MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INDONESIAN
CONSTITUTIONAL COURT

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Jakarta - Indonesia, 13 - 17 November 2017

PROCEEDING

SUMMARY AND MINUTES DISCUSSION OF

INTERNATIONAL SHORT COURSE ON THE CONSTITUTION 2017

IN OVERSEEING THE IMPLEMENTATION OF IDEOLOGY AND DEMOCRACY IN A PLURALISTIC SOCIETY

JAKARTA - INDONESIA, 13 - 17 NOVEMBER 2017

SUMMARY AND
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In Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Registry and Secretariat General of
the Constitutional Court of the Republic of Indonesia
Jakarta, 2017

CONTENTS

SUMMARY AND MINUTES OF DISCUSSION

- **OPENING CEREMONY 1**
- **SESSION 1 ..... 9**
- **SESSION 2 ..... 17**
- **SESSION 3 ..... 33**
- **SESSION 4 ..... 47**
- **SESSION 5 ..... 57**
- **SESSION 6 ..... 65**

ANNEX 1

- **PAPERS..... 87**
- **LIST OF THE DELEGATES 233**

SHORT COURSE
OPENING CEREMONY

Anwar Usman
(Deputy Chief Justice of the Constitutional Court)

Datuk Haji Aslam Bin Zainuddin
(Deputy Chief Registrar of The Federal Court of Malaysia)

Rubiyo
(Head of PR and Protocol Bureau)

INTERNATIONAL SHORT COURSE
13th NOVEMBER 2017, JAKARTA, INDONESIA

OPENING CEREMONY

1. MC:

The MC welcomed the audience and gave the highlight of the key sessions of the International short course

2. RUBIYO (HEAD OF PR AND PROTOCOL BUREAU)

The speaker started by greeting and welcoming all honorable guests and distinguished audience. He also expressed his sincere gratitude for the participation of all audience in the International Short Course.

The speaker then went on to inform the audience about the 2017 International Short Course which is the second one hosted by the Constitutional Court of the Republic of Indonesia. This year's International Short Course will be held for 5 days, from 13 to 17 of November 2017 in Jakarta brings up the theme "The role of the Constitutional Court in overseeing the implementation of ideology and democracy in pluralistic society. The theme is in line with the previous symposium held in Solo last August. However, this short course focuses more on deepening the understanding on how Indonesia deals with challenges and obstacles during the implementation of democratic values by upholding ideology as national principle amidst diverse society.

In addition to sessions that will mostly take place in Ayana Midplaza Hotel in Central Jakarta, the speaker informed the floor that participants

will be given the opportunity to visit several historical sites around Jakarta to get a closer look at the hosting city.

Then, the speaker reported the profile of the participants attending this International Short Course. The speaker reported that the participants consist of representatives of the AACC members, invited institutions, substitute registrars and researchers of the Constitutional Courts, as well as academics from Indonesia's reputable universities.

The success of this event depends on the participation of all elements of the audience. Thus, to achieve the desired result, the committee has invited notable speakers from constitutional justice, practitioners and national figures who fully understand the issues concerning democracy and ideology in Indonesia. It is hoped that all participants can benefit from the valuable lessons shared by each presenter. In addition, it is hoped that participants can share their experience on the judicial practice implemented in their home countries so that they can also learn from one another to help them deal with similar issues.

The speaker ended his remark by appreciating the participation of all audience that will certainly contribute to the success of this event.

3. DATUK HAJI ASLAM BIN ZAINUDDIN (DEPUTY CHIEF REGISTRAR OF THE FEDERAL COURT OF MALAYSIA)

Resume of Datuk Haji Aslam's speech.

He greets the distinguished guests and audience.

He commended the Indonesian Constitutional Court for holding this session.

He then addresses the role of the Constitutional Court in handling ideologies and democracy in pluralistic countries. Democracy, the government of the people, by the people, and for the people, carries the essence of plurality. Democracy, usually associated with capitalism, communism, socialism, and many others has caused conflicts of ideologies, and in addition, different histories of countries make democracy complex. Therefore, our commitments to democracy may be different from each other in the context of nations living side by side in harmony. The democracy in each country has been adapted to locality through governance and national ideologies, besides lending from others.

He addresses the pluralistic society in which people need to show tolerance, perseverance and patience because the society has various cultures, religions, customs, languages and other social ties, engaging with each other. As mentioned in the Solo conference in August this year, the success and continuity of a pluralistic society depend on tolerance, perseverance and patience.

The judiciary function is important in protecting the liberty of each member in such society. So, the law must reign supremely in each society. As each country recognizes that all men, women and children are equal before law, the society will survive in facing the adversity and be able to cope with problems against all odds. The judiciary, separated from government, provides check and balance, ensures the obedience to the law, and reviews any infringement of judicial rights.

Malaysia, for example, has a judicial system and federal constitution that ensure its 13 states enjoy peace, although it is a melting pot of 32 million people of different cultures, traditions, races, and religions. Malaysia's Federal Constitution has become the framework and shrine of plurality and has proven to be the road map for the nation in time of either peace or conflict. "Rukun Negara," the ideology of Malaysia, incorporates the unity,

rule of law, and the supremacy of the constitution, with its five principles: Believe in God, Loyalty to King and Country, Upholding the Constitution, Upholding Rule of Law, and Good Behavior and Morality. These are all intrinsic to the Malaysian society. Federal Constitution of Malaysia is the Constitutional Court that settles infringements of fundamental liberties. It upholds the habeas corpus, servers as check and balance of other arms of the government, and gives rights to all citizens who are encroached by law.

As a conclusion, Mr. Aslam says that no country in the world has completely fulfilled the ideals of democracy and states have depended on the level of democracy they have realized. He also stresses that pluralism and rich society should be cherished by good governance. Strong civic institutions and policies should promote respect for diversity, tolerance, and compromise, which are all the key elements of strong, cohesive, and peaceful society.

4. ANWAR USMAN (DEPUTY CHIEF JUSTICE OF THE CONSTITUTIONAL COURT)

The speaker started by saying praise and gratitude to God Almighty for His grace and blessings at the opening session of the International Short Course with the theme “The Role of the Constitutional Court in Overseeing the Implementation of the Ideology and Democracy in Pluralistic Society.”

The speaker then elaborated the history of Indonesia, starting from its independence, Indonesia was established based on the principles of democracy and law, and its noble values that form the unique identity of the nation. This identity, as declared by Soekarno, the first president of Indonesia, should be reflected in the way of life of the people, unite the nation and be used to help fulfill the goal of the independent Indonesia.

According to the speaker, at the establishment of the country, the founding fathers committed themselves not only to the creation of the state with the democracy principle, but also to embody the conception of state law, as clearly stated in the Preamble of the 1945 Constitution, in paragraph 4. This section of the 1945 constitution confirmed that Indonesia is run based on Constitution. This conception of State Law was reconfirmed in Article 1, Paragraph 3 of 1945 Constitution (Indonesia is a state based on law).

In the perspective theory, the speaker explained that the term of legal state or state of law was translated form rechsstaat or the rule of law, embraced by many countries in Europe who also embraced the civil law system. Even though 'state law' is derived from rechsstaat or the rule of law, these two terms have different historical backgrounds, history and implementation. However, they both refer to the principle of human rights protection.

The speaker continued on to explain the unique conception and adoption of rechstaat in Indonesia. According to the speaker, rechstaat in Indonesia was then neutralized into a legal state or state of law only that adheres to the 1945 Constitution, obtained from any other integrative law system, such as customary law and adjusted to the demand of the current development.

This concept of Indonesia state of law adopted the principle of legal certainty from rechstaat and the principle of justice from the concept of the rule of law. Thus, it can be stated that Indonesia has a unique law system with its own special characteristics. Referring to the Preamble of the 1945 Constitution, in the 4th paragraph, it is confirmed that the legal system prevailing in our country is in line with the democracy principle and imbued by Pancasila, the state ideology.

Thus, in this context, the speaker explained that Pancasila was adopted as the ideals of the legal state as it is adopted as the ideals underlying in the state fundamental norm (staatsfundamentalnorm). Therefore, Pancasila was also adopted as the ultimate source for all legal products in Indonesia, which means that Pancasila becomes the starting as well as destination point of the law in Indonesia.

The speaker continued the discussion by bringing up the challenge of managing a country's democracy which depends on the level of pluralism of its people—the higher the pluralism level of a country, the bigger the challenge for managing democracy in the country. With Pancasila and the noble principles contained in the state ideology, Indonesia has been able to manage democracy well despite the high level of pluralism of its society with 400 languages, various religion and around 700 ethnic groups. Guided by the principles of state ideology, Pancasila, Indonesia's constitutional court has also been able to play its important role well in managing the implementation of democracy and resolve many disputes and challenges in various aspects of the country's development.

The speaker concluded his remarks by stating that Indonesian constitution court which was established on August 13, 2003, played an important roles as the guardian and interpreter of the constitution, protector of the rights of the citizens, and upholder of the state ideology. Once again, the speaker confirmed that upholding the constitution also means upholding the state ideology.

Finally, the speaker officially declared the International Short Course with the theme "The Role Of The Constitutional Court in Overseeing The Implementation of Ideology And Democracy in Pluralistic Society" opened.

END OF OPENING CEREMONY

SHORT COURSE
SESSION 1

Judicial Review as an Instrument to Oversee Ideology

I Dewa Gede Palguna
(Speaker)

Luthfi Widagdo
(Moderator)

SESSION 1

JUDICIAL REVIEW AS A CONSTITUTIONAL INSTRUMENT TO SAFEGUARD THE STATE IDEOLOGY: PANCASILA

By I Dewa Gede Palguna

1. MODERATOR: LUTHFI WIDAGDO

Moderator (Mr. Luthfi) introduced the speaker, Mr. ID.G. Palguna by highlighting speaker's career, books.

The moderator, Mr. Lutfi Widagdo, introduces Mr. Palguna is a politician, writer, judge of the constitutional court.

In his introduction, Mr. Palguna is trying to explain (1) what Pancasila means as the state or nation's ideology; (2) why such an ideology is needed by the nation; and (3) what role the Court plays in safeguarding the ideology. His presentation is not to provide room for the going-on debate, but he is trying to explain matters related to the questions. He also wants to explain the power and authority of the Court to review such constitutionality of law.

2. SPEAKER: I DEWA GEDE PALGUNA

Pancasila as a State Ideology: Mr. Palguna explains that Pancasila is the foundation of the Unitary State Republic of Indonesia, thus accepted as the nation's ideology on June 1, 1945, when Sukarno, a member of the Board of Inquiry for Independence Preparation Measures, proposed the philosophical of Indonesia. The five basic principles: (1) the Oneness of God the Almighty, (2) A just and civilized Humanity, (3) the Unity of Indonesia, (4) Democracy which shall be guided by the essence of wisdom

in assembly/representation, and (5) Social Justice for all the people of Indonesia, should be the ideological foundation of the state proclaimed on August 17 1945.

(1) The need for Pancasila in the Pluralistic Indonesia: Indonesia is a diversity, in terms of ethnic groups, local languages, religions, and customs, inhabiting the islands in the archipelago. Pancasila should be accepted in depth thought, spirit, and passion, because Pancasila is the instrument to unite all the people. The society of Indonesia consists of 6 characteristics. there are segmentations in the form of groups having sub-cultures which are often very different one another;

(2) the existence of a social structure which is divided into non-complementary institutions;

(3) a less-developed consensus as to some basic values among its members;

(4) conflicts occur relatively often among groups;

(5) social integration develops relatively based on coercion and economic interdependence among groups; and domination of a certain group towards the others.

(6) domination of a certain group towards the others.

The majority of the Indonesian society is marked by differences in lower class and the upper class, making us more diverse. That's another reason why we need a strong uniting instrument, which is Pancasila.

The role of the Constitutional Court in Safeguarding Pancasila: Remembering that we established the Constitutional Court is to develop the

Constitutionality of Indonesia, we have to make sure that all the law made by the court should not be contradictory to the constitution or the principle of constitutionalism. If the substance of the law is not constitutional, it will be declared by the Constitutional Court as unconstitutional.

Those who have the standing of the constitutionality include:

(1) In principle, the individual citizen of Indonesia, should be in conformity with the Unitary State of the Republic of Indonesia

(2) In line with democracy. For example, the traditional entity should not make law in law.

(3) Public or private legal entities, able to file constitutional review

(4) State institutions.

A law is considered unconstitutional if the enacting is considered unconstitutional, loosing its legal binding power.

The Preamble, where Pancasila is stated, cannot be changed, so a law is considered unlawful if it is against the Preamble/Pancasila, because Pancasila is a concept and value. So, based on that, the Court should decide whether the entity can be accepted. The Court should dig deep in the Preamble, because there are issues that are not debatable. So, the Court should make the constitution a living constitution. We cannot ignore international communities to comprehend the cases as wide as we can so that we can provide in depth ways out. The Court should develop n approach in looking into whether constitutions are right.

DISCUSSION

The discussion brought up the issues of tension between state ideology and exercising human rights, the power of the constitutional court to amend the constitution, the reason why the term Pancasila didn't specifically appear in Indonesia's constitution, the reference used in making judicial review in a highly pluralistic society, how to decide if an argument meets the society needs in case of a judicial review, and the influence of globalization and international law in judicial review.

A more detailed summary of the discussion is as follows:

The moderator summarized the speaker's presentation highlighting the prime question in the presentation, that is, how to interpret the constitution as a living constitution that is in line with the state ideology. Then, the moderator invited questions and comments from the floor.

3. TURKEY: MUCAHIT AYDIN

The first question came Turkey who brought up the issue of a tension between state ideology and human rights.

4. SPEAKER: I DEWA GEDE PALGUNA

The speaker responded to this question by explaining that exercising human rights may be restricted by law for the purpose of safeguarding other rights and safeguarding democracy. However, before coming to final decision, views from different parties who are expert in the related issue needed to be taken into consideration.

5. THAILAND: CHONLAPOOM YENSUANG

The next question was from Thailand. Thailand asked if Indonesian Constitutional Court had the same power as the Constitutional Court of Thailand to consider the depth of the Constitution Amendment.

6. SPEAKER: I DEWA GEDE PALGUNA

In response to the question from Thailand, the speaker explained that there is no constitutional mechanism that can be used to change the constitution. If the constitution is changed than there is no more unitary state of Indonesia that uses the constitution as the foundation of the state. He also added that Indonesia adopted the programmatic preamble in which the preamble is an integrated part of the constitution. The only thing that the Constitutional Court can do is to interpret whether a case or a petition is against the constitution or not.

7. THAILAND: PITAKSIN SIVAROOT

The third question was from Thailand. The participant from Thailand inquired why Pancasila didn't appear explicitly in the Constitution.

8. SPEAKER: I DEWA GEDE PALGUNA

To answer this question, the speaker referred back to the establishment of the Constitution where there were two opposing groups: One would like to base the new state by the Islamic foundation and the other proposed the State foundation. The two groups came to a compromise of formulating the five principles in the Preamble, without specifically naming them the principles of Pancasila.

9. MYANMAR: NYI NYI LWIN

The next question was from Myanmar. Considering the highly pluralistic nature of the Indonesian society, the participant from Myanmar inquired the reference used by the Constitutional Court in making judicial review.

10. SPEAKER: I DEWA GEDE PALGUNA

According to the speaker, the Constitutional Court of Indonesia uses Pancasila as the ultimate guidance in making the review. Thus, there no different treatment in terms of ethnicity, religious or social groups. In deciding a case, it is possible to support a local wisdom, such as in the case of Subak in Bali, as long as it is in line with the development of the society and not contradictory with the state principles of Pancasila.

11. LUSI APRIYANI (SRIWIJAYA UNIVERSITY)

A participant from Sriwijaya University, Indonesia, inquired the way to judge if an argument meets the society needs despite being an originalist or non-originalist.

12. SPEAKER: I DEWA GEDE PALGUNA

In answering the question, the speaker personally claimed that he is not an originalist. He believed in interpreting the text of the constitution as a living constitution taking into the consideration the contemporary development in the society.

13. MODERATOR: LUTFI WIDAGDO

Finally, the moderator raised the issue of the globalization and international law.

14. SPEAKER: I DEWA GEDE PALGUNA

The speaker answered by referring to the fact that in any international convention, treaty or agreement, there is the right of every state to state their involvement in such an agreement or exercising the principle of preservation. The state has to know what kind of 'world' they wanted to go in and decide which areas they would adopt to their law.

END OF SESSION 1

SHORT COURSE
SESSION 2

Pancasila Amidst World Ideologies

Jimly Assiddhiqie
Speaker

Pan Mohamad Faiz
Moderator

INTERNATIONAL SHORT COURSE
14th NOVEMBER 2017, JAKARTA, INDONESIA

SESSION 2

CONSTITUTIONALISM AND THE COURT

by Jimly Asshiddiqie

1. MODERATOR: PAN MOHAMAD FAIZ

The MC startes the session by introducing the speaker and the moderator.

The Moderator introduces the speaker, Mr. Jimly Asshiddiqie, by highlighting speaker's career. He was the founder and the first Chief Justice of the Indonesian Constitutional Court. He has played a prominent role in developing the structure of the Constitutional Court of Indonesia, an expert of the People's Assembly, and other roles. He has written 60 books on various constitutional issues and topics.

2. SPEAKER: JIMLY ASSIDDHIQIE

The presenter startes by apologizing for presenting a paper about Constitutionalism and the Court, which was not the same as the topic recommended by the Committee.

The presenter then continues on to briefly highlight each principle in Pancasila and about Indonesia being the most pluralistic society, even dated way back in history in the Sriwijaya Kingdom in the 16th century. He adds that the five principles serve as the spirit of the nation, whereas the

Body is the Constitution. The basic law is the text of the 1945 Constitution Body, in which the spirit is Pancasila in the Preamble. The Constitutional Court deals not only with the Body but also the spirit of the Preamble, so when the Court reviews the law, the Court reviews both the Body and the Spirit (Pancasila) that form the Constitution.

In his view, Pancasila is the constitutional identity, the same as other countries that have their own unique cultural identity. Civil Law countries, such as the Netherlands.

There are a few key points that were highlighted:

a. The unique identity of each constitution of a country.

b. The trends in the development of Constitution:

    1. The Constitution is regarded as the highest law of the ranks.

    2. The new movement and understanding of the new notion integrate Ethics and Law.

    3. The constitution is the highest law of the land. But in Indonesia, the Constitution is the highest law and ethics, mentioning the land and water (tanah air). However, we missed one aspect: the air, which may become crucial in the future. Thus, constitution should deals with not only the land and water but also the air as the future depends on how we manage the land, the water, as well as the air. The idea of green constitution (the land and the water) should be completed with the idea of blue constitution (the air) in the future. We should think more openly, depending not only on the past but also the future.

4. So today the constitution and constitutionalism should consider present topics.

5. The new notion of integrating Economics and Law: The constitution deals not only with politics, like in the US—no connection with economy, but today, there are many constitutions that have special chapters concerning economics and social justice/ welfare. This means that the economic policy, law of trade for example, in every country should be in line with the constitution.

6. The new notions on Constitutional text that needs to also support Constitutional culture. The fact up to now, almost 90% of the constitution culture was implanted from other cultures. Most constitutions consist of human right issues, and they look similar in every country, even Indonesian Constitution. Thus, problems arise—the problems of word of mind and word of behavior, constitution and tradition, constitutional structure and constitutional culture. All judges should not just do the grammatical reading of the law and the constitution, but they all have to interpret and read the moral, philosophical, and cultural reading. This is important for the judges and the researchers to not be trapped in the habit to understand the law and constitution through grammatical understand.

c. Finally, the speaker would like to share about the rule of constitutional adjudication. The constitution is a social contract that must prevail. Let the constitution/law be enforced since the sky will never fall because of that. A special agency is needed which is accommodated by three models: (1) Decentralized model – like the one in America. All courts have the power to do the judicial review. Most of the common law countries also follow this tradition, e.g. India, Australia, and Canada.

(2) Centralized model, established in 1930 in Vienna, (3) French Model: The audit body is called Court, but the Constitutional Court is called Council. Almost all countries that used to be colonized by France follow this model, which name their agency as Council. Indonesia is number 78 that established Constitutional Court in 2003. The nine functions of the Constitutional Court:

1. Guardian of the constitution
2. Counter balancing power to the majoritarian democracy
3. Guarantor of minority rights
4. The Protector of Human Rights
5. Protector of citizen's constitutional rights
6. The final interpreter of the constitution
7. Maintaining check and balance's mechanism
8. Problem solver in democratic electoral disputes
9. The ruler of impeachment for democratically elected officials

Indonesia's Constitutional Court has five jurisdictions or authorities:

1. Judicial review on the constitutionality of law
2. Disputes on the constitutionality of the authority of state institutions
3. Disputes on electoral results
4. Political parties dissolution
5. Impeachment of President and/or Vice president

The function of constitutional review of law and regulations should be integrated into one system as the jurisdiction of the Constitutional Court mechanism under one roof of the constitution. Inviting chief justices from other countries for comparative studies and learning from South Korea, Indonesia simplified the system to dualistic system of review. Now, in 14 years, the dualistic system is not the best solution to the legal reform in Indonesia. There are more and more scholars thinking of the need to have a more integrated judicial review.

DISCUSSION

3. THAILAND: CHONLAPOOM YENSUANG

Our country has many coup d'etats, why Indonesia doesn't have many coups so Indonesia can invite many investors?

4. TURKEY: MUCAHIT AYDIN

Ethics are more than written rule. It's dangerous for judges to go beyond their power because the might abuse it, especially in time of crisis.

Constitutionalism comes from Western Culture. We also adopted some basic values from eastern countries. There are some unique cultures, the Asian values. How do we bring these two notions together? For example the issue of LGBT – we are forced to take position like in Western Countries, like a hegemony issue. Another issue is headscarf issue that is fundamental to Moslem women. What are your thoughts about these issues?

5. REPUBLIC OF KOREA: JUNGHYUN HWANG

Sharing Constitutional Court and Supreme Court

Question about the standard of constitutional ethics, and the line between ethics and law. Officials still consider ethics law. What is your opinion about it?

6. SPEAKER: JIMLY ASSIDDHIQIE

Responses:

1. To Thailand:

Indonesia also have many isolated groups that try to make coups and proceed according to their own truths in relations to the issues of race, for example during the government election in Jakarta as the candidate is Chinese and non Moslem. The way Indonesia changes the constitution—according to the procedure, it is not mentioned that the constitutional change must be conducted through amendment system. The shortest constitution is Indonesia's. When we come to the agreement to make a reform, there are two groups of people: the conservative – they don't want to change any words in the constitution – for this group, the Constitution is sacred; and the extreme – they want a totally new constitution. Then, there are agreements with five consensuses. Thus, the decision was: The change must be conducted not through replacement, but by addendum. This is called incremental change, which substantially is not an incremental change, but a big-bang change or probably more appropriately called incrementally big bang change. The changes are already 300%.

2. To Turkey:

Ethics – the system of ethics must be managed differently from law. In the speaker's view, we need special court of ethics in the future, and also the supreme court of ethics as the philosophy, and the way of handling ethics are different. Jail is today becomes the best solution for a legal problem in Indonesia and other countries. Ethics should be more effective because from the point of ethics, reprimanding should be considered, not just giving sentence. The system of ethics in the Constitutional Court and Supreme Court: sentencing to jail. This will have to be reevaluated in guiding the behavior of people. But the ethical approach give reproach to criminals. President might be impeached because of unethical behavior. How can the court deal with it without considering ethics?

In Europe many jails have been closed, but Asian and Indonesia, jails have become over capacity. Ethical solution is probably dismissing people from office or giving reprimand. We need to broaden our understanding about the Constitution, law and ethics. Almost all countries have adopted this ethical system. Before, many think that law is higher than ethics – because of the supremacy of law. But, for the religious leaders, law must conform to ethics. But today, the two understandings are not appropriate. This is not about which one is higher or lower. The two have to be of similar level: Law is the outer body and ethics is the content or the spirit. Warren said, "Law is like a ship, ethics is the sea. Law is the ship, and the ship will not reach the island of justice if there is no water." So, if we want to see the law of justice implemented, we need ethics.

Most of our constitutions are borrowed or transplanted from the West, but actually it is better for us not to talk about West and East. The world Democracy is actually from Greek, not from the West. The speaker preferred to call these values as universal values – which can come from outside and from within the local cultures. Universalization, having fundamental values, is not globalization, universal and local values. Pancasila has universal values, and so it is eternal. The speaker referred to the final part of his paper that talked about cultural/constitutional identity, inclusivism, universalism, and pluralism. The issue of LGBT doesn't come only from the West--it is about a new reality, now reaching 5% of the world population. The constitutional issue is related to the issue of *Recht* person – a 'legalized' person created by law. We need to accommodate the various needs of everybody. This also covers the issue of headscarf.

3. To Korea:

Thanking Korea for the shared information about the Constitutional Court in Korea. We are discussing to have a more integrated system.

In the future, judicial review in Indonesia must be integrated within one system.

Constitutional Ethics – when it is written, must be predictable – this is the characters of code of law.

When talking about Ethics, we have two views: Sense of ethics or unwritten law, and Written Ethics – code of conduct which must be written and regulated. For Indonesia, the speaker

proposed a special national ethical system under the constitution. Not all problems should be solved by rule of law, but also by rule of ethics.

Codes of ethics are actually regulated in the law and the legislation is also law. Ethics was not used to be written but now it is. It is time now to use ethics to solve problems, because not all problems can be solved by the written law.

7. MODERATOR: PAN MOHAMAD FAIZ

The moderator invites more comments and questions from the floor.

8. MYANMAR: NYI NYI LWIN

Myanmar established the Constitutional Court in 2011.

How does the Constitutional Court of Indonesia conduct judicial review?

Five jurisdictions of Constitutional Court – how can Indonesian citizens submit applications?

9. CAMBODIA: SOTHEA SENG

The real case resolved by the Indonesian Constitutional Court regarding the implementation of judicial review in case the social opinion is in contradiction with the law?

10. LUSI APRIYANI (SRIWIJAYA UNIVERSITY)

What are other things that a good constitution should cover?

Which constitution from other countries can be defined as a good model of a constitution?

11. SPEAKER: JIMLY ASSIDDHIQIE

Responses

1. To Indonesia

There are 3 matters of Constitutional Change:

1. Formal amendment
2. Through Interpretation
3. Through constitutional convention and practices

Not all countries have adopted the Green Constitution. The most green constitution in the world is French and Equador. In Equador they also talked about the fundamental rights of nature (rivers, mountains, animals).

Indonesian constitution has included some issues of Green Constitution. In Article 10, the President has the power over the Army, Navy and Air force. Because of that, we can make new interpretation to manage property on the land, in the water and the air.

2. Cambodia

We have many examples or landmarks/leading cases of the court ruling. One example is a well-known court ruling in history

dealing with terrorism: Law no 15 on Anti-terrorism which is declared as effective retroactively after the Bali Bomb. The law no 16 is declared unconstitutional – the law was only supported by 5 judges while the other 4 were against it. Insulting the president is a crime. There are two types of crime: reported crime and legal crime. The police may take action to catch the person who insulted the President. *Delik aduan* – a person makes a report to the police about someone insulting the president. The president is different from common people. President is an institution with no emotion. The person who sits in the presidency can come to the police to file a report. This is to avoid discriminatory clause in the Constitution.

3. Myanmar

Any individual including tax payer can file a complaint. If a person complains about the law concerning an injustice treatment, the person can go to the constitutional court. The constitutional court can also review the procedure.

12. MODERATOR: PAN MOHAMAD FAIZ

The moderator encouraged more comments and questions.

13. MONGOLIA: BILEGJARGAL BAT-ERDENE

Different models of Constitutional jurisdiction. Could it effect the perception of human rights?

14. THAILAND: PITAKSIN SIVAROOT

Thailand raised the issue of the court of Ethics. In Thailand, an agency has to have its own court of ethics – this is a must according to

Thai Constitution. There are some agencies—whether your country has special agency?

15. MALAYSIA: ASLAM ZAINUDDIN

Law and ethics – opinion on whether the constitution can go against the natural law? If the constitution goes against the natural of the society?

Opinion basic structure of the constitution whether the legislation can amend the basic structure of the constitution?

16. SPEAKER: JIMLY ASSIDDHIQIE

Responses:

1. To Mongolia

French enjoys a more stable legal system that if it is already adopted or promulgated it cannot be reviewed any more. One can propose a review before being signed by the president. This has weakness because the articles may be found inappropriate if they have been implemented. Some countries resolve this by a centralized system of legal review.

Once a law was officiated, the law can be reviewed by the parliament, e.g. the law of election and anti-corruption law. These two laws have received many reviews – this cause instability.

2. To Thailand

Almost all countries in the world have adopted ethics infrastructure of public offices. So, one day, we need to institutionalize it in a more integrated way.

Until today, mostly in the world, they are not talking about the court, they are only talking about a special close mechanism. In our constitution, we have judicial commission for judges but the way they work is very private – they only publish the decision.

Courts are not just about law, that's why it has to be open. Ethics should be more concrete because in the civil society everywhere we need ethics. Medical ethics was first written. All states have ethical system. The layer must understand this. So, we need the Supreme Court of ethics.

The parliament of Indonesia now has an honorary body to deal with code of ethics. This body used to be called Honorary Body but then was changed to Mahkamah Kehormatan – or the Court of Honor.

We need to institutionalize ethical system—for example a supreme court of ethics.

3. To Malaysia

Concerning Law and ethics, the speaker noted the problems between Islamic Law and National Law. He also added that in Indonesia, consensus is a social contract – iman, adil and amanah (trust) – there is the importance to fulfill our contract. Once we have signed the contract, we have to follow through. All the natural laws must conform to the contract. We need to read the cultural and philosophical readings, not just the grammatical readings. Again, the speaker reminded the audience to have deep meaning of cultural principles including understanding of the natural issues. Once it is set by the constitution, we have to conform to that.

In Indonesia the object of amendment is only the 'articles', not the preamble (it is not the object of change). Article 37.5, especially mentioned the structure of NKRI – the Unitary State System of the Republic of Indonesia may not be changed.

17. MODERATOR: PAN MOHAMAD FAIZ

The moderator closed the session by appreciating the speaker for his noble ideas. He also summarized the presentation as follows:

- Study and research on constitutional issues – not just constitutional law abut also constitutional ethics
- Constitution should not only cover land and water, but also the air.
- The most important thing is that the fact that almost all the constitutions were crafted from other sources. There is a serious a problem related to this issue because it arises conflict between constitutional text and reality. Therefore, we need to interpret the constitution not just from the grammatical aspects but also by considering the values adopted by the society.

END OF SESSION 2

SHORT COURSE
SESSION 3

Maintaining Diversity Under Unitary State

Agus Widjojo
Speaker

Rubiyo

Jana Tjahjana Anggadiredja

SESSION 3

MAINTAINING DIVERSITY UNDER UNITARY STATE MANAGING DIVERSITY WITHIN THE FRAMEWORK OF THE COUNTRY

by Agus Widjojo

1. MC:

The MC starts the session by thanking God for the wonderful opportunity. She then welcoms all participants to Lemhannas. Finally, the MC reviews the agenda for the afternoon.

OPENING REMARKS

2. RUBIYO

Mr. Rubiyo starts by addressing his greetings to the honorable guests and participants of the International Short Course of the AACC 2017. He also expresses his gratitude to God for the health and opportunity to attend this session. The speaker also expresses gratitude to Lemhannas and the speaker. Mr. Rubiyo then introduces the participants from different countries.

Mr. Rubiyo also introduces the topic of the presentation in the third session and the speaker of this session, Letjen (Purn) Agus Widjojo.

VIDEO PROFILE OF LEMHANNAS RI

The showing of the video profile of Lemhannas RI.

The video starts with the issue of cold war and the early establishment of Indonesia. Then, the video displayes some activities of Lemhannas among others: Regular and short education programs for future national leaders across organizations, across government ministries and private institutions, Consolidation forum for governors.

3. JANA TJAHJANA ANGGADIREDJA

BRIEF BIOGRAPHY OF THE PRESENTER, PRESENTED BY PROF. JANA

Professor Jana reads out the brief profile of the governor of the national resilience institute of the Republic of Indonesia, the speaker of the third session.

The speaker holds a Master's degree in Military Art and Science from the US Army Command and General Staff College, National Security from US National Defense University and Public Administration from George Washington University.

The presenter's research interests are security sector reform, democratization process, post-conflict reconciliation.

4. AGUS WIDJOJO (GOVERNOR OF THE NATIONAL RESILIENCE INSTITUTE OF THE REPUBLIC OF INDONESIA)

Introduction

· The speaker starts by welcoming all the participants. He also introduces the name "Lemhannas" which means resilience. He adds the history of the changing names of the institution, from defense

institution, to defense and security institution, and now it changes to National Resilience Institution.

· The speaker then introduces the title of the presentation: Maintaining diversity under unitary state with a subtitle of managing diversity within the framework of the country.

Inception of the a nation

· The speaker continues on to introduce the inception of a nation. In this topic, the speaker starts from the Dutch colonial policy of ethical politics, by establishing education opportunities for Indonesians to study abroad. This became the first milestone of the rise of the Indonesian nation to unite against colonialism. This led to the establishment of the youth association of Budi Oetomo, with its legendary movement commemorated as National Awakening Day, as the output of the second youth congress in 1928. It was then, the Indonesian National Anthem was first played and the youth pledge was declared (One motherland of Indonesia, one nation of Indonesia, upholding the Indonesian language as language of unity. It was the first of the start of the principle of consensus.

· This youth pledge cultivated the nationalism, the sense and the spirit of nationality until the culmination on August 17, 1945 with the proclamation of independence.

Nation's insight

The speaker quotes two statements of Ir. Soekarno containing the concept of nationalism:

"We do not set up the state for one person, one class, but all for all, one for all, all make one, and for the state to be strong."

The Republic of Indonesia does not belong to a group, not to a religion, not to any tribe, to a group of customs, but all of us, from Sabang to Merauke (1955).

The Life of the Nation and the State rests on Four Basic Consensus

1. The national values originating from Pancasila

2. National values originating from the Constitution of the RI as the nation's constitutional foundation

3. Values of nationality originated from the nation's motto, Bhineka Tunggal Ika, which means Unity in Diversity.

4. Nationality values originating from the Unitary State of the Republic of Indonesia. This is because from the history of struggle for independence, the Dutch established the Dutch colonial state which only covered Yogyakarta and surrounding areas. But then the other areas of Indonesia voluntarily agreed to be united under one nation, Indonesia.

