THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

INTERNATIONAL SYMPOSIUM

"THE CONSTITUTIONAL COURT AND CONSTITUTIONALISM IN POLITICAL DYNAMICS"

YOGYAKARTA, INDONESIA, 1 OCTOBER 2018

PROCEEDING

PROCEEDING
The 2nd Indonesian Constitutional Court International Symposium (ICCIS) 2018

The Contitutional Court and Contitutionalism in Potlitical Dynamics

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OPENING CEREMONY

CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

REPORT BY THE SECRETARY GENERAL AT THE OPENING OF THE INTERNATIONAL SYMPOSIUM OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Yogyakarta, October 1st, 2018

1. Your Excellency, Chief Justice of the Constitutional Court of the Republic of Indonesia, Dr. Anwar Usman;
2. Your Excellency, Deputy Chief Justice of the Constitutional Court of the Republic of Indonesia, Prof. Dr. Aswanto;
3. Your Excellency, Vice President of the Constitutional Court of the Republic of Turkey, Prof. Dr. Engin Yildirim;
4. Your Excellencies, Justices and Lady Justice of the Constitutional Court of the Republic of Indonesia and other countries;
5. Your Excellency, the first Chief Justice of the Constitutional Court of the Republic of Indonesia, Prof. Dr. Jimly Asshiddiqie;
6. Your Excellency, the second Chief Justice of the Constitutional Court of the Republic of Indonesia, Prof. Dr. Moh. Mahfud MD;
7. Your Excellency, the fourth Chief Justice of the Constitutional Court of the Republic of Indonesia, Prof. Dr. Hamdan Zoelva;
8. Your Excellency, the fifth Chief Justice of the Constitutional Court of the Republic of Indonesia, Prof. Dr. Arief Hidayat;
9. Honorable Former Justices and Lady Justice of the Constitutional Court of the Republic of Indonesia;
10. Your Excellency, Governor of the Special Region of Yogyakarta, or the representing;

11. Honorable Members of Commission 3 of the House of the Representative of the Republic of Indonesia;
12. Honorable Deputy Chairman of the Corruption Eradication Commission, Laode M. Syarief, P.hd.;
13. Distinguished Public Officials from other respected state institutions;
14. Distinguished Speakers and Presenters of the International Symposium, Short Course, and Call for Papers;
15. All Participants of the International Symposium, Short Course, and Call for Papers;
16. The Honorable Guests;
17. Ladies and Gentlemen.

Assalamualaikum warahmatullahi wabarakatuh.

Good morning.

May peace and prosperity be upon us all.

Shalom, Om swastiastu, Namo Buddhaye. **Salam kebajikan.**

First of all, praise be to the Almighty for his blessings and grace that today we can attend the Indonesian Constitutional Court International Symposium (ICCIS) under the theme of "Constitutional Court and Constitutionalism in Political Dynamics".

Your Excellency Chief Justice of the Constitutional Court, distinguished ladies and gentlemen,

On this occasion, I would like to report that the Indonesian Constitutional Court International Symposium (ICCIS) will take place starting today, Monday, October 1st, 2018 until Thursday, October 4th, 2018. The series of events consist of: ***Firstly***, international symposium for Constitutional Court Justices and academics; ***Secondly***, short course for staffs of the Constitutional Courts from Asian countries who are members of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC); ***Thirdly***, call for papers for experts, academics, and researchers from various countries across the world; and ***Fourthly***, cultural program to be held in Yogyakarta.

The number of participants attending the international symposium is 200 (two hundred) people from 15 (fifteen) different countries, namely: Afghanistan, Australia, Cambodia, Colombia, France, Japan, Kazakhstan, Kyrgyzstan, Korea, Macedonia, Malaysia, Mongolia, Russia, Thailand, Turkey, and Uzbekistan. So, let us give a warm welcome to the participants from abroad with a round of applause.

Esteemed Delegates and Participants, ladies and gentlemen,

There is one well-known Javanese proverb, "*Ngelmu iku kelakone kanthi laku*," roughly meaning: One's search of knowledge will be achieved through hard work and emotional and physical journey. Therefore, we planned on holding this International Symposium in the City of Yogyakarta, which is also known as "the city of students," in the hope that there will be quality discussions that will bring new insights, knowledge, and perspectives for all of us.

The International Symposium was designed as a medium for judicial dialogues among constitutional court justices as well as academics to share experiences and learn best practices of each country. The Short Course is a forum to develop the capacity of the support staff of the constitutional courts in Asia as well as efforts to strengthen institutional relations and cooperation. Meanwhile, Call for Papers is a special forum to discuss contemporary constitutional issues and the development of the constitutional courts in various countries from an academic perspective.

The selected papers from speakers at this International Symposium will be published in our international journal, the *Constitutional Review*, the first English-language journal on constitutional law in Indonesia showcasing the best articles in Indonesia and the world. This journal has been globally-indexed by more than 15 reputable institutions, such as the Venice Commission, Max-Planck Institute, Harvard Library, and Leiden University.

In this opening event, we would also officially launch the website of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), where the Constitutional Court of the Republic of Indonesia has been trusted to host the AACC Secretariat for Planning and Coordination based in Jakarta, Indonesia.

Your Excellency Chief Justice, Ladies and Gentlemen,

This concludes my report. Next, I would like to give the floor to His Excellency Chief Justice of the Constitutional Court of the Republic of Indonesia who will officially open this International Symposium.

Thank you very much.

Wassalamu'alaikum warahmatullahi wabarakaatuh.

Om shanti shanti shanti oom.

CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

REMARKS BY THE CHIEF JUSTICE AT THE OPENING OF THE INTERNATIONAL SYMPOSIUM

Yogyakarta, October 1, 2018

Bismillahirahmanirahim,

Assalamu'alaikum Wa Rahmatullahi Wa Barakatuh,

Good morning and may the peace be with us.

- Honorable Chief Justice and Justices of Constitutional Court and Equivalent Institutions from fellow countries;
- All distinguished Chiefs of State Institutions, Justices of Constitutional Court of the Republic of Indonesia, Ministers, the Governor of Special Region of Yogyakarta, dan all State Officials;
- All distinguished ambassadors from fellow countries;
- All respected structural dan functional officials in Yogyakarta;
- Ladies and Gentlemen.

First of all, let us bring our praise to God the Almighty, because it is only by His grace we can gather in this place in a good condition for the Opening of International Symposium "The Constitutional Court and Constitutionalism in Political dynamics".

Respected Ladies and Gentlemen,

As we know and understand, the Constitutional Court or equivalent institution in various countries is a judicial institution that functionally intersects with political interest. On the other hand, it also has functions to provide protection for the citizen's constitutional rights and guard the constitution. Both are two interests that indeed often against with each other.

Political interest is the representation of the majority interest, however, the protection toward the constitutional rights cannot be neglected since it is part of protection towards citizens' constitutional rights and it safeguards the constitutionality of the state. Here lies the important role of the Constitutional Court in taking a decision if both cases against with each other.

As one of the examples, it lies under the authority of judicial review, which is to examine a law against the constitution. Law is indeed a political product made by the government along with parliament. However, if the law is clearly on the contrary to the constitution, the Constitutional Court should not be reluctant or hesitant to take a decision to revoke or deem it inconstitutional.

As we often hear, the Constitutional Court's decisions that adhere to the constitution but contradict the political dynamics and interest often receive resistance. Rejection towards decisions is often done in various kind of ways. Some of them are done by not carrying out the decisions, or taking legislative actions by reviving the canceled laws or norms that is deemed inconstitutional, or by giving political pressure and other forms of repudiation.

So are other authorities given to the Constitutional Court, such as the dissolution of political parties, the impeachment of the president, and the settlement of disputes over election results. These three authorities are so close and related to political development. Thus, it is possible that the decision taken during the exercise of such authorities, will likely be influenced by political situation and dynamics. Nevertheless, throughout his or her length of service, any judge or any institution, including the Constitutional Court, will find it difficult or even impossible to make decisions that please all parties involved, due to different background of interest.

Ladies and Gentlemen,

Political dynamics and interest phenomenon that affects Constitutional Court's position in dealing with its authorities are common occurrence in many countries. Its position, on one side, is important for its strategic authorities, however, at the same time, the Constitutional Court's position is also less powerful compared to executive and legislative branch which have broader authorities.

However, political dynamics issue and its influence towards Constitutional Courts position, and its decision, depends on the commitment to uphold the rule of law and public awareness to achieve it. In addition, it also depends on the level of independence and objectivity of the justices in deciding on certain cases. If all three run simultaneously, the existing political dynamics will not affect the Court and its decisions. Yet, it is indeed not as easy and pleasing as what is written.

In an international conference two months ago in Andorra, several countries also expressed the same concern, regarding the difficulty in keeping the independence of the Constitutional Court under the existing political dynamics. These independece issues can be divided into three forms, namely structural independence (institutional), functional (implementation of authorities, and personal independece.

Structural independence means that the Constitutional Court must not be related to or being under a structure of other branches of state power. Structural independence is also often

associated with budget independence, which should be managed and proposed independently.

Functional independence means that every constitutional justice has independence and freedom in examining and deciding each case he or she handles. He or she must not be influenced by anyone or anything whilst deciding on cases, even including the Chief Justice (or President) of the Constitutional Court, moreover by other state institutions.

Personal independence means that a constitutional justice must not have any dependency in any case, including to other person or party. The dependency may be in a form of finance, security protection for him/herself and the rest of his/her family members, as well as other matters.

In some cases, we still often hear that independence as mentioned earlier, is often not well guaranteed, thus affecting the performance of the Constitutional Court and its decisions. For example, budgeting issues of the Indonesian Constitutional Court. If the Court decisions are often in contrast with the political will of the government and the legislature, in some cases, the Constitutional Court's budget may be cut for the next period as the form of rejection toward the decision.

Another example, a security threat toward justices and their families when making the decisions. If this happens, it is not impossible for them to functionally no longer have independence and freedom in deciding a certain case or decide in accordance with the will of the party providing the threat.

Distinguished Ladies and Gentlemen,

Politics, law, and power are things that are difficult to separate. The three are interrelated and interact. However, if the commitment of a state of law has been stated in the constitution, the constituional law politics should be the ruler for the existing power and political dynamics. But if what happens is the opposite, it is feared that it will be an absolute power and tend to oppress or will be a tyranny of the majority that does not consider the constitutional rights of the minority.

For that reason, in this International Symposium, the theme "The Constitutional Court and Constitutionalism in Political dynamics" is chosen with a hope that all speakers will be able to elaborate their various experience and solutions for the establishment of the constitution, and of the concept of the rule of law, for the realization of the principle of constitutionality of the state.

This is the end of my remarks. Thank you for your all attention and apologize for all shortcomings.

Billahi Taufik wal Hidayah.

Wassalamu'alaikum Warahmatullahi Wabarakatuh.

Good evening and may the peace be with us.

SUMMARY OF DISCUSSION

SUMMARY OF DISCUSSION

THE INTERNATIONAL SYMPOSIUM ON THE CONSTITUTIONAL COURT AND CONSTITUTIONALISM IN POLITICAL DYNAMICS

Yogyakarta, Indonesia, 1 October 2018

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1. The International Symposium and Short Course on The Constitutional Court and Constitutionalism in Political Dynamics, hereinafter referred to as the Symposium, was held in Yogyakarta, Indonesia on 1-3 October 2018.

2. The Symposium was organized by the Constitutional Court of the Republic of Indonesia, and attended by Member States of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), Researches from Universities and Constitutional Courts from neighboring Countries, and Representatives from related Associations. The complete list of participants of the Symposium is attached as ANNEX II.

DAY I : 1 OCTOBER 2018

AGENDA ITEM 1 : OPENING

3. The Symposium was opened by the Report from the Secretary General of the Constitutional Court of the Republic of Indonesia, Prof. Dr. Guntur Hamzah. In the Report he conveyed that the Symposium is attended by 200 participants, from 15 Countries, and also invites researchers to submit papers related to the Constitution and the Constitutional Court. The chosen papers will be presented during the Symposium and later published in *the Constitutional Review,* the first English Journal regarding Constitutional Law created by the Constitutional Court of Indonesia.

4. The Symposium was continued with the Remarks by the Chief Justice of the Constitutional Court of the Republic of Indonesia, Dr. Anwar Usman. In the remarks, he conveyed the importance of the role of Constitutional Courts or Courts having the authority with relations to the Constitution, within States to protect Constitutional Rights of the People, even though influences of politics could not be separated from practices of the Courts. To ensure impartiality of the Court, the systems and processes within the Courts should not be hindered by exterior influences and upholding the independency of the Judicial Systems

should be ensured. It is then hoped that the present Symposium could provide a forum to share knowledge between Countries to guarantee Constitutionalism continues to be maintained. The Symposium was then officially opened by the Chief Justice of the Constitutional Court of the Republic of Indonesia, and continued by the launch of the official website for the Association of Asian Constitutional Courts and Equivalent Institutions (AACC).

AGENDA ITEM 2 : INTERNATIONAL SYMPOSIUM SESSION I

"COMPARATIVE PERSPECTIVE"

5. The First Session was opened by a presentation from the Justice of the Federal Court of Malaysia, Mrs. Tan Sri Zainun binti Ali. In Malaysia, a separate court that specialized in dealing with Constitutional matters is not established, and falls within the authority of the Federal Court of Malaysia. Constitutional questions that arise from the High Courts or other Courts are then referred to the Federal Court, as having the jurisdiction to determine such Constitutional question.
6. Even though a separate Court for Constitutional matters is not established, Malaysia regards the importance of Constitutionalism and views Constitution as the supreme source of law and for all matters regarding the government. In practice, a number of times the separation of power, which is an important point in Constitutionalism, comes into question, especially when referring to Article 121 (1) of the Federal Constitution. Though discussions and debates persist on the issue, Malaysia still persist in ensuring that Judicial System shall remain independent without interference from other branches of the Government.
7. The second presentation of the Session was delivered by the Former Chief of Justice of the Republic of Indonesia, Prof. Dr. Jimly Asshidiqie. Indonesia will be facing their Political Year in 2019, with the Presidential Elections and Elections of the Members of the People's Consultative Assembly that will be conducted in the same day. Therefore the Constitutional Court of Indonesia will have the task to ensure that all processes of the election follow the corridor of the related rule of laws. One way to reach such assurance is to uphold democracy within Indonesia. Good standard of democracy is achieved when there is clear separation of power within the Government. The Constitution of Indonesia provides the separation of power needed not only to warrant a lawful election, but also an independent judicial system.
8. Chapter IX of the Indonesian Constitution ensures the impartiality of the Judicial Power within the Government, in particular Article 24C that stipulates regarding how the Chief Justice and Deputy of the Constitutional Court of Indonesia are chosen by Justices of the Constitutional Court. Besides the separation of power between the Executive, Legislative and Judicial Branches of the Government, separation is also needed for powers dealing with matters of Businesses, Political, Civil Society, and the Media, to avoid a Totalitarianism regime.
9. The third presentation of the Session was delivered by the Secretary General of the

Constitutional Council of the Kingdom of Cambodia, Mr. Ratana Taing. Regarding the competency in interpreting the Constitution and laws adopted by the National Assembly of the Kingdom of Cambodia, it falls within the authority of the Constitutional Council. The Constitutional Council is a supreme, neutral, and independent institution created in 1993 by the Cambodian Constitution, and having the duty not only to guarantee the respect of the Constitution, also to examine and oversee electoral litigations.

10. Electoral litigations cover issues from the early stages such as the registration of the political parties at the Ministry of Interior, and not only during the Election Day. Since this type of litigation is a form of Political Litigation, a clear separation between the political influences to the Council is difficult to separate. However the Constitutional Council still maintains its independent status as a neutral institution, and no branches of power within the Government or Political Interference could hinder the work and judicial processes of the Constitutional Council.

