGE
CONSTITUTIONAL COURT OF KOREA

Lee Moonjoo

The Role of the Constitutional Court in Political Dynamics in Korea

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It is my great honor to share some experiences of the Constitutional Court of Korea with each nation and I sincerely appreciate the Constitutional Court of the Republic of Indonesia for providing this meaningful conference.

Today, I would like to address the role of the Constitutional Court of Korea(hereinafter referred to as the "the Court") in political dynamics with some of the most representative cases.

This year marks the 30th anniversary of the Court, established in 1988. Founded in answer to the Korean people's strong desire for a true democracy, the Court has been steadfast in performing its innate role as the highest institution entrusted with the task of interpreting the Constitution to safeguard the constitutional order.

Historically, the Court cannot be described separately from democratization. A judicial system tends to play an important role in most nations that had experiences of transition from an authoritarian regime to democratic regime. We can find this tendency in Asia, East Europe and Latin America that relatively had been democratized recently. Meanwhile, after the exit of authoritarian regimes, democracy and the rule of law are emerging as important issues.

In the history of constitutional democracy of Korea, there are various experiences from regime change to substantial democracy and the Court has played a decisive role. On that note, let me introduce some of the Court's decision that affected political dynamics in Korea.

Case on the Special Act on the May 18 Democratization Movement, etc.

In this case, the Court upheld Article 2 of the Special Act on the May 18 Democratization Movement, etc.(hereinafter referred to as the "May 18 Act") that suspended the prescription of public prosecution for leaders of the December 12 Incident and the May 18 Incident in order to punish them as criminals disrupting the constitutional order. Article 2 of the May 18 Act provided that for the crimes disrupting the the constitutional order that took place around December 12, 1979, and May 18, 1980, the accrual of the prescription period is hereby considered as having been suspended until the expiration of term of office of President Roh Tae-Woo.

All justices agreed that Article 2 of the May 18 Act is constitutional if the period of prescription for public prosecution had not expired at the time of enactment. Four justices stated that they would still uphold the article as constitutional even if the period had expired at the time of enactment. They ruled that, although genuine retroactive legislation is prohibited in principle by the rule of law, it can be allowed exceptionally when the protection of the private interest of confidence in the existing status of law cannot be justified in light of the compelling public interest in changing it. They found that the provision pursues a public interest overwhelmingly more important than the protection of expectation interests of criminals who had disrupted the constitutional order regarding the completion of the prescription for public prosecution – and deemed it constitutional.

Five justices stated that they would find it unconstitutional to a limited extent in that case. They reasoned that making a new law to prosecute a crime against which the period of prescription for public prosecution has already expired is equivalent to legislating new elements that enable ex post facto criminal punishment. They ruled that such legislation is not permissible under the principle of due process of the latter part of Article 12 Section 1 and the prohibition of ex post facto criminal punishment under Article 13 Section 1 of the Constitution.

As the quorum for unconstitutionality was not met, the article was held as constitutional.

This decision put an end to the controversy surrounding the constitutionality of the provision. The ordinary courts could solely concentrate on the issue of guilt, without worrying about when the period of prescription for public prosecution began to accrue. As a result, the two former presidents, Chun Doo-Hwan and Roh Tae-woo were sentenced to life imprisonment and 17 years in prison.

In general, the very fact that there was a transition under way from an authoritarian regime to a new one, meant that justice were viewed with particular suspicion, as potential holders of constitutional review authority. As a result, there were powerful political reasons to place constitutional adjudication outside the judiciary and give it to a specialized and politically appointed body.[1] In this case, the Court justified the exit of authoritarian regimes in the name of rule of law. Simultaneously the Court thus met the political demand of separation of authoritarian regimes.

Case on the relocation of the Capital

As a presidential candidate, Roh Moo-hyun announced as one his campaign pledges a plan to relocate the administrative functions of the capital to the Chungcheong region, to curb metropolitan concentration and boost the undeveloped regional economy. On December 19, 2002, Roh was elected president in the 16th Presidential Election. Thereafter, the National Assembly passed the government-sponsored bill for the Act on Special Measures for the Construction of a New Administrative Capital(hereinafter referred to as the "New Administrative Capital Act").

1 Ferejohn, John ·Pasquino, Pasquale. 2003. "Rule of Democracy and Rule of Law." Democracy and Rule of Law. p. 252. Cambridge University Press.

In this case, the Court delivered a decision of unconstitutionality for the New Administrative Capital Act as follows.

Seoul as the capital of Korea is a norm which is evident to everybody and which was presupposed by the written Constitution, although it is not expressly provided for in text. As a customary constitutional norm, it has gained the status of an unwritten Constitution. Since Seoul's status as the nation's capital is a customary constitutional norm, it retains constitutional force, unless and until an explicit constitutional provision on establishing a new capital is created. According to Article 130 of the Constitution, a constitutional revision must be passed at a national referendum. The New Administrative Capital Act seeks to effect the relocation of the nation's capital, a matter requiring constitutional revision, without following the procedures required for revising the Constitution. As such, it bars the exercise of the citizen's right to vote in a national referendum with regard to constitutional revisions, and thus violates the Constitution.

In this case, there was one dissenting opinion. Under a system of law governed by a written constitution, we cannot regard a customary constitutional norm as having the same force as the text of the Constitution, or as having a normative force that can disable provisions of the written text. A customary constitutional norm holds "supplementary force" only when it is harmonious with the various principles of the written text. This is true even when the subject matter regulated by the customary constitution is a "significant constitutional matter." Therefore, the revision of a constitutional custom such as the relocation of the capital can be undertaken through legislation by the National Assembly, as long as there is no explicit constitutional provision that restricts this. Thus, there is no possibility for the enactment of the New Administrative Capital Act to infringe the public's right to a national referendum.

Case on the Dissolution of the Unified Progressive Party

In this case, the Court decided to dissolve the respondent(Unified Progressive Party) and strip its affiliated lawmakers of their National Assembly seats on grounds that its objectives and activities are against the fundamental democratic order under the Constitution.

The court stated that "against the fundamental democratic order" means having the concrete danger of causing a substantial threat to the fundamental democratic order, so party dissolution can only be justified when the principle of proportionality is strictly observed.

The respondent's objectives were against the fundamental democratic order. Considering all circumstances, it could be concluded that the objectives of the respondent's leading members are eventually aimed at achieving the North Korean style of socialism, which contradicts the fundamental democratic order in our Constitution. The Court further examined whether the dissolution of party is compatible with the proportionality principle. As a result, it concluded that the decision to dissolve the respondent is not in violation of the principle of proportionality in that the objectives and activities of the respondent aimed at implementing the North Korean style of socialism contain seriously unconstitutional elements; South Korea is in a unique situation where it faces confrontation with North Korea, a country that strives to overthrow the

government of its southern neighbor; there is no alternative other than dissolution in removing the risk of the respondent; and the interest of safeguarding the fundamental democratic order outweighs the disadvantage caused by party dissolution, namely the restraint on the respondent's freedom to engage in party activities. With the dissolution of the respondent, the Court removed the affiliated lawmakers from their National Assembly seats.

In this case, there was one dissenting opinion that it cannot positively be said that the respondent advocates progressive democracy to pursue the North Korean style of socialism; the gatherings to plot treason are only meetings of some members of the party, not attributable to the respondent; and if not, the dissolution of the respondent is contrary to the proportionality principle.

Concerning both cases above, these decisions led to controversy in the worlds of politics, academy and press. In particular some criticized that the Court is politically biased toward conservative ideology and revealed judicial activism grounded on such bias. After all, it is apparent that the Court is not inferior to the legislative or the administrative power through these decisions.

Cases on Presidential Impeachment

The Court decided two cases on presidential impeachment. In the 2004 impeachment case against President Roh Moo-hyun(hereinafter referred to as the "the first impeachment case"), the petition was rejected, while, in the 2016 impeachment case against President Park Geun-hye(hereinafter referred to as the "the second impeachment case"), the petition was upheld and the President was removed from office.

The motion for impeachment of President Roh Moo-hyun was passed by concurrent votes of 193 National Assembly members on March 12, 2004, on the grounds that the president had disrupted the national law and order by supporting a particular political party and playing down constitutional agencies.

In the first impeachment case, the Court rejected the petition for impeachment adjudication. The Court's reasoning is summarized as follow.

The president violated the duty of public officials to maintain political impartiality in election and the duty to protect the Constitution by making statements at a press conference in support of a particular political party with the election close at hand, by denigrating the election law as the "vestige of the era of elections affected by government interference" and publicly questioning the legitimacy of the law although he had been warned by the National Election Commission against the violation of election law, and by proposing a confidence referendum not permitted under the Constitution.

However, "where a request for an impeachment is well-grounded" in Article 53 Section 1 of the Constitutional Court Act does not mean any and all violations of the Constitution or Acts, but means a violation of law grave enough to justify the removal of a public official from

office. Further, a "violation of law grave enough to justify the removal of the president from office" means such circumstances where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution or where the president has lost the qualifications to administrate state affairs by betraying the people's trust. Thus, the president's violation of law recognized in this case is insufficient to justify his impeachment.

The impeachment proceedings against President Park Geun-hye were triggered by the press report on October 24, 2016, to the effect that key Cheng Wa Dae documents were leaked to the president's old acquaintance, who had been secretly involved in running state affairs. The people were shocked by the fact that the acquaintance, who was a mere civilian, had intervened in state affairs and pursued her personal gains using the relationship with the president. As public opinion demanding her resignation heightened, President Park Geun-hye announced three statements of apology to the people, but did not voluntarily resign from the presidency. The motion for impeachment was passed on December 9, 2016, with 234 National Assembly members voting in favor.

In the second impeachment case, the Court upheld the petition for impeachment adjudication and removed President Park Geun-hye from her office. The Court's reasoning is summarized as follows.

The Constitution clarifies the duty of public officials to serve public interest by providing that public officials shall be "servants of the entire people," and the duty is further specified in the State Public Officials Act the Public Service Ethics Act. The respondent, however, violated the above duty by abusing her position and authority as president for the benefits of the specific acquaintance. The respondent infringed upon the property rights and freedom of management of companies by abusing her authority as president to help the specific acquaintance seek her own interests, and violated the duty of confidentiality under the State Public Officials Act by allowing numerous documents kept classified to be leaked under the orders and tacit approval of the respondent.

The respondent's act of violating the Constitution and law are a betrayal of the people's confidence, and are grave violations of the law unpardonable from the perspective of protecting the Constitution. Since the negative impact and influence on the constitutional order brought about by the respondent's acts are serious, the benefits of protecting the Constitution obtained by the removal of the respondent from office overwhelmingly outweigh the loss that would be incurred by the removal of the respondent from office.

Until the Court decided the two impeachment case against presidents, severe national division and political crisis arose. The Court has united the nation by pronouncing decisions that upheld the spirit of the Constitution. However, there are some critical views on the role of the Court that the Court holds so excessive political power on several political issues that the space of political autonomy is reduced. These criticisms are partial valid and more and more political issues have been concentrated on the Court. In this situation, the Court could be

degraded as a political weapon. Therefore it is the most important role for the Court to maintain the independency from political power and making decisions impartially.

Presently, the Court has become the most credible and trusted national institution among the Korean people. It is the result of continual efforts and self-restraint of justices.

Through this conference, it is great honor to share the Court's experiences with each other. Thank you very much for your attention.

THE REPUBLIC OF INDONESIA

CONSTITUTIONAL DEPARTMENT LECTURER AT THE FACULTY OF LAW OF ANDALAS UNIVERSITY

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CONSTITUTIONALISM AND COMPLIANCE WITH THE DECISIONS OF THE CONSTITUTIONAL COURT

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ABSTRACT

The establishment of the constitution guarantor institute is aimed at making the constitutional rights of every citizen or state institution not easily harmed by power through legislation, so that in the amendment to the 1945 Constitution of the Republic of Indonesia the Constitutional Court is present as an institution serving as the guarantor of the constitution. the number of legal norms that exist in a country and many institutions that are authorized to form them can be ascertained that the contradictions from the existing norms will require a dispute breaker institution, the character of the Constitutional Court's decision is final and binding to differentiate with other judicial institutions, as well as the decision of the Court bind the whole party without exception, not only the parties disputed but also public member, it is only the issue that arises into a problem after the Constitutional Court decides a case of reviewing laws that are considered contrary to the constitution, it should be the legislative body in this case such as the People's Representative Council and the President or other relevant state institutions obey the decision and implement it. However, because the Constitutional Court does not have an executive tool for the decision, it is still a great homework by this country, the ethics of state that should be prioritized by the parties in complying with the Court's ruling. This is study that will be the author's explain in this paper.

Keywords: Decision of the Constitutional Court, Final and Binding, non-compliance, Eksekutorial

A. Introduction

The Indonesian state is said to be a legal state in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. As a rule of law, there are restrictions on the attitudes, behavior and actions of the authorities and citizens based on law. It is intended that citizens are free from arbitrary actions from state authorities.[1]

The consequences of these provisions are one of the most important principles in the rule of law, namely the guarantee of an independent judicial power administration, free from the influence of other branches power to administer the judiciary to enforce law and justice.

Indonesian state can be said as a country that uses a constitutional law paradigm, Juan Linz stated that because of the commitment (Self-Binding Procedure), on this system the government is very bound by the procedures for the use of power regulated in the constitution. Therefore, in the framework of a government that can be controlled, power should only be replaced by a majority of exceptional powers (absolute majority). Besides that, the main characteristic of constitutional government requires clear hierarchy of laws and only interpreted by judicial authority.[2]

The third Amendment to the 1945 Constitution of the Republic of Indonesia resulted in a new judicial power branch institution in addition to the Supreme Court, the presence of the Constitutional Court as one of the new judicial power actors in the Indonesian constitutional system. The establishment of the Constitutional Court regulated in the Indonesian constitution in Article 24 Paragraph (2) which reads the judicial power is carried out by a Supreme Court and the judiciary under it in the general court environment, religious court environment, military court environment, state administrative court environment and by a Constitutional Court.

With the changes in Article 24 paragraph (2) it requires the existence of a Constitutional Court came in Indonesia. A new state institution was formed with a purpose to carry out the judiciary relating to maintaining the constitution.[3] The Constitutional Court has several duties and authorities that are carried out in the realm of the judiciary. This authority is regulated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia reads:

> "The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final to examine the law against the Constitution, decide on 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."

1 Fatkhurohman, Dian Aminudin, and Sirajudin, *Understanding the Existence of the Constitutional Court in Indonesia*, Citra Aditya Bhakti, Bandung, 2004, p. 7

2 Juan J. Linz and Alfred Stepen, "*Defining and Crafting Democratic Transition, Constitutions, and Consolidation*" in Crafting Indonesian Democracy. Edited by R. William Liddle, Mizan Pustaka, Jakarta, 2001, p. 30, see also in Ahmad Syahrizal, *Constitutional Court*, Pradnya Paramita, Jakarta, p. 55

3 The constitution can be interpreted as the framework of the state that is organized through the law, in which case the law stipulates: the regulation regarding the establishment of permanent institutions, the function of the equipment, and certain specified rights. Dahlan Thaib, Jazim Hamidi, Ni'matul Huda, *Theory of Law and Constitution*, Rajawali Press, Cet II, 2015, Jakarta, p. 11

Besides that, the Constitutional Court also has a constitutional obligation which is also regulated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia reads:

> "The Constitutional Court must provide a decision on the opinion of the People's Legislative Assembly regarding alleged violations by the President and / or Vice President in accordance with the Constitution."

Judicial review can be done through a judicial mechanism (justial) or a non-justial mechanism. Reviewing by the judiciary is called a judicial review, and other review conducted by other than the judiciary can be in the form of legislative review (by the legislator) or it can be in the form of an executive review (by the government).[4]

Even though the Constitutional Court in conducting the examination of the law against the Constitution the decision is final and binding, but the reality is sometimes that the decision of the Constitutional Court is not obeyed or ignored by the legislator. The House of Representatives and the President as legislators often do not comply with the decisions of the Constitutional Court. In fact, according to the provisions of Article 10 Paragraph (1) letter d of Law Number 12 of 2011 concerning the Establishment of Legislation, one of the contents of the law is a follow-up to the decision of the Constitutional Court. This condition resulted in the Constitutional Court's decision as if it had no meaning, because there were no sanctions for lawmakers (DPR and President) who did not comply and did not follow up on the Constitutional Court's decision.[5]

Alexander Hamilton had issued a statement written in Federalist No. 78 (1788), as follows;[6]

The judiciary, from the nature of its function, will always be least dangerous to the

> political rights of the constitution. The executive holds the sword of the community and the legislature the purse: The judiciary, on the contrary has no influence over either the sword or the purse; no direction either of the strength or the wealth of society, and take no active resolution whatever. The court, may truly be said to have neither FORCE no WILL but merely judgment; and must ultimately depend upon the aid of executive arm for the efficacious exercise even this facility. The judiciary is therefore the weakest of the three branches.

The article was given the theme Least Dangerous Branch of Government. In Hamilton's thought, if the executive has a sword (weapon), while the legislature determines the state finances (wallet). On the contrary, the judiciary power is only authorized to decide cases, it means that to be able to execute the decision, the court must be assisted by the executive branch. Of the three branches of power, he argued that judicial power was the weakest branch.[7]

4 Jimly Asshiddiqie, *Procedural Law for Judicial Review*, Secretariat General and Registrar of the Constitutional Court of the Republic of Indonesia, Jakarta, 2006, p. 1-2

5 Widayati, Disobedience Problem Against the Ruling of the Constitutional Court About Testing the Law, *Journal of Legal Reform Volume IV No. January 1 - April 2017*, p. 2

6 Alexander Hamilton, Federalist 78. In the Federalist Papers. New York: Mentor. See also the analysis of William J. Quirk and R. Randall Bridwell in Judicial Dictatorship, (New Jersey: Transaction Publishers, 1995), p. 30, see also in Inosenti Samsul, *Legal Assessment of Decisions of the Constitutional Court*, National Law Development Agency, Ministry of Law and Human Rights, Jakarta, 2009, p. 72

7 Inosenti Samsul, *Legal Assessment of the Decision of the Constitutional Court*, National Law Development Agency, Ministry of Law and Human Rights, Jakarta, 2009, p. 72

Therefore, it is necessary to study how to understand the process of running a country with the constitution and constitutionalism and that understanding must be realized in the ethics of the state by the legislators and all state institutions by complying and implementing decisions from the Constitutional Court.

