Universalization of Democratic Constitutionalism and The Work of Constitutional Courts Today

Jimly Asshiddiqie
Professor of Constitutional Law at the University of Indonesia, The Founding Chief Justice of the Constitutional Court of the Republic of Indonesia (2003-2008)

Abstract

Modern constitutions with its content of values and legal norms and universal ethics contained therein continuously influence the paradigm of thought and the system of practice and constitutional democratic political regimes in the world. We may say that nowadays we are in the midst of the current development of new thoughts in the study of constitution and the practice of constitutional judiciary in the world, namely the phenomenon of "universal democratic constitutionalism." Indonesia and all the states are experiencing the development of the same influence, so that way of working of the Constitutional Court as an institution to safeguard democracy and being the upholder of the constitution shall also catch the moral signs and messages behind that new development with a critical stance, so that each of its decisions can truly produce justice, certainty, and is solvent in nature vis-à-vis the constitutional problems occurring in the public of the respective states.

Keys word: Constitutional Court, Constitutional Ethic, Supreme Court

I. INTRODUCTION

Nowadays the organized wise conduct of power in the joint livelihood of mankind wheresoever and in whatsoever field is agreed to be bound and be based on system of norms applying equally for all members/citizens set out in one document or in various forms of documents named as a constitution. The development of the aforesaid constitution can be seen from (i) the aspect of its subject: *the state, the civil society, the market*; (ii) from the aspect of its

substance: *politics, integrating legal norms, social-oriented, economic, cultural, welfare, civic education, social engineering, social emancipating, etc.*;[1] and also (iii) from the aspect of its organization: state organization, non-state organization, professional organization, organization of the business realm, public organization, village community organization , etc.

From the aspect of the organization subject as regulated by the constitution it can be in the form of the subject of the state organization as well as non-state organization which comprises corporations in the business realm or the organizations of public legal entities, like the foundations, associations, public organizations or civil society organizations, and even political parties. All the aforesaid organizations require a legal document to be their guidance in conducting their work which is named a constitution. Even among organized civil societies, I advocate to develop a perspective about social constitution which should have been made as one among the new study objects in the studies on constitution nowadays and in the future.

From the aspect of substance or its material content, the constitution of nowadays can be said as loading a very extensive content of values and norms, and not only limited to political matters as used to be understood according to the tradition of constitution of the United States of America being made a model for the drafting of the constitutions of many states in the world. The Constitution of the United States of America is no other than only a "*political constitution*", wherein no rules regarding policies for the field of economy and socio-culture have been loaded at all. Compared to the Constitution of the State of the Republic of Indonesia of 1945 (the Constitution of 1945) which specifically loads provisions in Chapter XIV on National Economy and Social Welfare which comprises Article 33 and Article 34 regulating that policy on economy and social welfare. Therefore, we can say that the Indonesian Constitution is not only a political constitution, but it is also an economic constitution.[2]

---

[1] Jimly Asshiddiqie, *Gagasan Konstitusi Sosial: Institusionalisasi dan Konstitusionalisasi Kehidupan Sosial Masyarakat Madani*, LP3ES, Jakarta, 2015; *Ibid*., *Konstitusi Ekonomi*, Kompas, Jakarta, 2010; *Green Constitution: Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Rajagrafindo, Jakarta, 2009.

[2] Jimly Asshiddiqie, *Konstitusi Ekonomi* (*Economic Constitution*), Kompas, Jakarta, 2010.

From the aspect of institutional organization which forms and requires a constitutional arrangement as referred to, we may put forward that such could also be developed extensively. Organizations having a constitution would not only be the state organizations, but all forms of public organizations, the business realm, and even in the villages being legal entities can also be institutionalized with the support of a document of a constitution as is practiced in the environment of the customary village government of the Indian tribes in the United States of America. In short, the constitution of nowadays continuous to develop in the various fields of scientific legal and political studies as well as studies in social sciences generally. In due time all these dynamics of development will also influence our perspective on the way how the system of the constitutional judiciary works in the frame of supporting the development process in the progress of civilization of each nation and the civilization mankind in general.

II. DISCUSSION

Constitutional Values and Norms: Law and Ethics

Among the scholars of law and constitution nowadays, the constitution in general is only understood as a manuscript which contains legal norms of the constitution (*legal norms)*. In the past, we could not have imagined that in the prevailing constitutions there are also non-legal values and norms, but ethical norms. Let alone among the law scholars and studies in the environment faculties or law schools, referred to as constitution is none other than merely a source of constitutional law. Nevertheless, in the development of nowadays, the need to develop efforts towards the system structuring of the ethical infra-structure in the environment of state organs and public offices as well as professional offices in all over the world has grown increasingly stronger. Therefore, there appears the need to develop various theoretical studies on "constitutional ethics" besides "constitutional law."[3]

[3] *Vide* Keith Whittington, "On the need for A Theory of Constitutional Ethics", 2005, *vide* in Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi*, Rajagrafindo, Jakarta, 2014.