11. During the discussions, current political trends of the Countries were raised, and questions also were raised regarding a clear separation of power within governments. Though a separation of power is clear within the Constitution, a number of political figures in Indonesia hold memberships in the Chamber of Commerce of Indonesia, therefore their involvement can shift certain economy policies. Issues arise as well in relations with the emerging government in Malaysia and the cases related to the previous administration. Cambodia also faces impacts from political figures that were banned from participating in elections and their influences with their "clean finger movement", provoking people of Cambodia not to vote during the elections.

12. The Papers presented by the Speakers in Session I are attached as **ANNEX I**

AGENDA ITEM 3: INTERNATIONAL SYMPOSIUM SESSION II

"COMPARATIVE PERSPECTIVE CONTINUED"

13. The Second Session was open with a presentation by the Vice President of the Constitutional Court of the Republic of Turkey, Mr. Engin Yildirim. Turkey, as many countries as well, view the Constitution as a body of superior binding rules, having two main functions, which are to safeguard fundamental rights and freedoms of individuals, and to map out governmental control, by setting limits to state authority. This is done by ensuring the independence of the judiciary function from legislature and the executive.

14. Maintaining the supremacy of the Constitution is crucial, therefore the Constitutional Court was established by the Government of Turkey, to uphold constitutional justice, rule of law, and protection of human rights. In Turkey, the Constitutional Court functions as well as a tool to safeguard democracy, and to increase the quality of democracy. This is achieved by upholding the independence of the judicial system, and ensuring they have high popular

legitimacy in dealing with related cases. The moral authority or legitimacy means that people accept judicial decisions even those are the ones that they oppose.

15. The Session continued with a presentation by the Former Chief Justice of the Constitutional Court of the Republic of Indonesia, Mr. Mahfud MD. Indonesia puts forward Constitutionalism as an idea and concept that the state needs to guarantee for the protection of human rights, and for that reason the government is separated into state institutions having limited authority based on their respective functions. Indonesia embraces Constitutionalism, therefore as mentioned earlier have clear separation of powers, including the Judicial Function. Judicial functions before were performed solely by the Supreme Court, however since the Indonesian political reform in 1998, the need of a separated institution arise to deal with issues of regulations, conflicts of certain state institutions and cases related to specific constitutional issues.

16. With the amendment of the Indonesian Constitution, on 13 August 2003 the Constitutional Court of Indonesia was established, having the authority to review laws against the Constitution, determining disputes over authorities of state institutions, authority in dissolution of political parties, and handling disputes with relations to the general election. Until today, the Constitutional Court of Indonesia thrives to improve the quality of law and institutions, and to provide maximum protection of human rights, as well as to ensure democracy within the Country.

17. The final presentation concluding the International Symposium was delivered by the Director General of Secretary of The Independent Commission for Overseeing the Implementation of Constitution of the Islamic Republic of Afghanistan, Dr. Hidayatullah Habib. The Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), was established in 2010 and having the function to oversee and interpret the Constitution of Afghanistan, as well as oversee various entities including the National Assembly, Government and Non-Government entities. ICOIC is the last entity to handle cases in Constitutional matters, therefore their decisions are final and binding, and transparent to the media and public.

18. After the collapse of the Taliban regime, the process of creating a new Constitution for Afghanistan started in 5 October 2002, with the appointment of the Constitutional Drafting Commission. The draft was then reviewed by another Constitutional Review Commission and participated by a number of experts and lawyers. The Constitution was finally signed by President Hamid Karzai on 26 January 2004. With Afghanistan currently rebuilding itself from war, the Government continues to strengthen its institution and ICOIC plays an important role to intensify and institutionalize a constitutional state based regime. To achieve this, ICOIC oversees the compliance actions of the President, Three Branches of the Government, and also ensure the separation of powers, including overseeing the work of other institutions as mandated by their Constitution.

19. During the discussion of the Session, questions arise regarding the regime of the Governments, especially the regime change of the Turkey government into a Presidential system, as well

as questions regarding the rebuilding efforts by the Afghanistan government after war and the role of Civil Society within the Government. On the change into the Presidential system, it is correct that it provides the President with increase authority towards the government, however Turkey is still in the period of learning on how the system change would affect the dynamics within the government in the future. For the rebuilding efforts in Afghanistan, the process continues, and the focus besides aspects of infrastructure, are also the strengthening of governmental institutions, and Civil Societies play an important role into supporting that goal.

20. The Papers presented by the Speakers in Session I are attached as **ANNEX I.**

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ANNEX I

PAPERS
INTERNATIONAL SYMPOSIUM

SESSION I

JUDGE OF THE FEDERAL COURT MALAYSIA

Tan Sri Zainun Binti ali

International Symposium: "The Constitutional Court and Constitutionalism In Political Dynamics"

Constitutionalism and the Judiciary in the face of Politics: A Malaysian Perspective

Tan Sri Zainun Ali

Judge of the Federal Court of Malaysia

Introduction

1. While constitutionalism as a legal idea is a relatively new concept on our shores, its swift uptake and warm reception in the region has been a great boon to the development of constitutional law jurisprudence within the Asian continent. Mere decades have passed, in some cases, since the first modern constitutions have been adopted but the zeal and interest of scholars and judges alike in developing finely tuned principles of constitutional law have been a boon to our growing democracies in the Asian region.

2. Yet, while the march of constitutionalism presses forward, there are occasions when, at least speaking from the Malaysian perspective, it seemed as though steps had been taken backwards, impasses encountered, or, at least, that there existed a real reluctance on the part of the judiciary to hold the other branches of government accountable under the constitution in the spirit of deference. Nevertheless, we persisted.

3. Constitutionalism implies both a sense of reverence for the Constitution and its precepts as well as cognisance of its supremacy in and over all matters of government in a way which best manifests the objects it has set out to accomplish by the means it so prescribes. As such, the Federal Constitution, in article 4(1) declares itself to be "*the supreme law of the Federation and any law passed after*

Merdeka Day (Independence Day, 31 August 1957) which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void." (note added)

4. By this, within the Malaysian jurisdiction, the Federal Constitution acknowledges and accepts no equal, subjecting Parliament, the Executive, and the Judiciary alike – being co-equal branches of government – firmly beneath its authority. Therefore, the judiciary when presiding over matters found within the Constitution should have, as its principal point of reference, the Federal Constitution. Such is its significance in the life and work of the judiciary, and of government, that it is termed the "Document of Destiny."[1]

The Constitutional Jurisdiction of the Malaysian Federal Court

5. Unlike Indonesia and various jurisdictions, Malaysia does not, as a matter of form, have a separately instituted Constitutional Court. Instead the powers usually associated with the constitutional courts are, as a matter of substance, vested in the Federal Court of Malaysia – the apex court of the jurisdiction – within its original jurisdiction, pursuant to Federal Constitution[2] and elucidated in the Courts of Judicature Act 1964.[3] Constitutional questions which arise in the High Court and the subordinate courts are to be referred to the Federal Court for determination by way of a case stated[4] and the Federal Court has the sole jurisdiction in such a reference to make a determination on a constitutional question.[5]

6. What is observed, therefore, is that there exists a fairly well-defined area within the ambit of the judiciary which deals specifically with questions regarding the constitution, and that these provisions allow matters of importance to be expedited to the apex court without requiring the two-step appeals process to be engaged

[1] Shad Saleem Faruqi, *Document of Destiny: the Constitution of the Federation of Malaysia* (Star Publications (Malaysia), 2008).
[2] Article 128(2) Federal Constitution of Malaysia.
[3] Sections 84 and 85 Courts of Judicature Act 1964.
[4] Sections 30 and 84(1) Courts of Judicature Act 1964.
[5] *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265.

before a final determination on questions of constitutional importance are dealt with.

7. What I propose to do in this paper is to address what is, to my mind, a particularly important strand within constitutionalism, namely the separation of powers and the independence of the judiciary drawing on the Malaysian experience.

The Vicissitudes of Politics

8. To grasp the whole picture of constitutionalism in the face of political action in Malaysia, it is necessary to cast the mind back to the events of 1988.

9. In 1988, the position of the judiciary as a co-equal branch of government was threatened by Parliament. Parliament passed an act[6] to amend Article 121 of the Federal Constitution of Malaysia which dealt with the recognition of the judicial powers vested in the judiciary.

10. The original text of Article 121(1) which came into existence in 1957 read that: *"The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law."* Following the unification of Malaya, Singapore, Sabah and Sarawak to form the Federation of Malaysia in 1963, the Act was amended to read:-

"... the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely –
(a) One in the States of Malaya...;
and
(b) One in the States of Sabah and Sarawak
and in such inferior courts as may be provided by federal law."

[6] Constitution (Amendment) Act 1988 (Act A704).

11. In what has been described as intended to clip the judicial power of the courts and to curtail them to the limits prescribed by the other two branches of government.[7] Renowned constitutional scholar Andrew Harding described it as "the response of a government intent on stopping its executive and legislative authority from being scrutinised or undone by judicial decisions."[8]

12. Following the act of Parliament, Article 121(1) of the Federal Constitution was amended to read:-

"(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely-

(a) one in the States of Malaya, which shall be known as the High Court in Malaya...;

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak...;

(c) (Repealed)

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."

13. What is significant in the 1988 amendment of Article 121(1) was the removal of reference to the "judicial power of the Federation" and the circumscription of the jurisdiction and powers of the High Courts and inferior courts to that which has been and would be conferred by federal law. The object of this was ostensibly to subject the judiciary to the power of the executive and the legislature to the extent of subordination. So egregious was the intent behind the amendment, that the International Commission of Jurists described it in their 2001 report as a "threat to the structural independence of the judiciary."[9]

[7] Gurdial Singh Nijar, 'The Shine on Seventh Joyo: Resurrecting Judicial Power' January [2018] Journal of the Malaysian Judiciary 192, 195.
[8] Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, 2012).
[9] *Report on Malaysia, International Commission of Jurists*, August 13, 2001.

14. It seemed as if this was how the independence of the judiciary would die, with thunderous applause. At the hands of those who wielded immense political power, constitutionalism in Malaysia appeared to be at its nadir.

Constitutionalism: The Basic Structure of the Constitution

15. Ruling on the Article 121(1) amendment, the opinion of the majority of the Federal Court in *Kok Wah Kuan v Public Prosecutor*[10] held that the doctrine of separation of powers was "not a provision of the Malaysian Constitution" with serious repercussions. This essentially repudiated the existence of the doctrine and making it possible for Parliament to be the one to decide on what powers to give to, or take away from, the judiciary.[11] The judiciary was thus ruled by Parliament and the executive, through the majority control of the legislature.

16. This might have been thought to be the death knell of the separation of powers, and by extension the very idea of constitutionalism and rule of law itself. Nonetheless, egregious though the attempt at neutering the judiciary might be, there were indicia that it might not have been efficacious as the amenders of the constitution might have thought. In both the Court of Appeal in *Koh Wah Kuan*[12] and in the sole dissent by Justice Richard Malanjum (as His Lordship then was), judicial support for the idea that the 1988 amendment was inefficacious in divesting the judicial power of the Federation away from the courts was growing.

17. While the ebb and flow of constitutionalism persisted, the clear and quintessential expression of constitutionalism was recently expressed in the Federal Court, most notably in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[13] *("Semenyih Jaya")*. In that case, the judicial power that had been given to the courts was slow but surely eroded in the context of the Land Acquisition Act 1960.[14] Previously, the judge in a land acquisition matter was the public official who was

[10] [2008] 6 MLJ 1; [2007] 6 CLJ 341.
[11] Gurdial Singh Nijar (n 7) at 196.
[12] [2007] 4 CLJ 454, CA
[13] [2017] 5 CLJ 526.
[14] Act 486.

responsible for disposing of the case with the assistance of assessors. Over time and through various amendments, section 408 of the Land Acquisition Act essentially broadened the role of the assessors to the sole adjudicators as to the amount of compensation payable. The judge was not entitled to disagree[15]. The decision of the assessors, according to the Land Acquisition Act 1960 was final and non-appealable[16].

18. The question before the Federal Court was whether the amendment to vest judicial power in the assessors rather than the judges was "valid in the face of Article 121 of the Constitution that contemplates that judicial power of the courts should be exercised by judges only." The unanimous bench of the Federal Court in *Semenyih Jaya* ruled that the Federal Court Bench in *Kok Wah Kuan* had taken an unduly restrictive and narrow approach to the interpretation of Article 121(1), saying:

"Whilst it is correct to say that the powers of the High Courts to adjudicate legal disputes are those which have been conferred by Federal laws, in our view the legal implication of Article 121(1) extends well beyond that. In this connection, there is general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity..."

19. According to the Federal Court in *Semenyih Jaya*, it was not open for the basic structure of the Constitution, which consisted two sacrosanct principles: firstly, the doctrine of separation of powers; and secondly, the independence of the judiciary.[17] Such a claim to sovereignty by Parliament, being merely one of three co-equal branches, over the judiciary was diametrically opposed to the basic structure of the Constitution. Consequently, being a law passed post-Merdeka Day which was inconsistent with the Federal Constitution, it was rendered void by Article 4(1) of the same.

[15] Land Acquisition Act [Act 486], s 408[1],[2].
[16] Land Acquisition Act [Act 486], s 408[3].
[17] Richard Malanjum FCJ's dissent in *Kok Wah Kuan* [2008] MLJ MLJ 1; [2007] 6 CLJ 341. See also *Semenyih Jaya* (n 13) at [88]–[90].

20. The doctrine of the basic structure of the constitution was upheld in a different legal context in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak and other appeals ("Indira Gandhi Mutho")*.[18] Once again, the case dealt with Article 121 of the Federal Constitution, but with the inclusion of Article 121(1A) on the conflict of laws between the civil and Syariah jurisdictions.

21. Article 121(1A) reads: *"The courts referred to in Clause (1)* [namely the two High Courts of co-ordinate jurisdiction and status] *shall have no jurisdiction in respect of any matter within a jurisdiction of the Syariah Courts."*

22. The *Indira Gandhi Mutho* case concerned the unilateral conversion by a parent of his children from Hinduism to Islam. This was objected to by the Hindu mother, being the appellant in the Federal Court. Her contention was that the issuance of her children's certificates of conversion to Islam by the Registrar of Muallafs was ultra vires and illegal as it, inter alia, contravened provisions of the very state-Syariah law[19] which governed them.[20] In the Court of Appeal below, it was held that the High Court had no power to question the decision of the Registrar of Muallafs or to judicially review the Registrar's compliance with the state-Syariah statutory requirements.

23. The unanimous bench of the Federal Court in *Indira Gandhi Mutho* held that the High Courts possessed jurisdiction granted by the Courts of Judicature Act to exercise supervisory powers which included the review of administrative decisions by authorities[21]. By contrast, the Syariah Courts, being inferior courts, were not conferred with the same power.

24. Crucially, the power of judicial review was inherent in the basic structure of the Constitution and was essential to the constitutional role of the courts. As such, it

[18] [2018] 3 CLJ 145.
[19] Namely, sections 96 and 106(b) of the Administration of the Religion of Islam (Perak) Enactment 2004.
[20] It was also alleged that it contravened ss5 and 11 of the Guardianship and Infants Act 1961, and Articles 12(4) and Article 8(2), read together, of the Federal Constitution of Malaysia.
[21] Courts of Judicature Act 1964 (Act 91), s 25(2) and Schedule, Para 1.

could not be abrogated or altered by Parliament, even by way of an otherwise procedurally legitimate constitutional amendment.[22]

25. The significance of the exclusive vesting of judicial power in the judiciary and the vital role of judicial review in the basic structure of the constitution meant ipso facto that the jurisdiction of the High Courts could not be truncated or infringed, much less removed altogether. Hence, even if the governing statute provides that the administrative decision of a non-judicial body is final, the aggrieved party could not be barred from invoking the supervisory jurisdiction of the court. The finality clause would merely bar an appeal to be filed by the aggrieved party within the context of the statute.[23]

26. Secondly, this also meant that judicial power could not be conferred on any other body whose members did not enjoy the same level of constitutional protection as civil court judges did to ensure their independence. Parliament, it is said, "could not declare formally that a new court is a superior court or shares the rank of being at the apex of the judicial hierarchy; the test is substantive requiring an examination of the composition of powers of the new court."[24]

27. As was eloquently described by Supreme Court Justice Abdoolcader in *Public Prosecutor v Dato' Yap Peng*[25]:

"... any other view would ex necessitate rei result in relegating the provisions of Article 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will."