Background of National Motto 'Bhineka Tunggal Ika'

· Sesanti or Bhineka Tunggal Ika motto, first disclosed by Mpu Tantular, Buddhist Tantrayana, Great Pujangga of Majapahit kingdom, during the regime of King Hayamwuruk (1350 – 1389).

The Position of the Motto

· 600 years after it was revealed by Mpu Tantular, in 1951, Bhineka tunggal Ika was designated as the official motto of the Republic of

Indonesia through Government regulation No 66 of 1951 (The word “Bhinna ika” then strung together into one word “Bhineka”).

· The PP stipulates that Bhineka Tunggal Ika is designated as a motto contained in the State Symbol of the Republic of Indonesia, Garuda Pancasila. This is stated in the second amendment of the 1945 constitution.

Bhineka Tunggal Ika as the Motto

· To set and regulate life of society, nation and sate

· To respect and bring harmonious relationship of different ethnic groups, races, languages, cultures and customs.

Constitutional Bases for maintaining diversity

According to the speaker, the constitutional bases maintaining diversity is the 1945 Constitution. He mentioned the Preamble and some articles (article 1 and Article 28 E and Article 32 of the 1945 Constitution that support, respect and nurture diversity in Indonesia

How Difficult it is to maintain diversity?

· Indonesia is not a nation state

· Qu’estce Qu’un Nation (Ernest Renan) – What is a nation

· A nation is a collective bond of people bound and united by a common sense of destiny and suffering in the past with a shared vision.

· Benedict Anderson: a nation is a sovereign political imagined geographical area with distinct borders.

Indonesia is nation of consensus

In this section, the presenter notes some points concerning Indonesia as the nation of consensus.

- Building blocks of national consensus building
- The arrival of Islam was by trade. It paved the way to the existence of 'wali's or Islamic cleric – teaching Islam by blending the local wisdom.
- 1908: Establishment of Budi Oetomo and other educational movement
- 1928 Resulting in a consensus
- August 17, 1945.

Pancasila as National Ideology

- Pancasila as State Ideology
- The foundation in the hierarchical legal system
- Reflection of character of the people of Indonesia
- National way of life
- Point of reference and norm in the life of the Indonesian people
- Sacred oath of the Indonesian people
- Ligature of the Indonesian people

Challenges

In maintaining diversity, Indonesia also faces challenges.

- Facing the dynamics of the International environment
- The borderless world
- People have unlimited choices
- Early democratization vs. freedom of opinion
- The vibrancy of market of ideas is a consequence of the success of democratization
- Race to swift between the development of ideas and the building of effective political institutions in a new democracy.
- National values and system was to be competitive in the competition of ideas
- Recovery of Pancasila and other national values to be manifested and felt in concrete terms in the national life.

Conclusion

- Indonesia has rich resources in its national values
- Indonesia is not a nation state, cannot take management of diversity for granted but has to be worked out to see it manifested
- The historical perspective of Indonesia is an evidence how the managing of diversity is rested on consensus and not majority-minority mechanics

· The dynamics of contemporary strategic international environment will pose challenges to the management of diversity in Indonesia

DISCUSSION

5. QURROTA AYUNI (UNIVERSITY OF INDONESIA)

Question:

Challenges faced by Indonesia – we have challenges on freedom of expressions, nationalism and Islam. As the governor of Lemhannas – national propaganda – build up the belief of Pancasila. Many NGOs come to Indonesia with the goal of infiltrating their ideology.

What is your national propaganda to protect the geopolitical unity?

Pancasila – political propaganda in the era of Soeharto –

I'm Pancasila.

We have national resources. We need to have a lot of awareness that we need to understand our own culture.

6. AGUS WIDJOJO (GOVERNOR OF THE NATIONAL RESILIENCE INSTITUTE OF THE REPUBLIC OF INDONESIA)

Answer:

All these challenges come with the dynamic and development. This is also the product of the success of democratization. It is a race of enhancing the speed of the establishment of various ideas that in the past were too effectively controlled.

The challenges cannot be responded by the government only because democracy is owned by the people. There is a paradox in the early democratization process. We required a strong leader in fact democracy never required a strong leader.

Here we have to take care of ourselves, we cannot just leave it to the government. There are some things that we need to nurture in ourselves.

We cannot live without leaders, we only look for perfect leaders. But in fact it doesn't exist in reality.

The soul of democracy is the sovereignty of people.

Presidential election is the election of the smartest, where in fact, it is not. There was over expectation in early democracy.

We can say that one policy of the government, there is always the opposite site of the policy.

Aku Pancasila – it's a political jargon to push the resurgence of Pancasila to face all the challenges. But then again in the end, as a starting point of all the arguments of the existence of the unitary state of Indonesia is consensus.

7. TURKEY: MUCAHIT AYDIN

Question:

I want to ask about languages. Indonesian is the official language. Under your policy there is a mandate to support local languages. Are they fading away? In the court room, an old person doesn't know the official language, is there any assistance.

8. AGUS WIDJOJO (GOVERNOR OF THE NATIONAL RESILIENCE INSTITUTE OF THE REPUBLIC OF INDONESIA)

Answer:

We can learn a lot from Turkey in terms of relationship between religion and the state. It is not that we are separated. The world is getting smaller and smaller we can learn from each other.

In the law the government will nurture local languages: Are those language disappearing and how they go hand in hand with bahasa Indonesia?

Indonesia is the state language but we also nurture local languages. At school we learned Indonesian language and local language.

The speaker shares his experience learning bahasa Indonesia and local language.

The local languages are not to compete with Indonesian language but to maintain the local culture.

9. ERLIS SEPTIANA NURBANI (UNIVERSITY OF MATARAM)

Question:

Indonesia is a country with big diversity. After our independence, the Netherlands predicted that we couldn't survive.

What are the strong points of Indonesia to manage our diversity to prove the prediction is wrong?

10. AGUS WIDJOJO (GOVERNOR OF THE NATIONAL RESILIENCE INSTITUTE OF THE REPUBLIC OF INDONESIA)

Answer:

I have mentioned one phenomena in the development of environment that is the diminishing borders. There is no limit for information to be shared.

Globalization – borders are diminishing in the sense that if a country is facing its own internal problem, the country has no absolute freedom or power to take the actions they want to take.

If the actions are not considered appropriate, others can involve themselves in the situation.

For example: Rohingya Issue in Myanmar. International institutions jumped in and interfere and it became complicated.

How do we maintain diversity to survive?

Information technology revolution, especially social media is impacting many countries. It caught many countries by surprise. It formed public opinions that may be irrational or illogical. This has to be resolved or responded not only by one department, but in a holistic way.

Silent majority power and strength to respond. If the good people stand as silent majority, the bad will take over – let your opinion be known, educate the public.

END OF SESSION 3

SHORT COURSE
SESSION 4

Pancasila as Unifying Ideology: Background and Histroy

Yudi Latif
Speaker

Bisariyadi
Moderator

INTERNATIONAL SHORT COURSE
15th NOVEMBER 2017, JAKARTA, INDONESIA

SESSION 4

THE WAY PANCASILA ENGAGING GLOBALIZATION

by Yudi Latief

1. MODERATOR: BISARIYADI

Moderator, Mr Bisariyadi, introduces the speaker, the author of many books about Pancasila from the history and constitutional points of view. The Moderator divides the session into three: Presentation, QA session and Discussion.

2. SPEAKER: YUDI LATIF

Yudi Latief's Presentation

Soekarno said that the UN cannot be the UN unless it adopted Pancasila. When Pancasila is juxtaposed with other concepts, communism, etc., it can address the potential conflicts, be they global or local. Pancasila has the power to face the potential conflicts. Historical roots of Indonesia, containing a lot of pluralities, with so many aspects of geography, languages, religions, ethnic groups in various colors, culture backgrounds, poses the fact that the ideology is universal. The diversity in Indonesia, with its multi political parties, social status, make Indonesia a garden in this world. After gaining the independence, we must have a constitution, where the happiness of the nation can be guaranteed. From the very beginning

of Indonesia's independence, to bring the diverse people, Sukarno thought that unless there was a common denominator to unite all the diverse people, it could not be done.

The speaker then explains Pancasila and its principles as the binding essence for the whole nation. The first principle is to unite the different religions, the second being the principle of internationalism, just and civilized humanity, the third being the principle of diversity in unity to respect for differences in the country as symbolized by the national flag the fourth being the social deliberative democracy and social democracy, a win-win peaceful solution of the people through communication, and the fifth being the social justice that guarantees the people's rights and social functions in economy. The five principles can be compressed into three:

1. The principle of social nationalism, a combination of nationalism and internationalism establishing brotherhood with other nations and humanity

2. The principle of social democracy, of politics and of economy

3. The principle of civilized theism or socio-religious, tolerating peple with different religious backgrounds to match the principle of love.

They can be compressed into one: Mutual cooperation (*Gotong Royong*), the spirit of love. So Pancasila can be transformed into the ethics of the world: the principle of mutual love, caring and nurturing.

DISCUSSION

3. TURKEY: MUCAHIT AYDIN

To what degree is Pancasila implemented in practice? In his country, the implementation depends on the social conditions such as poverty. He also asks the meaning of Pancasila.

4. SPEAKER: YUDI LATIF

Response to the question:

Mr. Latief explains that the words, *panca* and *sila*, came from Sanskrit, the five principles. The principles transcend beyond the individual right of people, expressing the love for the country and nation, and fulfil the social spiritual needs. It is the problem of ideality and reality. Pancasila calls for the spirit of human nature, a concept coming from human beings, not from animals.

The first principle is well implemented in the country. The second is also implemented although what happened in Jakarta is not a good model since there are also some non-Muslim leaders. The third principle is implemented miraculously, magically, practiced in all regions, even in remote areas. The forth principle concerning democracy's spirit, we respect the social fabric of the people, although some still show the primordial bond. So we are still struggling to implement the forth principle. The fifth, social justice, is still a problem. It needs to be supported by the spirit of sharing. The speaker has invited 14 Indonesian tycoons to help in this matter. Social gap in this case may lead to social gap in Indonesia.

5. MYANMAR: NYI NYI LWIN

Indonesia is very lucky to have Pancasila as a foundation of the country and the Constitutional Court.

6. REPUBLIC OF KOREA: JUNGHYUN HWANG

Pancasila is the fundamental of the constitution in Indonesia. I wonder if the Constitutional Court can apply Pancasila in actual cases and declare the reason based on Pancasila.

7. INDONESIA: ABDUL GOFFAR

He is still confused about Pancasila. When there is a problem, people will keep silent, or laughing. We need a guideline of how to implement Pancasila.

8. CAMBODIA: SAMNANG CHHY

How do you bring these principles to be the spirit of the people?

9. SPEAKER: YUDI LATIF

Responses to:

Cambodia: Pancasila is the soul of Indonesian Nation, above the constitution. The principles state that the constitution can be derived from the different sources. In some countries, like Yemen, Iraq, and Turkey, they have difficulty defining the counties. State and religions are not to be separated but differentiated, religion-friendly state, but the state is the guarantee of the religions of different people. The Medina principle respects the principle of unity of diversity.

Indonesia: What we lack in the implementation of Pancasila is the absence of solid guidelines. But there are ontological, epistemological, and axiological dimensions, the blue print of the guideline of the implementation has been prepared. And hopefully can be distributed to the stakeholders.

10. MODERATOR: BISARIYADI

Moderator responds to Korean participant that the Constitutional Court had one opportunity to interpret Pancasila in the constitutional review. We call the program as the fourth pillar. But the court doesn't agree with the term pillar but supposed to be foundation. That's the only CC's decision regarding Pancasila.

11. INDONESIA: QURROTA AYUNI

There should be a limitation in election in terms of budget. How do we come to a consensus, as stated in the fourth principle, because we are not used to having consensus. Western capitalization, imperialism have an impact on Pancasila. So there is the need to understand our own culture before we accept others' principles. How do we adjust the law for everyone?

12. SPEAKER: YUDI LATIF

Response:

Democracy tends to be perceived as majoritarian, but it is actually consensus democracy. So, democracy should not be limited to equal liberty, because it is the principle of justice: the principle of equality will produce more inequality. The quality of the argument should also be questioned, not only just the argument. It should also be recognized as the representative democracy, not direct democracy.

13. MODERATOR: BISARIYADI

Are there any similarities between Pancasila and principles in the country of the participant?

14. MALAYSIA: ASLAM ZAINUDDIN

Rukun Negara, though not mentioned in the constitution, is quite similar. For example, the first Rukun, belief in God, is similar. Loyalty to the King and country constitution is supreme and good morality. There is a campaign to make *Rukun Negara* in the Preamble in the Constitution.

Q: If RN is not in the constitution, where it is mentioned?

A: They are the universal value to promote the government.

Q: Is it the common law?

A: Yes, it is. Although there is no mention who can be appointed to be a prime minister in the constitution, but it is common that the prime minister can be appointed from the largest party winning in the election.

Q: In Thailand, a democratic country under the King as the head, it is a democratic monarchy. In the criminal law no one can insult the king or the family and whoever does it he can be jailed. The King and the royal family do not have the obligation to go to war or politics. There are two members of the Parliament, senators and …. The court has to protect the Royal Family,

Q: from Indonesia: what kind of insult is punishable? To what degree is the insult?

A: Although Thailand has changed from absolute to democratic monarchy, the king can do no wrong.

15. TURKEY: MUCAHIT AYDIN

The Preamble of the constitution contains the statement of the independence, but it is amendable. The Court must protect different religions of the public and the State doesn't have religion.

16. MODERATOR: BISARIYADI

The constitution has the consensus that it is amendable. Ataturk is the founder of modern Turkey, so the modern concept of law is like moving from the imperial to democracy. It is a crime to insult Ataturk,and so many people still commemorate by giving respect to Ataturk on his date of death.

Q: from Malaysia: the issue that the king or the founder cannot be criticized, is it still acceptable that people can express their opinions on the king and founder? After the end of the Ottoman Empire there was a movement to restore the caliphate. The western countries also separated the State and the church.

A: Attaturk could be criticized but not insulted. Sometime people go too far and that is not allowed. The caliphate is stillembodied in theconstitution, but not in person. Turkey's Islamic practices, Jewish and other practices are still there. After 100 years,there have been changes,for example about headscarf.

Q: from Mr. Aslam: In the past the church dominated the state, so that's why they are separated….

Moderator: the idea of secularismin Turkey is different.

A: There is no council of caliphates, unlike the UN, they just sit to gather and solve their problems. So the caliphates haven modernized.

Moderator: continues with the discussion.

Q: from Thailand: The consensus of the Thai people, because the people love the monarchy, just like Indonesian who love Pancasila.

Moderator invites delegations from Kyrgyzstan

Kyrgyzstan: 70% of the people are Moslem but there are other religions.

17. MODERATOR: BISARIYADI

Invites more comments.

18. TURKEY: MUCAHIT AYDIN

Islamization of the country. Turkey doesn't become an Islamic country, although the young get more aware, and want to do so because of their own wish.

END OF SESSION 4

SHORT COURSE
SESSION 5

Political Parties, Democracy, and the Authorities of Constitutional Court

Maruarar Siahaan
Speaker

Helmi Kasim
Moderator

SESSION 5

THE LIQUIDATION OF POLITICAL PARTIES IN INDONESIA

by Maruarar Siahaan

1. MODERATOR: HELMI KASIM

Moderator,Mr. Helmi Kasim, starts by introducing the speaker, now as a Rector of the UI.

2. SPEAKER: MARUARAR SIAHAAN

Presentation

- The speaker greets the audience and starts with the joke as a person that is not useful. But he considers himself lucky to be the president of the University, one of the prominent university in South Asia. He just finished translating the paper this morning.

- Under the same constitution there were three political parties in Suharto's time, directed by the president himself. Under the old constitution, the members of the Parliament were appointed by the President. No wonder they were all obeyed the president. The President was only the receiver of mandate from the Parliament, but he was the one who commanded everything. No wonder he was elected so many consecutive times. In 1998, the reformation movement took place, changing everything.

- The reformation started but it was only possible through the amendment of the Constitution. He was the executor of the 1945 Constitution at

that time. They didn't need checks and balances mechanism, just like a family that obey the head of the family, requiring no control from the family.

- The Constitution was amended, but they didn't change the Preamble because otherwise it would not be called the 1945 Constitution. Under Suharto administration, there was no checks and balances mechanism at all. The short note given to the Head of Parliament saying that the President wanted things according to his wishes. Article 33 mentions the economic system was based on family. It was only natural for the head of the family when dealing with his son or daughter. So, the winner of the election had been determined even before the election. That was the condition under the regime of Suharto

- Article 32, in running the whole country, there should be political parties. What is called freedom of expression, freedom of religion, etc., under the amendment of the Constitution, suddenly there were so many new political parties that wanted to have the power as part of the government. In the 1999 election 48 political parties were eligible to be in the General Election, but only 24 passed. It was like a euphoria.

- Political parties are not supposed to be like recruiting people, but they are a means for managing conflicts. The candidates should be chosen by each part but not all parties could have one candidate for each. So if there is a liquidation, what is the ground for that? In article 21, political parties are banned under the authority of the Constitution. How come the President can petition his own party to be liquidated? The ruling party was once petitioned by a small party but was not granted by the Constitution. So this law should be amended.

- If the ideology, programs and practices are against the Constitution, such a political party is contradictory to the constitution. So, if there is a party that wants to change the Unitary State into a caliphate, the party is against the constitution, so the Constitutional Court should not allow such a thing happens. But regulations are not adequate enough, there should be amendments. The Constitutional Court regulation no 12 of 2008 can dissolve a political party. The Constitutional Court can grant the verdict to dissolve such a party, and the symbol of the party will be banned and the Parliament members of the party will be dismissed. The officials of the party are prohibited to take part of any political activities, though they move to another party.

- The dissolution of political parties keep the aggregation activities of political aspirations and the recruitment of leaders can preserve the ideology Pancasila. From time to time Pancasila has proven to be able to unite the people and suppress contradictions in ideology. In history, Pancasila has been successful in unifying the diversity of our nation.

3. MODERATOR: HELMI KASIM

Moderator closes the presentation and invites the participants to share their knowledge about political parties or dissolution of political parties.

ROUND 1

4. THAILAND: CHONLAPOOM YENSUANG

One question: how do you handle the dissolution of a big political party that has many people supporting it.

5. REPUBLIC OF KOREA: JUNGHYUN HWANG

If the activities of a political party are not in accordance with the constitution, the dissolution can be done by the Government. In Korea it looks similar. There was one dissolution happened in 2014, and it was not a dream.

6. INDONESIA: ABDUL GOFFAR

We have no experience in the dissolution of political parties, but through the electoral regulation, many political parties have been dissolved.

7. SPEAKER: MARUARAR SIAHAAN

Responses

To Korea: Thank you for the comment. It was a very big surprise to us when the president was impeached but the unity of the state was not split.

To Thailand: The support from the people was not very enthusiastic, but the impeachment to the prime minister was a success. As long as the rules and regulations are stipulated in such a way, there won't be any dissolution of the political parties. If the president comes from the dissolved party, how will such a dissolution can be done without filing a petition from the people?

A party will be automatically dissolved if the electoral threshold is not met. So many members of the local government and Parliament, even the Head of the parliament will go to jail. So, the leader, who is supposed to uphold the legal system, breaks the law.

ROUND 2

8. TURKEY: MUCAHIT AYDIN

For many people It was controversial concerning the decisions of the constitutional court, as long as there is no violence taking place.

9. MYANMAR: NYI NYI LWIN

According to our constitution, a party can submit evidence that the dissolution is necessary or not.

10. SPEAKER: MARUARAR SIAHAAN

Responses:

To Myanmar: Only the result of electionscan be submitted to the Constitutional court.

To Turkey: If there is no file against the constitution, it is fine. But it there is evidence of separation, even though it is peacefully done, it cannot be tolerated in Indonesia because we a unitary country. So the reason justifies the dissolution of the political party. So the case in Turkey as we read in the paper, if it contains no violence, then it is okay, is not in our case.

11. MODERATOR: HELMI KASIM

Moderator: He closes the session by giving good comments on the presenter.

END OF SESSION 5

SHORT COURSE
SESSION 6

Center of Pancasila and Constitution Education, Research, and Case Review as Supporting Unit in Exercising Authority to Safeguard Ideology

Budi Achmad Djohari
Speaker

Pan Mohamad Faiz
Moderator

INTERNATIONAL SHORT COURSE
17th NOVEMBER 2017, JAKARTA, INDONESIA

SESSION 6

Role of Center of Pancasila and Constitution Education and Center of Research, and Case Review as Supporting Units in Exercising Constitutional Court's Authority to Safeguard the Ideology

By : Budi Achmad Djohari

1. MC

The MC welcomes the audience and gives brief background of the topic. She also introduces the Moderator and the Speaker.

2. MODERATOR: PAN MOHAMAD FAIZ

The moderator, Mr. Pan Muhammad Faiz, greets the audience. He also invites the audience to be involved in an interactive session. The moderator introduces the topic quoting a literature concerning the function of the Constitution: judicial function and non-judicial function. The presentation will be about non-judicial function. It will be done in Bahasa Indonesia and the moderator will help provide the translation in English. The moderator finally invites the presenter to start the presentation.

3. SPEAKER: BUDI ACHMAD DJOHARI

The Presenter informs the audience that he will be using Bahasa Indonesia to present his ideas. He apologizes for this.

The Presentation

In this occasion, the presenter will discuss the system and development and financial aspects and will focus on supporting unit system in exercising the function of the constitutional court.

The administration of the judiciary includes management which is in direct contact with the community and which provides services and support to judges in examining, hearing, and deciding cases. Therefore, the performance of the judiciary is also determined by the performance of the administration of the judiciary. An unjust verdict can happen because the administration of the judiciary is not optimal in providing services to the judge so that the judge cannot decide the case objectively and find the truth. In fact, fair decisions can be unfair if to get the verdict, it takes a discriminatory and convoluted administration process. Therefore, the efforts to realize the ideal figure of the Constitutional Court also involves the question of capacity building of administrative tasks in the Constitutional Court.

In Indonesia there are a Registrar's Office and a Secretariat General. The Registrar is a functional position that has the duty of providing judicial administrative technical support to the Constitutional Court, including:

1. Coordination of judicial technical implementation in the Constitutional Court.

2. Guidance and implementation of case administration.

The speaker continues by underscoring the two points that he will highlight in his presentation today: research and center of education of Pancasila.

THE SHOWING OF THE VIDEO PROFILE

The presenter invites the audience to watch the video profile of Pancasila, Constitution and the Constitutional Court.

4. SPEAKER: BUDI ACHMAD DJOHARI

He says that he heard that the participants went to Taman Safari. The education Center is actually just two kilometers away. But unfortunately because of the activities and unfriendly whether the participants couldn't visit the Center.

The Center

The Center was initially established based on the concerns of the leaders about Pancasila. Leaders from various state institutions gathered to take action to safeguard Pancasila with the purpose of revitalization, re-internalization of Pancasila involving all elements of the nation.

To execute the function as the guardian of Pancasila, the Constitutional Court decides to establish this Center and opens up access to court and access to justice. Transparency and accountability have been implemented in carrying its function.

Education Center and the Constitution will hold the smooth implementation of duties and authority of the Constitutional Court of the Republic of Indonesia is strongly influenced, even determined by at least two things. First, how the public understanding and awareness

of the existence of the 1945 Constitution. The more people have a good level of understanding and awareness of the 1945 Constitution, the more aware of the public will be of their constitutional rights. Secondly, the community is challenged to have an understanding of how to prosecute and fight for their constitutional rights. Especially when its constitutional rights are violated by the enactment of a law.

Of these two things, the Center and the Constitution are at the forefront of efforts to "bring closer" the reach of society to the Constitutional Court of the Republic of Indonesia, including to justice as reflected in the decision. For the Court, the Center is a great force to support the smooth functioning and constitutional authority of the Constitutional Court.

In an effort to improve people's access to justice and improve public access to the judiciary, the Constitutional Court through the Pancasila Education Center and the Constitution conducts various activities involving the sharing of community elements, including Political Parties, Community Organizations, Youth Organizations, Women's Organizations, Professional Organizations, Customary Law, Non-Governmental Organizations, State Organizers, Armed Forces / Police, Teachers, Lecturers, and Students as well as other elements of society with various forms and methods of activities.

On the other hand, ffforts to improve community access to justice are conducted through various activities to improve public understanding of the values of Pancasila, the Constitution and their basic rights as citizens guaranteed by the constitution (constitutional rights of citizens). While efforts to improve public access to the judiciary, especially to the constitutional court, are conducted through various activities to provide an understanding of the Procedural Law

of the Constitutional Court as well as the process and the mechanism of the law practitioners in the Constitutional Court.

Both efforts are made by the Constitutional Court, because enforcement of law and constitution as well as the implementation of a democratic state of Pancasila requires a good constitutional understanding and awareness of all citizens. Therefore, in order for citizens to play an optimal role, every citizen needs to understand his constitutional rights as well as the efforts that can be taken to defend their rights.

The form of activities undertaken by the Pancasila Education Center and the Constitution in an effort to improve people's access to justice is done through the Constitutional Rights Education of Citizens for various eleman communities throughout Indonesia. To support this, the Center and the Constitution has developed a master curriculum as the main guideline for learning activities. The curriculum can be seen on the slides, which covers several aspects.

A. National Insight

The national insight includes the conceptions of National Interest and National Vigilance. It also covers Nationality Insight, Nationalism, National Integration and National Paradigm (Pancasila, the 1945 Constitution, the Unitary State of the Republic of Indonesia and Unity in Diversity). In addition, the national insight also covers the Influence of Current Development in Strategic Environment (National, Regional, Global) on National Integration and National Sovereignty. Finally, it covers the strengthening of the National Insight

B. Reactualization Implementation of Pancasila

After they understand who they are, the basics of the nationalism, they will learn the following points.

a. Concepts, Principles, and Values in Pancasila;

b. Reactualization implementation of Pancasila as the Philosophy of Life of the Nation;

c. Reactualization implementation of Pancasila as the National Ideology;

d. Reactualization implementation of Pancasila as the State Basics;

e. Pancasila reactualization implementation challenges in the era of globalization

C. Constitution and Indonesian Constitutionalism

Then the discussion moves on to cover constitution and constitutionalism. The details of this segment of the curriculum is as follows:

a. Definition of Constitution and Constitutionalism, and Relations between Constitutional and Constitutionalism;

b. The Supremacy of the Constitution in a Constitutional Democratic State;

c. Content of Constitutional Materials;

d. Constitution and Regulation under the Constitution;

e. Constitutional Amendment including how to change and the method to change the constitution.

D. Constitutional System in accordance with the 1945 Constitution

Then, discussion leads to the topic of Constitutional system that includes:

a. Principal Ideas of the 1945 Constitution Preamble;

b. The Basics of State Organization;

c. Government system;

d. State Institutions and Relationships among State Institutions (Principles of Checks and Balances);

e. Regional autonomy

E. Guarantees of Citizens' Constitutional Rights in the 1945 Constitution

Then, the discussion extends to the guarantees of Citizens' Constitutional Rights, including:

a. Relations between the State and the Citizens;

b. Universality of Human Rights;

c. Human Rights in the 1945 Constitution;

d. Constitutional Rights of Indigenous People

F. Constitutional Court in the Indonesian State System

Finally, we discuss the Constitutional Court. Here the discussion covers the followings:

a. History of the Establishment of the Constitutional Court;

b. Functions and Authorities of the Constitutional Court;

c. Comparative Functions and Authorities of the Constitutional Court in Different Countries;

- Structure and Work Mechanism of the Constitutional Court;
- Procedural Law of the Constitutional Court;
- Constitutional Court's decision related to the Promotion and Protection of Constitutional Rights of Citizens

Other activities in the effort to improve public understanding of Pancasila, Constitution, and Constitutional Rights in the form of holding Constitutional Debate between Students and Constitutional Award for Achieving Pancasila and Civics Teachers, both at elementary, junior and senior high schools.

While the activities undertaken in an effort to improve public access to the Constitutional Court in the form of Technical Guidance of Procedural Law of the Constitutional Court for all the authority of the Constitutional Court, both the Tests of the Law, the Dispute Authority between State Institutions whose Authority is regulated in the Constitution, / or Vice President, Dissolution of Political Parties, as well as Dispute on Election Results (Election of President / Vice

President and Election of Legislative Members) and Election of Head of Region (Governor / Regent / Mayor). The emphasis of the Technical Guidance Curriculum is stacked on the skills for the practice of law in the Constitutional Court of the Republic of Indonesia.

This Technical Guidance Activities is aimed at various elements of society who are parties to litigation in the Constitutional Court, such as Advocates, General Election Commission, Election Supervisory Board, Electoral Political Parties, Legislative Candidates (DPR, DPD, and DPRD), Chief Candidate Regions, Government Officials in Legal Affairs, including lecturers in law faculties.

Other forms of activity in understanding the Constitutional Court Procedural Law, especially among students in the form of Constitutional Justice Moot Court Competition. This activity aims to provide understanding to the students how the procedural procedure in the Constitutional Court, especially the procedures and mechanisms of law in the Judicial Review of Acts against the 1945 Constitution.

All activities are organized by Civil Servants of the Constitutional Court assigned to the Pancasila Education Center and the Constitution, assigned to the Center, with a total of 15 employees:

a. 1 Head of Center

b. 2 Head of Divisions

c. 4 Heads of Subdivisions

d. 9 staffs

Lecturers in the Center consists of the Professor and experts in Constitutional Law, former Constitutional Court and the researchers

as well as the Registrars of the Constitutional Court, Prof. Jimly Asshidiqqie, Dr. Maruar, and Yudi Latif.

The Pancasila and the Constitution Education Center also cooperates with the National Resilience Institute for the curriculum, methodology, and lecturer of National Insight also with the Presidential Working Unit for Guidance of Ideology of Pancasila for material on Reactualization of Pancasila Implementation as well as with various universities and other state institutions in an effort to strengthen curriculum, lecturers, as well as teaching methodologies and broadening the scope of educational participants.

That's all about the Center. Next the discussion will be on the Research and Case Study Center.

Research and Case Study

Implementation of the task of the Secretariat General of the Constitutional Court in providing substance / material support to the Constitutional Court is conducted by Researchers and Reviewers of Cases in the Center for Research and Case Studies and Management of Information Technology Communications.

The Case Reviewer is an officer attached to a Constitutional Court Justice with the task of assisting the Constitutional Judge in drafting the Legal Opinion by conducting an in-depth assessment of the matters being dealt with. Case Examiners make a deepening of the matter based on the written instructions of the Constitutional Judge containing the Constitution Judge's thoughts on matters to be studied and also make important records obtained during the trial for the purpose of the next hearing review and for the need for the drafting of the Legal Opinion concept. The Constitutional Judges will submit each

of its Legal Opinions in the Judicial Consultation Meeting and further discussed and discussed as a matter of compiling the Court's verdict on the matter concerned. The Case Studies also serve to provide data and information services to judges in the form of previous Court verdicts, doctrines, or legal comparisons to the Constitutional Court.

While the Researcher is an employee who conducts research on constitutional issues, constitution, democracy, human rights as well as other issues relevant to the authority of the other Court. Research is conducted to provide additional supply of references and various perspectives for judges who are expected to be useful in deciding a case, similar to the one in Korea.

Researchers are also tasked with analyzing the decision of the Constitutional Court with the aim of at least three:

1. Formulating the rules of law found in the Court's Decision,
2. Compiling the interpretation of the Court on the 1945 Constitution,
3. Establishing the jurisprudence of the Court's Decision.

In addition, the Researchers are also tasked with monitoring and evaluation of the implementation and implications of the Court Decisions as well as publishing the Constitutional articles both on a national scale and international scale.

The results of the researcher's work are not only used by the Case Reviewers in the case study, but also used by Pancasila Education Center and the Constitution in improving the module and teaching materials and can be published to various parties who need them,

including the Law Faculty of Higher Education institutions throughout Indonesia.

Conclusion

Without the slightest denying the support of other work units, the Center for Research and Case Review as well as the Pancasila and Constitutional Education Center provided siginikan support for the Constitutional Court of the Republic of Indonesia. The Center for Case Studies and Studies provides substantial support in the decision making process of the Constitutional Court of the Republic of Indonesia. With the various efforts undertaken, the Center for Research and Case Review through the Researchers is expected to improve the quality of the decision.

In addition, the Pancasila Education Center and the Constitution provide support not less important, that is to relate to the public in order to develop a constitutionally conscious culture, to provide an understanding of the citizens' constitutional rights, and to provide insight and skills on the effort to fight for impaired constitutional rights. Not only that, through the Pancasila Education Center and the Constitution, the dissemination of the decisions made by the Constitutional Court of the Republic of Indonesia is known, understood, and implemented properly.

You can also see the display of relationship between the researchers and the center of Pancasila on the slide.

Finally, the presenter invites sharing of information from the audience.

QUESTION AND ANSWER SESSION

ROUND 1

5. MODERATOR: PAN MOHAMAD FAIZ

The moderator opens the first round of question and answer session. He invites questions and sharing from the audience concerning similar programs or activities in their countries.

In round 1, the moderator invites Thailand, Mongolia and Myanmar to ask questions or give comments.

6. THAILAND: CHONLAPOOM YENSUANG

Thailand asks about the role of Constitutional Court in national and International level?

The Thailand participant also informs to the floor that Thailand has collaborated with other parties in International and national levels with the signing of MoUs. The Thai delegate also adds that they have designed curriculum for higher ranking officials.

Thailand also The Curriculum for Higher ranking officials.

7. SPEAKER: BUDI ACHMAD DJOHARI

Response to Thailand:

The speaker informs the audience that in order to enhance the capacity of the law makers, the Court establishes collaboration with various universities to help the law makers attain doctoral degree. The

Center aims at having 30 to 50 law makers to study for a minimum of doctoral degree.

The Center also collaborates with international institutions, for example collaboration with Hague University for recharging programs.

The researchers are also assigned to be involved in various activities like seminars and workshops.

8. MODERATOR: PAN MOHAMAD FAIZ

The moderator adds that in International level, Indonesia is active as members of AACC (which secretariat is here) and WCCD. Indonesia also forms bilateral MoUs with Asian and European countries.