By using such a way thought, as of the year 1997 I have also continuously advocated various studies on the system of the infra-structure of ethics in the environment of public offices in Indonesia. As of the Reformation of 1998, Indonesia has also formed an institution for the upholders of ethics of the judiciary which has been specifically contained in Article 24B of the Constitution of 1945, named as the Judicial Commission (*Komisi Yudisial*, KY). As of then, many state institutions and even all professional organizations have formed a code of ethics along with the mechanism for its effective enforcement by an ethics committee or an honorary council. What is more, as of the year 2009, when I was entrusted to become the Chairperson of the *Honorary Council of the Electoral Commission*, an institute for the upholders of the code of ethics for the commissioners of that Electoral Commission, we have developed it as an institution for judiciary ethics of a special nature. This model of judiciary ethics for public officers was carried on when I was entrusted to become the Chairperson of the *Honorary Council of the General Election Committee of the Republic of Indonesia* up to date.[4]

With the existence of the mechanism of enforcement of the code of ethics, we may expect that the system of ethical norms may support and complete the shortage of the system of legal norms in the control of and to guide the public at large towards an ideal behavior. Therefore, in the book "*Peradilan Etik dan Etika Konstitusi*" (*The Judiciary of Ethics and Constitutional Ethics*),[5] I have introduced a new term regarding "*constitutional ethics*" besides the *"constitutional law"*. I have also introduced a new perspective regarding the "*Rule of Ethics*" to complete the doctrine we know to date, namely the "*Rule of Law*", which comprises the term regarding "*code of law and the court of law*" and "*code of ethics and the court of ethics*". Even based on the provisions in the laws, in the environment of the People's Representative Council (*Dewan Perwakilan Rakyat,* DPR) it has also been established the Honorary Court of the DPR (*Mahkamah Kehormatan* DPR) initially named the Honorary Body of the DPR (*Badan Kehormatan* DPR).

[4] Jimly Asshiddiqie, *Menegakkan Etika Penyelenggara Pemilu*, Rajagrafindo, Jakarta, 2013.
[5] Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi*, Rajagrafindo, Jakarta, 2014.

That means, the mechanism for the enforcement of the code of ethics for the representatives of the people sitting in the parliament in Indonesia nowadays has formally been developed as a process of judiciary ethics or honorary court.

In the environment of the other state institutions and also in all the environment of professional organizations, a system of ethical infra-structure has also been developed supported by the institutionalization of a commission of ethics or an honorary council to enforce the applicable code of ethics. Even in the environment of judicial power, a special commission has also been established as separately regulated in the Constitution of 1945, namely the Judicial Commission which has the function of the upholders of the code of ethics for the judges. By the time all these will be arranged completely so that an integrated system of judiciary ethics can be established based on the principles of constitutional ethics.

The Universalization of Constitutional Values

In the midst of globalization and dynamics of relations and interplay of influence among cultures, inter-economies, and the political systems of modern states, there appears also new terms regarding values deemed good to be developed in the practice of each state. Let alone the modern state of nowadays can no longer elude from the must to be active and even be pro-active in the dynamics of international relations.

In the aforesaid arena of the dynamic global inter-communication, the constitutions of the modern states as a legal document contribute mutually ideas deemed ideal for the development of joint livelihood in all the modern states. The comparative study of constitutions and constitutionalism has also developed very rapidly producing a comprehension regarding a system of universal values which integrate all the ideal aspirations of being in a state wheresoever mankind dreams about the progress of civilization. After Amos Peaslee published the "*Constitutions of Nations*" in the year 1965,[6] HTJF van Marseeven GFM van der

[6] *Vide* Amos J. Peaslee published the *Constitutions of Nations*, HTJF van Marseeven GFM van der Tang, *Written Constitutions: A Computerized Comparative Study*, 1978.

Tang published "*Written Constitutions: A Computerized Comparative Study*[7] in 1978, then nowadays in the 21st century there are lots of comparative studies conducted by experts regarding the comparison of constitutions which produced a conclusion that nowadays, modern constitution and constitutionalism are undergoing a process of a very rapid universalization of values. [8]

Even Professor Thomas Fleiner, Director of the Institute of Federalism at the University of Fribourg, Switzerland, characterizes the modern era as '*the age of the constitution*' which tends to (i) ignore diversity of different peoples, (ii) proclaim universality and inclusiveness, (iii) subsume sovereignty of nation states into a globalized world, and (iv) profess to recognize the worth of individuals.[9]

Mark Tushnet wrote also in the Minnesota Law Review (2005): "When Is Knowing Better Than Knowing More-Unpacking the Controversy over Supreme-Court Reference to Non-US Law."[10] In his keynote speech at the Annual Meeting of the American Society of International Law (2004), Justice Stephen Breyer stated that "*comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights*."[11]

What is more was said by Vicki C. Jackson, that in quite a lot of cases, the judges deciding on case which are domestic in nature, have increasingly read and considered decisions made by foreign judges abroad as non-binding comparison material but applied as material to decide on a case they handled respectively.[12] As matter of course, the use of these foreign materials has given rise to its pros and cons *per se*. Included is also Chief Justice Rehnquist known for being conservative strongly opposed this. For instance, in one among the dissenting opinions made in the case involving the death penalty, Justice Rehnquist wrote: "*I write separately... to call attention to the defects in the Court's decision to place*

[7] HTJF van Marseeven GFM van der Tang, "Written Constitutions: A Computerized Comparative Study, 1978.