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[22] Indira Gandhi Mutho (n 18) at [42].
[23] *Ibid* at [45].
[24] Semenyih Jaya (n 13) citing Thio Li-Ann, *A Treatise on Singapore Constitutional Law* [Singapore Academy Publishing, 2012] at 10.054.
[25] [1987] 2 MLJ 311.

Thus denying the attempt of incursion into the judicial power of the Federation through the divestment of judicial powers away from the High Court and into Syariah Courts.

Constitutionalism and Judicial Activism

28. In many of the circumstances described above, it is more than arguable that the political influences of the other branches of government were pushing a stronger view, or some might even say sovereignty or supremacy, of the executive-legislature bloc that is prevalent in jurisdictions like Malaysia which are built on the Westminster Model.

29. What is also clear is the role of judicial activism in carrying out the judiciary's constitutional duty of upholding the Federal Constitution and the basic structure with underpins a functioning democracy and the very idea of the rule of law itself.

30. As such, the return to secure constitutional foundations as laid out in *Ah Tian v Government of Malaysia*[25] where Lord President Suffian made clear that *"the doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislation in Malaysia is limited by the Constitution, and they cannot make any law they please"* is made possible by judicial activism as a legitimate exercise of the court's judicial function, particularly, in the cases that have been laid out above, against any attempt at a direct attack at the lifeblood of the judiciary itself.

Conclusion

31. There is, however, no guarantee that constitutionalism as is manifested in the independence of the judiciary and the separation of powers will continue to stand the test of time. At least, there is no guarantee that it will if the judiciary is not vigilant in defending the very fundamental structure of the Constitution itself. Only

[25] [1976] 2 MLJ 112.

time will tell if the vicissitudes of political interference, the ambitions of a government, or the curtailing of a "misbehaving" judiciary in the eyes of its would-be executive overlords will once again threaten the fabric of democracy, the rule of law, and the Constitution.

32. For now, the Constitution, though seemingly wounded in 1988, has prevailed, and has been seen to be vindicated through the ingenuity, activism, and zeal of its judiciary. We would do well not to forget the past, lest we be destined to repeat it.[27] However, we should not take too somber a tone, since the winds of change have brought about a sincere zeitgeist of constitutionalism. In that there is much cause for revelling and repose in the hope that constitutionalism will mature and continue to bloom.

33. It is said that *"a poem is never finished; it's always an accident that puts a stop to it – ie gives it to the public."*[28] So too must a paper espousing the beauty, the nobility, and the integrity of constitutionalism as the most sacrosanct of ideals come to a necessarily abrupt and unsatisfying end. There is much more to be said and indeed much more that should be said but time permits us not the opportunity to do so. Notwithstanding this, it is hoped this brief paper on the fruits of our deliberations about constitutionalism and the lessons of our constitutional journey in Malaysia will be of some value to the broader community of constitutional jurists and judges across this august fraternity of jurisdictions.

[27] George Santayana, *The Life of Reason: The Phases of Human Progress*, Vol 1, Reason in Common Sense (first published 1905, Project Gutenberg) ((paraphrased).
[28] Paul Valéry, as attributed in Susan Ratcliffe, *Concise Oxford Dictionary of Quotations* [Oxford University Press, 2011], 385.

FORMER CHIEF JUSTICE OF
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THE POLITICAL DYNAMICS BEHIND CONSTITUTIONAL COURT AND CONSTITUTIONALISM

By: Prof. Dr. Jimly Asshiddiqie, SH.[1]

INTRODUCTION

Ladies and gentlemen, and distinguished guests. Thanks to the organizer, the Indonesian Constitutional Court and the International Association of Constitutional Courts that lend me the honour to take part as a speaker in this important gathering. The topics of the conference is very important, that is "Constitutional Court and Constitutionalism in the Political Dynamics". As I have mentioned in my keynote speech for the Colombo Conference on Comparative Constitutionalism in South Asia, in the last July of 2018, we live in Asia as the most diverse, most populated societies on the planet. Common sense, logic, and political theories all suggest that the institution of democracy is the best system of government to build general prosperity and social justice for all, while guarding the liberties of every individual citizen. However, when we look across the region, we see an interesting collection of countries demonstrating varieties of degrees of democratic development and institutionalization everywhere.

THE DYNAMIC AGENDA OF DEMOCRACY

There are an estimated 4.4 billion people or approximately 59.63% of the world's population living in the 48 countries of Asia[2]. Two of them, India and Indonesia, represent the largest and the third largest democratic countries in the world[3]. All religions of the world grew up in Asia. Judaism, Christianity and Islam grew from West Asia. Buddhism and Hinduism grew from South-Asia, while Taoism, Confucianism and Shintoism grew from East Asia. Notably, almost all the great religions, can be found in Indonesia, and each have influenced very strongly the cultures of Indonesian societies throughout the history. Until now the majority of its population embrace Islam, and at this point in history, Indonesia is the country with the largest Muslim population in the world. (Muslims represent 87% of Indonesia's current population in 2018 of 266,927,712 persons)[4].

In 2016, the Economist Intelligence Unit (EIU) produced a Democracy Index that measured

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2 According to the US Census Bureau, world population estimate in 2016, per 23rd of August, is approximately 7,346,235,000.

3 The second largest democracy in term of its population is the United States of America, approximately 327 million people according to usapopulation2018.com.

4 Republic of Indonesia, National Board of Statistics, 2017.

the level of democracy on a ten-point scale from 0 (authoritarian) to 10 (full democracy).[5] The average democracy score for Asia was 5.05 in 2006, and by 2016 this had increased to 5.41, while the global average for both years stood at 5.52. Thus, while the world score stayed stagnant, Asia's score indicated forward movement. Net democratic progress surpassed all other regions of the globe. Solid gains in scores were recorded in South Asia (up 0.62 points) and Southeast Asia (up 0.50 points), while East Asia experienced a stagnation (up 0.02 points). Indonesia, the largest democracy in Southeast Asia, has recorded significant achievement and enjoys the results of its reform era in the last two decades. In 2016, Indonesia was ranked 48th in the world, while India was ranked 32nd.

However, in the 2017 Democracy Index, the EIU reported that the Asia's two largest emerging democracies suffered significant declines in their scores. Citing a rise in "conservative religious ideologies" the EIU dropped India to 42nd from the 32nd, and placed Indonesia at 68th from 48th. Throughout 2017, India experienced a series of mob attacks on marginalized groups. According to the EIU, the strengthening of right-wing Hindu groups led to a rise in vigilantism and violence against minority communities as well as other dissenting voices[6].

In the case of Indonesia, the EIU's judgement was based on last year's gubernatorial campaign in Jakarta, the country's capital and most important city, which was marred by the arrest of the non-Muslim incumbent governor Basuki Tjahaja Purnama. The blunt talking reformist governor, known as "Ahok" was charged and found guilty under Indonesia's stringent blasphemy law, which has often been used to limit freedom of expression. There was a significant regress of the scores in 2017, just because of Jakarta governor election in Indonesia and vigilante cases in India.

However, the decline in scores reflects the conventional approach or methodology used to measure levels of democracy. That approach relies too much on output-oriented judgements to measure democratization when we ought to look at the process of democratization within the socio-cultural context of the respective societies. If we do that, I believe that we then see a clearer and more encouraging path to democratic transformation than the relatively minor swings in annual scores.

In the case of Indonesia, the 1945 Constitution, first applied from 18 August 1945 to December 1949 and then re-applied since July 1959 and with its first amendment in 1999, the idea of democracy or popular sovereignty which was followed did not yet guarantee protection for human rights. Since the Second Amendment in 2000, all international human rights instruments have been adopted materially in Article 28A to 28J of the 1945 Constitution. Furthermore, the substance of the Third and Fourth Amendments in 2001 and 2002 respectively cover fundamental changes that enabled the founding of the system of modern Indonesian constitutional democracy. The problem now is a matter of implementation which contains within it various socio-economic and socio-cultural aspects that live on in society. Because of that, the process of transformation towards democracy Indonesia requires quite a lengthy and sequenced period of time until all the constitutional values and norms upon which there is agreement can truly be reflected in the

5 Democracy Index 2016, https://www.eiu.com.

6 Democracy Index 2017, https://www.eiu.com.

practices of a constitutional culture that lives to the core of society. At the same time too, the transplanting of constitutional principles or "cultural borrowing" of the values of constitutional democracy from outside the experiential realities of a society requires a process of cultural transformation that is certain to be dynamic along the path to creating a genuine democratic constitutional culture[7]. Therefore, today, democratic civilization cannot only be seen as a final score without considering that it is a process of civilizational transformation. Indonesia and India are the largest and also most pluralistic countries in South Asia and Southeast Asia and almost in every aspect of social and public life. These two countries like other countries where we are coming from share similar experiences in the practices of democracy and constitutionalism, moving from being western colonized societies to future independent constitutional democratic countries, while promoting each's own respective political cultural traditions from past history. To achieve this the transformation to become a democracy must be seen as a complex process, especially in this era with so many changes thus bringing about a need to re-evaluate all old theories and metrics, because not all of them can be applied in evaluating the processes of change in the civilization of democracy in this age and for the future.

DEMOCRATIC CONSTITUTIONALISM IN INDONESIA

Since its independence in 1945, Indonesia has adopted the idea of democracy and constitutionalism. The ideas have been explicitly formulated in 5 constitutions applied since the independence, i.e. (i) the 1945 Constitution, (ii) the Constitution of Federal Republic of Indonesia of 1949, (iii) the Provisional Constitution of 1950, (iv) the 1945 Constitution with its Explanation enacted in 1959. This final Constitution has been improved through four rounds of amendments in 1999, 2000, 2001 and 2002 and the adoption of some 174 new provision while retaining 25 of the original provisions of the 1945 Constitution (300% new), and by continuing to use the name of the 1945 Constitution, now known as the Constitution State of the Republic of Indonesia of Year 1945. I refer to these changes as an incremental big-bang changes that affirm the principle of continuity and change. Almost all the new ideas transplanted from outside and which have now reached the stage of implementation cannot but be expected to face constitutional cultural obstacles in being applied in practice.

The quality of Indonesian democracy in its full sense has just been adopted following the first four amendments in 1999, 2000, 2001, and 2002. The new constitutional rules comprise almost everything needed by Indonesia to be a modern constitutional democratic country, such as the promotion and protection of human rights, applying the principles of checks and balances in power relations between and among state organs or functions, upholding the principles of an independence of judiciary, etc. The principle of checks and balances have been affirmed by transforming the old quasi-presidential system into a pure presidential system and leaving behind the system in which there was a supreme state institution to become one where that is complemented with a constitutional court as the senior most and final interpreter of the Constitution within a constitutional democracy. In short, the 1945 Constitution has been transformed significantly even though this process unfolded over a four years period. This was an example of incremental change that was fundamental in scale or an incremental big bang of

7 Jimly Asshiddiqie, The Constitution of Cultures and Constitutional Cultures, Malang: Intrans, 2017.

constitutional change that ensured balances were retained amid a process of substantial change within a relatively tight time frame – continuity and big bang change.

But, still, the transformation process in the post-reform era, in the last 20 years since 2002, requires further consolidation, more improvement, and further institutionalization. Implementing the 1945 Constitution that has 300% changed provisions requires time too because these changes have not been accompanied fully by a culture of democracy in moving forward with the world of normative ideas that have been incorporated into the written constitution. The process of institutionalizing democracy calls for further development in terms of effectiveness and also in terms of developing contemporary leadership role models in the arts of exercising state power on a day to day basis. This requires transformational leadership that is effective and active in being role models in this era of great upheavel and change, a none too easy task to achieve, considering the needs to respond practically and even pragmatically to short term matters of urgency in an era of transition and consolidation over these past 20 years.

In this process of transformation, the 1945 Constitution has also introduced a system of "rule of ethics" in addition to the "rule of law". The transformation should be guided by the rules of the Constitution, the fair enforcement of the law and the Constitution by an independent judiciary (which itself needs to reform to be more respected and respectable) consisting of the Supreme Court and Constitutional Court; and at the same time, the role of public ethics infrastructure and the rule of ethics in supporting the rule of law are also introduced in the new amendments. Therefore, the Constitution can be treated as the supreme source of law (constitutional law) as well as the supreme source of ethics (constitutional ethics) supporting, guiding, and guarding the constitutional democracy of Indonesia.

The constitutional reform agenda (from 1999-2002) following the fall, after 32 years, of the New Order era under General Suharto's presidency in 1998, has changed Indonesia very fundamentally, transforming it from an authoritarian regime to a modern constitutional democracy. The first direct election of the President and Vice President was conducted successfully in 2004, while the fourth direct presidential elections will be conducted next year in 2019 in a simultenous scheduled election with national and local parliamentary elections. In the long run, the current multi-party system will transform and consolidate the grouping of political parties into between two and four coalitions that will make the Indonesian political system more stable and sustainable into the future. Under the leadership of the three presidents, i.e. B.J. Habibie, Abdurrahman Wahid, and Megawati Soekarnoputri, during the transitional period (1998-2004), Indonesia was successful in ending its long authoritarian systems and moving toward democracy in a genuine sense. The management of reform started from the first day that President B.J. Habibie took over the presidency from President Soeharto. Since then, there have been so many changes enacted, among others:

1. Political relaxation:[8]

    1.1. Lifting the laws restricting freedom of expression, upholding freedom of the press, and freedom of peaceful association.

8 Sergio Bitar and Abraham F. Lowenthal, Putting Principles into Practice: Democratic Transitions (Conversation with World Leaders), Johns Hopkins University Press, Baltimore, 2015.

1.2. Releasing and freeing about 150 political prisons, including all incarcerated communists.

2. Political Parties and Elections:

2.1. Transforming GOLKAR, the quasi political party created and used by Soeharto's New Order regime for power consolidation, into a normal political party by delinking it from the bureaucracy and the military and police; and providing for an open and fair multi-party system in the Constitution.

2.2. Accelerating the next scheduled parliamentary elections from 2002 to 1999 with the appointment by the Peoples' Assembly (MPR) of the new president brought forward from 2003 to 1999 as well. The adoption of a direct presidential election system in the Constitution through the third and the fourth Constitutional Amendments and then conducting the first direct presidential elections in 2004.

2.3. Establishment of an independent General Elections Commission, Electoral Supervisory Board, and the Honorary Council of Election Officials, plus the Constitutional Court as four integrated but independent administrative and institutional systems to guarantee electoral democracy.

3. Restructuring constitutional state organs:

3.1. Creating a three-chamber-legislative system: the House of Representatives (DPR), the Council of Regional Representatives (DPD), and the People's Assembly (MPR).

3.2. Establishment of a Constitutional Court.

3.3. Strengthening the independence of the Supreme Court by integrating full administration of justice under the authority of the Supreme Court.

3.4. Establishment of a Judicial Commission.

3.5. Strengthening the powers of the National Audit Body (BPK).

3.6. Separation of the police from the military as two independent constitutional agencies.

3.7. Empowerment of the independent Central Bank and the establishment of the Financial Services Authority (OJK).

4. Distribution of power to various independent agencies and Civil Services Reform:

4.1. Ensuring the bureaucracy is independent and secured from political intereference.

4.2. Establishment of an Ombudsman;

4.3. Establishment of an Anti-Corruption Commission (KPK).

4.4. Empowering the National Commission of Human Rights.

4.5. Establishment of an independent National Commission of Antitrust and Anti Monopoly (KPPU), and other independent agencies, such as National Commission of Public Information (KIP), National Commission of Broadcasting (KPI), etc. authorized independently with mixed functions as administrator, regulator, and adjudicator for cases of violations of the respective laws related to the protection of fair operation of and competition of markets within the commercial sector, the protection of freedom of public information, the watchdog for the neutrality of electronic media, and so forth.

