CONSTITUTIONAL ADJUDICATION AND DEMOCRACY[1]

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Democracy and the Constitution

Constitutional adjudication is needed in every constitutional democratic country as an official mechanism to ensure that the constitution as the highest reference of guiding norms in public life and in the process of the administration of state power prevails. Democracy is based on the dynamics of the free market politics, just as it is in the system of market economy that it needs the system of values and norms control, balancing the power derived from the market-oriented behaviours in public life. Therefore, the system of democracy is compatible with the system of market economy, that both need the constitution as the highest reference on the system of norms and values prevail in the actual state life.

As the highest norms in democratic country, the constitution should be reflected in the system of rule of law and rule of ethics as well. The constitution itself should be used as the source of the constitutional law and of the constitutional ethics in actual practices. With regard to constitutional law, the enforcement of the law in any democratic country must be started with the enforcement of the highest law of the land, that is the constitution. Therefore, we need to have a judicial mechanism to ensure that the constitution prevails. Democracy needs the court with its final judgment and binding decisions applicable to all legal subjects in the state system.

Today, we have three major models of judicial adjudication in the world. [3] First, the American decentralized model of constitutional adjudication invented by John Marshall's court in 1803[4]; Second, the Kelsenian (Austrian) model of constitutional court, introduced in by Hans Kelsen in 1919 and institutionalized in Vienna in 1920[5]; Third, the French model of preview by constitutional council (Conseil Constitutionnel) rather than a court.[6] The most important authority entitled to the court or the council in this respect is its relation to the need to control the law-making mechanism by the parliament or the congress. This is what we call "judicial

[1] Presented for the International Symposium on Constitutional Adjudication and Democracy, organized by the Constitutional Court of South Korea, in Seoul, 29th of August, 2018.

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[3] Jimly Asshiddiqie, The Constitutional Law of Indonesia: A Comprehensive Overview, Maxwell Asia, 2009; See also, Models of Constitutional Review in Various Countries, MKRI Secretariat, Jakarta, 2005; and Sinar Grafika, Jakarta, 2010;

[4] Erwin Chemerinsky, Constitutional Law: Principles and Policies, Aspen Law and Business, New York, 1997, page 36.

[5] Herbert Hausmaninger, The Austrian Legal System, 3rd edition, Mansche Verlags-und Universitatsbuchhandelung, Vienna, 2003, hal. 140.

[6] The establishment of this Constitutional Council was set forth in the Constitution of the Fifth Republic of 1958. John Bell, French Constitutional Law, Clarendon Press, Oxford-New York,1992, page 29.

review" as it is applied in American model or in Kelsenian Austrian model, or "judicial preview" as it is applied in France.[7]

Democracy and the Justices

Democracy is concerned with the quantity of votes and voices in any decision-making process, without regard of the substantive quality of the decisions. Therefore, any law created and democratically adopted in a parliament or the peoples' assembly is always a law resulted on the basis of political agreement or consensus which does not always contain the best substance of public policy. It just reflects the political truth in the political forum, rather than academic truth as it comes out from the expert advisors. Therefore, we can say that democracy does not too much concerned with the quality of its decision, as it is with the court should do. Democracy, then, needs to be balanced by the rule of law guarded by the respected and respectable judicial branch of power. On behalf of the ideal norms of constitutional truth and justice, it is the tasks of constitutional judges to decide whether the law proposed by the applicant to be reviewed constitutional or not. If it is contrary to the constitution, then, the majority of the judges can declare it is unconstitutional and that it is null and void.

The congressmen or the people's representatives (parliament) usually have negative views on every times the constitutional court reviewing the constitutionality of their democratically adopted laws. As what happen in Indonesia, members of the House of Representatives are 560 persons[8] directly elected by and representing the whole sovereign people of Indonesia, and the President who is also directly elected by the people, are usually unhappy with the power of the court, especially when it rules out the unconstitutionality of a law which is adopted only after mutual agreement between the government and the house. While the nine judges of the constitutional court are indirectly elected, respectively three judges elected by the House, three by the Supreme Court, and the other three elected by the President of the Republic. But the nine, or even it is enough by only five judges out of the nine who decide the ruling by majority, are entitled with the constitutional authority to declare the law unconstitutional, and decide the law is null and void.