[8] *Vide*, e.g., Dennis Davis, Cheryl Saunders, and Alan Richter (Eds.), *An Inquiry into the Existence of Global Values through the Lens of Comparative Constitutional Law* (Hart Studies in Comparative Public Law, United Kingdom: Bloomsbury, 30 July 2015.

[9] Thomas Fleiner, 'The Age of Constitutions' in Robert French, Geoffrey Lindell and Cheryl Saunders (Eds), *Reflections on the Australian Constitution*, (2003), page 236, UNSW Law Journal 25, 2003, 26 (1), 327.

[10] Mark Tushnet, Minn. Law Review, 90, (2005-2006), page 1275.

[11] *Vide* Harold Hongju Koh, "International Law as part of our law", The American Journal of International Law, page 43-57. *Vide* also Roger P. Alford, "Misusing International Sources to Interpret the Constitution" in The American Journal of International Law, Vol. 98, No. 1 (Jan, 2004), page 57-69.

[12] Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, Harvard Law Review, Vol. 119, No. 1 (Nov, 2005), page 109-128.

weight on foreign laws. ... In reaching its conclusion today, the Court... adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders.... I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination...."[13]

Nevertheless, irrespective of the heat of the debate, the general trend indicates that nowadays the phenomenon of the universalization of constitutional values idealized in the joint livelihood of mankind in all over the world is developing continuously. This general phenomenon is also supported by the increasingly developing contributions of scientific research produced by quite a lot of comparative legal studies, *'International Law and Comparative Constitutional Law*'. The comparative study of constitution nowadays has developed very rapidly, and therefore, S. Choudry, in the Indiana Law Journal (1999), named it as *"a central component of contemporary constitutional practice."*[14] This has actually been described by Bruce Ackerman in his article: "*The Rise of World Constitutionalism*" (1997).[15]

This development can also be read in the writings of Cheryl Saunders (professor of comparative constitution, Melbourne Law University)[16] or the handbook written by Mark Tushnet *et al.*[17] describing the extensive influence of universal values related to themes of constitutionalism, structure of government, and various ideas which are '*commonly shared*' in various states in the world. Let alone the larger part of the various instruments of human rights being universal in nature and stemming from various instruments of International Human Rights have been made into a barometer regarding as to how far an applied constitution in a state is modern or not, so that one among the measures of a modern ideal constitution is when that constitution has adopted universal values contained in an instrument of the international law prevailing in the field of human rights.

[13] Taavi Annus, "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments", Duke Journal of Comparative and International Law, Vo. 14, (2004), page 301.
[14] S. Choudry, "Globalization In Search of Justification: Towards A Theory of Comparative Constitutional Interpretation", Indiana Law Journal, 1999.
[15] Bruce Ackerman, "The Rise of World Constitutionalism", Virginia Law Review, Vo. 83, No. 4 (May, 1997), page 771-797.
[16] Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law", Indiana Journal of Global Legal Studies, Vol. 13, 2006.
[17] *Vide* Mark Tushnet et al., Routledge Handbook of Constitutional Law, Routledge, 2015.

Therefore, the phenomenon of universalization of the content of rules values of the constitution of modern states in the world is indeed not avoidable. One of the examples is the Constitution of 1945 post Reformation adopting almost all instruments of the International Human Rights to become the material of Article 28A up to Article 28J of the Constitution of 1945. This has given cause to the most material content in articles of the Constitution of 1945 that are provisions regarding the constitutional guaranty of human rights. That is the reason why I frequently state that the Constitution of 1945 prevailing nowadays is one among the examples of the most modern constitution in the world.

Modern constitutions with its content of values and legal norms and universal ethics contained therein continuously influence the paradigm of thought and the system of practice and constitutional democratic political regimes in the world. We may say that nowadays we are in the midst of the current development of new thoughts in the study of constitution and the practice of constitutional judiciary in the world, namely the phenomenon of "*universal democratic constitutionalism*." Indonesia and all the states are experiencing the development of the same influence, so that way of working of the Constitutional Court as an institution to safeguard democracy and being the upholder of the constitution shall also catch the moral signs and messages behind that new development with a critical stance, so that each of its decisions can truly produce justice, certainty, and is solvent in nature vis-à-vis the constitutional problems occurring in the public of the respective states. According to Gary Jeffrey Jacobson,[18] the political leaders and the judges in a state shall try to overcome the disharmony in determining the constitutional identity as a product of the influence of the dynamics of universal values with typical elements in a culture living in the midst of the people.