5. Decentralization and local autonomy

5.1. Enacting laws to affirm wide ranging autonomy and decentralization in the provinces, cities and counties all over Indonesia.

5.2. Enshrining the constitutional status of special autonomous regions currently covering four provinces (and later expanded to become five provinces, i.e.: Aceh, Jakarta, Yogyakarta, Papua, and West Papua).

5.3. Application of direct election for governors of provinces, chiefs of counties, and mayors of cities by voters all over Indonesia.

5.4. Application of the direct election of heads of villages all over Indonesia, ensuring that sovereign authority rests with voters in the cities as well as in the villages. Every five years, each and every eligible voter living in the towns and cities have their votes for the elections of president, governor, and city major; whereas those who are living in the villages, have their votes for the elections of president, governor, county chief and the head of their village.

FUTURE THREATS AND CHALLENGES

Despite all these stories of progress of which we are grateful, we must also note several challenges and even new threats to the principles of democracy, both in its practice as well as in its theory. In this era of disruption, we cannot rely merely on fixed theories inherited from earlier era that are not necessarily relevant in addressing the problems of humanity in this age and into the future. Among others there are six issues that deserve serious attention, namely; (i) the emergence of a disbelief in democracy guaranteeing the welfare of the people; (ii) the development of radical religious interpretations that are anti-democratic in nature; (iii) the diminution of the quality of democracy in various countries like the USA and Russia; (iv) the development of a symptom of universalization of constitutional values in the midst of the realities of constitutional culture in every individual country; (v) the emergence of a new phenomenon that I call it "deinstitutionalization of politics or postmodern individualization of politics"; and (vi) the emergence of the need to prevent conflicts of interest between sources of new power, that is the state, civil society, the market and the media;

1.1. The economic success of China without democracy

The first problem that has given rise to a disbelief in democracy relates to the increase in the standards of welfare of a community that is not always in parallel with applying a system of democracy. The Peoples' Republic of China is a country that still applies a belief in communism but whose economic development has been very successful even though it is without democracy. Moreover, the PRC has recently amended its Constitution to permit a Chinese President to serve for life. As such the state administration of the PRC could well continue to develop to become a nation that is ever stronger and stable, or at least tranquil, into the long term.

The emergence of China, which while still applying communism, but which has been successful in developing its economy, gives rise to a wide-ranging conclusion that economic welfare can be achieved without democracy. Because of that, many people are convinced that the welfare of the people should be prioritized at the expense of a free democracy. The most moderate among these people hold to the view that the conditions to develop a democracy is met when the level of welfare or per capita incomes of the people has already reached a certain level as a basis and social model for the development of a quality democracy. With these developments, promoting the idea and principles of democracy confronts real obstacles in facing the realities of communities that place a higher priority on their daily needs and welfare.

This matter also holds relevance in Indonesia, in Malaysia and in many other countries. The economic influence of China with its expansive networks through its Chinese diapora throughout Asia is very strong, including in Indonesia. Some who used to be involved in communism but in general now are active in business and constitute most of the major business people in Indonesia. Even though they only represent 5% of the Indonesian population they command 95% of the Indonesian economy. In addition to that Chinese offshore investment practices are accompanied by the mobilization of Chinese labor to follow investment activities to various nations including to Malaysia and Indonesia. These issues create larger problems in the process of building social integration, and the institutionalization of inclusive politics in practicing constitutional democracy in Indonesia.

1.2. Emergence of Radicalism, Ideology of a Caliphate, and the Relationship between State and Religion

The second problem is that the seemingly endless colonialization of the people of Palestine and assorted conflicts in the Middle East is disseminating an ideology of hatred, enmity and an ideology of war from the Middle East to all Muslim majority nations by giving birth to assorted radical anti-democratic movements with democracy being perceived as somehow "Western" and giving succour to an ideology promoting an Islamic Caliphate and other radical interpretations. In addition to that much of the agenda of democratization in the Middle East which was seen initially and enthusiastically as the "Arab Spring" has not been very successful, especially as seen in Egypt and elsewhere. Tunisia remains the brightest beacon to arise from the Arab Spring.

These issues also resonate in dealing with the very plural political cultures of Indonesia, in which politics are not yet institutionalized on a rational basis so that differences of primordial sentiment (ethnicity, race, religion and social class) are very open to be exploited for political

gain for short term electoral benefits. This is a matter that is of great concern to people in terms of stoking inter-ethnic conflict or even inter-religious conflict as well as the problem of the relationship between religion and the state.

On the political "culture" of playing with primordial sentiments and negative campaigning for elections, these are not of course specific to Indonesia. Such things often still occur even in the USA: when Obama first sought election to the presidency, his opponents disseminated photos of him dressed in a Yasir Arafat styled kaftan from Palestine. This photo of Obama was of course intended to associate Obama with Muslims, with Palestine and even to terrorists. Even though this negative campaign did not succeed in thwarting Obama's election, but it nonetheless demonstrated that such things could still occur in American presidential elections in the 21st Century. As a result, should such campaigns be deployed in Indonesia or India we should see them with some sense of proportionality as part of the process of transforming towards a more mature form of democracy in each nation that each have their own specific problems.

Regarding the relationship between religion and the state, it should be noted that Indonesia follows five philosophical principles called *Pancasila*, which places Belief in One Supreme God as its first principle. Furthermore Article 29 of the Indonesian constitution, states that the state is based on the belief in One Supreme God. But the notion of the One Supreme God is universal, that is God of and for all people who believe in the Almighty according to his/her own respective beliefs or religions. No one may or can compel or force any one to follow any religion in which he/she does not believe. The government may not interfere with freedom of belief and religion. But the Indonesian government may work in fraternal cooperative relationships with any religious organization for the purpose of promoting the quality of attitudes and behaviors of all citizens in accordance with the Constitution and the state's law. Indeed, the government is considered to have its own duty to assist and help anyone to believe in his/her God or his/her respective religion. The government has also the obligation to empower any religions and treat all religious organizations as its partners in developing the human quality of the whole people, especially with regards to the ethical aspects of public life or the spiritual and moral values shared in social life.

This fraternal relationship practiced in Indonesia is of course very different from what is applied in Europe and the United States of America. Under communist regimes, especially in Eastern Europe in the past time, the relationship between state and religion was very negative. Under these communist regimes, God and religion were considered detrimental, even subversive. Meanwhile most Western European countries had experienced a very long history of hostile relations between the state and religion. A new and different development has been seen in the United States of America since the 19th century, namely that the relationship between the two is friendlier than that which unfolded in Europe. From Europe to America, the relationship between the state and religion moved progressively from a hostile relationship to a friendly one. In Indonesia, the relation is not only friendly but also fraternal. The Indonesian government works in close cooperation with any religious organization for the purpose of promoting the quality of attitudes and behaviors of all citizens in accordance with the Constitution and the state's law.

Is there any possibility to adopt religious law to become the state's law through legislation? Why not? All religions may be treated as rich sources of virtues and noble values to be adopted to become the contents of any needed law and regulation to uphold and advance justice and the good life. In this regard it is like any universal values from International Instruments of Human Rights or best practices of constitutional values from any other countries in the world that can be adopted or transplanted into the constitutional rules in our respective countries. So far as it is not contrary to the highest agreement or highest national consensus written in the constitution, the Islamic syari'ah law derived from the teachings of any fiqh (the science of Islamic law) schools of thought may be treated scientifically as legal and legitimate scientific sources of law in Indonesia. The same treatment is also applied to the holy books of other religions, such as the Bible, Veda, etc. Even in the faculty of law, the students are accustomed with so many good words which are popular among Christian churches, or other religions, such as Hinduism, Buddhism, and Confucianism.

1.3. The Diminution of Quality of Democracy in Various Countries

Since the dawn of the 21st century there has been a re-emergence of hatred based on ethnic, racial and religious differences in the politics of Western nations. Even so certainly in Western Europe to date no elections have been won by the haters and their political parties. The election of Donald Trump as President of the USA is a new phenomenon. His antipathy towards Islam and Muslims and non-White immigrants has been shown bluntly by him on numerous occasions. According to an EIU report, the USA scored of 7.98 out of a maximum of 10 in 2016 and was always considered as a full democracy. This figure dropped in 2017 into the status of a flawed democracy for the first time in the history of this data series. The change reflected a sharp fall in popular confidence in the functioning of public institutions, predated and aided by the election of Donald Trump as President. Starting from the year 2017, USA is now among other flawed democracies, placing it behind 19 full democracies, such as Norway, Ireland, the UK, Spain, etc. Now, the USA is ranked 21st among other flawed democracies, such as South Korea, India, and Indonesia, Chile, Botswana, and Mexico.

There are two important things that the world learned from the example of the USA. First, this is the first time that a big and influential businessman has been elected President of the USA and certainly the first time that anyone has been elected President in 2016 who has never served the nation in any way shape or form, for example from the bureaucracy, the military, the judiciary, the legislature or any other elected office. Second, President Donald Trump is considered by historian to be the most racist leader since Woodrow Wilson (1913-1921). This is also the first time in the 21st century, 153 years after the abolition of slavery (1863) and 52 years after the passage of the Civil Rights Act (1964), a racial, ethnic, and religious hater has won major support from the American people to be the President of the most influential country in the world. When these developments are combined with the regressing phenomena of democracy in the world, the position of those who do not believe in democratic system of government become emboldened. This can also be seen in Indonesia today. They use this democratic regression and the bad examples in contemporary American democracy as a rationale for rejecting any idea of democracy.

On the other hand, there is a new trend in Russia and China to strengthen leadership by removing limits for terms in office. President Vladimir Putih has been re-elected for his fourth term, making him the longest ruler of Russia since Stalin led the old USSR. President Xi Jinping has succeeded in entrenching his position by a constitutional amendment that makes him eligible to be a president for life. These are all the new signs that in a long run, Russia and China will be more stable and even stronger under a strong and effective leadership, (or at least for as long as the health of these paramount leaders remain). In other country, we can see example of formal democracy also applied under Prime Minister Hun Sen of Cambodia. He has been until now the longest Prime Minister in power, since 1993, and just won the previous election for more than 80% votes. Based on the current constitutional rules, PM Hun Sen has the opportunity to continue to be Cambodian Prime Minister for his life, although it would be reconfirmed in every five years pursuant to the constitution. In its formal sense, the Cambodian government system is parliamentary, but its constitution set forth the rule for the election for every five years, that make it more presidential in nature than a true parliamentary system of government, by securing a fixed term of stable cabinet for every five years. The practices in the above countries will create more confidence for those rejecting democracy to grow in many parts of the world.

1.4. Universalization of constitutional values and the problem of constitutional cultures

The fourth issue that I believe to be very important in this era is the beginning of the emergence of an awareness of the problem of local political culture versus the institutionalization of new values brought about by the transplanting of constitutional systems from the wider world that often inhibits the process of institutionalizing the politics of constitutional democracy in practice. The problem of the universalization of constitutional values is a reality experienced in almost all nations, including in Indonesia. Almost the majority of the substances contained and set forth in the text of the Constitution comes from foreign ideas and experiences. Then the problem is in the implementation of the constitutional rules and the institutionalization of power structure and functions of the state that were formed in practice in many ways not in conformity with the realities of the political culture and the constitutional culture that lives at the heart of society and in the practices of the conduct of state power.

If the ideas of the constitutional norms being institutionalized in practice come from the wider world while the cultural traditions coming from the ancestors from time immorial are not compatible with each other then there will surely emerge a discrepancy between modern institutions that have been built upon the cultural traditions that live on within society. This reality will in turn complicate or inhibit the emergence of these constitutional values in their practical application. For this the study of *constitutional cultures* is very important in closing the intellectual gap between the political and cultural traditions, which have been handed down from the history of every community, and modern constitutional ideas and principles that have been adopted from the wider world and institutionalized in the practice of constitutional democracy in each nation. In essence there is a need to prevent there being a widening discrepancy between political institutions and traditional cultures that can cause modern ideas of constitutional democracy and democratic rule of law (*democratische rechtsstaat*) to be merely systems on paper.

Because of that, the values adopted from outside and the values developed from one's own culture must find points of meeting that are universal. These universal values we can find from our own traditions as well as from outside, so that the adoption of a constitutional provision from outside is no longer seen as something foreign because within it are also to be found one's own cultural traditions. In doing so our mixing with values that originate from outside do not have to be based upon pragmatic attitudes, to merely photocopy or be in some form of uncritical constitutional transplantation, except for some inferiority complex to oppose anything that is foreign and comes from another country. Every country must have its own *constitutional identity* as a constitutional state.

1.5. Deinstitutionalization of Politics: Postmodern Individualization of Politics

The fifth, in this all-disruptive age of social media there is a new tendency that impedes the institutionalization of politics, namely the tendency towards an individualization of politics that is causing a deinstitutionalization of politics. There are three phenomena emerging in Indonesia recently, i.e. (i) the phenomenon of *crowd politics* that ought to evolve to become organized politics; (ii) there is also an emerging habit of political office holders to communicate personally and directly on social media and in doing so bypassing respective institutional agencies, and (iii) the phenomenon of exploiting law enforcement by police as a pressure and support tool for the expression of hatred among citizens or groups to denigrate each other. The consequence of this is that the process of public communication is filled with an atmosphere of hatred and enmity that tends to be directed personally, and for law enforcement authorities to be used as a tool among groups and communities, that are not in line with the interests of society and the nation. Oppositionist groups tend to give vent to their views that are opposed to the government harshly and crudely through social media using blunt sentences and, by using identities that are anonymous enables everyone to act in crude ways. Supporters of the government are no less harsh and crude in their communications through social media. Beyond that those who cannot contain their verbal communications to social media vent their anger through "demonstrations" in open spaces creating a new habit of "crowd politics" that began with mobilising to bring about the downfall of the non-Muslim Governor of Jakarta who was jailed successfully, and which was evaluated to be connected to pressure from mass demonstrations.

In public communications between officials there also emerges communication that is private in nature through social media. The consequence is that criticism launched by an opposition figure against the government in parliament can be transformed into person to person criticism through mass public media or social media, so that politics develops to become the politics of the individual public official with no institutional consequences for the relationship between the government and parliament. I refer to this phenomenon as the *deinstitutionalization of politics* that is very unproductive in terms of striving to advance the practical application of the principles of constitutional democracy. Under whatever the circumstances, politics must be institutionalized, not the other way around.

In Indonesian experiences, there are varied experiences, for example the problem that befell the Constitutional Court, in 2015 in which the third Chair of Constitutional Court was caught red handed receiving bribes and corruption. Whosoever conducts a crime, including

someone occupying the position of Chair of the Constitutional Court, must be prosecuted firmly as an individual. At the same time, the institution of the Constitutional Court must remain standing resolutely because it has institutionalized well in terms of its position and function within the post-Reform constitutional structures of Indonesia. Based on the 1945 Constitution, the Constitutional Court has five authorities that are crucial in the system of Indonesia's constitutional democracy, namely: (i) to examine the constitutionality of laws (legislation) that is final and binding; (ii) to make rulings on electoral disputes, (iii) to make rulings on disputes between institutions of the state; (iv) to make rulings on the dissolution of political parties; and (v) to make rulings on opinions from the DPR that the President/Vice-president has/have committed such a violation as to meet the constitutional provisions for the DPR to recommend their dismissal to the Peoples' Assembly (MPR).