9. MONGOLIA: BILEGJARGAL BAT-ERDENE

Mongolia wants to know whether Pancasila is also reflected in the school or university curriculum or programs.

Next, Mongolia inquires about the joint program of researchers with universities, even with high schools or secondary schools.

10. SPEAKER: BUDI ACHMAD DJOHARI

Response to Mongolia:

The speaker confirms that there is the subject of Character Building in all levels of education (school and university levels), one of which covers Pancasila.

The Center has also signed MoUs with many universities. For example: the professors who are active in the universities also teach in the center. Cooperation with universities comes in form of supporting research conducted by the lecturers, and organizing of some seminars.

11. MODERATOR: PAN MOHAMAD FAIZ

The moderator adds information about more activities conducted by the Center in terms of cooperation with many universities, many of which are conducted in terms of video conferences.

12. SPEAKER: BUDI ACHMAD DJOHARI

The speaker highlights the benefits of video conferences to open up access to the public (General public and experts) to know more about the activities in Constitutional Court. So, the public from outside Jakarta can just go to the nearest universities to access the information and activities of the Constitutional Court.

Video conferences are also conducted when involving experts from overseas speaking and sharing through video conference.

13. MODERATOR: PAN MOHAMAD FAIZ

The moderator adds information that 42 video conferences have been conducted.

14. MYANMAR: NYI NYI LWIN

Myanmar asks the following three questions:

1. How do you recruit registers and researchers?

2. In which fields is the research conducted?

3. Does the constitution provide the procedure of the video conference

15. SPEAKER: BUDI ACHMAD DJOHARI

Response to Myanmar:

Response to Question 1: The registrars and researchers are the civil servants which are recruited following the national process in collaboration with the relevant ministries. First, needs analysis of the amount of registrars and researchers is conducted. Then, they propose this needs to the relevant ministries.

The minimum requirements for registers and researchers are as follows: Master's degree with preferably legal background. However, other related backgrounds (politics, economics) are welcome.

Response to Question 2: The areas of research cover Constitution, Democracy, Human Rights and other relevant constitutional issues. These are the most relevant cases submitted to the constitutional court.

Response to Question 3: With regards to Video Conference, there is internal regulation in Constitutional Court of law that has been uploaded on to the website, but it is in Bahasa Indonesia.

16. MODERATOR: PAN MOHAMAD FAIZ

The moderator adds that technical regulations are also provided to manage the results of the video conference.

ROUND 2

17. MODERATOR: PAN MOHAMAD FAIZ

The moderator opens the second round of questions and comments. The moderator invites Korea to share their experience and best practice about the similar center in Korea.

18. REPUBLIC OF KOREA: DASOL LYU

The Constitutional research institute in Korea conducts systematic study of constitutional law and adjudication. It also conducts education for people from all walks of life. It was established in 2011. She also explains the various teams in the institute. The research teams in the institute conduct research and analysis of major cases in major courts. The instruction teams write textbooks and conduct education for the public. Publication of research outcomes is also made possible by the Institute.

19. MODERATOR: PAN MOHAMAD FAIZ

The moderator extends appreciation to Korea for sharing the information about the similar institute. The moderator invites delegates from Indonesian Universities to share their experiences.

20. INDONESIA: ELRIS SEPTIANA NURBANI

The representative from University of Mataram informs the floor that University of Mataram has established cooperation with the Constitutional Court. They have a Video Conference room and Center for Constitution Education. They also organize events in collaboration with the Constitutional Court of Indonesia and interesting programs for college students like constitutional debates and the likes.

21. MODERATOR: PAN MOHAMAD FAIZ

The moderator adds that the cooperation is not just organizing video conferences only. Other activities that involve seminars are also live broadcast to other parts of Indonesia.

22. SPEAKER: BUDI ACHMAD DJOHARI

The speaker welcomes the suggestion from Myanmar, in terms of internship and research exchange of staff to enhance Constitutional system in Indonesia and Myanmar.

23. MYANMAR: NYI NYI LWIN

Myanmar informs that they have researchers, we teach more knowledge. They have many cases in our tribunal units. During the case theory, not only justice is managed. Researchers only do research about constitutional cases from other countries.—how they decide the cases. We need groups to support justice concerning a case, such as this short course. We thank you for Indonesia for providing the course.

24. MALAYSIA: ASLAM ZAINUDDIN

Mr. Aslam asks three questions.

1. The video conference facility: who manages this? Who is the owner of this facility?

2. The legal procedure and filing a case in e-court: the procedure of the actual hearing of the constitutional cases.

3. The role of executives

25. SPEAKER: BUDI ACHMAD DJOHARI

The speaker starts by answering question numbers 2 and 3 about legal procedure. The center is the result of an agreement of high ranking officials in various state institutions, including the executive, to support Pancasila. It was also agreed that each institution has to start something regarding this agreement. The Constitutional Court decided to establish the Center because they want the public to know the basic rights in the Constitution so the public can adhere to the law and when the rights are violated and the public can file complaints. So, the court has to give enlightenment of these rights and what the public have to do when their rights are violated.

There are risks that naturally come up: With the increasing understanding of the public of their rights, the Court can be flooded by cases – this is probably happening in the early stage. On the other hand, the law makers are encouraged to improve the quality of the law. Thus, with the increasing quality of the law and better understanding of the public about their rights, cases will become less.

In terms of video conferencing, the Court provides the facilities placed in the collaborating universities. The Universities who signed agreement with the Court have to manage and secure the video conference system and provide a room that can accommodate a minimum of 50 participants. They should also provide the electricity. The facility will be checked regularly by the Constitutional Court. There is also a competition among the universities. The one who conducts the most activities making use of the video conferencing facility will receive appreciation from the Constitutional Court. Some activities include public lectures (for example lectures by Pak Jimly). The lectures will be broadcast to all the collaborating universities.

The activities such as lectures and seminars are just supporting activities to the video conferencing. The main function of the video conference is public hearing. For example in case of filing an election dispute.

26. MODERATOR: PAN MOHAMAD FAIZ

The moderator closes the session by quoting from Hamilton: Judiciary is the least dangerous power of a nation. So, how does the Court exercise power? They can make use of its non-judicial power: the public.

END OF SESSION 6

ANNEX: PAPER

Report
Opening Ceremony
International Short Course 2017
Monday, November 13th, 2017
Jakarta, Indonesia

Bismillahirrohmaanirrohim,

Assalamu'alaikum warahmatullahi wabarakaatuh

Good morning, Om Swastiastu, Namo Buddhaya

- His excellency, Deputy Chief Justice of the Constitutional Court of the Republic of Indonesia
- Honorable participants from the Association of Asian Constitutional Courts and Equivalent Institutions
- participants of invitee institutions
- academics from 10 reputable universities in Indonesia
- Substitute registrars and researchers of the Constitutional Courts of the Republic of Indonesia
- Distinguished Ladies and gentlemen

Let us thank God Almighty for the opportunity for us to attend and gather in this ceremony. I would like to welcome you to Indonesia as well as express my sincere gratitude for your participation in this International Short Course.

Ladies and gentlemen,

This year's international short course is the second time to be hosted by the Constitutional Court of the Republic of Indonesia. The first short

course being held in 2015 has been very successful so we hope that we can bring a more positive result than we expect for this event.

Please allow me to deliver a report on this International Short Course year 2017. This event will be held for 5 days, 13 – 17 November 2017 in Jakarta. Most of the event will take place in Ayana Midplaza Hotel in Central Jakarta. In addition, we are planning to also make a short visit to several historical sites round Jakarta to give participants more experience and a closer look of the city.

The short course is attended by representatives of the members of the AACC, other invitee institutions, substitute registrars and researchers of the Constitutional Courts, as well as academics from Indonesia's reputable universities.

The International short course 2017 with the theme "the role of the Constitutional Court in overseeing the implementation of ideology and democracy in pluralistic society, is in line with previous symposium held in Solo last August. However, this short course aims to deepen understanding on how Indonesia deals with challenges and obstacles during the implementation of democratic values by upholding ideology as national principle amidst diverse society.

In order to achieve the desirable result, the committee has invited presenters comprise of constitutional justice, practitioners, and national figures whom fully understand the issues concerning democracy and ideology in Indonesia. On the other hand, we also wish that participant could also share their experience on the practice implemented at home countries so that we can also learn a lesson from their approach to overcome such issues.

Distinguished participants,

At the end, we realize that the success of this event cannot be separated from all of your participation. For this end, I would like to say thank you for all of your support to this event.

Thank you.

Billahi taufiq wal hidayah,
Wassalamualaikum warahmatullahiwabarakatuh

Rubiyo

WELCOMING SPEECH
DEPUTY CHIEF JUSTICE OF
THE INDONESIA CONSTITUTIONAL COURT FOR
THE INTERNATIONAL SHORT COURSE
"THE ROLE OF THE CONSTITUTIONAL COURT IN OVERSEEING THE IMPLEMENTATION OF IDEOLOGY AND DEMOCRACY IN PLURALISTIC SOCIETY"
13th OF NOVEMBER 2017

Bismillahirahmanirrahiim

Assalamualaikum warahmatullahi wabarakatuh

Syalom and peace be upon us all,

- The honorable Mr. Datuk Aslam from Malaysia,
- Head of the Bureau and Structural from Indonesian Constitutional Court
- Delegations and participants of this international short course.
- All the beloved audience.

First of all, let's say our praise and gratitude only to Allah due to His grace and blessings upon us so that on this good time and occasion we all can still gather here in this place, in the best of our health for the Opening Session for International Short Course with the theme of the course "The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in Pluralistic Society".

The honorable guests, ladies and gentlemen.

If we look carefully, the founding fathers of the Republic of Indonesia very well understand that an independent Indonesia built as the country will be based on the principal of democracy and law. Nevertheless aside from the two principals, Indonesia that wants to be built shall be based on the principals and the Indonesian values that has its own identity. Its identity according to Soekarno (the 1st president of Indonesia) at that time is the way of life of the nation as the basic of the country that must be explored from the noble values of our battles and the cultural values of the nation itself. Those values must unite the nation, in order to fulfill the goal of the independent Indonesia.

Since Indonesian independence, the founding fathers was not just committed to the creation of the state with the democracy principal, yet also committed to embody the conception of state law. In the preambule of 1945 constitution, state law concept mentioned clearly in the 4th paragraph that said, "...then compiled the independence of Indonesian in the constitution of Indonesia...," the formula shown that Indonesia shall run based on constitution. A form conception of state law further formulated in Article 1 Paragraph (3) 1945 constitution that said, "Indonesia is a state law."

In the perspective theory, the term of *state law* translated form *rechsstaat* or *the rule of law*. However, even though *rechsstaat* or *the rule of law* mean as 'state law' yet those two terms have a different background and tradition, and also different institutionalization. Nonetheless, both also have the similarity, which is they are all concede the principal of human rights protection by way to free and impartial judiciary.

As we all know, rechsstaat embraced by many continental European countries that embrace to the civil law system. Whilst the rule of law embraced more by the countries with the law tradition of anglo saxon based

on customary law system. In their operationalization, civil law emphasized more to the administration and norm system, whilst customary law is more to judicial activity. Further, rechsstaat concept accentuate *wetmatigheid* principle (written law) which is then become *rechtmatigheid* (the act based on law) while rule of law accentuate equality before the law principle that gives freedom to the judge to creating law for justice.

As for Indonesia, before the amendment of 1945 constitution, the explanation of 1945 constitution mention about rechsstaat term explicitly. This matters makes Indonesia as if adheres to the concept of rechsstaat state law as any other civil law countries. But, post the amendment of 1945 constitution, Article 1 paragraph (3) said that, “Indonesia is a state law.” With this provision, state law conception that used to be identical to rechsstaat neutralized into a state law only. The state law conception adheres by 1945 constitution obtained from rechsstaat and also the rule of law. It is even obtained from any other integrative law system (customary law) and the implementation adjusted to the demand and to the current development.

With that said, the concept of Indonesia law state accepted the principle of legal certainty that become the main element of rechsstaat both also accepted the principle of justice from the rule of law. The written law and all the procedural obligation well accepted but placed in the context to law enforcement. In this case, the written law which hinders the attainment of justice can be ignored with the creation of new law by the judges using the judge made law principle. As for, Article 24 Paragraph (1) confirmed that the function of judicial power is to have the law enforcement in every segment, not just only for the written law. Another provision for instead seen in Article 28D Paragraph (1) concerning the right to have legal certainty and Article 28H which determine that law must be build based on justice and merit. This is asserting the obligation to the law enforcement and justice intertwined.

Distinguished ladies and gentlemen,

From the conception of Indonesian state law, therefore Indonesia has a unique law system and has its own characteristics. If refer to the preambule 1945 constitution, 4th paragraph that said, “The Indonesian national independence was composed in the Indonesian state constitution, which is formed in the composition of the Republic of Indonesia sovereign people based on belief in one Almighty God…, etc” so that the legal system prevailing in our country is the legal system adjacent to the democracy principle and imbued by the state ideology, Pancasila we are familiar with.

Pancasila becomes the ideals law because its form as the state fundamental norm *(staatsfundamentalnorm)*. That is also why Pancasila becomes the guidance for all law national product. By mean, all the created and enforced law products intended to embody the ideas contained in Pancasila. With that said, Pancasila becomes the source from all the law sources and the legal guidance. In other words, Pancasila become starting point as well as being the destination point of law in Indonesia.

The honorable ladies and gentlemen.

As become the common knowledge and has been experienced also by various countries that the challenge of managing a country’s democracy one of them depends on the pluralism level of its people. The higher the pluralism level of a country, then the higher the challenge for democratic management. The level of pluralism can be seen at least from the existence of the differences from ethnic groups, religions, races, and languages. Democracy with a high level of pluralism is very fragile to conflicts and divisions. In fact, in real history, democracy in a pluralistic country can produce civil war and separatism action.

Since the independence of Indonesia to date, the management democracy can be said quite stable, even though in every period of government there is always change or improvement. Whereas Indonesia has a high level of pluralism. From the aspect of tribal for instance, there are at least 700 tribes that live and exist with over 400 languages until today. From the religious side, even though the majority of Indonesian are moslem, yet other religions like Christian, Hindus, Budhist, kong hu cu, believer, etc, can live side aside without any long, basic, and relevant conflict.

In fact, the plurality face their other challenge, which is the Indonesia geographical conditions. The population of Indonesia is no less than 250 million, with the voters no less than 120 million, spread over 17 thousand clusters of island. Indonesia's direct election system for all level of elections, namely the election of the President and Vice President, members of the House Representatives, Governors, Regents, and Mayors, as well as DPRD members at each level also adds the level of complexity of democracy in Indonesia.

Whilst the level of pluralism in Indonesia is quite high and that become a challenge for the management democracy, yet Indonesia can run it well. The role of state ideology (Pancasila) has gathered the differences, also the role of Indonesian constitutional court for resolving the election disputes has been able to play its role in guiding the democracy life in Indonesia.

Indonesian constitutional court born in 13th of august 2003, aside having its role as the guardian and the interpreter of the constitution, to protect the constitutional rights of the citizens, the protector of the constitutional rights of the citizens, also as the upholder of the state ideology. Therefore Pancasila as the state ideology is an integral part from 1945 Constitution as the Indonesian constitution.

Every principles in Pancasila, applied in the norms of 1945 Constitution, so that upholding constitution is the same as upholding the state ideology.

In the end, by saying *Bismillahirahmanirrahim*, this opening ceremony of the international short course with the theme **"The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in Pluralistic Society"** officially I declare open.

Thank you.

Billahi Taufik wal Hidayah.
Wassalamu'alaikum Warahmatullahi Wabarakatuh.

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Jakarta - Indonesia, 13 - 17 November 2017

Session 1

Judicial Review as an Instrument to Oversee Ideology

by I Dewa Gede Palguna

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society
Jakarta - Indonesia, 13 - 17 November 2017

JUDICIAL REVIEW AS A CONSTITUTIONAL INSTRUMENT TO SAFEGUARD THE STATE IDEOLOGY: PANCASILA[1*]

***I D.G. Palguna*[2**]**

"Ideology…is indispensable in any society if men are to be formed, transformed and equipped to respond to the demands of their conditions of existence."

Louis Althusser, a French Philosopher.

INTRODUCTION

Just only a few months ago, I was given an opportunity to present a paper pertaining to the role of the Indonesia's Constitutional Court (hereinafter referred to as "the Court") in connection with the nation's ideology, *Pancasila* (which is literally means "Five Basic Principles").[3] As we know, ideology is a complex, intricate and as well as a controversial concept. Hence, it's understandable why debates on the subject among

1 * Presented as a course material for *International Short Course 2017 on the Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in Pluralistic Society*, participated by staffs of AACC (Association of Asian Constitutional Courts and Equivalent Institutions) members and academicians across Indonesia, held in Jakarta, 13th -17th November 2017.

2 ** I Dewa Gede Palguna is a Justice of the Constitutional Court of the Republic of Indonesia and a lecturer in Public International Law and Constitutional Law at the Faculty of Law, Udayana University, Bali, Indonesia.

3 See I Dewa Gede Palguna, "*Pancasila* as State Ideology and the Constitutional Court", presented at *the International Symposium on Constitutional Courts as the Guardian of Ideology and Democracy in A Pluralistic Society*, which was part of *Asian Association of Constitutional Court and Equivalent Institutions (AACC) Conference* agendas, held in Solo, Indonesia, 7-10th August 2017.

scholars, especially those in the field of political philosophy, endure. There are now dozens of definitions on ideology – of which we can even identify some contradictions among them – since the introduction of the term by the 18th century prominent French scholar, Destutt de Tracy.[4]

This short presentation is, however, not designed to give another space for further debate on the issue concerning the concept of ideology – since that is not the purpose of this forum – but rather it'll try to find explanations as to matters related to questions: as for Indonesia, what does it mean by *Pancasila* as the state or the nation's ideology? Why such an "ideology" is needed by the nation? And, taking into account the constitutional powers entrusted to the Court by the Constitution of 1945 (hereinafter referred to as the Constitution), what role the Court might play in safeguarding the ideology – especially the power or authority to review the constitutionality of law?

PANCASILA AS A STATE IDEOLOGY

As for Indonesia, *Pancasila* is regarded as the state's ideology because it serves as the nation's philosophical foundation on which the Unitary State Republic of Indonesia was established. The acceptance of *Pancasila* as the state's philosophical foundation or the state's ideology dated back to 1st June 1945, the time when Soekarno – then, a member of the *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan* (BPUPK) or *Board of Inquiry for Independence Preparation Measures* – delivered his historic speech in front of the BPUPK grand meeting. In his highly lauded and acclaimed speech, after meticulously and comprehensively presented his eloquent insight pertaining to the conception of "Indonesian nation"

4 *Ibid*.

which was formed out of a pluralistic society, Soekarno confidently, yet humbly, proposed that the Independent Indonesia should be established on a philosophical foundation consisted of five elements which, he said, deeply rooted in the Indonesian "soil". The five basic principles were (1) Indonesian Nationalism, (2) Humanity or Internationalism, (3) Democracy, (4) Social Welfare, and (5) the belief in God. After comprehensively elaborating the philosophy and substance contained in each and every principle he then named the five basic principles *Pancasila,* a Sanskrit term. "*Panca*" means five. "*Sila*" means foundation or principle. As a philosophical foundation, according to Soekarno, *Pancasila* shall serve as the foundation, in-depth thought, spirit, in-depth passion on which the "building" of eternally independent Indonesia will be established.[5]

Soekarno's proposal was unanimously approved by all BPUPK's members on condition that it ought to be reformulated.[6] After being reformulated, the five basic principles contained in *Pancasila* read as follows: (1) the Oneness of God the Almighty (*Ketuhanan Yang Maha Esa*), (2) A just and civilized Humanity (*Kemanusiaan yang adil dan beradab*), (3) the Unity of Indonesia (*Persatuan Indonesia*), (4) Democracy which shall be guided by the essence of wisdom in assembly/representation (*Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan/perwakilan*), and (5) Social Justice for all the people of Indonesia (*Keadilan sosial bagi seluruh rakyat Indonesia*).

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5 For further details, see RM A.B. Kusuma, 2004, *Lahirnya Undang-Undang Dasar 1945* (***The Birth of the Constitution of 1945***), Badan Penerbit Fakultas Hukum Universitas Indonesia: Jakarta. For comparison, see Saafroedin Bahar *et.al*., 1992, *Risalah Sidang Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI) 29 Mei 1945-19 Agustus 1945* (***Minutes of Meetings of Board of Inquiry for Preparation of Indonesia's Independence (BPUPKI), Committee for Preparation of Indonesia's Independence (PPKI) 29th May-19th August 1945***), Sekretariat Negara Republik Indonesia: Jakarta.

6 That's why 1st June is now commemorated as the birth of *Pancasila*.

Now, the five basic principles has become integral part of the Preamble of the Constitution. According to the Preamble, the Constitution shall serve as the "organization" of the Indonesian Independence (proclaimed at 17th August 1945) where the five basic principles (or the *Pancasila*) shall be the foundation of such a state. In other words, *Pancasila* is a *conditio sine qua non* for the Unitary State Republic of Indonesia. Or, there shall be no Unitary State Republic of Indonesia (in terms of the state which was proclaimed at 17th August 1945) if *Pancasila* is not the foundation of such a state.

From this point of view, it is constitutionally rational and coherent why Article 37 of the Constitution (regulating the constitutional procedures to amend the Constitution) expressly emphasizes "proposal for amending the Articles of the Constitution" in its formulation. It means that the procedures set forth in Article 37 of the Constitution applied only to the Articles of the Constitution. In other words, the Preamble of the Constitution (containing the state's philosophical foundation, *Pancasila*) shall not subject to procedures formulated in Article 37 of the Constitution. Or, it impliedly means that the Preamble of the Constitution shall not be amended.

THE NEED FOR PANCASILA IN THE PLURALISTIC INDONESIA

Indonesia is a huge archipelagic state with more than 250 million people inhabiting more than 17,000 islands scattered between two continents, Asia and Australia, and between two oceans, the Indian and the Pacific. Sociologically, as well as anthropologically, Indonesia is a pluralistic society in terms of ethnicity, race, language, religion, culture,

and many others. Sociologist Pierre L. van den Berghe describes that there are some characteristics of a pluralistic society, *i.e.*:

(1) there are segmentations in the form of groups having sub-cultures which are often very different one another;

(2) the existence of a social structure which is divided into non-complementary institutions;

(3) a less-developed consensus as to some basic values among its members;

(4) conflicts occur relatively often among groups;

(5) social integration develops relatively based on coercion and economic interdependence among groups; and

(6) domination of a certain group towards the others.[7]

All the above-mentioned characteristics can be found in the Indonesian society. In addition, the late prominent sociologist, Nasikun, says that there are two unique characteristics of the Indonesian social system. Horizontally, the Indonesian social structure marked by social units developed based on differences as to ethnicity, religion, custom, and region. Vertically, the Indonesian social structure marked by sharp differences between the upper-class and the lower-class.[8] It means that, theoretically by referring to categorization of society made by Emile Durkheim, the pluralistic

[7] Cited from Nasikun, 2001, *Sistem Sosial Indonesia* (***Indonesian Social System***), Rajawali Pers: Jakarta, p. 33

[8] *Ibid*.

society of Indonesia cannot be categorized as a society which is bound by a mechanical solidarity (that is a bond based on collective awareness) and at the same time it cannot also be categorized as a society which is bound by an organic solidarity (that is a bond developed by interdependencies among units of a social system).[9]

The last statement was confirmed and added further by a noted sociologist and pro-democracy activist, George J. Aditjondro, who said that there were also tensions in the society's minority-majority relation. There were three characteristics of tensions arising from three kinds of minority-majority relation in the contemporary Indonesian society: (1) tension between the minority urban people and the majority rural one. The source of tension is the fact that urban people (the minority) have better access to political resources compare to the rural people (the majority); (2) tension between the minority of the highly-educated people and the majority one who have poor education or even have no access to education. The source of tension is that because political decisions are made by those of the minority who have high education; and (3) tension between the minority of the haves and the majority of the haves not. The level of such tensions may increase at any time when they overlap with, for instances, interethnic and/or interreligious relations where certain ethnic with certain religion considered to have had more access to wealth, education, or politics.[10]

Considering the characteristics of the Indonesian pluralistic society mentioned above, there is a reasonable and unavoidable need to have

[9] See further Emile Durkheim, 1933, *The Division of Labor in Society*, The Free Press, New York.

[10] George J. Aditjondro, "Empat Dimensi Perjuangan Demokrasi Di Indonesia", November 1994 (transkrip prasaran lisan yang disampaikan pada seminar *Urgensi Pembangunan Politik Dalam Proses Demokrasi di Indonesia* ("Four Dimensions of the Struggle for Democracy in Indonesia," a presentation conveyed in a seminar on the *Urgency of Political Development in the Process of Democracy in Indonesia*, held in Indonesian Islamic University (or Universitas Islam Indonesia), Yogyakarta, 10th August 1994.

a uniting "instrument" established out of shared concepts, principles, and values among social units in the social system which forms the pluralistic society of Indonesia.[11] The instrument is nothing else but Pancasila.

THE ROLE OF THE COURT IN SAFEGUARDING PANCASILA

According to part of a statement contained in the Preamble of the Constitution, Indonesia shall be a state based on principle of people's sovereignty, or, in other words, a democratic state. The statement elaborated further in Article 1 paragraph (2) of the Constitution which clearly stated that sovereignty shall be in the hand of the people and it shall be exercised according to the Constitution. Meanwhile, paragraph (3) of the same Article expressly says that Indonesia shall be a state practicing the rule of law. A conclusion can be drawn, accordingly, that Indonesia shall be a constitutional democratic state.[12]

Theoretically, by referring to an analysis made by Koopmans, a constitutional democratic state might be practiced either by taking the shape of a parliamentary model or a constitutional model.[13] In the case of the former, parliament is considered supreme and is also conceived as the guardian of the constitution. Hence, there is no need to form a special institution functioning as the guardian of the constitution. While in the case of the latter, it is the constitution which is considered supreme,

11 For comparison, the existence of the Indonesian pluralistic society from the development of democracy perspective, see I Dewa Gede Palguna, "Minority Rights in Indonesia: In Search of Suitable Legal Remedy for Constitutional Complaint", a paper presented at *the Indonesian-Austrian Dialogue Symposium on State, Law, and Religion*, organized by Ministry of Foreign Affairs of the Republic of Indonesia in cooperation with Ministry of Foreign Affairs of Austria, held in Vienna-Austria, 27th – 29th May, 2009

12 I made a similar emphasis in my lecture in The Hague recently, see I Dewa Gede Palguna, "The Influence International Law on the Indonesian Constitutional Court Decisions", a lecture delivered at The Hague University of Applied Sciences, The Hague, Netherlands, 24th October 2017.

13 See Tim Koopmans, 2003, *Court and Political Institutions. A Comparative View*, Cambridge University Press: Cambridge-New York-Melbourne-Madrid-Cape Town, pp. 35 *et.sec*.

not the parliament. A problem arises: who will assure that the constitution will be obeyed in daily practice, especially by state's apparatus? Or how to assure that the constitution will be transformed into a living practice in the organization of a state? There where the need to introduce a constitutional court derived from – although it is also possible to give a constitutional court's function to the already established courts, like those practiced in U.S. and other countries.[14]

By establishing the Court, whose function is as a guardian of the Constitution, it means that Indonesia is a constitutional democratic state in the category of a constitutional model. Such a function reflected in the Court's constitutionally entrusted powers or authorities. The Court, which was established in 2003 following the amendment of the Constitution, is entrusted with authorities to adjudicate cases: (1) of judicial review (or review on the constitutionality of laws)*, (2) disputes of authorities among state organs whose authorities are given by the Constitution, (3)* dissolution of political parties, and (4) disputes on the result of general elections.[15] The Constitution also gives the Court an authority to hand down a ruling concerning an opinion of the House of Representatives who considers that the President and/or Vice President have (has) committed crimes

[14] In this context, Comella classifies two models of constitutional review, monist and dualist. Monist model refers to a practice where the function of constitutional review and the function as regular court are embodied in and exercised by the same court, *i.e.* a regular court. For example, the one that practices in U.S. where the function of constitutional review and the function of regular court embodied in and exercised by the U.S. Supreme Court. While, dualist model refers to a practice where the function of constitutional review is separated from the function of regular courts in which the function of constitutional review is designated to a specialized established court, *i.e.*, constitutional court. For further details, see Victor Ferreres Comella, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism", http://www.utexas.edu/law/journals/tlr/abstracts/82/ferreres.pdf. See also Victor Ferreres Comella, "Is The European Model of Constitutional Review In Crisis?", paper presented for *the 12th Annual Conference on 'the Individual Vs. the State*, Central European University, Budapest, June 18-19, 2004.

[15] The Constitution, Article 24C paragraph (1).

expressly described in the Constitution or no longer meet the qualifications as President and/or Vice President.[16]

The Court's constitutional powers or authorities were further elaborated in the Law Number 24 of 2003 as amended by Law Number 8 of 2011 on Constitutional Court (hereinafter referred to as CC Law). By having the authority to adjudicate judicial review cases (or authority to review cases on the constitutionality of laws), the Court is impliedly equipped with a constitutional power or authority to protect the state's ideology, *Pancasila*.

According to CC Law, those who have the standing to file a petition on constitutionality of laws are the ones who consider their constitutional rights or authorities have been infringed by a law (certain article or paragraph or part of the law), namely (1) individual citizen of Indonesia (including group of citizens who have a common interest on the issue), (2) traditional legal entity as long as it still exists and in line with the development of society and the principle of the Unitary State Republic of Indonesia, (3) public or private legal entities, and (4) state institutions.[17] The petitioner must in the first place clearly describe its argumentations which constitutional right(s) is or are deemed to be infringed by the enacted law (or part of it) and why the law (or part of it) is considered unconstitutional. If the Court of the opinion that the petition is justified then the Court will rule that the petition is granted and at the same time it will declare that the law (or certain article or paragraph or part of the law concerned) unconstitutional and no longer has its legally binding power.[18]

16 The Constitution, Article 24C paragraph (2).

17 CC Law, Article 51 paragraph (1).

18 CC Law, Article 56 paragraphs (2), (3) in conjunction with Article 57 paragraph (1).

A petition on the constitutionality of law may also be filed to challenge the constitutionality of the procedures of enacting a law.[19] If the Court of the opinion that the procedures of enacting a law is unconstitutional, the Court shall rule that the petition is granted and at the same time it shall declare that the law as a whole unconstitutional and has no legally binding power.[20]

Hence, a law can be considered unconstitutional (and, consequently, at the same time lost its legally binding power) either if the substance the law (an article or a paragraph of an article or part of a law) or the procedure or process in the enactment of the law is proved to be contradictory to the Constitution. Furthermore, by referring to the Constitution's Additional Rules Article II, the Constitution covers both the Preamble and the Articles of the Constitution. It means, in the context of judicial review, that a law might be considered unconstitutional if either its substance or its enacting process proved to be in contradiction either with the Preamble or with the Articles of the Constitution. Since *Pancasila* is an integral part of the Preamble, hence, theoretically or academically, it is possible that a law is considered unconstitutional based on reason that the law is against or in contradiction with *Pancasila*, the nation's ideology. Here is a delicate-pragmatic question arises: how to prove it? How can a law be considered unconstitutional simply by confronting it with such vague principles?

As a philosophical foundation (which has been further recognized and treated as a state's ideology), *Pancasila* consists of concepts, principles, and values. Here I would like to restate the elaboration I made in my previous papers:

19 CC Law, Article 51 paragraph (2)a.

20 CC Law, Article 56 paragraph (4) in conjunction with Article 57 paragraph (2).

A thorough study conducted by Suprapto reveals that *Pancasila* contains the concepts of (a) religiosity, (b) humanity, (c) nationality, (d) sovereignty, and (e) sociality. The concept of religiosity contains acknowledgement on the existence of religions and the beliefs in God the Almighty – a concept that have been upheld by the Indonesian ancestors since ancient times. While in the concept of humanity, of which Soekarno fondly named it "internationalism", there is thought to respect human dignity as a personality who has its own particular traits – from which, then, the ideas of freedom of thought, freedom of expression, and freedom of choice are derived. As to the concept of nationality, it explains that the idea of "nation", contained within it, is not "nation" in a narrow sense referring to a certain group or a certain region, instead it encompasses the unity of all people and territory stretching across the archipelago that used to be the territory of the Dutch Colonial administration. Meanwhile the concept of sovereignty confirms the idea of democracy that upholds the supreme will of the people. The exercise of the idea, however, must be guided by wisdom in assembly/representation in accordance with the Indonesian culture. Lastly, the concept of sociality is a concept which figures out the goal of the nation, that is physical and spiritual well-being of all people of Indonesia.

As to the principles contained in *Pancasila*, they are nothing else but the five basic principles forming the *Pancasila* as a whole. The first principle (the Oneness of God the Almighty) acknowledges, inter alia, the existence of varied religions and beliefs in God; everyone is free to hold his or her own religion or belief in God; no one shall be allowed to force his or her religion or belief to the others; there shall be mutual respect among individuals holding different religion or belief. The second principle (A just

and civilized Humanity) contains, inter alia, respect for human nature and dignity, human freedom to express its aspiration and opinion, and the nation plurality. The third principle (the Unity of Indonesia) contains, inter alia, pride of the nation's state of the art and achievements of its people, loving the nation and the motherland of Indonesia, developing patriotism to save-guard the nation's integrity. The forth principle (Democracy with the guidance of wisdom in assembly/representation) contains, inter alia, insight that consensus must be primarily upheld in making decisions for the common interest, any decision or policy for the sake of the common interest must consider the fulfillment of justice; avoiding majority domination as well as tyranny of minority. The fifth principle (Social Justice for all the people of Indonesia) contains, inter alia, that economic development must be arranged as a joint effort upon the foundation of togetherness, vital branches of production affecting public life must be put under the state control, all natural resources must be controlled by the state and must be used for betterment or well-being of the people, the poor and the neglected children must be taken care by the state, a social security system covering the entire people must be built as well as empowering those who are weak and poor to uphold human dignity, the state must ensure the rights of educations for all citizens.