The Court and the Enforcement of the Constitution in Practice

The development of the institutionalization of the mechanism of constitutional review in history, starting as of the controversial decision of the Chief Justice

[18] Gary Jeffrey Jacobson, *Constitutional Identity*, Harvard University Press, Cambridge, 2010, page 143-144.

of the Supreme Court of the United States of America John Marshall in 1803, namely in the renowned case of Marburry versus Madison.[19] It was this decision of the Supreme Court Justice John Marshall which for the first time determined the inapplicability of a prevailing law as a binding law based on a decision of the parliament, in accordance with the doctrine of separation of power among the branches of the legislative, executive, and the judicative powers. With that decision of John Marshall of 1803, the Supreme Court indeed took over the authority of the Congress for determining the validity or non-validity of a law.

As of the aforesaid case of Marburry versus Madison, the practice of reviewing the constitutionality of controversial laws invited a sharp debate, but at the end it was accepted as a good practice for guarding the system of democracy which only rely on the principle of '*majority rule*'. This review mechanism became later on known as '*judicial review*' to be practiced continuously, not only by the Federal Supreme Court of the United States of America, but also the Supreme Court of the states and even in all over the judiciary levels. It is such a system that later on is named the '*decentralized model of judicial review'* followed by other states, mainly by states with a '*common law'* tradition. '*Judicial review'* is conducted by all courts, without the need to form a new institution at all.

Nevertheless, that good practice which has already been commenced as of the year 1803 in the United States of America, could only be accepted in the environment of the Continental Western European '*civil law*' states at the end of the 19th century. A lot of scholars in Germany and in France have discussed the importance of '*judicial review'* to be implemented in the system of the civil law of Continental Europe. Nevertheless, its implementation in the practice occurred only following the adoption of the idea of Hans Kelsen regarding the establishment of the first Constitutional Court (*Verfassungsgerichtshof*) in Austria. The idea of a Constitutional Court independent from the Supreme Court and the Court of State Administration (*Verwaltungsgerichtshof*), became contained in the New Constitution of Austria only in 1919 and only one year later, namely in 1920, the first Constitutional Court in the world was established by virtue of a

[19] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, Konpres, Jakarta, 2005.

law. All the functions of the constitutional judiciary became integrated into the jurisdiction of this Constitutional Court (*Verfassungsgerichtshof*), so that it was mentioned that the model of constitutional review conducted by this Austrian Constitutional Court is a "*centralized model of judicial review.*" As a result of the thought of Hans Kelsen, this Austrian model is also named the "*Kelsenian Model of Judicial Review.*"

The third model, which is slightly different is the model of '*constitutional review*' in France. In the French system as of the year 1958, a Council of the Constitution (*Conseil Constitutionnel*) which is not a Constitutional Court (*Corte Constitutionnel*) was established.[20] Its work mechanism is also slightly different from the Austrian and German Constitutional Court, as it is not a *'judicial review'* but a *'judicial preview'*, namely following the bills are approved by the parliament and prior to endorsement by the President, there is time to conduct a review by the Council of the Constitution (*Conseil Constitutionnel*). If a bill has been submitted for review to the Council of the Constitution, the President would only endorse it if the Council of the Constitution resolved that the bill is constitutional. Besides, as of the year 2010, the French Council of the Constitution also obtains a new authority to decide on petitions from parties having a case in an ordinary court regarding the constitutionality of the provisions being made to be a base by the parties to litigate or a base for the prosecutor general to accuse a defendant.[21]

This French model, particularly with regard to the '*a priori*' mechanism of '*judicial review*' can be said to be very different from the model of the United States of America and the Kelsenian model. The positive side is, the system of legal norms can be more stable in its implementation. However, problems of injustice due to the legal norms used to be discovered only when the laws are enforced in practice, cannot be settled through efforts of 'judicial *review*' to the

[20] Alec Stone Weet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, New Haven: Oxford University Press, 1992, hal.46-47.

[21] As of the 1st of March 2010, the Council of the Constitution of France also receives petitions to review posterior submitted by individual citizens litigating in court by filing a petition to the Council of the Constitution to conduct review on the constitutionality of provisions of laws being made a base for prosecuting or claim against it.

Council of the Constitution. This might be the weak side of this review model of the French Council of the Constitution. Nevertheless, many states influenced by the French legal system have imitated the pattern of the Council of the Constitution France. The remaining democratic states with a '*civil law*' tradition, save to the Kingdom of the Netherlands, almost all follow the Kelsenian pattern. The average of the new democratic states, including those stemming from the communist regimes, following their reform and becoming democracies, they always follow with the establishment of a Constitutional Court according to this Kelsenian model.[22] Whereas the commonwealth states (the *Commonwealth*), save to the United Kingdom, and states influenced by the constitutional system of the United States of America, all have developed a "*decentralized model*" like that in the United States of America. All the authorities of '*constitutional review*' are conducted by courts culminating at the Federal Supreme Court.