1.6. The Emergence of the New Quadru-Politica

Another serious challenge that Indonesia must confront in this age is the management of democratic activities that are becoming ever more expensive and requiring larger costs. Many political positions must be filled through general elections to the House of Regional Representatives (DPD) as well as the House of Peoples' Representatives (DPR). Representatives throughout Indonesia filling these two national chambers will also be elected at the same time as those being elected to provincial, city and county level councils. Finally, the President will also be elected on this same day. All up some 17,478 people will be elected. In addition, some 548 local government leaders including 34 governors, 416 county chiefs and 98 mayors are also elected directly. All of these require considerable expense so that candidates and their party backers are forced to seek as much financial support as possible to win elections.

The need for these huge funds has encouraged unhealthy practices of collaboration among parties and corporations that constitute indirect and even direct conflicts of interest between one and the other. This has contributed to so many corrupt practices taking place across the nation. This is reflected in the fact that between 2004 and 2017 some 313 local government leaders were jailed due to their involvement in corruption. Among central figures in a political party, that is its general chair, some four have been jailed for corruption. Two of these had been leaders of religious based parties while the remaining two had led nationalist parties. Each of the 10 parties currently sitting in Parliament contain some cadre who have been convicted of corruption. This is because the need to raise money, both by each candidate as well as by their party, can be said to be very substantial. As a result, the role of corporations in politics also calls for specific handling in the future so that there does not emerge conflicts of interest between political positions and corporate business interests.

At this point of time in Indonesia regulations that prohibit these kinds of conflicts of interest do not exist. Even in the USA despite the fact that there exists the law on government ethics[9] which provides for Blind-Trust Management to manage the equity assets of political officials so as not to give rise to conflicts of interest between the public offices being occupied with the equity holder, there continues to exist no regulation regarding businesses owned by a President. Now

9 US Federal Ethics in Government Act of 1978 requires all government officials to disclose their financial holdings unless they are placed in a qualified blind trust. Many of them sell off their assets or transfer them to a blind trust in order to avoid scrutiny or the appearance of conflict of interest.

after the election of businessman Donald Trump to the presidency of the United States everyone is now aware of the importance of differentiating and indeed separating the political office from the business world so as to not give rise to conflicts of interest. Furthermore in Indonesia in this age there is also a growing trend of corporate conglomerate owners who control a group of large businesses to also control networks across the electronic communications media sector in the form of television, radio and online media, and then to become the core leader of some community organisation that has extensive networks in "civil society", and then to establish their own political party, or to buy an existing political party or to become the general chair or core position holder in the political party. These days, several political parties are led directly by the head of a conglomerate who commands the television media industry that then advertises himself and his party every day.

If at some day in the future a conglomerate holder who controls the media industry, and a community organization and is also the head of a political party succeeds in being elected President of Indonesia they would in fact be in command of the four important forces in the society, that is state administration, civil society, the market and the media – all of which would be in the hands of one autocrat. If that were the case, the future of democracy would face a collapse. This is what Sheldon Wolin referred to as inverted totalitarianism in an incorporated managed democracy[10]. Because of this, there emerges a need in our time to give serious attention to the new phenomenon of power relations that emerge between four domains of power in a new quadru-politica that is the emergent threat of new totalitarianism through the possibility of (a) the joining of (i) the state, (ii) the market, (iii) civil society, and (iv) the media (especially the electronic media, the internet and social media) in one hand as a form of 21st century totalitarianism; and (b) the need for a new understanding of the "separation of powers" and the prohibition of conflicts of interests between the four pillars of power (the new quadru-politica) as a new characteristic of quality democracy and integrity in this millennial age[11]. These issues, in my view, require far more urgent attention by experts than making issue with the blasphemy case against the non-Muslim former Governor of Jakarta or cases of negative campaigning through mobilising primordial sentiments that are more related to a level of democratic civilization that is immature due to various cultural constraints that are temporary in nature.

The separation of powers between and among the state organs, business corporations, civil society organizations, and the media are important to avoid future accumulation and concentration of power in the one hand of a despot. If it happens, it will certainly give ways to the survival of a new form of totalitarianism. This is what Sheldon Wolin had reminded us on the corporate influence on democracy in his book about "managed democracy and the specter of inverted totalitarianism" (2005). During the Hitler's era, the old totalitarianism gave the power without checks to the public authority to control all private affairs of the people; while in the new inverted totalitarianism, the power is given to the private business authorities to control the public lives. In Nazi Germany, the state dominated the economic actors whereas in in the new inverted totalitarianism private corporations dominate the state with the government acting as

10 Sheldon S. Wolin, Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism, Princeton University Press, Princeton, 2008.

11 Jimly Asshiddiqie, The Idea of Social Constitution: Institutionalization and Constitutionalization of Civil Society's Social Life, Jakarta: LP3ES, 2014.

the servant for the large amounts of the corporations.[12]

This new phenomenon is now happening everywhere in the world today, including in the United States of America and Indonesia. It is the time when a big businessman, an influential conglomerate, was elected become the president of the powerful country, the United States of America[13]. Although before Donald Trump was elected the President, United States has had actually an effective law of prohibition of conflict of interest between public officials and private business activities of the officials.[14] But, the law is not valid for the holder of the political position of presidency. In response to the issue of conflict between his business interests and presidential duties, Donald J. Trump told the New York Times "I can be president of the United States and run my business 100 percent".[15] However, the potential conflicts of interest between private position of Donald Trump as businessman and his public position of the President of the United States, have to be watched carefully on its impacts to the future quality and integrity of American democracy and democracies around the world.

In Indonesian case, there are many groups of conglomerate or big businessmen who cleverly have been successful in expanding his/her business in the fields of information and communication industry, especially television, radio, and other electronic and internet media. Most of the media as the fourth estate of twentieth century democracy have been used by business conglomerate to control the media for market oriented popular promotion, not only for business marketing, but also political marketing. And now, these successful businessmen try to influence political parties or even some of them have established political parties for his own political ambitions to control the state power. At the same time, it is also easy for them to influence civil societies by distributing donations to massive influential civil society organizations and by making himself or herself appointed as the supervisor, advisor, or the patron in those important organizations. It means, it is now easier for businessmen to concentrate all powers in business, politics, civil societies, and the media at the same time in his/her own hand.

Therefore, it is now the time to rethink about the criteria of democracy with quality and integrity for the future. There should be a new form of separation of powers, to avoid conflicts of interest between and among the domains of power in the system constitutional democracy today and tomorrow, i.e. the separation of powers between (i) the state, (ii) the market, (iii) civil society, and (iv) the media.[16] Organizations belong to the four domains of power should be avoided from

12 Sheldon S. Wolin, Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism, Princeton University Press, Princeton, 2008.

13 Indeed, Donald J. Trump is the seventh businessman elected became President of the United States of America after Warren Harding in 1920, Herbert Hoover in 1928, Harry S Truman in 1945, Jimmy Carter in 1976, George H.W. Bush in 1988, and George W. Bush in 2000. But according to the term popularly used by media in conjunction with Donald J. Trump, everything about him is unprecedented. His underdog victory on November 9 was unprecedented. His trigger-finger tweeting style is unprecedented. And more than anything, his personal wealth as businessman, at an estimated US.$. 3.7 billion, is unprecedented for any elected officials in the history of United States of America (See Dave Roos, May 29, 2016. https://people.howstuffworks.com)

14 US Federal law, Ethics in Government Act of 1978, has created mandatory, public disclosure of financial and employment history of public officials and their immediate families. It also created restrictions on lobbying efforts by public officials for a set period after leaving public office. For the enforcement of the act, US Office of Independent Council was tasked with investigating government officials suspected from violating the act.

15 The New York Times, November 29, 2016.

16 Jimly Asshiddiqie, The Idea of Social Constitution: Institutionalization and Constitutionalization of Civil Society's Social Lives, Jakarta: LP3ES, 2014.

conflicts of interests between and among one to the other. This is what I call the new form of quadru-politica in its macro sense of the outer structure of power. These new four branches of power have to be separated, just as Montesquieu promoted the idea of separation of power between the executive, legislature, and the judicial power in 1748[17]. As the guardian and the final interpreter of the constitution, and the constitutional disputes resolution centre, the constitutional court has to move to the new understanding of the domains of power for the interest of the whole people based on the constitutional truth and justice. Modern democracy and constitutionalism are all about the principles of limitation and liberation of power. The constitutional court has to guard the application of the principles and may not let them diminished by the growing practices of concentration of powers into one hand of a totalitarian or an authoritarian despot in the future.

For the purpose, I have introduced the notion of power structure comprising of two smaller structures, namely, the internal power structure in its micro sense and the outer larger power structure in its macro sense. There are "*auxiliary state organs for the administration of power, regulatory power and quasi-judicial power"* other than the administrative, legislative, and judicial powers, and that "*these auxiliary state organs with mixed functions are considered the new fourth branch of the inner structure of power, the four branches of power in its micro sense.*" While the separation of power in its macro sense related to the phenomenon of emerging new forms of power relation consisting of the state politics, business corporations, civil society organizations, and the media, especially electronic media industries and social media. It is actually not only the problem in one country, but the new threads towards democracy in the whole world, that the theory of separation of power and theory of branches of power should be revised. Even in USA, they have a new problem when a famous and influencial conglomerate, Donald Trumps was elected become a president, that the blind trust independent management established based on Ethics in Government Act of 1978 prohibiting conflict of interest in public offices, cannot be applied to the president. Indonesia has also introduced several law and regulations concerning the press media, media industry, and communication and information technology, but those laws are still not enough to avoid and even to separate the potential conflict of interest between the new forms of branches of powers, I suggested as the new macro quadru-politica.

In Indonesia today, there are at least 6amongthe 16 political parties eligible to run in the upcoming election of 2019chaired by business and/or political dynasty. Two of them are established and chaired by a multi-billion conglomerate who owns and leads group of big companies in various fields, including electronic media network, radio and television broadcasting industry. The other one political party are chaired by a businessman and in the last period also chaired by a big businessman who own television broadcast. One new political party which is also established by a businessman, the son of the former President Soeharto of the New Order Regime. Almost all political parties which are not chaired by businessman, financed or "owned" by big businessman. Another two political parties were established and chaired by former President who control the party as a political dynasty. Meanwhile, there are two political parties belong to two largest Muslim organizations, i.e. Nahdhatul Ulama and Muhammadiyah as Non-Government Organizations and the symbol of social movement of Indonesian civil

17 The Laws of Plato, translated, with notes and an interpretive essay, by Thomas L. Pangle, The University of Chicago Press, Chicago and London, 1988.

society. The two civil society organizations were known to be very active in advocating political decisions to the political parties as well as to the government, including for the purpose of political recruitments and business affairs.

In short, today, we are witnessing a new trend of a more conflicting interests, trading influences, and unfair and uncontrollable power plays between and among the power politics, business, public media, and civil society organizations. It may happen one day, a multibillion conglomerate who can control media industry network for the purpose of his own political promotion, and then elected become president of the republic, while at the same time being very active providing his large amount of donation to civil society organizations to be honoured with the position of patron or honorary advisor of the organizations. It means, the four domains of power: the state, civil society, corporate business, and the media may one day be managed concentratedly in one hand. What will then modern democracy mean, if the four domains of power be concentrated in a hand of a man? He will be nothing less than a despot who rules the state power without checks. There will be no democracy without limitation of power, and therefore the separation and the prohibition of conflict of interests among the four domains of power is crucial for the future quality and integrity of democracy.

Therefore, it is now the time for us to rethink about the criteria of democracy with quality and integrity for the future. There should be a new form of separation of powers, to avoid conflicts of interest between and among the domains of power in the system constitutional democracy today and tomorrow, i.e. the separation of powers between (i) the state, (ii) the market, (iii) civil society, and (iv) the media.[18] Organizations belong to the four domains of power should be avoided from conflicts of interests between and among one to the other. This is what I call the new form of quadru-politica in its macro sense of the outer structure of power. These new four branches of power have to be separated, just as Montesquieu promoted the idea of separation of power between the executive, legislature, and the judicial power in 1748[19]. As the guardian and the final interpreter of the constitution, and the constitutional disputes resolution centre, the constitutional court has to move to the new understanding of the domains of power for the interest of the whole people based on the constitutional truth and justice. Modern democracy and constitutionalism are all about the principles of limitation and liberation of power. The constitutional court has to guard the application of the principles and may not let them diminished by the growing practices of concentration of powers into one hand of a totalitarian or an authoritarian despot in the future.

THE NEED FOR COMPARATIVE PERSPECTIVES

Considering the above challenges, the constitutional courts and constitutional lawyers across the countries should also be recalled that studies of the constitution all over the world today show the growing phenomenon of constitutional values and ideas transplantations and borrowings among nations. No more single constitution in the world that purely crafted and drafted without the influences of the constitutions of other countries. In this regard, there are two important things to be done for the future by constitutional courts and constitutional lawyers all over the world. The first is that we have to be aware on the importance of different

18 Jimly Asshiddiqie, The Idea of Social Constitution: Institutionalization and Constitutionalization of Civil Society's Social Lives, Jakarta: LP3ES, 2014.

19 The Laws of Plato, translated, with notes and an interpretive essay, by Thomas L. Pangle, The University of Chicago Press, Chicago and London, 1988.

perspectives in constitutional studies and understanding across the countries. The second is that it is important for us to intensify intellectual dialogues and exchanges of information and views on the contemporary issues of constitutional justices such is this conference.

Most of constitutional lawyers in the past have been trapped in a narrow and domestic perspectives of rigid constitutionalism and territorial sovereigntist perspectives[20] in the studies of the constitution that today are no longer workable and applicable. Ultra nationalist, territorial sovereigntist, and rigid constitutionalist approaches cannot provide solution anymore to the understanding of living constitutional values everywhere in the world. But, knowing the facts that most constitutional rules everywhere in the world are just the easy results of intellectual borrowings or transplantations from other countries or from international instruments best practices, we have to evaluate the actual problems in our respective countries. The problems are in the processes of implementation of those foreign ideas of constitutional rules and the processes of institutionalization of the state organs and their actual performances in day-to-day politics. In many countries, just like what is also happening in Indonesia, we have problems of modern institutionalization of politics versus the cultural traditions inherited from the past history of Indonesian politics. Many ideas of political institutions derived from cognitive minds of the so-called modern and up-to-dated personalities of policy makers, but their own behaviours had mostly been formed, and well-trained by cultural traditions inherited from their families and ancestors. Therefore, in the actual practices of modern constitutionalism and democracy, we still have serious cultural lags or cultural problem. The problems may not always be about the weakness of the cultural tradition itself, but actually on the way we adopted the foreign ideas which are not necessarily compatible with our own respective cultural traditions.

But today, no country could avoid from living in an open environment to share to and to receive ideas and examples from other countries. Our task is to comprehend in more appropriate way about the underlying values and ideas behind the new rules and institutions to be adopted and established in our constitutional system. The understanding and comprehension on the universal values and norms in the constitution are now the answer. The universals can be found not always from foreign countries, but also from our own cultural traditions. Universalization of constitutional values is not identical with westernization, internationalization, nor globalization of values. Universal values may be found in our own history. Therefore, the constitutional judges, and the constitutional lawyers and legal scholars all over the world have to take the responsibility to develop intellectual bridges between the institutionalization of modern civilization of democratic constitutionalism and the cultural traditions of political and constitutional history of our own respective countries. We have to promote constitutional cultures and constitutional morality to achieve a more democratic culture that respects and fosters constitutional morality.

For the purpose, we need this kind of international forum more frequently in the future, and promote new perspectives on constitutional cultures, cultural and constitutional identity of every country or nation, the unavoidable agenda of universalization of constitutional values, and even the idea of cosmopolitan constitutional pluralism to avoid pragmatic approaches in dealing with the issues of globalization and internationalization of values nor the old passion of territorial sovereigntist idealism in understanding modern constitution.

20 Read "The Limits of Sovereigntist Territoriality" in Paul Schiff Berman, Global Legal Pluralism: A Jurisprdence of Law Beyond Borders, Cambridge University Press, 2013, pp. 61-127.