Meanwhile, values that the *Pancasila* contained are: value of belief in God which explains the belief of the existence of transcendental power which is called God; value of equality which explains the equal treatment to all human being without any discrimination based on sex, ethnicity, race, group, religion, customs, culture, etc.; everyone is treated equal before the law and everyone has the equal opportunity in any field of life according to his or her potentials; value of unity and togetherness upholding the

existence of Indonesia as a pluralistic society which consists of various components forming one integral unity where every component is equally respected and becomes inherent part of the nation-state system; value of consensus which explains the existence of open-minded attitude guided by the spirit of togetherness to reach decision; and, lastly, value of welfare which explains the fulfillment of human needs, physically and spiritually, so as to create security, peace, and happiness.[21]

The exercise of the Court's constitutional authorities in adjudicating constitutional cases submitted to it means that the Court engages in the activity of interpreting the Constitution, that is an activity with a view to seek answer of an important question: how we are supposed to understand a constitution and the purposes it aimed at? Or, according to Whittington, interpreting a constitution means a way or a method to elaborate concepts contained in the text of a constitution, the result of which will be accepted or recognized as part of a constitutional law that can be elaborately explained and applied by courts.[22] That's why I once emphasis that interpreting a constitution does not simply mean an activity of "measuring" a concrete case using the text of a constitution.[23] Furthermore, it doesn't matter whether you belong to the so-called "originalist" or "non-originalist",[24] three important aspects need to be taken into consideration when interpreting a

21 See I Dewa Gede Palguna, "Pancasila as the State Ideology…*loc.cit*.; I Dewa Gede Palguna, "Rekonstruksi Sistem Ketatanegaraan yang Dijiwai Semangat Pancasila 1 Juni 1945 Sebagai Jalan Mewujudkan Kedaulatan Politik" (*Reconstructing A State Constitutional System Based on the Spirit of Pancasila of 1st June 1945 as a Way to Achieve Political Sovereignty*), a paper presented at a national seminar held in connection with the 3rd PA GMNI (the Association of Indonesian National Student Movement) Congress, Bandung, 2nd August 2015.

22 Keith E. Whittington, 1999, *Constitutional Interpretation; Textual Meaning, Original Intent, and Judicial Review*, University Press of Kansas: Kansas, p. 5.

23 I Dewa Gede Palguna, "The Influence…," *op.cit.*, p. 15.

24 As to the debate between those who called "originalist" and "non-originalist", see Dennis J. Goldford, 2005, *The American Constitution and the Debate over Originalism*, Cambridge University Press: Cambridge-New York-Melbourne-Madrid-Cape Town-Singapore-São Paolo.

constitution, they are the unity of the constitution, practical coherence, and the appropriate working of a particular constitutional norm.[25]

Accordingly, it can be concluded that the Court's success or failure in exercising its function as the guardian of the state's ideology, *Pancasila*, will depend primarily on the Constitutional Justices' knowledge and comprehension as to the concepts, principles, and values contained in *Pancasila* and their mastery in interpreting the Constitution so as to make the Constitution transforms itself into a living constitution.[26]

Jakarta, 13 November 2017.

25 See further Heinrich Scholler, 2004, *Notes on Constitutional Interpretation*, Hans Seidel Foundation: Jakarta, pp. 4-5.

26 For further elaboration on constitutional interpretation, see I Dewa Gede Palguna, 2013, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-hak Konstitusional Warga Negara (**Constitutional Complaint: Legal Remedy for Violation of Citizen's Constitutional Rights**)*, Sinar Grafika: Jakarta pp. 280-308.

BOBLIOGRAFI

Aditjondro, George J., "Empat Dimensi Perjuangan Demokrasi Di Indonesia", November 1994 (transkrip prasaran lisan yang disampaikan pada seminar *Urgensi Pembangunan Politik Dalam Proses Demokrasi di Indonesia* ("Four Dimensions of the Struggle for Democracy in Indonesia," a presentation conveyed in a seminar on *the Urgency of Political Development in the Process of Democracy in Indonesia*, held in Indonesian Islamic University (or Universitas Islam Indonesia), Yogyakarta, 10th August 1994.

Bahar, Saafroedin et.al., 1992, *Risalah Sidang Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI) 29 Mei 1945-19 Agustus 1945* ***(Minutes of Meetings of Board of Inquiry for Preparation of Indonesia's Independence (BPUPKI), Committee for Preparation of Indonesia's Independence (PPKI) 29th May-19th August 1945)***, Sekretariat Negara Republik Indonesia: Jakarta.

Comella, Victor Ferreres, "Is The European Model of Constitutional Review In Crisis?", paper presented for the 12th Annual Conference on 'the Individual Vs. the State, Central European University, Budapest, June 18-19, 2004.

Comella, Victor Ferreres, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism", http://www.utexas.edu/law/journals/tlr/abstracts/82/ferreres.pdf.

Durkheim, Emile, 1933, *The Division of Labor in Society*, The Free Press: New York.

Goldford, Dennis J., 2005, *The American Constitution and the Debate over Originalism*, Cambridge University Press: Cambridge-New York-Melbourne-Madrid-Cape Town-Singapore-São Paolo.

Koopmans, Tim, 2003, *Court and Political Institutions. A Comparative View*, Cambridge University Press: Cambridge-New York-Melbourne-Madrid-Cape Town.

Kusuma, RM A.B., 004, *Lahirnya Undang-Undang Dasar 1945* **(*The Birth of the Constitution of 1945*)**, Badan Penerbit Fakultas Hukum Universitas Indonesia: Jakarta.

Law Number 24 of 2003 (as amended by Law Number 8 of 2011) on Constitutional Court.

Nasikun, 2001, *Sistem Sosial Indonesia* ***(Indonesian Social System)***, Rajawali Pers: Jakarta.

Palguna, I Dewa Gede, "Minority Rights in Indonesia: In Search of Suitable Legal Remedy for Constitutional Complaint", a paper presented at the Indonesian-Austrian Dialogue Symposium on State, Law, and Religion, organized by Ministry of Foreign Affairs of the Republic of Indonesia in cooperation with Ministry of Foreign Affairs of Austria, held in Vienna-Austria, 27th – 29th May, 2009.

Palguna, I Dewa Gede, "Pancasila as State Ideology and the Constitutional Court", presented at *the International Symposium on Constitutional Courts as the Guardian of Ideology and Democracy in A Pluralistic Society*, which was part of *Asian Association of Constitutional Court*

and Equivalent Institutions (AACC) Conference agendas, held in Solo, Indonesia, 7-10th August 2017.

Palguna, I Dewa Gede, "Rekonstruksi Sistem Ketatanegaraan yang Dijiwai Semangat Pancasila 1 Juni 1945 Sebagai Jalan Mewujudkan Kedaulatan Politik" (Reconstructing A State Constitutional System Based on the Spirit of Pancasila of 1st June 1945 as a Way to Achieve Political Sovereignty), a paper presented at a national seminar held in connection with the 3rd PA GMNI (the Association of Indonesian National Student Movement) Congress, Bandung, 2nd August 2015.

Palguna, I Dewa Gede, "The Influence International Law on the Indonesian Constitutional Court Decisions", a lecture delivered at The Hague University of Applied Sciences, The Hague, Netherlands, 24th October 2017.

Scholler, Heinrich, 2004, *Notes on Constitutional Interpretation*, Hans Seidel Foundation: Jakarta. Palguna, I Dewa Gede, 2013, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-hak Konstitusional Warga Negara* ***(Constitutional Complaint: Legal Remedy for Violation of Citizen's Constitutional Rights)***, Sinar Grafika: Jakarta.

The Constitution of 1945

Whittington, Keith E., 1999, *Constitutional Interpretation; Textual Meaning, Original Intent, and Judicial Review*, University Press of Kansas: Kansas.


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Session 2

" Pancasila Amidst World Ideologies "

by Jimly Asshiddiqie



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CONSTITUTIONALISM AND THE COURT

by Prof. Dr. JimlyAsshiddiqie, SH.,

CONSTITUTIONALISM

1. Conventional Meaning of Social Contact as the Supreme Law of the Land (Only Law and Land).

Constitution is generally understood as "a social contract madeasa body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed". While "constitutionalism,often equated with the concept of regulaiuris or 'rule of law', is a complex ideas, attitudes, and patterns of behavior elaborating the principles that the authority of a government derives from and is limited by the body of fundamental law, called constitution". In the concept of constitutionalism, government can and should be legally limited in its powers, and that its authority depends on enforcing these limitations.

Today, the principles of constitutional government and democracy are considered the most ideal state in theory and practices. The two principles are a two-side of the same coin, a democratic rule of law, and a constitutional democracy as the ideal form of modern state. Constitutional government is just another attribute and synonym for the concept of rule of law or "*rechtsstaat*" (in German) which is idealized to be democratic. On the other hand, the concept of democracy, as the most popularly adopted by more than 95% countries in the world today, is also considered best to be balanced by the concept of rule of law. Therefore, the best government today is a constitutional democracy, and at the same time, a democratic rule of law (democratis cherechtsstaat).

The constitution as a social contact is the supreme law of the land. Historically, it is called as the supreme law only of the land,because in ancient English, people thought of living only on the earth of land, not on the water. But in Indonesian world view, we used to name it as "tanah air" or "land and water" for the world 'country'. But still the meaning of the world view is only limited to the land and the water, without mentioning the importance of the air and even the outer space. Today, we have to comprehend the social contract as the supreme law, not only of the land, but also of the water and of the air. The social contract consists of the highest ruling and guiding values of living together on the land, on the water, and on the sky, i.e. the social consensus of all the people on the red and white (the national flag of Indonesia), as well as the greenandblue constitution.

2. From Rule of Law to Rule of Ethics, from Constitutional Law to Constitutional Ethics (The Moral Constitution).

The role of applied public ethics around the world has been developing very rapidly, in United States of America and other European countries, since the last decade of the 20th century. Even the General Assembly of the United Nations in 1997 recommended its member countries to develop ethics infrastructure for public offices. Since then, starting from the early years of this 21st century, the ideas has widely been spreading and influencing almost all countries in the world. Many countries try to adopt the ideas for the development of ethics infrastructures for public offices, consisting of code of ethics or code of conducts and the committees or agencies for the enforcement of the codes.

In my views, to ensure the importance of the system of ethics, it is good to consider the idea to constitutionalize the ethics policy through constitutional interpretation accordingly. Therefore, I myself advocate for a new notion that the social contract of the constitution does not only contain the values and norms of law (legal norms), but also norms of ethics (ethical norms). The constitution must not only regarded as a document of law, but also of ethics. The system of ethics is as important as the system of law for public life. We need the system of the rule of ethics as well as the system of the rule of law. Read my book "Court of Ethics and Constitutional Ethics" (2014) that advocate the new understanding that the constitution cannot be regarded only as the source of constitution law, but also the source of constitutional ethics.[1]

By doing so, the world is expected not only dependent upon the role of law, but should also develop the effective role of ethics for public offices. We need legal and constitutional government as well as good government. Since the reformation, Indonesia has also adopted the system of ethics for public offices. For the enforcement of judicial ethics, we have established the Judicial Commission set-forth in the Article of 24B, Chapter IX of the 1945 Constitution. The People's Assembly's Decision No. VI/2001 on Ethics for the Nation's Public Life has supplemented the guiding principles of ethics in the 1945 Constitution.

Based on the Constitution and the ruling of the People's Assembly, almost all state institutions in Indonesia today has been equipped by law with code of ethics and a special committee to enforce the code. The balanced roles of the notion of constitutional law and constitutional ethics are expected to overcome the weakness of the system of rule of law by the application of the system of rule of ethics at the same time. Not all problems should be overcome through legal approach. Some problems related to public offices are considered more effective to be addressed by the rule of ethics. Besides, the effectiveness of the legal norm is also dependent upon the effectiveness of ethical norm in practice. Law is like a ship, and ethics is the sea. The law will never sail and reach the island of justice, when there is no enough water in the sea. Therefore, the future of constitutional law need the support from the idea of constitutional ethics, that every constitutional lawyers should take part in developing the study of constitutional ethics in the future.

Jimly Asshiddiqie, PeradilanEtikdanEtikaKonstitusi, Rajagrafindo, Jakarta, 2014.

For instance, in the field of ethics for election management bodies and ethics for members of parliament, the code of ethics is enforced through and by a system of court of ethics. In the House of Representatives, we have established "MahkamahKehormatan" or court of honor. While for the election management bodies, we established Honorary Council of Electoral Management Bodies which performthe enforcement of the code of ethics through adjudicating process, like in the ordinary court of law. By application of the system, Indonesia has begun to introduce the new system of court of ethics, besides the conventional system of court of law and justice. Besides the notion of constitutional law and the principles of rule of law, we have to develop also the notion of constitutional ethics and the principles of rule of ethics for the future.

3. Moving From Political Context to Social, Economic and Cultural Context.

The Constitution of the United States of America is a political constitution in nature. As a modern political constitution, the contents are merely about politics and political relationship between functions and institutions of power, and political relation between the state institutions and the citizens. That's why C.F. Strong used the term of political constitution in his book, "Modern Political Constitution" (1966)[2]. Most constitutions in the world follow the political tradition of the United States Constitution that other aspects, such as economic, social, and cultural policies are not regarded as that important to be formulated in the constitution. Among the reason why the US Constitution does not contain economic subject is that the drafting of US Constitution was fully occupied with only political consideration for the establishment of independent federal state of America, and left the economic affairs be regulated in and by the market place.

Before the establishment of the federation, American society has been developed as an industrious society that the economic affairs have been run independently in the free market capitalism. Therefore, the framers of the constitution did not think of the importance to formulate any articles of economic policy in the constitution. Just later in the history that the economic aspects of the constitution come out from the interpretation by the Supreme Court as it was discussed by James Buchanan in his Economic Interpretation of American Constitution.

Today, many countries formulated articles of economic policy in the constitution. Not only communist countries have the tradition of formulating economic policy in the constitution, but also non-communist countries, such as Irish Constitution, India's Constitution, Indonesian 1945 Constitution, and many others. Among the

[2]C.F. Strong, Modern Political Constitutions, Sidgwick& Jackson, 1966.

growing roles of market economy in today's globalization era, the role of economic constitution is also growing, for the purpose of controlling the free market. Therefore, Indonesian experience is one of the examples. Chapter XIV of the 1945 Constitution has special articles about national economy and social welfare policies. Therefore, I call the 1945 Constitution as a political constitution as well as an economic constitution that make the national economic system, must be run as "a constitutional market economy", i.e. a free market limited by the constitution as the highest policy norm[3].

Besides, the growing concern on the economics of the constitution, scholars have to look further at the ideas of social constitution[4] and the constitution of cultures too[5]. Constitution today is not only used for the organization of state power, but also related to the organized civil societies, corporate's constitutions, and even the villages' constitution, such as in American tribal villages. Therefore the study of the constitution grows from the perspectives of political constitution to economic constitution, social constitution, and even cultural constitution. I hope that scholars of the constitutional study and judges of the constitutional court around the world could develop more attention to the wider aspects of the constitution, not only limited to the conventional meaning of the political constitution.

[3]Jimly Asshiddiqie, Konstitusi Ekonomi, PenerbitKompas, Jakarta, 2010 and 2012.
[4]Jimly Asshiddiqie, Gagasan Konstitus iSosial: Institusional isasidan KonstitusionalisasiKehidupanSosialMasyarakatMadani, LP3ES, Jakarta, 2014.
[5]Jimly Asshiddiqie, Konstitusi Kebudayaan dan Kebudayaan Konstitusi, Intrans, Malang, 2017.

CONSTITUTIONAL COURT

1. The Role of Constitutional Adjudication

Constitutional Court or other similar agency has a very pivotal role in the constitutional system of democratic polity. It has the power to enforce the constitution as the highest norm in a country. The rule of the constitution and of the law must prevail, begun with the highest law and ethics in the respective country. Besides the doctrine of "fiat justitiaruat coelom", we can develop also the principle of"exerceatur constitution, ruat coelom". Let the constitution be enforced, though the sky fall. But more that, for me, "*let the constitution be enforced, since the sky will never fall because of it*". It is for purpose of enforcement of constitutional rules that mankind need to establish system of constitutional adjudication through a court system.

From various practices of the constitutional adjudication models and systems around the world, we can describedsome common jurisdictions and general functions of the 'court'. They are: (i) the guardian of the constitution, (ii) the counter balancing power of majoritarian democracy, (iii) the guarantor of minority right (iv) the protector of human right, (v) the protector of citizen's constitutional rights, (vi) the final interpreter of the constitution, (vii) maintaining checks and balances mechanism among branches of powers and between power relations, (viii) problem solver in democratic electoral disputes, (ix) the ruler of impeachment for democratically elected officials.

2. Institutional Models of Constitutional Adjudication

In general, there are three institutional models of constitutional adjudicationin the world today. The first is known as the American decentralized model invented by the US Supreme Court in 1803. The second is known to be centralized Kelsenianmodel established for the first time in 1920 in Vienna. The third is the French model of Constitutional Council (ConseilConstitutionell) established for the first time in Paris in 1958.[6]

2.1. Decentralized Model of Constitutional Adjudication. Originally, constitutional adjudication was begun by the invention of judicial review on the issue of constitutionality of law as legislative act in American case of Marburry vs Madison (1803). It was the first case in human history that a court (Supreme Court) declare a legislative act unconstitutional and void. Since then, except in England, all court of any level in the common law countries enjoyed the power to review any law or regulation contrary to the constitution.

2.2. Kelsenian Model of Centralized Constitutional Court. The above judicial invention was adopted in the continental European civil law countries with different response. Austrian scholar, Hans Kelsen, advocated the idea of constitutional review by the establishment of a special institution called "verfassungsgerichtshof" (constitutional court) in Austrian new constitution of 1919, which then was established by law in 2020. In this system, all law and regulation can be judicially reviewed centralizedly by the Constitutional Court. Until now,

[6]JimlyAsshiddiqie, Model-Model PengujianKonstitusional di Berbagai Negara, SinarGrafika, Jakarta, 2010.



except Netherland, mostly civil law countries in the world adopt this system of constitutional review, following the centralized Kelsenianmodel of constitutional review by the Constitutional Court.

2.3. French Constitutional Council Model of Judicial Preview. The third institusional model of constitutional adjudication is the French judicial preview system. It is called preview, because the ruling on the constitutionality of the legislative act is conducted before the law officially singed by the president. Although the bill or law draft has been adopted by the majority members in the parliament (National Assembly), the minority votes of at least 60 members of the Assembly or 60 Senators can submit the statute for examination by the Constitutional Council (ConseilConstitutionnell). Most of the countries of former France's colonies, adopt this model of constitutional review by a constitutional council.

INDONESIAN EXPERIENCES

1. Number 78 Constitutional Court in 2003

The first Constitutional Court in the world is the "Verfassungsgerichtshof" in Vienna established in 1920. The last constitutional court established in the 20th century was the Constitutional Court of Thailand in 1998. If we count together the Kelsenian model of constitutional courts and the French model of constitutional councils, Indonesian Constitutional Court was the 78th of such an establishment in the history, and was the first established in the 21st century, i.e. in 2003. During that year, there has been 77 constitutional courtsor constitutional councils established in various countries around the world. Therefore, it was lucky for Indonesia to be able to learn from the 77 countries of the world on how to establish a modern and effective constitutional court in Indonesia.

Those 77 countries are: (1) Albania, (2) Algiers, (3) Andorra, (4) Angola, (5) Armenia, (6) Austria, (7) Azerbaijan, (8) Bahrain, (9) Belarussia, (10) Belgium, (11), Benin, (12) Bolivia, (13) Bosnia-Herzegovina, (14) Bulgaria, (15) Burundi, (16) Cambodia, (17) Central Africa, (18) Chile, (19) Colombia, (20) Comoros, (21) Congo, (22) Cote d'Ivore, (23) Croatia, (24) Cyprus, (25) Czech, (26) Djibouti, (27) Ecuador, (28) Egypt, (29) Gabon, (30) Georgia, (31) Guatemala, (32) Hungary, (32) Italy, (33) Germany, (34) Kazakhstan, (35) Kosovo, (36) Kuwait, (37) Kyrgizstan,(38) Latvia, (39) Lebanon, (40) Lithuania, (41) Luxembourg, (42) Macedonia, (43)Madagaskar, (44) Mali, (45) Malta, (46)Marocco, (47) Mauritania, (48) Moldova, (49) Mongolia, (50)Mozambigue, (51) Nepal, (51) France, (52) Peru, (53)Polandia, (54) Portugal, (55), (56) Romania, (57) Russia, (58) Rwanda, (59) Senegal, (60) Slovakia, (61) Slovenia, (62)Spain, (63) South Africa, (64) South Korea, (65) Sri Lanka, (66) Sudan, (67) Suriname, (68) Syria, (69) Tajikistan, (70) Thailand, (71) Togo, (72) Tunisia, (73) Turkey, (74), Ukraine (75) Uzbekistan, (76) Venezuela, and (77)Serbia.

2. The Institutional Structures

The court consists of 9 judges, respectively three of whom are elected by the parliament (the House of Representatives), three judges are elected by the Supreme Court, and the other three are elected by the President of the Republic of Indonesia. The judges of the Constitutional Court serve for five years term and can be reelected for only one more term of another five years. The Chief Justice and the Vice Chief Justice is elected from and by the judges for 2 years and 6 months term, and may be reelected for the next term of another 2 years and 6 months. The court administration composed of two separated supporting staff consisting of the Secretary General for general administration and other institutional supporting system, and the Judicial Secretary responsible for the case substance and judicial forum management system.

3. Five Jurisdictions of Indonesia Constitutional Court

There are five jurisdictions or authorities of the court regulated by law. Those are:

3.1. Judicial review on the constitutionality of law;

3.2. Disputes on the constitutionality of the authority of state institutions;
3.3. Disputes on electoral results;
3.4. Political parties dissolution; and
3.5. Impeachment of President and/or Vice President.

4. The Issue of Integrated Constitutional Review System of Law and Regulation

During the public debate on the idea to adopt the establishment of the constitutional court into the third amendment of the 1945 Constitution in 2001, there were many expert advisors, including myself, advised that the function of constitutional review of law and regulations should be integrated into one system as the jurisdiction of the constitutional court. However, before the constitutional reform of 1999-2002, the jurisdiction to review the legality of regulations under law as the executive act has been conducted by the Supreme Court, that many law scholars and judges, especially from the Supreme Court and practicing lawyers opposed the idea to constitute the mechanism of judicial review into one system conducted by the new constitutional court to be established.

Therefore, when the Indonesian People's Assembly invited Chief Justice of several constitutional courtsfrom Asia, Africa, and Europe, in 2001, for comparative studies, some members of the working committee seriously consider the system adoptedin the constitution of South Korean which divide the review system into two separated bodies. The judicial review on the legality of regulations under law is conducted by the existing Supreme Court, and the judicial review on the constitutionality of law (legislative acts) will be conducted by the new constitutional court to be established. The dual system is now proven not the best solution to the purpose of Indonesian legal reform and harmonious integration under the constitution. Therefore, there is a growing awareness among scholars at present on the need for the integration of the judicial review system in the future.

GLOBALIZATION, NATIONAL IDENTITY, AND THE FUTURE CONSTITUTIONALISM

1. Globalization and Global Constitutionalism

In the globalizing world, constitutional law as a subject of study has been changing significantly from a positive and domestic oriented to a general science of law applicable anywhere in the world. We are now on the move from exclusive and domestic oriented constitutionalism to inclusive regional and international constitutionalism. Besides, substantially, we are also moving towards universalization of constitutional values around the world and its dynamic relation with the constitutional cultures of our own local history.

All modern constitutions today share common constitutional values which some are borrowed, imitated, or transplanted from other countries or other international best practices making them all look like similar in substances. However, we have to look into details both the problems of interpretation and implementation of the constitutions with universally contained substances in the cultural context of the respective countries concerned. Universalization of constitutional values is not identical with internationalization,nor with globalization of values. Universal values may come from outside as well as from our own respective cultural history. Therefore, the issues of constitutional cultures should become pivotal in the studies of the constitution today. It is now the time to pay more attention to the issues of “cultural constitution and the constitutional culture” of each country so that the institutionalization of constitutional rules would not be conflicting with the living cultural traditions in the respective history.

Indonesia has its own long historical experiences with so pluralistic cultural traditions throughout the country. But most of the ideas adopted into the constitution are transplanted or borrowed from other countries. So it is really the task of the scholars to build an intellectual bridge between modern constitutional state institutions to the constitutional culture and cultural living tradition of the people. We have to avoid cultural divide or cultural discrepancy between political institution and the living tradition of the people. The state and its power is nothing less than the power of the people, for the people, and by the people themselves. Even today, I always add these quotes from Abraham Lincoln that not only the government of the people, by the people, and for the people, but also with the people. The government is always of the people, by the people, for the people, and with the people.

2. From Universalism to Multiversalism, Toward a Cosmopolitan Legal Pluralism



Another issue following the above trend of universalization of legal and constitutional values, and the need for a cultural reading of the law and the constitution is the issue of global pluralism. We live now in a globalizing and borderless world with the complexities of law, where a single act or actor is potentially regulated by different multiple legal or quasi-legal regimes. We have to live in the complex relationships among international, regional, national, and subnational legal system, where non-state actors such as industry-setting bodies, non-governmental organizations, religious institutions, ethnic groups, and others exert significant normative pull. We cannot depend anymore upon the old perspectives of souvereigntist territorialism, nor substantive universalist approach that require people to be conceptualized as fundamentally identical in order to be brought within the same normative system. We are now moving from universalism toward multiversalism that Paul S. Berman call it "cosmopolitan legal pluralism" (2012)[7] as a useful approach to the design of the procedural mechanisms, institutions, and discursive practices.

A cosmopolitan pluralist approach manages multiplicity without attempt to erase the reality of that multiplicity. The key solution for the legal scholars on the problem of legal pluralism is not the pluralism itself, but the need for a global comparative study of law and constitution. Legal scholars in every country have to pay more attention to the need for a comparative study. Scholars of the countries with common law tradition have to know civil law legal tradition vice versa. Lawyers and judges of one country should also know and understand well about legal and constitutional system of other countries with intensive interactions between people to people or business to business contacts.

3. Pancasila as Basic Philosophy of Indonesian Constitutional System

Pancasila consists of five principles of values invented and formulated from the root of Indonesian constitutional cultures of the local history. But the value substance are universal in nature. The first is the belief in the One God as a Universal God of mankind. The second is the principle of humanity with justice and civility. The third is the principle of unity in diversity. The fourth is the principle of popular democracy, and the fifth is the principle of social justice for all the people of Indonesia. The five principles are the five fundamental values or the basic philosophy of Indonesian national identity, and the real living spirit of the text of 1945 Constitution. Therefore, the Pancasila is considered as supreme source of constitutional values and national identity of Indonesia, but since the contents are also universal in nature, in its application, it is also opened to live with the influences from any other sources of values.

[7] Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders, Cambridge University Press, 2012.



As universal values, the underlying fundamental principles of the Pancasila can be found in the root of Indonesian local cultural history as well as in the best practices in other countries or in International relations. The universality of fundamental values of Pancasilawere found from the past history, continuously relevant to be applied today, and will constantly relevant for the future. By the application of the basic philosophy of Pancasila, Indonesia will always be united in diversity, based on The One and The Only Universal God of Existence, the humanity with justice and civility, popular democracy, and social justice for all. Indonesia will also always be opened in the world encounter for competition and cooperation based on the independence, peace, and social justice.We hope that the Constitutional Court and the Judges should always be enlighted by and share the living values among the people to whom they serve based on the five principles of Pancasila. They have to read and comprehend the constitution not only grammatically, but also philosophically and culturally based on the living universal values of Pancasila. By doing so, the judges of the constitutional court will not only be enlightened themselves, but also enlightening the whole people for the growing civilization of Indonesia in the future

To conclude, I would like to emphasize that in this globalizing world, the constitutional court in our respective country and the doctrine of constitutionalism have to faced so many new challenges. There are at least four important issues we have to count on seriously today and in the future, i.e. (i) constitutional identity, (ii) inclusiveness, (iii) universalism, and (iv) pluralism. Each country and every constitutional system should have its own identity, but has to live inclusively and close to the underlying universal values that unite humanity. However, in the world and also in our own respective country, we have to live in the reality of pluralism. Therefore, we need the constitution to prevail as the integrating factor in our respective country.


International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Jakarta - Indonesia, 13 - 17 November 2017

Session 3

Maintaining Diversity Under Unitary State

By Agus Widjojo

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society
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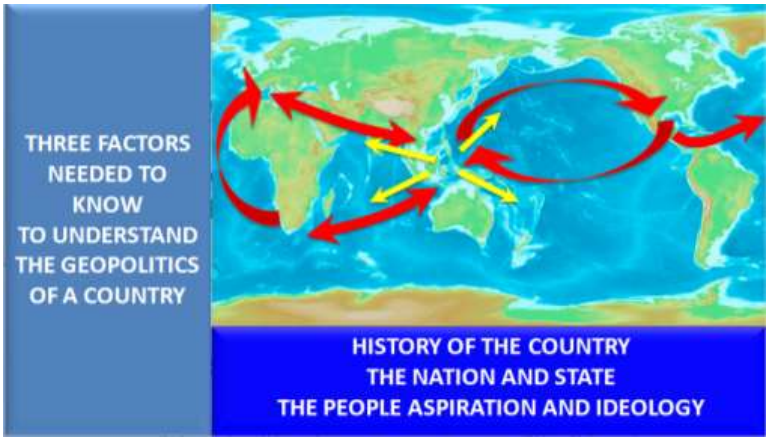
I. GEOPOLITICS AND GEOGRAPHICAL POSITION OF INDONESIA



II. THE INCEPTION OF A NATION

- The Dutch colonials policy of ethical politics, by establishing education opportunities for Indonesian became the first milestone of the rise of the Indonesian nation to unite against colonialism.
- The invaders set up schools and open for education opportunities abroad, which then opened the students' minds of independence, and May 20, 1908 the youth association of Budi Oetomo was established, now commemorated as National Awakening Day.
- Followed by the establishment of youth societies, students both in homeland and abroad, religious organizations, and political parties.

THE INCEPTION OF A NATION (CONT'D)

- In 1926 the first Youth Congress was held, attended by youth and student, gathered and planned for the fusion of all youth organizations.
- 1928 the Second Youth Congress was held by agreeing on the fusion of all youth organizations into "Indonesia Muda".
- The Indonesian National Anthem was first played, right before the declaration of the congressional decision known as the Youth Pledge.
- One motherland of Indonesia, One nation of Indonesia and upholding the Indonesian language as language of unity.
- The Motherland of Indonesia, The Nation of Indonesia and The National language of Indonesia has come to existence before the independence.
- The spirit of the Youth Pledge cultivated the nationalism, the sense of nationality and the spirit of national until finally the Indonesian nation on August 17, 1945 was declared through the Proclamation of Independence.

NATION'S INSIGHT

"... We do not set up the State for one person, one class, but all for all, one for all, all make one, and for the state to be strong .... "

(Ir. Sukarno)

"The Republic of Indonesia:

not belonging to a group, not a religion, not belonging to any tribe, not belonging to a group of customs, but all of us from Sabang to Merauke"

(Speech of Ir. Soekarno in Surabaya, 24 September 1955)

THE LIFE OF THE NATION AND THE STATE RESTS ON:

FOUR BASIC CONSENSUS

- The national values originating from Pancasila as the basis of the state and the nation's ideological foundation.
- National Values originating from the Constitution of the Republic of Indonesia as the nation's constitutional foundation.
- Values of Nationality originated from the Nation's motto, Bhineka Tunggal Ika.
- Nationality Values originating from the Unitary State of the Republic of Indonesia.

III. BACKGROUND OF THE NATIONAL MOTTO *BHINNEKA TUNGGAL IKA*

Sesanti or **Bhinneka Tunggal Ika** motto, first disclosed by Mpu Tantular, Buddhist Tantrayana, Great Pujangga of Majapahit kingdom, during the regim of

King Hayamwuruk (1350-1389).

The Sesanti was written on his book**:**

Kakawin Sutasoma, Pupuh (Chapter) 139, Verse 5,

says "**Bhinna ika tunggal ika, Tan hana dharma mangrva"** which means **"Diversity means one, There is no ambiguous devotion"**

THE POSITION OF MOTTO BHINEKA TUNGGAL IKA

- In 1951, 600 years after it was revealed by mPu Tantular, Bhinneka Tunggal Ika was designated as the official motto of the Republic of Indonesia through Government Regulation No. 66 of 1951. (The word "bhinna ika," then strung together into one word "bhinneka").
- The PP stipulates that Bhinneka Tunggal Ika is designated as a motto contained in the State Symbol of the Republic of Indonesia, Garuda Pancasila.

- In the second Amendment of the 1945 Constitution (2002), Bhinneka Tunggal Ika was confirmed as the official motto contained in the State Symbol, and contained in Article 36a of the 1945 Constitution.

THE NATIONAL COAT OF ARMS OF GARUDA PANCASILA UUD NRI 1945, Article 36A

BHINNEKA TUNGGAL IKA

As THE MOTTO :

* to SET and REGULATE life of society, nation and state

* to RESPECT and BRING HARMONIOUS relationships of different ethnic, racial, religious, linguistic, cultural, customary, etc

- ETHNIC GROUPS 1.340 (BPS2010).
- RELIGIONS AND BELIEFS > 245.
- NUMBER OF ISLANDS REGISTERERD IN UNITED NATIONS 13.466 FROM 17.554 ISLANDS

IV. CONSTITUTIONAL BASIS FOR MAINTAINING DIVERSITY

- CONTENT OF 1945 CONSTITUTION:
  - Preamble: (With the proclamation of independence) … implies the purpose of establishing a national government with the task to safeguard the nation and motherland of Indonesia.
- Article 1:
  The state of Indonesia is a unitary state in the form of a republic.
- Article 28E:
  - Each citizen is free to choose to her/his choice of religion, education, citizenship and place of residence.
  - Each of citizen is free to have the freedom of opinion.
  - Each citizen is assured of freedom of association.
- Article 32:
  - The state will develop national culture and assure the society to maintain and develop its cultural values.

- The state respects and maintains the local language as part of legacy of national culture.