B. Analysis and Discussion

1. Constitutionalism and the Role of the Constitutional Court

According to I Dewa Gede Atmaja literally "constitutionalism" is defined as understanding of government according to the constitution or briefly called constitutional state. In the scientific world, this doctrine undergoes a development from classical doctrine including; Ancient Greece, Ancient Rome, to the Modern Age.[8] Furthermore, Ahsin Thohari stated that underlying the idea and then called constitutionalism is a spirit that is built to limit the power of the government with a constitution both written constitution or unwritten constitution.[9]

Carl J. Friedrich gives an understanding of constitutionalism as the idea that the government is a collection of activities held for and in the name of the people, but the government must be submitted to several restrictions to guarantee that the power needed for the government is not misused by those who have the duty to govern.[10] Furthermore, Walton H. Hamilton in an article he wrote with the title "constitutionalism" which became one of the entries in the Encyclopedia of Social Sciences in 1930 with the sentence: "*Constutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep government in order"*. For the purpose of "*to keep a government in order*" it is necessary to have such arrangements, so that the dynamics of power in the government process can be limited and properly controlled.[11]

The division and segregation of power is regulated in a tiered norm in accordance with the formation authority and the institution that forms, Hans Kelsen has predicted the potential for the emergence of higher conflict norms with lower norms, not only concerning the relationship between laws (ordinary laws) with court decisions, but also concerning the relationship between the constitution and the law. A law is valid so that the law can be valid only because the law is in accordance with the constitution. On the contrary, the law cannot be valid if it conflicts with the constitution. The only basis for the validity of a law is that the law has been made in a manner determined by the constitution.[12]

The role of the Constitutional Court in this case is to ensure that there are no laws that are contrary to the constitution. As the authority of the right to the authority of the Constitutional Court. The Constitutional Court as a judicial institution that is equal to the legislators is based

8 I DewaGede Atmaja, *Constitutional Law*, Setara Press, Malang, 2012, p. 13

9 A. Ahsin Thohari, Constitutional Rights in Indonesian Constitutional Law, Erlangga Publisher, Jakarta, 2016, p. 12

10 Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 5th edition, (welt ham, mass.: Blaisdell Publishing Company, 1976), p. 74, see also in A. Ahsin Thohari, *Constitutional Rights in Indonesian Constitutional Law*, Erlangga Publisher, Jakarta, 2016, p. 12-13

11 Jimly Asshiddiqie, *Indonesian Constitution and Constitutionalism*, Sinar Grafika, Jakarta, 2014, p. 19

12 Ahmad Syahrizal, *Constitutional Court A Study of Constitutional Adjudication as Normative Dispute Resolution*, Pradnya Pramita, Jakarta, p. 71

on the view of the need for checks and balances between state institutions, referring to the reason for John Marsall, the chairman of the United States Supreme Court, for the first time in the history of the administration to conduct a Judicial review by canceling the Judiciary Act 1789 because the contents contradict the United States constitution. Based on experience and reality, the spirit of institutionalizing Judicial Review is that the law is a political product, as a political product it is very possible for the contents of the law contradictory with the constitution, for example due to the political interests of majority voters in parliament, or the existence of political collusion between member of parliament, or intervention from the government that is very strong regardless of the requirement to comply with the principles of the constitution and constitution itself.[13]

2. The Constitutional Court Decision is Final and Binding

Disputes brought to the Constitutional Court actually have their own character and are different from the disputes faced by ordinary courts. Decisions requested by the applicant and given by the Constitutional Court will bring legal consequences not only regarding individuals, but also other people, state institutions and government officials or public, especially in terms of reviewing laws against the Constitution (Judicial review).[14]

Article 24C paragraph (1) of the 1945 Constitution states that the decision of the Constitutional Court is final. This means that the Constitutional Court Ruling has permanent legal force since it was read in court. Court decisions that have legal force still have binding legal force to be implemented. In contrast to ordinary court decisions that only bind the parties, the Constitutional Court's ruling in the case of reviewing the law binds all components of the nation, both state administrators and citizens. In the case of law reviewing, what is tested is the norm of law which is abstract and general binding. Although the basis for the petition for reviewing is the constitutional right of the damnification applicant, the act is actually representing the legal interests of the entire community, for the establishment of the constitution.[15]

The decision of the Constitutional Court since it was pronounced by court that was open to the public can have three powers, namely:

a. Binding power

The power of binding on the Constitutional Court's ruling is different from ordinary courts, not only covering parties who are litigants, namely the applicant, government, DPR / DPD, or related parties who are permitted to enter the proceedings, but the decision is also binding on all people, state institutions, and legal entity within the territory of the Republic of Indonesia This applies as a law as the law was created by lawmakers. The Constitutional Court Judge is said to be a negative legislator whose verdict is erga omnes, aimed at everyone.

13 Mahfud MD, *The Debate on Constitutional Law after Constitutional Amendment*, Rajawali Press, Jakarta, 2011, p. 98-99

14 Inosentius Samsul, Op. Cit, p. 23-24

15 M Ali Safaat, *Binding Strength and Implementation of Constitutional Court Decisions*, https://www.google.com/safaat.lecture.ub.ac.id, Strength-Mengikat-and-Pelaksana-Putasan-MK.pdf accessed on September 22, 2018

b. Strength of Proof

Article 60 of the Constitutional Court Law stipulates that the material contained in the paragraph, article and / or part of the law that has been tested cannot be appealed for review. Thus, the existence of a Court decision that has tested a Law is a proof that can be used that has obtained a definite power (gezag van gevijsde) It is said that the definite strength or gezag van gevijsde can be negative or positive. The definite strength of a decision is negatively interpreted as saying that the judge may no longer decide on a case for an application that was previously decided as referred to in Article 60 of the Law of the Constitutional Court. In civil law this is interpreted, only if the same party is submitted with the same subject matter. In relation to the constitutional case whose verdict is erga omnes, the petition for reviewing concerning the same material that has been decided cannot be submitted for reviewing by anyone. The decision of the Constitutional Court which has the legal power to remain so can be used as a positive proof of force with certainty that what has been decided by the judge has been considered correct. The opposite proof is not permitted.

c. Strength of Executorial

As a legal act of a state official intended to end a dispute that will nullify or create a new law, then of course it is expected that the decision is not only dead words on paper. As a judge's decision, each person will then talk about how it will be implemented in reality. However, as mentioned above, it is different from the ordinary judge's decision, then a decision that has been binding on the parties in a civil case gives the party won the right to request that the decision be executed if it concerns the punishment of the loser to do something or pay some money. In such a case it is said that the decision that has permanent legal force has executive strength, namely that the decision is carried out and if necessary by force.

3. Non-compliance of State Institutions in the Decision of the Constitutional Court

Decisions in the judiciary are the actions of the judge as the authorized state official who is pronounced to the public and made in writing to end the dispute of the parties confronted. As a legal act that will resolve the dispute faced by him, the judge's decision is an act of the state where the authority is delegated to the judge based on both the 1945 Constitution and the law.[16]

The types of decisions concluded from their arguments can be distinguished between decisions that are declaratory, constitutief, and condemnatory. Looking at the decisions made by the Constitutional Court, these decisions are generally categorized into the type of constitutief declaratory decision. Declaratoir means a decision in which the judge simply states what is law, does not condemn. This can be seen in the ruling of the judicial review states that the content, paragraph, article and / or section of the law does not have binding legal force. Being constitutive means a decision that states the absence of a legal condition and / or creates a new legal state. In Article 63 of the Constitutional Court Law concerning the stipulation or interlocutory decision

16 Maruarar Siahaan, *Constitutional Court Procedural Law of the Republic of Indonesia*, 2nd Edition, Sinar Grafika, Jakarta, 2015, p. 201

issued, ordered to do or not do something and in this case not to implement the disputed authority. Thus, this type is included in a decision that is condemnatory.[17]

Even though the Constitutional Court's ruling is final and binding, there are many decisions that are not obeyed and implemented by the law-making institutions, especially on the authority of the Constitutional Court regarding Judicial Review, in other cases such as disputes over election results or disputes over the authority of state institutions. the parties to the dispute, the decision related to this matter if viewed in terms of quantity is not much when compared to reviewing the law.

If the government or other state institutions do not comply with these decisions and instead still treat the laws that have been declared by the Constitutional Court to have no binding power, it is an act whose supervision is in the mechanism of law and state itself. Acts that are carried out on the basis of laws that have been declared null and do not have binding legal force are acts against the law, and by law null and void (ab initio). If the legal consequences that occur in the form of financial losses, the state apparatus or state institutions will bear the consequences of personal law (personal liability).[18]

M. Ali Safaat argued that to implement the decision of the Constitutional Court, further arrangements should be made. However, this is not because the Constitutional Court's ruling does not yet have binding power, because of the complexity of the issues in the implementation of decisions by the legislature. However, the absence of regulations following up on the decision of the Constitutional Court does not reduce the binding power that has been inherent since it was read. Each party concerned must carry out the decision. If a regulation is implemented it turns out to be contrary to the decision of the Constitutional Court, then the legal basis is the decision of the Constitutional Court. The mechanism is the same as the establishment of a new law. A law has binding legal force since promulgation. However, there are provisions that can be directly implemented, but some also require implementing regulations. If the implementing rules have not been made or adjusted, it does not reduce the binding nature of the law itself. In fact, in every statutory closing provision always states that all implementing regulations remain in force as long as they do not conflict with the law itself.[19]

Similar to what Martitah stated; The decision of the Constitutional Court regarding the reviewing of laws generally cannot be directly implemented (non self-executing). A decision that cancels a norm and influences other norms, or to implement it requires more operational rules.[20] If the absence of rules regarding the follow-up to the Constitutional Court's decision will have consequences on the variety of legal choices taken by address. *Addressed*[21] the Constitutional Court's ruling differs in every exercise of the authority of the Constitutional Court. In the case of legal product judicial review, which is the address of the Constitutional Court's ruling is the President and the DPR. Whereas in Election and Regional Election Disputes, the address is KPU,

17 Ibid, p. 205-206

18 Ibid, p. 213

19 M. Ali Safaat, Op. Cit.

20 Martitah, Constitutional Court from Negative Legislature to Positive Legislature, Cet 1, Constitution Press, Jakarta, 2013, p. 234

21 This term was stated by Constitutional Justice Arif Hidayat in the Continuing Legal Education program at the BPHN, with the theme "The Role of the Constitutional Court as Constitutional Guard and Guardian of Democracy in Election Disputes", Jakarta, 2013, p. 3.

and Provincial / Regency / City KPU. Another case in the dissolution of political parties, the address of the Constitutional Court's ruling is the government and in the case of Impeachment is the DPR.

C. Conclusion

The Constitutional Court should be a state institution came from the 1945 Constitution, and its position is equivalent to that of other state institutions whose decisions are obeyed and implemented by lawmakers in particular the Constitutional Court's ruling regarding Judicial Review, because this is an effort to fulfill the constitutional rights of citizens granted by The 1945 Constitution of the Republic of Indonesia. As well as the realization of checks and balances between branches of power, meaning that the decision of the Constitutional Court regarding Judicial review is a form of constitutionalism improvement in the state.

In case all state institutions understand that compliance with the decisions of the Constitutional Court is a form of implementation that Indonesia is a law-based country, we certainly will not have long debates regarding the issue of whether there is a need to regulate the executive nature of the Constitutional Court's ruling, because its implementation post-decided by the Court. to law-making institutions and the public outside the constitutional court. If disobedience by other state institutions towards the Constitutional Court's decision is repeated repeatedly it will certainly have implications for reducing the authority of the Constitutional Court in the eyes of the public. We certainly do not want this in the state.

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Indonesia Constitutional Courts in the Middle of Political Cycle

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ABSTRACT

The Indonesia constitutional court is an instiotion who have a duty to give an interpretation of the constitution. According to the Indonesia constitution, the court are mainly have 5 duties. However, the problem are arise when their duty is easily collide with the political aspect. In 2014 and 2015, there are two constitutional judges allegedly accpeting the bribe in relation with the political aspect. This article will mainly discuss about the collision between the constitutional court and the political aspect. Moreover, the article will also discuss about the rule of law in order to uprise the independecy of Indonesia constitutional court.

1. Introduction

The most important task of Indonesia constitutional court is to give interpretation for Indonesia constitution. They have been work as the guardian of constitution for almost one decade. According to Article 24C of Indonesia constitution, the Indonesia Constitutional court main duty is to examine and compare the Indonesian Law and the Constitution of Indonesia.

However, that is not their only main duty. The Indonesia Constitutional court is not only have to make an interpretation of the constitution, moreover, their duties are also included: (1). To solve the clash between Indonesia institution; (2). The dissoulution of political party; (3). Impeachment of Indonesian President; (4). To give a decission about Indonesia general election. According to Article 24 of the Indonesia constitution, the court initial mandates are:[2]

> "The Constitutional Court of Indonesia possesses the authority to hear matters at the lowest and highest levels and to make final decisions on the review of legislation against the Constitution, the settlement of disputes regarding the authority of state bodies whose authority is given by the Constitution, the dissolution of political parties, and the settlement of disputes concerning the results of general elections."

The problem arises when the constitutional courts have to made a decission in the area which related with political aspect. The main driver for political parties to support the independence of the Court is that they have an interest in the Court's role in maintaining a competitive electoral system.[3] Realizing the role of the Court to protect democracy and provide

1 Lecturer at Constitutional Law Departement, Universitas Diponegoro.

2 Indonesia Constitution Art. 24

3 Matthew C. Stephenson, "When the Devil Turns: The Political Foundations of Independent Judicial Review," Journal of Legal Studies Vol. 32 (January 2003) p. 59.

adequate rule of law in order to maintain free and fair election, political parties will have ultimate focus to their agenda, in which to get more seat in Parliament.[4] Even a dominant political party, may have an interest in respecting the independence of a constitutional court if the court is seen to perform some function useful to it.[5] However, this condition is not guaranteeing that the political aspect will not interupt the independency of the court. In 2014 and 2015, the chief of Indonesia Constitutional court, Akil Mochtar and the member of Judge, Patrialis Akbar are arrested by the Corruption Eradication Commision (KPK) for accepting the bribery and money laundring case in a local election dispute.[6]

> "In 2013, a bribery case had ensnared then Chief Justice of the Constitutional Court, Akil Mochtar, in the case of the handling the Regional Head Elections in Gunung Mas and Lebak districts. The case ended up in the Supreme Court with a verdict in the form of a life imprisonment for Akil Mochtar. Patrialis allegedly received a bribe of 20,000 and 200,000 Singapore dollars (2.15 billion rupiahs) from someone named Basuki Hariman, a meat importer, to intervene the judicial review process of Law Number 41/2014 on Animal Husbandry and Animal Health (Animal Husbandry and Health Law). Although he denied that he accepted bribes and confessed to the media that he felt wronged, Patrialis ultimately remain in custody. In this case, Patrialis is being charged with Article 12 c of Law Number 20/2001 on the Amendment to the Law Number 31/1999 on the Eradication of Corruption (Corruption Law) jo. Article 55 paragraph (1) Law Book of Criminal Law (Criminal Code). The article stipulates the punishment for judges who accept gifts or promises to influence a case that is assigned to them for trial."

This article then will be focused on two main discussion. First discussion will be how the court protect their independency and integrity. Furthermore, it will be followed by the discussion of the rule of law in Indonesia.

2. Discussion

Historically, the Indonesia constitutional court was created by the opionion of the people which demand a special court in order to guarantee accuracy and the quality of the court verdict. This idea was rejected by Bagir Manan, the Indonesian chief of justice, who openly said that Forming special courts (meaning Courts/chambers outside the four current divisions), would not be an easy task as it would have to be based on a regulation which would involve the government and legislative assembly, and would also affect the state budget. Lastly it would require specialization of the judges in specific areas of law, all this would entail a lot of time and effort to bring forth.[7]

4 Theunis Roux, The Politics of Principle: The First South African Constitutional Court, 1995–2005 (Cambridge: Cambridge University Press, 2013), p 21.

5 ibid. p. 23.

6 The Indonesia Instititute, 'The Indonesian Update' http://www.theindonesianinstitute.com/wp-content/uploads/2017/03/The-Indonesian-Update-%E2%80%94-Volume-XI-No.2-February-2017-English-Version.pdf. Accessed on 28th September 2018.

7 Bagir Manan, 'Independence of the Judiciary, Experience of Indonesia' http://www.supremecourt.gov.pk/ijc/articles/2/10.pdf. Accessed on 28th September 2018.