We may say that nowadays, almost all states have already this constitutional judiciary mechanism with the intention: (a) to guarantee the uprightness and the guarding of the constitution in a democratic system, (b) to ensure the uprightness of justice as a counterweight of freedom and simultaneously to ensure the unity of the system being in a state through system integration of controlling norms, (c) to ensure and to protect the freedom and basic rights of the citizens, and (d) to protect human rights as *fundamental rights*, (e) to check the trend of *'abuse of power'* mainly in the execution of '*the power for rule-making'*, (f) to safeguard the balance between the principle of '*majority rule'* and the '*minority rights'*, (g) to muster the aspirations of living together in one vessel of a modern constitutional state which may motivate and guide the pace of the development of civilization of the citizens organized in a vessel of a state.[23] There are exceptions as states like only (a) the United Kingdom,[24] (b) the Kingdom of the Netherlands,[25] (c) several remaining communist countries, or (d) several other states which are yet to embrace the principle of democracy.[26]

[22] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusi di Berbagai Negara*, Konpres, Jakarta, 2006. Tom Ginsberg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, Cambridge, 2003.
[23] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, PSHTN-FHUI, Jakarta, 2004.
[24] Dawn Oliver, *Constitutional Reform in the UK*, Oxford University Press, 2003, page 95.
[25] *Vide* also Hilaire Barnett, *Constitutional and Administrative Law*, Clavendish Pub. Ltd, 2004, page 88.
[26] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, 2003.

The Constitutional Court of Indonesia

By its early development, when Indonesia was preparing its independent constitution in 1945, the idea of the establishment of a Constitutional Court had been discussed at the proposal of Prof. Muhammad Yamin. Nevertheless, his idea was still integrated into the function and the authority of the Supreme Court, and this was rejected by Prof. Soepomo as it was deemed not yet the time.[27] By the time, the importance of making a comparison with a resembling court which was already existing in Austria and Czechoslovakia. It is just finally, that the idea of reviewing the constitutionality of the laws *per se* was not accepted yet by '*the founding leaders*' of Indonesia who formulated the Constitution of 1945. One among the reasons was that the formulators of the Constitution of 1945 were still quite influenced by the legal tradition of the Netherlands which embraced the principle of "*de wet is onschendbaar*", namely that the laws cannot be rated or challenged by a judge.

Following the Reformation of 1999-2002, the idea of '*judicial review*' and the establishment of the Constitutional Court gained its momentum to be adopted into the Third Amendment of the Constitution of 1945 in the year 2001 and the Fourth Amendment in the year 2002. According to Article III of the Transitional Provisions of the Constitution of 1945, "The Constitutional Court will be established the latest on the 17th of August 2003 and prior to its establishment, all its authorities will be conducted by the Supreme Court." With the passing of the Law Number 24 of 2003 regarding the Constitutional Court on the 13th of August 2003, and the designation of nine Constitutional Justices based on a decision of the President on the 15th of August 2003, and who had taken the oath of office on the 16th of August, 2003, the Constitutional Court of the Republic of Indonesia was formally established.

The formal authorities of the Constitutional Court of the Republic of Indonesia comprise:

[27] Jimly Asshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Overview*, Maxwell Asia, 2009.

1) The constitutional review of Laws;
2) Dispute of constitutional authority among state institutions;
3) Disputes regarding the result of general elections;
4) The dissolution of political parties; and
5) Impeachment against the president/vice the president.[28]

Legal subjects who have *'legal standing'* being eligible to file a petition for a case:

1) For '*judicial review*' case: (a) individuals or group of citizens, (b) public legal entities, (c) corporate legal entities, (d) an institution of the state;
2) For disputes of state institutions, an institution the authorities of which is determined by the Constitution;[29]
3) For cases of Disputes on the Result of General Elections: (a) candidates or participants of a general election or public organizations acknowledged as a party eligible to represent the interest of the voters;
4) For cases of the dissolution of political parties, for the time being (based on the provisions of the prevailing laws) only the Government is entitled to file a petition for such a case. Nevertheless, the government should be prohibited to file a petition.[30] As the government is led by the President supported by Political Parties being winners of a general election, it is quite improper if he/she is given the right to demand the dissolution of a political party being a political adversary of the government. Therefore, in the future it is the public who should be given the right to demand the dissolution of a political party, not the government; and
5) For cases demanding '*impeachment*' against the President and/or the Vice President, it is the People's Representative Council (*Dewan Perwakilan Rakyat*, DPR) which is eligible to file a petition in the Constitutional Court.[31]

[28] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, Rajagrafindo, Jakarta, 2004.
[29] Jimly Asshiddiqie, *Sengketa Antarlembaga Negara*, Konpres, Jakarta, 2004.
[30] Jimly Asshiddiqie, *Kebebasan Berserikat, Pembubaran Partai Politik, dan Mahkamah Konstitusi*, Konpres, Jakarta, 2006.
[31] Hamdan Zoelva, *Impeachment Presiden: Alasan Tindak Pidana Pemberhentian Presiden Menurut UUD 1945*, Konpres, Jakarta, 2011.