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.

1 TAING Ratana (Mr.) is currently the Secretary General of the Constitutional Council of Cambodia (rank secretary of state), and Director of Cabinet of the President of the Constitutional Council. He has worked for the Constitutional Council for more than 12 years. Since 2005 he was promoted to various positions: legal officer of Bureau of Litigation (2005-2009), Deputy Chief of Bureau of Legal Affairs (2009), and Chief of Bureau III (2009-2014), Advisor to the President of the Constitutional Council (February 2017). He is also Legal advisor to the Theravada Buddhist Order of the Kingdom of Cambodia (with Buddhist title *Maha Buddha Jinarasa*); Professor of Law, Paññāsāstra University of Cambodia (*PUC*). He is a holder of various degrees: Executive Master of Advanced Studies in Development Studies from the Graduate Institute of International and Development Studies (*IHEID*), Geneva, Switzerland; LL.B and LL.M from Royal University of Law and Economics (*RULE*), Phnom Penh; Bachelor of English Literature from Build Bright University (BBU); and DDS from University of Health Sciences (UHS), Phnom Penh. Ratana is also an alumnus of International Visitor Leadership Program (*IVLP*), the U.S State Department, of Intellectual Property Rights for Least Developed Countries (LDCs), WIPO-Sida; and a member of KAS Research Group on Constitutionalism in Asia.

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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 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

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2 Article 51 (new) of the constitution

3 Khmer means Cambodian people

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 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.

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

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 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

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.

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).

♦ 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

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.

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 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

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.

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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SESSION II

VICE-PRESIDENT
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY

Engin Yildirim

Constitutional Courts and Democracy

Engin Yildirim[1]

Distinguished participants, ladies and gentlemen; it is a great pleasure for me to participate in this symposium. I would like to express my gratitude to the Indonesian Constitutional Court for their kind invitation and warm hospitality. I have brought with me the best wishes of the Turkish Constitutional Court. What unites all of us who have come here today is our commitment to the idea of the constitutional justice.

Constitutions, as a body of superior and binding rules, have two basic functions; first, to safeguard fundamental rights and freedoms of individuals, and, second, in the pursuit of this goal, to map out the governmental power, that is, to set the limits of state authority.

These two functions of constitutions particularly require the independence of judiciary from legislature and executive. At this point, the relation of judiciary with legislature and executive, which form the sphere of politics, is of vital importance. The establishment of the relation between judiciary and politics on a sound basis and its maintenance depend on ensuring judicial independence and impartiality, on one hand, and judicial abstention from judicial independence and impartiality, on one hand, and judicial abstention from substantive review and activism by observing the constitutional and legal boundaries, on the other.

The objective of constitutions to safeguard fundamental rights and to restrict the state authority to that end, along with incorporation of the principle of supremacy of the constitution, has instituted the constitutional jurisdiction in the next step. As we all know the goal of constitutional justice is to uphold the principles of supremacy of constitution, rule of law and protection of human rights. Constitutional and supreme courts or councils operate to realize this objective through various means such as concrete and abstract review of constitutionality and individual or constitutional complaint.

Constitutional courts are established to put the principle of supremacy of the constitution into action effectively. In other words, constitutional courts are intended as institutions empowered to oversee whether the governmental power map is infringed, with a view to protecting constitutional rights and freedoms.

The establishment and spread of constitutional courts historically corresponds to the post World War II era to a great extent. The underlying reason behind this progress was extensive human rights violations before and during the war. Therefore, the establishment of constitutional courts at national level and the signing of the European Convention on Human Rights as well

1 Vice-President, The Constitutional Court of the Republic of Turkey

as the establishment of the European Court of Human Rights at the regional level were the outcomes of the reaction against systematic violations of human rights resulting in a tragedy.

It is the main duty of constitutional courts to protect rights and freedoms against the threats and to contribute to their deepening and strengthening. These rights and freedoms, that we aim to protect, have an effect and importance to ensure the peaceful co-existence of all humanity. It is our duty to uphold universal values in order to establish to the constitutional justice. In order to ensure this, it is of vital significance to contribute to the creation of a "universal language" without localizing the universal concepts.

In recent decades, we have been witnessing global expansion of judicial power as all over the world Constitutional Court have been given the power to declare acts of the executive or laws enacted by the democratically elected legislature unconstitutional. Constitutional Courts are important actors in modern democracies. Although their legitimacy is still controversial in political theory and philosophy, their major role in democratization and furthering democratic governance cannot be ignored. Whether or not constitutional courts are democratic actors is a controversial issue. Proponents of a strong constitutionalism stress that without constitutional courts, fundamental rights would not be as well protected and that without constitutional protection these individual rights would be regularly flouted by democratic majorities. The opponents of strong constitutionalism on the other hand refer to the fact that the shift of decision-making procedures from directly elected parliaments to indirectly elected judges is weakening democracy. Constitutional courts play an important role in democratization by contributing that the state does not infringe on basic political rights and civil liberties. Court-based constitutional review as a way of controlling executive and legislative action is generally viewed to be the one of the most important developments in constitutionalism.

The literature on judicial empowerment is divided into two basic categories: those seeing the expanded political role of the courts as the manifestation of a "rights revolution" and those that see judicialization as part of a conscious attempt by the dominant elite to safeguard their privileges against emerging counter elite. Most critics of judicial activism often blame courts and judges or being hyperactive, excessively entangled with moral and political decision making and subsequently disregarding fundamental separation of power and democratic governance principles. Portraying courts and judges as the source of evil is misguided. Courts do not operate in a political, institutional and ideological vacuum. Judicial power is politically constructed. Its expansion through constitutionalization or judicial review does not develop separately from the concrete social cultural political and economic struggles.

A constitutional court can play a positive role in democratic governance if it makes use of its power and if it acts in a way that is functional from democracy. A court that does not make use of its power is as detrimental as a court that exceeds its power at the expense of the other branches of the government in a way that is harmful to democracy. In terms of institutional design, constitutional courts can increase the quality of democracy if they hold strong powers, if access to the courts is open and if the courts possess high popular legitimacy. An extension of the access to constitutional courts to various political courts and individual citizens contributes directly to the strong position of the Court.

Constitutions need to be viewed more as instruments for achieving general fairness and justice than as instruments from efficiently pursuing specific public policies. There has been a general and significant move in constitutional democracies toward "rights consciousness". Under certain circumstances courts achieve a moral authority that places them above politics and allows them to make unpopular decisions. The moral authority or legitimacy means that people accept judicial decisions even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions.

Finally, I wish that the symposium to be fruitful and successful. I would like to express in advance my thanks to all distinguished academicians and members of the judiciary who will contribute to this symposium with their presentations.

FORMER CHIEF JUSTICE OF CONSTITUTIONAL COURT, REPUBLIK OF INDONESIA

Moh. Mahfud MD

Constitutionalism and Constitutional Court in Indonesia

By **Prof. Dr. Moh. Mahfud MD**
Former Chief Justice of Constitutional Court, Republik of Indonesia

Dear honorable guests, Chaimen and delegates from friendly countries. Welcome and confer in Indonesia.

Let me convey my paper in accordance with the title asked by the committee that is: *"*The Constitutional Court and Constitutionalism in Political Dynamics: Comparative Perspective*"*. In my understanding, the committee did not ask me to discuss the comparison of the constitutional courts in various countries, but I was only asked to present the existance of the Contitutional Courts of Republic of Indonesia

The comparison with the Constitutional Court from other countries can be found in a separate presentation delivered by the delegations of each country in this session, namely: Your Honor Prof. Engin Yildirin from Turkey's Constitutional Court, Your Honor Ratana Taing from the Constitutional Council of the Kingdom of Cambodia, and the Honorable Mr. Hidayatullah Tabib of the Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan.

Since its inception, Indonesia was established as an independent state, Indonesia has chosen constitutionalism as a state idea. This is evident from the historical fact that at the time Indonesia would declare independence, a preparatory body for independence was formed, namely the Agency for Investigating the Progress of Independence (BPUPK) with the task of drafting a constitution draft. When Indonesia proclaimed independence, the 1945 Constitution was enacted as a written constitution for the state. In paragraph IV the Preamble of the 1945 Constitution also stated that the Indonesian state government was prepared based on a state constitution as a state idea. Precisely this is stated in the phrase *"... the national independence of Indonesia shall be formulated into a constitution of the sovereign Republic of Indonesia ...*"

In a very simple understanding, constitutionalism is defined as idea and concept that the state was established to guarantee the protection of human rights. For this reason, the authority of the government must be separated or divided into state institutions whose powers are limited in accordance with their respective functions. Thus constitutionalism contains two main things, namely, First, the guarantee of the protection of human rights; Second, a government system that regulates the relations and work procedures between state institutions to protect these human rights.

In general, state power to protect human rights is separated or divided into three institutions and functions, namely the legislative body, executive body, and judicative body. The three institutions are intertwined in a relationship of supervising and balancing work arrangements

which is known as checks and balances mechanism. Judicial power is one of the state institutions that is very important to protect human rights.

As a country that has embraced constitutionalism from the start, Indonesia has a judicial authority that handles judicial functions. At first the judicial power in Indonesia was carried out by a Supreme Court which handled all types of conflicts, both conflicts between people and people or with institutions and conflicts between regulations.

But since the Political Reform in 1998 the idea emerged to create an institution that is Constitutional Court that specifically judges conflict of regulations and conflicts of certain state institutions and cases in specific constitutional issues. Among the background of the establishment of the Constitutional Court in Indonesia are:

1) In the past there were no judicial institutions that could conduct judicial review of the law even though many laws were contrary to the constitution. That cases could only be corrected with legislative reviews that took a long time and political attractiveness.

2) In the past there were no election courts that could be effective even though in practice there were a lot of violations in the general election either by the state election organizer or by the contestants of election.

3) In the past there were no judicial institutions that judged conflict of authority between state institutions even though such conflicts often occur.

4) In the past there was no judicial mechanism to replace the incumbent President and/or Vice President so that it was felt very unfair because the President and/or Vice President could be brought down or impeached only by political struggle.

5) In the past there was no legal mechanism to be able to dissolve political parties so that the dissolution of political parties could be carried out uniterally by President.

Thus, through an amendment to the 1945 Constitution, Indonesia established a new state institution that handled certain constitutional issues, namely the Constitutional Court, so that since then in Indonesia there were two parallel judicial institutions namely the Supreme Court and the Constitutional Court. Officially the Constitutional Court of the Republic of Indonesia was formed on August 13, 2003.

In various countries there are various ways of institutionalizing and naming constitutional justice. In some countries such as the United States and Malaysia there is only one judiciary power that handles all conflicts, namely the Supreme Court. In some other countries there are those who make more than one judicial authority, that is, form a Constitutional Court (or other name) in equal addition to the Supreme Court such as Austria, Germany, Turkey, and Indonesia.

Since the amendments to the 1945 Constitution carried out during the period 1999-2002 Indonesia has pursued the formation of two judicial institutions namely the Supreme Court and the Constitutional Court.

In Article 24 paragraph (2) of the 1945 Constitution the amendment states that, *"The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affair courts, military tribunals, and setate administrative courts, and by a Constitutional Courts"*

The function of the Constitutional Court is stipulated in the amendments to Article 24C Paragraph (1) of the 1945 Constitution which states, *"The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining desputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party , and deciding desputes over the result of general election.*

Furthermore, related to the impeachment process of the President and / or the Vice President who is still in his term of office the 1945 Constitution regulates it in Article 24C paragraph (2) which reads, *"The Constitutional Court shall possess the authority to issue a decision over an opinion of the DPR corcerning alleged violations by the President and/orVice-President of this Constitution.*

As for certain types of violations of law that can be used as a basis for impeachment of Preisdent and/or Vice President are still in their term of office regulated in Article 7B paragraph (1) and paragraph (2).

Article 7B paragraph (1) stipulates, *" Any proposal for the dismissal of the President and/or Vice-President may be submitted by the House of Representative to the People's Consultative Assembly only by first submitting a request to the Constitutional Court to investigate, bring to trial, and issue a decision on the opinion of the DPR either that the President and/or Vice-President has violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or through moral turpitude, and/or that the President and/or Vice-President no longer meets the qualifications to serve as President and/or Vice President".*

The Article 7B paragraph (2) regulates the impeachment of the President and/or Vice Presiden if they no longer fulfill the conditions that, *" The opinion of the House of Representative that the President and/or Vice-President has violated the law or no longer meets the qualifications to serve as President and/or Vice-President is undertaken in the course of implementation of the supervision function of the House of Representative"*

In its 15-year-old history, the Constitutional Court of the Republic of Indonesia has contributed greatly to the strengthening of constitutionalism in Indonesia. The Constitutional Court of the Republic of Indonesia has made many decisions that can be qualified as "landmark decisions" which then directs the improvement of law and institutions to provide maximum protection for human rights and to uphold Indonesia as a democratic country. The Constitutional Court of the Republic of Indonesia declares itself to be an enforcer of "substantive justice", not just the enforcement of "procedural justice".

DIRECTOR GENERAL OF SECRETARY OF THE INDEPENDENT COMMISSION FOR OVERSEEING THE IMPLEMENTATION OF CONSTITUTION ISLAMIC REPUBLIC OF AFGHANISTAN

Dr. Hidayatullah Habib

Constitutionalism and separation of power in Afghanistan

Afghanistan Independent Commission for overseeing the implementation of Constitution
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ABSTRACT:

Established in 2010, the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) of Afghanistan has seven members. They are nominated by the state president and receive a vote of confidence from the legislatures. The ICOIC President is elected from the members through internal elections and serves for a period of four years. Each ICOIC member also heads up a professional department. In addition to the General Secretariat, there are six professional departments. Access to the ICOIC is only permitted to an enumerated number of state institutions. The jurisdictions of the ICOIC are the following: To interpret the constitution at the request of the State President, National Assembly, the Supreme Court, and government; to oversee the compliance of governmental and non-governmental institutions with the provisions of the Constitution; to provide legal advice to the President and National Assembly in relations to constitutional matters; to conduct research, for example finding contradictions of laws with the Constitution and suggest measures to resolve such contradictions; present specific proposals concerning the development of legislation in response to rulings regarding the Constitution; reporting to the President in the event of violations of constitutional provisions; the approval of by-laws and relevant guidelines.

- The decisions of the Independent Commission for the Implementation of the Constitution of Afghanistan (ICOIC) are final and binding. The decision is shared with the government and other ministries, the media and the public.
- The ICOIC of Afghanistan's duty is not just to oversee but also to interpret the constitution. In this context, the ICOIC oversees various entities, including the National Assembly, government and non-government entities. Reports are submitted to the State President. In the case where the State President is deemed to have acted unconstitutionally, the ICOIC's report is also submitted to the State President.
- The seven members of Afghanistan's ICOIC decide on whether to give advice on the matter of unconstitutionality.

INTRODUCTION

CONSTITUTIONALISM IN AFGHANISTAN

The idea of the constitutionalism was discussed among intellectuals who called themselves " Young Afghans" in the first decades of the twentieth century .The first Afghan constitution (Neẓām-nāma-ye asāsī) was adopted in 1922 by a *lōyaJirga* (grand council of notables) especially convened for the purpose; it provided for a government composed of executive, legislative, and judicial branches, but the basic constitutionalist demand for an elected national assembly to which the government would be responsible was not realized. Rather, the document provided for a cabinet of ministers, led by and accountable to the king, rather than to the legislature; the king himself was declared not responsible to anybody. Members of the Šūrā-ye dawlat (State council), as well as of the provincial councils, were to be chosen only partly through popular elections.