The concept of Independence of the judiciary is one of the cardinal principles of a democracy. According to this theory, all components of the judicial system, including the Supreme Court should be free from extraneous pressures, intervention and compulsion, whether direct or indirect brought to bear by other institutions, colleagues, superiors or third parties outside of the judicial system, with the result that all judges are free to decide the cases that come before them based only on law and their conscience.[8] Benny K Harman asserted that the Constitutional Court has provided fresh air to the political life, democracy and national life of Indonesians. The role of the Constitutional Court is exercised through checks and balances mechanism in the constitutional system. This mechanism may also overcome gap between lack of sense of justice in society and the practice of authoritarian regime and abuse of power in the level of state for long time, more over in Soeharto regime.[9]

In order to protect the independency of the court, it is is important to create a specific criteria for the Constitutional Judge. In order to maintain the independence of Constitutional Justices, the Indonesian Constitutional Court has also formulated the Constitutional Justice Code of Ethics. The Code of Ethics has been made with reference to the principles set out in The Bangalore Principles of Judicial Conduct, namely the principles of independence, impartiality, integrity, propriety, equality, competence and diligence, as well as implementation. By adhering to the Code of Ethics, Constitutional Justices are able to remain unaffected by any influence or intervention by any party in performing their duties, including the public opinion or mass media reports. If a Constitutional Justice violates the Code of Ethics, the Constitutional Court will internally form an Honorary Council of the Constitutional Court for conducting examinations and imposing sanctions, if necessary, merely for maintaining independence, impartiality and accountability of the Constitutional Court to the public. In order to strengthen the independence of the Constitutional Court, the Parliament (DPR) is currently discussing the most appropriate format for taking part in overseeing the conduct of Constitutional Justices by other independent institutions.[10]

In relation with the political aspect, the enforcement of the rule of law value is also important. It cannot be denied that most of the time the implementation and enforcement of laws and regulations do not run effectively and efficiently due to problem of optimality of the laws to resolve problems. At least there are three problems correlated with laws and regulations: firstly, substantial problem related to legal basis that underlying laws, 'want vs need' in drafting laws, dis-harmony between substance of one law to other laws, and the development of science which often changes very rapidly. Secondly, problems related to procedure or process in drafting laws related to pre-legislative process (the quality of research, academic script, priority determination, meeting between ministry and harmonization), legislative process (mechanism in the House of Representatives) and pasca legislation (disemmination/sozialisation). Thirdly,

8 ibid (n. 6)

9 Benny K. Harman, Peranan Mahkamah Konstitusi dalam Reformasi Hukum, dari buku Menjaga Denyut Nadi Konstitusi: Refleksi satu Tahun Mahkamah Konstitusi, Konstitusi Press, 2004, p. 39.

10 Moh. Mahfud MD, 'Separation of Power and Independence of Constitutional Court in Indonesia' https://www.venice.coe.int/WCCJ/Rio/Papers/INA_Mahfud_E.pdf. Accessed on 28th September 2018.

problem associated with initiator of the law which currently is still based on sectorial ego.[11]

In the case of Akil Mochtar, The question is how Mochtar could steer the Court decision without the knowledge of his brethren who sat on the same panel. After he became the Chief Justice, Mochtar shuffled the panel of judges that examine the regional election disputes. Mochyar assigned himself to sit in a panel of judges with Justice Maria Farida and Justice Anwar Usman.[12] Tanuredjo reported that Mochtar received multiple bribes to issue a favorable ruling to certain candidates.[13] These facts lead into two different conclusions: first, Mochtar steered the Court's decision in collaboration with his fellow justices who sat on the same panel; second, he received bribes alone, but he was able to use his insider position to advocate strongly for certain positions while the other judges were oblivious.[14] It is clearly that politics can interupt the decission of Indonesia constitutional court through the bribery or corruption. Hence, since the practice of corruption is mind blowingly massive, it is important to strengthen the integrity of constitutional Judge. According to Professor Jimly Asshidiqqie, there are 5 important aspects in relation to the practice of rule of law in Indonesia, including:[15]

1. The presence of democracy system that successfully builds a climate guaranteeing the freedom and openness in every aspect of life of the society, the nation and the state;

2. The increase of social justice structurally which is indicated by the shrinking of gap in the structure of socio-politics, economy, and culture in society.

3. The development of 'good governance' practice in the state power management, in business environment and in practices of civic society organization reflects the development of social ethics in society.

4. The growth and the development of social ethics system supported by the institutionalization of ethics structure in the framework of 'rule of ethics' system in public space and in the environment of public official positions growing as the social basis for enforcement and proper function of the 'rule of law' system in life of the society, the nation and the state;

5. The increase of institutional quality of institutions and professionalism of law enforcer apparatus, and professionals in legal field in accordance with universal quality standards.

Hence, if the Indonesia constitutional court want to strengthen the court through its independency from political aspect, it is important to reconsider the strong enforcement of the rule of law through all aspect in the constitutional courts

11 Enny Nurbaningsih, 'Rule of Law and its Development in Indonesia' https://worldjusticeproject.org/sites/default/files/documents/remarks_english_drenny.pdf. Accessed on 28th September 2018.

12 Stefanus Hendrianto, 'The Rise and Fall of Historic Chief Justice: Constitutional Politics and Judicial Leadership in Indonesia' http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1629/25WILJ0489.pdf?sequence=4. Accessed on 28th September 2018

13 ibid.

14 ibid.

15 Jimly Asshidiqie, 'The Rule of Law in Indonesia in Post Reformation' https://worldjusticeproject.org/sites/default/files/documents/remarks_english_jimly.pdf. Accessed on 28th September 2018.

3. Conclusion

In conclusion, the political aspect in Indonesia have succesfully interupt the constitutional court practice in Indonesia through the negative aspect, namely bribery and corrruption. It is important to rethink the concept of judiciary independency of Indonesia constitutional courts. The courts can start to strengthen the independency through the strong enforcement of the rule of law.

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CONSTITUTIONAL COURT AND CONSTITUALISME IN THE MIDDLE OF POLITICAL DYNAMIC

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DEFINITION.

The term constitution comes from "constituer" (French) which means to form. The use of the term constitution in question is to form or to formulate and/or to declare a state. While the term the constitution has been translated from the Dutch language - called "Grondwet". The word "wet" is translated into Indonesian, which means law and "ground" means land / foundation. In Indonesia, the term constitution is known as "Konstitusi".

In Latin, the word constitution is a combination of two words, namely "cume" and "statuere". It (cume) is a preposition which means "together with ...", while "statuere" comes from the word "sta" to form the main verb "stare" means standing up. On that basis statuere, therefore, it means to "making something to stand or establish / set. Thus, "constitutio" (single form) means setting together and "constitusiones" (plural) means everything that has been determined.

According to Cart J. Friedrich, constitution is a collection of activities held by and on behalf of the people, which is subject to several restrictions to guarantee that the power needed for government is not misused by those who get the task to govern. A similar opinion expressed by Richard S. Kay. He states that constitutionalism as the implementation of the rule of law in individual relations with government. Constitutionalism fosters a sense of security because of restrictions on the authority of the government that has been determined in advance.

According to Andrew Heywood, constitutionalism can be defined in 2 (two) senses. In a narrow sense, constitutionalism is the administration of government which is limited by the Constitution. In other words, constitutionalism exists when government institutions and political processes are effectively limited by constitutional rules. While in a broad sense, constitutionalism is a set of political values and aspirations that reflects the desire to protect freedom by carrying out internal and external checks on the power of government.

K.C Wheare defines the constitution as: "the entire constitutional system of the state consists of a collection of regulations to form, regulate or govern in the government". The regulation means a combination of provisions that have legal and non-legal characteristics. In terms of political science, According to K. C Wheare, constitution contains 2 (two) notions,

namely the constitution in the broadest sense and the constitution in the narrow sense. ***In a broad sense***, the constitution describes the whole system of government and a collection of rules that underlie and regulate or direct to the government. In this context, this regulation can be separated into legal and non-legal terms. In legal terms, the sense of the court of law recognizes and applies those regulation, and in non-legal or extra-legal terms, it is formed customs, agreements, and conventions, in which it is effectively in the community even though the court do not recognize as a law. **In a narrow sense** itself, the constitution means a set of legal regulations that are contained in a "document" or "several documents" which are closely related based on the results of legal regulations selection to govern the governance of a state.

Hermen Heller defines "constitution" into 3 (three) definitions, as followings:

a. *Die Politische Verfassung als gesellschaftlich wirklichkeit*.

The constitution is a reflection of political life in society as a fact. It contains political and sociological notions.

b. *Die Verselbstandigte rechtsversfassung*.

The constitution is a living norm in the society. It contains legal notion.

c. Die geshereiben verfassung.

The constitution is written in a text as the highest law that applies in one state.

Analysis:

The constitution as UUD is only part of the constitution in narrow sense that lives in society. It is then in sociological and political nature. According to Leon Duguit, Maurice Hauriou, and Lasalle Ferdinand, the constitution is abstracted from the legal elements of the constitution that live in the community and then compiled and made into a legal rule to show its juridical nature, and its manifestation is called rechtverfassung.

However, Ferdinand Lassalle in his book "Uber Verfassungswesen" states the definition of the constitution into 2 (two) notions; *Firstly*, sociological or political perspectives (*sosiologische atau politische begrip*). The constitution is the synthesis of real power factor (dereele machtsfactoren) in society. The constitution describes the relationship amongst the powers that are real and existing in a state. These powers include kings, parliaments, cabinets, pressure groups, political parties and others; *Secondly*, Juridical perspectives (yuridische begrip). The Constitution is a text containing all the buildings of the State and the joints of government.

The constitution's definition as stated by F. Lasalle above provides a broader meaning of the constitution than just the Constitution (UUD). The constitution in a sociological or political sense contains real power in society and describes the relations amongst the powers in an existed state. While the constitution in the juridical sense is a text (written document) which contains all the buildings of the State and the joints of government. However, regarding the contents of the constitution, it is still incompatible because according to the modern understanding that not all

institutions/organs (alle institutionnen) but only contain the main lines of the institution. Lasalle also does not mention firmly that the constitution is the highest law in the state.

The History of the Constitution

Intensive knowledge of the constitution has emerged since the 4th century BC. It began with an investigation by Aristotle / Aristotle (384-322 BC) concerning the constitution (politeia) of 158 city states (polis) of 186 city states (polis) in ancient Greece which prevailed from the 6th century BC to 2nd century BC. The results of Aristotle / Aristotle's investigation were outlined in his book Politica (Politics). Knowledge of the constitution changed to an introduction to constitutional law studied by Prof. Albert Venn Dicey (1835-1922) stated in his book An Introduction to the Study of the Law of the Constitution (1885).

From the classical historical record, there are two words that are closely related to our present understanding of the constitution, namely in the ancient Greek words 'politeia' and the Latin words 'constitutio' which are also related to the word 'jus'. In both the words 'politeia' and 'constitutio' that was the beginning of the idea of constitutionalism expressed by humanity and the relationship between the two terms in history. If the two terms are compared, it can be said that the oldest is the word "politeia" which comes from Greek culture. The farthest root of the early development of the rule of law was in ancient Greece.

In addition to Greece, the concept of constitutionalism also emerged in Rome. The constitutionalism emerged against the background of the fact that Rome was also a city state as well as in Greece, but since its first year its existence had been surrounded and threatened by hostile countries, prompting the emergence of a policy of expansion that had never vanished until the Roman Empire was defeated by the world. civilized. The importance of Rome in the history of constitutionalism according to CF. Strong lies in the fact that the role of its constitution in the ancient world can be compared to the role of the British constitution in the modern world.

The Roman constitution was originally a very powerful instrument of government, although it was not found in written form. It was a set of precedents that were carried in someone's memory or recorded in writing, a collection of attorney or statesman decisions, a collection of customs, habits, understanding, and beliefs related to the government method, put together a number of specific laws. The idea of constitutionalism can be captured from the change of Roman rule which was originally a monarchy, but then the kings were forcibly removed. As it has been explained that around 500 S.M, the form of the republic began to emerge clearly, followed by the struggle for power between groups (between aristocratics and laborers) which lasted very long and ended around 300 S.M with the establishment of equal rights to the common people protected by officials specially chosen for this called Tribunes.

The Rome's constitution had such a great influence that it reached the Middle Ages, where the concept of ultimate power of the Roman emperors, which had manifested itself in the form of L'Etat General in France, even the romance of the Roman people of the order et unity inspired the growth of understanding. representative democracy "and" nationalism ".

In addition, some conclusions can be drawn from the historical experience of this ancient Roman constitutionalism are: ***first,*** to understand the true conception of 'the spirit of our constitutional antecedents' in history, legal science must be considered important or at least as important as just talking regarding legal material. ***Second***, legal science is distinguished from highly Roman law according to the origin of its growth. ***Third***, the center of attention and basic principles developed in Roman law is not 'the absolutism of a prince' as is often imagined by many experts, but precisely lies in the populist doctrine, namely that the people are the source of all legitimacy of political authority in one state. Thus, the people in the development of Roman thought are considered to be the essential contributors to the law and the power system.

The Constitution Court

The constitutional court stands on the assumption that constitutional supremacy is the highest law that underlies state activities and as a parameter to prevent the state from acting unconstitutionally. The establishment of the Constitutional Court proves that Indonesia adheres to a free and independent judicial power as well as an affirmation of the principle of a democratic rule of law.

The Constitutional Court in carrying out its function as the guardian of the constitution in accordance with the provisions of Article 24C of the 1945 Constitution of the Republic of Indonesia NRI, has four authorities and one obligation, namely *examining the law against UUD the Judicial Review*, *disputes regarding state institution's authority*, *deciding on political party's dissolution*, and *deciding on the general election's results, including disputes of election results of the head of government both in the provincial and the district/city levels*.

In the middle of the current political dynamic, the Constitutional Court of course still remains an institution that really guards the pulse of the constitution, there is no other way than the independence of the institution and the impartiality of judges to continue to be treated. The Constitutional Court must continue to be a state institution that has dignity to keep maintaining distance from politics and dynamics. Only in this way, the mandate of the constitution and the law can be carried out well.

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THE LEGAL PROBLEM OF SINGLE CANDIDATE ON LOCAL ELECTION

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ABSTRACT

Law that regulates the Local Election contains the norm that if in an area that organizes the selection of participants there is only 1 (one) candidate pair and after a temporary delay and extension of the registration period, the election is postponed to the next simultaneous election. This norm according to the Constitutional Court contains a legal vacuum because there is no way out if the condition persists despite the delay in the next simultaneous election. To fill the legal vacuum and in order to safeguard the constitutional rights of the people as holders of sovereignty, the Constitutional Court provides a solution so that the election is still held by giving the people the choice to declare "Agree" or "Disagree: To safeguard the interests of the people who disagree will be represented by The monitoring team is accredited and registered with the local KPU. There are no further rules on how if the Monitoring Team is not accredited and / or there is no registration for the local KPU.

Keywords:

single candidate, monitoring team, regional election

INTRODUCTION

The initial norms in Law No. 8 of 2015, concerning the Local Election state that the election of regional heads and its deputy is followed by at least 2 (two) candidate pairs. If until the end of the registration period, there is only 1 (one) Candidate Pair or no Candidate Pair is registered, then the delay is followed by an extension of the registration period of the Candidate Pair for a maximum of 3 (three) days. Furthermore, it is stated that in the event that until the expiration of the registration period there is only 1 (one) Candidate Pairs or no Candidate Pairs who register, then the postponement of all stages and elections will be held in the next simultaneous election.

The rationale behind the norm for the legislators is the assumption that general elections are competitions to win the hearts and support of the people. Therefore, the election must be followed by at least 2 (two) Candidate Pairs, so that people who have the voting rights can use theirs to determine the figure who will be their leader.

Based on this norm, the electoral organizer (Provincial KPU / Aceh KIP or Regency / City KPU / KIP) faces the fact that there are elections for regional heads and deputy regional heads in several locations with only 1 (one) Candidate Pair and after registration the registration period turns out there is no addition to the Candidate Pairs, so the holding of the election is postponed.

The reality conditions are the reason for filing a judicial review to the Constitutional Court because they are presumed to have the potential to impair people's constitutional rights, be discriminatory, and create legal uncertainty. The impairment of constitutional rights and discriminatory actions referred to is based on the idea that the people who are in an area with only 1 (one) Candidate Pair cannot use their voting rights compared to the regions whose elections are followed by 2 (two) or more Candidate Pairs.

The Constitutional Court in its decision as stated in Decision No. 100 / PUU-XIII / 2016 granted some of the Petitioners' requests. One of the considerations of the Constitutional Court was to refer to the provision as contained in Article 121 paragraphs (1) of Law Number 1 of 2015 which reads; "... other disturbances ...". The existence of "phrases" regarding the reason for delaying the election of regional heads and deputy regional heads ... "and other disturbances" does not include the condition of the election whose participants consist of only 1 (one) Candidate Pair.

METHOD

The writing of this article uses the normative legal research methods combined with case studies of decisions, and in this case is the Constitutional Court Decision Number: 100 / PUU-XIII / 2015. The use of the normative legal research methods because legal studies are more directed to the provisions of the law, especially Law Number 1 of 2015 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors into Laws as amended with Law Number 8 of 2015 and after the birth of the Decision of the Constitutional Court Number 100 / PUU-XIII / 2015 Law No. 10 of 2016 was issued.

ANALYSIS AND DISCUSSION

As mentioned earlier, the initial norms formulated by the Legislators, delaying the election of regional heads and deputy regional heads if the registering participant consists of only 1 (one) Candidate Pair because the election process is carried out competitively and the people have the choice of exercising their voting rights. The thought formation of the Law refers to the phrase contained in Article 18 of the 1945 Constitution of the Republic of Indonesia which states; "..... elected democratically", so that it is not appropriate if the "democratic" value is also interpreted by the single regional head election. The initial draft Law on the Election of Regional Heads and Deputy Regional Heads is only to elect Governors, Regents and Mayors,

while their Representatives are elected through other mechanisms.

This concept then got a spotlight because it was considered not in accordance with the spirit of direct election. Because, if one day the governor, regent and / or mayor is absent then the person who continues the position is his representative, even though his representative is not elected through direct election. The rules regarding the nomination of candidates for regional heads in pairs to get popular support in direct elections and then followed by other provisions that the election can only be held if the participants consist of at least 2 (two) Candidate Pairs are in line with the phrase "democratically elected".