That's why, in many occasion, I always emphasize the very important and pivotal position a constitutional judge has in his/her devote and services for the country and the whole people through his/her final decisions in the constitutional court. We have in Indonesia 9 judges of the Constitutional Court for five years term, and eligible for only two terms of office. The nine number reflects various different schools of thoughts and groups of aspiration or different perspectives on the constitutional living values in the society at large. The constitution as a highest national consensus of the whole people of the nation should be read and understood not only from its grammatical text, but also through a moral, philosophical, socio-economic, and socio-cultural reading of its context. The nine judges are a "Nine Wali", the nine Solomon as they had played important roles in Indonesian past history, reflecting different approaches in dealing with people along the history. This idea of number of judges was also discussed in the

[7] Alec Stone Sweet, The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspectives, New York: Oxford University Press, 1992.
[8] According to the new law, in the coming general election of 2019, the number of parliamentary members will increase to 575.

People's Assembly during the debate on the third constitutional amendment in 2001, before the idea to establish the court was finally adopted.

Therefore, as the founding Chief Justice of the Constitutional Court, when we planned to build permanent building for the Indonesian Constitutional Court in 2005[9], I did my every effort to put nine number into the front construction of the building to symbolize the independent position of each of the nine judges as the nine pillars of the constitutional truth and justice.[10] The 9 pillars are the symbols of 9 guardians of Indonesian constitution. They have to make a research by his/her own efforts through panels of examination, sessions of public hearings, individual library research supported by administrative clerks, and write legal opinions for every case to be presented in the internal debate with the other eight judges. If they cannot find the best common arguments agreed by all the nine in ruling out a decision, each judge is welcomed to write his/her concurrent or even dissenting opinion. These different opinions are useful lessons for public not only in its relation to the public accountability and transparency in the dynamics of legal reasonings discussed behind the bench, but also important to represent various perspectives, living ways of thinking, and different dreams for justice in the society. The final decision made by the Constitutional Court is not an easy taking decision. It is serious and final decision based on a very serious dan profound consideration from all aspects of constitutional truth and justice.

Therefore, we may come to the conclusion that modern civilization needs constitutional adjudication mechanism through independent court system to guard the implementation of the highest norms of the constitution, and to guide and control democracy at work. Democracy concerns especially only to the quantity of the votes of the sovereign people who decide the public policy reflected in law and regulation, while the quality of the decisions for the interest of all the people can be left up to those respected and respectable constitutional judges. Democracy deserves the majority rights to rule, and the court deserves the minority right to be protected. Majoritarian democracy is just a formalistic and procedural democracy, while the roles of the constitutional court qualifies it as a substantial democracy, for the interest of the whole people, both the majority and the more so for the neglected or even suppressed minority.

Of course, the tension that may rise between the legislators and the court may happen in every country. It is actually useful to check and balance the power of law-making that ruling the rights and obligations of the citizens in their relation with the state power. The constitutional courting mechanism is important to guard the constitution, guide its reflection in the legal system, and enforce the implementation of democracy in actual practices. In Indonesian case, the Constitutional Court has five powers or jurisdictions, i.e. (i) judicial review on the constitutionality of law; (ii) constitutional disputes resolution between state organs; (iii)

[9] Jimly Asshiddiqie, Building Pillars of the Constitution, Jakarta: MKRI, 2008.

[10] Even the architect of the building construction, the Jakarta Municipal Council of Construction, and the Indonesian National Association of Architects rejected the idea of nine pillars based on their professional reasonable consideration about architectural universal principles that the number of pillars for any gothic building should be an even number. They advise me to accept the choices of even numbers of 6, 8, or 10 pillars for the front appearance of the building. But I stuck to my plan to have nine pillars based on the number of judges determined in the constitution as the highest norm in the country. I was happy that finally they followed my determination on the number. But after the grand opening of the new building on the next year (2006), it was the number of pillars attracted many comments on the news media from many prominent engineers and architects that the building violates the universal architectural principles. But I assumed it as a good lesson for everybody that constitutional rules must be put priority rather than scientific or technological romantism.

disputes on electoral result; (iv) political party dissolution; and (v) impeachment of the President and/or Vice President.