After nine months of civil war another member of the Moḥammadzay tribe, the former general Moḥammad-Nāder, established himself as ruler (1929-33). Although he had been a member of the anti-British war party and had distinguished himself in the war of independence in 1919, both constitutionalists and supporters of the deposed king Amān-Allāh looked upon him as pro-British and objected to his installing himself on the throne, instead of restoring Amān-Allāh. For a time Nāder was successful in suppressing the opposition. In 1931 a new constitution (Oṣūl-e asāsī-e dawlat-e ʿalīya-ye Afghanistan) was adopted by a *lōyajerga*, with recognition of Nāder and his descendants as the legitimate rulers of the country. Among the major differences from the constitution of a decade earlier were provisions for a cabinet accountable (except for the prime minister) to an elected national assembly (Majles-e šūrā-ye mellī) and a house of elders (Majles-e aʿyān) the members of which were to be selected by the king; in practice, delegates for election to the assembly were also handpicked by the government. Another departure was constitutional recognition of the supremacy of the Hanafite School of jurisprudence and guarantee of the autonomy of the Šarīʿa courts. For the first time religious leaders were appointed to some ministerial posts. Nevertheless, the royal house maintained a monopoly of government power, and Afghanistan was only nominally a constitutional monarchy. In 1933 Nāder Shah was assassinated; he was succeeded by his nineteen-year-old son Mohammad-Ẓāher (1933-73). For the first thirteen years of Ẓāher Shah's reign his uncle, the prime minister, Moḥammad-Hāšem, actually wielded the power of government. Concern for order became supreme, and the rights of individuals guaranteed in the constitution were trampled upon. Many political dissidents were put in prison, where some languished for more than a decade without trial. At the same time selective schemes for modernization and a gradual expansion of the modern educational system were undertaken. It is mentionable that no institution was foreseen for the interpretation, explanation and protecting of the constitution.

A long-standing problem that had first arisen between Afghanistan and the British government of India over a large territory on the Afghan side of the frontier, which had nevertheless been declared part of the British sphere of influence in the Anglo-Afghan agreement of 1893 .became acute after 1947, when it was incorporated by the new state of Pakistan . In response Afghanistan demanded application of the principle of self-determination to the inhabitants of the territory, which it labeled Paštūnestān. In 1961 the dispute caused a two-year suspension of diplomatic relations between the two Muslim countries. Alarmed by the resulting strengthening of Afghan ties with the Soviet Union under Dāʾūd's leadership, the shah decided to normalize relations with Pakistan and to democratize the government structure. In 1963 he persuaded Dāʾūd to resign and asked a commoner, Moḥammad-Yūsof, to form a new government. In the following year a new constitution was approved by a *lōyajerga*. In this constitution Afghanistan was declared "a constitutional monarchy." The national assembly (Wolesījerga), provincial assemblies, and municipal councils were to be directly elected by the general population in secret ballots (*enteḵābāt-e serrī*). One-third of the members of the senate (Mešranojerga) were to be elected in the same way, one-third to be elected indirectly by the provincial councils, and one-third to be appointed by the shah. The shah was to nominate members of the cabinet, but they could be confirmed only by a vote in the assembly, to which they were to be accountable. Members of the shah's family, including paternal uncles and cousins, were barred from entering politics. Judges were to be appointed by the shah but to function independently. There was no institution forecasted for interpretation and protecting of the constitution just it was written that the king is the custodian of the constitution.

Constitutions written after 1973 were less relevant for the current parliamentary government structure. In 1973 the tenth king Mohammad Zahershah , was overthrown by a military coup *The*

In 1973, with the assistance of leftist military officers, the former Prime MinisterDāʾūd overthrew the monarchy and declared Afghanistan a republic with himself at its head. He governed with dictatorial powers until a new constitution was promulgated by a *lōyaJirga* in 1976. A presidential government was then formed under the domination of the official Revolutionary national party (Ḥezb-e enqelāb-e mellī). The president was to be elected for a six-year term by a two-thirds vote of the *lōyajerga*. The national assembly was to sit for only four months a year and had the power only to question cabinet ministers, who were to be appointed by the president. In 1978, however, when President Dāʾūd began an effort to loosen ties with the Soviet Union, leftist military officers toppled him in a coup.

Fortunately in article135 of the1977 constitution the Supreme Court was introduced for interpretation of the constitution which as a judicial method of constitutional justice.

The coup brought the P.D.P.A. to power; the new communist leaders established a single-party government, "the new-style state of the Democratic Republic of Afghanistan," in which the executive entirely dominated the legislature (renamed Šūrā-ye enqelābī, Revolutionary council) and the judiciary. Within the party the Ḵalq faction actually controlled the state: The secretary-general of the party, Nūr-MoḥammadTarakī, became president of both the revolutionary council and the council of ministers, governing entirely by edict. Nevertheless, frequent rebellions

weakened his government and increased his dependence on support from the Soviet Union. In 1979 he was replaced by Ḥafīẓ-AllāhAmīn, who showed signs of loosening Afghan dependence on the Soviets; the Soviet Union then invaded Afghanistan in December and raised the dissident Paṛcham faction of the P.D.P.A., led by BabrakKārmal, to power.

With the support of the Soviet army Kārmal also assumed the triple role of secretary-general of the P.D.P.A., president of the revolutionary council, and president of the council of ministers. In 1980 a temporary constitution, Oṣūl-e asāsī-e jomhūrī-e democratic-e Afghanistan (Fundamental principles of the Democratic Republic of Afghanistan), was adopted. The expressed aim was to guide the Afghans in the creation of a society of human beings free from exploitation of one another. The constitution was based on the political structure that was already in existence. The rights to free expression, sanctity of the home, and peaceful assembly were again guaranteed; people were to be accused, arrested, and punished only in conformity with the law; individuals were to be presumed innocent until found guilty in court. The P.D.P.A., representing itself as the party of the working class, was recognized as "the guiding and driving force of society and the state." The state undertook to bring the family, especially mothers and children, under its special protection and pledged to supervise youth. Followers not only of Islam but also of other faiths were guaranteed the freedom to practice their religions. This constitution represented an ideal, but it had little effect on Afghan society as a whole. By the time it was promulgated the government had already lost control of the rural areas to the anti-Soviet freedom fighters (*mojāhedīn*). In the few urban areas that remained under its control the government disregarded the clauses guaranteeing individual rights while vigorously enforcing those that guaranteed its authority.

In1987, after Najīb-Allāh had replaced Kārmal as president, still another constitution was adopted. It provided for a bicameral legislature in which members of the national assembly were to be popularly elected. Both the parliament and the government were dominated by men and women with no affiliation to the official party. The word "democratic" was dropped from the name of the country, which thenceforth was known merely as the Republic of Afghanistan. Najīb-Allāh strove to effect "national reconciliation." The single-party system was abandoned in favor of political pluralism, and the P.D.P.A. was renamed Ḥezb-e waṭan (Fatherland party). Most of these changes were introduced in the more liberal atmosphere following the rise of Mikhail Gorbachev in the Soviet Union and after the withdrawal of Soviet troops from Afghanistan in 1989. The Soviet Union was dissolved in December 1991, and in April 1992 Kabul was taken by the *mujahidin*.

A constitutional council was forecasted which had the responsibility of overseeing and comparing the ordinary law and other legislative documents as well as international treaties with the constitution. This was method of political control and it was the same with the France constitutional council.

Under the leadership of Ṣebḡat-AllāhMojaddedī the *mujahidin* declared an "Islamic state" in Kabul, to be governed by a "head of state," assisted by a leadership council and the council of *mujahidin*. The leadership council immediately banned the Fatherland party. In the absence

of unity among the former organizations of *mujahidin*, however, conditions of political anarchy and civil war continued to prevail in Afghanistan. The provinces were controlled by councils unaccountable to the government in Kabul, and neighboring states, relying on groups of local allies, continued to interfere in Afghan national affairs to further their own interests. In late 1992 there was thus no clear prospect of a unified administration, an end to civil war

During the reign of BurhanuddingRabbani the president of Islamic state of Afghanistan the draft of the fifth constitution by the name of (The new Fundamental principles of Afghanistan), was drafted but it never ratified.

The Mujahidin government overturned by the Taliban in 1996 from the time the Taliban came to the power until 2001. The Taliban practiced a strictly religious system, using public executions to intimidate the population. They never attempted their own constitution, the Taliban regime finally overthrown by the U.S led on 2001.

The current Afghan Constitution.

of the constitution and other laws could be referred to the State Council which would give an authorities

The Creation of the New Constitution (2001-2004)

The process of creating a new constitution after the collapse of the Taliban regime began formally on October 5, 2002, when a constitutional drafting commission was appointed to draft the new constitution. The constitution would later be adopted by the LoyaJirgan.

The new commission mandated to draft the constitution spends many months preparing a draft, which was afterward reviewed by another Constitutional Review Commission with a participation of a larger number of lawyers and experts. The Constitutional Loya Jirga which was then convened endorse the document after bringing a number of changes to the original draft. On December, 14, 2003. The constitution was signed by the president Hamid Karzai on January 26, 2004. Official version exist in both official languages of Afghanistan.

Analysis and Discussion

THE SEPARATION OF POWERS IN THE AFGHAN CONSTITUTION

Presidential Authority

Afghanistan separation of powers revolves around a strong presidential system. The new Afghan constitution has combined the powers of king and prime minister under the 1964 constitution to create the present- day presidency. Although there are three distinct branches, the president as head of state and head of government, presides over all three (Art 60) the president has the authority and duty among others, to determine the fundamental policies of the country, to appoint ministers, judges and other high- ranking officials, to review decisions of the legislatures as part of the endorsement procedure, and to decide whether to submit constitutional issues to the supreme court. To be elected the president must obtain more than 50 percent of the votes“

cast in free general, secret and direct elections"(Art. 61). The election is for a term of five years, with a possibility of direct reelection of the one further term (Art.62). The president is elected with along with the two vice- president who run for office along with him. Their duties are only to stand in for the president in case of emergency, but the vice presidents are not prevented from being appointed ministers, the selection of the two vice- presidents allows the president to make concessions towards other political groups and allies. The president may be impeached by the Loya Jirga for crimes such as crimes against humanity or national treason. The verdict of guilt given by a special court.

The constitution of 1978 in (Art. 97) give the president the power to dissolve the parliament on "reasonable ground" the president, in the consultation of the chairmen of both houses of the parliament, the prime minister, the chief justice and the chairman of the constitutional council could declare the dissolution of the parliament stating the reason on which he based that decision. The constitution enforced on 2004 has taken away the power of the president to dissolve the National assembly when the need arises. there are different views concerning the power of the president to dissolve the parliament under certain legal predetermined conditions. Constitution of some countries deprive the head of state from having such reasoning that this power is vulnerable to being misused.

Parliamentary Authority

Under the first constitution of Afghanistan (the NezamnamaeAsasi) introduced by king Amanullah khan in 1923 members of parliament were appointed by king they have a kind of consultative role on state affairs. The budget was submitted to the parliament, which also had the wright to discuss treaties and agreements.

In 1964 parliament became, for the first time in the history of Afghanistan, an independent branch of the state .the parliament had extensive powers including casting votes of confidence on the government. Art.46 of the constitution made literacy requirement to stand for election as a candidate for Member of Parliament.Further more this constitution gave the king the power to dissolve the parliament under certain circumstances

The current National Assembly or Shura-e- Melliis modeled after the parliament is modeled after the parliament of 1964 constitution. It is comprised of two houses: the upper houses called Mishrano Jirga or House of elders, and the Lower house called WulosiJerga or House of the people the Wulosi Jirga is directly elected by the people and Mishrano Jirga is partly elected and partly appointed. The president appoints one-third of its members, which have the advantage of a longer term than other members of Meshrano Jirga. The president is enjoined by the constitution to chose women as 50 percent of this appointees. The Wulosi Jirga is more powerful than the MishranoJirgan, reflecting the importance placed on a democratically elected body over the partly appointed upper house.

The two main powers of the National Assembly are to legislate and to control the executive (the president and the government). It works primarily on adopting new laws and abrogating old laws. A bill must be approved by both houses and by the president to become a law however

if the Mishrano Jirga rejects a bill, the Wulosi Jirga ultimately has the last words on whether to accept it. The Wulosi Jirga has the responsibility of resolving conflicts with controversial bills, especially those concerning financial affairs. Responsible for all non- legislative procedures in the National Assembly. The lower house also approves presidential appointees, and may force resignation of government ministers through votes of no-confidence.

The Judicial Branch

The Supreme Court is composed of mine members appointed by the president and subject to the approval by the Wulosi Jirga. They serve then year's terms. A justice of the supreme court must be an afghan citizen of a minimum of forty years of age, of good reputation and without criminal record, and must have studied law or Islamic jurisprudence and demonstrate " sufficient expertize in the judicial system of Afghanistan " (Art.118). Interestingly enough, under the constitutional requirement for equality, women may be named to the Supreme Court. A justice may only removed from his position by impeachment (Art127) on of the duties of the supreme court is to propose judges for appointment by the president.(Art.132 section2) the supreme court consists of the chief justice and the high judicial council. Each member of the Supreme Court meanwhile chairs a division of that courts such as criminal division, commercial division, and so forth, when necessary the Supreme Court can create specialized or travelling courts. The Supreme Court is responsible for the administration of the justice system as well.

Judicial independence and accountability are necessary basis for impartial rulings that uphold the precepts of the constitution. According to Martin Lau, there is little doubt that in many countries the gap between the constitutional theory and political reality is considerable. The practical application of constitution principles transforms the constitution from a merely symbolical dynamic guide for the functioning of the state and the protection of its people. A constitution requires a stable government structure to support it. Afghanistan has very little practical experience with an independent judiciary, as the 1964 constitution innovative provisions were not effectively carried out in its short lifespan.

Historical Role of Supreme court and other Interpretive Bodies

In the constitution enforced during the reign of King Amanullahkhan (1923-1929), the interpretation of the constitution was vested in the state council, composed of appointed and elected bodies. According to Art.71 of the constitution, any question concerning the interpretation of the constitution and other laws could be referred to the state council which would give an authorities ruling. By contrast, the constitution introduced during the reign of king Zaher khan in 1964 no direct provision on the issue it was discussed at the time whether the interpretation of the constitution was a judicial function at all so. The reference to the regulation of the "judicial affairs of the state" by the Supreme Court Art 107 could have been understood to imply that the supreme court was authorized to interpret the constitution when considering cases based on a constitution provisions.

The constitution of 1976, promulgated during the presidency of MohammdDaud, explicitly gave the mandate of the interpretation of constitution to the p\supreme court, whereas

the constitution introduced in 1977 during the communist government of BabrakKarmal assigned the interpretation of the laws to the Presidium of the Revolutionary Council, the term "laws "being broad enough to includes the constitution as well, finally the constitution promulgated during the presidency of Dr. Najeebullah in 1986 provided for the establishment of constitutional council with the power to review the conformity of laws, legislative decrees, and international treaties with the constitution, an institution which was preserved in the subsequent 1987 constitution, However as Art.124 of the 1978 constitution made clear, the council could not give a binding ruling on the final issue of constitutionality: its function was merely to give advice to the president, leaving the final decision on the matter to the head of state.

The Role of the Supreme Court under the 2004 constitution

The constitution of 2004 in Art. 121 provides that the supreme court shall review, at the request of the government or the courts, the laws, legislative decrees, international treaties and international conventions for their compliance with the constitution and determine their interpretation in accordance with the law. The draft constitution had originally include a provisions on a constitutional courts which was given the power to examine the conformity of laws, and legislative decrees and international agreements and covenant with the constitution as well as to interpret the constitution, law, and legislative decrees. However any reference to a constitution court was eliminated from the draft finally presented to the Loya Jirga. In addition the provisions on the constitutional review and interpretation of laws were fused in to one section, without realizing the potential ambiguity that this might create. The fierce controversy has broken out in the past years over a question of whether the supreme court may interpret the constitution when no law, legislative decree, international treaties or international covenant is involved. This is the case when the court is asked to review the constitutionality of any other acts of the legislature or the executive than those mentioned in Art.121 the Supreme Court is of the view that this competency is inherent its constitutional interpretation. In 2008 the court has proposed to clarity the legal situation by amending Art.24 of the Law on the Organization and Jurisdiction of the Courts of 2005.