The election is a contestation, and in the direct election process the contestation is to win and gather popular support as voters. Therefore, direct elections which are only followed by Single Candidate Pairs are not in accordance with the initial purpose of choosing the regional head and deputy regional head through a direct mechanism that wants to raise the people's sovereignty.

In its development, the formulation act was criticized by many parties. Critics claim that these norms can have a negative impact on the development of local-level democracy. The incumbent candidates who are considered too strong and have excessive resources lead to no rival figures who dare to compete. This norm can also be used as a political opportunity to design the electoral process by displaying the puppet Candidate Pair only to legitimize the election so that there is no delay.

In its legal considerations, the Constitutional Court stated that the contestation of the Regional Head Election there must be at least two candidate pairs. However, on the other hand the Lawmakers did not provide a solution at all if the requirements of at least two pairs of candidates were not fulfilled. Thus, according to the Constitutional Court there is a legal vacuum when the requirements of at least two pairs of candidates are not fulfilled where such a legal vacuum will result in not being able to hold regional elections. The material test petitioner in one of his descriptions stated that the Election of the Regional Head is the implementation of popular sovereignty and the legal vacuum referred to would threaten the rights of the people as the holder of sovereignty.

As guardian of the Constitution, the Constitutional Court may not allow violations of the constitutional rights of citizens and it has been stated in the legal consideration of the Constitutional Court Decision as reflected in Decision Number 1 / PUU-VIII / 2010. It states, among other things, "the Constitutional Court, in accordance with the authority the constitutionality will not allow the existence of norms in the Law which are inconsistent and not in accordance with the mandate of constitutional protection constructed by the Court "... even more so if such violations are related to the implementation of popular sovereignty which has wide-ranging consequences for impacting in the disruption of the implementation of government, in this case the regional government.

In the Law on the election of Regional Heads and Deputy Regional Heads, it is stated that for regions that do not meet the requirements of at least two candidate pairs even though the

extension of registration period has been carried out, the election is postponed to participate in simultaneous regional head elections which have been designed nationally. However, according to the Constitutional Court, the delay still did not guarantee that in the next simultaneous election, the right of the people to be elected and to vote would be fulfilled. The causes of the non-fulfilment of the people's rights still exist, namely the provision that requires at least two Candidate Pairs in the contestation of the Election of Regional Heads.

When the Article was asked to test the Constitutional Court, there were several election models offered as solutions so that there were no delays at the same time without injuring the principles of "democratically elected". Referring to the practice in several other countries, one of the models was the Candidate Pair that was immediately determined as the chosen Candidate Pair. This model has weaknesses that are substantive because it eliminates the right of the people to exercise their right to vote. In addition, the model is feared to be used as a means of legitimizing the Candidate Pairs who are able to gather political support from the coalition of political parties and at the same time prevent the appearance of rival Candidate Pairs.

A model similar to the above model is to provide an empty column to voters as a counterpart to the Candidate Pairs set by the election organizers. However, whatever the results are in the vote counting for the support of the people, the Candidate Pair remains legalized and appointed as the elected Candidate Pair. Criticism of a model like this, among others, is the lack of respect for the voice of the people and this can interfere with the democratic process. The election should still refer to its philosophical value, which is giving the people the right to make their choices, including when the majority of people vote for ballots in an empty column.

According to the Constitutional Court, if in an area that registers only one Candidate Pair and after being seriously pursued through a temporary delay and then reopen the registration process for the candidate pair, there is still no additional candidate pair, then the election of regional head and deputy regional head remains held. The Constitutional Court further stated that the Election of Regional Heads and Deputy Regional Heads who were only followed by one Candidate Pair manifesting their contestation was more appropriate when paired with a plebiscite that asked the people (voters) to determine their choice whether "agree" or "Disagree" with the candidate pair, not with the Empty Box Candidate Pair.

If the result of the election turns out that the people prefer "Agree", the candidate pair is designated as the regional head and the elected deputy regional head. Conversely, if it turns out that the votes of the people prefer "Disagree" then in such circumstances the election is postponed until the next Regional Head Election. Such a delay according to the Constitutional Court is not in line with the constitution because basically it is the people who have decided the delay through the "Disagree" vote.

Following up on the Article No. 100 / PUU-XIII / 2015, the Law Number 10 of 2016 concerning the Second Amendment to Act Number 1 of 2015 concerning the Establishment of Government Regulation in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents and Mayor. According to Law Number 10 of 2016.

According to the provisions of Article 54C paragraph (2) of Law Number 10 of 2016; "The selection of 1 (one) candidate pair is carried out using a ballot containing 2 (two) columns consisting of 1 (one) column containing a photo of the candidate pair and 1 (one) empty column that is not pictured". The provision of Article 54C paragraph (2) is the implementation of the Constitutional Court Decision which states the choice "Agree" or "Disagree". The design of such ballots means that the people who vote for the photo column of the candidate pair are considered "Agree", while the people who cast the blank column are considered "Disagree".

Referring to the Constitutional Court Decision Number 100 / PUU-XIII / 205, in several regions which happened to have only one Candidate Pair, the implementation of the election of the regional head and deputy regional head could finally be carried out. The results of the election with a model that the Constitutional Court decided was quite interesting, because some areas of the Single Candidate Pair were defeated by the votes of the people who did not agree because the votes of the people cast more empty columns. This implies that the people do not provide support to the Single Candidate Pair intended to be their leader.

The legal problem that arises in the election process with the Single Candidate Pair is in relation to the submission of objections to the results of the vote count. The General Election Commission' Laws and Regulations (PKPU) have included regulations concerning the mechanism for submitting objections to the Election Organizing Decision (KPUD) related to the results of the vote count. Legal subjects who may file objections to the KPUD Decree are Candidate Pairs who feel aggrieved with the results of the vote count. According to the provisions of Article 158 paragraph (2) of Law Number 10 of 2016, the filing of an objection related to the results of the vote count is if there is a maximum difference of 2% (two percent) of the total valid votes of the final vote counting results set by the KPUD. Even so, in several explanations to the press, the Constitutional Court also affirmed that the 2% difference was not absolute if there were matters in the trial that needed to be considered in more detail.

The objection to be submitted by an "empty column" of interest is denied by an accredited Monitoring Team and registered with the local Election Organizer. This provision raises legal issues because in an area that is conducting an election, there are no monitors who follow the election process, or there are monitors but are not accredited and are not registered with the local KPU. Conditions like this can be detrimental to the voice of the people who provide support to the "empty column" because there are no representatives who can fight for their interests if in the election process there are indications of fraud and / or there is a real mistake in the vote counting process.

CONCLUSION

1. The Legal vacuum regarding the selection of regional heads and deputy regional heads that are only followed by 1 (one) candidate pair has been overcome by the issuance of the Constitutional Court Decision Number 100 / PUU-XIII / 2015;

2. The legal issue in the election which is only attended by 1 (one) candidate pair is about representatives who can fight for the interests of the empty column if the representative assigned by the authority is the non-existent Monitoring Team who is accredited and / or not registered with the local KPU.

SUGGESTION

If there is no accredited Monitoring Team and / or who registers with the local KPU until the polling day is approaching, an Independent Team is established to serve as election monitors in the regions whose election is only followed by 1 (one) candidate pair.

REFERENCE:

1. Undang-Undang Nomor 1 Tahun 2015 tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2014 tentang Pemilihan Gubernur, Bupati, dan Walikota menjadi Undang-Undang sebagaimana telah diubah dengnUndang-Undang Nomor 8 Tahun 2015.
2. Undang-Undang Nomor 10 Tahun 2016 tentang Perubahan Kedua atas Undang-Undang Nomor 1 Tahun 2015 tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2014 tentang Pemilihan Gubernur, Bupati, dan Walikota.
3. Putusan Mahkamah Konstitusi Nomor 1/PUU-VIII/2010.
4. Putusan Mahkamah Konstitusi Nomor 100/PUU-XIII/2015.

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CONSTITUTIONAL COURT AND CONSTITUTIONAL DEMOCRACY IN INDONESIA

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ABSTRACT

The constitution is the embodiment of the conception of the rule of law both *Rechtsstaat* and The Rule Of Law, where the state is not only based on power alone (absolutism/*machtstaat*), but is based on law, symbolized in a constitution. Therefore, the constitution must always be guarded and guarded, because all forms of deviation of power, both by holders of power and the rule of law under the constitution against the constitution, are a form of denial of popular sovereignty. The constitutional court as the guardian and sole interpreter of constitution has a very strategic role in the implementation of constitutional democracy in Indonesia. There are two things from the results of the analysis carried out: First, the substance of constitutional democracy is a government that has limited power and is not justified in acting arbitrarily against its citizens. Restrictions on government power are contained in the constitution or in other laws and regulations. Second, the role of the Constitutional Court in maintaining the implementation of constitutional democracy in Indonesia can be seen from its authority which is able to guarantee the implementation of the constitutional rights of citizens from the substance of the law that contradicts the 1945 Constitution, and in maintaining the principle of checks and balances between governmental powers, in order to achieve stability in government and the principles of constitutional democracy in Indonesia.

Keywords: Constitution, constitutional, democracy, sovereignty, people.

1. Introduction

Democracy has become a highly respected term in the history of human thought about an ideal socio-political order. In modern times, almost all countries adhere to the sovereignty of the people in their constitution and claim to be adherents of constitutional democracy. The constitution is closely related to the democratic system adopted by a country.

Almost all modern countries have a Constitution (except for a few countries like Britain, Israel, Saudi Arabia and some more). Even though it has a Constitution, there are no countries

that have the same Constitution. Differences occur due to various factors such as the form of the state, the form of government, the history of the country, the ideals of the state, including ideological differences in the political, economic, social and other fields. [1]

The Constitution contains a fundamental rule regarding the first joints to establish a large building called the state. The joints must of course be sturdy, strong and not easily collapsed so that the state building remains upright. [2] The constitution is the main legal basis that must be owned by a country to legitimize itself as a rule of law. The constitution is the embodiment of the legal state conception of both *Rechtsstaat* and The Rule Of Law, where the state is not only based on power alone (absolutism/*machtstaat*), but is based on law, which is embodied at the same time symbolized in a constitution, as a form of social contract of citizens with the state . The constitution is a form of the sovereignty of the people to the state, through the constitution of the people, giving up part of their rights to the state. Therefore, the constitution must always be guarded and guarded, because all forms of deviation of power, both by holders of power and the rule of law under the constitution against the constitution, are a form of denial of popular sovereignty.

In the context of constitutional democracy, there are characteristics, namely a government whose power is limited and not enforced to act arbitrarily against the people. These restrictions are stated in the constitution. In a constitutional democratic system, state power is in the hands of the people. The power holder is limited by the constitution so that it does not violate the human rights of the people. [3]

The 1945 Constitution of the Republic of Indonesia affirms that sovereignty is in the hands of the people and carried out according to the Constitution. It was also emphasized that the Indonesian state was a legal state. In line with the above constitutional principles, one of the important substances of the amendment to the 1945 Constitution of the Republic of Indonesia is the existence of the Constitutional Court as a state institution that functions to handle certain cases in the state administration, in order to maintain the constitution to be carried out responsibly in accordance with the will of the people and the ideals of democracy. The existence of the Constitutional Court is at the same time to maintain the implementation of a stable state government, and is also a correction to the experience of constitutional life in the past caused by multiple interpretations of the constitution. [4]

The Constitutional Court (MK) maintains that checks and balances occur in the branches of state power. The Constitutional Court is also often referred to as constitutional judiciary, namely the state organ that has the authority to resolve legal disputes based on the constitution. The Constitutional Court is one of the pillars of constitutional democracy, meaning that democracy is carried out with the aim of realizing the rule of law, namely: justice, order, independence and freedom, and prosperity and welfare.[5]

1 Jimly Asshiddiqie, Bagir Manan et all, *Gagasan Amandemen UUD 1945 dan Pemilihan Presiden Secara Langsung/The Idea of the 1945 Constitution Amendment and the Direct Presidential Election*, (Jakarta: Setjen & Kepaniteraan MKRI, 2006), 2.

2 Mirza Nasution, *Negara dan Konstitusi/State and Constitution*, (Medan: FH USU, 2004), 2.

3 Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara/ Constitutional Testing Models in Various Countries*, (Jakarta: Konstitusi Press, 2005), 8-9.

4 General explanation of Law Number 24 of 2003 on the Constitutional Court.

5 Ibid.

Constitutional authority of the Constitutional Court in implementing the principle of checks and balances that places all state institutions in equal position so that there is a balance in the administration of the state. The existence of the Constitutional Court is a concrete step to be able to correct each other's performance between state institutions and maintain the implementation of constitutional democracy. Based on the description above, the aim of this paper is to analyze the role of the Constitutional Court in the implementation of constitutional democracy in Indonesia.

2. Analysis and Discussion

1.1. Constitutional Democracy

Democracy comes from Greek, which is demos which means people (people) and cratos which means government or rule. Democracy means the meaning of a political system in which the people hold the highest power, not the power by the king or the nobility. The concept of democracy has long been debated. In ancient Greece, democracy as an idea and political order was the concern of state thinkers. Some are pro and some are contra. Plato and Aristotle did not really believe in democracy and put democracy in a bad form of government. This famous philosopher believes in monarchies, whose rulers are wise and pay attention to the fate of their people.[6]

Etymologically, democracy (democratie) is the highest form of government or state power, where the highest source of power is the power of the people gathered through an assembly called the People's Consultative Assembly (*die gesamte staatsgewalt liegt allein bei der majelis*). While Sri Soemantri defines Indonesian democracy in terms of formal (indirect democracy) as a democracy in which the implementation of popular sovereignty is not carried out directly by the people but through representative institutions such as the DPR and MPR, and democracy in the sense of life according to Sri Soemantri is democracy as a philosophy of life (democracy in philosophy).[7]

According to Miriam Budiardjo, basically democracy is divided into two streams, namely constitutional democracy and democracy which bases itself on the teachings of communism. [8] Characteristic of constitutional democracy is a government that has limited power and is not justified in acting arbitrarily against its citizens. Restrictions on government power are contained in the constitution or in other laws and regulations. Therefore, it is often called constitutional government. [9]

Constitutional democracy that grows and develops rapidly in Indonesia requires the harmonization of theories and knowledge possessed by all components of the nation with the forms and implementation of existing democratic principles, including the issue of General

6 Mahfud MD, et.all, *Wacana Politik dan Demokrasi Indonesia/Indonesian Political and Democratic Discourse,* (Yogyakarta: Pustaka Pelajar, 1999). 65.

7 Sri Soemantri, *Perbandingan Antar Hukum Tata Negara/Comparison between Constitutional Laws*, (Bandung: Alumni, 1971), 26.

8 Miriam Budiardjo*, Dasar-Dasar Ilmu Politik/Basics of Political Science*, (Jakarta: PT Gramedia Pustaka Utama, 2002), 55.

9 Ibid, 52.

Election. The application of this principle is expected to create a constitutional life order that runs in full balance towards the goal of the Unitary Republic of Indonesia, namely the creation of a just and prosperous society based on Pancasila and the 1945 Constitution.[10]

Constitutional democracy, which is also called democracy under the rule of law, has basic requirements for carrying out democratic governance. These conditions according to the International Commission of Jurists (1965) are: [11]

1) Constitutional protection (guaranteeing individual rights and determining procedural ways to obtain protection for guaranteed rights);
2) a free and impartial judiciary body;
3) Free general elections;
4) Freedom to express opinions;
5) Freedom of association/organization and opposition; and
6) Citizenship education.

In accordance with the characteristics of constitutional democracy, the application of constitutional democracy in Indonesia can be seen in the provisions of the 1945 Constitution which limits the authority of state institutions in carrying out government functions. The limitation of authority is intended to protect citizens from the arbitrary actions of the government. In addition, it can also be seen from the recognition of human rights in Article 28.

According to the provisions of the 1945 Constitution of the Republic of Indonesia after the Fourth Amendment, [12] in the institutional structure of the Republic of Indonesia there are (at least) 9 (nine) state organs that directly receive direct authority from the Constitution. The nine organs are (i) the House of Representatives, (ii) the Regional Representative Council, (iii) the People's Consultative Assembly, (iv) the Supreme Audit Board, (v) the President, (vi) Vice President, (vii) the Supreme Court, (viii) Constitutional Court, and (ix) Judicial Commission. In addition to the nine institutions, there are also several institutions or institutions that have the authority in the Constitution, namely (a) the Indonesian National Army, (b) the Indonesian National Police, (c) Local Governments, (d) Political Parties. In addition, there are also institutions that are not named, but are called functions, but the authority is stated to be regulated by law, namely: (i) central bank which is not named "Bank Indonesia", and (ii) the election commission which also not a name because it is written in lower case. Both Bank Indonesia and the General Election Commission which are now holding electoral activities are independent institutions that get their authority from the Act. [13]

10 Ibid.

11 Op. Cit, Mahfud ....119.

12 Fourth Amendment to the 1945 Constitution, August 10, 2002.

13 Jimly Assiddiqie, *Kedudukan Mahkamah Konstitusi dalam Ketatanegaraan Indonesia/ Position of the Constitutional Court in Indonesian State Administration*, (Surakarta: Makalah Kuliah Umum di Fakultas Hukum Universitas Sebelas Maret, Kamis, 2 September, 2004). Therefore, we can distinguish clearly between the authority of state organs based on the constitutionally entrusted power, and the authority of state organs that are only based on the law's order (legislatively entrusted power), and even in fact there are also institutions or organs whose authority comes from or comes from a mere Presidential Decree. This last example, for example, is the establishment of the National Ombudsman Commission, the National Law Commission, and so on. While the examples of institutions whose authority is given by the Law, for example, are the National Human Rights Commission, the Indonesian Broadcasting Commission, the Financial Traction Analysis and Reporting Center (PPATK).