With the five powers, the Constitutional Court can be viewed as the guardian the constitution and the controller of democracy, the protector of the rights of every human being (human rights) as well as the citizens' constitutional rights, the centre for constitutional disputes resolution, and the final interpreter of the constitution. The four functions of the constitutional court are very important for the performance of modern democracy. Without this mechanism, the meaning of modern democratic rule of law or constitutional democracy is not complete, just like during the 19th century, legal scholars such as Julius Stahl stressed on the importance of administrative court (administratieve rechtspraak) as the fourth character of classical doctrine of rechtsstaat.[11] Therefore, until early 20th century, Austria has developed two separated highest court in its judicial system, i.e. the Supreme Court and the Administrative Court. The establishment of Constitutional Court (Verfassungsgerichtshoft) as the first constitutional adjudicator was initiated by Hans Kelsen in 1919, and officially established in Vienna in 1920.[12]

Until now, there are three separate highest court in Austrian judicial system, i.e. the Supreme Court, the Administrative Court, and the Constitutional Court. The establishment of this new court in 1920 has been inspiring other constitutional democracies in the world to establish this constitutional adjudication mechanism. Today, we can conclude a maxim that every constitutional democratic country needs constitutional court or constitutional adjudication forum to guard the constitution, to guide dan control democracy, to protect human rights and citizens' rights, to solve the problems of constitutional disputes, and to be the final interpreter of the constitution. Countries with the common law tradition usually follow the American model of constitutional review which are carried out by the court of all levels of the Supreme Court. The exception within the common countries is the British Kingdom and other countries influenced by England such as Mauritius that until now do not adopt this idea of constitutional adjudication, especially on the system of judicial review on the constitutionality of law. On the other hand, the countries with civil law tradition mostly follow the centralized model of constitutional court like in Austria. For some federal countries, like Germany, Austria, and South Africa, they have constitutional court in every state, and in the federal government. The only exception among the constitutional democratic countries within the civil law tradition is Netherland that until now do not adopt the judicial review system at all.

Until now, constitutional system in England and Holland cannot accept this judicial mechanism and most of the scholars still reject the idea of judicial review on the constitutionality of law as legislative acts to be applied in the judicial system. Legal theories and practices in Holland still stick to the principles that "de wet is onschenbaar", the law cannot be reviewed by other branch of power than those powers involved in the legislating process of the law.[13] The same principles applied in England that the court only has the power to apply the law, not to review it.[14] How come a law as the legislative act which is adopted by the involvement of two branches of power, i.e. the King or the Queen and the two houses of parliament, be reviewed and declared null and void by a court whose judges appointed by the

[11] Jimly Asshiddiqie, Menuju Negara Hukum (Toward the Rule of Law), Gramedia, Jakarta, 2007.
[12] Herbert Hausmaninger, Op.Cit.
[13] David Oliver, Constitutional Reform in the UK, Oxford University Press, 2003, p. 95.
[14] Jimly Asshiddiqie, Models of Constitutional Reviews In Various Countries, Sinar Grafika, Jakarta, 2010, pp 64-71.

decree of the Queen or the King? In these two countries, the supremacy of parliament principle takes the first position than the supremacy of the constitution and the court.

The Future Quality and Integrity of Constitutional Democracy and the Court

Indonesia has had 15 years experiences with the establishment and the functioning of the constitutional court. While South Korea has experiences in 30 years. Each country has its own respective historical backgrounds and working experiences with this new symbol of modern constitutional democracy in the world. This year is the 98 years since the first constitutional court was established in Vienna (1920). I would suggest that the International Association of Constitutional Courts and the World Association of Constitutional Lawyers will sit together to organize the world conference to celebrate the Century of the Constitutional Court in Vienna.

This is very important, because the theories and practices of constitutionalism and democracies in many and even in all countries of the world have experienced from so many substantial and fundamental changes in the 20th and 21th century. We have to share information and experiences with the processes of constitutional changes and democratic government in our respective countries and on how to cope with the new challenges in the globalizing human civilizations in the world surroundings. The constitutional court must continue to ascertain and maintain that the constitution as the highest norm prevails in the day-to-day administration of state power.