Role of the Independent Commission for overseeing the Implementation of the constitution.

Independent Commission for overseeing the implementation of the constitution of Afghanistan (ICOIC) has been established within the state of Islamic republic of Afghanistan frame on 2010 and it has fully independence in its activities. The ICOIC goal is to intensify and institutionalize a constitutional-state-based regime. For achievement of this goal, the ICOIC according to the provisions of the constitution oversees compliance of actions of the president, the three branches of the government, and all governmental and non-governmental institutions with the provisions of the constitution.

The basis for the Independent commission for overseeing the Implementation of the constitution (ICOIC) is article 157 of the Afghanistan constitution. Which says (the independent commission for supervision of the implementation of the constitution shall be established in according with the provisions of the law. Members of this commission shall be appointed by the president with the endorsement of the House of People.

ICOIC since its establishment functions in according by its own law. This law which has been indorsed by parliament, contains (17) articles. The commission is independent and functions in according to the constitution, within the framework of the state of Islamic republic of Afghanistan.

In accordance with this law the commission has seven members. The members nominate by the president and receive vote of confidence from the parliament.

According to article 8 of the ICOIC law, the Commission has the following duties and authorities in order to provide a better oversight from the implementation of the constitution:

1. Interpretation of the constitution, at the request of the President, National Assembly, Supreme Court and the government;
2. Overseeing the compliance of the actions of the president, government, National Assembly, Judiciary, Offices, governmental and non-governmental institutions with the provisions of the constitution;
3. Providing legal advice in case of issues arising from the constitution to the President and National Assembly;
4. The study of laws for finding out their contradictions with the constitution and to present the findings to the President and National Assembly in order to take necessary measures for their elimination.
5. Presenting specific proposal to the President and National Assembly in regards to taking necessary measures concerning the development of legislation in cases where the constitution has ruled.
6. Presenting the report to the President in the event of violation from the provisions of the constitution.
7. Approval of by-laws and relevant guidelines.

Conclusion

The afghan constitution promulgated in 2004 is among the most progressive and modern constitution in Islamic world. Islamic law is recognized as a source of law alongside, but not in contradiction to the constitutional provisions, statutes, and international conventions that constitute Afghan law. The constitution gives Islamic law and jurisprudence a status of supremacy over the other sources of law. However the young state has recently been subject to considerable influence from western nations interested in its development, and has, for example, recognize international conventions on human rights, Islamic law and secular law diverge on the rights of women and of followers of minority religion, the court when using Islamic jurisprudence to interpret the law can take either a liberal or a fundamentalist perspective. Not all of their decisions are in compliance with the constitution. Practical implementation of the constitutional principles is further hindered by continuing of many citizens in villages on local Jira, which practice tribal customary law often to the detriment of rights that are protected under the Sharea.

In practice the interpretation of the constitution poses considerable difficulties apparent contradictions between Islamic and secular laws must be resolved and the separation of powers between the government, the national assembly and supreme court must be clarified. Unfortunately the authority of the supreme court to make binding decisions on constitutional matters, is disputed. Whether the Supreme Court may review government actions is not agreed upon. Precedent does not provide any consistent guideline. If the national assembly and government cannot work together and settle their differences in this regard, the central government will not have force to implement the constitutional principles and the rule of law. The executive and legislative branches of government must put aside their current grievances and cooperate with one another in order to come an agreement on the different perspectives on interpretation, and begin to work on constitutional amendment.

ANNEX II

LIST OF PARTICIPANTS

ANNEX I

LIST OF PARTICIPANTS
INTERNATIONAL SYMPOSIUM 2018
1 October 2018
"Constitutional Court & Constitutionalism in Political Dynamics"

NO	NAME	POSITION
Constitutional Justice of Republic Indonesia		
1	Dr. Anwar Usman, S.H., M.H.	Constitutional Justice
2	Prof. Dr. Aswanto, S.H., M.Si., DFM.	Constitutional Justice
3	Prof. Dr. Arief Hidayat, S.H., M.S.	Constitutional Justice
4	Dr. Wahiduddin Adams, S.H., MA	Constitutional Justice
5	Dr. I Dewa Gede Palguna, S.H., M.Hum.	Constitutional Justice
6	Dr. Suhartoyo S.H., M.H.	Constitutional Justice
7	Dr. Manahan M. P. Sitompul, S.H., M. Hum.	Constitutional Justice
8	Prof. Dr. Saldi Isra, S.H., MPA	Constitutional Justice
9	Dr. Enny Nurbaningsih, S.H., M.Hum.	Constitutional Justice
Former Justice and Speakers		
10	Prof. Dr. Jimly Asshiddiqie, S.H.	International Symposium Speaker
11	Prof. Dr. Mahfud MD, S.H., S.U.	International Symposium Speaker
12	Dr. Hamdan Zoelva, S.H., M.H.	Short Course Speaker
13	Dr. Maruarar Siahaan, S.H.	Short Course Speaker

14	Prof. Dr. Aidul Fitriciada Azhari, S.H., M.Hum.	Short Course Speaker
15	Prof. Dr. Maria Farida Indrati, S.H., M.H.	Former Justice
16	Dr. H. Harjono, S.H., MCL.	Former Justice
17	Prof. Dr. Achmad Sodiki, S.H.	Former Justice
Members of AACC		
18	Mr. Abdul Rouf Herawi	Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan
19	Mr. Hidayatullah Habib	Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan
20	Mr. Ratana Taing	Constitutional Council of the Kingdom of Cambodia
21	Mr. Murat Assylbayev	Constitutional Council of Kazakhstan
22	Mrs. Aigul Mukusheva	Constitutional Council of Kazakhstan
23	Mr. Moonjoo Lee	Constitutional Court of Republic Korea
24	Mr. Jaehwa Noh	Constitutional Court of Republic Korea
25	Ms. Sabreena binti Bakar	Federal Court of Malaysia
26	Mr. Syahrul Sazly bin Md Sain	Federal Court of Malaysia
27	Ms. Bolortungalag Narangerel	Constitutional Court of Mongolia
28	Ms. Bilegjargal Bat-Erdene	Constitutional Court of Mongolia
29	Ms. Svetlana Karamysheva	Constitutional Court of Russian Federation
30	Ms. Srimoung Sumaporn	Constitutional Court of the Kingdom of Thailand
31	Mr. Pitaksin Sivaroot	Constitutional Court of the Kingdom of Thailand
32	Mr. Recep Kaplan	Constitutional Court of Turkey
33	Mr. Sukhrob Norbekov	Republic of Uzbekistan

International Participants		
34	Sonja Stojadinovic	
35	Jin Wook Kim	
36	Saniia Toktogazieva	
37	Haleh Etemad	
38	Syed Fadhil Hanafi Syed A Rahman	
39	Nino Kashkashvili	
40	Moin Uddin	
41	Juan Sebastian Villamil Rodriguez	
42	Bjorn Dressel	
43	Tomoo Inoue	
44	Theunis Rox	
Representative of Indonesian Institutions		
45	Abhan, S.H.	The Elections Supervisory Agency (Bawaslu)
46	Prof. Amzulian Rifai, S.H., LL.M., Ph.D.	Ombudsman
47	Laode Muhammad Syarif S.H., LL.M., Ph.D	The Corruption Eradication Commission (KPK)
48	Jhoni Ginting	Ministry of Political, Legal, Security
49	Reza Faraby	The National Development Planning Agency (Bappenas)
50	Maya Grandty	The National Development Planning Agency (Bappenas)
51	Hermawan Susanto, S.H., M.A.	The Secretary of Cabinet
52	Erick Mario, S.H., M.H.	The Secretary of Cabinet

53	Armein Rizal	The Witness and Victim Protection Agency (LPSK)
54	Abdul Azis Muslim	The Witness and Victim Protection Agency (LPSK)
55	Sutarno Bintoro	The Corruption Eradication Commission (KPK)
Representative of Indonesian University & Law Faculty		
56	Jamal Hi. Arsad, S.H., M.H.	University of Khairun
57	Prof. Dr. Supanto	State University of Sebelas Maret
58	Prof. Dr. Budiman Ginting, S.H., M.H.	University of Sumatera Utara
59	Dr. Rodiyah, S.Pd, S.H., M.Si.	National University of Semarang
60	Prof. Dr. H. Muhammad Jufri, S.H., M.S.	University of Halu Oleo
61	Dr. Wasis Susetio, S.H., M.H, MA	University of Esa Unggul
62	Dr. Rachmad Safa'at, SH., M.Si.	University of Brawijaya
63	Prof. Dr. Ilyas Ismail, S.H., M.Hum.	University of Syiah Kuala
64	Fathul Wahid, S.T., M.Sc., Ph.D.	University of Islam Indonesia
65	Prof. Dr. Retno Saraswati, S.H., M.Hum.	University of Diponegoro
66	Insan Tajali Nur, S.H., M.H.	University of Mulawarman
67	Prof. Dr. Nunuk Nuswardani, S.H., M.H.	University of Trunojoyo Madura
68	Dr. Amad Sudiro, S.H., M.H., M.M.	University of Tarumanegara
69	Dr. Lalu Parman, S.H., M.Hum.	University of Mataram
70	Edward Thomas Lamury Hadjon	University of Udayana
71	Dr. Yoan Nursari Simanjuntak, S.H., M.Hum.	University of Surabaya
72	Dr. Eddhie Praptono, S.H., M.H.	University of Pancasakti Tegal

73	Yanti Fristikawati	University of Atma Jaya Jakarta
74	Yorhan Yohanis Nome, S.H., M.Hum.	University of Nusa Cendana
75	Dr. Y. Sari Murti Widiyastuti, S.H., M.Hum	University of Atma Jaya Yogyakarta
76	Rezki Azis, S.H., M.H.	University of Al Asyariah Mandar
77	Wirazil Mustaan	University of Bangka Belitung
78	Dr. Yahya Ahmad Zein, S.H., M.H.	University of Borneo Tarakan
79	Dr. Firdaus, SH., MH	University of Riau
80	Prof. Dr. Ade Maman Suherman, S.H., M.Sc	University of Jenderal Soedirman
81	Dr. Radian Salman, S.H., LL.M	University of Airlangga
82	Dr. Krisna Djaya Darumurti, S.H., M.H.	Christian University of Satya Wacana
83	Wendy Budiah, S.H., M.H.,LL.M.	UIN Sunan Kalijaga
84	Prof. Dr. Jamaluddin, S.H., M.Hum	University of Malikussaleh
85	Erna Kurniawati, Sip., M.Si	UPN “Veteran” Yogyakarta
86	Dr. Retno Mawarini S., S.H., M.Hum.	University of 17 Agustus Semarang
87	Erni Dwita Silambi, S.H., M.H.	University of Musamus
88	Dr. Flora Pricilla Kalalo, SH, MH	University of Sam Ratulangi
89	Lailani Sungkar	University of Padjadjaran
90	Rafika Nur, S.H. M.H.	University of Ichsan Gorontalo
91	Dr. Upik Mutiara, S.H., M.H.	Muhammadiyah University of Tangerang
Indonesian Academicians & Practitioners		
92	Prof. Dr. Ni’matul Huda S.H., M.Hum.	Lecture of Islamic University of Indonesia

93	Dr. Oky Deviany Burhamzah, S.H., M.H	Lecture of University of Hasanuddin
94	Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, S.H., M.M.	State University of Sebelas Maret
95	Gregorius Seto Harianto	Constitution Forum
96	Ir. Pataniari Siahaan	Constitution Forum
97	Dr. Hj. Hesti Armiwulan S.H., M.Hum.	Lecture of University of Surabaya
98	Prof. Dr. Muhammad Fauzan, S.H., M.Hum.	University of Jenderal Soedirman
99	Titi Herwati Soeryabrata, S.H., M.Hum.	University of 17 Agustus Semarang
100	Auliya Khasanofa, S.H., M.H.	Muhammadiyah University of Tangerang
101	Dr. Amalia Diamantina, S.H., M.Hum.	University of Diponegoro
102	Prof. Susi Dwi Harijanti, S.H., LL.M., Ph.D	University of Padjadjaran
103	Dr. Toendjoeng Herning Sitabuana, S.H.,C.N.,M.Hum	Lecture of University of Diponegoro
104	Dr. Cora Elly Novianti, S.H., M.H.	Dean of University of Moch. Sroedji Jember
105	I Made Kusuma Jaya, S.H., S.I.K.	Head of Legal Division of POLDA DIY
106	M. Firman L. Hakim, M.Si	Police Chief of Sleman POLDA DIY
107	Drs. Gatot Agus Budi Utomo	Director of Special Criminal Division of POLDA DIY
108	Dr. Hadi Utomo, S.H., M.Hum.	Director of GeneralCriminal Division of POLDA DIY
109	Wisnu Widarto, S.I.K.	Director of Drugs Criminal Division of POLDA DIY
110	Dr. Zainal Arifin Mochtar, S.H., LL.M	Chief of Anti-Corruption of Gadjah Mada University
111	Ali Setyawan, S.H.	Jogja Practitioner
112	Dr. Agung Makbul	Indonesian Republic Police
113	Drs. Teguh Sarwono	POLDA DIY

114	KOL. KAV. Puji Setiono	POLDA DIY
115	Ngadiyo	POLDA DIY
116	Hery Riyadi	POLDA DIY
117	Danang Wibowo	POLDA DIY
118	Sumawan Ismuworo	POLDA DIY
119	Trihadmaji	POLDA DIY
120	Sukartono	POLDA DIY
121	Hermanto	POLDA DIY
Short Course Participants		
122	Diastama Anggita Ramadhan, S.H., LL.M.	University of Diponegoro
123	Andy Omara	Gadjah Mada University
124	Dr. Budiyono, S.H., M.H.	University of Lampung
125	Dr. Julistia Mustamu, S.H., M.H.	Pattimura University
126	Beni Kharisma Arrasuli, S.H., LL.M.	Andalas University
127	Dr. Mohammad Effendy, S.H., M.H.	Lambung Mangkurat University
128	Dr. Malahayati, S.H., LL.M.	Malikussaleh University
129	Prof. Dr. Syamsul Bachri, S.H., M.S.	Hassanudin University
130	Dr. Riris Ardhanariswari	Jenderal Soedirman University
131	Andriani Wahyuningtyas Novitasari, S.H., M.H.	Researcher of Constitutional Court of the Republic of Indonesia
132	Intan Permata Putri, S.H.	Researcher of Constitutional Court of the Republic of Indonesia
133	Muhammad Ramlan Aminuddin, S.H., M.H.	Legal Officer of Constitutional Court of the Republic of Indonesia

134	Rafiuddin, S.H., M.H.	Legal Officer of Constitutional Court of the Republic of Indonesia
135	Ery Satria Pamungkas, S.H.	Rapporteur Officer of Constitutional Court of the Republic of Indonesia
136	Saiful Anwar, S.H., M.H.	Rapporteur Officer of Constitutional Court of the Republic of Indonesia
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150	Kasianur Sidauruk, S.H., M.H	Registrar
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152	Drs. Mulyono	Head of Human Resources & Organizational Division
153	Kurniasih Panti Rahayu, S.E., M.A.	Head of Legal Division
154	Teguh Wahyudi, S.Sos.	Head of general Affairs Division
155	Tatang Garjito, S.E., M.M.	Inspector
156	Heru Setiawan, S.E., M.Si.	Head of IT Center
157	Muhidin, S.H., M.Hum.	Junior Registrar I
158	Triyono Edy Budhiarto, S.H.	Junior Registrar II
159	Ida Ria Tambunan, S.H., M.H.	Junior Registrar III
160	Prof. Dr. H. Ahmad Syafii Maarif	Ethics Council
161	Prof. Dr. Bintan R.Saragih, S.H.	Ethics Council
162	Prof. Dr. Zainal Arifin, S.H., M.H.	Former Registrar
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