The limitation of power of state institutions that obtain authority attributively above is a tangible form of the implementation of constitutional democracy in Indonesia. Furthermore, to guarantee the implementation of constitutional democracy, protect the constitutional rights of citizens and maintain the continuity of the principle of check and balance between these state institutions is the duty of the Constitutional Court in accordance with the 1945 Constitution.

1.2. Constitutional Court and Implementation of Constitutional Democracy

In every talk about state institutions, there are 2 (two) key elements that are interrelated, namely organs and functie. An organ is a form or container, while a functie is its contents; the organ is the status of its form (English: form, German: *vorm*), while functie is the movement of the container according to the purpose of its formation. [14]

The Constitutional Court of the Republic of Indonesia is a new (high) state institution that is equal and equal in height to the Supreme Court (MA). The idea was in line with the idea of testing the constitutionality of the law adopted in the norms of the constitution and even the institutions were formed in isolation. [15]

Based on Article 24C of the 1945 Constitution, the attributive authority of the Constitutional Court is as follows: [16]

1) The Constitutional Court has the authority to adjudicate at the first and final level whose decisions are final to examine the law against the Constitution, decide on disputes over the authority of state institutions whose authority is granted by the Constitution, decide upon the dissolution of political parties, and decide disputes regarding results general election.

2) The Constitutional Court must provide a decision on the opinion of the People's Representative Council regarding alleged violations by the President and / or Vice-President in accordance with the Constitution.

3) The Constitutional Court has nine constitutional judges appointed by the President, submitted by three Supreme Court members, three by the House of Representatives, and three by the President.

4) The Chairperson and Deputy Chairperson of the Constitutional Court are elected from and by constitutional judges.

5) A constitutional judge must have integrity and personality that is not reprehensible, fair, statesman who overcomes the constitution and constitution, and does not concurrently serve as a State official.

14 Jimly Ashiddiqie, *Implikasi Perubahan UUD 1945 Terhadap Pembangunan Hukum Nasional/Implications of Amendments to the 1945 Constitution Against National Law Development*, (Jakarta: Konstitusi Press, 2005), 12.

15 Jimly Assiddiqie, *Pokok-Pokok Hukum Tatanegara/Constitutional Law Principles*, (Jakarta: Buana Ilmu Populer, 2007), 583.

16 Tim Penyusun Mahkamah Konstitusi, *Profil Mahkamah Konstitusi/Profile of the Constitutional Court,* Cet. 4, (Jakarta: Sekretariat Jenderal dan Kepanitraan Mahkamah Konstitusi, , 2009), 2.

6) Appointment and dismissal of constitutional judges, procedural law and other provisions concerning the Constitutional Court are regulated by law.

From the authority of the Constitutional Court to adjudicate at the first and final level, the decision is final to examine the law against the Constitution and the authority to decide disputes over the authority of state institutions whose authority is granted by the Constitution, are two authorities to maintain the implementation of constitutional democracy in Indonesia. Because by adjudicating the petition of citizens to test the law which is a product of government against the 1945 Constitution, it means that the Constitutional Court has guaranteed the rights of citizens from the arbitrary actions of the government executors. Furthermore, the authority to decide disputes between state institutions whose authority comes from the 1945 Constitution is also a tangible form of the role of the Constitutional Court in maintaining the principle of checks and balances between state institutions, in order to achieve government stability and the principles of constitutional democracy in Indonesia.

2. Conclusion

As a conclusion of the analysis and discussion, it is necessary to put forward the following conclusions: First, the substance of constitutional democracy is a government that has limited power and is not justified in acting arbitrarily against its citizens. Restrictions on government power are contained in the constitution or in other laws and regulations. Second, the role of the Constitutional Court in maintaining the implementation of constitutional democracy in Indonesia can be seen from its authority which is able to guarantee the implementation of the constitutional rights of citizens from the substance of the law that contradicts the 1945 Constitution, and in maintaining the principle of checks and balances between governmental powers, in order to achieve stability in government and the principles of constitutional democracy in Indonesia.

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SESSION III

PRESIDENTIAL DECREES IN TURKISH GOVERNMENT SYSTEM AND THE ROLE OF THE CONSTITUTIONAL COURT

Recep Kaplan

CONTENTS

Abstract

The 2017 constitutional amendment has changed the governmental system in Turkey. By this amendment presidentialism is adopted as the government system of the Republic of Turkey, replacing parliamentary system.

This paper concentrates on the presidential government system in Turkey particularly in the framework of a new regulatory instrument called as "presidential decrees" introduced by the 2017 constitutional amendment, and on the increasing role of the Constitutional Court which is assigned to carry out the judicial review of such decrees in the new system. It discusses the new legislative system in a comparative perspective with the former one. By doing so, the most remarkable changes of this amendment regarding the constitutional justice are introduced in a systematic way.

Keywords: Presidentialism, Turkey, Parliamentary System, Constitutional Court.

1. Introduction

On 16 April 2017 a referendum for constitutional amendments was approved by Turkish citizens. Besides other remarkable provisions the major issue brought by those amendments was the modification of the government system. The amendment modified the system of government from parliamentary to presidential. The new government system entered into force as from 24 June 2018 on which the presidential elections was held with its all aspects.

With the constitutional amendment the Board of Ministers was abolished. According to new provisions, executive power and function shall be exercised and carried out by the President of the Republic.

One of the most remarkable alterations of the amendment is "presidential decrees". Article 104 of the Turkish Constitution grants the power to the president to issue "presidential decrees". According to this Article the president may issue presidential decrees on matters relating to the executive power. In addition, Article 148 of the Constitution regulates the judicial review of such decrees which fall in the scope of the judicial review of constitutionality by the Constitutional Court.

The aim of this article is to introduce the primary aspects of the new government system in Turkey, namely the presidential system and to discuss it with the former system. Second aim is to reveal the increasing role of the Constitutional Court in the new system especially with regard to the introduction of the "presidential decrees".

2. The transformation of the government system from parliamentary to presidential

Before 2007, according to the original text of the 1982 Constitution, the president shall be elected by the members of the Turkish Grand National Assembly (the Parliament). However the 2007 constitutional amendments adopted by Turkish citizens by a referendum requiring that the president of the republic shall be elected directly by Turkish citizens. The first implementation of this new election system was made in 2014 and Mr. Recep Tayyip Erdoğan, who is currently the President of the Republic of Turkey, was directly elected by voters. Despite this new and important situation, the Board of Ministers protected its primary role on executive issues until 2017. However, Turkey experienced some governmental difficulties between the prime minister and the President.

Almost 10 years after the 2007 amendments, in April 2017 a new referendum was held again on constitutional issues and voters adopted constitutional amendments. This time, many of the constitutional provisions were modified to provide transformation of government system. With this new amendments the government system of Turkey has been changed from parliamentary to presidential. And now the president is responsible for all executive issues.

3. The Competences and Responsibilities of the President

After 2017 amendments Article 104 of the 1982 Constitution defines the general role of the president as follows:

> *"The President of the Republic is the head of the State. Executive power belongs to the President of the Republic.*
>
> *In this capacity, he/she shall represent the Republic of Turkey and the unity of the Turkish Nation; he/she shall ensure the implementation of the Constitution and the regular and harmonious functioning of the organs of the State."*[1]

The major difference with the former wording of the Article 104 is *"executive power belongs to the President of the Republic."*

The new Article 104 not only lists previous powers of the president and transfers the competences of the prime minister and Board of Ministers to the president but also empowers

[1] Current text of Constitution of the Republic of Turkey including 2017 amendments can be found at: http://www.humanrights.justice.gov.tr/announcement/2017/may%C4%B1s/current-version-of-constitution.html

president with new competences such as issuing presidential decrees on subjects regarding executive powers.

4. The Empowered Rule-Making Instrument: Presidential Decrees

4.1. Presidential Decrees in Parliamentary System before 2017 Amendments

Indeed before 2017 amendments, according to the original text of the Article 107 of the 1982 Constitution, the President had already enjoyed a power to issue decrees. The text of that Article was as follows:

> *"The establishment, the principles of organization and functioning, and the personnel appointment proceedings of General Secretariat of the Presidency shall be regulated by presidential decrees"*

As it is seen, the President had an exclusive right to regulate its own institution by his/her own initiative without a need to have a power originating from any other law. But this power to issue presidential decree was limited to the organization of the General Secretariat of the Presidency. In this context the President did not have any competence to issue presidential decrees on any other matters. Article 107 of the Constitution was abolished by 2017 amendments.

4.2. Presidential Decrees in Presidential System after 2017 Amendments

The modified provision of the Article 104 amended by 2017 referendum is as follows:

> *"The President of the Republic may issue presidential decrees on matters relating to the executive power. The fundamental rights, individual rights and duties included in the first and second chapters, and the political rights and duties listed in the fourth chapter of the second part of the Constitution, shall not be regulated by presidential decrees. No presidential decrees shall be issued on matters to be regulated exclusively by law embodied in the Constitution. No presidential decree shall be issued on matters explicitly regulated by law. In the case of a conflict between presidential decrees and the laws due to differences in provisions on the same matter, the provisions of law shall prevail. In case the Grand National Assembly of Turkey introduces a law on the same matter, the presidential decree shall become null and void."*

As it is explained before, 2017 amendments grants the president to issue presidential decrees on executive matters. The presidents' power to issue presidential decrees originates directly from the Constitution not from any other law. Therefore the President does not need to

base on any empowering law when issuing presidential decrees. Accordingly, there is no need for presidential decrees to conform to any legislation except Constitution.

4.2.1. Restrictions for Presidential Decrees

The Constitutional provisions includes four restrictions to issue presidential decrees. The following subjects cannot be regulated by presidential decrees.

1- Individual rights and duties,

2- Political rights and duties,[2]

3- The matters to be regulated exclusively by law[3]

4- The matters clearly regulated by law.

4.2.2. The Hierarchy between Laws and Presidential Decrees

According to the Constitution, there are two ways to prevent conflicts between laws and presidential decrees. These are as follows:

1- In the event of a conflict between a presidential decree and a law due to differences in provisions on the same matter, the provisions of law shall prevail.

2- In the event of the Parliament adopts a law on the same subject, the presidential decree shall become null and void.

4.2.3. The Matters can only be regulated by Presidential Decrees

Before 2017 amendments, the Parliament's power to adopt laws in regard to matters was not limited except for the General Secretariat of the Presidency. However, with the 2017 amendments, some restrictions were set to limit the domain of laws and form exclusive areas for the presidential decrees.

The 2017 amendment stipulates areas that can only be regulated by Presidential decrees. It is clear that the limiting provisions restrict the legislative power of the Parliament. The areas which cannot be regulated by the Parliament by law and shall only be regulated by presidential decrees are as follows:

1- The procedures and principles relating to the appointment of high level State officials.

[2] However, the President of the Republic may declare state of emergency in the case of situations (i.e. war, severe economic crises) listed in the Article 119 of the Constitution. During the state of emergency period, the President may issue presidential decrees on the subjects including individual and political rights.

[3] According to my own analysis there are 81 provisions in the Constitution that envisage areas to be regulated by law.

2- The establishment, abolition, duties, powers, organizational structure and formation of central and provincial organization of the ministries.

3- The functioning of the State Supervisory Council, the term of office of its members, and other personnel matters relating to their status.

4- The organization and duties of the General Secretariat of the National Security Council.

5. The Increasing Role of the Constitutional Court: The Constitutionality Review of the Presidential Decrees

5.1. The Scope of the Constitutional Review of the Presidential Decrees

The 2017 amendments grant the Constitutional Court to carry out constitutionality review of presidential decrees. According to the amended text of the Article 148 of the Constitution:

> *"The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance."*

As it can be understood from the above-mentioned provision, the Constitutional Court has a general power to review to presidential decrees with one exception. Since it is prevented by the Constitution to allege unconstitutionality of the presidential decrees issued during a state of emergency or in time of war, The Constitutional Court cannot examine constitutionality of such decrees. According to the article 119 of the Constitution the President may issue presidential decrees on the matters including individual and political rights necessitated by the state of emergency. These decrees having the force of law shall be published in the Official Gazette, and shall be submitted to the Parliament on the same day for approval. According to the same article:

> *"Save for the situations that the Grand National Assembly of Turkey cannot convene due to war and force majeure; presidential decrees issued during the state of emergency shall be debated and concluded in the Grand National Assembly of Turkey*

within three months. Otherwise, the Presidential decree issued in the state of emergency shall ex officio cease to have effect."

5.2. Two Different Ways to Allege Unconstitutionality of Presidential Decrees

There are two ways to allege unconstitutionality of presidential decrees. One of them is annulment action and the other one is the claim of unconstitutionality before civil and administrative courts.

5.2.1. Annulment Action

5.2.1.1. Who May Apply for Annulment Action

The constitutionality of presidential decrees may be challenged directly before the Constitutional Court through an annulment action by the relevant parties empowered by the Constitution. In this context, the competent persons and organs have the right to apply for annulment action directly to the Constitutional Court, based on the assertion of the unconstitutionality.

According to the amended Article 150 of the Constitution these persons and organs are as follows:

1- The President of the Republic,
2- The groups of two political parties which have the highest number of members in the Parliament,[4]
3- A minimum of one-fifth of the total number of members of the Parliament.[5]

5.2.1.2. Time limit for annulment action

The right to apply for annulment action directly to the Constitutional Court shall lapse sixty days after publication of the contested presidential decree in the Official Gazette.

[4] Current Composition of the Parliament:
1- Justice and Development Party (AK Party): 290 Members
2- Republican People's Party (CHP): 144 Members
3- Peoples' Democratic Party (HDP): 67 Members
4- Nationalist Movement Party (MHP): 50 Members
5- Good Party (Iyi Party): 40 Members
6- Felicity Party (Saadet Party): 2 Members
7- Democrat Party (Demokrat Party): 1 Member
8- Great Union Party (BBP): 1 Member
9- Independent MPs: 1 Member

[5] The Parliament shall be composed of 600 deputies.

5.2.2. Claim of Unconstitutionality before Other Courts

According to Article 152 of the Constitution, if a court hearing a case finds that the presidential decree to be applied is unconstitutional, or if it convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties of the case, it shall apply to the Constitutional Court to decide on constitutionality of the presidential decree and shall postpone the proceedings of the case until the Constitutional Court decides on the issue.

The Constitutional Court shall decide on the matter and declare its judgment within five months of receiving the contention. If no decision is reached within this period, the applicant court shall conclude the case under existing law. However, if the applicant court receives the decision of the Constitutional Court before the judgment on the merits of the case is final, the applicant court shall be obliged to comply with it.

5.3. Decisions of the Constitutional Court

According to the Article 153 of the Constitution, the decisions of the Constitutional Court are final. However, in the course of annulling the whole or a provision of presidential decrees, the Constitutional Court shall not act as a legislator and take a decision leading to a new application.

Presidential decrees or provisions thereof, shall cease to have effect from the date of publication in the Official Gazette of the Constitutional Courts' annulment decision. Where it deems necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That period shall not be more than one year from the date of publication of the annulment decision in the Official Gazette.

Annulment decisions of the Constitutional Court cannot be implemented retroactively.

Judgments of the Constitutional Court are binding on the legislative, executive and judicial organs and on persons and corporate bodies.

6. Conclusion

The original version of the 1982 Constitution envisaged parliamentary system for Turkey. However after 2007 Constitutional referendum made direct election of the president possible, the debates over the government system of Turkey increased. After 2014 popular presidential elections by which Mr. Recep Tayyip Erdoğan had been elected, such debates reached its peak. And finally through 2017 Constitutional amendments adopted by a referendum Turkey altered its parliamentary government system to presidential.

In the new system it should be admitted that the president has been granted with a very powerful legislative instrument called as presidential decree which does not need to be based on a law.

President may issue presidential decrees on almost all executive matters except those to be regulated by the law embodied in the Constitution. Also the president has an exclusive power to regulate some issues which cannot be regulated by law.

The Constitutional Court is the organ which have the power to make constitutionality review of such decrees. However the Court has yet to render a judgment on any presidential decree. The opposition parties have brought some cases before the Court and it is expected from the Court to render its judgment on those cases in the near future.

The Turkish Constitutional Court, as being one of the oldest Constitutional Courts in Europe, can be expected to deal with this interesting and challenging task in an effective way with the help of its vast case-law and institutional capacity.

FEDERAL COURT OF MALAYSIA

"THE CONSTITUTIONAL COURT AND CONSTITUTIONALISM IN POLITICAL DYNAMICS"

The Role of Judicial Review in relation to the Doctrine of Separation of Powers in Malaysia

Introduction

Malaysia's system of government is based on the Westminster system of parliamentary democracy with the basic principle of separation of powers between the executive, legislature and the judiciary.

Separation of powers is a term coined by French political enlightenment thinker Baron de Montesquieu[1]. It is a political doctrine under which the legislative, executive and judicial branches of government are kept distinct, to prevent abuse of power[2].

In Malaysia, separation of powers between the Legislative, Executive and Judiciary is clearly expressed in the Federal Constitution that spells out the functions of the three branches. Article 39 of the Federal Constitution vested the executive authority of the Federation in the Yang Di-Pertuan Agong (the King) and exercisable by him or by the cabinet. Article 44 vested the legislative authority of the Federation in a Parliament. Article 121 deals with the judicial power of the federation.

[1] Montesquieu, Charles de Secondat, baron de. The Sprit of Laws (c.1748). Translated and edited by Anne Cohler, Basia Miller, Harold Stone. (New York: Cambridge University Press, 1989)
"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the powers of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers."
[2] Per Dato' Abdul Hamid Bin Haji Mohamad (as he then was) in the case of Pendakwa Raya v. Kok Wah Kuan [2007] 6 CLJ 341

The doctrine of separation of powers involved a system of "check and balance". Each branch of government is given specific powers of oversight over the other branches of government, and powers to restrain the actions of the other branches of government. The aim is to ensure a balance of power between the three arms of government.