The Dynamics of the Function of the Constitutional Judiciary in the Future

Besides the authorities used to be handled by the Constitutional Court variably in various states nowadays, there are also several functions of the constitutional judiciary which might be developed in the future. Noted are also several functions of the constitutional judiciary which have been used to be implemented in practice in several states, but not in other several states. If described in all, the following matters can be put forward:

1) Constitutional Review[32] (abstract norm and concrete norm, a priori and posterior, judicial and executive review, constitutional question, constitutional challenge, constitutional complaint)[33]. For instance, the French Council of the Constitution has commenced to practice the '*constitutional question*' as of the year 2010 whereby the parties litigating in the court can file a petition to the Council of the Constitution to review the constitutionality of an article of the laws being made a base in the case. In the future, Indonesia may also consider to practice the same.
2) Constitutionally Institutional Disputes Resolution, various conflicts of constitutional authority among state institutions shall be settled through a constitutional judiciary. The conflict of authority among state institutions occurred frequently without the existence of a forum which may settle it effectively and efficiently. To date, disputes of authority which can be turned into a case object as referred to, be limited only for authorities which are explicitly determined by the Constitution. Nevertheless, in the future, the constitutional authority can be extended, not only those explicitly mentioned or determined, but to the extent the institutional authority as referred to is constitutional in nature and gives rise to a dispute with another institution in its implementation as well as with another legal subject or state institution, then such a case may also be deemed as a dispute of constitutional authority of a state institution.

[32] Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, Rajagrafindo, Jakarta, 2007; and *Perihal Undang-Undang*, Sinar Grafika, Jakarta, 2008;

[33] On this "Constitutional Complaint" *vide* I Dewa Gede Palguna, *Pengaduan Konstitutional: Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, Sinar Grafika, Jakarta, 2013.

3) *Adjudication of the* Freedom of Association and Party Dissolution. Political parties and public organizations being a reflection of the *Freedom of Association* are protected by the Constitution. Therefore, political parties and public organizations can only be dissolved if conducted through a constitutional judiciary process.[34] The demand for dissolution shall not be conducted on the initiative of the government but from the members or public citizens voting for political parties and members of or public citizens in general for the dissolution of public organizations. The objective is (i) to protect the freedom of organization peacefully and constitutionally, and (ii) to protect the public from others organizing themselves to spread hatred and hostilities as well as treason against the constitutional state;

4) Democratic Electoral Result Disputes Resolution.[35] The function of dispute settlement regarding the result of general elections, in my opinion, should indeed be settled by the constitutional judiciary. The reason is, general elections and as such also political parties are the pillars of democracy and constitution. Therefore, it would be more proper if it be settled by a system of constitutional judiciary and not by an ordinary judiciary. Moreover, the nature of the judiciary which has to be fast and its management of examination shall also be '*judex facti*' in nature and simultaneously '*judex juris*' render the examination in a high court as well as in the Supreme Court improper. Nowadays people elect directly the following offices: (i) the President and the Vice President, (ii) Governors and Vice Governors, (iii) Regents and Vice Regents, (iv) Mayors and Vice Mayors, (v) Members of the DPR, (vi) Members of the Regional Representative Council (*Dewan Perwakilan Daerah*, DPD), (vii) Members of the Regional Council of People's Representatives (*Dewan Perwakilan Rakyat Daerah*, DPRD) of the Provinces, (viii) Members of the DPRD of the Regencies (*Kabupaten*), and (ix) Members of the DPRD of the Cities (*Kota*).

[34] Jimly Asshiddiqie, *Kebebasan Berserikat, Pembubaran Partai Politik, dan Mahkamah Konstitusi*, Konpres, Jakarta, 2006; "The Idea of Social Constitution: Institutionalization and Constitutionalization of Public Life of Civil Society", LP3ES, Jakarta, 2015;
[35] Jimly Asshiddiqie, *Menegakkan Etika Penyelenggara Pemilu*, Rajagrafindo, Jakarta, 2013.

5) The impeachment of 'Directly' Elected Officials, including the elected president and/or vice president, the elected governor, etc. In order to be consistent with the judiciary on the result of general elections, then the mechanism of dismissal of an officer produced by a general election should also only be conducted through the mechanism of '*impeachment*' which involves the participation of the judiciary forum and political forum simultaneously. In this case, for the 'impeachment' of officers directly elected by people, the constitutional judiciary should better be given a role for legal verification on such base, the political forum is given the authority to impose the sanction of dismissal as it should be. This is consistent with the mechanism of impeachment against the president/vice president, namely that following the Constitutional Court has succeeded to proof and determine the element of mistake of the President or the Vice President, it is the forum of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) which will impose the sanction of dismissal against the President and/or the Vice President as it should be. [36]

The aforesaid second function up to the fifth function are related with cases involving '*concrete norms*', whereas the first function, *judicial review*, may be related to an '*abstract review*' and may also be a '*concrete review*', like for instance it is related with an '*individual complaint against the state*' assessed to have violated the human rights of the victim which in Indonesia is conducted through the Court of Human Rights. However, the focus of the Constitutional Court should be better be directed to handle '*abstract cases*' only, rather than '*concrete cases*' like cases of Human Rights violations be better kept by the Supreme Court and its ranks for the handling thereof. As such, in the future, the Constitutional Court shall remain focused on efforts to handle cases related to efforts of '*constitutional review*' on the '*abstract norms*' only.