V. HOW DIFFICULT IS IT TO MAINTAIN INDONESIAN DIVERSITY?

- Indonesia is not a nation state.
- Qu'estce Qu'un Nation?
  (Ernest Renan, Sorbonne University 1883).
  A nation is a collective bond of people bound and united by a common sense of destiny and suffering in the past with a shared vision.
- *A nation is sovereign political imagined geographical area with distinct borders.*
  (Benedict Anderson)

VI. INDONESIA AS A NATION OF CONCENSUS

- Building blocks of national consensus building:
- The arrival of Islam by trade.
- 1908: Establishment of Budi Oetomo, and other educational movements.
- 1928: Resulting in consensus.
  One Motherland, Indonesia
  One Nation, Indonesia
  One Language, Indonesia
- 17 August 1945: Proclamation of Independence of the Republic of Indonesia with national motto *Bhinneka Tunggal Ika: Unity in Diversity.*

VII. PANCASILA AS NATIONAL IDEOLOGY

- Pancasila as State Ideology:
  - Pancasila as the foundation in the hierarchical legal system.
  - Pancasila as the reflection of character of the people of Indonesia.
  - Pancasila as the national way of life.
  - A point of reference and norm in the life of the Indonesian people.
  - Pancasila as sacred oath of the Indonesian people.
  - The Pancasila as the national consensus as a final form to regulate the Indonesian national system.
  - Pancasila as ligature of the Indonesian people.

VIII. CHALLENGES

- Facing the dynamics of the international environment.
- The borderless world.
- FORA of competition of ideas and ideologies.
- People have unlimited choice.
- Early democratization vs freedom of opinion.
- The vibrancy of market of ideas is a consequence of the success of democratization.
- Race to the swift between the development of ideas, and the building of effective political institutions in a new democracy.



- National values and system was to be competitive in the competition of ideas.
- Recovery of Pancasila and other national values to be manifested and felt in concrete terms in the national life.

IX. CONCLUSION

- Indonesia has rich resources in its national values which reflects harmony, the spirit of nurturing diversity and tolerance.
- Indonesia is not a nation state, cannot take management of diversity for granted but has to be worked out to see it manifested.
- The historical perspective of Indonesia is an evidence how the managing of diversity is rested on consensus and not majority-minority mechanics.
- The dynamics of contemporary strategic international environment will pose challenges to the management of diversity in Indonesia.
- Some of the most important elements in the way forward to manage and safeguard diversity in Indonesia and the future are:
    - To contain then in the nation legal system.
    - Reinvigorate Pancasila and manifest the values in the daily life of the society.
    - Continue with the process to deepen democracy and regional autonomy which allows communities to believe they have a stake in their own governance.

NATIONAL RESILIENCE INSTITUTE
REPUBLIC OF INDONESIA

Title :

MAINTAINING DIVERSITY UNDER UNITARY STATE

Sub Title :

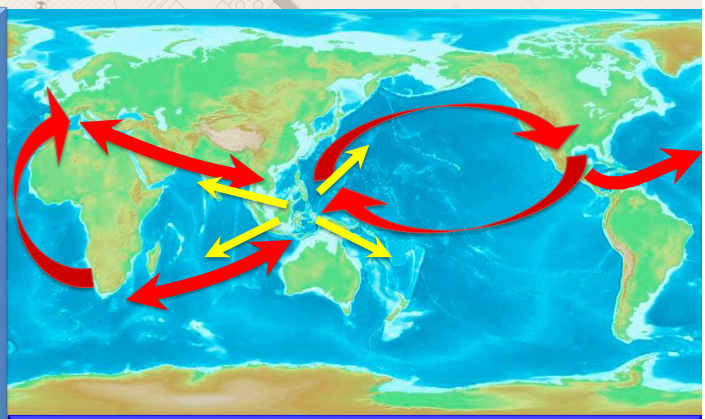
MANAGING DIVERSITY WITHIN THE FRAMEWORK OF THE COUNTRY

Lieutenant General (Ret.) Agus Widjojo
Governor of National Resilience Institute of Indonesia

International Short Course
Constitutional Court
Jakarta, November 14th 2017

GEOPOLITICS
AND GEOGRAPHICAL POSITION OF INDONESIA

THREE FACTORS NEEDED TO KNOW TO UNDERSTAND THE GEOPOLITICS OF A COUNTRY



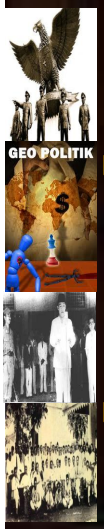
HISTORY OF THE COUNTRY
THE NATION AND STATE
THE PEOPLE ASPIRATION AND IDEOLOGY

LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

II. THE INCEPTION OF A NATION

LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

THE INCEPTION OF A NATION



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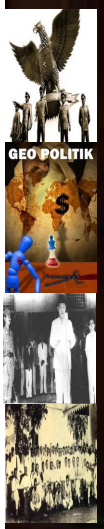
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

THE INCEPTION OF A NATION (CONT'D)



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LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

NATION'S INSIGHT

8

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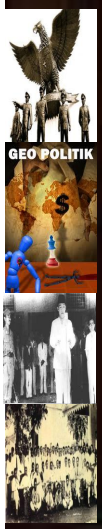

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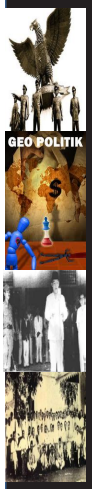
Kakawin Sutasoma, Pupuh (Chapter) 139, Verse 5, says "***Bhinna ika tunggal ika, Tan hana dharma mangrva"*** which means ***"Diversity means one, There is no ambiguous devotion"***

LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

THE POSITION OF MOTTO BHINEKA TUNGGAL IKA



- In 1951, 600 years after it was revealed by mPu Tantular, Bhinneka Tunggal Ika was designated as the official motto of the Republic of Indonesia through Government Regulation No. 66 of 1951. (The word "bhinna ika," then strung together into one word "bhinneka").
- The PP stipulates that Bhinneka Tunggal Ika is designated as a motto contained in the State Symbol of the Republic of Indonesia, Garuda Pancasila.
- In the second Amendment of the 1945 Constitution (2002), Bhinneka Tunggal Ika was confirmed as the official motto contained in the State Symbol, and contained in Article 36a of the 1945 Constitution.

LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

THE NATIONAL COAT OF ARMS OF GARUDA PANCASILA
UUD NRI 1945, Article 36A

LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

BHINNEKA TUNGGAL IKA

As THE MOTTO :

* to SET and REGULATE life of society, nation and state

* to RESPECT and BRING HARMONIOUS relationships of different ethnic, racial, religious, linguistic, cultural, customary, etc

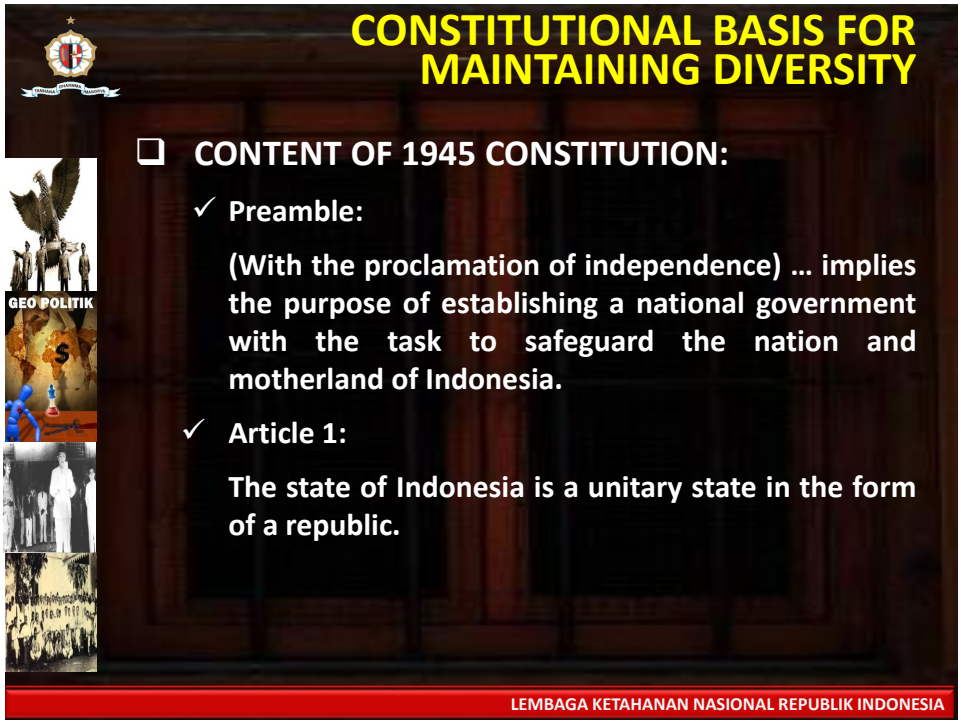
- ETHNIC GROUPS 1.340 (BPS2010).
- RELIGIONS AND BELIEFS > 245.
- NUMBER OF ISLANDS REGISTERERD IN UNITED NATIONS 13.466 FROM 17.554 ISLANDS

LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA



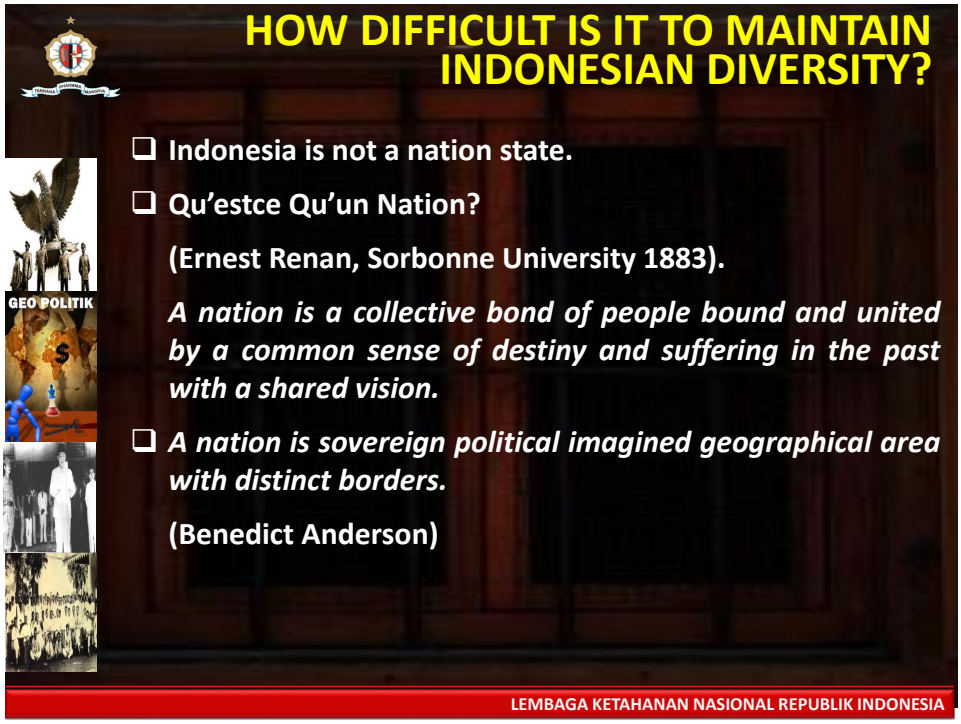
IV. CONSTITUTIONAL BASIS FOR MAINTAINING DIVERSITY

LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


CONSTITUTIONAL BASIS FOR MAINTAINING DIVERSITY
CONTENT OF 1945 CONSTITUTION:
Preamble:
(With the proclamation of independence) … implies the purpose of establishing a national government with the task to safeguard the nation and motherland of Indonesia.
Article 1:
The state of Indonesia is a unitary state in the form of a republic.
GEO POLITIK
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


CONSTITUTIONAL BASIS FOR MAINTAINING DIVERSITY (CONT'D)
Article 28E:
Each citizen is free to choose to her/his choice of religion, education, citizenship and place of residence.
Each of citizen is free to have the freedom of opinion.
Each citizen is assured of freedom of association.
Article 32:
The state will develop national culture and assure the society to maintain and develop its cultural values.
The state respects and maintains the local language as part of legacy of national culture.
GEO POLITIK
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

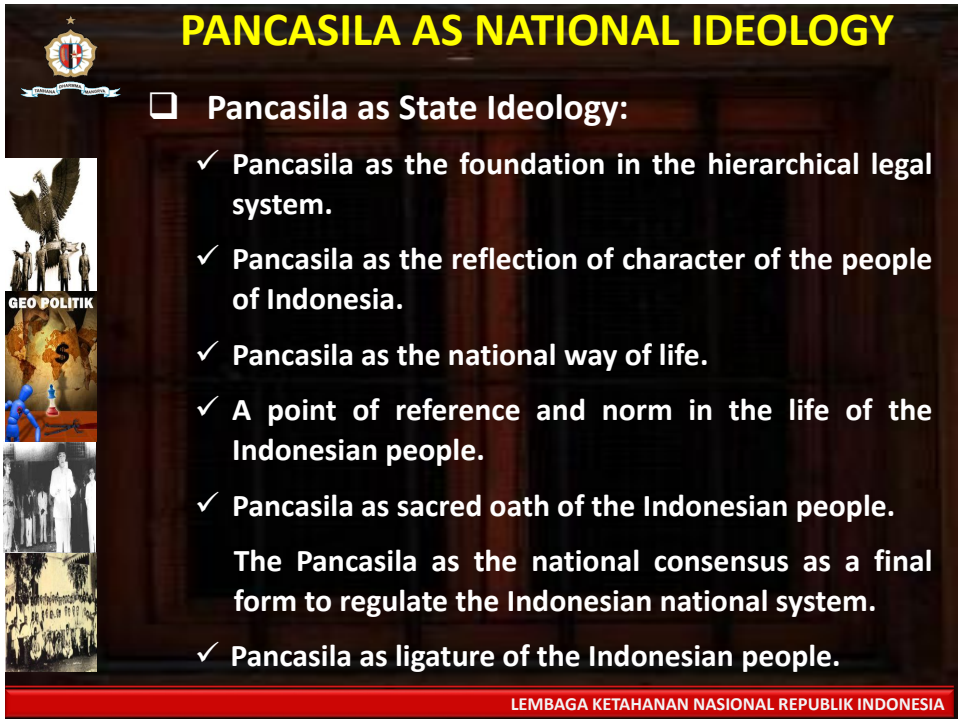

GEO POLITIK
V. HOW DIFFICULT IS IT TO MAINTAIN INDONESIAN DIVERSITY?
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


GEO POLITIK
HOW DIFFICULT IS IT TO MAINTAIN INDONESIAN DIVERSITY?
Indonesia is not a nation state.
Qu'estce Qu'un Nation?
(Ernest Renan, Sorbonne University 1883).
A nation is a collective bond of people bound and united by a common sense of destiny and suffering in the past with a shared vision.
A nation is sovereign political imagined geographical area with distinct borders.
(Benedict Anderson)
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

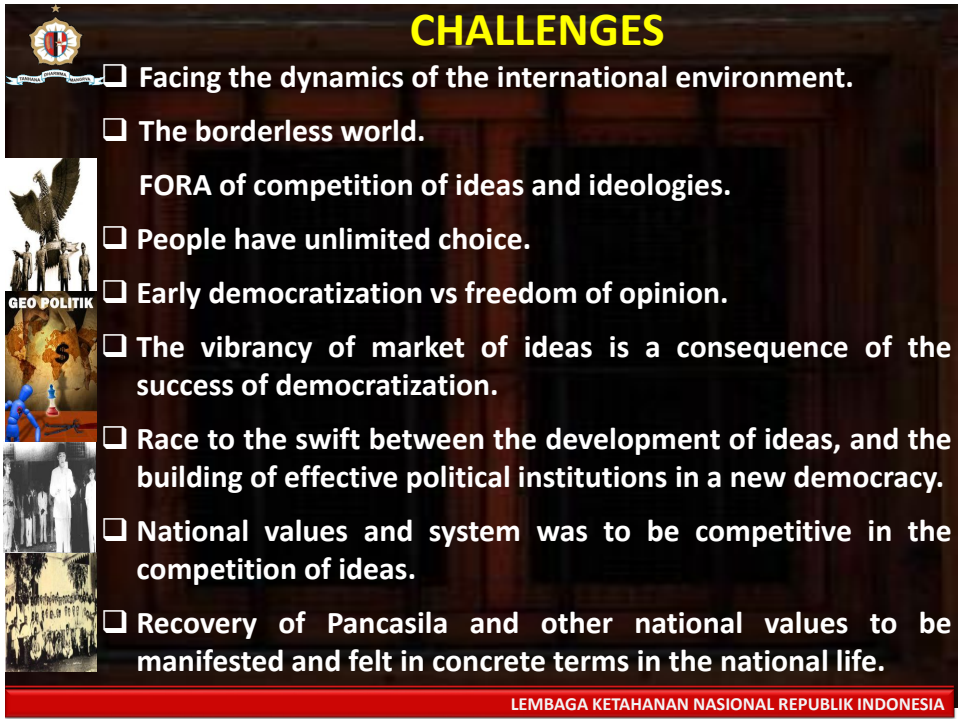

GEO POLITIK
VI. INDONESIA AS A NATION OF CONCENSUS
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


GEO POLITIK
INDONESIA AS A NATION OF CONCENSUS
Building blocks of national consensus building:
The arrival of Islam by trade.
1908: Establishment of Budi Oetomo, and other educational movements.
1928: Resulting in consensus.
One Motherland, Indonesia
One Nation, Indonesia
One Language, Indonesia
17 August 1945: Proclamation of Independence of the Republic of Indonesia with national motto Bhinneka Tunggal Ika: Unity in Diversity.
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


GEO POLITIK
VII. PANCASILA AS NATIONAL IDEOLOGY
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


GEO POLITIK
PANCASILA AS NATIONAL IDEOLOGY
Pancasila as State Ideology:
Pancasila as the foundation in the hierarchical legal system.
Pancasila as the reflection of character of the people of Indonesia.
Pancasila as the national way of life.
A point of reference and norm in the life of the Indonesian people.
Pancasila as sacred oath of the Indonesian people.
The Pancasila as the national consensus as a final form to regulate the Indonesian national system.
Pancasila as ligature of the Indonesian people.
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


VIII. CHALLENGES
GEO POLITIK
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


CHALLENGES
Facing the dynamics of the international environment.
The borderless world.
FORA of competition of ideas and ideologies.
People have unlimited choice.
Early democratization vs freedom of opinion.
The vibrancy of market of ideas is a consequence of the success of democratization.
Race to the swift between the development of ideas, and the building of effective political institutions in a new democracy.
National values and system was to be competitive in the competition of ideas.
Recovery of Pancasila and other national values to be manifested and felt in concrete terms in the national life.
GEO POLITIK
LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA

CONCLUSION

- Indonesia has rich resources in its national values which reflects harmony, the spirit of nurturing diversity and tolerance.
- Indonesia is not a nation state, cannot take management of diversity for granted but has to be worked out to see it manifested.
- The historical perspective of Indonesia is an evidence how the managing of diversity is rested on consensus and not majority-minority mechanics.
- The dynamics of contemporary strategic international environment will pose challenges to the management of diversity in Indonesia.
- Some of the most important elements in the way forward to manage and safeguard diversity in Indonesia and the future are:
  - To contain then in the nation legal system.
  - Reinvigorate Pancasila and manifest the values in the daily life of the society.
  - Continue with the process to deepen democracy and regional autonomy which allows communities to believe they have a stake in their own governance.

LEMBAGA KETAHANAN NASIONAL REPUBLIK INDONESIA


THANK YOU
TANHANA DHARMMA MANGRVA


International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Jakarta - Indonesia, 13 - 17 November 2017

Session 4

Pancasila as Unifying Ideology : Background and History

By Yudi Latief

The Way Pancasila Engaging Globalization

Indonesia: The Biggest Archipelagic Country

Indonesia as a Plural Society

- Indonesia is a plural society par excellence
- Indonesia is the biggest archipelagic country in the world, stretching almost 5,000 kilometers from west to east and consists of over 16,000 islands (about 6,000 of which are inhabited).
- Around 8 hours flight from corner to corner (equivalent from London to Moscow)
- 240 million population, 171 millions in active years
- It incorporates ethnic and cultural diversity of over 500 ethnic groups and 600 distinct languages (around 2/3 still to be documented into documentation or put into readable Indonesian translation)

The Character of Indonesianess

- The ecosystem of seas and islands greatly shaped the character of Indonesia. Sea absorbs and cleanses; absorbs without leaving any litters. Sea, in its width and depth, is living space for huge diverse species of huge diverse sizes.
- As a greatest "islands country" in the world, Indonesia is in meeting point of inter-continental and inter-great seas. Indonesia also is attractive with her natural resources. For almost perennial time, this put Indonesia in a meeting point of travelers of civilisation and of streams of civilisation.

The Character of Indonesianess

- Denys Lombard (1996: I, 1) said, "Indeed, there is no single place –except maybe of Central Asia- like Nusantara (read: Indonesia) which hosts and is a home of the presence of all great civilisations who coexists and/or converging into one stream" He described several "socio-cultural nebulae" who strongly shaped the civilisation of nusantara (Java in particular): Indianisation, web of Islam and China, and western stream.
- The dynamism of global traffic made Nusantara into *carrefour* of civilisation which in turn could grow cross-culture fertilisation. Indonesia grows as flower garden of world's civilisation .

The Challenge for Connectivity & Integration

- How one legitimise the overlapping civilisations in such context (:archipelago)?
- How one would recognise plurality while ensuring nation building?
- Why and how kingdoms are eventually outlived by democracy?
- Will integration means uniformity at all cost?
- Population means 'ungovernable'?

Pancasila as The Unifying Principles

Pancasila = Five Principles of the State

1. Belief in the Supreme Being. (Civilized theism)
2. Just and civilized humanity. (Internationalism)
3. The unity of Indonesia. (Unity in diversity of Indonesia)
4. Democracy guided by the inner wisdom in the unanimity arising out of deliberation amongst representatives. (Deliberative democracy)
5. Social justice for the people of Indonesia. (Social welfare)



The Five Principles Can be Converged into Three Principles

- In Soekarno's view, those five principles could be still converged into three *sila* or principles:
- Kebangsaan dan internationalism (sosio-nasionalisme); Nationalism and internationalism (socio-nationalism);
- Demokrasi-politik dan Demokrasi ekonomi (sosio-demokrasi); Democracy of politics and democracy of economy (socio-democracy);
- and Ketuhanan yang berkebudayaan Civilized theism (Socio-Religious)

The Three Principles Can be Converged into One Principle

- Furthermore, Soekarno said, "If I am to reach the very heart of those principles: five to three, three to one, then I will arrive to one original Indonesian word: *gotong royong* (mutual cooperation).
- The state of Indonesia should be founded as state of *gotong royong (mutual cooperation)*
- loosely translated or paraphrased "jointly-shouldering, sharing, closing the loose ends". This word came from the practice of rural population in providing (public) services, make a work according to roster/schedule, eating from one or two big plates in time of pray or fest, moving homes, making terrace and irrigation.
- In other way of explanation, the foundation of all principles of Pancasila is *gotong royong (*mutual cooperation)
- This explains to: theism which must be *gotong royong* in its core (theism which is of cultural, wide and tolerance); and not a theism which is aggressive and alienating of each against the other.
- The principle of internationalism should be of *gotong royong* (which is of humanistic, just and civilized); and not an internationalism which is of colonialistic and exploitative.
- The principle of nationhood should be of *gotong royong* (capable to develop unity in diversity, "bhinneka tunggal ika"; not a nationhood which eliminates differences and diversity, or refuses unity.
- The principle of democracy should be of *gotong royong* (develop a deliberative process); not a democracy which is dictated by majoritarianism (majorocracy) or by few elites of powerful-resourceful groups (minorocracy).
- The principle of social welfare should be of *gotong royong* (develops a wider participation and emancipation in the field of economy with the spirit of brotherhood); not a vision of welfare which is based by individualism-capitalism, but also not that which oppresses individual liberty or physical humans just like happened in etatism.



The Challenge of Globalization

Definition

Globalization is the intensivication of world-wide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa

(Anthony Giddens, 1990)

-*Time-space distanciation* (Giddens, 1999)

-*Time-space compression (*David Harvey, 1989)

The impact:

Globalization pull away and push down the nation-state

Engagement of Pancasila with Globalization

- In fact, diverse contemporary global and local problems have been anticipated by Pancasila with its ability to look into those problems and inherent ability to engage.
- In engaging the emboldened religious fundamentalism, first principle emphasises principle of civilized theism. Soekarno (or *Bung* Karno, as his fellow citizen name) said, "State Indonesia should be a state where each and every person could believe and pray to their God freely. All people should be have God in their life in cultural way, that is without 'egotism of religion'… Theism with high virtue of full human, theism who pay respect one to other".

Engagement of Pancasila -continued

- In engaging destructive impacts of globalisation and localisation, in the form of homogenisation and particularisation of identity, the principle of "socio-nationalism" which is enshrined in the second and third principle gave a powerful virtue and framework to do positive engagement.
- In the principle of "socio-nationalism", Indonesian nationhood is nationhood which surpasses narrow individual and group thinking, stand on all for all. At the same time, Indonesian nationhood is also humanistic nationhood, which brings universal sisterhood and fraternity into reality, along with justice and civility of the world. Bung Karno said, "Internationalism could not live without rooting in fertile soil of nationalism. Nationalism could not fertile if that did not lives in the flower garden of internationalism"

Engagement of Pancasila -continued

- On engaging tyranny and injustice in the polity and economy, the principle "socio-democracy" which is enshrined in the fourth and fifth principle of Pancasila, is of powerful engagement.
- These principles necessitate and provide a necessary framework for political democracy which is in line with economic democracy.

- In the political sphere, democracy which is developed is deliberative democracy which is impartial, which take wider involvement and considerations all parties inclusively.
- In the economic sphere, state should be active in achieving social justice, in order to respond and to counterbalance the inequeality in the market, by developing a health climate of competition, to defend those who cannot defend themselves, and developing investments on public goods for the livelihood and welfare of the people.

Conclusion

- In those five principles of Pancasila, state and nation of Indonesia have visionary and durable worldview.
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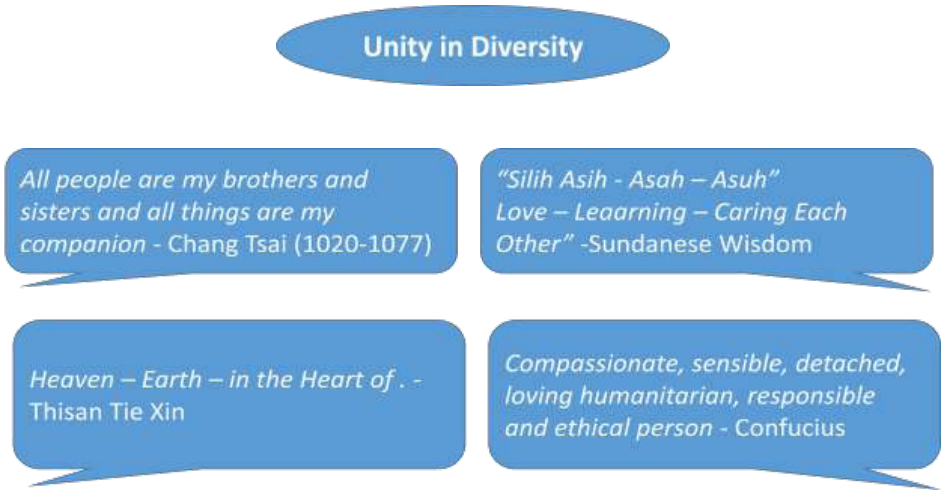

UKP PANCASILA
UNIT KERJA PRESIDEN PEMBINAAN IDEOLOGI PANCASILA

YUDI LATIF

Kepala Unit Kerja Presiden
Pembinaan Ideologi Pancasila

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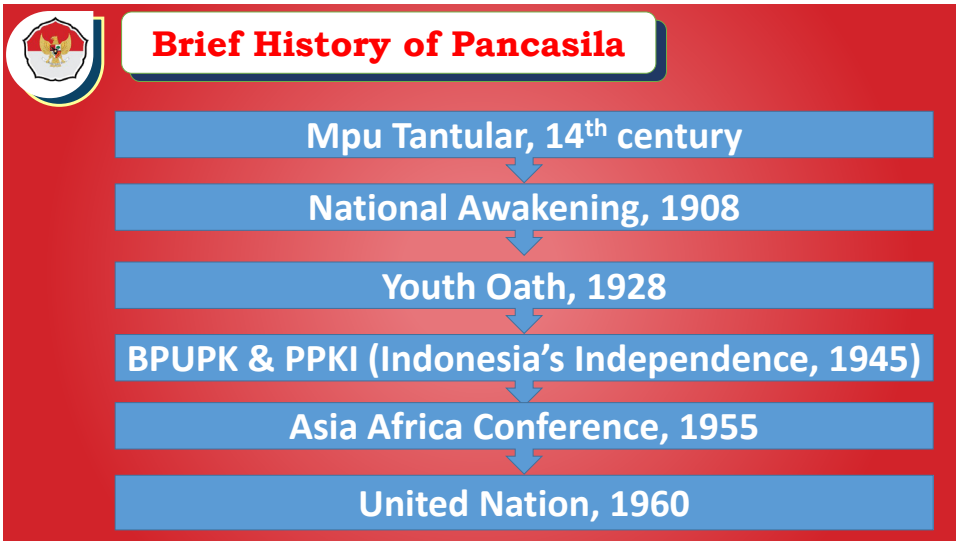
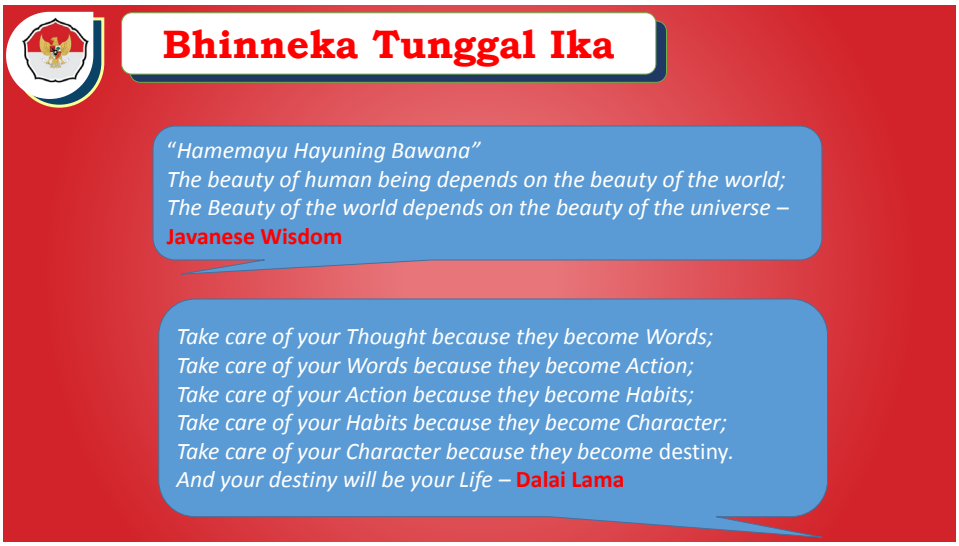
Bhinneka Tunggal Ika
Unity in Diversity
All people are my brothers and sisters and all things are my companion - Chang Tsai (1020-1077)
"Silih Asih - Asah – Asuh" Love – Leaarning – Caring Each Other" -Sundanese Wisdom
Heaven – Earth – in the Heart of . - Thisan Tie Xin
Compassionate, sensible, detached, loving humanitarian, responsible and ethical person - Confucius


Brief History of Pancasila
Mpu Tantular, 14th century
National Awakening, 1908
Youth Oath, 1928
BPUPK & PPKI (Indonesia's Independence, 1945)
Asia Africa Conference, 1955
United Nation, 1960


Bhinneka Tunggal Ika
"Hamemayu Hayuning Bawana"
The beauty of human being depends on the beauty of the world;
The Beauty of the world depends on the beauty of the universe –
Javanese Wisdom
Take care of your Thought because they become Words;
Take care of your Words because they become Action;
Take care of your Action because they become Habits;
Take care of your Habits because they become Character;
Take care of your Character because they become destiny.
And your destiny will be your Life – Dalai Lama


Thank You
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International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Jakarta - Indonesia, 13 - 17 November 2017

Session 5

" Political Parties, Democracy and the Authorities of Constitutional Court "

by Maruarar Siahaan

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society
Jakarta - Indonesia, 13 - 17 November 2017

LIQUIDATION OF POLITICAL PARTIES IN INDONESIA

By Dr. Maruarar Siahaan, S.H.

Introduction.

Indonesia as a democracy, explicitly mentioned in the constitution both before and after the amendment, refers to the sovereignty of the people, which not only determines the people who will sit in the Parliament, central and regional governments, but also determines the public policy decisions in legislation and implementation state of power. In a democratic system, it is a necessity that the existence of a political party - as a functioning institution for recruiting candidates for legislators and heads of central and local governments, becomes very important. It can not be imagined the existence of a democratic state without a political party. Indonesia as a state based on rule of law, in which sovereignty lies in the hands of the people and implemented under the Constitution, it means that Indonesia is a constitutional democracy and a democratic constitutional state (*Democratische-Rechtstaatstaat*).

Therefore, reforms that occurred in 1998 with the fall of the New Order regieme under Suharto, the reform was conducted by constitutional amendment, because some of the problems faced are rooted in the rules of the constitution, for reasons:

1. The 1945 Constitution establishes a constitutional structure which is based on the highest authority in the hands of the People's Consultative Assembly which fully exercises the sovereignty of the people. This results in the absence of checks and balances mechanism among the constitutional institutions;

2. The 1945 Constitution gives a powerful position to the executive (president). The system adopted by the 1945 Constitution is an executive heavy: the dominant power is in the hands of the President supplemented by various constitutional rights commonly called prerogative rights (such as granting amnesty, abolition and rehabilitation) and legislative power because the President also has the power of legislation to form laws.

3. The 1945 Constitution contains articles that are too "flexible" so that it can lead to more than one, or multifarious interpretation, for example Article 7 of the 1945 Constitution (before amended).

4. The 1945 Constitution gives too much authority to the President's power to enforce important matters with the Law. The President also holds the legislative powers so that the President can formulate important matters according to his will in the law.