Ahmad Masum, senior lecturer of the College of Law, Government and International Studies Universiti Utara Malaysia opined as follows :

> *Added to the doctrine is of course the idea of democracy and constitutionalism where authorities would not be allowed to go beyond their limits; something that is apparently a reflection of the notion of* ***limited government***[3].

(emphasis ours)

Judicial Review

Judicial review is a method used by the courts to regulate governmental power.[4]

Judicial review is defined by the Halsbury Laws of Malaysia as the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties[5]. Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong.

[3] Ahmad Masum, The Doctrine of Judicial Review : A Cornerstone of Good Governance in Malaysia [2010] 6 MLJ cxiv at cxviii
[4] Ibid at 6 MLJ cxiv at cx
[5] Halsbury Laws of Malaysia, Vol.9, para. 160.059

There is no expressed provision in the Malaysian Federal Constitution which provides for judicial review, however, based on the doctrine of separation of powers, the courts must play its part in ensuring that each branch of government functions appropriately[6].

The statutory basis of judicial review actions in Malaysia is provided under section 25(2) of the Courts of Judicature Act 1964 (CJA 1964) which clearly stated that the High Court shall have the additional powers set out in the Schedule to the CJA 1964. The relevant provision in Paragraph 1 of the Schedule 1 of the CJA 1964 are as follows:

> *"power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part 11 of the Constitution, or any of them, or for any purpose".*

The application for judicial review is currently regulated by Order 53 of the Rules of Court 2012. Order 53 rule 3(1) provides that an application for judicial review cannot be made unless leave of court is obtained and the applicant must have a valid grievance to be a successful applicant. In the case of Ahmad Jefri bin Mohd Jahri @ Md Johari v. Pengarah Kebudayaan & Kesenian Johor & Ors.[7] the Federal Court had set out a specific procedure for an aggrieved party seeking judicial review. The court also appropriately observed that the stringent conditions of Order 53 are in place to "protect those entrusted with the performance of public duties against groundless unmeritorious or tardy harassment." James Foong FCJ in delivering the judgment had said:

> *"One may ask what is the purpose of these conditions? The basic objective is to protect those entrusted with the enforcement of public duties "against groundless, unmeritorious or tardy harassment that were accorded to statutory tribunals or decision making public authorities by Ord 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the*

[6] As stated at no. 3 at 6 MLJ cxiv at cxviii
[7] [2010] 3 MLJ 145

application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration…" as described in the celebrated case of O'Reilly v Mackman (1982) 3 All ER 1124 @ 1133. Further, there is also the need to reduce the delay in resolving such application in the interest of good administration. As Lord Diplock in O'Reilly v Mackman (supra) reiterated, "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

Prof. M.P. Jain in his paper entitled "Judicial Review of Administrative Action" presented in Malacca Law Seminar held on March 9 - 10, 1985 and explained by Tun Raus Sharif, CJ (as he then was) in his article entitle "Judicial Review: The Malaysian Experience", the role of judicial review as a cornerstone of good governance in Malaysia could be viewed from two prongs:

i. Where powers are conferred on the superior courts to determine the constitutional validity of federal and state laws and to invalidate them on the ground of unconstitutionality; and
ii. Where constitutional supremacy is maintained by reviewing the executive act on constitutional as well as on administrative law grounds[8].

Judicial Review Cases

The courts' view on the validity of decisions made by the executive can be observed in three decisions, namely, Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor.[9], State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors[10] and Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals.

[8] Tan Sri Dato' Seri Md Raus bin Sharif, Judicial Review: The Malaysian Experience, Journal of the Malaysian Judiciary, July 2017
[9] [2014] 6 CLJ
[10] [2015] 8 CLJ

Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor

In this case, The Titular Roman Catholic Archbishop of Kuala Lumpur as the applicant, was granted a publication permit by the first respondent, the Minister of Home Affairs, to publish the Herald-the Catholic Weekly. On 8th January, 2009, the applicant received a letter dated 7th January 2009 from the first respondent approving the publication permit for the publication period of 1st January 2009 until 31st December 2009 subject to the condition that the applicant was prohibited from using the word Allah in the publication. The applicant, by way of judicial review sought leave for an order of certiorari to quash the impugned decision and for an order for stay of the impugned decision pending the court's determination of the matter, and for various declarations with costs in the cause. The applicant's grounds for the reliefs of certiorari and declaration were premised on the unconstitutional acts and conducts of the Respondents, which were inconsistent with articles 3(1), 10, 11 and 12 of the Federal Constitution, namely that the applicant's right to use the word Allah stemmed from the applicant's constitutional rights to freedom of speech and expression and religion and in instructing and educating the Catholic congregation in the Christian religion. The High Court allowed the application, but the Court of Appeal reversed the decision of the High Court by saying that "the minister has not acted in any manner or way that merit judicial interference". The case failed to obtain leave to appeal to the Federal Court. The decision of the Court of Appeal still stands.

State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors

This case concerned the Shariah offence of cross-dressing women's attire by a few Muslim men in Negeri Sembilan. The plaintiffs Muhamad Juzaili bin Mohd Khamis and several others had filed an application to the Court seeking judicial review of the Shariah enforcement action in convicting them in accordance to with the provision of section 66 of the Shariah Criminal Enactment 1992 of Negeri Sembilan. The provision criminalises Muslim men wearing the women's attire. The plaintiffs declared that this provision was unconstitutional as it contradicted interalia, with Article 5(1), 8(1), 9(2) and 10(1)(a) of the Federal Constitution which guarantee the citizen to freedom of life and liberty, equality before the law, freedom of movement and freedom of expression. Their

application for judicial review, however, was dismissed by the court on October 11th, 2012 and they subsequently filed an appeal to the Court of Appeal against the decision. The appeal was allowed: :"We therefore, grant the declaration sought in prayer… that section 66 of the Syariah Criminal Enactment 1992 is void by reason of being inconsistent with the articles above." Dissatisfied with the decision, the State of Negeri Sembilan filed an appeal to the Federal Court. The Federal Court in allowing the appeal stated that the application for declarations sought by the respondents before the High Court by way of judicial review was in fact a challenge to the legislative powers of the State Legislature of Negeri Sembilan. What the respondents wanted was to limit the legislative powers of the State Legislature, by saying that despite its powers to legislate on matters on Islamic law having been given to the State Legislature by article 74 of the Federal Constitution read with List II in the Ninth Schedule thereof, that legislation must still comply with the provisions on fundamental liberties enshrined in articles 5(1), 8(2), 9(2) and 10(1) of the Federal Constitution. The Court further held that the application for the declarations sought by the respondents were incompetent by reason of substantive procedural non-compliance with clauses 2 and 4 of article 4 of the Federal Constitution, and should have been dismissed by the High Court on the ground that the High Court had no jurisdiction to hear the matter.

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals

The Federal Court ruling in Indira Ghandi's case has been hailed as a landmark decision that reaffirms the civil courts' constitutional role and powers. In this case, a muslim convert father, Muhammad Riduan Abdullah converted the three children from his civil marriage with Hindu Mother M. Indira Gandhi to Islam without their knowledge or consent in 2009.

At the Federal Court, one of the question that was posed by Indira is whether the civil courts have exclusive jurisdiction and inherent jurisdiction to review the actions of a public authority (Registrar of Muallafs). The Court in answering this question had said that the civil courts' powers to review a public authority's action is a basic part of the Federal Constitution that cannot be altered or removed. The Federal Constitution's basic structure includes judicial powers such as judicial review, the principles of separation of powers, rule of law and protection of minorities. Parliament cannot remove such features by amending the constitution.

The court also stated that judicial power –which includes judicial review or the review of public authorities' actions and decision - cannot be removed from the civil courts and cannot be given to any other body who do not have the same level of constitutional protection as civil judges to safeguard their independence.

It is interesting to note that in Indira Gandhi's case, the courts in Malaysia has now moved towards judicial activism.

Conclusion

Lord Acton, the historian and moralist was quoted to have said that "power tends to corrupt and absolute power corrupts absolutely".

In Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.[11], Raja Azlan Shah said as follows :

"Every legal power must have legal limits, otherwise there is dictatorship".

[11] [1979] 2 MLJ 135

THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN

Murat Assylbayev

"The Constitutional Council of the Republic of Kazakhstan and constitutional control"

The beginning of the establishment of the institution of constitutional control in Kazakhstan is associated with the introduction in 1989 of an amendment to the Constitution of the Kazakh SSR that covers the establishment of the Constitutional Oversight Committee, which, however, was not created.

Actually, the beginning of the establishment of this institution in Kazakhstan is considered to be the adoption of the Constitutional Law of December 16, 1991 "On State Independence of the Republic of Kazakhstan", in Article 10 of which it was stipulated that "The highest body of judicial protection of the Constitution shall be the Constitutional Court of the Republic of Kazakhstan.»

This body was elected by the Supreme Council of the Republic on July 2, 1992 and exercised constitutional control until October 1995, as the current Constitution of 1995 established a new body - the Constitutional Council.

It is not included in a unified system of branches of power, does not belong to the judiciary and is not the cassation or supervisory instance for courts of general jurisdiction. It is an independent state body.

The presence in the constitutional and legal field of the Republic of the body of constitutional control - the Constitutional Council inevitably brings its "amendments" to the traditional understanding of the constitutional principle of "the system of checks and balances between the branches of power." Independence of the Constitutional Council and its constitutional "separation" from organs of a unified system of branches of power (primarily from legislative and executive branches) provides the basis for developing a doctrine of an independent constitutional control system. Decisions made by the Constitutional Council and legal positions contained therein are the source for constitutional law. So, the modern constitutional law of the Republic of Kazakhstan develops as far as the norms and provisions, enshrined in the Constitution, are interpreted by the Constitutional Council.

Over the years of its activity, the Constitutional Council has become a real driving force for the mechanism of constitutional procedural regulation and development of constitutional and legal relations. It, as the main part of the legal mechanism, serves to ensure and develop constitutional processes within the framework of the Basic Law. Playing an essential role in the proper implementation of the norms and principles of the Constitution, the Constitutional Council has become an important guarantor of the exercise of human and civil rights and freedoms.

In order to avoid politicization of the Constitutional Council, which may appear in resolving issues related to the competencies of the legislative and executive authorities, in order to prevent a decrease in the effectiveness of its activities as a constitutional-control institution of the state, the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" envisaged serious legal guarantees of the independence of this body from all sorts of political processes.

First of all, such a guarantee is the provision of the Constitutional Law which states that the members of the Constitutional Council in the exercise of their powers are guided only by the Constitution and the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan."

Moreover, the Constitutional Law establishes that in the exercise of its powers the Constitutional Council is independent from state bodies, organizations, officials and citizens, and cannot proceed from political and other motives.

In addition, the Constitutional Law specifically stipulates the following: The Chairperson and members of the Constitutional Council are independent in the performance of their duties and are subject only to the Constitution and the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan." No other acts have for them wittingly binding force. Any interference in their activities, as well as making a pressure or other influence on them, in any form, is not allowed and entails legal liability. Article 377 of the Criminal Code of the Republic of Kazakhstan establishes the liability for interference, in whatever form, in the activities of the Constitutional Council.

The Constitutional Council's proper exercise of its functions is also ensured by the organizational, financial and material-technical independence of the Constitutional Council, the principles of constitutional proceedings, non-replaceability, immunity of the Chairperson and members of the Council, equality of their rights, special procedures for suspension and termination of their powers and other constitutional and legal guarantees.

Requirements for candidates for the post of Council members, which are important components in determining their status, are also a kind of guarantee for the effectiveness of activities of the Constitutional Council. Thus, a citizen of a republic not younger than thirty who resides on the territory of the republic, having a higher legal education, an experience of work in the legal profession for at least five years may be appointed to the Constitutional Council. These requirements do not apply to the ex-Presidents of the Republic (Article 4 of the Constitutional Law).

One of the main guarantees of the independence of organs of constitutional control is the procedure for their formation established by constitutional norms. The Constitutional Council consists of seven members. The Chairperson and two members of the Council are appointed by the President of the Republic, and other 4 members are appointed by the Parliament for a period of six years.

Half of members of the Constitutional Council are renewed every three years. Moreover, ex-Presidents of the Republic shall be life-long members of the Constitutional Council.

In accordance with paragraph 5 of Article 71 of the Constitution, the Chairperson and members of the Constitutional Council during their term of office cannot be arrested, subjected to a forced delivery, administrative penalties imposed in court, brought to criminal liability without the consent of the Parliament of the Republic, except in cases of being apprehended on the scene of a crime or committing grave crimes.

Article 11 of the Constitutional Law enshrines such guarantees of independence as:

1) non-interference in the activities of the Chairperson and members of the Council;

2) unaccountability of the Chairperson and members of the Council;

3) compliance with official ethics;

4) non-replaceability;

5) announcement of self-dismissal ;

6) a restriction on the exercise of protection or representation.

The Chairperson and members of the Constitutional Council shall not be accountable for their activities on constitutional issues. This means that no one has the right to demand from them any report. Before the adoption of the final decision, the Chairperson and members of the Constitutional Council have no right, except at a meeting of the Constitutional Council, to express an opinion or advice on issues that are the subject of constitutional proceedings.

During the period of exercising their powers, the members of the Constitutional Council shall not be replaceable. Their powers cannot be terminated or suspended, except in cases provided for by Constitutional Law.

The powers of the Constitutional Council are in fact the same as those of organs of constitutional control of other countries.

This is to ensure the supremacy of the Constitution, by recognizing unconstitutional laws and other regulatory legal acts, if they contradict the Basic Law.

The Constitutional Council gives official interpretation to constitutional norms, revealing potential, implicit and hidden meaning contained in principles, norms and provisions of the Constitution.

The competence of the Constitutional Council also includes:

- making a decision in case of dispute the issue of the correctness of the conduct of elections of the President of the Republic, deputies of the Parliament and republican referendum.

- consideration for compliance with the Constitution of resolutions adopted by Parliament and its Chambers.

By the Constitutional Reform of 2017 in the competence of the Constitutional Council additionally included:

- consideration of appeals of the President of the Republic on the verification of the constitutionality of legal acts that came into force in the interests of protecting human and civil rights and freedoms, ensuring national security, sovereignty and integrity of the state;

- giving a conclusion on the compliance of amendments and additions to the Constitution of the Republic with requirements established by paragraph 2 of Article 91 of the Basic Law, before they are submitted to a republican referendum or to the Parliament.

The annual message sent to the Parliament of the Republic on the status of constitutional legality in the country is an important document of the Constitutional Council.

Constitutional Council analyzes the status of legislation, the level of protection of constitutional rights and freedoms of citizens, as well as the implementation of its final decisions in its annual messages.

Citizens of the Republic are not included in the list of subjects of appeal to the Constitutional Council.

Their constitutional rights and freedoms can be protected in the courts of general jurisdiction, and in the Constitutional Council in cases and in the manner established by Article 78 of the Constitution. According to this Article, if a court finds that a law or other regulatory legal act subject to the application violates the rights and liberties of an individual and a citizen, it shall suspend legal proceedings and address the Constitutional Council with a proposal to declare that law unconstitutional.

The legal force of decisions of the Constitutional Council

Normative decrees of the Constitutional Council are attributed to the current law of the Republic and on legal force are equal to the norms of the Basic Law.

The decision of the Constitutional Council shall come into force from the day of its adoption, shall be binding on the entire territory of the Republic, and shall be final and not subject to appeal.

Results of activities of the Constitutional Council for the period 1996-2018

Over the period from February 1996 to the present, the Constitutional Council received more than 190 appeals, including:

- from the Head of State – 22 appeals;
- from Chairpersons of Chambers of the Parliament and its deputies – 78 appeals;
- from the Prime Minister – 27 appeals;
- from courts – 68 appeals.

Of all appeals submitted to the Constitutional Council, 27 of them were on the compliance of laws adopted by the Parliament and submitted to the Head of State for signing with the Constitution.

Totally 17 laws were found unconstitutional in 15 appeals.

In conclusion, the constitutional control serves as an incentive for continuous improvement of national legal system and harmonization of the constantly changing social relations. It forms state thinking and the necessary quality of legal consciousness. The constitutional control in the Republic of Kazakhstan plays a serious preventive role, encouraging not only state authorities, but also every member of the society, to a legal, constitutional form of actions.

HEAD OF THE LEGAL SERVICE DEPARTMENT OF THE SECRETARIAT OF THE CONSTITUTIONAL COURT OF MONGOLIA

Bolortungalag Narangerel

The Constitutional Court of Mongolia and Political Dynamics

BOLORTUNGALAG NARANGEREL,
Head of the Legal Service Department
of the Secretariat of The Constitutional Court of Mongolia

ABSTRACT

The Constitution is the fundamental law of state management which establishes powers of state organs and boundaries thereof, creates the balance between state powers. Therefore, some of the authority and political powers may falsely implement concepts of the Constitution, its clauses to fit their narrow interests. However, the Constitutional Court has been established to carry out activities of organs exercising state powers in accordance with the Constitution and to limit their powers in order to protect values of democracy and fundamental rights of citizens.

I prepared the presentation on the relationship between the Constitutional Court of Mongolia and political powers, and some related current issues. The presentation is consisted of the following parts: the foreword that introduces the Constitutional Court of Mongolia; main part that introduces the relationship between the Constitutional Court of Mongolia and the political powers, and analysis of its regulation; final part that introduces conclusion.