Nevertheless, to the extent it involves this '*constitutional review on abstract norms*', many scopes can be imagined in the frame of strengthening these

[36] Compare with the mechanism of *impeachment* of the President of the United States of America which embraces the presidential government system, and the mechanism of *impeachment* as practiced in the environment of states embracing parliamentarian government system or semi-presidential government system.

functions of the constitutional judiciary in the future. The vertical and horizontal hierarchical system of legal norms should be well integrated and be subject to one unity of review system only. What is practiced in Indonesia and also in South Korea is dualistic in nature by differentiating between review of the constitutionality of the laws and review of the legality of the regulations of the laws beneath the laws can be deemed to not assuring an equitable and efficient legal certainty, as well as it does not assist efforts to develop an integrated legal system under the control of the constitution being the highest law.

In order to overcome various burdens of cases, the work mechanism of the constitutional judiciary can also be developed variably through two means which should be available simultaneously, namely the review by a superior executive officer and/or review by the constitutional judiciary through '*review*' or '*preview*'. As such, the process and mechanism of the review can be developed through several means as follow, namely: (a) *executive preview*, (b) *executive review*, (c) *judicial preview*, and/or (d) *judicial review.*[37]

In the practice in Indonesia now, '*Executive preview*' is conducted by the Central Government *casu quo* the Ministry of Home Affairs against the material as well as formal validity of a product of a Regional Regulation deemed to be contrary to the regulation of the central government, particularly the Laws. A '*preview*' is conducted prior to a Regional Regulation is endorsed and published in a Regional Gazette. Nevertheless, following a Regional Regulation (*Peraturan Daerah*, Perda) is valid and in force, the Central Government remains to be given the authority by Laws to revoke or to cancel regional regulations deemed contrary to the laws of the central government by granting a right to the respective regional government to submit an objection by filing a petition directly to the Supreme Court. The Supreme Court is given the authority to state its agreement on a decision to cancel a Regional Regulation by the Central Government, or otherwise to justify the Regional Regulation and ordering the revocation of a decision cancelling the aforesaid Regional Regulation to the Central Government. I name this mechanism the "*executive preview*" and "*executive review*" which have been implemented in practice.

[37] Jimly Asshiddiqie, *Perihal Undang-Undang*, Sinar Grafika, Jakarta, 2008.

Meanwhile, the mechanism of *'judicial review'* which has been practiced indeed by the Constitutional Court and the Supreme Court to date either against the constitutionality of laws or against the legality of a regulation beneath the laws. Besides, in my view, the Constitutional Court is also authorized to review the constitutionality of either a bill pending to formal legalization to become a law or a Government Regulation in Lieu of Laws (*Peraturan Pemerintah Pengganti Undang-Undang*, Perpu) pending to its submission to the People's Representatives Council. If a Perpu having been stipulated by the President violates human rights and obviously will give rise to serious casualties, it should not be that the Constitutional Court being the supervisor of democracy and guardian of the constitution being the highest law to sit idle and wait for the political process in the DPR (Parliament) while openly witnessing casualties as a result of the validity of a Perpu being proven to be unconstitutional. Such is also with a bill which have been stipulated by the DPR, awaiting the formal endorsement by the President within 30 days, shall not wait to review the constitutionality of such bill, if it has been filed by parties feeling aggrieved of their constitutional rights. Let alone is the constitutional loss as referred to, is linked to serious human rights. This mechanism can be mentioned as *'judicial preview'* which shall be conducted by the Constitutional Court for the upholding of the constitution and the constitutional democracy.

III. CONCLUSION

Such are several developments, in the world as well as in Indonesia, the information of which can be shared with the participants. All states shall be open to learning and imitate whatsoever and from wheresoever where there are good examples to be developed and implemented in the respective states. Indonesia also learned from the other states for the establishment of the Constitutional Court, including from 78 states which have institutionalized the mechanism of '*constitutional review'* earlier into a system of their respective constitutions. Therefore, if there are one or two states perceiving that the Constitutional

Court of Indonesia imitates one among those states, I may ensure that such is incorrect. Which is correct is that the Constitutional Court of Indonesia has learned all the way from the good and the not good things from 78 states as reflected in the book of compilation of '*constitutional rules of constitutional adjudication in 78 countries*' which has been published only in the year 2003,[38] but has been made a discussion material as of the year 2001, when the ideas of the Constitutional Court was being drafted and planned in the formulation of the Constitution of 1945 and for the preparation of the first bill regarding the Constitutional Court in the years of 2002-2003.[39]

The world nowadays has indeed become more open. Constitutional values and norms among states have increasingly achieved a very smooth level of development and open for receiving from and rendering influence to wheresoever for the interest of universal mankind. All of us should no way ignore the importance of the factors of history, political systems, economy, and socio-culture of the respective states which would certainly determine the dynamics of the progress of a nation and state. However, the willingness to learn the exemplar and the giving of exemplar in inter-communication among nations and among mankind in the era of globalization nowadays, is one which cannot be avoided.