5. The formulation of the 1945 Constitution that heacily rely on the spirit of state administrator has not been sufficiently supported by constitutional provisions containing basic rules on democratic life, the rule of law, the empowerment of the people, respect for human rights, and regional autonomy. This opens up opportunities for the development of state administration practices that are inconsistent with the Preamble of the 1945 Constitution, including the following:

a. The absence of checks and balances between state institutions and the power centered upon the President;

b. Political infrastructure established, among others, political parties and civil society organization;

c. Elections (elections) were held to meet the requirements of formal democracy because all processes and phases of its implementation were controlled by the government;

Several concensuss reached by the Ad Hoc Committee prior to the amendment of the 1945 Constitution at the time stated that:

1.would not change the preamble of the 1945 Constitution.

2. To maintain the Unitary State of the Republic of Indonesia.

3. Reinforce the presidential system.of government;

4. The elucidation of the 1945 Constitution was abolished and the normative matters in the explanation are to be included in the articles of the constitution.



Political Parties and Their Roles.

In accordance with the agreed principles, the constitutional amendment will avoid an authoritarian government with checks and balances mechanism established between branches of state power with clear mechanisms and democratization through the construction of political infrastructure such as political parties as step democratization with fair and just general elections. Given such developments in constitutional arrangements, the growth of political parties as a result of guaranteed freedom of assembly and association, even though the Indonesian government maintains a presidential system, the growth of parties then becomes a separate issue for the president in implementing his duties.

The formulation of political parties in Indonesia has experienced a long history since independence. When the General Elections becomes a democratic and truly democratic instrument of democracy that far from the direction of government in power, it has only begun since the reforms that took place after the fall of the New Order government as mentioned above. The reforms that took place since 1998 have brought Indonesiainto transition from a State with an authoritarian system to a democratic country. 4 (four) stage of constitutional amendment from 1999-2002 lay the foundation for the life of a nation that applies the values and principles of democracy within the Unitary State of the Republic of Indonesia based on the ideology of the Pancasila. The ongoing reforms and democratization, marked by a multi-party system, undoubtedly complicates governance under a presidential system, as it has to seek cooperation with many political parties with seats in parliament to gain support in order to secure government programs in a viable and effective way.

Political parties are defined as: *"a national organization and formed by a group of Indonesian citizens voluntarily on the basis of similarity of will and ideals, to fight for and defend the political interests of members, society, nation and state and to maintain the unity of the Unitary State of the Republic of Indonesia based on*

Pancasila and 1945 Constitution of the State of the Republic of Indonesia ".[1] The political party is thus a civil legal entity born of constitutional freedom of association and freedom of expression, whose function and existence is oriented to the public interest with the duty to safeguard the struggle for member's political aspirations within the framework of democracy. The party plays a role in the process of recruitment of public officials by placing their representatives through elections and obtaining legitimacy to participate in the formulation of state policies.

Of course Power, interests and conflict are familiar with politics. The main motive in politics is to gain legitimate power. Political parties are thus a means for citizens to participate in the process of managing the State, with their collective interests articulated in groups. He became the liaison between the people on the one hand and the government on the other. There is no denial of the importance of political parties in the continuity of a democratic system of government. The importance of political parties can also be seen from the provisions stipulating that the participants of the general election to be member of Parliaments, local parliament are political parties. On the other hand, candidate pairs of President and Vice President in a presidential election, can only be proposed by Political Party or a combination of political parties. The function of political parties in democratic countries like Indonesia can be expressed as follows:

1. Means of political communication, namely to aggregate (combine) interests or aspirations of individuals or groups to be formulated (articulated).

2. Means of Socialization of Politics, the process by which people gain attitude and orientation to political phenomena. It is also seen as a process by which people convey the political culture, namely the norms and values of one generation to the next generation.

3. Conflict Management means, as a means of resolving conflict and in order to be optimally minimized.

[1] Article 1 (1) Law Number 2 year 2011 as an amendment to Law Number 2 yera 2008, on Political Party.



4. Instrument of political Recruitment Facility, which a view to the selection of leadership, both internally and nationally.[2]

It is also intended to be able to articulate the interests that become the ideals, ideals and visions and policies of certain political parties into state policy through the influence that can be played by the leader of the political party and presented by candidates who then elected as government leader or member of parliament.

Dissolution of Political Party.

Although freedom of association and assembly and freedom of expression is guaranteed by the constitution, but the existence of political parties which generally recruit cadres to participate in democratic elections to articulate the vision, ideals of established political parties, political parties remains in a framework which is not contrary to the basic state and maintains the integrity of the Unitary State of the Republic of Indonesia based on Pancasila and the 1945. Therefore, even in the statutes on the political party, the basic and written objectives are said to fight for Pancasila as the basis of the state and the Constitution 1945 as a constitutional basis, it may be in its real activities, certain political parties may actually do things contrary to Pancasila and the 1945 Constitution, as the basis of the state of Indonesia. Under such conditions, it becomes possible under the Indonesian Constitution to dissolve such political Party.

Despite the fact that the constitution only mentions summarily the authority of the Constitutional Court to dissolve unconstitutional political party, namely in the Article 24C paragraph 1 that mentions 5 (five) authority of the Constitutional Court, and one of them is to decide the dissolution of political parties. The authority is then repeated and mentioned in Article 10 of the Constitutional Court Law, and further elaborated in Chapter V of The Tenth Part of the Law, regarding dissolution of Political Parties. From the arrangement it can be seen, it is only the Governement itself or the excecutive that can apply for the dissolution of political parties. The government itself, can apply by delienating the reasons to the Constitutional Court that, ideology, principles, objectives, programs and activities of an intended political party are

[2] Miriam Budiarjo, Dasar-Dasar Ilmu Politik, Gramedia, Jakarta 2003.



considered contrary to the 1945 Constitution. The regulation are then elaborated by the Constitutional Court with Regulation of the Constitutional Court Number 12 / PMK / 2008, in Article 2 more explicitly states that political parties may be dissolved if :

1. Ideology, principles, objectives of political party programs are contradictory to the Constitution of the Republic of Indonesia Year 1945, and / or

2. The activities of a political party are inconsistent with the Constitution of the Republic of Indonesia or its consequences are contrary to the 1945 Constitution of the State of the Republic of Indonesia.

The establishment of a Political Party in Indonesia must be in the form a legal entity and then to be registered as a participant in the general election, which must show documents containing ideology, principles, objectives of a political party. In order to be eligible for registration, of course, in its documents or articles of association, it is certainly formulated to contain things that are not contradictory to Pancasila and the 1945 Constitution. However, in practice, both activities and programs may also established later and unpublished, as it may occur that the aims, principles and ideologies are in practice not as stated in the documents, in order to obtain the status of a recognized state party. Therefore, it is very relevant that the provisions in PMK 12 / PMK / 2008 which mention activities or consequences caused by activities that are contradictory to the 1945 Constitution, are the reasons that may result in the dissolution of one political party. A political party whose activities are in direct contradiction to democracy, and prevents the right of people to vote and to be elected, to do things that impede the ongoing democracy in a free and fair and just elections, can qualify as reason for dissolution or ban. Not to mention that its activities advocate for the replacement of the state of Pancasila, . Activities that provoke violence or disunity, separatism and calls to change the country's foundation or ideology, if viewed seriously lead to divisions and efforts leading to state ideology replacements, in my opinion, are the reasons mentioned in PMK 12 / PMK / 2008. As a comparative, it may be worthwhile to look at Article 21 (2) of the German Basic Law which states that "...*"...by reasons of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to*

endanger the existence of the Federal Republic of Germany are unconstitutional", became the reason for banning political parties.[3]

So far the German Constitutional Court has banned two political parties, the Socialist Reich Party (SRP) of an extreme right-wing party on October 23, 1953, and the German Communist Party (KPD) on 17 August 1956.[4] Reasons that can also be used as the basis of the dissolution of political parties in Indonesia is also mentioned in the Political Party Act which expressly formulates the prohibition of political parties to:

1. Conduct activities that are contrary to the 1945 Constitution of the State of the Republic of Indonesia;

2.To do harm that endanger the unity of the Unitary State of the Republic of Indonesia;

3. Conducting activities that are contrary to the policies of the state government in maintaining friendship with other countries in order to participate in maintaining world peace and order.

Procedures for Dissolution of Political Parties in Indonesia.

One political party may be dissolved by its own decision, or by joining itself with another political party. The authority of the Constitutional Court to decide upon the dissolution of Political Parties is due to the existence of the Government's Request. The 1945 Constitution does not contain any rules referring to the procedures for the dissolution of the political parties, although Article 24C Paragraph (1) refers to the authority of the Constitutional Court to dissolve the Political Parties. However, Law Number 2 Year 2008 as amended by Law Number 2 Year 2011 on Political Parties and Law Number 24 Year 2003 as amended by Law Number 8 Year 2011 Concerning the Constitutional Court, regulating the dissolution of Political Parties, with the reasons or the grounds, and the procedures, although the provisions

[3] Legal Text, *Law on The Federal Constitutional Court,* Inter Nationes, second edition, 1996 p. 10.

[4] Ibid. P.11

are not sufficient. The drawbacks are then regulated in the Constitutional Court Regulation Number 12 of 2008, and in the absence of cases or petitions that have occurred in the Constitutional Court, such regulations have not been amended since its inception

Government is the only applicant who can apply for dissolution of political parties. In the elucidation it is said that the meaning of the Government is the Central Government. Because the Government is headed by the President, the ministry in charge to submit an application to dissolve a political party must be by appointment of the President. Technically, it may be that the Petitioner for the dissolution appointed by the President is the Minister of Home Affairs, or the Minister of Law and Human Rights or the General Election Commission, because each of them also has the task of overseeing political parties with different perspectives. The petitioner in the petition to dissolve the political party must be clearly and detailed in his / her position that the ideology, principles, objectives, programs and activities of the political party concerned are considered contradictory to the 1945 Constitution. If the arguments in the governmental petition can be proven and reasonably enough, then the Constitutional Court may grant the petition and declare the dissolution of the political party concerned. The question is whether with such limited authority, the Constitutional Court that declares a political party dissolved, whether such a step is a last resort or is there any other attempt to be made before the Government's step applying for dissolution. Since Laws of political parties that authorize the Government cq Minister of Justice and Human Rights, Minister of Home Affairs and General Election Commission to supervise, in my opinion before taking the last step to apply for dissolution of political parties, it has the authority to conduct coaching or educating the party's personel.

The violations referred to in Article 40 paragraph (2) of the Political Party Law in the form of activities that are contrary to the 1945 Constitution and the Laws and Regulations, as well as carrying out activities that endanger the integrity and safety of the Unitary State of the Republic of Indonesia may be temporarily frozen for a maximum of 1 (one) year but if thereafter commits the same offense may be dissolved by a decision of the Constitutional Court on the application of the Government.

Decision of the Constitutional Court.

As mentioned earlier, if the Petition for dissolution of the Political Party is constitionally legitimate, then the Political Party will be declared, which are petitioned to be dissolved by the Constitutional Court shall be declared dissolved. The execution of such Decision shall be communicated to the relevant Political Party, and the execution of such decision shall be made by canceling its registration with the Government, and published in the State Gazette of the Republic of Indonesia. However, in addition to the dissolution verdict, the Constitutional Court may also regulate the legal consequences of the dissolution of the Political Party by stating:

a. The prohibition of the right of political parties and the use of party symbols throughout Indonesia;
b. Dismissal of all members of the People's Legislative Assembly and the Regional People's Legislative Assembly from the dissolved Political Party.
c. Prohibition against former political party officials disbanded for political activities;
d. The state takeover of the wealth of the disbanded Political Parties.

This last part constitutes an authority, which I think is a judge of the Constitutional Court's discretion to decide, since it is not mentioned in the Constitution of the Republik of Indonesia.

Jakarta November 15..

THE LIQUIDATION OF POLITICAL PARTIES IN INDONESIA

FOREWORD

The Reformation movement that took place in 1998 has brought Indonesia into the time of transition, a transition from a state with an authoritarian system to a state of democracy. There are four (4) stages of the amendment of UUD 1945 that have laid the foundation for the life of a nation that applies the values and principles of democracy within the Unitary State of the Republic of Indonesia, based on the State ideology of Pancasila

The themes of Reformation essentially require a political system with checks and balances, rule of law, respect for human rights that assert freedom of expression, freedom of assembly and association

The ongoing reformation and democratization processes, marked by a multi-party system, complicates governance with a presidential system; however, it must be compromised with the majority of these political parties in order to gain majority of the vote in the House so that the government can run effectively

MULTI PARTAI

The multi-party system that characterizes the politics of Indonesia, naturally and slowly, requires a change in the future with the so-called simple multiparty, both with the consolidation of small parties that do not meet the electoral threshold to participate in the next election or to place their representatives in the House.

The Constitutional Court's ruling stipulates not only the serial number of candidates in the legislative elections that determine the election of a candidate for the people's representatives, but the majority vote, although it indirectly impedes the growth and reduces the political party naturally

The difficulties of the government administration that occur due to this multi-party system are considered to be obstacles undermining the Presidential system, causing in many instances Political Party officials considered only to have concerns related with transactional politics, which greatly reduces the sympathy of the people towards political parties – political parties which are regarded as not putting the interests of the people as their main goal

Political Parties and Democracy

Article 1 Paragraph (2) of the 1945 Constitutionstates that sovereignty is in the hands of the people and implemented according to the Constitution. However, it, in fact, refers to the system of democracy within the government. In running the wheel of democracy, political parties occupy an important position and are said to carry out a very strategic liaison function between the processes of governance with citizens

The recent Political Party Act provides that:

"A political party is a national organization and is formed by a group of Indonesian citizens voluntarily on the basis of equality of will and ideals to fight for and defend the political interests of members, society, nation and State, and to maintain the unity of the Unitary State of the Republic of Indonesia based on Pancasila and Undang -The Basic State of the Republic of Indonesia Year 1945 "

The common interests of a group of people as championed through organized associations, such as the organization of political parties, the interests of which are championed, thus become strong and institutionalized, rather than if the interests are articulated individually, although it includes a considerable number of members

Political parties are thus a means for citizens to participate in the process of managing the State, with their collective interests as articulated in the groups. The political parties became the liaison between the people on the one hand and the government on the other

The 1999 election, there were 141 political parties that enrolled in the Ministry of Justice and Human Rights, although there were only 48 political parties eligible for vote. In the 2004 General Election, in which there were only 24 political parties participated, 26 of the parties did not pass KPU verification, 58 political parties did not qualify as party legal bodies, and 153 political parties canceled their legal entity status. After the 2004 elections, 107 political parties filed for registration of the establishment to the Ministry of Law and Human Rights and then 24 political parties passed the verification of legal entity. The number of political parties that have seats in the DPR based on Article 316 Sub-Article d of Law Number 10 Year 208 which can participate in the 2009 elections are 16 political parties, but with the addition of political parties applying to the Constitutional Court to participate in the elections, plus political parties in Aceh, the number of political parties participating in the 2009 elections amounted to 44 parties

How important political parties are can also be seen from the provisions stipulating that the election participants of DPR, DPD and DPRD are political parties. On the other hand the candidate pairs of President and Vice President in presidential election and President's Vice can only be proposed by a political party or combination of several political parties

Regardless of the actions of certain political parties that seem very clearly to emphasize in gaining power and fight for the interests of his group in ways that are not harmonious with the demands of law, constitution and political morals, it is undeniable that political parties are very important in the life of democratic governance, and one cannot imagine to have a democratic country without the political party

Fungsi Partai Politik

Political parties are defined as an organized group whose members have the same orientation, values, and ideals. The aim of this group is to gain political power and seize political positions - usually in a constitutional way - to implement the program

A old writer once defined a political party as the following:

"a political party is a group of people who are organized in a stable manner with the aim of seizing and retaining control of the government for the leadership of his party and based on this mastery, giving the members of the party the idealistic and material benefits"

The functions of political parties accordng to Miriam Budiarjo (1)

The struggle or effort to gain power and political position is in order to realize the ideals and common interests that are fought in constitutional ways, as participation in the management of life in the state. In the context of democracy, of course, all things are done democratically.

The function of political parties in a democratic country like Indonesia are described by Miriam Budiarjo as follows:

1. **Means of political communication,** namely to aggregate (merge) interests or aspirations of individuals or groups to be formulated (articulated).
2. **To facilitate the socialization of politics,** a process by which people gain attitude and orientation toward political phenomenon. It is also seen as a process by which people convey the political culture, namely the norms and values of one generation of generation that follows.

Fungsi partai politik menurut Miriam Budiarjo (2)

3. **A Means of Conflict Management,** i.e. as a means of resolving conflicts and suppressed to a minimum.

4. **A means of a political recruitment,** which deals with the selection of leadership, which are wider in both internal and national scopes. both internal and national wider. **This recruitment function as well**

These functions are interconnected.Recruitment of the leader of the person who is a cadre of political parties, is certainly intended to be able to articulate the interests of the ideals and vision as a policy of a particular political party to become state policy through the influence that can be played by the leader of the political party

PEMBUBARAN PARTAI POLITIK

The German Constitution regulates the dissolution of political parties in article 21, by first stating that

- Political parties take part in the formation of the people's political will, and are free to establish, with the organization internally to be in accordance with constitutional principles, accountable to the public the source and use of their funds and assets.
- Parties that, because of their purpose or because of the conduct of their members, attempt to undermine or abolish a democratic basic order or jeopardize the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court broke the issue of the constitutionality of the party.
- Further details are set out in federal law.

The basis for declaring the constitutionality of a political party in Germany is an objective laid down in its own constitution or member behavior that undermines or abolishes the basic order of democracy. This endangers the existence of the Federal Republic of Germany. This authority is placed on the Federal Constitutional Court. Legal standing of the applicant for a case like this is granted to the Bundestag, Bundesrat or Federal Government of Germany. The state is also given the legal standing to file such a request to the Federal Court, if the political party in question is present or domiciled in its territory. The regulation in the German Constitutional Court Law provides an opportunity for the respective Political Party to provide information, as part of the due process of law Article 43 of the Federal Constitutional Court

The Constitutional Court's verdict may include the entire party or only concerning a certain part of the party. If the whole political party is declared contrary to the constitution, the Constitutional Court's decision will contain a dictum containing the dissolution of political parties in the intent. The decision of the Constitutional Court may also specify that the party's assets are confiscated for the State. The implementation of the decision of the Constitutional Court to declare a party inconstitutional must be done by the Government, including the State, when it concerns the party in Article 46 of the German Constitutional Court Law.

The case of the dissolution of political parties which was once terminated by the Federal Court of Germany, included the dissolution of the Socialist Reich Party (SRP) in 1952 and the German Communist Party (Comunist Party of Germany) in 1956. The SRP was dissolved because it had similar structures, objectives, programs and activities with the Nazi party seeking to destroy the values of democracy and the fact supporting that the SRP was a new form of the Nazi party.

THE DISSOLUTION OF POLITICAL PARTIES IN INDONESIA

The 1945 Constitution does not contain any rules referring to the dissolution of the political party, although Article 24C Paragraph (1) refers to the authority of the Constitutional Court to dissolve the Political Parties. However, Law Number 2 Year 2008 as amended by Law Number 2 Year 2011 on Political Parties and Law Number 24 Year 2003 Concerning the Constitutional Court, regulating the dissolution of Political Parties

The Political Party Act recognizes several types of dissolution as follows

1. Self-dissolution;
2. Merge with other political parties;
3. Dissolution by the Constitutional Court

The self dissolution of the party and by merger with another political party is not a matter of controversy because it is voluntary

Article 48 of Law Number 2 Year 2008 stipulates sanctions for violation of Article 40 paragraph (2) that is temporary freezing of the political Party for a maximum of 1 (one) year due to:

1. Conducting activities that are contrary to the 1945 Constitution of the State of the Republic of Indonesia and the laws and regulations;
2. Conducting activities that endanger the integrity and safety of the Unitary State of the Republic of Indonesia

After one political party is dissolved, if it commits another violation as mentioned in Article 40 paragraph (2) above, the political party is dissolved by the Constitutional Court

The Constitutional Court's authority in Article 24C Paragraph (1) concerning the dissolution of political parties shall be further stipulated in the Constitutional Court Law in Chapter Two of the Tenth Part in Articles 68 to 73

In Article 68 it is briefly mentioned that the Petitioner is a government, and the reasons for the petition must state:

- **Ideology;**
- **Principle;**
- **Aim;**
- **Program; and Party Activities, which are deemed to be contradictory to the 1945 Constitution**

But in particular the reason for the dissolution as sanction for violation because it embraces and develops and spreads the doctrine of communism / Leninism is also regarded as one reason for the dissolution of the party by the Constitutional Court

The assets and wealth of disbanded parties are actually regulated in the Political Party Act, which is only done by canceling the registration to the Government. Of course the meaning in this case is in the Department of Law and Human Rights

The Petitioner for the dissolution of a political party appointed by the President may be the Minister of Home Affairs, the Minister of Law and Human Rights or the KPU because according to Article 46 of the Law of the Political Parties the supervision of the implementation of this law shall be carried out by the Megara Authority functionally in accordance with the Act. When viewing the reasons for the dissolution of political parties that have been alluded to, the Minister of Home Affairs is more appropriate as a party to be appointed or authorized by the President to propose the dissolution of political parties because the reasons for the dissolution are within the scope of supervision of the Ministry of Home Affairs

Regulation of the Constitutional Court Number 12 Year 2008 concerning the Dissolution of Political Parties, in particular concerning the Constitutional Court's decision in granting a petition when granting the petition and declaring dissolving and canceling the legal body status of the political party requested for its dissolution and ordering the Government to:

- to eliminate a political party which is dissolved from a list to the Government no later than 7 (seven) years from the date the decision of the Constitutional Court is accepted;
- to announce the decision of the Court in the State Gazette of the Republic of Indonesia no later than 14 (fourteen) working days after the decision is received.
- The verdict which grant the request for the dissolution of political parties.

The verdict which grants the request for dissolution of a political party, is concerned with

- Prohibition of the right of life of political parties and the use of symbols of the party throughout Indonesia.
- Dismissal of all members of the People's Legislative Assembly and the Regional People's Legislative Assembly from political parties dissolved;
- Prohibition against former political party officials disbanded for political activities;
- Takeover by the State on the wealth of disbanded political parties.

CONCLUSION

1. The dissolution of political parties as instruments to keep the aggregation activities of political aspirations and the recruitment of leaders can preserve and preserve the ideology ideology of Pancisila State, the ideals and goals of the state which has been laid down the Founding Fathers in the Preamble to the 1945 Constitution, to protect,

2. Political parties as a product of democracy and freedom of thought and freedom of association must also remain coherent and faithful to build democracy within the framework of the Unitary State of the Republic of Indonesia, which respects diversity in unity.


THANK
YOU

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INDONESIAN
CONSTITUTIONAL COURT

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Jakarta - Indonesia, 13 - 17 November 2017

SESSION 6

Role of Center of Pancasila and Constitution Education and Center of Research, and Case Review as Supporting Units in Exercising Constitutional Court's Authority to Safeguard the Ideology

By : Budi Achmad Djohari

1. Foreward

The administration of the judiciary includes management which is in direct contact with the community and which provides services and support to judges in examining, hearing, and deciding cases. Therefore, the performance of the judiciary is also determined by the performance of the administration of the judiciary. An unjust verdict can happen because the administration of the judiciary is not optimal in providing services to the judge so that the judge can not decide the case objectively and find the truth. In fact, fair decisions can be unfair if to get the verdict, it takes a discriminatory and convoluted administration process. Therefore, the effort to realize the ideal figure of the Constitutional Court also involves the question of capacity building of administrative tasks in the Constitutional Court.

As regulated in Article 7 of Law Number 24 Year 2003 on the Constitutional Court as amended by Law Number 8 Year 2011, to assist in the implementation of the duties and authorities of the Constitutional Court, a Registrar's Office and a Secretariat General shall be established. The Registrar is a functional position that has the duty of providing judicial administrative technical support to the Constitutional Court, including:

1. coordination of judicial technical implementation in the Constitutional Court;
2. guidance and implementation of case administration;
3. guidance of technical services of judicial activities in the Constitutional Court; and
4. the implementation of other duties given by the Chief Justice of the Constitutional Court in accordance with the field of duty.

The General Secretariat undertakes the task of providing administrative technical support to the Constitutional Court, which includes:

1. planning, analysis and evaluation, general administration supervision and administration of justice, and organizational and management structuring;
2. financial and human resource development management;
3. management of housekeeping, filing and expedition, and state property;
4. implementation of public relations and cooperation, Justice's office and protocol administration, and secretariat of the registrar;

5. research and case study, library management, and management of information and communication technology;
6. education of Pancasila and the Constitution; and
7. the implementation of other duties given by the Chief Justice of the Constitutional Court in accordance with the field of duty.

From the above explanation it can be seen that the Registrar provides support to the Constitutional Court in the field of judicial administration, starting from the administration of registration the petition, the recording of the case, the court administration, until the case is decided. While the Secretariat General provides support, among others, in two matters, namely the support of material substance through research and case studies and general administrative support, including Finance, Personnel, Supplies, Public Relations, and increasing public understanding of Pancasila and the Constitution.

The organization of the Registrar and the General Secretariat of the Constitutional Court shall be guided by the mission of the Constitutional Court to become a modern and credible judicial institution and to develop constitutionality and the culture of constitutional awareness. Therefore, the steps taken are to affirm the position and function of the Constitutional Court as the actor of the judicial authority, and to organize and strengthen the organization of the Constitutional Court in accordance with the principles of good judicial governance. Therefore, the principles of good governance are implemented namely, transparent, fair, accountable, impartial, and independent. In order for the public to be well served, the public must be able to understand how the judicial process should be done, the history of the case being heard, the trial process, and the judicial decision itself.

In accordance with the title conveyed, the discussion in this paper will be limited to 2 (two) things, namely (1) Education of Pancasila and the Constitution and (2) Research and Case Study.

2. Education of Pancasila and the Constitution

Initially, the Pancasila Education Center and the Constitution were established based on the concerns, awareness, and similarities of the minds of the leaders of the State Institutions which held a meeting on May 24, 2011 at the Constitutional Court Building. The meeting were attended by: (1). President and vice president; (2). Chairman of the Constitutional Court; (3). Chairman of the People's Consultative Assembly; (4). Speaker of the House of Representatives; (5). Chairman of the Regional Representative Council; (6). Chief Justice of the Supreme Court; (7). Chairman of the Supreme Audit Board; and (8). Chairman of the Judicial Commission.

Departing from the position of the Constitutional Court of RI as a constitutional court to uphold the law and justice under the 1945 Constitution of the Republic of Indonesia, based on the agreement, the Constitutional Court of the Republic of Indonesia took proactive and concrete action. Beyond the main function as a constitutional court, the Constitutional Court of the Republic of Indonesia is called upon to take on the role and responsibility of 'inducing' and 'cultivating' the values of Pancasila by conducting activities in order to foster and enhance the Pancasila-conscious culture and the Constitution. The move is based on the thought and understanding that Pancasila is the soul of the 1945 Constitution of the Republic of Indonesia. Therefore, as a constitutional body, the Constitutional Court has an interest in every effort to strengthen the Pancasila

In its development, in addition to performing functions in the effort to revitalize, internalize and implement the values of Pancasila, Pancasila Education Center and the Constitution has also become an effective instrument for the Constitutional Court of the Republic of Indonesia to open acces to court and access to justice

Since its inception, the Constitutional Court has committed to apply the principle of transparency and accountability in exercising its authority. More concretely, the Constitutional Court of the Republic of Indonesia continues to open

the widest possible access to the public regarding all information, both on the process and the mechanism of the trial and includes the institutional performance. In the framework of acces to court and acces to justice, Pancasila Education Center and the Constitution holds that the smooth implementation of duties and authority of the Constitutional Court of the Republic of Indonesia is strongly influenced, even determined by at least two things. First, how the public understanding and awareness of the existence of the 1945 Constitution. The more people have a good level of understanding and awareness of the 1945 Constitution, the more aware of the public will be their constitutional rights. Secondly, the community is challenged to have an understanding of how to prosecute and fight for their constitutional rights. Especially when its constitutional rights are violated by the enactment of a law.

Of these two things, the Pancasila Education Center and the Constitution are at the forefront of efforts to "bring closer" the reach of society to the Constitutional Court of the Republic of Indonesia, including to justice as reflected in the decision. For the Constitutional Court of Indonesia, Pancasila Education Center and the Constitution is a great force to support the smooth functioning and constitutional authority of the Constitutional Court of the Republic of Indonesia

In an effort to improve people's access to justice and improve public access to the judiciary, the Constitutional Court through the Pancasila Education Center and the Constitution conducts various activities involving the sharing of community elements, including Political Parties, Community Organizations, Youth Organizations, Women's Organizations, Professional Organizations, Customary Law, Non-Governmental Organizations, State Organizers, Armed Forces / Police, Teachers, Lecturers, and Students as well as other elements of society with various forms and methods of activities.

Efforts to improve community access to justice are conducted through various activities to improve public understanding of the values of Pancasila, the Constitution and their basic rights as citizens guaranteed by the constitution

(constitutional rights of citizens). While efforts to improve public access to the judiciary, especially to the constitutional court, are conducted through various activities to provide an understanding of the Procedural Law of the Constitutional Court as well as the process and the mekasime of Lawyers in the Constitutional Court.

Both efforts are made by the Constitutional Court, because enforcement of law and constitution as well as the implementation of a democratic state of Pancasila requires a good constitutional understanding and awareness of all citizens. Therefore, in order for citizens to play an optimal role, every citizen needs to understand his constitutional rights as well as the efforts that can be taken to defend them.

The Constitutional Court has the responsibility to provide understanding to the public about the constitutional values and constitutional rights of citizens. Constitutional values stem from the basic value of Pancasila as the nation's life view. Understanding of the basic values described as constitutional values will open the public's understanding to see clearly the existence of Pancasila as the nation's life philosophy, state ideology, and the state base. Therefore, strategic effort is needed in order to preserve and preserve the values of Pancasila and its embodiment in instrumental value and praxis value along with the development and dynamics of the people of Indonesia.

The form of activities undertaken by the Pancasila Education Center and the Constitution in an effort to improve people's access to justice is done through the Constitutional Rights Education of Citizens for various eleman communities throughout Indonesia. To support this, the Pancasila Education Center and the Constitution have developed a master curriculum as the main guideline for learning activities. Education curriculum includes:

A. National Insight

a. Conceptions of National Interest and National Vigilance;



b. Nationality Insight, Nationalism, National Integration and National Paradigm (Pancasila, the 1945 Constitution, the Unitary State of the Republic of Indonesia and Unity in Diversity);
c. The Influence of Current Development in Strategic Environment (National, Regional, Global) on National Integration and National Sovereignty;
d. Strengthening the National Insight

B. Reactualization Implementation of Pancasila

a. Concepts, Principles, and Values in Pancasila;
b. Reactualization implementation of Pancasila as the Philosophy of Life of the Nation;
c. Reactualization implementation of Pancasila as the National Ideology;
d. Reactualization implementation of Pancasila as the State Basics;
e. Pancasila reactualization implementation challenges in the era of globalization

C. Constitution and Indonesian Constitutionalism

a. Definition of Constitution and Constitutionalism, and Relations between Constitutional and Constitutionalism;
b. The Supremacy of the Constitution in a Constitutional Democratic State;
c. Content of Constitutional Material;
d. Constitution and Regulation under the Constitution;
e. Constitutional Amendment

D. Constitutional System in accordance with the 1945 Constitution

a. Principal Ideas of the 1945 Constitution Preamble;
b. The Basics of State Organization;
c. Government system;
d. State Institutions and Relationships among State Institutions (Principles of Checks and Balances);
e. Regional autonomy



E. Guarantees of Citizens' Constitutional Rights in the 1945 Constitution

a. Relations between the State and the Citizens;
b. Universality of Human Rights;
c. Human Rights in the 1945 Constitution;
d. Constitutional Rights of Indigenous People

F. Constitutional Court in the Indonesian State System

a. History of the Establishment of the Constitutional Court;
b. Functions and Authorities of the Constitutional Court;
c. Comparative Functions and Authorities of the Constitutional Court in Different Countries;
d. Structure and Work Mechanism of the Constitutional Court;
e. Procedural Law of the Constitutional Court;
f. Constitutional Court's decision related to the Promotion and Protection of Constitutional Rights of Citizens

Other activities in the effort to improve public understanding of Pancasila, Constitution, and Constitutional Rights in the form of holding Constitutional Debate between Students and Constitutional Award for Achieving Pancasila and Civics Teachers, both at elementary, junior and senior high schools.

While the activities undertaken in an effort to improve public access to the Constitutional Court in the form of Technical Guidance of Procedural Law of the Constitutional Court for all the authority of the Constitutional Court, whether the Judicial Review, the Dispute Authority between State Institutions whose Authority is regulated in the Constitution, Impeachment of President and/or Vice President, Dissolution of Political Parties, as well as Dispute on Election Results (Election of President/Vice President and Election of Legislative Members) and Election of Regional Heads (Governor / Regent / Mayor). This Technical Guidance Activities is aimed at various elements of society who are parties to litigation in the Constitutional Court, such as Advocates, General Election Commission, Election

Supervisory Board, Electoral Political Parties, Legislative Candidates (DPR, DPD, and DPRD), Chief Candidate Regions, Government Officials in Legal Affairs, including lecturers in law faculties.

While the activities undertaken in an effort to improve public access to the Constitutional Court in the form of Technical Guidance of Procedural Law of the Constitutional Court for all the authority of the Constitutional Court, both the Tests of the Law, the Dispute Authority between State Institutions whose Authority is regulated in the Constitution, / or Vice President, Dissolution of Political Parties, as well as Dispute on Election Results (Election of President / Vice President and Election of Legislative Members) and Election of Head of Region (Governor / Regent / Mayor). The emphasis of the Technical Guidance Curriculum is stacked on the skills for the practice of law in the Constitutional Court of the Republic of Indonesia.

This Technical Guidance Activities is aimed at various elements of society who are parties to litigation in the Constitutional Court, such as Advocates, General Election Commission, Election Supervisory Board, Electoral Political Parties, Legislative Candidates (DPR, DPD, and DPRD), Chief Candidate Regions, Government Officials in Legal Affairs, including lecturers in law faculties.

Other forms of activity in understanding the Constitutional Court Procedural Law, especially among students in the form of Constitutional Justice Moot Court Competition. This activity aims to provide understanding to the students how the procedural procedure in the Constitutional Court, especially the procedures and mechanisms of law in the Judicial Review of Acts against the 1945 Constitution.