But today, firstly, the meaning of constitution itself must be reviewed since the system of the constitution as the highest rule of law does not cover the whole contextual meaning of constitutional norms. It is now growing understanding both in theory and practices about the importance of rule of ethics for public offices and in public life at large. Because of that, the constitution must be understood not only as the source constitutional law, but also of constitutional ethics[15]. There are so many countries have adopted the idea of developing ethics infra-structures for public offices, as it was recommended by the United Nations since 1997[16]. This growing awareness of the importance of ethics system for public office will encourage a new understanding about the rule of the constitution as the highest norms, not only the highest law, but also the highest ethics which have to be reckoned by the constitutional judges every where in improving the way they read and understand the constitution.

We have to remember that the title of Plato's book was "Nomoi" which is usually translated to English as "The Laws"[17] because of the influence of legal positivism philosophical understanding of the word. Ethics or ethical norm is always understood as norm that is imposed from within the private awareness influenced by religion or belief system. While legal norm is imposed from without, i.e. from the power of state. Then, according to the positivist legal scholars, Plato's nomoi should be understood as law, not norm which may contain both legal norm as well as ethical norm. But today, by the new understanding of the importance of ethics infra-structure for public offices, it is now the time for every constitutional judges to open their

[15] Jimly Asshiddiqie, Constitutional Ethics and the Court of Ethics: New Perspectives on the Rule of Law and the Rule of Ethics, Constitutional Law and Constitutional Ethics, Jakarta: Rajagrafindo, 2013.
[16] Report of the United Nations General Assembly, 1997.
[17] The Laws of Plato, translated, with notes and an interpretive essay, by Thomas L. Pangle, The University of Chicago Press, Chicago and London, 1988.

minds that the constitutional rules are not only contain legal norms, but also important ethical norms. Both systems of norm can be used to guide the implementation of modern constitutional democracies with higher quality and integrity.

Secondly, the real power relations today have changed dramatically from the old era to a new disruptive era of constitutional and democratic civilizations. Every things look upside-down. When the first time Montesquieu published his book "The Spirit of the Law" in 1748[18] (41 years before the French Revolution of 1789), he promoted the idea of liberty and separation of powers among the executive power, legislature, and the judiciary (trias politica). But now, in almost all countries, the hybrid state organs in many parts have been entitled with so many mixed functions for the administration of power, regulatory power, and quasi-judicial power. These auxiliary state organs with mixed functions are considered the new fourth branch of the inner structure of power, the four branches of power in its micro sense. While the media is still the fourth branch or the fourth estate of the outer structure of power, together with the state, civil society, and the market. In this macro sense of the outer structure of power, then we can differentiate the new four domains of power (quadru politica) with their dominant influential effects to the state and the nation public life everywhere in the world. Therefore, all organizations established in those four domains of power have to be separated to avoid any potential conflicts of interest between and among them.

The separation of powers between and among the state organs, business corporations, civil society organizations, and the media are important to avoid future accumulation and concentration of power in the one hand of a despot. If it happens, it will certainly give ways to the survival of a new form of totalitarianism. This is what Sheldon Wolin had reminded us on the corporate influence on democracy in his book about "managed democracy and the specter of inverted totalitarianism" (2005). During the Hitler's era, the old totalitarianism gave the power without checks to the public authority to control all private affairs of the people; while in the new inverted totalitarianism, the power is given to the private business authorities to control the public lives. In Nazi Germany, the state dominated the economic actors whereas in in the new inverted totalitarianism private corporations dominate the state with the government acting as the servant for the large amounts of the corporations.[19]

This new phenomenon is now happening everywhere in the world today, including in the United States of America and in Indonesia. It is the time when a big businessman, an influential conglomerate, was elected become the president of the powerful country, the United States of America. Although before Donald Trump was elected the President, United States has had actually an effective law of prohibition of conflict of interest between public officials and private business activities of the officials.[20] But, the law is not yet valid for the holder of the political position of presidency. Therefore, potential conflicts of interest between private position of Donald Trump as businessman and his public position of the President of the United