THE CONSTITUTIONAL COURT OF MONGOLIA AND POLITICAL DYNAMICS

BOLORTUNGALAG NARANGEREL,

Head of the Legal Service Department
of the Secretariat of The Constitutional Court of Mongolia

DEAR PARTICIPANTS,

First of all let me begin by extending gratitude to the Constitutional Court of the Republic of Indonesia for organizing the International Symposium on behalf of the Constitutional Court of Mongolia and myself and wish great success in its work.

Dear participants and colleagues presenting papers and exchanging experiences, please accept my warm greetings. I believe this Symposium and Short course will be as fruitful and successful.

Abstract

The Constitution is the fundamental law of state management which establishes powers of state organs and boundaries thereof, creates the balance between state powers. Therefore, some of the authority and political powers may falsely implement concepts of the Constitution, its clauses to fit their narrow interests. However, the Constitutional Court has been established to carry out activities of organs exercising state powers in accordance with the Constitution and to limit their powers in order to protect values of democracy and fundamental rights of citizens.

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1.FOREWORD

The Constitutional Court was established by the new Constitution of Mongolia of 1992 and is the first institution to exercise the supreme supervision over the implementation of the Constitution. It has been 26 years since its establishment. During this time, the attitude of citizens and organizations addressing the Constitutional Court has changed, with the volume of petitions, notifications and requests to the Constitutional Court increasing each year.

Article 64 of the Constitution of Mongolia provides that "The Constitutional Court shall be an organ exercising supreme supervision over implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes". This is further defined in the Law on the Constitutional Court in paragraph 1 of article 8: "The Constitutional Court shall exercise its supreme supervision over the implementation of the Constitution through making conclusions on disputes as provided in this law, and through settling disputes as provided in paragraph 2 of this article."

Within its competencies provided by the Constitution, the Constitutional Court announces null and void the laws, resolutions, decrees and other decisions issued by the President, the Parliament and the Government if they contradict with the Constitution and establishes whether certain actions of authorized officials are in conflict with the Constitution. The objectives of examining and resolving disputes by the Constitutional Court of Mongolia is to guarantee strict adherence to the Constitution through resolution of disputes upon complete, accurate and objective examination of all claims concerning a breach of the Constitution.

The Constitutional Court settles a disputes on the basis of the petitions and notification, submitted by the citizens or requests forwarded by the President, the Parliament, the Prime Minister, the Supreme Court, and the Prosecutor General concerning whether the Constitution has been breached. Foreign citizens and stateless persons residing lawfully in the territory of Mongolia shall enjoy the right to forward petitions and notification to the Constitutional Court of Mongolia.

2. POLITICAL DYNAMICS OF MONGOLIA

With the transition to a new democratic system, Mongolia adopted a new Constitution in 1992 as a foundation of a democratic state which upholds human rights and the rule of law. This new Constitution contains principles of separation of powers between highest organs of state power, creating a system of balanced existence of legislative, executive and judiciary branches and their mutual supervision. These state organs (subjects) supervise each other by means of different legal measures. The Constitutional Court of Mongolia exercises legal supervision of these organizations as an independent and specialized court.

The Constitutional Court plays an important role in balancing the state powers. Dispute adjudication of the Constitutional Court is differentiated from other courts through the political and legal nature of its decisions and their implications.

The Constitution of Mongolia declares that Mongolia shall have a parliamentary form of governance. Under provisions of the Constitution, Mongolia has a four-years political cycle. For example, parliamentary and presidential elections are held every four years. The presidential election is organized one year after the parliamentary election and a political party that seats in the Parliament is eligible to nominate a candidate for the President of Mongolia.

Also after elections, Political powers seated in parliament change the law on election according to their interest.

3. THE CONSTITUTIONAL COURT AND THE POLITICAL INSTITUTIONS

3.1. As in other countries in Mongolia, members of the Constitutional Court are appointed by political means. In conformity with the law the member of the Constitutional Court of Mongolia shall be appointed by the Parliament for a term of 6 years. Accordingly, the term of a member of the Constitutional Court to take up to 6 years is because keeping the political influence free, preserve the independence of the judiciary. It is also based on principles of separation of powers with three of them to be nominated by the Parliament, three by the President, and three by the Supreme Court.

The rule on appointment and nomination of constitutional judges is aimed at ensuring independence of the Constitutional Court judges. The influence of the authority and political powers on appointing and nominating constitutional judges varies in each country. In most cases, the Parliament or the President is involved in the process of appointing a judge.

The procedure for appointing the Chairperson of the Constitutional Court is different from the procedure for appointing judges. In Mongolia, members of the Constitutional Court shall propose from among themselves the name of a person to be elected as a Chairman, and elect the person, who receives the majority of votes, as the Chairman.[1] It is considered to be the most democratic procedure that guarantees the independence of the Court. The term of the Chairman is shorter 3-year term than the members', which allows the members to change from among members. And the Chairman of the Constitutional Court of Mongolia may be re-elected only once.

While the Constitutional Court functions on the law and political boundaries, it is probable that politicization of the Constitution will be politicized if the term of the members is too long. On the other hand, it is considered that too short term of the members might negatively influence on Court's successive character, stability and prestige. Accordingly, the term of Constitutional Court judge is usually varied between five to twelve years and the average is six years.

3.2. The Constitutional Courts are always in the spotlight by exercising supreme supervision over the implementation of the Constitution, which is the basic law of a State. Therefore, the Court's decisions are always widely discussed.

1 Law on the Constitutional Court of Mongolia in paragraph 1-6 of article 6, 1992.

A contradiction between the political institutions results in a political crisis. In case this crisis influences on a society the Constitutional Courts have an important and unique role in a society by converting them into legal disputes and resolving them furtherly.[2] On the other hand, Constitution even it is well drafted, would not be able to prevent political conflict.[3]

Moreover, Constitutional Courts are eligible to examine and resolve disputes regarding on the constitutionality of statues, on competence disputes between the State organs, whether high ranking political officials breach the Constitution, on dissolution of political parties and these disputes are obviously have political character. In this regard, an obligation of Constitutional control is to resolve according to law a constitutional dispute which has political character and thus keeping political process in the frame of law.[4] It is considered that Constitutionalism is process of legalizing political authority.[5]

3.3. Today in Mongolian society, political parties tend to strive to create their own influence on the judiciary. This is an attempt to influence on the judicial independence set forth in the Constitution of Mongolia, and is a contradiction to Constitutionalism.

Article 20 of the Constitution of Mongolia provides that "the Parliament is the highest organ of State power". In its original interpretation, that Mongolia shall have a parliamentary form of governance. But some members of the Parliament may believe that the Parliament has the power to guide and command other state institutions.

Among the three highest organs of State power, the Constitutional Court's general function of supervision necessitates that it work more closely and on a wider spectrum with the legislative organ, the Parliament. This inevitably leads to a high probability of conflicts in the relationship of these two organizations. The majority of the disputes settled at the Constitutional Court of Mongolia are related to the laws adopted by the Parliament. Thus, it should be mentioned that quite a few attempts on the part of members of Parliament and political parties were made to influence the judges through exerting pressure and slandering them via mass media in order to mislead the public opinion.

Although such minor difficulties persist, there are important issues such as developing constitutionalism and rule of law, reducing influence and pressure from the political parties and authorities, and ensuring independence of the Constitutional Court. In this view, we need to improve the law on the Constitutional Court and Constitutional Procedure.

2 Enkhbaatar Ch., Constitutional court and politic, Rule of Law, Ulaanbaatar, 2012, №04, p 41
3 Lichtenberger ., Internationale wissenschaftliche konferenz Vortragssammlung, Ulaanbaatar, 1998, p 87
4 Enkhbaatar Ch., Constitutional court and politic, Rule of Law, Ulaanbaatar, 2012, №04, p 41
5 Sholler H., Internationale wissenschaftliche konferenz Vortragssammlung, Ulaanbaatar, 1998, p 87

4. CONCLUSION

The most important factor of the Constitutional Court's separation from politics is complete implementation of the principle of judicial independence. The guarantees of the authorities of members of the Constitutional Court should be guaranteed by the Constitution and other laws.

Therefore, the Constitutional Court of Mongolia can exercise supreme supervision of the Constitution only when it fully independent from any other officials . It must be noted that the Mongolian State has paid due attention to ensure the independence of the Court especially to improve the legal environment for the activity of the Constitutional Court of Mongolia.

Finally, it should be highlighted that Constitutional Court of Mongolia gives high importance to cooperation between our institutions in defining the future orientation of the activity as well as enhancing the quality and impact of the resolutions of the Court.

Thank you for your kind attention!

SESSION IV

SENIOR LEGAL OFFICER OF
THE DEPARTMENT OF INTERNATIONAL RELATIONS AND
RESEARCH OF CONSTITUTIONAL REVIEW PRACTICE OF
THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

Svetlana Karamysheva

Political Impartiality of the Constitutional Court of the Russian Federation

Presentation by Svetlana Karamysheva, senior legal officer of the Department of International Relations and Research of Constitutional Review Practice of the Constitutional Court of the Russian Federation

DEAR COLLEAGUES,

First of all I would like to thank the organisers of this event for their hospitality and perfect organisation.

My presentation is mainly devoted to the place the Constitutional Court of the Russian Federation occupies in the system of separation of powers of the Russian Federation, making in an independent body, from the one hand distant from the politics and, from the other hand, influencing the politics in the country by the means of constitutional review.

The presentation consists of 3 parts, firstly, I will discuss general competence of the Constitutional Court of Russia, secondly, I will briefly elaborate on the rules of application to the Court and provide some relevant statistical data, and in the last part of my presentation I will provide you with the information on legal positions of the Court which influenced a lot the current political domain of the country.

1. General competence of the Russian Constitutional Court

The key element to the political impartiality of a constitutional review body is a wise establishment of the competence thereof in the Constitution and the special legislation.

Upon its establishment in 1991 the Constitutional Court of the Russian Federation was regarded as an inalienable guarantor of democracy and separation of powers. The powers of the Constitutional Court enumerated in the Constitution and expanded in the Federal Constitutional Law on the Constitutional Court among other things name interpretation of the Russian Constitution as one of the most important powers of the Court. Such a power could be considered as a necessary guarantee for the preservation of democracy.

According to Article 125 of the Constitution the Constitutional Court of the Russian Federation is a judicial body of constitutional review, which independently exercises judicial power by means of constitutional judicial proceedings.

Upon application of the competent Federal bodies and the bodies of the constituent entities of the Russian Federation as well as members of both chambers of the parliament and the Supreme Court of the Russian Federation the Constitutional Court decides on conformity with the Constitution of federal laws, normative acts. The Court decides on conformity with the Constitution of agreements between bodies of state power of the Russian Federation and international treaties pending their entry into force (abstract judicial review).

More than that, the Constitutional Court on complaints about violation of constitutional rights and freedoms of citizens, verifies the constitutionality of a law that has been applied in a specific case.

The competence of the Court also comprises disputes concerning competence between Federal bodies of state power, between Federal bodies of state power and constituent entities of the Russian Federation as well as between supreme bodies of state power of constituent entities of the Russian Federation, if such competence is defined by the Constitution and there are no alternative means to settle the dispute; renders a declaratory judgment on the observance of a prescribed procedure for charging the President of the Russian Federation with high treason or with commission of other grave offense.

The legal force of the decision of the Constitutional Court on unconstitutionality cannot be overcome by the repeated adoption of the same act. Acts or their separate provisions, recognised unconstitutional, become invalid; international treaties found to be contradictory to the Constitution of the Russian Federation are not subject to enactment and application.

The decision of the Constitutional Court to recognise a law or certain provisions thereof as not in accordance with the Constitution entails a review by the competent authority (according to the general rule - by the court) of the applicants' case, that is the cases of individuals (citizens and their associations), who appealed to the Constitutional Court with a complaint about violation of their constitutional rights by the law applied by the court when considering their specific cases.

Recognition by the Constitutional Court of a law unconstitutional or revealing of its actual constitutional and legal meaning entails not only the obligation of courts to review decisions based on this law in concrete cases, but also entails inadmissibility of interpretation and application of the provisions in law enforcement practice in a constitutional and legal sense, different from the meaning that has been revealed by the Constitutional Court. Also courts cannon be guided by a law, which has previously been recognised unconstitutional in the relevant judgement of the Constitutional Court.

The abovementioned provisions lead us to some conclusions: firstly, the Constitutional Court is a court of law, not a court of facts. Secondly, decisions of the Court having a direct and supreme legal force are pronounced exclusively in the domain of constitutional judiciary. Thirdly, the Court does not interfere in the practice or competence of other constitutional bodies, thus, for example the Court cannot by the means of constitutional justice make a new law within the posers of the parliament.

2. Statistics

Within the history of the Court we had only two cases of the disputes on the competence between bodies of state power which resulted in Court's judgements. These were the political issues raised before the Constitutional Court. Nowadays the biggest part of applications to the Court comes from the citizens and their groups.

Over the last three years, the Constitutional Court received about 43 300 appeals. Among them, complaints of citizens, groups of citizens and legal entities are about 43 200, applications and 117 requests of state bodies. The greatest number of appeals concerned, in particular, issues of protection of constitutional rights and freedoms of citizens - about 11 800 (including protection of labour rights - more than 900, protection of housing rights - about 1 900, social protection - more than 300; constitutional law (organisation of public authority) - about 1300; civil law and process - about 9600; criminal law and process - more than 15 600; economy and finance - over 600 and other issues.

Over the last three years in public hearings and in written proceedings the Constitutional Court considered 105 cases. The Court adopted 102 final judgements related to the verification of the constitutionality of the provisions of labour, pension, housing legislation, legislation on social insurance, civil, civil procedural, criminal, criminal procedural legislation, budgetary, taxation rules, etc.

Consideration by the Constitutional Court of complaints of citizens and their associations, as well as appeals in connection with a specific case (requests of courts, complaints of empowered officials), is the main tool for the Court's impact on rulemaking and law enforcement in the area of regulation and protection of constitutional rights and freedoms.

From 1995 there were more than 40 requests for constitutional interpretation from the government, the legislature, the President, legislative bodies of the subjects of the Federation. As the result there were 12 Rulings of the Court. It should be noted that these power of the Court was used more widely during the first decade of the new Russia.

As examples of the decisions of the Court concerning constitutional interpretation one can call:

- Judgment of 22 April 1996 No. 10-П in the case concerning the interpretation of certain provisions of Article 107 of the Constitution of the Russian Federation [concerning the procedure of adoption of federal laws].
- Judgment of 12 April 1995 No. 2-П in the case concerning the interpretation of Articles 103 (Section 3), 105 (Sections 2 and 5), 107 (Section 3), 108 (Section 2), 117 (Section 3) and 135 (Section 2) of the Constitution of the Russian Federation [concerning the interpretation of the number of members of the Council of the Federation].
- Judgment of 11 December 1998 No. 28-П in the case concerning the interpretation of the provisions of Section 4 of Article 111 of the Constitution of the Russian Federation [concerning appointment of the Prime-Minister].

- Judgment of 11 November 1999 No. 15-П in the case concerning the interpretation of Articles 84 (Paragraph "б"), 99 (Sections 1, 2 and 4) and 109 (Section 1) of the Constitution of the Russian Federation [concerning dissolution of the State Duma].

The unique position of the Constitutional Court is proved by the power to develop legal positions, in accordance with which normative legal acts and the practice of their application should be implemented. We draw the attention of the rule maker (first of all, of course, the legislator) to the necessity of introducing changes to the current legal regulation aimed at improving the mechanisms for protecting human rights and freedoms.

3. Political questions and the Constitutional Court

It is well accepted in the legal system of Russia that the Constitutional Court stands outside the politics.

Independence of constitutional justice is guaranteed by jurisdictional appreciation, including by its legislatively established competence. The legal force of the final decision of the Constitutional Court of the Russian Federation - a decision that recognises the inconsistency of a normative act to the Constitution or reveals its constitutional meaning - is unconditional.

If such a decision implies the need to eliminate a lacuna or contradictions in the legal regulation, then the proper subjects of the legislative initiative are obliged to introduce the necessary bills that correct the revealed regulatory defects.

In the exercise of these powers, the Constitutional Court of the Russian Federation could not fail to give an interpretation of the principle of separation of powers, which lies in the foundation of an independent court. It includes several important provisions, in particular, the following:

- separation of powers implies establishment of such a system of legal guarantees, checks and balances that excludes a possibility of concentration of power within one of them, ensures independent implementation of all branches of government and at the same time - their interaction (Judgment of 18 January 1996 on the case of verification of the Charter (Fundamental Law) of the Altai Territory);
- the principle of separation of powers means not only the distribution of power between the bodies of various branches of state power, but also mutual balancing of the branches of power, the impossibility for one of them to subordinate others to themselves; this principle does not allow for the concentration of the functions of the various branches of government in one body (Judgment of 29 May 1998 on the Verification of the Law of the Republic of Komi on Civil Service).

On the one hand, the Constitutional Court, through its inherent powers, protects the Constitution, including protection of the principle of separation of powers as one of the foundations of the constitutional order. Constitutional justice becomes a guarantee of retaining

governmental branches within their competence, outlined by the Constitution on the basis of the principle of separation of powers.

On the other hand, the Constitutional Court, as a judicial body, is itself in the system of separation of powers. Constitutional justice is a part of the relationship on the exercise of state power on the basis of its division into legislative, executive and judicial. An independent and fair court, including the Constitutional Court, is possible only in the conditions of such division. With respect to courts of general jurisdiction and arbitration courts that resolve specific cases and treat disputes as law enforcement, the separation of powers and the associated system of checks and balances are built, basically, in the paradigm of "court-executive branch". In the sphere of tasks that are decided through the constitutional court, the separation of powers primarily affects the problem of "constitutional court - the legislative power".

Thus, the Constitutional Court serves as the guardian and protector of the separation of powers.