All activities are organized by Civil Servants of the Constitutional Court assigned to the Pancasila Education Center and the Constitution, with the following organizational structure:

a. 1 Head of Center
b. 2 Head of Divisions

c. 4 Heads of Subdivisions
d. 9 staffs

Lecturer in the Center for Education Pancasila and the Constitution consists of the Professor and expert in Constitutional Law, former Constitutional Court and the researcher as well as the Registrar of the Constitutional Court. The Pancasila and the Constitution Education Center also cooperates with the National Resilience Institute for the curriculum, methodology, and lecturer of National Insight also with the Presidential Working Unit for Guidance of Ideology of Pancasila for material on Reactualization of Pancasila Implementation as well as with various universities and other state institutions in an effort to strengthen curriculum, lecturers, as well as teaching methodologies and broadening the scope of educational participants.

The campus of Pancasila and Constitution Education Center is located at Jalan Raya Puncak, Cisarua, Bogor, West Java. Available facilities include lodging for 200 people, a 200-person auditorium, 8 units of classrooms (25 people each), libraries, polyclinics, dining rooms and worship facilities.

3. Research and Case Study

Implementation of the task of the Secretariat General of the Constitutional Court in providing substance / material support to the Constitutional Court is conducted by Researchers and Reviewers of Cases in the Center for Research and Case Studies and Management of Information Technology Communications.

Case Reviewer is an officer attached to a Constitutional Court Justice with the task of assisting the Constitutional Judge in drafting the Legal Opinion by conducting an in-depth assessment of the matters being dealt with. Case Examiners make a deepening of the matter based on the written instructions of the Constitutional Judge containing the Constitution Judge's thoughts on matters to be studied and also make important records obtained during the trial for the purpose of the next hearing review and for the need for the drafting of the Legal Opinion concept. The Constitutional Judges will submit each of its Legal Opinions in the

Judicial Consultation Meeting and further discussed and discussed as a matter of compiling the Court's verdict on the matter concerned. The Case Studies also serve to provide data and information services to judges in the form of previous Court verdicts, doctrines, or legal comparisons to the Constitutional Court.

While the Researcher is an employee conducting research on constitutional issues, constitution, democracy, human rights as well as other issues relevant to the authority of the other Court. Research is conducted to provide additional supply of references and various perspectives for judges who are expected to be useful in deciding a case.

Researchers are also tasked with analyzing the decision of the Constitutional Court with the aim of:

1. Formulating the rules of law found in the Court's Decision,
2. Compiling the interpretation of the Court on the 1945 Constitution,
3. Establishing the jurisprudence of the Court's Decision.

In addition, the Researchers are also tasked with monitoring and evaluation of the implementation and implications of the Court Decisions as well as publishing the Constitutional Journal both on a national scale and international scale.

The results of the researcher's work are not only used by the Case Reviewers in the case study, but also used by Pancasila Education Center and the Constitution in improving the module and teaching materials and can be published to various parties who need them, including the Law Faculty of Higher Education throughout Indonesia.

In view of this, the Center for Research and Case Review can contribute fully to the Constitutional Court of the Republic of Indonesia, especially in generating and improving the quality of decisions, then what is done is to keep improving (upgrading) the quality and skills of human resources Researchers. In this case, the academic ability of the Researcher will be strengthened in preparing a higher-quality and world-class legal opinion based on strong constitutional arguments, comprehensive, problem-solving, and accountable as the meaning of quality

decisions. Improving the quality of human resources Researchers are directed to Researchers who are able to academically provide support to constitutional judges to be able to interpret the constitution comprehensively based on the morality and noble values of the Indonesian nation. With such Human Resource Qualification, improving the quality of the Constitutional Court ruling is not only maintained, but will be further improved.

Furthermore, concerning the pattern and mechanism of work Researchers, which has been done and continue to develop is to build interaction, cooperation, and atmosphere and a stronger academic culture among Researchers. Undeniably, the success of the Center for Research and Case Review will be reflected in the performance of the Researchers with all the scientific traditions attached to it. For that reason, one of the things that can not be abandoned is the Center for Research and Case Study as much as possible opens opportunities to produce scientific works that are periodically published. The scientific work is related to the decision of the Constitutional Court and other constitutional issues, either through research results, books, or journals as institutional icons. Thus, in addition to providing substantial support to the Constitutional Court of the Republic of Indonesia in drafting a decision, will also foster and nurture the desire to continue working. At this level, the patterns and mechanisms at the Center for Research and Case Review show a love of institutions and scholarship.



4. Closing

Without the slightest denying the support of other work units, the Center for Research and Case Review as well as the Pancasila and Constitutional Education Center provided siginikan support for the Constitutional Court of the Republic of Indonesia. The Center for Case Studies and Studies provides substantial support in the decision making process of the Constitutional Court of the Republic of Indonesia. With the various efforts undertaken, the Center for Research and Case Review through the Researchers is expected to improve the quality of the decision.

Meanwhile, the Pancasila Education Center and the Constitution provide support not less important, that is to relate to the public in order to develop a constitutionally conscious culture, to provide an understanding of the citizens' constitutional rights, and to provide insight and skills on the effort to fight for impaired constitutional rights. Not only that, through the Pancasila Education Center and the Constitution, the dissemination of the decisions made by the Constitutional Court of the Republic of Indonesia is known, understood, and implemented properly.

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MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INDONESIAN
CONSTITUTIONAL COURT

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

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Malaysia

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JUDICIAL REVIEW AS AN INSTRUMENT TO OVERSEE IDEOLOGY - MALAYSIA'S PERSPECTIVE

Introduction

1. Lord Acton is famously quoted as having said "Power corrupts; absolute power corrupts absolutely". It is therefore noted that the doctrine of separation of powers is practiced in a nation to limit the powers of the three institutions, namely the Legislature, Executive and Judiciary with checks and balances in order to protect liberty and to prevent abuse of power.

2. To achieve a complete separation of powers is practically impossible, and thus powers can only be separated with checks and balances. To put it in layman's terms, with checks and balances, each of the three branches can limit or control the powers of the others. The judicial branch, for example, checks on the government through judicial review. It now leads to the first question, what is judicial review?

3. The expression judicial review may be taken to refer to the process by which the courts exercise their supervisory jurisdiction to see that public authorities do not act outside the remit of their powers. In other words, judicial review is a process whereby a court of law examines the conduct of a governmental body to establish whether or not that body has acted lawfully, in the sense of acting within the scope of its lawful powers. Judicial review, in general, is concerned with legality of the decision- making process of the executive (government), not with the merits of the decision.

4. As such, judicial review is an important application of the rule of law on the administrative aspects of a governmental power. Judicial review may result in the granting of remedies to the affected party. Hence, judicial review represents the means by which the courts control the exercise of governmental power. It is, therefore, expected that government departments, local authorities, tribunals, state agencies and agencies exercising powers which are governmental in nature to exercise their powers in a lawful manner.

5. In Malaysia, the Parliament which is made up of Dewan Rakyat and Dewan Negara is a democratically elected legislature that legislates the laws. The Executives are headed by a Constitutional Monarch, His Majesty the Yang di-Pertuan Agong, appointed every five years on a rotational basis among the nine Malay Rulers of each State within the Federation; which also includes the Prime Minister and the Cabinet execute the laws passed by the Parliament. The Judiciary, lastly, decides and interprets the laws by upholding the rule of law.

6. It has to be pointed out that although the concept of judicial review is not expressly stated in the Malaysian Federal Constitution, it is of paramount importance to note that just as the Parliament is subject to the Constitution, all executive officials, from the Yang di-Pertuan Agong down to the ordinary public servant, are bound by the Constitution. Even if the executive/administrative decision is not open to any appeal or is expressed by the law to be 'final and conclusive', courts are not to be deterred by reviewing such acts or decisions. It is, therefore, important to note that in Malaysia, constitutional supremacy is maintained by reviewing the executive act on constitutional as well as administrative law grounds.

The Position of Judicial Review under the Malaysian Federal Constitution

7. Having defined the term 'judicial review' above, it is now vital to pay attention to the position of judicial review under the Federal Constitution. First and foremost, it important to note that the position of judicial review under the Federal Constitution could not be discussed without making a cross- reference to the recommendations made by the Reid Commission, a body set up in 1956 responsible for drafting features of the Constitution. It is important to note from the onset that the five members of the Commission were not unanimous on the issue of judicial review.

8. For example, Justice Abdul Hamid, a Pakistan High Court judge, one of the five founding fathers who had framed Malaysia's national charter, whose dissenting opinions on some other matters have proved to be rather more prophetic than his opinions on this matter, objected to judicial review of Article 10, rights of freedom of speech, assembly and association on the grounds of reasonableness; he also objected to the provision in the draft for judicial review of administrative decisions on the ground of natural justice; both objections were put on the ground that these concepts were incapable of precise definition.

9. Based on these objections, it would be right to state that the doctrine of judicial review, is not to be found in the constitution but it has been argued on the basis of the separation of powers doctrine where the court is to perform a special role to ensure that each and every branch of government maintains their competence. Added to the doctrine is of course the idea of democracy and constitutionalism where authorities would not be allowed to go beyond their limits; something that is apparently a reflection of the notion of limited government.

10. If the authority acts against or fails to act according to the will of the Parliament, it is therefore said to be acting ultra vires and is unlawful. In that case, the court will interfere by reviewing the decision to deter mine the lawfulness of the decision, actions or omission. Having said that, there must be a decision from the Minister (or the government) before an application for judicial review can be made. There are three grounds for judicial review, namely illegality, unreasonableness or irrationality, and procedural impropriety.

The Entrenched Principle of Judicial Review

11. A perusal of local cases of judicial review of industrial court decisions shows that the primary authority relied upon for the purpose of limiting the scope of judicial review was the case of Chief Constable of North Wales v Evans [1982] 1 WLR 1155. It is noteworthy that in this landmark case, Lord Brightman of the House of Lords stipulated that:

"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

12. This view had become the entrenched principle of judicial review, and that the principle was entrenched in Malaysia's judicial system was incidentally acknowledged by Wan Yahya FCJ in the landmark ruling of the Federal Court in **R Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 145** when he said that *"his dissenting judgment is written with no other motive than a sincere desire to uphold an entrenched principle of the law on Judicial Review"*.

13. The ruling of the Federal Court in **Rama Chandran case**, is indeed a turning point in administrative law. This is because it altered the scope of judicial review radically in that a court exercising judicial review has the power to review the decision of the industrial court on its merits, quash it by certiorari, substitute the decision of the industrial court with a different decision and also mould the relief (not only to order reinstatement or payment of compensation, but in the latter case, the court can also compute the quantum of compensation).

14. Edgar Joseph Jr FCJ in his search to find a legal basis that provided the rationale and justification for the exercise of extended powers of judicial review by a reviewing court called to his aid Lord Diplock's ruling in **Council of Civil Service Unions & Ors v Minister For Civil Service [1985] AC 374** that a decision susceptible to judicial review is not only open to challenge on the ground of procedural impropriety but also on the grounds of illegality and irrationality (Lord Diplock also mentioned proportionality as a possible fourth ground).

15. Illegality becomes a ground for judicial review when the industrial court or administrative authority acts outside the perimeters of its powers or, to put it differently, when the decision of the industrial ribunal (court) is ultra vires the Act. Irrationality becomes a ground for judicial review when the Industrial Court decision is tainted by *'Wednesbury unreasonableness'*. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.decision is tainted by *'Wednesbury unreasonableness'*. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.

16. Procedural impropriety becomes a ground for judicial review not only when the industrial court or public decision-maker fails to observe the principles of natural justice but also involves failure by an administrative tribunal to observe procedural rules that are expressly laid down in the statute from which it derives its jurisdiction or power to decide, even where such failures do not involve any denial of natural justice.

17. Proportionality is a ground for judicial review when the punishment is altogether excessive and out of proportion to the misconduct.

18. Irrationality becomes a ground for judicial review when the Industrial Court decision is tainted by Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.

19. According to Edgar Joseph Jr FCJ, of the four of Lord Diplock's grounds of judicial review, only procedural impropriety restricts judicial review to reviewing the decision-making process only; for the other three of Lord Diplock's grounds of judicial review, the review can be for both process and substance.

20. Thus, the reasoning and authorities cited above amply endorsed the legal basis for reviewing the award of the industrial court for substance and not just for process. As such, the Federal Court by doing this made it clear that in proceedings for judicial review the High Court has the power to—

(i) review the decision of the Industrial Court on its merits;
(ii) substitute the decision of the Industrial Court with its own decision, without remitting the matter for readjudication by the Industrial Court; and
(iii) may itself determine the consequential relief.

21. The principle method by which the court exercises its judicial review jurisdiction to see that public authorities do not act outside the remit of their powers is by way of the application for judicial review as provided for under Order 53 of the Rules of Court 2012. By means of this procedure, the court may grant the prerogative remedies of certiorari, prohibition and mandamus. Damages may also be awarded in certain prescribed circumstances. However, it should be noted that a number of c onditions exist under Order 53 of the Rules of Court 2012 that have to be met before the leave to apply fo r judicial review is granted, for instance the requirement of prompt application within three months from the date when the grounds of application for judicial review arose or when the decision is first communicated to the applicant.

Overseeing State Ideology Through the Mechanism of Judicial Review

22. Malaysia's state ideology, already a national philosophy, is embodied and prescribed in the national principles, known locally as Rukun Negara. The Rukun Negara was instated by the Royal Proclamation with the aims to incorporate and promote among others the principles of

unity, rule of l aw and the supremacy of the constitution. These five principles are:

1. Belief in God;
2. Loyalty to King and Country;
3. Upholding the constitution;
4. Rule of Law; and
5. Good Behavior and Morality.

the Rukun Negara as being intrinsic to the social structure or the Malaysian society and take conscious to promote and protect this philosophy that had been incorporated in the provisions of the Federal Constitution.

24. On the judicial level, the courts are well aware of its role as the guardians and protectors of the Federal onstitution. The Federal Court is the only court empowered to decide on legal questions relating to the constitutionality of a law passed by the Parliament under Article 128 of the Federal Constitution. This technically makes the Federal Court the constitutional court for Malaysia.

25. The redress for any infringement of fundamental liberties is by way of judicial review. Under this mechanism, the High Court is empowered by section 25 of the Courts of Judicature Act 1964 to order for *habeas corpus, mandamus, quo warranto,* certiorari and prohibition or any others for the enforcement of the fundamental rights provided in Part II of the Federal Constitution.

26. The High Court is also empowered by sections 30 and 84 (3) of the Courts of Judicature Act 1964 to examine the constitutionality of a parliamentary legislation which serves as a form of 'check-and-balance' to other arms of the government. This mechanism is called constitutional challenge which allows any aggrieved citizen whose fundamental rights have been encroached to refer his or her constitutional questions to the highest court, i.e. the Federal Court.

27. Any appeal lies to the Court of Appeal and the Federal Court. By way of example, the fundamental right under Article 121 (1B) of the Federal Constitution came for consideration by the Federal Court in the case of **Semenyih Jaya Sdn. Bhd. v Pentadbir Tanah Daerah Hulu Langat & Anor [2017] 5 CLJ 526**. This case concerns a dispute of the amount of compensation awarded by the Land Administrator arising out of the acquisition of part of the Semenyih Jaya's (the Appellant) land. The Appellant was aggrieved with the amount of compensation determined by the assessors under section 40D(3) of the Land Acquisition Act 1960 and brought an application to review the powers exercised by the Land Administrator. The High Court dismissed the Appellant's application and later the Appellant brought an appeal to the Court of Appeal. At the appeal level, the Appellant contested against the constitutionality of section 40D(3) of the Land Acquisition Act 1960, in particular to the part of the provision which precludes appeals against the High Court decision on the amount of compensation. The Court of Appeal held in the negative of the Appellant's appeal. Unsatisfied with the decision, the Appellant proceeded to bring the matter to the Federal Court where it was held that section 40D(3) of the Act to be ultra vires the Constitution as the Federal Court found that the Appellant's constitutional rights to a fair and reasonable compensation arising from compulsory acquisition had been violated.

23.These principles are very much alive in Malaysia. The Malaysian Court recognizes these principles under

CONCLUSION

28. On the basis of the separation of powers doctrine, the time has come for the courts to better assert their judicial review power, as it is an important tool given to the court in exercising the principle of — check and balance on the legislature and executive. This would not only ensure good governance, which is also an important rule of constitutionalism, but more importantly it can provide a sufficient condition for public confidence that the rights of individuals in the administrative process of the country are adequately protected.

Prepared by:
Chief Registrar's Office, Federal Court of Malaysia
12th November 2017

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INDONESIAN
CONSTITUTIONAL COURT

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Turkey

PROSPECTS FOR AN ASIAN HUMAN RIGHTS COURT AND THE ROLE OF CONSTITUTIONAL COURTS

The world has witnessed important developments with regard to human rights in the twentieth century. Until about the second half of the century, human rights were regarded solely as the responsibility of the state. The atrocities and destructive effects of the World War II have changed this view drastically and triggered international action on the issue. The adoption of the Universal Declaration of Human Rights on December 10, 1948 by the UN General Assembly was a landmark step in recognition and articulation of human rights by the international community. The declaration enshrined the bedrock principle that all human beings, by virtue of their common humanity, are entitled to minimum standards of human dignity regardless of any distinction such as race, sex, origin, religion, or political opinion. The recognition of human rights continued with the emergence of human rights arrangements at the regional level. Europe, America and Africa have established their regional human rights instruments along with implementation machineries. Asia, the largest and most populous continent of the world, remains the only region that lacks a region-wide mechanism for the protection of human rights.

It has been argued that certain unique characteristics of Asia, such as geographical vastness of the continent, the great diversity of ethnicities, cultures, and religions across the region, and significant disparities in the level of economic and social development among the regional states hinder the establishment of a regional human rights mechanism. The lack of political will and heterogeneity of the political regimes are other and, perhaps the most underlying, factors that explain the absence of a human rights arrangement in the region.

This paper has been previously published in the book entitled "Global Constitutionalism and Multi-layered Protection of Human Rights, Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia," Constitutional Court of Korea, 2016 ISBN : 978-89-499-4232-2 94360

See art. 2 The Universal Declaration of Human Rights.

It should be noted that the conceptualization of human rights and the implementation mechanisms vary in these three regional systems to some extent. See infra notes 13−27 & accompanying text.

See The Role of Regional Human Rights Mechanisms, EU Doc EXPO/B/DROI/2009/25 (2010), at 20, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf, accessed on 28.09.2015; Jina Kim, Developments of Regional Human Rights Regime: Prospects for and Implications to Asia, at 58, available at http://www.tokyofoundation.org/sylff/wp-content/uploads/2009/03/sylff_p57-1022.pdf, accessed on 28.09.2015.

The Role of Regional Human Rights Mechanisms, supra note 3, at 5.

However, there have been visible movements in Asia towards recognition and improvement of human rights standards in the last few decades. Asian states have increasingly signed and ratified international human rights instruments, most notably the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. The participation of Asian governments, national human rights commissions and civil society organizations in the regional meetings and activities to address human rights issues has also risen significantly. Moreover, serious efforts have been undertaken by certain Asian states for the establishment of a human rights mechanism at the sub-regional level. All these developments raise hope for institutionalization of human rights in the region.

As emphasized in the Vienna Declaration of 1993 and epitomized by the three existing regional human rights mechanisms, "regional arrangements play a fundamental role in promoting and protecting human rights." As such, a regional human rights system would undoubtedly contribute to the enhancement of human rights culture and practices in Asia. In such a diverse region as Asia, greater respect for human rights will facilitate an environment that diverse cultures and ethnicities and vulnerable groups can live together in peace and harmony. A regional mechanism will also create an impetus for further cooperation and integration among Asian states and will help settle regional disputes. Further, it will strengthen the efforts and cooperation in combating transnational problems in the region, such as child and women trafficking and forced labor. Therefore, the establishment of a regional human rights system in Asia should be supported to the full extent.

See Andrea Durbach, Catherine Renshaw & Andrew Byrnes, 'A tongue but no teeth?': The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region, 31 Sydney L. Rev. 211, 215−22 (2009).

Kim, supra note 3, at 57.

Id. at 82.

Association of Southeast Asian Nations (ASEAN) made considerable progress towards establishing a sub-regional human rights mechanism. Article 14 of ASEAN Charter stipulates the establishment of an ASEAN human rights body for the promotion and protection of human rights and fundamental freedoms. Pursuant to the Article, the Terms of Reference (TOR) was adopted in 2009, and following, ASEAN Intergovernmental Commission on Human Rights was established in the same year. TOR states that the purpose of AICHR are, inter alia, "to promote and protect human rights and fundamental freedoms of the peoples of ASEAN" and "to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties." ASEAN TOR available at file:///C:/Users/ay700244/Downloads/TOR-of-AICHR%20(1).pdf, accessed on 28.09.2015. For a detailed information of ASEAN's human rights initiative see AICHR What You Need to Know, 2nd edition, The ASEAN Secretariat, available at file:///C:/Users/ay700244/Downloads/AICHR_Booklet_2nd_Edition_1.pdf, accessed on 28.9.2015; Hao Duy Phan, A Blueprint For a Southeast Asian Court Of Human Rights, 10 Asia-Pac. J. on Hum. Rts. & L. 385, 385-91 (2009).

Art. 37 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (1993). The Article reads as follows: "Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.

The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist."

The establishment of a region-wide human rights mechanism, however, involves many challenges, particularly considering the regional idiosyncrasies of Asia. The path toward that end requires genuine and continuous efforts by political actors and civil society organizations. Although it ultimately depends on political will of the regional states, civil society organizations and various non-political state organs, such as judiciary, may play an important role in promoting political consensus. The involvement of constitutional courts in such efforts will indeed contribute to this endeavor. The constitutional courts of Asia should thus undertake an initiative to discover possibilities for the establishment of an effective and credible human rights system.

The progress of regional human rights systems in Europe, America and Africa may provide valuable lessons for Asia. In Europe and in the Americas rather effective and advanced human rights systems are in place. The European Convention on Human Rights (ECHR), which is the primary human rights instrument in Europe, comprises civil and political rights and currently has forty seven state parties, covering nearly entire Europe and eight hundred million people. The Convention had originally prescribed implementation machinery consisting of a Commission having quasi-judicial functions and a non-permanent Court. In 1998, the Protocol 11 replaced the existing mechanism with the permanent European Court of Human Rights. The Court supervises state compliance with the Convention through individual and inter-state complaints. Individual complaint mechanism is the pillar of the European system. Well developed case law and high compliance rate of the member states with the judgments of the Court constitute the major strengths of the individual complaint mechanism.

The inter-American Commission on Human Rights was established with a mandate to promote and protect human rights through facilitating the exchange of information and cooperation among governments. Although the Commission was bound with the principle of non-interference and had lacked the power to adjudicate individual complaints for violation of human rights, it played an eminent role in promoting human rights in the region by carrying out on-site observations and publishing country reports. The inter-American system was strengthened by the adoption of the American Convention on Human Rights (ACHR), which primarily affords protection to civil and political rights. The Convention extended the powers of the Commission to examine individual complaints and prescribed the non-permanent American Human Rights Court. Only the Commission and the state parties are empowered to refer a case to the Court, and thereby they are performing a filter function with respect to the individual complaints in the inter-American system.

The African Charter on Human and People's Rights (ACHPR) covers both civil and political rights and economic, social and cultural rights. It is also unique among international and regional human rights instruments in the sense that it includes not only human rights but also people's rights and a list of duties of individuals to the community and the state. The Charter established the African Commission as the supervisory organ, and the Protocol, which entered into force in 2004, supplemented the system with the African Court for Human and People's Rights (ACtHPR) with the power to render legally binding decisions. Similar to the inter-American system, individuals are not entitled to direct access to the Court.

See OAS, Inter-American Commission on Human Rights, http://www.oas.org/en/iachr/mandate/what.asp.
See Report of Expert Dialogue with Civil Society and NHRIs on Regional Human Rights Mechanisms in Africa, the Americas and Europe (hereinafter UN Report) (2009), at 8−11, United Nations Human Rights, Office of the High Commissioner for Human Rights, Regional Office for South-East Asia, available at http://bangkok.ohchr.org/programme/asean/report-jakarta-workshop.aspx.
See art. 3−25 ACHR. Art. 26 adopts an evolutionary approach with regard to social, economic and cultural rights.
See art. 41, 52−69 ACHR.
See art. 61 ACHR.
See art. 3−14, 15−17 ACHPR
See art. 19−24, 27−29 ACHPR.
See art. 5 ACtHPR Protocol.

As the experience of Europe, Americas and Africa demonstrate, the establishment of a regional human rights system requires an evolving process. It took, for example, five decades for the European system to reach its current form. With this in mind, Asia should employ a step by step process to achieve an effective and credible system. The prerequisite for a regional human rights system is an intergovernmental organization. All the three existing regional systems were built within a political organization: the Council of Europe, the Organization of American States, and the African Union (previously the Organization of African States). Thus, at the initial stage of an Asian human rights system, the focus of efforts should be primarily directed at establishing an intergovernmental organization to promote cooperation among regional states for the development of human rights.

One may raise the concern that such an organization might not attract widespread interest from Asian states. It should be not forgotten, however, the Council of Europe was established by only ten West-European countries in 1949, and today it virtually encompasses the entire Europe. There exist a considerable number of advanced liberal democracies in Asia, and those countries may lead the establishment of a regional-intergovernmental organization. The accomplishment of this initial step, in turn, might prompt more Asian countries to participate in the organization in the near future.

The next component of a regional system is a human rights instrument. With respect to the scope of rights to be addressed in the instrument, it may be more practical for Asia to follow the European and American examples. Accordingly, the instrument might incorporate primarily political and civil rights, and social, cultural and economic rights might be addressed in a separate document. Alternatively, both generations of rights might be embraced by employing an evolutionary approach concerning second generation of rights. Due to low level of economic development across Asia, the fulfillment of social and economic rights may need to be considered in the long term. Therefore, it might be advised for Asia to give the priority to civil and political rights at the formation stage of a regional arrangement.

The Council of Europe, the main intergovernmental organization in the region, was established in 1949 by ten Western European countries in London as a response to the horrors of the World War II with the aim of protecting and promoting human rights, democracy and the rule of law. See The Role of Regional Human Rights Mechanisms, supra note 3, at 56.

A prospective Asian human rights instrument should reflect the regional characteristics while respecting universal human rights. The very purpose of a regional system is to promote and protect human rights standards within the context of local cultures, needs, and priorities. That does not implicate a disregard of universal standards but to pay due regard to regional values and particularities. The African Charter, for example, incorporates its regional peculiarities along with international standards. Collective rights and duties and respect for family and community are explicitly defined in the African Charter. In a similar fashion, regional values and cultures, such as collectivism and filial piety may be embraced in the Asian instrument without deviating from universal standards. In this way, the portrayal of Asian values in a contradictory manner with universal human rights would be invalidated. Further, certain regional human rights issues, such as exploitation of woman and children, may need to be addressed with a special emphasis in the instrument.

Also critical is that the establishment of an appropriate mechanism to supervise the compliance of the state parties with the regional instrument. It might be advised for Asia to follow an evolutionary approach with respect to the supervision mechanism as well. Because the principles of sovereignty and non-interference are highly regarded by Asian states, it may not be feasible at an early stage to reach a widespread consensus for a regional human rights court with power to render legally binding decisions. The operation of a regional court in an effective manner also would require adequate funding and human resources, which may be more achievable over time. The African Court, for example, lacks effectiveness due to such hardships. Though the ultimate goal of a prospective Asian system should be the implementation of human rights principles through a competent regional court, its establishment might need to be considered at a later stage.

The early progress of the Inter-American system may provide a good example for Asia with respect to the implementation mechanism. As noted earlier, although the American Commission was initially established with a soft mandate to promote human rights in the region and was bound with the principle of non-interference, it played an eminent role in promoting and protecting human rights in the region by holding on-site visits and publishing country reports with the consent of the concerned state. Asia may follow a similar path by establishing a Commission having a mandate to promote state parties to respect human rights and the regional system. The Commission may be empowered to interpret the prospective Convention upon the request of state parties, to investigate alleged massive human right violations with the cooperation of the concerned state, and to publish reports on the progress of the state parties on human rights. The regional states may be more comfortable with granting such soft powers to the Commission since they rest upon cooperation rather than enforcement and therefore are not in direct conflict with the principle of sovereignty. This initial step may lead to a greater cooperation and consensus on human rights issues among the regional states, and in the future the Commission may be supplemented with a Court competent to adjudicate individual complaints for human rights violations.

See The Role of Regional Human Rights Mechanisms, supra note 3, at 74.

The structure of the Commission carries great significance to ensure a well-functioning mechanism. First, a single Commission rather than a set of separate bodies may be more practical and effective. Several sub-commissions may be formed to assist the Commission with administrative matters or certain human rights issues of regional importance, such as woman and child exploitation. Every state party to the Convention should be represented in the Commission. However, in order to assure impartiality and independence, a special emphasis should be placed on the qualifications of individuals who will serve in the Commission. The members of the Commission should not be affiliated with their governments, and they should serve in their personal capacity. Further, they should be granted a full-time and long term service, with a restriction on engaging any activities that is in compatible with their positions. The Commission must also be provided with adequate and stable funding.

This rather soft mechanism outlined above may be more achievable at the early stage of institutionalization of human rights in Asia. The central factor in establishing and maintaining a regional human rights system is the political will, and this soft approach may be necessary to induce the regional states to participate in the system. As stated earlier, there has been growing presence of civil society organizations in the field of human rights in recent years, demanding from Asian governments a greater respect for human rights.

Similarly, the number of national human rights institution has risen significantly in Asia, and Asia-Pacific Forum has been very successful in promoting human rights in the region. All these developments, however, have yet to lead to a tangible outcome with respect to a regional human rights arrangement.

The participation of the constitutional courts in such efforts may give a momentum to the process and accelerate the pace of institutionalization of human rights. Although not political actors, constitutional courts play a crucial role in state affairs by safeguarding the principles of democracy, the rule of law, and human rights, and they may exercise a greater influence on political actors for the establishment of a human rights system. In this sense, the constitutional courts may serve as a bridge between state authorities and civil society organizations. In addition, constitutional courts may cooperate with civil society organizations in raising public awareness on human rights through capacity building and education, which are necessary for accomplishing advanced human rights practices and standards in the long run. Constitutional courts of Asia thereby may play a constructive role in the advancement of human rights by integrating different actors concerned.

The Association of Asian Constitutional Courts and Equivalent Institutions (AACC) might engage in activities to advance public opinion toward the establishment of an Asian human rights system. AACC might prompt and coordinate the cooperation of Asian constitutional courts with national human rights institutions and civil society organizations at the national and regional level so as to enhance human rights fulfillment and buttress demands for a regional arrangement. AACC might hold region-wide events and activities on a regular basis to explore the prospects of a human rights arrangement. It might also adopt an Asian Human Rights Declaration as a way of leveraging the establishment of a regional instrument. Although not legally binding, the Declaration would serve as a basis for a prospective Asian human rights instrument as well as contributing to the development of customary human rights law in Asia. AACC might also initiate a forum to facilitate intergovernmental collaboration for a regional human rights arrangement.

As one noted commentator stated, “the APF and its network of national human rights institutions are the closest that the Asia Pacific region has come to a regional arrangement or machinery for the promotion and protection of human rights.” Cited from Durbach, Renshaw & Byrnes, supra note 5, at 217.

See generally Tom Ginsburg, Constitutional Courts in East Asia: Understanding Variation, 3 Journal of Comparative Law 80 (2008) (a case study regarding the role of constitutional courts in political and state affairs in Asia (Indonesia, Thailand, South Korea, Mongolia)).

The Turkish Constitutional Court (TCC) is committed to the development of constitutional justice and human rights in Asia. As a member of AACC, TCC undertook extensive activities to that end. TCC assumed the term presidency of AACC between 2012-2014 and hosted its 2nd Congress on 27 April-1 May, 2014 in Istanbul. It is also worth mentioning the Summer School on Constitutional Law, which has been organized by TCC for five consecutive years on behalf of AACC. The fifth summer school was held between 13-17 September, 2017 in Ankara, with the participation of representatives of fourteen constitutional courts from Asia and Europe. The participants have shared and discussed their experiences and ideas on the topic of migration and refugee law as well as on general constitutional and human rights law, with a particular focus on their respective countries. The summer school is a noteworthy project in the sense that it significantly contributes to the development of regional understanding on human rights law. TCC will maintain its commitment to the development of human rights in Asia and will support and participate in the efforts toward the establishment of a human rights arrangement to the full extent.

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INDONESIAN
CONSTITUTIONAL COURT

International Short Course On The Constitution 2017
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South Korea

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The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in Pluralistic Society

Hwang Junghyun
Rapporteur Judge, Constitutional Court of Korea

It is my great pleasure to be here with you at this meaningful international conference, where we can share our experiences and views on the constitutional justice of each nation with one another.

Today, I would like to address the topic of the conference in the Korean context and briefly explain how “the Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in Pluralistic Society” is served in Korea with some of the most important cases of our Court since established in 1988.

Pluralistic society is a society in which a variety of groups with different ethnic backgrounds, cultural practices, religions, political opinions among others coexist. Democracy is founded upon the pluralistic view, which believes in the autonomy of reason and the relative truth and rationality in everyone’s opinion. Democracy is formed and operated by a decision-making process that respects majority but is considerate of minority, and is based on the principles of liberty and equality, and popular sovereignty more specific, as well as respect for basic human rights, the principle of separation of powers and the plural party system.

As Korea is becoming increasingly pluralistic nowadays, it is important to keep in mind that democracy is the basic principle and fundamental value that must be ensured in the society. Constitutional justice stands to play a vital role in preserving national order in a pluralistic society, by means of decisions that protect the minority, ensure natural rights and uphold the rule of law.

On that note, let me introduce some of our Court's decisions that have contributed to the implementation of ideology and democracy in a pluralistic society.

Restriction on Right to vote of Prisoners and Probationers with Suspended Sentence

The right to vote of a person who is sentenced to imprisonment for a limited term or without prison labor for a limited term and the execution of his/her sentence is suspended (hereinafter, “prisoner”) and a person who is sentenced to imprisonment for a fixed term or imprisonment without prison labor for a fixed term or imprisonment without prison labor for a fixed term and his/her sentence is suspended (hereinafter, “probationer with suspended sentence”) was restricted pursuant to the Public Official Election Act and the Criminal Code of Korea.