[18] This book first published in French "De l'esprit des Lois" in 1748, and then in English "The Spirit of the Laws" in 1750. See Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (eds.), De Secondat, Charles, Baron de Montesquieu: Spirit of the Laws. Cambridge Texts in the History of Political Thought. Cambridge University Press, Cambridge, 1989.
[19] Sheldon S. Wolin, Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism, Princeton University Press, Princeton, 2008.
[20] US Federal law, Ethics in Government Act of 1978, has created mandatory, public disclosure of financial and employment history of public officials and their immediate families. It also created restrictions on lobbying efforts by public officials for a set period after leaving public office. For the enforcement of the act, US Office of Independent Council was tasked with investigating government officials suspected from violating the act.

States, have to be matched carefully on its impacts to the future quality and integrity of American democracy and democracies around the world.

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

Therefore, it is now the time to rethink about the criteria of democracy with quality and integrity for the future. There should be a new form of separation of powers, to avoid conflicts of interest between and among the domains of power in the system constitutional democracy today and tomorrow, i.e. the separation of powers between (i) the state, (ii) the market, (iii) civil society, and (iv) the media.[21] Organizations belong to the four domains of power should be avoided from conflicts of interests between and among one to the other. This is what I call the new form of quadru-politica in its macro sense of the outer structure of power. These new four branches of power have to be separated, just as Montesquieu promoted the idea of separation of power between the executive, legislature, and the judicial power in 1748[22]. As the guardian and the final interpreter of the constitution, and the constitutional disputes resolution centre, the constitutional court has to move to the new understanding of the domains of power for the interest of the whole people based on the constitutional truth and justice. Modern democracy and constitutionalism are all about the principles of limitation and liberation of power. The constitutional court has to guard the application of the principles and may not let them diminished by the growing practices of concentration of powers into one hand of a totalitarian or an authoritarian despot in the future.

Thirdly, the constitutional courts and constitutional lawyers across the countries should also be recalled that studies of constitution all over the world today show the growing phenomenon of constitutional values and ideas transplantations and borrowings among nations. No more single constitution in the world that purely crafted and drafted without the influences of the constitutions of other countries. In this regard, there two important things to be done for the future by the constitutional courts and constitutional lawyers all over the world. The first is to intensify intellectual dialogues and exchanges of information and views on the contemporary issues of constitutional justices. The second is that we have to be aware on the importance of a new perspectives on constitutional cultures in our respective countries.[23]

[21] Jimly Asshiddiqie, The Idea of Social Constitution: Institutionalization and Constitutionalization of Civil Society's Social Lives, Jakarta: LP3ES, 2014.
[22] The Laws of Plato, translated, with notes and an interpretive essay, by Thomas L. Pangle, The University of Chicago Press, Chicago and London, 1988.
[23] Jimly Asshiddiqie, The Constitution of Cultures and Constitutional Cultures, Malang: Intrans, 2017.

Most of constitutional lawyers in the past have been trapped in a narrow and domestic perspectives of rigid constitutionalism and territorial sovereigntist perspectives[24] in the studies of the constitution that today are no longer workable and applicable. Ultra nationalist, territorial sovereigntist, and rigid constitutionalist approaches cannot provide solution anymore to the understanding of living constitutional values everywhere in the world. But, knowing the facts that most constitutional rules everywhere in the world are just the easy results of intellectual borrowings or transplantations from other countries or from international instruments best practices, we have to evaluate the actual problems in our respective countries. The problems are in the processes of implementation of those foreign ideas of constitutional rules and the processes of institutionalization of the state organs and their actual performances in day-to-day politics. In many countries, just like what is also happening in Indonesia, we have problems of modern institutionalization of politics versus the cultural traditions inherited from the past history of Indonesian politics. Many ideas of political institutions derived from cognitive minds of the so modern and up-to-dated personalities of policy makers, but their own behaviours had mostly been formed, and well-trained by cultural traditions inherited from their families and ancestors. Therefore, in the actual practices of modern constitutionalism and democracy, we still have serious cultural lags or cultural problem. The problems may not always be about the weakness of the cultural tradition itself, but actually on the way we adopted the foreign ideas which are not necessarily compatible with our own respective cultural traditions.

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

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

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