Important Cases

FREEDOM OF EXPRESSION

In 2011 the Constitutional Court considered the complaint of the citizens who challenged constitutionality of laws forbidding civil servants to give public statements, evaluations and to estimate activities of state bodies or their heads in the media, when it was not within their competence. In case of violation of this provision an employee shall be subjected to official dismissal.

As it was stressed in the media, such a ban to some extent was caused by spreading of the Internet video services, such as the YouTube. These web-pages were utilised by some officials who posted their revelatory videos describing the state of affairs in the departments where they were serving (the newspaper "Kommersant", №118, 01.07.2011). One of the applicants in this case posted a video message on the Internet, where he criticised the police department, where he was serving. Then, in an interview, he said that the abuses in the abovementioned police department, as they were mentioned in the video, are still not eliminated. On the basis of this information, the applicant was dismissed from his duty for repeated violations of the ban on expression of public opinions in respect of a state body. On June 30th, 2011 the Constitutional Court announced its Judgement on the case. The Court found that the challenged law cannot be applied automatically to any out of public criticism by a civil servant. The disputed provision of the law cannot be considered as prohibiting public expression of civil servants opinions (including in the media), in respect of the work of state bodies. The Constitutional Court elaborated a number of tests which must be regarded when evaluating the actions of a public servant:

1) the content of public statements, their social significance and motives;
2) the ratio of real or potential damage to the state or public interests to the harm, prevented as a result of the civil servant's actions;

3) whether there is a possibility for a civil servant to protect his or her rights or state or public interests, which caused the act of expression, in other legal ways; are there any other relevant circumstances.

Law enforcement decisions which provoked the appeal to the Constitutional Court in case if they were adopted on the basis of the contested law, interpreted differently than the Court's interpretation, shall be subjected to review. This decision of the Constitutional Court is of great importance for the ordinary courts, which have to move away from formalism in consideration of disputes on dismissal for public criticism of the authorities, and have to seek the objective truth. The courts need to act in such a way which shows the fine line that separates unauthorised slander and disloyalty from a legitimate expression in the lawful form.

Freedom of Assembly

As the Constitutional Court case law shows conflicts over freedom of assembly were not associated with restrictions on the expression of certain opinions as such, while processions, rallies, and demonstrations exist for expression of an opinion on a particular political issue. In other words, the difficulties in conducting meetings occurred not because of the content of the problems submitted for public discussion, but because of the technical conditions of such meetings. Opposition groups of citizens often challenge organisational modalities of the meetings. And this is a manifestation of these opposition views against the power of the government, which, in their opinion, has established such rules which are disproportionate and unreasonable. In several press publications the position of some opposition leaders, who were encouraging "instead of protesting against a specific issue" "just gather", was considered as the non-constructive one ("Literary Gazette" № 39 (6293) of 6 October 2010).

The first block of the Constitutional Court decisions concerns regulation of venues, prohibited for public gatherings. Currently the law names a number of areas where conduct of public events is prohibited. In particular these are areas around the courts. Back in 2007, the Federal Ombudsman lodged a complaint to the Constitutional Court, arguing that the boundaries of the territories directly adjacent to the buildings occupied by the courts are uncertain. When these boundaries are not specified clearly, it is difficult to comply with the ban on holding the public event, punishable with administrative liability in the form of fine.

By the decision of 17th July, 2007 the Constitutional Court rejected the complaint of the Ombudsman, but at the same time the Court gave a detailed answer to the question in the complaint. The Constitutional Court pointed out that restricted areas, adjacent to buildings and other facilities, are territories the boundaries of which are defined by decisions of regional authorities or decisions of municipalities in accordance with the legislation in the field of land management, the use of land and urban planning. The Court concluded that if there is no decision of a public authority on designation of the appropriate territory, there is no reason to consider picketing or another public event violating the prohibition of public events on the territory adjacent to the building with a special legal regime. Consequently, there is no reason

to find protestor liable. Thus, the legal uncertainty about compliance with the ban on holding public events near buildings with a special regime has been overcome.

In 2014 the Constitutional Court considered the notion of unconstitutionality of the regional law of St. Petersburg on rallies. The law prohibits holding meetings, rallies, marches and demonstrations in the Palace Square, St. Isaac's Square and the Nevsky Avenue. However, the city's public authorities designated a special place for holding public gatherings in the heart of St. Petersburg: a platform located on the Field of Mars. Moreover, there is no requirement of notification of public authorities on an event there. The applicant claimed that this regulation is groundlessness because the disputed law does not prohibit organising cultural, sport, and other celebrations on the Nevsky Avenue. The Constitutional Court decision of 22nd April 2014, rejected the complaint, stressing that non-political public events are not as controversial as public events or celebrations of a political nature. Taking into account the designation of a special place at the very city centre, the Court found that the ban on public rallies of political nature on the Nevsky Avenue cannot be considered as a violation of constitutional rights of citizens and has no objective justification. The Constitutional Court also referred to the decision of an ordinary court (the decision of the St. Petersburg City Court) which, while considering the applicant's case, said that the ban on holding meetings on the Nevsky Avenue appears objectively necessary, as this avenue is one of the main highways for public transportation and is characterised by high pedestrian congestion.

Another example of the dispute over the conduct of a public event in the territory with a special regime is the decision of the Constitutional Court from June, 2015. The complainant, an organiser of a public event, submitted to the prefecture of one of the Moscow districts a notice of intention to hold a march promoting healthy lifestyle and Vaishnavism beliefs. Deputy Prefect informed the applicant that the public event must be coordinated with agencies in charge of the relevant territory. The territory in question was the territory of the nature reserve "Sparrow Hills". In the constitutional complaint the applicant challenged the constitutionality of the law which was the legal foundation for the prefect's answer. He believed that this provision allows arbitrary decisions with regard to refuse to conform public religious missionary activities. The Constitutional Court decision of 23rd June, 2015 № 1296-O dismissed the appeal, stating that the law obliges the executive authority, in case when they have a reasonable expectation that a public event could violate legal restrictions, to warn the organiser of a public event about it. The Constitutional Court emphasised that the applicant was not denied the right to organise a procession. Since the selected place is situated within the protected territory, the applicant was asked to communicate with the agency responsible for the maintenance of the protective regime of this area about the conduct of a public event there.

REPUBLIC OF UZBEKISTAN

Sukhrov Norbekov

The text of the speech of the expert of the Constitutional Court of the Republic of Uzbekistan Norbekov Sukhrob at an international symposium and short courses for members of the Association of Asian Constitutional Courts and equivalent institutes on the theme: "Constitutional Court and Constitutionalism in Political Dynamics", October 1-5, 2018,city Yogyakarta

"Enhancing the role of the Constitutional Court of the Republic of Uzbekistan in ensuring the supremacy of the Constitution in political dynamics "

Dear Chairman!

Dear colleagues!

Ladies and gentlemen!

First of all, allow me personally and on behalf of the Constitutional Court of the Republic of Uzbekistan to thank the organizers of this international symposium from short-term courses, in particular the President of the Constitutional Court of the Republic of Indonesia, Mr. Anwar Usman, for inviting me to participate in this event.

After achieving independence, the Republic of Uzbekistan has set itself the goal of creating a humane democratic law-based state adherent to human rights, which has been legislated in the preamble of the Constitution.

The Constitution pursues such noble goals as loyalty to the ideas of human rights and state independence, respect for democracy and legality, recognition of the priority of universally recognized norms of international law, ensuring a dignified life, peace and national harmony among citizens. Of all the world values in the Constitution, the greatest is given - a person and on this basis a rational legal solution of the relationship between a citizen, society and the state was found. Democratic rights and freedoms are protected by the Constitution and laws. The state carries out its activities in the interests of the welfare of man and society. The system of state power of the Republic of Uzbekistan is based on the principle of separation of powers into legislative, executive and judicial powers. In accordance with the Constitution, these three branches of power act independently, independently of each other.

As the President of the Republic of Uzbekistan Shavkat Mirziyoyev noted in his speech at the 72nd session of the UN General Assembly, the goal of the reforms implemented today in our country is the implementation of a simple and concrete principle - human rights above all, the formation of a democratic state and a just society, which has priority .

Our goal is to strengthen the mechanisms of non-nominal and real implementation of democracy in our country. In the words of our President, **it is not the people that serve the state organs, but the state organs must serve the people.** In the implementation of these noble goals, the role and importance of our Constitution is great. Since the Republic of Uzbekistan recognizes the unconditional supremacy of the Constitution and laws of the Republic of Uzbekistan. The state, its bodies, officials, public associations, citizens act in accordance with the Constitution and laws.

In the Constitution of the Republic of Uzbekistan, along with universally recognized democratic principles, national values and a rich experience of the statehood of our people are reflected.Constitutional reform in Uzbekistan was started even before independence. Thus, Uzbekistan was the first of the Union republics to introduce the presidential form of government. This was the beginning of construction, a perfect new, independent Uzbekistan.

With the adoption of the Constitution of independent Uzbekistan on December 8, 1992, a new stage in the constitutional and legal development of the country began. In the Basic Law, many principles of a democratic state, constitutionalism, including separation of powers, judicial constitutional control were embodied.

For 25 years, the Constitution of the Republic of Uzbekistan has proved its effectiveness. It serves as a solid foundation for building a legal democratic state in the country, a strong civil society, creating a peaceful and prosperous life for our people, and finding Uzbekistan a worthy place in the international arena.

The progressive rates of development of the Republic of Uzbekistan over the past years have required the need to comprehend the ideas and principles of constitutionalism, the extent of their spread and the dynamics of implementation in national legislation.At present, the Republic of Uzbekistan is at a qualitatively new stage of development on the way to the establishment of a democratic rule-of-law state.

On the initiative of the President of the Republic of Uzbekistan Shavkat Mirziyoyev, the "Strategy of actions on five priority directions of development of the Republic of Uzbekistan in 2017-2021" was developed and adopted. This is a program of real update actions. It is aimed at implementing the constitutional principle that democracy in the Republic of Uzbekistan is based on universal principles, according to which the highest value is a person, his life, freedom, honor, dignity and other inalienable rights.

One of the five directions of the Strategy of Action is to ensure the rule of law and further reform of the judicial and legal systemAs we know, the Constitutional Court takes a special place in ensuring the supremacy of the Constitution.In accordance with the Strategy for Action in May 2017, amendments were made to the Constitution of the Republic of Uzbekistan aimed at strengthening the independence of the Constitutional Court with a view to enhancing its role in protecting human rights. Based on these amendments, a new Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" was adopted.

In accordance with it, the Constitutional Court in all its activities is called upon to ensure the supremacy of the Constitution, implementation of the constitutional principle of the priority of human rights and freedoms and other norms of the Constitution of the Republic of Uzbekistan in acts of legislative and executive power. The Constitutional Court resolves cases and issues conclusions, guided solely by the Constitution of the Republic of Uzbekistan. The new Constitutional Law enshrines a number of new provisions aimed at further expanding the powers of the Constitutional Court.

Firstly, the Law regulating the activity of the Constitutional Court was adopted as the Constitutional Law.

Secondly, the procedure for the formation of the Constitutional Court has become more democratic. Now the Constitutional Court is elected by the Senate on the proposal of the President of the Republic of Uzbekistan from among the persons recommended by the Supreme Judicial Council, including a representative from the Republic of Karakalpakstan. The Chairman of the Constitutional Court and his deputy are elected from among the judges of the Constitutional Court at its meeting. That is, now the judges themselves decide who to be the chairman of the Constitutional Court, and who his deputy.

Thirdly, the range of subjects with the right to submit questions to the Constitutional Court was expanded, including the Cabinet of Ministers and the Commissioner for Human Rights of the Oliy Majlis of the Republic of Uzbekistan (Ombudsman).

Fourth, from now on the Constitutional Court will also consider the appeal of the Supreme Court initiated by the courts on the compliance of the Constitution with normative and legal acts to be applied in a particular case.Thus, now the right to submit for consideration by the Constitutional Court issues are:

1) Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan;
2) Senate of the Oliy Majlis of the Republic of Uzbekistan;
3) the President of the Republic of Uzbekistan;
4) The Cabinet of Ministers of the Republic of Uzbekistan;
5) The Ombudsman of the Oliy Majlis of the Republic of Uzbekistan for Human Rights (Ombudsman);
6) Zhokargy Kenes of the Republic of Karakalpakstan;
7) a group of deputies - at least one fourth of the total number of deputies of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan;
8) a group of senators - at least one fourth of the total number of members of the Senate of the Oliy Majlis of the Republic of Uzbekistan;
9) The Supreme Court of the Republic of Uzbekistan;

10) The Prosecutor General of the Republic of Uzbekistan.

11) The issue for consideration of the Constitutional Court can be submitted and on the initiative of at least three judges of the Constitutional Court.

Fifthly, the new law imposes on the Constitutional Court the task of determining the constitutionality of constitutional laws, laws on ratification of international treaties - before they are signed by the President of the Republic of Uzbekistan.

In the sixth, the law imposes a new mandate on the Constitutional Court - on the results of generalizing the practice of constitutional legal proceedings, to submit annually to the chambers of the Oliy Majlis and to the President of the Republic of Uzbekistan information on the state of constitutional legality in the country.

In accordance with Article 13 of the Constitutional Law"On the Constitutional Court of the Republic of Uzbekistan" is very important implementation of the decisions of the Constitutional Court by state bodies, officials and citizens, which is the result of compliance with constitutional legality. Decisions of the Constitutional Court have the force of an act of direct action and are subject to immediate execution. They are obligatory for all bodies of state power and administration, as well as enterprises, institutions, organizations and public associations, officials and citizens.

An important factor for constitutional legality is constitutional justice, which ensures the quality of regulatory legal acts adopted. Recognition by the Constitutional Court, for example, of a law unconstitutional means the termination of this law, in essence its cancellation. Thus, constitutional justice is the highest form of constitutional control.

In accordance with Article 26 of the Constitutional Law"On the Constitutional Court of the Republic of Uzbekistan", the Constitutional Court proceeds to examine the issue no later than seven days after the receipt of the materials, if they meet the requirements. The decision on the issue under consideration is taken in the Constitutional Court not later than three months from the receipt of the relevant material. The court takes decisions only on specific issues under consideration, the constitutionality of which is questioned.

The decision of the Constitutional Court is made by open voting. A judge of the Constitutional Court has no right to abstain or not to vote. The decision is considered adopted if the majority of the judges present at the meeting voted for it. In the case when the votes are divided equally, the voice of the presiding officer is decisive. The decision of the Constitutional Court comes into force from the day of its official publication.

Thus, the improvement of legislation on the Constitutional Court of the Republic of Uzbekistan is primarily aimed at enhancing the role of the Constitutional Court in protecting human rights and freedoms and in ensuring the supremacy of the Constitution of the Republic of Uzbekistan.

ANNEX II

LIST OF PARTICIPANTS

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INTERNATIONAL SHORT COURSE 2018
2-3 October 2018
"Constitutional Court & Constitutionalism in Political Dynamics"

Members of AACC		
1	Mr. Abdul Rouf Herawi	Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan
2	Mr. Hidayatullah Habib	Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan
3	Mr. Ratana Taing	Constitutional Council of the Kingdom of Cambodia
4	Mr. Murat Assylbayev	Constitutional Council of Kazakhstan
5	Mrs. Aigul Mukusheva	Constitutional Council of Kazakhstan
6	Mr. Moonjoo Lee	Constitutional Court of Republic Korea
7	Mr. Jaehwa Noh	Constitutional Court of Republic Korea
8	Ms. Sabreena binti Bakar	Federal Court of Malaysia
9	Mr. Syahrul Sazly bin Md Sain	Federal Court of Malaysia
10	Ms. Bolortungalag Narangerel	Constitutional Court of Mongolia
11	Ms. Bilegjargal Bat-Erdene	Constitutional Court of Mongolia
12	Ms. Svetlana Karamysheva	Constitutional Court of Russian Federation
13	Ms. Srimoung Sumaporn	Constitutional Court of the Kingdom of Thailand
14	Mr. Pitaksin Sivaroot	Constitutional Court of the Kingdom of Thailand
15	Mr. Recep Kaplan	Constitutional Court of Turkey
16	Mr. Sukhrob Norbekov	Republic of Uzbekistan

Domestic Participants		
17	Diastama Anggita Ramadhan, S.H., LL.M.	University of Diponegoro
18	Andy Omara	Gadjah Mada University
19	Dr. Budiyono, S.H., M.H.	University of Lampung
20	Dr. Julistia Mustamu, S.H., M.H.	Pattimura University
21	Beni Kharisma Arrasuli, S.H., LL.M.	Andalas University
22	Dr. Mohammad Effendy, S.H., M.H.	Lambung Mangkurat University
23	Dr. Malahayati, S.H., LL.M.	Malikussaleh University
24	Prof. Dr. Syamsul Bachri, S.H., M.S.	Hassanudin University
25	Dr. Riris Ardhanariswari	Jenderal Soedirman University
26	Andriani Wahyuningtyas Novitasari, S.H., M.H.	Researcher of Constitutional Court of the Republic of Indonesia
27	Intan Permata Putri, S.H.	Researcher of Constitutional Court of the Republic of Indonesia
28	Muhammad Ramlan Aminuddin, S.H., M.H.	Legal Officer of Constitutional Court of the Republic of Indonesia
29	Rafiuddin, S.H., M.H.	Legal Officer of Constitutional Court of the Republic of Indonesia
30	Ery Satria Pamungkas, S.H.	Rapporteur Officer of Constitutional Court of the Republic of Indonesia
31	Saiful Anwar, S.H., M.H.	Rapporteur Officer of Constitutional Court of the Republic of Indonesia
32	Jefri Porkonanta Tarigan, S.H., M.H.	Legal Division of Constitutional Court of the Republic of Indonesia


ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS
AACC