In this case, the Constitutional Court held that the principles of universal suffrage and equal election that require all citizens to equally participate in election are the essential elements to realize a democratic state, therefore the principle of universal suffrage and the right to vote based on it should be restricted to the minimum extent only when it is necessary. The provisions at issue, however, fully and uniformly restrict the right to vote of prisoners and probationers with suspended sentence. The scope of application of the provisions at issue is very broad, spanning from those who are guilty of relatively minor crimes to those who are guilty of felonies.

Specifically, probationers with suspended sentences will not be incarcerated in correctional institutions unless the execution of sentences is invalidated or cancelled, leading the same life as other ordinary citizens. Therefore, the necessity to restrict their right to vote does not seem evident.

The public interests, which are expected to be achieved by ‘the restriction including sanction against criminals who commit grave crimes or the reinforcement of citizens’ respect to the rule of law’, are less valuable than 'the private interests of prisoners and probationers with suspended sentence or the public value of democratic election system' expected to be infringed by the provisions at issue.

Among the provisions at issue, the part relating to probationers with suspended sentence can regain its constitutionality by declaring it unconstitutional, which instantly removes the infringement on the right to vote. On the contrary, regarding to the part relating to prisoners, its unconstitutionality results from the blanket and uniform restriction on the right to vote and it is within the scope of legislative discretion to remove such unconstitutionality. Therefore, the part relating to prisoners was declared not to be compatible with the Constitution but it was to be temporarily enforced until the legislature revises it.

Night time Outdoor Assembly Ban Case

Movant at the requesting court was charged with the violation of "Assembly and Demonstration Act" by allegedly organizing an outdoor assembly from 19:35 to 21:47. During the trial, the said movant filed a motion to request for the constitutional review of 'Assembly and Demonstration Act, Article 10 and 23 Item 1' claiming that the instant law allows the advance permit for assembly which is prohibited by the Constitution. The trial court granted the motion and requested this constitutional review of the aforementioned provisions.

Under the Constitution, the freedom of assembly has the nature of a subjective right which expels governmental interference as well as an objective right which is essential for a societal community to materialize liberal democracy. The freedom of assembly is set to guarantee the right to determine the time, place, method and purpose of assembly including the preparation, organization, participation, place and time of assembly.

In this case, the Constitutional Court issued a decision of incompatibility with the Constitution.

The majority opinion of unconstitutionality held that under the Constitution Article 21 Section 2, the permit system for assembly is prohibited. And the permit prohibited by Constitution is defined as a system under which an administrative authority may permit assemblies in certain cases by reviewing the contents, the time and the place of reported assemblies with exceptional allowance, under the principle of general ban on the freedom of assembly. This approach is different from the report system for assembly where the freedom of assembly is a principle and the ban is an exception.

However, The Assembly and Demonstration Act Article 10 prescribes that the head of a competent police department, as an administrative authority, may ban an outdoor assembly scheduled either before sunrise or after sunset as a general rule with an exception that the authority may decide not to ban it based on the review of the contents of an assembly in advance. Therefore, it is against the Article 21 Section 2 of the Constitution.

Meanwhile, there were two opinions of incompatibility with the Constitution, which held that the contested provision is the time restriction of outdoor assembly and thus not against the principle of "the prohibition of advance permit" promulgated by the Constitution, Article 21 Section 2, but it violates the principle of the prohibition of excessive restriction and infringes on the freedom of assembly.

Case on Prohibition of Using the Name of a Political Party Whose Registration Has Been Cancelled

The New Progressive Party, the Green Party and the Youth Party had registered with the National Election Commission of Korea, but their registrations were cancelled on April 12, 2012 when they failed to obtain more than 2/100 of total number of effective votes in the 19th National Election held on April 11, 2012(New Progressive Party 1.13%, Green Party 0.48% and Youth Party 0.34%). The National Election Commission cancelled their registrations and published a public notice regarding the cancellation on April 12, pursuant to Article 44 Section 1 of the Political Parties Act (hereinafter, “the Cancellation Provision”).

Considering the freedom to form a political party guaranteed by Article 8 Section 1 of the Constitution and the legislative purpose of Article 8 Section 4 of the Constitution, any legislation excluding a political party from the process of forming a political opinion by the people simply because it is a small or minor party that fails to achieve a certain level of political support should not be allowed under the Constitution.

Meanwhile, as the essential meaning of a political party's existence is to participate in the process of 'forming a political opinion by the people', the legislative purpose of t he Cancellation Provision can be considered legitimate to the extent that a political party that practically does not h ave any ability or will to participate in the process in order to foster the development of party democracy. And cancelling the registration of a political party that has no members of the National Assembly or fails to obtain certain number of votes is an effective means to achieve the legislative purpose.

Given the importance of a political party in the representative democracy, any statutory restriction on the freedom to form a political party should be as minimal as possible. In this case, there are less restrictive measures than those provided by the Cancellation Provision while faithfully achieving the legislative purpose. For example, the cancellation of registration can be decided depending on the result of election after providing such a political party with several chances to participate in elections for a certain period of time not based on the result of a single National Assembly election.

Also, it is an unreasonable consequence to cancel a registration of a political party no matter how successful or unsuccessful the party has been in the Presidential Election or local government elections. In addition, newly established or small parties would not even venture into elections from the beginning, thereby losing chances to objectively express their intention of continuous participation in the process of forming a political opinion by the people and to effectively advertise their existence and policies to the public. Consequently, the public value of the freedom to form a political party infringed by the Cancellation Provision is significant. It can impair political diversity and openness in political process.

As such, the Constitutional Court of Korea has been taking the lead in ensuring democracy by making significant rulings in strict compliance with the basic principles that a pluralistic society needs to observe.

Modern democracy dealt with abundant challenges, but in the end, the fundamental principles of constitutional order have always prevailed, protecting the sovereignty vested in the people and basic human rights.

The Constitutional Court of Korea has followed these principles. By doing so, our Court became the most credible and trusted national institution among the Korean people and our decisions are also well-respected.

That brings us to the end of my presentation. It was a great pleasure and honor to share some of the most important cases which our Court had handled with all of you today.

Thank you very much for your attention.

MAHKAMAH KONSTITUSI
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Cambodia

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Role of the Constitutional Council in Overseeing the Implementation of National Unity and Democracy

Abstract:

The Constitutional Council of the Kingdom of Cambodia is a supreme institution stipulates in the 1993 Constitution being responsible for interpreting the constitution and laws, deciding on constitutionality of laws and internal regulation of the parliament and examining and deciding on litigation related to the election of the Members of the National Assembly and to the elections of the Senators.

The implementation of its role as describe above means that the constitutional council has performed the task to defend and to guarantee the respect of the constitution. It has also revealed that the council plays the role in overseeing the implementation of democracy. All these roles were stated in many articles of constitution and the organic law of the council. But, there is another function, invisible function, unifying the nation to rebuild the country to be oasis of the peace.

In last two decades, Cambodia has fallen into the terrifying decay, but has rebuilt the peace under the consciousness of unity. National unity has become a fundamental principal state in the Paris Peace Accord (1991) then inserted in the preamble of the constitution (1993). As state in the preamble of the constitution, it is not a responsibility of another institution but for all. All the institutions, include the constitutional council, have different tasks, but there is only one the same duty maintaining the peace together.

“Win Win” policy has been being become a very effective instrument for the nation’s unity. Weather, it will become a state ideology as Pancasila of the republic of Indonesia or not is still on the way.

Thus, the participation in the short course preparing by the constitutional court of the republic of Indonesia is a very special occasion for me to learn, to get experience, understanding the willing of Indonesian’s unity and the way the constitutional court to guard the implementation of ideology and democracy.

MAHKAMAH KONSTITUSI
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Thailand

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"The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy : Experience from Thailand"

by Mr. Chonlapoom Yensuang
Mr. Pitaksin Sivaroot

I. Introduction

Both "democracy" and "monarchy" are two of the vital elements in modern Thai democratic regime. Such two elements are said to be the core pillars of a cathedral. That is to say, both pillars need standing together – not separately. If one was destroyed, the other would be collapsed, too.

Theoretically in the government of democratic regime, any supreme provisions shall be provided in order to guarantee and protect people's rights and liberties, and distribute any powers to each entity in a society. Such provisions are prescribed in a "constitution" which is widely thought to be a significant written form for modern state establishment. With respects to Thailand, the country has adopted and adapted the civil law principle of the constitutions since its political revolution in B.E. 2475 (1932), changing from the absolute monarchy to the democracy with the king as the head of state.

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II. Institution of Monarchy and the Democratic Regime of Thailand

Take, for example, Section 2 of every Constitution of the Kingdom of Thailand, providing "Thailand adopts a democratic regime of government with the King as Head of State." This "eternal" provision consists of two elements together; that is to say, "a democratic regime of government" and "the King as Head of State."

The country cannot lose one of such elements as both of them are said to have been as two core pillars of Thai politics and government since the revolution in B.E. 2475 (1932). Theoretically, like many other civilized democratic societies, all the people carry powers, but they agree to distribute such powers to the state under the King as the head of the nation in terms of history and culture.

Statistically, since the revolution on 24th June B.E. 2475 (1932), Thailand has had 20 Constitutions, 61 Councils of Cabinet, 24 Houses of Representatives, 11 Houses of the Senators, 6 National Legislative Assemblies, and 4 reigns of Monarchs.

The institution of monarchy plays an important role in Thai politics – especially King Bhumibol Adulyadej (Rama IX) of the Chakri Dynasty. The King eased political turmoil many times. For example, "Black May", or "Bloody May" is a common name for the 17–20 May 1992 popular protest in Bangkok against the government of General Suchinda Kraprayoon and the military crackdown that followed. Up to 200,000 people demonstrated in central Bangkok at the height of the protests. The military crackdown resulted in 52 officially confirmed deaths, many disappearances, hundreds of injuries, and over 3,500 arrests. Many of those arrested are alleged to have been tortured. Due to a television broadcast of King Bhumibol Adulyadej, in which the King demanded that the both sides put an end to their confrontation and work together through parliamentary procedures. General Suchinda Kraprayoon then announced an amnesty for protesters, and also agreed to support an amendment requiring the prime minister to be elected.

III. The Constitutional Court of the Kingdom of Thailand

3.1 Overview

The Constitutional Court is the new organization which was established by the Constitution of the Kingdom of Thailand B.E. 2540 (1997). Many previous constitutions defines that there was the organization whose duty was to decide the problems concerning the constitutionality of law; that is "the Constitutional Tribunal". The Constitutional Tribunal existed for the first time in Thailand due to the Constitution of the Kingdom of Thailand B.E. 2489 (1946). Since then the Constitutional Tribunal appeared in other six Constitutions; that is the ones in B.E. 2492 (1949), B.E. 2495 (1952), B.E. 2511 (1968), B.E. 2517 (1974), B.E.2521 (1978) and B.E. 2534 (1991).

Considering the structure and authority of the Constitutional Tribunal in the past, it was evident that the Constitutional Tribunal was not responsible for its own work as the routine jobs. The composition of the Constitutional Tribunal was mostly appointed which caused a lot of outcomes; that is, the limited freedom in doing their duties. Such problems caused the Constitutional Tribunal to be unable to do their duties smoothly. Consequently the creation of the new Constitution in B.E. 2540 (1997) has changes the Constitution Tribunal to be "The Constitutional Court" whose duty is to consider the problems concerning the constitution and the problems of the constitutionality of laws. Moreover, it is defined to have the independent to do their duties as well.

The Constitutional Court is the organization which has the same source as other Constitutional Courts in the foreign countries where civil law is committed. Mostly, there is a special court to control the constitutionality of laws.

3.2 Composition of the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2560 (2017)

Section 200 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) provided the Constitutional Court consists of nine judges of the Constitutional Court appointed by the King from the following Persons.

3.2.1 Judges of the Supreme Court, 3 judges in the Supreme Court holding a position not lower than Presiding Justice of the Supreme Court for not less than three years elected by a plenary meeting of the Supreme Court.

3.2.2 Judges of the Supreme Administrative Court, 2 Judges of the Supreme Administrative Court holding a position not lower than judge of the Supreme Administrative Court for not less than five years elected by a plenary meeting of the Supreme Administrative Court.

3.2.3 Qualified person in the field of law, 1 qualified person in law obtained by selection from persons holding or having held a position of Professor of a university in Thailand for not less than five years, and currently having renowned academic work.

3.2.4 Qualified person in the field of political science or public administration, 1 qualified person in political science or public administration obtained by selection from persons holding or having held a position of Professor of a university in Thailand for not less than five years, and currently having renowned academic work.

3.2.5 Qualified person from person holding or having held a position not lower than Director-General or a position equivalent to a head of government agency or a position not lower than Deputy Attorney-General, for not less than five years, 2 qualified persons from person holding or having held a position not lower than Director-General or a position equivalent to a head of government agency or a position not lower than Deputy Attorney-General, for not less than five years.

Section 206 In considering and approval under section 204, if the number of persons approved by the Senate is not fewer than seven persons, the approved persons shall elect one among themselves to be the President of the Constitutional Court and inform the President of the Senate of the result without awaiting the complete number of nine approved persons, and upon receiving Royal appointments, the Constitutional Court shall perform its duties and powers for the time being. During that period, the Constitutional Court shall be deemed to consist of number of the existing judges of the Constitutional Court.

3.3 Term of the Justices of the Constitutional Court

Section 207 A judge of the Constitutional Court shall hold office for a term of seven years as from the date of appointment by the King and shall hold office for only one term.

3.4 Panel and Decision of the Constitutional Court

Section 211 A panel of judges of the Constitutional Court for hearing and rendering a decision shall consist of not fewer than seven judges.

A decision of the Constitutional Court shall be made by a majority of votes, unless otherwise prescribed by the Constitution.

In the case where the Constitutional Court accepts any case for consideration, any judge of the Constitutional Court may not refuse to adjudicate on the ground that the case does not fall under the jurisdiction of the Constitutional Court.

The decision of the Constitutional Court shall be final and binding on the National Assembly, the Council of Ministers, Courts, Independent Organs, and State agencies.

3.5 Powers and Duties of the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2560 (2017)

(1) to consider and adjudicate on the constitutionality of a law or bill. **(Section 210 (1))**
(2) to consider on the membership or qualifications of members of the National Assembly, Minister **(Section 82, 170)**
(3) to consider and adjudicate on a question regarding duties and powers of the House of Representative, the Senate, the National Assembly, the Council of Ministers or Independent Organs. **(Section 210 (2))**
(4) to consider on cases concerning person exercising the rights or liberties to overthrow the democratic regime of government with the King as Head of State. **(Section 49)**
(5) to consider on cases concerning person whose rights or liberties guaranteed by the Constitution are violated, has the right to submit a petition to the Constitutional Court for a decision on whether such act is contrary to or inconsistent with the Constitution, according to the rules, procedures and conditions prescribed by the Organic Act on Procedures of the Constitutional Court. **(Section 213)**
(6) to consider an annual appropriations bill, supplementary appropriations bill, and transfer of appropriations bill in consideration by the House of Representatives, the Senate or a committee, any proposal, submission of a motion or commission of any act, which results in direct or indirect involvement by Members of the House of Representatives, Senators or members of a committee in the use of the appropriations, shall not be permitted. **(Section 144 paragraph 3)**
(7) to rule on whether or not a treaty must be approved by the National Assembly. **(Section 178)**
(8) to consider the draft Constitution Amendment. **(Section 256 (9))**
(9) others duties and powers prescribed in the Constitution. **(Section 210 (3))**
(10) powers and duties stipulated by the Organic Act on Political Party B.E. 2560 (2017).

IV. The Decisions of the Constitutional Court concerning to the status of the Institution of Kingship

4.1 Constitutional Court Ruling No. 6/2000 (6/2543) Date 29th February, 2000.

The Election Commission requested for a Constitutional Court ruling on the scope of application of section 68 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

1. The Reason of the Constitutional Court Ruling

The issue considered was whether or not persons under the duty to exercise voting rights section 68 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) included the King, Queen, Heir to the Throne and members of the Royal Household.

The Constitutional Court held the following opinion:

(1) Reference to member of the Royal Household had been made in the first draft Constitution of the Country. This appeared in the letter of King Phra Pokklao No.1/60, dated 14th November, B.E. 2475 (1932), to Phraya Manopakornnitithada, President of the People's Assembly, which stated therein that He agreed with Phraya Manopakornnitithada that members of the Royal Household who were ranked Mom Chao or higher should be above politics. As a consequence, the Constitution of the Kingdom of Siam, B.E. 2475 (1932), which was published in the Government Gazette on 10th December B.E. 2475 (1932), provided in section 11 that "members of the Royal Household who were ranked Mom Chao or higher by birth or by appointment shall be above politics.".

Every subsequent Constitution of Thailand contained a specific chapter on the King. Such provisions recognized the special nature of the Institution of Kingship under the democratic regime with the King as Head of State. The King was above politics. The King was enthroned in a position of revered worship and should not be violated. No person should expose the King to any sort of accusation or action.

(2) Section 3 of the present Constitution state that the sovereign power belonged to the Thai people. The King as Head of the State exercised such power through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). As the King was the exerciser of the sovereign power, there was no reason why He should be under a duty to elect a representative to exercise such power.

After an analysis of section 68 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the Constitutional Court was of the opinion that King exercised sovereign powers, was above politics and maintained political impartiality. In addition in the past, Kings, Queens, Princes and Princesses had never exercised any voting rights. A prescription that the King, Queen, Heir to the Throne or members of the Royal Household, who were in line with the succession to the Throne under the Palace Law on Succession, B.E. 2467 (1924) and maintained close connections with the King as well as were habitually entrusted by the King to perform Royal functions on His behalf, were under a duty exercise voting rights would create a contrariness or inconsistency with the principles of maintaining a position above politics and of political impartiality of the King.

2. Ruling of the Constitutional Court

In order to maintain the Institution of Kingship under section 71 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the Constitutional Court therefore held that the provision in section 68 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) was not applicable to the King, Queen, Heir to the Throne and members of the Royal Household under section 22 and section 23.

4.2 Constitutional Court Ruling No. 28-29/2012 (28-29/2555) Date 10th October, 2012.

The Ordinary Court submitted the objection of the defendants to the Constitutional Court for a ruling in the case of whether penal code, section 112 was contrary to or inconsistent with the Constitution of the Kingdom of Thailand 2007, section 3 paragraph 2, section 29 and section 45 paragraph 1 and paragraph 2.

1. The Reason of the Constitutional Court Ruling

There was a case of the European Court of Human Rights named Otegi Mondragon v. Spain (no. 2034/07) on 15 March 2011 which the Court decided that Spanish law on lese majeste was contrary to Human Rights norm and liberty of expression. This decision is distinct from Thai Constitutional Court Ruling concerning Penal Code, section 112, as indicated in the Constitutional Court Ruling no. 28 - 29/2012. This is because the regime of the monarch as the head of the State has had a long history in Thailand, even though Thailand has shifted the regime to be constitutional monarchy since 1932, the recent Constitution of the Kingdom of Thailand still remains the King as the Head of the State. This demonstrates the reverent adoration and worship of Thai people to the King which has been enduring; also, it represents the uniqueness of Thailand that does not appear in any other country.

2. Ruling of the Constitutional Court

The Constitutional Court held that Penal Code, section 112 was not contrary to or inconsistent with the Constitution of the Kingdom of Thailand 2007, section 3 paragraph 2, section 29 and section 45 paragraph 1 and paragraph 2.

V. Conclusion

Thailand has shifted from the Absolute Monarchy Regime to be Constitutional Monarchy like England since 1932 (B.E. 2475). However, the principle of the Absolute Monarchy that "The King can do no wrong." was written in all of the Constitutions of the Kingdom of Thailand since 1932 (B.E. 2475). We have 19 Constitutions. The recent Constitution of the Kingdom of Thailand B.E. 2560 (2017), the 20th Constitution still remains the principle of the democratic regime of government with the King as Head of State.

Section 2 "Thailand adopts a democratic regime of government with the King as Head of State."
Section 3 paragraph one "Sovereign power belongs to the people. The King as Head of State shall exercise such power through the National Assembly. The Council of Ministers and the Courts in accordance with the provisions of the Constitution."

The Constitutional Court performs the important function of safeguarding the supremacy of the Constitution, protecting the principle and ideology of the democratic regime of government with the King as Head of State as in section 49 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017)

Section 49 "No person shall exercise the rights or liberties to overthrow the democratic regime of government with the King as Head of the State.

Any person who has knowledge of an act under paragraph one shall have the right to petition to the Attorney-General to submit a motion to the Constitutional Court for an order to cease such act.

In the case where the Attorney-General orders a refusal to proceed as petitioned or fails to proceed within fifteen days as from the date of receiving the petition, the person making the petition may submit the petition directly to the Constitutional Court.

The action under this section shall not prejudice the criminal prosecution against the person committing an act under paragraph one."

3 The Constitutional Court Ruling No. 15-18/2013 (15-18/2556), this case concerning about the constitutionality of amending the Constitution of the Kingdom of Thailand B.E. 2550 (2007) regarding the qualifications and selection process of the Senators. In this case, the Prime Minister presented the draft amendment of the Constitution to the King for his signature before the Constitutional Court Ruling. However, the draft was not signed by His Majesty the King. The Constitutional Court thus held by a majority votes that the conduct of deliberations and voting on the constitutional amendment of all respondents in this case were inconsistent with section 122, section 125 paragraph 1 and paragraph 2, section 126 paragraph 3, section 291 (1), (2) and (4) and section 3 paragraph 2 of the Constitution. The Constitution Court further held by the majority votes that the Draft Amendment to the Constitution contained provisions which were in the essence contrary to the fundamental principles and intents of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), constituting acts to enable all the respondents to acquire national government powers by means which were not provided under the Constitution of the Kingdom of Thailand B.E. 2550 (2017), and hence a violation of section 68 paragraph 1 of the Constitution.

As for the first applicant's petition for the dissolution of the relevant political parties and the revocation of election rights of such political party's executives, the Constitutional Court held that the prerequisites under section 68 paragraph 3 and paragraph 4 of the

Moreover, the Constitutional Court also serves as a judicial body which recognizes and protects the rights and liberties of the people and translates into reality with the protection of rights and liberties by the exercise of adjudicative power.

Since the establishment of the Constitutional Court according to the Constitution of the Kingdom of Thailand B.E. 2540 (1997) on 11th April, 1998 until now for 19 years, the Constitutional Court has performed its function remarkably well, so it is definitely certain that it will keep its outstanding records in the future.

Bibliography

Books

BORAMANAND, Nantawat : Research Report on the topic "the Comparative of the Constitutional Courts". P. Press : Bangkok, 2005, executive summary.
section 68 paragraph 3 and paragraph 4 of the Constitution of the Kingdom of Thailand B.E. 2550 (2017) had not yet been satisfied. This motion was therefore dismissed.

Journals

SAMUDAVANIJD, Kla : "His Majesty the Late King Bhumibo Adulyadej Center of Hearts of Thai People under Thai Democratic Regime". The Office of the Constitutional Court Journal, The Office of the Constitutional Court of Thailand, Special Edition, Bangkok, 2017.

Legislation and Treaties

The Constitution of the Kingdom of Thailand B.E. 2540 (1997).
The Constitution of the Kingdom of Thailand B.E. 2550 (2007).
The Constitution of the Kingdom of Thailand Interim B.E. 2557 (2014).
The Constitution of the Kingdom of Thailand B.E. 2560 (2017).
The Organic Act on Political Party B.E. 2560 (2017).

Cases

Constitutional Court of Thailand, 29.2.2000, Case No. 6/2543 (2000).
Constitutional Court of Thailand, 10.10.2012, Case No. 28-29/2555 (2012).
Constitutional Court of Thailand, 20.11.2013, Case No. 15-18/2556 (2013).

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Jakarta - Indonesia, 13 - 17 November 2017

Kyrgyz Republic

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Maintenance Diversity under Unitary State: on the example of the Kyrgyz Republic

According to the Constitution, the Kyrgyz Republic is a unitary state. A unified Constitution operates throughout its territory; there is a unified system of supreme bodies of state power and a unified system of judicial and constitutional control; the territory of the state is divided into administrative-territorial units.

The Kyrgyz Republic is a multiethnic state. The resident population of Kyrgyzstan is 6 million 140 thousand people. Today representatives of more than 100 nations and nationalities live in peace and harmony in Kyrgyzstan. The titular nation, ethnic Kyrgyz make – 73%, the percentage of other ethnic groups is 27% of the population of Kyrgyzstan. According to the Constitution, everyone has a freedom to determine and state one's ethnicity. No one can be forced to determine and state his/her ethnicity.

Since its independence the country has faced considerable changes in a demographic situation. The number of Kyrgyz, Uzbeks, Tajiks, Uyghurs is growing. At the same time, the number of Russians, Ukrainians, Byelorussians, Jews and Germans is decreasing.

As a result of historical, political, social and economic, migration processes of the last years, Kyrgyzstan from the republic with the various ethnic structure of the population, especially urban, is gradually transforming into a country with numerical predominance of central Asian ethnic groups. According to the expert demographic forecast, such tendency in the change of a ratio of the largest ethnic groups will continue in the future.

According to the Constitution the state language of the Kyrgyz Republic is the Kyrgyz language and the Russian language is used in the capacity of an official language. The Kyrgyz Republic ensures that the representatives of all ethnicities which form the population of Kyrgyzstan have the right to preserve their native language as well as creation of conditions for its learning and development.

It is necessary to note the difference between the state language and the official language. The Kyrgyz language as one of the main bases of the statehood of the Kyrgyz Republic functions mandatory in all fields of state activity. All official documents of public authorities are enacted in a state language. And in cases provided for by law, they are translated into official language and published in two languages. The document in a state language is considered the original. It is in order to create the basis for the protection and development of the Kyrgyz language and for ensuring its comprehensive and full application in all spheres of public administration, the Kyrgyz language has the constitutional status of a state language.

The Kyrgyz Republic is a secular state. Everyone has the right to confess individually or jointly with other persons any religion or not to confess religion.

The legal basis of regulation of the interethnic relations was laid in the Constitution of the Kyrgyz Republic back in 1993.

Since it acquired its independence, Kyrgyzstan enacted a number of conceptual documents on improvement of the interethnic relations.

One of the last such documents is the «the Concept on Strengthening the National Unity and Interethnic Relations in the Kyrgyz Republic» approved in 2013 by the Decree of the President of the Kyrgyz Republic.

The purpose of this Concept is contribution to ensuring national unity through improvement of the interethnic relations, preservation of cultural heritage and ethnic variety of the country.

Today the participation of various ethnic communities in a political life of the country and their representation in governing bodies a t the central and local levels is very important. Therefore the special measures designed to ensure equal opportunities for various groups have been provided by the legislation on elections of the Kyrgyz Republic.

Also the state takes all measures for ensuring realization of the principle of equality of citizens irrespective of ethnic origin, the relation to religion and also other circumstances when hiring, when replacing positions in the state and municipal service and in law enforcement agencies and judicial system.

In order to fully support the strengthening of the interethnic harmony, civil peace and unity in society the Assembly of the people of Kyrgyzstan was formed on the First Kurultai (Gathering) of the people of Kyrgyzstan in 1994. Each ethnos has its own representative in the Council of the Assembly.

Thanks to the work of the Assembly, Kyrgyzstan has all opportunities to build a harmonious society that can serve as a model of interethnic harmony and peace for other countries.

And at the end I would like to note that ensuring interethnic consent and ensuring national unity by consolidation of all ethnic communities while preserving cultural heritage and promoting tolerance are the most important conditions of maintaining statehood and one of the main conditions of successful development of the Kyrgyz Republic.

International Short Course On The Constitution 2017
The Role of the Constitutional Court in Overseeing the Implementation of Ideology and Democracy in a Pluralistic Society

Jakarta - Indonesia, 13 - 17 November 2017

Republic of Kazakhstan

Short course speech on "The role of the Constitutional Court in the implementation of ideology and democracy in a pluralistic society" in Jakarta

Dear presiding and participants of the course!

Allow me, on behalf of the Constitutional Council of the Republic of Kazakhstan, to greet you and express gratitude to the organizers of the course for the invitation and excellent organization of the work.

Today's short course is devoted to the current topic. In the modern world, the ideological diversity and the democratic nature of the governance regime are among the basic constitutional values of most countries claiming to be a democratic and legal state. They are enshrined in the constitutions of many countries, which establish the duty of the state to respect, protect and properly implement them.

Article 1 of the Constitution of Kazakhstan states that ideological and political diversities are recognized in the Republic of Kazakhstan.

Recognition of ideological and political diversities presupposes freedom of choice and confession to citizens of certain values, but at the same time does not interfere with their voluntary association on the basis of common views and ideas. We can talk about a certain degree of conventionality, about the need for ideology or a national idea that reflects the interests of the overwhelming majority of citizens. I believe that the central link that accumulates all these components of the national idea and ideology is the constitution because it determines the main directions of the society movement and the states that allow to answer the question: "Where are we going? What is our ultimate goal? And how can we achieve it? ".

First, the Basic Law determines the principles on which the nation is built. Given the universally recognized human values and the requirements of fundamental international documents, the constitution provides for such fundamental principles as the supreme value of the human is the person, the equality of people, the prohibition of discrimination against anyone for any motive, the inviolability of property, pluralism of opinions, the inalienability of natural rights and freedoms, sovereignty of the citizens and others.

Secondly, the constitution clearly sets out the goals to which the nation is moving. For example, article 1, paragraph 1, of the Basic Law of Kazakhstan stipulates that the Republic shall establish itself as a democratic, secular, legal and social state whose highest values are the person, his life, rights and freedoms.

Third, the Constitution determines how to achieve these high goals. In Kazakhstan, they are directly indicated by the fundamental principles of the Republic's activity, stipulated in paragraph 2 of Article 1 of the Constitution, according to which the state policy is being created and implemented, and the main directions of functioning of sovereign Kazakhstan are formed: public consent and political stability, economic development for the benefit of the whole people, Kazakhstan's patriotism , The solution of the most important issues of state life by democratic methods, including voting at the republican Referendum or in Parliament.

The bodies of constitutional justice play an important role in protecting and realizing constitutional values. Through the constitutional control, they act as their "custodians" and are an effective guarantor of the functioning of the country's legislation and ultimately of law enforcement, within constitutional and legal matter.

In the practice of the Constitutional Council of Kazakhstan, a number of appeals have been related to the subject of discussions of this symposium.

In 2002, on the appeal of the Head of State, the Constitutional Council considered the Law on Political Parties adopted by the Parliament for compliance with the Constitution. In its decision, the Constitutional Council noted that the right to freedom of association in political parties is a collective right that is exercised by citizens of the Republic jointly and at the personal choice of each of them. Participation in the activities of political parties, as well as activities of political parties, should not violate the human rights and freedoms guaranteed by the Constitution. Equally, like membership in any political party, it does not relieve a citizen of the Republic from performing constitutional duties.

The Constitutional Council has repeatedly considered the issues of legislative regulation of the status of religions and the right to freedom of religion. As noted in his decisions, the secular nature of the state, as provided by Article 1 (1) of the Constitution, implies the separation of religion from the state. According to Article 14 of the Constitution, all are equal before the law, which, in the context of the subject of research, implies the equality of all religions and religious associations before the law, preventing any religions and religious associations from giving any advantages to others and prohibiting discrimination based on religion, beliefs or for any other reasons.

As the society develops further, in the implementation of international legal norms and the purification of the national legal system from the rudiments of the totalitarian past by eliminating the inevitable inconsistencies and contradictions in the legislation, , Kazakhstan pursues a policy of gradual liberalization and democratization of the mechanism of state administration and strengthening of guarantees for the protection of rights and freedoms of citizens as the supreme value of the state.

To this end, in our country at the beginning of this year, the next constitutional reform was carried out, the essence of which is the redistribution of certain powers of the Head of State between the Parliament and the Government with the strengthening of the independence and responsibility of the latter, the democratization of the political system as a whole, and the modernization of instruments for protecting the foundations of the constitutional system.

referendum or to the Parliament. This norm establishes a list of especially protected constitutional values that can not be changed in any cases, even by revising the Basic Law itself. These include: the independence of the state, the unitarity and territorial integrity of the Republic, the form of its governance, as well as the aforementioned fundamental principles of the Republic's activities laid down by the Founder of Independent Kazakhstan, the First President of the Republic of Kazakhstan and his status.

To ensure the inviolability of these constitutional provisions in the conduct of constitutional reforms in the future, a mandatory constitutional review mechanism has been introduced. This is due to the fact that if there are structures at the legislative and subordinate levels (the prosecutor's office, judicial authorities, etc.) that follow the observance of the above constitutional principles in the law-making and law enforcement process, then there was no such special mechanism at the constitutional level. Now it is entrusted to the Constitutional Council, which will give an opinion on whether the amendments to the Constitution of the country do not infringe on the values noted. Such experience is known to exist in many foreign countries.

At the initiative of the Head of State, Article 73 (4) of the Constitution was excluded, which provided for the right of the President of the Republic to object to the decision of the Constitutional Council and regulated the procedure and consequences of their consideration. The adopted decision aimed at strengthening the Constitutional Council, increases the responsibility and tightens the requirements for the activity of the body of constitutional control. As many foreign experts note, with these constitutional amendments, the Constitutional Council of Kazakhstan is now, by its competence, the Constitutional Council of Kazakhstan is now, by its competence, equal to the constitutional courts of a number of European countries.

I think that this conference will help all of us to better understand the existing problems, exchange positive experiences and outline ways of further work to ensure the inviolability of the fundamental constitutional values of our countries.

Thank you for attention.

ANNEX:
LIST OF PARTICIPANT

LIST OF PARTICIPANTS

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15	Mr. Sothea Seng	Constitutional Council of Cambodia	Cambodia
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17	Ms. Junghyun Hwang	Constitutional Court of Korea	Republic of Korea

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19	Mr. Aslam Zainuddin	Federal Court of Malaysia	Malaysia
20	Ms. Bilegjargal Bat-Erdene	Constitutional Court of Mongolia	Mongolia
21	Mr. Aung Kyaw Zin	Constitutional Tribunal of the Union	Myanmar
22	Mr. Nyi Nyi Lwin	Constitutional Tribunal of the Union	Myanmar
23	Mr. Pitaksin Sivaroot	Constitutional Court of Thailand	Thailand
24	Mr. Chonlapoom Yensuang	Constitutional Court of Thailand	Thailand
25	Mr. Mucahit Aydin	Turkish Constitutional Court	Turkey
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