REFERENCES

Indonesia, *The Constitution of the State of the Republic of Indonesia of 1945*;

Jimly Asshiddiqie, 2015, *Gagasan Konstitusi Sosial: Institusionalisasi dan Konstitusionalisasi Kehidupan Sosial Masyarakat Madani*, Jakarta: LP3ES.

---------, 2009, *Green Constitution: Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Jakarta: Rajagrafindo.

---------, 2010, *Konstitusi Ekonomi* (*Economic Constitution*), Jakarta: Kompas.

[38] Jimly Asshiddiqie and Mustafa Fakhry, *Mahkamah Konstitusi: Kompilasi Ketentuan Konstitusi-Konstitusi, Undang-Undang, dan Peraturan di 78 Negara*, PSHTN-FHUI, Jakarta, 2003.
[39] *Vide* Bill on the Constitutional Court, 2002-2003.

---------, 2014, *Peradilan Etik dan Etika Konstitusi*, Jakarta: Rajagrafindo.

---------, 2013, *Menegakkan Etika Penyelenggara Pemilu*, Jakarta Rajagrafindo.

---------, 2006, *Kebebasan Berserikat, Pembubaran Partai Politik, dan Mahkamah Konstitusi*, , Jakarta: Konpres.

---------, 2008, *Perihal Undang-Undang*, Jakarta: Sinar Grafika.

---------, 2005, *Model-Model Pengujian Konstitusional di Berbagai Negara*, Jakarta: Konpres.

---------, 2004, *Konstitusi dan Konstitusionalisme Indonesia*, Jakarta: PSHTN-FHUI.

---------, 2009, *The Constitutional Law of Indonesia: A Comprehensive Overview*, Maxwell Asia.

---------, 2004, *Hukum Acara Pengujian Undang-Undang*, Jakarta: Rajagrafindo.

---------, 2004, *Sengketa Antarlembaga Negara*, Jakarta: Konpres.

---------, 2008, *Pengantar Ilmu Hukum Tata Negara*, Jakarta: Rajagrafindo.

Amos J. Peaslee published the *Constitutions of Nations*, 1978, HTJF van Marseeven GFM van der Tang, *Written Constitutions: A Computerized Comparative Study*;

HTJF van Marseeven GFM van der Tang, 1978, *Written Constitutions: A Computerized Comparative Study*.

Dennis Davis, Cheryl Saunders, and Alan Richter (Eds.), *An Inquiry into the Existence of Global Values through the Lens of Comparative Constitutional Law* (Hart Studies in Comparative Public Law, United Kingdom: Bloomsbury, 30 July 2015;

Thomas Fleiner, 'The Age of Constitutions' in Robert French, Geoffrey Lindell and Cheryl Saunders (Eds), *Reflections on the Australian Constitution*, (2003), UNSW Law Journal 25, 2003, 26 (1);

Harold Hongju Koh, "International Law as part of our law", The American Journal of International Law;

Roger P. Alford, "Misusing International Sources to Interpret the Constitution" in The American Journal of International Law, Vol. 98, No. 1 (Jan, 2004);

Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, Harvard Law Review, Vol. 119, No. 1 (Nov, 2005);

Taavi Annus, "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments", Duke Journal of Comparative and International Law, Vo. 14, (2004);

S. Choudry, "Globalization In Search of Justification: Towards A Theory of Comparative Constitutional Interpretation", Indiana Law Journal, 1999;

Bruce Ackerman, "The Rise of World Constitutionalism", Virginia Law Review, Vo. 83, No. 4 (May, 1997);

Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law", Indiana Journal of Global Legal Studies, Vol. 13, 2006;

Mark Tushnet et al., Routledge Handbook of Constitutional Law, Routledge, 2015;

Gary Jeffrey Jacobson, *Constitutional Identity*, Harvard University Press, Cambridge, 2010;

Alec Stone Weet, 1992, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, New Haven: Oxford University Press.

Tom Ginsberg, 2003, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge: Cambridge University Press.

Dawn Oliver, 2003, *Constitutional Reform in the UK*, Oxford University Press.

Hilaire Barnett, 2004, *Constitutional and Administrative Law*, Clavendish Pub. Ltd.

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

Hamdan Zoelva, 2011, *Impeachment Presiden: Alasan Tindak Pidana Pemberhentian Presiden Menurut UUD 1945*, Jakarta: Konpres.

I Dewa Gede Palguna. 2013, *Pengaduan Konstitutional: Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara,* Jakarta: Sinar Grafika.

Jimly Asshiddiqie and Mustafa Fakhry, 2003, *Mahkamah Konstitusi: Kompilasi Ketentuan Konstitusi-Konstitusi, Undang-Undang, dan Peraturan di 78 Negara*, Jakarta: PSHTN-FHUI.